

UNIVERSITY OF KWAZULU-NATAL
SCHOOL OF LAW, HOWARD COLLEGE

**THE TRIPARTITE FREE TRADE AREA: TOWARDS A
COMPREHENSIVE AFRICAN ECONOMIC COMMUNITY
WITH A PARTICULAR FOCUS ON SADC**

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This mini-dissertation is submitted in partial fulfilment of the
requirements for the degree of Master of Laws in Business Law

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2021

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ACKNOWLEDGEMENTS

This has not been an easy road. A number of sacrifices had to be made in order for this exercise to be successful. Accordingly, it would be erroneous not to extend a word of gratitude to the following people for the unwavering support and commitment shown toward me.

Firstly, I want to thank my family; my wife Buyisiwe Mabinza and my son Mfanelo Mabinza who have allowed me the space to write and make use of family time that I was supposed to share with them. They took care of the household and ensured that things continued to function as normal, even in my absence. At times I would wake them in the middle of the night and without any reluctance or complaint they assisted me.

Secondly, I would like to thank my friend and schoolmate Tamanda Kamwendo who assisted me when I was struggling to make corrections and edit my work. She did a wonderful job without any gain. She is a wonderful human being. I further want to thank her family who, in the busiest of their schedule, allowed her to assist me.

I further want to thank Kgomotso Tabane who, in the thick of things, provided support and advice on how to approach certain topics. Even when she relocated to Gauteng province, she continued to provide support. Without her I would not have reached this far.

I run short of words to express my humble and sincere gratitude to my supervisor, Mrs. Clydenia Edwina Stevens, who, beyond being my supervisor, became a mother and a sister – guiding me at all times. At certain intervals, I could not meet deadlines, but she continued to patiently provide support whilst pushing me very hard to ensure that I did not lose momentum with my work. Without her spirit of selflessness, diligence and determination, I believe that I would have struggled to make it this far.

Finally, I give thanks to everyone who understood my busy schedule but continued to provide support in order to ensure that I complete this project. I wish to humble myself before them.

KEY TERMS

Tripartite Free Trade Agreement (TFTA); Southern African Development Community (SADC); Common Market for Eastern and Southern Africa (COMESA); East African Community (EAC); World Trade Organisation (WTO); Free Trade Area (FTA); Regional Trade Agreement (RTA); General Agreements on Tariffs and Trade (GATT); European Union (EU); Most Favoured Nation (MFN)

TABLE OF CONTENTS

DECLARATION REGARDING ORIGINALITY	2
ACKNOWLEDGEMENTS	3
KEY TERMS	4
CHAPTER ONE:.....	8
INTRODUCTION	8
1.1 BACKGROUND OF THE STUDY	8
1.2 PROBLEM STATEMENT.....	12
1.3 RESEARCH QUESTIONS	13
1.4 RESEARCH METHODOLOGY	13
1.5 LIMITATIONS OF THE STUDY	14
1.6 STRUCTURE OF THESIS	14
CHAPTER TWO:.....	15
THE MULTILATERAL TRADE FRAMEWORK: FROM GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT) TO THE WORLD TRADE ORGANISATION (WTO).....	15
2.1 INTRODUCTION	15
2.2 BRIEF HISTORY OF GATT AND WTO AND THE INVOLVEMENT OF DEVELOPING COUNTRIES.....	16
2.3 THE GENESIS OF THE WTO	19
2.4 THE FUNDAMENTAL PRINCIPLES UNDERLYING THE MULTILATERAL TRADING SYSTEM.....	20
2.4.1 RECIPROCITY	21
2.4.2 MOST-FAVORED-NATION TREATMENT	22
2.4.3 NATIONAL TREATMENT	24
2.4.4 TRANSPARENCY.....	24
2.5 LEGAL FRAMEWORK FOR RTA's.....	26
2.5.1 ARTICLE XXIV	26
2.6 RTAs AND MULTILATERAL TRADE.....	28
2.7 PARTICULAR ARTICLE XXIV CASES	30
2.8 DEFINING REGIONALISM AND REGIONALISATION	32
2.9 BACKGROUND ON AFRICA'S TRADE FRAMEWORK.....	36

2.10 RATIONALE OF REGIONAL INTEGRATION IN AFRICA	37
CHAPTER 3:	40
AN OVERVIEW OF THE REGIONAL TRADE FRAMEWORK WITH PARTICULAR FOCUS ON EAC, COMESA AND THE LAGOS PLAN	40
3.1 INTRODUCTION	40
3.2 GENERAL AFRICAN REGARD FOR REGIONAL INTEGRATION	41
3.3 BRIEF OVERVIEW OF THE EAC AND COMESA	42
3.3.1 The EAC	42
3.3.2 COMESA.....	44
3.4 DYNAMISM IN THE GAINS FROM THE FORMATION OF THE TFTA FOR EAC AND COMESA.....	45
3.5 IMPACT OF THE TFTA	49
3.6 CONCLUSION.....	50
CHAPTER 4:	52
A STUDY OF THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY	52
4.1 INTRODUCTION	52
4.2 BRIEF HISTORICAL OVERVIEW OF SADCC AND SADC	52
4.3 The Objectives of SADC	55
4.4 THE SADC ACCOMPLISHMENTS.....	57
4.5 THE CHALLENGES FACED IN SADC	58
4.5.1 Unreasonable targets.....	58
4.5.2 Overlapping multiple Membership of SADC Member States to other RIAs	59
4.5.3 Delays in the consolidation of SADC Free Trade Area (FTA)	61
4.5.4 Over-dependence on donor funds.....	62
4.5.5 Lack of industrial capacity in SADC.....	63
4.5.6 High cost of doing business within SADC	64
4.5.7 Lack of private sector participation	64
4.6 PROSPECTS FOR REGIONAL INTEGRATION IN THE SADC	65
4.7 SADC ROLE IN THE TFTA	66
4.8 CONCLUSION.....	67
CHAPTER 5:	69
FINDINGS, RECOMMENDATIONS AND CONCLUSION	69
5.1 INTRODUCTION	69
5.2 KEY ISSUES IDENTIFIED.....	69

5.3 RECOMMENDATIONS.....	74
5.3.1 Improved coordination and bargaining power.....	74
5.3.2 Improved regional security	75
5.3.3 Private sector involvement	75
5.4 CONCLUSION.....	75
BIBLIOGRAPHY	77

CHAPTER ONE: INTRODUCTION

1.1 BACKGROUND OF THE STUDY

In recent years, there has been an increase in regional integration initiatives in the world trading system.¹ Although not entirely exhaustive, regional integration may be defined as the outcome of processes — cooperative agreements, intergovernmental treaty enforcement, and market-led mechanisms — in which the economies of countries within a particular region become interrelated.² Stemming from regional integration are positive developments such as establishing more stable and competitive economies, enhanced growth opportunities and the generation of new sources of investment finance. More so, regional integration stimulates inter-regional commerce, promotes economies of scale and ensures greater participation for regional bodies in global economic governance.³ The basic premise of such initiatives is to liberalise trade among the Members by granting tariff concessions or eliminations on selected products.⁴

One of the most significant problems facing the multilateral trading system is the surge of Preferential Trade Arrangements (hereinafter referred to as PTAs). This is evident in the increase of the total number of such agreements as well as their scope.⁵ The plummet of the Ministerial Meeting of the Doha Round in 2008 fuelled the trend towards PTAs.⁶

¹ Mold, A & Mukwaya, R 'The Effects of the Tripartite Free Trade Area: Towards a New Economic Geography in Southern, Eastern and Northern Africa', at 3 available at www.nottingham.ac.uk/economics/credit/, accessed on 22 April 2017.

² African Union, 'Assessing Regional Integration in Africa', available at <https://www.tralac.org/documents/resources/africa/2898-assessing-regional-integration-in-africa-ix-uneca-auc-afdb-unctad-july-2019/file.html>, accessed on 26 August 2021.

³ *Ibid.*

⁴ Mold & Mukwaya R op cit note 1 at 3.

⁵ Dieter, H 'The Multilateral Trading System and Preferential Trade Agreements: Can their Negative Effects be Minimised?' *Berlin GARNET Working Paper No: 54/08*, German Institute for International and Security Affairs available at <https://warwick.ac.uk/fac/soc/pais/research/researchcentres/csgr/garnet/workingpapers/5408.pdf>, accessed on 4 December 2019.

⁶ Bellmann, C Hepburn J & Wilke, M 'The Challenges Facing the Multilateral Trading System in Addressing Global Public Policy Objectives' 2012 (3) *Journal of International Development Policy* 4.

Although the European Union (hereinafter referred to as the EU) implemented a customs union in 1958 and has been implementing PTAs for several years, especially in Asian countries, this was not the only reason for the growing number of PTAs before 2000.⁷ When utilised correctly, regional integration is more likely to succeed and boost trade liberalisation amongst the Member States. However, improper implementation of regional integration initiatives can posture genuine threats owing to the multiple membership regional integration models that are currently prevalent. The Asian economies, like China, have in recent years contributed to this precarious trend.⁸ Africa has also followed suit as several Free Trade Areas (widely known as FTAs) were formed. The East African Community (hereinafter referred to as EAC) was formed to facilitate free trade within countries in the east of Africa.⁹ At present, however, Southern Africa has the most FTAs. Southern African Customs Union (SACU), Southern African Development Society (SADC) and South Africa and European Union (EU) FTA are but a few of the most common FTAs in the region of Southern Africa. The Common Market for Eastern and Southern Africa (COMESA) is also one of the first few FTAs that were formed in Africa.

Historically, there have been barriers to internal trade in many countries. Their abolition is the equivalent of the country's constituent units creating a customs union. Examples of these barriers abolished include France's post-revolutionary elimination of internal trade arms and the adoption of the United States of America (USA) Constitution in 1787, which included an inter-state commerce clause forbidding trade barriers.¹⁰ Further illustrations include a customs union among Belgium, Netherlands, and Luxemburg (Benelux) as established in 1944 and the European Union, which began as the European Coal and Steel Community in 1952.¹¹ Others include the European Free Trade Association (EFTA), which entered into force in May 1960, and the Latin American Free

⁷ World Trade Organisation *Understanding the WTO* (2015) Fifth Edition, available at <http://www.wto.org>, accessed on 22/04/2017.

⁸ Dieter, H (2008) The Multilateral Trading System and Preferential Trade Agreements: Can their Negative Effects be minimized? *Berlin GARNET Working Paper No: 54/08*, German Institute for International and Security Affairs at page 2.

⁹ The countries that formed EAC are to name a few: Kenya, Uganda and Tanzania amongst others.

¹⁰ Arblaster, P *History of the low countries* Red Globe Press (1982) 242-244.

¹¹ *Ibid*.

Trade Area (LAFTA) in June 1961.¹² Another is the East African Economic Community which was established in 1967.¹³ The World Trade Organisation (WTO) lists 109 Regional Trade Agreements (hereinafter referred to as RTAs) which were notified to the General Agreement on Tariffs and Trade (GATT) since its inception in 1947.¹⁴ As many as 34 out of the 109 agreements were notified during the period between 1990-94. In the period between 1995 and 2000, a further 111 agreements have been notified to the WTO.¹⁵

RTAs are therefore a prominent feature of international trade, and the number of these arrangements are ever-increasing. The Dictionary of Trade Policy Terms defines regionalism as ‘actions by governments to liberalise or facilitate trade on a regional basis, sometimes through free-trade areas or customs unions.’¹⁶ The WTO defines RTAs as ‘reciprocal trade agreements between two or more partners’. RTAs can be categorised into five groupings depending upon the level of integration. These groupings are ‘Preferential Trade Agreements (PTAs), Free Trade Agreements (FTAs), Customs Unions, Common Markets and Economic Unions.’¹⁷ Bhala¹⁸ defines the formation of an RTA as giving preferential treatment to suppliers in the Member States, thereby increasing trade activity among the suppliers.¹⁹ He further adds that consumers enjoy a greater range of goods at lower prices when their countries join RTAs.²⁰

The traditional forms of regional integration have undergone significant changes, as the major economies have shifted trade-negotiating emphasis toward mega-regional agreements. In particular, the emergence of the Trans-Pacific Partnership (TPP);²¹ the

¹² Nattier, FE ‘LAFTA – The Latin American Free Trade Association’ (1966) 10(2) *Section of International and comparative law bulletin* 20-31.

¹³ Mbogoro, DAK ‘African Review - The East African community: an economic analysis of the integration scheme’ (1978) 8(2) *African Review* 54-55.

¹⁴ Devuyt, Y & Serdarevic, A ‘The World Trade Organization and Regional Trade Agreements: Bridging the Constitutional Credibility Gap’ (2007) 18(1) *Duke Journal of Comparative & International Law* 2.

¹⁵ Regional Trade Agreements and Preferential Trade Arrangements, available at http://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm, accessed on 22 April 2017.

¹⁶ Kamwendo, TA *A Critical Discussion on Botswana’s Access to Medicine and TRIPS Flexibilities* (an unpublished LLM thesis, University of Kwazulu-Natal 2017) 22.

¹⁷ Pal, P ‘Regional Trade Agreements in a Multilateral Trade Regime: An Overview’ (2004), available at http://www.networkideas.org/feathm/may2004/survey_paper_rta.pdf, accessed on 22 April 2017.

¹⁸ Raj Bhala *International Trade Law: Interdisciplinary Theory and Practice* 3rd ed (2006) 36.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Agreement between Australia, Canada, Japan, Mexico, the United States, and seven other countries.

Transatlantic Trade and Investment Partnership (TTIP); and China's pursuit of the Regional Comprehensive Economic Partnership (RCEP) raises a host of short and long term questions for the multilateral trading system.²²

Notwithstanding the foundation established by the General Agreement on Tariffs and Trade (GATT) and WTO, the multilateral trade system has remained unchanged since 1995. However, the first wave of RTAs developed by the United States and the European Union in the 1990s set the stage for the new-fangled features of the upcoming mega-regional accords. In particular, for both the TPP and TTIP agreements, the desire to write new rules is an essential driver of the negotiations. The new rules cover public health and product safety standards, labour and the environment, international investment, digital trade and e-commerce, and state-owned enterprises.²³

Another significant African integration effort is the Abuja Treaty,²⁴ which entered into force in 1994, intending to set up a functional continental economic community by 2028.²⁵ Although the signatories to the Abuja Treaty have committed to establishing optimal conditions for the African Economic Community to prosper as with the Lagos Plan of Action, there are also inherent flaws in the legal framework which have made development incredibly sluggish in this regard.²⁶ Thus, in October 2008, heads of states in Kampala decided to develop the Tripartite FTA within the African context.²⁷ The Tripartite FTA is meant to build upon the already existing FTAs being COMESA, EAC and SADC. To date, at least 36 of the 55 African Union Member States have ratified the agreement.²⁸

²² *Ibid.*

²³ Brown, CP (2016) 'Mega-Regional Trade Agreements and the Future of the WTO Part of Discussion Paper Series on Global and Regional Governance' at 4 available at <https://piie.com/system/files/documents/bown201609cfr.pdf>, accessed on 2 March 2017.

²⁴ This is the treaty establishing the African Economic Community (AEC).

²⁵ Qobo, M 'The challenges of regional integration in Africa In the context of globalisation and the prospects for a United States of Africa' (2007) paper 145, available at <https://www.files.ethz.ch/isn/98933/PAPER145H.pdf>, accessed on 10 December 2019.

²⁶ Lehloenyana, PM & Mpya, M 'Exploring the Citizen Inclusiveness and Micro- Economic Empowerment Aspects of Regional Integration in Africa' (2016) 20 *Law, Democracy and Development* 92.

²⁷ Hartzenberg, T 'Regional integration in Africa' 2011(14) WTO Staff Working Paper, page 6 available at <https://www.econstor.eu/bitstream/10419/57595/1/669412368.pdf>, accessed on 11 December 2019.

²⁸ See <https://sdg.iisd.org/commentary/policy-briefs/african-continental-free-trade-area-completes-first-month-of-trading/>, accessed 8 March 2021.

This regional bloc aims to enact and enforce policies that promote and consolidate an equitable society and social justice in all economic and social life areas.²⁹ One of the main benefits envisioned by the Tripartite FTA is establishing a common market with a single economic space, which will boost production capacities as sought in the 1991 Abuja Treaty.³⁰

Interestingly, all forty-four African WTO members are also signatories to the CFTA. As such, these Members should be guided by the overarching principle of non-discrimination enshrined in Article XXIV of the GATT and the 1979 Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries (Enabling Clause) and Article V of The General Agreement on Trade in services (GATS).³¹ As a RTA, the Tripartite FTA may have the potential of departing from the guiding principles of the WTO because it is preferential in nature. However, this problem may be countered as WTO Members may only enter into a RTA under specific conditions.³²

1.2 PROBLEM STATEMENT

Trade has been widely accepted as an essential tool in spearheading economic growth and development. In many different parts of the world, countries have alleviated poverty and economically prospered through effective trade. Despite the efforts to dismantle trade restrictions and create a common market, the problem of disintegrated African markets, which lead to poor intra-African trade, remains. The TFTA was created to solve a regional problem African countries face to ensure that they can efficiently participate in the multilateral trading system by accessing developed countries' markets. However, as inspiring as these objectives are, the underlying problems with the multilateral trade

²⁹ The tripartite free trade area agreement between SADC, COMESA AND EAC, available at <https://www.tralac.org/resources/by-region/comesa-eac-sadc-tripartite-fta.html> accessed on 22 April 2017.

³⁰ *Ibid.*

³¹ Saurombe, A 'The Southern African Development Community trade legal instruments compliance with certain criteria of GATT Article XXIV' 2011 (14)4 *PELJ* 288.

