

**REGIONAL TRADE INTEGRATION AND CO-OPERATION IN SOUTHERN
AFRICA – THE CASE OF THE SOUTHERN AFRICAN DEVELOPMENT
COMMUNITY (SADC)**

by

MPUBANE MOX MATHEBE

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SUPERVISOR: PROF HCAW SCHULZE

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STATEMENT

Student Number: **33632618**

I, **Mpubane Mox Mathebe**, do hereby declare that **Regional Trade Integration and Co-operation in Southern Africa – The Case of the Southern African Development Community (SADC)** is my own work. I further affirm that all the sources and/or references that I have used and/or quoted have been indicated and acknowledged by means of complete references.

Mr Mpubane Mox Mathebe

30 June 2017

Date

This thesis is dedicated to my late parents, Radile Thage Mathebe and Moshalagae Elizabeth Mathebe (née Masemola), whose dream has always been that I reach to this level of education.

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List of Abbreviations/Acronyms

ACB	African Central Bank
ACHPR	African Charter on Human Rights and People's Rights
ACM	African Common Market
ACP	African, Caribbean and Pacific
ADB	African Development Bank
ADF	African Development Forum
AEC	African Economic Community
AFRAC	African Accreditation Cooperation
AfDB	African Development Bank
AGOA	African Growth and Opportunity Act
AI	Amnesty International
AIB	African Investment Bank
AIPPA	Access to Information and Protection of Privacy Act
AMF	African Monetary Fund
AMU	Arab Maghreb Union
ANC	African National Congress
ARIA	Assessing Regional Integration in Africa
APRM	African Peer Review Mechanism
APSA	African Peace and Security Architecture
ASCB	African System of Central Banks
ASCCI	Association of SADC Chambers of Commerce and Industry
ASYCUDA	Automated System for Customs Data
ASEAN	Association of South-East Asian Nations
ATAF	African Tax Administration Forum
AU	African Union
AUC	African Union Commission
BCC	Benguela Current Commission
BENEFIT	Benguela Environmental Fisheries Interaction and Training Programme
BEPG	Broad Economic Policy Guidelines
BLNS	Botswana, Lesotho, Namibia and Swaziland
BTA	Bilateral Trade Agreement
CAF	Confederation of African Football
CARICOM	Caribbean Community
CCBG	Committee of Central Bank Governors
CCU	Continental Customs Union
CEE	Central and Eastern Europe
CEN-SAD	Economic Community of Sahel-Saharan States
CESP	Centre for European Policy Studies
CET	Common External Tariff
CFP	Common Fisheries Policy
CFSP	Common Foreign and Security Policy
CFTA	Continental Free Trade Area
CID	Center for International Development
CJEU	Court of Justice of the European Union

CLAP	Calibration Laboratory Accreditation Programme
CMT	Committee of Ministers
COMAI	Conferences of African Ministers in Charge of Integration
COMESA	Common Market of Eastern and Southern Africa
CoR	Committee of the Regions
COSAFA	Confederation of Southern African Football Associations
COSANOC	Confederation of Southern African National Olympic Committees
CPJ	Committee to Protect Journalists
CRTA	Committee on Regional Trade Agreements
CSF	Civil Society Forum
CSGR	Centre for the Study of Globalisation and Regionalisation
CSSDCA	Conference on Security, Stability Development and Co-operation in Africa
CTD	Committee on Trade and Development
DBSA	Development Bank of Southern Africa
DDA	Doha Development Agenda
DDT	dichlorodiphenyltrichloroethane
DEASA	Distance Education Association of Southern Africa
DFID-SA	Department for International Development – Southern Africa
DIIS	Danish Institute for International Studies
DRC	Democratic Republic of Congo
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism/ Digital Single Market
DSU	Dispute Settlement Understanding
DTAA	Double Taxation Avoidance Agreement
DTI	Department of Trade and Industry
EAC	East African Community
EAPP	East African Power Pool
EASSy	Eastern Africa Submarine Cable System
EC	European Community or Commission
ECA	Economic Commission for Africa
ECB	European Central Bank
ECCAS	Economic Community of Central African States
ECJ	European Court of Justice
ECOSOCC	Economic, Social and Cultural Council
ECOWAS	Economic Community for West African States
ECSC	European Coal and Steel Community
ECU	European Currency Unit
EEC	European Economic Community
EIB	European Investment Bank
EISA	Electoral Institute of Southern Africa
EMU	Economic and Monetary Union
EPA	Economic Partnership Agreement
EPP	Economic Reform Programme
ERM	Exchange Rate Mechanism
ERSA	Economic Research Southern Africa
ESAF	Enhanced Structural Adjustment Facility

ESAP	Economic Structural Adjustment Programme
ESCC	Economic and Social Committee
ESF	European Social Fund
ESI	Electricity Supply Industry
EU	European Union
EURATOM	European Atomic Energy Community
EUSF	European Union Solidarity Fund
FAO	Food and Agriculture Organisation
FEWS NET	Famine Early Warning Systems Network
FOPRISA	Formative Process Research on Integration in Southern Africa
FDI	Foreign Direct Investment
FSAP	Financial Sector Assessment Programme
FTA	Free Trade Area
GATS	General Agreement on Trade and Services
GATT	General Agreement on Trade and Tariffs
GCC	Gulf Cooperation Council for the Arab States
GDP	Gross Domestic Product
GMB	Grain Marketing Board
GNP	Gross National Product
GSP	General System of Preference
GSTP	Global System of Trade Preferences
GTF	Global Trust Fund
GTZ	<i>Gesellschaft für Technische Zusammenarbeit</i>
HIPC	Heavily Indebted Poor Countries
HLEG	High Level Expert Group
HSGIC	Heads of State and Government Implementing Committee
IAAC	Inter-American Accreditation Cooperation
IAF	International Accreditation Forum
IATA	International Air Transport Association
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Association
ICB	International Competitive Bidding
ICCPR	International Covenant on Civil and Political Rights
ICDP	Institutional Capacity Developmental Programme
ICG	International Crisis Group
ICJ	International Court of Justice
ICM	Integrated Committee of Ministers
ICP	International Cooperating Partners
ICSECR	International Covenant on Economic, Social and Cultural Rights
ICSID	International Centre for Settlement of Investment Disputes
ICT	Information and Communication Technology
ICTSD	International Centre for Trade and Sustainable Development
IDA	International Development Association
IF	Integrated Framework for Trade-related Technical Assistance
IFC	International Finance Corporation
IGAD	Inter-Governmental Authority for Development

ILAC	International Laboratory Accreditation Cooperation
ILO	International Labour Organisation
IMF	International Monetary Fund
IMO	International Maritime Organisation
ISO	International Standards Organisation
ISPA	Instruments for Structural Policies for Pre-Accession
ITEDD	International Trade and Economic Development Division
ITO	International Trade Organisation
IUU	illegal, unreported and unregulated
JCA	Joint Competition Authority
JHA	Justice and Home Affairs
KOBWA	Komati Basin Water Authority
LDC	Least Developed Country
LTA	Lake Tanganyika Authority
MAP	Millennium African Recovery Plan
MDGs	Millennium Development Goals
MERCOSUR	<i>Mercado Comun del Sur</i> (Common Market of the South)
MFN	Most Favoured Nation
MIASA	Mining Industries Association of Southern Africa
MIC	Media and Transformation Commission
MISA	Media Institute of Southern Africa
MIP	Minimum Integration Programme
MoU	Memorandum of Understanding
MPDC	Maputo Port Development Company
MTR	Mid-Term Review
NAFP	National Accreditation Focal Point
NAFTA	North American Free Trade Agreement
NAI	New African Initiative
NAM	Non-Aligned Movement
NCB	National Central Banks
NCTS	New Computerised Transit System
NEPAD	New Partnership for Africa's Development
NGO	Non-Governmental Organisation
NTB	Non-tariff barriers
OAU	Organisation of African Unity
ODA	Official Development Assistance
OECD	Organisation for Economic Co-operation and Development
OKACOM	Okavango River Basin Water Commission
OMT	Outright Monetary Transaction
ORASECOM	Orange-Senqu River Commission
OSBP	One-Stop Border Post
PAP	Pan-African Parliament
PJCCM	Police and Judicial Co-operation in Criminal Matters
POSA	Public Order and Security Act
PRC	Permanent Representatives Committee
PRGF	Poverty Reduction and Growth Facility

PRSP	Poverty Reduction Strategy Paper
PSP	Programme Steering Committee
PTA	Preferential Trade Agreement
PTF	Permanent Trade Forum
RBZ	Reserve Bank of Zimbabwe
RCB	Regional Central Bank
REC	Regional Economic Community
RERA	Regional Electricity Regulators' Association
RETOSA	Regional Tourism Organisation of Southern Africa
RIA	Regional Integration Arrangement
RIDMP	Regional Infrastructure Development Master Plan
RIP	Regional Indicative Programme
RISDP	Regional Indicative Strategic Development Plan
RoO	Rules of Origin
RSP	Regional Strategy Paper
RTA	Regional trade Agreement
SA	South Africa
SACHES	Southern African Comparative and History of Education Society
SACU	Southern African Customs Union
SADC	Southern African Development Community
SADCAS	Southern African Development Community Accreditation System
SADCC	Southern African Development Coordinating Conference
SADC-CNGO	Southern African Development Community Council of Non-Governmental Organisations
SADC-PF	Southern African Development Community Parliamentary Forum
SADCSTAN	SADC Cooperation in Standardization
SACREE	SADC Regional Centre for Renewable Energy and Energy Efficiency
SAF	Structural Adjustment Facility
SAIIA	South African Institute of International Affairs
SANAS	South African National Accreditation System
SAP	Structural Adjustment Programme
SAPARD	Special Accession Programme for Agriculture and Rural Development
SAPP	Southern African Power Pool
SARUA	Southern African Regional Universities Association
SARW	Southern African Resources Watch
SATC	Southern African Transport Conference
SATCC	Southern African Transport and Communications Commission
SCCC	Subcommittee on Customs Cooperation
SDI	Spatial Development Initiatives
SDR	Special Drawing Rights
SGB	Stability and Growth Pact
SIPO	Strategic Indicative Plan for the Organ
SIS	Schengen Information System
SMEs	Small and Medium-sized enterprises
SNC	SADC National Committee
SRII	SADC Regional Information Infrastructure

SPS	Sanitary and Phytosanitary
SQAM	Standardisation, Quality assurance, Accreditation and Metrology
SSA	Sub-Saharan Africa
STEP	Southern Africa Transport Efficiency Project
SWCI	Shared Watercourse Institutions
TBT	Technical Barrier to Trade
TCs	Technical Assistance Consultations
TCAP	Technical Cooperation Action Plan
TDCA	Trade, Development and Co-operation Agreement
TEU	Treaty establishing the European Union
TFCA	Trans-Frontier Conservation Area
TFEU	Treaty on the Functioning of the European Union
T-FTA	Tripartite Free Trade Area
TISA	Trade and Investment South Africa
TLAP	Testing Laboratory Accreditation Programme
TNF	Trade Negotiating Forum
Tralac	Trade Law Centre for Southern Africa
TRIMS	Trade-Related Investment Measures
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TPRM	Trade Policy Review Mechanism
UK	United Kingdom of England and Northern Ireland
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference for Trade and Development
UNDP	United Nations Development Programme
UNECA	United Nations Economic Commission for Africa
UN-ECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
UNICEF	United Nations Children's Fund
UNU-CRIS	United Nations University Institute on Comparative Regional Integration Studies
UNIVISA	Universal Visa
UNU	United Nations University
USA	United States of America
UWI	University of West Indies
VAT	Value Added Tax
WC	Washington Consensus
WCO	World Customs Organisation
WEF	World Economic Forum
WFP	World Food Programme
WIMT	Women in Mining Trust
WTO	World Trade Organisation
ZAMCOM	Zambezi Watercourse Commission
ZiZaBoNa	Zimbabwe-Zambia-Botswana-Namibia
ZTK	Zambia-Tanzania-Ke

CHAPTER 1

INTRODUCTION

1.1 Regional trade integration in context

The countries of Africa, like others on other continents, have decided to integrate their economies into regional blocs. These countries do so despite the view held worldwide that regional integration is a very difficult process.¹ However, it being difficult does not mean that integration cannot or should not be done. Even the World Trade Organisation (WTO), which advocates for multilateralism, does allow regionalism among its member states.²

The question, however, is “why do states even bother engaging in it”? This is more so because states that get involved in integration efforts more often than not have different legal regimes and this creates a challenge of harmonising those laws. Without this harmonisation, it is difficult to have common policies. The guideline to be followed here, therefore, is that for policies to work, laws must be implemented and enforced in respect of those policies. This is, of course, looking at integration from a legal point of view.

However, from an economic point of view the sentiment is different. This different sentiment can be summed by the former South African President Thabo Mbeki’s statement when he said: “integration can create the basis for regional markets and industries to overcome the limits of small markets, to achieve economies of scale, and enhance competitiveness.”³

¹ Roberts, S *et al.* “Understanding competition and regional integration as part of an inclusive growth agenda for Africa: key issues, insights and a research agenda” Paper submitted for Competition Commission and Tribunal Annual Conference, 26 August 2014; Moon, W *et al.* *Regional Integration – Europe and Asia Compared* (2017) at 103.

² This is done through Article 24 (“XXIV”) of the World Trade Organisation (WTO) or General Agreement on Tariffs and Trade (GATT) Treaty. This Article sets out the basic conditions for the formation of customs unions and free trade areas which are forms of regional schemes or arrangements. This Article is discussed in detail in Chapter 2.

³ Mbeki, T. “Statement of the Chairperson of SADC and President of South Africa,” (Speech on the occasion of the Launch of the SADC Free Trade Area, Sandton, Johannesburg, August 16-17, 2008.

There is as such a need to reconcile these different views in order for integration to be a success. The starting point should thus be to define “integration”. According to the *integration theory*⁴ this is a process of integrating the activities of different parts into a system, with the integrating parts performing certain functions in the system. Its main assumption is that because resources are scarce, actors depend on each other, thus responding to the environment by pooling resources, the latter being the initial moment of integration.⁵

As a “process” integration would thus involve different phases, namely, *preparation*, *cooperation*, *harmonisation* and *integration*. Sometimes it is taken further to *unification*. It means, therefore, that for integration to happen member states must have gone through the other three phases first. And in most cases, if not all, this is politically-driven.⁶

From the economic point of view integration can be shallow or deep. Shallow integration involves the removal of border barriers to trade, typically tariffs and quotas. Deep integration involves policies and institutions that facilitate trade by eliminating or reducing regulatory and behind-the-border impediments to trade, whether these impediments are intentional or not. These can include issues such as customs procedures or competition policies.⁷

Available at <http://www.dfa.gov.za/docs/speeches/2008.mbek0818c.html> (accessed on 18 November 2015).

⁴ This includes both political and economic approaches to integration. Political approaches include inter-governmentalism, federalism, etc. Economic theories include market integration theory, development integration theory, functionalist and neo-functionalist theories, etc. Proponents of the economic integration theory include Ernst B. Haas and Béla Alexander Balassa. The integration theory, including the political and economic approaches, is discussed in detail in Chapter 3.

⁵ Ndlovu, J.M.L. “The AU–SADC interface on peace and security: challenges and opportunities” in van Nieuwkerk, A *et al.* *Southern African Security Review* (2013) at 55; Ujupan, A.S. “Reconciling theories of regional integration: a third way approach”. University of Ulster at <http://www.jhubc.it/ecpr-istanbul/virtualpaperroom/060.pdf> (accessed on 15 January 2016).

⁶ Nene, M.M.B. “Political and Economic Drivers of Regional Integration in Africa: A Case Study of the Democratic Republic of Congo” *South African Institute of International Affairs (SAIIA) Occasional Paper No. 106*, January 2012; Spolaore, E. “What Is European Integration Really About?: A Political Guide for Economists” *Journal of Economic Perspectives* vol. 27 no. 3 (2013) 125.

⁷ Rollo, J. “The Challenge of Negotiating RTA’s for Developing Countries: what could the WTO do to Help?” Paper presented at the WTO Conference on Multilateralising Regionalism 10-12 September 2007 Geneva, Switzerland; Rollo, J. “Negotiating RTAs for developing countries” in Baldwin, R *et al.* *Multilateralizing Regionalism: Challenges for the Global Trading System* (2008) at 698.

To understand the meaning of regional integration first there must be an understanding of the notion of “regionalism”. Regionalism is a term in international relations that refers to the expression of a common sense of identity and purpose combined with the creation and implementation of institutions that express a particular identity and shape collective action within a geographical region. The idea that lies behind this increased regional identity is that as a region becomes more economically integrated, it will necessarily become politically integrated as well. This means that integration can take different forms: economic, socio-economic or political integration or combination of the three.⁸

As this thesis deals with regional trade integration, it means that we must also understand the notion of regional economic integration, within which regional trade integration falls. Regional economic integration itself falls within a broader or general economic integration.

Encyclopaedia Britannica⁹ defines economic integration as the unification of economic policies between different states through the partial or full abolition of tariff and non-tariff restrictions on trade taking place among them prior to their integration. This definition takes a narrow economic view. Balassa, on the other hand, takes an even narrower economic view and looks at economic integration both as a process and as a state of affairs. As a process, he states, “it encompasses measures designed to abolish discrimination between economic units belonging to different national states.”¹⁰ When viewed as a state of affairs, “it can be represented by the absence of various forms of discrimination between national economies.”¹¹

What is common between the two definitions is that states are involved. As this involves two or more states this means there will also be issues of international law involved – the legal view. This is why it is stated, above, that the guideline to be followed is that for

⁸ Mandal. C. *Dictionary of Public Administration*, 2007.

⁹ Encyclopaedia Britannica, vol. 1 (2009) at 22.

¹⁰ Balassa, B. *The Theory of Economic Integration* (1961) 1; Biswaro, J.M. *The Quest for Regional Integration in the Twenty First Century: Rhetoric versus Reality – A comparative study* (2012) at 8.

¹¹ Balassa (above).

economic policies to work laws must be implemented and enforced in respect of those policies.

With regard to regional economic integration Mongelli¹² takes a broader economic view and defines it as the degree of interpenetration of economic activity among two or more countries belonging to the same geographic area as measured at a given point in time. It may include institutional integration, which is the policy decision(s) taken by two or more governments of countries belonging to the same geographic area in order to promote economic co-operation in terms of deepening and/or widening the spheres of co-ordination under the terms of an agreed pact.

As such regional integration can be defined as the unification of neighbouring states working within a framework to promote free movement of goods, services and factors of production, and to coordinate and harmonise their policies. It can also be defined as a process and a means by which a group of countries strive to increase their levels of welfare. It involves the recognition that partnership between countries can achieve this goal in a more efficient way than unilateral or independent pursuance of policy in each country.¹³

Several studies have shown that in Africa, regional integration should have been an effective driver of development and one of the solutions to the problems of small market size, weak institutions, low human development, worsening terms of trade, conflicts between countries, and the poor investment climate. In this instance regional agreements were therefore expected to:

- increase trade and attract more investments;
- generate greater economies of scale based on profitable competition;
- facilitate free movement of resources;
- promote peace and security; and

¹² Mongelli, F.P. "What does European institutional integration tell us about trade integration?" European Central Bank Occasional Paper Series no. 40 December 2005.

¹³ Mutasa, C. "Regional Integration and Debt in Africa: A Comparative Report of Africa's Regional Groupings" Southern African Regional Poverty Network (SARPN) Paper March 2003.

- improve the bargaining power of small countries in multilateral or bilateral negotiations with the long-term objective of generating sustainable economic growth and development of countries.¹⁴

However, regional integration in Africa has been characterised by overlapping memberships of countries in many economic communities, rendering them inefficient.¹⁵ This overlapping membership is called the “spaghetti bowl effect”.¹⁶ Bhagwati coined the term in 1995¹⁷ to explain how the proliferation of regional agreements makes trade procedures more complicated by increasing the number of tariffs and rules of origin.

Geographic location is one reason, among others, that justifies membership of more than one regional economic community (REC). It also potentially allows a country to profit from the benefits offered by its economic integration in the different RECs. Yet there are many disadvantages of multiple memberships. Results of a survey conducted by the Economic Commission for Africa (ECA) shows that 25% of countries consider multiple memberships as the reason for their arrears in contributions to the different RECs. Multiple membership is also given by countries surveyed as a reason for low programme implementation (23%), low level of attendance at meetings (16%), and duplication and conflicting programme implementation (16%).¹⁸

¹⁴ “The Rise of the South: Human progress in a diverse world”. United Nations Development Programme (UNDP) Human Development Report 2013; The World Bank. “Can Africa claim the 21st Century?” (2000); Ndomo, A. “Regional Economic Communities in Africa: A Progress overview” Study commissioned by German technical Cooperation (GTZ), Nairobi, May 2009.

¹⁵ Economic Commission for Africa. “The Status of regional integration in Africa” *Assessing Regional integration in Africa* (ARIA IV) (2010) Chapter 2.

¹⁶ The “spaghetti bowl effect or phenomenon” is discussed in Chapter 3 (at 111 – 112).

¹⁷ Bhagwati, J. “U.S. Trade Policy: The Infatuation with Free Trade Agreements” in Bhagwati, J *et al.* *The Dangerous Drift to Preferential Trade Agreements* (1995); Bhagwati, J *et al.* “Trading preferentially: Theory and Policy” *Economic Journal* vol. 108 no. 449 (1998) 1128.

¹⁸ Nene, M. “Political and economic drivers of regional integration in Africa: A case study of the Democratic Republic of Congo”. South African Institute of International Affairs (SAIIA) Occasional Paper No. 106, January 2012.

There are four different approaches to regional economic integration: *developmental regional integration*, *market regional integration*, *ad hoc regional cooperation*, and *functional regional integration*.¹⁹

Developmental regional economic integration promotes greater regional interdependence and argues that for regional economic integration to work, it must first and foremost focus on equitable regional development. In its broader meaning it requires strong state intervention. In the Southern African context, this means, for example, that South Africa cannot be allowed to develop at the expense of its poorer neighbours.²⁰

Market regional integration promotes regional interdependence, but does so by progressively removing the barriers to economic activity between states in the region: “the integrating force of the market is released through the removal of restrictions and barriers to regional trade, rather than through positive government interventions”.²¹

Ad hoc regional economic integration relies heavily on bilateral agreements between regional states. It is considered ad hoc because it is not part of a larger plan to induce regional interdependence, or even part of a regional scheme. By connecting countries, albeit in an *ad hoc* manner, it does create a more integrated region.²²

Functional regional integration proceeds by linking particular activities and interests, one at a time, according to a need and an acceptability, giving each a joint authority and policy limited to that activity alone. This can be done through a series of shared projects across borders, which creates habits of cooperation and reveal the advantages of pooling efforts. It entails less sacrifice of sovereignty than with market integration, but does see intra-regional economic interactions creating a ‘functional need’ for regional institution. Both

¹⁹ Hentz, J.J. “South Africa and the political economy of regional cooperation in Southern Africa” *Journal of Modern African Studies* vol. 43 no. 1 (2005) 21 – 51.

²⁰ Hentz (above) at 24.

²¹ Hentz, at 25.

²² *Ibid.*

ad hoc and functional integrations are typically anchored by projects and, in particular, both focus on infrastructural development.²³

In this thesis the economic integration is further narrowed to trade integration. Trade integration means the establishment of free trade between a number of countries with the aim of securing the benefits of international specialisation and international trade.²⁴ In the context of this thesis it means trade by member states in the Southern African region among themselves as well as trade by them as a group with other groupings and/or countries.

There are four main forms of trade integration, ranging from a loose association of trade partners to a fully integrated group of nation states. These are:

- (a) a free trade area (FTA), where members eliminate trade barriers between themselves, but each continues to operate its own particular barriers against non-members;
- (b) a customs union, where members eliminate trade barriers between themselves and establish uniform barriers against non-members, in particular a common external tariff (CET);
- (c) a common market, which is a customs union that also provides for the free movement of labour and capital across national boundaries; and
- (d) an economic community or union, which is a common market that also provides for the unification or harmonisation of monetary, fiscal and other policies of members.²⁵

These are also called regional trade arrangements (RTAs) and do not have to be a process as stated above. The participating parties can opt whichever arrangement they want and stick to it, or evolve from it and develop into the other, etc. However, in most instances the linear approach, as outlined above, is followed.

²³Hentz, at 26.

²⁴ Nye, J.S. "Comparative Regional Integration: Concept and Measurement" *International Organization* vol. 22 no. 4 (1968) 855 at 860; Carim, X. "Multilateral trading, regional integration and the Southern African Development Community" *South African Journal of Economics* vol. 65 no. 3 (1997) 334.

²⁵ These are all discussed in Chapter 3.

The regional bloc to be dealt with in this case is the Southern African Development Community (SADC). However, there is also a brief look into other groupings in the Southern African region such as the Southern African Customs Union (SACU),²⁶ and the Common Market for Eastern and Southern Africa (COMESA).²⁷

When the SADC changed from the Southern African Development Coordinating Conference (SADCC) in 1992 greater emphasis was placed on “integration” rather than mere “cooperation”.²⁸ Thus now regional integration features pre-eminently in the Southern African Development Community (SADC) Treaty, protocols and programmes as a mechanism to take the region forward. The Preamble to the SADC Treaty notes the SADC states’ “duty to promote interdependence and integration of their national economies for the harmonious, balanced and equitable development of the Region” and of “the need to mobilise ... resources to promote ... economic integration.” In addition, the areas of co-operation and the economic objectives of the SADC are trade-oriented and are premised on the increase of regional and international trade for the achievement of economic growth.²⁹

Further, the majority of protocols adopted by the SADC are intended to deepen regional economic integration. All these protocols are intended to enhance productivity and efficiency as well as to encourage both intra- and extra-regional trade.³⁰

²⁶ The SACU was established in 1910 as a Customs Union Agreement between the then Union of South Africa and the High Commission Territories of Botswana, Lesotho, and Swaziland. With the advent of independence for these territories, the agreement was updated and, on 11 December 1969, it was re-launched as the SACU with the signing of an agreement between the Republic of South Africa, Botswana, Lesotho and Swaziland. The updated union officially entered into force on March 1, 1970. After Namibia’s independence from South Africa in 1990, it joined SACU as its fifth member.

²⁷ COMESA is a free trade area with nineteen member states (Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe). It was formed in December 1994, replacing a Preferential Trade Area which had existed since 1981.

²⁸ Hull, C *et al.* “Abandoning Frontline Trenches?: Capabilities of peace and security in the SADC region” Research paper for the Swedish Defence Research Agency (FOI), June 2009 at 19.

²⁹ Treaty Establishing the Southern African Development Community (SADC Treaty) Article 5.

³⁰ These are SADC Protocols on Trade; Mining; Energy; Transport, Communication and Meteorology; Fisheries; Tourism; etc. See Chapter Five for full discussions of these protocols.

The reasons for the pre-eminence of trade within the SADC's legal, institutional and programmatic framework may be classified into three categories. These are historical precedents, regional economic dynamics and international economic imperatives.³¹

What is disturbing is that, despite the existence of these RTAs in Southern Africa, economically the region's, as well as the continent's performance, remains dismal. All other regions of the Third World have made some progress and sub-Saharan Africa as a whole has not. One commentator has actually regarded it a misnomer to classify the sub-Saharan Africa as "developing" because it is at best stagnant, and at worst regressing.³²

The problems or challenges faced by the SADC are mainly *political* in nature. One of these problems or challenges in the SADC is that the member countries have protectionist tendencies. They impose duties on all imports, and this does not augur well for a trade bloc. These duties sometimes act as barriers to free trade and discourage businessmen from importing goods. The trade laws also differ from one Member State to another. One way of resolving this is therefore to harmonise these trade policies or laws.

Article 21 of the SADC Treaty lists a number of areas of cooperation among the member states, but harmonisation of law is not one of them. This is unfortunate because this aspect would prove to be significant in the realisation of achieving regional integration. The achievement of several of the objectives of the SADC requires the taking of legal measures to eliminate customs duties and adoption of a common external customs tariff and to eliminate non-tariff barriers to trade. The South African Customs Union (SACU) is in favour of such a move, but this needs to extend to the whole region – the SADC.

From the above it is clear that the problem is primarily of governance, which is political. However, international institutions such as the International Monetary Fund (IMF) and World Bank tend to concentrate only on the economic side of the problem, while in fact

³¹ Kaime, T. "SADC and human security: Fitting human rights into the trade matrix" *African Security Review* vol. 13 no. 1 (2004) 109.

³² Dell, S. "The Future of the International Monetary System" *The future role of the United Nations in an independent world* (1989) at 109.

the sub-Saharan African problem is primarily a political one. The SADC strategy of encompassing non-economic activities among its areas of cooperation is a realisation that successful integration is based on the twin foundations of economic and political integration. The political environment prevailing in countries joined together as a community is a critical factor. Economic co-operation and integration flourish better in an environment that is politically peaceful and stable. After all, law is “congealed politics”, especially at the international level.³³

The approach in the SADC can be contrasted with that of the European Union (EU). The European countries did not sign the EU Treaty simply to create mutual obligations governed by the law of nations. Rather, they limited their sovereign rights by transferring them to institutions over which they had no direct control. The southern African governments, on the other hand, seem not to want to limit their sovereignty.

The only economic community that can work well is one where all member states perceive membership as beneficial to all their economies. This is in fact implicit in the SADC Treaty objectives. But experience shows that there must be a member country that takes the leading position in the Community like it is with the European Union. In the EU Germany is the leader because of its powerful economy. With the SADC South Africa should take such a responsibility because of its advanced technology and powerful economy as compared to other members of the SADC. However, laws should be enacted to make sure that this position is not abused or misused.

Having identified the problems or challenges, it is submitted that the SADC should take specific steps to eliminate them. The final solutions rest on the individual member states that must enact legislation abolishing duties. Such measures would enhance integration.

There must also be a way to integrate the different legal systems of the member states. One of these ways is harmonisation of these laws. Others could include adopting the United

³³ *Ibid.*

Nations conventions relating to international trade such as United Nations Conference on Trade and Development (UNCTAD)³⁴ as their operating legal system.

Orthodox theorists hold that regional integration among developing countries is immaterial. They say this is because the real obstacle to intra-regional trade is not the presence of tariff barriers, but structural conditions of these developing countries.³⁵ This thesis will argue against this statement and show that regional integration can materialise in Southern Africa despite the poor structural conditions in the region.

There is also a question of credibility on the part of financial institutions towards the Southern African blocs. In the late 80s the IMF and the World Bank decided to make funds available to Eastern Europe bloc states. This shifted the focus from third-world debtors to Eastern Europe.³⁶ Critics feared that the IMF was becoming a development agency instead of a world central bank. Therefore, it should be asked why the same is not done to the poor Southern African region, particularly with the crisis in Zimbabwe and after the devastation in Mozambique. In fact Trevor Manuel, South Africa's former Finance Minister, asked the question at the World Economic Summit³⁷ why the foreign investors continued to pour their monies into Eastern Europe despite the crises in Kosovo, but always cited Zimbabwe, as an obstacle, in regard to Southern Africa.

1.2 Problem statement and objectives

As stated above, the countries of Africa, through the African Union, have decided to integrate their economies so that they ultimately achieve the stage of an economic community i.e. the African Economic Community (AEC). They have set themselves,

³⁴ UNCTAD was established in 1964 in order to provide a forum where the developing countries could discuss the problems relating to their economic development. The primary objective of the UNCTAD is to formulate policies relating to all aspects of development including trade, aid, transport, finance and technology. The Conference ordinarily meets once in four years.

³⁵ McCarthy, C.L. "Regional Integration of Developing Countries at Different Levels of Economic Development: Problems and Prospects" *Transnational Law and Contemporary Problems* vol. 4 (1994) 1; Mytelka, L.K. "The Salience of Gains in the Third-World Integrative Systems" *World Politics* vol. 25 (1973) 236.

³⁶ Bruce, N. "IMF and World Bank meetings" *Financial Mail* vol. 133 issue 12, 29 September (1989) 34.

³⁷ The Summit was held in Durban during the week of 11-15 June 2001.

through the *Treaty establishing the African Economic Treaty* (the Abuja Treaty),³⁸ the deadline of 2028 in which to achieve this stage. This stage would be preceded by others in the linear process of economic integration: free trade areas (FTAs), customs unions and common markets.

The regional economic communities (RECs) have been identified as building blocks through which this integration agenda should be achieved.³⁹ The Southern African Development Community (SADC) is the identified REC for the Southern African region.

The question, therefore, that this thesis is trying to answer is whether the SADC is able to achieve this mandate, as well as whether it can do this within the stipulated timeframes. It also looks at how the SADC does, or intends to do, this.

As such the **objectives** of the study are as follows:

- It deals with the WTO as the legal basis for regional integration worldwide and how it fits and relates to regional trade integration in Southern Africa.
- It compares and contrasts as well as analyse different regional schemes used in the world to see whether they are suitable for Southern Africa.
- It traces the origin of the Southern African regional institutions and their performance with regard to integrating the region's trade and overall economy.
- It deals with the applicability of the rules/laws of these institutions (SADC, COMESA, SACU and WTO) in the effort to alleviate the trading pedigree of Southern African states in particular, if there are any.
- It looks into the integration agenda of the European Union (EU) and draws some lessons from which the SADC could learn.

³⁸ *Treaty establishing the African Economic Treaty* (the Abuja Treaty) was concluded in Abuja, Nigeria in June 1991 and came into force in May 1994. It provides for the African Economic Community to be set up through a gradual process, which would be achieved by coordination, harmonisation and progressive integration of the activities of existing and future regional economic communities (RECs) in Africa.

³⁹ Article 5(1)(d) of the *Protocol on Relations between the AU and the RECs* provides that the regional economic communities shall take steps to review their treaties to provide an umbilical link to the Community and in particular provide for the eventual absorption, at stage 5 set out in Article 6(2)(e) of the Treaty, of the RECs into the African Common Market as a prelude to the Community.

- It then gives a verdict as to whether the attempts in integrating the Southern African region are bearing fruits or not as well as recommendations therefor.

1.3 Methodology

The methodology adopted by this study is primarily desk and library research. An array of mostly recent books, journal articles, case law, treaties and protocols relating to the subject of regional trade integration, especially relating to the SADC, is used and analysed.

The study also applies a descriptive analysis in order to provide a detailed foundation and framework. In this regard, the various theories underpinning the core elements of the thesis are discussed. The comparative method is also used to enrich the discussion as well as the conclusion and recommendations.

1.4 Scope and structure of the study

The study deals mainly with the SADC, but also touches on the Southern African Customs Union (SACU) and the Common Market of Eastern and Southern Africa (COMESA) as well as with the AEC and AU, in as far as they relate to the SADC.

However, the thesis starts by briefly analysing the World Trade Organisation (WTO) because it is the umbrella body that controls trade globally. Because the WTO allows or makes provision for regionalism, it could be concluded that regionalism is a supplement or complement to multilateralism, at least through the prism of the WTO. This is the approach this thesis follows. Thereafter it measures the regional trade integration in Southern Africa (SADC) against particular provisions of the WTO Agreement.

The approach of this thesis, therefore, is that regionalism, as opposed to unilateralism, and multilateralism by the WTO, is the way to go for the Southern Africa region. Intra-regional trade is thus used as one of the most important empirical indicators of success, or lack of, in this regional integration.

The **Structure** of the thesis is as follows:

Chapter 2 looks into how regional integration comes into being. This entails looking (briefly) at the origin of the WTO and its perceived role towards regional integration. It will also touch on its impact or implications on regional integration in southern Africa.

Chapter 3 will give an overview and comparison of different types or schemes of regional integration used throughout the world and state as to which one(s) is (are) best suited for southern Africa.

Chapter 4 will look at the SADC, its composition and roles as well as the African Economic Community (AEC), the NEPAD and the AU in as far as they deal with trade and integration in Africa.

Chapter 5 will deal with achievements and performance of the SADC thus far regarding regional integration and tell whether it is a success or failure, or whether it is on the right path or not.

Chapter 6 will compare the SADC with the European Union (EU) and state the lessons that the SADC can learn from the EU for it to become a success.

Chapter 7 will consist of two parts:

Part A will be my conclusion.

In *part B* I will give recommendations of what should be done to develop and integrate trade in Southern Africa Region, in particular by the SADC.

It then ends with *concluding remarks*.

CHAPTER 2

HOW REGIONAL TRADE INTEGRATION COMES INTO BEING

Introduction

Regional integration is the unification of neighbouring states working within a framework in order to upgrade cooperation through common institutions and rules. The objective is thus to promote free movement of goods, services and factors of production, and to coordinate and harmonise the policies of the member states. It can also be defined as a process and a means by which a group of countries strive to increase their levels of welfare. It involves the recognition that partnership between countries can achieve this goal in a more efficient way than unilateral or independent pursuance of policy in each country.⁴⁰

Regional economic integration as a strategy for achieving greater economic development and growth is currently being implemented in many parts of the world. The idea of regional integration is reinforced by relatively successful experience of integration among European states in the European Union (EU) and other integration schemes such as the North American Free Trade Agreement (NAFTA).

The EU is currently a union of twenty-eight independent states based on the European communities and founded to enhance political, economic and social co-operation. It has a single market as its core as well as a common currency – the Euro. The single market basically means that barriers are removed, and people, goods, services and money move around Europe as freely as within one country. The people of Europe travel at will across EU's internal frontiers for business and pleasure or, if they choose, they can stay at home and enjoy a dazzling array of products from all over the European Union.⁴¹

⁴⁰ Mutasa, C. "Regional Integration and Debt in Africa: A Comparative Report of Africa's Regional Groupings" SARP Paper, March 2003.

⁴¹ The Preamble of the Treaty of Lisbon provides, among others, that the signatories: "Resolved to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by establishing an area of freedom, security and justice, in accordance with the provisions of this Treaty and of the Treaty on the Functioning of the European Union".

The EU was formerly known as European Community (EC) or European Economic Community (EEC). Its date of foundation is 1st November 1993 through the Treaty of Maastricht⁴² (Treaty Establishing the European Union). Its predecessor is the Treaty of Rome⁴³ which created the then EEC in 1958.

The EU's success owes a lot to the way it works – its unique method of interaction between institutions such as the European Parliament, the Council and the European Commission, supported by a number of agencies and other bodies. Like any government, the Union has a legislative and an executive branch and an independent judiciary, though it is a non-state body. Three institutions within the Union are responsible for making policy and taking decisions. These are: The Council of European Union, the European Commission and the European Parliament.⁴⁴

The NAFTA is an agreement signed by Canada, Mexico, and the United States of America (USA), creating a trilateral trade bloc in North America. The agreement came into force on 1 January 1994 and it eliminated barriers to trade and investment between the U.S.A, Canada and Mexico. Since it came into effect, the North Americans have enjoyed an overall extended period of strong economic growth and rising prosperity. The NAFTA has helped to stimulate economic growth and create higher-paying jobs across North America. It has also paved the way for greater market competition and enhanced choice and purchasing power for the North American consumers, families, farmers, and businesses.⁴⁵

Achievements in these integrated schemes have demonstrated that economic cooperation can be an important and potentially effective means for facilitating social and economic development.⁴⁶ However, material conditions existing in different member states, like

⁴² Officially called the *Treaty on European Union*. It was signed on 7 February 1992 by the members of the European Community in Maastricht, Netherlands and came into force on 1 November 1993.

⁴³ Officially called the *Treaty establishing the European Economic Community*. It was signed on 25 March 1957 by Belgium, France, Italy, Luxembourg, the Netherlands and the then West Germany, and came into force on 1 January 1958.

⁴⁴ Article 9(A), (C) & (D) of the Treaty on the European Union.

⁴⁵ Abbott, J *et al.* *Uniting North American Business: NAFTA Best Practices* (2002) at 13; “What is NAFTA” naftanow.org/ (accessed on 10 November 2016).

⁴⁶ Lawrence, R. “Competing with regionalism by revitalizing the WTO” in Meléndez-Ortiz, R *et al.* *The Future and the WTO: Confronting the Challenges. A Collection of Short Essays*, International Centre for

varying economic levels, must be taken into account before deciding which type of integration to follow.

The NAFTA stopped at trade integration, in part because of a recognition that the economic shocks faced by Canada and Mexico are different to those faced by the USA, and the smaller economies need currency flexibility, but also because of political concerns.⁴⁷

However, the first question that must be answered with regard to regional trade integration, and regional integration in general, is: “how does it come into being? In other words, “what is its legal basis?

The answer to the above question lies in Article 24 (“XXIV”) of the World Trade Organisation (WTO) or General Agreement on Tariffs and Trade (GATT) Treaty. This Article sets out the basic conditions for the formation of customs unions and free trade areas which are forms of regional schemes or arrangements.⁴⁸ In addition to customs unions and free trade areas, Article XXIV further envisages “interim arrangements” leading to a customs union or free trade area.⁴⁹

Trade and Sustainable Development (ICTSD) Programme on Global Economic Policy and Institutions (2012) at 38.

⁴⁷ Jefferis, K.R. “The Process of Monetary Integration in the SADC Region” *Journal of Southern African Studies* vol. 33 no. 1 (March 2007) 83 at 93.

⁴⁸ See Chapter Three for detailed discussion of customs union and free trade areas.

⁴⁹ GATT Article XXIV(5). It provides:

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

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

A key rule of the multilateral trade system is that reductions in trade barriers should be applied, on a most-favoured nation (MFN) basis, to all WTO members. This means no WTO member should be discriminated against by another member's trade regime. However, regional schemes or arrangements are an important exception to this rule. This exception is allowed under *Article XXIV of the General Agreement on Tariffs and Trade* (GATT)⁵⁰ for trade in goods, in *Article V of the General Agreement on Trade in Services* (GATS)⁵¹ for trade in services and in the *Enabling Clause*.⁵²

territories prior to the formation of the free-trade area, or interim agreement as the case may be; and

- (c) any interim agreement referred to in subparagraphs (a) and (b) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.”

⁵⁰ GATT Article XXIV(1) provides: “The provisions of this Agreement shall apply to the metropolitan customs territories of the contracting parties and to any other customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application. Each such customs territory shall, exclusively for the purposes of the territorial application of this Agreement, be treated as though it were a contracting party; *Provided* that the provisions of this paragraph shall not be construed to create any rights or obligations as between two or more customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application by a single contracting party.”

⁵¹ GATS Article V provides:

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

- (a) has substantial sectoral coverage, and
- (b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through:
- (i) elimination of existing discriminatory measures, and/or
- (ii) prohibition of new or more discriminatory measures,

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

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

⁵² GATT Decision (*L/4903*) of 28 November 1979 (on “treatment of developing nations”).

Article XXIV of GATT and Article V of GATS essentially mean that goods and services originating in a particular trading bloc or scheme can have different tariffs in states that are not member states of the bloc or scheme from which those goods or services originate, even if those states are members of the WTO.

The Enabling Clause is officially called the “Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries” and was adopted under the GATT in 1979, and enables developed member states to give differential and more favourable treatment to developing countries. It is the WTO’s legal basis for the Generalised System of Preferences (GSP). Under the GSP, developed countries offer non-reciprocal preferential treatment (such as zero or low duties on imports) to products originating in developing countries. Preference-giving countries unilaterally determine which countries and which products are included in their schemes. The Enabling Clause is also the legal basis for regional arrangements among developing countries and for the Global System of Trade Preferences (GSTP), under which a number of developing countries exchange trade concessions among themselves.⁵³

The Enabling Clause is designed principally to care for the needs of developing countries, as its main objective is to facilitate economic development rather than tariff liberalisation. The principal justification for granting preferences under the Enabling Clause is the contention that treating equally those states that are unequal would be unfair.⁵⁴

Regional trade agreements, therefore, must be consistent with the WTO rules governing such agreements, which require that parties to a regional trade agreement must have established free trade on “substantially all” goods within the regional area within ten

⁵³ Panagariya, A. “Preferential Trade Liberalization: The Traditional Theory and New Developments” *Journal of Economic Literature* vol. 38 no. 2 (June 2000) 287; Bartels, L. “The WTO Enabling Clause and Positive Conditionality in the European Community’s GSP Program” *Journal of International Economic Law* vol. 6 issue 2 (2003) 507 at 510.

⁵⁴ Thomas, R. “The World Trade Organisation and Southern African trade relations” *Law Democracy & Development* vol. 3 issue 1 May – June (1999) 105 at 111; Pangestu, M. “Special and Differential Treatment in the Millennium: Special for Whom and How Different?” *The World Economy* vol. 23 issue 9 (2000) 1285 at 1287; Islam, R *et al.* “Preferential Trade Agreements and the Scope of GATT Article XXIV, GATS Article V and the enabling clause: an Appraisal of GATT/WTO Jurisprudence” *Netherlands International Law Review* vol. 56 issue 1 (2009) 1 at 5.

years,⁵⁵ and that the parties cannot raise their tariffs against countries outside the agreement. Compliance with the WTO rules is important to ensuring that an agreement is beneficial to all parties in the multilateral system.

There is no gainsaying that for a regional integration arrangement such as a customs union or a free trade area to be sustainable, the attention should be placed on promotion of better governance, and on creating or maintaining conditions for sustainable and equitable growth. Also there is a need to strengthen governments' human resource and institutional capacities for effective economic management.

This chapter, therefore, deals only with the WTO as the legal basis of regional trade integration as well as its impact or implications on regional integration in southern Africa.

2.1 THE OVERVIEW OF THE WTO SYSTEM

The World Trade Organisation (WTO) came into existence on 1 January 1995 under the Marrakesh Agreement,⁵⁶ with the aim of improving existing international trade regimes in goods and services. It replaces or merges the two regimes that regulated trade in goods and services respectively since 1947. These were the GATT⁵⁷ which regulated trade in goods and the GATS⁵⁸ which regulated trade in services.

The purpose of this new organisation was, and still is, to supervise the international trade from a legal standpoint. The formation of the WTO was necessitated by many problems encountered in commercial transactions between countries under the GATT law.⁵⁹ This was because the GATT system was provisional, though almost for half a century. This,

⁵⁵ "Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994" Article 3 provides:

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

⁵⁶ It is called Marrakech Agreement as it was signed in Marrakech, Morocco, on 15 April 1994.

⁵⁷ General Agreement on Trade and Tariffs came into being in 1947 and was renegotiated in 1994.

⁵⁸ General Agreement on Trade in Services.

⁵⁹ Van den Bossche, P *et al.* *The Law and Policy of the World Trade Organization* (2013) at 40.

however, does not mean that the GATT and the GATS no longer exist. One must understand that these two are not institutions, but agreements. The WTO, on the other hand, is an institution.⁶⁰

The original intention was to create a third institution to handle the trade side of international cooperation, joining the two “Bretton Woods” institutions (the International Monetary Fund (IMF) and the World Bank). This institution was to be called the International Trade Organisation (ITO) and over 50 countries participated in negotiations to create it as a specialised agency of the United Nations. However, the draft ITO Charter was ambitious: it extended beyond world trade discipline, to include rules on employment, commodity agreements, restrictive business practices, international investments, and services.⁶¹ That is why it could not go far.

In terms of Article XI(1) of the Agreement Establishing the WTO, the contracting parties to the GATT 1947 and the European communities which accept the Agreement shall become the original members of the WTO. This means membership of the WTO is divided into *original members* and *ordinary members*.⁶² However, it is not clear, from this Article or the Treaty in general, whether there will be a different treatment for these members or not. It looks, therefore, like conferring original membership is just an acknowledgement of support, and dedication of these members, to international trade – there is nothing special about it. This argument is supported by the WTO’s Appellate Body decision⁶³ that the WTO Agreement is a “single treaty instrument which was accepted by the WTO members as a ‘single undertaking’ and binding on all members”.

⁶⁰ Article II of the Marrakesh Agreement Establishing the World Trade Organisation provides:

“(1) The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.”

Both the GATT and the GATS are listed in Annexes 1A and 1B respectively.

⁶¹ Matsushita, M *et al.* *The World Trade Organization: Law, Practice and Policy* (2006) at 1; Wolfrum, R *et al.* *WTO [World Trade Organization]: Institutions and Dispute Settlement* (2006) at 138.

⁶² Tams, J *et al.* *Documents in International Economic Law: Trade, Investment, and Finance* (2012) at 61; Steinberger, E. “The WTO Treaty as a Mixed Agreement: Problems with the EC’s and the EC Member states’ Membership of the WTO” *European Journal of International Law* vol. 17 issue 4 (2006) 837 at 839.

⁶³ *Appellate Body Report, Brazil – Measures Affecting Desiccated Coconuts*, WT/DS22/AB/R, adopted on 20 March 1997, at 12; Steinberger (above) at 837.

Duties of the WTO include, *inter alia*, implementation of a large number of existing agreements that bear on international trade in goods, with the GATT occupying centre position in the group. It is also charged with overseeing agreements that cover services and intellectual property. The WTO's jurisdiction, therefore, covers the GATT as well as various trade agreements concluded under the auspices of the GATT, such as the GATS and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).⁶⁴ It is also to cooperate with the IMF and the World Bank, with a view to achieving a greater coherence in global economic policy-making.⁶⁵

At the heart of the WTO are the international agreements negotiated and signed by the majority of the world's trading nations which are its members. However, it is important to note that the WTO is not just about liberalising trade, because in some circumstances its rules support maintaining trade barriers to protect the poor.⁶⁶

2.1.1 Policy-making of the WTO

The WTO has a *Ministerial Conference*, *General Council* and other *specialised Councils*, and *Committees* as its organs.⁶⁷ The specialised Councils are: Council for Trade in Goods, Council for Trade in Services and a Council for Trade-Related Aspects of Intellectual

⁶⁴ Gallagher, P. *The First Ten Years of the WTO: 1995-2005* (2005) at 1; World Trade Organization. *Understanding the WTO* (September 2003) at 16; Matsushita, M *et al.* *The World Trade Organization: Law, Practice and Policy* (2006) at 1; Shukla, S.P. "From GATT to WTO and Beyond" The United Nations University Working Paper No. 195 (August 2000).

⁶⁵ Article III:5 of the WTO Agreement provides: "With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies." In furtherance of the WTO's mandate to 'cooperate, as appropriate' with the IMF, the *Agreement Between the IMF and the WTO* was concluded on 9 December 1996. The *Agreement Between the WTO and the World Bank* was signed on 28 April 1997; Sally, R. "Whither the world trading system? Trade policy reform: the WTO and prospects for the New Round" Institute for Global Dialogue (IGD) Occasional Paper No 36, January 2003 at 18.

⁶⁶ Weiler, J.H.H *et al.* "International and Regional Trade Law: The Law of the World Trade Organization. Unit I: The Syntax and Grammar of International Trade Law" New York University Paper (2011) at 15.

⁶⁷ Article IV of the Agreement Establishing the World Trade Organization.

Property Rights. All these specialised councils operate under the general guidance of the General Council.⁶⁸

The Ministerial Conference is the highest organ and is composed of representatives of all member states, and meets at least once every two years. This Conference carries out the functions of the WTO and has the authority to take decisions on all matters under any of the trade agreements, if so requested by a member.⁶⁹

The General Council is also composed of representatives of all member states and is in session between the meetings of the Ministerial Conference. It also acts as the Dispute Settlement Body (DSB) and the Trade Policy Review Body.⁷⁰ This, however, poses a serious challenge of combining the political and judicial powers, i.e. in line with the “separation of powers principle”. However, this should be understood within the context of method(s) that the DSB follows: that is alternative dispute resolution (ADR) rather than “strict court” method.

In essence the General Council is the real engine of the WTO, and has all the powers of the Ministerial Conference when that body is not in operation.⁷¹ The General Council has the following subsidiary bodies which oversee committees in different areas:

- *Council for Trade in Goods*

There are 11 committees⁷² under the jurisdiction of the Goods Council each with a specific task. All members of the WTO participate in the committees. The Textiles Monitoring Body is separate from the other committees, but still under the

⁶⁸ Schott, J. “Decision-Making in the WTO” *Policy Brief* 2 March 2000.

⁶⁹ *Ibid*; Article IV(1).

⁷⁰ Article IV(2).

⁷¹ Bartels, L. “The Separation of Powers in the WTO: How to Avoid Judicial Activism” *International and Comparative Law Quarterly* vol. 53 no. 4 (2004) 861 at 863; “Organisational Structure of the WTO” World Trade Organization Open Lab Space, available at labspace.open.ac.uk/mod/oucontent/view.php?id (accessed on 15 October 2013).

⁷² These are: Committee on Market Access; Committee on Agriculture; Committee on Sanitary and Phytosanitary Measures; Committee on Anti-Dumping Practices; Committee on Subsidies and Countervailing Measures; Committee on Safeguards; Committee on Import Licensing; Committee on Customs Valuation; Committee on Technical Barriers to Trade; Committee on TRIMs; and Information and Technology Agreement (ITA) Committee.

jurisdiction of Goods Council. The body has its own chairman and only 10 members. The body also has several groups relating to textiles.⁷³

- *Council for Trade-Related Aspects of Intellectual Property Rights*

It deals with information on intellectual property in the WTO, news and official records of the activities of the TRIPS Council, and details of the WTO's work with other international organisations in the field of intellectual property.⁷⁴

- *Council for Trade in Services*

The Council for Trade in Services operates under the guidance of the General Council and is responsible for overseeing the functioning of the General Agreement on Trade in Services (GATS). It is open to all WTO members, and can create subsidiary bodies as required.⁷⁵

- *Trade Negotiations Committee*

The Trade Negotiations Committee (TNC) is the committee that deals with the current trade talks round. Its chairperson is the WTO's Director-General. As of June 2012, the Committee was tasked with the Doha Development Round.⁷⁶

- *Committee on Trade and Development*

It periodically reviews the special provisions in the multilateral trade agreements in favour of the least-developed member countries, and reports to the General Council for appropriate action.⁷⁷

⁷³ Wouters, J *et al.* "The World Trade Organization: a legal and institutional analysis" *International Law Series* vol.1 (2007) 3; World Trade Organization. *Whose WTO is it anyway?* (2008) 101.

⁷⁴ *Ibid.*

⁷⁵ Wouters (above).

⁷⁶ The Doha Round is the latest round of trade negotiations among the WTO membership, officially launched at the WTO's Fourth Ministerial Conference in Doha, Qatar, in November 2001. Its aim is to achieve major reform of the international trading system through the introduction of lower trade barriers and revised trade rules. The Round is also known semi-officially as the "Doha Development Agenda" as a fundamental objective is to improve the trading prospects of developing countries.

⁷⁷ Wouters (fn 73).

The decisions within the WTO are taken through consensus first. In the event that a decision cannot be arrived at by consensus, it takes place through voting, in which case decisions are arrived at by a two-thirds majority of votes. Each member state has one vote, thus voting prowess is not dependant on a member's contribution to international trade or its contribution to the budget of the WTO.⁷⁸

However, there are instances where even the two-thirds majority vote does not apply. These are instances of amendments relating to Article I, (Most-Favoured Nation principle), Article IX (decision-making), Article II of the GATT 1994 (Tariff concessions) and Article II of the GATS and Article 4 of the TRIPS (both MFN). In these instances decisions can only be made through or by the acceptance of all the member states.⁷⁹

2.1.2 Functions of the WTO

The WTO is an organisation that intends to supervise and liberalise international trade. The full list of its functions is contained in Article III of the WTO Agreement,⁸⁰ but the following are regarded by analysts as the most important:

⁷⁸ Art. IX of the WTO Treaty; Pauwelyn, J. "The Transformation of World Trade" *Michigan Law Review* vol. 104 no. 1 (2005) 1 at 24.

⁷⁹ World Trade Organization. *Understanding the WTO* (September 2003) at 16; Article X(2) of the WTO Treaty.

⁸⁰ In terms of Article III of the Agreement, the functions of the WTO are:

1. to facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the multilateral trade agreements, and to provide the framework for the implementation, administration and operation of the plurilateral trade agreements.
2. to provide the reform for negotiations among its members concerning their multilateral trade relations in matters dealt with under the agreements in the annexes to the Agreement. The WTO may also provide a forum for further negotiations among its members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.
3. to administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding or "DSU") in the Annex of the Agreement.
4. to administer the Trade Policy Review Mechanism (TPRM) provided for in Annex 3 of the Agreement.
5. with a view to achieving greater coherence in global economic policy-making, to cooperate with the International Monetary Fund (IMF) and with the International Bank for Reconstruction and Development (IBRD) and its affiliated agencies.

- It oversees the implementation, administration and operation of the covered agreements.⁸¹
- It provides a forum for negotiations and for settling disputes.⁸²

It can be said that the functions of the WTO are three-pronged:

1. It is an organisation for liberalising trade.
2. It is a forum for governments to negotiate trade agreements.
3. It is a place for them to settle trade disputes.⁸³

2.1.3 The Role of the WTO

The WTO agreements are lengthy and complex because they are legal texts covering a wide range of activities.⁸⁴ However, there are a number of simple, fundamental principles that are common to all of these agreements. These principles are the foundation of the multilateral trading system. They are: trade without discrimination; free trade; encouraging development and economic reform; predictability; and fair competition.⁸⁵ However, only the first three are discussed in this thesis as they are the more relevant hereto.

2.1.3.1 Trade without discrimination

i. Most-Favoured-Nation treatment (MFN)⁸⁶

⁸¹ United Nations Environment Programme (UNEP). *The Basics of the WTO: Environment and Trade: A handbook* (2000) at 1.

⁸² Deere, C. "Decision-making in the WTO: Medieval or Up-to-Date?" *WTO Public Forum* 26 September 2006.

⁸³ World Trade Organization *Understanding the WTO: Trading into the future* (2011) at 9; Hoekman, B. *The WTO: Functions and Basic Principles – A Handbook* (2002) at 7; Matsushita, M *et al. The World Trade Organization: Law, Practice and Policy* (2006) at 9.

⁸⁴ They deal with agriculture, textile and clothing, banking, telecommunications, government purchases, industrial standards and product safety, food sanitation regulations, intellectual property, and much more.

⁸⁵ Bagwell, K *et al. The Economics of the World Trading System* (2004) at 7; Chan *et al.* "World Trade Organization" Paper prepared for Department of International Relations, Zaman University (2014) at 9.

⁸⁶ Article I(1) of GATT provides:

"With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and

This sounds like a contradiction because if taken literally it suggests special treatment, but in the WTO context it actually means non-discrimination – treating virtually everyone equally.⁸⁷ This means that each member treats all the other members equally as “most-favoured” trading partners. If a country improves the benefits that it gives to one trading partner, it has to give the same “best” treatment to all the other WTO members so that they all remain “most-favoured”.⁸⁸

The MFN, together with the National Treatment principle, is one of the two fundamental non-discrimination clauses on which the GATT/WTO system rests. The MFN treatment has been defined as the “cornerstone” of the WTO and the “defining principle” of the GATT.⁸⁹ However, it is not limited to GATT as it is also stipulated in other WTO agreements such as the General Agreement on Trade in Services,⁹⁰ Agreement on Technical Barriers to Trade⁹¹ and Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).⁹² In all these agreements the principle is the same: that if a country grants another a special favour (such as a lower customs duty rate for one of their products), they have to do the same for all other WTO members.

with respect to all matters referred to in paragraphs 2 and 4 of Article III, 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.”

⁸⁷ According to Caplin, A and Krishna, K [*Seoul Journal of Economics* vol. 1 no. 3 (1988) 267] the term “Most-Favoured Nation” was first used in 1692 in a treaty between Denmark and the Hanse cities.

⁸⁸ Gazzini, T. “The Legal Nature of WTO Obligations and the Consequences of their Violation” *European Journal of International Law* vol. 17 issue 4 (2006) 723 at 727; Horn, H *et al.* “Economic and legal aspects of the Most-Favored-Nation clause” *European Journal of Political Economy* vol. 17 (2001) 233 at 234.

⁸⁹ “Most-Favoured Nation Treatment” UNCTAD Series on Issues in International Investment Agreements II, United Nations (2010) at 13; Banifatemi, Y. “The emerging jurisprudence on the most favoured-nation treatment in investment arbitration” in Bjorklund, A.K *et al.* *Investment Treaty Law, Current Issues III* (2008) at 239-272.

⁹⁰ Article II.

⁹¹ Article 2(1).

⁹² Article 4.

There is a debate in legal circles as to whether MFN clauses include only substantive rules or also procedural protections, especially in bilateral investment treaties. One side of the argument is that MFN clauses should be interpreted broadly.⁹³ The underlying rationale for this side of the argument is that the term “treatment” in MFN clauses is in itself wide enough to be applicable to procedural matters such as dispute settlement. The argument goes further to say that as regards “all matters” MFN clauses, such a phrase should not be read narrowly as referring to “all similar matters” or “all other matters of the same kind” such that it excludes procedural matters.⁹⁴

The other side of the argument is that MFN clauses relate to the substantial protections afforded to investors and investments and that, therefore, their reach should not extend to procedural issues such as dispute resolution.⁹⁵

There is also another argument that says that in fact the MFN treatment should not be extended to dispute resolution. One of the judges in the *Impregilo*⁹⁶ case (the Argentina-Italy BIT), Prof. Stern, views this debate from the “rights and conditions” perspective. In his view, an MFN clause can only concern the rights that an investor can enjoy – it cannot modify the fundamental conditions for the enjoyment of such rights.⁹⁷

However, there are some exceptions allowed by GATT Article XXIV. For example, countries can set up a free trade agreement (FTA) that applies only to

⁹³ Majority decision of ICSID award in *Impregilo SpA v Argentina (ICSID Case No ARB/07/17)* – 21 June 2011).

⁹⁴ There is a significant volume of case law to support this position. The leading decision is *Maffezini v Spain (ICSID Case No. ARB/97/7)* – 25 January 2000). Other examples include: *Gas Natural v. Argentina (ICSID Case No. ARB/03/10)* – 17 June 2005); *Suez and Vivendi v. Argentina (ICSID Case No. ARB/03/19)* – 3 August 2006); and *Camuzzi International v. Argentina, ICSID Case No. ARB/03/2* – 11 May 2005).

⁹⁵ The decisions to support this side of the argument include: *Salini v. Jordan (ICSID Case No. ARB/02/13)* – November 9, 2004); *Plama v. Bulgaria (ICSID Case No. ARB/03/24)* – 8 February 2005); and *Telenor v Hungary (ICSID Case No. ARB/04/15)* – 13 September 2006).

⁹⁶ *Impreglio* case (above, fn 93).

⁹⁷ Dissenting decision of ICSID award in *Impregilo SpA v Argentina (ICSID Case No ARB/07/17)* – 21 June 2011).

goods traded within a group – discriminating against goods from outside. Or a country can give developing countries special access to their markets. Or a country can raise barriers against products that are considered to be traded unfairly from specific countries.⁹⁸

In general, the MFN means that every time a country lowers a trade barrier or opens up a market, it has to do so for the same goods or services from all its trading partners – whether rich or poor, weak or strong.⁹⁹

The MFN principle is embodied in Article I of the GATT and the question might be asked why this is so. The former Secretary of State for the World Trade Division, Jean-Daniel Gerber, is of the view that the order by which the drafters of the GATT have integrated the MFN principle and the provision on preferential trade agreements into the Agreement is not just the result of pure coincidence. He opines that the drafters of the GATT likely wished to convey an important message which could read: “Most-Favoured Nation treatment is the overall guideline and the fundamental principle of multilateralism. By contrast, free trade agreements and customs unions should only be allowed as exceptions to this overall principle, under the condition that they fulfil certain strict requirements.”¹⁰⁰

From a political perspective, trade liberalisation on the MFN basis provides protection for countries from the abuse of trade policy for political or non-trade purposes by more powerful countries. By contrast, preferential trade agreements may have exclusive, and therefore also exclusionary, character.¹⁰¹

⁹⁸ These are Preferential Trade Agreements (PTA) as allowed by Art. XXIV of GATT such as free trade agreements (FTA) and customs unions; Moore, M. *The World Trade Organization: Legal, Economic and Political Analysis* (2005) at 40.

⁹⁹ Moore, M. “The WTO’s first decade” *World Trade Review* vol. 4 no. 3 (2005) 359 at 362.

¹⁰⁰ Gerber, J. “Preferential Trade Agreements and the Most Favoured Nation Principle” presentation at the Conference on “Multilateralising Regionalism” Geneva, 11 September 2007.

¹⁰¹ Weiler, J.H.H *et al.* “International and Regional Trade Law: The Law of the World Trade Organization. Unit II: Globalism v Regionalism” New York University Paper (2011) at 23; Davidson, P.J. “The Legal Framework for RTAs/FTAs” APEC Study Center Consortium Conference Paper *The Asia-Pacific Region* (2005). Available at www.apec.org.au/docs/koreapapers2/SX-PD-Paper.pdf (accessed on 14 January 2014).

Also the MFN principle is of particularly high value from the perspective of a small or medium-sized country. On the one hand, small and medium-sized countries often lack the market power necessary to negotiate commitments from larger partners. On the other hand, small and medium-sized countries depend much more on free trade than their larger counterparts because their firms require international markets in order to harvest the gains from specialisation and economies of scale.¹⁰²

By contrast, firms in large markets such as the United States of America (USA) may find a sufficiently large customer base already at home. The MFN principle has therefore done small and medium-sized economies a great service: it has secured a certain level of market access on a global scale and it has made sure that the concessions granted by members in the many trade rounds since the establishment of the GATT have been applied to all trade partners, regardless of their political or economic weight.¹⁰³

Despite its general acceptance as part of the WTO system, there is a most notable and long-standing concern about MFN, which is that it opens the possibility of countries “free riding” on the trade negotiations of others. This concern stems from the fact that whenever a few WTO members mutually exchange trade-barrier reductions, they must extend those reductions to all other WTO members under the MFN, even if the latter do not reciprocate. This means that, to the extent that non-reciprocating countries benefit from improved market access to liberalising countries (the so-called MFN externality), two related incentive problems emerge: countries may avoid entering into negotiations in the hope of free riding on the liberalisation of others; and

¹⁰² Gerber (fn 100).

¹⁰³ Gerber.

countries that do enter negotiations may reach inefficient agreements, as they do not fully internalise the benefits of their liberalisation.¹⁰⁴

According to Ludema and Mayda¹⁰⁵ the severity of the MFN free rider effect is greater for markets in which the country has greater monopoly power in trade. This view is supported by Bagwell and Staiger¹⁰⁶ who find no evidence of MFN free riding in the tariffs of countries recently acceding to the WTO, which are mostly developing and least-developed countries.

ii. National treatment

The National Treatment (NT) principle is found under Article III of the GATT, Article XVII of GATS and Article 3 of TRIPS and, together with the MFN principle, it is regarded as a cornerstone of the WTO trade law.¹⁰⁷ This one, however, means treating foreigners and locals equally, that is giving others the same treatment as one's own nationals. Imported and locally produced goods would thus be treated equally – at least after the foreign goods have entered the market.

Unlike the MFN, the NT does not only refer to like products, but has also been interpreted to apply in the case of directly competitive or substitutable goods.¹⁰⁸ Its obligation in the General Agreement on Trade in Services (GATS) is wider in scope, but more limited in application than that in the GATT. It is wider in

¹⁰⁴ Ludema, R *et al.* “Do Countries Free Ride on MFN?” *Journal of International Economics* vol. 77 issue 2 (2009) 1.

¹⁰⁵ *Ibid.*

¹⁰⁶ Bagwell, K *et al.* “What do trade negotiators negotiate about? Empirical evidence from the World Trade Organization” Stanford University Paper, July 2009.

¹⁰⁷ Horn, H *et al.* “Still Hazy after All These Years: The Interpretation of National Treatment in the GATT/WTO Case-law on Tax Discrimination” *European Journal of International Law* vol. 15 issue 1 (2004) at 39; Gerhart, P *et al.* “Understanding National Treatment: The Participatory Vision of the WTO” *Indiana International and Comparative Law Review* vol. 14 (2003-2004) 505; Saggi, K *et al.* “National Treatment at the WTO: The Roles of Product and Country Heterogeneity” *International Economic Review* vol. 49 no. 4 (2008) 1365 at 1366.

¹⁰⁸ Interpretative Note to Article III(2) of GATT.

scope because, while national treatment under GATT is concerned with measures affecting products *per se*, the domain of this obligation in the GATS includes not only measures affecting services products, but also measures affecting service suppliers. It is more limited in application because, while national treatment under the GATT applies across the board, under the GATS it applies only to scheduled sectors, and there too it may be subject to limitations.¹⁰⁹

For each WTO member states the national treatment principle covers virtually every policy of government, whether it is tax, law, regulation, etc.¹¹⁰ However, it only applies once a product, service or item of intellectual property has entered the market. Therefore, charging customs on an import is not a violation of national treatment even if locally produced products are not charged an equivalent tax.¹¹¹

The NT rule prevents countries from taking discriminatory measures on imports on the one hand, and to prevent countries from offsetting the effects of tariffs through non-tariff measures on the other. The purpose of the NT rule, therefore, is to eliminate “hidden” domestic barriers to trade by the WTO members through according imported products treatment no less favourable than that accorded to products of national origin. The adherence to this principle is important to maintain the balance of rights and obligations, and is essential for the maintenance of the multilateral trading system.¹¹²

¹⁰⁹ Mattoo, A. “National Treatment in the GATS: Corner-stone or Pandora's Box?” Staff Working Paper, WTO Trade in Services Division (22 January 1997) at 2; Ahnliid, A. “Comparing GATT and GATS: Regime Creation under and after Hegemony” *Review of International Political Economy* vol. 3 (1996) 65.

¹¹⁰ Horn, H. “National Treatment in GATT” *The American Economic Review* vol. 96 no. 1 (2006) 394.

¹¹¹ Marceau, G. “The WTO in the Emerging Energy Governance Debate” *Global Trade and Customs Journal* vol. 5 issue 3 (2010) 83 at 85.

¹¹² “National Treatment Principle”, available at www.docstoc.com/docs/.../NATIONAL-TREATMENT-PRINCIPLE at 267 (accessed on 14 January 2014); Elahi, M. “National Treatment and Efficient Protection as adopted in IP treaties” *Business, IPR & Global Perspective* (2005) at 13.

Although national treatment is a basic principle under the GATT, Article III(8) provides for certain exceptions such as government procurement, domestic subsidies, and infant industries. This was made in order to protect domestic production in member states.¹¹³ The provisions of GATT Article XX on general exceptions, Article XXI on security exceptions, and WTO Article IX on waivers also apply to the national treatment rule.¹¹⁴

An important derogation from the principle of non-discrimination in international commerce and the MFN treatment rule was the concept of special and differential treatment of developing countries, introduced into the GATT law under the “Enabling Clause”. Paragraph 2 of the Clause gave at least four examples of trade or tariff schemes under which developing countries could be favourably treated without bringing into operation the MFN treatment rule for the benefit of other GATT parties.¹¹⁵

The examples included tariff schemes evolved under the GATT; regional or global arrangements entered into “among less-developed contracting parties” for the mutual reduction, or elimination, of tariffs and non-tariff measures, in accordance with criteria and conditions which may be prescribed, in respect of products imported from one another; and arrangements providing for the special treatment of the “least-developed among the developing countries” in the context of any general or specific measures in favour of developing states.¹¹⁶

This list, however, did not cover all special and differential (SD) treatment arrangements that should have been covered. The most notable omission was that of

¹¹³ Article III(1) provides:

“The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.”

¹¹⁴ Hoekman, B. *The WTO: Functions and Basic Principles – A Handbook* (2002) at 7.

¹¹⁵ Ng’ong’ola, C. “The reconstitution of the Southern African Development Community: some international trade law perspectives” *South African Law Journal* vol. 50 no.117 (2000) 256 at 261.

¹¹⁶ *Ibid.*

the Lomé Convention¹¹⁷ between the European Union and the African, Caribbean and Pacific (ACP) states. The implication of this omission was that the legal cover for Lomé trade arrangements under the GATT law, unlike Generalized System of Preferences (GSP) schemes specifically mentioned in the Enabling Clause, continued to require waivers secured periodically in terms of Article XXV(5) of the GATT.¹¹⁸

Paragraph 3 of the Enabling Clause listed three substantive conditions to be complied with by acceptable arrangements. It suggested that they must be designed to facilitate and promote the trade of other contracting parties; they must not constitute an impediment to tariff and trade liberalisation on MFN basis; and any treatment accorded by developed countries must be designed to respond positively to the development, financial and trade needs of the developing countries.¹¹⁹

It was, however, uncertain whether “regional or global arrangements entered into among less-developed contracting parties” were also to be assessed in terms of the problematic external and internal trade facilitation parameters in paragraphs 5 and 8 of Article XXIV of the GATT. There was also no indication of the factors to be taken into account in the assessment of the position of each country on the development of continuum, from least-developed to developed contracting party.¹²⁰

Article XI(2) of the WTO Agreement, on original membership, clarified some of the ambiguities on the identification of the beneficiaries of SD treatment. It indicated that only the “least-developed countries, recognised as such by UN”, would be entitled to seek exemptions from some of the obligations entailed by the WTO membership on

¹¹⁷ The “Lomé Convention” is a trade and aid agreement between the European Union (EU) and African, Caribbean, and Pacific (ACP) countries, first signed in February 1975 in Lomé, Togo. In June 2000 it was replaced by the Cotonou Agreement.

¹¹⁸ Ritter, L *et al.* *European Competition Law: A Practitioner's Guide* (2004) at 93 – 96.

¹¹⁹ Ng’ong’ola (above, fn 115) at 264; Grossman, G *et al.* “A preference for development: the law and economics of GSP” *World Trade Review* vol. 4 issue 1 (2005) 41 at 46; Mikic, M. “Multilateral rules for regional trade Agreements: past, present and future”, Macao Regional Knowledge Hub Working Papers, No. 19, January 2009.

¹²⁰ Muroyi, R *et al.* “Trade protocols and Health: Issues for Health Equity in Southern Africa”, Working Paper produced for the EQUINET/GEWA/SADC Parliamentary Forum Regional Meeting on Parliamentary Alliances for Equity in Health South Africa, August 2003.

account of their development, financial and trade needs, or their administrative and institutional capabilities. This was to wean developing countries off concessionary or SD treatment in international law and diplomatically encouraging the participation and integration of developing countries within the multilateral trading system.¹²¹

The only instrument on trade in goods directly dealing with formation of regional trading arrangements is the “Understanding on the interpretation of Article XXIV”.¹²² This, with its imperfections, must be the primary instrument to be applied in the assessment of arrangements such as the Southern African Development Community (SADC), which bring together countries placed in different development categories under the UN criteria that are now applicable.¹²³

Under the WTO, the SADC countries are involved in tariff reduction and simplification of their complicated tariff systems. In particular, as a more developed country, South Africa, has honoured significant commitments of trade liberalisation under the WTO. These commitments have liberalised the access of the South African market for third countries, and so eroded the preferences South Africa extended to the other SADC countries in the context of bilateral trade agreements (BTAs), or is about to extend to them in the context of the new trade agreements.¹²⁴

2.1.3.2 Encouraging development and economic reform

The WTO system contributes to development, and the developing countries need flexibility in the time they take to implement the system’s agreements. The agreements themselves inherit the earlier provisions of the GATT that allow for special assistance

¹²¹ Ng’ong’ola at 269.

¹²² This “Understanding”, as agreed to by member states, has been added to the original Article XXIV as an update.

¹²³ Ng’ong’ola at 273.

¹²⁴ Ng’ong’ola at 276; Alavi, A *et al.* “EU-ACP Economic Partnership Agreements (EPAs): Institutional and Substantive Issues”, Paper for the Danish Institute for International Studies (DIIS), Copenhagen 2007 at 26 – 28.

and trade concessions for developing countries.¹²⁵ Over three quarters of the WTO members are developing countries and countries in transition to market economies. Developing countries and transition economies were much more active and influential in the Uruguay Round¹²⁶ negotiations than in any previous round, and they are even more so in the current Doha Development Agenda.¹²⁷

A Ministerial Decision adopted at the end of the Uruguay Round says that developed countries should accelerate implementing market access commitments on goods exported by the least-developed countries, and it seeks increased technical assistance for them. More recently, developed countries have started to allow duty-free and quota-free imports for almost all products from least-developed countries. The current Doha Development Agenda includes developing countries' concerns about the difficulties they face in implementing the Uruguay Round agreements.¹²⁸

This principle is more beneficial for less developed countries because it gives them more time to adjust, greater flexibility, and special privileges.¹²⁹ It is also, as with other principles, not absolute but subject to exceptions. In terms of the GATT Articles XI and XII, a member country may issue quantitative restrictions in respect of export of certain goods or the importation of certain agricultural products, or to safeguard their external financial positions and balance of payment or other non-tariff barriers.¹³⁰

¹²⁵ Weiler, J.H.H *et al.* "International and Regional Trade Law: The Law of the World Trade Organization. Unit I: The Syntax and Grammar of International Trade Law" New York University Paper (2011) at 19; Bhala, R. *Modern GATT Law: A Treatise on the General Agreement on Tariffs and Trade* (2005); Trebilcock, M.J *et al.* *The Regulation of International Trade* (2005).

¹²⁶ Since the GATT's creation there have been eight rounds of trade negotiations: They started in 1948 in Havana (Cuba), via Annecy (France), Torquay (UK), Tokyo (Japan), Punta del Este (Uruguay), Montreal (Canada), Brussels (Belgium) and finally Marrakesh (Morocco) in 1994.

¹²⁷ This Round, which is the ninth, started in 2001 and it still goes by the name "Doha Development Agenda even though the subsequent meetings are held elsewhere. There were many more representatives from developing countries in Mauritius (2004) Session than from developed countries.

¹²⁸ World Trade Organization. *Understanding the WTO* (2010) at 12 – 13; Van den Bossche, P. *The Law and Policy of the World Trade Organization* (2005); Paugam, J. "Why and how differentiate developing countries in the WTO? Theoretical Options and Negotiating Solutions", Paper prepared for the Ifri/AFD Conference, September 2005.

¹²⁹ Steers, R.M *et al.* *Managing in the Global Economy* (2005) at 44.

¹³⁰ Gupta, A *et al.* "Evolving Relationship between Law, Offshoring of Professional Services, Intellectual Property, and International Organizations", available at <http://ssrn.com/abstract=1010843> (accessed on 16 January 2014); Weiler, J.H.H *et al.* "International and Regional Trade Law: The Law of the World Trade Organization Unit XVI" New York University Paper (2006).

Reforms of the multilateral trading system during the Uruguay Round took into account the poor record of the GATT mechanisms in the implementation of Article XXIV, and the threat posed to the system by the resurgence of regional trading arrangements in the 1990s. The four substantive requirements remained unchanged, and fairly uncertain, except for the clarification that a “reasonable length of time” for the implementation arrangements under interim agreements should exceed 10 years only in “exceptional cases”, calling for a “full explanation” of the need for a longer period.¹³¹

2.1.3.3 Free trade

Free trade implies removing trade barriers gradually through negotiations. The barriers concerned include customs duties (or tariffs) and measures such as import bans or quotas that restrict quantities selectively. It falls within one of the primary objectives of the WTO, which is to identify and neutralise obstacles to “free trade”.¹³² Opening markets can be beneficial, but it also requires adjustment. The WTO agreements therefore allow countries to introduce changes gradually, through “progressive liberalisation”. However, developing countries are usually given longer to fulfil their obligation.¹³³

According to Rose¹³⁴ free trade does not lead to countries that join the WTO to reduce their trade barriers. He states that many countries, it seems, choose to reduce their

¹³¹ Saurombe, A. “The Southern African Development Community trade legal instruments compliance with certain criteria of GATT Article XXIV” *Potchefstroom Electronic Law Journal* vol. 14 no. 4 (2011) 287.

¹³² World Trade Organization. *Understanding the WTO: Trading into the future* (2011) at 11; World Trade Organization. *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (2004) at 10 - 14.

¹³³ *Ibid*; International Business Management Lecture 9: World Trade Organization, February 2011; World Trade Organization. “Special and Differential Treatment Provisions – Joint Communication from the African Group in the WTO” Document NT/CTD/28, 14 February 2003; Keck, A *et al.* “Special and Differential Treatment in the WTO: Why, When and How?” WTO Economic Research and Statistics Division, Staff Working Paper ERSD 2004.

¹³⁴ Rose, A. “Do we really know that the WTO increases Trade?” Cambridge Mass: National Bureau of Economic Research Working Paper 9273 (2002); Milner, H *et al.* “Why the Move to Free Trade? Democracy and Trade Policy in the Developing Countries” *International Organization* vol. 59 no. 1 (2005) 107.

barriers before they join the WTO or even if they have no plans of joining. From this one can deduce that countries would be attracted to the WTO by their realisation that they meet the requirements of free trade anyway.

The WTO has extended application of free trade to areas such as health, environment, sustainable development, etc.¹³⁵ This is clear in the Appellate Body's decisions, which recognise that it is no longer possible for the WTO to uphold the free trade goals of the GATT 1994, such as promoting market access, above all these other concerns and goals.¹³⁶

Trade negotiations have been a sore point of the GATT/WTO system since the GATT's creation. Eight rounds¹³⁷ have failed and the ninth round started in 2001 under the "Doha Development Agenda" with the WTO as host and is still continuing. It was supposed to end in 2006, but this was already doubtful when in August 2004 a special session was held in Mauritius to forge ways for implementation of the Doha Agreement.¹³⁸ This was after the developing countries raised some concerns about tariffs and subsidies during the 2003 Cancun talks.

From the failure of these trade talks one might ask the question: is the WTO necessary for free trade talks? This is relevant because the WTO doesn't dictate policy, as any intergovernmental body. It provides a forum for members to discuss concerns and find solutions. It makes decision by consensus and if any of the members dislike an agreement the agreement does not get made.

¹³⁵ Ala'I, P. "Free Trade or Sustainable Development? An Analysis of the WTO Appellate Body's Shift to a More Balanced Approach to Trade Liberalization" *American University International Law Review* vol. 14 no. 4 (1999) 1129.

¹³⁶ Report of the Appellate Body on *United States-Standards for Reformulated and Conventional Gasoline*, April 26, 1996, WTO Doc. No. \T/DS2JAB1R; Report of the Appellate Body on *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, October 12, 1998, WTO Doc. No. WT/DS58AB'R.

¹³⁷ See fn 127.

¹³⁸ The negotiations take place in the Trade Negotiations Committee and its subsidiaries. Other work under the work programme takes place in other WTO councils and committees.

During the Cancun and Doha talks an agreement was not reached for exactly the same reason. Poor countries felt that rich countries were trying to hold on to their profits. However, some commentators feel that this can't be the reason as rich countries do not need the WTO for that, given that many already have bilateral agreements with other countries and also belong to other regional blocs. They say countries belong to the WTO because they see its advantages towards unifying the trade regime globally.¹³⁹

However, on 7 December 2013, in a meeting held in Bali, Indonesia, the WTO's 159 members reached a major agreement to lower barriers to international trade. The most-important component of this agreement, known as "trade facilitation", sets minimum standards for customs administration. It aims to reduce the amount of bureaucracy involved in clearing customs and limit delays at borders, in ports and in transit.¹⁴⁰

The "Bali Package", as this Agreement is known, is a legally binding agreement and covers three more areas – besides trade facilitation – namely, *agriculture*, *cotton* and *development issues*. It entered into operation on 22 February 2017.¹⁴¹ The agreement on agriculture focuses on shielding public stockholding programmes for food security in developing countries, so that they would not be challenged legally even if a country's agreed limits for trade-distorting domestic support were breached.

The Ministerial Conference also adopted five other decisions on the WTO's regular work:

- (1) In *intellectual property*, members agreed not to bring "non-violation" cases to the WTO dispute settlement process — "non-violation" is shorthand for the technical question of whether there can be legal grounds for complaint

¹³⁹ "Does WTO promote free Trade?" *The Daily Iowan* Newspaper (online version) of 10 December 2004, available at dailyiowan.lib.uiowa.edu/DI/2004/di2004-12-02.pdf (accessed on 16 January 2014).

¹⁴⁰ World Trade Organization Ministerial Conference Report, Bali, Indonesia, 5 – 7 December 2013.

¹⁴¹ "WTO's Trade Facilitation Agreement enters into force" WTO: 2017 News Items of 22 February 2017. Available at https://www.wto.org/english/news_e/news17_e/fac_31jan17_e.htm (accessed on 28 September 2017); Batibonak, P. "Africa and implementation of Trade facilitation agreement" *Bridges Africa* vol. 6 no. 3, 17 May 2017 at 8.

about loss of an expected right under the WTO's intellectual property agreement, even when the agreement has not been violated.

- (2) In *electronic commerce*, members agreed not to charge import duties on electronic transmissions. The Work Programme also encourages continued discussions on electronic commerce in relation to commercial issues, development and new technology.
- (3) Ministers decided to give special consideration to issues of *small economies*. Ministers instructed the Committee on Trade and Development to consider proposals on small economies and make recommendations to the General Council.
- (4) Ministers reaffirmed their commitment to *Aid for Trade*, an initiative that assists developing countries, and in particular least-developed countries, to trade. They welcomed progress on Aid for Trade since its launch in 2005 and mandated the Director-General to continue the support of the programme.
- (5) Ministers directed their Geneva delegations to continue examining the link between trade and *transfer of technology* and make possible recommendations on steps that might be taken to increase flows of technology to developing countries. The mandate was given at the 2001 Doha declaration.¹⁴²

The “Bali Package” – though it falls short of the more ambitious global free-trade deal championed by the WTO ever since the 2001 Doha Round of talks – brings hope that the Doha Development Agenda (DDA) could be achieved.

2.1.4 Legal status and dispute settlement system of the WTO

In terms of Article VIII of the WTO Treaty, the WTO has legal personality and shall be accorded by each of its members such legal capacity as may be necessary for the exercise

¹⁴² “Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization” General Council Decision of 27 November 2014 (WT/L/940).

of its functions. Though not expressly stated, this means the WTO can sue and be sued as well as be able to conclude a contract. This much is supported by Article VIII(5) where it is stated that the WTO may conclude a headquarters agreement.

The officials of the WTO and the representatives of the member states shall not be responsible for actions committed while discharging their official duties for the WTO.¹⁴³ These officials and representatives shall also be given the same privileges and immunities as those given to officials of other UN specialised agencies, such as the IMF and the World Bank.¹⁴⁴

The settlement of trade disputes under the GATT was blamed for many weaknesses, including the lack of an institutional framework and procedure for the resolution of disputes as well as questions of delay, uncertainties, and ineffectiveness. This led to the WTO adopting the “Dispute Settlement Understanding” (DSU).¹⁴⁵ This new WTO dispute settlement procedure presents a crucial step towards a more rule-oriented system and represents a significant improvement over the GATT dispute resolution system.¹⁴⁶

The “Understanding on Rules and Procedures Governing the Settlement of Disputes” (the Understanding)¹⁴⁷ shall apply to consultations and the settlement of disputes between members concerning their rights and obligations under the provisions of the “Agreement Establishing the WTO”. In terms of these rules the Dispute Settlement Body (DSB) is established to administer these rules and procedures, as well as the consultation and dispute settlement provisions of the covered agreement.¹⁴⁸ The DSB is empowered to establish panels, and adopt Panel and Appellate Body (AB) reports. In terms of Article 2(2) the DSB

¹⁴³ Article VIII(3).

¹⁴⁴ Article VIII(4).

¹⁴⁵ Odour, M. “Resolving Trade Disputes in Africa: Choosing between multilateralism and regionalism: The case of COMESA and WTO” *Tulane Journal of international and Comparative Law* vol. 13 (2005) 177 at 191; Jackson, J.H. “The WTO Dispute Settlement Understanding--Misunderstandings on the Nature of Legal Obligation” *American Journal of International Law* vol. 91 no. 1(1997) 64 at 66.

¹⁴⁶ Choo, M.H. “Dispute Settlement Mechanisms of Regional Economic Arrangements and Their Effects on the WTO” *Temple International and Comparative Law Journal* vol. 13 (1999) 253 at 260; Ng’ong’ola, C. “Replication of WTO dispute settlement processes in SADC” *SADC Law Journal* vol. 1 (2011) 35 at 39.

¹⁴⁷ These Rules are Annex 2 to the Agreement Establishing the WTO.

¹⁴⁸ Article 2 of the “Understanding on Rules and Procedures Governing the Settlement of Disputes”.

is to inform the relevant WTO councils and committees of any developments in disputes related to provisions of the respective covered agreements. The DSB takes decisions by consensus.¹⁴⁹

The jurisdiction of the DSB is, however, limited in some important respects. For example, it is not empowered to adopt in abstract interpretations of the multilateral trade agreements or the Agreement Establishing the WTO. This function is reserved for the exclusive authority of the Ministerial Conference and the General Council. Thus, the aim of the dispute settlement process is to settle “real” disputes only. The process is not intended to clarify the law outside the context of the dispute.¹⁵⁰

Article 3(2) of the Understanding gives the members of the WTO assurance that this dispute settlement system will not undermine the rights and duties of parties agreed to in treaties, and also that it respects and abide by the international law. It states that recommendations and rulings of the DSB could not add to or diminish the rights and obligations provided in the covered agreements. This shows the independence of the DSB. The DSB shall also strive for the speedy or expedient resolution of disputes to avoid backlogs and prejudice to members.¹⁵¹

Article 3(7) of the Understanding provides that the aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of this mutual solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.

Compensation, as one of the possible awards, will only be resorted to if the immediate withdrawal of the measure is impracticable, and as a temporary measure pending the

¹⁴⁹ Art. 2(4) of the “Understanding on Rules and Procedures Governing the Settlement of Disputes”.

¹⁵⁰ Qureshi, A.H *et al.* *International Economic Law* (2007) at 350.

¹⁵¹ Article 3(3) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

withdrawal of the measure which is inconsistent with a covered agreement. This provision makes sense especially when one looks at the difficulties associated with “enforcement” at international law level. This is what led to some commentators to put it thus: “The WTO has no jailhouse, no blue helmets, no truncheons or teargas”.¹⁵²

There are different methods available for conflict resolutions in terms of the Understanding. The principal method is adjudication through panel process, subject to an appeal procedure. The other methods include consultation procedures, good offices, conciliation, mediation, and arbitration. The emphasis in the use of all these methods is on ensuring a “consensual” resolution between the members, rather than necessarily a rule-orientated decision.¹⁵³

With regard to consultations, the rules provide that all requests for consultations shall be notified to the DSB and the relevant councils and committees by the member which requests consultations. Such a request for consultation shall be in writing and shall give the reasons for the request, including identification of the measures at issue and an identification of the legal basis for the complaint.¹⁵⁴

Article 4(6) of the Understanding states that the consultations should be confidential and without prejudice to the rights of any member in any further proceedings. If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel. However, in cases of urgency, the period of entering into consultations shall be reduced to within 10 days. If the consultations have failed to settle the dispute within a period of 20 days after the date of receipt of the request, the complaining party may request the establishment of a panel.¹⁵⁵

¹⁵² Rothwell, D *et al.* *International Law: Cases and Materials with Australian Perspectives* (2010) at 655; Bello, J.H. “The WTO Dispute Settlement Understanding: Less is More” *American Journal of International Law* vol. 90 no. 3 (1996) 416 at 417.

¹⁵³ Qureshi, A.H *et al.* *International Economic Law* (2007) at 354.

¹⁵⁴ Article 4(4) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

¹⁵⁵ Article 4(7) & (8) of the Understanding.

Good offices, conciliation and mediation procedures, as provided for by Article 5 of the Understanding, are also confidential and without prejudice. These procedures may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party then proceed with a request for the establishment of a panel.

Since these procedures are optional and additional to the consultations, the complaining party must allow a period of 60 days after the date of receipt of the request for consultations to elapse before requesting the establishment of a panel. The complaining party may request the establishment of a panel during the 60-day period if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute. If the parties to a dispute agree, these procedures may continue while the panel process proceeds.

The most important question, though, is: is the 60-day timeframe enough for the settlement of these international disputes? Recent case law, however, shows that at the request of parties to the dispute the DSB can extend this time frame if exceptional circumstances are shown.¹⁵⁶

The Panel itself is composed of well-qualified persons, including lawyers and academics. There are no nominations by government for members of the Panel, and also no opposition to candidates except for compelling reasons. To show fairness, citizens to a country in dispute may not serve on the Panel.¹⁵⁷

The Panel is to produce a final report within six months of its establishment; and in cases which require urgent consideration including cases involving perishable goods, the final

¹⁵⁶ *WT/DS384/R and WT/DS386/R November 2011*. The two complaints were brought respectively by Canada and Mexico, regarding US country of origin labelling (COOL) requirements. At the joint requests of Canada, Mexico and the US, WTO members meeting as the Dispute Settlement Body agreed on 5 January 2012 to extend the timeframe by 95 days. The decision was made taking into account the current workload of the Appellate Body.