³² Regional Integration According to Article XXIV of GATT Take note that the conditions are entailed in the GATT available at http://www.mpil.de/files/pdf3/mpunyb_hilpold_7.pdf , accessed on 22 April 2017.

system are of concern. This research aimed to examine whether the Tripartite Free Trade Area between the COMESA, EAC, and the SADC can indeed be considered a beacon of hope in ensuring market access for these countries and regions.

1.3 RESEARCH QUESTIONS

The following research questions were undertaken:

- To what extent has the problems within the multilateral system resulted in the proliferation of FTAs?
- How are the particular African countries equipped to deal with FTAs?
- To what extent will the TFTA solve the particular problems of trade faced by the continent of Africa? How will the formation of the TFTA assist a Regional Bloc such as the SADC to have market access in other countries, and how will it operate?

1.4 RESEARCH METHODOLOGY

The methodology employed in this work is desk-top research. This research relied entirely on materials from various primary sources, including national legislation, particularly international and regional agreements. These include the policy documents on the Tripartite FTA, different WTO agreements, and available materials on COMESA, the EAC, and SADC. Secondary sources such as journal articles, academic textbooks, and commentary reports of the negotiation processes undertaken by the Member countries of the Tripartite FTA, newspaper Articles and internet sources were also used. The research aimed to review textbooks that propose trade facilitation and liberalisation of trade in goods.

1.5 LIMITATIONS OF THE STUDY

International trade law is a field widely written about across the globe, and as such, this study will be limited to the African context. The study provides a brief overview of the TFTA regional groups and provides an in-depth discussion on the SADC. Lastly, references to other regional groups will be used as a guide to provide suitable recommendations.

1.6 STRUCTURE OF THESIS

Chapter 1: Introduction

This Chapter introduces the issues this study is based upon and provides a background on the subject matter. The research questions, as well as the research methodology, are also set out in this Chapter.

Chapter 2: The multilateral trade framework and Regional Trade Agreements: From General Agreement on Tariffs and Trade (GATT) to the World Trade Organisation (WTO)

This Chapter focuses on the history of the GATT and WTO. It further discusses the WTO agreement and the relevant institutions and provisions responsible for overseeing the relevant instruments.

Chapter 3: Regional Trade Framework: TFTA

This Chapter provides an overview of the regional trade framework and a summary of the EAC, COMESA and the Lagos Plan.

Chapter 4: Southern African Development Community (SADC)

This Chapter involves a discussion on the background of the SADC and the specific aspects of the trade relations between SADC member countries.

Chapter 5: Recommendations and Conclusion

This Chapter concludes and further provides recommendations.

CHAPTER TWO:
**THE MULTILATERAL TRADE FRAMEWORK: FROM GENERAL
AGREEMENT ON TARIFFS AND TRADE (GATT) TO THE WORLD TRADE
ORGANISATION (WTO)**

2.1 INTRODUCTION

Article XXIV of the GATT is arguably the 'scapegoat' for the creation of PTAs. However, this provision in itself is regarded as a form of diversion as some Members of the WTO now prefer participating in regional agreements and other preferential trade unions rather than participate in the formation of global or multilateral trade relations. On the one hand, it has been argued that Article XXIV will disintegrate the WTO, while on the other, it has been said that such trading arrangements are still within the mandate of the WTO. Some authors, such as Alan Winters,³³ extend the view that Article XXIV is an excellent platform for developing countries, as their interests have not been heard on the WTO forum. Such countries argue that the formation of such smaller groups will help them negotiate better and ultimately ensure that their interests are heard. It is submitted that another brewing concern may be that developing countries are apprehensive about voicing their opinions. Instead, developing countries can better voice their opinions in smaller groups with the same challenges and goals.³⁴

This Chapter aims to determine the extent to which problems within the multilateral trading system have resulted in the proliferation of RTAs. As such, the Chapter will firstly discuss the historical development of the GATT and that of the WTO. Secondly, it will identify and discuss the principles that underlie the WTO and the possible factors that have led to an increase in RTAs. Thirdly, the Chapter will discuss the legal framework underpinning Article XXIV and the relevant cases where this provision was discussed. Lastly, the Chapter's ultimate focus will be given to the participation of the developing countries in the WTO and their influence (if any) in the multilateral trading system.

³³ Winters, L.A. 'Regionalism versus Multilateralism' (1996) *World Bank Policy Research Working Paper* 26.

³⁴ *Ibid.*

2.2 BRIEF HISTORY OF GATT AND WTO AND THE INVOLVEMENT OF DEVELOPING COUNTRIES

Developing countries remained sceptical at the start of the Doha Round that the Round would resolve issues of importance to them. These countries' cynicism was founded on their observation of the previous eight rounds of the GATT that did not sufficiently resolve the needs and concerns of developing countries. It was through the Doha Round that developing countries actively engaged in forming several coalitions with other developing countries. These coalitions included the Group of 20 countries (G20),³⁵ Non-Agricultural Market Access negotiations (shortly referred to as NAMA 11), the Group of 33 countries (G33)³⁶ and other regional groups, for instance, the Africa Group: the African, Caribbean and Pacific Group of States (ACP), and groups that are at lower levels of development such as the Least Developed Countries (LDCs) and Small and Vulnerable Economies (SVEs).³⁷ By their very essence, these groups were very coordinated and actively voiced their interests, thus enhancing their bargaining power. Countries involved in the G20, G33 and NAMA 11 have demonstrated to have the capacity as equal to main developed nations. However, the political and economic struggles resulted from several critical factors throughout the history of the multilateral trade system. To fully understand the causes of the present problems within the WTO and the reasons for the creation of RTAs, it is important to detail its history.

The period of the Great Depression and World War II (1930-1940s) is a significant illustration of the last bleak period of protectionism in globalisation.³⁸ The implementation

³⁵ The G20 (or G-20 or Group of Twenty) is an international forum for the governments and central bank governors from 20 major economies. Currently, these are Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, South Korea, Turkey, United Kingdom, United States, and the European Union.

³⁶ Despite the name, there are currently 48 Member nations named: Antigua and Barbuda, Barbados, Belize, Benin, China, Cote d'Ivoire, Cuba, Democratic Republic of the Congo, Dominican Republic, El Salvador, Grenada, Guyana, Guatemala, Haiti, Honduras, India, Indonesia, Jamaica, Kenya, Laos, Mauritius, Madagascar, Mongolia, Mozambique, Nicaragua, Nigeria, Pakistan, Panama, Peru, Philippines, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Senegal, Sri Lanka, Suriname, Tanzania, Trinidad and Tobago, Turkey, Uganda, Venezuela, Zambia, Zimbabwe.

³⁷ Draper, P & Sally, R 'Developing country coalitions in multilateral trade negotiations: Aligning the majors?' available at <https://saiia.org.za/wp-content/uploads/2013/06/8-SAIIA-Trade-Report-No.-8.pdf>, accessed on 5 January 2020.

³⁸ Protectionism is defined as blocking international products from entering a local market, to protect the local industries.

of the Smoot-Hawley tariffs by the United States and the international retaliatory reaction in the 1930s, contributed to the virtual halt of international trade.³⁹ Twenty-three nations, mainly led by the United States, the United Kingdom and Canada, signed the GATT at the conclusion of the Second World War. The aim was to establish an agreement that would guarantee post-war peace and prevent a repeat of past failures.⁴⁰

It is, however, imperative that before delving into the WTO to briefly discuss its precursor, which is the International Trade Organisation (ITO). The ITO is a product of the Havana Convention of 1948.⁴¹ The proposed establishment of the ITO was necessitated by the challenges experienced after World War 2, which related to the rise in tariffs and the instituting of non-tariff barriers, which impeded imports and reduction in export markets. This resulted in poor economic conditions prompting the United States Congress to propose establishing a new international trade organisation.⁴² The primary objective herein was to establish an organisation that would regulate trade policies; promote the growth of trade by eliminating or reducing tariffs and other trade barriers; regulate restrictive business practices hampering trade; regulate international commodity agreements; assist economic development and reconstruction and settle disputes among Member nations regarding harmful trade policies.⁴³

As such, the ITO was intended to function as a global trade ministry. However, tensions and attachments to individual country sovereignty emerged that consequently undermined this idea (as noted from the USA discussion above). Subsequently, countries began to pursue their own goals as some reasoned that free trade was not a realistic goal in pursuing a liberal economic system operated by sovereign states.⁴⁴ As a result of this uneasiness, the ITO became the first casualty of the post-war political environment.

³⁹ Barton, JL *et al* 'The Evolution of the Trade Regime Politics, Law and Economics of the GATT and the WTO' (2006), available at <https://press.princeton.edu/titles>, accessed on 19 November 2017 at 1-12.

⁴⁰ Horowitz, S 'Restarting Globalization after World War II *Structure, Coalitions, and the Cold War*' March 1, 2004 retrieved from <http://journals.sagepub.com/doi/abs/10.1177/0010414003260980> accessed on the July 26, 2017 at 12.

⁴¹ Meagher, RF *An International Redistribution of Wealth and Power: A Study of the Charter of Economic Rights and Duties of States* New York: Pergamon Policy Studies, (1981) 14.

⁴² Legal-dictionary.thefreedictionary.com/international +trade+organisation, accessed on 11 November 2017.

⁴³ *Ibid.*

⁴⁴ Vangrasstek, C 'The History and Future of the World Trade Organisation' (2013), available at http://www.wto.org/english/res_e/booksp_e/historywto_epdf, accessed on 11 November 2017 at 10.

Institutions such as the United States Congress refused to ratify the Havana Charter leading to Member countries reverting to GATT, which became the centre-piece of the trading system although it was initially regarded as an interim arrangement in pursuit of a harmonised international trading environment.⁴⁵

At its commencement in 1947, the newly created GATT did not address the specific problems developing countries face. The basic premise of the Agreement, as alluded to in Article I of the GATT — the principle of the Most-Favoured-Nation — was that the rights and responsibilities of all contracting parties should be enforced equally.⁴⁶ Therefore, developing countries engaged as equal participants in trade during the early phases of the GATT (1948 to 1955).⁴⁷ However, through the special and differential treatment provisions (SDTs), the GATT managed to introduce a range of exceptions to the Most Favored Nation (MFN) and national treatment principles.

It should be noted that when the GATT was established, many developing countries were still under colonial domination. During the early GATT Rounds, the interests of the developing countries were brought to the international community's attention via their colonial occupiers.⁴⁸ Moreover, the colonial occupiers regarded the GATT as their 'property' and saw no desire to satisfy the needs of other countries.⁴⁹ Therefore, when most developing countries attained independence in the late 1950s and early 1960s, their perceptions were influenced by their past encounters and views on the different development concerns now as independent countries.⁵⁰

In addition, the GATT of 1947 established a new fundamental structure of rules and derogations for controlling international trade between contracting parties and kept the initial tariff as it was. The first five rounds of GATT negotiations were primarily driven by main exporting countries and those with a primary supply stake in a specific

⁴⁵ Vangrasstek, C 'The History and Future of the World Trade Organisation' (2013), available at http://www.wto.org/english/res_e/booksp_e/historywto_epdf, accessed on 11 November 2017 at page10.

⁴⁶ Barton op cit note 39 at 1-12.

⁴⁷ Lee, Y., Horlick, G *et al* Law and Development Perspective on International Trade Law (2011) 131.

⁴⁸ For example, South Africa was colonized by Britain and therefore was represented by her in the international negotiations.

⁴⁹ Barton op cit note 39 at 1-12.

⁵⁰ *Ibid.*

commodity, coming together and seeking changes in mutual market access.⁵¹ They based their negotiating efforts on reducing import barriers in several other countries that were of interest to them.⁵² Whereas the trade barriers selected for removal were usually those on other developed countries' import markets, the main consequence stemming from such was that developed countries were required to lower their tariffs. In other words, owing to the fact that most developing countries were neither major producers nor major importers, very little was demanded from them in light of trade liberalisation. Such a result is in conjunction with the import tariff trend that continues today.⁵³

2.3 THE GENESIS OF THE WTO

Despite the significant advances made by the GATT, the international community sought to strengthen the *status quo* by forming the WTO. The WTO was formed as a replacement for the GATT in 1995 to supervise and liberalise international trade. The organisation deals with the regulation of trade between participating countries. It also provides a legal and institutional framework for negotiations and formalising trade agreements and is mainly responsible for enforcing trade laws and agreements and resolving disputes.⁵⁴ The WTO was created to be stronger and have a more permanent framework than the previous GATT. It also monitors trade in services and trade-related aspects of intellectual property rights and trade in goods. The WTO has a total of 164 Member countries.⁵⁵

According to North,

⁵¹ Barton op cit note 39 at 1-12. The twenty-three countries engaging in the Geneva negotiations that led to the signing of the GATT in 1947 were Australia, Belgium, Brazil, Burma (Myanmar), Canada, Ceylon (Sri Lanka), Chile, China, Cuba, Czechoslovakia (Czech Republic and Slovakia), France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, South Africa, Southern Rhodesia (Zimbabwe), Syria, United Kingdom, and United States.

⁵² 'The GATT grew out of discussions between government officials from the United States and United Kingdom during the war. Once these two countries agreed on a document that could serve as a basis for negotiation, other countries were invited to participate in shaping the provisions of the GATT and the charter for an International Trade Organisation.'

⁵³ Barton op cit note 39 at 1-12.

⁵⁴ See https://www.wto.org/english/thewto_e/what_is_e/wto_dg_stat_e.htm, available at 14 January 2021.

⁵⁵ Difference between GATT and WTO retrieved from <http://www.differencebetween.info/difference-between-gatt-and-wto> accessed on the 26th July 2017.

‘Institutions are the humanly devised limitations that structure political, economic and social interaction and consist of both informal constraints (sanctions, taboos, customs, traditions, and codes of conduct) and formal rules (constitutions, laws, property rights).’⁵⁶

Accordingly, the WTO staff include international civil servants, and on the other hand, it is an organisation that is accountable to its Members.⁵⁷ The primary responsibility of the WTO is to develop rules to govern the operation of international trade and administer the agreements. But it also facilitates negotiations between members.⁵⁸ Additionally, it also monitors members’ compliance with the rules. It also urges developing and least-developed Members to participate more effectively in the organisation to take advantage of the open market opportunities.⁵⁹ The general operation and the management of the WTO activities are challenging. The WTO must find a balance between upholding its core principles and meeting the expectations of the Member States.

2.4 THE FUNDAMENTAL PRINCIPLES UNDERLYING THE MULTILATERAL TRADING SYSTEM

The existing WTO agreements consist of obligations that countries have freely concluded over decades since the beginning of the GATT. Furthermore, the trade rules underpin the multilateral trading system. Interestingly, the GATT, according to Kamwendo, ‘was more a contract to which States were Contracting Parties than an organisation.’⁶⁰ The GATT was characterised by eight rounds of negotiations on various trade issues, starting with the 1947 Geneva Round, ending with the 1986-1994 Uruguay Round.⁶¹ In the first rounds of GATT negotiations, Member States focused primarily on reducing tariff barriers. The Uruguay Round of negotiations, which began in 1994, marked the conclusion of the

⁵⁶ North, DC ‘Institutions’ *Journal of Economic Perspectives* 5(1) 1991 97-112.

⁵⁷ See https://www.wto.org/english/res_e/booksp_e/historywto_14_e.pdf, accessed on 3 January 2020 at 503-506.

⁵⁸ *Ibid* at 503-506.

⁵⁹ *Ibid*.

⁶⁰ Kamwendo op cit note 16 at 22.

⁶¹ GATT rounds; Geneva Round 1947, Annency Round 1949, Torquay Round 1951, Geneva Round 1955-56, Dillon Round 1960-62, Kennedy Round 1964-67, Tokyo Round 1973-79, Uruguay Round 1986-94.

GATT era and the beginning of the World Trade Organization (WTO).⁶² For systematic reasons, the GATT rounds of negotiations have been tabulated below as follows;⁶³

Year	Round Name	Subjects covered
1947	Geneva	Tariffs
1949	Annecy	Tariffs
1951	Torquay	Tariffs
1956	Geneva	Tariffs
1960-1961	Geneva Dillon Round	Tariffs
1964-1967	Geneva Kennedy Round	Tariffs and anti-dumping measures
1973-1979	Geneva Tokyo Round	Tariffs, non-tariff measures, framework agreements
1986-1994	Geneva Uruguay Round	Tariffs, intellectual property, non-tariff measures, services, rules, dispute settlement, textiles, agriculture, the creation of WTO.

2.4.1 RECIPROCITY

The fundamental principle of reciprocity underpins GATT rounds of negotiations. These negotiations are reciprocal between countries with primary export commodities and countries interested in importing such commodities. Although this particular negotiating strategy has been influential in the past, the GATT texts do not compel countries to negotiate when mutually promoting market access.⁶⁴

⁶² Kamwendo op cit note 16 at 22.

⁶³ https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm, accessed on 3 January 2020.

⁶⁴ Difference between GATT and WTO retrieved from <http://www.differencebetween.info/difference-between-gatt-and-wto> accessed on the 26th July 2017.

Secondly, if a negotiating party has promised to enhance its market access, reciprocity during renegotiations is required.⁶⁵ There are two ways countries can revoke prior commitments, and in both instances, the solution is reciprocity. The first circumstance is where a country seeks to obey the legal procedures when it adjusts its import tariffs to rates above what was agreed with other Members at an earlier negotiation round.⁶⁶ Trading partners who are negatively affected by the adjustment are then permitted to request reciprocal access to a market in another industry. Although this may be achieved through trade liberalisation in the exporter's other industry, it is usually enforced by a new 'market closing', which is reliant on the principle of reciprocity in order to rebalance the agreement.⁶⁷ The second circumstance is where a country rescinds its commitment by granting access to a market in a manner not prescribed in the GATT/WTO.⁶⁸ The adversely affected trade parties can obtain a legal ruling through the dispute resolution mechanism to have their market access obligations rebalanced.⁶⁹ This has resulted in the use of the principle of reciprocity to compensate negatively affected countries upon a country infringing the rules of the GATT/WTO. This has resulted in the use of the principle of reciprocity to compensate negatively affected countries upon a country infringing the rules of the GATT/WTO.⁷⁰

2.4.2 MOST-FAVORED-NATION TREATMENT

The principle of the Most Favored Nation (MFN) is the GATT's second underlying principle. It entails that importers should not discriminate between different sources of foreign exports. MFN treatment, as stipulated in GATT Articles I, XIII, and XVII, provides as follows:

⁶⁵ Crystal, J 'Bargaining in the Negotiations over Liberalizing Trade in Services: Power, Reciprocity and Learning' (2003) 10(3) *Review of International Political Economy* 560.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ Crystal op cit note 65 at 571.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

‘WTO Members to extend MFN treatment to like products of other WTO Members regarding tariffs, regulations on exports and imports, internal taxes and charges, and internal regulations. In other words, 'like' products from all WTO Members must be given the same treatment as the most advantageous treatment accorded the products of any state.’⁷¹

GATT Article XIII stipulates that concerning like products, quantitative restrictions or limits set on tariffs should be applied in a non-discriminatory manner. It further specifies that, in enforcing tariff quotas and import restrictions, Members of the WTO should assign shares that adhere as much as possible to what would be anticipated in their absence. Article XIII calls for treatment on an MFN basis when applying quantitative restrictions and supports the disciplines referred to in Article I.

Generally, the GATT's MFN principles regulate both negotiations as well as renegotiations. If during a round of negotiations, a GATT contracting party agrees to lower its tariff and improve the available market access to exporters from another GATT country, similar lower tariff and enhanced market access conditions must be provided to all the other GATT countries on a non-discriminatory MFN basis. It is due to this advantage that most countries preferred Membership in the GATT.⁷² Although a country might not aim to use the GATT for its tariff liberalisation discussions or to promote internal change (for reasons explained in the next section) and Membership in the GATT appeared helpful as it offered assurance that the exporters of the country have the same benefits made available to other member states.⁷³ This highlights and offers evidence of why developing countries would be interested in joining the GATT / WTO.⁷⁴

Nonetheless, while MFN is a valuable principle, as already discussed, the GATT/WTO exceptions to the MFN makes it more weakened. Also, the GATT / WTO allows Members to sign PTAs between themselves and thereby give selected partners lower tariff rates than

⁷¹ General Agreements on Tariffs and Trade Article I:1.

⁷² General Agreement on Tariffs and Trade 1994 retrieved from https://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_09_e.htm accessed 27 June 2017.

⁷³ Baggaley, N ‘Trade Liberalisation Under the GATT, the NAFTA and the EU: Selected Topic’ 1998 1(1), available at <https://journals.lib.unb.ca/index.php/jcim/article/view/474/795>, accessed on 30 June 2021.

⁷⁴ *Ibid.*

the MFN as long as it includes all trade.⁷⁵ In addition, the GATT / WTO supports Members to provide significantly lower tariffs compared to those of the MFN to exporters from developing countries, provided it is done through the Generalised System of Preferences (GSP).⁷⁶

2.4.3 NATIONAL TREATMENT

National treatment is the second core principle of non-discrimination embodied in the GATT/WTO.⁷⁷ It is essential that after an import tariff has been paid for foreign goods, such goods must be treated much like a qualifying domestically produced product.⁷⁸ After payment of such import tariff, the products cannot be subject to additional taxes or administrative restrictions, which will separate them from a domestically manufactured product.⁷⁹ The national treatment principle serves to deter governments from undermining the tariff reductions they initially offered by eventually implementing certain internal policies, such as taxes or subsidies.⁸⁰ This principle is significant to this present study as there is a regular tendency for countries to attempt to apply discriminatory taxes and regulations to protect their domestic market. Accordingly, the existence of the National treatment principle hinders the adoption of domestic protection policies and measures, thus promoting trade liberalisation in the TFTA region.

2.4.4 TRANSPARENCY

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ Article III of the GATT

⁷⁸ The principle of national treatment is found in Article III of the GATT 1947. Horn, T 'National Treatment in the GATT' (2006) *CEPR Discussion Paper No. 5450* available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=898900, accessed on 3 January 2020 provides a recent theoretical treatment of the national treatment principle on which the GATT/ WTO are modeled as an incomplete contract.

⁷⁹ Keen, M *Changing Customs: Challenges and Strategies for the Reform of Customs Administration*. USA: International Monetary Fund 7.

⁸⁰ *Ibid.*

Without transparency, trade agreements are difficult to enforce. Transparency enables trading partners to be aware of how rules are implemented. Moreover, decision-making transparency guarantees equality and peer-review. As such, the minutes and financial accounts of the numerous WTO bodies, as well as the periodic review of the trading system by the Director-General, offer essential details on the transparency processes of the WTO.⁸¹ However, it remains that the comparative analysis of the same is not easy.⁸²

Individuals and businesses participating in trade need to learn about their trading conditions. Consequently, the regulations and policies must be clear. Within the WTO, this is done in two ways. Firstly, countries must notify the WTO and fellow Members about new measures, strategies or legislation through periodic notifications; and secondly, the WTO periodically examines countries' trading practices, and such reviews are known as trade policy reviews.⁸³ Those reviews resulted from the Uruguay Round agreement but began some years before the end of the round.

Consequently, they became an early result of the negotiations. The first review was carried out in 1989, where they worked under the GATT and, like the GATT, they concentrated on the trade in goods. With the formation of the WTO in 1995, their coverage, like the WTO, was increased to include intellectual property and services.⁸⁴

'Transparency' may, in the trading system framework, be defined as the 'degree to which trade policies and practices, and the process by which they are established, are open and predictable.'⁸⁵ This definition, as encapsulated in the WTO Glossary, pronounces ways in which transparency can be achieved. It refers to many interrelated acts such as how; the rule is applied, or regulation is implemented; the rule is made public; the process by which the new rule or policy action is communicated to other WTO members.⁸⁶ The

⁸¹ Wolfe, R 'Letting the sun shine in at the WTO: How transparency brings the trading system to life' (2013) *World Trade Organization, Staff Working Paper ERSD-2013-03*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2229741, accessed on 3 January 2020.

⁸² *Ibid.*

⁸³ See https://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_text_e.pdf, accessed on 13 December 2019.

⁸⁴ World Trade Organisation *Understanding the WTO: The Agreements Trade Policy Reviews: ensuring transparency* (2015) Fifth Edition, available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm11_e.htm, accessed on 26th July 2017.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

various mechanisms of transparency which include monitoring and surveillance systems, have improved since implemented in 1979 at the end of the Tokyo Round of negotiations. And these were further strengthened during the Uruguay Round of negotiations which led to the establishment of the WTO in 1995.⁸⁷

Ironically, before China entered the WTO, observers were worried that it would not be able to meet transparency criteria due to domestic politics, institutional capability, and the complexity of its legal system.⁸⁸ Although since accession, several reforms have taken place, there are still issues of ‘regulatory transparency, notification of subsidies and implementation of reforms at sub-central government level.’⁸⁹ Of concern, for several years, notifications and the implementation of reform at various levels of government have been inconsistent.⁹⁰

2.5 LEGAL FRAMEWORK FOR RTA’s

2.5.1 ARTICLE XXIV

As alluded to above, Article XXIV of the GATT 1994 and Article V of the GATS authorise Members of the WTO, subject to other conditions, to deviate from the MFN rule by giving their trading partners more preferential treatment without affording the same treatment to all WTO members. Likewise, paragraph 2(c) of the 1979 Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developed Countries (the ‘Enabling Clause’) requires developing Member States to create RTAs amongst themselves with more favourable conditions than with those provided for in Article XXIV of the GATT 1994. Additionally, other than RTAs, the Enabling Clause, under certain circumstances, also allows for other preferential arrangements.⁹¹

⁸⁷ Wolfe op cit note 81.

⁸⁸ Meléndez-Ortiz, R Bellmann, C & Cheng, S ‘A Decade in the WTO: Implications for China and Global Trade Governance’ available at <https://www.files.ethz.ch/isn/139098/a-decade-in-the-wto-implications-for-china-and-global-trade-governance.pdf>, accessed on 15 June 2021.

⁸⁹ Wolfe op cite note 81.

⁹⁰ Biukovic, L ‘Selective Adaptation of WTO Transparency Norms and Local Practices in China and Japan’ (2008) 11(4) *Journal of International Economic Law* 820.

⁹¹ World Trade Organisation *Exceptions to WTO Rules: General Exceptions, Security Exceptions, Regional Trade Agreements (RTAs), Balance of Payments (BOPs) & Waivers*, available at

In this respect, Article XXIV: 4⁹² provides that:

‘a customs union, free trade area or an interim agreement should aim to facilitate trade between the constituent territories and not to raise barriers to the trade of third parties.’

The language of intent found in Article XXIV: 4 sets out two key conditions to be fulfilled by the parties to an RTA to benefit from the MFN derogation.⁹³ The first is an internal requirement relating to what is expected from the parties concerning intra-trade liberalisation, and the second is an external requirement relating to the avoidance of negative effects to third parties as a result of the formation of the RTA.⁹⁴

Thus, Article XXIV permits Members of the WTO to deviate from the MFN by giving their trading partners within a CU or FTA preferential treatment. Concerning FTAs and customs unions: aside from a few exceptions allowed under some provisions of the 1994 GATT,⁹⁵ customs duty and other barriers to trade in goods between the parties to a CU or FTA shall be removed (Article XXIV:8). To count as a customs union, its Members must apply significantly the same duty and other trade rules when trading with non-Members.⁹⁶

The above connotations imply that parties within the WTO can form the trade relations that will afford them rights and benefits, which would not naturally be afforded to the rest of the parties in the WTO. The MFN rule was created as an exception to the Non-Discriminatory rule. Therefore, it is submitted that by opening the door to ‘preferentialism’ through Article XXIV, the trading system through the ‘beggar-thy-neighbour policies’, which once before nearly brought the world to destruction, was not eliminated.⁹⁷

While there were quite a few FTAs in existence, this is not a cause for concern. However, the proliferation of agreements that rely on exclusions to MFN has a striking

https://ecampus.wto.org/admin/files/Course_382/Module_537/ModuleDocuments/eWTO-M8-R1-E.pdf, accessed on the 27th June 2017.

⁹² XXIV (4) of the GATT 1994.

⁹³ Trebilcock, MJ *Understanding Trade Law* Edward Elgar (2011) 72.

⁹⁴ XXIV (4) of the GATT 1994.

⁹⁵ Articles XI, XII, XIII, XIV, XV and XX.

⁹⁶ https://ecampus.wto.org/admin/files/Course_382/Module_537/ModuleDocuments/eWTO-M8-R1-E.pdf, accessed on 10 June 2017.

⁹⁷ Stiglitz, JE ‘Beggar-Thyself versus Beggar-Thy-Neighbor Policies: The Dangers of Intellectual Incoherence in Addressing the Global Financial Crisis’ (1999) 66(1) *Southern Economic Journal* 1-38.

resemblance to the ill-fated ‘Untrusting Trading Blocs’ crisis of the 1930s.⁹⁸ Research suggests that there exists the danger of a single economic hegemony dominating such trading blocs.⁹⁹ Supporters of this approach argue that its main advantage lies in being able to obtain a deeper degree of economic integration due to having fewer players at the table.¹⁰⁰ While this may be true, it is important to consider when using this approach; the creation of substantial regional blocs through preferential agreements may create an opportunity for parties to negotiate and integrate only with each other. It is argued that it was erroneous to allow exceptions to the MFN as this made it easier to avoid confrontation on matters related to global economic governance cooperation. The research posits that, after these regional blocs are formed through preferential agreements, they would inevitably merge in the long run. Particularly, in this respect, this research portrays this as a ‘Pollyanna interpretation of reality’, and it is, therefore, doubtful to happen. Put differently, introducing exceptions to MFN was a major mistake as it made it somewhat easier to dismiss the tough questions concerning the coordination of global economic governance.

2.6 RTAs AND MULTILATERAL TRADE

Despite their differences and contradictory nature, RTAs can supplement the multilateral trading system. Regional agreements have made it possible for regional blocs to negotiate rules and obligations beyond what would multilaterally be feasible at the time. These rules, have in effect, laid the foundation for WTO agreements. Issues such as environmental protection and intellectual property, to mention a few, have all been tabled at regional negotiations and eventually formed into WTO agreements or discussion topics.¹⁰¹

⁹⁸ Eichengreen, B & Irwin, DA ‘Trade blocs, currency blocs and the reorientation of world trade in the 1930s’ (1995) 38 *Journal of International Economics* 3.

⁹⁹ *Ibid* 1-6.

¹⁰⁰ Saull, R ‘Rethinking Hegemony: Uneven Development, Historical Blocs, and the World Economic Crisis’ (2012) 56(2) *International Studies Quarterly* 232-238.

¹⁰¹ Hilpold, P. ‘Regional integration according to Article XXIV - between law and politics’ retrieved from http://www.mpil.de/files/pdf3/mpunyb_hilpold_7.pdf, accessed on the 27th June 2017 at 10-33.

The WTO agreements recognise that regional arrangements and closer economic integration can benefit countries, especially those less developed. It also acknowledges that regional trade agreements can be detrimental to other countries' trade interests in certain instances. Nonetheless, Article XXIV of the GATT permits the formation of regional trade agreements as long as certain requirements are met. These agreements must facilitate the free flow of trade between countries within the group without raising barriers to trade with the rest of the world. In other words, regional integration must supplement and not challenge the multilateral trading system.

Furthermore, Article XXIV proposes that when a free-trade region or customs union is established, duties and other trade barriers should be mitigated or eliminated in all trade sectors within the community. Non-Members should not find a trade with the group any more restrictive than before the group was set up. Other provisions in the WTO agreements permit developing countries to conclude regional or international agreements that aim at reducing or eliminating tariffs and non-tariff barriers to trade between themselves.¹⁰² It should be noted that Article XXIV must operate within the general scheme of the WTO principles.

Against this background, the WTO General Council established the Regional Trade Agreements Committee on 6th February 1996.¹⁰³ Its purpose is to examine regional groups and to assess whether they are consistent with WTO rules. The Committee also examines the degree to which these regional trade agreements may conflict with the multilateral trade system and the magnitude of the interaction between the two arrangements.¹⁰⁴ As noted earlier, Article XXIV of the GATT serves as a loophole allowing members to participate in activities incompatible with the WTO, provided a set of requirements are met. This is apparent when a PTA satisfies the definitional criteria stipulated in Article XXIV. Although in violation of Article I of the GATT, parties to a PTA may reduce their tariffs below the MFN standard offered to other Members of the WTO. However, some interpretation challenges exist in Article XXIV. For example, the provision does not lay down the limitations of its use. It is also uncertain if it might triumph over some or all

¹⁰² *Ibid.*

¹⁰³ Hilpold op cit note 101 at 10-33.

¹⁰⁴ *Ibid.*

other WTO obligations. Instead, Article XXIV only addresses the limits of internal liberalisation that PTAs must attain to apply for the exception.¹⁰⁵

2.7 PARTICULAR ARTICLE XXIV CASES

The most well-known case concerning Article XXIV is the *Turkey-Textiles*.¹⁰⁶ In this case, the Appellate Body interpreted that Article XXIV:4 informs the other relevant paragraphs of Article XXIV, including paragraph.¹⁰⁷ The Understanding on Article XXIV explicitly reaffirms this purpose. It states that the constituent Members should ‘to the greatest possible extent, avoid creating adverse effects on the trade of other Members.’¹⁰⁸ This entails trade with few restrictions as most avoidable barriers to trade will be dealt away with.

WTO Panel heard this case on Dispute Settlement and eventually decided on appeal by the Appellate Body after the Turkey-EC Association Council adopted Decision 1/95, which set out rules for implementation of the final phase of the customs union between Turkey and the European Communities.¹⁰⁹ Of relevance, Article 12(2) of this Decision states:

‘In conformity with the requirements of Article XXIV of the GATT Turkey will apply as from the entry into force of this Decision, substantially the same commercial policy as the

¹⁰⁵ Hurley, M & Murina M (June 2011) “designing a WTO-consistent customs union: select WTO obligations in the context of GATT Article XXIV submitted to the permanent mission of the Russian federation to the united nations office and other international organisations in Geneva final version.” *The Graduate Institute Trade and Investment Law Clinic*.

¹⁰⁶ The case involved a challenge brought by India about the Turkey's quantitative import restrictions pursuant to the Turkey-EC customs union.

¹⁰⁷ Turkey-Textiles, Appellate Body Report, para. 57, available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds34_e.htm, accessed on 13 November 2017.

¹⁰⁸ World Trade Organisation *Exceptions to WTO Rules: General Exceptions, Security Exceptions, Regional Trade Agreements (RTAs), Balance of Payments (BOPs) & Waivers*, available at https://ecampus.wto.org/admin/files/Course_382/Module_537/ModuleDocuments/eWTO-M8-R1-E.pdf, accessed on the 27th June 2017.

¹⁰⁹ Turkey-Textiles, Appellate Body Report, page 1, available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds34_e.htm, accessed on 13 November 2017.