¹⁵⁷ Article 8 of the Understanding.

report is produced within three months. However, the Panel is to issue an interim report for consideration of the parties before a final report is recommended. This final report must then be adopted within 60 days of its issuance. However, the final report will not be adopted if one of the parties to the dispute formally notifies the DSB of its intention to appeal or if it is decided by the DSB by consensus not to adopt the report.¹⁵⁸

There is also the Standing Appellate Body, appointed by the DSB, to hear appeals from panel cases.¹⁵⁹ It is composed of seven persons, three of whom serve on any one case. Their term of office is four years and each person may be reappointed only once.¹⁶⁰ These persons shall be experts in law, international trade and the subject-matter of the covered agreements generally. They shall be broadly representative of membership in the WTO and shall not participate in the considerations of any disputes that would create a direct or indirect conflict of interest.¹⁶¹

The appeal to this body can only be noted by parties to the dispute. Third parties may take part in the appeal as interested parties by notifying the body of their intention by written application. The proceedings of appeal shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. When this body is of the opinion that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. However, in no case shall the proceedings exceed 90 days. That is, if the body has failed to submit its report within 60 days, it would only be given another 30 days within which to finish the report.¹⁶²

An appeal to the Appellate Body shall be limited to issues of law covered in the panel report and legal interpretations developed by the Panel. The body will then address each of the issues raised. The proceedings shall be confidential and the reports shall be drafted

¹⁵⁸ Articles 12 – 16 of the Understanding.

¹⁵⁹ Article 17(1) of the Understanding.

¹⁶⁰ Article 17(2) of the Understanding.

¹⁶¹ Article (3) of the Understanding.

¹⁶² Article 17(4) of the Understanding.

without the presence of the parties to the dispute.¹⁶³ This body may uphold, modify or reverse the legal findings and conclusions of the Panel.¹⁶⁴

The DSB shall adopt the report of the Appellate Body and the parties to the dispute shall unconditionally accept it, unless the DSB decides by consensus not to adopt the report within 30 days following its circulation to the members.¹⁶⁵

The decisions or judgments of the Panel and the Appellate Body shall be in the form of recommendations. For example, where a Panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement it shall recommend that the member concerned bring the measure into conformity with that agreement. To show their justice or fairness, a Panel or the Appellate Body cannot add or diminish the rights and obligations of the parties provided in the covered agreements when making their findings or recommendations.¹⁶⁶

The time-frame for the decisions of the DSB shall be within 9 months from the date of the establishment of the Panel until the date the DSB considers the Panel or appellate report for adoption, unless the parties to the dispute agree otherwise. However, where there is an appeal against the report the time-frame will be 12 months. That is, an addition of 3 months.¹⁶⁷

As an alternative and expeditious means of dispute settlement, arbitration is also provided for. However, this shall only be resorted to if both parties to the dispute agree to the arbitration. Agreement to arbitration shall be notified to all members sufficiently in advance of the actual commencement of the arbitration process. Other members may become party to an arbitration proceeding only upon the agreement of the parties which have recourse to arbitration, i.e. main parties. The parties shall agree to abide by the

¹⁶³ Article 17(9) of the Understanding.

¹⁶⁴ Article 17(13) of the Understanding.

¹⁶⁵ Article 17(14) of the Understanding.

¹⁶⁶ Article 19 of the Understanding.

¹⁶⁷ Article 20 of the Understanding.

arbitration award. The awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any member may raise any point relating thereto.¹⁶⁸

As a measure of compliance, a member must confirm intention to implement the report within a reasonable time. This intention must be conveyed to the DSB within days of the adoption of the report by the DSB. The arbiter decides the reasonableness on case-by-case basis. The DSB then tracks implementation of the Panel's or Appellate Body's report.¹⁶⁹

For remedies, the DSB favours the general rule that a challenged measure be terminated or phased out. There could also be a recommendation to bring matters in conformity with agreement in terms of Article 19(1). If a member fails with this recommendation, voluntary compensation could be agreed upon as concession – not punitive damages.¹⁷⁰

This, however, does not mean that the system is that of “breach and pay”.¹⁷¹ This is so because if there is no agreement within 21 days on compensation *retaliation* could be resorted to. However, the retaliation must meet the following requirements: it must be under guidance of DSB; it must be proportionate to the impairment; it must be of/within same section of economy; and must not be a prohibited action in terms of (international) law.¹⁷²

There could also be a *cross retaliation* instead of ordinary retaliation. This, however, must meet the following requirements: there must be proof that it is not effective to retaliate in the same sector or that retaliation in this domain is not practicable; must be subjected to review in mini-arbitration to ensure proportionality; that it is temporary and it does not distort trade. However, distortion of trade – which is a policy that alters the amount of

¹⁶⁸ Article 25 of the Understanding.

¹⁶⁹ Qureshi, A.H *et al.* *International Economic Law* (2007) at 357.

¹⁷⁰ World Trade Organization. *Understanding the WTO* (2010) at 55.

¹⁷¹ Bello, J.H. “The WTO Dispute Settlement Understanding: Less is More” *American Journal of International Law* vol. 90 no. 3 (1996) 416.

¹⁷² World Trade Organization. *Understanding the WTO* (2010) at 55.

trade, up or down, from what it would otherwise be – can be allowed in exceptional cases.¹⁷³ Also, in exceptional cases, the DSB can order for *specific performance*.

Under the WTO system, the dispute can be set in motion under three circumstances: first when a party considers that another country has taken a measure that impairs or nullifies its benefits under any of the covered agreements through a breach or failure to carry out the obligations created (violation claim).¹⁷⁴ Second, when, without a violation of any of the agreements, a measure taken by another country results in such impairment or nullification (a non-violation claim).¹⁷⁵ Third, when such nullification or impairment occurs for “any other situation” (a situation claim).¹⁷⁶

For a violation claim, the general rule is that it is sufficient for the claiming party to allege that there is a violation, whereupon the burden of proof shifts to the defending party to prove that no such violation has occurred.¹⁷⁷

Under the dispute settlement mechanism, the remedy to which a party is entitled depends on whether the claim relates to a violation or non-violation measure. Thus, where the impairment or nullification is the result of a violation measure, the complaining party would be entitled to the whole range of remedies available under the Dispute Settlement Understanding (DSU). In the case of a non-violation measure, the DSU normally recommends that parties agree to a compensatory arrangement or to “a mutually satisfactory adjustment as final settlement”.¹⁷⁸

No matter how clear this dispute settlement system may seem to be, Qureshi and Ziegler¹⁷⁹ are of the opinion that it offers a number of challenges for developing member states. They opine, first, that a number of provisions are hortatory and difficult to enforce in relation to

¹⁷³ *ibid*

¹⁷⁴ Article 18(1)(a) of the Understanding.

¹⁷⁵ Article 18(1)(b) of the Understanding.

¹⁷⁶ Article 18(1)(c) of the Understanding.

¹⁷⁷ Article 3 of the Understanding.

¹⁷⁸ Article 26 (1)(b), (d) and (2) of the Understanding.

¹⁷⁹ Qureshi, A.H *et al. International Economic Law* (2007) at 371.

developing countries. Secondly, the consensual character of the process is “power based” and developing countries do not have this power. More so the system does not appear to allow a third member state to retaliate on behalf of another member. Thirdly, the developing members, despite the provision for assistance from the WTO, can have problems in having access to relevant expertise in order to engage in litigation.

However, with regard to regional arrangements or bodies there seems to be some clarity. With the adoption of the “Uruguay Round Understanding on Article XXIV”¹⁸⁰, it is now clear that the WTO members can invoke the dispute settlement procedure to challenge the RTA formation or any other aspect relating to RTAs under Article XXIV of the GATT. Among other things the Understanding sets a “reasonable length of time” of 10 years for interim agreements.

In the case “*Turkey – Restrictions on Imports of Textile and Clothing Products (Turkish Textiles)*”¹⁸¹ the WTO Appellate Body held that Article XXIV of the GATT did not allow Turkey to impose trade restrictions which violate other WTO provisions, such as Articles XI and XIII, where less restrictive measures could have been introduced to avoid disrupting trade in the proposed customs union. The Appellate Body further held that paragraph 4 of Article XXIV expresses “purposive” and not “operative” language.

The *Turkish Textiles* decision shows that RTAs can exist in the WTO regime, but remain subject to scrutiny regarding their multilateral trade obligations. With this case it was for the first time that the Appellate Body had been called upon to interpret Article XXIV of the GATT 1994 and the related “Understanding on the Interpretation of Article XXIV of the General Agreements on Tariffs and Trade 1994”.

¹⁸⁰ It is officially called “Understanding on the Interpretation of Article XXIV of the General Agreement on Trade and Tariffs 1994” in order to formalise further details concerning RTA disciplines.

¹⁸¹ *Turkey-Restrictions on Imports of Textile and Clothing Products*, AB-1999-5, WT/DS34/AB/R, (99-4546), adopted by Dispute Settlement Body, 19 November 1999.

The case also shows that notwithstanding the absence of any authoritative pronouncement, the WTO dispute settlement mechanism is not foreclosed as a possible forum even in cases of internal violations of regional trade arrangements.¹⁸²

There is also another enforcement mechanism, despite the dispute settlement, that the WTO uses, called the “Trade Policy Review Mechanism”. This Mechanism embraces conflict resolution as opposed to surveillance and supervision techniques embraced by the dispute settlement. The responsibility for its administration vests with the Trade Policy Review Body (TPRB), which is essentially the General Council acting under a different framework.¹⁸³ The main aim of this body is to regularly examine individual members’ trade policies and practices.

2.2. WTO and Regional Trade

2.2.1 Applicability of the WTO Law in RTAs

Having accepted the regional trade agreements (RTAs) as part of the WTO system the question that will necessarily follow is: “what role should the WTO law play in the decisions taken by panels, in interpreting RTA provisions that either incorporate or resemble the WTO language; What could be the theoretical underpinnings that could link them? This question is necessary as there will be an interface between the WTO law (treaty and dispute settlement mechanisms) and the number of dispute settlement panels that are provided for under the RTAs.

At the outset it is apparent that the WTO law does have an impact on interpretation outside the WTO. As such, at the very least, the relationship between the WTO law and the RTA law will be one of influence and persuasiveness where there is common treaty language.

¹⁸² Odour, M. “Resolving Trade Disputes in Africa: Choosing between multilateralism and regionalism: The case of COMESA and WTO” *Tulane Journal of international and Comparative Law* vol. 13 (2005) 177 at 181.

¹⁸³ Articles III and IV of the WTO Agreement.

However, since an RTA is an international treaty, it is subject to the textual approach of interpretation of the Vienna Convention on the Law of Treaties (“Vienna Convention”).¹⁸⁴

In the *Turkey – Textiles* case the Panel stated at the outset that panels and the Appellate Body should not ignore bilateral and regional trade agreements in the interpretation of the WTO agreements. This was in recognition of the fact that RTAs have greatly increased in number and importance since the establishment of the GATT in 1947 and today cover a significant portion of world trade. Another factor is that the economic and political realities that prevailed when Article XXIV of the GATT was drafted have evolved and the scope of RTAs is now broader than it was in 1947.

Hsu¹⁸⁵ is of the view that where there is a language in the RTA that is similar or identical to that of the WTO Treaty, an RTA panel would have to interpret the RTA language in accordance with principles of the Vienna Convention (i.e. good faith, etc.), and might therefore, in the light of that RTA’s text, context and objective, come to an interpretation that differs from what is in a particular WTO case. In terms of the Vienna Convention every treaty in force is binding upon the parties to it and must be performed by them in good faith¹⁸⁶ and a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty¹⁸⁷.

In other words, there should not be blind or slavish reference to the WTO interpretations since the RTA is a separate treaty, equally subject to rules used in interpreting international law. This is more so because, at the very least, the WTO cases may form “judicial

¹⁸⁴ The Vienna Convention on the Law of Treaties was adopted on 22 May 1969 and entered into force on 27 January 1980, in accordance with Article 84(1). It can be found in the Official Publication in United Nations, *Treaty Series*, vol. 1155 at 331. Article 31(1) of the Convention states: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

¹⁸⁵ Locknie Hsu quoted in Bartels, L *et al. Regional Trade Agreements and the WTO Legal Systems* (2006) at 541. Hsu is an Associate Professor and former Associate Dean at the School of Law, Singapore Management University.

¹⁸⁶ Article 26 of the Vienna Convention on the Law of Treaties.

¹⁸⁷ Article 27 of the Vienna Convention on the Law of Treaties.

decisions” to be used by an RTA panel as subsidiary source of international law under Article 38(1)(d) of the International Court of Justice (ICJ) Statute.¹⁸⁸

However, it should be borne in mind that several provisions in the WTO agreements do establish a hierarchy between the WTO-covered agreements and regional trade agreements, including GATT Article XXIV, GATS Article 5 and Article IX(3) of the WTO Agreement. To the extent that these provisions set out the conditions that customs unions, free trade areas and other preferential arrangements must meet, in order to be tolerated by the multilateral trading system, the WTO regime is superior to those preferential arrangements of various natures.¹⁸⁹ Simply put, this means that in cases where the two regimes are applicable the WTO regime will supersede the RTA regime.

2.2.2 Application of RTAs within the WTO

When one looks at the institutions of the WTO one cannot help, but think that the WTO’s institutional framework seems to be hindering the incorporation of regional economic agreements into the WTO. This, however, should not be surprising given the fact that the WTO is an organisation propagating for multilateralism, as opposed to regionalism.¹⁹⁰ But as it has been stated above, the WTO does allow regional economic agreements, despite the view held by some that they tend to undermine the development of the multilateral trade system as well as posing an institutional threat to the WTO.¹⁹¹

¹⁸⁸ Article 38(1)(d) of the Statute of the International Court of Justice provides: “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

¹⁸⁹ Bartels (fn 185) at 564; Morgan, D. “Dispute Settlement under RTAs: Political or Legal?” in Buckley, R *et al.* *Challenges to Multilateral Trade: The Impact of Bilateral, Preferential and Regional Agreements* (2008) 241-260; Pauwelyn, J. “Legal avenues to ‘multilateralizing regionalism’: beyond Article XXIV” in Baldwin, R *et al.* *Multilateralizing Regionalism: Challenges for the Global Trading System* (2008) at 389.

¹⁹⁰ Picker, C.B. “Regional Trade Agreements v the WTO: A proposal for reform of Article XXIV to counter this threat” *University of Pennsylvania Journal of International Economics* vol. 16 (2005) 267 at 268 – 273.

¹⁹¹ Chapter 2 of the International Bank of Reconstruction and Development, World Bank, *Global Economic Prospects: Trade Regionalism & Development* (2005) [hereinafter World Bank, *Global Economic Prospects*]; Picker, C.B. “Regional Trade Agreements v. The WTO: A Proposal for Reform of Article XXIV to Counter this Institutional Threat” *Journal of International Law* vol. 26 (2005) 267 at 270.

This then means that RTAs and the WTO share the common objective of trade liberalisation, with the former being discriminatory and the latter not. The pursuance of similar objectives, however, according to different approaches, creates inevitably some tension in this relationship. The tension has extensive ramifications and may pose a threat to a balanced development of world trade through increased trade and investment diversion, particularly if liberalisation on a preferential basis is not accompanied by concurrent MFN liberalisation; it also poses a threat to the business community and to the global production system on which it operates by raising costs through regulatory complexity and shifting production from comparative advantage to competitive preferences.¹⁹²

The regional trade agreements (RTAs) have been seen as both building blocks and stumbling blocks to multilateral liberalisation.¹⁹³ As building blocks, RTAs facilitate the further liberalisation of trade through fora such as the WTO; they establish incentives that lead governments to oppose protectionism generally at both regional and multilateral levels.¹⁹⁴ As stumbling blocks, they divert trade and clash with the economic goals of multilateral liberalisation.¹⁹⁵ However, confronted with the reality of proliferation of the RTAs the WTO was forced to go with the lesser of the “two evils”, that is, making the exception for the RTAs to exist within its multilateral framework.

Regional agreements have allowed groups of countries to negotiate rules and commitments that go beyond what was possible at the time multilaterally. In turn, some of these rules have paved the way for agreement in the WTO. Services, intellectual property, environmental standards, investment and competition policies are all issues that were raised

¹⁹² Fiorentino, R *et al.* “The Changing Landscape of Regional Trade Agreements: 2006 Update” WTO Discussion Paper No 12, World Trade Organization (2007) at 26.

¹⁹³ Bartels (fn 185) at 24; Fink, C *et al.* “Services provisions in regional trade agreements: stumbling or building blocks for multilateral liberalization?” Paper presented at the Conference on Multilateralising Regionalism 10-12 September 2007, Geneva, Switzerland.

¹⁹⁴ Bartels (fn 185) at 24; Baldwin, R. “Multilateralising Regionalism: Spaghetti Bowls as Building Blocs on the Path to Global Free Trade” *The World Economy* vol. 29 no. 11 (2006) 1451.

¹⁹⁵ Bartels (fn 185) 24; Levy, P. “A Political-Economic Analysis of Free-Trade Agreements” *American Economic Review* vol. 87 no. 4 (1997) 506; Krishna, P. “Regionalism and Multilateralism: A Political Economy Approach” *Quarterly Journal of Economics* vol. 113 no. 1 (1998) 227.

in regional negotiations and later developed into agreements or topics of discussion in the WTO.¹⁹⁶

Normally, setting up a customs union or a free trade area would violate the WTO's principle of equal treatment for all trading partners ("most-favoured-nation"). But the GATT's Article XXIV allows regional trading arrangements to be set up as a special exception, provided certain strict criteria are met. These are:

- Customs unions and free trade areas (FTAs) are exempted from the MFN clause only if such an arrangement does not increase existing levels of trade restrictions affecting non-member countries;
- If existing trade barriers are raised to outsiders, compensation may be required;
- The arrangement must lead to significant liberalisation - in particular, it must cover "substantially all" trade between participating countries; and
- interim arrangements should lead to formation of FTAs or customs unions within a reasonable period of time.¹⁹⁷

In particular, the arrangements should help trade flow more freely among the countries in the group without barriers being raised on trade with the outside world. In other words, regional integration should complement the multilateral trading system and not threaten it.

Article XXIV of the GATT states that if a free trade area or a customs union is created, duties and other trade barriers should be reduced or removed on substantially all sectors of trade in the group. Non-members should not find trade with the members of the group any more restrictive than before the group was set up.

¹⁹⁶ Schott, J.J. *The WTO After Seattle* (2000) 1; Panagariya, A. "Developing Countries at Doha: A Political Economy Analysis" *The World Economy* vol. 25 issue 11 (2002) 1; World Trade Organization. "Understanding the WTO: Cross-Cutting and New Issues: Regionalism - friends or rivals?" Available at www.wto.org (accessed on 16 January 2014).

¹⁹⁷ Article 24 (XXIV) of GATT.

Similarly, Article V of the General Agreement on Trade in Services (GATS) provides for economic integration agreements in services. It provides as follows:

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

- (a) has substantial sectoral coverage, and
- (b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through:
 - (i) elimination of existing discriminatory measures, and/or
 - (ii) prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV bis.

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

3. (a) Where developing countries are parties to an agreement of the type referred to in paragraph 1, flexibility shall be provided for regarding the conditions set out in paragraph 1, particularly with reference to subparagraph (b) thereof, in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors.

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

4. Any agreement referred to in paragraph 1 shall be designed to facilitate trade between the parties to the agreement and shall not in respect of any member outside the agreement raise the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an agreement.
- 3 If, in the conclusion, enlargement or any significant modification of any agreement under paragraph 1, a member intends to withdraw or modify a specific commitment inconsistently with the terms and conditions set out in its schedule, it shall provide at least 90 days advance notice of such modification or withdrawal and the procedure set forth in paragraphs 2, 3 and 4 of Article XXI shall apply.
- 4 A service supplier of any other member that is a juridical person constituted under the laws of a party to an agreement referred to in paragraph 1 shall be entitled to treatment granted under such agreement, provided that it engages in substantive business operations in the territory of the parties to such agreement.
- 5 (a) Members which are parties to any agreement referred to in paragraph 1 shall promptly notify any such agreement and any enlargement or any significant modification of that agreement to the Council for Trade in Services. They shall also make available to the Council such relevant information as may be requested by it. The Council may establish a working party to examine such an agreement or enlargement or modification of that agreement and to report to the Council on its consistency with this Article.
 - (b) Members which are parties to any agreement referred to in paragraph 1 which is implemented on the basis of a time-frame shall report periodically to the Council for Trade in Services on its implementation. The Council may establish a working party to examine such reports if it deems such a working party necessary.

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

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

Other provisions in the WTO agreements also allow developing countries to enter into regional or global agreements that include the reduction or elimination of tariffs and non-tariff barriers on trade among themselves. For example, Article 24 of Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)¹⁹⁸ provides for exception in

¹⁹⁸ Article 24: International Negotiations; Exceptions:

“1. Members agree to enter into negotiations aimed at increasing the protection of individual geographical indications under Article 23. The provisions of paragraphs 4 through 8 below shall not be used by a Member to refuse to conduct negotiations or to conclude bilateral or multilateral agreements. In the context of such negotiations, Members shall be willing to consider the continued applicability of these provisions to individual geographical indications whose use was the subject of such negotiations.

2. The Council for TRIPS shall keep under review the application of the provisions of this Section; the first such review shall take place within two years of the entry into force of the WTO Agreement. Any matter affecting the compliance with the obligations under these provisions may be drawn to the attention of the Council, which, at the request of a Member, shall consult with any Member or Members in respect of such matter in respect of which it has not been possible to find a satisfactory solution through bilateral or plurilateral consultations between the Members concerned. The Council shall take such action as may be agreed to facilitate the operation and further the objectives of this Section.

3. In implementing this Section, a Member shall not diminish the protection of geographical indications that existed in that Member immediately prior to the date of entry into force of the WTO Agreement.

4. Nothing in this Section shall require a Member to prevent continued and similar use of a particular geographical indication of another Member identifying wines or spirits in connection with goods or services by any of its nationals or domiciliaries who have used that geographical indication in a continuous manner with regard to the same or related goods or services in the territory of that Member either (a) for at least 10 years preceding 15 April 1994 or (b) in good faith preceding that date.

5. Where a trademark has been applied for or registered in good faith, or where rights to a trademark have been acquired through use in good faith either:

- (a) before the date of application of these provisions in that Member as defined in Part VI;
- or

international negotiations, and a notable exception is the one contained in Article 66¹⁹⁹ for least developed countries. Article 4 of Agreement on Trade-Related Investment Measures (TRIMS)²⁰⁰ also provides for similar special conditions for developing countries with regard to investment agreements.

(b) before the geographical indication is protected in its country of origin;

measures adopted to implement this Section shall not prejudice eligibility for or the validity of the registration of a trademark, or the right to use a trademark, on the basis that such a trademark is identical with, or similar to, a geographical indication.

6. Nothing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to goods or services for which the relevant indication is identical with the term customary in common language as the common name for such goods or services in the territory of that Member. Nothing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to products of the vine for which the relevant indication is identical with the customary name of a grape variety existing in the territory of that Member as of the date of entry into force of the WTO Agreement.

7. A Member may provide that any request made under this Section in connection with the use or registration of a trademark must be presented within five years after the adverse use of the protected indication has become generally known in that Member or after the date of registration of the trademark in that Member provided that the trademark has been published by that date, if such date is earlier than the date on which the adverse use became generally known in that Member, provided that the geographical indication is not used or registered in bad faith.

8. The provisions of this Section shall in no way prejudice the right of any person to use, in the course of trade, that person's name or the name of that person's predecessor in business, except where such name is used in such a manner as to mislead the public.

9. There shall be no obligation under this Agreement to protect geographical indications which are not or cease to be protected in their country of origin, or which have fallen into disuse in that country.”

¹⁹⁹ Article 66: Least-Developed Country Members:

“1. In view of the special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, such Members shall not be required to apply the provisions of this Agreement, other than Articles 3, 4 and 5, for a period of 10 years from the date of application as defined under paragraph 1 of Article 65. The Council for TRIPS shall, upon duly motivated request by a least-developed country Member, accord extensions of this period.

2. Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.”

²⁰⁰ Article 4: Developing Country Members:

“A developing country Member shall be free to deviate temporarily from the provisions of Article 2 to the extent and in such a manner as Article XVIII of GATT 1994, the Understanding on the Balance-of-Payments Provisions of GATT 1994, and the Declaration on Trade Measures Taken for

As indicated in Chapter 1 compliance with the WTO rules is important to ensuring that an agreement is beneficial to all parties in the multilateral system. As such the WTO created the Committee on Regional Trade Agreements (CRTA), following the Uruguay Round of negotiations to ensure the consistency of RTAs with the WTO rules.²⁰¹ This was in recognition of the fact that regional trade agreements can play an important role in promoting trade liberalisation and in fostering economic development.

The CRTA plays an important role in ensuring that regional agreements do not undermine the multilateral system. It has the following terms of reference:

- To carry out examinations of bilateral and regional preferential trade agreements and report on them;
- To consider how the required reporting on the operation of regional agreements should be carried out;
- To develop procedures to facilitate and improve the examination process;
- To consider the systemic implications of regional agreements for the multilateral trading system.²⁰²

The WTO members are required to notify regional trade agreements to the CRTA to ensure that the agreements meet the WTO requirements. Once an agreement has been notified it is carefully examined and scrutinised by other WTO members for the WTO compliance.

However, these rules are not 100% and the WTO itself accepts that some of the existing rules governing RTAs need clarification. To address this situation, at their meeting in Doha in 2001, the WTO Ministers agreed to “negotiations aimed at clarifying and improving

Balance-of-Payments Purposes adopted on 28 November 1979 (BISD 26S/205–209) permit the Member to deviate from the provisions of Articles III and XI of GATT 1994.”

²⁰¹ WTO General Council Decision WT/L/127 of February 1996.

²⁰² *Ibid.*

disciplines and procedures under the existing WTO provisions applying to regional trade agreements.”²⁰³

In late 2004, an independent report prepared for the WTO, entitled “*The Future of the WTO: Addressing institutional challenges in the new millennium*” (the Sutherland Report), underlined these concerns and recommended, *inter alia*, that FTAs, and RTAs in general, be subjected to meaningful review and effective disciplines in the WTO.²⁰⁴ The Report is yet to be agreed to.

The current negotiations on the RTAs have been conducted on two tracks: transparency issues and systemic issues. First priority has been given to transparency issues which are, by nature, less contentious than the systemic ones. The resumption of Doha negotiations in 2004 has furthered the work on transparency and they have enlarged the scope of the negotiations to include systemic issues.²⁰⁵

In June 2006, the WTO “Negotiating Group on Rules” approved a new WTO transparency mechanism, called “*Transparency Mechanism for Regional Trade Agreements*”, for all regional trade agreements (RTAs). This transparency mechanism provides for early announcement of any RTA and notification to the WTO.²⁰⁶ Commenting on this new development, the then Director-General of the WTO, Pascal Lamy, had this to say: “This decision will help break the current logjam in the WTO on regional trade agreements. This is an important step towards ensuring that regional trade agreements become building blocks, not stumbling blocks to world trade.”²⁰⁷

²⁰³ Fiorentino, R *et al.* “The Changing Landscape of Regional Trade Agreements: 2006 Update” WTO Discussion Paper No 12, World Trade Organization (2007) at 26. Available at http://www.dfat.gov.au/trade/negotiations/wto_agreements.html (accessed on 14 January 2014).

²⁰⁴ The Conclusions and Recommendations of the Report by the Consultative Board to the former Director-General, Supachai Panitchpakdi, commonly called the “Sutherland Report,” are on pages 79 - 83 of the Report.

²⁰⁵ Crawford, J *et al.* “The Changing Landscape of Regional Trade Agreements” WTO Discussion Paper No. 8 (2005) at 19.

²⁰⁶ WTO General Council Decision WT/L/671 of 14 December 2006.

²⁰⁷ “Lamy welcomes WTO agreement on regional trade agreements”. Available at http://www.wto.org/english/news_july06 (accessed on 12 March 2014).

In terms of this Mechanism, the CRTA and Committee on Trade and Development (CTD) are instrumental for its implementation. The CRTA will conduct the review of RTAs falling under Article XXIV of the GATT and Article V of the GATS. The Committee on Trade and Development (CTD) will, on the other hand, conduct the review of RTAs falling under the Enabling Clause.²⁰⁸

The transparency mechanism is to be implemented on a provisional basis.²⁰⁹ Members are to review, and if necessary modify, the decision and replace it by a permanent mechanism adopted as part of the overall results of the Doha Round.²¹⁰

2.2.3 The WTO July (2004) Framework Agreement

Progress on the Doha Development Round or Agenda (DDA) was halted by the failure of the Trade Ministers to agree on the four Singapore issues²¹¹. However, prospects on progress of the DDA emerged with the WTO General Council Decision of 31 July 2004 – referred to as the *WTO July (2004) Framework Agreement*. This is simply a framework agreement and actual modalities for negotiations are still to be negotiated.²¹²

The Framework is an attempt at devising partial modalities that would guide future commitments under the Doha Round and included, among other things, an agreement on a “tiered formula” for tariff reduction (in which tariffs are categorised according to their height and with deeper cuts made to higher tariffs), confirmation that tariff reduction will be made from bound (and not applied) rates, recognition of the concept of “sensitive products” (which would not be subject to formula cuts but for which additional access would be given through tariff quota expansion), recognition of the concept of “special products” to address development concerns of developing countries, and which would be

²⁰⁸ Clause 18 of the Mechanism entitled “*Bodies Entrusted with the Implementation of the Mechanism*”.

²⁰⁹ Clause 22 of the Mechanism.

²¹⁰ Clause 23 of the Mechanism.

²¹¹ These issues relate to investment, competition, transparency in government procurement and trade facilitation, and were agreed to at the WTO Ministerial meeting in Singapore in 1996 – hence they are called “Singapore issues”.

²¹² WTO General Council Decision [WT/L/579](#) of 2 August 2004.

accorded “more flexible treatment”; and agreement that developing countries will have access to a new Special Safeguard Mechanism (SSM).²¹³

“Trade facilitation” is the only Singapore issue²¹⁴ that remained part of the Framework Agreement. This is not surprising given its complexities. It basically means the simplification, harmonisation, standardisation and modernization of trade procedures, and is aimed at reducing all the transactions costs associated with the enforcement, regulation and administration of trade policies.²¹⁵

Due to “trade facilitation” remaining a sore issue it was not surprising that the Mini-Ministerial negotiations were held in July 2008 in Geneva, Switzerland on modalities focused on trade. In various briefings during the July 2008 talks, the WTO Director-General had listed issues that had been most divisive and which were on the agenda of the Mini-Ministerial negotiations.²¹⁶ In agriculture, these were six: trade-distorting domestic support measures; cotton; tariff cuts for developed countries; sensitive products; Special Products (SPs); and the SSM. Two other outstanding issues that were also prominent were: tropical products and preference erosion; and trade-related aspects of intellectual property rights (TRIPS).

At the end of the negotiations the following were agreed upon:²¹⁷

- In *domestic support*, it has been agreed to group countries in three tiers according to the level of trade-distorting support level in the base period. The latest position as of December 2008 was to reduce the overall trade-distorting domestic support (OTDS) by 80% for the Members with the highest level of support in the base period, and in the range of 70% and 55% respectively for the other two tiers.

²¹³ Clauses 27 – 44 of the *WTO July (2004) Framework Agreement*.

²¹⁴ See fn 211.

²¹⁵ Grainger, A. “Customs and Trade Facilitation: from concepts to implementation” *World Customs Journal* vol. 2 no. 1 (2008) 17.

²¹⁶ “Multilateral Negotiations in the WTO: Current Position and Implications” available at www.fao.org/fileadmin/user_upload/G77/COAG-CCDP/CCP_09-7.doc (accessed on 12 March 2014).

²¹⁷ *Ibid.*

- In the July 2004 Framework Agreement, Members had agreed that *sensitive products* would not go through the full tariff cuts, but this would have to be offset substantially through provision of additional import quota. However, there were two main issues still to be settled: one was the number of sensitive products, and the second issue was the size of the additional quota. In early 2008, considerable technical progress was made by a group of WTO Members in establishing a method for determining additional quota at the level of tariff line.
- With regard to *special products*, there were three divisive issues: i) total number of special products (SPs); ii) the number of SPs tariff lines requiring no tariff cut; and iii) tariff reduction rate for the rest of the SPs. The G-33²¹⁸ countries had proposed 15% of tariff lines for the total number of SPs, of which 5% of lines would have no tariff cut while the overall average cut would be 9% for the rest of the SPs. SPs became a divisive issue because negotiators from the two sides saw the instrument very differently. The proponents viewed SPs as a key development instrument for ensuring food security, rural development and livelihood security. The other side – mainly the developed and developing agricultural exporting countries – argued that SPs could potentially block a significant share of their exports and that the key parameters should reflect this.
- With regard to *Special Safeguard Mechanism*, there were sharp differences in views on all three components that make up the SSM: i) threshold level for triggering volume-based SSM; ii) level of remedy; and iii) number and frequency of use. On the first point, the positions ranged from a 40% threshold to 10 - 15%. Proponents of the 40% trigger argued that below that level, market access would be seriously compromised. The other side stressed that small farmers and agriculture in general, in developing countries, are highly vulnerable to shocks for which they lacked alternative risk mitigating instruments, and so only a low threshold of 10 to 15% could safeguard farming and livelihoods from import surges. On the remedy, the differences were about whether the total duty should exceed pre-Doha bound tariff

²¹⁸ This is a group of developing countries that coordinate on trade and economic issues in order to help a group of countries that were all facing similar problems. It is still called G-33 (the original number) even though it has grown to 45 members.

levels. One side argued that exceeding these levels would undo what had been negotiated in the past. The other side held that SSM is a safeguard, and like other WTO safeguards, the level of the remedy should be linked to the problem at hand and so the issue of exceeding the bound tariff is not a relevant consideration.

From these negotiations it is clear that in the area of trade facilitation, it is important to conduct a capacity-needs assessment in order to effectively benefit from available technical assistance and capacity-building provisions. This may also be important in informing negotiating positions on special and differential treatment for developing and least developed countries in trade facilitation. Developing countries should seek to benefit effectively from trade facilitation provisions while avoiding making commitments that may become unsustainably costly and administratively burdensome. Trade facilitation matters for competitive growth remain key determinants for effective integration into global economy.²¹⁹

The development dimension of the Doha Round of negotiations, through special and differential treatment still needs to be clearly spelled out and made operationally effective. This simply means that in all key issues for negotiations, the developing countries will need to make sure that the final outcomes are supportive of their development objectives.²²⁰

As stated above (at page 39), the WTO members concluded negotiations on the Framework Agreement and adopted the *Trade Facilitation Agreement* at the Bali Ministerial Conference, the so-called “Bali Package” in December 2013.²²¹ Since then, WTO members have undertaken a legal review of the text. Under the decision adopted in Bali, WTO members must draft a Protocol of Amendment to insert the new Agreement into Annex 1A

²¹⁹ Kalenga, P. “The WTO July (2004) Framework Agreement: Some observations” Tralac Trade Brief, October 2004 at 4 – 5; Finger, J.M *et al.* “Implementing a WTO Agreement on Trade Facilitation: What Makes Sense?” World Bank Policy Research Working Paper No. 3971, 1 August 2006.

²²⁰ “Report on Doha Negotiations” delivered by Egypt, at the African Group Coordinator on WTO Issues EPA coordination meeting 22 – 23, July 2009, Gaborone, Botswana.

²²¹ “Bali Ministerial Declaration - WT/MIN(13)/DEC”, Ministerial Conference Ninth Session, Bali, 3 – 6 December 2013.

of the WTO Agreement. As stated above, the Agreement entered into force on 22 February 2017.²²²

The Trade Facilitation Agreement contains provisions for expediting the movement, release and clearance of goods, including goods in transit. It also sets out measures for effective cooperation between customs and other appropriate authorities on trade facilitation and customs compliance issues. It further contains provisions for technical assistance and capacity building in this area.²²³

2.3 The WTO and Southern Africa

The World Trade Organisation (WTO) provides a range of technical assistance and training activities in support of African countries in the area of trade. While a key objective is to maintain a geographical balance in the delivery of activities, particular attention is given to Africa, which benefits from over one third of activities. In 2005, 45% of its national and 34% of its regional trade-related technical assistance was directed at African countries.²²⁴

The WTO Secretariat Technical Assistance (TA) Plans continue to accord priority to the delivery of technical assistance to least-developed countries (LDCs), the majority of which are in Africa. It is estimated that roughly one third (i.e. an estimated CHF10-12 million) of all funds available for Trade-Related Technical Assistance (TRTA) in the WTO, including regular and extra-budgetary (i.e. through the Doha Development Agenda Global Trust Fund (GTF)) have been put to use for Africa.²²⁵

While many African countries accepted the WTO obligations in full, several agreements afforded special concessions to developing countries, such as those in Africa. For example,

²²² “WTO’s Trade Facilitation Agreement enters into force” WTO: 2017 News Items of 22 February 2017. Available at https://www.wto.org/english/news_e/news17_e/fac_31jan17_e.htm (accessed on 28 September 2017); Batibonak, P. “Africa and implementation of Trade facilitation agreement” *Bridges Africa* vol. 6 no. 3, 17 May 2017 at 8.

²²³ The WTO Agreement on Trade Facilitation WT/L/931.

²²⁴ World Trade Organization Report: Support to NEPAD 2005- 2006.

²²⁵ *Ibid.*

some agreements included special provisions allowing developing countries extra time to fulfil the WTO commitments, providing greater market access for developing countries, and mandating members to safeguard developing nation's interests. These are agreements such as TRIPS, TRIMS, Marrakesh Agreement, etc.²²⁶ These concessions, however, still exist alongside trade barriers, including domestic production supports and the use of export subsidies for agricultural products.

The Doha Development Agenda (DDA) calls for “substantial reductions in trade-distorting domestic support” in agriculture.²²⁷ However, Least-Developed Countries (LDCs) will not be required to undertake reduction commitments.²²⁸ This is in recognition of their “weak” economies and/or inadequate infrastructure, and will come handy for Southern Africa as most of the states in the region are classified as LDCs.

Cuts in tariffs are critical in enabling countries, not only in southern Africa, but the entire developing world, to compete on an equal footing in the global economy. At the WTO Ministerial Meeting in Hong Kong in December 2005, member countries set 30 April 2006 as the deadline for reaching an agreement on how to reduce farm subsidies and cut tariffs on manufactured goods. However, by the beginning of April 2006, there was growing concern that WTO member countries were unlikely to meet the 30 April 2006 deadline for a broad agreement on agricultural and trade tariff cuts. A round of talks between the African Union and the WTO in Kenya in April 2006 also did not make much progress on this issue of agriculture.²²⁹

This concern became a reality when the former Director-General of the WTO, Pascal Lamy, announced that plans to hold this key ministerial meeting in Geneva at the end of April 2006 would be abandoned. Trade diplomats agreed that it would be pointless to convene a ministerial meeting since differences between WTO members remained so wide

²²⁶ Scott, F. “Too much of a good thing: Reassessing the proliferation of Regional Trade Agreements” *Suffolk Transnational Law Review* vol. 30 (2006 – 2007) 407 at 416.

²²⁷ The Agriculture Framework (Annex A of the 31 July 2004 Decision)

²²⁸ Clause 45 of the WTO General Council Decision [WT/L/579](#) of 2 August 2004.

²²⁹ http://www.irinnews.org/report.asp?ReportID=52910&SelectRegion=Southern_Africa&SelectCountry=SOUTHERN_AFRICA (accessed on 6 November 2014).

that there was no realistic chance of reaching agreement, particularly on modalities in agriculture and industrial tariffs.²³⁰

This conduct by/of the WTO raises questions such as what can be gained by developing countries from the Doha Round, and the WTO in general, and what are the implications for regional trade arrangements? Do developing countries have an alternative if the negotiations within the WTO keep on failing them?

However, on 8 July 2013, the WTO and the Economic Commission for Africa (ECA) signed a Memorandum of Understanding (MoU) to enhance trade-related technical assistance and capacity-building for African countries. The two parties underscored the importance of leveraging their comparative advantage in implementing the joint agreement. They agreed to jointly manage a Trade Related Technical Assistance (TRTA) programme for selected participants from African countries on a cost-sharing basis. They also agreed that the technical assistance to be provided to the RECs shall be determined jointly by the parties in consultation with relevant individual RECs, taking account of the priority needs of countries in specific regions of Africa, the Doha Development Agenda and its expected outcomes.²³¹

Conclusion

With the stalling of multilateral trade negotiations, regional trade agreements have “kept the fires of international trade burning”. Multilateral trade has shown that countries, when grouped together through regional trade agreements (read arrangements), can do business more effectively and can attract interest from other countries outside the group; given that when consolidated they are more attractive both as markets and investment destinations. For example, in July 2013 the European Investment Bank (EIB) announced that it will invest 9 billion Euros in the countries of the ACP (Africa, Caribbean and Pacific) region

²³⁰ This was announced by Tralac on 9 May 2006. Available at <http://www.tralac.org/scripts/content.php?id=4823> (accessed on 6 November 2014).

²³¹ “ECA and WTO strengthen cooperation to enhance Africa’s participation in multilateral trade” at www.wto.org/english/news_e/news13_e/igo_06jul13_e.htm (accessed on 6 November 2014).

by 2020, in partnership with the Investment Facility ACP. According to the EIB the objective is to support infrastructure investments that are critical to private sector development and improving regional integration.²³²

In addition, RTAs offer a platform for LDCs to consolidate their interests and take advantage of strength in numbers during multilateral negotiations. As such, on the one hand, there is the undeniable fact that rapid development in regional trade cooperation has at least partly undermined the WTO members' mutual trust and belief in the multilateral trading system (MTS); on the other, fast-moving RTAs, as the prerequisite and basis for the MTS, can serve as a major driving force for the progress of the MTS. Thus, the two are not necessarily mutually incompatible or exclusive.²³³

The creation of the (WTO), and other international institutions, gives credence to the view held by some people that for international business to succeed, it must be done through formalised structure(s). Formal structure, in turn, means the organisation must have rules and regulations and other legal prescripts such as a constitution.

Compared to the IMF/World Bank agreements the WTO rules are stricter and more legal-oriented. The IMF/World Bank rules are mostly bilateral and the agreements are in the form of loan agreements. This difference is more visible in the dispute-settling mechanisms of these three institutions. The WTO has a dispute settling mechanism, which is quasi-judicial in nature, entrenched in the articles and seeks to secure compliance with the agreements.²³⁴ The articles of agreements of both the IMF and World Bank do not provide for internal organs to settle disputes. Instead they rely on courts of member countries for judicial processes.²³⁵

²³² http://europa.eu/rapid/press-release_BEI-13-107_en.htm (accessed on 6 November 2014).

²³³ Taifeng, C. "Regional Trade Agreement vs. Multilateral Trading System: A Study of Chinese Interests and Policy Options" Norwegian Institute of International Affairs Working Paper 762 (2009) at 7. Available at www.nupi.no/content/download/10219/.../5/.../WP-762-Taifeng.pdf (accessed on 6 November 2014).

²³⁴ Article VIII of the WTO Treaty, "Dispute Settling Understanding" and "Understanding on Rules and Procedures Governing the Settlement of Disputes".

²³⁵ Article VII(3) of the Article of Agreement of World Bank provides:

"Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall,

The dispute settlement mechanism of the WTO means the WTO has competences and powers that were previously the monopoly of states (i.e. through courts). What counts, therefore, is whether the balance between some loss of policy space at the national level and the advantages of cooperation and the rule of law at the multilateral level is positive or negative.

However, all three institutions use arbitration as a form of dispute resolution. But with regard to the IMF and the World Bank arbitration is a “must” when there is a dispute, whereas with regard to the WTO it is an “alternative” to other measures.

In terms of the “Understanding on Rules and Procedures Governing the Settlement of Disputes” of the WTO, the parties will have to follow the procedure of consultation, conciliation or mediation first. If this does not work a complaints panel composed of trade experts is convened. If neither party wishes to appeal, the process of adjudication is complete. However, if an appeal is noted, this is taken to a body of legal experts who pass judgment on legal issues within a prescribed period.²³⁶

In a nutshell, the dispute settlement mechanism of the WTO takes two approaches: the conciliation system (good offices, consultation, conciliation or mediation) and the adjudication system (panels and Appellate Body). The panels operate as “courts” and if the parties are not satisfied with decisions of these panels, they are free to appeal to the Appellate Body.

however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank.”

Article IX (3) of the IMF Articles of Agreement provides:

“The Fund, its property and its assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract.”

²³⁶ Articles 11 – 15 of the “Understanding on Rules and Procedures Governing the Settlement of Disputes” of the WTO;

At face value the WTO dispute settling mechanism looks simple and ordinary, but Trachtman²³⁷ holds a different opinion. He says the WTO law is mandatory law with compensation or trade retaliation being merely temporary solutions. Other jurists are also of the opinion that the WTO rules, as interpreted in WTO dispute settlement reports, constitute firmly binding legal obligations.²³⁸

The Doha Declaration mandated negotiations to improve the WTO rules that govern the development of regional trade agreements (RTAs). This was because some WTO members have interpreted the rules broadly, resulting in RTAs that are not comprehensive or truly liberalising. These RTAs undermine the multilateral trading system through limited and selective liberalisation and giving comfort to protectionist interests. Concerns about such RTAs were highlighted in the WTO report *'The Future of the WTO: Addressing Institutional Challenges in the New Millennium'* (the Sutherland Report).²³⁹

These different interpretations are partly to blame for frequent failures of talks that hamper progress on trade. However, the "July (2004) package"²⁴⁰ seems to carry some hopes, although lot still needs to be done as the Mini-Ministerial negotiations (July 2008 – December 2013) have shown how complicated the modalities to this framework can be. The "July (2004) package" has brought back hope among developing countries that they can still use the Doha Round of multilateral trade negotiations in furtherance of their development objectives.

With the signing and coming into operation of existing RTAs one has to ask: Does the proliferation of preferential trade agreements and the decreasing role of MFN treatment

²³⁷ Trachtman, P. "The WTO Cathedral" *Stanford Journal of International Law* vol. 43 (2007) 127 at 130.

²³⁸ Zimmermann, C. "Toleration of Temporary Non-Compliance: The Systemic Safety Valve of WTO Dispute Settlement Revisited" *Trade, Law and Development* vol. 3, no. 2 (2011) 382; Schwartz, W *et al.* "The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization" *Journal of Legal Studies* vol. 31 (2002) 179; Jackson, J. "The WTO Dispute Settlement Understanding: Misunderstandings on the Nature of Legal Obligation" *American Journal of International Law* vol. 91 no. 1 (1997) 60.

²³⁹ This was the Report by the Consultative Board to the former Director-General, Supachai Panitchpakdi, marking the 10th anniversary of the WTO, released in January 2005. It, *inter alia*, calls for "addressing institutional challenges in the new millennium".

²⁴⁰ WTO General Council's Post Cancun Decision [WT/L/579](#) of July 2004.

mean that the MFN principle has lost its value for policy-makers? What exactly is the value of the MFN principle today?

Other subsequent questions would be: How can we reconcile the normative principle of MFN treatment with today's reality of proliferating preferential agreements? How can we avoid preferential trade agreements from rendering the MFN principle meaningless? How can we make sure that both concepts coexist in a way that is mutually supportive and that helps countries to reap benefits from both concepts?

The WTO has to support regional integration and lay to rest the fear that regionalism would replace multilateralism. As the discussion above has shown regionalism can be a powerful force, but it does not have to substitute multilateralism. In fact, the two can co-exist as the WTO bears testimony to this.

Today there is almost no country among the WTO's member countries that has not signed at least one regional trade agreement, and this makes countries more open to trade and more competitive. Also there is no strong leadership for advancing the new round of multilateral negotiations and this has justified the deepening of regional integration processes as a fundamental tool for development.

Having accepted the regional integration as a "necessary evil" within the multilateral trade landscape, the WTO must do more to support the regional integration schemes. Yes, the WTO rules do provide for existence of such schemes and tools such as the MoU for technical assistance are appreciated, but there is still a need for this to be put into practice. Practical assistance will empower and strengthen the RECs and stronger RECs will eventually benefit the WTO regime in the long run, not the opposite.

CHAPTER 3

OVERVIEW OF REGIONAL TRADE INTEGRATION SCHEMES IN SOUTHERN AFRICA

Introduction

Africa is not alone in aspiring for regional integration. With increasing globalisation and the advent of the World Trade Organisation (WTO), other parts of the world have embraced the ideal of regional integration. Among others, these include:

- The European Union (EU), in which some members have opted for a single currency, a central bank and free movement of factors of production for all members;²⁴¹
- North American Free Trade Area (NAFTA) which brings together the US, Canada and Mexico;
- Caribbean Community and Common Market (CARICOM); and
- Council of Arab Economic Unity (CAEU) in the Middle East.

This has made regional economic integration to be a strategy for achieving greater economic development and growth. According to the Institute for International Economics this is because “regionalism is in fashion”.²⁴² Others may argue that successes of regional bodies, such as the European Union (EU), also reinforce the idea of regional integration.²⁴³ Such successes demonstrate that economic cooperation can be an important and potentially effective means for facilitating social and economic development.

The success of an integration project seems, firstly, to depend on the economic well-being of a region. Secondly, competence of an organisation to enact supranational legislation

²⁴¹ This is in line with Articles 45, 56 and 119 of the *Maastricht Treaty* (formally called the *Treaty on European Union*).

²⁴² Frankel, J.A. *Regional Trading Blocs in the World Economic System* (1997) at 1.

²⁴³ One of the EU’s greatest success stories was rounded off in 1993 with the full entry into force of the internal market (free movement of people, goods, services and capital).

does not guarantee the success of an integration project as such. For example, the Economic Community of West African States (ECOWAS) has this supranational legislation, but it does not lead to successful integration.²⁴⁴ Thirdly, the member states in a regional integration scheme must be clear of what they want to achieve and also make proper projections. This is so because the new regional frameworks encompass not only trade and economic developments, but also environmental and social policies, and security cooperation.²⁴⁵

Regional trade integration is driven through different types or schemes that are utilised throughout the world. These are free trade areas (FTAs), customs unions, common markets and economic communities or unions. However, despite it having been embraced globally, critics argue that regardless of what type of integration is followed, it benefits only the developed economies.²⁴⁶ This chapter will try to look into the correctness or credibility of this sentiment.

The regional economic communities (RECs) – which are the drivers of regional integration – have become pivotal tools in the promotion of international trade, investment and trade liberalisation. In the Southern Africa region, there are a number of these bodies, used for economic integration and cooperation, such as the Southern African Customs Union (SACU); the Southern African Development Community (SADC); and the Common Market for Eastern and Southern Africa (COMESA). They take different forms of integration such as a customs union, a common market, a free trade area (FTA) and an economic community or union. These are typical forms of integration, but other authors

²⁴⁴ Lehmann, J. “Regional Economic Integration and Dispute Settlement outside Europe” *International Law Forum* vol. 7 no.1 - 4 (2005) 54 at 60.

²⁴⁵ Onzivu, W. “Globalism, Regionalism, or both: Health Policy and Regional Economic Integration in Developing Countries, an Evolution of a Legal Regime?” *Minnesota Journal of International Law* vol. 15 (2006) 111; Bishop, M.L. “Caribbean Regional Integration” – A Report by the University of West Indies (UWI) Institute of International Relations (IIR), April 2011; EUROSTAT, January 2013 (available at ec.europa.eu/eurostat/statistics).

²⁴⁶ Mathis, J.H. “World Trade Report 2011. The WTO and the Preferential Trade Agreements: From Co-existence to Coherence” *World Trade Review* vol. no.1 (2012) 1 at 2; Bruce, A. “The Pros and Cons of Pursuing Free-Trade Agreements” *Almanac of Policy Issues* (31 July 2003). Retrieved from: http://www.policyalmanac.org/economic/archive/free_trade_agreements.shtml (accessed 23 September 2015); Nye, J.S. “Comparative Regional Integration: Concept and Measurement” *International Organization* vol. 22 no. 4 (Autumn 1968) 885.

include in this linear process of regional integration a preferential trade agreement (PTA), at the beginning, and end it with a political union.²⁴⁷

Trade integration, as part of economic integration, provides the region with a degree of policy credibility if the integration agenda is adhered to. This in turn attracts foreign direct investment (FDI) to the region, a phenomenon which developing countries are so reliant upon.²⁴⁸ The FDIs have sparked increased debate as to their relevance and efficacy in the efforts to attain meaningful development in Africa, particularly, in the wake of the phenomenon of globalisation and the increased marginalisation of Africa in world trade.²⁴⁹ However, this will not be discussed here.

3.1 THE THEORY OF REGIONAL INTEGRATION

In the context of this thesis by “theory” it is meant a theory from a philosophical point of view. This means a theory is viewed as a model, which is a logical framework intended to represent reality. This context is important because there is always a debate whether regional integration is a theory or a practice. This is as a result of Aristotle’s definitions, where theory is always contrasted to practice.²⁵⁰

Another debate, which ensued when early theories of integration were developed, was on how to define the concept of integration. It was for instance discussed whether integration refers to a process or to an end product. Of course the two can be combined. Integration could then be defined as a process that leads to a certain state of affairs.²⁵¹

²⁴⁷ Wu J.P. “Measuring and Explaining Levels of Regional integration” Centre for European Integration working Paper No. B12 (2004) at 5; Choi, Y.J *et al.* *Handbook of International Relations* (2002) at 483; Choo, M.H. “Dispute Settlement Mechanisms of Regional Economic Arrangements and Their Effects on the WTO” *Temple International and Comparative Law Journal* vol. 13 (1999) 253 at 255.

²⁴⁸ Hansohm, D *et al.* “Introduction: Monitoring the Process of Regional Integration in Southern Africa in 2004-2005” *Monitoring Regional Integration in Southern Africa Yearbook* vol. 5 (2005) 1.

²⁴⁹ *Ibid.*

250 Söderbaum, F. “Comparative Regional Integration and Regionalism” *The Sage Handbook of Comparative Politics* (2008) at 2; Laursen, F. “Theory and Practice of Regional Integration”, Paper prepared for presentation at the European Union Centre, University of Miami, Coral Gables, Florida, 25 February 2008.

²⁵¹ Laursen, F. “Theory and Practice of Regional Integration”, Paper prepared for presentation at the European Union Centre, University of Miami, Coral Gables, Florida, 25 February 2008.

This philosophical point of view takes care of one aspect of “regional integration” (i.e. integration). However, to fully understand the meaning of regional integration the other aspect – regionalism – must also be understood. Regionalism is a term in international relations that refers to the expression of a common sense of identity and purpose, combined with the creation and implementation of institutions that express a particular identity, and shape collective action within a geographical region.²⁵² The idea that lies behind this increased regional identity is that as a region becomes more economically integrated, it will necessarily become politically integrated as well.²⁵³

As such regional integration can be defined as a process and a means by which a group of countries strive to increase their levels of welfare, be it politically, economically or otherwise. It can also be defined as the unification of neighbouring states working within a framework to promote free movement of goods, services and factors of production, and to coordinate and harmonise their policies. It involves the recognition that partnership between countries can achieve this goal in a more efficient way than unilateral or independent pursuance of policy in each country.²⁵⁴

Choo²⁵⁵ argues that the main objective of regional integration is the acquisition of hegemonic status for general purpose. He says if this were not the case, the European Union (EU) would not need to be an amalgamated community with a formally institutionalised and rule-based dispute settlement. That is why, he says, the EU’s objective is to create “Fortress Europe” with regard to power distribution of world politics, including general foreign policies.

²⁵² Definition of “regionalism” at [http://en.wikipedia.org/wiki/Regionalism_\(international_relations\)](http://en.wikipedia.org/wiki/Regionalism_(international_relations)) (accessed on 10 February 2015).

²⁵³ *Ibid.*

²⁵⁴ Haas, B. “The Study of Regional Integration: Reflections on the Joy and Anguish of Pretheorizing” *International Organization* vol. 24 no. 4 (1970) 607; Schiff, M.W *et al. Regional Integration and Development* (2003) at 1; Choi, Y.J *et al. Handbook of International Relations* (2002) at 481.

²⁵⁵ Choo, M.H. “Dispute Settlement Mechanisms of Regional Economic Arrangements and Their Effects on the WTO” *Temple International and Comparative Law Journal* vol. 13 (1999) 253 at 276.

Regional integration can be either economic, political, social or all three. Economic integration is the unification of economic policies between different states through the partial or full abolition of tariff and non-tariff restrictions on trade taking place among them prior to their integration. This is meant in turn to lead to lower prices for distributors and consumers with the goal of increasing the combined economic productivity of the states.²⁵⁶

Political integration involves the strengthening of a political system, in particular the scope and capacity of its decision-making process. Besides this institutional aspect of integration, there is as well the normative dimension of creating a political community.²⁵⁷

Social integration - in the sense of regional integration²⁵⁸ - is the blending and unifying of social groups, most commonly seen in the desegregation of races. It is about making societies more equitable.²⁵⁹ The United Nations Department of Economic and Social Affairs defines it as “a dynamic and principled process where all members participate in dialogue to achieve and maintain peaceful social relations.”²⁶⁰

Economic integration may include institutional integration, which is the policy decision(s) taken by two or more governments of countries belonging to the same geographic area in order to promote economic co-operation in terms of deepening and/or widening the spheres of co-ordination under the terms of an agreed pact. So, economic integration has some aspects of political integration, as decisions will have to be taken at political level.²⁶¹

²⁵⁶ Balassa, B. *The Theory of Economic Integration (Routledge Revivals)* (2013) at 1; Schiff, M *et al.*

“Regional Integration as Diplomacy” *World Bank Economic Review* vol. 12 issue 2 (1998) 12 at 14.

²⁵⁷ *Collins Cobuild English Dictionary for Advanced Learners* 4th edition (2003) (online version).

²⁵⁸ This is to distinguish this definition from the general and broad definition in a sociological sense, which basically refers to “embeddedness”.

²⁵⁹ Ferguson, C. “Promoting Social Integration”, Report commissioned by the United Nations Department of Economic and Social Affairs (UNDESA) for the Expert Group Meeting on Promoting Social Integration, Helsinki, Finland, 8-10 July 2008, at 5.

²⁶⁰ United Nations Department of Economic and Social Affairs. “Definition of Social integration”. Available at http://www.un.org/esa/socdev/sib/peacedialogue/soc_integration.htm (accessed 11 February 2015).

²⁶¹ Odour, M. “Resolving Trade Disputes in Africa: Choosing between multilateralism and regionalism: The case of COMESA and WTO” *Tulane Journal of international and Comparative Law* vol. 13 (2005) 177 at 187.

Economic integration, also, may be characterised as negative or positive integration. Negative integration denotes the removal of discrimination in national economic rules and policies under joint and authoritative surveillance. It involves limiting national economic power and decision-making. It is prevalent in free trade areas (FTAs), customs unions and common markets. Positive integration, on the other hand, involves the transfer of public market-rule-making and policy-making powers from the participating states to the union level. It is at this level where unification of monetary and fiscal policies happens.²⁶²

It is within the context of economic integration that trade integration should be understood: it (trade integration) being a condition (or process) wherein separate national economies maintain lower barriers to mutual trade, while sustaining relatively higher barriers to third parties.²⁶³

An alternate approach to understanding forms of integration would encompass: trade or goods market integration – concerning free flow of goods; labour market integration – concerning free movement of labour; capital market integration – concerning equalisation of real interest rates across countries; monetary integration – relating to common currency; and integration of movement activity and regulation. The advantage of this approach is that integration is not seen as sequential or linear, rather the approach is dynamic and allows for various types of integration to occur either together or separately.²⁶⁴

Trade integration can be divided into *trade creation* and *trade diversion*.²⁶⁵ Both are possible consequences of the formation of regional arrangements. In other words, they can occur regardless of whether a preferential trade agreement, a free trade area or a customs union is formed.

²⁶² Oppong, R.F. “Observing the legal systems of the Community: The relationship between Community and national legal systems under African Economic Community” *Tulane Journal of International and Comparative Law* vol. 15 (2006 – 2007) 41.

²⁶³ Carim, X. “Multilateral trading, regional integration and the Southern African Development Community” *South African Journal of Economics* vol. 65 no. 3 (1997) 334.

²⁶⁴ *Ibid.*

²⁶⁵ The concepts of “trade creation” and “trade diversion” were introduced in 1950 by an economist Jacob Viner (May 3, 1892 - September 12, 1970). Viner was a noted opponent of John Maynard Keynes during the Great Depression. While he agreed with the policies of government spending that Keynes pushed for, Viner argued that Keynes's analysis was flawed and would not stand in the long run.

3.1.1 Trade creation and Trade diversion

Trade creation relates to a situation where once a regional bloc is created, members agree to eliminate tariffs between themselves. That is, the integration creates trade that would not have existed otherwise. The effect of this is that, facing lower priced and zero-tariff imports from members, consumers increase their demand for these goods, and new trade will be created – *trade creation*.²⁶⁶

After the formation of an economic bloc, the cost of the goods considered is decreased, leading to an increase of efficiency of economic integration. Hence, trade creation's essence is in elimination of customs tariffs on inner border of unifying states (usually already trading with each other), causing further decrease of price of the goods, while there may be a case of new trade flow creation of the goods between the states decided to economically integrate.²⁶⁷

The results will be that the production of a popular good in one country, which does not possess a comparative advantage in that sector, is replaced by cheaper supplies from a producer within the region which does. This then leads to the increase in intra-regional trade due to the relative decrease in price as a result of lower tariffs, thereby complementing – or extending – comparative advantage within the regional context.²⁶⁸

Trade diversion, on the other hand, in its simplest form, means any trade diverted away from efficient global producers as a result of the creation of a trading bloc. It occurs when a country turns from lower cost suppliers in an extra-regional (third) country to higher cost regional suppliers that enjoy an advantage only as a result of the preferential tariff arrangement. It does not change the total volume of the individual country imports nor does it displace regional production. Rather, it changes the geographic composition of imports, as importers substitute imports from a foreign supplier whose price is unchanged, to

²⁶⁶ Suranovic, S.M. *International Trade Theory and Policy* (1998) - Chapter 10 at 2.

²⁶⁷ *Ibid.*

²⁶⁸ Rosson, C.P. "Preferential Trading Arrangements: Gainers and Losers from Regional Trading Blocs" available at www.ces.ncsu.edu/depts/agecon/trade/eight.html (accessed on 11 February 2015).

imports from a regional supplier whose relative price has fallen as a result of the lowering of tariffs.²⁶⁹

According to Jacob Viner,²⁷⁰ the welfare impact of preferential trade agreements is ambiguous, because preferential trade liberalisation can either result in the replacement of inefficient domestic production with low-cost imports from member countries (trade creation) or in the substitution of efficient, low-cost imports from non-member countries with less efficient imports from member countries (trade diversion).²⁷¹

Regional economic integration is seen to be economically beneficial in situations where trade creation outweighs trade diversion. According to conventional theory, trade creation is more likely to outweigh trade diversion when trade among co-operating partners is currently or potentially a large proportion of their overall trade; or there is a high level of complementarity in production structures. When the establishment of a regional arrangement leads to a trade diversion, a misallocation of resources is a possible outcome. It is therefore expected that trade diversion will lead to a decline in imports and an expansion of domestic production, but at relatively higher costs.²⁷²

Although existing theory on trade is unable to determine whether regional arrangements increase or reduce international trade distortion, regional arrangements are more likely to enhance world efficiency if their primary effect is to create new investment and trade rather than divert existing investment and trade flows.²⁷³ The prospects for this depend on existing

²⁶⁹ Suranovic (above, fn 266).

²⁷⁰ Viner, J. *The Customs Union Issue* (1950) – as referred to by Sidzingre, A in “Trade structure as a constraint to multilateral and regional arrangements in sub-Saharan Africa: WTO and African Union” Centre for the Study of Globalisation and Regionalisation (CSGR) 10th Anniversary Conference Paper. University of Warwick, 17 – 19 September (2007) at 22.

²⁷¹ Sidzingre, A. “Trade structure as a constraint to multilateral and regional arrangements in sub-Saharan Africa: WTO and African Union” Centre for the Study of Globalisation and Regionalisation (CSGR) 10th Anniversary Conference Paper. University of Warwick, 17 – 19 September (2007) at 22.

²⁷² Siah, K.L *et al.* “AFTA and the Intra-trade patterns among ASEAN-5 Economies: Trade-Enhancing or trade-inhibiting?” *International Journal of Economics and Finance* vol. 1 no. 1 February (2009) 117.

²⁷³ Carim, X. “Multilateral trading, regional integration and the Southern African Development Community” *The South African Journal of Economics* vol. 65 no. 3 (1997) 334 at 339.

trade patterns among would-be regional partners and the manner in which their agreement is structured.

In a large free trade area or a large customs union, consumer welfare may increase if such regional arrangements are able to shift the terms of trade in their favour through the reduction of imports and the expansion of regional production. While large regional arrangements will generate greater influences on the pattern of world trade, investment, etc, others are likely to have negligible effects.²⁷⁴

South-South trade agreements²⁷⁵ – a situation in the Southern African region – are likely to lead to trade diversion as opposed to trade creation because developing countries trade little with each other, and tend to have a comparative advantage in the same sectors.²⁷⁶ This is why some authors state that values like “trade creation” or “trade diversion” cannot be used as measurements for judging the “quality” of integration in third world countries. They argue that what matters are the positive effects of cooperation on the single developing country.²⁷⁷

Several studies show that the SADC countries retained their openness and outward orientation despite signing the Trade Protocol²⁷⁸ for enhancing intra-SADC trade. As a result of this outward orientation, there is an increasing trend of extra-SADC trade commodities such as agriculture and light manufacturing sectors, and thus creating a negative trade diversion effect.²⁷⁹ However, the studies also show that intra-SADC trade is growing in the fuel and minerals and the heavy manufacturing sectors.

²⁷⁴ *Ibid.*

²⁷⁵ “South–South Cooperation” is a term historically used by policymakers and academics to describe the exchange of resources, technology, and knowledge between developing countries.

²⁷⁶ Sindzingre, A. “The European Union Economic Partnership Agreements with Sub-Saharan Africa”, United Nations University Institute on Comparative Regional Integration Studies (UNU-CRIS) Working Papers W-2008/5, 2008 at 30.

²⁷⁷ Sundkvist, D. “The Southern African Development Community – A successful regional organisation?” Paper for Växjö University, Germany, 2009 at 9; Muuka, G.N *et al.* “Impediments to Economic Integration in Africa: The Case of COMESA” *Journal of Business in Developing Nations* vol. 2 (1998).

²⁷⁸ This Protocol was concluded in Maseru, Lesotho on 24 August 1996, but its implementation phase began on 1 September 2000. It is discussed in detail in Chapter 4.

²⁷⁹ Chauvin, S *et al.* “Regional trade integration in Southern Africa” *Centre d’Études Prospectives and d’Informations Internationales* (CEPII) Working Paper no. 2002-12 (2002); Bun, M. J *et al.* “The

3.2 APPROACHES TOWARDS INTEGRATION

When attempting to explain the rationale for integration of economies, one must look both at the economic and the political motivations that lie behind such a move. This is because economic and political factors often closely interact in integration schemes.²⁸⁰ Also, membership of a regional integration arrangement is a political choice of any one country, whether based on political, social, geographic and/or economic considerations.

Consideration of both economic and political aspects in integration led to development of economic and political theories. Economic theories include the market integration, development integration, functional and neo-functional integration, etc. Political theories, on the other hand, have to do with consideration of political factors such as reducing the chances of war, achieving regional security, promoting market-oriented democracies, or avoiding marginalisation in relation to other countries.²⁸¹

In this chapter only economic theories are dealt with, as they are the ones relevant to this thesis.

3.2.1 Economic Theories of Integration

i. Market integration theory²⁸²

Importance of dynamics in panel gravity models of trade” (Discussion Paper: 2002/18) Department of Quantitative Economics, Faculty of Economics and Econometrics, University of van Amsterdam, Roetersstraat (2002) 11; Yayo, M *et al.* “International Trade Effects of Regional Economic Integration in Africa: The Case of the Southern African Development Community (SADC)” *International Journal of African Development* vol. 3 no. 2 (Spring 2016).

²⁸⁰ Ng’ong’ola, C. “The drive towards regionalisation in Southern Africa: fictional reality” *African Journal of International and Comparative Law* vol. 9 (1997) 639 at 640; “Chapter 2: Economic Aspects of Regional Integration” *Regional integration and food security in developing countries* FAO Corporate Document Repository (online version), available at www.fao.org/3/a-y4793e/y4793e05.htm (accessed on 24 September 2015).

²⁸¹ Scott, F. “Too much of a good thing: Reassessing the proliferation of Regional Trade Agreements” *Suffolk Transnational Law Review* vol. 30 (2006 – 2007) 407 at 414.

²⁸² Ng’ong’ola (fn 270).

The market integration theory is premised upon a group of member states that creates a common external tariff and remove internal tariff, hence it is sometimes called “customs union” theory. However, Lee²⁸³ argues that this theory is applicable in other forms of integration as well, including free trade areas, common markets, economic union and total economic integration.

Market regional integration promotes regional interdependence, but does so by progressively removing the barriers to economic activity between states in the region: “the integrating force of the market is released through the removal of restrictions and barriers to regional trade, rather than through positive government interventions”.²⁸⁴

This typically starts by reducing barriers to intra-regional trade such as tariffs, but later can include dismantling barriers to other factors of production, such as the movement of people.

In theory, the process follows in linear succession, from preferential trade area (PTA), to a free trade area (FTA), customs union (CU), common market (CM), economic and monetary union (EMU)²⁸⁵, and finally complete economic integration. The important difference between the developmental approach (discussed below) and the market approach to regional economic integration is that with the latter the market, rather than the state, is the engine for closer economic integration.²⁸⁶

However, the fundamental flaw of the market integration theory is that it is premised on the idea that all member states are developed economies and that trade is competitive. It is therefore open to discussion how useful market integration can be in the Southern Africa region, where almost half the gross domestic product (GNP) of the entire region originates in only five countries – South Africa, Angola, Mauritius, Botswana and Namibia.²⁸⁷

²⁸³ Lee, M. *The Political Economy of Regionalism in Africa* (2003) at 15.

²⁸⁴ Hentz, J.J. “South Africa and the political economy of regional cooperation in Southern Africa” *Journal of Modern African Studies* vol. 43 no 1 (2005) 25.

²⁸⁵ See details discussion of different schemes of integration below.

²⁸⁶ Matli, W. *The Logic of Regional Integration: Europe and Beyond* (1999) at 31; Hentz, J.J. *South Africa and the Logic of Regional Cooperation* (2005) at 6.

²⁸⁷ World Bank. *Global Economic Prospects* (January 2015) at 6 – 9; Oluwu, D. “Regional integration, Development and the AU Agenda: Challenges, Gaps and Opportunities” *Transnational Law and Contemporary Problems* vol. 13 (2003) 212 at 241.

ii. Development integration theory²⁸⁸

This theory developed in response to the criticisms of the market integration theory's failure to account for the problems of less developed countries. Such problems are: different economic sizes, different political systems, and different levels of industrialisation. Rather than focusing on maximising the efficiency of existing trade, this theory looks at how to stimulate the countries' productive capacities.²⁸⁹ It is characterised by an intentional effort on the part of regional partners to promote cooperation and interdependence, and this call for cooperation and co-ordination leads to a higher degree of state intervention than in the market integration model. This cooperation takes the form of regional industrial planning, in which implementation of development plans occur at a regional, rather than national, level.²⁹⁰

The development integration theory requires a great degree of state participation in controlling economic activity as well as regional institutions playing a substantial role. In short, development integration theory is very much a state-led process. The other element of integration in this theory is the priority given to an equitable distribution of benefits derived from regional integration. This redistribution may come in the form of a transfer tax that allows poorer member states to impose limited tariffs on imports from a partner state.²⁹¹

The development integration theory would seem to have greater economic application among less developed countries than would the market integration theory. The political requirement of intensive cooperation among member states' governments and strong regional institutions make it difficult to implement this model. Additionally, the fall of

²⁸⁸ Ng'ong'ola, C. "The drive towards regionalisation in Southern Africa: fictional reality" *African Journal of International and Comparative Law* vol. 9 (1997) 639at 640.

²⁸⁹ Lee, M. "Regionalism in Africa - A Part of Problem or a Part of Solution" *Polis / R.C.S.P. / C.P.S.R.* vol. 9 special number (2002) at 4.

²⁹⁰ Hentz, J.J. "South Africa and the political economy of regional cooperation in Southern Africa" *Journal of Modern African Studies* vol. 43 no 1 (2005) 25.

²⁹¹ Hentz, J.J. *South Africa and the Logic of Regional Cooperation* (2005) at 5; Mittelman, J. *The Globalization Syndrome: Transformation and Resistance* (2000) at 21.

Soviet Union and worldwide shift to market-oriented economies has led to many questioning the theory's practical application.²⁹²

In Southern Africa this theory is applicable to both the SADC and the COMESA, especially the COMESA as it is still developing from a common market to an economic community. Article 177 of the COMESA Treaty makes provision for gradual development into an economic union, which led to a four-stage programme towards the establishment of a monetary union by the year 2025 being approved by the Authority of Heads of State and Government of the COMESA in 1992.²⁹³ The stages are the following:

- stage one 1992 - 1996: consolidation of existing instruments of Monetary Co-operation and implementation of policy measures aimed at achieving macroeconomic convergence;
- stage two 1997 - 2000: introduction of limited currency convertibility and informal exchange rate union;
- stage three 2000 - 2024: formal exchange rate union and co-ordination of economic policies by a common monetary institution;
- stage four 2025: full monetary union involving the use of one common currency issued by a common central bank.²⁹⁴

For the SADC Article 21 of the SADC Treaty calls for cooperation in areas such as trade, science and technology. Nowhere in the Treaty does a demand for a common external tariff appear, although the signing of the Trade Protocol indicates a shift. Article 11 of the SADC Trade Protocol adheres to national treatment principle while Article 12 provides for "Community treatment" of originating goods. Article 26A makes a provision for establishment of the Regional Development Fund in which shall be accounted receipts and expenditure of the SADC relating to the development of the SADC.

²⁹²Hentz, J.J. "South Africa and the political economy of regional cooperation in Southern Africa" *Journal of Modern African Studies* vol. 43 no 1 (2005) 25.

²⁹³ Economic Commission for Africa (ECA). "Assessing Regional Integration in Africa (ARIA III): Towards Monetary and Financial Integration in Africa" (2008) at 198.

²⁹⁴ *Ibid*; "COMESA Strategy" at about.comesa.int/index.php?option=com_content&view... (accessed on 5 February 2015).

The SACU Treaty is a mix of both market integration and development integration theories. It has established a common external tariff for South Africa and the Botswana-Lesotho-Namibia-Swaziland (BLNS) states. Coupled with this is a development integration element in which the Treaty allows for a monetary transfer based on duties collected flowing from South Africa to the BLNS countries.²⁹⁵

However, there are problems to the SACU Treaty, which are two-fold. First, because of its market integration approach, the benefits from a common external tariff have not been shared among the BLNS countries. Secondly, market forces tend to benefit the larger countries in such an arrangement. With this, the BLNS countries have been unable to attract industrial development, and they face the prospect of trade diversion as an industrial state such as South Africa is able to exploit the common tariff to develop markets in the BLNS countries for its exports. Even with the compensatory customs arrangement, industrial investments both from within the Customs Union and outside still flow to South Africa. This continues the cycle of further industrialisation for South Africa and minimal growth for the other member states.²⁹⁶

iii. Functional and Neo-functional integration theories (or Post-neo-functionalism)

Functional theory is based on the functional model of integration as advanced by David Mitrany²⁹⁷ after the World War II. Mitrany felt that integration was necessary to solve security problems, rather than creating a massive supranational structure. He argued that integration could proceed by linking particular activities and interests, one at a time, according to need and acceptability, giving each a joint authority and policy limited to that activity alone. This, he said, can be done through a series of shared projects across borders,

²⁹⁵ Ng'ong'ola, C. "The drive towards regionalisation in Southern Africa: fictional reality" *African Journal of International and Comparative Law* vol. 9 (1997) 639 at 644.

²⁹⁶ *Ibid.*

²⁹⁷ (1898 – 1975) He was the mastermind behind the 'Reconstruction of Europe' after World War II. He was an intellect of Romanian origin. One of his seminal proposals was to 'contain in a dialectical sense the old nations states, to entangle and de-substantiate them in a web of transnational economic and administrative functions thus creating a "working peace system" beyond the old conflict laden European power system'. With publication of this vision he became the intellectual godfather of many subsequent European developments in real politics and in academic analysis.

which create habits of cooperation and reveal the advantages of pooling efforts.²⁹⁸ Therefore, according to this theory the functional way for regional integration has to do with sharing the load or burden among regional members in such a way that each nation is responsible for a specific task and, therefore, plays a role in integrating and catering for the region.

This theory is as such limited to the formation of non-political institutions and entails less sacrifice of sovereignty than with market integration, but does see intra-regional economic interactions creating a “functional need” for a regional institution.²⁹⁹ Unlike in the prior models, an increase in trade or the establishment of a customs union is considered a by-product of the political goal of diminishing the likelihood of regional aggression in this model.³⁰⁰

The neo-functional theory developed as a result of the complaint or concern that Mitrany had separated economics from politics. Like the functionalists, neo-functionalists believe that international cooperation should begin in narrow technical areas. Yet they differ in that neo-functionalists believe success in one sector will lead to pressures for integration in other areas. As these sectors merge at the regional level, the need for political institutions will arise. Ultimately, groups within the region will look to supranational structures as a way of reaching their aims.³⁰¹ Another difference is that neo-functionalism describes or explains the process of regional integration based on empirical data. Its focus on supranationalism is on regional integration or regional supranationalism, and not on global integration or global supranationalism, which is a primary concern of functionalism theory.³⁰²

²⁹⁸ Mitrany, D. “Functional Approach to World Organization” *International Affairs* vol. 24 no. 3 (1948) 350.

²⁹⁹ Hentz, J.J. “South Africa and the political economy of regional cooperation in Southern Africa” *Journal of Modern African Studies* vol. 43 no 1 (2005) 25 at 26.

³⁰⁰ Maffei, D *et al.* “Crisis and Integration: The Effect of Crisis on the Pace of European Integration”, Paper presented at European Union Studies Association Conference Baltimore, Maryland (May 2013) at 1.

³⁰¹ Akwara, A *et al.* “The Role of Regional Economic and Political Groups in the Globalization Process: A Case Study of the Economic Community of West African States (ECOWAS) (1982-2002)” *Canadian Social Science* vol. 9 no. 6 (2013) 67 at 68.

³⁰² Burchill, S *et al.* *Theories of International Relations* (2005) at 10 – 27; Echezona, N. *International Politics in Post Cold War Era* (1998) at 76 – 80.

Haas³⁰³ is generally regarded as the “father” of neo-functionalism and his theory arose out of the European integration experiences in the early post-war years. He noted that certain kinds of organisational tasks most intimately related to group and national aspirations can be expected to result in integration even though the actors responsible for this development may not deliberately work towards such an end.³⁰⁴

According to the theory, initial cooperation on the creation of common institutions in non-political (and hence non-controversial) policy areas is, over time, not only deepened, but also widened to include the realm of other connected policy areas. The deliberate design of institutions is seen as the most effective means for solving common problems, and these, in turn, are instrumental to the creation of functional as well as “political spill-over” and ultimately to a redefinition of group identity around the regional unit.³⁰⁵

Neo-functionalists therefore believe that economic integration would lead to political integration - the so-called “spill-over” - according to which integration would deepen from economic to political and the result would be an integrated union of states.³⁰⁶

The idea of spill-over, particularly the fact that economic integration would lead to political integration, was challenged by various critics.³⁰⁷ They say the neo-functionalists – that is, proponents of “spill-over” – did not make a distinction between high and low politics. Low politics would be the more technocratic issues which did not involve too much sovereignty transfer from the Member State and therefore in such a case integration would be possible.

³⁰³ Ernst Bernard Haas (1924 – 6 March 2003) was a leading authority on international relations theory and published numerous books, monographs and articles. He also acted as a consultant to many national and international organisations.

³⁰⁴ Stephan, H *et al.* “New regionalism in southern Africa: functional developmentalism and the Southern African Power Pool” *Politeia* vol. 27 issue 3 (2008) 54 at 56.

³⁰⁵ Fawcett, L *et al.* *Regionalism in World Politics: Regional Organization and International Order* (1995) at 59.

³⁰⁶ Pollack, M. A. “International Relations Theory and European Integration” *Journal of Common Market Studies* vol. 39 (2) (2001) 221- 244.

³⁰⁷ Ujupan, A. “Reconciling theories of regional integration: a third way approach”, University of Ulster Paper (2005) at 3; Sandholtz, W *et al.* “Neo-functionalism and Supranational Governance” *Oxford Handbook of the European Union* (2012) at 17; Gehring, T. “Integrating Integration Theory: Neo-functionalism and International Regimes” *Global Society* vol. 10 no. 3 (1996) 225 at 229.

High politics would be a different issue – this concept refers to key policies of member states such as defence, taxation, macroeconomic strategies, etc.³⁰⁸

There are three major principles of neo-functionalism:

- (i) The principle of positive spill-over effects which states that integration between states in one sector, that is economic sector, will eventually ramify into integration or cooperation in other sectors, such as political, socio-cultural, security, etc;
- (ii) The mechanism of a transfer in domestic allegiance which assumes that as the process of integration gathers momentum in an increasingly pluralistic domestic society of each state, interest groups and other associations will transfer their allegiance or loyalty away from national institutions towards the supranational institution(s) when they begin to realise that their material interests or wellbeing can be better pursued through supranational institution(s) than the pre-existing national institutions; and
- (iii) The principle of technocratic automaticity which states that as integration hastens, the supranational institution(s) will take the lead in fostering further integration as they become more and more autonomous of the member states.³⁰⁹

Both the functional and neo-functional approaches could be found in the SADC and COMESA, especially the SADC, which as the Southern African Development Coordination Conference (SADCC), started as a loose security co-operation arrangement which spilled over into co-operation in the economic sphere. The majority of institutions of these two bodies are headed by politicians and even their policies have huge political overtones as it is states that are parties to these treaties. This is despite some authors maintaining that neo-functionalism, in particular, is Eurocentric and not appropriate for

³⁰⁸ Ujupan (above).

³⁰⁹ Aniche, E. “Problematizing Neo-functionalism in the Search for a New Theory of African Integration: The Case of the Proposed Tripartite Free Trade Area (T-FTA) in Africa” *Developing Country Studies* vol.4 no.20 (2014) 128 at 136.

Africa. They maintain that Africa needs to look for a theory, which transcends neo-functionalism, a *post-neo-functional theory*.³¹⁰

The proponents of post-neo-functional theory maintain that neo-functionalism has many defects. One defect is that while assuming that regional integration is a gradual process, its conception of integration as a linear process makes explanation of setbacks or shortcomings impossible. Another of its defects is that neo-functionalism assumes that integration of states is an integration of interdependence, and therefore, not adequate for explaining the incidence of dependence of African economies to Western economies and integration of dependence of the one African state to another.³¹¹

Consequently, according to these proponents, there is a need for a paradigm shift in Africa, that is, a theory that will be appropriate or adequate in explaining the African predicament: a theory which will enable Africans to tell their own stories by themselves, a post-neo-functional theory.³¹²

iv. *Ad hoc* integration theory

Ad hoc regional economic integration relies heavily on bilateral agreements between regional states. It is considered *ad hoc* because it is not part of a larger plan to induce regional interdependence, or even part of a regional scheme. However, some authors do not regard this as a theory of integration for the mere reason that “ad hoc” itself denotes

³¹⁰ Aniche, E. “Problematizing Neofunctionalism in the Search for a New Theory of African Integration: The Case of the Proposed Tripartite Free Trade Area (T-FTA) in Africa” *Developing Country Studies* vol. 4 no. 20 (2014) 128 at 129; Okeke V.O.S *et al.* “Economic Regionalism and Dependency in Africa: A Study of African Economic Community (AEC)” *Arabian Journal of Business and Management Review* vol.1 no.1 (June 2012) 1 at 6; Aniche, E *et al.* “Regional Economic Integration in Africa: A Comparative Study of ECOWAS and SADC” *International Journal of Africa Culture, Politics and Development* vol. 4 no. 2 (2009) 82 - 101.

³¹¹ Aniche, E. “Problematizing Neo-functionalism in the Search for a New Theory of African Integration: The Case of the Proposed Tripartite Free Trade Area (T-FTA) in Africa” *Developing Country Studies* vol.4 no.20 (2014) 128 at 136.

³¹² Aniche, E. *A Modern Introduction to Political Science* (2009) at 404.

something temporary whereas “integration” denotes something permanent.³¹³ However, by connecting countries, albeit in an *ad hoc* manner, it does create a more integrated region.

Both the *ad hoc* and functional integration focus on infrastructural development, but the *ad hoc* approach explicitly rejects the promotion of regional interdependence and advocates a much less progressive role for the state.³¹⁴

v. The Neo-liberal economic theory

As the concept itself suggests, neo-liberalism is a revival of liberalism. It is thus thought of as the return and spread of economic liberalism, which is, basically, the belief that states ought to abstain from intervening in the economy, and instead leave that, as much as possible, up to individuals participating in free and self-regulating markets.³¹⁵

This theory is, in the main, a variant of the market integration approach to regionalism as, and to some less degree, political theory of integration. That is why Harvey³¹⁶ defines it as “a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterised by strong private property rights, free markets and free trade.”

According to Gibb,³¹⁷ this approach prioritises “open regionalism . . . as a mechanism to enhance multilateral liberalisation and promote integration in the world economy.” It is underpinned by the principle of comparative advantage, which says that countries should specialise in producing what they are specially endowed to produce.

³¹³ Biswaro, J.M. *The Quest for Regional Integration in the Twenty First Century: Rhetoric versus Reality – A comparative study* (2012) at 13; Schiff, M *et al. Regional Integration and Development* (2003) at 187.

³¹⁴ Ng’ong’ola, C. “The drive towards regionalisation in Southern Africa: fictional reality” *African Journal of International and Comparative Law* vol. 9 (1997) 639 at 640.

³¹⁵ Thorsen, D.E *et al.* “What is Neoliberalism?” Paper written for the Department of Political Science, University of Oslo (2008) at 2.

³¹⁶ Harvey, D. *A Brief History of Neoliberalism* (2005) at 2.

³¹⁷ Gibb, R. “Regional Integration and Development Trajectory: Meta-theories, expectations and reality” *Third World Quarterly* vol. 30 no. 4 (2009) 701 at 708.

In agreeing with Gibb, Gamble and Payne³¹⁸ argue that the neo-liberal theoretical framework of analysing integration is open regionalism, which tend to reinforce the detrimental effects of economic globalisation and global capitalism. They also see the contemporary form of regionalism as a manifestation of economic globalisation and prevailing form of hegemony.

Having dealt with the theories and approaches of regional integration as well as its relationship with the WTO, it is now pertinent to look into different integration schemes that are applied by various regions globally, but use those in Southern Africa as examples.

3.3 REGIONAL ECONOMIC INTEGRATION SCHEMES IN SOUTHERN AFRICA

Regional economic integration arrangements or schemes are not new phenomena. One of the first recorded regional integration initiatives was the customs union established by Prussia with Hesse-Darmstadt. This was followed by the Bavaria Württemberg Customs Union, the German Zollverein, the North German Tax Union and the German Reich.³¹⁹ This wave of integration is what influenced the creation of the European Steel and Coal Community (ECSC) in 1952 by Belgium, France, West Germany, Italy, the Netherlands and Luxembourg. In 1957 the West Germany, France, Italy, Belgium, Luxembourg and the Netherlands signed the Treaty of Rome establishing the European Community, which is the precursor of the present-day European Union (EU).³²⁰

In Southern Africa, the then Union of South Africa and the High Commission Territories of Bechuanaland, Basutoland and Swaziland concluded the Southern African Customs Union (SACU) in 1910. With the advent of independence for these territories, the

³¹⁸ Gamble, A *et al.* "The World Order Approach" in Soderbaum, F *et al.* *Theories of New Regionalism: A Palgrave Reader* (2004) at 30.

³¹⁹ Matlli, W. *The Logic of Regional Integration: Europe and Beyond* (1999) at 2.

³²⁰ *Ibid.*

agreement was updated on 11 December 1969 and entered into force on 1 March 1970. Namibia joined the Customs Union in 1990 after gaining its independence.³²¹

Regional integration schemes differ in terms of depth and kind, moving from most limited to deepest integration. They include the following:

1. *Preferential Trade Agreement (PTA)*: customs duties on trade among members are reduced compared to those on trade with non-member countries. That is where “preferential treatment” comes in;
2. *Free Trade Area (FTA)*: tariffs and quotas on trade between members are totally removed, but members retain control over their own restrictions on trade with non-member countries. The different rules applying to external trade make a system of rules of origin necessary;
3. *Customs Union*: in addition to free internal trade (as in FTA) member countries apply a common external tariff (CET) on trade with non-member countries. Rules of origin are no longer required;
4. *Common Market*: in addition to a customs union there is a free movement of factors of production. Common restrictions apply to the movement of factors of production with non-member countries; and
5. *Economic Union*: in addition to a common market major economic policies (e.g. fiscal and monetary policy) are coordinated.³²²

Because there is currently no PTA in existence in Southern Africa the thesis will deal only with the other four applicable schemes, i.e. FTA, customs union, common market and economic union.

³²¹ “About SACU” at www.sacu.int/ (accessed on 6 March 2015). In-depth discussion on SACU is made below under 3.3.2.

³²² Balassa, B. *The Theory of Economic Integration* (1961) 1; Nye, J.S. “Comparative Regional Integration: Concept and Measurement” *International Organization* vol. 22 no. 4 (1968) 855 at 860.

3.3.1 Free Trade Area

A free trade area (FTA) can be considered the second stage of economic integration – that is, after the PTA – and it involves removal of tariff and quantitative restrictions on trade between member states. If people are also free to move between the countries, in addition to the FTA, it would also be considered an open border. Normally countries would choose this kind of economic integration if their economic structures are complementary. If their economic structures are competitive, it is likely there will be no incentive for an FTA, or only selected areas of goods and services will be covered to fulfil the economic interests between the two signatories of an FTA.³²³ An FTA is a result of a free-trade agreement (a form of trade pact) between two or more countries.

As such free trade area can be defined as an area formed by reciprocal multilateral agreements whereby two or more nations agree to limit or eliminate all import tariffs and duties between them.³²⁴ However, the process of such economic integration must not result in higher external trade barriers for non-members, as per the GATT Article XXIV(5).³²⁵

³²³ Komolanavij, S *et al.* “The Formation of Industrial Clusters in Asia and regional integration” – Midterm Report (2008) at 63.

³²⁴ Sullivan, A *et al.* *Economic: Principles in Action* (2003) at 453; Schulze, H.C.A.W. “The legal implications of the establishment of free trade zones in South Africa” *Comparative and International Law Journal of Southern Africa (CILSA)* vol. XXXI (1998) 1 at 2; De Melo, J *et al.* *New Dimensions in Regional Integration* (1995) at 160.

³²⁵ Article XXIV(5) Provides:

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

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

Unlike in a customs union (the third stage of economic integration), members of a free-trade area do not have a common external tariff, which means they have different quotas and customs, as well as other policies with respect to non-members. To avoid tariff evasion (through re-exportation) the countries use the system of certification of origin - commonly called “rules of origin” - where there is a requirement for the minimum extent of local material inputs and local transformations adding value to the goods. Only goods that meet these minimum requirements are entitled to the special treatment envisioned by the free trade area provisions.³²⁶

FTAs have both advantages and disadvantages. The principal advantage of an FTA is trade liberalisation. A practical advantage of FTAs is that they are quicker and easier to negotiate than other multilateral agreements because fewer parties are at the table. As such parties can secure advantages that are harder to win in bigger forums.³²⁷

The disadvantages are twofold. If FTAs are not set up within the right framework of policies, they can diminish rather than enhance economic welfare. The second disadvantage is that they are not good vehicles for liberalising trade in sectors on which parties outside the agreement have a major influence. In addition to these two there is a traditional debate that FTAs have a danger of diverting rather than creating trade.³²⁸

duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be; and

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

³²⁶ Komolanavij, S *et al.* “The Formation of Industrial Clusters in Asia and regional integration” – Midterm Report (2008) at; www.princeton.edu/freetrade/html (accessed 31 March 2015).