Community in the textile sector including the agreements or arrangements on trade in textile and clothing.’¹¹⁰

In 1996, Turkey introduced quantitative restrictions on imports from India on 19 categories of textile and clothing products relying on Article XXIV of GATT.¹¹¹ The Panel had to consider the submission by India that the quantitative restrictions introduced by Turkey were inconsistent with Articles XI and XIII of the GATT 1994 and Article 2.4 of the Agreement on Textiles and Clothing (the “ATC”).¹¹² The Panel decided that the quantitative restrictions were inconsistent with the provisions of Articles XI and XIII of the GATT 1994 and with those of Article 2.4 of the *ATC* and dismissed Turkey’s defence that Article XXIV of the GATT 1994 permits such restrictions.¹¹³

On appeal, Turkey averred that the Panel erred in establishing a conflict between Articles XI and XIII of the GATT 1994 and Article 2.4 of the *ATC* versus Article XXIV of the GATT 1994.¹¹⁴ It further submitted that the Panel’s:

‘reasoning was based on the incorrect presumption that the quantitative restrictions introduced by Turkey in the framework of its customs union with the European Communities were incompatible with Turkey’s WTO obligations.’¹¹⁵

Conversely, India and other parties commonly argued in that the

‘Panel’s ruling that Article XXIV did not authorise the introduction of quantitative restrictions in this case as is compelled by the recognised principles of interpretation set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties’.¹¹⁶

In making its decision, the Panel noted the substance of Article XXIV and Articles XI and XIII, including Article 2.4 of the *ATC*) and concluded that the wording of Article XXIV

¹¹⁰ *Ibid.*

¹¹¹ Hilpold op cit note 101 at 244.

¹¹² World Trade Organisation, “Turkey - Restrictions on Imports of Textile and Clothing Products, Report of the Appellate Body, 22 October 1999, accessed on 11th November 2017 at page 3.

¹¹³ Panel Report, page 2.

¹¹⁴ Panel Report, page 2.

¹¹⁵ *Ibid.*

¹¹⁶ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <https://www.refworld.org/docid/3ae6b3a10.html>, accessed on 7 January 2020. See Panel Report, pages 4 - 10.

does not permit any deviations from the obligations provided for in terms of Articles XI and XIII of GATT and Article 2.4 of the ATC.¹¹⁷

Accordingly, the Panel held that in this appeal, the quantitative limitations were unfounded. The Appellate Body recommended that the DSB request Turkey align its measures, which were inconsistent with Articles XI and XIII of the GATT 1994 and Article 2.4 of the ATC with its obligations under the relevant agreements.¹¹⁸

2.8 DEFINING REGIONALISM AND REGIONALISATION

Regionalism, as defined by the Dictionary of Trade Policy Terms, refers to:

‘actions by governments to liberalise or facilitate trade on a regional basis, sometimes through free-trade areas or customs unions.’¹¹⁹

Similarly, Lorenz defines regionalism as ‘the formal regional integration using preferential or free trade agreements or the formation of customs or economic unions’¹²⁰ Therefore, the concept of regionalism indicates that regions are restructured at the politico-economic level for collaboration and interconnectivity. Furthermore, regionalism is considered to be the medium to overcome the economic constraints or challenges faced by lesser developed or sometimes referred to as ‘small economic size nations’.¹²¹ According to Lorenz, regionalisation is defined as follows ‘an empirically observable process of the regional concentration of economic activities.’¹²² The research proffers that regionalisation is centred on harnessing economic activities or processes to further national and regional economic goals. It then follows that regionalism brings about regionalisation and *vice versa*.

¹¹⁷ Panel Report, page 10.

¹¹⁸ *Ibid* at 19.

¹¹⁹ Hirakawa, H ‘East Asia and the Development of Regionalism’ in C Lapavitsas & M Noguchi *Beyond Market- Driven Development: Drawing on the Experience of Asia and Latin America* London: Routledge, (2005) 200.

¹²⁰ Lorenz, D “Regionalisation versus Regionalism- Problems of Change in the World Economy” (1991) *Intereconomics* 26(1) at 3-10.

¹²¹ Teunissen, JJ *Regionalism and the Global Economy: The Case of Africa* The Hague: FONDAD, (1996) 11.

¹²² Lorenz op cit note 120 at 3-10.

It is through regionalisation that countries mobilise to strengthen their economic standing in the global trade market.¹²³ Since distance may pose a barrier to trade, regionalisation is more likely to occur with neighbouring countries as trade flows occur within a specified geographic region.¹²⁴ There seem to be divergent views on the benefits of regionalisation as opposed to multilateralism. In this instance, multilateralism denotes trade that is undertaken within the world trade system without prejudice. Interestingly, as regional agreements became more familiar, then WTO Director-General, Mike Moore, was worried about the future of the world trade system. In his speech, his concerns were captured when he asked:

‘Is there a risk that regionalism is becoming a stumbling –block, more than a building block, for the new WTO, draining energy from multilateral negotiations, fragmenting internal trade, and creating a new international dis-order characterised by growing rivalries and marginalisation and the possibility of hostile blocks?’¹²⁵

His predecessor, Renato Ruggiero, expressed a similar concern in a speech he gave in 1996 when he said:

‘Ensuring that regionalism and multilateralism grow together-and not apart-is perhaps the most urgent issue facing trade policy-makers today.’¹²⁶

Generally, regionalism is regarded as a vital tool to facilitate the incorporation of the lesser economies into the mainstream of the global economy. It is for that reason that regionalism can also foster a common approach to trade discourse or negotiations. Consequently, regional trade initiatives remain, above all, an excellent tool for reducing or eliminating tensions. Renato Ruggiero further highlighted that the rapid progress of global economic integration entails that while regional initiatives remain relevant, they alone are not

¹²³ Borrmann, A & Koopmann, G ‘Regionalisation and Regionalism in World Trade’ (1994) *Intereconomics* 29(4) 163.

¹²⁴ Gaulier, G & Jean, S *et al* “Regionalism and the Regionalisation of International Trade” (2004) *CEPII* at 14-15.

¹²⁵ Donald, A *Calvert How the Multilateral Trade System Under the World Trade Organization is Attempting to Reconcile the Contradiction & Hurdles posed by Regional Trade Agreements, An Analysis of the Article XXIV of the General Agreement on Tariffs & Trade* (Unpublished Master’s Thesis, George Mason University, Virginia, 2002) 56.

¹²⁶ Renato, R *Multilateralism and Regionalism in Trade* WTO View, November 1996:1, available at https://www.wto.org/english/news_e/pres96_e/pr058_e.htm, accessed on 17 April 2019.

adequate to conduct international trade relations.¹²⁷ Further, it must be noted that the challenges necessitate a functional and effective trade system with transparent and predictable rules within the multilateral system, which is crucial to a region's economic prosperity.¹²⁸ Although the issues raised in 1996, still be relevant in this day and age due to the rapid spread of RTAs among developing countries. Renato Ruggiero and Mike Moore did not question the value of RTAs; they were, however, concerned that the proliferation of RTAs could jeopardise the future of the world trading system.¹²⁹

The WTO Report, 'The World Trade Organization's Future', has also criticised the proliferation RTAs on the basis that this has made the principle of the Most Favored Nation (MFN) the exception rather than the rule.¹³⁰ This has caused an increase in discrimination within international trade. In identifying the key challenges faced by the WTO, the report identified that the proliferation of RTAs posed a threat to non-discrimination, which is a cornerstone of the WTO.¹³¹ It argues that by fostering preferential market access between a few countries, they (RTAs) are invariably trade diverting. The report recommends that RTAs should be subject to more rigorous review by the WTO and that governments' focus should be redirected to multilateral trade negotiations to reduce MFN tariffs and non-tariff measures effectively.¹³² Cae-One Kim, Former President, European Union Studies Association (EUSA) Asia-Pacific is of the view that multilateralism often overshadows regionalism to the extent that it is immaterial to draw the contrast between the two.¹³³

¹²⁷ Multilateralism is fundamental to US-LED strategy for Global stability and prosperity - WTO Director-General WTO NEWS: 1995 PRESS RELEASES PRESS/24 13 October 1995 WTO | News - Multilateralism, accessed on 24 August 2021.

¹²⁸ Renatto, R Multilateralism and Regionalism, in Trade' WTO View, November 1996:1, available at https://www.wto.org/english/news_e/pres96_e/pr058_e.htm, accessed on 17 April 2019.

¹²⁹ Lunani, SM *Understanding regionalisation and preferential relations in world trade law and policy: a perspective from the East African Community (EAC)* (an unpublished LLM thesis, University of Western Cape 2011) 15.

¹³⁰ The Future of the WTO: Addressing institutional challenges in the new millennium, available at https://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf, accessed on 26 May 2021.

¹³¹ *Ibid.*

¹³² The Future of the WTO: Addressing institutional challenges in the new millennium, available at https://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf, accessed on 26 May 2021.

¹³³ Minter, E 'The Future of the WTO: Report by the Consultative Board to the WTO Director General' Published March 31, 2005 – Australia available at http://www.hg.org/articles/article_677.html, accessed on 17 April 2019.

Owing to the above discussion, the question begs — do RTAs act as building or stumbling blocks? Bhagwati views regionalism as weakens the overpowering nature of the multilateral system as RTAs are put forward as tools to ensure equal opportunities and unbiased competition for minority countries.¹³⁴ Conversely, Winter opines that regionalism acts as a way of assembling trade partners for the multilateral negotiation table due to its coercive nature.¹³⁵ Tiziana Bonapace avers that both developing and developed countries can resolve their issues efficiently through regionalism, which would otherwise be difficult to resolve in the broader multilateral framework. The author argues that since most of the major trading countries belong to more than one RTA, then in this context, the most favoured nation basis will most likely be the exception as opposed to the norm.¹³⁶

Bhagwati shares deep reservations about the detrimental consequences of regionalism. The author is of the view that regionalism is drawing focus away from multilateral trade. Bhagwati rejects the view that regionalism is an alternative to the multilateral trading system but rather more of a supplement.¹³⁷ Roberta Benini and Micheal G. Plummer, who stated the following, also shared these sentiments:

‘It is an urgent task in the policy agenda to find possible solutions, ensure compatibility and coherence, and limit the phenomena of treaty congestion-overlapping and contradictions across agreements-that might put the multilateral trade system at risk.’¹³⁸

Earlier discussions on RTAs were phrased negatively, and it was viewed as competing with the dominant but predictable multilateral trade system. Unfortunately, the proliferation of RTAs has increased the opposing views.

¹³⁴ Bhagwati J ‘Regionalism versus Multilateralism’ (1992) 15(5) *The World Economy* 540.

¹³⁵ Winters, AL Regionalism versus Multilateralism. Policy Research Paper prepared for a conference on regional integration sponsored by the Centre for Economic Policy Research, Working Paper 1687, The World Bank International Economic Department, International Trade Division, La Coruna, Spain, Nov 26-27 (1996).

¹³⁶ Tiziana, B ‘Multilateralism and Regionalism: Enhancing Integration of Developing Countries into the Multilateral Trading system through Regionalism.’ A paper prepared by Ms Tiziana Bonapace, Economic Affairs officer, Trade Policy Section, International Trade and industry Division, ESCAP, available at <http://www.unescap.org/tid/publication/chap1-2161.pdf> (accessed 1 April 2019).

¹³⁷ Bhagwati J ‘Regionalism versus Multilateralism’ (1992) 15(5) *The World Economy* 543.

¹³⁸ Mashayeki M & Ito, T *Multilateralism and Regionalism: the new interface* New York and Geneva: UNCTAD, (2005).

2.9 BACKGROUND ON AFRICA'S TRADE FRAMEWORK

As highlighted in earlier Chapter 2, the existence of RTAs is not a new phenomenon to the African continent. Their existence indicates a genuine interest among African countries to promote regional integration to foster development.¹³⁹ However, during the post-colonial era, most RTAs were motivated by the political vision of promoting African Unity as opposed to its economic benefits.¹⁴⁰

Currently, the continent has approximately eighteen RTAs. However, the African Union (AU) recognises eight RTAs as 'building blocks' for the African Economic Community (AEC). These are the Common Market for Eastern and Southern Africa (COMESA)¹⁴¹, the Community of Sahara-Sahel States (CEN-SAD)¹⁴², the Intergovernmental Authority on Development (IGAD),¹⁴³ the East African Community (EAC),¹⁴⁴ the Economic Community of Central African States (ECCAS),¹⁴⁵ the Southern African Development Community (SADC), the Economic Community of West African States (ECOWAS)¹⁴⁶ and the Arab Maghreb Union (AMU).¹⁴⁷ A close analysis of the legal

¹³⁹ UNCTAD 'Building the African Continental Free Trade Area: Some Suggestions on the Way Forward' (2015) *United Nations* 1 at 5.

¹⁴⁰ Kritzinger-van Niekerk, L 'Regional Integration: Concepts, Advantages, Disadvantages and Lessons of Experience', available at www.sarpn.org/documents/P146-RI, accessed on 17 July 2017 at 1.

¹⁴¹ It was established in 1993 and is made up of nineteen Member States namely; Burundi, Comoros, D.R. Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe.

¹⁴² This was established on 4 February 1998 and comprises of Central African Republic, Benin, Chad, Niger, Morocco, Libya, Nigeria, Egypt, Sudan, Togo, Mali, Tunisia, Somalia, Mauritania, Sierra Leone, Senegal, the Comoros, Burkina Faso, Djibouti, Gambia, Eritrea, Cote d'Ivoire, Ghana and Guinea-Bissau. Available at <https://www.uneca.org/oria/pages/cen-sad-community-sahel-saharan-states>, accessed on 10 August 2017.

¹⁴³ This is 8 country trade bloc (Kenya, Uganda, Sudan, South Sudan, Ethiopia, Somalia, Eritrea and Djibouti) established in 1996. Available at <https://au.int/en/recs/igad>, accessed on 10 August 2017.

¹⁴⁴ Established in 1967 and is made up of 6 Member States; Burundi, Rwanda, Kenya, Tanzania, Uganda and South Sudan. Available at <http://www.eac.int/>, accessed on 2 August 2017.

¹⁴⁵ It was established on 18 October 1983 and is made up of Angola, Rwanda, Gabon, Burundi, Cameroon, Central African Republic, Chad, DRC and Equatorial Guinea.

¹⁴⁶ It is made up of Benin, Burkina Faso, Cabo Verde, Ghana, Gambia, Cote d'Ivoire, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo. It was established on 28 May 1975. Available at <http://www.internationaldemocracywatch.org/index.php/economic-community-of-west-african-states->, accessed on 7 August 2017.

¹⁴⁷ UNCTAD "Building the African Continental Free Trade Area: Some Suggestions on the Way Forward" (2015) *United Nations* 1 at 5. The AMU was established on 17 February 1989 and is made up of Libya,

frameworks that underpin these regional communities reveal that they have shared objectives. This is important because an African collective response to the issues within the multilateral trade system could create new opportunities and comprehensively deal with current problems.

2.10 RATIONALE OF REGIONAL INTEGRATION IN AFRICA

RTAs in Africa raises an essential question of why regional integration is pursued in the African continent. There are several benefits that African countries can derive from regional integration. Still, the most compelling reason is to speed up economic growth and ensure sustainable development in Africa through trade enhancement. According to statistics, Africa's real Gross Domestic Product (GDP) growth rate has steadily declined over the years, recording a GDP of 3.9 in 2013 and 2.2 in 2016.¹⁴⁸ Therefore, it is incumbent that African countries consolidate into regional trade groups to boost economic growth through collective efforts.

The Preamble to the Treaty establishing the ECOWAS further substantiates this by providing the main reason for establishing the community, which is:

‘...overriding need to accelerate, foster and encourage the economic and social development of their states in order to improve the living standards of their peoples.’¹⁴⁹

Not only is the need to improve economic development the driving force, but there is also an alarming emergence of RTAs in Asia and Europe, which further enhances their bargaining power.¹⁵⁰ Therefore, African countries feel the growing urge to integrate into more prominent communities to prevent their position in the world economy from

Algeria, Morocco, Mauritania and Tunisia. Available at <https://issafrica.org/profile-arab-maghreb-union-amu>, accessed on 5 August 2017.

¹⁴⁸ See <http://www.africaneconomicoutlook.org/en/statistics>, accessed on 11 August 2017.

¹⁴⁹ The ECOWAS was established by the Treaty concluded in Gabon, on 28 May 1975 which was replaced by the Revised Treaty signed in Cotonou in 1993.

¹⁵⁰ Such as Thailand and its Comprehensive Economic Partnership Agreement with Indonesia; India and the Associations of South East Asian Nations (ASEAN); between the EU and the USA; and the Eurasian Customs Union with Russia to cite a few. See Fratianni, M & Oh Chang, H “Expanding RTAs, Trade Flows, and the Multinational Enterprise” (2009) *Journal of International Business Studies* (40) 1206-1218.

weakening.¹⁵¹ This is primarily because African countries have small economies with very low GDP. According to African Development Bank (AfDB) Statistics Department, in 2019, the GDP of some African countries, to mention a few, were as follows; Zimbabwe -8.1, South Sudan -10.8, Somalia -1.5, Angola 0.6, Equatorial Guinea -5.6.¹⁵² However, even though countries like Tanzania and Kenya have good GDPs, most African countries are battling with poor GDPs.¹⁵³ This makes it impossible for most of these countries to participate meaningfully in international trade agreements with European countries.¹⁵⁴

Regional integration, therefore, enhances their bargaining power and allows African countries to coordinate their positions in multilateral trade negotiations.¹⁵⁵ Their negotiations as a bigger group as compared to negotiating on a solo basis or in smaller groups are more likely to yield better outcomes which eventually benefits a vast section of the continent. Regional integration, therefore, serves as a vehicle of mitigating the constraints faced by small economic countries in the multilateral trading system. For instance, 33 out of 54 African countries are LDCs. Therefore, regional integration is crucial to African development as socio, economic, and political problems still ravage the continent.

2.11 CONCLUSION

This Chapter outlined that more states prefer the route of RTAs than multilateral negotiations as it is easier and more efficient to work in a small group than it is to work in a larger one. It is also observed that Africa has been side-lined in international trade negotiations, which is why African countries opted to form smaller trade groups. The WTO supports RTAs; however, under closer inspection, it appears that it causes deviation from world trade and focuses on regional trades groups. This may have the effect of

¹⁵¹ Teunissen, JJ *Regionalism and the Global Economy: The Case of Africa* The Hague: FONDAD, (1996) 13.

¹⁵² See <http://www.africaneconomicoutlook.org/en/statistics>, accessed on 11 March 2021.

¹⁵³ *Ibid.*

¹⁵⁴ Teunissen op cit note 151 at 88-91.

¹⁵⁵ Kritzing-van Niekerk, L “Regional Integration: Concepts, Advantages, Disadvantages and Lessons of Experience”, available at www.sarpn.org/documents/P146-RI, accessed on 17 July 2017 at page 3.

sabotaging the WTO. Another existing problem with RTAs is their discrimination against the parties that are not part of the RTAs.

Generally, it should be noted that after establishing the GATT, developing countries have called for the recognition of their specific development concerns and desires. However, developing countries' desire for enhanced market access for goods of export value, along with the likes of agricultural and textile products, was widely overlooked. Instead, since the establishment of the GATT, developed countries have conferred ever-increasing security on such products.¹⁵⁶ Developing countries have even criticised the GATT and the WTO for being unequal and unbalanced to the concerns of developing countries.¹⁵⁷

Moreover, transparency remains a problem for RTAs, as these groups tend not to share their information with the WTO, which drives the whole initiative. In conclusion, it is clear from the above discussion that RTAs are suitable for smaller economies. This benefit, however, is hindered by their ability to cause deviation, which leads to countries not actively participating in global trade organisations. This is problematic given that this is the primary purpose the GATT envisioned when they allowed for RTAs. One can argue that the WTO by allowing for the creation of RTAs to some inadvertently shot themselves in the foot. The next Chapter will provide a brief overview of the African regional trade framework - mainly, the region's capacity to deal with FTAs.

¹⁵⁶ Krist, W 'Trade Agreements and Economic Theory' *Wilson Centre* <<https://www.wilsoncenter.org/chapter-3-trade-agreements-and-economic-theory>> accessed 1 July 2021.

¹⁵⁷ Wilkinson, R. & Scott, J 'Developing Country Participation in the GATT: A Reassessment' (2008) 7(3) *World Trade Review* 1-18.

CHAPTER 3:

AN OVERVIEW OF THE REGIONAL TRADE FRAMEWORK WITH PARTICULAR FOCUS ON EAC, COMESA AND THE LAGOS PLAN

3.1 INTRODUCTION

As discussed in Chapter 2, there has been a steady increase in the formation of Regional Trade Agreements (RTAs) in recent years.¹⁵⁸ According to Schiff and Winters, the formation of RTAs is often a political effort to deepen economic relations with other countries.¹⁵⁹ Mwasha argues that this is done to jointly overcome institutional and policy barriers to trade in the region.¹⁶⁰ Consequently, trade-expanding policies are put in place to improve the overall economic status of the region.¹⁶¹

As noted in earlier Chapters, in Africa, the formation of such agreements has led to establishing regional organisations such as the SADC, ECOWAS and EAC. It is said that the primary purpose of the particular agreements that underpin the formation of these organisations is to foster and encourage the economic and social development of Member States. As noted in Chapter 2, lack of commitment by developed countries and unfair trade terms are attributed to the increase in such agreements. It is therefore argued that free trade agreements concluded within a regional setting seek to eliminate unfair trade terms that exist in the global market and raise the economy of developing countries.

The Tripartite Free Trade Agreement (TFTA) formed between SADC, EAC and COMESA enable Africa and these regions to reach trade liberalisation and ultimately sustainable development in the continent. The aim of the tripartite is stated in Articles 4 and 5 of the agreement, respectively. The aims stated in Article 4 contain the general

¹⁵⁸ Mold & Mukwaya op cit note 1 at 3.

¹⁵⁹ Schiff, M & Winters, LA *Regional Integration and Development* Washington DC: World Bank (2003) at 14.

¹⁶⁰ Mwasha, ON 'The Benefits of Regional Economic Integration for Developing Countries in Africa: A Case of East African Community (EAC)' (2005) 11 (1) *Korea Review of International Studies* 71.

¹⁶¹ Schiff, M & Winters, LA *Regional Integration and Development* Washington DC: World Bank (2003) 14.

objectives of the TFTA, whilst Article 5 contains specific objectives that aid in realising Article 4.¹⁶²

This Chapter aims to determine whether particular African regions are indeed equipped to deal with FTAs. To do so, the Chapter will firstly explain the term regionalism to provide some needed context to the discussion. Secondly, the Chapter will discuss the EAC and COMESA and their limitations in greater detail as they form part of the TFTA.

The Chapter will also briefly give an overview of Africa's current trade framework and the rationale for the formation of such FTAs. As such, this Chapter discusses the extent to which the TFTA can solve the problems of trade faced by the three regions in the continent of Africa. The Chapter focuses on how the formation of the TFTA will assist a Regional Bloc (such as the SADC) to gain market access in other countries and how this will operate. To do this adequately, a short discussion of the origin of SADC shall be contained herein. This discussion is followed by an analysis of the benefits derived by the Member countries and the problems faced by this regional bloc.

3.2 GENERAL AFRICAN REGARD FOR REGIONAL INTEGRATION

The this posits that African governments have acquired immense support from regional integration. This is so because, since gaining independence, most African countries have conceived regional integration as an essential component of their development. As a result, they are members of a number of these agreements. This has resulted in an overlay in membership. However, African Regional Integration Agreements (RIA) have not been very successful.¹⁶³ They are often characterised as over-ambitious agreements that set unrealistic time frames towards their aims and objectives, as explained in later Chapters.¹⁶⁴

¹⁶² The agreement establishing the tripartite free trade area between SADC, EAC and COMESA. Retrieved from <https://www.tralac.org/documents/resources/tfta/1084-signed-tfta-agreement-and-declaration-10-june-2015/file.html> Accessed on the 4th of November 2017.

¹⁶⁴ Hartzenberg, T (2011) "Regional Integration in Africa" *Trade Law Centre for Southern Africa (tralac)* at 1-6.

Various African countries have formed different negotiation groups, many of which overlap with other existing regional integration agreements, thus creating extra complications to regional integration in Africa. The lengthy and complex EPA negotiations somewhat represent the disparity in framework and complexities between the African regional integration and the EU model of regional integration. The EPA negotiations exposed significant differences in the economic realism of African regional integration and its political aspirations.¹⁶⁵ Debates on the agenda for African integration and even the plan for Africa to expand into the global economy originate from these discussions.¹⁶⁶

3.3 BRIEF OVERVIEW OF THE EAC AND COMESA

This section briefly discusses the history of the EAC and COMESA. The EAC and COMESA form the founding blocks of the COMESA-EAC-SADC Tripartite Free Trade Agreement. An extensive discussion of SADC will be discussed in Chapter four of this study.

3.3.1 The EAC

The East African Community was formed in 1967 under the Permanent Tripartite Commission for East African Co-operation. It was a regional body that comprised of East African countries; Kenya, Uganda and Tanzania. It aimed to promote economic integration in the East African region with prospects of establishing a political union in the long run.¹⁶⁷ However, this RTA was short-lived and collapsed in 1977. The formation of the EAC was problematic from the start. This was due to the affairs of its Member States; Tanzania, Kenya and Uganda were managed by ‘foreign influences’.¹⁶⁸ For instance, East African Airways (EAA) was managed by the western bloc. Uganda, on the

¹⁶⁵ *Ibid* at 1-6.

¹⁶⁶ *Ibid*.

¹⁶⁷ Mngomezulu, BR ‘Why did regional integration fail in East Africa in the 1970s? A historical explanation’, available at www.kznhas-history.net/files/seminars, accessed on 10 June 2017.

¹⁶⁸ Drummond, P & Wajid SK *et al The East African Community Quest for Regional Integration* International Monetary Fund (2015) 162.

other hand, was assisted by the Soviet Union.¹⁶⁹ Secondly, when the EAC was formed, there were already signs of disintegration within the region. Another such case would be the existence of the Kingdom of Buganda in Uganda.¹⁷⁰ This essentially meant that a particular group of Ugandans led under King Mutesa II and did not consider themselves part of the Ugandan nation. It would be unrealistic to expect such a nation to effortlessly integrate with other countries and form a regional community since the country's composition itself was problematic.¹⁷¹

The Buganda Kingdom saw itself as a separate entity, which resulted in a civil war in Uganda in the 1960s. On the other hand, Tanzania was also reluctant to join the EAC as it was unsure of the benefits that would accrue to them as a result of such RTA formation.¹⁷² This shows that countries not fully aware of the benefits of such a community were acting on the basis of 'foreign influences'. This illustrates that the earlier EAC agenda and framework could have been described as a 'still born' entity.

In 1993, 15 years after its collapse, East African countries converged again to give the EAC a new birth. The Treaty for the Establishment of the East African Community¹⁷³ was later signed in 1999 in Arusha, Tanzania and came into effect in 2001. The new EAC included other East African countries such as Rwanda and Burundi.¹⁷⁴ This is the most recent RTA in Africa and has helped bring the EAC back to the limelight. The EAC has ushered the seamless travel of goods within the region, thus promoting trade. This was achieved by ensuring that non-trade barriers to trade are reduced to make goods less expensive.

Further, in 2005 the EAC established a Customs Union with zero internal tariffs. In 2014, the EAC initiated a region-to-region EPA with the European Union. This

¹⁶⁹ Potholm, CP "Who killed Cock Robin? Perceptions concerning the breakup of the East African Community" (1979) 142 (1) *World Affairs* at 45-56.

¹⁷⁰ Mngomezulu op cit note 167 at 6.

¹⁷¹ *Ibid.*

¹⁷² Walsh, B 'Human Security in East Africa: The EAC's Illusive Quest for Inclusive Citizenship' (2015) 37(1) *Strategic Review for Southern Africa* 80-85.

¹⁷³ The treaty for the establishment of the East African Community was signed on 30 November 1999 and entered into force on 7 July 2000 following its ratification by the original three Partner States – Kenya, Uganda and Tanzania.

¹⁷⁴ *Ibid.*

Agreement removes unjustified restrictions on exports and imports, which aligns with the EACs goal to eradicate non-tariff barriers in intra-trade.¹⁷⁵ The EAC continues to face several unprecedented challenges. Peace and security are the biggest challenges the regional economic bloc is facing. Civil conflict and political instability in Somalia, Burundi, and South Sudan continue to impact the security and economic performance of the region negatively.¹⁷⁶ Other Member states have been reluctant to assist, particularly in the Burundi case of arbitrary killings, and have resorted to reporting the matter to the AU.¹⁷⁷ Furthermore, the delay in implementing the peace agreement in South Sudan has had a severe negative impact on Ethiopia, Kenya and Uganda. Economies. More so, Member States continue to erect non - tariff barriers despite the entry into force of the Common Market Protocol in July 2010.¹⁷⁸

3.3.2 COMESA

COMESA came into being in 1994 as a successor to the regional Preferential Trading Area (PTA), which has existed since 1981. In 1976, a meeting was held in Lusaka, Zambia, forming a sub-regional PTA that would gradually evolve into a common market.¹⁷⁹ It was at this meeting that countries adopted the Lusaka Declaration of Intent and Commitment to the Establishment of a Preferential Free Trade Area for Eastern and Southern Africa.¹⁸⁰ Heads of States were reluctant to sign the Treaty forming the PTA until 21 December 1981, which subsequently entered into force on 30 September 1982.¹⁸¹ The PTA aimed to share in the region's resources for the common good of the region.¹⁸² Its overall objective was to reduce the cost of cross-border trade by eliminating internal

¹⁷⁵ <https://au.int/recs/eac>, accessed on 5 February 2018.

¹⁷⁶ Bello-Schünemann, J & Moyer, JD 'Structural pressures and political instability' available at https://www.africaportal.org/documents/18461/Structural_pressures.pdf, accessed on 15 May 2021.

¹⁷⁷ *Ibid.*

¹⁷⁸ Oluoch, LW *The Challenges Facing The Eastern African Community In Conflict Intervention: A Study of Eastern African Standby Force (EASF) As Regional Security Mechanism* (unpublished Master of Arts thesis, Kenyatta University, 2015).

¹⁷⁹ See www.comesa.int/history-of-comesa/, accessed on 19 July 2017.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

trade barriers. It also aims to foster the involvement of the local private sector in regional trade.¹⁸³

In 1993 the envisaged common market was formed. A treaty establishing the Common Market for Eastern and Southern Africa was signed in Kampala, Uganda and later ratified in 1994. As of date, COMESA has nineteen Member States.¹⁸⁴ Eight of its Members are also Members of the SADC. These are Swaziland, Zambia, Zimbabwe, DRC, Madagascar, Malawi, Mauritius and Seychelles.¹⁸⁵ The development status of these countries ranges from least developed to developing, with five of its member states recording the highest levels of growth between 2014 and 2015. These are the Democratic Republic of Congo, Ethiopia, Kenya, Rwanda, and Uganda.¹⁸⁶

Despite this damning qualification, COMESA is considered as the largest economic community in Africa, covering a population of about 430 million.¹⁸⁷ Its primary trading partner is India. In 2003, an MOU for long term economic collaboration was signed between COMESA and India.¹⁸⁸ Amongst other things, India primarily imports from COMESA petroleum products (about 70%) and cotton (about 10%).¹⁸⁹ In return, Indian exports rice, refined petroleum products and pharmaceuticals to COMESA.¹⁹⁰

3.4 DYNAMISM IN THE GAINS FROM THE FORMATION OF THE TFTA FOR EAC AND COMESA

As alluded to above, the TFTA is an integration of three African Regional Agreements, namely SADC, COMESA and EAC. The expectation that the COMESA-EAC-SADC-

¹⁸³ See https://eeas.europa.eu/delegations/congo-brazzaville/2071/common-market-eastern-and-southern-africa-comesa_fr, accessed on 3 January 2020.

¹⁸⁴ These are Burundi, Comoros, DRC, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

¹⁸⁵ Legum, *C Africa: A Handbook*, London: Anthony Blond (1967) 33.

¹⁸⁶ See <https://www.africahealthbusiness.com/comesa-remains-worlds-fastest-growing-global-economic-bloc/>, accessed on 17 April 2019.

¹⁸⁷ See www.comesa.int/history-of-comesa/, accessed on 19 July 2017.

¹⁸⁸ See <https://www.mea.gov.in.ForeignRelation>, accessed on 10 October 2017.

¹⁸⁹ COMESA, *The State of Integration in COMESA*. (November 2006 Summit) at 14, available at <https://issafrica.s3.amazonaws.com/site/uploads/STATE%20OF%20INTEGRATION%20REPORT%20-%2006TH%20NOV%202006.PDF>, accessed on 11 August 2017.

¹⁹⁰ See www.uneca.org/oria/pages/comesa-common-market-eastern-and-southern-africa, accessed on 25 July 2017

Tripartite Agreement will lead to significant economic gains in the African region is due to the fact that its primary vision is to increase trade among the countries involved, thus leading to gains to consumers, as they get access to cheaper and better-quality products. The TFTA could, therefore, be said to be a pivotal step to escape from the constraints of the split-up economies of Africa's past.¹⁹¹

There has been slow progress in achieving economic integration in Africa due to the fact that a few countries mainly dominate intra-African trade, ranked according to their trade weight: South Africa, Nigeria, Côte d'Ivoire, Kenya and Egypt.¹⁹² The formation of the TFTA is likely to lead to unlimited economic growth across the continent because, unlike most RTAs, the TFTA takes into account the existence of unequal economies in Africa. Its primary objective is to reduce border thickness across the continent to increase inter-regional trade across the continent.¹⁹³

The TFTA, therefore, recognises that the more prominent regional economies are more likely to take dominance of a particular industry and therefore seeks to protect infant industries. An infant industry is defined as a national strategic interest that has been around for less than five years and is tarnished by hefty start-up expenses, making it difficult to compete with comparable imports.¹⁹⁴ The Agreement provides that, as a means of protecting such industries, Member States may introduce appropriate measures on like products imported from the other Member States, as long as such measures are implemented on a non-discriminatory basis. Such measures should only be implemented after taking all necessary steps to address the difficulties faced by the infant industry.¹⁹⁵

Secondly, most parts of Africa desperately need Foreign Direct Investment (FDI) to boost economic development. The mere establishment of the TFTA would serve as an economic driver for investment in the region and subsequently lure new investors. Africa has many untapped resources that foreign investors would be attracted to invest in, thereby

¹⁹¹ Mold & Mukwaya op cit note 1 at 3.

¹⁹² Makochehanwa, A 'Welfare Implications of COMESA-EAC-SADC Tripartite Free Trade Area' (2014) 26(1) *African Development Review* 186 at 186-187.

¹⁹³ de Melo, J 'The Tripartite Free Trade Africa: Is it the way to deepen integration in Africa?', available at <https://www.brookings.edu/blog/africa-in-focus/2014/11/04/the-tripartite-free-trade-africa-is-it-the-way-to-deepen-integration-in-africa/>, accessed on 2 January 2020.

¹⁹⁴ Article XXIV (1) of the Agreement.