³²⁷ “Chapter 3 FTAs — advantages and disadvantages, An Australia–USA Free Trade Agreement: Issues and Implications”, Report by Monash University's APEC Study Centre, August 2001; Cooper, W. “Free Trade Agreements: Impact on U.S. Trade and Implications for U.S. Trade Policy”, Congressional Research Service (CRC) Report, February 2014 at 3.

³²⁸ Baldwin, R *et al.* “are Free Trade Agreements Contagious” *Journal of International Economics* vol. 88 (2012) 1 at 7; Baldwin, R *et al.* “A Test of Endogenous Trade Bloc Formation Theory on EU Data” *Journal of International Economic Studies* vol. 11 no. 2 (2007) 77 at 80; Baier, S.L *et al.* “Economic Determinants of Free Trade Area” *Journal of International Economic* vol. 64 issue 1 (2004) 29 at 55; “Chapter 3 FTAs — advantages and disadvantages, An Australia–USA Free Trade Agreement: Issues and Implications”,

3.3.1.1 COMESA

The classic example of a free trade area in Southern Africa is the Common Market of Eastern and Southern Africa (COMESA), formerly the Preferential Trade Area for Eastern and Southern Africa (PTA). It should be remembered that a common market encompasses both the customs union and a free trade area. The PTA was the brainchild of the United Nations Economic Commissions for Africa (ECA). Its founding Treaty was signed on 21 December 1981 and it entered into force on 30 September 1982.³²⁹

The COMESA formally succeeded the PTA on 8 December 1994 when it came into force. This is the largest regional economic community in Africa with membership of 20 states.³³⁰

The COMESA strives for economic integration in all fields of economic activity, not only trade. It sees integration as involving a gradual process – the establishment of a free trade area to be followed by a common market and eventually an economic community. This was stated in the Preamble to the PTA Treaty which stated that the PTA is a “first step towards . . . a common market and eventually an Economic Community of Eastern and Southern African States”.³³¹

Article 12 of the PTA Treaty provided for “the establishment of a common market within which customs duties or other charges . . . shall be progressively eliminated . . . and a common customs tariff . . . established and maintained.” This first step was realised by

Report by Monash University's APEC Study Centre, August 2001; Grossman, G.M *et al.* “The Politics of Free trade Agreements” *American Economic Review* vol. 85 no. 4 (September 1995) 667 at 672 – 673.

³²⁹ Schechter, M.G. *International Organizations* (2010) at 13.

³³⁰ These are: Burundi, Comoros, DRC, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, South Sudan, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

³³¹ This is reiterated in the Preamble to the COMESA Treaty, which reads:

“*Bearing in mind* the establishment among their respective States of the Preferential Trade Area for Eastern and Southern African States as a first step towards the creation of a Common Market and eventually of an Economic Community for Eastern and Southern Africa.

Recalling the provisions of Article 29 of PTA Treaty to the effect that steps should be taken to develop the Preferential Trade Area established by that Treaty into a Common Market and eventually into an Economic Community.”

transforming the PTA into the COMESA, which then means it (COMESA) will have to realise the eventual step of establishing the economic community.

The COMESA Free Trade Area (FTA) was launched on 31 October 2000,³³² marking the first ever free trade area within the African continent. The FTA started with nine countries, namely: Djibouti, Egypt, Kenya, Madagascar, Malawi, Mauritius, Sudan, Zambia and Zimbabwe. Membership in the FTA is now sixteen,³³³ with the DRC being the latest member to join in 2016. All other fifteen member states trade on a full duty free and quota free basis, except for the DRC. Having joined the FTA recently, the DRC's accession to the FTA would be done through a three-year phase down approach starting in 2016 with a 40% reduction on duty, followed by a 30% reduction in 2017 and another 30% in 2018.³³⁴

Eritrea and Ethiopia are still undergoing legislative process to pass the necessary legal instruments for accession to the COMESA FTA,³³⁵ whilst Swaziland is trading under an indefinite derogation which allows the country not to reciprocate tariff preference on imports originating from other member states of COMESA as provided for by the COMESA Treaty.³³⁶

Article 48 of the COMESA Treaty provides the "Rules of Origin" for protection and

³³² Lombaerde, P. *Multilateralism, Regionalism and Bilateralism in Trade and Investment* (2006) at 131; Tralac. "COMESA Legal Texts and Policy Documents" available at www.tralac.org/resources (accessed on 31 March 2015).

³³³ The 16 participating countries are Burundi, Comoros, Djibouti, Democratic Republic of Congo, Egypt, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Uganda, Zambia and Zimbabwe.

³³⁴ "16 countries now in COMESA Free Trade Area" Tralac, 3 May 2016 (online). Available at <https://www.tralac.org/news/article/9574-16-countries-now-in-comesa-free-trade-area.html> (accessed on 4 October 2017).

³³⁵ Communiqué of the nineteenth Summit of the COMESA Authority of Heads of State and Government, Addis Ababa, Ethiopia, 18 – 19 October 2016.

³³⁶ "Free Trade and Preferential Agreements Relevant to Swaziland" available at <http://www.sra.org.sz/customs/free-trade-and-preferential-agreements.php> (accessed on 4 October 2017); Mchavi, K. "Country Spotlight: Kingdom of Swaziland" *Political Economy Southern Africa (PESA) Regional Integration Monitor* (September 2016) at 8.

checks-and-balances of the FTA.³³⁷ The COMESA is also a legal person that can sue and be sued.³³⁸ The institutions of the COMESA are: the *Authority of Heads of State and Government*, *Council of Ministers*, the *Court of Justice* and the *Committee of Governors of Central Banks*. These four have the power to take decisions on behalf of the COMESA. In addition there are other organs: the *Intergovernmental Committee*, the *Technical Committees*, the *Secretariat* and the *Consultative Committee*.³³⁹

The Authority is the supreme policy organ of the COMESA and is responsible for the general policy, direction and control of the performance of the executive functions of the Common Market and the achievement of its aims and objectives. The decisions and directives of the Authority are by consensus and are binding on all subordinate institutions, other than the Court of Justice.³⁴⁰

³³⁷ Article 48 states:

- “1. For the purposes of this Treaty, goods shall be accepted as eligible for Common Market tariff treatment if they originate in the member states.
2. The definition of products originating in the member states shall be as provided for in a Protocol on the Rules of Origin to be concluded by the member states.
3. The Intergovernmental Committee shall, from time to time, examine the rules referred to in paragraph 2 of this Article and propose amendments thereto to the Council.”

³³⁸ Article 186 provides:

- “1. The Common Market shall enjoy international legal personality.
2. It shall have in the territory of each Member State:
 - (a) the legal capacity required for the performance of its functions under this Treaty; and
 - (b) power to acquire or dispose of movable and immovable property in accordance with the laws and regulations in force in each member state.
3. The Common Market shall, in the exercise of its legal personality, be represented by the Secretary-General.
4. Subject to the provisions of the Charters establishing the institutions of the Common Market which provide that the institutions, as the case may be, shall be capable of being sued, the Agreement shall be extended to the institutions of the Common Market:

Provided that the Secretary-General shall make arrangements by which the administrative costs related to implementation of the provisions of the Agreement are equitably shared with the institutions of the Common Market.”

³³⁹ Article 7(1) of the COMESA Treaty.

³⁴⁰ Article 8.

The Council of Ministers is the second highest policy organ of the COMESA. It is composed of ministers designated by the member states. It takes policy decisions on the programmes and activities of the COMESA, including the monitoring and reviewing of its financial and administrative management. The Council decisions are made by consensus, failing which, by two-thirds majority of the members of the Council.³⁴¹

The Court of Justice is the judicial organ of the COMESA, having jurisdiction to adjudicate upon all matters that may be referred to it pursuant to the COMESA Treaty.³⁴² It ensures the proper interpretation and application of the provisions of the Treaty and adjudicates any disputes that may arise among the member states regarding the interpretation and application of the provisions of the Treaty. The decisions of the Court are binding and final. When acting within its jurisdiction, it is independent of the Authority and the Council.

The Committee of Governors of Central Banks is empowered under the Treaty to, *inter alia*, determine the maximum debt and credit limits to the COMESA Clearing House. It also monitors, and ensures the proper implementation of the Monetary and Financial Cooperation programmes.³⁴³

The Inter-governmental Committee is a multi-disciplinary body composed of permanent secretaries from member states in the fields of trade and customs, administrative and budgetary matters, transport and industry, legal affairs, etc. Decisions of the Committee are taken by simple majority. Its main functions include:

- the development of programmes and action plans in all the sectors of co-operation, except in the finance and monetary sector;
- the monitoring and keeping under constant review and ensuring proper functioning and development of the Common Market;
- overseeing the implementation of the provisions of the Treaty and, for that purpose, requesting a technical committee to investigate any particular matter; and

³⁴¹ Article 9.

³⁴² Article 23.

³⁴³ Article 13.

- submission from time to time of the reports and recommendations to the Council.³⁴⁴

There are twelve (12) Technical Committees³⁴⁵ on, *inter alia*, Administrative and Budgetary Matters, Legal Affairs, Trade and Customs and Transport and Communications. The Technical Committees are responsible for the preparation of comprehensive implementation programmes and monitoring their implementation and then making recommendations to the Council.³⁴⁶

There is also the Consultative Committee that consists of representatives of business community and other interest groups from member states. It is responsible for providing a link and facilitating dialogue between the business community and other interest groups, and other organs of the COMESA.³⁴⁷

The Secretariat is headed by a Secretary-General, who is appointed by the Authority for a term of five years and eligible for re-appointment for a further term of five years. The basic function of the Secretariat is to provide technical support and advisory services to the member states in the implementation of the Treaty. It undertakes research and studies as a basis for implementing the decisions adopted by the policy organs. The various activities of the Secretariat encompass, *inter alia*: Trade and Customs, Monetary Co-operation and Administration. The Office of the Secretary-General includes the Legal Office.³⁴⁸

Several institutions have been created to promote sub-regional co-operation and development. These include:

- the COMESA Trade and Development Bank in Nairobi, Kenya;
- the COMESA Clearing House in Harare, Zimbabwe;
- the COMESA Association of Commercial Banks in Harare;

³⁴⁴ Article 14.

³⁴⁵ Article 15.

³⁴⁶ Article 16.

³⁴⁷ Article 18.

³⁴⁸ Article 17.

- Federation of National Associations of Women in Business in Common Market for Eastern and Southern Africa (FEMCOM) in Harare;
- the COMESA Leather and Leather Products Institute (LLPI) in Addis Ababa, Ethiopia; and
- the COMESA Re-Insurance Company in Nairobi.³⁴⁹

3.3.1.2 SADC

The two founding documents, the Declaration³⁵⁰ and Treaty,³⁵¹ establishing the Southern African Development Community (SADC) were signed at the Summit of Heads of State or Government on 17th of July 1992 in Windhoek, Namibia. The SADC replaced the Southern African Development Coordination Conference (SADCC), which had been in existence since 1980.³⁵² The main aim of the SADCC was to reduce the economic dependence of the region on apartheid South Africa, but with the political change looming in South Africa – which eventually happened in 1994 – it was clear that this objective would soon be obsolete. The SADC is currently composed of 15 member states.³⁵³

The SADC also has its own FTA, which entered into force in January 2008 and was officially launched during the SADC Summit held in Sandton, South Africa, in August 2008. The SADC FTA was launched as a result of attainment of minimum conditions for the FTA – 85% of intraregional trade among member states attaining zero duty. According

³⁴⁹ “About COMESA” at about.comesa.int/index.php?option=com_content&view (accessed 31 March 2015).

Some of these institutions, together with others listed in Article 174, were established under the PTA Treaty and shall be recognised by COMESA.

³⁵⁰ The Declaration was entitled “Towards a Southern African Development Community: - Declaration made by Heads of State or Governments of Southern Africa, Windhoek, August, 1992”.

³⁵¹ Treaty of the Southern African Development Community (Windhoek) August, 1992.

³⁵² SADCC was created by the so-called Front Line States (Angola, Botswana, Mozambique, Tanzania, Zambia and Zimbabwe).

³⁵³ Angola, Botswana, Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe; Kalenga, P. “Regional integration in SADC: retreating or forging ahead?” Tralac Working Paper D12WP08/2012 (September 2012) at 3.

to the SADC maximum tariff liberalisation was only attained by January 2012, when the tariff phase-down process for sensitive products was completed.³⁵⁴

However, Sandrey³⁵⁵ argues that the maximum tariff liberalisation was never attained since for Mozambique the process was only due to be completed in 2015 in the case of imports from South Africa. Also Angola and the DRC still remain outside the agreement. In addition, Malawi, Tanzania and Zimbabwe had derogations that include allowances for a 25% import duty on sugar and paper products until 2015 in order for the industries to take measures to adjust.

The existence of the FTAs in both the COMESA and the SADC presents some challenges with regards to the rules of origin. But the flipside of this can be seen as advantageous as member states have an option to choose which rules of origin they can apply to their trade transaction.

The SADC rules of origin are substantially different from those applied by the COMESA. Whilst the COMESA rules of origin are only of general conditions, the SADC rules of origin include both general conditions and specific rules for all chapters of the harmonised system (HS) classification.³⁵⁶ They therefore vary widely across product chapters, headings and subheadings.³⁵⁷

Another FTA, The Tripartite FTA between the SADC, COMESA and East African Community (EAC), has just been established on 10 June 2015.³⁵⁸ This FTA was envisaged in 2005 when a Task Force was formed in 2005 to coordinate the trade-related programmes

³⁵⁴ Southern African Development Community – Towards a common future. Available at www.sadc.int/about-sadc/integration-milestones/free-trade-area/ (accessed on 8 April 2015).

³⁵⁵ Sandrey, R. “An Analysis of the SADC Free Trade Area” Tralac Working Paper (2013) at 2.

³⁵⁶ Shayanowako, P. “Towards a COMESA, EAC and SADC Tripartite Free Trade Area” *Trade and Development Studies* Issue No. 40 (January 2011) at 14; Kalaba, M. “Exploring the COMESA-EAC-SADC Trilateral Free Trade Area: An Approach to Rules of Origin” Trade and Industrial Policy Strategies Working Paper, December 2009 at 7; Kalenga, P. “Rules of Origin and Regional Integration in Southern Africa” *Monitoring Regional Integration in Southern Africa Yearbook* vol. 5 (2005) 25 at 34.

³⁵⁷ Appendix I of Annex I of the SADC Trade Protocol.

³⁵⁸ Communiqué of the Third COMESA-EAC-SADC Tripartite Summit, adopted on 10 June 2015 at Sharm El Sheikh, Egypt.

of the three RECs and eliminate any duplication of efforts. Afterwards the RECs' Heads of State and Government met in October 2008 in Kampala, Uganda and agreed to:

- Form an enlarged FTA encompassing SADC, EAC and COMESA leading to an enlarged customs union;
- Develop a roadmap for establishing the enlarged FTA; and
- Directed the chairpersons for the three RECs to accelerate the development of joint programmes that enhance cooperation and coordination in industrial and competition policies.³⁵⁹

The Kampala Summit took far-reaching decisions, including the merger of the three RECs.³⁶⁰ During the Second COMESA-EAC-SADC Tripartite Summit that took place on 12 June 2011 in Sandton, South Africa, the three RECs agreed on the negotiating principles, processes, scope and institutional framework for negotiating the Tripartite FTA. A roadmap and timelines for establishing the FTA were also agreed upon.³⁶¹

The first (preparatory) phase of negotiations was aimed at addressing tariff liberalisation, rules of origin, customs cooperation and customs-related matters, non-tariff barriers, sanitary and phytosanitary measures, technical barriers to trade, trade remedies and dispute settlement.³⁶² During this phase, countries exchanged information, adopted the terms of reference and rules of procedure, as well as the schedule of negotiations, established a monitoring and evaluation mechanism and prepared national negotiating positions for core FTA items. Facilitating movement of business persons within the region

³⁵⁹ <http://www.comesa-eac-sadc-tripartite.org/about/background> (accessed on 10 June 2015);

Shayanowako, P. "Towards a COMESA, EAC and SADC Tripartite Free Trade Area" *Trade and Development Studies* issue no. 40 (January 2011) at 7.

³⁶⁰ "Final Communiqué of the joint COMESA-EAC-SADC Heads of State and Government Summit, Vision: Towards a Single Market, Theme: Deepening COMESA-EAC-SADC Integration, 20 October 2008, Kampala, Uganda".

³⁶¹ "Communiqué of the Second COMESA-EAC-SADC Tripartite Summit, Vision: Towards a Single Market, Theme: Deepening COMESA-EAC-SADC Integration, 12 June 2011, Sandton Convention Centre, Johannesburg, South Africa".

³⁶² *Ibid.*

was negotiated in parallel with this phase. A timeline of 36 months was set for completion of the first phase and it ran from December 2011 to November 2012.³⁶³

However, the November 2012 deadline was not met and the completion of the first phase was done in October 2014 during the Tripartite Sectoral Committee of Ministers meeting in Bujumbura, Burundi where the majority of the Tripartite Member/Partner States made ambitious tariff offers and agreed on rules of origin to be applied in the interim whilst further work continued on product specific rules of origin.³⁶⁴

The second phase, which is the last stage, focuses on negotiating trade in services and trade-related issues, including intellectual property rights, competition policy and trade development and competitiveness. This would start after the adoption of the “Declaration launching Phase II of the negotiations for the TFTA and the Roadmap”, which was done on 10 June 2015 by the 3rd Summit of the Tripartite Heads of State and Governments in Sharm El Sheikh, Egypt. The Summit also launched the COMESA-EAC-SADC Tripartite Free Trade Area (Tripartite FTA).³⁶⁵

3.3.2 Customs Union

Characteristics of a customs union ordinarily involve the following:

- the removal of trade restrictions, such as import quotas and customs tariffs, among member states of the union;
- the adoption of a common external tariffs and common customs regulations against non-member states; and
- a division of customs revenue among union members.³⁶⁶

³⁶³ “Towards a Tripartite Free Trade Area” www.comesa.int/index.php?option=com_content&view=article&id=123&Itemid=123 (accessed on 12 June 2015).

³⁶⁴ Tralac. “Largest Free Trade Area set for launch” at www.tralac.org/.../7483-largest-free-trade-area-set-for-launch.html (accessed on 12 June 2015).

³⁶⁵ Communiqué of the Third COMESA-EAC-SADC Tripartite Summit, adopted on 10 June 2015 at Sharm El Sheikh, Egypt.

³⁶⁶ Kemp, M. *et al.* “An Elementary Proposition Concerning the Formation of Customs Unions” *Journal of International Economics* vol. 6 (1976) 95; Viner, J. *The Customs Union Issue* (2014) at 4.

As such a customs union may be defined as a merger of two or more customs territories into a single customs territory, in which customs duties and other measures that restrict trade are eliminated for substantially all trade between the merged territories.³⁶⁷ Those territories, in turn, apply the same duties and measures in their trade with third parties, that is, territories not included in the customs union.

A customs union allows for free movements of goods – by removing tariff barriers – but it does not allow free movement for factors of production such as capital, labour, technology, etc.³⁶⁸ The WTO principles of most-favoured nation (MFN) and national treatment would thus not apply because a customs union creates a common trade barrier for members in regard to third-party states.³⁶⁹ Sometimes, not necessarily all the time, signatory nations also share a common currency unit.

A customs union provides three advantages to members of the union:

- First, custom unions promote trade among members by the elimination or severe reduction of tariffs. The reduction makes exporting more profitable and easier to accomplish because it makes the cost of the goods more competitive with domestic products.
- Second, it provides protection for the domestic industries of members conducting business in protected trade area from non-members. Protection is available because all members create a common trade policy, including such matters as quotas and tariffs, which protect member industries from outsiders.
- Third and finally, the members agree to revenue sharing regarding funds generated from common tariffs imposed upon outsiders. This may provide additional income

³⁶⁷ Johnson, H.G. “The Economic Theory of Customs Union” in Jovanović, M.N *et al.* *International Economic Integration: Theory and measurement* (1998) at 198; Balassa, B. *The Theory of Economic Integration* (2013) at 21; “About Comesa” at http://about.comesa.int/index.php?option=com_content&view=article&id=75&Itemid=106 (accessed on 23 April 2015).

³⁶⁸ Mikić, M. “Preferential trading agreements: adding spices and noodles to a spaghetti bowl!” *Cahiers De Commerce International No 3* (2002) 1 at 8.

³⁶⁹ Centre for Economic Policy Research, London. “Trade and Investment Competence Review - A study for the Department for Business Innovation and Skills” November 2013 at 14 – 17.

to a country that might not otherwise generate such income because of low trade activity.³⁷⁰

A customs union is, however, not without some disadvantages for its members. Some of these disadvantages include the following:

- Member countries give up some degree of sovereignty (the power to control their own actions) upon entering a customs union. For example, members have to give up some control over fiscal policy - spending and taxing - such as unilateral decisions on tariffs, duties and sales taxes.
- Secondly, while custom unions can protect domestic industries, they will not always protect domestic member industries, because their member neighbours can compete against them uninhibited by normal trade barriers such as tariffs.
- Finally, the “big kids” on the block get more out of the deal. Larger member countries often take advantage of economies of scale - cost efficiencies due to the fact that costs per unit will decline as volume of production increases - that give them an advantage. Smaller member countries may get access to cheaper imports from members, but they also risk their own industries eroding because they cannot compete with the larger members.³⁷¹

So before a country joins a customs union its political leadership must compare the advantages with disadvantages of a customs union in deciding whether the idea is worth pursuing or not.

3.3.2.1 SACU

The classic example of a customs union in Southern Africa is the Southern African Customs Union (SACU). The SACU provides for duty-free movements of goods and services, and a common external tariff (CET) against the rest of the world. In recent years,

³⁷⁰ “Customs Union: Definition, Theory & Quiz” at education-portal.com/.../customs-union-definition-theory-quiz.html (accessed on 23 April 2015).

³⁷¹ *Ibid.*

the SACU tariffs against the rest of the world have been progressively reduced, partly in response to membership of the World Trade Organisation (WTO).³⁷²

The SACU Agreement came into force on 1 March 1970 between South Africa, Botswana, Lesotho and Swaziland. This was in fact a re-negotiation of a 1910 Customs Union between the then Union of South Africa and the High Commission Territories of Bechuanaland, Basutoland and Swaziland,³⁷³ making it the oldest customs union in the world. The re-negotiation was due to the Territories having achieved independence, and thus under new governments. Namibia became a member of the SACU in 1990 after gaining independence from South Africa. This was in pursuance of Article 23 of the SACU Agreement³⁷⁴ which provided that any state may, on application, be admitted as a contracting party by unanimous decision of the current contracting parties.

The SACU embodies the essential characteristics of a customs union as outlined above. It abolishes quantitative restrictions and duties on the importation (from within the common customs area) of goods grown, produced or manufactured in the common customs area or imported from outside the area, that is, free movement of domestic products. The abolition of transport rate discrimination and discrimination in respect of tariffs for the conveyance of goods by public road and rail is also provided for. There is also the removal of discrimination in respect of freedom of transit, and a common external customs tariff exists, as does a formula for the division of the common customs revenue.³⁷⁵

The SACU is designed to ensure the continued economic development of the customs union area as a whole, to encourage the development of the less advanced members of the customs union and the diversification of their economies and afford to all parties equitable

³⁷² Edwards, L *et al.* "SACU Tariff Policies: Where Should They Go From Here?" Center for International Development (CID) Working Paper No. 169, Harvard University, May 2008 at 4.

³⁷³ "An Overview of SACU" at www.tralac.org/resources/by-region/sacu.html (accessed on 23 April 2015); Gibb, R. "The New Southern African Customs Union Agreement: Dependence with Democracy" *Journal of Southern African Studies* vol. 32 no. 3 (2006) 583.

³⁷⁴ This was the situation as provided for under the 1969 Agreement which is now obsolete. It was replaced by the 2002 Agreement (Final Agreement). The admission of new members is dealt with in Article 6 of SACU Final Act.

³⁷⁵ These are provided in the SACU Final Agreement, Articles 18, 19, 20, 23, 24 and 32.

benefits arising from trade among themselves and with other countries.³⁷⁶ In pursuance of these ideals, Botswana, Lesotho, Namibia and Swaziland (BLNS) had the right, subject to prior consultation, to levy additional duties on goods imported into their areas to enable new industries to face competition from other producers or manufacturers in the common customs area.³⁷⁷ However, the SACU Final Agreement tends to treat members equally by applying identical rebates, refunds, etc.³⁷⁸

Customs duties on foreign goods that compete with goods from any industry specified by any of the BLNS states as being of major importance to their economies, may not without consent, be cancelled or decreased for a specified period. South Africa, which determines the common customs tariff, had to sympathetically consider proposals by the BLNS states to increase the customs duty on such foreign goods or to decrease customs duty on materials used in the production or manufacturing process of such goods in order to promote these industries.³⁷⁹

The financial benefits in the SACU Agreement are commonly regarded as constituting the most important advantage for the BLNS states of continued membership of the SACU, as they compensate them for the detrimental effects of customs union membership, such as

³⁷⁶ The Preamble to the 1969 Agreement. This was modified in the Preamble of the Final Agreement to align SACU with the current developments in international trade relations.

³⁷⁷ Edwards, L *et al.* "SACU Tariff Policies: Where Should They Go From Here?" Center for International Development (CID) Working Paper No. 169, Harvard University, May 2008 at 5.

³⁷⁸ Article 21(2) of the SACU Final Act. It provides:

"1. The Ministers responsible for Finance in all Member states shall meet and agree on the rates of specific excise and ad valorem excise duties and specific customs and ad valorem customs duties to be applied to goods grown, produced or manufactured in or imported into the Common Customs Area.

2. Member states shall apply identical rebates, refunds or drawbacks of specific excise and ad valorem excise duties and of specific customs and ad valorem customs duties on imported goods in respect of such goods. Such rebates, refunds or drawbacks of specific excise and ad valorem excise duties and specific customs and ad valorem customs duties shall be determined by the Ministers responsible for Finance in the Member states through consultation."

³⁷⁹ Grynberg, R *et al.* "SACU Revenue Sharing Formula: The History of an Equation" South African Foreign Policy Initiative Working Paper, 2010 at 23; Edwards, L *et al.* "SACU Tariff Policies: Where Should They Go From Here?" Center for International Development (CID) Working Paper No. 169, Harvard University, May 2008 at 6; Alden, C *et al.* "South Africa's Economic Relations with Africa: Hegemony and Its Discontents" *The Journal of Modern African Studies* vol. 43 no. 3 (September 2005) 367 at 371.

industrial polarisation, price-raising as a result of protective tariffs, and loss of tariff revenues.³⁸⁰

The SACU is administered by the *Council of Ministers, Customs Union Commission, the Secretariat, Tariff Board, ad hoc Tribunal and Technical Liaison Committees*.³⁸¹

The Council consists of one minister from each Member State and is the supreme decision-making organ of the SACU. The Customs Union Commission is responsible for the implementation of the Agreement and the decision of the Council. It also manages the Common Revenue Pool into which all revenues collected are paid. The Secretariat is responsible for the day-to-day administration of the SACU. The Tariff Board is an independent institution consisting of experts drawn from member states. Its main function is to make recommendations to the Council on any changes that the SACU must do.

There are four Technical Liaison Committees that assist and advise the Commission in its work: *Agriculture Liaison Committee*, the *Customs Technical Liaison Committee*, the *Trade and Industry Liaison Committee* and the *Communications and Transport Liaison Committee*. These committees are not supranational authorities with legislative or adjudicative functions, because the Council has the authority to determine and alter their terms of reference.³⁸²

The Tribunal shall be composed of three members and will deal with any dispute apropos the Agreement on an *ad hoc* basis. The Tribunal shall decide by majority vote and its

³⁸⁰ Gibb, R *et al.* "From Colonial Administration to Development Funding: Characterisations of SACU as a Governance Mechanism" *Journal of Southern African Studies* vol. 40 no. 4 (2014) 819 at 828; Edwards, L *et al.* "SACU Tariff Policies: Where Should They Go From Here?" Center for International Development (CID) Working Paper No. 169, Harvard University, May 2008 at 6; Flanagan, G. "Friends in high places: Benefits and costs of SACU members' economic ties with South Africa" Consultancy Africa Intelligence (CAI) Discussion Paper of 4 June 2013; Flatters, F *et al.* "Implementing the SACU Revenue Sharing Formula: Customs Revenues" (USAID, 2005) 2, available at http://pdf.usaid.gov/pdf_docs/PNADF156.pdf (accessed on 28 September 2015).

³⁸¹ Article 7 of the SACU Final Agreement.

³⁸² Article 12(2).

decision shall be final and binding. It shall also provide the Council with advisory opinion if so requested.³⁸³

In addition, the member states shall establish specialised, independent and dedicated national bodies or designate institutions which shall be entrusted with receiving requests for tariff changes and other related SACU issues. These bodies will carry out preliminary investigations and recommend any tariff changes necessary to the Tariff Board. The SACU will assist member states with the establishment of common procedures and technical capacity to ensure effective, efficient and transparent functioning of these national bodies.³⁸⁴

One disadvantage for the BLNS states, in line with the disadvantages alluded to above, is that they have surrendered their sovereign capacity to influence their domestic trade practices by determining customs tariffs. This surrender has been, not to a supranational authority as is usual in a customs union, but to South Africa, the dominant Member State.³⁸⁵ However, the Final Agreement is geared towards correcting this by providing protection of infant industries of the BLNS countries in Article 26.³⁸⁶

The Final Agreement seeks to safeguard the interests of smaller member states, and provides for joint exercise of responsibility over decisions affecting tariff setting, revenue

³⁸³ Article 13.

³⁸⁴ Article 14.

³⁸⁵ McCarthy, C. "South African Trade and Industrial Policy in a Regional Context" in Petersson, L. *Post-Apartheid Southern Africa: Economic Challenges and Policies for the Future* (2013) at 76; McCarthy, C. "The Southern African Customs Union in Transition" *African Affairs* vol. 102 (2003) 605 at 624; Ahwireng-Obeng, F. "Partner or hegemon?: South Africa in Africa. Part one" *Journal of Contemporary African Studies* vol. 16 issue 1 (January 1998) 1.

³⁸⁶ Article 26 of Final SACU Agreement provides:

"1. The Government of Botswana, Lesotho, Namibia or Swaziland may as a temporary measure levy additional duties on goods imported into its area to enable infant industries in its area to meet competition from other producers or manufacturers in the Common Customs Area, provided that such duties are levied equally on goods grown, produced or manufactured in other parts of the Common Customs Area and like products imported from outside that area, irrespective of whether the latter goods are imported directly or from the area of another Member State and subject to payment of the customs duties applicable to such goods on importation into the Common Customs Area.

2. Infant industry means an industry which has been established in the area of a Member State for not more than eight (8) years.

3. Protection afforded to an infant industry in terms of paragraph 1 shall be for a period of eight (8) years unless otherwise determined by the Council."

pooling and overall direction of the organisation. It also provides for deeper economic integration through the development of common policies on industry, investment, agriculture and competition, as well as the harmonisation of policies on unfair trade practice.³⁸⁷

The SACU is a legal person with capacity and power to enter into contracts, acquire, own or dispose of movable or immovable property, and to sue and be sued.³⁸⁸ Its Headquarters are in Windhoek, Namibia. However, the Common Revenue Pool is in South Africa (within the South African Reserve Bank), as it has been managed by South Africa for a “transitional period of two years” from entry into force of the Agreement.³⁸⁹ All member states of the SACU are also members of the SADC.

Except for Botswana, the other member states of the SACU (Lesotho, Namibia and Swaziland) have their national currencies pegged at par to the South African currency, the Rand, through the common monetary area (CMA).³⁹⁰

Compared to the SACU, the COMESA also has its own customs union which was launched in June 2010 and allows the application of a single tariff, the common external tariff (CET) in all the COMESA member states for an interim period of three years. A programme for eliminating non-tariff barriers has been implemented through organisational structures at the national and regional level. By 2025, the COMESA expects to remove all tariff barriers.³⁹¹

The BLNS States (of SACU) have a special status within the COMESA. Because the SACU membership prevents them from granting tariff preferences, they are not obliged to

³⁸⁷ “South African Trade with Africa”

http://www.southafrica.info/doing_business/sa_trade/agreements/trade_africa.htm (accessed on 23 April 2015).

³⁸⁸ Article 4.

³⁸⁹ Article 33(4). It states that “A Member State or SACU Institution may be appointed to manage the Common Revenue Pool.”

³⁹⁰ Article 2 of the Common Monetary Area (Multilateral) Agreement.

³⁹¹ “The Status of regional integration in Africa”. Enhancing Intra-African Trade: Assessing Regional integration in Africa (ARIA IV) – United Nations Economic Commission for Africa (UNECA) Report (2010) Chapter 2 at 13.

reciprocate the preferential tariffs granted for their exports to the COMESA states. This is one problem that is likely to persist because of dual membership of the SACU and the COMESA. This is so because from a technical and legal viewpoint, a country cannot apply two different external tariffs and therefore cannot be a member of more than one customs union.

The SADC, on the other hand, missed its deadline of establishing a customs union by 2010. This was despite the Report by the Ministerial Task Team that this was at an advanced stage.³⁹² In terms of the Regional Indicative Strategic Development Plan (RISDP),³⁹³ the aim is to establish the customs union by 2010, common market by 2015 and monetary union by 2016. The SADC now seems to have abandoned these targets in favour of the Tripartite Free Trade Area with the COMESA and East African Community (EAC).³⁹⁴ Another reason might be that the SADC has come to the realisation that it may be unrealistic to introduce the customs union before the FTA is fully operational.³⁹⁵

The main challenge with the establishment of a customs union in the SADC is the overlapping membership of member states with other RECs. Almost all the SADC member states, with the exception of Angola and Mozambique, belong to existing customs unions. This overlapping membership is called the “spaghetti bowl effect”. Bhagwati coined the

³⁹² The Ministerial Task Force reported to the SADC Council of Ministers at the February/March 2012 Meeting in Luanda, Angola, outlining the strategic direction towards the SADC Customs Union, identifying, in particular the Parameters of the Future Customs Union, Benchmarks or Milestones and elements for a Model SADC Customs Union. The Ministerial Task Force on Regional Economic Integration also considered the High Level Expert Group (HLEG) report on the framework for a SADC Customs Union at their 25 November 2011 deliberations that took place in Luanda, Angola. The report of the MTF was considered by the SADC Summit in August 2012 as well as the overall approach to regional integration in SADC. The key issue for consideration is to ensure that SADC adopts and implements a developmental approach to integration to ensure that the region is able to address the critical constraints to development, which are fundamentally the supply-side constraints.

³⁹³ The RISDP is the SADC’s implementation programme – it is discussed fully in Chapter 5 of this thesis.

³⁹⁴ Grynberg, R. “SADC: Rhodes versus Nkrumah?” *Mmegi* Newspaper (online) of 27 May 2013, available at <http://www.mmegi.bw/index.php?sid=10&aid=229&dir=2013/> (accessed on 15 October 2015); Makgetlaneng, S. “The Role of South Africa in Southern African Regional Integration” *Africa Insight* vol. 41 issue 3 (2011) 80 at 85.

³⁹⁵ Chinyoka, R. “Analysis of regional integration within SACU” Stellenbosch, Tralac (2010) at 4.

term in 1995³⁹⁶ to explain how the proliferation of regional agreements makes trade procedures more complicated by increasing the number of tariffs and rules of origin.

Since its first use, the “spaghetti bowl phenomenon” has been defined in various ways. Baldwin,³⁹⁷ for example, uses the term to describe the complete global trend of regionalism. Schiff and Winters³⁹⁸ use it to explain that multiple membership may generate duty-free market access and zero-tariffs on imports with many trading partners and can hence be an appealing alternative to national policy makers as a substitute to free trade. Tavares and Tang³⁹⁹ use it to show how the complexities created by overlapping memberships risk slowing down trade liberalisation within the integration area and hampering the effect on integration.

The establishment of a SADC Customs Union, if it were still to be pursued, would have to be carefully considered as the implications for the Customs Union are that the SADC member states may then have to choose which customs union they want to belong to between the COMESA Customs Union and the SADC Customs Union. This is so because, as stated above, technically, a member state cannot belong to more than one customs union because of the common external tariff (CET).⁴⁰⁰ This will also have implications for the SACU: it will have to stop existing by either absorption into the SADC Customs Union or by dissolution.

Another challenge is that if the SACU were to widen to include more SADC members like Mozambique, it would necessarily have to include them in the distribution of revenues from the SACU Revenue Pool, something that the BLNS states seem not to be in favour

³⁹⁶ Bhagwati, J. “U.S. Trade Policy: The Infatuation with Free Trade Agreements” in Bhagwati, J *et al.* *The Dangerous Drift to Preferential Trade Agreements* (1995); Bhagwati, J *et al.* “Trading preferentially: Theory and Policy” *Economic Journal* vol. 108 no. 449 (1998) 1128.

³⁹⁷ Baldwin, R. “Multilateralising Regionalism: Spaghetti Bowls as Building Blocs on the Path to Global Free Trade” *World Economy* vol. 29 issue 11 (2006) 1.

³⁹⁸ Schiff, M *et al.* *Regional Integration and Development* (2003) at 75.

³⁹⁹ Tavares, R *et al.* “Regional economic integration in Africa: impediments to progress?” *South African Journal of International Affairs* vol. 18 no2 (2011) 217.

⁴⁰⁰ “Reply by Minister of International Relations and Cooperation” - published in Question Paper NO 7-2012 of 22 August 2012 (South African Parliament).

of. This is so because, though the SACU may be able to fudge the common external tariff, it can't fudge the distribution of the revenues. There can only be one formula.⁴⁰¹

However, the SADC Secretariat undertook two preliminary studies to prepare for negotiations for the SADC Customs Union. The first related to the customs union model, while the second concerned the compatibility of trade policies. From the resulting consultations and discussions, the SADC Council of Ministers approved the establishment of technical working groups to begin to make progress on customs union issues such as a common external tariff; revenue collection; a distribution and sharing mechanism (including the development fund); legal and institutional arrangements; and coordinating industrial, agricultural, infrastructure, competition and other sectoral policies.⁴⁰²

The intended SADC Customs Union is not expected to create irresolvable complications within the SACU as all member states of the SACU are also members of the SADC i.e. the SACU is a "sub-regional association" of the SADC. However, there are expected complications with regard to the COMESA in view of the fact that some SADC member states also belong to the COMESA, which launched its own customs union in June 2010.

It is an accepted argument that multiple memberships are a hindrance to regional integration since, among other things, they introduce duplication of effort. So the SADC and COMESA will have similar problem, given their convergence to both sectoral cooperation and trade integration in Southern Africa.⁴⁰³

Member states of these RECs will thus face enormous tests when the two customs unions are fully operational. As alluded to above technically, given the requirement for a common

⁴⁰¹ Grynberg, R. "SADC: Rhodes versus Nkrumah?" *Mmegi* (online) of 27 May 2013. Available at <http://www.mmegi.bw/index.php?sid=10&aid=229&dir=2013/> (accessed on 15 October 2015).

⁴⁰² "The Status of regional integration in Africa". Enhancing Intra-African Trade: Assessing Regional integration in Africa (ARIA IV) – UNECA Report (2010) Chapter 2 at 14 - 15.

⁴⁰³ Jovanović, M. *The Economics of International Integration* (2015) at 570; Geda, A *et al.* "Regional Economic Integration in Africa: A Review of Problems and Prospects with a Case Study of COMESA" *Journal of African Economics* vol. 17 no. 3 (2008) 357 at 360; Sakyi, D *et al.* "Regionalism and Economic Integration in Africa: A Conceptual and Theoretical Perspective", The African Capacity Building Foundation Occasional Paper 22 of 2014 at 15.

external tariff (CET), a country cannot belong to more than one customs union. The implication, therefore, is that the SADC member states would have to choose which customs union they want to belong to between the COMESA Customs Union and SADC Customs Union. However, of utmost importance is to ascertain whether or not this situation is contrary to the WTO rules.⁴⁰⁴

These challenges seem to be the main reason that persuaded the SADC leadership to lean towards the creation of the Tripartite Free Trade Area with the COMESA and the EAC. Also the BLNS states seem to be against the SADC customs union because that would mean they lose the revenue that they currently get in terms of the revenue-sharing formula in the SACU. If the SADC custom union comes to fruition, there would be one external tariff and the revenue would be shared with all member states.⁴⁰⁵

3.3.3 Common Market

A common market provides not only for the free movement of goods across national boundaries (as in an FTA and customs union), but also allows a free flow of other production aspects like labour, services and capital.⁴⁰⁶ This means physical (borders), technical (standards) and fiscal (taxes) barriers among the member states are removed to the maximum extent possible. It also institutionalises a system that prevents distortion through competition and strives for approximation of laws. Like a customs union, a common market requires all imports entering such an area to meet the requirements at their initial point of entry. A common market encompasses both the customs union and free trade area.⁴⁰⁷

⁴⁰⁴ “SADC Think Tank Conference on Regional Integration” Conference Report and Policy Papers, 10 August 2012, Maputo, Mozambique at 16.

⁴⁰⁵ Professor Roman Grynberg’s article titled “Customs Union inhibits development”, published in the *Mail and Guardian* Newspaper of 20 March 2015.

⁴⁰⁶ Wooton, I. “Towards a Common Market: Factor Mobility in a Customs Union” *Canadian Journal of Economics / Revue canadienne d’Economie* vol. 21 no. 3 (August 1988) 525 at 526; Baldwin, R.E *et al. Handbook of International Economics* (1995) at 1598.

⁴⁰⁷ Foster, N. *EU Law Directions* (2013) – Chapter 10; Sakyi, D *et al.* “Regionalism and Economic Integration in Africa: A Conceptual and Theoretical Perspective”, the African Capacity Building Foundation Occasional Paper 22 of 2014 at 3; Fiorentino, R *et al. The Changing Landscape of Regional Trade Agreements* (2005) at 16.

The advantages of a common market are in the main the following:

- With full freedom of movement for all the factors of production between the member countries, the factors of production become more efficiently allocated, further increasing productivity.
- Consumers have lower prices, more choices, and opportunities for work throughout the common market.
- Businesses have more consumers and are able to exploit economies of scale.
- Competitive environment brings cheaper products, more efficient providers of products and increased choice of products to consumers.
- Efficient firms can benefit from economies of scale, increased competitiveness and lower costs, as well as expect profitability to be a result.
- The common regulatory regime and frameworks ensure that best practice within the regional framework is not only in place, but adhered to.
- By being in common market and practising common policies and regulations, countries in the trading bloc become their “brothers’ keepers” and therefore they create a system of surveillance upon one another based on “best endeavours” and, at times, backed by legal systems.⁴⁰⁸

The disadvantages include the following:

- In reality worker mobility does not happen as hoped and thus render the common market a misnomer.
- Many businesses still see or experience barriers.
- Enhanced competition leads to removal of less efficient forms and industries, and therefore unemployment.

⁴⁰⁸ “Benefits of a Common Market” at www.eac.int/commonmarket/.../74-what-are-the-benefits-of-a-common-market.html (accessed on 19 June 2015); Kritzinger-van Niekerk, L. “Regional Integration: Concepts, Advantages, Disadvantages and Lessons of Experience” Paper for the World Bank, May 2005, at 8; European Bank for Reconstruction and Development. Integration across Borders: Transition Report 2012 at 64.

- Monopolies may be formed – these are an example of market failure.⁴⁰⁹

The classic example of a common market in Southern Africa is still the COMESA. Of the twelve Technical Committees of the COMESA there are the Committee on Finance and Monetary Affairs; Committee on Labour, Human Resources and Social and Cultural Affairs; Committee on Administrative and Budgetary Matters; Committee on Trade and Customs; and Committee on Transport and Communications.⁴¹⁰

Each Technical Committee shall:

- (a) be responsible for the preparation of a comprehensive implementation programme and a time-table prioritising the programmes with respect to its sector;
- (b) monitor and keep under constant review the implementation of co-operation programmes with respect to its sector; and
- (c) except for the Committee on Finance and Monetary Affairs, which submits its report and recommendations to the Committee of Governors of Central Banks, submit from time to time reports and recommendations to the Intergovernmental Committee, either on its own initiative or upon the request of the Council, concerning the implementation of the provisions of the Treaty.⁴¹¹

⁴⁰⁹ “Advantages and Disadvantages of a single market” at <http://www.revisionworld.com/a2-level-level-revision/economics/working-economist/case-study-european-union> (accessed on 19 June 2015); Wehrich, H. “Analyzing the competitive advantages and disadvantages of Germany with the TOWS Matrix - an alternative to Porter’s Model” *European Business Review* vol. 99 issue 1 (1999) 9 at 13.

⁴¹⁰ Article 15(1) of the COMESA Treaty provides:

“The Technical Committees of the Common Market shall be the following:

- (a) the Committee on Administrative and Budgetary Matters;
- (b) the Committee on Agriculture;
- (c) the Committee on Comprehensive Information Systems;
- (d) the Committee on Energy;
- (e) the Committee on Finance and Monetary Affairs;
- (f) the Committee on Industry;
- (g) the Committee on Labour, Human Resources and Social and Cultural Affairs;
- (h) the Committee on Legal Affairs;
- (i) the Committee on Natural Resources and Environment;
- (j) the Committee on Tourism and Wildlife;
- (k) the Committee on Trade and Customs; and
- (l) the Committee on Transport and Communications.”

⁴¹¹ Article 16 of the COMESA Treaty.

Various articles of the COMESA Treaty lay foundation for meeting or complying with the requirements of a common market:

Article 55⁴¹² of the COMESA Treaty deals with the requirement of preventing distortion through competition. Through Article 72 the member states also undertake to co-operate in monetary and financial matters in accordance with the monetary harmonisation programme in order to establish monetary stability within the common market, aimed at facilitating economic integration efforts and the attainment of sustainable economic development of the common market. This they would do by taking measures that would facilitate trade and capital movement within the common market.⁴¹³

In Article 81 the COMESA Treaty provides:

“The Member states shall, permit the free movement of capital within the Common Market and integrate their financial structures. In this regard, the Member states shall:

⁴¹² Article 55 provides:

1. The Member states agree that any practice which negates the objective of free and liberalised trade shall be prohibited. To this end, the Member states agree to prohibit any agreement between undertakings or concerted practice which has as its objective or effect the prevention, restriction or distortion of competition within the Common Market.
2. The Council may declare the provisions of paragraph 1 of this Article inapplicable in the case of:
 - (a) any agreement or category thereof between undertakings;
 - (b) any decision by association of undertakings;
 - (c) any concerted practice thereof;

which improves production or distribution of goods or promotes technical or economic progress and has the effect of enabling consumers a fair share of the benefits:

Provided that the agreement, decision or practice does not impose on the undertaking restrictions inconsistent with the attainment of the objectives of this Treaty or has the effect of eliminating competition.

3. The Council shall make regulations to regulate competition within the Member states.

⁴¹³ Article 72(b).

- (a) ensure the unimpeded flow of capital within the Common Market through the removal of controls on the transfer of capital among the Member states in accordance with a timetable to be determined by the Council;
- (b) ensure that the citizens of and persons resident in the Member states are allowed to acquire stocks, shares and other securities or to invest in enterprises in the territories of the other Member states; and
- (c) encourage cross border trade in government securities such as treasury bills, development and loan stocks within the Common Market.”

Article 164 states:

1. The Member states agree to adopt, individually, at bilateral or regional levels the necessary measures in order to achieve progressively the free movement of persons, labour and services and to ensure the enjoyment of the right of establishment and residence by their citizens within the Common Market.
2. The Member states agree to conclude a Protocol on the Free Movement of Persons, Labour, Services, Right of Establishment and Right of residence.
3. The Member states agree that the Protocol on the Gradual Relaxation and Eventual Elimination of Visa requirements within the PTA adopted under the PTA Treaty shall remain in force until such time that a Protocol on the Free Movement of Persons, Labour, Service, Right of Establishment and Residence enters into force.

Articles 81 and 164 clearly show that the COMESA also meets the requirement of free movement of labour and services – a characteristic of a common market. Read with Article 55, one can safely conclude that the COMESA meets all the requirements of a Common Market as per its Treaty. However, the proof of these lies in the implementation of the particular articles of the Treaty.

To meet the requirement of free flow of other means of production, the member states adopted the *COMESA Protocol on the Free Movement of Persons, Labour, Services, and Rights of Establishment and Residence* in 2001, but this was ratified only by Burundi. In 2012 the COMESA began consultations with member states towards implementation of this Protocol.⁴¹⁴ On the other hand, the *COMESA Protocol on the Gradual Relaxation and Eventual Elimination of Visas* was adopted in 1984 and ratified by all member states, and entered into force in phases through workshops, meetings, direct contact with member states and using mass media.⁴¹⁵

In October and November 2013 the COMESA Secretariat carried out consultative visits to the eight select member states of Djibouti, Uganda, Rwanda, Kenya, Seychelles, Comoros, Swaziland and Malawi. From its findings, the Secretariat observed that the level of awareness on the COMESA legal instruments has not been effectively cascaded to the general public. However, the member states have now undertaken to set up structures aimed at implementing the COMESA legal instruments.⁴¹⁶

The SADC Common Market that was targeted to be achieved in 2015, in terms of the Regional Indicative Strategic Development Plan (RISDP) timelines or targets, seems not to be achievable, at least not in the near future. This is mainly due to the immaterialisation of the SADC Customs Union, which is the preceding step for the common market.⁴¹⁷ Also the focus, as alluded to above, has shifted to the COMESA-EAC-SADC Tripartite FTA.

In 2009 the Chirundu One Stop Border Post (OSBP) at the Zambia/Zimbabwe Border, the first of its kind in Africa, was launched under the auspices of the COMESA-EAC-SADC Tripartite Arrangement within the broader programme of the North-South Corridor Initiative. It is aimed at addressing the challenge of duplication of processes (customs,

⁴¹⁴ “Consultations Underway on Free Movement of Persons” at www.comesa.int/index.php?...id...free-movement (accessed on 15 June 2015).

⁴¹⁵ Oucho, J.O. “Cross-border migration and regional initiatives in managing migration in Southern Africa” in Oucho, J.O *et al. Migration in South and Southern Africa: Dynamics and Determinants* (2006) at 66.

⁴¹⁶ “Fresh commitment towards free movement of persons in the region” at www.comesa.int/index.php?...id...free-movement (accessed on 15 June 2015).

⁴¹⁷ The RISDP states that “negotiations on establishment of SADC Common Market should commence soon after establishing a customs union.” (RISDP, at 66).

immigration, health, agriculture, security, etc.) on both sides of the border by merging entry/exit processes, and potentially cutting down costs and delays by 50%. This is to be replicated in other border posts on the North-South Corridor and the rest of the corridors in the COMESA, EAC and SADC.⁴¹⁸

However, this arrangement is not without challenges. One of the most significant challenges currently facing operations at Chirundu is the lack of information and communications technology (ICT) connectivity between the Zambian and Zimbabwean sides of the border. This has resulted in certain clearance procedures having to be duplicated as the Zimbabwean Revenue Authority officers on the Zambian side of the border are unable to connect to the Automated System for Customs Data (ASYCUDA) for computerised customs administration used on the Zimbabwean side. To overcome this problem, procedures are being completed manually on the Zambian side and then inputted on the computer system on the Zimbabwean side. Zambian border agents based on the Zimbabwean side also face a similar problem in not being able to access the electronic systems used in Zambia. The lack of connectivity between the two sides of the border has also prevented the designated “fast track” lane from becoming fully functional.⁴¹⁹

3.3.4 Economic Community or Union

The words “community” and “unity” presuppose group cohesiveness and this applies similarly to the group of states that are part of the economic community or union as a form of regional integration. For this group of states to be regarded as “economic community or union” it must have reached a stage where there is free movement of products and factors of production between the countries, and some degree of harmonisation of national economic policies to remove discrimination that was due to disparities in these policies.⁴²⁰

⁴¹⁸ “Transformation-Ready: The strategic application of information and communication technologies in Africa”. Regional Trade and Integration Sector Study Annexes - Report for the African Development Bank, the World Bank and the African Union, October 2011 at 60.

⁴¹⁹ Woolfrey, S *et al.* “Challenges at Chirundu One-Stop Border Post” at www.tralac.org/.../5338-challenges-at-chirundu-one-stop-border-post.html (accessed on 15 June 2015).

⁴²⁰ Balassa, B. *The Theory of Economic Integration* (1961) at 2; Pinder, J. “Positive integration and negative integration: some problems of economic union in the EEC” *The World Today* vol. 24 no. 3 (March 1968) 88 at 88 – 89.

An economic community or union is essentially a type of trade bloc which is composed of a common market with a customs union. It adds to the common market harmonised fiscal, monetary and labour market policies. Because labour market policies affect migration patterns and production costs, these will have to be streamlined among members and the process involves harmonisation of basic national economic policies.⁴²¹

To achieve such a union, it is necessary to form supranational institutions that legislate the rules of commerce for the entire area, leaving the administration to national bodies, but with recourse to supranational administrative tribunals to ensure uniform application of these rules. In an economic union, supranational commercial law replaces national law.⁴²²

In addition to the advantages that accrue in the common market the following are potential benefits associated with the economic union:

- Harmonised and improved rules and regulations that facilitate foreign direct investment in the region.
- Contribute to development of financial markets, cross-border issuances of securities, etc.
- Open borders allow easier travel.
- Louder international voice for member states as a bloc.⁴²³

The disadvantages include the following:

- Inequalities of member states in the community mean the stronger members benefit more than the weaker members.
- The economic demands of the membership are strenuous for weaker or not-so-wealthy members.

⁴²¹ Mirus, R *et al.* “Economic Integration: Free Trade Areas vs. Customs Unions” Paper by Western Centre for Economic Research, University of Alberta, Edmonton, August 2011 at 4; Dinan, D. *Ever Closer Union: An Introduction to European Integration* (2005) at 97; El-Agraa, A. *The European Union: Economics and Policies* (2011) at 1.

⁴²² Mirus, R *et al.* “Economic Integration: Free Trade Areas vs. Customs Unions” Paper by Western Centre for Economic Research, University of Alberta, Edmonton, August 2011 at 4.

⁴²³ “How the E.U works” available at: http://europa.eu/about-eu/index_en.htm (accessed on 16 June 2015).

- Net migration into wealthier or more developed member states.
- Different political opinions, which may cause red tape and disagreements.⁴²⁴

Both the COMESA and SADC have the characteristics of an economic community. In the Preamble to its Treaty, the COMESA states that eventually it will become an economic community. This means that COMESA is not yet an economic community, though its aim is to become one. This is more evident in Article 177 of the COMESA Treaty, which provides for gradual establishment of an Economic Community for Eastern and Southern Africa.⁴²⁵ The proposed date for this is 2025.⁴²⁶

The SADC on the other hand is already a “community”, albeit a development community, and aims to achieve a monetary union with a single currency by 2018.⁴²⁷ The objectives of the SADC also point to this direction, some of which are:

- (a) to promote sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration;⁴²⁸
- (b) to promote self-sustaining development on the basis of collective self-reliance, and the interdependence of member states;⁴²⁹ and

⁴²⁴ Perry, M *et al. Sources of European History: Since 1900* (2010) at 459; “Disadvantages of EU Membership at www.economicshelp.org/europe/disadvantages-eu/ (accessed on 16 June 2015).

⁴²⁵ Article 177 of COMESA Treaty provides:

“1. At a date to be determined by the Authority after the entry into force of this Treaty, the Council shall propose to the Authority for its approval, measures which in addition to the provisions of this Treaty would be required to be implemented in order to assist in the eventual development and establishment of an Economic Community for Eastern and Southern Africa.

2. The functioning and development of the Common Market shall be reviewed in accordance with the provisions of this Treaty in order to establish an Economic Community for Eastern and Southern Africa.

3. The transition from the Common Market into an Economic Community for Eastern and Southern Africa shall be conditional upon a finding that the objectives of the Common Market have been substantially attained and that the obligations upon the Member states have been fulfilled.”

⁴²⁶ This is in terms of a four-stage programme towards the establishment of a Monetary Union by the year 2025, as approved by the Authority of Heads of State and Government in 1992; “COMESA Strategy” at about.comesa.int/index.php?option=com_content&view... (Accessed on 16 June 2015).

⁴²⁷ This is in terms of the Regional Indicative Strategy Development Plan (RISDP) timelines (RISDP at 67).

⁴²⁸ Article 5(1)(a) of SADC Treaty.

⁴²⁹ Article 5(1)(d) of the SADC Treaty.

- (c) to achieve complementarity between national and regional strategies and programmes.⁴³⁰

The undertakings by the SADC to achieve these objectives point clearly to an economic community. These include: “SADC shall:

- (a) harmonise political and socio-economic policies and plans of Member states;
- (b) encourage the people of the region and their institutions to take initiatives to develop economic, social and cultural ties across the region, and to participate fully in the implementation of the programmes and projects of SADC;
- (c) create appropriate institutions and mechanisms for the mobilisation of requisite resources for the implementation of programmes and operations of SADC and its institutions;
- (d) improve economic management and performance through regional co-operation;
- (e) promote the coordination and harmonisation of the international relations of Member states; and
- (f) secure international understanding, co-operation and support, and mobilise the inflow of public and private resources into the Region.”⁴³¹

Article 22 of the SADC Treaty provides:

“(1). Member states shall conclude such Protocols as may be necessary in each area of co-operation, which shall spell out the objectives and scope of, and institutional mechanisms for, co-operation and integration.”

One such protocol is the *SADC Protocol on Trade*, which provides for harmonisation of laws – a phenomenon that is lacking in the SADC Treaty. These are contained in Annex II, Articles 2 – 5. Article 3 of this Annex deals with “Harmonisation of Customs Tariff Nomenclatures and Statistical Nomenclatures”, Article 4 deals with “Harmonisation of

⁴³⁰ Article 5(1)(e) of the SADC Treaty.

⁴³¹ Article 5(2)(a), (b), (c), (d), (g), (h) and (i).

Valuation Laws and Practice” and Article 5 deals with “Simplification and Harmonisation of Customs Procedures”.⁴³²

Another protocol dealing with fiscal and monetary issues in the SADC is the *Finance and Investment Protocol*, concluded and approved in 2006. It seeks to foster harmonisation of finance and investment policies of member states in order to make them consistent with the objectives of the SADC and ensure that any changes to the financial and investment policies in one member State do not necessitate undesirable adjustments in other member states.⁴³³ This Protocol came into operation on 16 April 2006.

The SADC has also adopted a Regional Indicative Strategic Development Plan (RISDP),⁴³⁴ which is a strategic plan/document that “outlines the necessary conditions that should be realised towards the attainment of the SADC’s regional integration and development goals”. The RISDP recommends that the SADC should establish a customs union by 2010, a common market by 2015, monetary union by 2016 and an economic union with a single currency by 2018.

The RISDP seeks, among other things, to address several key challenges related to labour market in Southern Africa by:

- Removing structural distortions in the economies of member states and combating of high-levels of unemployment and under-employment, especially among women and youth;
- Addressing gender inequalities in the labour markets and inadequate mainstreaming of gender concerns in the policy formulation and programme implementation;
- Inadequate integration of employment and labour issues in overall economic and social development;

⁴³² The details of these provisions are dealt with in Chapter 5.

⁴³³ Article 2(1).

⁴³⁴ The RISDP is also dealt with in detail in Chapter 5.

- Weak institutional and human capacity for the collection, analysis, harmonisation, utilisation and dissemination of labour market information and data;
- Lack of a policy framework for promoting social dialogue and social protection;
- Lack of a comprehensive framework to facilitate smooth movement of labour as a factor of production;
- Lack of a comprehensive regulatory mechanisms to promote the informal sector;
- The impact of HIV and AIDS on the most productive segment of the labour force; and
- Lack of positive cultural attitudes towards productivity, entrepreneurship and innovation.

The SADC has already developed appropriate policies and legal frameworks in some of these areas through the adoption of protocols. These include the protocols on Education and Training⁴³⁵, on Health⁴³⁶, on Tourism⁴³⁷, and on Mining⁴³⁸.

In addition to these the SADC has also made progress in accelerating the free movement of goods, services and capital by taking the following actions:

- Creating initiatives to coordinate customs procedures and instruments (including electronically exchanging customs data);
- Developing a single customs administrative document (SADC CD) to harmonise customs declarations in the SADC;
- Passing a law on a SADC customs model to facilitate the coordination of customs in national legislations;
- Adopting a nomenclature of common tariffs;
- Proposing and developing a regional transit framework;

⁴³⁵ It entered into force on 31 July 2000.

⁴³⁶ It entered into force on 14 August 2004.

⁴³⁷ It entered into force on 26 November 2002.

⁴³⁸ It entered into force on 10 February 2000.

- Initiating a review of rules of origin in 2007;
- Creating a software on trade facilitation: for example, the promotion of a single counter at border posts and to implement the SADC Transit Chain Bond Guarantee regulations;
- Updating non-tariff obstacles to inform, monitor and eliminate non-tariff obstacles in 2007;
- Developing a regional qualifications framework for coordinating education systems in the region to facilitate the free movement of people and manpower;⁴³⁹ and
- Adopting Regional Labour Migration Policy Framework to promote sound management of intra-regional labour migration for the benefit of both the sending and receiving countries as well as the migrant workers.⁴⁴⁰

Conclusion

Names given to most African regional groupings have tended to reflect the goal rather than the stage of integration that has actually been reached. For example, the SADC use the name “Community” whereas it has not yet reached that stage. Complicating this name-thing further is the fact that in terms of the RISDP, reaching a “community stage” is not a target for the SADC. The targets in terms of the RISDP are: a customs union by 2010, a common market by 2015, monetary union by 2016 and a single currency by 2018. One can then ask: why call SADC a “community”, and not a “union”?

In contrast to the SADC is the COMESA. It is called a “common market” even though its target is to eventually become an economic community, by 2025. Here too one can ask: will COMESA change its name to, for example, Economic Community of Eastern and Southern Africa once it reaches the “community” stage? In fact, this is what is suggested by Article 177(1) of COMESA Treaty that provides:

⁴³⁹ Kitimbo, A. “Is it time for open borders in Southern Africa? The Case for Free Labour Movement in SADC” The Brenthurst Foundation Discussion Paper 4/2014 at 6; Economic Commission for Africa. “The Status of regional integration in Africa”, Towards an African Continental Free Trade Area: Assessing Regional Integration in Africa (ARIA V) – UNECA Report (2012) Chapter 2 at 18.

⁴⁴⁰ SADC Labour Migration Policy Framework, 2013.

“At a date to be determined by the Authority after the entry into force of this Treaty, the Council shall propose to the Authority for its approval, measures which in addition to the provisions of this Treaty would be required to be implemented in order to assist in the eventual development and establishment of an Economic Community for Eastern and Southern Africa.”

Perhaps this confusion in the names of the RECs is something that is deep-rooted in the integration stages themselves. For example, the choice between a free trade agreement (FTA) and a customs union remains a matter of debate. Customs unions are supposed to be more efficient than FTAs and to foster greater market integration, but they also require more coordination and entail tighter constraints on member policies and sovereignty.⁴⁴¹

FTA negotiations react to one another, and as FTAs disadvantage non-members, every time one is signed there is pressure from non-member exporters to engage in integration.⁴⁴² Also in an FTA no duties are applied to goods from other members, but each member determines its own tariff policy in relation to goods imported from outside the area.

A customs union is only viable in a situation where member states are few – perhaps four or five – and governs trade with non-members by a common external tariff (CET), and this would lead to multiple organisations in the same region. It is as such good for members, but not necessarily good for those outside it.⁴⁴³

The economic community or union also has its fair share of disadvantages. However, these are overwhelmed by advantages, especially where the community is also a monetary union. The European Union (EU) is the leading model of this kind of integration. It has delivered half a century of peace, stability and prosperity; helped raise living standards; launched a

⁴⁴¹ Sindzingre, A. “The European Union Economic Partnership Agreements with Sub-Saharan Africa”, UNU-CRIS Working Papers W-2008/5 (2008) at 11; Schiff, M *et al.* *Regional Integration and Development* (2003) at 78.

⁴⁴² Sindzingre (above); Baldwin, R. “Big-Think Regionalism: a Critical Survey” Cambridge MA, NBER Working Paper 14056 (2008) at 1.

⁴⁴³ Facchini, G. “The customs union issue: Why do we observe so few of them?” *Journal of International Economics* vol. 90 issue 1 (2013) at 136.

single European currency; and is progressively building a single Europe-wide market in which people, goods, services and capital move among member states as freely as within one country.⁴⁴⁴

The EU has the European Regional Development Fund (ERDF), the purpose of which is to redress imbalances in development across the EU through the distribution of funds to stimulate economic development in the most deprived areas.⁴⁴⁵ The importance of the Fund was shown during the so-called “Euro financial crisis”, where several eurozone member states (Greece, Portugal, Ireland, Spain and Cyprus) were unable to repay or refinance their government debt or to bail out over-indebted banks under their national supervision. The Fund was used to bail out these countries in the form of loans, bonds, etc.⁴⁴⁶

The World Trade Organisation (WTO), although it frowns upon regional economic schemes, does allow for their existence as an exception. Its main reason for this frowning is that these arrangements do not advance the goal of global free trade. In a background briefing ahead of a *Seminar on Regional Trade Agreements* in November 2003 the WTO stated:

“Regional trade agreements can potentially hinder the objectives of a coherent and transparent multilateral trading system by discriminating against third parties, distorting trade flows and by detracting limited resources from multilateral to regional and bilateral trade negotiations.”⁴⁴⁷

This argument makes sense, especially with regard to free trade areas and customs unions because these two arrangements tend to discriminate against non-members. However,

⁴⁴⁴ Perry, M *et al.* *Sources of European History: Since 1900* (2010) at 450.

⁴⁴⁵ Gibb, R *et al.* “From Colonial Administration to Development Funding: Characterisations of SACU as a Governance Mechanism” *Journal of Southern African Studies* vol. 40 no. 4 (2014) 819 at 823.

⁴⁴⁶ Karanikolos, M *et al.* “Financial crisis, austerity, and health in Europe” *Health in Europe 7 Magazine* of 27 March 2013 at 5; Mody, A *et al.* “The Eurozone Crisis: How Banks and Sovereigns Came to be Joined at the Hip” IMF Working Paper WP/11/269, November 2011 at 16.

⁴⁴⁷ World Trade Organization. “Seminar on Regional Trade Agreements and the WTO” Report, 14 November 2003; *SOWETAN Newspaper* of Monday 16 February 2004 at 15; Dev, B.J. “Regionalism and multilateralism: conflicts and needs” *The Daily Star* (online) of 13 October 2006.

because the WTO allows for their existence it also realises the importance of cooperating with them. During the same briefing, ahead of the November 2003 Seminar the WTO stated:

“As the number of RTAs and scope expand to include complex regulatory trade provisions, trade in services and investment-based activity, the importance of improving the formal and substantive links between regional trade agreements and the multilateral trading system is becoming apparent.

Even more so as no effective multilateral surveillance mechanism is in place to address those cases where regional trade agreements may not be in line with the spirit of WTO fundamental principles. This may result in unbalances between the liberalisation efforts being pursued regionally and multilaterally and increasingly generate tensions.”⁴⁴⁸

From this statement it is clear that the WTO, despite catering for the regional integration arrangements (RIAs), is still, in principle against them. Statements like this may make cooperation between the RIAs or RECs and the WTO difficult.

Having looked into all these regional integration schemes one can therefore conclude that the type of regional arrangement scheme the WTO would favour would be the common market and economic community, as they move beyond intra-regional trade liberalisation among members. Based on this conclusion it would leave the SADC and COMESA as appropriate forms of economic communities to be followed in Southern Africa. However, the parallel existence of these organisations in Southern Africa creates a problem of overlapping membership.

All fourteen countries of the SADC are members of at least two organisations. Not only is there overlap in terms of membership, but there is also overlap regarding areas of claimed

⁴⁴⁸ World Trade Organization “Seminar on Regional Trade Agreements and the WTO” Report, 14 November 2003; *SOWETAN Newspaper*, of Monday 16 February 2004 at 15.

responsibility. Both the SADC and COMESA claim to take responsibility for enhancing integration in the areas of science, technology, industry, free movement of labour and goods, peace and security, to name a few. Given these types of overlap, the need for rationalisation of these two organisations seems clear. As it is obvious, the region's economy is extremely weak, and to have duplicative efforts towards similar goals would waste what little resources are available.

An attempt to solve this problem was made in January 1997 meeting between the COMESA and the SADC to discuss the issue of integration.⁴⁴⁹ However, despite calls for a merger, each group seems to be racing away from the other on separate courses. But even if these two do not merge, they can still co-operate in terms of Article 24 of the SADC Treaty⁴⁵⁰ and Articles 178 - 181 of the COMESA Treaty.⁴⁵¹ However, the bottom line

⁴⁴⁹ At the meeting of the COMESA Council of Ministers held in January 1997 it was agreed that COMESA and SADC should co-exist and cooperate. On 2 November 2001 there was a meeting in Gaborone, Botswana, where a joint task force looked at the harmonisation of rules of origin, customs procedures and the Economic Partnership agreements.

⁴⁵⁰ Article 24 of SADC Treaty provides: "1. Subject to the provisions of Article 6(1), Member states and SADC shall maintain good working relations and other forms of co-operation, and may enter into agreements with other . . . regional and international organisations, whose objectives are compatible with the objectives of SADC and the provisions of this Treaty.

2. Conferences and other meetings may be held between Member states and other Governments and organisations associated with the development efforts of SADC to review policies and strategies, and evaluate the performance of SADC in the implementation of its programmes and projects, identify and agree on future plans of co-operation."

⁴⁵¹ It provides:

Article 178: "1. . . the Member states shall: (a) negotiate, together with other regional economic communities, the Protocol on Relations between the African Economic Community and the Regional Economic Communities."

Article 179: "1. In the context of realising its regional integration objectives, the Common Market may enter into co-operation agreements with other regional communities.

2. The co-operation referred to in paragraph 1 of this Article shall be subject to prior approval by the Council."

Article 180: "1. Subject to the provisions of this Treaty, the Member states may be members of other regional or sub-regional organisations with other Member states or third countries for the purpose of strengthening co-operation among themselves.

2. The Secretary-General shall endeavour to co-ordinate the activities of the Common Market with those of the organisations referred to in paragraph 1 of this Article."

Article 181: "1. The Common Market shall establish such continuous and close working relations with relevant African organisations . . . and other intergovernmental and non-governmental organisations in Eastern and Southern Africa with a view to strengthening the institutional capacity of the Common Market and assisting it in the implementation of the provisions of this Treaty.

remains that there must not be an overlap of membership between the two. This will augur well with the rationalisation by AU/AEC of the COMESA as an REC for Eastern Africa Region and the SADC for Southern Africa Region.⁴⁵²

Since joining the SADC, South Africa has also voiced its support for such a rationalisation programme. To this point, South Africa has refused to join the COMESA. This has added to the already existing friction between the two RECs. Because of their continuing co-existence, questions about motives will continue to arise.

The leaders of these RECs should realise that it is not a particular trade scheme, whether the COMESA or SADC, that is a key to a successful trade bloc, but the regional trade itself. After a decade of trying to increase intra-regional trade, plus-minus five percent of trade is conducted by one state with other states in Southern Africa region, excluding South Africa.⁴⁵³ And there is no doubt that regional integration has a potential to change all this.

In the light of the above, and having compared the different integration schemes, one would lean towards the economic community or union as the model that the Southern African region has to follow. This is because economic community encompasses all other schemes of integration and is viable where the member states in the scheme are many.

2. The Common Market shall accord special importance to co-operation with United Nations systems, other international organisations and bi-lateral and multi-lateral donor agencies whose policies and programmes are compatible with the policies, programmes and activities of the Common Market.

3. The Secretary-General shall initiate and maintain dialogue with the organisations and agencies referred to in paragraph 2 of this Article and with any other organisation whose policies and programmes are compatible with those of the Common Market in order to facilitate closer co-operation with such organisations, agencies and multi-lateral and bilateral donor agencies.

4. Meetings may be held between the member states and governmental and Non-governmental organisations and bilateral donor agencies on the Common Market policies and strategies including the implementation thereof, with a view to enhancing the participation of these organisations and agencies in the implementation and development of the Common Market.”

⁴⁵² This, together with discussion of AU and AEC in general, is discussed in detail in Chapter 4.

⁴⁵³ Yabu, B. “Intra-SADC Trade in Goods and Services (Including Assessing the Condition for the Dynamism of Intra-regional Trade)” Report for the Bank of Tanzania, August 2014 at 26; Flatters, F. Technical Report: “SADC Trade Audit: Rules of Origin” - USAID/Southern Africa Gaborone, Botswana May 2012.

As such the SADC seems poised to emerge as the leading REC in the Southern African region. All countries in the SADC are members of the WTO, and South Africa, as the most significant trading nation in the region and on the African continent, plays an increasing role in the SADC.⁴⁵⁴ This role would probably continue even in the newly-established COMESA-EAC-SADC Free Trade Area.

⁴⁵⁴ Saurombe, A. "The role of South Africa in SADC regional integration: the making or braking of the organization" *Journal of international Commercial Law and Technology* vol. 5 issue 3 (2010) 124 at 128.

CHAPTER 4

THE REGIONAL INTEGRATION BODIES OF SADC, AEC AND AU IN SOUTHERN AFRICA

Introduction

As stated in chapters 2 and 3, regional integration is permitted through Article XXIV of the WTO (GATT) Agreement. Apropos the conditions set in Article XXIV the following question may be asked: are the regional arrangement schemes in Southern Africa Article XXIV-compliant? If not, what course of action should be taken (i.e. can this situation be remedied)? This is one of the questions this Chapter will seek to answer.

There has been increased debate as to the relevance and efficacy of regional integration in the efforts to attain meaningful development in Africa, particularly in the wake of the phenomenon of globalisation and the increased marginalisation of Africa in world trade.⁴⁵⁵ This Chapter will also deal with these efforts of regional integration efforts in Southern Africa, within the context of the Southern African Development Community (SADC).

Although the Southern African region has various integration bodies, such as the Common Market of Eastern and Southern Africa (COMESA), the Southern African Customs Union (SACU) and the Southern African Development Community (SADC), as touched upon in Chapter 3, this Chapter will focus on the SADC. However, the SADC, together with other regional bodies for integration in Africa, does not exist in a vacuum. There are bodies, such as the African Economic Community (AEC) and African Union (AU), which serve as the umbrella bodies within which these regional bodies fall. Both these bodies (AEC and AU)

⁴⁵⁵ Ndulo, M. "African integration schemes: a case study of the Southern African Development Community (SADC)" *African Yearbook of International Law* vol. 7 no. 7 (1999 – 2001) at 3; Schiff M. W *et al.* *Regional Integration and Development* (2003) at 1; Crawford, J. *et al.* "The Changing Landscape of Regional Trade Agreements" WTO Discussion Paper No.8, World Trade Organization, Geneva (2005).

use regional economic communities (RECs), like the SADC, as building blocks for economic integration of the whole continent.⁴⁵⁶

This implies that all the integration schemes in Africa must relate to these bodies (AEC and AU), as they also have a role to play in the ultimate aim of integrating the whole continent. Oppong⁴⁵⁷ is of the opinion that these relational issues are crucial and that Africa's economic integration processes fail because they do not pay necessary attention to these relational issues. These relational issues are not only horizontal, i.e. between AEC/AU and the RECs, but are also between the RECs themselves. And they take various forms such as laws, mechanisms, institutions, etc.

This Chapter will thus also briefly touch on the relationship between the three bodies (SADC, AEC and AU) as well as the roles of the AEC and AU in the entire scheme of integration on the continent. It starts with the SADC as it is the main focus of this Chapter and was also established before both the AEC and AU, which came into being in 1994 and 2002 respectively. The AEC is also still in formation and its development is largely contingent on the constituent RECs like the SADC.

4.1 SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC)

The Declaration⁴⁵⁸ and Treaty⁴⁵⁹ establishing the Southern African Development Community (SADC) were signed at the Summit of Heads of State or Government on 17

⁴⁵⁶ Article 3(2)(a) of the Treaty Establishing the African Economic Community (Abuja Treaty) provides: "In order to promote the attainment of the objectives of the Community as set out in paragraph I of this Article, and in accordance with the relevant provisions of this Treaty, the Community shall, by stages, ensure the strengthening of existing regional economic communities and the establishment of other communities where they do not exist."

Article 3(1) of the Constitutive Act of the African Union Provides:

"The objectives of the Union shall be to coordinate and harmonize the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union."

⁴⁵⁷ Oppong, R.F. *Legal Aspects of Economic Integration in Africa* (2011) at 5 and 12.

⁴⁵⁸ The Declaration was entitled "Towards a Southern African Development Community: - Declaration made by Heads of State or Governments of Southern Africa, Windhoek, August, 1992".

⁴⁵⁹ Treaty of the Southern African Development Community (Windhoek) August, 1992.

July 1992 in Windhoek, Namibia by the ten founding member states,⁴⁶⁰ and the SADC Treaty entered into force on 30 September 1993. The other five member states joined later, with South Africa joining in August 1994, followed by Mauritius, then the DRC, Madagascar⁴⁶¹ and Seychelles.⁴⁶² The Comoros is the latest member of the SADC after it was admitted in August 2017.⁴⁶³ The admission of any state to the membership is effected by a unanimous decision of all the SADC member states at a summit. One of the requirements for admission is that an aspiring Member State should be democratic.⁴⁶⁴

The SADC is established as an international organisation with legal personality. It has the capacity and power to enter into contracts, acquire, own or dispose of movable or immovable property, and to sue and be sued. In addition it has such legal capacity as is necessary for the proper exercise of its functions in the territory of each Member State.⁴⁶⁵ It currently consists of 16 member states: Angola, Botswana, Comoros, Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

The SADC replaced the Southern African Development Coordination Conference (SADCC), which had been in existence since 1980.⁴⁶⁶ The main aim of the SADCC was to reduce the economic dependence of the region on apartheid South Africa. With the political change looming in South Africa (which eventually happened in 1994) it was clear that this objective would soon be obsolete.

⁴⁶⁰ These were: Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Tanzania, Zambia and Zimbabwe

⁴⁶¹ Madagascar was fully admitted into SADC in August 2005 after it was given candidate membership status in August 2004. It was suspended in 2009 after President Ravalomanana was forced to resign in a military coup, but the suspension was lifted in February 2014 after the 20 December 2013 Presidential and Parliamentary elections.

⁴⁶² Seychelles pulled out in 2004 and re-joined in August 2008.

⁴⁶³ Communiqué of the 37th Ordinary Summit of the Heads of State and Government of the Southern African Development Community, Pretoria, Republic of South Africa, 18 - 20 August 2017.

⁴⁶⁴ However, the DRC was admitted into SADC despite it having not held democratic elections. It may be that member states were expecting this (democratic elections) after Laurent Kabila toppled the oppressive military regime of General Mobutu Sese Seko.

⁴⁶⁵ Article 3 of the SADC Treaty.

⁴⁶⁶ The SADCC was created by the so-called Front Line States (Angola, Botswana, Mozambique, Tanzania, Zambia and Zimbabwe); Ndlovu, J.M.L. "The AU-SADC interface on peace and security: challenges and opportunities" in van Nieuwkerk, A *et al.* *Southern African Security Review* (2013) at 59.

The coming into force of the SADC Treaty changed the name of the organisation from the Southern African Development Coordination Conference (SADCC) to the Southern African Development Community (SADC) and also its mission from that of reducing dependence on South Africa to one of creating an economic community in Southern Africa.⁴⁶⁷

The integration agenda for the SADC, as outlined in the Regional Indicative Strategic Development Plan (RISDP)⁴⁶⁸, is as follows:

- transformation to a Free Trade Area (FTA) in 2008;
- Customs Union in 2010;
- Common Market in 2015;
- Monetary Union in 2016; and
- Regional currency in 2018.

As indicated in Chapter 3, the SADC FTA has already been achieved whilst the set date of 2010 for the Customs Union was missed. However, this should be viewed in the context of the COMESA-SADC-EAC Tripartite FTA that is currently the pre-occupation of the three RECs.⁴⁶⁹

4.1.1 Structure and institutions of SADC

The SADC Treaty, as amended, establishes eight institutions: the *Summit of the Heads of State or Government*; the *Council of Ministers*; *Organ on politics, Defence and Security Co-operation*; *Sectoral and Cluster Ministerial Committees*; *Standing Committee of Officials*; the *Secretariat*; *SADC National Committees* and the *Tribunal*.⁴⁷⁰

⁴⁶⁷ Article 5 of the Treaty of the Southern African Development Community (SADC Treaty).

⁴⁶⁸ The Regional Indicative Strategic Development Plan (RISDP) is a comprehensive development and implementation framework guiding the regional integration agenda of the Southern African Development Community (SADC) over a period of fifteen years (2005-2020). It is fully discussed in Chapter 5.

⁴⁶⁹ The EAC-COMESA-SADC Tripartite Free Trade Area (Tripartite FTA) was launched on 10 June 2015, as discussed in detail in Chapter 3.

⁴⁷⁰ Article 9.

4.1.1.1 The Summit of the Heads of State or Government (the Summit)

The Summit consists of Heads of State or Government of member states. These are presidents or prime ministers, or king, in the case of Swaziland. It is the supreme policy-making body, and is responsible for overall policy direction and control of the functions of the SADC. It adopts the legal instruments for the implementation of the provisions of the SADC Treaty and its decisions are by consensus, and are binding.⁴⁷¹

This requirement of “consensus” essentially means giving the member in violation of its obligations a veto over any sanctions and this is a major flaw in the system.⁴⁷² This weakness played itself in the Zimbabwe saga⁴⁷³ that led to the de facto suspension of the SADC Tribunal.

4.1.1.2 The Council of Ministers (The Council)

The Council shall consist of one Minister from each Member State, preferably a Minister responsible for Foreign or External Affairs. It reports, and is responsible, to the Summit.⁴⁷⁴ It meets at least four times a year and its decisions are taken by

⁴⁷¹ Article 10.

⁴⁷² Erasmus, G. “Is the SADC trade regime a rules-based system?” *SADC Law Journal* vol. 1 (2011) 17 at 30; Scholtz, W. “Review of the role, functions and terms of reference of the SADC Tribunal” *SADC Law Journal* vol. 1 (2011) 197; Tino, E. “The Role of Regional Judiciaries in Eastern and Southern Africa” *Monitoring Regional Integration in Southern Africa Yearbook* (2012) 140.

⁴⁷³ In 2007 and 2008 the SADC Tribunal gave judgments against the Zimbabwean Government regarding its land policy in the *Mike Campbell* and *Gondo* cases respectively (see footnote 475 below for full citations). The Zimbabwean Government to comply with the SADC Tribunal’s rulings and the Summit was not prepared to act against Zimbabwe; instead, it decided to appoint a consultant to investigate the jurisdiction and terms of reference of the Tribunal.

⁴⁷⁴ Article 11(2) provides that the Council shall be responsible to:

- a. oversee the functioning and development of SADC;
- b. oversee the implementation of the policies of SADC and the proper execution of its programmes;
- c. advise the Summit on matters of overall policy and efficient and harmonious functioning and development of SADC;
- d. approve policies, strategies and work programmes of SADC;
- e. direct, coordinate and supervise the operations of the institutions of SADC subordinate to it;
- f. recommend, for approval to the Summit, the establishment of directorates, committees, other institutions and organs;
- g. create its own committees as necessary;

consensus. It also considers and recommends to the Summit any application for membership to the SADC.⁴⁷⁵

4.1.1.3 The Sectoral and Cluster Ministerial Committees

The Sectoral and Cluster Ministerial Committees consist of ministers from each SADC Member State. These committees are directly responsible for overseeing the activities of the core areas of integration, monitoring and controlling the implementation of the Regional Indicative Strategic Development Plan (RISDP)⁴⁷⁶ in their area of competence, as well as providing policy advice to the Council of Ministers. They replace the erstwhile Integrated Committee of Ministers (ICM),⁴⁷⁷ which consisted of one minister from each Member State.

4.1.1.4 The Organ on Politics, Defence and Security Co-operation (the Organ)

The Organ was established in terms of the amendment to the original SADC Treaty (Article 10A). It is selected by the Summit and its Chairperson and Deputy Chairperson are selected from the members of the Summit. It reports to the Summit and the Chairperson of the Summit cannot simultaneously be the chairperson of the Organ.⁴⁷⁸ There is also the Ministerial Committee of the Organ, consisting of ministers of foreign affairs; defence; public security or state security.⁴⁷⁹ This Organ

h. recommend to the Summit persons for appointment to the posts of Executive Secretary and Deputy Executive Secretary;

i. determine the Terms and Conditions of Service of the staff of the institutions of SADC;

j. develop and implement the SADC Common Agenda and strategic priorities;

k. convene conferences and other meetings as appropriate, for purposes of promoting the objectives and programmes of SADC; and

l. perform such other duties as may be assigned to it by the Summit or this Treaty.

⁴⁷⁵ Article 11(7).

⁴⁷⁶ Article 12.

⁴⁷⁷ The ICM was abolished in November 2007 after the observation that it was not able to provide the policy guidance as expected due to its wide range of representatives, thus not contributing to the SADC regional integration agenda. It, *inter alia*, oversaw the functions and development of the SADC and the implementation of the SADC policies and programs. It also advised the Summit on matters of overall policy and the development of the SADC, and approves policies, strategies and work programs of the SADC. Its decisions are also by consensus.

⁴⁷⁸ Article 10A(1).

⁴⁷⁹ Article 10A(4).

had to conclude a protocol that would outline its functions and powers,⁴⁸⁰ and as a result the “*Protocol on Politics, Defence and Security Co-operation*” was concluded, and it entered into force on 2 March 2004.

4.1.1.5 The SADC National Committee

This is another institution introduced by the amendment to the original SADC Treaty, in terms of Article 16A. This body shall be created in each Member State and shall be responsible to:

- (a) provide input at the national level in the formulation of the SADC policies, strategies and programmes of action;
- (b) co-ordinate and oversee, at the national level, implementation of the SADC programmes of action; and
- (c) create a national steering committee, sub-committees and technical committees.

Each national steering committee shall consist of the Chairperson of the SADC National Committee and the Chairpersons of sub-committees. A national steering committee is responsible for ensuring rapid implementation of programmes that would otherwise wait for a formal meeting of the SADC National Committee. Stakeholders here include government, private sector, civil society, non-governmental organisations and workers and employers’ organisations.

4.1.1.6 The Standing Committees of Officials

The Standing Committees of Officials are the real functioning units of the SADC. They consist of one permanent secretary or an official of equivalent rank from each Member State, preferably from a ministry responsible for economic planning or

⁴⁸⁰ Article 10A(5) provides:

“The structure, functions, powers and procedures of the Organ and other related matters shall be prescribed in a Protocol.”

finance. They make recommendations to the Council as its technical advisory committee. Their decisions are also by consensus.⁴⁸¹

4.1.1.7 The Secretariat

The Secretariat is the principal executive institution of the SADC and is responsible for the implementation of the decisions of both the Summit and the Council. It is also the chief administration body of the SADC, which includes financial management and promotion of the SADC.⁴⁸² It is headed by the Executive Secretary who is the accounting officer of the SADC. The Executive Secretary is also the public relations officer as well as the custodian of the property of the SADC.⁴⁸³

The Executive secretary is assisted by one or more Deputy Executive Secretaries as decided by the Summit from time to time.⁴⁸⁴ Currently there are two Deputy Executive Secretaries responsible for *Regional Integration* and for *Finance and Administration* respectively.⁴⁸⁵

4.1.1.8 The Tribunal

The Tribunal is constituted to ensure adherence to and the proper interpretation of the provisions of the SADC Treaty and to adjudicate upon disputes referred to it. Its composition, functions, powers and procedures are to be prescribed by a protocol

⁴⁸¹ Article 13 provides:

“1. The Standing Committee shall consist of one permanent secretary or an official of equivalent rank from each Member State, from the Ministry that is the SADC National Contact Point.

2. The Standing Committee shall be a technical advisory committee to the Council.

3. The Standing Committee shall process documentation from the Integrated Committee of Ministers to the Council.

4. The Standing Committee shall report and be responsible to the Council.”

⁴⁸² Article 14.

⁴⁸³ Article 15.

⁴⁸⁴ Article 14(2).

⁴⁸⁵ Report of the 2008 SADC Summit for Heads of State and Government, Sandton, South Africa, 16 - 17 August 2008 (Decision 5).

adopted by the Summit.⁴⁸⁶ It shall also give advisory opinions on such matters as the Summit or the Council may refer to it⁴⁸⁷ and its decisions are final and binding.⁴⁸⁸

This means that the purpose of the Tribunal is twofold: it is an “advisory body” to the Summit and/or Council as well as the “court” of the SADC. It will give advisory opinions *of legal nature* to the Summit or Council if and when so requested. These will be in the form of recommendations. However, when it adjudicates upon a dispute it will assume a “court status” and its decisions will be final and binding. The Protocol establishing the Tribunal entered into force on the 14 August 2001 and the Tribunal was inaugurated in November 2005.⁴⁸⁹

It should be mentioned that the *Protocol establishing the Tribunal* entered into force upon the adoption of the “Agreement Amending the Treaty of SADC” at the Blantyre Summit of August 2001, thus without going through the normal ratification process.⁴⁹⁰ This would later on prove to be a bad call as evidenced by the challenges that the Tribunal faced, leading to its suspension in 2010. The challenges were mainly with regard to non-compliance with its judgments, by the Government of Zimbabwe in particular.⁴⁹¹ The main argument by the Zimbabwean government against the Tribunal was that the Tribunal was not legally constituted because its protocol had not been ratified by two-thirds of the member states.⁴⁹²

⁴⁸⁶ Article 16.

⁴⁸⁷ Article 16(4).

⁴⁸⁸ Article 16(5).

⁴⁸⁹ Ebobrah, S *et al.* *Compendium of African sub-regional human rights documents* (2010) at 375; Rupel, O.C *et al.* “The SADC Tribunal: A legal analysis of its mandate and role in regional integration” *Monitoring Regional Integration in Southern Africa Yearbook* vol. 8 (2008) 179.

⁴⁹⁰ SADC Heads of State and Government Summit Communiqué, Blantyre, Malawi, August 2001; Peters, W. *The Quest for an African Economic Community: Regional Integration and its role in achieving African unity* (2010) at 187.

⁴⁹¹ In the two cases involving the Zimbabwean Government (*Mike Campbell (PVT) Limited and Another v Republic of Zimbabwe (2/07) [2007] SADC (T) 1 (13 December 2007)* and *Gondo and Others v Republic of Zimbabwe 05/2008 (T) (9 December 2010)* the Tribunal gave judgments against Zimbabwe, which refused to honour them arguing lack of jurisdiction by the Tribunal. This led to the suspension of the operations of the Tribunal by the SADC Heads of State or Government Extraordinary Summit of May 2011, in Windhoek, Namibia.

⁴⁹² Nathan, L. “Solidarity Triumphs Over Democracy - The Dissolution of the SADC Tribunal” *Development Dialogue* (December 2011) 124 at 127; Matyszak, D. “The Dissolution of the SADC

However, the role and functions of the Tribunal are set to change. This was after the SADC Summit⁴⁹³ resolved that a new Tribunal should be negotiated and that its mandate should be confined to interpretation of the SADC Treaty and protocols relating to disputes between member states. The new Tribunal Protocol was adopted by the 34th SADC Summit of Heads of State and Government, held in August 2014 in Victoria Falls, Zimbabwe, but is yet to come into operation.⁴⁹⁴

According to Phooko, the limitation of the Tribunal's mandate to interpretation of the SADC Treaty and protocols relating to disputes between member states would not mean that it would not have other powers. He argues that where the instrument is silent about certain powers of the Tribunal, the Tribunal may decide to resort to an implied mandate in order to adjudicate over a legal issue before it. This it can do by considering whether the exercise of such power would be necessary to achieve its object and purpose as contained in the constituent document.⁴⁹⁵ However, with the way the SADC conducts its affairs, it is difficult to see it, especially the Summit of Heads of state and Government, following or agreeing with this argument.

Tribunal" Paper for the Research and Advocacy Unit (RAU) available at <http://researchandadvocacyunit.org/system/files/The%20Dissolution%20of%20the%20SADC%20Tribunal.pdf> (accessed on 10 June 2016); Sasa, M. "Zim Pulls out of SADC Tribunal" *The Herald* Newspaper of 2 September 2009. Available at www.zimbabwesituation.com/sep3_2009.html (accessed on 10 June 2016).

⁴⁹³ Decision of the SADC Heads of State and Government Summit of 17 August 2012, Maputo, Mozambique.