¹⁹⁵ Article XXIV (2) of the Agreement.

boosting the entire continent's export earnings. Many of the opportunities in forestry, mining, energy, and agriculture currently remain unexplored due to low FDI. The Senior Director of Trade Mark East Africa, Jason Kapkirwok, stated the following to be one of the benefits of the TFTA:

‘It will increase demand for the region's goods and services and make the region more attractive to foreign investments. This would in turn create more jobs and catalyze technology transfer.’¹⁹⁶

It is therefore evident that the TFTA is expected to create a large market by creating a single economic space. This will widen market opportunities for most African countries to trade manufactured goods and services within the TFTA.¹⁹⁷ This is further supported by Article 15 of the Agreement places an obligation on Member States to facilitate the movement of goods and means of transport in transit to the other Tripartite Member States. Annexure 5 of the Agreement provides for regulations pertaining to transit trade as provided for under Article 15 of the Agreement. It stipulates that:

‘Member States should grant other Members all transit traffic freedom to traverse through their territories and not to impose any import or export duties on transit traffic.’¹⁹⁸

However, the increased market opportunities are likely to lead to stiff competition for the trade of goods between existing partner states. This will only be advantageous to the Member States who have already established themselves in these markets compared to the infant manufacturers seeking to penetrate these markets. However, the infant industries can negate this envisioned challenge by striving to produce low-cost, high-quality goods retailed at competitive prices to ensure maximum market penetration.¹⁹⁹ This will be made possible by the fact that the Agreement proposes for the reduction and/or elimination of import duties, and, therefore, these infant industries can import raw

¹⁹⁶ See <http://www.un.org/africarenewal/magazine/december-2015/towards-unified-african-market>, accessed on 26 June 2017.

¹⁹⁷ See Mold & Mukwaya op cit note 1 at 2.

¹⁹⁸ Article 1 & 2 of the Annex on Transit Trade and Transit Facilities (Annexure 5).

¹⁹⁹ Pasara, MT *The Welfare Effects of Economic Integration in the Tripartite Free Trade Area* (Doctor of Philosophy in Economics, North-West University 2019) 20.

materials at a lower cost.²⁰⁰ Consequently, the benefit of this increased competition will also accrue to consumers in Africa as the price of goods and services will be reduced.

However, even though the TFTA seems to be the gateway to liberalising trade in Africa, thus promoting economic growth, the primary beneficiaries are most likely to be multinational corporations situated in big African cities but originate from outside Africa.²⁰¹ This is because most of the prominent corporations in Africa originate outside the continent. A study covering 16 countries and carried out in 2011 by the United Nations Economic Commission for Africa (UNECA) also found that although there would be general welfare gains resulting from the establishment of the TFTA, these gains would be very unequally distributed.²⁰² As such, a very small number of countries reaping almost all the gains (Egypt, South Africa, and Zimbabwe accounting for over 90% of the welfare gains).²⁰³

Welfare losses are also likely to be experienced through employment reduction in some countries, as imports from TFTA countries will displace local products.²⁰⁴ Another major problem is the potential loss of revenue for governments, as customs duties are a significant source of government revenue. This loss of government revenue occurs when import duties are reduced or removed, thus causing a loss of customs revenue collected on imported goods.²⁰⁵ Makochehanwa argues that most countries collect up to half or even more of their government revenue from customs duties.²⁰⁶ Thus, a reduction in import duties will significantly reduce its government revenue.

²⁰⁰ Schoeman M 'What does the TFTA really mean for regional integration in Africa?' *South African Institute of International Africa (SAIIA)*, available at <http://www.saiia.org.za/opinion-analysis/what-does-the-tfta-really-mean-for-regional-integration-in-africa>, accessed on 20 July 2017.

²⁰¹ Miller, D 'South African multinational corporations, NEPAD and competing regional claims on Post-Apartheid Southern Africa' (2004) 8(1) *African Sociological Review* 178.

²⁰² TRALAC, 'Assessing Regional Integration in Africa VIII: Bringing the Continental Free Trade Area About', available at <https://www.tralac.org/new/Article/12366-assessing-regional-integration-in-africa-viii-bringing-the-continentakl-free-trade-area-about.html>, accessed on 31 January 2018.

²⁰³ CUTS International "Regionalism in Africa" (November 2015) at http://www.cuts-international.org/ARC/Accra/IVORI/pdf/Regionalism_in_Africa.pdf (accessed 22 July 2017).

²⁰⁴ Pasara op cit note 199 at 58.

²⁰⁵ *Ibid* 2–3.

²⁰⁶ See Makochehanwa op cit note 192 at 185.

Consequently, the potential depletion of revenue could have repercussions on the delivery of vital public services in the countries. Makochehanwa further argues that only a few countries such as Angola and South Africa will not be adversely affected by the trade liberalisation brought about by the TFTA as only 5 per cent (5%) of their customs duties accounts for the entire government revenue.²⁰⁷ This will result in already disadvantaged countries undertaking fiscal reforms to circumvent custom revenue losses. This may include increasing the Value-Added-Tax (VAT) to generate revenue.

3.5 IMPACT OF THE TFTA

In the past two decades, the three regional economic communities —that now make up the TFTA — have pursued numerous measures to improve intra-regional trade. Although it is difficult to quantify the actual impact of these trade development initiatives, existing data shows that between 1994 and 2014, exports among Tripartite Member States increased from \$2.3 billion to \$36 billion. Over a 20-year period, that indicates a rise of more than twelve times.²⁰⁸ The share of intra-regional commerce in total exports increased from four per cent to eight per cent. Over that time period, the percentage of intra-regional commerce in overall exports increased from seven per cent to twenty-five per cent.²⁰⁹ Although these percentages are small relative to Asian (50 per cent) or European (70 per cent) levels, the trend indicates that trade between Tripartite Members has risen faster as compared to their trading in the multilateral trade system.²¹⁰

The TFTA is considered a ‘big deal and potential game-changer’ for Africa’s trade system by regional policymakers. Furthermore, the agreement is regarded as a stepping stone toward the Continental Free Trade Area (CFTA), which is intended to encompass

²⁰⁷ *Ibid* at 187.

²⁰⁸ African Development Bank Group, ‘Tracking Africa’s Progress in Figures’ available at https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Tracking_Africa%E2%80%99s_Progress_in_Figures.pdf, accessed on 26 August 2021.

²⁰⁹ *Ibid*.

²¹⁰ Andriamananjara, S ‘Understanding the importance of the Tripartite Free Trade Area’ (2015) retrieved from <https://www.brookings.edu/blog/africa-in-focus/2015/06/17/understanding-the-importance-of-the-tripartite-free-trade-area/>, accessed on the 4th of November 2017.

all African countries. This has shown the potential for concerted action among 36 highly diverse nations (with GDP per capita varying from approximately \$16,000 for Seychelles to \$270 for Burundi) and demonstrates the possibility of streamlining three PTAs into one single trade regime.²¹¹

Since the TFTA includes close to the total number of African nations — that is 54 signatories, and at least 36 countries have ratified the agreement, the economic impact for such countries are theoretically immense.²¹² Based on the 2015 market exchange rates, the TFTA region has an overall population of 683 million people as well as a cumulative GDP of 1.2 trillion USD.²¹³ This constitutes 58 per cent of Africa's population and over half of Africa's overall GDP (54.3 per cent).²¹⁴ Consequently, the establishment and the commencement of trade of the TFTA in early 2021 positions the block as the world's 14th biggest economy. Similarly, Mukwaya and Mold analyse the effects of TFTA on the East African region using the GTAP model and database.²¹⁵ They aver that increased exports and imports are expected due to amplified industrial production across the East African region.²¹⁶

3.6 CONCLUSION

It is clear from the above literature that there has been a burgeoning of FTAs in the African continent. Each FTA has been established with peculiar goals in mind, and as a result, there has been overlapping membership to the RTAs by most African countries. Put differently, most countries are Members of more than one FTA in the region. However, such overlapping of membership can also be construed to mean that these FTAs are therefore not adequately equipped to deal with the trade barriers experienced by most African countries. As such, countries find it more effective to be part of more than one

²¹¹ *Ibid.*

²¹² Mold, A & Mukwaya, R 'Modelling the economic impact of the tripartite free trade area: Its implications for the economic geography of Southern, Eastern and Northern Africa' (2016) 3(1-2) *Journal of African Trade* 2.

²¹³ *Ibid* at 2-3.

²¹⁴ *Ibid.*

²¹⁵ *Ibid* 5.

²¹⁶ *Ibid.*

FTA to negate the various trade barriers faced by them.²¹⁷ Therefore, the formation of the TFTA could be a significant step towards creating a pan-continental FTA that would serve the catalytic role in achieving economic integration in the African continent. This will lead to economic growth and development. It would also open new business opportunities through an improved and harmonised trade regime that would reduce their operating costs and inflow foreign direct investment into the region. Having discussed the particular EAC, COMESA and the TFTA, the next chapter will focus solely on the SADC and its impact on regional trade.

²¹⁷ Krist op cit note 156.

CHAPTER 4:

A STUDY OF THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY

4.1 INTRODUCTION

Chapter 3 noted that throughout Africa, Europe and America, regional integration has traditionally presented itself as a centralized attempt to promote the growth of capitalist economies and political unity. It is argued that the creation of regional economic blocs will not only allow countries to deal with the region's economic issues together but it also reinforces their roles and bargaining powers in the international trade and/or economic arena. The concept of regional integration came into being due to individual countries being unable to address their economic challenges on their own. It is for these reasons that the Southern Africa Development Community (hereinafter referred to as SADC) was created. The SADC (similar to the EAC and COMESA) forms part of a greater plan to ensure regional integration within Africa. Stemming from such, this chapter will engage in a critical analysis of SADC's achievements drawing reference from its objectives. The chapter will also discuss the challenges experienced by SADC in achieving its goal.

4.2 BRIEF HISTORICAL OVERVIEW OF SADCC AND SADC

SADC's roots can be traced back to the 1960s and 70s. It is in this period that most leaders — those of black majority-ruled countries and national independence movements — harmonized their political, economic and military efforts to put a stop to Southern Africa's colonial and white-minority ruled governments. The informal Frontline States (FLS) grouping was the immediate predecessor to the political and security cooperation section of today's SADC.²¹⁸

²¹⁸ The nine majority-ruled states of Southern Africa are: Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe.

The initial strategy of the SADCC was to focus on fostering infrastructure cooperation. As such, its core mission was to organize development programs for Members States and to assist the Member States in raising funds for the programmes. SADCC focused on developing key sectors such as transport and communications, energy, mining, and industrial production. From 1992, the organisation became the SADCC and its aims, among others, included: reducing tariff barriers, promote trade exchanges and mutual investment, realise the free movement of goods, achieve the unification of tariffs and gradually establish a free trade zone by 2000.²¹⁹

Towards the end of the 1980s, it became apparent that SADCC had to be improved. A string of events contributed to a call to change the status quo of SADCC's modus operandi. Namibia's attainment of independence in 1990 can be regarded as one of the events. Namibia's attainment of sovereign nationhood marked the end of the region's battle against colonialism. More so, coordinated attempts to end internal disputes and civil wars in some countries have also yielded promising results.

Furthermore, the process of dismantling the apartheid regime in South Africa was also ongoing. This culminated in a constitutional dispensation that was agreed upon by all South Africans. The region's history of violence and animosity came to an end as a result of these occurrences. This brought peace and stability, which are essential for economic growth.²²⁰

It was in 1992 that the SADCC birthed the more economically motivated Southern Africa Development Community (SADC). SADC committed itself to promote peace and stability to exterminate poverty throughout Southern Africa (SADC, 2012). The SADC Treaty of 1992 turned a 'loose' association into a legally binding one for closer economic cooperation among Members. SADC was also part of the continent's initiative to further harmonise RECs to promote the creation of the AEC through the Abuja Treaty of 1991.²²¹

²¹⁹ <http://www.sahistory.org.za/organisations/southern-african-development-community-sadc> Southern African Development Community (SADC).

²²⁰ Southern African Development Community (SADC) *Southern African Development Community Regional Indicative Strategic Development Plan* at 14, available at <http://www.sahistory.org.za/organisations/southern-african-development-community-sadc>.

²²¹ Tanyanyiwa, VI & Hakuna, C 'Challenges and Opportunities for Regional Integration in Africa: The Case of SADC' (Dec 2014) 19(12) *IOSR Journal of Humanities and Social Science (IOSR-JHSS)* 110.

Stemming from such events, the SADC Treaty of 1992 was then amended on 14 August 2001. The amendment brought about a complete change in the structures, policies and procedures of SADC. This process is still ongoing. A notable fundamental change is that the Organ on Politics, Defence and Security (OPDS) institutionalizes political and security collaboration. One of the central SADC bodies, subject to the oversight of the organization's supreme body, the Summit, comprises the heads of state or government.²²² The institutions in SADC include (amongst others) the following:

- The SADC Summit is made up of all of the member states' heads of state. This body is chaired by the SADC summit chairperson, who monitors the community's overarching policy direction and ensures that it runs well. As a result, the SADC summit is regarded as the organization's policy-making body.
- The SADC Organ on Politics Defence and Security is made up of three members; a Chairperson, Incoming Chairperson and Outgoing Chairperson. This body is in charge of promoting peace and security in the SADC region. When dangers to the region's peace, security, and stability are imminent, Member States provide suggestions and guidance.
- The Council of Ministers is in charge of keeping track of the community's functioning and advancement. It also guarantees that the Summit's policies are correctly implemented. The Council, like the Summit, is made up of representatives from Member States. This council is made up of ministers from each member state, usually from the ministries of foreign affairs or finance. The council meets twice a year, in January and February and in August or September immediately before the summit.
- The Southern African Development Community (SADC) Secretariat is SADC's 'principal executive institution'. It is in charge of strategically planning,

²²² Southern African Development Community (SADC) *Southern African Development Community Regional Indicative Strategic Development Plan* at14, available at http://www.sahistory.org.za/organisations/southern-african-development-community-sadc_

organizing, and managing SADC programs. It is also in charge of putting SADC policy and institutions into action. The Executive Secretary oversees the institution, which is headquartered in Gaborone, Botswana.

- The SADC National Committees are committees tasked with assisting in developing regional policies and strategies and coordinating and overseeing the implementation of national programs. These Committees also initiate projects and produce papers as feedback to help with the development of Regional Strategies. The committees consist of key government officials from each Member State.²²³

From its very formation, SADC has retained a sense of regional affiliation and a tradition of consultation amongst Southern African citizens and governments. This has strengthened regional security, among other issues. In addition, SADC has established protocols in various areas, which act as the legal basis for cooperation between Member States.²²⁴

4.3 The Objectives of SADC

As mentioned above, the main objectives of SADC are:

‘to achieve economic development, peace, security, growth, alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa and support the socially disadvantaged through Regional Integration.’²²⁵

Such objectives are met through stronger regional cooperation founded on democratic values and sustainable development.²²⁶

²²³ <http://www.sadc.int/about-sadc/sadc-institutions/>, accessed on 27 October 2017.

²²⁴ SADC has 27 legally binding protocols that seek to address various issues such as free trade, defence and development. These Protocols include: Protocol Against Corruption 2001; Protocol on Combating Illicit Drug Trafficking 1996; Protocol on the Control of firearms Ammunition and other Related Materials 2001; Protocol on Culture, Information and Sport 2001; Protocol on Education and Training 1997; Protocol on Energy 1996; Protocol on Extradition 2002; Protocol on the Facilitation and Movement of Persons 2005; Protocol on Finance and Investment 2006 and Protocol on Fisheries 2001.

²²⁵ Article 4 and Article 5 of the Agreement establishing free trade area between SADC, EAC and COMESA.

²²⁶ <http://www.sadc.int/about-sadc/overview/sadc-objectiv/> accessed 16 October 2017.

The objectives of SADC, as stated in Article 5 of the SADC Treaty²²⁷ (1992), are to:

- ‘Achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through Regional Integration;
- Evolve common political values, systems and institutions;
- Promote and defend peace and security;
- Promote self-sustaining development on the basis of collective self-reliance, and the inter-dependence of Member States;
- Achieve complementarity between national and regional strategies and programs;
- Promote and maximise productive employment and utilisation of resources of the region;
- Achieve sustainable utilisation of natural resources and effective protection of the environment and strengthen and consolidate the long-standing historical, social and cultural affinities and links among the people of the region.’

The SADC Common Agenda is directly linked to the SADC's objectives. The SADC Common Agenda stems from Article 5 — as amended — of the 1992 SADC Treaty. This summarizes the institution's main policies and strategies. Subsequently, the structural framework of the SADC is aligned with SADC's Common Agenda and Strategic Priorities for the simple reason that it embodies the same principles reflected in the Strategic Indicative Plan for the Organ (SIPO) and the Regional Indicative Strategic Development Plan (RISDP).

The following are set of policies and principles that underpin the SADC Common Agenda:

- Promoting sustainable economic development as well as socio-cultural progress that aims to reduce poverty with the end goal of eradicating it;
- Promoting common political beliefs as well as other shared values, which are normally expressed through legitimate, democratic and efficient institutions and

²²⁷ SADC Treaty 1992 as amended.

- Promoting and maintaining peace, democracy as well as security.

In light of the above, it is essential to highlight how the organisation has sought to achieve its objectives by reviewing some of its accomplishments.

4.4 THE SADC ACCOMPLISHMENTS

The SADC has made many significant improvements since its establishment in 1992, but the community still faces several political and economic issues. As discussed in Chapter three, regional groupings have shown the potential and desirability of regional integration and collaboration. To address the challenges, relevant SADC bodies have policies of action in place, such as the SADC Program of Action, which promotes collaboration in the different economic spheres.²²⁸ Many infrastructural projects have indeed been initiated under the watchful gaze of the SADC to improve highways, railways, and harbours to enhance connectivity, communication, and infrastructure throughout the region. For example, the SADC-‘Africa 50 fund’ is a financial instrument to close Africa’s problematic infrastructure financing gap by financing commercially viable projects.²²⁹ These achievements have established a basis on which the SADC region can advance its regional integration efforts. Of note has been the domineering position of some Member states, which have flouted regulations and disregarded judgments – relevant example, the Zimbabwe and the SADC Tribunal judgment case.²³⁰ The SADC has also made significant steps towards preserving political stability, as the institution is quite aware that instability can divert focus away from economic integration.²³¹ Reportedly, members have responded positively to these concerns.²³² However, the current state of economic and political instability in some SADC members raises the question of responsiveness and the ability of the members to work as a collective. Notably, the SADC countries shared

²²⁸ Mapuva J & Muyengwa-Mapuva, L ‘The SADC regional bloc: What challenges and prospects for regional integration?’ (2014)18 *Law, Democracy & Development* 34.

²²⁹ See <https://www.sadc.int/news-events/news/sadc-and-africa50-infrastructure-fund-discusses-innovative-ways-financing-infrastructure/>, accessed on 1 January 2020.

²³⁰ *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (28 November 2008).

²³¹ Mapuva & Muyengwa-Mapuva op cit note 228 at 34.

²³² *Ibid* 16.

cultural and political interests that allow them to overcome individual countries' internal conflicts.²³³ The signing of the SADC Treaty provided flexibility in its relations with collaborating governments and international donor organizations, a legal position that its predecessor did not possess.²³⁴ SADC's population is 277 million people, and this offers a significant demand for human capital.²³⁵

4.5 THE CHALLENGES FACED IN SADC

4.5.1 Unreasonable targets

As stated above, there has been a significant increase in the number of RTAs concluded within the African continent, which has led to the overlapping of membership. Commonly, these RTAs set up ambitious targets, which they eventually fail to meet due to poor implementation mechanisms. An additional problem lies within the

‘paradigm of linear market integration, marked by stepwise integration of goods, labour and capital markets, and eventually monetary and fiscal integration.’²³⁶

Consequently, most of the short-term targets set by the SADC regional bloc have not been achieved. For instance, in 2000, 11 out of 15 Member States signed the SADC Trade Protocol to liberalise 85 per cent of intra-regional trade by 2008 of which was not met.²³⁷ Similarly, they also sought to liberalise 100 per cent of trade by 2012 and form a customs union for the region by 2010 and a monetary union by 2016.²³⁸ Of concern, these targets were not met. In response to the failure to meet these targets, the SADC has postponed them ‘due to the need for further studies on the impact on the integration of the economies of Member States.’²³⁹ Therefore, it is evident that SADC’s failure to achieve the goals set indicates the enormous task related to regional economic integration.

²³³ Cawthra, G & Van Nieuwkerk, A ‘Regional Renaissance? Security In A Globalized World. The Southern African Development Community’ FES Briefing Paper 12.

²³⁴ Tanyanyiwa, VI & Hakuna, C ‘Challenges and Opportunities for Regional Integration in Africa: The Case of SADC’ (Dec 2014) 19(12) *IOSR Journal of Humanities and Social Science (IOSR-JHSS)*.

²³⁵ *Ibid.*

²³⁶ Mapuva & Muyengwa-Mapuva op cit note 228 at 12.

²³⁷ See <https://www.sadc.int/themes/economic-development/trade/>, accessed on 2 July 2021.

²³⁸ *Ibid* 4.

²³⁹ *Ibid.*

4.5.2 Overlapping multiple Membership of SADC Member States to other RIAs

In its early years, regionalism in Africa was characterized by a multitude of often unsuccessful regionalist attempts.²⁴⁰ With multiple accessions to RTAs by African states, so has the issue of overlapping of membership.²⁴¹ Mart Sylvanus submits that due to the proliferation of the different RTAs in Africa, the African RTA landscape is a seemingly complex one.²⁴² Whilst, not a new phenomenon, overlapping Membership tends to create a lot of confusion amongst Members of different regional blocs. The overlapping issue dates back to colonial times and is influenced by regional integration models like the European Economic Communities (EEC).²⁴³ According to Mapuva,

‘multiple and concurrent Memberships of numerous RECs have presented the most daunting challenge to economic regional integration within the SADC.’²⁴⁴

Overlapping Membership of the different RECs has also resulted in unintended competition and duplication. Afesorgbor and colleague argue that although some of the objectives of the RTAs are not directly linked to promoting intra-regional trade, multiple memberships can lead to duplication and inefficiency.²⁴⁵ The by-product of this is a burden to the taxpayer.²⁴⁶ Similarly, countries in West Africa belong to at least two of the

²⁴⁰ Fawcett, L & Gandois, H ‘Regionalism in Africa and the Middle East: Implications for EU Studies’ (2010) 32(6) *Journal of European Integration* 620-621.

²⁴¹ *Ibid* at 632.

²⁴² Afesorgbor, SK & van Bergeijk, PAG ‘Multi-membership and the effectiveness of regional trade agreements in Western and Southern Africa A comparative study of ECOWAS and SADC’ page 13, available at <https://core.ac.uk/download/pdf/18512115.pdf>, accessed on 2 January 2020.

²⁴³ Mapuva & Muyengwa-Mapuva op cit note 228 at 4.

²⁴⁴ *Ibid*.

²⁴⁵ Afesorgbor, SK & van Bergeijk, PAG ‘Multi-membership and the effectiveness of regional trade agreements in Western and Southern Africa A comparative study of ECOWAS and SADC’ page 13, available at <https://core.ac.uk/download/pdf/18512115.pdf>, accessed on 2 January 2020.

²⁴⁶ For instance, ‘South Africa, Botswana, Lesotho and Swaziland are Members of both the SACU and the SADC, while Namibia and Swaziland both hold Memberships of three regional integration agreement (including the COMESA) and are part of the Common Monetary Area (which include South Africa and Lesotho) and also participate in the Regional Integration Facilitation Forum (RIFF).’ See For instance, ‘South Africa, Botswana, Lesotho and Swaziland are Members of both the SACU and the SADC, while Namibia and Swaziland both hold Memberships of three regional integration agreement (including the COMESA) and are part of the Common Monetary Area (which include South Africa and Lesotho) and also participate in the Regional Integration Facilitation Forum (RIFF).’ Mapuva & Muyengwa-Mapuva op cit note 228 at 7.

six RTAs in their region. More precisely, Guinea, Niger and Burkina belong to at least four of West Africa's regional groups.²⁴⁷

In some instances, a majority of the SADC Member States are also Members of the COMESA. This creates a problem when it comes to the customs union, given that no one country can simultaneously belong to two RECs at any one time.²⁴⁸ The additional problem is that of different integration models and lack of synergy in policy development and implementation. To explain this: the COMESA is guided by mainstream Vinerian philosophy and emphasizes the advantages of integration achieved by reducing trade barriers and non-tariff barriers.²⁴⁹ On the other hand, the SADC, whose past is ingrained in fostering economic freedom and political stability, advocates for a developmental strategy that emphasises sectoral cooperation. Multiple memberships are therefore not just costly and unreliable, they are also partially to blame for SADC's and other RECs restricted capability and success.²⁵⁰

Overlapping membership, in addition, has the propensity to implicitly pull the other Member States into an agreement against their will. South Africa is a Member of SACU alongside Lesotho, Botswana, Namibia and Swaziland; as such, agreements negotiated by South Africa with the EU, and also with the SACU, include other SACU Members.²⁵¹

Interestingly, Mozambique and Angola are the only countries that do not belong to any other RIA except SADC. Article XXIV of the GATT gives guidelines on the creation of RIAs. It also encourages countries to only belong to one customs union. The consequence of belonging to more than one customs union is that a country will have to agree to more than one Common External Tariff (CET), which may not always be possible because RECs have varying commitments and can enforce dissimilar CETs. From this perspective, the feasibility of a customs union in the SADC region remains elusive. Certain countries already belong to a customs union in other RIAs due to having multiple

²⁴⁷ Afesorgbor & van Bergeijk op cit note 245 at 13.

²⁴⁸ Mapuva & Muyengwa-Mapuva op cit note 228 at 7.

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

memberships. Six SADC countries are for example also in the COMESA CU. Five SADC countries are also in the Southern African Customs Union (SACU), including one country that participates in the EAC CU and one in the CEMAC CU. Consequently, only three SADC countries are not a party of any other Customs Union.

Establishing a SADC customs union implies that countries that belong to other customs unions will be subjected to more than one common external tariff and thus pose problems for SADC's customs union.²⁵² Authors such as Wolfe submit that it would have been better off if SADC and COMESA would merge since efforts have been made to integrate the work of both organisations to avoid overlap or conflict between programs, projects and activities but to no avail.²⁵³

Conversely, SADC countries would have to sacrifice their membership in other RIAs in order to permit the creation of SADC's customs union. Some of the participants interviewed, however, pointed out that a recent survey suggested that SADC countries are not ready to abandon their membership in other RIAs.²⁵⁴ This makes the viability of SADC's customs union less obvious. The possibility of the Grand Free Trade Area—COMESA-SADC-EAC TFTA — becomes highly unlikely.

4.5.3 Delays in the consolidation of SADC Free Trade Area (FTA)

It is necessary to remember that SADC should have concluded tariff concessions in an FTA arrangement. All Member States should participate in the FTA to continue to form a customs union. Although SADC is currently is an FTA, not all countries have fulfilled their respective FTA obligations. There are three Member States that do not currently

²⁵² Challenges and opportunities of regional integration in Africa: the case of SADC paper submitted for consideration for the African economic conference 2013 “regional integration in Africa” October 28-30, 2013 Johannesburg, South Africa.

²⁵³ Taole, TE, *Multi-membership in African regional trade agreements: A focus on SADC and COMESA* (an unpublished LLM thesis, North-West University 2014) 21-22.

²⁵⁴ Macroeconomic Convergence in SADC – A Policy Perspective for the Central Banks of the Integration Arrangement, available at <https://www.sadcbankers.org/Lists/News%20and%20Publications/Attachments/122/Paper.pdf>, accessed on 11 June 2021.

participate in the FTA, and several others have not adopted tariff concessions for the FTA in full.²⁵⁵

4.5.4 Over-dependence on donor funds

According to McLeod, the SADC has two main sources of finance; Member states' contributions and funding from International Cooperating Partners (ICPs).²⁵⁶ Some of these ICPs include the African Development Bank, the AU and the European Union.²⁵⁷ Annually each Member state contributes an amount that is calculated on the basis of the GDP of the respective States.²⁵⁸ Even though the annual contributions of Member States towards SADC are insufficient to meet the costs of the REC.²⁵⁹ As a result, the SADC Secretariat is effectively incapable of executing regional integration initiatives and is therefore completely reliant on donations. While donors assist in bridging these deficits in capacity, the efforts remain inadequate. Further, there is the added risk of donors advancing their agendas in SADC using conditions attached to aid. Studies have shown that more than 50 per cent of SADC's funding is from ICPs, with the EU being the major donor.²⁶⁰ This suggests that SADC may not be able to sustain itself if these donors were to pull out. This leaves the SADC at the mercy of donors' demands.

Despite the bulk of SADC's success, such as the reduction of tariffs, there has been little progress in industrialization and the development of infrastructure within the bloc. The justification for this inconsistency is large because donor support is mostly geared

²⁵⁵ McLeod, H 'Regional Integration and the Role of Donors' in Monitoring Regional Integration in Southern Africa: TRALAC (2011) 95.

²⁵⁶ McLeod op cit note 255 at 98.

²⁵⁷ See <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/1-Introduction%20and%20Overview.pdf>

²⁵⁸ SADC (2012) Resource Mobilization Strategy, Areas Dynamics, Gaborone Botswana, available at <http://videa.ca/wp-content/uploads/2015/08/SADC-Resource-mobilization-strategy.pdf>, accessed on 01 January 2018.

²⁵⁹ Challenges and Opportunities of Regional Integration in Africa: The Case of SADC. Paper Submitted for Consideration for the African Economic Conference 2013, available at https://www.afdb.org/.../CHALLENGES_AND_OPPORTUNITIES_OF_REGIONAL_, accessed on 20 December 2017.

²⁶⁰ *Ibid.*

towards tariff liberalisation than the rest of SADC's development programs.²⁶¹ Consequently, an inference can be drawn that the donors' agendas have always influenced SADC's efforts to liberalise trade through the reduction of tariffs.²⁶² This has resulted in areas that are the main facilitators of development, such as industrialization and infrastructure being neglected.

As postulated in the dependency theory,²⁶³ it is difficult to break free from donor dependency since donors often enforce penalties for such efforts to break away. Nonetheless, if the resource mobilization plan²⁶⁴ is adopted effectively, SADC could extricate itself from ICPs. Consequently, the production of own capital within SADC could promote and improve the REC's sustainability.

4.5.5 Lack of industrial capacity in SADC

Most studies suggest that countries prefer to trade with countries that have diverse exports, and this pattern can be observed within SADC itself. It further explains why intra-SADC trade is low.²⁶⁵ It is reported that Countries in the SADC lack the manufacturing capability to produce diverse products. As a consequence, SADC's exports frequently contain products of less value to other African countries.²⁶⁶

²⁶¹ Isaksen, J & Tjønneland, EN 'Assessing the Restructuring of SADC - Positions, Policies and Progress' 10-12 <<https://www.cmi.no/publications/file/880-assessing-the-restructuring-of-sadcpositions.pdf>> accessed 10 June 2021.

²⁶² Isaksen & Tjønneland op cite note 293.

²⁶³ Dependency Theory developed in the late 1950s under the guidance of the Director of the United Nations Economic Commission for Latin America, Raul Prebisch. Their studies suggested that economic activity in the richer countries often led to serious economic problems in the poorer countries. Dependency can be defined as an explanation of the economic development of a state in terms of the external influences--political, economic, and cultural--on national development policies.

²⁶⁴ The mandate of the Directorate of Policy, Planning and Resources Mobilisation is to serve the Southern African Development Community (SADC) Secretariat as the lead structure on strategy development, policy analysis, monitoring and evaluation, strategic partnerships, inter - regional and continental integration, and resource mobilization.

²⁶⁵ Yayo, M & Asefa, S 'International Trade Effects of Regional Economic Integration in Africa: The Case of the Southern African Development Community (SADC)' available at <http://scholarworks.wmich.edu/cgi/viewcontent.cgi?Article=1038&context=ijad>, accessed on 12 December 2017.

²⁶⁶ Hartzernberg op cit note 164.

4.5.6 High cost of doing business within SADC

Another challenge negatively impacting trade within the SADC is the rising cost of doing business within the bloc. This is often attributed to infrastructural shortages at ports of entry and transport networks.²⁶⁷ This often results in unnecessary border processes, lengthy document requirements and a reduction in the cross-border flow of persons and goods. Put differently, non-tariff barriers²⁶⁸ are, as analysts claim, a significant impairment to African trade. This analysis coincides with the conclusion that intra-regional trade is adversely impacted by the high cost of doing business. In fact, SADC's stringent Laws of Origin have also contributed to the rise in the cost of doing business within SADC.²⁶⁹

4.5.7 Lack of private sector participation

Furthermore, it was discovered Member States usually appoint top government officials to negotiate at SADC fora. As a consequence, non-state actors are often ignorant of the advantages they could have in SADC because they are not typically willing to set down the ground rules on what they would expect from SADC negotiations.²⁷⁰ Throughout the ASEAN, for example, the private sector is the driving force for negotiations in the REC. As a result, the business sector is largely involved in the path taken by the REC. This is no surprise that intra-regional trade is stronger in the EU and Asia as compared to

²⁶⁷ Keane *et al*, (2010), Impediments to Intra-Regional Trade in Sub-Saharan Africa, Overseas Development Institute, London Kritzinger, (undated) Regional Integration: Concepts, Advantages, Disadvantages and Lessons of the African Experience available on <http://siteresources.worldbank.org/EXTAFRREGINICOO/Resources/Kritzinger.pdf> accessed 16 October 2017.

²⁶⁸ Article 5 of Protocol on the Establishments of the EAC Common Market provides that the Member states shall eliminate tariff, non-tariff and technical barriers to trade; harmonise and mutually recognise standards and implement a common trade policy. It is strongly argued that the successful implementation of this Article will foster deeper economic integration in the region as it commits to addresses all barriers that affect integration.

²⁶⁹ Keane op cit note 267.

²⁷⁰ Challenges and Opportunities of Regional Integration in Africa: The Case of SADC. Paper Submitted for Consideration for the African Economic Conference 2013, available at https://www.afdb.org/.../CHALLENGES_AND_OPPORTUNITIES_OF_REGIONAL_..., accessed on 20 December 2017.

SADC.²⁷¹ Conclusively, to promote engagement within the SADC, these best practices could be adopted by SADC.²⁷²

4.6 PROSPECTS FOR REGIONAL INTEGRATION IN THE SADC

If the findings that former liberation-struggle leaders had an overwhelming desire for better democracy are something to go by, then the SADC which is made up of a variety of liberation movements has an enormous responsibility for the bloc in realizing the principles of regional integration.²⁷³ Despite Mozambique, Zimbabwe, South Africa and Namibia's prominent positions and revolutionary credentials in the SADC, the outcomes of Mo Ibrahim's Afro Barometer (2012) also offer a negative image of the possibilities for regional integration in the region. It must also be noted that democratic politics undisputedly promotes economic growth and is one of the most crucial steps in achieving regional integration.²⁷⁴ Consequently, there ought to be agreement regarding the type of democracy that should dominate the SADC to ensure meaningful regional integration within the bloc. This has been hampered due to the presence of a monarchical form of democracy in the region.²⁷⁵

Monarchies tend to go against the conventional wave of democracy. A monarchical form of democracy defies the principles of democracy as provided by numerous regional and international agreements. A classic example of such a state is Swaziland, whose model of governance conflicts with other SADC Members. The banning of all political parties and gross human rights violations tarnishes the country and hampers investor confidence and economic growth. Consequently, such forms of governance tend to affect regional integration as it makes it almost impossible for Members to integrate their respective economic and political policies to move towards regional integration.²⁷⁶

²⁷¹ Hartzenberg op cite note 164.