⁴⁹⁴ Communiqué of The 34th Summit of SADC Heads of State and Government, Victoria Falls, Zimbabwe, 17-18 August 2014. This decision is not immune to challenges though. In South Africa the Law Society of South Africa (LSSA) has taken the Government to court insisting that it (Government) must ensure public participation prior to voting in favour of the new protocol. This is in line with the promise made in the Preamble of the SADC Treaty – "to be mindful of the need to involve the people of the region in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the rule of law." Also Sections 59 and 72 of the Constitution of South Africa oblige Parliament to facilitate public participation in its legislative processes; Manyathi-Jele, N. "SADC stakeholders form coalition to lobby for restoration of a SADC Tribunal" *De Rebus* (October 2014) 5; Erasmus, G. "The New Protocol for the SADC Tribunal: Jurisdictional Changes and Implications for SADC Community Law" Tralac Working Paper No. US15WP01/2015, January 2015 at 1.

⁴⁹⁵ Phooko, M.R. "No Longer in Suspense: Clarifying the Human Rights Jurisdiction of the SADC Tribunal" *Potchefstroomse Elektroniese Regsblad (PER)* vol. 18 no.3 (2015 533 at 534).

Notably the new Protocol on the Tribunal clearly states that the Protocol shall enter into force thirty days after the deposit of instruments of ratification by two-thirds of the member states.⁴⁹⁶ Member states seem to have learned a hard lesson from the Zimbabwe saga, hence the adherence to the international norm of ratification. This clearly shows that the SADC wants to close every loophole that may allow the Tribunal to have any powers beyond those stipulated in the Protocol.

This new Protocol is, however, subject to legal challenges. The Law Society of South Africa (LSSA) has launched the application in the High Court: North Gauteng Division on 19 March 2015 to declare the actions of the President as well as the Ministers of Justice and International Relations and Cooperation in voting for, signing and planning to ratify the SADC Summit Protocol in 2014 as it relates to the SADC Tribunal, to be unconstitutional. It argues that the jurisdictional limit of the SADC Tribunal to disputes only between member states – and no longer between individual citizens and states – in the SADC region infringes the right of South African citizens to access justice in terms of the Bill of Rights contained in the South African Constitution.⁴⁹⁷

Other law societies and Bar councils in the SADC region have or are in the process of launching similar actions in their courts to challenge the ratification of the SADC Protocol in their countries. This resolution was taken by member societies at the SADC Lawyers Association annual general meeting held at Victoria Falls immediately after the SADC Summit in 2014.⁴⁹⁸

Recent publications on the Tribunal are also critical of this limited mandate. They argue that this effectively sets up a new judicial organ with the different role from the erstwhile Tribunal, which interpreted its role as protecting the rights and the

⁴⁹⁶ Article 53 of the new Protocol on the SADC Tribunal.

⁴⁹⁷ The matter is set down for hearing in the High Court: Gauteng Division, Pretoria on 5 to 7 February 2018 and will be heard by a full Bench (Notice of Set Down dated: 7 August 2017).

⁴⁹⁸ Manyathi-Jele, N. "SADC stakeholders form coalition to lobby for restoration of a SADC Tribunal" *De Rebus* (October 2014) 5.

interests of the SADC citizens. This, they argue, would be inadequate to meet the needs of a regional organisation, like the SADC, that is committed to economic development and integration, to democracy and to peace and security.⁴⁹⁹

4.1.2 Goals and Objectives of SADC

Article 5(1) of the SADC Treaty states the objectives as:

- a. promote sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration;
- b. promote common political values, systems and other shared values which are transmitted through institutions which are democratic, legitimate and effective;
- c. consolidate, defend and maintain democracy, peace, security and stability;
- d. promote self-sustaining development on the basis of collective self-reliance, and the interdependence of member states;
- e. achieve complementarity between national and regional strategies and programmes;
- f. promote and maximise productive employment and utilisation of resources of the Region;
- g. achieve sustainable utilisation of natural resources and effective protection of the environment;

⁴⁹⁹ Phooko, M.R. "The SADC Tribunal: Its Jurisdiction, Enforcement of Its Judgments and the Sovereignty of its Member States" Thesis submitted in accordance with the requirements for the degree of Doctor of Laws at the University of South Africa, February 2016; Naldi, G.J *et al.* "The New SADC Tribunal: Or the Emasculation of an International Tribunal" *Netherlands International Law Review* vol. 62 issue 2 (July 2016) 133; Tino, E. "The Denial of Access to Justice for Individuals Within the SADC: Some Considerations on the New Protocol on the Tribunal" *Diritti Umani e Diritto Internazionale* vol. 2 (May 2017) 477.

- h. strengthen and consolidate the long standing historical, social and cultural affinities and links among the people of the Region;
- i. combat HIV/AIDS or other deadly and communicable diseases;
- j. ensure that poverty eradication is addressed in all SADC activities and programmes; and
- k. mainstream gender in the process of community building.

These objectives are interrelated and straddle the economic, social and political spectrum. Through these objectives the SADC realises that integration into the world economy will help it to achieve the economic growth needed to realise its main goal of poverty eradication.⁵⁰⁰

The achievement of the key objectives of the Community requires that member states perform certain obligations over and above the measures they intend to take in terms of the SADC Treaty. Naturally, the first obligation of member states is to adopt adequate measures for the achievement of the key objectives of the SADC and the uniform application of the Treaty. The corollary of this obligation is the duty to refrain from taking any measure likely to jeopardise the achievement of the SADC's key objectives or the implementation of the provisions of the SADC Treaty.⁵⁰¹ The question therefore is: are the member states doing enough to implement the SADC Treaty and therefore achieve these objectives?

In order to achieve these goals, there are strategies outlining what is to be done by the SADC. These are:

- a. harmonise political and socio-economic policies and plans of member states;

⁵⁰⁰ Ng'ong'ola, C. "Regional integration and trade liberalisation in the Southern African Development Community" *Journal of International Economic Law* vol. 14 (2000) 485 at 489; Kaime, T. "SADC and Human Security: fitting human rights into the trade matrix" *African Security Review* vol. 13 no. 1 (2004) 109 at 110.

⁵⁰¹ Zongwe, D. "An Introduction to the Law of the Southern African Development Community" *GlobaLex* (online) February 2011.

- b. encourage the people of the region and their institutions to take initiatives to develop economic, social and cultural ties across the region, and to participate fully in the implementation of the programmes and objectives of the SADC;
- c. create appropriate institutions and mechanisms for the mobilisation of requisite resources for the implementation of programmes and operations of the SADC and its institutions;
- d. develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services and of peoples of the region generally among member states;
- e. promote the development of human resources;
- f. promote development, transfer and mastery of technology;
- g. improve economic management and performance through regional cooperation;
- h. promote the coordination and harmonisation of international relations of member states;
- i. secure international understanding, co-operation and support, and mobilise the inflow of public and private resources into the region; and
- j. develop such other activities as member states may decide in furtherance of the objectives of this treaty.⁵⁰²

Also, to give the Treaty a practical effect, provision is made for states to negotiate a series of protocols which spell out the objectives and scope of, and institutional mechanisms for, cooperation and integration in designated areas. These protocols are not necessarily limited to members inter se. On approval by the Summit, the protocols become an integral part of the SADC Treaty.⁵⁰³

Member states undertake to adopt adequate measures to promote the achievement of the objectives of the SADC, and agree to refrain from taking any measures likely to jeopardise the substance of its principles, the achievement of its objectives and the implementation of the provisions of the SADC Treaty. They are also required to take all steps necessary to

⁵⁰² These are set out in Article 5(2) of the SADC Treaty.

⁵⁰³ Article 22 of the SADC Treaty.

ensure the uniform application of the Treaty and to accord the Treaty the force of national law.⁵⁰⁴

To achieve these undertakings, the member states would have to pass implementing legislation for positive results. However, the situation in states where national constitutions make treaties, once entered into by the state, applicable in domestic jurisdiction, might be different. In South Africa this provision is entrenched in the Constitution.⁵⁰⁵

The freedom of establishment and the freedom to supply services are an important aspect of economic integration. The right to provide services extends to citizens of member states who are established in a country other than that of the individual for whom the services are intended. The SADC Treaty recognises the importance of this right to economic integration by categorically prohibiting discrimination between nationals of member states and asking member states to take measures that abolish all restrictions on the freedom of establishment.⁵⁰⁶

The freedom of movement of capital is complementary to that of movement of goods, persons and services, but it has a special connection with the right of establishment. This is so because it would be useless if a person could only have the right to set up an economic activity in a member country, but denied the right to transfer capital to that country to enable that person to acquire the necessary premises and operational facilities required for the activity.

It can be seen, from the areas of cooperation outlined in the Treaty,⁵⁰⁷ that the SADC is not simply a trading organisation or a mechanism restricted to the promotion of cooperation in

⁵⁰⁴ Article 6 of the SADC Treaty.

⁵⁰⁵ Section 231(4) of the Constitution of the Republic of South Africa, 1996 provides:

“Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”

⁵⁰⁶ Articles 5(2)(c) and 6(3).

⁵⁰⁷ Article 21 provides:

3. In accordance with the provisions of this Treaty, Member states agree to co-operate in the areas of:
 - a. food security, land and agriculture;

trade and production based on the creation of a common market. In addition to the integration of national markets and cooperation in production, states joining the Community undertake to cooperate with each other in certain functional areas as well.⁵⁰⁸

It is also important to note that the SADC states have many traditional links:

- the countries in the region all emerged from colonial oppression, most of them after bitter and protracted liberation wars;
- they assisted each other in the liberation wars⁵⁰⁹; and
- the indigenous ethnic groups in many of the SADC states overlap or have common historical origins.⁵¹⁰

That is why non-economic matters are also included in the areas of cooperation. The SADC strategy of encompassing non-economic matters among its areas of cooperation is a realisation that successful integration invariably has to be anchored on the twin foundations of economic and political integration.⁵¹¹

4.1.3. SADC Protocol on Trade

There is no doubt that trade is one of the most important tools for sustainable economic development and deeper regional integration and cooperation, and that it fosters growth.

-
- b. infrastructure and services;
 - c. trade, industry, finance, investment and mining;
 - d. social and human development and special programmes;
 - e. science and technology.
 - f. natural resources and environment;
 - g. social welfare, information and culture; and
 - h. politics, diplomacy, international relations, peace and security.

4. Additional areas of co-operation may be decided upon by the Council.

⁵⁰⁸ Article 5(1)(a), (b), (h) and 5(2)(b).

⁵⁰⁹ The ANC and its military wing, Umkhonto we Sizwe (MK), had their headquarters in Lusaka (Zambia) and also had camps in Angola, Mozambique, Tanzania, Swaziland and Zimbabwe.

⁵¹⁰ There are Batswana in South Africa as well as in Botswana, Swazis in South Africa as well as in Swaziland Shangaans in South Africa as well as in Mozambique and Ndebeles in South Africa as well as in Zimbabwe.

⁵¹¹ Ndulo, M. "African integration schemes: a case study of the Southern African Development Community (SADC)" *African Yearbook of International law* vol. 7 no. 7 (1999 – 2001) at 15; Kaime, T. "SADC and Human Security: fitting human rights into the trade matrix" *African Security Review* vol. 13 no. 1 (2004) 109 at 110.

Because the main aim of the SADC is to integrate the economies of its member states, it concluded the Protocol on Trade as one of the main tools to achieve its objectives.

This Protocol was concluded in Maseru, Lesotho on 24 August 1996, but its implementation phase began on 1 September 2000.⁵¹² It provides for trade liberalisation and co-operation in the SADC and the timing thereof enabled the framing of the Protocol to take into account the results of the Uruguay Round and the changes to the multilateral trading system arising out of the establishment of the WTO in 1995.⁵¹³ It entered into force on 25 January 2000 after ratification by two-thirds of the SADC member states,⁵¹⁴ but the three member states of Angola, the DRC and Seychelles remained outside.⁵¹⁵ Seychelles eventually acceded to the Protocol in September 2015.⁵¹⁶ The Protocol commits member states to provide duty-free treatment for 100% of trade by 2015.⁵¹⁷

Its objectives are:

1. To further liberalise intra-regional trade in goods and services on the basis of fair, mutually equitable and beneficial trade arrangements, complemented by protocols in other areas.
2. To ensure efficient production within the SADC reflecting the current and dynamic comparative advantages of its members.
3. To contribute towards the improvement of the climate for domestic, cross-border and foreign investment.

⁵¹² The Preamble to the amendment protocol on trade signed in August 2000; Bohanes, J. "A Few Reflections on Annex VI to the SADC Trade Protocol" Tralac Working Paper No. 3/2005, June 2005 at 1.

⁵¹³ Ng'ong'ola, C. "Regional integration and trade liberalization in the Southern African Development Community" *Journal of International Economic Law* vol. 3 no. 3 (2000) 485 at 488.

⁵¹⁴ Grynberg, R *et al.* *Multilateral and Regional Trade Issues for Developing Countries* (2003) at 184; www.sadc.int/documents-publications/show/Protocol_on_Trade1996.pdf (accessed on 9 November 2015).

⁵¹⁵ Kalenga, P. "Regional integration in SADC: retreating or forging ahead?" Tralac Working Paper D12WP08/2012 (September 2012) at 7. Sandrey, R. "An analysis of the SADC Free Trade Area" Tralac Paper No. D13TB01/2013, June 2013 at 1.

⁵¹⁶ This was announced by the South African Revenue Services (SARS) on 18 September 2015. Available at www.engineeringnews.co.za/.../seychelles-accedes-to-sadc-protocol (accessed on 9 November 2015).

⁵¹⁷ This is the date on which Mozambique would finalise its tariff phase-down on goods from South Africa. The SACU countries completed their tariff liberalisation commitments in 2008 and the others committed themselves to accomplish this by 2012, with the exception of Mozambique regarding South Africa.

4. To enhance the economic development, diversification and industrialisation of the Region.
5. To establish a Free Trade Area in the SADC Region.⁵¹⁸

The Protocol envisages the elimination of tariffs within eight years of its entry into force.⁵¹⁹ The processes and modalities for the elimination of the tariffs are to be determined by a Committee of Ministers responsible for trade (CMT).⁵²⁰ Member states who consider that they may be or have been adversely affected by the removal of tariff and non-tariff barriers to trade, may upon application to the Committee of Ministers of Trade, be granted a grace period to afford them additional time for the elimination of tariffs.

It also envisages the existence of different common tariffs for different products and as such provides for derogations from the applicable obligations in Article 3.⁵²¹ This is in recognition of the economic inequalities among the member states and as such goods had to be categorised into different classes for the purposes of tariff reduction. Category A requires immediate reduction of duty to zero at the beginning of the implementation period,

⁵¹⁸ Article 2.

⁵¹⁹ Article 3(1)(b); “2011 Audit of the Implementation of the SADC Protocol on Trade”, Technical Report by AECOM International Development, August 2011.

⁵²⁰ This is one of the special institutions established in terms of Article 31 of the Protocol, to be responsible for trade matters including the supervision of the implementation of this Protocol. Others are: the *Committee of Senior Officials* responsible for trade matters, the *Trade Negotiation Forum* (TNF), and the *Sector Coordinating Unit*.

⁵²¹ Article 3 provides:

- “1. The process and modalities for the phased elimination of tariffs and non-tariff barriers shall be determined by the Committee of Ministers responsible for trade matters (CMT) having due regard to the following:
 - (a) The existing preferential trade arrangements between and among the Member states.
 - (b) That the elimination of barriers to trade shall be achieved within a time frame of eight (8) years from entry into force of this Protocol.
 - (c) That Member states which consider they may be or have been adversely affected, by removal of tariffs and non-tariff barriers (NTBs) to trade may, upon application to CMT, be granted a grace period to afford them additional time for the elimination of tariffs and (NTBs). CMT shall elaborate appropriate criteria for the consideration of such applications.
 - (d) That different tariff lines may be applied within the agreed time frame for different products, in the process of eliminating tariffs and NTBs.
 - (e) The process and the method of eliminating barriers to intra-SADC trade, and the criteria of listing products for special consideration, shall be negotiated in the context of the Trade Negotiating forum (TNF).
2. The agreed process and modalities for eliminating barriers to intra-SADC trade shall upon adoption, be deemed to form an integral part of this Protocol.”

by year 2000. These were the commodities that already attracted low or zero tariffs. The second category B deals with goods that constitute significant sources of customs revenue and whose tariffs are to be removed over 8 years, by 2008. Categories A and B should account for 85% of intra-SADC trade so that by 2008 SADC could be regarded as a free trade area in compliance with Article XXIV of the General Agreement on Tariffs and Trade (GATT). This required that “substantially all trade” should be duty free.

Category C deals with sensitive products (imports sensitive to domestic industrial and agricultural activities) whose tariffs were to be eliminated between 2008 and 2012. Category C is limited to a maximum of 15% of each member’s intra-SADC merchandise trade. Category E is for goods that can be exempted from preferential treatment under Articles 9 and 10 of the Trade Protocol such as firearms and munitions, comprising of a small fraction of intra-SADC trade.⁵²²

This provision is critical for the functioning of the SADC Free Trade Area (FTA), in which substantially all trade must be liberalised within a reasonable period after the launching date. The process and the method of eliminating barriers to intra-SADC trade, and the criteria of listing products for special consideration have to be negotiated in the Trade Negotiating Forum (TNF). Once adopted, the process and modalities for eliminating intra-SADC trade barriers would form an integral part of the Trade Protocol and, therefore, of the SADC law. The same applies to the application for derogations. However, this is yet to be done.⁵²³

Erasmus⁵²⁴ is of the opinion that this state of affairs undermines legal certainty. According to him, this also results in the imperfect functioning of the SADC FTA, where exceptions

⁵²² SADC Trade Protocol Project, 2001. “Customs Revenue Implications of the SADC Trade Protocol”; Kalenga, P. “Implementation of the SADC Trade Protocol: Some Reflections” *Trade Briefs* (2004); Ng’ong’ola, C. “Regional integration and trade liberalization in the Southern African Development Community” *Journal of International Economic Law* vol. 3 no. 3 (2000) 485 at 487.

⁵²³ Erasmus, G. “Why Article 3 of the SADC Trade Protocol needs to be fixed” Tralac Paper of 19 June 2013, available at <http://www.tralac.org/discussions/article/5323-why-article-3-of-the-sadc-trade-protocol-needs-to-be-fixed.html> (accessed on 9 November 2015); Muntschick, J. “Regional Economic Integration in Southern Africa: SADC’s Protocol on Trade and South Africa’s big Fingerprint” Paper for the University of Bamberg Workshop on “Regional Integration”, 19 – 20 June 2009.

⁵²⁴ Erasmus (above).

to the tariff and related trade rules should be based on those provisions allowing particular exceptions such as safeguards, trade remedies, security or general exceptions. This is so because member states do not follow those routes and therefore objective criteria for justifying them are never invoked. Instead, the ad hoc and politically motivated derogations of Article 3 are employed.

The Protocol also provides for the phased reduction and eventual elimination of import duties on goods originating from member states.⁵²⁵ The key to qualifying for preferential treatment under the Protocol are *the rules of origin*⁵²⁶ and these are primarily used to determine from which country a product originates. Their purpose, therefore, is authentication in order to ensure that countries that are not signatories of the FTA do not enjoy the preferences offered by the agreement. These rules of origin are a complex set of trade rules and take into account the fact that virtually all manufactured products available in markets today are produced in more than one country.⁵²⁷ The SADC member states approved the rules of origin for most products that are exported within the region in July 2003.⁵²⁸ The approval means that products identified would gain entry from the country of origin into another country duty-free.

The Protocol is divided into nine Parts, and covers trade in goods (Part 2); customs procedures (Part 3); trade laws (Part 4); trade related investment measures (Part 5); trade in services, intellectual property rights, and competition policy (Part 6); and trade development (Part 7). Apart from these substantive issues, the Protocol also covers trade

⁵²⁵ Article 4.

⁵²⁶ There are two common types of rules of origin (RoO) depending on application: the preferential and non-preferential rules of origin. Preferential RoO are part of a free trade area or preferential trade arrangement which includes tariff concessions. These trade arrangements might be unilateral, bilateral or regional (also sometimes called multilateral) trade arrangements. Non-preferential RoO, on the other hand, are used to determine the country of origin for certain purposes. These purposes *may* be for quotas, anti-dumping, anti-circumvention, statistics or origin labelling.

⁵²⁷ Maiketso, J.T *et al.* "Countrywise Review of the Implementation of the SADC Trade Protocol" Proceedings of the 2006 Formative Process Research on Integration in Southern Africa (FOPRISA) Annual Conference, Report 3, at 217.

⁵²⁸ Muchinguri, W. "Southern Africa: SADC Approves Rules of Origin" allAfrica.com (online), 17 July 2013; "SADC Rules of Origin Exporters Guide Manual", approved at 7th Meeting of the Sub Committee on Customs Cooperation, November 2003; Brenton, P *et al.* "Rules of Origin and SADC: The Case for Change in the Mid Term Review of the Trade Protocol" Africa Region Working Paper Series No. 83, June 2005.

relations among member states and with non-member states (Part 8) as well as institutional arrangements and dispute resolution (Part 9).

This wide coverage is criticised as leading to its minimum implementation. It also leads to the Protocol lacking focus, as evidenced by its lack of rules and disciplines that are region-specific.⁵²⁹ By having this wide coverage it enters the terrain of the WTO rules, which are defined taking into account the international trading scenario, not looking to the specificities of regions such as Southern Africa, where heterogeneity or diversity is the main characteristic. This might lead to a conflict between the two.⁵³⁰

These nine parts are supported by nine Annexes elaborating on implementation of the Protocol. They deal with issues such as rules of origin (Annex I), customs co-operation (Annex II), simplification and harmonisation of trade documentation and procedures (Annex III), transit trade and facilities (Annex IV), trade development (Annex V), concerning the settlement of disputes between the (Annex VI), concerning trade in sugar (Annex VII), concerning sanitary and phytosanitary measures (Annex VIII) and concerning technical barriers to trade (Annex IX).

The parts of the Protocol dealing with “trade-related issues” and “investment matters” simply call upon the member states to “adopt policies and implement measures” in accordance with their obligations in terms of the GATS and the TRIPS agreements of the WTO. This is in view to liberalising their services sector within the SADC.⁵³¹ Member states are also called upon to adopt policies and to implement measures to promote an open cross-border investment regime thereby enhancing economic development, diversification and industrialisation,⁵³² and to prohibit unfair business practices and promote competition.⁵³³

⁵²⁹ Machava, A. “An Overview of the SADC Protocol on Trade in Services” *Regional Integration Observer* vol. 2 no. 2 (October 2014) 8.

⁵³⁰ *Ibid*; Ng’ong’ola, C. “Regional integration and trade liberalization in the Southern African Development Community” *Journal of International Economic Law* vol. 3 no. 3 (2000) 485 at 496.

⁵³¹ Article 23(2).

⁵³² Article 22.

⁵³³ Article 25.

Article 32 of the Trade Protocol, elaborated through Annex VI,⁵³⁴ describes the procedures and arrangements for settling disputes arising from the interpretation and implementation of the Protocol. The first step is through *negotiations* between member states involved in the dispute through *co-operation and consultation*, the second is taking recourse to a *panel of experts* and the third is in accordance with Article 32 of the SADC Treaty i.e. the dispute shall be referred to the *SADC Tribunal*. It is worth noting that the first two steps are the replica of the WTO process.⁵³⁵

This replication is also done with regard to alternative dispute resolution (ADR) mechanisms. Article 5 of the WTO “Understanding on Rules and Procedures Governing the Settlement of Disputes” provides for good offices, conciliation and mediation procedures, which are confidential, as alternative to the adjudication process. Annex VI of the SADC Trade Protocol provides the same.⁵³⁶

However, there are some differences between the two systems: first, under the SADC there is no clear indication of the linkages between the three levels of dispute settlement, i.e. conciliation, mediation and arbitration, which is the case with the WTO system. Secondly, in the WTO system these procedures are optional and additional to the consultations, whereas in the SADC system this is not so.

⁵³⁴ Annex VI ‘Concerning the Settlement of Disputes Between the Member states of SADC’, which was brought about by the Amendment Protocol on Trade adopted by the SADC member states at their Summit meeting in Windhoek, Namibia in September 2000.

⁵³⁵ Article 4 of the WTO “Understanding on Rules and Procedures Governing the Settlement of Disputes” provides for settlement of disputes first by *negotiations* between the parties through *cooperation and consultations*. If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a *panel*.

⁵³⁶ Article 4 of Annex VI to the SADC Trade Protocol provides:

- “1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the disputing Member states so agree.
2. Procedures involving good offices, conciliation and mediation shall be confidential, and may be requested at any time by a disputing Member State. These procedures may begin at any time and be terminated at any time.
3. The Chairperson of the CMT, or any other Member of the CMT designated by the Chairperson who is not a national of a disputing Member State, may offer good offices, conciliation or mediation with a view to assisting the disputing Member states.”

Thirdly, when it comes to remedies the WTO Dispute Settlement Body (DSB) makes provision for measures such as *retaliation* and *cross-retaliation* where recommendations of the DSB are not complied with.⁵³⁷ The SADC system, on the other hand, does not make this provision. Annex VI only empowers the Panel, as part of its terms of reference, to make findings as and when appropriate on the degree of adverse trade effects on any Member State of any measure found not to conform to the provisions of the Protocol, or to have caused nullification or impairment of the complaining Member State as well as to recommend that the Member State complained against brings a measure into conformity with the Protocol where such a measure is found to be inconsistent with this Protocol.⁵³⁸

This lack of regulation at the post-adjudication stage is striking, particularly because the agreement (SADC Trade Protocol) envisages the settlement of disputes through a legalistic procedure. In other words, although the SADC provides a complainant Member State with a right of access to an adjudicatory process, which is not conditioned on the consent of the respondent, it does not specify the means by which the result of that process might be enforced. It might be argued that this absence of regulation with regard to remedies for non-compliance leaves open the possibility that an RTA member could have recourse to countermeasures under customary international law with a view to inducing compliance with the ruling of an ad hoc panel.⁵³⁹

Annex VI is likely to become one of the crucial documents for the SADC integration efforts. This is so because experience at the global level (WTO) as well as the regional level (for instance, the European communities) teaches that a rules-based dispute resolution system – rather than a “soft” negotiation approach to solving trade disputes between members of an institution of economic integration – is an essential means of ensuring the

⁵³⁷Sykes, A.O. “The Disputes Settling Mechanism: Ensuring Compliance?” in Narlikar, M *et al.* *Oxford Handbook on the World Trade Organization* (2012) at 560; World Trade Organization. *Understanding the WTO* 5th ed. (2010) at 55; Spadano, L. ‘Cross-Agreement Retaliation in the WTO Dispute Settlement System: An Important Enforcement Mechanism for Developing Countries?’ *World Trade Review* vol. 7 no. 3 (2008) 511.

⁵³⁸ Article 9 (c) & (d) of Annex VI of the SADC Trade Protocol.

⁵³⁹ Chase, C *et al.* “Mapping of dispute settlement mechanisms in regional trade agreements: Innovative or variations on a theme?” WTO Staff Working Paper, No. ERSD-2013-07 (2013) at 38; Van den Bossche, P *et al.* “What to Do When Disagreement Strikes? The Complexity of Dispute Settlement under Trade Agreements” in Frankel, S *et al.* *Trade Agreements at the Crossroads* (2014).

functioning, establishing and maintaining the credibility of such an institution, both in the eyes of the governments as well as of the business community.⁵⁴⁰

So far, however, the implementation of Annex VI by the SADC member states has been slow to get off the ground. No disputes have been filed yet.⁵⁴¹ This state of affairs is most likely a result of the limited internal resources and experience of the SADC member states in this respect, and also due to the still very politicised climate prevalent within the SADC, where the vast majority of countries feel that a trade dispute is not simply a by-product of increased beneficial trading relations, but an unfriendly act – an attitude which is characteristic of a young and inexperienced regional organisation.⁵⁴²

This absence of disputes, however, does not point to a lack of interest of the SADC member states in the dispute settlement mechanism.⁵⁴³ Also the effectiveness of a dispute settlement mechanism cannot be discounted merely because it is not active. A dispute settlement mechanism that shows little or no activity may be effectively deterring parties from violating their obligations.⁵⁴⁴

4.1.4 SADC and WTO

As discussed in Chapter 2, regional integration schemes are recognised in terms of the World Trade Organisation (WTO) law – Article 24 (XXIV) of the World Trade Organisation (WTO) or General Agreement on Tariffs and Trade (GATT)⁵⁴⁵ for trade in

⁵⁴⁰ Bohanes, J. “A Few Reflections on Annex VI to the SADC Trade Protocol” Tralac Working Paper no. 3 June 2005 at 1; Erasmus, G. “Is the SADC trade regime a rules-based system?” *SADC Law Journal* Vol. 1 (2011) 17; Ndlovu, L. “The EC-Asbestos dispute and its implications for a transforming SADC: Is the dust refusing to settle?” *South African Public Law (SAPR/PL)* vol. 21 (2006) 246 at 260.

⁵⁴¹ Ng’ong’ola, C. “Replication of WTO dispute settlement processes in SADC” *SADC Law Journal* Vol. 1 (2011) 35 at 36; “The Settlement of Disputes in the SADC Free Trade Area”, Submission by Trade Law Centre (Tralac) for the SADC August 2014 Summit at 3.

⁵⁴² Ng’ong’ola (above).

⁵⁴³ Saurombe, A. “Regional Integration Agenda for SADC “Caught in the winds of change” Problems and Prospects” *Journal of International Commercial Law and Technology* Vol. 4 Issue 2 (2009) 100 at 103.

⁵⁴⁴ Chase (fn 539) at 47.

⁵⁴⁵ GATT Article XXIV(1) provides: “The provisions of this Agreement shall apply to the metropolitan customs territories of the contracting parties and to any other customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application. Each such customs territory shall, exclusively for the purposes of

goods, Article V of the General Agreement on Trade in Services (GATS)⁵⁴⁶ for trade in services and in the “Enabling Clause”.⁵⁴⁷ The Enabling Clause was essentially created in 1979 for preferential trade arrangements on goods between developing-country members. These arrangements are not subject to examination by the Committee on Regional Trade Agreements, but they are notified to the Committee on Trade and Development.

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

⁵⁴⁶ GATS Article V provides:

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

- (a) has substantial sectoral coverage, and
- (b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through:
 - (i) elimination of existing discriminatory measures, and/or
 - (ii) prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV bis.

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

⁵⁴⁷ The Enabling Clause is officially called the “Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries”. This was in terms of GATT Decision (L/4903) of 28 November 1979 (on “treatment of developing nations”).

Notification to the WTO can, therefore, be made under the provisions of Article XXIV of GATT⁵⁴⁸ and under the “Enabling Clause”.⁵⁴⁹

According to the WTO law or rules, and reinforced by the “*Understanding on the interpretation of Article XXIV*”,⁵⁵⁰ which was reached during the Uruguay Round, regional groups must inform the WTO of their arrangements as soon as they are agreed to and submit to an examination.⁵⁵¹

⁵⁴⁸ Paragraph 7 of GATT Article XXIV provides:

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

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

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

⁵⁴⁹ Paragraph 4 of “Decision of 28 November 1979 (L/4903)” – The Enabling Clause – provides:

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

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

b) afford adequate opportunity for prompt consultations at the request of any interested contracting party with respect to any difficulty or matter that may arise. The CONTRACTING PARTIES shall, if requested to do so by such contracting party, consult with all contracting parties concerned with respect to the matter with a view to reaching solutions satisfactory to all such contracting parties.”

⁵⁵⁰ The “*Understanding on the interpretation of Article XXIV*” sheds some light on certain issues (of a rather procedural nature).

⁵⁵¹ In November 2001 the WTO adopted a Declaration (*WT/MIN(01)/DEC/1*), which inter alia provides: “Notification

3. The required notification of an RTA by Members that are party to it shall take place as early as possible. As a rule, it will occur no later than directly following the parties’ ratification of the RTA or any party’s decision on application of the relevant parts of an agreement, and before the application of preferential treatment between the parties.”

All the SADC member states are members of the WTO thereby necessitating adherence to the WTO legal obligations with respect to the formation of regional groupings. This means that the SADC member states had a choice: they could opt for the more onerous Article XXIV notification or the notification under the “Enabling Clause”.⁵⁵² The SADC chose the Article XXIV notification when it notified the Protocol on Trade in the Southern African Development Community and the Amending Agreement to the Protocol to the WTO on 2 August 2004, as aiming at establishing a free trade area.⁵⁵³ It would have also qualified to notify under Paragraph 4 (b) of the Enabling Clause since the SADC involves developing countries, but it did not go this route. The terms of reference for the examination of the Protocol were adopted by the Council for Trade in Goods on 1 October 2004.⁵⁵⁴

Because the SADC chose the Article XXIV notification, which is onerous, it should be tested whether it fully complies with this Article.

4.1.4.1 Is SADC Article XXIV-compliant?

The WTO was notified of the SADC FTA under the Article XXIV of the GATT. This means for a SADC FTA to be WTO-compatible it must meet the following requirements:

- (a) GATT Art. XXIV: 5 (b) - No higher duties or restrictions;
- (b) GATT Art. XXIV: 7 (a) - Notification at the WTO
- (c) GATT Art. XXIV: 5 (c) - The reasonable time requirement;
- (d) GATT Art. XXIV: 8 - The substantial coverage requirement;

⁵⁵² Nhara, A. “What is SADC? Towards Implementation of the Trade Protocol” *SADC User’s Guide*, Trade & Development Studies Centre Harare, Zimbabwe July 2003 at 2; Saurombe, A. “The Southern African development community trade legal instruments compliance with certain criteria of GATT Article XXIV” *Potchefstroomse Elektroniese Regsblad* vol. 14 no.4 (2011) 286 at 294.

⁵⁵³ *Protocol on Trade in the Southern African Development Community*. World Trade Organization Document WT/REG/176/3. Geneva: WTO; Mutai, H.B. “Regional trade integration strategies under SADC and the EAC: A comparative analysis” *SADC Law Journal* vol. 1 (2011) 81 at 84.

⁵⁵⁴ “Terms of Reference of the Examination: Protocol on Trade in the Southern African Development Community”, World Trade Organization WT/REG176/3 22, December 2004 (04-5637) Committee on Regional Trade Agreements.

(a) No higher duties or restrictions

According to GATT Article XXIV(5)(b), the provisions of this Agreement shall not prevent the formation of a free-trade area, provided that the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area to the trade of contracting parties not included in such area or non-parties to such agreement, shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area. And this prohibition applies to all trade, except where specifically permitted, as per the definition of a free-trade area.⁵⁵⁵

In terms of Articles 3 – 6 of the SADC Trade Protocol member states have committed themselves to the elimination of all tariffs and non-tariff barriers to trade, which includes the elimination of import duties, export duties, quantitative import restrictions and export restrictions. Article 3 deals with the elimination of barriers to intra-SADC trade, the responsibility of which falls on the Committee of Ministers responsible for Trade Matters (CMT).⁵⁵⁶ The CMT must agree to the

⁵⁵⁵ GATT Article XXIV(8)(b) defines a free-trade area as a group of two or more customs territories in which the *duties and other restrictive regulations* of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

⁵⁵⁶ Article 3 of the SADC Protocol provides:

- “1. The process and modalities for the phased elimination of tariffs and non-tariff barriers shall be determined by the Committee of Ministers responsible for trade matters (CMT) having due regard to the following:
- a) The existing preferential trade arrangements between and among the Member states.
 - b) That the elimination of barriers to trade shall be achieved within a time frame of eight (8) years from entry into force of this Protocol.
 - c) That Member states which consider they may be or have been adversely affected, by removal of tariffs and non-tariff barriers (NTBs) to trade may, upon application to CMT, be granted a grace period to afford them additional time for the elimination of tariffs and (NTBs). CMT shall elaborate appropriate criteria for the consideration of such applications.
 - d) That different tariff lines may be applied within the agreed time frame for different products, in the process of eliminating tariffs and NTBs.

process and modalities for eliminating these intra-SADC barriers and adopt them, so that they form part of the Protocol.⁵⁵⁷

Articles 7 and 8 of the SADC Trade Protocol prohibit all the SADC member states from applying quantitative restrictions on import and exports, except if permitted in terms of the Protocol.

Not only have member states undertaken not to raise import duties beyond those which existed prior to the entry into force of the Trade Protocol, but they have also undertaken to grant no less favourable treatment to third states than they give to member states in circumstances where export duties and quantitative export restrictions are applied. These undertakings ensure that trade with third party states are not subject to protectionism.⁵⁵⁸

This means that Articles 3 – 8 of the SADC Trade Protocol are compliant with the definition and with GATT Article XXIV(5)(b) with regard to restrictive measures.

(b) Notification at the WTO

Notification is a requirement that has to be made to all contracting parties and has to be fulfilled “as early as possible . . . no later than directly following the parties” ratification of the RTA or any party’s decision on application of the relevant parts of an agreement, and “before” the application of preferential treatment between the parties.⁵⁵⁹

-
- e) The process and the method of eliminating barriers to intra-SADC trade, and the criteria of listing products for special consideration, shall be negotiated in the context of the Trade Negotiating Forum (TNF).”

⁵⁵⁷ Article 3(2) provides: “The agreed process and modalities for eliminating barriers to intra-SADC trade shall upon adoption, be deemed to form an integral part of this Protocol.”

⁵⁵⁸ Article 27 – 30 of the Trade Protocol.

⁵⁵⁹ GATT Article XXIV: 7 provides:

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

In practice this means that the WTO members have to be informed before the implementation of the RTA, so that those who have questions or reservations can raise them.⁵⁶⁰ In the case of the SADC Protocol on Trade, this was not done and therefore the question arises as to whether the SADC violated the notification requirement.

The answer to such a question would logically be in the positive, but one can argue that the 2004 notification was with regard to the SADC FTA, and not the Community itself, which was launched in January 2008. In this regard it would mean that the notification was in fact four years early and thus a “prior notification”, as required by the WTO.

The authority that must determine whether there was compliance or not is the Council on Trade in Goods, which is made up of representatives from all the WTO member countries. This is in terms of Paragraph 7 of the *Understanding on Article XXIV* which states:

“All notifications made under paragraph 7(a) of Article XXIV shall be examined by a working party⁵⁶¹ in the light of the relevant provisions of

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

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

⁵⁶⁰ Schaefer, M. “Ensuring that Regional Trade Agreements Complement the WTO System: US Unilateralism a Supplement to WTO Initiatives?” *Journal of International Economic Law* vol. 10 issue 3 (2007) 585 at 594.

⁵⁶¹ This work is now done by the Committee on Regional Trade Agreements (CRTA), which was created on 6 February 1996, as a result of the Singapore Ministerial Conference (Decision WT/L/ 127 of 6 February 1996).

GATT 1994 and of paragraph 1 of this Understanding. The working party shall submit a report to the Council for Trade in Goods on its findings in this regard. The Council for Trade in Goods may make such recommendations to Members as it deems appropriate.”

However, there is no obligation to accept these recommendations. If a member is not satisfied with the decision or recommendations of the Council for Trade in Goods, such a member would have recourse to dispute settlement proceedings on the question of the overall legality of the agreement.⁵⁶²

(c) Reasonable time requirement

This requirement is linked to the “notification requirement” because notification must take place within reasonable time. This was interpreted by the WTO to mean that any free trade agreement be implemented no more than ten years except for “exceptional cases”.⁵⁶³ However, there is no clear consensus on what is meant by “exceptional cases”.⁵⁶⁴

The SADC Trade Protocol entered into force in the year 2000, and according to Saurombe⁵⁶⁵ this means, as the SADC was notified to the WTO in 2004, that the notification requirement was not strictly complied with, as it was four years late or after the fact.

⁵⁶² WTO Appellate Body Report, Turkey – Textiles, WT/DS34/AB/R, adopted on 19 November 1999, paragraphs 360 and 369; Bartels, L. “Interim Agreements under Article XXIV GATT” *World Trade Review* vol. 8 no.2 (2009) 339 at 341.

⁵⁶³ *Understanding on the Interpretation of Article XXIV of the General Agreement Tariffs and Trade 1994* provides: “The ‘reasonable length of time’ referred to in paragraph 5(c) of Article XXIV should exceed 10 years only in exceptional cases.”

⁵⁶⁴ “The Future of the WTO: Addressing Institutional Challenges in the New Millennium” *World Trade Report 2007* at 310; Taylor, C.O. “Regionalism: the second-best option?” *Saint Louis University Public Law Review* Vol. XXVIII:155 (2008) 155 at 177.

⁵⁶⁵ Saurombe, A. “The Southern African development community trade legal instruments compliance with certain criteria of GATT Article XXIV” *Potchefstroomse Elektroniese Regsblad* vol. 14 no.4 (2011) 286 at 294.

This means, in practical terms, that the SADC is in violation of the notification requirement because four years had passed before notification was made. However, the obligation for notification has not been complied with in a systematic manner by WTO member states and Crawford⁵⁶⁶ notes that:

“While the wording of GATT Article XXIV suggests that an RTA should be notified before the entry into force of the RTA, notifications are generally received after entry into force, in some cases months or even years after.”

In terms of the *Understanding on the interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994*, where member parties to an agreement believe that ten years would be insufficient, they shall provide a full explanation to the Council for Trade in Goods (CTG) of the need for a longer period.⁵⁶⁷ Article 3(1)(b) of the Trade Protocol provides that elimination of the trade barriers shall be achieved within eight years. The question that now arises is whether the eight-year provision of the Trade Protocol is in contravention of the ten-year timeframe as per the “Understanding”.

Taken at face-value the answer would be in the affirmative, but the answer to the above question should be NO because of the following reasons:

- Shortening the achievement of the elimination of trade barriers by two years shows how positive the SADC is about achieving integration. The fact that member states have chosen to implement this within eight years should not pose any problems. This in fact puts them in good stead because they can always seek an extension of two years should they fail to achieve this within the eight years they set themselves. The extension would only become

⁵⁶⁶ Crawford, J. “A New Transparency Mechanism for Regional Trade Agreements” *Singapore Year Book of International Law and Contributors* (2007) 133 at 136.

⁵⁶⁷ Paragraph 3 of the “Understanding”.

problematic where the SADC member states seek a period of more than ten years in total.⁵⁶⁸

- Also the ten-year period itself is not rigid as member states can always provide a full explanation to the Council for Trade in Goods of the need for a longer period, as provided by Paragraph 3 of the Understanding.

So even with the SADC Customs Union, which was supposed to happen in 2010, the SADC would not necessarily be in violation of the GATT Article XXIV requirement of “reasonable time”, provided it furnishes the Council for Trade in Goods with a convincing argument.

(d) Substantial coverage requirement

The requirement of “substantial coverage” is a key notion in terms of Article XXIV(8) of the GATT.⁵⁶⁹ Of relevance to the SADC is the second part of the paragraph (i.e. Article XXIV(8)b) as it relates to FTAs, bearing in mind that the SADC was notified to the WTO as an FTA. Articles 7 and 8 prohibit member states

⁵⁶⁸ Saurombe, A. “The Southern African development community trade legal instruments compliance with certain criteria of GATT Article XXIV” *Potchefstroomse Elektroniese Regsblad* vol. 14 no.4 (2011) 286 at 294; Nhara, A. “What is SADC? Towards Implementation of the Trade Protocol” *SADC User’s Guide* (July 2003) at 2.

⁵⁶⁹ Article XXIV(8) provides:

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

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

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

(b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.”

from applying any quantitative restrictions on imports and exports, respectively, that originate in member states.⁵⁷⁰ Article 7 goes further to require member states to phase out the existing restrictions on the import of goods originating in member states, except where otherwise provided for in this Protocol.⁵⁷¹ These phase-out exceptions are listed in Article 9, with a proviso that the measures do not arbitrarily or unjustifiably discriminate between member states or are not disguised restrictions on intra-SADC trade.⁵⁷²

⁵⁷⁰ Article 7 provides:

1. Member states shall not apply any new quantitative restrictions and shall in accordance with Article 3, phase out the existing restrictions on the import of goods originating in Member states, except where otherwise provided for in this Protocol.
2. Notwithstanding the provisions of paragraph 1 of this Article, Member states may apply a quota system provided that the tariff rate under such a quota system is more favourable than the rate applied under this Protocol.

Article 8 provides:

1. Member states shall not apply any quantitative restrictions on exports to any other Member State, except where otherwise provided for in this Protocol.
2. Member states may take such measures as are necessary to prevent erosion of any prohibitions or restrictions which apply to exports outside the Community, provided that no less favourable treatment is granted to Member states than to third countries.

⁵⁷¹ Article 7(1).

⁵⁷² Article 9 provides:

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Member states, or a disguised restriction on intra-SADC trade, nothing in Article 7 and 8 of this Protocol shall be construed as to prevent the adoption or enforcement of any measures by a Member State:

- a) necessary to protect public morals or to maintain public order;
- b) necessary to protect human, animal or plant life or health;
- c) necessary to secure compliance with laws and regulations which are consistent with the provisions of the WTO;
- d) necessary to protect intellectual property rights, or to prevent deceptive trade practices;
- e) relating to transfer of gold, silver, precious and semi-precious stones, including precious and strategic metals;
- f) imposed for the protection of national treasures of artistic, historic or archaeological value;
- g) necessary to prevent or relieve critical shortages of foodstuffs in any exporting Member State;
- h) relating to the conservation of exhaustible natural resources and the environment;
- i) necessary to ensure compliance with existing obligations under international agreements;
- j) necessary to prohibit or control the importation or exportation of second-hand goods into or from its territory under this Protocol.”

Grimett argues that, although the general exceptions clause contains a proviso which aims to prevent protectionism between contracting Members States, the fact that it provides for the application of these quantitative restrictions between member states, could be interpreted as an infringement of Article XXIV(8)(b).⁵⁷³ Gathii,⁵⁷⁴ however, argues that Grimett's claim is unfounded as it is based on textual comparisons as, firstly, no conduct pursuant to the Protocol that is in violation of any GATT provision is available. Secondly, the Enabling Clause provides independent justification for least developed countries' RTAs outside of Article XXIV.

The SADC Protocol on Trade has also been crafted in such a way as to comply with the WTO requirement that intra-regional trade should cover "substantially all trade". The Protocol covers trade in goods⁵⁷⁵, sanitary and phytosanitary measures⁵⁷⁶, trade in services⁵⁷⁷, intellectual property rights⁵⁷⁸, competition policy⁵⁷⁹, trade with third countries⁵⁸⁰, etc.

One area that could cause some concern is the one provided for by Article 4(5) of the Trade Protocol. This paragraph is an exception to the provision of Article 4(4) that prohibits raising of import duties beyond those which existed when the Trade Protocol came into force.⁵⁸¹ This in effect means that member states can impose across-the-board internal charges. This would, in turn, be in contrast with the aim

⁵⁷³ Grimett, L.A. "Protectionism and Compliance with the GATT Article XXIV in selected regional trade arrangements" (Dissertation submitted in fulfilment of the requirement for the Degree of Master of Laws, January 1999) at 221.

⁵⁷⁴ Gathii, J.T. *African Regional Trade Agreements as Legal Regimes* (2011) at 215.

⁵⁷⁵ Articles 3 – 15.

⁵⁷⁶ Article 16.

⁵⁷⁷ Article 23.

⁵⁷⁸ Article 24.

⁵⁷⁹ Article 25.

⁵⁸⁰ Articles 27 – 30.

⁵⁸¹ Article 4(4) provides:

" . . . Member states shall not raise import duties beyond those in existence at the time of entry into force of this Protocol."

Article 4(5) states: "Nothing in paragraph 4 of this Article shall be construed as preventing the imposition across-the-board internal charges."

of a free-trade area, which is to liberalise trade within the common area. Levying of internal charges violates *ex facie* Article XXIV(8)(b).⁵⁸²

The above discussion therefore shows that the SADC complies with the GATT Article XXIV and is as such compliant with the WTO requirements for regional integration schemes.

4.2 AFRICAN ECONOMIC COMMUNITY

Having dealt with the various integration schemes that exist in the Southern Africa region (in Chapter 3), it is important to touch on the African Economic Community (AEC) since it is the over-arching body that will have to integrate the efforts of integration at regional and sub-regional levels in Africa.⁵⁸³ The focus, however, will be on how it relates to the SADC.

The AEC is actually a cooperation and integration plan of the erstwhile Organisation for African Unity (OAU). In 1963 the African leaders, when establishing the OAU, stated their commitment, individually and collectively, to promote the economic integration of Africa, in order to facilitate and reinforce social and economic intercourse. They also committed themselves to promote the economic and social development and integration of their economies and, to that end, to establish national, regional and sub-regional institutions leading to a dynamic and interdependent African economy, thus paving the way for the

⁵⁸² Grimett (fn 573) at 223.

⁵⁸³ The African Economic Community Treaty (more popularly known as the Abuja Treaty) was concluded in Abuja, Nigeria in June 1991 and came into force in May 1994. It provides for the African Economic Community to be set up through a gradual process, which would be achieved by coordination, harmonisation and progressive integration of the activities of existing and future regional economic communities (RECs) in Africa.

eventual establishment of the African Economic Community. In this way they were making a break with the market approach to integration.⁵⁸⁴

These commitments were translated into concrete form, in Abuja, Nigeria, in June 1991 when the OAU Heads of State and Government signed the *Treaty establishing the African Economic Community*. The AEC Treaty has been in operation since May 1994 when the required number of instruments of ratification for its coming into force was deposited with the Secretary General of the OAU/AEC.⁵⁸⁵

The main objective of the AEC is to foster the economic, social and cultural integration of the African Continent.⁵⁸⁶ This was after the realisation that “no African state is economically large enough to construct a modern economy alone. Africa as a whole has the resources for industrialisation, but it is split among more than fifty African territories. The only way to achieve the economic reconstruction and development essential to fulfil the aspirations, needs and demands of the peoples of Africa is through a sustained shift to continental planning, so as to unite increasingly the resources, markets and capital of Africa in a single substantial economic unit.”⁵⁸⁷

The above means that the AEC will lead to the unification of the economies of Africa, which will in turn permit economies of scale. However, the nature of integration remains contested. While some have advocated regionalism, others have emphasised the need for

⁵⁸⁴ Gibb, R. “Regional Integration and Africa's Development Trajectory: meta-theories, expectations and reality” *Third World Quarterly* vol.30 no.4 (2009) 701 at 708; Fakir, E *et al.* “Modernity, Globalisation, and Complexity: The Legacy and Future of the New Partnership for Africa’s development (NEPAD)” in Ingiriis, M.H. *The Africana World: From Fragmentation to Unity and Renaissance* (2012) at 145; “The African Economic Community” at <http://www.panafricanperspective.com/aec.htm> (accessed on 19 November 2015); “African Economic Community” by Department of International Relations and Cooperation at www.dirco.gov.za (accessed on 19 November 2015).

⁵⁸⁵ “The African Economic Community” at <http://www.panafricanperspective.com/aec.htm> (accessed on 19 November 2015); Gekonge, C.O. *Emerging Business Opportunities in Africa: Market Entry, Competitive Strategy and the Promotion of Foreign Direct Investments* (2013) at 93.

⁵⁸⁶ Preamble of the Treaty establishing the African Economic Community (Abuja Treaty), 1991.

⁵⁸⁷ Green, R *et al.* *Unity or Poverty: The Economics of Pan Africanism* (1968) at 22.

continent-wide integration. This led to the adoption of a compromise to use the RECs as building blocks for this envisaged continent-wide community.⁵⁸⁸

4.2.1 AEC and the Regional Economic Communities (RECs)

The AEC has established direct working relations with the Economic Community of West African States (ECOWAS) in the West African region; the Economic Community of Central African States (ECCAS), the Common Market for East and Southern Africa (COMESA), the Inter-Governmental Authority for Development (IGAD) and the East African Community in the Eastern region; the Economic Community of Sahel-Saharan States (CEN-SAD) in the Northern region and the Southern African Development Community (SADC) and the COMESA in the Southern region.⁵⁸⁹

However, despite this relationship between the AEC and the RECs, it should be borne in mind that, as non-partisan to the AEC Treaty, the RECs are in principle not bound by its provisions. In order to formalise their relationship, these parties signed the *Protocol on Relations between the AEC and the RECs*,⁵⁹⁰ which entered into force on 25 February 1998.

⁵⁸⁸ Oppong, R.F. "Observing the legal systems of the Community: The relationship between Community and national legal systems under African Economic Community" *Tulane Journal of International and Comparative Law* vol. 15 (2006 – 2007) 41 at 45; Danso, K. "African Economic Community: Problems and Prospects" *Africa Today* vol. 42 no. 4 (4th Quarter, 1995) 31 at 37.

⁵⁸⁹ Oppong (above); Saurombe, A. "An analysis of economic integration in Africa with specific reference to the African Union and the African Economic Community" *Southern African Public Law* vol. 27 issue 1 (2012) 292 at 297.

⁵⁹⁰ Article 5 provided the **Specific Undertakings** as follows:

"1. The Regional Economic Communities shall take steps to review their treaties to provide an umbilical link to the Community and in particular provide:

- a) in the treaties as their final objective, the establishment of the Community;
- b) legal links to this Protocol, the Treaty and the treaties of the Regional Economic Communities; and
- c) for the eventual absorption, at stage 5 set-out in paragraph 2 (f) of Article 6 of the Treaty, of the Regional Economic Communities into the African Common Market as a prelude to the Community.

2. The Community undertakes to discharge fully, and as the first priority, its responsibility of strengthening the existing Regional Economic Communities and establishing new ones where none exist, within the time framework set-out in Article 6 of the Treaty as well as of coordinating and harmonizing the activities of the regional economic communities."

The *Protocol on Relations between the AEC and the RECs* was adopted upon signature by the COMESA, SADC, IGAD and ECOWAS. The ECCAS signed the Protocol in October 1999 and the UMA had yet to sign, though it had been designated, together with the other RECs, a pillar of the AEC.⁵⁹¹ The Protocol would serve as an effective instrument and framework for close cooperation, programme harmonisation and coordination as well as integration among the RECs on the one hand, and between the AEC and RECs on the other.⁵⁹²

Following the establishment of the AU in 2002, the AEC became an integral part of its constitutional structure and this necessitated for the Protocol on Relations between the AEC and the RECs being replaced with the *Protocol on Relations between the African Union (AU) and the Regional Economic Communities (RECs)*, which came into force in July 2007.⁵⁹³ This new Protocol designates eight RECs,⁵⁹⁴ across the five regions of Africa, as the pillars or building blocks of the AEC. The Arab Maghreb Union (AMU/UMA), in the Northern region, has no relations with the AEC and has not yet signed this new Protocol either. This is so despite it being originally designated a pillar of the AEC and still being recognised by the AU as one of its eight RECs.⁵⁹⁵

⁵⁹¹ Dundas, C.W. *The Lag of 21st Century Democratic Elections: In the African Union Member states* (2011) at 212.

⁵⁹² The Preamble of the Protocol states, inter alia, that parties are “CONVINCED of the need to establish an institutional framework that shall govern relations between the African Economic Community and the regional economic communities, the harmonization and coordination of policies, measures, programmes and activities of the latter, implementation of the provisions of paragraph 2 (a) through (d) of Article 6 of the Treaty Establishing the African Economic Community and cooperation among the regional economic communities.”; Udombana, N.J. “A harmony or a cacophony?: the music of integration in the African Union Treaty and the New Partnership for Africa’s Development” *Indianapolis International and Comparative Law review* vol. 13 (2002 – 2003) 185 at 197; Marinov, E. “The History of African Integration: A Gradual Shift from Political to Economic Goals” *Journal of Global Economics* vol. 3 issue 1 (2015) 74 at 82.

⁵⁹³ Article 34 of the *Protocol on Relations between the African Union (AU) and the Regional Economic Communities (RECs)* provides: “The operation of the Protocol on Relations between the African Economic Community and the RECs, which entered into force on 25 February 1998 shall terminate upon entry into force of this Protocol.”

⁵⁹⁴ These are: AMU, CEN-SAD, COMESA, EAC, ECCAS, ECOWAS, IGAD and SADC, as per the AU *Decision AU/Dec.112 (VII)* of 2 July 2006; Ebobrah, S *et al. Compendium of African sub-regional human rights documents* (2010) at vi.

⁵⁹⁵ Institute for Security Studies. “Profile: Arab Maghreb Union (AMU)” available at www.issafrica.org/profile-arab-maghreb-union-amu (accessed on 20 November 2015).

The major characteristic of the AEC is the modalities that it has set up for establishing the AEC. They consist of **six stages** of variable duration over a transition period not exceeding thirty-four years, from the date of entry into force of the Treaty. Each of the stages consists of specific activities to be implemented concurrently.⁵⁹⁶ These are basically the linear stages of integration (free trade area, customs union, common market and economic community) and are activities to be performed by the regional economic communities (RECs), thus making the AEC different from other integration organisations.⁵⁹⁷ In fact the Abuja Treaty, as the AEC Treaty is sometimes called, makes it clear that the establishment of the AEC is the final objective towards which the activities of all the RECs (existing and future) shall be geared.⁵⁹⁸

Article 6(4) of the Treaty provides that the transition from one stage to another shall be determined when the specific objectives set in the Treaty or pronounced by the Assembly for a particular stage, are implemented and all commitments fulfilled. The Assembly⁵⁹⁹ is then tasked, on the recommendation of the Council,⁶⁰⁰ to confirm the attainment of the objectives to a particular stage and then approve the transition to the next stage.

However, this deadline of thirty-four years is not rigid as it can be extended, but such an extension cannot exceed forty years.⁶⁰¹

⁵⁹⁶ Article 6(1) and (2) of AEC Treaty.

⁵⁹⁷ Article 6 of the AEC Treaty provides:

“1. The Community shall be established gradually in six (6) stages of variable duration over a transitional period not exceeding thirty-four (34) years.

2. At each such stage, specific activities shall be assigned and implemented concurrently . . .”

⁵⁹⁸ Article 88 provides:

“1. The Community shall be established mainly through the co-ordination, harmonisation and progressive integration of the activities of regional economic communities.

2. Member states undertake to promote the co-ordination and harmonisation of the integration activities of regional economic communities of which they are members with the activities of the Community, it being understood that the establishment of the latter is the final objective towards which the activities of existing and future regional economic communities shall be geared.

3. To this end, the Community shall be entrusted with the co-ordination, harmonisation and evaluation of the activities of existing and future regional economic communities.

4. Member states undertake, through their respective regional economic communities, to coordinate and harmonize the activities of their sub-regional organisations, with a view to rationalising the integration process at the level of each region.”

⁵⁹⁹ This means the Assembly of Heads of State and Government of the African Union.

⁶⁰⁰ This means the Council of Ministers of the AU (i.e. Ministers responsible for foreign affairs or international relations).

⁶⁰¹ Article 6(5) of the AEC Treaty.

(a) First Stage (five years)

This stage is about strengthening of existing RECs and establishing new ones in the regions where they do not exist. The five years are calculated from the date of entry into force, which means this was to be completed in May 1999.⁶⁰² As such it is in principle complete, with only the Arab Maghreb Union (AMU/UMA) members and Saharawi Republic/Western Sahara not participating.⁶⁰³ The UMA is currently dormant due to deep political and economic disagreements between Morocco and Algeria regarding, among others, the issue of occupation of Western Sahara by Morocco.⁶⁰⁴

By recognising only eight RECs, this means that the AU, through its decision of the 2006 7th Summit⁶⁰⁵ and the Protocol on Relations between the AU and the RECs, considers this stage as completed.

(b) Second Stage (eight years)

This stage is all about strengthening of intra-REC integrations and inter-REC harmonisation including the following:

- (i) at the level of each REC, establishing tariff and non-tariff barriers, customs duties and internal taxes at the May 1994 level, and determination of the time table for the gradual liberalisation of regional and intra-

⁶⁰² Article 6(1)(a) of the AEC Treaty.

⁶⁰³ Zank, W. "A Region of Crises: North Africa under the Influence of Arab, African and European Integration Processes" in Fiamonti, L. *Regions and Crises: New Challenges for Contemporary Regionalisms* (2012) at 87; Willis, J. *Politics and Power in the Maghreb: Algeria, Tunisia and Morocco from Independence to the Arab spring* (2014) at 265.

⁶⁰⁴ Morocco withdrew from the AU's predecessor, the Organisation of African Unity (OAU) in 1984 after the OAU recognised the Sahrawi Arab Democratic Republic, which Morocco invaded and occupied in 1976. The AU recognised the existence of Sahrawi Arab Democratic Republic when it came into being in 2004 and it has been its member state since then.

⁶⁰⁵ During this Summit the AU adopted the "Moratorium on the establishment and recognition of more RECs".

community trade, and for the harmonisation of customs duties vis-à-vis third states;

(ii) strengthening of sectoral integration, particularly in the fields of trade, agriculture, money and finance, transport and communications, industry and energy; and

(iii) coordination and harmonisation of the activities of RECs.⁶⁰⁶

In terms of the timelines, this stage was to be completed in 2007, that is eight years from 1999, and as such should in principle also be complete. The SADC has signed various protocols that promote integration in various fields,⁶⁰⁷ with the Trade Protocol that entered into force in 2000 and establishing the FTA being the most significant. In terms of the SADC Trade Protocol, member states have committed themselves to the elimination of all tariffs and non-tariff barriers to trade.

The ECCAS has launched its free trade area in 2004 and the Protocol on Non-Tariff Trade Barriers is an appendix to the ECCAS Treaty. ECOWAS has put in place National Committees to deal with problems of non-tariff barriers (NTBs) and complaint desks at the borders.⁶⁰⁸ The EAC is the most advanced community which launched its common market in 2010 and the member states have implemented the following tariff structure:

- 0% on raw materials;
- 10% on intermediate goods; and
- 25% on finished products.⁶⁰⁹

⁶⁰⁶ Article 6(2)(b) of the AEC Treaty.

⁶⁰⁷ Other SADC protocols include *Protocol on Transport, Communications and Meteorology* that entered into force on 6 July 1998; *Protocol on Energy* that entered into force on 17 April 1998; *Finance and Investment Protocol* that came into operation on 16 April 2006; etc.

⁶⁰⁸ “Status of Integration in Africa (SIA IV) – 2013” – African Union Commission Report at 9.

⁶⁰⁹ SIA IV at 28.

The UMA member states adopted a Trade and Tariff Convention on 10 March 1991 in Ras Lanouf, Libya. This Convention provides for:

- the establishment of free trade area in conformity with WTO provisions;
- the free trade will be implemented after a transition period that may last twelve years from the date of entry into force of the Agreement;
- tariffs will be phased out during the transition period.

Unfortunately, this agreement in the UMA was not implemented like many others because of the political problems between the community member states.⁶¹⁰

With regard to the third element (coordination and harmonisation of the activities of the RECs) a *Protocol on Relations between the AEC and the RECs* was concluded and signed in February 1998. This Protocol served as an efficient instrument and framework for close cooperation, programme harmonisation and coordination, as well as integration among the RECs on the one hand (horizontal) and between the AEC and the RECs on the other (vertical).⁶¹¹ It was replaced by the *Protocol on Relations between the African Union (AU) and the Regional Economic Communities (RECs)*, which came into force in July 2007. Through this Protocol the parties (RECs) undertake to coordinate their policies and programmes with those of the AU.⁶¹²

To enhance cooperation among the RECs, the Protocol makes provisions for mandating or advocating entering into cooperation arrangements⁶¹³ and participation in each other's meetings.⁶¹⁴ The Protocol also establishes the Committee on Coordination and the Committee of Secretariat Officials as the

⁶¹⁰ SIA IV at 30.

⁶¹¹ Oppong, R.F. "The African Union, African Economic Community and Africa's Regional Economic Communities: Untangling a Complex Web" *African Journal of International and Comparative Law* vol. 18 issue 1 (2010) 92 at 94.

⁶¹² Article 4(a) of Protocol on Relations between the African Union (AU) and the Regional Economic Communities (RECs).

⁶¹³ Article 15(1).

⁶¹⁴ Article 16(1).

institutions responsible for ensuring the coordination of policies and activities of the RECs and the implementation of the Protocol.⁶¹⁵

Inter-REC activities entail collaboration by the RECs with one another. It is in line with this notion that the EAC, COMESA and SADC held a Tripartite Summit in October 2008, during which it was institutionalised to steer the process of integrating the three RECs, starting by establishing a free trade area. The Tripartite Free Trade Area was eventually established on 10 June 2015.⁶¹⁶

Member states of the Tripartite Free Trade Area (T-FTA), the COMESA-EAC-SADC FTA, are in addition to their individual commitments, implementing a comprehensive programme for the elimination of non-tariff barriers (NTBs) in order to minimise their impacts on intra-regional trade.⁶¹⁷ The COMESA-EAC-SADC Programme on Elimination of Non-Tariff Barriers (NTBs) was agreed to by the COMESA-SADC-EAC Committee of Ministers of Trade (CMT) at their meeting of February 2011 and came into operation when the Declaration on COMESA-EAC-SADC Tripartite Free Trade Area was signed by the Assembly on 12 June 2011.⁶¹⁸

In the North and the West Africa regions, there has not been much collaboration between the two regions nor intra-regionally in the North Africa region. In West Africa, there has been a reported growing rapport between ECOWAS and UEMOA, which yielded the sub-region's Common External Tariff (CET) that became effective on 1 January 2015.⁶¹⁹

⁶¹⁵ Articles 6 – 10; Opong, R.F. “Redefining the relations between the African Union and regional economic communities in Africa” in Bösl, A *et al. Monitoring Regional Integration in Southern Africa Yearbook* (2009) at 8.

⁶¹⁶ Communiqué of the Third COMESA-EAC-SADC Tripartite Summit, adopted on 10 June 2015 at Sharm El Sheikh, Egypt.

⁶¹⁷ *Ibid.*

⁶¹⁸ Declaration Launching the Negotiations for the Establishment of the Tripartite Free Trade Area, 12 June 2011.

⁶¹⁹ “ECOWAS, UEMOA and the World Bank Group Conclude 2nd Tripartite Meeting,” 11 February 2015, available at <http://www.worldbank.org/en/news/press-release/2015/02/11/> (accessed on 22 January 2016).

It could thus be said that, though its timeframe of eight years has lapsed, this stage is not fully completed because progress by regional blocs and the countries within them has been uneven. The question that must then be asked is whether transition into the stage three of the AEC can take. This question is necessary because Article 6(4) of the AEC Treaty provides:

“The transition from one stage to another shall be determined when the specific objectives set in this Treaty or pronounced by the Assembly for a particular stage, are implemented *and all commitments fulfilled*. The Assembly, on the recommendation of the Council, shall confirm that the objectives to a particular stage have been attained and shall approve the transition to the next stage.” (Emphasis added).

Although there has never been a decision to this effect, the third stage is being proceeded with. This augurs with the sentiments by Davies,⁶²⁰ who maintains that some of the stages will be skipped.

(c) *Third Stage (ten years)*

This is the stage where the AEC implementation is at currently. It is about the establishment of a free trade area (FTA) and a customs union at the level of each REC. This means each REC must have adopted a common external tariff (CET) vis-à-vis third parries by the end of the stage. This goal is to be completed in 2017.⁶²¹

The SADC FTA entered into force in January 2008 whilst the COMESA launched its FTA on 31 October 2000. The COMESA Customs Union was launched in June 2010 whilst the SADC missed its 2010 deadline of establishing a customs union.

⁶²⁰ Davies, R (Minister of Trade and Industry: South Africa). University of Western Cape Lecture, 7 April 2011.

⁶²¹ Article 6(2)(c); Mbenge, M *et al.* “The African Economic Community” in Yusuf, A.A *et al.* *The African Union: Legal and Institutional Framework: A Manual on the Pan-African Organization* (2012) at 197.

This was despite its report that the process of establishing the SADC customs union was at an advanced stage.⁶²² The SADC now seems to have abandoned this target in favour of the Tripartite Free Trade Area with the COMESA and the East African Community (EAC), which was established in June 2015. However, it should not be forgotten that the Southern African Customs Union (SACU) already exist consisting of five member states of the SADC – Botswana, Lesotho, Namibia, South Africa and Swaziland.

As stated above the ECCAS launched its free trade area in 2004 and common market in 2010. The ECOWAS free trade area, called the ECOWAS Trade Liberalisation Scheme (ETLS), was launched in 1990 and led to the proclamation of the sub-region as a free trade area (FTA) in 2000. 1 January 2001 was set as a date for transformation of this FTA into a customs union, but this is still to materialise.⁶²³

The UMA's objectives of establishing a free trade area by 1992 and common market by 2000 is still to be realised. However, it should be noted that the League of Arab States – which includes Egypt, Libya, Morocco and Tunisia – established the Greater Arab Free Trade Area in 1998.⁶²⁴

However, it seems like not every member state is convinced that this is the way to go. Davies argues that a trajectory that imitates the EU integration is unrealistic, that is the formal deepening of economic integration, following orthodox economic theory of the 1950s.⁶²⁵ Thus in 2009 the AU adopted

⁶²² The Ministerial Task Force reported to the SADC Council of Ministers at the February/March 2012 Meeting in Luanda, Angola, outlining the strategic direction towards the SADC Customs Union, identifying, in particular the Parameters of the Future Customs Union, Benchmarks or Milestones and elements for a Model SADC Customs Union.

⁶²³ Ukaoha, K *et al.* "The ECOWAS Trade Liberalisation Scheme: Genesis, Conditions and Appraisal" *ECOWAS Vanguard* vol. 2 issue 3 (January 2013) at 2.

⁶²⁴ Hufbauer, G.G *et al.* *Maghreb Regional and Global Integration: A Dream to be Fulfilled* (2008) at 50; "Greater Arab Free Trade Area (GAFTA)" at www.mit.gov.jo (accessed on 20 November 2015).

⁶²⁵ Davies, R. University of Western Cape Lecture, 7 April 2011.

the Minimum Integration Programme (MIP),⁶²⁶ which saw the first major revision of the Abuja Treaty by permitting the RECs to progress at different pace in the process of integration. To this end, the RECs will continue to implement their respective programmes (considered as priority programmes) and at the same time attempt to carry out the activities contained in the MIP, the contents of which were identified by the RECs themselves in close collaboration with the African Union Commission (AUC).⁶²⁷

Since the adoption of the MIP the current approach seems to be to broaden economic integration by creating and merging free trade areas before deepening each into customs unions and then common markets. This is in line with the Sirte Declaration,⁶²⁸ which undertook to speed up the process of rationalisation and shorten the period set forth in Article 6 of the AEC Treaty.

This approach was followed during the African Union (AU) Summit held in January 2011, where a decision was taken to endorse the recommendation of the 6th Ordinary Session of the AU Conference of Ministers of Trade, held in Kigali, Rwanda, from 29 October to 2 November 2010, to fast-track the establishment of a Pan-African/Continental Free Trade Area (CFTA). It was emphasised that 2017 was an indicative date for the CFTA and Africa's political leaders agreed to undertake further reflections on the establishment of the CFTA. The CFTA, if achieved, would be a major milestone and a stepping stone towards achieving the Continental Customs Union by 2019.⁶²⁹

⁶²⁶ This is the consensual framework between member states, RECs and African Union Commission (AUC), which serves as a connecting link or common denominator for African continental integration players. It aims to fast-track the integration in two phases: phase 1, from 2009 to 2012, is the development basis and phase two, from 2013 – 2016, is the implementation of various activities including the adoption of a continental common external tariff.

⁶²⁷ African Union Minimum Integration Programme (MIP) 2009, at 7 and 22.

⁶²⁸ Declaration of the Fourth Extraordinary Session of the Assembly of Heads of State and Government 8 – 9 September 1999 Sirte, Libya (*EAHG/Draft/Decl. (IV) Rev.1*).

⁶²⁹ Report of the Meeting of the Committee of Experts of the 5th Joint Annual Meetings of the AU Conference of Ministers of Economy and Finance and ECA Conference of African Ministers of Finance, Planning and Economic Development, Addis Ababa, Ethiopia 22–25 March 2012 – titled “Overview of Developments in Regional Integration in Africa”; Gottschalk, K. “The African Union and its sub-regional Structures” *Journal of African Union Studies* vol. 1 issue 1 (2012) at 16 – 17.

The MIP commends this as a model, urging that ECOWAS, ECCAS, CEN-SAD and AMU should follow this example and form their own grouping.⁶³⁰ Davies anticipates that a continental free trade area will precede further attempts to broaden existing customs unions, or forming common markets.⁶³¹

The decision to establish a Continental Free Trade Area by 2017 was re-affirmed at the African Union (AU) Summit of Heads of State and Government in January 2012, which focused on the theme of “Boosting Intra-Africa Trade”. However, this was taken with the option to review the target date according to progress made. This was obviously in recognition of the challenges that member states still have regarding achievement of this target.⁶³²

What is more striking, though, is the determination to continue even though the requirements of the stage are not fully met, just as it happened with the second stage. The question that would necessarily follow is: is the AU violating its own law or self-contradicting?

Hartzenberg states that the January 2012 Summit also agreed that the COMESA-EAC-SADC Tripartite Free Trade Area (T-FTA) and the ECOWAS FTA would serve as the building blocks of the CFTA.⁶³³ Though this is not clear from the documents of the Summit (Decision and Declaration),⁶³⁴ it must be stated that if this were the case this would de facto change the terms of the Protocol on Relations

⁶³⁰ MIP (fn 627) at 30, paragraphs 86 and 99.

⁶³¹ Davies (fn 625).

⁶³² 18th African Union Summit of the Heads of States and Government “Decision on Boosting Intra-African Trade and Fast Tracking the Continental Free Trade Area” (*Assembly/AU/Dec.394(XVIII)*); “Declaration on Boosting Intra-African Trade and the Establishment of a Continental Free Trade Area (CFTA)” (*Assembly/AU/Decl.1(XVIII)*).

⁶³³ Hartzenberg, T. “The Tripartite Free Trade Area: from the 2008 Kampala vision to . . .” in Hartzenberg, T *et al. Cape to Cairo: Exploring the Tripartite FTA Agenda* (2013) at 3.

⁶³⁴ Decision Document “*Assembly/AU/Dec 394(XVIII)*” and Declaration Document “*Assembly/AU/Decl.1(XVIII)*”.

between the African Union (AU) and the Regional Economic Communities, which designates eight RECs as the building blocks.

The Summit also adopted the roadmap for integration, which for this stage, includes “consolidation of the regional FTA processes into the CFTA by 2015-2016.” Once this consolidation is done then the CFTA would be established in the following year (2017).⁶³⁵

(d) Fourth Stage (two years)

This stage is about the coordination and harmonisation of tariff and non-tariff barriers among various RECs with a view to establishing a continental customs union. This goal is to be completed in 2019.

This will be a very interesting stage and it will have to be seen how the AEC navigates it. This is in light of the fact of the multiple memberships of the RECs and the fact that technically a state cannot maintain membership of two customs unions – i.e. apply two different external tariffs. This essentially means that countries would have to belong to one REC so that they can have a common external tariff. Moreover, each African country is allowed to exclude a certain number of products by the World Customs Organisation (WCO).⁶³⁶

Another challenge is the fact that RECs like the SADC still do not have a customs union. It is still has to be seen how the AU will convince the SADC to establish its

⁶³⁵ Soininen, I. “The Continental Free Trade Area: What’s going on?” *Bridges Africa* vol. 3, issue 9 (November 2014) 4 at 5; 18th African Union Summit of the Heads of States and Government “Decision on Boosting Intra-African Trade and Fast Tracking the Continental Free Trade Area” (Assembly/AU/Dec.394(XVIII)).

⁶³⁶ WCO allows for 2% to 5% of tariff lines defined at the Harmonized System 6-digit level (HS6) to be defined as sensitive products by each African country (2% corresponds to 102 product lines, while 5% is equal to 255 products lines). See http://www.wcoomd.org/home_wco_topics_hsoverviewboxes.htm (accessed on 31 November 2015); Mevel, S *et al.* “Deepening Regional Integration in Africa: A Computable General Equilibrium Assessment of the Establishment of a Continental Free Trade Area followed by a Continental Customs Union”, Paper presented at the 7th African Economic Conference Kigali, Rwanda, 30 October - 2 November, 2012 at 22.

customs union so that it complies with the other leg or element of the third stage, that is establishing a customs union at the level of each REC.

The Minimum Integration Programme (MIP), on the other hand, has established the guidelines in the medium and long term for the RECs in order to achieve the continental integration. In terms of this the RECs have agreed on issues such as, inter alia, the adoption of a continental common external tariff by 2016.⁶³⁷

Mbenge⁶³⁸ is of the view that, in practice, the achievement of this stage is unrealistic and the AU leaders seem to have been too optimistic. He continues that coordination and harmonisation of different laws, which are based on different legal systems, are definitely difficult tasks. By the end of 2016 the envisaged adoption of a continental external tariff had not materialised.

However, there is no doubt that if a continental customs union (CCU) is established, the reduction of average tariffs imposed by African countries on their imports of intermediate goods from the rest of the world would make imports of inputs, to be used in the production process of African economies, cheaper. Thus, production costs would be lowered leading to an increase in production. African economies would become more competitive on the world market and would be able to exploit new market opportunities outside the continent.⁶³⁹

⁶³⁷ African Union Millennium Integration Programme (MIP), at 56.

⁶³⁸ Mbenge, M *et al.* "The African Economic Community" in Yusuf, AA *et al.* *The African Union: Legal and Institutional Framework: A Manual on the Pan-African Organization* (2012) at 198.

⁶³⁹ Mevel, S *et al.* "Deepening Regional Integration in Africa: A Computable General Equilibrium Assessment of the Establishment of a Continental Free Trade Area followed by a Continental Customs Union", Paper presented at the 7th African Economic Conference Kigali, Rwanda, 30 October - 2 November, 2012 at 25 – 26.

(e) Fifth Stage (four years)

This stage concerns the establishment of an African Common Market (ACM) and is to be completed in 2023. In this regard four major activities would be carried out during this stage:

- (i) the adoption of a common policy in several areas such as agriculture, transport and communications, industry, energy and scientific research;
- (ii) the harmonisation of monetary, financial and fiscal policies;
- (iii) the application of the principle of free movement of persons as well as the provisions herein regarding the rights of residence and establishment; and
- (iv) constituting the proper resources of the Community as provided for in Paragraph 2 of Article 82 of the Treaty.⁶⁴⁰

(f) Sixth Stage (five years)

This is the final stage of the continental integration process and is about the consolidation and strengthening of the structures of the ACM, including the free movement of peoples of Africa and factors of production; creation of a single domestic market and Pan-African Economic and Monetary Union, African Central Bank and single African Currency, and establishment of a Pan-African Parliament.⁶⁴¹ This stage is to be completed in 2028.

It is interesting to note that the AEC does not expect or wish the RECs to achieve the full lengths of integration, as per market or linear integration, in their regions before the absorption into the African Economic Community. This is so because after the RECs

⁶⁴⁰ Article 6(2)(e).

⁶⁴¹ The Pan-African Parliament came into being in 2004 after ratification of the *Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament*. This was after the AU Heads of State and Government Summit in Maputo in July 2003 resolves to bring forward its date of establishment.

establish customs unions, as per stage three, then the preparations continue for the African Customs Union, as per stage four, and not the common market in the RECs, as it would normally be the case in a linear or market approach of integration.

This might pose a challenge for many of the RECs which aim to reach the next stages of common markets and economic unions. It is worth noting that the Protocol on the Relations between the AU and the RECs does not deal with this situation, which has the potential to derail this integration process as envisaged through the AEC.

Also, five of the eight recognised RECs were established before the AEC Treaty was concluded and provided for integration processes that end with either a common market or an economic community.⁶⁴² So many of these RECs might not easily abandon their integration agenda in favour of the AEC integration.

However, the six stages are not inflexible; the process can be expedited or extended with regular verification of completion of the stages.⁶⁴³ In other words, a particular stage may be extended beyond the period specified by Article 6(2), provided that the entire six transitional periods do not exceed a period of forty years.⁶⁴⁴ One therefore wishes, or rather expects, the AU to see this defect and allow the RECs to reach their full integration before being absorbed into the AEC. This will be easier to manage as compared to the currently

⁶⁴² AMU Treaty came into operation in February 1989; ECCAS Treaty in January 1985; ECOWAS Treaty in May 1975; IGAD Treaty in January 1986 and SADC Treaty in August 1992. Only the CEN-SAD (1998), COMESA (1994) and EAC (2001) were established after the AEC Treaty came into operation.

⁶⁴³ Article 6 provides, *inter alia*:

“(3). All measures envisaged under this Treaty for the promotion of a harmonious and balanced development among Member states, particularly, those relating to the formulation of multi-national projects and programmes, shall be implemented concurrently within the time period specified for the attainment of the objectives of the various stages outlined in paragraph 2 of this Article.

(4). The transition from one stage to another shall be determined when the specific objectives set in this Treaty or pronounced by the Assembly for a particular stage, are implemented and all commitments fulfilled. The Assembly, on the recommendation of the Council, shall confirm that the objectives to a particular stage have been attained and shall approve the transition to the next stage.

(5). Notwithstanding the provisions of the preceding paragraph, the cumulative transitional period shall not exceed forty (40) years from the date of entry into force of this Treaty.”

⁶⁴⁴ Saurombe, A. “An analysis of economic integration in Africa with specific reference to the African Union and the African Economic Community” *South African Public Law* vol. 27 (2012) 292 at 300.

proposed route. This will of course necessitate a new agreement, either in the form of a revision of the Protocol on Relations between the AU and the RECs or the stages of the AEC or both.

To achieve the integration, one of the strategies suggested by the AEC Treaty is a rationalisation by absorption, with the reduction of the fourteen, or eight in terms of the AU, recognised African RECs to only five. This means that the eight recognised RECs will change, in both form and name. The five RECs that have been proposed are as follows:

1. The *North Africa Economic Community* (NAEC), which would include Algeria, Egypt, Libya, Mauritania, Morocco, and Tunisia. The secretariats of the Arab Maghreb Union and the Regional Group of Sahel and Saharan States would unite to form a new secretariat to serve this community.

2. The *West Africa Economic Community* (WAEC) which would include Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo. The secretariats of the ECOWAS, *Union Economique et Monétaire Ouest Africain* (UEMOA), and the Mano River Union would unite to form a new secretariat to serve this community.

3. The *East Africa Economic Community* (EAEC) which would include Burundi, Comoros, Djibouti, Eritrea, Ethiopia, Kenya, Madagascar, Mauritius, Malawi, Rwanda, Seychelles, Somalia, Sudan, Tanzania, and Uganda. The secretariats of the COMESA, the EAC, and the Inter- Governmental Authority for Development (IGAD) would unite to form a new secretariat to serve this community.

4. The *Central African Economic Community* (CAEC) which would include Angola, Cameroon, Central African Republic, Chad, Republic of Congo, Democratic Republic of Congo, Equatorial Guinea, Gabon, and São Tomé and Príncipe. The secretariats of the ECCAS, *Communauté Economique et Monétaire*

de l'Afrique Centrale (CEMAC) and *Communauté Economique des Pays de Grands Lacs* (CEPGL) would unite to form a new secretariat to serve this community.

5. The *Southern Africa Economic Community* (SAEC) would include Botswana, Lesotho, Mozambique, Namibia, South Africa, Swaziland, Zambia, and Zimbabwe. The secretariats of the SADC, the SACU and the Indian Ocean Commission would unite to form a new secretariat to serve this community.⁶⁴⁵

According to the AEC Treaty, geographical proximity, economic interdependence, commonality of language and culture, history of co-operation, and shared resources should define the REC membership. However, despite the advantages offered by the merging solution (notably the reduction of the number of RECs, and the solution to the problems of multiple memberships and their consequences), many countries do not seem keen to adopt this scenario. This would be a challenge for the AEC because leaving other RECs could prove difficult for political, economic and historical reasons.⁶⁴⁶

4.2.2 Relationship between the AEC and the African Union

The AEC (Abuja) Treaty came into force in May 1994 and this meant that since 1994, the OAU was operating on the basis of two legal instruments – the OAU Charter and the Abuja Treaty. Since then it was clear that there was a need to integrate the political activities, as enshrined in the OAU Charter, with the economic and developmental issues laid out in the Abuja Treaty. The OAU and AEC had to interchange and brief each other on many issues affecting the continent. This resulted in an unnecessary waste of time and resources.⁶⁴⁷ As

⁶⁴⁵ Nene, M. “Political and Economic Drivers of Regional Integration in Africa: A Case Study of the Democratic Republic of Congo” South African Institute of International Affairs (SAIIA) Occasional Paper No. 106, January 2012.

⁶⁴⁶ *Ibid.*

⁶⁴⁷ Kössler, A. “The EU as a Role Model for African Integration?” in Kössler, A *et al. Global Voices on Regional Integration* (2007) at 17; Danso, K. “The African Economic Community: problems and prospects” *Africa Today* vol. 42 issue. 4 (1995) 31 – 55; Ndulo, M. “Harmonisation of trade laws in the African Economic Community” *International and Comparative Law Quarterly* vol. 42 (1993) 101 – 118.

such it was inevitable that these two had to be merged, and the foundation for this merger was laid in September 1999 during the OAU Extraordinary Summit in Sirte, Libya.⁶⁴⁸

The central theme of this OAU Extraordinary Summit was the commitment to accelerate the process envisaged by the AEC Treaty, in particular: shortening the implementation periods of the Treaty; and the speedy establishment of all the institutions provided for in the Abuja Treaty, such as the African Central Bank, the African Monetary Union, the African Court of Justice, and the Pan-African Parliament. This led to the adoption of the Constitutive Act of the African Union (AU) by the OAU/AEC Summit of July 2000 in Lomé, Togo, which essentially merged the two. The AU was inaugurated in July 2002.

In programmatic terms, the AU is premised on pursuing the objectives of the OAU Charter and Abuja Treaty.⁶⁴⁹ This becomes clear from the Preamble of the AU Constitutive Act, which states that the Union is also premised on the accelerated implementation of the Abuja Treaty in order to promote the socio-economic development of Africa, and to face more effectively the challenges posed by globalisation.

In terms of its legal status, Article 98(1) of the AEC Treaty states that it, together with its envisaged protocols, forms an integral part of the OAU Charter. Article 99 goes on to declare that the Treaty and protocols adopted under it shall form an integral part of the OAU Charter. However, what is meant by “integral part” is not defined. The immediate effect of these provisions was that the institutions or organs of the OAU were co-opted to perform the functions of the institutions established by the AEC Treaty without careful consideration as to whether, as then structured, the OAU institutions suited the needs of economic integration.⁶⁵⁰

⁶⁴⁸ The purpose of the Extraordinary Summit was to amend the OAU Charter to increase the efficiency and effectiveness of the OAU. This Summit concluded with the *Sirte Declaration* and decided to establish the African Union to replace the OAU.

⁶⁴⁹ Kössler (fn 647); “The Role of the Regional Economic Communities (RECs) as the Building Blocks of the African Union” at <http://www.dfa.gov.za/docs/2003/au0815.htm> (accessed on 8 December 2015).

⁶⁵⁰ Oppong, R.F. “The African Union, African Economic Community and Africa’s Regional Economic Communities: Untangling a Complex Web” *African Journal of International and Comparative Law* vol. 18 issue 1 (2010) 92 at 97 – 98; Mutai, H.K. *Compliance with international trade obligations: The common market for eastern and southern Africa* (2007) at 48.

Article 33(1) of the AU Constitutive Act, on the other hand, stipulates that the Act will replace the OAU Charter, while Article 33(2) stipulates that provisions of the Act will take precedence over and supersede any inconsistent or contrary provisions of the AEC Treaty. However, the relationship between the two bodies is not clearly defined in either of the two founding documents or anywhere else. Member states also have to ratify both the AU Constitutive Act and the AEC Treaty separately. As a result of this, the membership of the AU does not correspond with the membership of the AEC: of the fifty-five AU member states, forty-nine have ratified the AEC Treaty. In other words, the AU has fifty-five member states and the AEC forty-nine.⁶⁵¹

Even though the AU came into effect after the AEC, its organs are still not structured in a way that they are suited for the needs of economic integration. This means that the AU, just like the OAU, still operates on the basis of two legal instruments with regards to economic integration, though in a hierarchical or vertical form.⁶⁵²

It is worth noting that the African Court of Justice and Human Rights, which shall have jurisdiction over all cases and legal disputes that relate to “the interpretation and application of the Constitutive Act, Union treaties and all subsidiary legal instruments, the African Charter and any question of international law” is still to be established.⁶⁵³ The jurisdiction of this court is wide enough to cover integration issues as per the AEC Treaty.

⁶⁵¹ Djibouti, Eritrea, Madagascar, Morocco, Somalia and South Sudan have not ratified the AEC Treaty; “Status of OAU/AU Treaties, Conventions, Protocols and Charters (as of 30 November 2017)” available at <https://au.int/en/treaties> (accessed on 6 December 2017); Oppong R.F. *Legal Aspects of Economic Integration in Africa* (2011) at 22.

⁶⁵² Oppong (above) at 69; Asante, S.K.B *et al. Towards an African Economic Community* (2001) at 16.

⁶⁵³ In June 2014, the Assembly adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Assembly/AU/Dec.529(XXIII)). The new Court will begin after 15 member states have ratified the 2008 *Protocol on the Statute of the African Court of Justice and Human Rights*. This Protocol merges the African Court of Justice is provided for by the AU Constitutive Act, the Court of Justice of the AEC as provided for in the AEC Treaty and African Court on Human and Peoples’ Rights, which is the currently operational court in terms of the 2003 *Protocol on the African Court of Justice* that entered into force in February 2009. See more at: <http://au.int/en/organs/cj#sthash.DzX1Lk5e.dpuf> (accessed on 4 December 2015); Jalloh, C. C *et al. Shielding Humanity: Essays in International Law in Honour of Judge Abdul G Koroma* (2015) at 558.

4.2.3 African Union and Regional Integration

The final OAU Summit of 9 - 11 July 2001 in Lusaka, Zambia reaffirmed the status of the RECs as building blocks of the African Union and the need for their close involvement in the formulation and implementation of all programmes of the Union.⁶⁵⁴ When the AU came into being in 2002, it had as one of its objectives “to coordinate and harmonise the policies between the existing and future RECs for the gradual attainment of the objectives of the Union.”⁶⁵⁵

In November 2003 the AU Commission and the RECs agreed in Addis Ababa, Ethiopia, that the relationship between the African Union and the RECs needs a stable legal framework in order to foster cooperation between the two parties. Consequently, all efforts were to be exerted to prepare a new protocol on their relations using, among other elements, the Protocol between the AEC and the RECs.⁶⁵⁶

The parties further agreed that to fulfil the vision and mission of both the African Union and the RECs, a mechanism for the harmonisation and coordination of their various programmes and actions couldn't be avoided. This task has to be performed on a regular basis and in a proactive manner.⁶⁵⁷

In March 2005 a project of a protocol on relations between the AU and the RECs was adopted by the legal experts and Permanent Representatives' Committee (PRC) joint meeting, offering a good basis to rely on. The *Protocol on Relations between the African Union and the Regional Economic Communities* was then adopted at the July 2007 Accra Summit of the AU Assembly. This Protocol, as stated above, primarily set out the institutional and procedural framework for the AU's cooperation with the RECs. One of its

⁶⁵⁴ “Decisions and Declarations of the Assembly of Heads of State and Government”, Thirty-seventh Ordinary Session/Fifth Ordinary Session of the AEC 9 – 11 July, 2001 Lusaka, Zambia (*AHG/Dec.1 (XXXVII)*).

⁶⁵⁵ Article 3(1) of the African Union Constitutive Act.

⁶⁵⁶ This was in a “Brainstorming Session between AU Commission and Regional Economic Communities” of 21 –23 November 2003, in Addis Ababa, Ethiopia.

⁶⁵⁷ *Ibid.*

objectives was to accelerate the integration process by shortening the periods as provided for by the AEC Treaty.⁶⁵⁸

The UMA was the only recognised REC that did not sign this Protocol. Among the reasons was its dormancy, due to political differences among the members, chief of which is Morocco's annexation of the Western Sahara, which has paralysed the North Africa Region.⁶⁵⁹

Now the AU classifies Africa into five main regions, namely, North Africa, West Africa, Central Africa, East Africa and Southern Africa, but the configuration of none of the RECs tallies with the "regions" as defined by the AEC Treaty.⁶⁶⁰ Some RECs cut across these regions.⁶⁶¹

This regional cross-cutting led to the AU, in July 2006, at the close of its 7th Summit of the Assembly, saying that it would suspend recognition of new RECs on the continent, a move believed to be beneficial for enhancing the efficiency in the continent's integration process and economic development.⁶⁶² This decision was formalised with the adoption of a "Moratorium on the establishment and recognition of more RECs". This led to eight RECs being recognised by the AU, which has, in turn, led to the growing calls that the number of RECs be reduced from eight to five, to correspond with the regions as defined by the AU Treaty.

⁶⁵⁸ Article 3(d) of the *Protocol on Relations between the African Union and the Regional Economic Communities*; Mossner, L.E. "The Multilayered System of Regional Economic Integration in West Africa" in Herrmann, C *et al. European Yearbook of International Economic Law* (2014) at 334.

⁶⁵⁹ Ndomo at "Regional Economic Communities in Africa: A Progress overview", A study commissioned by GTZ, Nairobi, May 2009 at 25; Yaya, B.H. "Inter-regionalism as a Mechanism for the Harmonization of Africa's Regional Integration Projects", Paper for the Council for the Development of Social Science Research, April 2015 at 7.

⁶⁶⁰ Article 1(d) of the AEC Treaty provides:

"Region" shall mean an OAU region as defined by Resolution CM/Res.464 QCXVI of the OAU Council of Ministers concerning the Division of Africa into five (5) regions namely North Africa, West Africa, Central Africa, East Africa and Southern Africa.

⁶⁶¹ Ndomo (fn 659) at 8; Centre for Citizen's Participation on the African Union (CCP-AU). "AU organs and institutions, challenges and opportunities", Civil Society Briefing Notes: 001, January 2012 at 2.

⁶⁶² "AU Assembly 7th Ordinary Summit Decision on the Report on the Status of the OAU/AU" (*Doc.EX.CL/252 (IX) 1*); "AU to suspend recognition of new regional economic communities" http://english.people.com.cn/200607/03/eng20060703_279456.html (accessed on 8 December 2015).

Apropos this Summit, the AU Assembly urged the eight recognised RECs to coordinate and harmonise their policies among themselves and with the AU Commission with a view to accelerating Africa's integration process while requesting member states, RECs and the United Nations System, as well as development partners, to collaborate closely with the AU Commission in the rationalisation process.⁶⁶³

In order to make progress on the integration of Africa, the African Union Commission (AUC), in collaboration with the RECs, took steps to elaborate a Minimum Integration Programme (MIP). This followed decisions taken by various AU Conferences of African Ministers in Charge of Integration (COMAIs), which identified the urgent need to rationalise and harmonise REC activities and programmes, if the AEC were to become realised as it was conceived in the AEC Treaty and the AU Constitutive Act. The various AU COMAIs recommended the following:

- the AUC, in collaboration with the United Nations Economic Commission for Africa (UNECA), African Development Bank (AfDB) and the RECs, should review the stages of the Abuja Treaty, taking into account the recent AU decisions, including the Sirte Declaration;
- the MIP should be adopted and implemented as a dynamic strategic and continental framework for the integration process;
- the AUC should elaborate the MIP for RECs, bearing in mind that they implement their activities and programmes independently;
- the AUC should coordinate REC activities and harmonise their policies and programmes, as recommended in the AU decision taken in the Gambia; and
- the free movement of persons, goods, capital and services among and across all RECs should be encouraged and promoted to accelerate continental integration.⁶⁶⁴

⁶⁶³ “Decisions of the AU 7th Summit of the Assembly of Heads of States and Government, Banjul, Gambia, 1 -2 July 2006 (*Assembly/AU/Dec.111 – 132 (VII)*); High Level Panel Report on the “Audit of the African Union, 18 December 2007 at 138.

⁶⁶⁴ “Follow-up Report on the Implementation of Recommendations for the Fourth Conference of African ministers in charge of Integration (COMAI IV)”, African Union Department of Economic Affairs - July 2011, at 7.

In implementing these recommendations, the AUC undertook a study, the “Rationalization of the Regional Economic Communities (RECs): Review of the Abuja Treaty and Adoption of the Minimum Integration Programme”, which was completed in April 2007. However, the different AEC stages were never revised. Since then the AUC has been consulting with the RECs and other stakeholders, exchanging views on how to elaborate MIPs for RECs to advance Africa’s integration.⁶⁶⁵

The results of the study were presented to the Second Conference of Ministers in Charge of Integration in Rwanda, in July 2007. According to the AU July 2011 Report,⁶⁶⁶ all the eight RECs are implementing these recommendations, though to varying degrees as there are financial constraints.

After the adoption of the Minimum Implementation Plan (MIP) in 2009, the first draft plan for its implementation was adopted in January 2012 during the Eighteenth Ordinary Summit of the AU Assembly.⁶⁶⁷ With regard to trade, the draft plan prioritises the elimination of tariff and non-tariff barriers; rules of origin; customs and free movement of people, capital, goods and services.⁶⁶⁸

It was at this Summit that the Heads of States and Government also agreed to establish the Continental FTA (CFTA) by 2017, with the EAC-COMESA-SADC Tripartite FTA (T-FTA) and the second pole of integration made of ECOWAS, ECCAS, CEN-SAD and AMU as the building blocks.⁶⁶⁹ It must be said that the tone of the 2012 Summit implied an ambitious AU agenda of promoting and coordinating African integration and its accompanying benefits more quickly than before.

⁶⁶⁵ “The Status of regional integration in Africa: Assessing Regional integration in Africa (ARIA IV)” (2010) Chapter 2 at 8 – 9.

⁶⁶⁶ Ndomo (fn 659) at 18 *et seq.*

⁶⁶⁷ AU Eighteenth Ordinary Summit “Decision On African Integration” (*Assembly/AU/Dec.392(XVIII)*).

⁶⁶⁸ First Action Plan for the Implementation of the Minimum Integration Programme (MIP) at 8.

⁶⁶⁹ “Declaration on Boosting Intra-African Trade and the Establishment of a Continental Free Trade Area (CFTA)” (*Assembly/AU/Decl.1(XVIII)*); Hartzenberg, T. “The Tripartite Free Trade Area: from the 2008 Kampala vision to . . .” in *Cape to Cairo: Exploring the Tripartite FTA Agenda* (2013) at 3.

In pursuance of the aforementioned decision, the African Union Commission (AUC) has held several consultations with the four RECs of ECOWAS, ECCAS, CEN-SAD and AMU and the “Concept note on the modalities for the creation of the second bloc of RECs” has been developed. The Concept Note proposes the conclusion of a memorandum of understanding (MoU) among the RECs that will be the legal framework, with timeframes, of establishing the second bloc. However, the AMU is still not participating due to the persisting conflict in some of its member states.⁶⁷⁰

4.2.4 Relationship between AEC/AU and SADC

Article 5(1) of the *Protocol on Relations between the AU and the RECs* provides that the regional economic communities shall take steps to review their treaties to provide an umbilical link to the Community and in particular provide:

- (a) strengthening of their relations with the Union;
- (b) alignment of their programmes, policies and strategies with those of the AU;
- (c) providing for the effective implementation of this Protocol; and
- (d) providing for the eventual absorption, at stage 5 set out in Article 6(2)(e) of the Treaty, of the RECs into the African Common Market as a prelude to the Community.

In line with this, the revised ECOWAS Treaty now provides that integration of the West Africa region shall constitute an essential component of the integration of the African Continent. Member states undertake to facilitate the co-ordination and harmonisation of the policies and programmes of the Community with those of the African Economic Community.⁶⁷¹

The East African Community (EAC) Treaty provides that the partner states reiterate their desire for a wider unity of Africa and regard the Community as a step towards the

⁶⁷⁰ African Union. “Modalities for the Creation of a Second Bloc of RECs – Concept Note”, November 2013; Soininen, I. “The Continental Free Trade Area: What’s going on?” *Bridges Africa* vol. 3, issue 9 (November 2014) 4 at 5.

⁶⁷¹ Article 78 of the ECOWAS Treaty.

achievement of the objectives of the Treaty Establishing the African Economic Community.⁶⁷²

The COMESA Treaty has, as one of its main objectives, “to contribute towards the establishment, progress and the realisation of the objectives of the African Economic Community.”⁶⁷³ It also envisages the conversion of the COMESA into an organic entity of the African Economic Community.⁶⁷⁴ This is interesting because it talks of “conversion” and not “absorption”, which is the phrase used by the AEC Treaty. This appears to suggest that the COMESA does not envisage the formation of the African Economic Community as its demise.⁶⁷⁵

However, unlike the COMESA Treaty neither the ECOWAS Treaty⁶⁷⁶ nor the EAC Treaty⁶⁷⁷ contains any provision directly relevant to their status after the formation of the African Economic Community. Neither does the ECCAS Treaty.⁶⁷⁸

The SADC Treaty, on the other hand, contains very little with regard to its relationship with the AEC or AU in that it only states, in the Preamble, “taking into account the AEC Treaty and the AU Constitutive Act . . .”.⁶⁷⁹ This seems to be one of the reasons for the dysfunctional SADC-AU interface, which often leads to the SADC member states taking different decisions when they participate in or with the AU.⁶⁸⁰

⁶⁷² Article 130(2) of the EAC Treaty.

⁶⁷³ Article 3(f) of the COMESA Treaty.

⁶⁷⁴ Article 178(1)(c).

⁶⁷⁵ Opong, R.F. “The African Union, African Economic Community and Africa’s Regional Economic Communities: Untangling a Complex Web” *African Journal of International and Comparative Law* vol. 18 issue 1 (2010) 92 at 94.

⁶⁷⁶ Article 2(1) of the ECOWAS Treaty provides that the member states have decided that ECOWAS shall ultimately be the sole economic community in the region for the purpose of economic integration and the realization of the objectives of the African Economic Community.

⁶⁷⁷ In its Preamble, the EAC Treaty states that the member states affirm their desire for a wider unity of Africa and regarded the Community as a step towards the achievement of the objectives of the AEC Treaty.

⁶⁷⁸ The ECCAS Treaty only makes reference, in its Preamble, to the Lagos Plan of Action and the Final Act of Lagos (April 1980) as the bases for the African economic community.

⁶⁷⁹ Preamble to the SADC Treaty; Opong, R.F. *Legal Aspects of Economic Integration in Africa* (2011) at 68.

⁶⁸⁰ When the coup d’état happened in Madagascar in 2009, the SADC reacted to the crisis by convening an extraordinary summit at the request of the chairperson of the Organ, King Swati III. While SADC was still discussing the best way to address the crisis, the AU and UN deployed a mission to try to resolve the crisis. When the SADC mission arrived in Antananarivo, the issue of its mandate arose. The AU’s PSC had

However, Article 24 of the SADC Treaty reflects a clear desire on the part of the SADC to forge a working relationship with other international, albeit supranational, organisations such as the AEC or the AU.⁶⁸¹ According to this Article the SADC may hold meetings with organisations like the AEC or the AU to review policies and strategies, and to evaluate the performance of the SADC in the implementation of its programmes and projects as well as to identify and agree on future plans of cooperation.⁶⁸²

It could, therefore, be argued that lack of express provision in the SADC Treaty regarding its relationship with the AEC or AU, should not be viewed to mean that the SADC does not take its relationship with the AEC or AU seriously, compared to other RECs on the continent. One of the reasons might be that the SADC Treaty came into being before the *Protocol on Relations between the AU and the RECs*, and the SADC deemed it unnecessary to amend its Treaty as Article 24 already caters for that relationship.

Conclusion

Having analysed the objectives, role and structures of the SADC one can only conclude that the aim of the SADC is to create a community providing for regional peace and security, and an integrated regional economy. As a regional institution it has laid the basis on which regional planning and development in Southern Africa could be pursued. It also provides the desired instrument by means of which member states should move along towards eventual economic integration.

decided on the mission without consulting SADC, but had consulted the UN. SADC's reaction was based on its internal policies, since Madagascar was a member. The new regime exploited this lack of coordination, which complicated the prospects for a resolution of the conflict.

In the case of the DRC, in the stand-off between the Government and the Rebels called the M-23, The SADC deployed its stand-by forces and designated President Yoweri Museveni of Uganda as the mediator. However, the AU also entered the fray, which raised the issue of mandate as well as issues around funding.

⁶⁸¹ Article 24(1) of the SADC treaty provides:

“Subject to the provisions of Article 6(1), Member states and SADC shall maintain good working relations and other forms of co-operation, and may enter into agreements with other states, regional and international organisations, whose objectives are compatible with the objectives of SADC and the provisions of this Treaty.”

⁶⁸² Article 24(2).

Initially, the SADC was composed of countries with different economic orientations and political ideologies which would have made cooperation difficult. However, with the demise of the “cold war” all the SADC member states embrace the free market system and welcome the role of private investment in the development of their economies, which will make economic cooperation run smooth. This is apparent in almost all the protocols of the SADC, including the Protocol on Trade.⁶⁸³

The signature of the SADC Protocol on Trade in August 1996 confirmed the commitment of Southern Africa - as a regional bloc - to establish a Free Trade Area (FTA) in the region. The Trade Protocol was ratified by more than two thirds of the SADC member states and it started operating on the 1st of September 2000. The SADC also moved swiftly to adopt the “Protocol on Tribunal and the Rules of Procedure Thereof” and other protocols in order to regulate trade integration in the region. This shows that the SADC is not only “talking the talk”, but also “walking the talk”.

The SADC is also on the right track when one looks at the compliance of the Trade Protocol with Article XXIV of the GATT. However, the member states must still finalise details on the elimination of tariffs and non-tariffs barriers within the SADC region, especially with the confusion brought about by the exception in Article 4(5) of the Trade Protocol. Perhaps this would become clear in the programme of action (SADC Programme of action is dealt with fully in Chapter 5). Already the deadline of 2012 for a hundred percent implementation of the Trade Protocol could not be achieved.

One aspect that the SADC must be applauded on, with regard to integration, is its desire to involve the people of the region. Reference to this is made at least in three areas of the

⁶⁸³ Other protocols relating to trade integration are dealt with in Chapter 5.

Treaty, namely, the Preamble,⁶⁸⁴ Article 5 (Objectives)⁶⁸⁵ and Article 23 (Stakeholders).⁶⁸⁶ This is so because logically integration is for the people and thus has to be by the people, at least from a democracy point of view.

The SADC is also one of the building blocks of the African Economic Community (AEC). The AEC is an important body regarding integration and trade in the Southern Africa region since the RECs, which are primarily trade blocs, are the “Pillars of the Community”. However, it is still too early to state whether it would succeed in achieving its ultimate goal of an African economic community. The core stages for economic integration in its timeframes are still forthcoming and there is not much to report on the progress now.

The issue of multiple membership seems to be the Achilles heel for the realisation of the AEC. This is so because technically stage three of the AEC, the establishment of a customs union at the level of each REC, which is the stage that the AEC has now reached, cannot be completed with these multiple memberships. Again, member states seem to be oblivious to the fact that in fact their multiple membership of RECs contravenes the AEC. In Article 5(1) of the AEC Treaty, member states undertook to “create favourable conditions for the development of the Community and the attainment of its objectives, particularly by harmonising their strategies and policies”, and to “refrain from any unilateral action that may hinder the attainment of the said objectives”. The unilateral decision of AEC member

⁶⁸⁴ The Preamble provides, among others:

“MINDFUL of the need to involve the people of the Region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the rule of law.”

⁶⁸⁵ Article 5(2)(b) provides:

“In order to achieve the objectives set out in paragraph 1 of this Article, SADC shall encourage the people of the Region and their institutions to take initiatives to develop economic, social and cultural ties across the Region, and to participate fully in the implementation of the programmes and projects of SADC.”

⁶⁸⁶ Article 23 provides:

1. In pursuance of the objectives of this Treaty, SADC shall seek to involve fully, the people of the Region and key stakeholders in the process of regional integration.
2. SADC shall co-operate with, and support the initiatives of the peoples of the Region and key stakeholders, contributing to the objectives of this Treaty in the areas of co-operation in order to foster closer relations among the communities, associations and people of the Region.
3. For the purposes of this article, key stakeholders include:
 - a. private sector;
 - b. civil society;
 - c. non -governmental organisations; and
 - d. workers and employers organisations.”

states to be members of multiple RECs creates unfavourable conditions for the development of the AEC.⁶⁸⁷

The *Protocol on the Relations between the AU and the RECs* has brought two new innovations that might help in this whole integration process: firstly, the AU is vested with the authority to sanction the RECs or member states who do not comply with its directives.⁶⁸⁸ Secondly, it provides a mechanism for resolution of disputes.⁶⁸⁹ Hopefully these innovations will invigorate the RECs to do more in improving their relations with the AEC, thus accelerating the achievement of the African Economic Community.

Success will depend on the will and determination of each stakeholder to play its efficient role in the realisation of the African Economic Community through implementing the Abuja Treaty. And the AU should lead the integration process while the member states support the process.

What is needed, therefore, is more interaction between the AEC\AU and its building blocks RECs, to sort out these obstacles to integration such as multiple membership. At least there is a political will to this end, as attested to by the AU's decision to establish the Continental Free Trade Area (CFTA) by 2017. If this could be achieved the problem of multiple membership would be solved. This will then lay a perfect ground to move to the next stage of the continental customs union.

⁶⁸⁷ Oppong, R.F. "The African Union, African Economic Community and Africa's Regional Economic Communities: Untangling a Complex Web" *African Journal of International and Comparative Law* vol. 18 issue 1 (2010) 92 at 96.

⁶⁸⁸ Article 22.

⁶⁸⁹ Article 32.

CHAPTER 5

ACHIEVEMENTS BY THE SADC TOWARDS INTEGRATION IN SOUTHERN AFRICA

Introduction

The Southern Africa region is viewed as the one region with the greatest potential for spearheading the African Renaissance. This is because the SADC is arguably Africa's fastest growing region in Africa, but conflicts, in particular, are spoiling the potential harmony.⁶⁹⁰ This political instability can divert attention away from economic integration initiatives that the region has embarked upon.

Apart from the political challenges, the region also faces some economic challenges such as: to become competitive by attracting foreign investment; applying new technology; and producing goods and services that can compete effectively with other international role-players and penetrate industrial markets. However, not all is doom and gloom. The SADC has made some achievements, especially in the area of regional economic integration, which remains a viable development strategy for Africa, as advocated by the African Economic Community (AEC) Treaty.⁶⁹¹

The SADC integration agenda was conceptualised under the Regional Indicative Strategic Development Plan (RISDP) in 2003, which articulates the roadmap for SADC integration through the establishment of a free trade area (FTA) by 2008, a customs union in 2010, a common market in 2015, a monetary union in 2016, and an economic union with a single currency in 2018. However, institutional challenges remained as the SADC was still rooted

⁶⁹⁰ Angola, DRC and Mozambique have had a share of civil war, with the one in DRC not totally stopped. Zimbabwe had the so-called "operation clean-up" (Murambatsvina) in 2005, which led to massive internal displacement of citizens as well as the controversial land policy that ended up at the SADC Tribunal. Madagascar had a coup which toppled the government of elected President, Marc Ravalomanana in 2009. South Africa has a recurring problem of homophobia against the emigrants from Zimbabwe and Mozambique in particular. The recent conflict erupted in Lesotho, which led to the killing of the defence force chief and the dissolution of parliament in 2014.

⁶⁹¹ The AEC is discussed in details in Chapter 4, part 2 (above).

in the Southern African Development Coordination Conference (SADCC) framework instead of the rules-based mechanism. Its Secretariat was still not adequately transformed to suite the new approach.⁶⁹² There was as such a need to transform the SADC Secretariat.

In order to show its commitment to the issue of integration, the SADC Council approved the new structure of the Secretariat on 28 February 2008 in Lusaka, Zambia. The new structure created the posts of two Deputy Executive Secretaries: one for *Regional Integration* and the other for *Finance and Administration*. The Deputy Executive Secretary: Regional Integration is responsible for five directorates⁶⁹³ that address SADC's regional integration themes.

This commitment is also fortified by the SADC law, which is geared towards integration. For instance, Article 22 of the SADC Treaty requires member states to conclude and ratify protocols spelling out the goals, scope and manner of co-operation and integration in seven sectors, which cover "politics, diplomacy, international relations, peace and security". Out of the 27 protocols, 24 have come into force so far after being ratified by two-thirds of the signatory member states.⁶⁹⁴

Though the SADC member states have ratified most of these protocols, there are some instances wherein they have been found wanting. So in this section reference is made only to protocols that are in operation. The majority of these are protocols that are within the realm of economic integration, but others that fall within other areas such as social integration have been added because of their link to the subject.

This Chapter will thus be focused on SADC's achievements on various aspects relevant to integration, especially its blueprint for integration and economic development, the

⁶⁹² Saurombe, A. "Regional Integration Agenda for SADC 'Caught in the winds of change': Problems and Prospects" *Journal of International Commercial Law and Technology* vol. 4 issue 2 (2009) 100 at 101.

⁶⁹³ The Directorates are: Trade, Industry, Finance and Investment; Infrastructure and Services; Food, Agriculture and natural Resources; Social & Human development and Special Programmes; and Policy Planning and Resource Mobilisation.

⁶⁹⁴ "Foreword" by the SADC General Secretary, Dr Stergomena Lawrence Tax, in *SADC @35- Success Stories* vol. 1 (2015).

Regional Indicative Strategic Development Plan (RISDP), as well as its achievements in terms of various relevant protocols.

5.1 Institutional Framework

The institutions of every regional body are important vehicles to carry the obligations and objectives of that body. It is important that those institutions or organs are well equipped and empowered to fulfil the mandate they are tasked with. The transformation from the SADCC into the SADC was not accompanied by an appropriate institutional framework for integration. Hence there was a need for strong institutions in the SADC that are accountable not only to individual member states, but also to a central authority.⁶⁹⁵

Thus in August 1999 the SADC of Heads of State or Government Summit⁶⁹⁶ held in Maputo, Mozambique, instructed that a review be conducted of the institutions of the SADC as well as its operations. This directive was based on the fact that under the sector-based approach, which was inherited from the Southern African Development Coordination Conference (SADCC), the organisation was being hamstrung in its endeavours to achieve regional integration by devising and implementing regional policies and strategies in a co-ordinated and harmonised manner.⁶⁹⁷

In 2001 the SADC Heads of State and Government convened an Extra-Ordinary Summit on 9 March 2001, in Windhoek, Namibia,⁶⁹⁸ at which they approved a *Report on the Restructuring of SADC Institutions*, which spelled out enhanced objectives and common

⁶⁹⁵ Saurombe, A. “Regional Integration Agenda for SADC ‘Caught in the winds of change’: Problems and Prospects” *Journal of International Commercial Law and Technology* vol. 4 issue 2 (2009) 100 at 101.

⁶⁹⁶ The Summit is the ultimate policy-making institution of SADC and is responsible for the overall policy direction and control of functions of the Community (Article 10 of the SADC Treaty).

⁶⁹⁷ “Southern African Development Community (SADC): History and Present Status”, available at <http://www.dfa.gov.za/foreign/Multilateral/africa/sadc.htm> (accessed on 29 January 2016); Saurombe, A. “The Role of SADC Institutions in Implementing SADC Treaty Provisions dealing with Regional Integration” *Potchefstroomse Elektroniese Regsblad* vol. 15 no.2 (2012) 454 at 460.

⁶⁹⁸ “Communiqué from the SADC Heads of State and Government Extra-Ordinary Summit in Windhoek, Namibia, 9 March 2001”; “SADC: Ready for 21st century?” *Southern African Political and Economic Monthly* vol. 9 no.11 (1996) 2; Southern African Development Community. *SADC Major Challenges and Achievements Handbook* (2005) at 10; International Business Publications, USA. *Southern African Development Community (SADC) Business Law Handbook* (2011) at 216.

agenda for the SADC based on the objectives as outlined in Article 5 of the 1992 SADC Treaty. They scrapped the country-based coordination of sectoral activities and programmes, and replaced it with a more centralised approach through which the twenty-one Coordinating Units have been grouped together into four clusters, namely:

- Trade, Industry, Finance and Investment;
- Infrastructure and Services;
- Food, Agriculture and Natural Resources; and
- Social and Human Development and special programmes.⁶⁹⁹

The 2001 Extra-ordinary Summit also agreed on the current procedure, including a new formula for calculating monetary contributions made by member states. This was in recognition of unequal levels of the economies of member states.⁷⁰⁰

The review of the institutions led to the amendment of the Treaty establishing the SADC (SADC Treaty) to introduce the new institutions or organs. Article 9A(1) of the SADC Treaty introduced the *Troika* with respect to the following institutions: the Summit; the Organ on Politics, Defence and Security Co-operation; the Council; the Integrated Committee of Ministers (ICM);⁷⁰¹ and the Standing Committee of Officials. The Troika system comprises the current chairperson, the incoming chairperson (the deputy at the time), and the immediate previous chairperson.

The Troika of each institution shall function as a steering committee of the institution and shall, in between the meetings of the institution, be responsible for:

- (a) decision-making;
- (b) facilitating the implementation of decisions; and

⁶⁹⁹ “SADC: Corporate Profile”. Sourced from <http://www.sadcreview.com/sadc%20intro2003/Sadc%20Corporate%20Profile.htm> (accessed on 29 January 2016) at 2.

⁷⁰⁰ Scott, F. “Too much of a good thing: Reassessing the proliferation of Regional Trade Agreements” *Suffolk Transnational Law Review* vol. 30 (2006 – 2007) 407 at 416.

⁷⁰¹ The ICM was replaced by the Sectoral and Cluster Ministerial Committees in 2008.

(c) providing policy directions.⁷⁰²

The Troika of each institution shall have the power to create committees on an *ad hoc* basis. It shall also determine its own rules of procedure and may co-opt other members as and when required.⁷⁰³

The other organ established in terms of the amendment to the original Treaty is the *Organ on Politics, Defence and Security Co-operation*. It is selected by the Summit and its Chairperson and Deputy Chairperson are selected from the members of the Summit. The Chairperson of the Summit, however, cannot simultaneously be the Chairperson of the Organ. There is also the Ministerial Committee of the Organ, consisting of Ministers of Foreign Affairs; Defence; Public Security or State Security.⁷⁰⁴

The Organ had to conclude a protocol which would outline its functions and powers. This protocol had to be approved by the Summit and ratified by two-thirds of the SADC member states. The Summit approved the *Protocol on Politics, Defence and Security Co-operation*⁷⁰⁵ at its meeting in August 2001 and appointed President Chissano (as he then was) of Mozambique as the inaugural Chairperson of the Organ. The Summit also consolidated a far-reaching plan to restructure the SADC by centralising its operations in the Secretariat.⁷⁰⁶

Another institution introduced by the amendment is the *SADC National Committees*. These Committees shall be created in each Member State and shall be responsible to:

- (d) provide input at the national level in the formulation of the SADC policies, strategies and programmes of action;
- (e) co-ordinate and oversee, at the national level, implementation of the SADC programmes of action; and

⁷⁰² Article 9A(6) of the SADC Treaty.

⁷⁰³ Article 9A(7) – (9).

⁷⁰⁴ Article 10A.

⁷⁰⁵ Protocol on Politics, Defence and Security Co-operation entered into force on 2 March 2004.

⁷⁰⁶ Nathan, L. “SADC’s uncommon approach to common security, 1992 – 2003” *Journal of Southern African Studies* vol. 32 no. 3 (September 2006) 607 at 610.

- (f) create a national steering committee, sub-committees and technical committees.

Each national steering committee shall consist of the Chairperson of the SADC National Committee and the Chairpersons of sub-committees. A national steering committee is responsible for ensuring rapid implementation of programmes that would otherwise wait for a formal meeting of the SADC National Committee. It shall work with stakeholders that include government, private sector, civil society, non-governmental organisations and workers' and employers' organisations.⁷⁰⁷

Between 2006 and 2007, the SADC commissioned three studies that also recommended further consolidation process of the SADC institutional restructuring:

1. the "Job Evaluation study" by KPMG with focus on aligning the SADC governing and Secretariat organisational structure, grading system, remuneration structure as well as performance management and appraisal system;
2. the "European Commission Assessment" through Ernst & Young, with focus on improving SADC Secretariat operating policies and procedures; and
3. the "Assessment of Institutional Capacity Development Needs of the SADC Secretariat", supported by the German Government through *Gesellschaft für Technische Zusammenarbeit* (GTZ), with focus on strengthening staff competences, organisational cohesion and capacities.⁷⁰⁸

Apropos these studies, a special attention was given to the role of the *Integrated Committee of Ministers* (ICM), which was another institution that was introduced by the amendment to the SADC Treaty (Article 12). It consisted of at least two ministers from each Member State and was responsible to, *inter alia*, oversee the activities of the core areas of integration which include trade, industry, finance and investment. This body, in a nutshell, replaced the erstwhile SADC Commission.

⁷⁰⁷ Article 16A of the SADC Treaty.

⁷⁰⁸ Giuffrida, L *et al.* "Chapter 6: Strengthening SADC institutional structures – capacity development is the key to the SADC Secretariat's effectiveness" *Monitoring Regional Integration in Southern Africa Yearbook* vol. 8 (2008) at 5.

One major observation by these studies was that the ICM was not able to provide the policy guidance as expected due to its wide range of representatives. As such some of the former sectoral committees were re-established in some key areas such as energy and trade. Consequently, it was recommended that the Sectoral Committees of Ministers, in line with SADC regional integration priorities, be restored because these institutions were actually in a better position to provide policy guidance.⁷⁰⁹

In November 2007, the Council, after wide consultations, abolished the ICM and established six ministerial clusters, namely:

- Cluster for Trade, Industry, Finance and Investment (former Ministerial Task Force on Regional Integration);
- Cluster of Infrastructure and Services in Support of Regional Integration;
- Cluster of Food, Agriculture, Natural Resources and Environment;
- Cluster of Social, Human Development and Special Programmes;
- Cluster of the Organ of Politics, Defence and Security Cooperation;
- Cluster on cross-cutting issues related to Science and Technology and Gender.⁷¹⁰

The next step in the institutional restructuring process was the alignment of the SADC Secretariat's functions to the integration agenda. The position of Chief Director was abolished and a second Deputy Executive Secretary position introduced. Thus, the two Deputy Executive Secretaries are to be responsible for *Regional Integration* and for *Finance and Administration* respectively.⁷¹¹

The Deputy Executive Secretary for Regional Integration is, through delegation by the Executive Secretary, responsible for overseeing the programmes of regional integration of the technical directorates as well as the work of the directorate for policy planning and

⁷⁰⁹ *Ibid.*

⁷¹⁰ Peters, W. *The Quest for an African Economic Community: Regional Integration and Its Role in achieving African Unity – The Case of SADC* (2010) at 137; Odhiambo, M *et al. The Civil Society Guide to Regional Economic Communities in Africa* (2016) at 109.

⁷¹¹ Report of the 2008 SADC Summit for Heads of State and Government, Sandton, South Africa 16 - 17 August 2008 (Decision 5).

resource mobilisation.⁷¹² The latter is of great importance because it shall provide strategic direction to the Secretariat, recommend regional policies and coordinate with other regional economic blocs.⁷¹³

As a result of this institutional restructuring some achievements have been made:

- the SADC has a more focused governing and decision-making structure;
- the SADC has a prioritised integration agenda and key regional integration programmes to be centrally coordinated and managed by the SADC Secretariat;
- Clusters were established to guide and accelerate the deeper regional integration process;
- Secretariat vision, mission and values have been developed and the core functions of the Secretariat as a “think tank”, a principal regional coordinator of policies, a provider of support services, and a professional programme manager have been clarified;
- a new and more functional organisational structure consistent with the Secretariat’s mandate and in line with the SADC integration priorities has been approved;
- the Secretariat presently implements the Council decision to align the SADC Secretariat’s financial and human resources with priority areas and programmes of regional integration;
- a comprehensive SADC Secretariat Capacity Development Framework has been approved, and an institutional set-up to drive the implementation process of the Institutional Capacity Developmental Programme (ICDP) proposed;
- selected capacity development interventions such as the institutionalisation of the Performance Management and Appraisal System have been successfully started;
- a joint SADC-International Cooperating Partners (ICP) Partnership Facility for Capacity Development is proposed, and various ICPs have indicated their

⁷¹² “SADC Policy for Strategy Development, Planning, Monitoring and Evaluation” (February 2012) at 24; Muller, M *et al.* “Water and Regional Integration: The role of water as a driver of regional economic integration in Southern Africa”, Report to the Water Research Commission, March 2015 at 87.

⁷¹³ Giuffrida (fn 708) at 14.

willingness to financially and technically support the implementation of the ICDP.⁷¹⁴

These achievements augur well with the African Economic Community (AEC) Treaty plans for the African Economic Community. However, some authors like Gibb⁷¹⁵ are doubtful and only see this as a representation of an ambitious attempt to achieve greater integration in monetary and fiscal policies, as well as exchange and trade regimes.

This doubt is backed by the findings of the 2016 Study⁷¹⁶ that found that to date most directorates of the SADC Secretariat still struggle with human resource deployment and coordination between directorates. The Study states that authority to act exists on paper, but the Summit remains the only political authority, with a Secretariat that can only act with the full cooperation of the member states. It further states that even when summits agree – for example on the need for a well-resourced and funded Secretariat – there is little change. This is so because the budget for the Secretariat and the programmes and policies that it implements are largely donor-funded.

5.2 Regional Indicative Strategic Development Plan (RISDP)

The RISDP is one of the key outcomes of the implementation of the “Report on the Review of the Operations of SADC institutions”, which was adopted on 9 March 2001 at an Extra-Ordinary Summit in Windhoek, Namibia. The development of the Plan was an arduous, yet necessary and fulfilling task. It was a team-work involving the SADC governments, key stakeholders such as the private sector, non-governmental organisations (NGOs) and

⁷¹⁴ Giuffrida (fn 708) at 20; Tjønneland, E.N. “Making SADC Work? Revisiting Institutional Reform” *Monitoring Regional Integration in Southern Africa Yearbook* vol. 5 (2005); Buzdugan, S. “A Critical Analysis of Regionalism as a Development Strategy in southern Africa: beyond Institutional Explanations of Failure of the Southern African Development Community (SADC)” Paper for the British International Studies Association Annual Conference, University of Cambridge, 17-19 December 2007 at 18.

⁷¹⁵ Gibb, R. “Southern Africa in transition: prospects and problems facing regional integration” *Journal of Modern African Studies* vol. 36 no 2 (1998) 287 at 303; Peters, C. “Is SADC losing track?” in Bösl, A *et al. Monitoring Regional Integration in Southern Africa Yearbook* (2010) 143 at 165.

⁷¹⁶ Vanheukelom, J *et al.* “The Political Economy of Regional Integration in Africa: The Southern African Development Community (SADC)”, January 2016 Report at 8.

civil societies as well as their cooperating partners.⁷¹⁷ It was adopted by the Dar es Salaam Summit in August 2003 as the SADC's blueprint for regional integration and development and it saw globalisation as providing major new opportunities for Southern Africa's economic revival.⁷¹⁸

The RISDP is a 15-year strategic roadmap set by member states and its effective implementation began in 2005 and will run until 2020. After the launch of the RISDP the SADC started with the process of unbundling the Plan, an exercise which is continuing.⁷¹⁹ In this exercise the SADC is allocating clear and specific roles to key players with quantified deliverables. This is to meet the targets set within the given time frame, such as the free trade area (FTA), which was launched in August 2008, followed by the customs union and the common market.

The intention of the RISDP is to provide a clear direction for the SADC region's policies, programmes and activities over the long term. Everything that the SADC has done is founded on clear sense of what the common interests of the SADC states are, and how to advance them jointly, in practical ways. And the RISDP makes this point clear: the creation of a stable, secure and prosperous region is an overriding ambition for the SADC.⁷²⁰

⁷¹⁷ Peters-Berries, C. *Regional Integration in Southern Africa – A Guidebook* (2010) at 82; Trade Law Centre (Tralac). "The Regional Indicative Strategic Development Plan: SADC's trade-led integration agenda – how is it doing?" *Tralac Trade Brief* (April 2012) at 1.

⁷¹⁸ Communiqué of the SADC Summit of the Heads of Assembly and Government, 25 – 26 August 2003, Dar es Salaam, Tanzania (paragraph 37); Mulaudzi, C. "Politics of regionalism in Southern Africa" Institute for Global Dialogue, Occasional Paper no. 51, April 2006.

⁷¹⁹ In August 2010 the SADC Secretariat conducted a Desk Assessment Review of the Regional Indicative Strategic Development Plan. The assessment tracks the status of the implementation of the programmes and activities of the plan by the key actors and high lights the key achievements, challenges and lessons learned over the five-year period (2005-2010). This was followed by an Independent Review of the RISDP by the Zimbabwe-based Trade and Development Studies Centre (TRADES Centre), which began in 2012 and finalised in 2013. These and other consultations over recent years have emanated into a revised RISDP document, which was adopted by the Extraordinary Summit of Heads of State and Government of SADC on 29 April 2015. This revised document will guide implementation of SADC programmes in the remaining period i.e. 2015 to 2020.

⁷²⁰ This is a view expressed by Benjamin Mkapa, ex-President of Tanzania, at the launch of SADC RISDP in Arusha, Tanzania on 12 March 2004. Available at <http://www.sadc.int/printer.php?lang=english&path=newscenter/speeches&page> (accessed on 4 April 2016).

The RISDP also affirms that the private sector is a strategic vehicle through which the SADC region will achieve its objectives, including deeper integration and poverty alleviation. Even though the governments must continue to invest in things like infrastructure, both economic and social, as well as address other side constraints, the engine of growth can only be private sector investment.⁷²¹

As such a two-pronged approach is needed. On the one hand, governments need to mobilise national and regional savings and resources for productive investment. On the other hand, governments and private sectors need to work harder to attract foreign direct investments (FDIs). It is not a question of choice between national and regional investment on the one hand, and the FDI on the other. The search has to be for both, and in finding synergies that would give momentum to regional trade and investment initiatives.⁷²²

The RISDP can also be viewed in regional and global contexts. This is more so if one looks at the priorities of the initial RISDP, which were:

- a. Trade, economic liberalisation and development;
- b. Infrastructure in support of regional integration;
- c. Peace and security cooperation; and
- d. Special programmes with a regional dimension.

Even after the revised RISDP was adopted in 2015, the re-prioritised areas remained regional integration dimensional, the only change being under “priority A”, with focus now being on industrial development within the market integration agenda. The revised priorities are now as follows:

- a. Industrial development and market integration;
- b. Infrastructure in support of regional integration;
- c. Peace and security cooperation; and

⁷²¹ *Ibid.*

⁷²² *Ibid.*

d. Special programmes with a regional dimension.⁷²³

The regional dimension or outlook means the RISDP has to encompass and embrace the objectives of organisations such as the African Union (AU) and its programme, the New Partnership for Africa's Development (NEPAD). This is so because the SADC, as one of the regional economic communities (RECs) on the African continent, is expected to act as a building block in the implementation of the African Agenda under the frameworks of the AU and NEPAD.⁷²⁴

The RISDP must also have a global outlook. This is so because the SADC, as an REC registered with the World Trade Organisation (WTO), is a global player. At the global level economic challenges facing the SADC include the process and effects of globalisation, which encompass, among others, financial, trade and technological forces. The agenda of the WTO, the Cotonou Agreement between the European Union (EU) and the African, Caribbean and Pacific (ACP) states,⁷²⁵ as well as the United States of America's Africa Opportunity Act (AGOA)⁷²⁶ are all key challenges and opportunities for the SADC. This is so because the SADC and its member states are individually and collectively signatories to these agreements. The RISDP must thus also deal with them. However, it is important

⁷²³ Mwanza, W. "The Revised SADC RISDP and plans for market integration and industrial development going forward" Tralac Paper available at www.tralac.org/.../7530-the-revised-sadc-risd (accessed on 4 April 2016); "2015 – Towards Regional Integration and Industrialization" *Southern Africa Today* vol. 18 no. 1 (December 2015) 1 – 2.

⁷²⁴ "Halala SADC Halala!" *DFA Now* vol. 1 no. 3 (September 2005) 7; Saurombe, A. "An Analysis of Economic Integration in Africa with Specific Reference to the African Union and the African Economic Community" *South African Journal of Public Law* vol. 27 (2012) 292; Weltz, M. 2014. "A Culture of Conservatism: How and Why African Union Member States Obstruct the Deepening of Integration" *Strategic Review for Southern Africa* vol. 36 issue 1 (2014) 4.

⁷²⁵ The *Partnership Agreement 2000/483/EC 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*, signed in Cotonou, Benin, on 23 June 2000. It is aimed at the reduction and eventual eradication of poverty while contributing to sustainable development and to the gradual integration of ACP countries into the world economy.

⁷²⁶ The purpose of this legislation is to assist the economies of sub-Saharan Africa and to improve economic relations between the United States and the region. It does this by eliminating import levies on more than 7 000 products ranging from textiles to manufactured items and benefits. In late 2015 and early 2016 South Africa was threatened with exclusion from AGOA after failing to meet some of the requirements relating to duty-free treatment of the US poultry products. This was, however, resolved in March 2016 when South Africa met the requirements by the US Government.

to note that the RISDP is not a legally binding instrument, hence it can be adapted to respond to changing circumstances.⁷²⁷

5.2.1 RISDP Priority Intervention Areas

The original RISDP identifies challenges and priorities, including the twelve priority intervention areas to drive the region's integration and development agenda until 2015. These were of both cross-sectoral and sectoral nature and were identified as decisive for the realisation of the SADC's objectives, in particular in promoting deeper regional integration, integrating the SADC into the world economy, promoting balanced and equitable development, eradicating poverty, and promoting gender equality.⁷²⁸

For each of these intervention areas the RISDP listed general and comprehensive strategies and activities. Therefore, some more, unpublished and restricted documents were worked out such as the *2004 RISDP Implementation Framework*, which provides a rather detailed 15-year long-term plan, but with a five-year medium-term plan (2015 – 2020) and a one-year (2005-2006) implementation plan as well as a list of priorities and projects.⁷²⁹

⁷²⁷ Hartzenberg, T. "The Review of the SADC RISDP Matters" *Tralac Policy Brief* (August 2014) 2; Hartzenberg, T *et al.* "Regional Integration in Southern Africa: Key issues and challenges" in Volz, U. *Regional Integration, Economic Development and Global Governance* (2011) at 65.

⁷²⁸ The Areas are as follows:

1. Cross-Sectoral Intervention Areas:
 - * Poverty eradication;
 - * Combating of the HIV and AIDS pandemic;
 - * Gender equality and development;
 - * Science and Technology;
 - * Information and Communication Technologies;
 - * Environment and Sustainable Development;
 - * Private Sector
 - * Statistics

2. Sectoral cooperation and integration Intervention Areas:
 - * Trade/economic liberalization and development;
 - * Infrastructure support for regional integration and poverty eradication;
 - * Sustainable food security; and
 - * Human and social development.

⁷²⁹ "SADC Secretariat: Regional Indicative Strategic Development Plan (RISDP). Executive Summary, point no. 6", available at <http://www.sadc.int/english/documents/risdp/summary.php?media=print> (accessed on 1 April 2016).

Hereunder reference is made to one of these intervention areas, namely, “trade, economic liberalisation and development”, which later changed into “industrial development and market integration” – as it is the focus of this thesis – to show how it has developed.

5.2.1.1 Industrial development and market integration

As indicated above, this intervention area was originally called “Trade, Economic Liberalisation and Development” and its overall goal was to facilitate trade and financial liberalisation, competitive and diversified industrial development and increased investment for deeper regional integration and poverty eradication through the establishment of a SADC Common Market.⁷³⁰

The areas of focus included:

- market integration through the establishment of the SADC Free Trade Area, the SADC Customs Union and the SADC Common Market;
- attainment of macroeconomic convergence;
- development and strengthening of financial and capital markets;
- attainment of deeper monetary cooperation;
- increasing levels of investment in the SADC including FDI; and
- enhancing the SADC competitiveness in industrial and other productive activities for effective participation in the global economy.⁷³¹

The strategies included:

- fast tracking the implementation of the Protocol on Trade to achieve the FTA, which should be informed by, and take into account the recommendations of the mid-term review of the SADC Protocol on Trade;
- negotiations on the establishment of a SADC customs union would commence in 2005 having fulfilled some prerequisites such as ensuring that the FTA is

⁷³⁰ Southern African Development Community Regional Indicative Strategic Development Plan (RISDP), August 2003 at 65.

⁷³¹ RISDP at 66.

- established, carrying out studies on impact of a customs union and then commence negotiations for a common external tariff;
- preparations for the establishment of a monetary union;
 - negotiations on the establishment of the SADC common market should commence soon after establishing a customs union;
 - harmonisation of policies, legal and regulatory frameworks that address the business environment and the free movement of all factors of production;
 - promotion of the SADC as an attractive investment destination based on the observance and implementation of the Investment Memorandum of Understanding and subsequently the Protocol on Finance and Investment; and
 - entrepreneurship development with particular emphasis on small and medium scale enterprises.⁷³²

The envisaged economic integration in the SADC would proceed along a linear path. The targets⁷³³ thereof were set as follows:

Target 1: Free Trade Area – 2008;

Target 2: Completion of negotiations of the SADC Customs Union – 2010;

Target 3: Completion of negotiations of the SADC Common Market – 2015;

Target 4: Diversification of industrial structure and exports with more emphasis on value addition across all economic sectors – 2015, taking into account the following indicators:

- diversify and sustain exports growth rate of at least 5% annually;
- Increase in intra-regional trade to at least 35% by 2008; and
- Increment in manufacturing as a percentage of GDP to 25% by 2015.

Target 5: Macroeconomic convergence on:

- Inflation rate at a single digit by 2008, 5% by 2012 and 3% by 2018;
- Ratio of budget deficit to GDP not exceeding 5% by 2008 and 3% as an anchor within a band of 1% by 2012 and be maintained at the 2012 level up to 2018; and

⁷³² *Ibid.*

⁷³³ *Ibid.*

- Nominal Value of public and publicly guaranteed debt should be less than 60% of GDP by 2008, and this be maintained throughout the plan period (2018).

Target 6: Other Financial indicators;

- Increase the level of savings to at least 25% of GDP by 2008 and to 30% by 2012;
- Increase domestic investment levels to at least 30% of GDP by 2008;
- Gradual interconnection of payments and clearing system in the SADC by 2008;
- Achieve currency convertibility by 2008; and
- Finalise legal and regulatory framework for dual and cross listing on the regional stock exchanges by 2008.

Target 7: The establishment of a SADC monetary union by 2016;

- Finalise preparation of institutional, administrative and legal framework for setting up a SADC Central Bank by 2016;
- Launch a regional currency for the SADC Monetary Union by 2018.

Target 1, in terms of this intervention area, has been achieved as the SADC has been implementing the Trade Protocol since September 2000, which led to a free trade area (FTA) in 2008. However, only 13 out of 15 member states are currently participating in the FTA. Angola and the Democratic Republic of Congo (DRC) are still to implement the Protocol.⁷³⁴

Target 2, the establishment of a customs union by 2010, has been missed, mainly due to the focus being shifted to the Tripartite Free Trade Area (TFTA) with the Common Market of Southern and Eastern Africa (COMESA) and Eastern African Community (EAC). The

⁷³⁴ Sandrey, R. “An analysis of the SADC Free Trade Area”, Tralac (2013) at 1; “The Regional Indicative Strategic Development Plan: SADC’s trade-led Integration Agenda – How is SADC doing?” *Tralac Trade Brief* no. S12TB02/2012, April 2012 at 8; Redvers, L. “Angola, the reluctant SADC Trader” South African Institute of International Affairs (SAIIA) Occasional Paper no. 152 August 2013 at 13; “Seychelles accedes to SADC Protocol”, available at www.engineeringnews.co.za/.../seychelles-accedes-to-sadc-protocol (accessed on 7 April 2016).

TFTA was launched in June 2015 and its imminent adoption is what necessitated the review of the RISDP, and the revised RISDP was adopted in April 2015.⁷³⁵

The revised RISDP led to priority A – “Trade, economic liberalisation and development” – being changed to “Industrial development and market integration”. This was to ensure that the RISDP is synchronised with the “Industrialization Strategy and Roadmap 2015 – 2063”, which was also approved in April 2015.⁷³⁶ The Industrialization Strategy is a long-term development agenda that takes into account the dynamics of events and issues affecting not only the Southern African region, but also the rest of the world.⁷³⁷

The Industrialization Strategy is thus aligned with the African Union’s Agenda 2063⁷³⁸ and it is, in fact, an acknowledgement of the role that market integration has in industrial development, and an effort to pursue these jointly, particularly through the development of regional value chains.⁷³⁹

The missing of Target 2, the establishment of customs union by 2010, also means that the other targets are missed, as the targets are linear and one has to be completed before the next can follow. So it will have to be seen how far the RISDP would have gone by 2020, which is its deadline.

⁷³⁵ Communiqué of the Third COMESA-EAC-SADC Tripartite Summit, adopted on 10 June 2015 at Sharm El Sheikh, Egypt; Communiqué of the Extraordinary Summit of the Heads of State and Government of the Southern African Development Community, Harare, Republic of Zimbabwe, 29 April 2015.

⁷³⁶ Communiqué of the Extraordinary Summit of the Heads of State and Government of the Southern African Development Community, Harare, Republic of Zimbabwe, 29 April 2015.

⁷³⁷ Ngwawi, J. “Vision 2050 – SADC ponders future” *Southern Africa Today* vol. 14 no. 4 (June 2012) 1.

⁷³⁸ “AU Agenda 2063” is a 50-year Plan adopted in 2013 for the rejuvenation of the continent. According to this Plan this would be the ideal continent in 2063:

1. A prosperous Africa based on inclusive growth and sustainable development;
2. An integrated continent, politically united and based on the ideals of Pan Africanism and the vision of Africa’s Renaissance;
3. An Africa of good governance, democracy, respect for human rights, justice and the rule of law;
4. A peaceful and secure Africa;
5. An Africa with a strong cultural identity, common heritage, values and ethics;
6. An Africa where development is people-driven, unleashing the potential of its women and youth;
7. Africa as a strong, united and influential global player and partner.

⁷³⁹ Mgidlana, G. “SADC-PF regional parliament roadmap” *InSession Magazine* vol. 15 issue 5 (June 2015) at 9.

However, it is important to bear in mind that the RISDP is a non-binding agreement that merely outlines the necessary conditions that should be realised towards achieving the long-term objectives of the SADC. The legal binding framework still remains the one contained in the SADC Treaty and various protocols.⁷⁴⁰

5.3 Achievements in specific areas of integration

5.3.1 Elimination of Tariff Barriers within the region

In the Preamble of the SADC Treaty, member states allude to the conscience of their duty to promote the interdependence and integration of their national economies for the harmonious, balanced and equitable development of the region as well as the conviction of the need to mobilise their own and international resources to promote the implementation of national, interstate and regional policies, programmes and projects within the framework for economic integration.

Member states also undertake to adopt adequate measures to promote the achievement of the objectives of the SADC,⁷⁴¹ and one such measure taken was the adoption of the SADC *Protocol on Trade*.⁷⁴² The Protocol proposes to achieve a free trade area by the elimination of tariffs between member states.⁷⁴³ Its objectives are:

⁷⁴⁰ Trade Law Centre (Tralac). “The Regional Indicative Strategic Development Plan: SADC’s trade-led Integration Agenda – How is SADC doing?” Tralac (2012) at 11; Saurombe, A. “The Role of SADC Institutions in Implementing SADC Treaty Provisions dealing with Regional Integration” *Potchefstroomse Elektroniese Regsblad* vol. 15 no.2 (2012) 454; Chigara, B. *Southern African Development Community Land Issues: Towards a New Sustainable Land Relations Policy* (2013) at 110.

⁷⁴¹ Article 6(1) of the SADC Treaty provides:

“Member states undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty.”

⁷⁴² This was done at the SADC annual meeting of June 1996 in Gaborone, Botswana.

⁷⁴³ Article 2(5) of SADC Protocol on Trade.

- i. to further liberalise intra-regional trade in goods and services on the basis of fair, mutually equitable and beneficial trade arrangements, complemented by protocols in other areas;
- ii. to ensure efficient production within the SADC, which reflects the current and dynamic comparative advantages of its members;
- iii. to contribute towards the improvement of the climate for domestic, cross-border and foreign investment;
- iv. to enhance the economic development, diversification and industrialisation of the region; and
- v. to establish a Free Trade Area in the SADC region.⁷⁴⁴

The Protocol envisages the elimination of tariffs within eight years of its entry into force. The processes and modalities for the elimination of the tariffs are to be determined by the Committee of Ministers responsible for Trade (CMT). Member states that consider that they may be or have been adversely affected by the removal of tariff and non-tariff barriers to trade, may upon application to the Committee of Ministers of Trade, be granted a grace period to afford them additional time for the elimination of tariffs.⁷⁴⁵

The Protocol also envisages the existence of different common tariffs for different products. The actual method of eliminating barriers to intra-SADC trade, and the criteria of listing products for special consideration, is yet to be negotiated in the context of SADC's Trade Negotiating Forum (TNF).⁷⁴⁶ Once adopted, the process and modalities for eliminating barriers to intra-SADC trade will be deemed to form an integral part of the Protocol.⁷⁴⁷

The process of eliminating tariffs in the SADC region is to be accompanied by an industrialisation strategy to improve the competitiveness of member states' products.⁷⁴⁸

⁷⁴⁴ *Ibid.*

⁷⁴⁵ Article 3(1).

⁷⁴⁶ *Ibid.*

⁷⁴⁷ Article 3(2).

⁷⁴⁸ Article 4(2) of the SADC Protocol on Trade.

After several failed attempts⁷⁴⁹ at initiating and adopting the SADC industrial policy framework, the *SADC Industrialization Strategy and Roadmap 2015 – 2063* was launched in August 2016, after being adopted in April 2016 by the SADC Heads of State and Government. The Strategy is anchored on three pillars, namely:

- Industrialisation as a champion of economic and technological transformation;
- Competitiveness as an active process to move from comparative advantage to competitive advantage; and
- Regional integration and geography as the contexts for industrial development and economic prosperity.⁷⁵⁰

With regard to the elimination of the technical barriers to trade (TBTs) in the SADC region, this is addressed under the framework known as the TBT Annex (Annex IX) to the SADC Protocol on Trade. The Trade and Industry, Finance and Investment Directorate is a custodian of this framework and it supports the SADC Free Trade Area. The Standardisation, Quality Assurance, Accreditation and Metrology (SQAM) Programme⁷⁵¹ has been actively engaged on assisting the member states to have available at least a basic technical infrastructure and in further building capacity as required by the TBT Annex to the SADC Protocol on Trade.⁷⁵²

Another annex to the Trade Protocol, Annex IX, was approved on 12 July 2008 by the Committee of the Ministers of Trade (CMT) on the basis of the Memorandum of Understanding (MoU) on Cooperation in Standardisation, Quality assurance, Accreditation

⁷⁴⁹ “Industrial policy co-operation in Southern Africa: Exploring the Opportunities and challenges” – Institute for Global Dialogue (IGD) Paper, December 2011 at 15; Zarenda, H. “A Comprehensive Regional Industrial Policy for SADC” Tralac Working Paper, December 2012; Study Report on SADC Industrial Policy and Strategies - SADC Secretariat, November 2009.

⁷⁵⁰ “SADC Industrialization Strategy and Roadmap 2015 – 2063” at 1; “SADC Industrialisation Strategy and Roadmap at www.tralac.org/news/article/7932-sadc-industrialisation-strategy-and-roadmap.html (accessed on 24 May 2016).

⁷⁵¹ This is a programme established under Memorandum of Understanding (MoU) on standardisation, quality assurance, accreditation and metrology (SQAM) to establish the formal framework in which the co-operation amongst the national institution in standardisation, quality assurance, accreditation and metrology shall take place in the Southern Africa region. The MoU entered into force on 16 July 2000.

⁷⁵² Report on the SADC Standardization, Quality Assurance, Accreditation and Metrology (SQAM) Programme, Committee on Technical Barriers to Trade, 1 February 2016.

and Metrology (SQAM). The MoU served as the implementing instrument of the Trade Protocol on technical barriers to trade whilst awaiting the adoption of Annex IX. It was in place since 16 July 2000 until 17 July 2014 when Annex IX was adopted by the SADC.⁷⁵³

Under the MoU, the SADC established a SADC-wide accreditation system known as the Southern African Development Community Accreditation Service (SADCAS) in March 2009. The SADCAS is the first multi-economy accreditation body in the world and National Accreditation Focal Points (NAFPs) have been launched and appointed in the SADC member states which do not have a National Accreditation Body (NAB).⁷⁵⁴

In May-June 2015, the SADCAS underwent a peer evaluation on the Testing Laboratory Accreditation Programme (TLAP) and Calibration Laboratory Accreditation Programme (CLAP). The evaluation team confirmed that the overall system of the SADCAS meets the African Accreditation Cooperation (AFRAC) and International Laboratory Accreditation Cooperation (ILAC) requirements.⁷⁵⁵

The South African National Accreditation System (SANAS) – which is the SADCAS’ focal point in South Africa – represents the SADCAS on the Executive Committee of International Laboratory Accreditation Cooperation (ILAC) and the International Accreditation Forum (IAF). Attendance at these meetings is very important in ensuring the SADC’s participation internationally.⁷⁵⁶

Member states also commit themselves to the elimination of non-tariff barriers (NTBs).⁷⁵⁷ They are prohibited from applying any new quantitative restrictions on imports and exports, and are required to phase out existing restrictions on goods originating in other member states, except where this is provided for under the Protocol. Member states may

⁷⁵³ *Ibid.*

⁷⁵⁴ “Report of Meeting of Accreditation Body Experts of the COMESA-EAC-SADC Tripartite” 16 – 17 May 2012, Pretoria, South Africa.

⁷⁵⁵ Report on the SADC Standardization, Quality Assurance, Accreditation and Metrology (SQAM) Programme, Committee on Technical Barriers to Trade, 1 February 2016 at 3.

⁷⁵⁶ “Annual Report of the SADC Cooperation in Accreditation (SADCA)” January – December 2015.

⁷⁵⁷ Article 6 of Protocol on Trade.

also apply for a quota system only where such a quota system is more favourable than that applied under the Protocol.⁷⁵⁸

There is, however, a number of exceptions to the application of these prohibitions. The exceptions include measures necessary to:

1. protect public morals or maintain public order;
2. protect human, animal or plant life or health;
3. secure compliance with laws and regulations which are consistent with the provisions of the WTO;
4. protect intellectual property rights, or prevent deceptive trade practices;
5. the transfer of gold, silver, precious and semi-precious stones, including precious and strategic metals;
6. impose the protection of national treasures of artistic, historic or archaeological value;
7. prevent or relieve critical shortages of foodstuffs in any exporting Member State;
8. conserve exhaustible natural resources and the environment; and
9. ensure compliance with existing obligations under international agreements.⁷⁵⁹

To facilitate the goal of eliminating NTBs, an online NTB reporting mechanism was developed and adopted by the Committee of Ministers responsible for Trade (CMT) in July 2007 and it became effective in 2009. It has now been extended to cover all the countries involved in the COMESA-SADC-EAC Tripartite Agreement. A mechanism for monitoring NTBs has also been introduced for the SADC, the COMESA and the EAC.⁷⁶⁰ The three RECs also agreed to draw up a regional time-bound NTB elimination matrix. However, this might take time as the SADC and the COMESA have no regional

⁷⁵⁸ Article 7 of Protocol on Trade.

⁷⁵⁹ Article 9.

⁷⁶⁰ Trade Law Centre (Tralac). "The Regional Indicative Strategic Development Plan: SADC's trade-led Integration Agenda – How is SADC doing?" Tralac (2012) at 9; Viljoen, W. "The proposed Tripartite Non-tariff Barrier Elimination Mechanism: An Evaluation of Legal Texts and Practice" Tralac (2015) at 6; "Non-Tariff Measures and Regional Integration in the Southern African Development Community" Report of the United Nations Conference on Trade and Development (UNCTAD), 2015 at 13.

elimination matrix. The EAC is the only REC which has developed a time-bound elimination matrix.⁷⁶¹

The reporting and monitoring mechanisms show that the majority of complaints of non-compliance are against the SADC member states.⁷⁶² The non-compliance with the provision of the Trade Protocol regarding NTBs should, however, be understood within the context of the barriers that member states face. With regard to regulations on trade, for example, member states are required to use relevant international standards as the basis for their measures. The problem, however, is that there are already national standards in existence in these countries, and it is necessary to ensure that these standards are not an obstacle to trade in line with international standards.⁷⁶³

However, the SADC FTA has largely eliminated tariffs within SADC, though many member states still remain members of multiple overlapping, and sometimes inconsistent, agreements on the continent. This, however, must be understood within the context that many of these economies are simply too small and this is their way of expanding their investment.⁷⁶⁴

Therefore, the following problems have to be confronted in the case of the SADC:

⁷⁶¹ “Non-Tariff Measures and Regional Integration in the Southern African Development Community”, United Nations Conference on Trade and Development (UNCTAD) Report – 2015 at 14; *East African Community Elimination of Non-Tariff Barriers Act, 2015* (passed in May 2015 by East African Legislative Assembly).

⁷⁶² Viljoen (above, fn 760); Chikura, C. “The Non-Tariff Barrier Monitoring Mechanism” Political Economy of Regional Integration in Southern Africa (PERISA) Case Study for South African Institute of International Affairs (SAIIA), August 2013.

⁷⁶³ This is in line with Agreement on Technical Barriers to Trade, commonly referred to as the TBT Agreement, which is an international treaty administered by the World Trade Organisation. Its purpose is to ensure that technical regulations, standards, testing, and certification procedures do not create unnecessary obstacles to trade.

⁷⁶⁴ Mahembe, E *et al.* “The dynamics of foreign direct investment in SADC countries: experiences from five middle-income economies” *Problems and Perspectives in Management* vol. 11 issue 4 (2013); Behar, A *et al.* “How Integrated Is SADC? Trends in Intra-Regional and Extra-Regional Trade Flows and Policy” Policy Research Working Paper 5625 for the World Bank, April 2011 at 16.

Firstly, there is the fact that five members of SADC belong to the Southern African Customs Union (SACU).⁷⁶⁵ The SACU is a free trade area with common external tariffs. As such there will have to be an agreed formula on how the SADC and the SACU tariffs are to be harmonised with the view to have one level of tariffs for the whole SADC.⁷⁶⁶

Secondly, the application of tariff reduction programmes at different stages by different countries can create complex arrangements and undermine the overall integrative effect of the elimination of tariffs. The non-compliance by Angola and the DRC as well as partial application by Mozambique is a testimony to this.⁷⁶⁷

Thirdly, the SADC countries must realise that economic integration, by its very definition, is a process designed to completely abolish discrimination between local and imported goods, services and sectors over an agreed period of time. In other words, economic integration expands the effective market horizon within which economic agents can move the resources they hope to utilise productively.⁷⁶⁸ So if one or two member states do not comply fully with the agreement, the whole notion of integration is distorted. Again examples of Angola, the DRC and Mozambique, by not complying with the SADC FTA requirements, bear reference.

The Protocol also provides for the phased reduction and eventual elimination of import duties on goods originating from member states. This is in recognition of the inequalities

⁷⁶⁵ These are Botswana, Lesotho, Namibia, South Africa and Swaziland.

⁷⁶⁶ Mapuva, J *et al.* "The SADC regional bloc: What challenges and prospects for regional integration?" *Law, Democracy and Development* vol. 18 (2014) 22 at 30; Van der Merwe, C. "Zuma urges SACU to tackle EPA negotiations as united front" *Engineering News* (Online), 23 April 2010. Available at <http://www.engineeringnews.co.za/article/zuma-urges-sacu-to-tackleepa-negotiations-as-united-front-2010-04-22> (accessed on 25 May 2016); Ndulo, M. "African Integration Schemes: A case study of the SADC" *African Yearbook of International Law* vol. 7. No. 7 (1999 - 2001) at 23.

⁷⁶⁷ Ndulo, M. "African Integration Schemes: A Case Study of the Southern African Development Community" *Cornell Law Faculty Publications*, Paper 58 (1999) at 19; Ahmed, K. "An analysis of regional integration in Southern Africa: A South African perspective" *Tralac* (2011) at 12.

⁷⁶⁸ Weiler, J.H.H *et al.* "International and Regional Trade Law: The Law of the World Trade Organization. Unit I: The Syntax and Grammar of International Trade Law." New York University Paper (2011) at 12; Balassa, B. *The Theory of Economic Integration* (2013) at 1; Hoekman, B. M *et al.* *The Political Economy of the World Trading System* (2009) at 474.

of the economies of the member states.⁷⁶⁹ To minimise the potential negative impacts arising from the tariff phase-down, the SADC has opted for an arrangement that is based on a variable model, taking into account the asymmetrical level of development in the member states. The model is such that countries in the Southern African Customs Union - Botswana, Lesotho, Namibia, South Africa and Swaziland - are liberalising faster, followed by Mauritius and Zimbabwe, while the rest follow.⁷⁷⁰

The agreed tariff phase-down schedules were such that 85 percent of all product lines should be trading at zero tariffs by 2008. The remaining 15 percent, constituting sensitive products,⁷⁷¹ would have tariff barriers removed from 2008 to 2012. This was in recognition of the fact that not all SADC countries were members of the Free Trade Area, as Angola and the Democratic Republic of Congo are yet to apply the Trade Protocol.⁷⁷²

5.3.2 Harmonisation of laws

For trade and liberalisation measures to be successful, they must be accompanied by efforts to harmonise laws and policies in order to promote economic cooperation and integration. Legal integration is critical to the process of integration as laws of different SADC member states in matters relating to trade, arbitration and enforcement of judgments can lead to conflicts and divergences among member states. These conflicts and divergences rank among the major barriers to intra-regional cooperation and integration.⁷⁷³ Hence the need for harmonisation of the laws of the different member states.

⁷⁶⁹ Article 4 of the Protocol on Trade.

⁷⁷⁰ Sourced from <http://www.pambazuka.org/aumonitor/comments/966/> (accessed on 24 May 2016); Kalenga, P. "Regional integration in SADC: retreating or forging ahead?" Tralac Working Paper (2012) at 2; Mtana, D *et al.* "Implication of Tanzania's Multiple Memberships in Trade Performances: Focus of EAC and SADC Market" *International Journal of Academic Research in Progressive Education and Development* vol. 3 no. 3 (May 2014) 83 at 88.

⁷⁷¹ These are products listed by various signatories to be excluded from tariff liberalisation.

⁷⁷² Kalenga, P. "Regional integration in SADC: retreating or forging ahead?" Tralac Working Paper (2012) at 7; Sandrey, R. "An analysis of the SADC Free Trade Area" Tralac Working Paper (2013) at 1.

⁷⁷³ Ruppel, O.C *et al.* "The SADC Tribunal: a legal analysis of its mandate and role in regional integration" *Monitoring regional integration in Southern Africa Yearbook* vol. 8 (2008) at 207; Idris, M.B. "Harmonization of Business Laws in Africa – An Insight into the Laws, Issues, Problems and Prospects" *Unified Business Laws for Africa: Common Law Perspectives on OHADA* (2013) at 29.

Harmonisation means the removal of discord, and the reconciliation of contradictory elements between the rules and effects of two or more legal systems, often by eliminating major differences. The main essence of this harmonisation process in the context of international trade laws is that the effects of a type of transaction in one legal system are brought, as close as possible, to the effects of similar transactions under the laws of other countries.⁷⁷⁴

The membership of the SADC represents at least three main legal systems, namely, the Common law, Roman-Dutch law and Civil law.⁷⁷⁵ Each, in turn, comprises many different systems of law that follow colonial patterns, and in some instances include traditional customary laws.⁷⁷⁶ So there is a need for these different legal systems to have a convergence point if integration has to work.

Harmonisation of laws is not listed as an objective in Article 5, or an area of cooperation in Article 21, of the SADC Treaty. However, member states seem to have realised this shortcoming because the Trade Protocol deals extensively with this aspect in Annex II, Articles 2 to 5. Article 2 deals with scope and application of the Annex.⁷⁷⁷ Article 3 of this

⁷⁷⁴ Goldring J “Unification and the harmonisation of the rules of laws” *Federal Law Review* vol. 9 no. 3 (1978) 284 at 289; Coetzee J *et al.* “Harmonisation of sales law: an international and regional perspective” *Vindobona Journal of International Commercial Law and Arbitration* vol. 10 No. 1 (2006) 15; Shumba, T. “Revisiting legal harmonisation under the Southern African Development Community Treaty: The need to amend the Treaty” *Law Democracy and Development* vol. 19 (2015) 127 at 135.

⁷⁷⁵ South Africa, Botswana, Lesotho, Zimbabwe, Namibia and Swaziland (Roman-Dutch); Angola, Madagascar, Seychelles, Mauritius and Mozambique (Civil Law) and South Africa, Zambia, Tanzania, Malawi and Mauritius (Common Law); Shumba (above, fn 774) at 135 – 136); Rupel, O.C *et al.* “The SADC Tribunal: A legal analysis of its mandate and role in regional integration” *Monitoring Regional Integration in Southern Africa Yearbook* vol. 8 (2008): Chapter 8 at 17.

⁷⁷⁶ Allot, A. *New Essays in African Law* (1970) at 1; McDowell, C.M. “New Essays in African Law: Review” *Africa* (online publication) of 23 January 2012; Joireman, S.F. “Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy” Political Science Faculty Publications Paper 113 (2001); Bennet, T *et al.* *African Perspectives on Tradition and Justice* (2012); “Legal Research Guide: Customary Law in Africa” Law Library of the Congress, published on 19 June 2015. Available at www.loc.gov/law/help/africa-customary-law.php (accessed on 27 May 2016).

⁷⁷⁷ Annex II, Article 2 of the SADC Protocol provides:

- “1. The objective of this Annex is to simplify and harmonise Customs laws and procedures by:
 - a) providing for common measures with which Member states shall undertake to comply in the formulation of their Customs laws and procedures;
 - b) establishing appropriate institutional arrangements at regional and national levels; c) co-operating to prevent fraud and illicit trade.
2. The provisions of this Annex do not apply to areas of Customs co-operation which are covered specifically by Annexes I and IV of this Protocol.”

Annex deals with “Harmonisation of Customs Tariff Nomenclatures and Statistical Nomenclatures”,⁷⁷⁸ Article 4 with “Harmonisation of Valuation Laws and Practice”,⁷⁷⁹ and Article 5 with “Simplification and Harmonisation of Customs Procedures”.⁷⁸⁰

⁷⁷⁸ Article 3 provides:

- “1. Subject to the exceptions enumerated in paragraph 4:
- a) Each Member State undertakes, except as provided in sub-paragraph (c) of this paragraph, to adopt Customs tariffs nomenclatures and statistical nomenclatures which are in conformity with the Harmonised System. It thus undertakes that in respect of its Customs tariff and statistical nomenclatures –
 - (i) it shall use all the headings and sub-headings of the Harmonised System without addition or modification, together with their related numerical codes;
 - (ii) it shall apply the general rule for the interpretation of the Harmonised System and all the Section, chapter and sub-heading notes, and shall notify the scope of the sections, chapters, headings or sub-headings of the Harmonised Systems; and
 - (iii) it shall follow the numerical sequence of the Harmonised System;
 - b) Each Member State shall also make publicity available on its import and export trade statistics in conformity with the six-digit codes of the Harmonised System, or at the initiative of the Member State, beyond that level, to the extent that publication is not precluded for exceptional reasons such as commercial confidentiality or national security;
 - c) Nothing in this Article shall require a Contracting Party to use the sub-headings of the Harmonised System in its Customs Tariff Nomenclature provided that it meets the obligations at (a)(i) - (iii) above in a combined tariff/statistical nomenclature.
2. In complying with the undertakings at paragraph 1 (a) of this Article, each Member State may make such textual adoptions as may be necessary to give effect to the Harmonised System in its domestic law.”

⁷⁷⁹ Article 4 provides:

“Member states undertake to adopt a system of valuing goods for Customs purposes based on principles of transparency, equity, uniformity and simplification of application in accordance with the WTO Valuation System.”

⁷⁸⁰ Article 5 provides:

- “1. Member states, undertake to incorporate in their Customs Laws, provisions designed to simplify Customs procedures in accordance with internationally accepted standards, recommendations and guidelines particularly those which are contained in the International Instruments of:
- the World Customs Organisation (WCO);
 - the United Nations Economic Commission for Europe (UN-ECE)
 - the International Maritime Organisation (IMO);
 - the International Civil Aviation Association (ICAO);
 - the International Standards Organisation (ISO);
 - the International Chamber of Commerce (ICC); and
 - the International Air Transport Association (IATA)
2. Member states undertake to adopt in their Customs Laws, common principles for the Customs procedures which, in the opinion of CMT, are particularly important in intra-Community trade.”

With regard to harmonisation of customs tariff nomenclatures, the Subcommittee on Customs Cooperation (SCCC), established in terms of Article 13 of the SADC Treaty,⁷⁸¹ has developed the “Common Tariff Nomenclature”, but its implementation is constrained by the overlapping memberships of member states in other regional economic communities (RECs), each of which have their own common tariff nomenclature.⁷⁸²

The *SADC Customs Act*, which is a benchmark model law, was developed and adopted by the CMT in 2007 as a benchmark model law for the harmonisation of customs laws in the region. Member states are expected to align their national customs legislation to this model law. The SADC members also developed and agreed upon a Customs Declaration, a Transit Control Form and simplified procedures for risk analysis to facilitate intraregional trade. However, member states are having challenges in implementing these, including multiple memberships of different RECs; the lack of technical expertise to align the model Customs Act with domestic customs legislation; the lack of capacity to implement the instruments; the incompatibility of countries’ customs systems with the SADC Customs Declaration; and the absence of national legislation to enable countries to use the SADC Transit Control Form.⁷⁸³

In 2009 the SADC Committee of Central Bank Governors (CCBG) adopted the *Central Bank Model Law*, which enshrines the central banks’ cooperation through strategies for

⁷⁸¹ Article 13 of the SADC Protocol on Trade provides:

“Member states shall, as provided for in Annex II of this Protocol, take appropriate measures, including arrangements regarding Customs administration co-operation, to ensure that the provisions of this Protocol are effectively and harmoniously applied.”

In addition, Article 3 of Annex III of the Protocol provide:

“Each Member State undertakes, to adopt Customs tariffs nomenclatures and statistical nomenclatures which are in conformity with the Harmonized System”.

⁷⁸² “SADC Subcommittee on Customs Cooperation Indicative Strategic Plan” – July 2011 at 1; “2012 Audit of the Implementation of the SADC Protocol on Trade: USAID/Southern Africa Technical Report” – June 2012 at 77 – 78.

⁷⁸³ “2011 Audit of the Implementation of Regional SADC Customs Instruments and International Conventions: USAID/Southern Africa/SADC Technical Report” – October 2011 at 15; Trade Law Centre (Tralac). “The Regional Indicative Strategic Development Plan: SADC’s trade-led Integration Agenda – How is SADC doing?” Tralac Working Paper (2012) at 10; Hartzenberg, T. “Economic Integration Matters for SADC”, Paper for the SADC Think Tank Conference on Regional Integration Conference Report and Policy Papers, Maputo (Mozambique), 10 August 2012 at 18; “Non-Tariff Measures and Regional Integration in the Southern African Development Community”, United Nations Conference on Trade and Development (UNCTAD) Report – 2015 at 18.

stabilising financial systems in the SADC region. It also seeks to facilitate the harmonisation of their legal and operational frameworks, and sets standards of accountability and transparency in those frameworks. It is based on international best practices.⁷⁸⁴ All the SADC member states have passed legislation based on the Model Law and have independent central banks.⁷⁸⁵

In 2012 the SADC also adopted the *SADC Model Law on Electronic Transactions and Electronic Commerce*, which seeks to enhance electronic commerce in the region by improving and modernising national laws, and is a product of the International Telecommunication Union (ITU) that it created for the SADC.⁷⁸⁶ Together with two other models, namely, the *SADC Model Law on Data Protection, 2012* and the *SADC Model Law on Cybercrime, 2012*, it is intended to build a comprehensive regional framework for the development of the information society and the knowledge economy in the SADC; and to guide the SADC member states to draft or update their corresponding national legislations.⁷⁸⁷

⁷⁸⁴ Model Law, “Explanatory Note”; SADC “Guide to the SADC Central Bank Model Law (the Guide) 2011”; Zongwe, D. “Conjuring systemic risk through financial regulation by SADC central banks” *SADC Law Journal* vol. 1 (2011) 99 at 110.

⁷⁸⁵ Cabello, M *et al.* “Cross Border Banking Supervision in SADC Region” *Banking on the African Moment* vol. 4 issue 2 (2013) 36.

⁷⁸⁶ “SADC Model Law on Electronic Transactions and Electronic Commerce” available at: <http://www.itu.int/en/ITU-D/Projects/ITU-EC> (accessed on 1 June 2015); Shumba, T. “Revisiting legal harmonisation under the Southern African Development Community Treaty: The need to amend the Treaty” *Law Democracy and Development* vol. 19 (2015) at 141; Nangela, D. “Harmonisation or unification of laws in the context of SADC regional integration: Analysing the SADC’s initiatives in the area of e-commerce” online paper, available at www.slideshare.net/DrDeoNangela/harmonisation-of-national-laws-in-the-context-of- (accessed on 1 June 2016).

⁷⁸⁷ Reply by the Minister of Telecommunications and Postal Services to a parliamentary question by Hon K Mobu, 25 August 2015. Available at <https://pmg.org.za/committee-question/611/> (accessed on 8 June 2016).

So far only South Africa⁷⁸⁸ and Mauritius⁷⁸⁹ have domesticated these model laws. Botswana and Zambia have their own cybercrime laws, and all other SADC member states are still developing such laws.⁷⁹⁰ However, the biggest stumbling block for these member states seems to be the capacity to enact and implement such laws in various member states, especially the model laws on data protection and cybercrime, which are very technical.⁷⁹¹

Furthermore, in 2012, the SADC introduced the Model Bilateral Investment Treaty Template (Model BIT) in line with the SADC Protocol on Finance and Investment,⁷⁹² with a view to further foster the harmonisation of investment laws and practice at bilateral treaty level. It provides for the resolution of disputes between member states relating to the Model BIT and allows them to bring International Centre for Settlement of Investment Disputes (ICSID) or the United Nations Commission on International Trade Law (UNCITRAL)

⁷⁸⁸ South Africa have enacted the following legislation based on the Model Law: *Electronic Communications and Transactions Act, 2002* (as amended); *Regulation of Interception of Communications Act, 2002* (as amended), *National Credit Act, 2005*; *Protection of Personal Information Act, 2013* and *National Cyber Security Policy Framework for South Africa* approved by Cabinet, 2012; Chetty, P. “An Analysis of Electronic Signature Regulation in South Africa”, A research report submitted to the Faculty of Management, University of the Witwatersrand, in partial fulfilment of the requirements for the degree of Master of Management (in the field of ICT Policy and Regulation), March 2013.

⁷⁸⁹ Mauritius amended its IT-related laws such as *Information Technology Act, 1998*; *Cyber Crime and Computer Misuse Act, 2003*; *Data Protection Act, 2004* and *Electronic Transaction Act, 2010* to be in line with the SADC model laws United Nations Commission on International Trade Law (UNCITRAL) model law for electronic transactions; Blythe, S.E. *Certification Authority Law Around The World: The e-commerce law trilogy* vol. 3 (2013) Chapter 17; “Mauritius: e-commerce legislation” at <http://www.lowtax.net/information/mauritius/mauritius-e-commerce-legislation.html> (accessed on 8 June 2016).

⁷⁹⁰ “Electronic Transactions and Electronic Commerce: Southern African Development Community (SADC) Model Law”, International Telecommunication Union (ITU) Report 2013; “Computer Crime and Cybercrime: Southern African Development Community (SADC) Model Law”, International Telecommunication Union (ITU) Report 2013; Greenleaf, G *et al.* “African regional privacy instruments: Their effects on harmonization”, 132 *Privacy Laws and Business International Report*, 19 – 21 December 2014 at 3;

⁷⁹¹ Jamil, Z. “Cybercrime Model Laws”, Discussion paper prepared for the Cybercrime Convention Committee (T-CY), Strasbourg, France, 23 December 2014; Van der Merwe, D. “A comparative overview of the (sometimes uneasy) relationship between digital information and certain legal fields in South Africa and Uganda” *Potchefstroomse Elektroniese Regsblad* vol. 17 no. 1 (2014) 297; Orji, U.J. “Multilateral Legal Responses to Cyber Security in Africa: Any Hope for Effective International Cooperation?” in Maybaum, M *et al.* *2015 7th International Conference on Cyber Conflict Proceedings: Architectures in Cyberspace* (2015) at 108; Shumba, T. “Revisiting legal harmonisation under the Southern African Development Community Treaty: The need to amend the Treaty” *Law Democracy and Development* vol. 19 (2015) at 142.

⁷⁹² Article 2 of Annex 5 of the Protocol on Finance and Investment requires State Parties to “promote the mutual co-operation, co-ordination and harmonisation of the legal and operational frameworks of Central Banks which shall culminate in the creation of a Model Central Bank Statute for the Region as contemplated by the RISDP.”

arbitration proceedings against a host state on behalf of its national who suffered a loss as a result of the actions of the host state.⁷⁹³ In addition to ICSID and UNCITRAL, member states are allowed to use other alternative forums as alternatives, either regional or continental.⁷⁹⁴

Only Angola⁷⁹⁵ and South Africa⁷⁹⁶ have passed legislation based on the Model BIT. All other member states either rely on their constitutions or other laws that existed in their countries before 2012 having similar provisions to the Model BIT.⁷⁹⁷

5.3.3 Settlement of disputes

The dispute settlement mechanism is necessary to deal with situations whereby member states disagree on the existence of impediments to intra-regional trade. Parties to international treaties usually choose non-legalised dispute settlement (that is arbitration, mediation, good offices, etc.) or legalised dispute settlement such as courts or tribunals to settle their disputes. In most cases treaties provide that the mechanism is binding. However, the mere existence of a binding mechanism does not in itself guarantee effective dispute settlement. The success of the dispute settlement mechanism depends on the existence of a substantial corpus of “community law”. There is no necessity for a binding and compulsory

⁷⁹³ Article 28 of the SADC Model Bilateral Investment Treaty Template (Model BIT); Ngobeni, L. “The Investor-State Dispute Resolution Forum under the SADC Protocol on Finance and Investment: Challenges and opportunities for effective harmonisation” *Law, Democracy and Development* vol. 19 (2015) 175 at 179; Adeleke, F. “Benchmarking South Africa’s Foreign Direct Investment Policy” South African Institute of International Affairs (SAIIA) Policy Insights 13, April 2015 at 5.

⁷⁹⁴ Article 29(6).

⁷⁹⁵ Private Investment Law No. 14/15, of 11 August 2015; Nadais, J *et al.* “Approval of New Private Investment Law in Angola” Deloitte. Invest in Angola (online) available at http://www2.deloitte.com/content/dam/Deloitte/ao/Documents/tax/Deloitte_TripiticoLIP_EN_web.pdf (accessed on 28 July 2016).

⁷⁹⁶ Protection of Investment Act 22 of 2015 (signed into law by the President in December 2015).

⁷⁹⁷ Ngobeni L. “The Investor-State Dispute Resolution Forum under the SADC Protocol on Finance and Investment: Challenges and opportunities for effective harmonisation” *Law, Democracy and Development* vol. 19 (2015) at 183 – 184.

dispute settlement mechanism if there is a low degree of legal codification of the fields of cooperation,⁷⁹⁸ as evidenced by the SADC Tribunal-Zimbabwe saga.⁷⁹⁹

The SADC also follows both the non-legalised and legalised mechanisms of dispute resolution. The SADC Trade Protocol provides a procedure to deal with disputes concerning the interpretation and application of the Protocol. The first step of resolution is through *negotiations*⁸⁰⁰ between member states involved in the dispute. These negotiations will be in the form of cooperation⁸⁰¹ and consultations⁸⁰² to arrive at a mutually satisfactory

⁷⁹⁸ Alter, K. J. “The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review”, Faculty Working Papers. Paper 212 (2012) at 9; Staton, J.K. “A Taxonomy of International Rule of Law Institutions” *Journal of International Dispute Settlement* vol. 2 no. 1 (2011) 241; Lehmann, J. “Regional Economic Integration and Dispute Settlement outside Europe” *International Law Forum* vol. 7 no.1 – 4 (2005) 54 at 61.

⁷⁹⁹ In the two cases involving the Zimbabwean Government (*Mike Campbell (PVT) Limited and Another v Republic of Zimbabwe (2/07) [2007] SADC (T) 1 (13 December 2007)* and *Gondo and Others v Republic of Zimbabwe Case no. 05/2008 SADC (T)*) the Tribunal gave judgments against Zimbabwe, which refused to honour them arguing lack of jurisdiction by the Tribunal. This led to the suspension of the operations of the Tribunal by the SADC Heads of State or Government Summit of May 2011.

⁸⁰⁰ Article 32(1) of the SADC Protocol on Trade Provides:

“Member states shall endeavour to agree on the interpretation and application of this Protocol, and shall make every effort, through co-operation and consultation, to arrive at a mutually satisfactory agreement.”

⁸⁰¹ Article 2 of Annex VI to the SADC Protocol on Trade provides:

“The Member states shall:

- (a) at all times endeavour to agree on the interpretation and application of this Protocol;
- (b) make every attempt through cooperation to arrive at a mutually satisfactory resolution of any matter that may affect the operation of this Protocol; and
- (c) make use of the rules and procedures of this Annex to resolve disputes in a speedy, cost-effective and equitable manner.”

⁸⁰² Article 3 of Annex VI to the SADC Protocol on Trade provides:

1. A Member State may request in writing consultations with any other Member State regarding any measure that it considers might affect its rights and obligations under the provisions of this Protocol.
2. The requesting Member State shall notify the other Member states and the CMT of the request, through the Sector Coordinating Unit. Any request for consultations shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis of the complaint.
3. The requested Member State shall accord sympathetic consideration to and afford adequate opportunity for consultations regarding any representations made by another Member State.
4. The requested Member State shall, unless otherwise mutually agreed, reply to the request within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of not more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution. If the requested Member State does not respond within 10 days after the date of receipt of the request, or does not enter into consultations within a period of no more than 30 days, or a period otherwise mutually agreed, after the date of receipt of the request, then the requesting Member State may proceed directly to request the establishment of a panel.

agreement. If this fails, the second step would be to have recourse to a *panel of trade experts*.⁸⁰³ Referral to the panel of experts includes for any other disputes.⁸⁰⁴ If this also fails, the third and last step would be to refer the dispute to the *SADC Tribunal*.⁸⁰⁵

In addition, apart from this linear procedure or approach, Annex VI to the Protocol on Trade makes provision for dispute resolution (ADR) mechanisms in the form of *good offices, conciliation* and *mediation* procedures. However, all these are voluntary and per agreement.⁸⁰⁶

5. Whenever a Member State other than the consulting Member states considers that it has a substantial trade interest in consultations being held pursuant to a request made under paragraph 1, such Member State may notify the consulting Member states and the Sector Coordinating Unit, within 10 days after the date of circulation of the request for consultations, of its desire to be joined in the consultations. Such Member State shall be joined in the consultations, provided that the requested Member State agrees that the claim of substantial interest is well-founded. In that event, the consulting Member states shall also inform the CMT, through the Sector Coordinating Unit. If the request to be joined in the consultations is not accepted, the applicant Member State shall be free to request consultations under this Article.

6. The consulting Member states shall make every attempt to arrive at a mutually satisfactory resolution of any matter and, to this end, they shall- (a) provide sufficient information to enable a full examination of how the actual or proposed measure or other matter may affect the operation of this Protocol; (b) treat any confidential or proprietary information exchanged in the course of consultations on the same basis as the Member State providing the information; and (c) seek to avoid any resolution that adversely affects the interests of any other Member State under this Protocol.

7. If the consulting Member states fail to resolve a matter pursuant to this Article within: (a) 60 days after the date of receipt of the request for consultations; or (b) such other period as they may agree, any such Member State may request in writing the establishment of a panel. The requesting Member State shall notify the other Member states and the CMT of the request through the Sector Coordinating Unit.

8. In cases of urgency, including those which concern perishable goods, Member states shall enter into consultations within a period of no more than 10 days after the date of receipt of the request. If the consultations have failed to settle the dispute within a period of 20 days after the date of receipt of the request, the requesting Member State may request the establishment of a panel.”

⁸⁰³ Article 32(5). The procedure and scope of operation for the Panel are laid out in Annex VI of the SADC Trade Protocol Articles 5 – 19).

⁸⁰⁴ Article 32(2) provides:

“The settlement of *any dispute* among Member states shall, whenever possible, imply removal of a measure not conforming with the provisions of this Protocol or causing mollification or impairment of such provision.” (My emphasis).

⁸⁰⁵ Article 32(6) provides:

“As a last resort, disputes regarding the interpretation and application of this Protocol shall be settled in accordance with Article 32 of the Treaty.”

⁸⁰⁶ Article 4 of Annex VI to the SADC Trade Protocol provides:

“1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the disputing Member states so agree.

2. Procedures involving good offices, conciliation and mediation shall be confidential, and may be requested at any time by a disputing Member State. These procedures may begin at any time and be terminated at any time.

So far no disputes have been filed through the ADR or panel mechanisms yet.⁸⁰⁷ The SADC Tribunal had not dealt with any trade dispute either before its suspension,⁸⁰⁸ but has given a decision which implied “harmonisation of laws”. In the two cases involving the Government of Zimbabwe,⁸⁰⁹ the Tribunal held that section 5(2) of the State Liability Act of the Respondent (Zimbabwe) – which absolves the state property to form the subject-matter of execution, attachment or process to satisfy a judgment debt – is not only in breach of the right to an effective remedy, the right to have access to an independent and impartial court or tribunal and the right to a fair hearing, but is also in contravention of the right to equality before the law and the right to equal protection of the law, and, therefore, is incompatible with the Respondent’s obligations under Articles 4(c)⁸¹⁰ and 6(1)⁸¹¹ of the SADC Treaty.

In this regard, the Tribunal drew the attention of the member states to the adverse effect which their existing state immunity or state liability legislation has on the principles of human rights, democracy and the rule of law in so far as such legislation provides that state property cannot be the subject-matter of execution, attachment or process in satisfaction of a judgment debt.⁸¹²

3 The Chairperson of the CMT, or any other Member of the CMT designated by the Chairperson who is not a national of a disputing Member State, may offer good offices, conciliation or mediation with a view to assisting the disputing Member states.”

⁸⁰⁷ Ng’ong’ola, C. “Replication of WTO dispute settlement processes in SADC” *SADC Law Journal* Vol. 1 (2011) 35 at 36; Chase, C *et al.* “Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements - Innovative or Variations on a Theme?” WTO Staff Working Paper ERSD-2013-07, Geneva, June 2013 at 6; “The Settlement of Disputes in the SADC Free Trade Area”, Submission by Trade Law Centre (Tralac) for the SADC August 2014 Summit at 3.

⁸⁰⁸ It was formally suspended by the SADC Heads of State or Government Extraordinary Summit of August 2010, in Windhoek, Namibia after a protracted battle with the Government of Zimbabwe that refused to obey its judgments.

⁸⁰⁹ *Mike Campbell (PVT) Limited and Another v Republic of Zimbabwe (2/07) [2007] SADC (T) 1 (13 December 2007* (judgment delivered on 28 November 2008) and *Gondo and Others v Republic of Zimbabwe 05/2008 [2010] SADC (T)* (judgment delivered on 9 December 2010).

⁸¹⁰ Article 4(c) of the SADC Treaty provides:

“SADC and its Member states shall act in accordance human rights, democracy and the rule of law.”

⁸¹¹ Article 6(1) of the SADC Treaty provides:

“Member states undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty.”

⁸¹² *Gondo* Case (above, fn 809) at 14.

The suspension, and non-appointment of judges,⁸¹³ of the Tribunal effectively means the SADC currently has no court to deal with trade disputes if they were to arise. The only remaining mechanisms are thus the non-legalised mechanisms of alternative dispute resolution (ADR) and panel of experts. And the challenge with these mechanisms is that they are both not compulsory (they are voluntary) and per agreement by the parties involved. This essentially means an aggrieved Member State would not have a recourse if the respondent were not to agree to them.⁸¹⁴

5.4. Achievements with regard to various relevant protocols

The SADC has passed and adopted various protocols that constitute the SADC law for the integration process. Currently, the SADC has 26 Protocols, and out of these 2 have not yet entered into force.⁸¹⁵

The SADC Protocol on Trade forms the crux of this thesis, and has been dealt with extensively (especially under 5.3.1 above), so it will not be dealt with again in this section. The other protocol that has already been dealt with extensively – in Chapter 4, dealing with “institutions of the SADC” and in this Chapter (above) under “dispute resolution” – is the Protocol on the Tribunal and the Rules thereof. It will also not be repeated in this section. So is the Protocol on Politics, Defence and Security, which establishes the Organ on Politics, defence and Security. It was also dealt with in Chapter 4 – “structure and institutions of the SADC”.