²⁷² *Ibid.*

²⁷³ Mapuva & Muyengwa-Mapuva op cit note 228 at 4.

²⁷⁴ Mo Ibrahim's Afro Barometer (2012) available at https://www.afrobarometer.org/files/mau_rs_sor_presentation, accessed on 10 October 2017.

²⁷⁵ Hartzenberg op cite note 164.

²⁷⁶ *Ibid.*

4.7 SADC ROLE IN THE TFTA

The SADC originated as an organisation of frontline states to resist the influence of South Africa in the region during the period of apartheid. It was transformed into a development community in 1992 with the Signing of the treaty of Windhoek and now consists of fourteen Member countries.²⁷⁷ It is generally seen as one of the wealthiest regions on the continent, and in relation to COMESA is the second most prominent regional arrangement.²⁷⁸ The goal of the SADC FTA is to serve as a stimulus for greater regional integration and promote the free flow of trade and investment in the region. The organisation has had a different approach to regional integration than COMESA and the EAC. It has focused on alleviating trade supply constraints through regional collaboration in different sectors such as agriculture, transport and human capital.²⁷⁹

The SADC has implemented a Regional Indicative Strategic Development Plan (RISDP) that provides direction in the planning and implementing SADC programs, activities and projects.²⁸⁰ The overarching goal of the RISDP is to expand SADC's integration agenda to enhance poverty eradication and foster the achievement of other economic and non-economic growth objectives.²⁸¹

The overarching objective of the SADC Trade Protocol is to establish an FTA as a precursor to a customs union and, ultimately, a common market. Generally, the SADC trade policies and strategies are compatible with the aims of overcoming hurdles to the free flow of capital, labour, goods and services. This will lead to improving the region's

²⁷⁷ 'Declaration and Treaty of the Southern African Development Community' <https://www.sadc.int/files/8613/5292/8378/Declaration__Treaty_of_SADC.pdf> accessed 30 May 2021.

²⁷⁸ See <https://www.sadc.int/about-sadc/overview/sadc-facts-figures/>, accessed on 25 May 2021.

²⁷⁹ Hartzenberg op cite note 164 at 26.

²⁸⁰ Magakwe, J *The Activities of the Southern African Development Community in relation to its purpose statement* (unpublished masters dissertation, University of South Africa, 2013) 36-49.

²⁸¹ Daniels, CJM *Regional Integration in the COMESA-EAC-SADC Tripartite Free Trade Area and the Importance of Infrastructure Development in Promoting Trade and Reducing Poverty* (unpublished dissertation, University of The Western Cape, 2012) 12.

economic management and performance through regional co-operation with the ultimate goal of eradicating poverty.²⁸²

Based on the success achieved in the SADC region, the implementation of the TFTA brings with it a high likelihood of increased efficiency in production, trade and investment across the region and the promotion of cross border trade and movement of financial and capital assets. The above achievements by COMESA and the EAC are similar opportunities available to the TFTA region given the larger market.²⁸³

In building upon what has already been achieved, the TFTA can capitalize on the existing structures in the region, such as the COMESA Infrastructure Development Fund, the COMESA Regional Investment Agency and many other similar institutions. The TFTA can also take advantage of the infrastructure and skills in countries like South Africa and learn from the existing systems. Lastly, the TFTA can result in enhanced inter-regional cooperation, which is a catalyst for greater cooperation between countries and eventually common approaches amongst the Member States of the three RECs in their interaction with key partners and the global market.²⁸⁴

4.8 CONCLUSION

From the above, it is clear that the problems faced by SADC outweigh the benefits and success. This raises the question of whether the tripartite will be a success as the other already existing regional blocs have not been very successful, or perhaps one might learn from the regional blocs' failings in order to develop a better tripartite. Although SADC has its failures, there are prospects of growth and success for the objectives of the bloc.

According to Mpya *et al*,²⁸⁵ for regional integration to have a meaningful impact, such policies should foster growth and create opportunities in such a way that can be as inclusive as possible. To be exact, they should tackle problems that are crucial to ordinary

²⁸² *Ibid.*

²⁸³ *Ibid.*

²⁸⁴ Disenyana, T, 'Towards an EAC, COMESA, SADC Free Trade Area: Issues and Challenges', p21 available at <http://trademarksa.org> accessed on the 4th of November 2017.

²⁸⁵ Lehloenya & Mpya op cite note 26 at 94.

citizens, such as unemployment and mitigating inequalities. The extent to which regional integration affects the welfare of community members depends on a number of factors, mainly the types of policies put in place. Consequently, when the right policies are implemented and put into effect, they have the power to ‘shape institutions and capacities in the direction of inclusive growth and human development.’ The next chapter will give a brief overview of the previous chapters, conclusion and recommendations.

CHAPTER 5:

FINDINGS, RECOMMENDATIONS AND CONCLUSION

5.1 INTRODUCTION

Throughout this thesis, it has been argued that the world trading system has witnessed an increasing number of RTAs to such an extent that the current operation of the multilateral framework is being questioned. In particular, the African continents' great regional trade blocs have been formed as part of the plan to assist with market access and integration into the multilateral trading system. The study discussed the capacity of the African region to deal with the emergence of RTAs, particularly the TFTA. In particular, the study sought to establish to what extent has the problems within the multilateral system resulted in the proliferation of FTAs. Further, to establish the extent to which the formation of the TFTA will address the various problems of trade faced by the continent of Africa.

Against this backdrop, the study guided by the research mentioned above questions discussed the formation of RTAs. In concluding this work, it follows then that one must highlight the critical findings of each Chapter. Chapter one of the study determined the extent to which the problems within the multilateral system resulted in the proliferation of FTAs. Chapter two of the study discussed how particular African countries were equipped to deal with FTAs. Chapter three explored the extent to which the TFTA would be able to solve the particular problems of trade faced by the EAC. This final Chapter of the study, having established the position of RTAs, considers how the formation of the TFTA would assist a regional bloc such as the SADC to have market access in other countries and propose ways in which this should operate.

5.2 KEY ISSUES IDENTIFIED

As discussed in Chapter One of this work, the world trading system has witnessed an increasing number of regional integration initiatives. One of the most significant problems facing the multilateral trading system today is the increase of PTAs. This is evident in the

increase of both the total and scope of such agreements.²⁸⁶ Thus far, this has created some tension between the legal texts of the multilateral trade system and the regional system, especially in respect of dispute settlement. Disturbingly, the collapse of yet another Ministerial Meeting of the Doha Round further fuelled the trend toward preferential trade agreements. As such, today, no country or region has abstained from this trend. Africa also followed the trend, as several free trade areas formed within the African continent. As noted in Chapter 1 and further Chapters, the EAC was formed to facilitate free trade within countries in the east of Africa.²⁸⁷ Southern Africa has ample of these arrangements, including SACU, SADC, and the South Africa and European Union FTA. The latter are FTAs that were formed within Southern Africa to infiltrate free trade again. The COMESA is also one of the FTAs that were formed in Africa.²⁸⁸

As such, RTAs are a prominent feature of international trade, and the numbers of these arrangements are ever-growing.²⁸⁹ Thus, when in October 2008, heads of states in Kampala decided to develop the CFTA, not surprising that Africa would propel their stance on this issue. Eliminating for the AU, with an impressive 36 tripartite countries²⁹⁰, the Tripartite FTA builds upon the already existing regional trade agreements in COMESA, EAC and SADC. As noted in the research, this regional bloc aims to assume and implement much-needed that promote and consolidate an impartial society and social justice. If the various regions successfully implement the CFTA, it will pave the way for improved cooperation and amalgamation of the AEC. One of the main benefits to be secured from the CFTA is the establishment of a common market with a single economic space, which will boost production capacities as sought in the 1991 Abuja Treaty.

As discussed, interestingly, many of the Tripartite FTA signatories are also Members of the WTO. Further, the CFTA as a regional trade agreement may have the potential of departing from the guiding principles of WTO because it is preferential.²⁹¹ Furthermore, the TFTA was created to solve a regional problem, which is to ensure that African

²⁸⁶ Page 1 par 1.

²⁸⁷ Page 2.

²⁸⁸ *Ibid.*

²⁸⁹ Page 3 par 2.

²⁹⁰ Page 4 par 3.

²⁹¹ Page 5 and 6.

countries can effectively participate in the multilateral trading system by accessing developed country markets. As such, the study sought to examine whether the TFTA between the COMESA, EAC and SADC can indeed be considered a beacon of hope in ensuring market access for these countries.

Thus, Chapter two sought to discuss the multilateral trade framework, emphasising the GATT and the WTO. It was established that Article XXIV of the GATT had been seen as the ‘scapegoat’ for creating these trade arrangements. However, this is arguably some diversion as some WTO Members prefer participating in regional agreements and other preferential trade unions than engaging in global or multilateral trade relations. It has been argued that Article XXIV will disintegrate the WTO whilst on the other hand it has also been argued that such trading arrangements are still within the mandate of the WTO.²⁹²

This study further sought to establish the extent to which problems within the multilateral trading system have resulted in the proliferation of FTAs. In doing so, the Chapter firstly discusses the historical development of the GATT and the WTO. Secondly, it identified and discussed the principles that underlie the WTO and the possible factors that have led to an increase in RTAs. It was established that the initial negotiators under the GATT, especially those with a primary supply interest, were developed economies. They based their negotiating efforts on reducing import barriers in several other countries that were of interest to them.²⁹³ Since the trade barriers selected for removal were usually those on other developed countries' import markets, the main consequence was that developed countries were required to lower their tariffs.²⁹⁴

Despite the significant advances made by GATT, the international community sought to strengthen the *status quo* by the formation of the WTO. The organisation deals with trade regulation between participating countries; it also provides a framework for negotiations and formalisations of trade agreements.²⁹⁵

²⁹² Page 14 Par 1.

²⁹³ Par 2 of page 23.

²⁹⁴ Par 2 of page 23.

²⁹⁵ Par 3 page 23.

The main provision(s) (Article XXIV) was then discussed to ascertain their context and the legal implications for the multilateral and regional regime. It was further discussed that Members of the WTO, subject to other conditions, can deviate from the MFN rule by giving their trading partners more preferential treatment without affording the same treatment to all WTO members.²⁹⁶ This implies that parties within the WTO can form their trade relations that will infer rights and benefits that will not normally be afforded to the rest of the parties in the WTO.²⁹⁷ However, despite their differences, and contradictory nature, the thesis submits that RTAs also embrace the multilateral trade mechanism developed by the WTO. It is further submitted that these agreements have made it possible for groups of countries to discuss and implement trade obligations that surpass what could multilaterally be possible at the time.²⁹⁸

The WTO agreements recognise that regional arrangements and closer economic integration can benefit countries, especially those less developed. It also acknowledges that regional trade agreements can, in certain instances, be detrimental to other countries' trade interests. As noted earlier, Article XXIV of the GATT operates as *an exception* (emphasis added). It serves as a loophole allowing members to participate in activities that are incompatible with the WTO, provided a set of requirements are met. This is apparent when a PTA satisfies the definitional criteria stipulated in Article XXIV. Although in violation of Article I of the GATT, parties to a PTA may reduce their tariffs below the MFN standard offered to other members of the WTO. It is uncertain if it might triumph over some or all other WTO obligations. Instead, Article XXIV only addresses the limits of internal liberalisation that PTAs must attain to apply for the exception.²⁹⁹

Having established how the multilateral trade framework influences the formation of RTAs, Chapter three discussed how the particular African regions are equipped to deal with FTAs. The primary purpose of these agreements is to foster and encourage Member States' economic and social development. As noted in Chapter two, lack of commitment by developed countries, unfair trade terms is attributed to the increase in RTAs. Therefore,

²⁹⁶ Para 4 at 24.

²⁹⁷ Para 5 at 25.

²⁹⁸ Para 3 at 26.

²⁹⁹ Pp 26-27.

it is argued that regional trade agreements seek to eliminate unfair trade terms that exist in the global market and raise the economy of developing countries.³⁰⁰

The thesis highlighted that currently, the continent has about eighteen RTAs. Furthermore, the chapter explored the several benefits that African countries derive from regional integration. One of the most compelling reasons was to speed up economic growth in Africa by enhancing trade.³⁰¹ Therefore, it is incumbent that African countries consolidate into regional trade groups to boost economic growth through collective efforts.³⁰²

Regional integration, therefore, enhances their bargaining power and allows African countries to coordinate their positions in multilateral trade negotiations.³⁰³ Their negotiations as a more extensive group than negotiating on a solo basis or in smaller groups are more likely to yield better outcomes, which eventually benefits a vast Section of the continent. Conclusively, regional integration serves as a vehicle for mitigating the constraints faced by small economic countries in the multilateral trading system.³⁰⁴

As such, Chapter four discussed the prospective role of the TFTA and found that the TFTA is viewed by some observers as a 'big deal' and theoretically a 'game changer' for the African trade system with more than half a billion people as its total population.³⁰⁵ Nonetheless, the agreement intends to launch a more competitive CFTA, which includes the entire continent. The economic consequences for the countries involved are theoretically enormous since the TFTA includes almost half the total number of African nations — that is, 26 countries.³⁰⁶ If wholly incorporated, the TFTA will establish the largest free-trade area in Africa. Based on the 2015 market exchange rates, the TFTA region has an overall population of 683 million people and a cumulative GDP of 1.2 trillion USD.³⁰⁷ This constitutes 58 per cent of Africa's population and over half of Africa's

³⁰⁰ Par 2 page 32.

³⁰¹ Par 1 page 33.

³⁰² Par 2 page 33.

³⁰³ Kritzinger-van Niekerk, L “Regional Integration: Concepts, Advantages, Disadvantages and Lessons of Experience”, available at www.sarpn.org/documents/P146-RI, accessed on 17 July 2017 at page 3.

³⁰⁴ Para 2 at 36.

³⁰⁵ Para 3 at 55.

³⁰⁶ Mold & Mukwaya op cit note 212 at 2.

³⁰⁷ Para 1 at 56.

overall GDP (54.3 per cent).³⁰⁸ Consequently, the TFTA thus constitutes a very significant market by any standards and collectively places the block as the 14th largest economy globally.³⁰⁹

Building upon what has already been achieved, the TFTA can capitalize on the existing structures in the region, such as the COMESA Infrastructure Development. The TFTA can also benefit from current systems in countries like South Africa, which have solid infrastructure and capabilities. Lastly, the study found that the TFTA can result in enhanced inter-regional cooperation, which serves as a catalyst for increased collaboration among countries and, eventually, shared approaches among the three RECs' member states in their interactions with significant partners and the global market.³¹⁰

5.3 RECOMMENDATIONS

Having identified the above issues, this Chapter will now make particular recommendations on how the African region can benefit from the proposed TFTA. These recommendations are based upon a critical analysis of how the African region can be better equipped to deal with FTAs, particularly the TFTA.

5.3.1 Improved coordination and bargaining power

It has been argued in the preceding Chapters that one of the main benefits of FTAs is improved bargaining power in the multilateral trading system. The TFTA can therefore ensure that each Member state coordinates their position strategically so as to increase their visibility in multilateral negotiations thus increasing their bargaining power.³¹¹ This strategy will be most advantageous to the poor and fractioned countries of the region.

³⁰⁸ *Ibid.*

³⁰⁹ Par 1 page 56.

³¹⁰ Par 4 page 57.

³¹¹ Kritzinger-van Niekerk, L 'Regional Integration: Concepts, Advantages, Disadvantages and Lessons of Experience' available at www.sarpn.org/documents/P146-RI, accessed on 7 November 2017 at 34.

5.3.2 Improved regional security

Polachek argues that the formation of FTAs may, if not handled with the utmost care, cause tension between Member States. He further states that this may result in divergence rather than convergence of countries in the region. This mainly occurs when the industry concentration trend is aligned to only a few countries of the region.³¹² Therefore, the TFTA must guard against the formation of regional monopolies by extending markets and competition across the region.

5.3.3 Private sector involvement

There is a dire need to involve the private sector when dealing with RTAs. The private sector can recommend appropriate choices and policies for the region. Improved manufacturing and trade of services and goods rely on increased production by private companies. As such, involving the private sector would also help change the widespread perception that RTAs are essentially distant outgrowths of government bureaucracy rather than a tool for strengthening the region-wide private sector. For this purpose, the relevant institutions appoint individuals from different regions who have experience in economic development issues to be negotiators.

5.4 CONCLUSION

In conclusion, it has been established that more states prefer the route of RTAs than multilateral negotiations as it is easier and more efficient to work in a small group than it is to work in a larger one. Africa, in particular, has been sidelined on international trade negotiations that is why most of them have opted to form smaller trade groups. However, because each RTA was founded with certain objectives in mind, most African countries' membership in the RTAs overlapped.. Such overlapping of Membership can also be construed to mean that these RTAs are not properly equipped to deal with the trade

³¹² Polachek, SW 'Conflict and Trade: An Economics Approach to Political Interactions' in Isard, W and Anderton. CH Economics of Arms Reduction and the Peace Process New York: Elsevier, (1992) 16.

barriers experienced by most African countries. As such, countries find it more beneficial to be part of more than one RTA than to negate the various trade barriers.

The problems faced by most African RTAs outweigh their successes. This raises concerns on whether the tripartite will be successful as existing regional blocs have accomplished little. It is submitted that the failures of the regional blocs be documented to learn from these mistakes to create a better tripartite. Arguably, if appropriate policies are implemented, they would have the ability to transform institutions and capacities for sustainable growth and human development. Therefore, the formation of the TFTA could be a significant step towards the creation of a pan-continental free trade area. This would serve the catalytic role in achieving economic integration in the African continent and lead to economic growth and development. Its success would open new opportunities for businesses through an improved and harmonised trade regime that would decrease their operating costs and provide an inflow of foreign direct investment into the region.

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