⁸¹³ The SADC Heads of State and Government Extraordinary Summit of May 2011 resolves that no judges should be appointed to the Tribunal.

⁸¹⁴ Erasmus, G. “The New Protocol for the SADC Tribunal: Jurisdictional Changes and Implications for SADC Community Law”, Tralac Working Paper No. US15WP01/2015, January 2015; de Wet, E. “The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa” *ICSID Review* vol. 28 issue 1 (2013) 45 at 60; Tino, E. “The role of regional judiciaries in Eastern and Southern Africa” in Bösl, A *et al. Monitoring Regional Integration in Southern Africa Yearbook 2012* (2013) at 144.

⁸¹⁵ These are: “Protocol on Facilitation and Movement of Persons” (2005) and “Protocol on Science, Technology and Innovation” (2008).

The protocols dealt with under this section are others, besides the three, that have come into force.

5.4.1 Protocol on Transport, Communications and Meteorology

Recognising that closer integration of these sectors offers benefit to the region, the SADC passed the Protocol on Transport, Communications and Meteorology on 24 August 1996. This was in pursuance of Articles 22 and 23 of the SADC Treaty, which provide for member states to conclude a protocol to expand and deepen their cooperation in the areas of infrastructure and services. It entered into force on 6 July 1998.

In terms of this Protocol, member states' general objective is to establish transport, communications and meteorology systems which provide efficient, cost-effective and fully integrated infrastructure and operations, which best meet the needs of customers and promote economic and social development while being environmentally and economically sustainable.⁸¹⁶

⁸¹⁶ Article 2(3) of the Protocol on Transport, Communications and Meteorology.

In addition to these tenets the Protocol has specific objectives for each of the areas that it covers, that is, transport,⁸¹⁷ communications⁸¹⁸ and meteorology.⁸¹⁹

⁸¹⁷ These Articles list objectives with regard to various aspects and modes of transport as follows:

“3.1 (integrated transport)

Member states shall promote economically-viable integrated transport service provision in the region -

- a. characterized by high performance standards and consistent levels of efficiency and reliability of all individual component parts of the transport chain;
- b. on the basis of complementarity and co-operation between modes, modal choice optimization, seaport hinterland optimization and with due regard to modal advantages;
- c. bearing in mind the need to preserve the region's transportation infrastructure;
- d. by encouraging the development of multimodal service provision; and
- e. compatible with responsible environmental management;

to support the development of major regional development corridors and facilitate travel between their territories.

4.1 (road infrastructure)

Member states agree to ensure and sustain the development of an adequate roads network in support of regional socio-economic growth by providing, maintaining and improving all roads including primary, secondary, tertiary and urban roads, including those segments which collectively constitute the RTRN in order to -

- a. ensure access to major centres of population and economic activity;
- b. ensure access between ports of entry between Member states and harbours of importance to the region;
- c. minimize total road transport costs;
- d. preserve assets vested in road infrastructure; and
- e. minimize detrimental impacts to the environment.

5.1 (road transport)

Member states shall facilitate the unimpeded flow of goods and passengers between and across their respective territories by promoting the development of a strong and competitive commercial road transport industry which provides effective transport services to consumers.

6.1 (road traffic)

Member states shall enhance the overall quality of road traffic in the region with the emphasis on promoting acceptable levels of safety, security, order, discipline and mobility on the roads and protecting the environment and road infrastructure.

7. 1 (railways)

Member states shall facilitate the provision of a seamless, efficient, predictable, cost-effective, safe and environmentally-friendly railway service which is responsive to market needs and provides access to major centres of population and economic activity.

8.1 (maritime and inland waterway transport)

Member states shall promote the economic and social development of the region by developing and implementing harmonized international and regional transport policies in respect of the high seas and inland waterways which -

- a. maximize regional and international trade and exchange;
- b. provide appropriate frameworks for economic and concomitant institutional restructuring;
- c. promote a safe and clean marine, maritime and inland waterway environment;
- d. encourage the provision of accessible, viable and productive landside infrastructure;
- e. establish a customer-sensitive and needs-driven approach; and
- f. promote the establishment of an integrated transport system set out in Chapter 3.

9.1 (civil aviation)

1. Member states, recognizing the importance of air transport as a means of serving the national interests of the SADC Member states and the importance of promoting social and business relations amongst their nationals, shall ensure the provision of safe, reliable and efficient services in accordance with the ICAO SARPs, with a view to improving levels of service and cost-efficiency in support of the socio-economic development of the region.
2. Member states recognise further that in order to overcome the constraints of small national markets, market restrictions and the small size of some SADC airlines and further to ensure the competitiveness of regional air services in a global context, there is a need for enhanced co-operation within the regional air transport market. “

⁸¹⁸ Articles 10.1 and 11.1 provide:

“10.1 (telecommunications)

Member states agree to take advantage of international technological developments and to develop national telecommunications networks for the provision of reliable, effective and affordable telecommunications services in order to -

- a. ensure adequate high quality and efficient services responsive to the diverse needs of commerce and industry in support of regional social and economic growth;
- b. achieve regional universal service with regard to telecommunications services and regional universal access to advanced information services; and
- c. enhance service interconnectivity in the region and globally

11.1 (postal services)

Member states shall provide efficient market-related universal postal services responsive to consumer needs which are affordable, of a good quality and meet the social needs of communications as a public service mission and maintain complementary and supportive relationships between their respective postal administrations in support of the economic needs of the region.”

⁸¹⁹ Article 12.1 provides:

1. Member states acknowledge that they are members of the WMO and, through their national meteorological services, they constitute an integral part of the regional and global system or network of the WMO programmes and structures, in particular the World Weather Watch programme.

In order to achieve the objectives of this Protocol, the SADC developed key tenets of the Protocol and an implementation road map:

- a) developing a Regional Transport Master Plan to meet the trade and developmental requirements of the region, based on regional consensus;
- b) packaging of infrastructure development projects identified by the Master Plan to be marketed to the private sector through, among others, public-private partnerships (PPP) options;
- c) implementing corridor infrastructure development to ensure high standard of road, rail and inland waterways linkages interconnecting the SADC member states;
- d) undertaking transport and trade facilitation along with corridors to ensure smooth passage of trucks and people with minimal delays at border posts, through application of the one-stop border post concept and standardisation of customs procedures and documents; and
- e) development of harmonised road transport multilateral agreements in respect of licensing, road user charges, vehicle dimensions, overloading enforcement, third party, control rules of fair competition and bond guarantee schemes.⁸²⁰

After the coming into operation of this Protocol, the SADC replaced the Southern African Transport and Communications Commission (SATCC), which was established in 1981

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2. Member states shall, within the regional and international co-operative system of the WMO, provide adequate legal frameworks and appropriate financial support to the national meteorological services to -
 - a. establish an integrated network of observation, data processing and communications systems; and
 - b. enhance the provision of meteorological services for general and specialized applications in the region and internationally.

⁸²⁰ Makumbe, R. "The SADC regional strategy to intermodal transportation and logistics in southern Africa" On the occasion of the *5th Intermodal Africa 2007 South Africa exhibition and conference* - International Convention Centre Durban, South Africa 30 March, 2007.

during the Southern African Development Coordination Conference (SADCC) to coordinate regional transport, with the Directorate of Infrastructure and Services of the SADC Secretariat.⁸²¹

Through the Directorate, the SADC recognises the important role that cross-border transport plays in facilitating trade flows between member states within the SADC region. This is more so because no less than six countries in the SADC are landlocked, which means that these countries rely on the availability of efficient cross-border transport to reach global markets.⁸²²

In recognition of this important role, the SADC started to follow the “Corridor model” for both road and railway.⁸²³ So far the following transport corridors exist in the SADC region:

- Lobito Corridor - Angola, via the DRC, to Zambia;
- Dar es Salaam Corridor – Tanzania, through Malawi, to Zambia;
- Trans-Kalahari Corridor – from Walvis Bay in Namibia, through Botswana to Johannesburg;
- Beira Corridor – Mozambique to wider region (Agriculture);
- Nacala Corridor – Mozambique to Malawi;
- Maputo Corridor – Mozambique to South Africa;
- Trans-Capriivi Corridor – Namibia to Zambia; and
- North-South (Durban) Corridor – South Africa to the DRC.

⁸²¹ Carlsson, B.T *et al.* “Nordic Support to SATCC-TU” (online). Available at http://www.sida.se/English/publication/Publications_database/Publications-by-year-2002/april/9912 (accessed on 22 June 2016); Conjé, J.B. “The road transport sector in the context of the SADC Protocol on Transport, Communications and Meteorology” Tralac Working Paper (2015) at 24.

⁸²² Khumalo, S. “Unlocking South African Cross-Border Transport Challenges: A Case Study of Beitbridge Border Post”, Paper delivered at the 33rd Southern African Transport Conference (SATC 2014), 7 – 10 July 2014, Pretoria, South Africa.

⁸²³ Sindzingre, A. “Trade structure as a constraint to multilateral and regional arrangements in sub-Saharan Africa: the WTO and African Union” Centre for Study of Globalisation and Regionalisation (CSGR) 10th Anniversary Conference Paper, University of Warwick 17 – 19 September 2007 at 30; “Seamless transport corridors key to regional integration”, *Southern African News Features* (SANF) 11 no. 30B (online). Available at <http://www.sardc.net/en/southern-african-news-features/seamless-transport-corridors-key-to-regional-integration/> (accessed on 23 June 2016).

The Trans-Kalahari (TKH) Corridor is now a SADC-wide private/public partnership model and has been joined with the Maputo Corridor to form the so-called “Coast to Coast” Corridor. The total length of this Corridor is estimated at 2 310km and passes through four countries, namely, Namibia, Botswana, South Africa and Mozambique.⁸²⁴ The countries involved have signed a Memorandum of Understanding (MoU) committing to harmonisation of traffic laws and road management plan.⁸²⁵

In November 2009 the SADC launched the “One-Stop Border Post” (OSBP) initiative with the introduction of the Churundu One-Stop Border Post, in line with the Trade Protocol, which advocates for the elimination of barriers to trade as well as the easing of customs and transit procedures. Under this scheme, immigration and customs procedures are carried out just once in each direction, in contrast to the situation at most border posts in the region where paperwork must be completed on both sides.⁸²⁶

For now, Chirundu is the only operational OSBP of its kind in the region, but sixteen of the 35 most important border posts in the region have been identified as candidates for conversion to the one-stop system by 2020. South Africa is in the process of adopting a national policy and strategy which will allow the Beit Bridge and Lebombo border posts, among others, to work towards operating as OSBPs. In June 2016 South Africa and Mozambique integrated the Lebombo/Ressano Garcia border post and this was followed by an agreement between South Africa and Zimbabwe in October 2017 to set up the Beit Bridge One-Stop Border Post (OSBP) Technical Team. The team will develop the necessary legal framework for the establishment of the Beit Bridge One-Stop Border Post.⁸²⁷

⁸²⁴ van As, S.C *et al.* “Maputo to Walvis Bay Road Safety Management Pilot Study”, June 2009 at 2.

⁸²⁵ Article 4 of Trans-Kalahari Memorandum of Understanding (MoU) between Botswana, South Africa and Namibia, 2003.

⁸²⁶ “Facilitating trade, reducing time and costs” *SADC @35- Success Stories* vol. 1 (2015) at 4; De Bruyn, C. “Delays along key trade corridors costing ‘billions’ in trade” *Creamer Media’s Engineering News* (online). Available at http://www.engineeringnews.co.za/article/delays-along-key-sadc-trade-corridors-costing-billions-in-trade-study-2015-07-08/rep_id:4136 (accessed on 23 June 2016).

⁸²⁷ “SA, Zimbabwe push for one-stop Beitbridge border post” *The South African Government News Agency (SAnews)*, 3 October 2017; “SA, Zimbabwe push for one-stop Beitbridge border post” *The Citizen* (online), 3 October 2017; Joint Communiqué on the occasion of the Second Session of the Bi-National Commission (BNC) between South Africa and Zimbabwe in Pretoria, 3 October 2017.

With regard to aviation, the SADC adopted, together with the COMESA and the EAC, the “Guidelines, Provisions and Procedures for the Implementation of Regulations for Competition in Air Transport Services” on the basis of the Yamoussoukro Decision⁸²⁸ in 2007.⁸²⁹ In October 2008 the three RECs launched the Joint Competition Authority (JCA) to oversee the full implementation of the Yamoussoukro Decision in the three RECs. A Yamoussoukro Decision-compliant template has been proposed as an essential component of the framework to operationalise the JCA. The Draft Framework has been produced, but still has to be adopted by the three RECs.⁸³⁰

With regard to maritime transport, the Protocol encourages member states to facilitate development of port and inland waterway infrastructure throughout Southern Africa. Though there are still challenges due to lack of technical capacity in many member states, the region currently has 64 maritime and inland waterway transport projects under development. These projects concentrate on two centres: Dar es Salaam, Tanzania, and Walvis Bay, Namibia. In addition to these projects, significant developments are also underway at Nacala, Beira, and Maputo in Mozambique; Luanda in Angola; and the highly productive port of Durban, South Africa. And much of this development stems from private sector involvement.⁸³¹

⁸²⁸ The Yamoussoukro Decision is based on the Yamoussoukro Declaration of October 1988, which was an African Civil Aviation Policy geared towards a comprehensive reform of the air transport industry and the unification of the fragmented African air transport market. The Decision was taken in November 1999, aimed at liberalised intra-Africa air transport markets with minimum Government intervention.

⁸²⁹ “Southern African Development Community - Desk Assessment of the Regional Indicative Strategic Development Plan 2005 – 2010”, SADC Council November 2011 at 48; “A Framework for the Operationalisation of the COMESA EAC-SADC Joint Competition Authority (JCA)”, Draft Final Report of COMESA, EAC and SADC – Part 6 YD-Compliant Air Services Agreement at 10.

⁸³⁰ “A Framework for the Operationalisation of the COMESA EAC-SADC Joint Competition Authority (JCA)” (above, fn 829) at 12; Louga, K. “Air Traffic Competition Law: Africa – To what extent is the Southern and Eastern Africa Liberalized?” Research Paper for Leiden University, February 2016 at 12.

⁸³¹ “Maritime, ports and inland waterways”, SADC – Towards a Common Future (online). Available at <http://www.sadc.int/themes/infrastructure/maritime-ports-inland-waterways/> (accessed on 24 June 2016); Walker, T. “From missed opportunity to oceans of prosperity”, Institute for Security Studies (ISS) article of 13 October 2015. Available at <https://www.issafrica.org/iss-today/from-missed-opportunity-to-oceans-of-prosperity> (accessed on 24 June 2016).

With regard to communication, the SADC adopted the “ICT Development Strategy for the SADC Region” – called “e-SADC Strategic Framework” – in May 2010 which, among others, addresses convergence challenges and harmonisation of information and communication technology (ICT) infrastructure, services and indicators and promotes ICT usage for regional economic integration, enhancement of connectivity and access to ICT services among and within the member states.⁸³² It is a three-pronged strategy, namely:

- proper regulatory and policy framework for attracting investors;
- infrastructure development; and
- deployment of applications.

The main project under this Framework was the SADC Regional Information Infrastructure (SRII) Project, which was linked to an undersea fibre optic cable system connecting countries of eastern Africa to the rest of the world, the Eastern Africa Submarine Cable System (EASSy). The cable entered service on 16 July 2010, with commercial service starting on 30 July 2010.⁸³³ Currently all the SADC countries are connected to submarine cable landing stations, and many are implementing various national projects in line with the SADC Master Plan Vision 2027.⁸³⁴

The Vision 2027 is captured in the SADC Regional Infrastructure Development Master Plan (RIDMP), which was adopted in August 2012 to deal with infrastructure challenges in the region until 2027. It is being implemented over three five-year intervals: short term (2012 - 2017), medium term (2017 - 2022) and long term (2022 - 2027), and cuts across

⁸³² “SADC experts adopt e-commerce strategy to fast-track intra-regional trade, economic integration” ECA Press Release No. 54/2012.

⁸³³ “ICT Challenges to Enhance Socio-economic Development and Regional Integration within SADC”, presentation to the EuroAfrica-ICT FP7 Awareness Workshop, Southern African Development Community (SADC) Secretariat ICT Unit, Gaborone, 08 – 09 October 2007.

⁸³⁴ The SADC Regional Infrastructure Development Master Plan (RIDMP) was adopted by the SADC Heads of State and Government at the 32nd Ordinary Summit held in August 2012 in Maputo, Mozambique; “Presentation by the Southern Africa Telecommunications Association (SATA) at the AU-SADC Regional Internet Exchange Point (RIXP) and Regional Internet Carrier (RIC) Workshop”, 3 - 7 February 2014, Grand Palm Hotel, Gaborone, Botswana (online). Available at http://pages.au.int/sites/default/files/02SATA%20Activities%20on%20Interconnection%20and%20IXPs%20in%20the%20SADC%20Region_0.pdf (accessed on 24 June 2016).

six sectors, namely Energy, Transport, Tourism, Information and Communication technology (ICT) and Postal, Meteorology and Water.⁸³⁵

In the transport sector, the Master Plan focuses on effective regulation of transport services, liberalisation of transport markets, development of corridors and facilitation of cross-border movement, construction of missing regional transport links, corridor management institutions establishment for Beira, Lobito and North-South Corridors, and harmonisation of road safety data systems.⁸³⁶

In the information communication technology (ICT) sector, the Master Plan's focus is on addressing harmonisation of SADC regional ICT policy and regulatory frameworks; the SADC regional ICT infrastructure development, international and regional coordination; coordination and harmonisation of the SADC ICT and postal strategic plans and programmes; facilitation of policy dialogue and implementation of the Transport, Communication and Meteorology Protocol.⁸³⁷

In the meteorology sector, the Master Plan focuses on ensuring availability of timely early warning information relating to adverse weather and climate variability impacts. Another highlight in the meteorology sector is the development of a framework for harmonised indicators for the provision of relevant climate forecasting information to facilitate preparations of mitigation measures against droughts, floods and cyclones.⁸³⁸

Following the adoption of the Master Plan, the SADC Secretariat in collaboration with the SADC ministries responsible for the six sectors, namely Energy, Transport, Tourism, ICT and Postal, Meteorology and Water, are formulating frameworks to guide the

⁸³⁵ "SADC Regional Infrastructure Development Master Plan – August 2012"; Dube, M. "Analysing the Development Process for Infrastructure Projects in SADC" Political Economy of Regional Integration in Southern Africa (PERISA) Series 3 – Infrastructure, August 2013.

⁸³⁶ SADC Regional Infrastructure Development Master Plan – Executive Summary at 8.

⁸³⁷ SADC Regional Infrastructure Development Master Plan – Executive Summary at 10.

⁸³⁸ SADC Regional Infrastructure Development Master Plan – Executive Summary at 12.

implementation of efficient, seamless and cost-effective trans-boundary infrastructure networks in an integrated and coordinated manner.⁸³⁹

5.4.2 Protocol on Shared Watercourses

In the Southern African Development Community (SADC) region, water is seen as one of major areas of cooperation and integration. This owes to its nature of often being trans-boundary and shared between two countries or more. Many watercourses in the region are shared among several member states, a situation that demands their development in an environmentally sound manner. To this end, the SADC initially passed its “Protocol on Shared Watercourses in the Southern African Development Community” on 28 August 1995, and revised it on 7 August 2000. It came into force in September 2003.⁸⁴⁰

The Protocol was originally drafted in 1995 to be aligned with the Helsinki Rules,⁸⁴¹ but was revised to reflect the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses (UN Watercourses Convention). It further provides the flexibility for countries to enter into specific basin-wide agreements, which is the approach promoted under the UN Watercourses Convention. Such agreements would allow for planned measures, such as environmental protection, management of shared watercourses, prevention and mitigation of harmful conditions and emergency situations.⁸⁴²

⁸³⁹ “Water and Regional Integration - The role of water as a driver of regional economic integration in Southern Africa”, Report to the Water Research Commission of South Africa, no 2252/1/14, March 2015; “SADC Regional Infrastructure Development Master Plan Implementation Begins”, Southern African Development Community – Towards a Common Future. Available at www.sadc.int/.../sadc-regional-infrastructure-development-master-plan (accessed on 24 June 2016); Dube (above, fn 835).

⁸⁴⁰ “SADC Water Sector”, SADC – Towards a Common Future (online). Available at <http://www.sadc.int/sadc-secretariat/directorates/office-deputy-executive-secretary-regional-integration/infrastructure-services/sadc-water-sector/> (accessed on 27 June 2016).

⁸⁴¹ The “Helsinki Rules on the Uses of the Waters of International Rivers” is an international guideline regulating how rivers and their connected ground waters that cross national boundaries may be used, adopted by the International Law Association (ILA) in Helsinki, Finland in August 1966.

⁸⁴² “SADC Revised Protocol on Shared Watercourse - Orange-Senqu River Commission (ORASECOM)”, available at www.orasecom.org (accessed on 27 June 2016).

The Revised Protocol stresses the importance of taking a basin-wide approach to water management rather than emphasising the principle of territory sovereignty.⁸⁴³ It outlines specific objectives including improving cooperation to promote sustainable and coordinated management, protection, and utilisation of trans-boundary watercourses and promoting the SADC agenda of regional integration and poverty alleviation.⁸⁴⁴

In terms of the Revised Protocol, cooperation in the integrated management of shared watercourse should be institutionalised through appropriate Shared Watercourse Institutions (SWCI), such as *Watercourse Commissions, Water Authorities or Boards*. A Watercourse Institution shall be established on each shared watercourse to advise and coordinate the sustainable development and equitable utilisation of the associated water resources for mutual benefit and integration.⁸⁴⁵

Every SADC watercourse state must participate in the SWCI. However, this does not exclude the possibility of other bilateral or multilateral water institutions for specific purposes, particularly the development and operation of joint water projects, but these are subject to the framework provided by the watercourse states.⁸⁴⁶

In the SADC a number of “Joint Water Commissions” and “Joint Technical Committees” have been established to discuss and negotiate issues of common interest, to manage the water resources or implement joint development projects. The best known water commission is the Lesotho Highlands Water Commission, which is responsible for the overall management of the Lesotho Highlands Water Project (between South Africa and Lesotho). Others are:

- the Komati Basin Water Authority (KOBWA) between South Africa, Swaziland and Mozambique established in 1993;

⁸⁴³ Article 3 of the (Revised) Protocol on Shared Watercourses proposes the establishment of River Basin institutions that will, among others, be responsible for harmonising national policies and legislation, conducting research and data gathering, managing water control and utilisation, promoting environmental protection measures, and promoting a hydro-metric monitoring programme.

⁸⁴⁴ Article 2.

⁸⁴⁵ Article 3 of the Protocol.

⁸⁴⁶ Articles 4 – 6 of the Protocol.

- the Okavango River Basin Water Commission (OKACOM), originally formed in 1994 and re-established in April 2007, between Angola, Botswana and Namibia;
- the Lake Tanganyika Authority (LTA), established in 2003 by Tanzania, the DRC, Zambia and Burundi;
- the Orange-Senqu Commission (ORASECOM), established in 2000 between South Africa, Lesotho, Botswana and Namibia to manage the Orange River;
- the Limpopo Watercourse Commission, which was established in 2004 between South Africa, Botswana, Zimbabwe and Mozambique to manage the Limpopo River;⁸⁴⁷ and
- the Zambezi Watercourse Commission (ZAMCOM), which became operational in January 2015 for the eight countries that share the Zambezi River through an agreement signed in 2004. These are Angola, Botswana, Malawi, Mozambique, Namibia, Tanzania, Zambia and Zimbabwe.⁸⁴⁸

In 2011 the SADC adopted the *SADC Regional Water Infrastructure Programme* in terms of which member states prioritised 23 projects for promotion and development of water infrastructure within the region. These projects are categorised as regional, cross-border and members priority projects, and they are either short-term, medium-term or long-term.⁸⁴⁹

⁸⁴⁷ Speech by Mrs. L Hendricks, former Minister of Water Affairs and Forestry (SA) at “*Stockholm Water Symposium*” Stockholm, Sweden, 21 August 2006; Earle, A *et al.* “A gendered critique of transboundary water management” *Feminist Review* vol. 103 issue 1 (March 2013) 99.

⁸⁴⁸ “Permanent Zambezi Watercourse Commission (ZAMCOM) Secretariat Fully Operational” (online), available at <http://zambezicommission.org/newsite/index.php/2015/01/22/permanent-zambezi-watercourse-commission-zamcom-secretariat-fully-operational/> (accessed on 27 June 2016).

⁸⁴⁹ These are: Regional: INGA 3 Hydropower – DRC, Lesotho Highlands Phase 2 – Lesotho and South Africa, Batoka Gorge Hydropower – Zambia/Zimbabwe and Malawi Songwe River Basin Development Plan – Malawi; Cross-border: Food Security: Upper Okavango – Angola and Namibia, Vaal-Gamagara Water Supply – Botswana and South Africa, Ressano Garcia Weir – Water Supply – Mozambique and South Africa, Lomahasha>Namaacha Water Supply – Swaziland and Mozambique and Cross Border Locations – Water Supply & Sanitation – Zambia/Neighbours; and Member states’ Priority: Angola Lubango Water Supply & Sanitation, Botswana Limpopo Basin Joint Water monitoring, DRC Kinshasa Water Supply & Sanitation, Lesotho Lowlands Water Supply Scheme – Zone, *Madagascar Pending*, Malawi Mombezi Dam – Multipurpose, Mauritius 13 Housing Estates – Water Supply, Mozambique Movene Dam – Multipurpose, Namibia Windhoek – Managed Aquifer Recharge, Seychelles Non Revenue Water and Use Efficiency, South Africa Water Demand Management, Swaziland Nondvo Dam – Multipurpose, Tanzania Ruhuhu Valley Irrigation, Zambia Climate Change Adaptation – AER, Zimbabwe Bulawayo Water Supply from Zambezi River.

All the water projects were incorporated into the SADC Regional Master Plan in 2012.⁸⁵⁰ The Kunene Trans-boundary Water Supply and Sanitation Project, involving southern Angola and northern Namibia, was adopted as the pilot project for regional water supply and sanitation. The project entails development and rehabilitation of water supply and sanitation infrastructure for communities and towns in the project area. Another important component of the project is to establish and build the capacity of a water entity in the Kunene Province in Angola. However, this project is being derailed by inadequate funding.⁸⁵¹

5.4.3 Protocol on Mining

The minerals sector is the backbone of the majority of economies in the SADC region and harmonisation of policies in this sector would enhance regional integration. The region is reported to have proven reserves approaching \$5 Trillion in value, with approximately 3 000 active registered mines and at least ten countries in the region that have burgeoning mining sectors. The countries include Angola, Botswana, the Democratic Republic of Congo (DRC), Madagascar, Mozambique, Namibia, South Africa, Tanzania, Zambia and Zimbabwe.⁸⁵²

The minerals industry also has spin-off benefits to the other sectors of the economy such as energy, labour, transport and so on, as rail and road infrastructure built to serve the movement of material inputs to, and outputs from, the mines uses energy and human labour. Mining is also a hazardous undertaking, impacting on the environment and the

⁸⁵⁰ “SADC Regional Infrastructure Development Master Plan – August 2012”.

⁸⁵¹ “Water management challenges plenty in SADC Regions”, internet article by the South African Department of Water and Sanitation, 29 July 2015. Available at <https://www.dwa.gov.za/stories/Water%20management%20challenges%20plenty%20in%20SADC%20Regions.pdf> (accessed on 27 June 2016).

⁸⁵² “Mining Markets in Southern Africa – 2014” Report by Zurcom International for the Virginia Economic Development at 1; “Mining”, SADC – Towards a Common Future (online). Available at <http://www.sadc.int/themes/economic-development/industry/mining/> (accessed on 29 June 2016).

health of the citizens living in the precinct of the mines. As such there is a need for a comprehensive regulation of this sector.⁸⁵³

Recognising the significance of the mineral industry within the region, the SADC launched the Protocol on Mining in September 1997 and it entered into force on 10 February 2000. It is intended to promote the interdependence and integration of mining policies for the accelerated development and growth of the mining sector in the region. By agreeing to this Protocol member states are determined, through co-operation and collaboration, to develop the region's abundant mineral resources to improve the living standards of people throughout the SADC region.⁸⁵⁴

They intend to do this by promoting the economic and social development and integration of their economies with a view to achieving competitiveness and increasing their market share in international markets. The Protocol specifies the following areas of cooperation:

1. harmonising national and regional policies, strategies and programmes;
2. developing human and technological capacities;
3. promoting private sector exploitation of mineral resources;
4. improving availability of information to the private sector, member states and other countries;
5. promoting small-scale mining;
6. developing and observing internationally accepted standards of health, mining safety and environmental protection;
7. promoting economic empowerment of the historically disadvantaged in the sector; and
8. jointly developing and observing internationally accepted standards of health, mining safety and environmental protection.⁸⁵⁵

⁸⁵³ Mining Markets in South Africa – 2014 (above) at 3 – 8; Breslin, S *et al. Microregionalism and World Order* (2016) at 174.

⁸⁵⁴ “Preamble” to the SADC Protocol on Mining.

⁸⁵⁵ Article 5 of the SADC Protocol on Mining.

In September 1997 the Council of Ministers, at their meeting held in Blantyre, Malawi, approved the “1997-2001 Mining Sector Strategy”. The main objective of the Strategy was to ensure the harmonisation of mining policies in the member states.⁸⁵⁶ In 2004, in line with the Strategy, the SADC started the process of harmonising mineral policies and regulatory frameworks. The aim was to reduce differences in the operating environment between the member countries of the region. This process is yielding positive results because by mid-2011, the corporate tax range had narrowed from a low of fifteen percent to a high of sixty percent in 2004, and to a low of twenty-five percent and the high of forty percent in 2011. Branch office tax also narrowed during the period with the low rising from twenty percent in 2004 to twenty-five percent in 2011.⁸⁵⁷

Import and export duties have been almost entirely removed or exempted in the case of mining. These are important cost containment items for investment and production. Payroll taxes, land taxes, and municipal taxes are payable in all member states. Provincial (state) taxes are, however, not the norm in the region as mining is a national competence in all the SADC member states.⁸⁵⁸

In a bid to ensure that the mineral wealth in various member states translates into socio-economic development, the Southern African Resources Watch (SARW)⁸⁵⁹ and the Southern African Development Community Parliamentary Forum (SADC-PF) developed the “Southern Africa Resource Barometer” to help the parliamentarians in the region to effectively oversee the extractive industries to ensure that natural resources benefit all citizens. The Barometer was launched in December 2013 and will be used in two ways:

⁸⁵⁶ Kritzinger-van Niekerk, L *et al.* “Regional Integration in Southern Africa: Overview of recent developments” World Bank Document. December 2002, at 57.

⁸⁵⁷ Mtegha, H.D *et al.* “Mining fiscal environment in the SADC: status after harmonization attempts” *Journal of the Southern African Institute of Mining and Metallurgy* vol. 111 July (2011) 455 at 457.

⁸⁵⁸ *Ibid.*

⁸⁵⁹ Southern African Resources Watch (SARW) is a project of Open Society Initiative for Southern Africa (OSISA) and works closely with key stakeholders to increase their capacity to monitor the extractive industries in an effort to hold both the private sector and government to account.

1. Publish country parliamentary reports every year for each SADC country on the state of the extractive sector. The country reports will be consolidated into one Regional Report;
2. Parliaments will use these principles and guidelines in their day-to-day oversight of the Executive. Members of Parliament will familiarise themselves with these principles and use them along with all the other tools at their disposal, such as committee hearings, requests for documentation, parliamentary debates, etc., to keep a close watch on mining activities to ensure that the country's mineral wealth benefits the country and all its citizens.⁸⁶⁰

In pursuance of promoting private sector participation in its activities, the SADC has established the Association of SADC Chambers of Commerce and Industry (ASCCI). It has various affiliates in different sectors and in the context of mining, a Mining Industries Association of Southern Africa (MIASA)⁸⁶¹ has been established. MIASA represents national chambers of mines and mining associations in the region and articulates the interests of the private sector in the SADC mining programmes and activities. The SADC Women in Mining Trust (WIMT) is also a regional body which co-ordinates activities of the national women in mining associations. It articulates the interests of women in the mining industry.⁸⁶² Both these bodies work closely with governments as major stakeholders to address major common challenges such as job creation and poverty alleviation in various member states.

In April 2015 the SADC adopted the “SADC Industrialisation Strategy and Roadmap 2015 - 2063”, which is aimed at bringing the SADC member states’ production and trade capacities in line with the developed world. It places specific emphasis on the need for beneficiation and the development of value added chains in agriculture and mining. It is believed that these will yield much higher value returns on exported goods than at present,

⁸⁶⁰ “Southern Africa Resource Barometer – 2013” at 26.

⁸⁶¹ MIASA currently has seven members: Chambers of Mines of Botswana, The Democratic Republic of Congo, Namibia, South Africa, Tanzania, Zambia and Zimbabwe.

⁸⁶² Moyo, T. “Extractive Industries and Women in Southern Africa” *BUWA! – A Journal on African Women’s Experiences* (2012) at 68.

accelerate industrialisation, create investment and employment opportunities and contribute to strengthening intra-regional trade.⁸⁶³

5.4.4 Protocol on Energy

Energy is vital to development in Southern Africa. Beyond its use in daily life, fuel and electricity catalyse infrastructure projects that drive both regional integration and economic growth. As the SADC region industrialises, as attested to by the adoption of the “SADC Industrialisation Strategy and Roadmap 2015 - 2063”, energy production and distribution will increase in importance.

Recognising the fundamental role of energy in accomplishing its goals, the SADC has adopted the Protocol on Energy in 1996, which provides a framework for cooperation on energy policy among SADC member states. The Protocol entered into force on 17 April 1998.⁸⁶⁴ It intends to promote the harmonious development of national energy policies and matters of common interest for the balanced and equitable development of energy throughout the SADC region.

The overall objective of the Protocol is to ensure the availability of sufficient, reliable, least cost energy services that will assist in the attainment of economic efficiency and the eradication of poverty whilst ensuring the environmentally sustainable use of energy resources in the region.⁸⁶⁵

⁸⁶³ “SADC Industrialisation Strategy and Roadmap 2015 – 2063”, approved by Summit in Harare on 29 April 2015; Barlow, A. “The Southern African Development Community: IV – Recent Developments in the Economic Programme”, Helen Suzman Foundation Brief, 17 November 2015 (online). Available at <http://hsf.org.za/resource-centre/hsf-briefs/the-southern-african-development-community-iv-recent-developments-in-the-economic-programme> (accessed on 1 July 2016); Tralac. “SADC Legal Texts and Policy Documents”, available at <http://www.tralac.org/resources/by-region/sadc.html> (accessed on 1 July 2016).

⁸⁶⁴ “Energy”, Southern African Development Community – Towards a Common Future (online). Available at www.sadc.int/themes/infrastructure/en/ (accessed on 5 July 2016); Ruppel, O.C. “Climate change policy positions and related developments in the AU and SADC” *SADC Law Journal* vol. 2 issue 1 (2012) 14 – 35.

⁸⁶⁵ Preamble to the SADC Protocol on Energy.

Since the adoption of the Protocol, the SADC has enacted several strategic plans for energy development in the region: the SADC Energy Cooperation Policy and Strategy in 1996, the SADC Energy Action Plan in 1997, the SADC Energy Activity Plan in 2000, and most recently, the Regional Infrastructure Development Master Plan and its Energy Sector Plan in 2012. These development strategies set out tangible objectives for the SADC and its member states for infrastructure development in energy and its subsectors of wood fuel, petroleum and natural gas, electricity, coal, renewable energy, and energy efficiency and conservation.⁸⁶⁶

In September 2002 the Regional Electricity Regulators' Association (RERA) was launched, with the main purpose of providing a platform for co-operation between independent electricity regulators within the SADC region. It has three strategic objectives:

- Capacity building and information sharing – to facilitate electricity regulatory capacity building among members at both national and regional levels through information sharing and skills training;
- Facilitation of electricity supply industry (ESI) policy, legislation and regulations – to facilitate harmonised ESI policy, legislation and regulations for cross-border trading, focusing on issues concerning access to transmission capacity and cross-border tariffs; and
- Regional regulatory co-operation – to deliberate and make recommendations on issues that affect the economic efficiency of electricity interconnections and electricity trade among members that fall outside national jurisdiction, and to exercise such powers as may be conferred on RERA through the SADC Energy Protocol.⁸⁶⁷

⁸⁶⁶ Barnard, M. "SADC's response to climate change – the role of harmonised law and policy on mitigation in the energy sector" *Journal of Energy in Southern Africa* vol. 25 no. 1 (February 2014) 26 at 30; Ruppel (above, fn 864).

⁸⁶⁷ "Basic Electricity – National and Regional cooperation" Department of Energy of South Africa (online). Available at http://www.energy.gov.za/files/esources/electricity/electricity_national.html (accessed on 5 July 2016).

Although the number of the RERA membership has risen from four to ten, from 2005 to 2010,⁸⁶⁸ progress made by the RERA has been modest. However, in 2011 the RERA adopted the “Regulatory Guidelines on Cross-border Power Trading in Southern Africa” that the members were urged to adopt.⁸⁶⁹ Seven member states have adopted these Regulatory Guidelines.⁸⁷⁰

To improve this situation there have been key SADC Power Infrastructure Projects, including the following:

(a) The Western Corridor Project (WESTCOR)

WESTCOR is a SADC project conceived through the combined initiative of the SADC Secretariat and the power utilities of Angola, Botswana, the Democratic Republic of Congo (DRC), Namibia and South Africa in 1996. However, its Memorandum of Understanding was only signed in 2004. The aim of the project is to harness the large water resources of the Congo River at Inga in order to produce

⁸⁶⁸ These are: the Electricity Control Board of Namibia (ECB), the National Energy Regulator of South Africa (NERSA), the Malawi Energy Regulatory Authority (MERA), the Energy and Water Utilities Regulatory Authority of Tanzania (EWURA), the Energy Regulation Board of Zambia (ERB), the Zimbabwe Electricity Regulatory Commission (ZERC), the Institute for Electricity Sector Regulation of Angola (IRSE), Lesotho Electricity Authority (LEA) Office for Electricity Sector Regulation (ORE) of Madagascar and the National Electricity Advisory Council of Mozambique (CNELEC).

⁸⁶⁹ The nine Guidelines are:

1. Regulator’s powers and duties in cross-border trading;
2. Working to ensure compatible regulatory decisions;
3. Timing of regulatory interactions for proposed cross-border transactions;
4. Licensing cross-border trading facilities, imports and exports;
5. Approving cross-border agreements in importing countries;
6. Approving cross-border agreements in exporting countries;
7. Approving cross-border agreements in transit countries;
8. Approving transmission access and pricing and ancillary services;
9. Promoting transparency in the regulation of cross-border trading;

Chanakira, M. “SADC regional economic integration in the energy industry” *DOUNIA, revue d’intelligence stratégique et des relations internationales* no. 4 October (2011) 64 at 69.

⁸⁷⁰ These are the regulatory bodies of Lesotho, Malawi, Mozambique, Namibia, South Africa, United Republic of Tanzania, and Zambia; “Countries adopt RERA cross-border guidelines” SADC Energy in Southern Africa (online) April 2013. Available at http://sadc-energy.sardc.net/index.php?option=com_content&view=article&id=124:countries-adopt-rera-cross-border-guidelines&catid=37&Itemid=143 (accessed on 5 July 2016).

and supply electric power, initially for the five countries involved, but ultimately to the whole SADC region.⁸⁷¹

(b) Southern African Power Pool (SAPP)

The SAPP was created in September 1994, with the primary aim of providing reliable and economical electricity supply to the consumers of each of the SAPP members, consistent with the reasonable utilisation of natural resources and the effect on the environment. Membership of the SAPP is open to all participating electricity enterprises situated in a country which was a member of the SADC in September 1994. Full membership is for national utilities only and is restricted to one per country as designated by the country's government.⁸⁷²

The SAPP has identified six priority trans-boundary transmission projects that are expected to improve connectivity and electricity trading in the region by 2017. The priority projects, estimated to cost US\$5,6 billion, are part of a portfolio of short-to medium-term projects being pursued by the SAPP with the aim of increasing the availability of electricity in the region and connecting non-participating SADC member states to the regional power grid. These priority transmission projects are:

- Mozambique-Malawi interconnector;
- Zimbabwe-Zambia-Botswana-Namibia (ZiZaBoNa) interconnector;
- South Africa energy strengthening project;
- Zambia-Tanzania-Kenya interconnector;
- interconnection of Angola; and
- Mozambique energy backbone projects.⁸⁷³

⁸⁷¹ Chanakira (above, fn 869); "Sustainable development in Africa" *South Africa Yearbook* 2014/15 at 151.

⁸⁷² "Southern African Power Pool" at <http://www.sapp.co.zw/viewinfo.cfm?id=47&linkid=2&siteid=1> (accessed on 6 July 2016); "The Potential of Regional Power Sector Integration: South African Power Pool (SAPP) Case Study, Report by the Economic Consulting Associates (ECA), October 2009; "Regional Power Status In African Power Pools Report", Infrastructure Consortium for Africa (ICA), November 2011 at 52.

⁸⁷³ "Interconnectors - conduits for SADC energy integration" *SADC Today* vol. 14 no. 6 October 2012; Miketa, A *et al.* "Southern African Power Pool: Planning and Prospects for Renewable Energy" Report of the International Renewable Energy Agency (IRENA), 2013.

Nine member states of the SADC⁸⁷⁴ have merged their electricity grids into the SAPP and, together with the East African Power Pool (EAPP), the SAPP has prioritised the development of critical interconnectors, including the Zambia-Tanzania-Kenya (ZTK) interconnector, to improve regional integration and energy trade within and between the SAPP and the EAPP, as a project of the Tripartite Free Trade Area (T-FTA) between the SADC, the COMESA and the EAC. Covering a distance of 1 600km, the interconnector will have a capacity of 400 megawatt, and will be constructed as a double circuit 400 kilovolt line in sections from Pensulo in Zambia to Isinya in Kenya.⁸⁷⁵

Together with the other development organisations, including the World Bank, the African Development Bank (AfDB) and the European Investment Bank, the SAPP and the EAPP are partners in the Grand Inga Hydropower Scheme⁸⁷⁶ that will provide cheaper and readily available energy in the SADC region and allow Africa's industrial and manufacturing industry to take off. Grand Inga will generate 40 000 megawatts, and will be constructed in six phases of which the Inga III Dam is the first phase. The construction started in 2016.

In the energy sector, the Regional Infrastructure Development Master Plan is expected to address four key areas of energy security, improving access to modern energy services, tapping the abundant energy resources in the continent and up-scaling financial investment whilst enhancing environmental sustainability. The above projects have thus been incorporated into the Master Plan as part of the identified "hard" infrastructure projects.⁸⁷⁷

⁸⁷⁴ These are: Democratic Republic of Congo (DRC), Lesotho, Malawi, Mozambique, Namibia, Swaziland, Tanzania, Zambia and Zimbabwe.

⁸⁷⁵ *SADC Today* (above, fn 873); Barnard, M. "SADC's response to climate change – the role of harmonised law and policy on mitigation in the energy sector" *Journal of Energy in Southern Africa* vol. 25 no. 1 (February 2014) 26 at 30.

⁸⁷⁶ The Project started with the signing of a Memorandum of Understanding (MOU) in November 2011 by South Africa and the DRC. In May 2013, the two governments signed a co-operation Treaty to jointly develop the Inga III Dam.

⁸⁷⁷ "SADC Regional Infrastructure Development Master Plan – August 2012"; Luxande, A *et al.* "Mid-Term Review of the SADC Renewable Energy Support Programme", 31 October 2012.

In July 2015, during the 34th Meeting of the SADC Energy Ministers, held in Sandton, South Africa, the SADC Regional Centre for Renewable Energy and Energy Efficiency (SACREE) was approved. The Centre is hosted by Namibia and was launched in June 2016. It will primarily focus on developing renewable energy programmes for the region and resource mobilisation.⁸⁷⁸

5.4.5 Protocol on Fisheries

The SADC recognises the important role of fisheries in the social and economic well-being and livelihood of the people of the region, in ensuring food security and alleviating poverty. Therefore, in order to support national initiatives taken and international conventions for the sustainable use and the protection of the living aquatic resources and aquatic environment of the region, the SADC member states signed the Protocol on Fisheries in 2001. It entered into force on 8 August 2003.⁸⁷⁹

The objective of the Protocol is to promote responsible and sustainable use of the living aquatic resources and ecosystems on the coastline in order to promote and enhance food security and human health. The Protocol also aims to safeguard the livelihood of fishing communities, to generate economic opportunities, to ensure that future generations benefit from these renewable resources and to alleviate poverty.⁸⁸⁰ It further provides for national and regional responsibilities for legislative and policy harmonisation, information sharing, and protection of fisheries from over-exploitation in the SADC region by member states.⁸⁸¹

⁸⁷⁸ “SADC Centre for Renewable Energy and Energy Efficiency to be launched mid-2016” *Southern Africa Today* vol. 18 no. 1 (December 2015) 9; “SADC moves closer to establishing renewable energy centre” *SADC Energy Thematic Group Bulletin* issue no. 13 (April 2016) 1.

⁸⁷⁹ “Fisheries”, Southern African Development Community – Towards a common Future. Available at <http://www.sadc.int/themes/agriculture-food-security/fisheries/> (accessed on 7 July 2016); The Food, Agriculture and Natural Resources Policy Analysis Network (FANRPAN). FANRPAN. “Policies for Enhanced Fisheries Productivity and Security” *Policy Brief Series: Fisheries* vol. X issue no. 3 (December 2010);

⁸⁸⁰ Preamble to the SADC Protocol on Fisheries; Sumaila, U.R. *et al.* “Management of Shared Hake Stocks in the Benguela Marine Ecosystems”, Papers Presented at the Norway-FAO Expert Consultation on the Management of shared fish stocks of 7 – 10 October 2002, Bergen, Norway. FAO Fisheries Report no. 695 at 152.

⁸⁸¹ Article 5(1) provides:

“State Parties shall take measures, at national and international levels, suitable for the harmonisation of laws, policies, plans and programmes on fisheries aimed at promoting the objective of this Protocol.”

The Implementation Strategy of the Protocol was approved by Ministers responsible for Fisheries in 2010 and it prioritises the following aspects of fisheries:

- aquaculture (farmed fish);
- management of shared fisheries resources; and
- combating illegal, unregulated and unreported fishing.⁸⁸²

Under “trade and investment”, the Protocol calls on member states to promote sustainable trade and investment in fisheries and related goods and services by reducing barriers to trade and investment, facilitating business contacts and exchange of information and establishing basic infrastructure for the fisheries sector. It further calls on them to create favourable economic conditions to support sustainable fishing and processing activities so as to promote regional food security and fisheries development.⁸⁸³

As a result of the slow pace of the implementation of the Protocol by member states, the SADC adopted an implementation plan of the Protocol that produced two regional programmes:

1. Managing for Resilience: Strengthening Co- management of Shared Fisheries Resources in the Zambezi basin; and
2. Aquaculture Development.⁸⁸⁴

The main objective of the first programme is to promote co-management of shared fisheries resources in the Zambezi Basin⁸⁸⁵ while the Aquaculture programme seeks to enhance information sharing, build capacity and review policies and the legal framework in line

⁸⁸² “Fisheries”, Southern African Development Community – Towards a common Future: Fisheries” available at www.sadc.int/themes/agriculture-food-security/fisheries/ (accessed on 7 July 2016).

⁸⁸³ Article 16 (1) and (2); Winter, G. “Promotion and Management of Marine Fisheries in Namibia”, Towards Sustainable Fisheries Law: A Comparative Analysis (2009) at 157.

⁸⁸⁴ SADC. “Food, Agriculture and Natural Resources” Desk Assessment of the Regional Indicative Strategic Development Plan 2005 – 2010, November 2011 at 62; “Fisheries”, Southern African Development Community – Towards a common Future: Fisheries” available at www.sadc.int/themes/agriculture-food-security/fisheries/ (accessed on 12 July 2016).

⁸⁸⁵ The Zambezi Basin consists of the eight countries of Angola, Botswana, Malawi, Mozambique, Namibia, Tanzania, Zambia and Zimbabwe with an area of 1.39 million km².

with the Protocol. These programmes were approved in August 2010 and the process of mobilising resources is ongoing.⁸⁸⁶

Aware of the challenges in maintaining and strengthening the benefits from fisheries resources, the countries of the Zambezi Basin have developed a SADC Regional Technical Programme (RTP) to strengthen co-management and value chains of shared fisheries resources in the Zambezi Basin. The programme also acts as an instrument to aid the implementation of the SADC Protocol on Fisheries. The Programme was approved at the Ministerial Meeting on Natural Resources and Environment held on 16 July 2010 in Victoria Falls, Zimbabwe. The initial RTP was later restructured to enable a more efficient resource mobilisation in January 2012 and later developed into a project at a workshop held in Kasane, Botswana from 27 to 30 August 2012, with funding support from the European Union.⁸⁸⁷

The overall goal of the RTP is to support the objectives of the SADC and specifically to support the implementation of the SADC Protocol on Fisheries through enhancing regional food security and rural economic growth, through two linked projects:

1. Strengthening Co-Management of Shared Fisheries Resources in the Zambezi River Basin.
2. Enhancing Value Chain Gains of the Shared Fisheries Resources in the Zambezi River Basin.⁸⁸⁸

Another programme undertaken by the SADC promoting an ecosystem approach to management was the Benguela Environmental Fisheries Interaction and Training Programme (BENEFIT). It ran from 1999 to 2009 and established the Benguela Current

⁸⁸⁶ Desk Assessment of the Regional Indicative Strategic Development Plan 2005 – 2010 (above, fn 884).

⁸⁸⁷ “SADC Concept note - Strengthening Co-management in the Zambezi Basin – October 2012” at 2.

⁸⁸⁸ *Ibid.*

Commission (BCC)⁸⁸⁹ in 2007, which continues to contribute to trans-boundary research and cooperative management of this vital marine ecosystem.⁸⁹⁰

Other programmes developed to respond to the challenges faced by the region in fisheries and aquaculture include the establishment of the SADC Regional Fisheries Monitoring Control and Surveillance (MCS) Coordination Centre and the SADC Action Plan on illegal, unreported and unregulated (IUU) fishing.⁸⁹¹ These are a response to the “Statement of Commitment to combat IUU fishing” signed by the Ministers responsible for Marine Fisheries in July 2008. The Statement was later converted into Annex 1 of the Protocol.⁸⁹²

The July 2008 meeting of Ministers also established the SADC Task Force on IUU fishing to guide the process of establishing the MCS Centre in Mozambique, which was expected to be in operation in 2017. The Draft Charter for the Centre is already in place and needs to be approved by the member states to pave the way for the establishment of the Centre.⁸⁹³

In May 2017, the SADC Ministers responsible for Agriculture, Food Security, and Fisheries and Aquaculture, at their joint extra-ordinary meeting in Ezulwini, Swaziland, identified gaps in the MCS Centre project documents, in particular that there was a lack of a clear financial sustainability plan, that provides for financial model incorporating risk mitigation plan. They then ordered for a review of the project. In July 2017 the SADC Secretariat and its partner organisation, the World Wildlife Fund (WWF), presented a

⁸⁸⁹ The Benguela Current Commission (BCC) consists of the three countries of Angola, Namibia and South Africa.

⁸⁹⁰ Paterson, B *et al.* “Integrating the Human Dimension of an Ecosystem Approach to Fisheries (EAF) into Fisheries Management in the BCC region”, FAO-BCC Project EAF Draft Report, September 2012 at 1; Benguela Current Commission Strategic Action Programme 2015 – 2019 at 8.

⁸⁹¹ SADC. “SADC Fisheries and Aquaculture: Progress Report for 2015 – 2016 and Proposed Actions for 2016-2017 Programme of Work”, 09 June 2016 (*SADC/FTC/1/2016/3*).

⁸⁹² Article 21 of the Protocol on Fisheries provides:

“1. State Parties may develop and adopt annexes for the implementation of this Protocol.
2. An annex shall form an integral part of this Protocol.”

⁸⁹³ Report of the 35th meeting of the SADC Technical Committee on Fisheries, Gaborone, Botswana, 9 – 10 June 2016 at 8 – 9.

reviewed project to the Ministers for the project to proceed. This is expected to start in early 2018.⁸⁹⁴

5.4.6 Protocol on Development of Tourism

As a growth industry with socioeconomic impacts, tourism is of particular interest to the SADC. In order to foster the tourism industry in Southern Africa for greater economic development of the region, the SADC passed its Protocol on the Development of Tourism on 14 September 1998. The Protocol entered into force on 26 November 2002 and was amended on 8 September 2009.⁸⁹⁵ Article 2 provides the objectives of this Protocol and covers a wide range of the tourism sector.⁸⁹⁶

⁸⁹⁴ “Report of SADC/WWF on Short-term Consultancy to Develop the Financial Sustainability Plan and financial model for the proposed SADC Regional Fisheries Monitoring Control and Surveillance Coordination Centre”, July 2017.

⁸⁹⁵ “Tourism” Southern African Development Community – Towards a common Future. Available at www.sadc.int/themes/infrastructure/tourism/ (accessed on 13 July 2016).

⁸⁹⁶ Article 2 lists the objectives of this Protocol as:

1. To use tourism as a vehicle to achieve sustainable social and economic development through the full realisation of its potential for the Region;
2. To ensure equitable, balanced and complimentary development of the tourism industry region-wide;
3. To optimise resource usage and increase competitive advantage in the Region vis-à-vis other destinations through collective efforts and co-operation in an environmentally sustainable manner;
4. To ensure the involvement of small and micro-enterprises, local communities, women and youth in the development of tourism throughout the Region;
5. To contribute towards the human resource development of the Region through job creation and the development of skills at all levels in the tourism industry;
6. To create a favourable investment climate for tourism within the Region for both the public and private sectors, including small and medium scale tourist establishments;
7. To improve the quality, competitiveness and standards of service of the tourism industry in the Region;
8. To improve the standards of safety and security for tourists in the territories of Member states and to make appropriate provision for disabled, handicapped and senior citizens in their respective countries;
9. To aggressively promote the Region as a single but multifaceted tourism destination capitalising on its common strengths and highlighting individual Member State's unique tourist attractions;
10. To facilitate intra-regional travel for the development of tourism through the easing or removal of travel and visa restrictions and harmonisation of immigration procedures;
11. To improve tourism service and infrastructure in order to foster a vibrant tourism industry.

Through this Protocol, the SADC intends to ensure even distribution of tourism development throughout the region and to create a favourable environment for tourism, thereby using tourism as a vehicle for socio-economic development. To facilitate these plans, member states agree to encourage private sector involvement in the industry through incentives, infrastructure, and a regulatory framework that encourages their participation.

The Protocol urges member states to facilitate travelling in the region by having a tourism common visa (UNIVISA), which will facilitate movement of international tourists in the region in order to increase the market share and revenue of the region in world tourism on the basis of arrangements to be negotiated and agreed upon by member states.⁸⁹⁷

It also adopts the Regional Tourism Organisation of Southern Africa (RETOSA), which is a SADC body responsible for the promotion and marketing of tourism in the region established through the RETOSA Charter in 1996, as the promotional and marketing arm of SADC tourism sector.⁸⁹⁸ The RETOSA collaborates with the public and private sectors to achieve this mandate.⁸⁹⁹

The Tourism Sector Ministers approved a five-year Tourism Development Strategy (1995-1999) for the tourism sector, with the objective of promoting the equitable and sustainable growth of the tourism sector in the region. This was reviewed in 2001 (The Tourism

⁸⁹⁷ Article 5(1)(c).

⁸⁹⁸ Article 7 of the Protocol provides:

“1. The Regional Tourism Organisation of Southern Africa (RETOSA) established in accordance with the provision of the RETOSA Charter shall be the promotional and marketing arm of SADC tourism sector.

2. In accordance with RETOSA Charter, Member states shall:

- a. develop common and coordinated marketing and promotion strategies, action plans, and implementation programmes to promote both intra-regional and international tourism in the Region and respond to market demand;
- b. in pursuit of the tourism marketing strategies, market the Region as a tourist destination of choice and utilise the RETOSA logo and brand to promote the regional destination identity and competitiveness;
- c. undertake marketing and promotion activities, which highlight the diversity of the tourist product of the Region;
- d. notwithstanding and without prejudice to this Article individual, Member states may collaborate in packaging their destinations.”

⁸⁹⁹ Article 13(7)(b) of the Protocol provides that RETOSA shall fulfil its objectives as specified in its Charter by, inter alia, developing tourism through effective marketing of the region in collaboration with the public and private sectors.

Development Strategy 2001 – 2005) to be in line with the Regional Indicative Strategic Development Plan (RISDP). This Strategy undertook several actions to promote tourism in the region, including the following:

- UNIVISA System – to facilitate intra-regional travel for the development of tourism through easing and removal of travel and visa restrictions for international tourists to increase the market share and revenue of the region in the world tourism;
- Harmonisation of standards – to design and implement the standard grading and classification of hotels and other accommodation establishments and to achieve harmonisation of service standards throughout the region;
- Model Tourism Legislation – to develop model tourism legislation within the SADC, which would help member states to align their national tourism legislations to that of the SADC;
- Regional website – to establish, disseminate and maintain relevant information with emphasis on tourism development policy of the SADC member states; and
- Common Tourism Signage Policy – to help tourists by developing effective signs that will guide them to various facilities and services.⁹⁰⁰

The UNIVISA, or common visa, was earmarked for the soccer 2010 World Cup in South Africa and the 27th Edition of the 2010 Confederation of African Football (CAF) African Cup of Nations tournament in Angola. It was also stated that the UNIVISA would go beyond these two events.⁹⁰¹ This deadline was missed, but the SADC Univisa Working Group's work is ongoing and aimed at facilitating the implementation of the Univisa system by the pilot group of countries (Mozambique, Namibia, Swaziland, Angola, Lesotho, South Africa and Zimbabwe). Activities completed by the group include the following:

⁹⁰⁰ Kritzinger-van Niekerk, L *et al.* "Regional Integration in Southern Africa: Overview of recent developments", World Bank Document December (2002), 75 – 76; Khumalo, N. "Services Trade in Southern Africa: A Literature Survey and Overview" South African Institute of International Affairs (SAIIA) Trade Policy Report No. 10, May 2006 at 33; Mfunne, F. "Tourism Development in Southern Africa" *SADC Trade, Industry and Investment Review* 2007/08 (2008).

⁹⁰¹ Statement by Mr. M. van Schalkwyk, SA Minister of Tourism, during the 26th South African Tourism Indaba, 19 April 2008; UNCTAD. "Towards SADC Services Liberalization: Balancing Multiple Imperatives", Paper UNCTAD/DITC/TNCD/2008/4 (2010) at 66.

- harmonisation of rules, regulations, and operational procedures;
- budget allocation/resources mobilisation;
- information and communications technologies procurement; and
- administration and corporate communications (marketing of the concept to overseas embassies and agreement on a revenue-sharing model).⁹⁰²

The Tourism Regional Infrastructure Development Master Plan proposes the creation of Trans-Frontier Conservation Areas (TFCAs) as a means of promoting tourism as well as ensuring conservation of biodiversity in the region. It is hoped that the TFCAs will ensure the ease of movement of tourists across the SADC region, wilderness protection, employment creation and income generation in rural areas, which translate into an improved quality of life for the citizens of this region. So far the existing SADC TFCAs can be divided into three main categories based on their level of development:

- Category A or Established TFCAs with formal agreements;
- Category B or Emerging TFCAs in the process of establishment; and
- Category C or Conceptual TFCAs which only exist as concepts.⁹⁰³

5.4.7 Protocol on Health

A healthy population is a pre-requisite for the sustainable human development and increased productivity in a country. The SADC recognises that close co-operation in the area of health is essential for the effective control of communicable and non-communicable diseases for addressing common concerns within the region. To this end the SADC member

⁹⁰² “SADC Univisa: Why the Lack of Progress?” South African Institute of International Affairs (SAIIA) Case Study 05 (2015) 55 at 56; SADC. “Media Statement on the Meeting of SADC Ministers responsible for Tourism, Grand Baie, Mauritius, 29 March 2012; Douglas, A *et al.* “Would a single regional visa encourage tourist arrivals in southern Africa?” Study for the University of Pretoria Department of Tourism Management, 2012 at 6. Available at [http://repository.up.ac.za/dspace/bitstream/handle/2263/21590/Douglas_Would\(2012\).pdf?sequence=1&isAllowed=y](http://repository.up.ac.za/dspace/bitstream/handle/2263/21590/Douglas_Would(2012).pdf?sequence=1&isAllowed=y) (accessed on 14 July 2016).

⁹⁰³ SADC Regional Infrastructure Development Master Plan: Tourism (TFCAS) Sector Plan – August 2012 at 5; “SADC TFCAs – Transfrontier Conservation Areas in the Southern African Development Community”, GIZ Report 2015; Bertelsmann-Scott, T. “The Impact of Transfrontier Conservation Areas on Regional Integration” PERISA Case Study 3 (2013); Hanks, J. “Transfrontier Conservation Areas (TFCAs) in southern Africa: their role in conserving biodiversity, socioeconomic development and promoting a culture of peace” *Journal of Sustainable Forestry* vol. 17 issue 1 – 2 (2003) 127.

states signed the Protocol on Health on 18 August 1999 to coordinate regional efforts on epidemic preparedness, mapping prevention, control and, where possible, the eradication of communicable and non-communicable diseases. This Protocol entered into force on 14 August 2004.⁹⁰⁴

The Protocol encourages the establishment of institutional mechanisms within the health sector of the region to effectively implement the Protocol.⁹⁰⁵ Its main objective is to ensure that state parties co-operate in addressing health problems and challenges facing them through effective regional collaboration and mutual support under the Protocol. This includes raising funds to acquire medicines, technology and other resources needed by citizens.⁹⁰⁶

The HIV/Aids pandemic is one of the diseases ravaging the region. It is as such no surprise that it is one of the diseases that the Protocol deals with.⁹⁰⁷ This is actually one way of

⁹⁰⁴ “Protocol on Health (1999)” Southern African Development Community – Towards a common Future. Available at <http://www.sadc.int/documents-publications/show/804> (accessed on 18 July 2016); Kortenbout, W *et al.* *Communicable Diseases in Southern Africa* (2011) at 83.

⁹⁰⁵ Article 4 provides the institutional mechanisms for the implementation of the Protocol as:

- (a) The Health Sector Co-ordinating Unit;
- (b) Health Sector Committee of Ministers;
- (c) The Health Sector Committee of Senior Officials; and
- (d) Technical Sub-Committees.

⁹⁰⁶ Article 3 and 19 of the Protocol on Health; Durojaye, E. *Litigating the Right to Health in Africa: Challenges and Prospects* (2016) at 200.

⁹⁰⁷ Article 10 provides:

- “1. In order to deal effectively with the HIV/AIDS/STDs epidemic in the Region and the interaction of HIV/AIDS/STDs with other diseases, States Parties shall –
 - a) harmonise policies aimed at disease prevention and control, including co-operation and identification of mechanisms to reduce the transmission of STDs and HIV infection;
 - b) develop approaches for the prevention and management of HIV/AID/STDs to be implemented in a coherent, comparable, harmonised and standardised manner;
 - c) develop regional policies and plans that recognise the intersectoral impact of HIV/AIDS/STDs and the need for an intersectoral approach to these diseases; and
 - d) co-operate in the areas of -
 - (i) standardisation of HIV/AIDS/STDs surveillance systems in order to facilitate collation of information which has a regional impact;
 - (ii) regional advocacy efforts to increase commitment to the expanded response to HIV/AIDS/STDs; and
 - (iii) sharing of information.
- 2. States Parties shall endeavour to provide high-risk and transborder populations with preventative and basic curative services for HIV/AIDS/STDs.”

giving effect to the SADC Treaty⁹⁰⁸ and the “Maseru Declaration on the Fight against HIV/AIDS in the SADC Region (2003)”⁹⁰⁹. To this end the SADC region is continuing with the implementation of various HIV/Aids projects including the following:

- development of guidelines for the mainstreaming of HIV and AIDS in priority areas such as agriculture and food security, basic education (education needs of orphans and vulnerable children), transport and labour;
- improvements in the provision of condoms in high transit points and border sites;
- strengthening of partnerships through regular forums for key stakeholders such as National AIDS Coordinating Agencies and the SADC Editors Forum on HIV and AIDS;
- Regional Minimum Standards for Harmonised Guidance on HIV Testing and Counselling in the SADC region;
- Regional Minimum Standards for the Harmonised Control of HIV and AIDS, Tuberculosis and Malaria in Militaries in the SADC region;
- Regional Minimum Standards for Harmonised Approaches to the Prevention of Mother-to-Child Transmission of HIV in the SADC region.⁹¹⁰

An HIV Prevention Strategy has been developed to ensure that prevention is taken as a priority area for Tuberculosis, Malaria and HIV interventions in the region. In order to realise the targets, regional policy minimum standards have been developed to facilitate the harmonisation of policies, strategies and legislation relating to HIV prevention, care, treatment and support within the region. The minimum policy standards have sharpened some of the HIV interventions in the region.⁹¹¹

⁹⁰⁸ One of the objectives of the SADC Treaty is to combat HIV/Aids and other communicable diseases (Art 5(1)(i)).

⁹⁰⁹ The Maseru Declaration was adopted in 2003, in Maseru, Lesotho as a commitment by member states to dealing with the HIV/AIDS Pandemic in the SADC Region.

⁹¹⁰ “Press Briefing by Director Stephen Sianga, Directorate of Social and Human Development and Special Programmes, Council of Ministers February 2006”, available at http://www.sadc.int/news/news_details.php?news_id=633 (accessed on 18 July 2016); “Information resources from SADC's HIV and AIDS Programme”, Published on K4Health at <https://www.k4health.org> (accessed on 18 June 2016).

⁹¹¹ SADC. “Southern African Development Community - Desk Assessment of the Regional Indicative Strategic Development Plan 2005 – 2010”, SADC Council November 2011 at 93.

In addition, with regard to combating of malaria, best practices are being exchanged and collaboration strengthened, especially under the malaria control programme in the Lubombo Spatial Development Initiative (LSDI) that covers the borders between Mozambique, South Africa and Swaziland, as part of the SADC Malaria Strategic Plan.⁹¹² The SADC also undertook advocacy activities aimed at increasing awareness on the dangers of malaria and social mobilisation for its control. To this end, the SADC Malaria Day was commemorated in KwaZulu-Natal in South Africa on 10 November 2005, where the SADC Ministers of Health undertook indoor spraying of houses and reaffirmed the SADC's use of dichlorodiphenyltrichloroethane (DDT) as a primary preventive strategy to address malaria in the region. Malaria Day is now commemorated annually in the SADC.⁹¹³

The SADC has now partnered with institutions like the University of Pretoria Institute for Sustainable Malaria Control to spread malaria awareness by sharing information on the disease, and research is being done at the Institute through short articles. The information is available on the website of the Institute as well as through a link page on the University of Pretoria website.⁹¹⁴

All these strategies, together with other strategies for non-communicable diseases, are being devised within the context of the RISDP and are reviewed regularly.⁹¹⁵ During their January 2015 meeting in Victoria Falls, Zimbabwe, the SADC Ministers responsible for Health approved key documents including the “SADC Code and Action Plan of Conduct

⁹¹² The Southern Africa Development Community. SADC Malaria Strategic Plan 2007–2015 was adopted by the Ministers of Health in 2007, in Gaborone, Botswana; Feachem, R *et al.* “A new global malaria eradication strategy” *Viewpoint* vol. 371 (May 2008) 1633 at 1634.

⁹¹³ Feachem, R *et al.* “Shrinking the malaria map: progress and prospects” Malaria Elimination Series (online), 29 October 2010 at 8 – 9. Available at <http://www.indiaenvironmentportal.org.in/files/Shrinking%20the%20malaria%20map.pdf> (accessed on 19 July 2016); Smith R.D *et al.* “Global public goods and the global health agenda: problems, priorities and potential” *Global Health* vol. 3 no. 9 (2007) 1 at 4.

⁹¹⁴ Available at <http://www.up.ac.za/en/up-centre-for-sustainable-malaria-control/article/2191573/postgraduate-students> (accessed on 19 July 2016).

⁹¹⁵ Lezotre, P. “Regional Initiatives: Southern African Development Community”, International Cooperation, Convergence and Harmonization of Pharmaceutical Regulations: A Global perspective (2014) at 127; Southern African Development Community. “Policy Framework for Population Mobility and Communicable Diseases in the SADC Region”, April 2009.

on TB in the Mining Sector”, “Minimum Standards for the Integration of Sexual and Reproductive Health and HIV in SADC”, “Framework of Action for Sustainable Financing of Health and HIV in the SADC Region” and the establishment of “Public-Private Regional Partnership” in complimentary health financing.⁹¹⁶

5.4.8 Protocol on Education and Training

Member states acknowledge that whilst each Member State has its own policies for education and training, and whilst cooperation and mutual assistance in education is desirable, this can be facilitated more effectively by the development of harmonised and eventually standardised policies regarding education and training. In line with these the Protocol on Education and Training Development was signed on 8 September 1997 and entered into force on 31 July 2000. It advocates cooperative education and identifies the areas of cooperation as follows:

- Policy;
- Basic education;
- Intermediate education and training;
- Higher education and training;
- Research and development;
- Life-long education and publishing; and
- Library resources.⁹¹⁷

⁹¹⁶ “Southern Africa: SADC Health Ministers Address Public Health Issues”, available at <http://www.jointlearningnetwork.org/news/southern-africa-sadc-health-ministers-address-public-health-issues> (accessed on 19 July 2016); “Media Statement – Ordinary Joint Meeting of SADC Ministers of Health and Ministers Responsible for HIV and AIDS, Victoria Falls, Republic of Zimbabwe, January 15, 2015.

⁹¹⁷ “SADC Protocol on Education and Training (1997)” Southern African Development Community – Towards a common Future. Available at http://www.sadc.int/documents-publications/show/Protocol_on_Education_Training1997.pdf (accessed on 20 July 2016); Articles 4 – 10 of the SADC Protocol on education and Training.

Member states are convinced that these areas of cooperation will enable the SADC to achieve the objectives of the Protocol.⁹¹⁸ In addition to these objectives the other salient features covered by this Protocol include the following:

- guaranteeing academic freedom in institutions of learning and research as it is the *sine qua non* for high quality education, training and research and as it ensures freedom of enquiry, experimentation and critical and creative thinking.⁹¹⁹
- recommending to universities and other tertiary institutions in their countries to reserve at least 5% of admission, for students from the SADC nations, other than their own;⁹²⁰
- promoting free movement of professional personnel.⁹²¹

⁹¹⁸ In terms of Article 3 of the Protocol the objectives are:

(a) to develop and implement a common system of regular collection and reporting of information by Member states about the current status and future demand and supply, and the priority areas for provision of education and training in the Region;

(b) to establish mechanisms and institutional arrangements that enable Member states to pool their resources to effectively and efficiently produce the required professional, technical, research and managerial personnel to plan and manage the development process in general and across all sectors in the Region;

(c) to promote and coordinate the formulation and implementation of comparable and appropriate policies, strategies and systems of education and training in Member states;

(d) to develop and implement policies and strategies that promote the participation and contribution of the private sector, non-governmental organisations and other key stakeholders in the provision of education and training;

(e) to promote and coordinate the formulation and implementation of policies, strategies and programmes for the promotion and application of science and technology, including modern information technology and research and development in the Region;

(f) to work towards the reduction and eventual elimination of constraints to better and freer access, by citizens of Member states, to good quality education and training opportunities within the Region;

(g) to work towards the relaxation and eventual elimination of immigration formalities in order to facilitate freer movement of students and staff within the Region for the specific purposes of study, teaching, research and any other pursuits relating to education and training.

(h) to promote policies for creation of an enabling environment with appropriate incentives based on meritorious performance, for educated and trained persons to effectively apply and utilise their knowledge and skills for the general development of Member states and the Region;

(i) to promote the learning of English and Portuguese as the working languages of the Region.

(j) to achieve gradually and over a period not exceeding twenty years from the date of entry into force of this Protocol, the implementation of the ultimate objective as stated in paragraph (k) hereof;

(k) to progressively achieve the equivalence, harmonisation and standardization of the education and training systems in the Region which is the ultimate objective of this Protocol.

⁹¹⁹ Article 2(g).

⁹²⁰ Article 7(1).

⁹²¹ Article 7(4).

Since the Protocol came into operation, some substantial progress has been noted including the following:

- most member states are complying with the provisions of the SADC Protocol on Education and Training, such as the one on treating the SADC students as home students in terms of tuition and accommodation, and they are reserving 5% of admission for the SADC students in higher education institutions;
- net enrolment rate in primary education is ranging from 71 to 95 percent and there are no gender gaps at this level;
- most member states have developed national science and technology policies in recognition of the fact that the subjects of mathematics, science and technology are critical for economic growth and development;
- collaboration between teachers' and students' associations, as well as through multi-lateral organisations such as the Distance Education Association of Southern Africa (DEASA);⁹²² Southern African Comparative and History of Education Society (SACHES)⁹²³ and Southern African Regional Universities Association (SARUA);⁹²⁴
- fifty-seven initiatives for collaboration in programmes for higher education, technical and vocational education and open distance learning have been established; and
- all the member states have articulated their education policies and linked them to the objectives of the Protocol, as well as the SADC Regional Indicative Strategic Development Plan (RISDP), the New Partnership for Africa's Development

⁹²² Distance Education Association of Southern Africa (DEASA) is the regional powerhouse in Open and Distance Education (ODL) in the SADC Region. Member countries are Botswana, Lesotho, Madagascar, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe.

⁹²³ Southern African Comparative and History of Education Society (SACHES) holds conferences periodically which allow Southern African as well as international researchers to present and discuss their research work on education in Southern Africa. It provides good opportunities for researchers to learn about each other's work through conferences and in a digital format.

⁹²⁴ Southern African Regional Universities Association (SARUA) comprises of 58 public universities across all 15 SADC member states.

(NEPAD), the African Union Second Decade of Education (2006 – 2015) and the Millennium Development Goals (2000 – 2015).⁹²⁵

However, despite these achievements, there are still some challenges. For example, in 2016, the Southern African Regional Universities Association (SARUA) indicated that although there are collaborative projects underway for regional cooperation in higher education, too little is known about their extent and success and they face many challenges. It stated that to facilitate collaborations that are mutually beneficial and help to develop higher education, expertise, activity and strength in the region need to be mapped. It further stated that there is also a need to bring people together to facilitate discussion and to build networks, and perhaps to develop a framework of basic principles for collaboration which stresses equality and mutual benefit.⁹²⁶

This assertion by the SARUA adds to the one it made in 2012, where it stated that by 2010, the SADC region was spending more on education than any other region in the world. However, most of the expenditure went towards primary education and less was spent on higher education. As a result, because the increased demand for higher education has not been matched by increased levels of funding, the quality of higher education in the SADC region has deteriorated and the number of academic staff has declined.⁹²⁷

Also according to the 2015 SADC Barometer, the SADC region still needs to address education for disabled children, especially girls, who are among the most marginalised.⁹²⁸

⁹²⁵ “Communiqué on the meeting of Ministers for Education held in Maseru, Lesotho on 27 July 2007”; Umlilo weMfundo; “Review of the Status and Capacities for the Implementation of the Protocol on Education and Training” Study done for the SADC, June 2007 at 15.

⁹²⁶ “SADC’s 20 Higher Education Challenges – According to the Southern African Regional Universities Association (SARUA)” *Southern African News*, 27 February 2016.

⁹²⁷ Mouton, J *et al.* *Leadership and Management Case Studies in Training in Higher Education in Africa* (2015) at 4; Kotecha, P. “Higher Education in the Southern African Region: Current trends, challenges, and recommendations” Presentation to the Extraordinary Meeting of the SADC Ministers of Higher Education and Training, 5 June 2012 Johannesburg, South Africa, at 6.

⁹²⁸ SADC Gender Protocol 2015 Barometer: Chapter 3 at 113; “Education for All 2000 - 2015: Achievements and Challenges”, EFA Global Monitoring Report (2015) at 155.

5.4.9 Protocol on Culture, Information and Sport

Southern African countries have a common history and tradition that transcend national borders in the region. This history includes pre-colonial warfare and colonialism. In recognition of this history, the SADC adopted the Protocol on Culture, Information and Sport to re-enforce the central role played by culture and sport in the integration and co-operation of its member states. The Protocol was signed on 14 August 2001 and came into operation on 7 January 2006.⁹²⁹

The Protocol is guided by the following general principles, in the spirit of regional integration and co-operation:

- striving to develop policies and programmes in the areas of culture information and sport;
- pooling of resources (expertise, infrastructure facilities) by member states; and
- commitment to enhance a regional identity in diversity and the right of access to information and participation in the areas of culture, information and sport by all citizens.⁹³⁰

Section I of the Protocol deals with culture, and covers the general and specific areas of co-operation in this sector including training, capacity-building and research, resource mobilisation, language policy formulation, preservation of cultural heritage and arts and culture festivals amongst others.⁹³¹

⁹²⁹ “Protocol on Culture, Information and Sports 2001” Southern African Development Community – Towards a common Future. Available at <http://www.sadc.int/documents-publications/show/Protocol%20on%20Culture,%20Information%20and%20Sport%202001> (accessed on 2 August 2016); Du Plessis, A.A *et al.* “Legal perspectives on the role of culture in sustainable development” *Potchefstroomse Elektroniese Regsblad* vol. 13 no. 1 (2010) 27 at 53; Chingono, M *et al.* “The challenges of regional integration in Southern Africa” *African Journal of Political Science and International Relations* vol. 3 no. 10 (2009) 396 at 400.

⁹³⁰ Article 2 of the Protocol.

⁹³¹ Articles 11 – 16.

Section II deals with information – availability, infrastructure, freedom of media and code of ethics;⁹³² and Section III covers regional tournaments, talent development, centres of excellence and national policies in the area of sport.⁹³³

In the area of culture and arts, the SADC has established the Committee of Ministers for Arts and Culture⁹³⁴ which must facilitate the use of arts and culture in the process of integration and sustainable development in the SADC and the significance of the cultural industries to contribute to the gross domestic product (GDP) of the region. The Committee meets at least once per annum in order to evaluate the role of culture in regional integration and sustainable development in the SADC region, as well as to evaluate the significance and contribution of cultural industries to the GDP in each Member State in particular, and of the region in general.⁹³⁵

Some of the initiatives by the Committee of Ministers to promote integration through arts and culture include the establishment of a SADC Cultural Fund, the SADC Hall of Fame and the Multi-Disciplinary Festival. However, lack of funding prevents these from coming into operation.⁹³⁶

In the area of sports, regional bodies like the Confederation of Southern African National Olympic Committees (COSANOC) and the Confederation of Southern African Football Associations (COSAFA) exist to run the sports in the region. However, sports facilities are always at the bottom of the priority list in almost every Member State. Even initiatives to

⁹³² Articles 17 – 23.

⁹³³ Articles 24 – 31.

⁹³⁴ Committee was established in accordance with Article 11(2)(g) of the SADC Treaty, which provides that the Council can create its own committees as necessary; “Deputy Minister Joe Phaahla speaks at the SADC Committee Meeting of Ministers of Arts and Culture” Department of Arts and Culture Media Statement, 4 July 2013. Available at <http://www.dac.gov.za/content/deputy-minister-joe-phaahla-speaks-sadc-committee-meeting-ministers-arts-and-culture> (accessed on 11 August 2016).

⁹³⁵ Article 33 of the Protocol provides:

“1. The Committee of Ministers shall be responsible, amongst others, for:

- (a) establishing the policies, priorities and strategies of the Sector;
- (b) supervising the implementation of this Protocol; and
- (c) renewing the determining areas of cooperation as provided for in Article (4) of this Protocol.

2. The Committee of Ministers shall meet, at least once a year, at such place and time as may be agreed.”

⁹³⁶ “International Organizations – Southern African Development Community” *The Europa World Yearbook* vol.1 (2016) at 331.

encourage the private sector to invest in sports and recreation facilities for communities are virtually non-existent. The identification and development of talent is therefore seriously compromised because of a shortage of a wide range of sport facilities.⁹³⁷

In the area of information, the Southern African Broadcasters Association is one of the bodies formed to cooperate and share information between broadcasters in the region. However, the region still lags behind with regards to information mainly due to information censorship by government-controlled state or public broadcasters. This is the reason why about 300 civic society delegates under the umbrella of the Southern Africa Civil Society Forum meeting (CSF) in Harare on 30 July 2014 made a call to the SADC to review this Protocol. Among their reasons was that the Protocol is archaic and out of sync with the rapidly changing information and communication trends.⁹³⁸

5.4.10 Finance and Investment Protocol

The signing of this Protocol was necessitated by the need to accelerate growth, investment and employment in the SADC region through increased cooperation, coordination and management of macroeconomic, monetary and fiscal policies, and to establish and sustain macroeconomic stability as a precondition to sustainable economic growth and for the creation of a monetary union in the region.⁹³⁹

This Protocol was signed on 16 August 2006 and came into operation on 16 April 2010. It is comprehensive and very complex with eleven annexes. It seeks to foster the harmonisation of finance and investment policies of member states, in order to make them

⁹³⁷ Burnett, C. "Olympic Movement Stakeholder Collaboration for Delivering on Sport Development in Eight African (SADC) Countries", final Report for the University of Johannesburg Olympic Studies Centre (UJOSC), May 2015; "SADC & Sport: Relevance or obscurity", *The Southern Times* of 15 February 2016 (online). Available at <http://southernafrican.news/2016/02/15/sadc-sport-relevance-or-obscurity/> (accessed on 10 August 2016).

⁹³⁸ "Southern Africa: SADC Protocol on Information Should Be Reviewed" Press release by Media Institute of Southern Africa (MISA), 1 August 2014 (online). Available at <http://allafrica.com/stories/201408042861.html> (accessed on 2 August 2016); Communique of the 10th Civil Society Forum held on 30th July 2014, Harare, Zimbabwe to the 34th Ordinary Summit of the SADC Heads of State & Government.

⁹³⁹ Preamble to the Protocol.

consistent with the objectives of the SADC and to ensure that any changes to the financial and investment policies in one Member State do not necessitate undesirable adjustments in other member states.⁹⁴⁰ The Protocol also deals with taxation matters and how to harmonise the tax regimes of member states.

The Protocol allows affected investors in a SADC country, from *any other state*, to institute claims for breaches of its prohibition on nationalisation and guarantee of fair and equitable treatment. It gives investors the right to submit a claim to binding international arbitration for *disputes related to admitted investments*, where *local remedies have been exhausted*, and at least *six months have passed* since the SADC Member State was notified of the claim. And, most importantly, the dispute must have arisen after 16 April 2010 (i.e. date of entry into force of the Protocol).⁹⁴¹

It also provides important protection to foreign investors in the SADC member states: it prohibits the nationalisation of property or investments and guarantees fair and equitable treatment; it allows foreign investors to elevate their disputes with member states to the international plane and initiate arbitration under the International Centre for Settlement of Investment Disputes (ICSID), or the United Nations Commission on International Trade Law (UNCITRAL) rules; and, crucially, it broadly provides these protections to *all* foreign investors, regardless of their nationality.⁹⁴²

Apropos these provisions, in 2012 a group of investors (claimants)⁹⁴³ referred a dispute against Lesotho to the UNICITRAL arbitration tribunal alleging that Lesotho's participation in the disbandment of the SADC Tribunal constitutes a denial of justice under customary international law and a breach of several investor protection provision contained

⁹⁴⁰ Article 2(1); "The Basis for Harmonisation of Payment System Law in SADC", the Legal and Regulatory Framework for Payments in 14 Member states Master Report, August 2014 at 12.

⁹⁴¹ Articles 5 and 28 of Annex 1; Kotuby, C Jr. *et al.* "Protecting Foreign Investments in Sub-Saharan Africa: The Southern African Development Community and its Protocol on Finance and Investment" *Jones Day* 8 January 2014. Available at www.mondaq.com/...Investment/ (accessed on 28 July 2016).

⁹⁴² Kotuby (above).

⁹⁴³ The nine claimants were: Swissbrough Diamond Mines (Pty) Ltd; Josias van Zyl; The Josias van Zyl Family Trust; The Burmilla Trust; Matsoku Diamonds (Pty) Ltd; Motete Diamonds (Pty) Ltd; Orange Diamonds (Pty) Ltd; Patiseng Diamonds (Pty) Ltd and Rampai Diamonds (Pty) Ltd.

in the Protocol (including obligations on fair and equitable treatment, “access to courts and tribunals” and a general undertaking to fulfil obligations arising from the protocol).⁹⁴⁴

On 18 April 2016 the UNCITRAL Arbitration Tribunal issued a partial final award on jurisdiction and merits of the case, and ruled in favour of the claimants. It held that Lesotho was wrong in participating in the disbandment of the Tribunal, as this resulted in the denial of justice to the claimants as well as a violation of other SADC protocols and the respect of the “rule of law”.⁹⁴⁵

However, Lesotho applied to the Singapore High Court to have the award set aside (as permissible under Article 27 of the Protocol) and in April 2017 the Singapore High Court set aside the award. The Court found that the claimants’ investment, the mining leases, was made before 16 April 2010 when the Protocol came into effect and thus it lacked jurisdiction, and so did the Arbitration Tribunal. It also found that the claimants did not exhaust local remedies in the Lesotho courts.⁹⁴⁶ The claimants have now lodged an appeal in the Lesotho High Court.⁹⁴⁷

Under this Protocol, the SADC has co-opted the then Committee of Governors of Central Banks and renamed it the *Independent Committee of Governors of Central Banks*.⁹⁴⁸ The (Independent) Committee has established a small *Specialised Secretariat and Research Facility* within the South African Reserve Bank to it.

⁹⁴⁴ Ngobeni, L. “The Investor-State Dispute Resolution Forum under the SADC Protocol on Finance and Investment: Challenges and opportunities for effective harmonisation” *Law, Democracy and Development* vol. 19 (2015) 175;

⁹⁴⁵ Peterson, L.E. “Investigation: Lesotho is held liable for investment treaty breach arising out of its role in hobbling a regional tribunal that had been hearing expropriation case”, 14 July 2016 (online). Available at <http://www.bankside.co.nz/wp-content/uploads/2016/07/IA-Article-Swissborough.pdf> (accessed on 28 July 2016).

⁹⁴⁶ *Kingdom of Lesotho v Swissborough Diamond Mines (Pty) Limited* [2017] SGHC 195 (*Lesotho*).

⁹⁴⁷ Searle, N *et al.* “Singapore court sets aside award against Lesotho” *African Law and Business Newsletter*, 5 September 2017 (online). Available at <https://www.africanlawbusiness.com/news/7569-singapore-court-sets-aside-award-against-lesotho> (accessed on 24 October 2017).

⁹⁴⁸ This Committee was established in 1995 when South Africa was given the special task of administering the erstwhile SADC Finance and Investment Sector.

The SADC has also adopted a bottom-up approach with respect to the question of financial integration. This approach is based on building financial cooperation by laying an appropriate foundation in the form of an effective institutional framework for the financial system in each country.⁹⁴⁹

Pursuant to Article 5(5) of the Protocol that requires state parties to draw up guidelines for the effective exchange of information and the implementation of mutual agreements procedures, the SADC member states signed the Agreement on Assistance in Tax Matters (AATM) in 2012. It provides, among others, for information exchange and mutual assistance including a joint audit. The SADC has also facilitated multilateral negotiations of Tax Information Exchange Agreements ((TIEA) between the SADC member states and identified state and territories. This happened with the state of Guernsey in October 2011 and with the Isle of Man in March 2012. There is also growth in the network of signed double taxation agreements between member states.⁹⁵⁰

In August 2015 the SADC Committee of Ministers of Finance and Investment approved three key regional frameworks for tax cooperation, namely: Value Added Tax (VAT); Excise and Tax Incentives Guidelines and their supporting Commentaries, as well as the SADC Model Double Taxation Avoidance Agreement (DTAA) and the use of the African Tax Administration Forum (ATAF) practical guidelines for information exchange for use by the SADC.⁹⁵¹ The Guidelines were published in May 2016 and, notwithstanding that

⁹⁴⁹ Stals, C. “The Role of Financial Co-operation in the Development of the Southern African Development Community (SADC)”, Lecture presented to the Harvard Institute for International Development Boston, 01 May 1997 at 3; Zongwe, D. “Conjuring systemic risk through financial regulation by SADC central banks” *SADC Law Journal* vol. 1 (2011) 99 at 111.

⁹⁵⁰ Macheli, S. “SADC Work on Exchange of Information”, paper delivered at the ATAF-EU-URA Technical Conference on Exchange of Information and Tax Treaties, Kampala, Uganda, 19 – 20 April 2012 at 20; Oguttu, A.W. “A Critique on the Effectiveness of “Exchange of Information on Tax Matters” in Preventing Tax Avoidance and Evasion: A South African Perspective” *Bulletin for International Taxation* vol. 68 no. 1 (2014) 2.

⁹⁵¹ Oahile, I. “Key Regional Frameworks for Tax Cooperation Adopted”, published on 15 October 2015 (online). Available at www.linkedin.com/pulse/key-regional-frameworks-tax-cooperation-adopted-itumeleng-oahile (accessed on 29 July 2016).

they are non-binding, there is already evidence of member states using them to help tackle policy challenges.⁹⁵²

5.4.11 Protocol on Combating Illicit Drug Trafficking

The SADC is aware that the region is being increasingly used as a conduit for drugs destined for international markets and that illicit drug-trafficking generates large financial gains and wealth thus encouraging cross-border criminals and organisations to penetrate, contaminate and corrupt society at all levels. To deal with this problem the SADC developed the Protocol on Combating Illicit Drug Trafficking, which was signed on 24 August 1996 and entered into force on 20 March 1999.⁹⁵³

In November 2013 the SADC adopted “the Regional Programme 2013-2020” - *Making the Southern African Development Community (SADC) Region Safer from Crime and Drugs*, which was jointly developed by the United Nations Office on Drugs and Crime (UNODC) and the SADC, as one mechanism to facilitate the implementation of the Protocol. It makes provision for the creation of focal points in each member state and it covers all the 15 member states of the SADC.⁹⁵⁴

However, despite all these efforts illicit drugs and activities associated to them are still pervasive in the region and the implementation of the provisions of the SADC Protocol on Combating Illicit Drugs is not fully happening in member states. The main reasons for

⁹⁵² Gondwe, G.E. “2016 - 2017 Budget Statement presented by the Minister of Finance, Economic Planning & Development (Malawi)”, 14 December 2016; Hollinrake, D. “Vat as a part of Regional Tax Cooperation in the SADC Region” Paper prepared for the VAT Symposium: “VAT in Developing Countries: Policy, Law and Practice”, Pretoria, South Africa, 2 October 2016 at 13.

⁹⁵³ “Protocol on Combating Illicit Drug Trafficking 1996” available at [http://www.sadc.int/documents-publications/show/Protocol%20Against%20Corruption%20\(2001\)](http://www.sadc.int/documents-publications/show/Protocol%20Against%20Corruption%20(2001)) (accessed on 8 December 2017); USA International Business. Southern African Development Community (SADC) Business Law Handbook (2011) at 57.

⁹⁵⁴ United Nations Office on Drugs and Crime (UNODC). “Making the Southern African Development Community (SADC) Region Safer from Crime and Drugs: Regional Programme 2013-2020”.

these are the lack of political will among the leadership in various member states and the lack of necessary infrastructure.⁹⁵⁵

Cannabis is reported to be the most common drug used in the region, followed by mandrax, then cocaine, heroin, hashish, crystal methamphetamine (usually known as tik) and ecstasy. And there seems to be a link between the drug use and the persistent violent crime in the region, especially in South Africa.⁹⁵⁶

5.4.12 Protocol Against Corruption

The SADC Protocol Against Corruption aims to promote and strengthen the development, within each member state, of mechanisms needed to prevent, detect, punish and eradicate corruption in the public and private sector. It further seeks to facilitate and regulate cooperation in matters of corruption among member states and to foster development and harmonisation of policies and domestic legislation related to corruption. It was signed on 14 August 2001 and came into force on 6 August 2003.⁹⁵⁷

The Protocol has been ratified by thirteen member states and the only two states not to have ratified the Protocol are Madagascar and the Seychelles. The Protocol provides that each state party undertakes to adopt measures that will protect individuals, who in good faith, report acts of corruption. However, despite this provision, legislation in Mozambique, Namibia and Swaziland fails to protect whistle blowers. However, other jurisdictions like

⁹⁵⁵ Mudzingwa, E. “Southern African Development Community (SADC) Protocol on Combating Illicit Drugs in Southern Africa: The Case of Zimbabwe and South Africa” Thesis to Bindura University of Science Education in Partial Fulfilment of the Requirements of the Master of Science Degree in International Relations, October 2015.

⁹⁵⁶ United Nations Office on Drugs and Crime (UNODC). “World Drug Report – 2015”; Goredema, C. “Drugs and violent crime in southern Africa” *SADC Law Journal* vol. 1 (2011) 175 at 177.

⁹⁵⁷ “Protocol Against Corruption (2001)” available at <http://www.sadc.int/documents-publications/show/> (accessed on 8 December 2017); Williams-Elegbe, S. “Perspective on Corruption and Public” in Quinot, G *et al. Public Procurement Regulation in Africa* (2013) 667.

South Africa guarantee the protection of whistle blowers through witness protection programmes.⁹⁵⁸

All thirteen member states have a body tasked to investigate acts of corruption, but these bodies have numerous problems, including a lack of independence in carrying out their functions; political interference is also a problem especially in the appointment process of the head of the anti-corruption institution as in most jurisdictions the head is a President-appointee; lack of capacity for institutions to carry out the necessary investigations and day-to-day operations; lack of funding and technical expertise as institutions were understaffed and poorly trained, etc. All these factors point to a lack of political will by state members to effectively and efficiently combat corruption.⁹⁵⁹

5.4.13 Protocol on the Control of Firearms, Ammunition and Other Materials

The Protocol answers to the urgent need to prevent and eradicate the illicit manufacturing of firearms, ammunition and other related materials as well as the accumulation, trafficking, possession and use of these in the region. It also addresses issues of operational capacity, making of fire-arms and record-keeping, transparency and information exchange, voluntary surrender of firearms, public education and awareness as well as the institutional arrangements for effective implementation of these measures. It was signed on 14 August 2001 and entered into force on 8 November 2004.⁹⁶⁰

The SADC has appointed a contact person at the SADC Secretariat for all matters relating to the implementation of the Protocol. The Public Security Sub-Committee, part of the SADC Organ on Politics, Defence and Security Operation, coordinates illicit trade matters

⁹⁵⁸ de Sousa, C. “Combatting corruption in the SADC” *De Rebus* (April 2015) 12; Nsereko, Z *et al.* “The SADC Protocol against corruption: Example of the region's response to an international scourge” *Botswana Law Journal* vol. 1 issue 6 (June 2005) 85.

⁹⁵⁹ de Sousa (above).

⁹⁶⁰ “Protocol on the Control of Firearms, Ammunition and Other Materials (2001)” available at [http://www.sadc.int/documents-publications/show/Protocol%20on%20the%20Control%20of%20Firearms.%20Ammunition%20and%20Other%20Materials%20\(2001\)](http://www.sadc.int/documents-publications/show/Protocol%20on%20the%20Control%20of%20Firearms.%20Ammunition%20and%20Other%20Materials%20(2001)) (accessed on 8 December 2017); Geneva Academy of International Humanitarian Law and Human Rights. “2001 SADC Protocol” *Weapons Law Encyclopaedia* (2017) 1211.

with Customs, Police, Immigration and other agencies. Furthermore, a Technical Committee on Small Arms was established to coordinate communication between member states and sub-regional bodies and provide a place for member states to share information on best practices and agree mutual assistance. The SADC has also worked with civil society organisations, most notably SaferAfrica and the Institute for Security Studies (ISS), to further the implementation of the Protocol and to carry out policy development and research.⁹⁶¹

These measures have, however, not managed to effectively reduce the proliferation and use of these illicit firearms. They are the often-used weapons in violent crimes such as murder, car hijackings and robberies, especially in South Africa, and these threaten the stability and peace of the region.⁹⁶² According to the world crime statistics, firearms account for 30% of all the homicides committed in the region.⁹⁶³

5.4.14 Protocol on Extradition

The SADC Protocol on Extradition was signed with the intention to reduce the crime levels by enabling member states to extradite to the other, any person within their jurisdiction who is wanted for prosecution or the imposition or enforcement of a sentence in the requesting member state. By signing the Protocol, member states have agreed to speedy response and cooperation to assist the prevention of crime and eliminate threats to security of member states by mutual assistance on matters of extradition. It was signed on 3 October 2002 and entered into force on 1 September 2006.⁹⁶⁴

⁹⁶¹ Human Rights Law in Africa. “Protocol On the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community (SADC) Region” available at <https://www.researchgate.net/publication/315625497> (accessed on 9 December 2017); Fellmeth, A.X. “The Un Firearms Protocol” in Hauck, P *et al.* *International Law and Transnational Organized Crime* (2016) at 216.

⁹⁶² Oosthuysen, G. “Shooting the golden goose: Small-arms proliferation in Southern Africa” in Rotberg, R.I *et al.* *War and Peace in Southern Africa: Crime, Drugs, Armies, Trade* (2010) at 64; Grip, L. “Small arms control in Africa” Academic dissertation to Helsinki University Department of Political and Economic Studies, May 2017 at 105.

⁹⁶³ World Association of Investigators. “List of countries by intentional homicide rate” available at <https://www.crimestatssa.com/international.php> (accessed on 13 December 2017).

⁹⁶⁴ “Protocol on Extradition (2002)” available at [http://www.sadc.int/documents-publications/show/Protocol%20on%20Extradition%20\(2002\)](http://www.sadc.int/documents-publications/show/Protocol%20on%20Extradition%20(2002)) (accessed on 9 December 2017).

However, the Protocol does not enumerate the offences in respect of which extradition may be granted. Article 3(1) simply provides:

For the purpose of this Protocol, extraditable offence are offences that are punishable under the laws of both State Parties by imprisonment or other deprivation of liberty for a period of at least one year, or by a more severe penalty. Where the request for extradition relates to a person wanted for the enforcement of a sentence of imprisonment or other deprivation of liberty imposed for such an offence, extradition may be refused if a period of less than six months of such sentence remains to be served.”

Articles 4 and 5 provide for circumstances under which extradition may be refused.⁹⁶⁵ One of these circumstances, which have been used often, by South Africa in particular, is where

⁹⁶⁵ Article 4 provides: (Mandatory grounds to refuse extradition)

“Extradition shall be refused in any of the following circumstances:

- (a) if the offence for which extradition is requested is of a political nature. An offence of a political nature shall not include any offence in respect of which the State Parties have assumed an obligation, pursuant to any multilateral convention, to take prosecutorial action where they do not extradite, or any other offence that the State Parties have agreed is not an offence of a political character for the purposes of extradition;
- (b) if the Requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinion, sex or status or that the person's position may be prejudiced for any of those reasons;
- (c) if the offence for which extradition is requested constitutes an offence under military law, which is not an offence under ordinary criminal law;
- (d) if there has been a final judgment rendered against the person in the Requested State or a Third State in respect of the offence for which the person's extradition is requested;
- (e) if the person whose extradition is requested has, under the law of either State Party, become immune from prosecution or punishment for any reason, including lapse of time or amnesty;
- (f) if the person whose extradition is requested has been, or would be subjected in the Requesting State to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in Article 7 of the African Charter on Human and Peoples Rights; and
- (g) if the judgment of the Requesting State has been rendered in absentia and the convicted person has not had sufficient notice of the trial or the opportunity to arrange for his or her defence and he or she has not had or will not have the opportunity to have the case retried in his or her presence.”

Article 5 provides: (Optional grounds for refusal)

“Extradition may be refused in any of the following circumstances:

- (a) if the person whose extradition is requested is a national of the Requested State. Where extradition is refused on this ground, the Requested State shall, if the other State so requests, submit the case to its competent authorities with a view to taking appropriate action against the person in respect of the offence for which extradition had been requested;

the death penalty is likely to be imposed.⁹⁶⁶ South Africa does however, in other circumstances, comply with extradition requests where the provisions or requirements of the Protocol are met. Member states that South Africa has extradited wanted fugitives to include Botswana, Lesotho, Mozambique and Zimbabwe.⁹⁶⁷

Many of the SADC member states have also signed bilateral extradition agreements between themselves, but these are treated as complementary to the Protocol.⁹⁶⁸

5.4.15 Protocol on Forestry

The Protocol aims to promote the development, conservation, sustainable management and utilisation of all types of forest and trees; trade in forest products and achieve effective protection of the environment; and safeguards the interests of both the present and future

-
- (b) if a prosecution in respect of the offence for which extradition is requested is pending in the Requested State against the person whose extradition is requested;
 - (c) if the offence for which extradition is requested carries a death penalty under the law of the Requesting State, unless that State gives such assurance, as the Requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out. Where extradition is refused on this ground, the Requested State shall, if the other State so requests, submit the case to its competent authorities with a view to taking appropriate action against the person for the offence for which extradition had been requested;
 - (d) if the offence for which extradition is requested has been committed outside the territory of either State Party and the law of the Requested State does not provide for jurisdiction over such an offence committed outside its territory in comparable circumstances;
 - (e) if the offence for which extradition is requested is regarded under the laws of the Requested State as having been committed in whole or in part within that State. Where extradition is refused on this ground, the Requested State shall, if the other State Party so requests submit the case to its competent authorities with a view to taking appropriate action against the person for the offence for which extradition had been requested; and
 - (f) if the Requested State, while also taking into account the nature of the offence and the interest of the Requesting State, considers that, in the circumstances of the case, the extradition of that person would be incompatible with humanitarian considerations in view of age, health or other personal circumstances of that person.”

⁹⁶⁶ *Mohamed and Another v President of the Republic of South Africa and Others* [2001] ZACC 18 (CC); *Tsebe and Another v Minister of Home Affairs and Others*, *Phale v Minister of Home Affairs and Others* [2011] ZAGPJHC 115 (South Gauteng High Court); *Ex Parte Minister of Home Affairs and Four Others v Tsebe & Phale* 2012 (5) SA 467 (CC); Bulman, A. “The Death of Capital Punishment? Ex Parte Minister of Home Affairs and Four others v Tsebe & Phale - A Case Analysis” Legal Resources Centre Working Paper Series (No. A4/2012), 2 December 2012; “Judge Slams Illegal Deportation of Murder Accused” *Business Day* of 18 September 2014.

⁹⁶⁷ *S v Khanyisile and Another* (CA 12/2012) [2012] ZANWHC 35; *S v Shoniwa and Others* (CA 41/2010) [2011] ZANWHC 25 (27 May 2011); “7 extradited to Lesotho” *News24* (online) of 19 April 2011.

⁹⁶⁸ Article 19; *Phale v Minister of Home Affairs and Others* [2011] ZAGPJHC 115 (South Gauteng High Court).

generations. The Protocol therefore provides guidance on the undertaking of national forest assessments and national forest policies, programmes and laws. Through the Protocol, member states are encouraged to strive to have substantial forest based industries within their territories in order to eradicate poverty eradication in their countries. It was signed on 3 August 2002 and entered into force on 17 September 2009.⁹⁶⁹

In 2011 the SADC developed and adopted “A SADC Support Programme on Reducing Emissions from Deforestation and Forest Degradation (REDD): 2012 – 2015”, whose goal is to contribute to the sustainable management of the forests of the SADC as well as to contribute to poverty reduction and sustainable development, and mitigate climate change. The Programme was to be implemented at sub-national, national and Regional levels.⁹⁷⁰

In line with this Protocol, member states of Botswana, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles and South Africa adopted their own mitigation programmes. However, lack of adequate resources hampers full implementation of these programmes.⁹⁷¹

5.4.16 Protocol on Gender and Development

The SADC Protocol on Gender and Development looks into integration and mainstreaming of gender issues into the SADC Programme of Action and community building initiatives which are important to the sustainable development of the SADC region. It aims to provide for the empowerment of women, to eliminate discrimination and to achieve gender equality by encouraging and harmonising the development and implementation of gender responsive legislation, policies and programmes and projects. It is also a tool used to set realistic, measurable targets, time frames and indicators for achieving gender equality and equity, and monitor and evaluate the progress made by member states thereof. It was

⁹⁶⁹ “Protocol on Forestry (2002)” available at [http://www.sadc.int/documents-publications/show/Protocol%20on%20Forestry%20\(2002\)](http://www.sadc.int/documents-publications/show/Protocol%20on%20Forestry%20(2002)) (accessed on 11 December 2017).

⁹⁷⁰ SADC. “A SADC Support Programme on Reducing Emissions from Deforestation and Forest Degradation (REDD): 2012 – 2015”, May 2011.

⁹⁷¹ Morna, C.L. *et al.* “Gender, Climate Change and Sustainable Development” *SADC Gender Protocol 2015 Barometer* (2016) at 332.

signed on 7 August 2008 and came into force on 22 February 2013. It was revised in 2016 so that its objectives are aligned to various global targets and emerging issues such as the United Nations Sustainable Development Goals (SDGs).⁹⁷²

Following the signing of the Protocol, the Southern Africa Gender Protocol Alliance was established as a regional “network of networks” that championed the ratification of the Protocol by each member state. The Alliance also advocates for implementation of the protocol and partners with various gender organisations in various member states. It is made up of fifteen country networks comprising of different Alliance focal point organisations.⁹⁷³

Other notable achievements regarding this Protocol are the following:

- At end of 2016, the proportion of SADC women in climate change decision-making positions was at 24%. Only Lesotho, at 50%, had achieved gender parity for women in decision-making.
- With regard to supply of clean water for the citizens, Mauritius had achieved 100% supply of clean water for its population while Angola was the lowest achiever with 49% supply.
- In July 2017, the SADC Ministers responsible for gender issues adopted a Monitoring, Evaluation and Reporting Framework (MERF) that will be the basis of future reporting.⁹⁷⁴

5.4.17 Protocol to the Treaty establishing SADC on Immunities and Privileges

This Protocol grants immunity to the property and assets of the SADC so that they are immune from every form of legal process, search, and requisition or confiscation except in

⁹⁷² “Protocol on Gender and Development (2008)” available at [http://www.sadc.int/documents-publications/show/Protocol%20on%20Gender%20and%20Development%20\(2008\)](http://www.sadc.int/documents-publications/show/Protocol%20on%20Gender%20and%20Development%20(2008)) (accessed on 11 December 2017).

⁹⁷³ “SADC Gender Protocol Alliance” available at <http://genderlinks.org.za/what-we-do/sadc-gender-protocol/> (accessed on 11 December 2017); Yaliwe M *et al.* “SADC gender and development protocol : an evaluation of equality, empowerment and gender based violence in South Africa (2008-2012)” *Gender and Behaviour* vol.11 issue 1 (2013) 5175.

⁹⁷⁴ Morna, C.L *et al.* “Gender and Governance” *SADC Gender Protocol 2017 Barometer* (2017) at 71.

instances where such immunity has been expressly waived. Such immunity extends to the SADC officials and their immediate families. It also considers all the communications of the SADC non-violable. With respect to privileges, the Protocol grants tax exemption and non-restrictive financial controls to the SADC, its institutions and officials. Member states representatives to the SADC and to conferences convened by the SADC as well as experts performing missions for the SADC are also accorded the same immunities and privileges in term of this Protocol. It was signed on 17 August 1992 and entered into force on 30 September 1993.⁹⁷⁵

The immunities and privileges accorded in terms of this Protocol are comparable to those accorded by similar international organisations. As such there has never been a reported case wherein the Protocol was flouted by member states that host various institutions and officials of the SADC.⁹⁷⁶

5.4.18 Protocol on Legal Affairs

The Protocol establishes the SADC Legal Affairs Unit to give constant legal support and advice to the institutions of the SADC for their effective performance. The main aim of the Legal Affairs Unit is thus to provide legal advice and legal related services to the SADC and its institutions, interpret, draft and develop legal documents/instruments for implementing the Treaty and SADC protocols, facilitate the notification of the status, ratification, accession and entry into force of the SADC protocols as well as provide litigation services.⁹⁷⁷ It was signed on 7 August 2000 and came into effect on 1 September 2006.⁹⁷⁸

⁹⁷⁵ “Protocol to the Treaty establishing SADC on Immunities and Privileges (1992)” available at [http://www.sadc.int/documents-publications/show/Protocol%20to%20the%20Treaty%20establishing%20SADC%20on%20Immunities%20and%20Privileges%20\(1992\)](http://www.sadc.int/documents-publications/show/Protocol%20to%20the%20Treaty%20establishing%20SADC%20on%20Immunities%20and%20Privileges%20(1992)) (accessed on 11 December 2017);

⁹⁷⁶ Kyambalesa, H *et al.* *Economic Integration and Development in Africa* (2016) at 117.

⁹⁷⁷ Article 2 – Objectives.

⁹⁷⁸ “Protocol on Legal Affairs (2000)” available at [http://www.sadc.int/documents-publications/show/Protocol%20on%20Legal%20Affairs%20\(2000\)](http://www.sadc.int/documents-publications/show/Protocol%20on%20Legal%20Affairs%20(2000)) (accessed on 12 December 2017).

The Protocol also encourages member states to harmonise their legal system. As discussed in Chapter 5, member states have made some progress with regard to this objective, through, *inter alia*, adopting model laws in various areas or fields.⁹⁷⁹

5.4.19 Protocol on Mutual Legal Assistance in Criminal Matters

The Protocol was signed in pursuance of the goal of regional integration in the areas of social welfare, peace and security. It extends to member states the widest possible mutual legal assistance within the limits of the laws of their respective jurisdictions. It also sets the framework for member states to assist each other in respect of investigations, prosecutions as well as proceedings in a criminal matter without regarding whether the act committed would be a criminal matter or not in the state being requested for assistance. The protocol further provides guidance on how such assistance will be given, the authorities responsible and grounds on which such assistance can be denied. It was signed on 3 October 2002 and entered into force on 1 March 2007.⁹⁸⁰

The mutual assistance to be given is limited to state parties and shall not give rise to a right on the part of any private person to obtain, suppress or exclude any evidence to impede the execution of a request for assistance.⁹⁸¹ However, the Protocol requires the state parties to ensure respect for the rights of *bona fide* third parties and victims.⁹⁸² The assistance to be provided includes the following:

- a. locating and identifying persons, property, objects and items;

⁹⁷⁹ See Chapter 5 part 5.3.2 (harmonisation of laws) above.

⁹⁸⁰ “Protocol on Mutual Legal Assistance in Criminal Matters (2002)” available at [http://www.sadc.int/documents-publications/show/Protocol%20on%20Mutual%20Legal%20Assistance%20in%20Criminal%20Matters%20\(2002\)](http://www.sadc.int/documents-publications/show/Protocol%20on%20Mutual%20Legal%20Assistance%20in%20Criminal%20Matters%20(2002)) (accessed on 13 December 2017); Cryer, R *et al.* *An Introduction to International Criminal Law and Procedure* (2010) at 102; Ewi, M.A. “Criminal Justice Responses to Terrorism in Africa: The Role of the African Union and Sub-Regional Organizations” in de Frías, A.S *et al.* *Counter-Terrorism: International Law and Practice* (2012) at 990 – 1043; Watney, M. “A South African perspective on mutual legal assistance and extradition in a globalized world” *Potchefstroomse Elektroniese Regsblad (PER)* vol. 15 no. 2 (2012).

⁹⁸¹ Article 2(6).

⁹⁸² Article 22(2); Ivory, R. *Corruption, Asset Recovery, and the Protection of Property in Public* (2014) at 134.

- b. serving documents, including documents seeking the attendance of persons and providing returns of such service;
- c. providing information, documents and records;
- d. providing objects and temporary transfer of exhibits;
- e. search and seizure;
- f. taking evidence or obtaining statements or both;
- g. authorising the presence of persons from the requesting state at the execution of requests;
- h. ensuring the availability of detained persons to give evidence or to assist in possible investigations;
- i. facilitating the appearance of witnesses or the assistance of persons in investigations; and
- j. taking possible measures for location, restraint, seizure, freezing or forfeiture of the proceeds of crime.⁹⁸³

Despite the existence of this Protocol and national legislations in member states domesticating it, there is still a lack of information-sharing and cooperation among law enforcement agencies in the region. This has led to transnational organised crime groups to flourish, taking advantage of the long and porous borders, the ease of cross-border trade and the diversity of individual countries' legislations. There is also a general weakness in the criminal justice systems of most jurisdictions in the SADC region, leading to difficulties in dealing with complex crimes like money laundering and tax evasion. The exceptions are South Africa and the Seychelles.⁹⁸⁴

South Africa is the most affected member state by these weaknesses and the lack of assistance from its neighbours. The rate of vehicle theft in South Africa has increased recently, with the majority of the vehicles reported to have ended up in Mozambique and Zimbabwe. The authorities in these two member states, are however, not able to assist in

⁹⁸³ Article 2(5).

⁹⁸⁴ United Nations Office on Drugs and Crime (UNODC). "Asset Recovery Inter-Agency Network Southern Africa (ARINSA) Annual Report 2016" at 6.

recovering these stolen vehicles due to the weaknesses in their criminal justice systems and technologies.⁹⁸⁵

5.4.20 Protocol on Wildlife Conservation and Law Enforcement

In recognition of wildlife resources' potential to affect the region's economic development and environmental protection, the SADC passed its Protocol on Wildlife Conservation and Law Enforcement to establish a common framework for conservation and sustainable use of wildlife in the region. The Protocol advocates for member states to harmonise legal instruments for wildlife, establish management programmes for wildlife, and create a regional database of wildlife status and management. It also establishes institutional arrangements for the Protocol's implementation, specifying committees and units, a schedule of meetings, and each division's functions. It was signed on 14 August 1999 and entered into force on 30 November 2003.⁹⁸⁶

The SADC member states have taken meaningful steps towards implementing this Protocol by adopting legislations dealing with wildlife. However, the analysis of national legislations in the SADC region, through the study conducted by the Food and Agriculture Organization of the United Nations (FAO) and the International Council for Game and Wildlife Conservation (CIC), shows that general statements on wildlife ownership are less important than substantive provisions entitling persons to benefit from wildlife use. In the majority of the member states ordinary people seem to be unaware of the legislation and licences granted in respect thereof. In the majority of cases these licences are granted to

⁹⁸⁵ *Ibid*; "MAP: Here's how many cars are hijacked in SA by province" *Wheels24* (online) of 31 October 2017, available at http://www.wheels24.co.za/News/Guides_and_Lists/map-heres-how-many-cars-are-hijacked-in-sa-by-province-20171031 (accessed on 13 December 2017).

⁹⁸⁶ "Protocol on Wildlife Conservation and Law Enforcement (1999)" available at [http://www.sadc.int/documents-publications/show/Protocol%20on%20Wildlife%20Conservation%20and%20Law%20Enforcement%20\(1999\)](http://www.sadc.int/documents-publications/show/Protocol%20on%20Wildlife%20Conservation%20and%20Law%20Enforcement%20(1999)) (accessed on 13 December 2017).

the rich, who are, in most cases, foreign nationals. There is, as such, a need to strengthen the legislation and law enforcement in most of the member states.⁹⁸⁷

The member states have also embarked on the establishment of the transfrontier conservation areas (TFCAs), with the aim of collaboratively managing shared natural and cultural resources across international boundaries for improved biodiversity conservation and socio-economic development. Currently the following TFCAs have been established in the SADC region:

- /Ai/Ais - Richtersveld Transfrontier Park – made up of /Ai/Ais Hot Springs Game Park in Namibia and the Richtersveld Park in South Africa;
- Chimanimani Transfrontier Conservation Area – made up of Chimanimani Nature Reserve in Mozambique and the Chimanimani National Park in Zimbabwe;
- Great Limpopo Transfrontier Park – Spanning Mozambique, South Africa and Zimbabwe;
- Iona-Skeleton Coast Transfrontier Conservation Area – made up of the Iona National Park in Angola and the Skeleton Coast National Park in Namibia;
- Kagera Transfrontier Conservation Area – made up of the Ibanda Rumanyika Game Reserve in Tanzania and the Akagera National Park in Rwanda;
- Kavango-Zambezi (KAZA) Transfrontier Conservation Area – occupying the Okavango and Zambezi river basins, it encompasses areas within the borders of Angola, Botswana, Namibia, Zambia and Zimbabwe, and includes 36 formally proclaimed national parks and a host of game reserves, forest reserves, game management areas, and conservation and tourism concession areas;
- Kgalagadi Transfrontier Park – made up of South Africa’s Kalahari Gemsbok National Park and Botswana’s Gemsbok National Park;
- Liuwa Plains-Mussuma Transfrontier Conservation Area – consists of the Mussuma area in Angola and the Liuwa National Park in the western province of Zambia;

⁹⁸⁷ Cirelli, M.T *et al.* “Wildlife Law in the Southern African Development Community. Joint publication of FAO and CIC”, *CIC Technical Series Publication no. 9*, Budapest (2010).

- Lower Zambezi - Mana Pools Transfrontier Conservation Area – composed of the Lower Zambezi National Park in Zambia and the Mana Pools National Park in northern Zimbabwe;
- Lubombo Transfrontier Conservation Area – borders Swaziland, Mozambique and South Africa;
- Maiombe Forest Transfrontier Conservation Area – encompasses the Maiombe Forest, stretching over four countries, including the south-west corner of the Democratic Republic of Congo (DRC), Cabinda Enclave in Angola, the Republic of Congo and south-west Gabon;
- Malawi Zambia (Nyika) Transfrontier Conservation Area - includes Nyika National Park, Lundazi, Mitenge and Mikuti Forest Reserves and Musalangu Game Management Area in Zambia, and Nyika National Park and Vwaza Marsh Wildlife Reserve in Malawi.
- Maloti Drakensberg Transfrontier Conservation and Development Area (MDTFCA/ MDTP) – composed of four sub-regions, namely, (i) the Eastern Cape Drakensberg and Witteberge, (ii) the KZN Drakensberg, (iii) the Lesotho Maloti mountains, and (iv) the eastern Free State;
- Mnazi Bay- Quirimbas Transfrontier Conservation Area – covers the Mnazi Bay-Ruvuma Estuary Marine Park in Tanzania and the Quirimbas National Park in Mozambique;
- Niassa-Selous Transfrontier Conservation Area – covers the Selous Game Reserve in the northern Tanzania and the Niassa Game Reserve in Mozambique;
- Western Indian Ocean Transfrontier Marine Park (WIO TFMP) – covers the marine water spaces of Madagascar, Mauritius, Mozambique, Seychelles, Tanzania and the Comoros;
- Zimbabwe-Mozambique-Zambia Transfrontier Park (ZIMOZA) – made up of the Zumbo and Magoé districts in eastern Mozambique, Luangwa in southern Zambia and Guruve in northern Zimbabwe; and

- Greater Mapungubwe Transfrontier Conservation Area – at the confluence of the Shashe and Limpopo rivers and encompasses areas in Botswana, South Africa and Zimbabwe.⁹⁸⁸

Conclusion

Developments over the past few months and years suggest that political and economic integration in the Southern African region has reached a delicate phase. Given the complexity of the integration process, the question which arose frequently was whether the SADC institutions were equipped with required capabilities to manage the integration process. The answer to this question now seems to be in the affirmative if one looks into developments that have occurred within the SADC, especially after the 1999 Maputo Summit that instructed the review of the SADC institutions. There has been a lot of achievements since then: the amendment of the SADC Treaty, which brought about new institutions; the signing of protocols and agreements such as the Protocol on Trade; the passing of model laws on a variety of aspects/fields; etc.

What may be obscured in these achievements, though, is the fact that the real test to any integration process comes with the implementation of the instruments of cooperation, which must be done by member states. The squabbles in Europe over the Maastricht Treaty or the Monetary Union showed that there is no guarantee that regional goals will not be derailed by national agendas during the implementation process.⁹⁸⁹ More, therefore, still needs to be done.

However, this inability by member states is in most instances not their own making. As shown above, the region's stagnant trade pattern is explained by three challenges: an underdeveloped and non-diversified industrial manufacturing base in most SADC

⁹⁸⁸ "SADC TFCA Fact Sheets" available at http://www.sadc.int/files/2514/2122/3333/SADC_TFCA_Fact_Sheetsv_final.pdf (accessed on 13 December 2017).

⁹⁸⁹ Henning, C.R. *et al. Transatlantic Perspectives on the Euro* (2000) at 6; Majone, G. *Rethinking the Union of Europe Post-Crisis: Has Integration Gone Too Far?* (2014) at 48 – 53.

countries, an inadequate infrastructure to support trade in goods, and tariff barriers that inhibit market access.⁹⁹⁰

Doing away with sectors was one of the major achievements by the SADC. The trouble with these sectors was that the region did not have a say on the appointment of sectoral managers or the level of resources put at the sector's disposal. The effectiveness and control of a particular sector depended entirely on the level of commitment and sensitivity of the host government. In practice this led to sectors being dysfunctional.

It is pleasing to note that the SADC Secretariat has been given enough and necessary powers to ensure that the policies and programmes of the SADC are successful. The establishment of the Deputy Executive Secretary for Integration position also shows how committed the SADC is to the integration of the region. This will no doubt enable the Secretariat to perform in accordance with its being the "principal executive organ of the SADC".⁹⁹¹ However, the lack of funds is a serious challenge for the Secretariat to realise this goal.

For the implementation of the SADC legislation to materialise, a dedicated high level champion should be identified at a regional level to persuade member states to implement protocols. A corresponding counterpart should also be identified at national level to work with the SADC National Committees (SNCs) to interact with ministries on the SADC activities. This is because the major component of protocol implementation is the domestication of the protocol provisions at the national level. Accordingly, a framework (or guidelines) for domestication of the protocols should be developed and agreed to.

The failure to move faster on popularising the ideals of the Community could be entirely ascribed to the SADC's lack of coherent strategy to involve the stakeholders in conformity with the undertaking of Article 23 of the SADC Treaty, which pledges "to involve fully

⁹⁹⁰ Vickers, B. "Between a Rock and a Hard Place: Small States in the EU-SADC EPA Negotiations" *The Round Table* vol. 100 no. 413 (April 2011) 183 at 185.

⁹⁹¹ Article 14(1) of the SADC Treaty.

the peoples of the region” in the integration process. This, however, seems to have been corrected by some of the protocols, especially with the involvement of these stakeholders in the SADC national committees of member states. The Regional Indicative Strategic Development Plan (RISDP) was also drawn by the SADC together with the “stakeholders”.⁹⁹²

It can be said that through adopting the Regional Indicative Strategic Development Plan (RISDP) and aligning it with the various protocols and infrastructural projects, the SADC is making progress towards achieving the regional integration. However, the slow pace at which this is being done is still a concern.

But at least, there is a development plan, a starting point or rallying point. The Plan (RISDP) consolidates a concerted regional effort at equitable development: it translates the SADC’s strategic objectives into a plan on key priorities and implementation guidelines and institutions. Though it runs until 2020, it is aligned to the long-term programmes such as the Industrialization Strategy 2063 and the AU Agenda 2063. This means that the SADC sees itself as integral part of the envisaged continental integration agenda.

With regard to protocols, chief among the concerns at the SADC Secretariat is that protocols take, on average, two and half years to implement. Due to the range of differing legal structures, amongst other reasons, member states have found it difficult to reconcile domestic legislation with the SADC protocols. Other issues that hamper the implementation of protocols include the scarcity of human and financial resources and limited enforcement capabilities. These must be addressed as a matter of urgency for the SADC integration to be a success.⁹⁹³

In some instances, however, it seems as though there is not enough political will to ratify protocols. A case in point is the Protocol on Facilitation of Movement of Persons, which

⁹⁹² “Acknowledgments” *SADC Regional Indicative Strategic Development Plan (RISDP)*.

⁹⁹³ This concern was raised during “SADC workshop on protocol and policy implementation in Cape Town, South Africa” held on 25 – 26 May 2005.

requires the SADC to develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services and of the people of the region generally amongst member states. Despite being agreed to in 2005, it still has not been ratified by the required two-thirds majority for it to come into force. This is more worrying because this means that the SADC cannot move into the next stage of integration, which is a common market. For a common market to materialise, there must be the free movement of capital and labour.

However, other protocols have been ratified and several, including the Protocol on Finance and Investment, require state parties to create model laws for the region though these are, by their very nature, “soft laws” and are not legally enforceable. This development should, however, be welcome because these model laws are generally used to guide governments in the crafting and amendment of their own domestic laws.

Other protocols dealing with trade in services, such as the protocols on education and on health, will be inspired by the newly adopted UN Sustainable Development Goals (SDGs)⁹⁹⁴ and Africa’s Agenda 2063 which are outcome-based.

⁹⁹⁴ The SDGs were adopted in September 2015 to replace the Millennium Development Goals (MDGs), which had a deadline of 2015. The SDGs came into operation in February 2016 and each goal has specific targets to be achieved over the next 15 years.

CHAPTER 6

THE SADC COMPARED TO THE EUROPEAN UNION

Introduction

The SADC has adopted the European Union (EU) model of integration and this is mainly because the “EU is a living laboratory for the integration theory”.⁹⁹⁵ The EU’s relationship with Africa has been formalised since its creation in 1957. The Treaty of Rome (1957) included articles providing for the association of African colonies⁹⁹⁶ and this seems to have

⁹⁹⁵ De Melo, J *et al.* “The New Regionalism” *Finance and Development* vol. 29 no. 4 (1992) 37; Saurombe, A. “The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis” *Law, Democracy and Development* vol. 13 (2013) 457 at 458.

⁹⁹⁶ Part Four of the Treaty of Rome Provided”

“The Association of Overseas Countries and Territories:

Article 131

The Member States hereby agree to bring into association with the Community the non-European countries and territories which have special relations with Belgium, France, Italy and the Netherlands. These countries and territories, hereinafter referred to as “the countries and territories”, are listed in Annex IV to this Treaty.

The purpose of this association shall be 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 conformity with the principles stated in the Preamble to this Treaty, this association shall in the first place permit the furthering of the interests and prosperity of the inhabitants of these countries and territories in such a manner as to lead them to the economic, social and cultural development which they expect.

Article 132

Such association shall have the following objects:

1. Member States shall, in their commercial exchanges with the countries and territories, apply the same rules which they apply among themselves pursuant to this Treaty.
2. Each country or territory shall apply to its commercial exchanges with Member States and with the other countries and territories the same rules which it applies in respect of the European State with which it has special relations.
3. Member States shall contribute to the investments required by the progressive development of these countries and territories.
4. As regards investments financed by the Community, participation in tenders and supplies shall be open, on equal terms, to all natural and legal persons being nationals of Member States or of the countries and territories.
5. In relations between Member States and the countries and territories, the right of establishment of nationals and companies shall be regulated in accordance with the provisions, and by application of the

been a deliberate act on the part of EU to externalise its model of integration over time. Accordingly, the strategy has been to secure market access for European products while

procedures, referred to in the Chapter relating to the right of establishment and on a non-discriminatory basis, subject to the special provisions made pursuant to Article 136.

Article 133

1. Imports originating in the countries or territories shall, on their entry into Member States, benefit by the total abolition of customs duties which shall take place progressively between Member States in conformity with the provisions of this Treaty.
2. Customs duties imposed on imports from Member States and from countries or territories shall, on the entry of such imports into any of the other countries or territories, be progressively abolished in conformity with the provisions of Articles 12, 13, 14, 15 and 17.
3. The countries and territories may, however, levy customs duties which correspond to the needs of their development and to the requirements of their industrialisation or which, being of a fiscal nature, have the object of contributing to their budgets.

The duties referred to in the preceding sub-paragraph shall be progressively reduced to the level of those imposed on imports of products coming from the Member State with which each country or territory has special relations. The percentages and the timing of the reductions provided for under this Treaty shall apply to the difference between the duty imposed, on entry into the importing country or territory, on a product coming from the Member State which has special relations with the country or territory concerned and the duty imposed on the same product coming from the Community.

4. Paragraph 2 shall not apply to countries and territories which, by reason of the special international obligations by which they are bound, already apply a non-discriminatory customs tariff at the date of the entry into force of this Treaty.
5. The establishment or amendment of customs duties imposed on goods imported into the countries and territories shall not, either de jure or de facto, give rise to any direct or indirect discrimination between imports coming from the various Member States.

Article 134

If the level of the duties applicable to goods coming from a third country on entry into a country or territory is likely, having regard to the application of the provisions of Article 133, paragraph 1, to cause diversions of commercial traffic to the detriment of any Member State, the latter may request the Commission to propose to the other Member States the measures necessary to remedy the situation.

Article 135

Subject to the provisions relating to public health, public safety and public order, the freedom of movement in Member States of workers from the countries and territories, and in the countries and territories of workers from Member States shall be governed by subsequent conventions which shall require unanimous agreement of Member States.

Article 136

For a first period of five years as from the date of the entry into force of this Treaty, an Implementing Convention annexed to this Treaty shall determine the particulars and procedure concerning the association of the countries and territories with the Community.

Before the expiry of the Convention provided for in the preceding sub-paragraph, the Council, acting by means of a unanimous vote, shall, proceeding from the results achieved and on the basis of the principles set out in this Treaty, determine the provisions to be made for a further period.”

selling the concept of the European model of regional integration.⁹⁹⁷ This relationship between the EU and Africa, which still exists today, has helped shape the trends of regional integration in most of the regional economic communities (RECs) in Africa, including the SADC.⁹⁹⁸ Currently the EU is Southern Africa's most important trading partner, which gives it some leverage to influence regional integration in the SADC.⁹⁹⁹ The Treaty of Lisbon (2009) also makes provision for this kind of arrangement.¹⁰⁰⁰

The EU is ranked among the most successful regional integration arrangements (RIAs) in the world today, hence other bodies, like the SADC, that are engaged in integration efforts would like to learn from it. Its success owes a lot to the way it works – its unique method of interaction between institutions such as the European Parliament, the Council and the European Commission, supported by a number of agencies and other bodies. It has a single market as its core as well as a common currency – the euro. The single market basically means that barriers are removed, and people, goods, services and money move around Europe as freely as within one country. The people of Europe travel at will across the EU's internal frontiers for business and pleasure or, if they choose, they can stay at home and enjoy a dazzling array of products from all over the European Union.¹⁰⁰¹

It started as an economic bloc for the Western European states, but it is becoming a fully-fledged continental bloc, after many Eastern European countries joined it in 2004 and

⁹⁹⁷ Holmes, P *et al.* "Exporting rules: The European Union as model for international regimes?" Paper delivered at the *European Union Studies Association (EUSA) 6th Biennial Conference*, Pittsburgh, 2 -5 June 1999; Farrell, M. "The EU and Inter-regional Cooperation: In Search of Global Presence?" in Verdun, A *et al.* *The Political Economy of European Integration: Theory and Analysis* (2005) at 19; Saurombe, A. "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" *Law, Democracy and Development* vol. 13 (2013) 457 at 460.

⁹⁹⁸ African countries and the EU cooperate through multiple frameworks such as the Cotonou Agreement (2000) and the Joint Africa EU Strategy as well as through formal dialogues, such as the EU-Africa summits.

⁹⁹⁹ Muntschick, J. "SADC: Extra-Regional Trade Relations Constrain Deeper Market Integration" in Kraphol, S. *Regional Integration in the Global South* (2016) at 179.

¹⁰⁰⁰ Title VI of the Consolidated EU Treaty (Treaty of Lisbon) entitled: "The Union's Relations with International Organisations and Third Countries and Union Delegations".

¹⁰⁰¹ Article 45 of the Lisbon Treaty; The Preamble of the Treaty of Lisbon provides, among others, that the signatories:
"Resolved to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by establishing an area of freedom, security and justice, in accordance with the provisions of this Treaty and of the Treaty on the Functioning of the European Union".

thereafter.¹⁰⁰² Currently it is a union of twenty-eight independent states¹⁰⁰³ based on the European communities and founded to enhance political, economic and social co-operation. It was formerly known as the European Community (EC) or the European Economic Community (EEC) through the Treaty of Rome (Treaty establishing the European Community), which was signed in 1958. It transformed into the European Union on 1st November 1993 through the Treaty of Maastricht (Treaty establishing the European Union). However, the Treaty establishing the European Union (TEU) did not replace the Treaty establishing the European Community (TEC), which meant the EU operated on the basis of the two treaties.¹⁰⁰⁴

In June 2004, leaders of the Union agreed on a new Constitution (Constitutional Treaty) to merge the two treaties, which would have taken effect on 1st of November 2006 once ratified by all member states. However, France and the Netherlands voted against the Constitution in their respective referendums, thus putting a halt on its operation. The results of the referendums meant that the European Union was still operating under two treaties: Treaty establishing the European Community (TEC) and the Treaty establishing the European Union (TEU).¹⁰⁰⁵

This led to the adoption of the Treaty of Lisbon (initially known as the Reform Treaty) in December 2009, which is a compromise agreement to replace the failed Constitutional Treaty. It amended and synchronised the two treaties (TEC and TEU) and thus created a

¹⁰⁰² In 2004, the following countries joined the union: Cyprus (Greek part), Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia. In 2007 Romania and Bulgaria joined, and Croatia was the latest to join in 2013; Wallace, H *et al.* *Policy-making in the European Union* (2015) at 7.

¹⁰⁰³ The membership of the United Kingdom of Great Britain and Northern Ireland (UK) will lapse after it voted in a referendum in June 2016 to withdraw from the EU, which will leave the membership at 27. However, the withdrawal will apply two years after being officially communicated to the EU, which the UK Government did in March 2017; “Here’s the full Brexit letter Britain sent to the EU”, available at <http://www.cnbc.com/2017/03/29/heres-the-brexite-letter-britain-sent-to-the-eu.html> (accessed on 3 May 2017).

¹⁰⁰⁴ McCormick, J. *Understanding the European Union: A Concise Introduction* (2014) at 13; Nugent, N. “The creation of the European Community” in Nugent, N. *The Government and Politics of the European Union* (2010) at 19 – 26; Dinan, D. *Ever Closer Union? – An Introduction to the European Community* (2005) 1.

¹⁰⁰⁵ Craig, P *et al.* *EU Law: Text, Cases, and Materials* (2011) at 1.

consolidated legal personality for the EU.¹⁰⁰⁶ It also renamed the Treaty establishing the European Community (TEC) “Treaty on the Functioning of the European Union” (TFEU). The Treaty of Lisbon also made the Union’s bill of rights, the Charter of Fundamental Rights, legally binding.¹⁰⁰⁷ It further, for the first time, gave member states the explicit legal right to leave the EU or re-join it and procedures to do so.¹⁰⁰⁸

The Treaty of Lisbon also provides a legal basis for the promotion of integration at EU level, which is such an explicit act by any EU treaty. In Article 79(4), it states that “the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of member states with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the member states.”

It is, however, not only the two institutions – Parliament and Council – that are at the centre of the EU integration. All the seven principal institutions¹⁰⁰⁹ are integral to the whole integration effort.

6.1 HOW THE EUROPEAN UNION WORKS

6.1.1 Institutions of the EU

¹⁰⁰⁶ Clark, S. “How Will the Crisis in the European Single Currency Change the Direction of Integration in Europe?” *Interstate - Journal of International Affairs* vol. 2011/2012 no. 2 (2012) 1.

¹⁰⁰⁷ Articles 51 and 52 Treaty on European Union (TEU).

¹⁰⁰⁸ Article 50 of the Treaty on the Functioning of the European Union (TFEU).

¹⁰⁰⁹ These are:

- the *European Council*,
- the *Council of the European Union*,
- the *European Commission*,
- the *European Parliament*,
- the *Court of Justice of the European Union*,
- the *European Central Bank*, and
- the *European Court of Auditors*.

As stated in the Introduction, the EU's success owes a lot to the way it works, especially the interactions between its institutions. It is a supranational body and like any government, the Union has a legislative and an executive branch and an independent judiciary, though it is a non-state body. The seven principal decision-making bodies – known as the institutions of the European Union – are the *European Council*, the *Council of the European Union*, the *European Commission*, the *European Parliament*, the *Court of Justice of the European Union*, the *European Central Bank*, and the *European Court of Auditors*.¹⁰¹⁰

6.1.1.1 The European Council

The European Council is the highest political body of the Union and consists of heads of state or government of the EU member states plus the President of the Commission. It meets four times a year to define the Union's policy agenda and give impetus to integration by, among others, effectively deciding if and when the EU should welcome new members. It has its own General Secretariat that assists it and its meetings are held behind closed doors.¹⁰¹¹

6.1.1.2 The Council of the European Union (Council)

The Council is the main decision-taking body. It is the voice of the member states, consisting of ministers from each one, and has both legislative function, which it shares with the European Parliament, and an executive function, which it shares with the European Commission.¹⁰¹² It used to have the final say in most legislative matters, but this is now vested with the EU Parliament, especially after the adoption

¹⁰¹⁰ Article 13 of the TEU.

¹⁰¹¹ Article 15 of the TEU and Articles 235 – 236 of the TFEU; Alexandrova, P *et al.* “Policy Punctuations and Issue Diversity on the European Council Agenda” *Policy Studies Journal* vol. 40 no. 1 (2012) 69; Tallberg, J. “Bargaining Power in the European Council” *Journal of Common Market Studies (JCMS)* vol. 46 no. 3 (2008) 685.

¹⁰¹² Article 16 of the TEU and Articles 237 – 243 of the TFEU; Lewis, J. The European Council and the Council of the European Union” in Cini, M *et al.* *European Union Politics* (2016) at 138.

of the Treaty of Lisbon.¹⁰¹³ In terms of the new Constitution (Constitutional Treaty), this Council would have been called “the Council of Ministers” to distinguish it from the European Council.¹⁰¹⁴

With regard to the legislative role, the Council adopts the EU legislation and the budget. On the executive side it coordinates the broad economic policy goals of the member states, concludes international agreements of the EU, coordinates security and judicial cooperation, and proposes reforms to the EU treaties.¹⁰¹⁵

The Council is headed by the President, but the presidency is not an individual. It is rather the position held by a national government and rotates among the member states of the EU every six months. It uses a system of *presidency trios*, where the three successive presidencies cooperate on a common political programme for better coordination of the work and long-term priorities of the Council.¹⁰¹⁶ It meets in various formations where its composition depends on the topic discussed. For example, the Minister of Agriculture for the member state holding the presidency chairs the Agriculture Council.

6.1.1.3 The European Commission

The European Commission is the executive arm of the Union and also deals with the day-to-day running of the Union. It is responsible for drafting all laws of the EU and has a near monopoly on proposing new laws (bills), and as such has the

¹⁰¹³ Greenwood, J *et al.* “Conceptualising collective action in the European Union: An Introduction” in Greenwood, J *et al.* *Collective Action in the European Union: Interests and the New Politics of associability* (2013) at 2.

¹⁰¹⁴ Article I-19 of the new Constitution provides:

“The institutional framework (of the Union) comprises: The European Parliament; The European Council; The Council of Ministers (hereinafter referred to as the “Council”); The European Commission (hereinafter referred to as the “Commission”); and The Court of Justice of the European Union.”

¹⁰¹⁵ Hix, S *et al.* *The Political System of the European Union* (2011) at 9.

¹⁰¹⁶ Article 16(9) of the TEU; Naurin, D. “The councils of the EU: intergovernmental bargaining in a supranational polity” in Richardson, J *et al.* *European Union: Power and Policy-making* (2015) at 135.

duty of upholding the law and treaties. It is sometimes referred to as the “guardian of the treaties” because of this role.¹⁰¹⁷

Because of this role, it is also given a responsibility of giving a legal opinion before a matter can be referred to court for a suspected violation of the EU law.¹⁰¹⁸ When it performs its responsibilities, it is completely independent and does not take any instruction from any other institution of the EU or government of any Member State. It has thus greater authority on external relations matters than any other institution of the EU.¹⁰¹⁹

It is composed of commissioners, each representing a Member State. The President of the Commission is elected from among these commissioners by the European Parliament, on a proposal by the European Council. It also has the Secretary-General of the Commission, who is the most senior civil servant. The Commission is thus a political hybrid, both in terms of its functions and its composition.¹⁰²⁰

6.1.1.4 The European Parliament

The European Parliament shares the legislative and budgetary authority of the Union with the Council of the European Union (Council). They both can amend or reject the legislation or budget proposed by the Commission. While it, together with

¹⁰¹⁷ Article 17 of the TEU and Article 244 – 250 of the TFEU; Koskinen, K. *Translating Institutions: An Ethnographic Study of EU Translation* (2014) at 15.

¹⁰¹⁸ Article 259 of the TFEU provides:

“A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union. Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission. The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party’s case both orally and in writing. If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.”

¹⁰¹⁹ Article 17(3) of the TEU; Thomas, D.C. *Making EU Foreign Policy: National Preferences, European Norms and Common Policies* (2012) at 12; Bocquillon, P *et al.* “An elephant on the 13th floor of the Berlaymont? European Council and Commission relations in legislative agenda setting” *Journal of European Public Policy* vol. 21 no. 1 (2014) 20.

¹⁰²⁰ Nugent, N *et al.* *The European Commission* (2015) at 9 – 21; Shore, C. *Building Europe: The Cultural Politics of European Integration* (2013) at 130; Egeberg, M. *European Union Politics* (2003) at 126 – 136.

the Council, does not have legislative initiative, it has powers over the Commission which the Council does not have, in that the Commission reports and accounts to it only.¹⁰²¹ Its members are elected by universal suffrage directly by voters every five years according to political allegiance. The criteria used to determine the number of seats per Member State include population and economic strength of a country.¹⁰²²

When adopting the draft legislation by the Commission, it functions in an ordinary legislative procedure or process, previously called “co-decision”, with the Council. In this way the Parliament and the Council work together in a way similar to that of the two chambers in a national legislature. The Parliament will decide first and refer the matter to the Council for concurrence or approval, or vice versa.¹⁰²³

However, when dealing with areas of justice and home affairs, budget and taxation, and certain aspects of fiscal policy such as the environment, the two (Parliament and Council) follow *special legislative procedures* in which each decides alone.¹⁰²⁴

The Parliament also has other powers of general supervision. It has the power to set up a committee of inquiry, can call other institutions to answer questions and if necessary to take them to court if they break EU law or treaties. It also has powers over the appointment of the members of the Court of Auditors as well as the

¹⁰²¹ Article 17(8) of the TEU; Cram, L. “The EU institutions and collective action: Constructing a European Interest?” in Greenwood, J *et al.* *Collective Action in the European Union: Interests and the New Politics of associability* (2013) at 63.

¹⁰²² Article 14 of the TEU and Articles 223 – 234 of the TFEU; Hix, S *et al.* *Democratic Politics in the European Parliament* (2007) at 1 – 25; Judge, D *et al.* *The European Parliament* (2008) at 113; Hix, S *et al.* “Dimensions of Politics in the European Parliament” *American Journal of Political Science* vol. 50 no. 2 (April 2006) 494.

¹⁰²³ Drachenberg, R. “Policy-making in the European Union” in Cini, M *et al.* *European Union Politics* (2016) at 203; Kelemen, R.D. *The Rules of Federalism: institutions and regulatory politics in the EU and beyond* (2009) at 24.

¹⁰²⁴ Drachenberg (above); European Commission. “Explaining the Treaty of Lisbon” at http://europa.eu/rapid/press-release_MEMO-09-531_en.htm (accessed on 17 January 2017).

President and Executive Board of the European Central Bank (ECB). The ECB President is also obliged to present an annual report to the Parliament.¹⁰²⁵

6.1.1.5 The Court of Justice of the European Union

The Court of Justice of the European Union (CJEU), previously called the European Court of Justice (ECJ), is the judicial authority of the EU and its main task is to uphold the law and ensure that the EU law is interpreted and applied in the same way by all member states. This avoids situations where national courts might rule in different ways on the same issue, thereby ensuring that the EU law is equal for all those to whom it applies. The Court of Justice of the European Union includes the *Court of Justice*, the *General Court* and the *specialised courts*.¹⁰²⁶

The General Court shall include at least one judge per member state. The number of the judges of the General Court is determined by the Statute of the Court of Justice of the European Union (the Statute). The members of this Court are chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to the *high judicial office*.¹⁰²⁷

The difference between the General Court and the Court of Justice is that the former is the court of first instance whereas the latter is the court of appeal.¹⁰²⁸ The qualification requirements for the two courts are also different in that for the appointment to the Court of Justice candidates must possess qualifications required for appointment to the *highest* judicial offices in their respective countries, whereas

¹⁰²⁵ Raube, K. "The European External Action Service and the European Parliament" *Hague Journal of Diplomacy* vol. 7 issue 1 (2012) 65; Quaglia, L. "The politics of financial services regulation and supervision reform in the European Union" *European Journal of Political Research* vol. 46 issue 2 (2007) 269; Rittberger, B. "The Creation and Empowerment of the European Parliament" *Journal of Common Market Studies* vol. 41 issue 2 (2003) 203.

¹⁰²⁶ Article 19 of the TEU and Article 253 of the TFEU; Hix, S *et al.* *The Political System of the European Union* (2011) at 9.

¹⁰²⁷ Article 19(2) of the TEU; Chalmers, D *et al.* *European Union Law: Cases and Materials* (2010) at 44.

¹⁰²⁸ Article 256 of the TFEU.

for appointment to the General Court only qualifications required for appointment to *high* judicial office is necessary.

Where the General Court considers that the case requires a decision of principle likely to affect the unity or consistency of Union law, it may refer the case to the Court of Justice for a ruling. Decisions given by the General Court on questions referred for a preliminary ruling may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Union law being affected.¹⁰²⁹

The specialised courts are not peremptory and may be established by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure to hear and determine at first instance certain classes of action or proceeding brought in specific areas.¹⁰³⁰

The Court has jurisdiction in all the fields except for foreign and security policy, a clear sign that the EU has not reached the status of a political union.¹⁰³¹ However, policy and judicial-cooperation in criminal matters are no longer explicitly excluded as it was the case under the Maastricht Treaty.¹⁰³² It is open to any person,

¹⁰²⁹ *Ibid.*

¹⁰³⁰ Article 257 of the TFEU; Kallestrup, M. “European integration and European Court of Justice. Can European Court of Justice be seen as a pro-integrative institution?” Lecture for the University of Copenhagen Faculty of Social Science, Winter 2009 at 5.

¹⁰³¹ Article 275 of the TFEU provides:

“The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.”

Puetter, U. *The European Council and the Council: New Intergovernmentalism and Institutional Change* (2014) at 1.

¹⁰³² Kallestrup (above, fn 1030); Under the Maastricht Treaty the EU legally comprised three pillars, namely:

1. The European Communities pillar handled economic, social and environmental policies. It comprised the European Community (EC), the European Coal and Steel Community (ECSC, until its expiry in 2002), and the European Atomic Energy Community (EURATOM).
2. The Common Foreign and Security Policy (CFSP) pillar took care of foreign policy and military matters.
3. Police and Judicial Co-operation in Criminal Matters (PJCCM) brought together co-operation in the fight against crime. This pillar was originally named Justice and Home Affairs (JHA).

natural or juristic, but such a person must be persons “directly and individually” concerned.¹⁰³³ It is a reactive, and not a proactive, institution as it is not empowered to initiate cases.

There are other agencies established to deal with judicial co-operation in criminal matters, such as the *Eurojust* and *Europol*, with the former being responsible for prosecutions and the latter for policing.¹⁰³⁴ These agencies are necessary because the removal of barriers of trade and free movements of people and goods might be exploited by criminal elements.

Eurojust was established in 2002 to improve the handling of serious cross-border and organised crime by stimulating investigative and prosecutorial co-ordination among agencies of the EU member states. However, it is not empowered to investigate or prosecute crimes, but instead works to coordinate investigations and prosecutions between the EU member states when dealing with cross-border crime.¹⁰³⁵

Europol handles criminal intelligence and combating of serious international organised crime by means of cooperation between the relevant authorities of the member states, including those tasked with customs, immigration services, border and financial police, etc. Its officials are, however, not entitled to conduct investigations in the member states, or to arrest suspects.¹⁰³⁶

¹⁰³³ Article 263 of the TFEU.

¹⁰³⁴ Article 85 of the TFEU.

¹⁰³⁵ Maylis L *et al.* “The Role and organisation of Eurojust: added value for judicial co-operation in criminal matters” in Jörg M. *The institutional dimension of the European Union’s Area of Freedom, Security and Justice* (2010) at 195; Horváth, Z. *Handbook on the European Union* (2012) at 302.

¹⁰³⁶ “Council Decision of 6 April 2009 establishing the European Police Office (Europol)” *Official Journal of the European Union* L(121), 5 May 2009; Riekmann, S.P. “Security, Freedom and Accountability: Europol and Frontex” in Geyer, F. *Security Versus Justice?: Police and Judicial Cooperation in the European Union* (2016) at 19.

6.1.1.6 The European Central Bank

The European Central Bank (ECB) is the central bank of the EU and is responsible for managing the euro, the EU's single currency, and setting the EU's monetary policy.¹⁰³⁷ It is as such a lender of last resort to member states, as it happened during the so-called "Eurozone financial crisis". During this period, starting in late 2009, several Eurozone member states (Greece, Portugal, Ireland, Spain and Cyprus) were unable to repay or refinance their government debt, or to bail out over-indebted banks under their national supervision without the assistance of third parties. These member states were then bailed out by the ECB.¹⁰³⁸

6.1.1.7 The Court of Auditors

The Court of Auditors is responsible to check that the EU budget, funded by the European taxpayers, is spent correctly. It has no judicial powers, despite being called a "court".¹⁰³⁹

6.1.1.8 Other Institutions

The EU Treaty or Treaty of Lisbon creates other bodies that lie outside the Union's main institutional structure. These bodies have no legislative or other decision-making powers. Their main role is to advise the European Commission, the Council of the European Union, the European Commission and the European Parliament on legislative and policy proposals. These include the *Committee of the Regions*, the

¹⁰³⁷ Article 282 – 284 of the TFEU; Hix, S *et al.* *The Political System of the European Union* (2011) at 9.

¹⁰³⁸ De Grauwe, P. "The European Central Bank: Lender of last resort in the government bond markets?" Center for Economic Studies and Ifo Institute for Economic Research (CESifo) Working Paper: Monetary Policy and International Finance, No. 3569 (2011); Buiters, W.H *et al.* "The ECB as lender of last resort for sovereigns in the euro area" Centre for Economic Policy Research (CEPR) Discussion Paper No. 8974, May 2012.

¹⁰³⁹ Articles 285 – 287 of the TFEU; Hix (above, fn 1037).

*Economic and Social Committee, European Investment Bank*¹⁰⁴⁰ and the *Ombudsman*.¹⁰⁴¹

(a) The Committee of the Regions

The Committee of the Regions (CoR) is an advisory body which assists the European Parliament, the Council and the Commission, especially in cases which concern cross-border cooperation.

(b) The Economic and Social Committee

Economic and Social Committee (ESCC), like the Committee of the Regions, is an advisory and consultative body to the Union. It advises on matters such as social policy, social and economic cohesion, environment, education, health, customer protection, industry, trans-European networks, indirect taxation and structural funds. These two are totally independent of the institutions of the EU and are consulted only when necessary.¹⁰⁴²

(c) The European Investment Bank

The European Investment Bank is a lending institution created to fund the projects in the EU's poorer regions and to promote the development of small and medium-sized enterprises (SMEs). Its role has, however, developed to include projects of common interest to several member states which are of such a size or nature that they cannot be entirely financed by the various means available in the individual member states. Unlike the CoR and ESCC, it has a legal personality and operates on a non-profit-making basis, granting loans and giving guarantees which facilitate the financing of the projects.¹⁰⁴³

¹⁰⁴⁰ Article 300 of the TFEU.

¹⁰⁴¹ Article 228 of the TFEU.

¹⁰⁴² Article 304 of the TFEU.

¹⁰⁴³ Article 308 – 309 of the TFEU.

(d) The European Ombudsman

The European Ombudsman is elected by the European Parliament and investigates complaints against EU institutions from citizens, businesses and other bodies concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies, with the exception of the Court of Justice and acting in its judicial role. The Ombudsman is completely independent in the performance of his or her duties.¹⁰⁴⁴

6.1.2 Comparisons between the EU institutions and the SADC organs

6.1.2.1 The European Council versus the SADC Summit

The European Council is the counterpart of the Summit of Heads of State and Government in the SADC. They both consist of the heads of state and government.

The difference between the two is that European Council shares its executive powers with the other principal institutions of the EU, whereas the SADC Summit of Heads of State and Government (SADC Summit) is the supreme policy-making body, and is responsible for overall policy direction and control of the functions of the SADC.¹⁰⁴⁵

¹⁰⁴⁴ Article 228(1) of the TFEU provides:

“A European Ombudsman elected by the European Parliament shall be empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies, with the exception of the Court of Justice and acting in its judicial role. He or she shall examine such complaints and report on them.”

Kourtikakis, K. “Imitation and supranational politics: some lessons from the European Ombudsman and the European Court of Auditors” *European Political Science Review* vol. 2 issue 1 (2010) 27; Moure Pino, A.M. “The European Ombudsman in the Framework of the European Union” *Revista Chilena de Derecho* vol. 38 no. 3 (September - December 2011) 421.

¹⁰⁴⁵ Article 10 of the SADC Treaty.

Another difference between the two is that, since 2009 when the Treaty of Lisbon came into force, the President of the European Council shall not hold a national office. In other words, the President of the European Council is a full-time president.¹⁰⁴⁶ This means no President or Prime Minister of a member state will concurrently be President of the European Council. It also means that if a President or Prime Minister of a Member State were to be elected a President of the European Council, such a President or Prime Minister would have to vacate his or her national position. However, this has never happened in the history of the EU. Rather the drafters of the Lisbon Treaty seem to have had former Presidents and/or Prime Ministers in mind when they drafted this particular sub-article (15(6)(d) of the TEU).¹⁰⁴⁷ This is supported by the two choices so far of former Belgium Prime Minister Herman van Rompuy (1 December 2009 – 30 November 2014) and former Polish Prime Minister Donald Tusk (1 December 2014 – to date).

In the SADC, the Chairman of the Summit of Heads of State and Government is always a sitting head of state – president, prime minister or king (in the case of Swaziland) – of a member state.

6.1.2.2 The Council of the European Union vis-à-vis the SADC Council of Ministers

The Council of the European Union is the counterpart of the Council of Ministers in the SADC. The main difference between the two councils is that in the SADC the Council is composed of ministers responsible for foreign affairs or international relations,¹⁰⁴⁸ whilst in the EU the Council meets in various formations depending on the topic to be discussed.

¹⁰⁴⁶ Article 15(6)(d) of the TEU; Lewis, J. “The Council of the European Union and the European Council” in Magone, J.M. *Routledge Handbook of European Politics* (2015) at 220; Puetter, U. *The European Council and the Council: New Intergovernmentalism and Institutional Change* (2014) at 111.

¹⁰⁴⁷ Iey Berry, P.S. “[Comment] The new EU president: standard bearer or shaker?” *The EU Observer*, 16 November 2007.

¹⁰⁴⁸ Article 11(1) of the SADC Treaty provides:

“The Council shall consist of one Minister from each Member State, preferably a Minister responsible for Foreign or External Affairs.”

In the EU, for example, the Minister of Agriculture for the member state holding the presidency chairs the Agriculture Council. In the SADC it is always the Minister responsible for foreign affairs or international relations from the member state that holds the chairpersonship of the Summit who chairs the SADC Council of Ministers meetings.

Another difference is that the EU Council has both a legislative function, which it shares with the European Parliament, and an executive function, which it shares with the European Commission, whilst the SADC Council has neither.¹⁰⁴⁹

6.1.2.3 The European Commission vis-à-vis the SADC Secretariat

The European Commission is the counterpart of the Secretariat in the SADC and they are both responsible for administration in their respective bodies.

The main difference between the two is that the EU Commission has executive powers, whereas the SADC Secretariat does not. The EU Commission also has a legislative function, which it shares with the European Parliament, whereas the SADC Secretariat does not.¹⁰⁵⁰

¹⁰⁴⁹ Article 11(2) of the SADC Treaty lists the functions of the SADC Council as to:

- “1. oversee the functioning and development of SADC;
2. oversee the implementation of the policies of SADC and the proper execution of its programmes;
3. advise the Summit on matters of overall policy and efficient and harmonious functioning and development of SADC;
4. approve policies, strategies and work programmes of SADC;
5. direct, coordinate and supervise the operations of the institutions of SADC subordinate to it;
6. recommend, for approval to the Summit, the establishment of directorates, committees, other institutions and organs;
7. create its own committees as necessary;
8. recommend to the Summit persons for appointment to the posts of Executive Secretary and Deputy Executive Secretary;
9. determine the Terms and Conditions of Service of the staff of the institutions of SADC;
10. develop and implement the SADC Common Agenda and strategic priorities;
11. convene conferences and other meetings as appropriate, for purposes of promoting the objectives and programmes of SADC; and
12. perform such other duties as may be assigned to it by the Summit or this Treaty.”

¹⁰⁵⁰ Article 14(1) of the SADC Treaty provides:

“The Secretariat shall be the principal executive institution of SADC, and shall be responsible for:

The EU Commission also consists of commissioners each representing a Member State, and the Secretary-General of the Commission, who is the most senior civil servant. It is headed by the President who is elected by the European Parliament from among the other commissioners. It is thus a political hybrid, both in terms of its functions and its composition. The SADC Secretariat, on the other hand, is purely administrative, headed by the Executive Secretary.

6.1.2.4 The European Parliament vis-à-vis the SADC Parliamentary Forum

The European Parliament is the counterpart of the Southern African Development Community Parliamentary Forum (SADC-PF) in the SADC. The main difference between the two is that the European Parliament is a legislative body whilst the SADC-PF is not. The SADC-PF is not yet an institution or organ of the SADC and its role is thus limited to providing a platform for parliamentarians of the SADC to support and improve regional integration, and promote best practices in the role of parliaments in regional integration and cooperation.¹⁰⁵¹

6.1.2.5 The Court of Justice of the European Union vis-à-vis the SADC Tribunal

The Court of Justice of the European Union (CJEU) is the counterpart of the SADC Tribunal in the SADC. They are both judicial authorities in their respective bodies.

The main difference between the two is that the CJEU is totally independent whereas the SADC Tribunal is subject to the executive control of the Summit of

1. strategic planning and management of the programmes of SADC;
2. implementation of decisions of the Summit, Troika of the Summit, Organ on Politics, Defence and Security Co-operation, Troika of the Organ on Politics, Defence and Security Co-operation, Council, Troika of the Council, Integrated Committee of Ministers and Troika of the Integrated Committee of Ministers.”

¹⁰⁵¹ Karuuombe, B. “The role of parliament in regional integration – the missing link” in Bösl, A *et al.* *Monitoring Regional Integration in Southern Africa Yearbook* vol. 8 (2008) at 233.

Heads of State and Government. It was because of this executive control that the Summit suspended the Tribunal, after the Tribunal had given two judgments against the Government of Zimbabwe on its land policy, which it refused to honour: *Mike Campbell (PVT) Limited and Another v Republic of Zimbabwe (2/07) [2007] SADC (T) 1 (13 December 2007)* and *Gondo and Others v Republic of Zimbabwe 05/2008 [2010] SADC (T) (9 December 2010)*.

With regard to jurisdiction, the CJEU has jurisdiction in all the fields except for foreign and security policy, whilst the SADC Tribunal's mandate would be confined to the interpretation of the SADC Treaty and protocols relating to disputes between member states. This is in terms of the new Tribunal Protocol that was adopted by the 34th SADC Summit of Heads of State and Government, held in August 2014 in Victoria Falls, Zimbabwe, which is yet to come into operation.¹⁰⁵² In terms of the revised Tribunal Protocol, only states can be litigants in the Tribunal.¹⁰⁵³ In contrast, the CJEU is open to both natural and juristic persons.

6.2. THE EU ECONOMIC INTEGRATION

Europe's economic integration process narrative can be traced from coming into operation of the Treaty of Rome in 1958. It went through the five recognised "stages" of integration, namely, the free trade area (FTA); customs union; common market; economic community and monetary union. However, the first stage of the establishment of an FTA was not explicit in the Treaty of Rome.¹⁰⁵⁴

¹⁰⁵² Communiqué of The 34th Summit of SADC Heads of State and Government, Victoria Falls, Zimbabwe, 17-18 August 2014. This decision is not immune to challenges though. In South Africa the Law Society of South Africa (LSSA) has taken the Government to court insisting that it (Government) must ensure public participation prior to voting in favour of the new protocol. This is in line with the promise made in the Preamble of the SADC Treaty – "to be mindful of the need to involve the people of the region in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the rule of law." Also Sections 59 and 72 of the Constitution of South Africa oblige Parliament to facilitate public participation in its legislative processes; Manyathi-Jele, N. "SADC stakeholders form coalition to lobby for restoration of a SADC Tribunal" *De Rebus* (October 2014) 5; Erasmus, G. "The New Protocol for the SADC Tribunal: Jurisdictional Changes and Implications for SADC Community Law" Tralac Working Paper No. US15WP01/2015 (2015) at 1.

¹⁰⁵³ Erasmus (above, fn 1052).

¹⁰⁵⁴ Article 3 of the Treaty of Rome provided:

6.2.1 Free trade area and customs union

The Treaty of Rome did not explicitly make provision for establishment of the free trade area (FTA), but this was implied in Article 3(a). It provided that the activities of the European Community (EC) shall include the elimination, as between member states, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect. However, the EU FTA would be an imperfect form of free trade area since it was not, and is still not, equipped with rules of origin to prevent trade deflection.¹⁰⁵⁵

With regard to the customs union, the provision was both implicit and explicit in the Treaty of Rome. Article 3(b) made provision for the establishment of a common customs tariff and of a common commercial policy towards third countries whilst Article 9(1) stated:

“The Community shall be based upon a customs union which shall cover all trade in goods and which shall involve the prohibition between Member states of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.”

“ . . . the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

- (a) the elimination, as between Member states, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;
- (b) the establishment of a common customs tariff and of a common commercial policy towards third countries;
- (c) the abolition, as between Member states, of obstacles to freedom of movement for persons, services and capital;
- . . .
- (j) the establishment of a European Investment Bank to facilitate the economic expansion of the Community by opening up fresh resources.”

¹⁰⁵⁵ Bourdet, Y *et al.* “Completing the EU Customs Union. The Effects of Trade Procedure Harmonization” *Journal of Common Market Studies* vol. 50 issue 2 (March 2012) 300 at 305.

Article 12 of the Treaty of Rome prohibited the introduction of customs duties between member states on imports and exports¹⁰⁵⁶ and Article 13 provided for progressive abolishment of customs duties during the transitional period outlined in Article 14.¹⁰⁵⁷ Article 14 then made provision of the timetable and modalities of the reductions of the customs duties.¹⁰⁵⁸ Member states also committed themselves to setting up the common customs tariff.¹⁰⁵⁹ The first intra-EC tariff reductions were scheduled for 1 January 1959 and indeed took place as scheduled.¹⁰⁶⁰

The Common Commercial Policy¹⁰⁶¹ was also introduced in 1957 as the EC's external trade policy. It focused on tariffs and other border measures which affected trade in goods, and its formulation involved member states' representatives, who were closely consulted on a regular basis, and each Member State's government ministers, who took key decisions about the direction of trade policy through

¹⁰⁵⁶ Article 12 provided:

“Member states shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other.”

¹⁰⁵⁷ Article 13 provided:

“1. Customs duties on imports in force between Member states shall be progressively abolished by them during the transitional period in accordance with Articles 14 and 15.
2. Charges having an effect equivalent to customs duties on imports, in force between Member states, shall be progressively abolished by them during the transitional period. The Commission shall determine by means of directives the timetable for such abolition. It shall be guided by the rules contained in Article 14(2) and (3) and by the directives issued by the Council pursuant to Article 14(2).”

¹⁰⁵⁸ Article 14 provides:

“1. For each product, the basic duty to which the successive reductions shall be applied shall be the duty applied on 1 January 1957.
2. The timetable for the reductions shall be determined as follows:
(a) during the first stage, the first reduction shall be made one year after the date when this Treaty enters into force; the second reduction, eighteen months later; the third reduction, at the end of the fourth year after the date when this Treaty enters into force;
(b) during the second stage, a reduction shall be made eighteen months after that stage begins; a second reduction, eighteen months after the preceding one; a third reduction, one year later;
(c) any remaining reductions shall be made during the third stage; the Council shall, acting by a qualified majority on a proposal from the Commission, determine the timetable therefor by means of directives.”

¹⁰⁵⁹ Article 18 provided:

“The Member states declare their readiness to contribute to the development of international trade and the lowering of barriers to trade by entering into agreements designed, on a basis of reciprocity and mutual advantage, to reduce customs duties below the general level of which they could avail themselves as a result of the establishment of a customs union between them.”

¹⁰⁶⁰ Dinan, D. *Ever Closer Union? – An Introduction to the European Community* (2005) at 46; Duina, F.G. *The Social Construction of Free Trade: The European Union, NAFTA, and MERCOSUR* (2006) at 17.

¹⁰⁶¹ The Common Commercial Policy means it is the EU that sets external tariffs and negotiates trade deals, rather than individual member states.

majority (or in some areas, unanimous) voting within the EU's Council of Ministers.¹⁰⁶²

The Customs Union eventually came into being on 1 July 1968,¹⁰⁶³ but checkpoints at borders between member states eventually disappeared only in 1993 with the coming into operation of the Treaty establishing the European Union (Maastricht Treaty). In addition to the abolishment of customs duties at internal borders, a uniform system for taxing imports was put in place. Customs officers are now found at the EU's external borders.¹⁰⁶⁴

The Treaty of Nice,¹⁰⁶⁵ which came into operation in 2003, expanded the scope of the Common Commercial Policy into the fields of trade in services and trade-related aspects of intellectual property.

Having joined the EU in 2004, the central and eastern European states (CEECs) also entered into the customs union of the EU (Common External Tariff and Common Commercial Policy) and abolished border controls.¹⁰⁶⁶

The Treaty of Lisbon has now confirmed the EU as a customs union. Article 28 of the TFEU states that all trade in goods between the EU countries must be free of customs duties and that member states must apply a common customs tariff for goods imported from outside the EU. This means that all goods that have been imported into an EU country can then be moved freely within the EU without further customs checks.¹⁰⁶⁷

¹⁰⁶² Manchin, M *et al.* "External Trade Policy" in El-Agraa, A.M *The European Union: Economics and Policies* (2011) at 383; Cremona, M. "The external dimension of the internal market" in Barnard, C *et al. The Law of the Single European Market: Unpacking the premises* (2002) at 354.

¹⁰⁶³ Dinan (above, fn 1060).

¹⁰⁶⁴ European Union Commission Memorandum on Croatia's accession to the European Union, Brussels, 28 June 2013.

¹⁰⁶⁵ The Treaty of Nice mainly amended the Maastricht Treaty, by reforming the institutional structure of the European Union to withstand eastward expansion.

¹⁰⁶⁶ De Benedictis, L *et al.* "Hub-and-Spoke or else? Free trade agreements in the 'enlarged' European Union", *Istituto di Studi e Analisi Economica* (ISAE) Working Paper No. 52, June 2005 at 11.

¹⁰⁶⁷ Viner, J. *The Customs Union Issue* (2014) at 51; Horspool, M *et al. European Union Law* (2012) at 71.

The Treaty of Lisbon also extends the Common Commercial Policy to the second most important field of international economic relations, namely foreign investment. It empowers the Union to take external action in most fields of foreign investment regulation and facilitates the exercise of its current, fragmented and incomplete competence over foreign investment by establishing a single legal basis. Furthermore, the scope of the foreign direct investment (FDI) competence extends to specific aspects of foreign investment regulation, such as performance requirements and movement of key personnel.¹⁰⁶⁸

The Treaty also brings a change with regard to decision-making in the field of the Common Commercial Policy. Articles 207 and 218 of the TFEU render the European Parliament a co-legislator, together with the Council, in the definition and implementation of the framework of the Common Commercial Policy. The consent of the European Parliament is necessary not only for the adoption of autonomous measures, but also for the negotiation and conclusion of international agreements, which is the basic means of action in the field of the Common Commercial Policy.¹⁰⁶⁹

However, Bourdet *et al*¹⁰⁷⁰ argue that in practice, the EU does not meet the customs union condition of having a common external trade policy and as such it is not a pure customs union. They state that there is a lot of variations in trade procedures between EU countries with delays that range from merely five days in the most efficient countries to twenty-five days in some others. This, they state, happens despite the existence of the Common Commercial Policy that is entrenched in the Treaty.

¹⁰⁶⁸ Article 206 – 207 of the TFEU; Cremona (above, fn 1062) at 30.

¹⁰⁶⁹ Krajewski, M. “External Trade Law and the Constitutional Treaty: Towards a federal and more democratic common Commercial Policy?” *Common Market Law Review* (CMLR) vol. 42 (2005) 96 at 123; Dimopoulos, A. “The Common Commercial Policy after Lisbon: Establishing parallelism between internal and external economic policy?”, Seminar on *Re-thinking the European Constitution in an Enlarged European Union* Faculty of Law - University of Zagreb, Jean Monnet Seminar 6th Session, 26 April 2015.

¹⁰⁷⁰ Bourdet, Y *et al*. “Completing the EU Customs Union. The Effects of Trade Procedure Harmonization” *Journal of Common Market Studies* vol. 50 issue 2 (March 2012) 300 at 311.

One of the consequences of the EU Customs Union is that the EU negotiates as a single entity in international trade deals such as the World Trade Organisation (WTO), instead of individual member states negotiating for themselves. As such the EU sets its imports tariffs and other customs rules on the basis of international agreements and, in principle, these apply to all imports.¹⁰⁷¹

The average level of EU customs duty on industrial products is 4 percent, but the EU offers cut-rate entry and often duty-free access for goods from other countries. This is done within the framework of several agreements that it has concluded with third countries, and in the framework of autonomous preferential arrangements for some beneficiary countries, tariff concessions are provided for a pre-determined volume of goods. These tariff concessions are called “preferential tariff quotas”.¹⁰⁷²

Customs officers have to ensure compliance with both the EU and international rules on protection of the environment, and of consumer health and safety. They also do a vital job in collecting statistics. For example, they have to keep records of goods that have, or might become subject to quotas because they are not competing fairly with EU products. The data that they collect on trade flows helps policymakers to understand key trends in the economy.¹⁰⁷³

Another task for customs is to ensure that anyone travelling with large amounts of cash or its equivalent (such as bearer bonds or cheques) is entitled to do so and is not using these as a way of laundering money. Customs officers help to fight illicit traffic in people, drugs, firearms, etc. They combat organised crime and support the work of the police and immigration services.

¹⁰⁷¹ “Finance Guides” – *EUbusiness* (online). Available at http://www.eubusiness.com/topics/finance/guides/atct_topic_view?b_start:int=300&-C (accessed on 28 October 2016).

¹⁰⁷² “Taxations and Customs Union” https://ec.europa.eu/taxation_customs/business/calculation-customs-duties/what-is-common-customs-tariff/tariff-quotas_en; http://europa.eu.int/pol/cust/overview_en.htm (accessed on 28 October 2016).

¹⁰⁷³ Alevantis, P.E. “History and Evolution of the European Union Institutions and Policies” Text for the course “International Business – Europe”, Napier University, Edinburgh (2013) at 12.

Before 1988, customs offices across the European Union used 150 different forms in their dealings with business. Now they use a single document and most trade is processed electronically through the New Computerised Transit System (NCTS), launched in 2003. These simplified procedures for handling more than 20 million transit operations annually apply to all EU countries and also to non-EU European states, such as Iceland, Liechtenstein, Norway and Switzerland. And the EU and its member states are constantly updating these automated procedures, spending well over 400 million euros between 2003 and 2013 on automating customs procedures.¹⁰⁷⁴

The NCTS is part of the e-Europe, launched in December 1999 by the Commission to bring the benefits of the information technology to all Europeans. One of its aims is to stimulate the growth of e-commerce (buying and selling online) and the inherent re-organisation of business processes to digital technologies. The EU is, therefore, constantly working on updating customs procedures with the twin aims of radically simplifying intra-EU trade and trade with other countries, and of optimising the use of information technology.¹⁰⁷⁵

At all times, the EU balances the goal of easy trade and travel against the need for customs officers to collect statistics and to check containers – for example, to see that they do not contain arms and are not being used for human trafficking. Automation, through the use of container scanners, for example, helps to achieve this objective. This helps to achieve current goals of tightening security controls, but avoids the need for lengthy manual container searches.¹⁰⁷⁶

¹⁰⁷⁴ *Ibid.*

¹⁰⁷⁵ e-Europe Act, 1999, titled “eEurope - An information society for all” available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A124221> (accessed on 31 October 2016).

¹⁰⁷⁶ Brian, T *et al.* *Fatal Journeys: Tracking Lives Lost during Migration* (2014) at 32; European Commission. “Guidelines for Integrated Border Management in European Commission External Cooperation”, November 2010 at 40.

Customs officers play a crucial role in collecting duty on imports and value-added tax. They ensure imports are not avoiding duty by claiming to fall into a category that pays a lower tariff. They also detect fraud in value-added tax declarations and payments, or the evasion of excise duties on items such as cigarettes. Without this work by customs officers, it would be all too easy for goods to disappear into the black economy rather than entering the tax system, or for unscrupulous business people to report fictitious trade.¹⁰⁷⁷

This is important not just for the sake of fair trade, but also for the EU's budget. Some of the EU budget comes from customs duties and levies on non-EU imported products.¹⁰⁷⁸

6.2.2 The Common or Single Market

One of the original core objectives of the European Economic Community (EEC) was the development of a common market offering free movement of goods, services, people and capital.¹⁰⁷⁹ The tangible attempt to establish the common market was done through the Delors Commission,¹⁰⁸⁰ which took the initiative to publish a White Paper in 1985 identifying 300 measures to be addressed in order to create a single market. The Delors Commission relied, among others, upon the European Court of Justice's *Cassis de Dijon*¹⁰⁸¹ jurisprudence of non-discrimination, under which member states were obliged to recognise goods which had been legally produced in another member state, unless the member state could justify the restriction by reference to a mandatory requirement.

¹⁰⁷⁷ European Commission (above).

¹⁰⁷⁸ "How is the EU Funded?" (online), available at https://europa.eu/european-union/about-eu/money/revenue-income_en (accessed on 31 October 2016).

¹⁰⁷⁹ Article 2 of the (Rome) Treaty establishing the European Economic Community provides that it shall be the aim of the Community to establish a common market. Article 3(c) provides that this shall be done through, inter alia, abolishing, as between member states, of the obstacles to the free movement of persons, services and capital.

¹⁰⁸⁰ The Delors Commission was the administration of Jacques Delors, the eighth President of the European Commission (1985 – 1994).

¹⁰⁸¹ *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (1979) Case 120/78.

The White Paper was well-received and led to the adoption of the *Single European Act* in 1986, a treaty which reformed the decision-making mechanisms of the EEC and set a deadline of 31 December 1992 for the completion of a single market. It essentially entailed combining market and political integrations.¹⁰⁸²

The single market was eventually achieved in 1993 when the Treaty of Maastricht (Treaty establishing the European Union) came into operation. The single market was the EU's greatest achievement and also its toughest challenge, and is the core of today's Union. It basically means that barriers are removed, and people, goods, services and money move around Europe as freely as within one country. The free movement of "goods", "people", "services" and "capital" are commonly referred to as the "four freedoms" of the EU.¹⁰⁸³

Free movement of goods within the European Union is achieved by a customs union, and the principle of non-discrimination. The free movement of persons, on the other hand, means EU citizens can move freely between member states to live, work, study or retire in another country. This is done through Article 45 of the TFEU, which prohibits restrictions on the basis of nationality. In terms of Article 20 of the TFEU, citizenship of the EU derives from the nationality of a member state. The Court of Justice (ECJ) also held that "citizenship is destined to be the fundamental status of nationals of the member states."¹⁰⁸⁴

The "freedom to provide services" applies to people who give services "for remuneration", especially commercial or professional activity. "Services" in

¹⁰⁸² Barnard, C. "Competence Review: the internal market" (online) at 10. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/226863/bis-13-1064-competence-review-internal-market.pdf (accessed 31 October 2016); Gabel, M.J. *Interests and Integration: Market Liberalization, Public Opinion and European Union* (2009) at 6. Fligstein, N *et al.* "How to Make a Market: Reflections on the Attempt to Create a Single Market in the European Union" *American Journal of Sociology* vol. 102 no. 1 (July 1996) 1 at 14; Ross, G. *Jacques Delors and European Integration* (1995) at 8.

¹⁰⁸³ Kaczorowska-Ireland, A. *European Union Law* (2016) at 534 Nugent, N. *The Government and Politics of the European Union* (2010) at 33 -50.

¹⁰⁸⁴ Judgment of the Court of Justice in *Grzelczyk v Centre Public d'Aide Sociale d'Ottignes-Louvain-la-Neuve* (2001) C-184/99, [2001] ECR I-6193.

particular include: activities of an industrial character; activities of a commercial character; activities of craftsmen; and activities of the professions.¹⁰⁸⁵ The ECJ has held that this means activities such as prostitution or other quasi-legal activities that are subject to restriction in other member states do not qualify as services.¹⁰⁸⁶

In terms of Article 63 of the TFEU, “all restrictions on the movement of capital between member states and between member states and third countries shall be prohibited.” This means capital controls of various kinds are prohibited, including limits on buying currency, limits on buying company shares or financial assets, or government approval requirements for foreign investment. The EU *Capital Movement Directive 1988 Annex I* covers thirteen categories of capital which must move freely.¹⁰⁸⁷

To make it happen, the EU institutions and the member states have adopted hundreds of directives and policies needed to do away with technical, regulatory, legal, bureaucratic, cultural and protectionist barriers that stifled free trade and free movement within the Union. And the single market has opened up economic and

¹⁰⁸⁵ Article 57 of the TFEU provides:

“Services shall be considered to be “services” within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.”

¹⁰⁸⁶ *Josemans v Burgemeester van Maastricht* C-137/09 [2010] I-13019.

¹⁰⁸⁷ In terms of the *Capital Movement Directive 1988 (88/361/EEC) Annex I*, the following are covered:

- (i) investment in companies;
- (ii) real estate;
- (iii) securities;
- (iv) collective investment funds;
- (v) money market securities;
- (vi) bonds;
- (vii) service credit;
- (viii) loans;
- (ix) sureties and guarantees;
- (x) insurance rights;
- (xi) inheritance and personal loans;
- (xii) physical financial assets; and
- (xiii) other capital movements.

working opportunities that have transformed the lives of hundreds of millions of Europeans.¹⁰⁸⁸

According to the European Commission, the single market has achieved, among others, the following:

- created 2.77 million new jobs since 1993 and generated more than 800 billion euro in extra wealth;
- helped by new technology – the opening of national EU markets has brought down the price of national telephone calls by 50% since 1998;
- the removal of national restrictions has enabled more than 15 million Europeans to go to another EU country to work or spend their retirement;
- intra-EU trade in goods soared from 800 billion euro in 1992 to 2 800 billion euro in 2012, an increase of 22%.¹⁰⁸⁹

The creation of the single market also gave the European Union countries a stronger incentive to liberalise previously protected monopoly markets for utilities such as telecommunications, electricity, gas and water. The independent national regulators who supervise the now-liberalised markets for telecoms and energy coordinate their activity at EU level. Not just big industries, but households and small business across Europe are increasingly able to choose who supplies them with electricity and gas.¹⁰⁹⁰

The achievements of the single market seem to have vindicated Jacques Delors, former European Commission President and instigator of the whole single market project, who was quoted as saying that when he launched his vast single market project in 1985, he knew just how much potential for growth and odd jobs remained

¹⁰⁸⁸ Weatherill, S. *Cases and Materials on EU Law* (2016) at 250; OECD. *APEC-OECD Co-operative Initiative on Regulatory Reform: Proceedings of the Fourth Workshop, Vancouver, Canada, 2004* (2008) at 41.

¹⁰⁸⁹ European Commission. *20 Years of the European Single Market* (2012) at 4; Kalimo, H *et al.* “The United Kingdom and the (Digital) Single Market”, *Institute for European Studies Policy Brief* issue 2016/ 9 (April 2016) at 2.

¹⁰⁹⁰ European Commission (above) at 17 – 24.

locked up behind national frontiers. He stated that tariffs and quotas had been abolished at the end of the 1960s, but many technical and administrative obstacles to free trade still persisted.¹⁰⁹¹

Despite the huge success of the single market, it also had some slight shortcomings. For example, the services sector has opened up more slowly than markets for goods. This is particularly the case for a wide range of financial services, and for transportation, where separate national markets still exist, especially for rail and air transport.¹⁰⁹²

There is also a need to remove more red tape, those administrative and technical barriers to the free flow of goods and services. These include the reluctance of EU countries to accept each other's standards and norms or sometimes to recognise the equivalence of professional qualifications. The fragmented nature of national tax systems also puts a brake on market integration and efficiency.¹⁰⁹³

Free movement of labour has also caused problems of net migration, especially from Eastern Europe to Western Europe, and this has resulted in overcrowding in some of the Western Europe cities. This migration has pushed up house prices and increased congestion on the roads.¹⁰⁹⁴

To respond to these challenges, the European Commission, in April 2011, adopted the *Single Market Act*, which launched twelve key projects designed to give a new

¹⁰⁹¹ Jacques Delors. "The Single Market, Cornerstone of the EU", Speech at a Conference by the European Commission and the French Ministry for Economic Regeneration, in partnership with Notre Europe – Jacques Delors Institute, on the occasion of the 20th anniversary of the single market, Paris, 22 November 2012.

¹⁰⁹² Monti, M. "A New Strategy for the Single Market: At the Service of Europe's Economy and Society" Report to the President of the European Commission, 9 May 2010 at 64.

¹⁰⁹³ *Ibid.*

¹⁰⁹⁴ Atoyán, R *et al.* "Emigration and Its Economic Impact on Eastern Europe", IMF Discussion Note SDN/17/07, July 2016; Springford, J. "Is immigration a reason for Britain to leave the EU?" Report for the Centre for European Reform, October 2013; Kahanec, M *et al.* "Migration in an enlarged EU: A challenging solution?" Economic Paper no. 363, EU Commission Directorate-General for Economic and Financial Affairs, March 2009; Bruder, J. "East-West Migration in Europe, 2004 – 2015" University of Rostock Thünen-Series of Applied Economic Theory Working Paper No. 40, November 2003.

momentum to the Single Market and help stimulate economic growth. The twelve projects relate to competitiveness, social progress and growth, and range from worker mobility and SME finance to digital content and taxation. These are:

1. Access to finance for SMEs;
2. Worker mobility in the Single Market;
3. Intellectual property rights;
4. Consumers: Single Market players;
5. Services: strengthening standardisation;
6. Stronger European networks;
7. Digital Single Market;
8. Social entrepreneurship;
9. Taxation;
10. More social cohesion in the Single Market;
11. Regulatory environment for business; and
12. Public procurement.¹⁰⁹⁵

All these are continuing under the *Europe 2020* strategy, which is a 10-year strategy proposed by the European Commission on 3 March 2010, and adopted in August 2010, for the advancement of the economy of the European Union. It aims at “smart, sustainable, inclusive growth” with greater coordination of national and European policy by 2020.¹⁰⁹⁶

In May 2015, the European Commission introduced a Digital Single Market (DSM) for the continent as part of the Europe 2020 Strategy. It aims to encourage trade between member states; remove barriers; and encourage free movement of goods, services and people through technology. It targets information and communication technology (ICT) standards and interoperability, the modernisation of intellectual property rights enforcement, parcel delivery, the collaborative economy and e-

¹⁰⁹⁵ “Single Market Act: Twelve levers to boost growth and strengthen confidence”, Communication from the European Commission to the European Parliament, the Council, The Economic and Social Committee and the Committee of the Regions – April 2011.

¹⁰⁹⁶ “Europe 2020: A European Strategy for Smart, Sustainable, and Inclusive Growth”, August 2010 at 1.

commerce. The European Commission estimates that the completion of the DSM could contribute €415 billion per year to the EU economy and create hundreds of thousands of new jobs.¹⁰⁹⁷

The DSM has already delivered some achievements for European citizens in terms of access to services: the success most touted by the European Commission is the reduction of mobile roaming costs for European travellers. Industrial growth has been supported by research and development funds, currently disbursed through (among others) the Horizon 2020 programme. And it is hoped that in the near future, EU regulations will also help provide a (more) secure online environment for all Europeans (notably regarding data protection).¹⁰⁹⁸

6.2.3 The Economic and Monetary Union (EMU)

The economic union essentially means the existence of a single market plus close coordination of member states' economic policies. The monetary union, on the other hand, involves fixed exchange rates and a common monetary policy, possibly, but not necessarily, with a single currency. And the European leaders seem to have wanted to combine the two from the beginning.¹⁰⁹⁹

The original Treaty of Rome espoused, and implicitly endorsed, the economic and monetary union through Articles 105 – 109.¹¹⁰⁰ In 1972 the Community leaders made a call for the attainment of the economic and monetary union (EMU) by the end of the decade (i.e. by 1980). Though this was unrealistic due to the difficult

¹⁰⁹⁷ Kalimo, H *et al.* “The United Kingdom and the (Digital) Single Market” *Institute for European Studies Policy Brief* issue2016/ 9 (April 2016) at 2; “The European Single Market” at https://ec.europa.eu/growth/single-market_en (accessed on 21 November 2016).

¹⁰⁹⁸ Kalimo (above).

¹⁰⁹⁹ Verdun, A. “Economic and Monetary Union” in Cini M *et al.* *European Union Politics* (2016) at 297.

¹¹⁰⁰ The articles called for coordination of economic and monetary policies of member states through, *inter alia*, a monetary committee.

economic climate of the time, it nevertheless constituted an important political assertion of the EMU's significance for European integration.¹¹⁰¹

With the single market already off to a strong start in 1987, the next step for the community was to work towards achieving the single or common market and the EMU concurrently. This was in line with the 1990 communication by the EU Commission developing the linkage between the single market and the EMU:

“A single currency is the natural complement of a single market. The full potential of the latter will not be achieved without the former. Economic and monetary union therefore offers the prospect of consolidating the single market as well as bringing its own value-add to the performance of the Community economy.”¹¹⁰²

In the same year, 1990, the Commission produced a cost-benefit analysis of an EMU, *One Market, One Money*, in which it reinforced its message that “one market needs one money.”¹¹⁰³ When the Maastricht Treaty came into operation in 1993, it adopted the three-stage process, as proposed by the Delors Commission in 1989, towards the achievement of the EMU:

- Stage 1 – had already begun on 1 July 1990 until 31 December 1993 and involved the abolishment of exchange controls, thus capital movements were completely liberalised in the European Economic Community.
- Stage 2 – would automatically begin on 1 January 1994 to 31 December 1998 and involved the establishment of the European Monetary Institute, as the forerunner of the European Central Bank (ECB), with the task of strengthening monetary cooperation between the member states and their national banks, as well as supervising European Currency Unit (ECU) banknotes. This would culminate in the establishment of the European

¹¹⁰¹ The October 1972 Paris Summit Communique made a solemn declaration: “The member states of the Community, the driving force of European construction, affirm their intention before the end of the present decade to transform the whole complex of their relations into a European Union.”

¹¹⁰² European Community Commission (ECC). *Economic and Monetary Union* (1990) at 11.

¹¹⁰³ European Community Commission. *One Market, One Money: An Evaluation of the Potential Benefits and Costs of Forming an Economic and Monetary Union* (1990) at 9.

Central Bank on 1 June 1998 and the establishment of the single currency, the euro, on 31 December 1998.

- Stage 3 – 1 January 1999 and continuing. The euro is now a real currency, and a single monetary policy is introduced under the authority of the ECB for the participating member states, the so-called “Eurozone”.¹¹⁰⁴

All EU member states are part of the EMU, but not of the Eurozone. This is because each of the three stages consists of progressively closer economic integration, and only once a state participates in the third stage it is permitted to adopt the euro as its official currency. So far only nineteen of the twenty-eight member states are part of the Eurozone.¹¹⁰⁵

The consequence of the Eurozone is monetary policy inflexibility. Since membership of the Eurozone establishes a single monetary policy for the respective member states, they can no longer use an isolated monetary policy, for example, to increase their competitiveness at the cost of other Eurozone members by printing money and thus devalue their currencies, or to print money to finance excessive government deficits, or to pay interest on unsustainable high government debt levels. As a consequence, if member states do not manage their economy in a way that they can show a fiscal discipline (as they were obliged to by the Maastricht Treaty),¹¹⁰⁶ they will sooner or later risk a sovereign debt crisis in their country without the possibility to print money as an easy way out. This is what happened to Greece, Ireland, Portugal, Cyprus, and Spain during what is commonly called “Eurozone financial crisis”.¹¹⁰⁷

¹¹⁰⁴ Enderlein, H. “25 years after the Delors Report: Which lessons for economic and monetary union?” Jacques Delors Institute Policy Paper 109, April 2014; Mayes, D *et al.* “The development of EU economic and monetary integration” in El-Agraa, A.M *The European Union: Economics and Policies* (2011) at 163; Dinan, D. *Ever Closer Union? – An Introduction to the European Community* (2005) at 426.

¹¹⁰⁵ These are: Austria, Belgium, Cyprus, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Slovenia, and Spain.

¹¹⁰⁶ The Maastricht Treaty introduced a detailed rule and procedure to control excessive deficits, with specific numerical targets and the possibility of sanctions (Article 104(c) TEC, the so-called “excessive deficit procedure”).

¹¹⁰⁷ At the end of 2009 these countries were faced with high structural deficits, a slowing economy and expensive bailouts that led to rising interest rates, which exacerbated their governments’ tenuous positions.

The Treaty of Lisbon also provides measures for economic and monetary discipline. Member states of the EU regard their economic policies as a matter of common concern and coordinate them within the Council. The Council, on a recommendation from the Commission, formulates a draft for broad guidelines of the economic policies of the member states and of the Union, and reports its findings to the European Council. The European Council, on the basis of the report from the Council, discusses a conclusion on broad guidelines of the economic policies of the member states and of the Union. On the basis of this conclusion, the Council shall adopt a recommendation setting out these broad guidelines. It then informs the European Parliament of its recommendation.¹¹⁰⁸

6.2.3.1 The single currency

The single currency of the EU, the euro, was introduced on 1 January 1999 after the conversion rates between it and the currencies of the participating EU countries were irrevocably fixed on 31 December 1998. The “Eurosystem”, composed of the European Central Bank (ECB) and the national central banks (NCBs) of the euro-area countries, then took over responsibility for the monetary policy in the new euro area, the Eurozone. This was the beginning of a transitional period that was to last three years and end with the introduction of euro banknotes and coins, and the withdrawal of national banknotes and coins, in the participating member states in 2002.¹¹⁰⁹

During the transition period, an extensive publicity campaign to familiarise the general public with the euro and the coming introduction of its banknotes and coins was conducted. This included the appearance of dual pricing on labels in shops and

This situation was commonly referred to as “Eurozone financial crisis”; De Grauwe, P. “Crisis in the eurozone and how to deal with it”, Centre for European Policy Studies (CESP) Policy Brief No. 204, February 2010; Mody, A *et al.* “The Eurozone Crisis: How Banks and Sovereigns Came to be Joined at the Hip”, the IMF Working Paper WP/11/269, November 2011.

¹¹⁰⁸ Article 118 of the TFEU.

¹¹⁰⁹ European Commission. *One currency for one Europe: The road to the euro* (2015) at 8.

petrol stations, etc. For administrations and businesses there was a longer transition period as they gradually switched their systems for accounting, pricing and payments over to the euro.¹¹¹⁰

The cash changeover was completed within two months. National banknotes and coins ceased to be legal tender by the end of February 2002 at the latest, and earlier in some euro area countries. By that time, more than 6 billion banknotes and close to 30 billion national coins had been withdrawn, and for over 300 million citizens in 12 Eurozone countries the euro had finally arrived.¹¹¹¹

All the EMU members are eligible to adopt the euro and they may choose to wait if they think that their economies are not yet ready. They thus have to weigh the disadvantages (less control over their inflation, interest and exchange rates) against the likely benefits – which include having the same currency as major trading partners, greater credibility in international financial markets, and consequently greater flows of investment.¹¹¹²

The EMU member states wanting to introduce the euro must meet certain economic criteria. There are four main criteria, called the “convergence criteria”, that must be met, and these are a set of macroeconomic indicators which measure:

- price stability, to show inflation is controlled;
- soundness and sustainability of public finances, through limits on government borrowing and national debt to avoid excessive deficit;
- exchange-rate stability, through participation in the Exchange Rate Mechanism (ERM II)¹¹¹³ for at least two years without strong deviations from the ERM II central rate;

¹¹¹⁰ *Ibid.*

¹¹¹¹ *Ibid.*

¹¹¹² European Commission. “Economic and Financial Affairs – Who can join and when?”, available at http://ec.europa.eu/economy_finance/euro/adoption/who_can_join/index_en.htm (accessed on 21 November 2016).

¹¹¹³ The first Exchange Rate Mechanism (ERM) was introduced in 1979, hence the current one, introduced after the adoption of the euro, is referred to as “ERM II”.

- long-term interest rates, to assess the durability of the convergence achieved by fulfilling the other criteria.¹¹¹⁴

In addition to meeting the economic convergence criteria, a euro-area candidate country must make changes to national laws and rules, notably governing its national central bank and other monetary issues, in order to make them compatible with the Treaty. In particular, national central banks must be independent, such that the monetary policy decided by the European Central Bank is also independent.¹¹¹⁵

The Commission and the European Central Bank assess the progress made by the euro-area candidate countries, publish their conclusions in respective convergence reports to determine whether these criteria are met and then report to the Council thereon. This is done at least once in every two years or at the request of a non-Eurozone member state.¹¹¹⁶

The euro is now a recognised international currency used increasingly by international travellers and for invoicing commercial transactions with countries outside the euro-area, thus reducing the risk for euro-area business. It is also used by central banks worldwide as a reserve currency. Individuals also benefit from this process; they make savings by not having to change money when travelling within the euro area, by being able to compare prices more readily, and by benefitting from lower costs for the cross-border money transfer.¹¹¹⁷

With regard to trade, there is no doubt that trade among member countries of the EMU has moderately increased after the introduction of the euro. Several studies

¹¹¹⁴ These criteria, also called the “Maastricht criteria” were agreed to by the EU Member states in 1991 as part of the preparations for introduction of the euro; Haynes, P. “The European Single Currency Project and the Concept of Convergence for European Welfare States – The Ideal and the Reality” *Social Policy and Administration* vol. 49 issue 4 (July 2015) 466.

¹¹¹⁵ Articles 136 – 137 of the TFEU.

¹¹¹⁶ Article 140 of the TFEU; Haynes (above, fn 1114).

¹¹¹⁷ Investopedia Staff. “The 6 Most-Traded Currencies And Why They’re So Popular”, at <http://www.investopedia.com/articles/forex/11/popular-currencies-and-why-theyre-traded.asp> (accessed on 22 November 2016).

have found that this increment applies across all trade, including sectoral trade as well as firm level trade. These studies have found that the euro has increased the number of products that exporters ship to the euro-area. Further, they found that the newly exported products appear to be characterised by lower unit values than those that firms already export. All these effects are stronger for smaller and less productive firms.¹¹¹⁸

The Eurozone, however, raises some questions with regard to integration. One obvious question would be: can the EMU function in a European Union, in which not all countries have or use the single currency? The question is important, especially when considering that the Delors Report, which is the basis of the EMU, stated that there is a direct link between the single market and the single currency in order to achieve the integration in Europe.¹¹¹⁹

However, it should be noted that the single currency is not necessarily a requirement for the economic and monetary union stage of integration. However, the EU still expects all the member states to adopt the euro, albeit on meeting the “convergence criteria”. What this means for now is that the EU is not a pure or full-fledged monetary union. In other words, it is a weak version of a monetary union.¹¹²⁰

The “Eurozone financial crisis” has also cast some doubt over the whole single currency notion. It exposed one major flaw of having a single currency: the

¹¹¹⁸ Baldwin, R *et al.* “Study on the Impact of the Euro on Trade and Foreign Direct Investment”, Economic Papers 321, European Commission Directorate-General for Economic and Financial Affairs (2008); Berger, H *et al.* “Zooming Out: The Trade Effect of the Euro in Historical Perspective” *Journal of International Money and Finance* vol. 27 issue 8 (2008) 1244; Nitsch, V *et al.* “Scalpel, Please! Dissecting the Euro’s Effect on Trade,” ETH Zurich and National Bank of Belgium (2008); Flam H *et al.* “Euro effects on the intensive and extensive margins of trade” Center for Economic Studies and Ifo Institute for Economic Research (CESifo) Working Paper No. 1881, December 2006; Glick, R *et al.* “Does a Currency Union Affect Trade? The Time-Series Evidence” *European Economic Review* vol. 46 (June 2002) 1125; Rose, A. K. “One Money, One Market: The Effect of Common Currencies on Trade” *Economic Policy* 30 (April 2000) 7.

¹¹¹⁹ Enderlein, H. “25 years after the Delors Report: Which lessons for economic and monetary union?” Jacques Delors Institute Policy Paper 109, April 2014 at 16.

¹¹²⁰ Thygesen, N. “Why Did Europe Decide to Move to a Single Currency 25 Years Ago?” *Leibniz Information Centre for Economics Forum* (2016) at 6.

vulnerability of individual member states in trading in a currency that is not under their remit, but under the remit of the ECB.¹¹²¹

6.3 LESSONS TO BE LEARNED FROM THE EU INTEGRATION

Having made reference to the EU integration, it is proper to draw some lessons thereof from which the SADC integration can learn. However, these lessons must be made within certain contexts, taking into account different economic levels of the two continents.

However, the EU and the SADC integrations have some similarities. They both started against the backdrop of wars. The EU integration started against the backdrop of World War II and was entrenched during the “cold war”. The SADC, on the other hand, started against the backdrop of the liberation struggles in various member states.¹¹²²

6.3.1 Role played by institutions

Jean Monnet, widely regarded as the father of European integration, is quoted as having said: “Nothing is possible without men; nothing is lasting without institutions.”¹¹²³

6.3.1.1 Role played by EU institutions

The EU institutions play an active part in the integration agenda of the EU. All its seven principal institutions have decision-making powers and the EU Parliament and the Council have legislative and budgetary authority as per the TEU and the

¹¹²¹ Stiglitz, J. “A split euro is the solution for Europe’s single currency” *Financial Times* of 17 August 2016.

¹¹²² Almost all the SADC country went through wars of colonial resistance, whilst Angola, Mozambique, Zimbabwe, Namibia and South Africa also had overt liberation wars or struggles; Saul, J. “The Liberation of Southern Africa: The struggle continues” *International Journal of Socialist Renewal* vol. 12 (May – October 2010) 2.

¹¹²³ Tiersky, R. *François Mitterrand: A Very French President* (2003) at 215; Dinan, D. *Ever Closer Union? – An Introduction to the European Community* (2005) at 1.

TFEU. The Council is the main decision-taking body because it consists of ministers responsible for topics for discussion.

The European Council does not possess executive powers. Instead, it is given a particular responsibility of defining the EU's policy agenda and giving impetus to integration. Because of this strategic role, its President is a full-time appointee so that he or she will not share this responsibility with national obligations.

The Commission is, in addition to decision-making, also given powers to enforce the decisions of the EU.

In the EU, it is the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, that may amend the provisions of the Statute of the European Court regarding its existence.¹¹²⁴

The EU institutions have been instrumental in the integration agenda of the EU. The Commission, for instance, is credited with the establishment of the EMU, through the "Delors Commission". The European Council also adopts various programmes such as the Stockholm Programme (2009 – 2014), which urged member states to support their integration policies through the further development of structures and tools for knowledge exchange and coordination with other relevant policy areas, such as employment, education and social inclusion.

The EU experience shows that the character and strength of regional institutions are no doubt a pre-requisite for successful regional integration. The EU benefitted from having well-developed institutions before it eventually reached the last stage of integration, the monetary union.

However, it is important to note that the powers of the principal EU institutions have evolved over time. More importantly, this evolvement is made easier by the

¹¹²⁴ Article 281 of the TFEU.

national governments of member states by ceding significant powers to these EU institutions.

These powers, however, are not without complexities. In the EU's case they have led to what is known as "intergovernmentalism versus supranationalism" debate. Supranationalism refers to a large amount of power given to an authority which in theory is placed higher than the state, whereas intergovernmentalism focuses on the importance of member states in the process of creating EU-wide regulations. The powers of the EU institution would thus point to the EU as being a more supranational institution than intergovernmental.¹¹²⁵

This "supranationality" of the EU is confirmed by the *Court of Justice's* jurisprudence. In the early case of *NW Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Admniistratie der Belastingen* the European Court of Justice held that:

"The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the community."¹¹²⁶

¹¹²⁵ Schmidt, V.A. "The New EU Governance: New Intergovernmentalism, New Supranationalism, and New Parliamentarism", *Istituto Affari Internazionali (IAI) Working Papers* 16, 11 May 2016; Kassim, H *et al.* "The principal-agent approach and the study of the European Union: promise unfulfilled?" *Journal of European Public Policy* vol. 10 no.1 (February 2003) 121; Nugent, N. *Government and Politics of the European Union* (2003) at 475.

¹¹²⁶ *N. V. Algemene Transport- en Expeditie Onderneming Van Gend en Loos v. Nederlanse Administratie Der Belastingen C-26/62* at 11.

The Court of Justice of the EU (CJEU) has also used its judicial powers to foster an integrated economy of the EU. Indeed, a large measure of credit for creating the EU single market goes to the CJEU's judicial activism. This resulted from the decisions that the court gave in cases where firms in various member states, which were confronted with restrictions across national borders sought redress from the Court through the Community legal system.¹¹²⁷ Beck¹¹²⁸ argues that the CJEU has to take this integrationist approach, because the EU treaties and secondary legislation are characterised by a high degree of vagueness and value pluralism which embody political compromises between member states whereby they effectively delegated key questions to the CJEU.

6.3.1.2 Role by the SADC institutions

The SADC does not accord its institutions similar powers to their EU counterparts. It is instead only the Summit of Heads of States and Government that has executive control of the SADC, including all other organs.¹¹²⁹ Even the court of the SADC, the Tribunal, is not immune from this control by the Summit, as the suspension of the Tribunal in 2010, and the eventual revision of its protocol, by the Summit attests.¹¹³⁰

The SADC should learn that integration needs to be championed by supranational institutions with appropriate powers. It should as such consider amending the

¹¹²⁷ Egan, M. "The Single Market" in Cini, M *et al.* *European Union Politics* (2016) at 259; Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837; Joined Cases C-267/91 and 268/91 *Keck and Mithouard* [1993] I-6097.

¹¹²⁸ Beck, G. *The Legal Reasoning of the Court of Justice of the EU* (2012) at 437.

¹¹²⁹ Article 10(2) of the SADC Treaty provides:

"The Summit shall be responsible for the overall policy direction and control of the functions of SADC."

¹¹³⁰ The SADC Tribunal was suspended by the Summit after it had given (two) judgments against the Government of Zimbabwe on its land policy, which it refused to honour: *Mike Campbell (PVT) Limited and Another v Republic of Zimbabwe* (2/07) [2007] SADC (T) 1 (13 December 2007) and *Gondo and Others v Republic of Zimbabwe* 05/2008 [2010] SADC (T) (9 December 2010). In terms of the revised (Tribunal) Protocol only states can be litigants in the Tribunal.

SADC Treaty to provide a legal basis for such supranational institutions. There is no need to adopt the entire panoply of institutions as they apply in the EU. What is needed is to import the substantial elements of the EU model to the already existing institutions.¹¹³¹

6.3.2 Political will and leadership

6.3.2.1 Political will and leadership in the EU

There is no doubt that regional integration is a political process that involves giving up of some form of national sovereignty. This is more so because it is done at the international level where the decisions are taken by political leaders. The political leaders in the EU, especially in big member states like Germany and France, personally understood that the European project was ultimately about peace and prosperity, and they were willing to fight for it. Others, like Britain, were against this and wanted the EU to remain narrowly focused on economic integration and not political integration. But they were eventually influenced by those who saw the concurrent or twin economic and political integration as the path that the EU must follow.

The EU political leadership realised that in practise, there is a strong relationship between economics and politics because the performance of the economy is one of the key political battlegrounds. Many economic issues are inherently political because they lend themselves to different opinions. Also the economics needs political support, hence it is said that “it is the politicians who run the economy, not the economists.”

¹¹³¹ Saurombe, A. “The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis” *Law, Democracy and Development* vol. 13 (2013) 457 at 471.

Looking at the peace and prosperity that prevail in Europe today, these leaders are vindicated with regard to this belief. Europe has never experienced any major war since the Treaty of Rome came into operation in 1958, thanks mainly to the EU integration project.

6.3.2.2 Political will and leadership in the SADC

In the SADC, lack of political will has been listed as one of the factors to explain the lethargic state of regional integration and development in the region. Absence of reliable champions or leaders of the integration project is also listed as another factor.¹¹³²

This lack of political will and leadership has led to the SADC not achieving the goals and targets it set itself. For example, in the SADC Trade Protocol, the countries sought to liberalise 85% of intra-regional trade by 2008, liberalise 100% of trade by 2012, and form a customs union for the region by 2010. All these targets have since been missed. The suspension of the SADC Tribunal was also due to the SADC leaders bowing to the pressure by the Government of Zimbabwe because it did not want to implement or respect the judgement given by the Tribunal against it.¹¹³³

It is, therefore, important for the SADC leaders to develop the vision for regional integration and provide the leadership to get it done, even if it is unpopular at times. In particular, they could learn from the experiences of the EU the following:

- how to generate a political will for regional integration; and

¹¹³² Nganje, F. "South Africa and SADC: Options for Constructive Regional Leadership" Institute for Global Dialogue (IGD) Policy Brief, Issue 105/May 2014, at 1 - 2; Peters-Berries, C. *Regional Integration in Southern Africa – A Guidebook* (2010) at 137.

¹¹³³ Mapuva, J. "The SADC regional bloc: What challenges and prospects for regional integration?" *Law, Democracy and Development* vol. 18 (2014) 22 at 26; De Melo J *et al.* "Regional integration in Africa: Challenges and prospects" WIDER Working Paper 2014/037 (2014). Available at http://www.imvf.org/ficheiros/file/wp2014-037_1.pdf. (accessed on 22 February 2017); Hartzenberg T, "Regional integration in Africa" Tralac Staff Working Paper ERSD-2011-14 (October 2011).

- how to allow the private sector to play a more active role.¹¹³⁴

6.3.3 Go through all stages of integration

First “complete” the integration, then “deepen” it and thereafter “expand or enlarge”.

When the Treaty of Rome came into operation in 1958, its aim was to establish the economic community for Europe, albeit the Western Europe, starting with the customs union, then a common market and eventually reaching the economic community. This was explicit in Article 2 of the (Rome) Treaty establishing the European Economic Community, which provided that “it shall be the aim of the Community to establish a common market.” However, there was no timeframe given for this.

The timeframe was introduced in 1972 with regard to the EMU when the European Community leaders made a call for the attainment of an economic and monetary union (EMU) by the end of the decade (i.e. by 1980). At this point the leaders had already decided to deepen the integration believing that the common market, and thus “completion of the integration” was a given. This inherently meant the “completion” (i.e. attainment of common market) and “deepening” (the EMU) would be done concurrently. However, there were others who were not in favour of this approach and instead advocated for “widening”, which related to the membership increment of the Common Market. This led to what was called “deepening vs. widening”¹¹³⁵ tensions in the EU, the consequence of which was that the 1980 target for the EMU was missed, and the common or single market was only achieved in 1993 when the Maastricht Treaty came into operation.

¹¹³⁴ Peters-Berries (fn 1132) at 166.

¹¹³⁵ Deepening and widening are two schools of thought as to how the EU should develop. The notion of deepening refers to the ever closer union and is seen in the increased integration of the EU in terms of stages of integration whereas widening refers to expansion in terms of increased membership.

The “deepening” was eventually achieved in 1999 with the introduction of the euro as a single currency, and the “enlargement”, which is actually the “widening”, came with the accession of mostly Eastern European states in 2004 and thereafter.¹¹³⁶

The EU experience shows that the EU Customs Union created political and economic pressures for further economic, financial and monetary integration, which in turn created pressure for political integration. This, of course resonates with the “spill-over” concept of the neo-functional theory of integration.¹¹³⁷

6.3.4 Develop or strengthen the less or underdeveloped Member states

6.3.4.1 The EU situation

Some states of the EU are economically deprived and this would naturally lead to migration from less developed member states to more developed ones. In a bid to narrow the disparities between developed and underdeveloped regions in member states, the EU has developed two types of structural funds. One is the European Regional Development Fund designed to create infrastructure and support investment in job production, and the European Social Fund that invests in training measures to help unemployed and disadvantaged members of the population to enjoy a working life.¹¹³⁸

Through the Regional Development Fund, the EU focuses its investments on several key priority areas. This is known as “thematic concentration”:

- Innovation and research;

¹¹³⁶ Ruiz-Jiménez, A.M. “Is there a trade-off between deepening and widening? What do Europeans think?” European Policy Institutes Network (EPIN) Working Paper No. 17, April 2008.

¹¹³⁷ Eichengreen, B. “European Integration: What Lessons for Asia?” Paper for University of California, Berkeley, May 2007 at 4.

¹¹³⁸ Akbulut, H. “Testing Growth Effects of European Union Structural Funds According to Size of Government: A Dynamic Approach” *Journal of Business Economics and Finance* vol. 3 no. 1 (2014) 50; Puigcerver-Peñalver, M. “The Impact of Structural Funds Policy on European Regions’ Growth. A Theoretical and Empirical Approach” *European Journal of Comparative Economics* vol. 4 no. 2 (2007) 179.

- The digital agenda;
- Support for small and medium-sized enterprises (SMEs);
- The low-carbon economy.¹¹³⁹

The Fund's resources allocated to these priority areas will depend on the category of a region. In more developed regions, at least 80% of the funds must focus on at least two of these priorities; in a transition region, this focus is for 60% of the funds; and 50% in less developed regions. Furthermore, some Fund's resources must be channelled specifically towards low-carbon economy projects as follows:

- more developed regions: 20%;
- transition regions: 15%; and
- less developed regions: 12%.¹¹⁴⁰

Through the European Social Fund (ESF), the EU helps about fifteen million people to find employment, or to improve their skills to find work in future.¹¹⁴¹ This is important, in the short term, to mitigate the consequences of the current economic crisis, especially the rise in unemployment and poverty levels and, in the longer term, as part of Europe's strategy to remodel its economy, creating not just jobs, but an inclusive society. Funding is given to a wide range of organisations – public bodies, private companies and civil society – which give people practical help to find a job, or stay in their job.¹¹⁴²

Since the less developed countries of Central and Eastern Europe (CEE) became members of the EU, these regional funds have become essential for their

¹¹³⁹ European Commission. "European Regional Development Fund" available at http://ec.europa.eu/regional_policy/EN/funding/erdf/ (accessed on 28 November 2016).

¹¹⁴⁰ *Ibid.*

¹¹⁴¹ Article 151 of the TFEU declares that the Union and the member states, having in mind fundamental social rights, have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour and the development of human resources. This last goal entails effectual education and training policies.

¹¹⁴² European Commission. "ESF - European Social Fund" available at <http://ec.europa.eu/social/main.jsp?catId=325> (accessed on 28 November 2016).

development, accounting for 11.3% to 25% of their annual gross domestic product (GDP).¹¹⁴³

There is also the European Union Solidarity Fund (EUSF), which was set up to respond to major natural disasters and express European solidarity to disaster-stricken regions within Europe. The Fund was created as a reaction to the severe floods in Central Europe in the summer of 2002. Since then, it has been used for seventy-two disasters covering a range of different catastrophic events including floods, forest fires, earthquakes, storms and drought. More than twenty different European countries have been supported so far with an amount of over 3,8 billion euros.¹¹⁴⁴

This policy of transferring resources from affluent to poorer regions is commonly referred to as policy of “solidarity and cohesion.” The two words, solidarity and cohesion, sum up the values behind regional policy in the EU: “Solidarity” because the policy aims to benefit citizens and regions that are economically and socially deprived compared to EU averages. “Cohesion” because there are positive benefits for all in narrowing the gaps of income and wealth between the poorer countries and regions and those which are better off.¹¹⁴⁵

The dynamic effects of EU membership, coupled with a vigorous and targeted regional policy, can have positive results. The gap between richest and poorest regions of the EU has narrowed over the years. Since these regional funds took effect, many regions in the eastern parts of the EU, especially capital city regions, have seen their GDP per capita (adjusted for price level differences) rise in absolute terms and in relation to the average of all twenty-eight EU member states.¹¹⁴⁶

¹¹⁴³ KPMG. “EU Funds in Central and Eastern Europe: Progress Report 2007 – 2013” May 2014 at 6.

¹¹⁴⁴ European Commission. “EU Solidarity Fund” available at http://ec.europa.eu/regional_policy/en/funding/solidarity-fund/#2 (accessed on 29 November 2016).

¹¹⁴⁵ Promotion of “Solidarity and Cohesion” is one of the objectives of the EU (Articles 3 of the TEU and 174 of the TFEU).

¹¹⁴⁶ This data was as of March 2016, available at http://ec.europa.eu/eurostat/statistics-explained/index.php/GDP_at_regional_level (accessed on 29 November 2016).

6.3.4.2 The SADC situation

The SADC's envisaged regional development fund is yet to be established.¹¹⁴⁷ In August 2016, during the 36th Ordinary Session of the SADC Summit held in Mbabane, Swaziland, the SADC leaders resolved to open the SADC Regional Development Fund (RDF). Member states would be required to contribute to the Seed Capital of the Fund to the tune of US\$120 million for the next three years commencing from the 2017/2018 SADC Budget. Other sources of financing the Fund will be from the private sector and the international cooperating partners (ICPs).¹¹⁴⁸

It is therefore crucial that the RDF comes into operation.

6.3.5 Involve the people or citizens

6.3.5.1 Situation in the EU

One of the fundamental principles of the Treaty establishing the European Union (TEU) is representative democracy and thus direct representation of the EU citizens. To this end citizens of the EU are directly represented in the European Parliament through regular elections.¹¹⁴⁹

¹¹⁴⁷ Article 26A of the SADC Treaty provides:

“1. There is hereby established a special fund of SADC to be known as the Regional Development Fund in which shall be accounted receipts and expenditure of SADC relating to the development of SADC.

2. The Regional Development Fund shall, subject to this Treaty, consist of contributions of Member states and receipts from regional and non-regional sources, including the private sector, civil society, non-governmental organisations and workers and employers organisations.

3. The Council shall determine the modalities for the institutionalization, operation and management of the Regional Development Fund.

4. The Regional Development Fund shall be governed in terms of financial regulations made in accordance with Article 30 of this Treaty.”

¹¹⁴⁸ Ndhlovu, A. “Southern Africa: SADC Countries to Open Development Fund – Kasaila” *Nyasa Times* of 7 September 2016.

¹¹⁴⁹ Article 10 of the TEU.

Article 10(3) of the TEU also provides that “every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.” Member states of the EU have practicalised this provision in the form of referendums with regard to EU issues or matters, even though the EU does not require any member state or candidate country to hold a referendum.

In most instances, the referendums have been held on whether to become a member of the European Union as part of the accession process. In 2006 the member states also used referendums to decide as to whether to adopt the “new EU Constitution” (Constitution Treaty), which needed to be agreed upon by all member states. This was defeated when France and the Netherlands voted against it in their respective referendums.

Recently the United Kingdom used a referendum to decide on the issue of continued membership of the EU, the so-called “Brexit Referendum”. 51,9% of the Britons voted against continued membership and as a result the membership of the United Kingdom in the EU is expected to cease two years after Article 50 procedure of the Lisbon Treaty has been initiated, which the United Kingdom Government did on 29 March 2017.¹¹⁵⁰ The UK is thus on course to leave the EU on 29 March 2019.

The “Brexit” Negotiations with the EU officially started in late June 2017, after the United Kingdom general election which took place on 8 June 2017, and are ongoing. According to the European Parliament, the withdrawal agreement and any

¹¹⁵⁰ Gross, J. “Britain Delivers Stunning Rejection to EU” *The Wall Street Journal*, 24 June 2016; “UK votes to leave EU” at http://www.bbc.com/news/politics/eu_referendum/results (accessed on 13 January 2017); “Here’s the full Brexit letter Britain sent to the EU”, available at <http://www.cnbc.com/2017/03/29/heres-the-brexite-letter-britain-sent-to-the-eu.html> (accessed on 3 May 2017).

possible transitional arrangement(s) should enter into force “well before the elections to the European Parliament of May 2019.”¹¹⁵¹

However, despite the use of referendums for public involvement, there are still some sections within various EU member states who think that ordinary people are not being involved in the EU matters. This sentiment has led to the rise of Euro-sceptic parties in various member states such as France, Netherlands, Finland, Denmark and Italy, who, among others, are also arguing for an exit from the EU. This shows the importance and significance of involvement of ordinary people in integration efforts.¹¹⁵²

In order to gauge the knowledge of the citizens about the EU and how it works, the EU uses regular surveys, called “Eurobarometer”, conducted by the Commission, in each member state. In the 2013 Survey, 93% of the EU citizens reported that they know about the EU and how it works. 77% also felt that they are being kept informed about the developments in the EU.¹¹⁵³

The EU Commission is also obliged to consider proposals for legal measures made by petitions of one million citizens, who are nationals of a significant number of member states (citizens’ initiatives).¹¹⁵⁴

The ordinary people in the EU can be litigants in the Court of Justice of the European Union (CJEU). Article 270 of the TFEU also provides that the CJEU shall have jurisdiction in any dispute between the Union and its servants within the limits

¹¹⁵¹ “European Parliament Resolution on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union” European Parliament, 29 March 2017.

¹¹⁵² These parties are: The National Front (France), Party for Freedom (Netherlands), Finns (Finland), Danish People’s Party (Denmark), and the Five Star Movement (Italy); Richardson, J. “The EU as a policy-making state: a policy system like any other?” in Richardson, J *et al. European Union: Power and Policy-making* (2015) at 26.

¹¹⁵³ European Commission. “How much do European citizens know about the EU?” *Eurobarometer Report*, 2013 at 15.

¹¹⁵⁴ Articles 11(4) of the TEU and 24(1) of the TFEU; Chalmers, D *et al. European Union Law: Cases and Materials* (2010) at 47.

and under the conditions laid down in the Staff Regulations of Officials and the Conditions of Employment of other servants of the Union.

The citizens also elect the EU Members of the European Parliament (MEPs) directly through universal adult suffrage.

The involvement of the people in the EU is also extended to the civil society. Article 11 of the TEU provides that the institutions of the EU shall, by appropriate means, give representative associations the opportunity to make known and publicly exchange their views in all areas of Union action. The institutions are to maintain an open, transparent and regular dialogue with representative associations and civil society. And the Commission shall carry out broad consultations with parties concerned in order to ensure that the EU's actions are coherent and transparent.¹¹⁵⁵

To this end the EU Commission has a policy of dialogues with non-governmental organisations (NGOs) in various member states. It dialogues with these groups whenever an approach is made by the group or a member thereof. Another mechanism that the Commission uses is to give these groups places in its advisory committees.¹¹⁵⁶

6.3.5.2 Situation in the SADC

In the SADC, there has never been a referendum by member states on the SADC matters. This is so despite the Preamble to the SADC Treaty stating, among others, that it is “mindful of the need to involve the people of the Region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the rule of law.”

¹¹⁵⁵ Article 11(1) – (3) of the TEU; Greenwood, J. *Interest Representation in the European Union* (2011) at 2; Chalmers, D *et al.* *European Union Law: Cases and Materials* (2010) at 45.

¹¹⁵⁶ Greenwood (above) at 14.

In most cases the decisions are taken by the Summit of Heads of State and Government without the knowledge of the very same people that the Summit purports to represent. In fact, most of the people in the region seem not to know about the SADC and what it stands for. The former Executive Secretary of SADC, Dr Simba Makoni, once used an episode he experienced with a Zambian vendor, during the SADC meeting in Zambia, to gauge the popularity of the organisation. He said that when asked how important the SADC was to him, the vendor replied: “because my President goes there every year”.¹¹⁵⁷

Unlike the EU, the SADC does not have a barometer or similar instruments to gauge the opinion of its citizens.

With regard to litigation and access to court, the new SADC Tribunal Protocol provides that only states, and not private persons, will be litigants.

Also, with regard to representation, the ordinary people have no say regarding “their” representation at the SADC. The Southern African Development Community Parliamentary Forum (SADC-PF), on the other hand, is not even a parliament nor an organ or institution of the SADC. However, there are plans to transform the Forum into a legislative body, albeit this is without timeframe.¹¹⁵⁸

The SADC on the other hand, while it makes provision for working with the civil society, this is fraught with difficulties.¹¹⁵⁹ The reason for this seems to stem from

¹¹⁵⁷ Ndulo, M. “African integration schemes: a case study of the Southern African Development Community” *African Yearbook of International Law* vol. 7 no. 7 (1999 - 2001) 3 at 11; Ndulo, M. “Can SADC deliver?” *Southern African Political and Economic Monthly* vol. 9 no. 11 (August 1996) 5.

¹¹⁵⁸ In its Constitution the SADC Parliamentary Forum provides that “upon the Forum becoming a Parliament structure, the Plenary Assembly would be the legislative body in full consultation with SADC authorities and without infringing on the sovereignty of SADC National Parliaments’ legislative functions.”

¹¹⁵⁹ Article 23 of the SADC Treaty provides:

“1 In pursuance of the objectives of this Treaty, SADC shall seek to involve fully, the people of the Region and key stakeholders in the process of regional integration.

. . .

3. For the purposes of this article, key stakeholders include:

1. private sector;
2. civil society

the fact that there is not even a dedicated institution for this purpose, unlike with the EU where the Commission is tasked with this role. However, the SADC does have a number of entry points for civil society engagement at both the regional and national levels. At the regional level, it works, or is supposed to work, primarily through two channels: the Southern Africa Development Community Council of Non-Governmental Organisations (SADC-CNGO) and the SADC Civil Society Forum; and at the national level, it engages with the SADC national committees (SNC).¹¹⁶⁰

The SADC-CNGO has a memorandum of cooperation with the SADC Secretariat and aims to facilitate civil society contribution to regional integration for sustainable people-centred development, open and accountable governance and participatory democracy. However, in spite of the efforts of the SADC-CNGO to build a structure of civil society interaction with regional policy and institutional frameworks, a structured civil society interaction in the SADC is lacking.¹¹⁶¹

With regard to the SADC national committees (SNC), there tends to be a low level of awareness of SNCs in most of the SADC member states. This is so despite these being provided for by the SADC Treaty.¹¹⁶²

-
- 3. non-governmental organisations; and
 - 4. workers and employers organisations.”

¹¹⁶⁰ Mukumba, C et al. “Civil society role in SADC integration: A missed opportunity” GREAT Insights Magazine vol. 5 issue 4 July/August 2016 at 24; Vanheukelom, J *et al.* “The political economy of regional integration in Africa: The Southern African Development Community (SADC) Report” Report of the European Centre for Development Policy Management (ECDPM), January 2016 at 8.

¹¹⁶¹ Mukumba (above).

¹¹⁶² Article 16A of the SADC Treaty states:

“Each Member State shall create a SADC National Committee, which has to consist of key stakeholders which should:

- a) provide input at the national level in the formulation of SADC policies, strategies and programmes of action;
- b) coordinate and oversee, at the national level, implementation of SADC programmes of action;
- c) initiate projects and issue papers as an input to the preparation of the Regional Indicative Strategic Development Plan; and
- d) create a national steering committee, sub-committees and technical committees.”

Conclusion

The discussion above shows that there are vast differences between the SADC and EU, showing that it would be an error to simply copy the EU model as it is to the SADC in order for it to achieve integration. The SADC, and other RECs in Africa, still has much to do in order to reach the EU level. Oppong attributes this ineffective economic integration in Africa to many factors including socio-economic, political and infrastructural problems as well as the state of existing laws.¹¹⁶³

The European Union is a body that has gone through all types of economic integration since 1958. It had achieved a customs union and common market for all its members as well as an economic community, before it was transformed from being the European Community to the European Union. This was done in order to cover the other aspects of political, social and cultural nature in addition to the economic aspects that the European Community stood for.

It is also a monetary union, albeit not a fully-fledged one as only nineteen out of twenty-eight member states are participating in the Eurozone. However, all member states are encouraged and expected to join the Eurozone. This is because the EU understands that a fully-fledged monetary union is apt to foster further integration, including the integration of the financial sector. However, it is at this stage of the integration process that there are complications as the “Eurozone financial crisis” has attested. There is, therefore, a need to build in safeguard mechanisms for integration to succeed, as the EU did with the European Stability Mechanism (ESM),¹¹⁶⁴ albeit after the fact.

One feature of the monetary union, the creation of a supranational central bank, calls for political cooperation too. There must be agreed arrangements for choosing the bank’s

¹¹⁶³ Oppong, R.F. *Legal Aspects of Economic Integration in Africa* (2011) at 1.

¹¹⁶⁴ The European Stability Mechanism (ESM) was set up in 2012 to take the ECB out of the front line during crises. This step allowed the ECB to announce its Outright Monetary Transactions (OMT) programme, a commitment to purchase sovereign bonds with exceptionally high interest rates – provided the issuer had negotiated an adjustment programme with the ESM.

leadership and holding the bank accountable for its monetary policy. There is also a need for constraints on the members' fiscal policies, even the harmonisation of those policies.

It is important to note that the process of economic integration in Europe has been always incremental in nature. It took thirty-five years to establish the internal market, and yet in this period, there was no doubt about the path of economic integration to be followed. It is only lately in the Union era, as the "Eurozone financial crisis" has shown, that there were some uncertainties and ambiguity with regard to some of its final goals. This is in turn a by-product of the very high degree of national sovereignty pooling implied at this stage, which calls for properly addressing the ultimate question of democracy.

Experience over the last five decades has shown clearly that economic integration (removing barriers to the free movement of goods, services, money and people) gives Europe a much better chance of creating jobs and sustainable growth. Removing barriers to trade and free movement is a huge benefit for those engaged in commerce or travelling for legitimate reasons. But the disadvantage here is that criminals also seek to turn the system to their advantage. The EU's response for frontier-free crime has been to create a system of frontier-free police and criminal justice cooperation such as the Europol, Eurojust and the Schengen Information System,¹¹⁶⁵ whereby national police and prosecutors as well as border guards exchange information on wanted and suspected wrongdoers or illegal goods. Under this system member states second senior prosecutors, policemen and lawyers to a central team working together to fight organised crime.

The Union also advocates for one-kind approach in applying and interpreting the European laws. This is to avoid one law being applied and interpreted differently by member states. This in itself is "integration" of laws and it augurs well with "single trade law system" for international trade. It should be remembered that international or transnational traders face

¹¹⁶⁵ The Schengen Information System (SIS) is a highly efficient large-scale information system that supports external border control and law enforcement cooperation in the Schengen States. The SIS enables competent authorities, such as police and border guards, to enter and consult alerts on certain categories of wanted or missing persons and objects. Available at http://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen-information-system_en (accessed on 4 May 2017).

a dilemma of diversity of national laws and the complexity of the rules of private international law - or conflict of laws as some would call it - when determining which system applies to their transactions. If these laws were grouped together to form one system, it would be easier for international trade. The EU has thus adopted the so-called “Rome II Regulation”,¹¹⁶⁶ which creates a harmonised set of rules within the European Union to govern choice of law in civil and commercial matters.

However, above all these achievements, the EU has still not mastered the art of involving ordinary people. This has led to the rise of Euro-sceptic parties in various member states, which has the potential of negatively affecting the unity of the EU. It would, therefore, do the EU a great deal if it were to heed the call to create a greater involvement of ordinary people in its activities.

The SADC, and the African Union in general, would do better in fostering regional integration if it continues learning from the European Union’s model. It must not only learn, but also apply and modify the model to suit the African situation, which is different, and unique, from the European situation. And particular attention would be needed when the monetary union stage is reached, lest it experiences its own “financial crises”. At all times ordinary people must be at the centre of this integration process.

The fundamental lesson from the EU experience, therefore, is that deeper integration requires governance that transcends individual member states within the region to a level where decision-making is delegated to regional institutions that are to some extent independent of the influence of member states.¹¹⁶⁷

¹¹⁶⁶ “Regulation (EC) no. 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations, of 11 July 2007”.

¹¹⁶⁷ Saurombe, A. “The role of SADC Institutions in implementing SADC Treaty provisions dealing with regional integration” *Potchefstroom Electronic Law Journal* vol. 15 no. 2 (2012) 459 at 569; Mattli, W. *The Logic of Regional Integration: Europe and Beyond* (1999) 189.

CHAPTER 7

CONCLUSION AND RECOMMENDATIONS

PART A: CONCLUSION

Regionalism has gained momentum since the 1990s and became more appealing following the successful conclusion of the Uruguay Round of trade negotiations in 1994. Even the World Trade Organisation (WTO) – the chief proponent of multilateralism – has conceded that a multilateral trade system is no longer appealing to many countries, and regional integration is an emerging force in global trade. The United States of America (USA), having lost absolute control over the destiny of the multilateral trade system, has also shifted the formulation of its trade policy, abandoning the traditionally favoured multilateralism, the General Agreement on Tariffs and Trade (GATT), for regionalism in the form of the North American Free Trade Area (NAFTA).¹¹⁶⁸

South America is continuing the process of South American integration through the Common Market of the South (*Mercosur*) and the Andean Community of Nations. In Asia there is an Association of Southeast Asian Nations (ASEAN) and the Gulf Cooperation Council for the Arab States of the Gulf (GCC) that facilitate economic integration amongst states of Southeast Asia and the Gulf region respectively. The Caribbean has the Caribbean Community (CARICOM) that promotes economic integration and cooperation among its members. In fact regional blocs exist on all continents, except the Antarctica.¹¹⁶⁹

So it is not odd that the countries of Southern Africa are also taking their claim in this phenomenon of regionalism. They have realised that by organising themselves into a regional bloc, they will be poised for significant growth. And in this way, they will become

¹¹⁶⁸ Drabek, Z. *Is the World Trade Organization Attractive Enough for Emerging Economies?* (2010) at 72; World Trade Organisation. *Regionalism in the World Trading System* (1995) at 1.

¹¹⁶⁹ Gough, G.M. “Regional Economic Cooperation” *International Business and Economics Research Journal* vol. 5 no. 2 (February 2006) 49; “WTO Regional Trade Agreements Information System (RTA-IS)” available at <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> (accessed on 2 February 2017).

a more reliable partner in global trade. However, these countries must work together to accelerate this process. This is more so, as it has been shown in the preceding chapters, that this phenomenon, regional integration, is very complex. Southern African countries, for example, have to navigate *multilateral* trade liberalisation at the WTO, several trade arrangements at the *regional* level,¹¹⁷⁰ and *bilateral* free trade agreements with third parties such the European Union (EU),¹¹⁷¹ which impact on their regional organisation.

The success or failure of a regional integration initiative should be evaluated in the context of the objectives it sets to achieve and the political, economic and institutional context under which it operates. In the case of regional integration in Africa, all the African Economic Community (AEC)-recognised regional groupings, including the Southern African Development Community (SADC), set out to eventually form either a common market or a community among member countries.¹¹⁷²

However, judged against the achievements of their objectives so far, the consensus seems to be that none of these regional groupings have to date successfully fulfilled the requirements of a functional common market,¹¹⁷³ and in many cases, not even that of a

¹¹⁷⁰ Southern Africa has the Southern African Development Community (SADC), Common Market of Eastern and Southern Africa (COMESA) and Southern African Customs Union (SACU) as the three main regional schemes which exist alongside one another. The SADC and COMESA also concluded the tripartite free trade agreement (T-FTA) with the East African Community (EAC), which came into operation in June 2015.

¹¹⁷¹ The EU signed an Economic Partnership Agreement (EPA) on 10 June 2016 with the SADC EPA Group comprising Botswana, Lesotho, Mozambique, Namibia, South Africa and Swaziland. Angola has an option to join the agreement in future. The other six members of the Southern African Development Community region – the Democratic Republic of the Congo, Madagascar, Malawi, Mauritius, Zambia and Zimbabwe – are negotiating Economic Partnership Agreements with the EU as part of other regional groups, namely Central Africa or Eastern and Southern Africa; European Commission. “Economic Partnership Agreement (EPA) between the European Union and the Southern African Development Community (SADC) EPA Group” June 2016.

¹¹⁷² The Economic Community of West African States (ECOWAS)’s aim is the Monetary and Economic Union in West Africa – it’s still at customs union level, having achieved this in 2015; the Economic Community of Central African States (ECCAS) aims for monetary community or union and it’s still at FTA level, since 1994; the Arab Maghreb Union (UMA)’s objectives of establishing a free trade area by 1992 and common market by 2000 is still to be realised; the Common Market of Eastern and Southern Africa (COMESA)’s eventual objective is a common market and is still at customs union level since 2010 and the Southern African Development Community (SADC)’s eventual aim is a community, but it is still at FTA level since 2008.

¹¹⁷³ Even the COMESA, which is supposedly a common market, does not meet one of the requirements of a common market, namely, “requirement of free flow of other means of production”. In 2001 the COMESA

customs union.¹¹⁷⁴ This is substantiated by the fact that intra-REC trade in Africa is generally found to be very low compared with each REC's trade with non-member countries, in particular with that of European countries.¹¹⁷⁵

However, there is a general agreement that most, if not all, of these African regional groupings have achieved free trade areas (FTA) status. Both the SADC and the Common Market for Eastern and Southern Africa (COMESA), the two regional blocs recognised by the African Union (AU) for the Southern Africa region, have achieved this status. The COMESA launched its FTA in October 2000, whilst the SADC FTA came into operation in January 2008 as proposed by the SADC Protocol on Trade.¹¹⁷⁶ Among some of the Protocol's objectives are to liberalise intra-regional trade in goods and services¹¹⁷⁷ as well as to enhance the economic development, diversification and industrialisation of the region.¹¹⁷⁸

These objectives show that the SADC regards the impact of trade and industrial policy on market structure and economic geography in the region as crucial. And the key to facilitating intra-regional trade and socio-economic progress lies in the support and accelerated development of industries in the member states.

In order to operationalise these objectives, the SADC adopted the Regional Indicative Strategic Development Plan (RISDP), which is the overall framework for the organisation's regional integration activities. As a specific approach to industrial development in the region, the SADC adopted the Industrial Development Policy

adopted the *Protocol on the Free Movement of Persons, Labour, Services, and Rights of Establishment and Residence* in 2001, but this was ratified only by Burundi.

¹¹⁷⁴ The SADC has so far only achieved the FTA status. It missed the 2010 target of a customs union as well as a common market by 2015.

¹¹⁷⁵ Robson, P. *Regional Economic Integration in Africa* (2012) at 63; United Nations Economic Commission for Africa. *Assessing Regional Integration in Africa IV - Enhancing Intra-African Trade* (2010) at 357; Seid, E.H. "Regional Integration and Trade in Africa: Augmented Gravity Model Approach" Horn Economic and Social Policy Institute (HESPI) Working Paper No. 3/13, December 2013.

¹¹⁷⁶ Article 2(5) of the SADC Protocol on Trade provides:

"The objectives of this Protocol are . . . to establish a Free Trade Area in the SADC Region."

¹¹⁷⁷ Article 2(1).

¹¹⁷⁸ Article 2(4).

Framework and the 2015-2063 Industrialization Strategy and Roadmap. This industrialisation strategy or approach has “increasing intra-regional trade” as one of its crucial components.¹¹⁷⁹

While the SADC Trade Protocol requires a systematic phase-down of tariffs by all member states, there are still many factors that may constitute barriers to intra-regional trade. Of these barriers the lists of sensitive products are probably the most obvious, but the uncertainty associated with the range of invisible non-tariff barriers (NTBs) is likely to be the most significant obstacle to integration. The following can be singled out as the most important NTBs that impede trade in the region:

- Communication problems;
- Customs procedures and charges;
- Transport problems;
- Lack of market information;
- Other border procedures; and
- Services: financial, electricity and technical support.¹¹⁸⁰

These have contributed to the challenges that the countries in Southern Africa are facing, which range from macroeconomic issues to trade, education, infrastructural developments, etc. However, there are protocols that the SADC countries have signed and ratified as mechanisms to solve these challenges. These include the SADC protocols on Trade,

¹¹⁷⁹ The SADC 2015-2063 Industrialisation Strategy and Roadmap provides: “Regional integration is one of the three cornerstones of the SADC Industrialisation Strategy. Deeper regional integration is a sine qua non for collective development. To that end, Member states should accelerate implementation of SADC policies, protocols and agreements. Collective development requires complementarity of production and trade structures and policy convergence over time” (at 20).

¹¹⁸⁰ Mbekeani, K.K. “Understanding the Barriers to Regional Trade Integration in Africa” Paper prepared by staff of the African Development Bank in collaboration with World Bank and WTO staff for the 2011 G20 Summit in France (2013) at 19; Sandrey, R., *et al.* “Non-tariff measures inhibiting South African exports to China and India” Tralac Working Paper No 6/2008 (2008).

Transport, Communications and Meteorology, Energy, Education and Training, etc. The biggest challenge with regard to these protocols, though, remains their implementation.¹¹⁸¹

With regard to communication, the cellular network has made some improvements. However, although the cellular network has become available to a large part of the region, there are still countries in which roaming is impossible or difficult due to a failure to establish roaming agreements or to a lack of signalling links. The use of cellular phones has the potential to solve the communication challenges that the region is facing. The SADC should thus take advantage of this phenomenon.¹¹⁸²

As was stated in Chapter 5, the SADC FTA has largely eliminated tariffs within the SADC through various other mechanisms. These include the adoption of the technical barriers to trade (TBT) to the SADC Protocol on Trade Annex (“Annex IX”), and the SADC-wide accreditation system known as Southern African Development Community Accreditation Service (SADCAS) for the technical barriers, as well as the online reporting mechanism for the non-tariff barriers (NTBs). The online reporting mechanism has also been extended to the SADC-COMESA-EAC tripartite free trade area (T-FTA).¹¹⁸³

The elimination of tariffs, however, can have a negative impact on the economy of a country, especially small countries like the ones in the SADC. As tariffs are a tax placed by the government on imports, their elimination would necessarily mean a loss of this tax revenue for the importing country. It may also lead to the flooding of local markets with cheap imports, which could result in the elimination of those local markets. Therefore, a

¹¹⁸¹ Monyepao, K. “The impact of non-operationalisation of the SADC protocol and international transport agreements on cross border road transport movement in the SADC region” Report of the proceedings of the 34th Southern African Transport Conference (SATC) 2015, at 636.

¹¹⁸² Communication Regulators Association of Southern Africa (CRASA) Report to the SADC Roaming Policy Workshop, 26 June 2016, Walvis Bay, Namibia; Clarke, R. “Regulatory analysis of international mobile roaming services” Report of the International Telecommunication Union (ITU), March 2014 at 8.

¹¹⁸³ Hove, V.S. “An analysis of how the online non-tariff barriers mechanism facilitates reporting, monitoring and elimination of NTBs in the COMESA, EAC and SADC Region” Thesis for the Masters of Commerce (MCom) Degree, University of Cape Town (2015); Viljoen, W. “The proposed Tripartite Non-tariff Barrier Elimination Mechanism: An Evaluation of Legal texts and Practice” Tralac Trade Brief No. S15TB03/2015, March 2015.

country that wants to enter into an integration scheme such as an FTA should consider this decision carefully, as this would mean removing the tariffs.¹¹⁸⁴

It is in the light of this impact by removal of tariffs that the SADC had to make provision for a systematic phase-down of tariffs. This was in recognition of the vulnerability of many of the economies of the member states and thus to allow them to strengthen. When contemplating the decision to join a regional economic scheme, governments of these countries should be certain that this would create market contestability of their industries and enable them to actively engage in expanding their activities in the region.

However, despite this negative impact the removal of tariffs generally leads to trade liberalisation, thus intra-regional trade. For the SADC this is a progressive step as intra-regional trade in Southern Africa is still low, except for South Africa, which is prominent in terms of intra-regional trade volumes and patterns. This low level of intra-regional trade reflects the structure of production of countries composing the Southern African regional groups, and which are dominated by few commodities.¹¹⁸⁵

The achievement by the SADC of an FTA must, therefore, be applauded, as minimal as it may be. Together with other achievements, such as the SADC's decision to realign its regional institutional machinery and processes with its regional integration agenda, by clustering its sectors into four directorates and centralising these within a strengthened Secretariat, as well as that of designing and managing a regional development strategy (RISDP), this must be seen as an important step towards deeper integration.

With the launch of the RISDP, the SADC has every reason to look forward with confidence to dealing with the new challenges that it is facing. More so that the RISDP takes into account the impact and benefits of globalisation. However, there is much that the SADC

¹¹⁸⁴ Tarver, E. "How do tariffs protect domestic industries?" *Investopedia* (online). Available at <http://www.investopedia.com/> (accessed on 31 January 2017); World Trade Organisation (WTO). "Trade and public policies: A closer look at non-tariff measures in the 21st Century" World Trade Report 2012 at 2.

¹¹⁸⁵ Geda, A *et al.* "The potential for internal trade and regional integration in Africa" *Journal of African Trade* (December 2015); Mbekeani, K.K. "Intra-Regional Trade in Southern Africa: Structure, Performance and Challenges" Nepad Regional Integration Policy Papers No. 2, June 2013 at 32.

must do to integrate more usefully with the global market. Whether we like it or not, globalisation has arrived and it is here to stay.¹¹⁸⁶ As such the SADC needs to build a strong voice in the international arena, and at all forums for equitable global governance.

In as much as the achievement of an FTA is applauded, there is still much to be done for the SADC to achieve the eventual status of a “community” and the time is running out. In terms of the targets, as laid out in the RISDP, the SADC was supposed to achieve the customs union status by 2010, a common market by 2015, and a monetary union by 2018.

It is common knowledge that both the customs union and the common market targets have been missed and, by the look of things, the monetary union target will be missed as well. It is, therefore, necessary to examine critically why these targets were missed, and the implications thereof, for the integration process, especially the customs union, as it is the next step after the FTA step.

The main challenge for the SADC regarding the customs union is its multiple membership of its member states with other regional blocs, especially the COMESA and the Southern African Customs Union (SACU). It is an accepted argument among integrationists that multiple memberships are a hindrance to regional integration since, among other things, they introduce duplication of effort, and they are inefficient and costly.¹¹⁸⁷ Also, with regard to a customs union, technically a state cannot maintain membership of two customs unions as it cannot apply two different external tariffs. This is because a customs union creates a common trade barrier for members with regard to third-party states.¹¹⁸⁸

¹¹⁸⁶ Ramakrishnan, K. “Preface” *Managerial Leadership in Multicultural Organisations* (2013); Lule, J. *Globalization and Media: Global Village of Babel* (2012) at 25; Sinha, Y. “Entrepreneurial and innovative education” in Sharma, K *et al. Encyclopaedia of Higher Education: The Indian Perspectives* vol. 4 (2005) at 440.

¹¹⁸⁷ Corrigan, T. “Puzzling Over the Pieces: Regional Integration and the African Peer Review Mechanism” South African Institute of International Affairs (SAIIA) Research Report, January 2015 at 28; Geda, A *et al.* “The potential for internal trade and regional integration in Africa” *Journal of African Trade* vol. 2 (2015) 19 at 21; Saurombe, A. “The role of SADC Institutions in implementing SADC Treaty provisions dealing with regional integration” *Potchefstroom Electronic Law Journal* vol. 15 no. 2 (2012) 459.

¹¹⁸⁸ Centre for Economic Policy Research, London. “Trade and Investment Competence Review - A study for the Department for Business Innovation & Skills” November 2013 at 14 – 17.

Whilst it is technically possible for the COMESA and the SADC FTAs to co-exist, this is impossible for customs unions, unless each regime adopts the same customs union regulations. This problem befell Zambia, which announced that it will not join the COMESA Customs Union because of its participation in the SADC FTA implementation programme.¹¹⁸⁹

For Swaziland, its joint membership of the COMESA and the SACU became a dilemma with the introduction of the COMESA FTA. Swaziland has been unable to implement preferential tariffs for other COMESA countries and cannot introduce free trade imports from other COMESA countries in terms of this FTA. The SACU Agreement on common external tariff (CET) can also not be broken by some members granting preferences in terms of other FTA regimes, unless all the other members agree to this arrangement. South Africa, Botswana and Lesotho have not given their consent to such action by Swaziland, because once the CET wall is broken, it would be difficult to prevent goods illegally crossing to other SACU members without payment of duty.¹¹⁹⁰

This problem of multiple memberships, called a “spaghetti bowl effect”,¹¹⁹¹ also spoils the ability of the Southern Africa region to negotiate trade arrangements with other regions. For example, it took the six SADC member states¹¹⁹² sixteen years to sign an economic partnership agreement (EPA) with the European Union in terms of the Cotonou

¹¹⁸⁹ Edwards, L *et al.* “Zambian Regional Integration Policy Challenges” International Growth Centre (IGC) Working Paper, March 2012.

¹¹⁹⁰ Kritzinger-van Niekerk, L *et al.* “Regional Integration in Southern Africa – Overview of recent developments” Discussion Paper for the World Bank, December 2002 at 5; de la Rocha, M. “The Cotonou Agreement and its Implications for the Regional Trade Agenda in Eastern and Southern Africa” *World Bank e-library* (2003) at 11.

¹¹⁹¹ Bhagwati, J. “U.S. Trade Policy: The Infatuation with Free Trade Agreements” in *The Dangerous Drift to Preferential Trade Agreements* (1995); Bhagwati, J *et al.* “Trading preferentially: Theory and Policy” *Economic Journal* vol. 108, no. 449 (1998) 1128; Baldwin, R, “Multilateralising Regionalism: Spaghetti Bowls as Building Blocs on the Path to Global Free Trade” *World Economy* vol. 29 issue 11 (2006) 1; Tavares, R. *et al.* “Regional economic integration in Africa: impediments to progress?” *South African Journal of International Affairs* vol. 18 no2 (2011) 217.

¹¹⁹² These are Botswana, Lesotho, Mozambique, Namibia, South Africa and Swaziland - the so-called “SADC EPA Group”.

Agreement.¹¹⁹³ The mere fact that only six out of fifteen SADC member states could sign this EPA shows how problematic the issue of multiple membership in the SADC is.

This, however, should not be too surprising because ten of the SADC's members are now members of two or three different customs unions since 2004.¹¹⁹⁴ And customs unions have common external tariffs (CETs), and therefore forbid any single Member State to negotiate a trade agreement bilaterally. It seems, therefore, that what has happened with this EU-SADC EPA is that these member states, the so-called "SADC EPA Group", have decided to prioritise their individual trade with the EU, rather than reach a consensus within the SADC. This has a potential of harming the consensus, and thus unity, in the SADC.

As for South Africa, which is one of the six states, its signing of this EPA is more surprising, because it stated as its main objective in joining the EPA Group in 2004 "to minimise, as far as possible, the threat of fragmentation to regional integration and development processes underway in Southern Africa."¹¹⁹⁵ However, if one looks at the members of this SADC EPA Group, one would realise that it is actually the members of the SACU plus Mozambique.

Mozambique has long expressed its desire for the SACU membership,¹¹⁹⁶ but this is resisted by the BLNS (Botswana, Lesotho, Namibia and Swaziland) countries, as this would mean an overhaul of the revenue-sharing formula, thus resulting in a very substantial decline in their revenues from the SACU Revenue Pool. So this EU-SADC EPA provides

¹¹⁹³ The Cotonou Agreement was signed in June 2000 between the European Union (EU) and the African, Caribbean and Pacific (ACP) group, and allows the ACP member states enter into Economic Partnership Agreements (EPAs) with the EU, either individually or collectively, taking into account the regional integration processes already in existence. This EPA between "SADC EPA Group" and the EU was signed in June 2016.

¹¹⁹⁴ These are: DRC, Lesotho, Madagascar, Malawi, Mauritius, Namibia, South Africa, Swaziland, Tanzania and Zimbabwe.

¹¹⁹⁵ Davies, R. "The SADC EPA and beyond" *Great Insights Magazine* vol. 3 issue 9 (October/November 2014) 9 at 10.

¹¹⁹⁶ "Should Mozambique Join SACU? A Review of Key Policy Issues" Report of the Ministry of Industry and Commerce, Government of Mozambique, August 2004; Bertelsmann-Scott, T. "SACU – One Hundred Not Out: What future for the Customs Union?" *South African Institute of International Affairs (SAIIA) Occasional Paper* no. 68, September 2010 at 12.

Mozambique with an opportunity to trade within the SACU, though not necessarily being part of the SACU Revenue Pool.

The EPA might also help the SACU to function like an ordinary customs union. Currently the SACU is not functioning in an optimal way in terms of treatment for EU imports, as these are exempted from the SACU CET. Also the SACU members currently do not all impose the same duty to EU imports because of the various current bilateral agreements between the EU and the SACU countries.¹¹⁹⁷

The new EU-SADC EPA also comes with different rules of origin, and these have a potential of complicating intra-regional trade, as new controls will be required at borders of the SADC member states. This will also complicate the process to forge common policy positions in the unfolding integration agenda in Africa. However, the EPA also comes with the flexible rules of origin known as “cumulation”.¹¹⁹⁸ This means that the countries are allowed to source inputs from each other, as well as from other African countries under other EPAs for export to the EU. Such provisions will encourage intra-African trade and industrialisation in Africa. If this were to indeed happen, EPAs with the EU would complement, rather than harm, Africa’s integration agenda.¹¹⁹⁹

Angola has indicated that it may join the agreement at a later stage and six other SADC member states, namely the Democratic Republic of the Congo (DRC), Madagascar,

¹¹⁹⁷ European Commission. “Economic Partnership Agreement (EPA) between the European Union and the Southern African Development Community (SADC) EPA Group – Key advantages” June 2016 at 3.

¹¹⁹⁸ Cumulation is a concept used in preferential trade agreements, which essentially widens the definition of originating products and helps manufactured goods to meet the relevant origin rule. It is used to describe a system that allows originating products of country A to be further processed or added to products originating in country B, just as if they had originated in country B. The resulting product would have the origin of country B. It can only be applied between countries operating with identical origin rules; “Cumulation in free trade agreements” Federal Department of Finance of Switzerland, February 2016 [online]. Available at https://www.ezv.admin.ch/dam/ezv/.../cumulation_in_freetradeagreements.pdf (accessed on 24 February 2017); “Decision of the World Trade Organization: Least Developed Countries Group” (Paragraph 1.7 of the Decision), 8 October 2015, Florence, Italy.

¹¹⁹⁹ Davies (above, fn 1195); Statement by Ms Cecilia Malmström, Commissioner for Trade, at Signing Ceremony of the EU-SADC Economic Partnership Agreement, Kasane, Botswana, 10 June 2016.

Malawi, Mauritius, Zambia and Zimbabwe are negotiating EPAs with the EU as part of other regional groups, namely Central Africa or Eastern and Southern Africa.¹²⁰⁰

All these challenges show that the political momentum in Africa appears to have run ahead of economic reality, and the commitments that have been made, particularly of eventual monetary unions, are not based on any detailed analysis of whether a monetary union is suitable in an African context.¹²⁰¹

While trade integration almost certainly makes sense for Africa in general, through the pursuit of free trade areas or customs unions, a monetary union - at least on a continent-wide basis - almost certainly does not. There are exceptionally wide disparities in incomes and development levels in Africa that, in themselves, pose a barrier to monetary integration. A monetary union also requires high, and preferably uniform, standards of financial sector supervision, and most of the SADC countries lack adequate capacity for this. It could, therefore, amount to a “policy straitjacket” that inhibits governments’ abilities to respond to differing economic, social and political circumstances. More generally, the very diverse development levels in Africa may well be an obstacle to economic integration, with resistance among the economically stronger members that may argue that it will prove expensive for them - similar to concerns expressed in Europe with its eastward expansion and admission of new members.¹²⁰²

With regard to transport, it is obvious that the removal of barriers in this sector is of crucial importance in the SADC region. The SADC has the highest number of land-locked countries in Africa and as such it needs a well-functioning and inexpensive transport system. Measures such as the Regional Transport Master Plan, “Corridor model” and “e-SADC Strategic Framework” were put in place, but some challenges still remain.

¹²⁰⁰ European Commission (above, fn 1197).

¹²⁰¹ Jefferis, K.R. “The Process of Monetary Integration in the SADC Region” *Journal of Southern African Studies* vol. 33 no. 1 (March 2007) 83 at 92.

¹²⁰² *Ibid*; Debrun, X *et al.* “Should African Monetary Unions Be Expanded? An Empirical Investigation of the Scope for Monetary Integration in Sub-Saharan Africa” IMF Working Paper WP/10/157, July 2010; Masson, P *et al.* “The Monetary Geography of Africa and ‘A Single Currency for Africa’” *Finance and Development* (December 2004).

According to the case study done on NTB monitoring mechanisms,¹²⁰³ the largest number of unresolved complaints has to do with transport-related NTBs.

Another area that poses an integration challenge in the SADC is dispute settlement. Annex VI to the SADC Trade Protocol sets forth a trade dispute settlement mechanism between the SADC members that is based largely on the WTO settlement mechanism. All the SADC member states are also members of the WTO, and there is a large overlap between the SADC Trade Protocol and the WTO Dispute Settlement Understanding (DSU), as applied to the SADC members. This means that one dispute can be a subject of two different tribunals. To make matters worse, both instruments impose an obligation to provide national treatment, or rather an obligation not to treat imports differently from domestic products once inside a country.¹²⁰⁴

An overlap problem may arise in a situation where one SADC member thinks that its dispute with another SADC member falls under the general SADC Treaty and/or one of its protocols other than the Trade Protocol, while the opposing SADC member in the dispute insists that the dispute falls under the Trade Protocol. In this situation the first member would bring the dispute to the SADC Tribunal and the second member would bring it to a Trade Panel under Annex VI.¹²⁰⁵

Annex VI states that “the remuneration of panellists and experts, their travel and lodging expenses and all other general expenses of panels shall be borne in equal parts by the disputing member states or in a proportion as determined by a Panel”.¹²⁰⁶ In contrast, the DSU provides that “panellists’ expenses, including travel and subsistence allowance, shall

¹²⁰³ South African Institute of International Affairs (SAIIA). “Non-Tariff Barrier Monitoring Mechanism” Case Study 8, done for the SADC, 2013 at 81.

¹²⁰⁴ Articles 7 and 11 of the SADC Trade Protocol and Articles III and XI of the GATT 1994.

¹²⁰⁵ Pauwelyn, J. “Going Global, Regional or Both – Dispute Settlement in the Southern African Development Community and overlaps with the WTO and other jurisdictions” *Minnesota Journal of Global Trade* vol. 13 (2004) 231 at 240.

¹²⁰⁶ This is in accordance with Art. 19(2) of the SADC Trade Protocol.

be met from the WTO budget.”¹²⁰⁷ The expenses, in cases of an appeal, of the Appellate Body members are also met from the WTO budget.¹²⁰⁸

These costs of litigation are one of the factors that will most certainly lead to the SADC member states choosing the WTO channel rather than the SADC channel in settling their trade disputes. In addition, the WTO has established an “Advisory Centre on WTO Law” in Geneva to offer free legal advice to its developing country member states and least developed countries, up to a certain number of hours. The SADC on the other hand, does not have a similar “Dispute Resolution Centre”.¹²⁰⁹

There is no doubt that these overlaps encourage “forum shopping”¹²¹⁰ among member states of the SADC, especially in the light of the suspension and revised mandate of the SADC Tribunal. The member states would thus attempt to have their action tried in a particular court or tribunal where they feel they will receive the most favourable judgment.¹²¹¹

On the other hand, settling a dispute between the SADC members under the SADC umbrella may be particularly important where the dispute involves sensitivities or complexities that are unique to the SADC region. This will also augur well with the AU objective of promoting African and/or regional unity. However, the advantage of bringing a dispute to a world body like the WTO is that more countries would be notified of an alleged violation and may exert pressure on the aggressor state. Another advantage to the WTO is that it also has a “special treatment clause”¹²¹² for the least developed countries, whereas the SADC mechanisms offer no such preferential treatment.

¹²⁰⁷ Article 8(11) of the WTO Treaty.

¹²⁰⁸ Article 17(8) of the WTO Treaty.

¹²⁰⁹ Pauwelwyn (fn 1205) at 245.

¹²¹⁰ Forum shopping is the practice adopted by some litigants of having their legal case heard in the court thought most likely to provide a favourable judgment for them; Whytock, C.A. “The evolving forum shopping system” *Cornell Law Review* vol. 96 (2011) 481.

¹²¹¹ Saurombe, A. “An Analysis and Exposition of Dispute Settlement Forum Shopping for SADC Member states in the Light of the Suspension of the SADC Tribunal” *South African Mercantile Law Journal* vol. 23 no. 3 (2011) 392; Pauwelwyn (fn 1205) at 242.

¹²¹² Article 24 of the DSU - Special Procedures Involving Least-Developed Country Members:

However, apart from all these challenges, there is hope for the SADC integration agenda. The SADC is still considered young compared to other regional blocs and as such, with time, greater success will be realised. The *conclusion* of this thesis, therefore, is that regional trade integration and cooperation in Southern Africa is possible and achievable, but it needs to be accelerated. As Clapham said:

“The future of Africa, for better or worse, will be determined regionally.”¹²¹³

Such hope is now buttressed by the recently-established Tripartite Free Trade Area (T-FTA), which the SADC concluded with the COMESA and the East African Community (EAC) in June 2015. The T-FTA will go a long way in resolving some of the integration challenges in the continent such as proliferation of regional economic bodies. These many regional bodies often create confusing mixture of overlapping and, sometimes, incompatible preferential trade regimes.¹²¹⁴

The T-FTA agreement does not only contain tariff liberalisation measures, but places a heavy emphasis on non-tariff barriers to trade (NTBs), the development of transport infrastructure, and the development of a common industrial policy. All of these require a

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1. At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member. If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures.
 2. In dispute settlement cases involving a least-developed country Member, where a satisfactory solution has not been found in the course of consultations the Director-General or the Chairman of the DSB shall, upon request by a least-developed country Member offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute, before a request for a panel is made. The Director-General or the Chairman of the DSB, in providing the above assistance, may consult any source which either deems appropriate.

¹²¹³ Clapham, C. “The changing world of regional integration in Africa” in Clapham, C *et al.* *Regional Integration in Southern Africa: Comparative International Perspectives* (2001) at 59.

¹²¹⁴ Zamfir, I. “The Tripartite Free Trade Area Project Integration in southern and eastern Africa” European Parliamentary Research Service Briefing, March 2015; Erasmus, G *et al.* *The Tripartite Free Trade Area: towards a new African integration paradigm?* (2012) at 1.

large amount of co-ordination and co-operation among member states, something which African states have struggled with in the past.¹²¹⁵

Non-tariff barriers to trade (NTBs) remain a pertinent obstacle to intra-African trade and have not been successfully dealt with by regional economic communities (RECs). In preparation for the T-FTA, each of the RECs implemented an NTB Monitoring Mechanism which allows private sector actors to register NTBs they experience online, which then get sent directly to the offending state to be resolved.¹²¹⁶

Once fully operational, the T-FTA will usher in a single tripartite policy framework covering twenty-six countries in key regulatory areas affecting and promoting trade and investment. Because it covers half of Africa in terms of membership, economic and geographical size, the T-FTA has the critical political and strategic importance of being a launch pad for the continental free trade area (CFTA). The whole world is thus looking on and waiting with bated breath for progress in the implementation of the T-FTA.¹²¹⁷

PART B: RECOMMENDATIONS

Having concluded that integration of Southern Africa as a region is possible, the following are *recommended* to make it a reality:

1. Move from an era of commitments to an era of implementation.

The main stumbling block to integration in the SADC, and Africa generally, is non-implementation of undertakings. Too many commitments to integration in the form of protocols, policies, programmes, plans, etc. have been made, but these are not

¹²¹⁵ Schoeman, M. "What does the TFTA really mean for regional integration in Africa?" Available at <http://www.saiia.org.za/opinion-analysis/what-does-the-tfta-really-mean-for-regional-integration-in-africa> (accessed on 24 February 2017).

¹²¹⁶ *Ibid.*

¹²¹⁷ Walters, L *et al.* "The Impact of the COMESA-EAC-SADC Tripartite Free Trade Agreement on the South African Economy" Economic Research Southern Africa (ERSA) Working Paper 635, September 2016 at 3.

matched by implementation. It is about time that implementation of all these plans and programmes happened and this must also happen at national levels. Hentz¹²¹⁸ puts it thus: “The issue has become not whether the region should integrate economically, but the logistics – who, how and when.”

The “who” part relates mainly to the institutions and political leadership of the SADC. The leaders of the SADC, especially the Summit of Heads of State and Government, must realise that deeper integration needs capable institutions. As such the Summit must share the executive powers with some of the organs, especially the Secretariat and the Council of Ministers. This is what maintains in the EU and is yielding many positive results.

The Southern African Development Community Parliamentary Forum (SADC-PF) must be converted into the regional parliament as a matter of urgency. This will enable the people of the region to be represented adequately at the SADC and also be able to participate in its programmes. It should then gradually evolve into elections of its members through direct adult suffrage, just like the European Parliament. As discussed in chapters 3 and 6, there are plans to transform the SADC-PF into a legislative body, but this is without a timeframe. Therefore, the “urgency” should entail timeframes. This is one example of the “how” part.

The “how” part also relates to resources. Integration is costly, but it is worth it. Many integration projects in the SADC do not reach completion due to a lack of resources. Some of them are dependent on donor-funds because member states lack adequate finances to fund them. It is, therefore, incumbent upon member states to plan in accordance with available resources for the proposed projects. This “proper planning” will then enable determination of time-frames, the “when” part.

¹²¹⁸ Hentz, J.J. “South Africa and the political economy of regional cooperation in Southern Africa” *Journal of Modern African Studies* vol. 43 no. 1 (2005) 21 at 23.

The planning must also involve technical experts to a larger extent than at present. Most dates for the SADC and targets seem to have been set by political, rather than technical, principals, and this is the main reason for not achieving them as per the set time-frames.

The above recommendations would necessarily need to be regulated through legislation. For the laws, and the dispute settlement system to work properly, the SADC needs to have a court which is endowed with powers to give directives and make binding decisions. This can be done by the establishment of a “SADC Court”, as opposed to the Tribunal as it is currently the case.

This court must also be given total independence, especially with regard to personnel and financial resources, to become the full judicial authority in the SADC. This means that the revised Tribunal Protocol, which limits the mandate of the Tribunal to member states only, will have to be revised again or amended to provide for the establishment of the SADC Court. Such a court must be accessible to both natural and juristic persons, including private sector companies, as opposed to the current proposal for the Tribunal, which limits this access to states only. The proper juridical system is important for steady progress of the integrative process.

It is, therefore, submitted that the SADC should adopt the amended SADC Treaty, the Protocol establishing the SADC Parliament and the Protocol establishing the SADC Court with the following provisions:

1.1 Amendment to the Southern African Development Community Treaty

1.1.1 Article 6 of the Treaty is amended to read as follows:

“1. Member states undertake to adopt, within reasonable time, adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardise the sustenance of its

principles, the achievement of its objectives and the implementation of the provisions of this Treaty.

...

5. Member states shall take all necessary steps to accord this Treaty the force of national law within reasonable time after ratifying it.

6. Member states shall co-operate with and assist institutions of SADC in the performance of their duties as well as respect, and where needed, implement, their decisions.

7. Member states shall take all reasonable measures, including providing necessary resources, to achieve the objectives of SADC.”

1.1.2 Article 9 of the Treaty is amended to read as follows:

“The following institutions are hereby established:

- 1. the Summit of Heads of State or Government;*
- 2. the Organ on Politics, Defence and Security Co-operation;*
- 3. the Council of Ministers;*
- 4. the Integrated Committee of Ministers;*
- 5. the Standing Committee of Officials;*
- 6. the Secretariat;*
- 7. the [Tribunal] Court;*
- 8. SADC National Committees; and*
- 9. the Parliament”*

1.1.3 Article 10(2) of the Treaty is amended to read as follows:

“The Summit shall facilitate the development of the Community, and shall be responsible for the general political directions and priorities thereof.”

1.1.3 Article 14(1) of the Treaty is amended to read as follows:

“1. The Secretariat shall be the principal executive institution of SADC, and shall be responsible for:

1. *strategic planning and management of the programmes of SADC, and shall take appropriate initiatives thereof where necessary.”*

1.1.4 Article 16 of the Treaty is amended as follows:

“Substitution of the word ‘Tribunal’ with the word ‘Court’ in the Article, and everywhere else where it appears.”

1.1.5 *Article 16B (new)*

- “1. Parliament shall exercise legislative, oversight and budgetary functions. The Secretariat shall report to it.*
- 2. The composition, powers, functions, procedures and other related matters governing the Parliament shall be prescribed in a Protocol, which shall, notwithstanding the provisions of Article 22 of this Treaty, form an integral part of this Treaty, adopted by the Summit.*

1.2 Protocol establishing the Parliament of the Southern African Development Community

Articles of the Protocol establishing the Parliament of the Southern African Development Community should include the following:

1.2.1. Article 1: Composition

(1) For the first term, which shall be five years, Parliament shall be composed of five representatives from each of the member states of the Community. The composition shall, thereafter, be reviewed in line with the provision of Article 5 (Review of the Protocol).

(2) At least two of the five members of each delegation shall be women.

(3) Eligibility for membership of Parliament shall be the same as for national parliaments or legislatures, as the case may be.

1.2.2. Article 2: Elections

(1) For the first term, Members of Parliament shall be elected from among the members of national parliaments or legislative bodies, using their internal procedures.

(2) After the first review of the Protocol, in line with Article 5, the Members of Parliaments shall be elected through adult universal suffrage.

(3). Elections of Members of Parliament shall, as far as possible, be conducted during the same time throughout the member states.

1.2.3. Article 3. Objectives of the Parliament

(1) The objectives of the Parliament shall be to:

(a) give a voice to the citizens of the Region;

(b) encourage good governance, respect for the rule of law, transparency and accountability in member states;

(c) facilitate and promote integration of the Region as envisaged by the treaty establishing the Southern African Development Community.

(d) familiarise the people of the Region with the objectives and policies aimed at integrating the Region.

1.2.4 Article 4: Participation by the citizens

The Parliament shall facilitate participation of the citizens of the Community, including the civil society organisations in member states, in its proceedings.

1.2.5 Article 5: Review of the Protocol

(1) Member states shall organise a conference to review the Protocol within one year after the first term came to an end, with a view to ensuring that the objectives and purposes of this Protocol are being realised.

(2) Other subsequent conferences to review the Protocol may be organised by member states if such a need arises.

1.3 *Protocol establishing the Court of the Southern African Development Community*

The Protocol should include the following articles:

1.3.1 Article 1: Repeal of the Protocol on the Tribunal in the Southern African Development Community

The Protocol shall repeal and replace the Protocol on the Tribunal in the Southern African Development Community.

1.3.2 Article 2: Establishment of the Court

The Court of the Southern African Development Community (herein referred to as “the Court”), is hereby established in terms of Article 16 of the Southern African Development Community Treaty.

1.3.3 Article 3: Access to the Court

Natural and juristic persons, including private sector companies and civil societies registered in the member states, shall have access to the Court.

1.3.4. Article 4: Jurisdiction

The Court shall have jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and this Protocol which relate to:

- (a) the interpretation and application of the Treaty;*
- (b) the interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of the Community, and acts of the institutions of the Community;*
- (c) Any other act arising from international law.*

1.3.5 Article 5: Enforcement

The governments of member states shall take all reasonable steps to, diligently and without delay, enforce the judgments of the Court.

2. Improve infrastructure

Infrastructure and trade are inextricably linked. In order to allow trade to flow regionally, investment in physical infrastructure – roads, railways, power lines, air services and telecommunications – is necessary. As such all member states of the SADC must work together to improve infrastructure in their countries, especially that connects them with other Member states. This also entails availing resources to invest in infrastructure.

The following should thus happen:

*2.1 The governments of these member states must establish partnerships with the private sector to develop infrastructure, as the governments cannot do it alone. This is more so because most member states in the SADC are poor or least developed.*¹²¹⁹

2.2 Member states must invest more in information and communication technology (ICT).

*As discussed in Chapter 6, infrastructure improvement programmes such as “e-Europe” has tremendously simplified intra-EU trade and trade with other countries. The EU also introduced the Digital Single Market (DSM) in May 2015, which is estimated that it could contribute €415 billion per year to the EU economy and create hundreds of thousands of new jobs.*¹²²⁰

2.3 Member states must give special attention to mobile telephones, as they play an extremely important role in the SADC region for two reasons:

- *the poor state of the fixed network and the high cost of extending it; and*
- *telephone services that can be extended to rural areas via cellular networks.*

3. Overlapping membership of the SADC countries in a number of other regional bodies should be addressed urgently.

The problem of overlapping membership, the “spaghetti bowl effect”, in the SADC, and African Union (AU) generally, has been mentioned over long time as one of the main challenges to integration. To deal with this problem the AU has already pronounced on the regional blocs for the five regions of the continent and as such this should just be adhered to.

¹²¹⁹ According to the United Nations, least developed countries are those that exhibit the lowest indicators of socioeconomic development, with the lowest Human Development Index ratings of all countries in the world. For a country to be classified as least-developed it must meet the three UN criteria of poverty, Human resource weakness and economic vulnerability.

¹²²⁰ Kalimo, H *et al.* “The United Kingdom and the (Digital) Single Market” *Institute for European Studies Policy Brief* issue 2016/ 9 (April 2016) at 2; “The European Single Market” at https://ec.europa.eu/growth/single-market_en (accessed on 21 November 2016).

The SADC shares members in the region mainly with the Southern African Customs Union (SACU) and the Common Market of Southern and Eastern Africa (COMESA). All members of the SACU (Botswana, Lesotho, Namibia, South Africa and Swaziland) are also members of the SADC, whilst seven other member states of the SADC (the Democratic Republic of Congo, Madagascar, Mauritius, Seychelles, Swaziland, Zambia and Zimbabwe) are also members of the COMESA.

To deal with this challenge of overlapping membership the following must happen:

3.1 The AU should go a step further and adopt a resolution to strengthen positions of the proposed regional economic communities (RECs) as building blocks of the AU towards the achievement of the African Economic Community (AEC);

3.2 The Southern African Customs Union (SACU) must either dissolve, to make way for the SADC Customs Union, or be converted into the SADC Customs Union. However, there is a likelihood of resistance, especially from the Botswana, Lesotho, Namibia and Swaziland (BLNS) countries, who, as discussed in Chapter 3, prefer the current status to remain. This is because they fear that the inclusion of other members will dilute the revenue-sharing formulae of the SACU and thus reduce their revenue share. However, this argument could not necessarily be true because as membership of the SACU increases, so would its revenue. So it's a zero sum equation.

3.3 Membership of Angola, the Democratic Republic of Congo, Madagascar, Malawi, Mauritius, Seychelles and Tanzania in the SADC should cease. This will pave way for the envisaged Southern Africa Economic Community (SAEC) by the AU.¹²²¹

4. Align the Regional Indicative Strategic Development Plan with the African Economic Community timelines

¹²²¹ In terms of the AU proposal, the *Southern Africa Economic Community* (SAEC) would include Botswana, Lesotho, Mozambique, Namibia, South Africa, Swaziland, Zambia, and Zimbabwe.

The African Economic Community (AEC) envisages the establishment of a continental free trade area (CFTA) by 2017, a Continental Customs Union (CCU) by 2019, an African Common Market (ACM) by 2023 and a Pan-African Economic and Monetary Union (PAEMU) by 2028. These dates do not correspond with the SADC targets in terms of the Regional Indicative Strategic Development Plan (RISDP).

The SADC integration targets in terms of the RISDP should thus be revised as follows:

- 4.1 Establishment of a customs union by 2019 – from 2010;*
- 4.2 Establishment of a common market by 2023 – from 2015;*
- 4.3 Establishment of a monetary union by 2028 – from 2016.*

5. Improve efficiency and effectiveness

The human barriers, in the form of customs and immigration officials, are not given the necessary attention and yet are also contributing to the delay of integration. Bureaucratic delays in removing bottlenecks are crippling, and legislative frameworks for investors to move their plant and machinery from one place to another are not always easy to comply with. Southern Africa, therefore, needs to instil more efficiencies and effectiveness in its civil services and synchronise its legislative instruments to allow for the flow of investment within the region.¹²²²

In this regard member states must:

- 5.1 avail necessary resources for personnel training; and*
- 5.2 purchase quality instruments to bring about the desired results.*

6. Harmonise trade laws and commercial practices

¹²²² “Regional Economic Integration & Globalization Process”
<http://www.opm.gov.na/pm/speeches/speech87.htm> (accessed on 4 December 2016).

This is an important ingredient of regional integration, without which meaningful economic integration cannot be achieved. This is more so given the different legal systems followed by member states of the SADC.¹²²³

The following should happen in this regard:

- 6.1 *The SADC must develop a body of “SADC law”, including model laws dealing with trade-related issues, that each member state must adopt and incorporate into its national laws within reasonable time after its adoption;*
- 6.2 *A significant part of this law must include uniform commercial/trade law, which is a tool in developing the internal market;*
- 6.3 *This must be accompanied by an action plan on the harmonisation of commercial/trade law within the SADC as a building block for the AU.*

7. *Involve the people*

Involvement of the people in the SADC matters should happen at both individual and civil society levels. To achieve this the following must happen:

Member states must conduct public education programmes, especially with regard to regional integration arrangements (RIAs) or regional economic communities (RECs), for their citizens.

People, especially ordinary people, should be informed of the existence of these RIAs, their functions, how they can benefit them, etc. This will necessarily mean that member states must make provision for funding this education, as well as accessibility for citizens to participate in the activities of these RIAs or RECs.

¹²²³ The membership of the SADC represents at least three main legal systems: South Africa, Botswana, Lesotho, Zimbabwe, Namibia and Swaziland (Roman-Dutch); Angola, Madagascar, Seychelles, Mauritius and Mozambique (Civil Law) and South Africa, Zambia, Tanzania, Malawi and Mauritius (Common Law).

8. *Diversify the economies of member states*

There is a need for *diversification* in Southern Africa. At present regional economic arrangements exhibit narrow patterns of trade, depend on primary products and involve low levels of inter-country trade. This is in spite of the fact that most Southern African countries produce raw materials. Because these countries export these raw materials, and not processed goods, they are not interested in importing from each other. This must change for the region to fully benefit from its raw materials.¹²²⁴

9. *Think regional*

Currently the benefits of regional integration in Southern Africa, especially of intra-regional trade, is skewed in favour of large economies such as South Africa, and this is not good for regional integration.¹²²⁵

To address this situation, the following must happen.

9.1 The proposed SADC Regional Development Fund must as such come into operation by 2018 to boost the economies of struggling member states to meet the integration targets.

*9.2 The member states should incorporate regional and continental integration projects and programmes at the national level within reasonable time after their adoption.*¹²²⁶

¹²²⁴ Amponsah, W.A. “Analytical and empirical evidence of trade policy effects of regional integration: Implications for Africa”, paper prepared for the session on “Trade Policies” during the Africa Development Forum III, “Defining Priorities for Regional Integration,” 3 – 8 March 2002, Addis Ababa, Ethiopia at 4; Tumwebaze, H.K *et al.* “Regional Economic Integration and Economic Growth in the COMESA Region, 1980–2010” *African Development Review* vol. 27 issue 1 (March 2015) 67.

¹²²⁵ United Nations Economic Commission for Africa (ECA). *Economic Report on Africa 2015: Industrializing Through Trade* (2015) at 142; de Melo, J *et al.* “Regional integration in Africa: Challenges and prospects” United Nations University (UNU) WIDER Working Paper 2014/037, February 2014.

¹²²⁶ Mapuva, J. “The SADC regional bloc: What challenges and prospects for regional integration?” *Law, Democracy and Development* vol. 18 (2014) 22 at 25.

9.3 The Secretariat must develop a register to monitor the enforcement of the decisions of the SADC institutions by member states;

9.4 Every SADC member state must also use measures such as regional peer review mechanisms to encourage compliance with the SADC decisions and the pursuit of good economic policies that exist in other parts of the world as well as to learn from each other.

Concluding remarks

The success or failure of the regional trade integration in Southern Africa, and thus the African integration agenda in general, is largely dependent on the political will by leaders of the various member states. Many programmes and plans have been developed, and many treaties and protocols signed and ratified, but inadequately, and in some cases never, implemented. And this inadequate or non-implementation is mainly due to a lack of political will on the part of political leaders.

The SADC Heads of States and Government, as the executive representatives of their member states in the SADC, should seriously consider these recommendations lest this project of Southern African regional integration becomes just a pipe dream.

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