

Regional trade integration strategies under SADC and the EAC: A comparative analysis

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Abstract

Regional integration is more important today than it has ever been for eastern and southern Africa's development. This article engages in a comparative study of the key trade liberalisation provisions found in the constitutive legal instruments of the East African Community and the Southern African Development Community with the aim of identifying shortcomings in the legal framework and making proposals to address them. It concludes that serious efforts need to be made to reduce barriers to trade, increase capacity to implement and monitor implementation, and streamline and harmonise the various integration initiatives.

Introduction

The South African Deputy Minister of Trade and Industry, Elizabeth Thabethe, was recently quoted as telling a South Africa–Zambia business forum that the global economic crisis had made it more urgent for regional integration to be at the top of the southern African region's economic agenda.¹ Given the proliferation of regional trade agreements (RTAs) across Africa as a whole and in eastern and southern Africa in particular, this would appear to be a call, not for the creation of more such arrangements, but for the operationalisation, rationalisation and implementation of obligations under those arrangements that already exist. These include the Southern African Customs Union (SACU), the Southern African Development Community (SADC), the East African Community (EAC), and the Common Market for Eastern and Southern Africa (COMESA).

With 2011 marking the beginning of the second decade of the 21st century, it is an apt time to reflect on member states' record regarding the implementation of their obligations over the past ten years. It is also an opportune time to make some proposals regarding the steps that need to be taken in order for the region to improve its dismal record and to achieve its goals over the coming decade.

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1 "Regional integration should top SADC agenda: Minister"; available at <http://www.lusakatimes.com/2010/12/03/regional-integration-top-sadc-agenda-minister/>; last accessed 13 January 2011.

This article will, therefore, provide an overview of the key legal provisions facilitating regional integration within the EAC and SADC regions, and identify some of the shortcomings that can be found in the current legal frameworks. It will also try to tease out some lessons that SADC can take on board from the EAC's experience with deeper trade liberalisation and integration.

The next two sections provide some background information regarding the overall integration strategies adopted by the EAC and SADC, respectively. The paper will then look at various aspects of their trade liberalisation regimes, starting with the steps that have been taken to ensure the free movement of goods and the rules of origin adopted in this regard. After that, the article will look at the rules relating to the elimination of non-tariff barriers (NTBs) and the manner in which the principle of non-discrimination is being applied, before briefly discussing trade remedies and trade facilitation measures. The discussion will also touch on the approaches taken with regard to relations with third parties. Challenges facing regional integration will then be analysed before a conclusion is drawn regarding the prospects for enhanced regional integration.

The EAC: A customs union and beyond

Though the history of cooperation in the east African region can be traced as far back as 1917,² the EAC, in its current format, was only established in 1999, following the signing of the Treaty Establishing the East African Community.³ It is composed of five states, three of which (Kenya, Uganda, and Tanzania) were the founding partners, while Burundi and Rwanda joined in 2007. The objectives of the Community as set out in the Treaty include the progressive formation of a customs union, a common market, a monetary union and, ultimately, a political federation.⁴ Though the EAC has marked a number of significant milestones since its establishment – among which are the launch of the EAC Customs Union, the conclusion of a Protocol on a Common Market, and the entry into force of the latter Protocol on 1 July 2010 – these gains have been fitful and uneven. Developments on the ground have not always reflected the rhetoric of the politicians and the obligations contained in the constitutive documents.

2 This was the year in which the British colonies of Kenya and Uganda were joined together in a customs union. This later became the East African High Commission, which in turn morphed into the East African Common Services Organisation before its transformation into the original East African Community in 1967. See Mutai, Henry Kibet Mutai. 2007. *Compliance with international trade obligations*. Alphen aan den Rijn: Kluwer Law International, pp 116–118.

3 Treaty establishing the East African Community, 30 November 1999 (entered into force 7 July 2000). Available at <http://www.eac.int/treaty/>; last accessed 14 January 2011.

4 EAC Treaty, Article 5(2).

The EAC aims at achieving what is sometimes referred to as *deep integration* through a series of incremental steps. The incremental nature of integration is buttressed by the principles underlying the Community. Amongst the most important of these are “the principle of variable geometry which allows for progression in co-operation among groups within the Community for wider integration schemes in various fields and at different speeds”, and the principle of asymmetry.⁵ These provisions were included in the Treaty primarily to allay the fears of Tanzania and Uganda, which feared that, given their relatively lower levels of development, their economies ran the risk of being swamped by Kenyan goods if they were obliged to liberalise at the same rate. These principles have since proved to be central to the strategy being undertaken by partner states.⁶

The East African trade regime is set up and governed by Chapter Eleven of the Treaty, entitled “Co-operation in Trade Liberalisation and Development”. According to the Treaty, the customs union was to be set up progressively over the course of a transitional period.⁷ The Protocol guiding the process during this transitional period was to be concluded within four years of the Treaty’s entry into force.⁸ This arrangement was fairly unusual in the sense that, rather than adopt the conventional progression described in the economics literature, which involves a move from a free trade area (FTA) to a customs union and then to a common market,⁹ the FTA and customs union stages in the EAC were implemented simultaneously. The various elements comprising the trade regime will be discussed after the following brief overview of the SADC framework.

SADC: A cooperative approach to integration

The Southern African Development Community (SADC) is the successor organisation to the Southern African Development Coordination Conference (SADCC). It is currently composed of 15 states, i.e. Angola, Botswana, the Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. It was formed in 1992 with the signing of the SADC Treaty.¹⁰ Unlike the EAC, which only came into existence in its current guise

5 EAC Treaty, Article 7(1). The principle of asymmetry is defined in Article 1(1) as being “the principle which addresses variances in the implementation of measures in an integration process for purposes of achieving a common objective”.

6 Also referred to as *member states* herein.

7 EAC Treaty, Article 75(2).

8 EAC Treaty, Article 75(7).

9 See Balassa, B. 1961. *The theory of economic integration*. Homewood, ILL: Richard D Irwin, Inc., p. 2.

10 Treaty of the Southern African Development Community (SADC), opened for signature 17 August 1992 (entered into force 30 September 1993).

some eight years later, SADC's initial focus was on the harmonisation of its programmes rather than on regional integration.

The SADC Protocol on Trade, which contains the framework of the SADC trade regime, is actually older than the EAC Treaty, having been signed in August 1996. However, it only entered into force four years later, in 2000. The delay in the Protocol's entry into force was, perhaps, the first sign of the region's lack of preparedness to undertake trade liberalisation. The members' objectives, as set out in the Protocol, include the liberalisation of "intra-regional trade in goods and services on the basis of fair, mutually equitable and beneficial trade arrangements" and the creation of an FTA covering the member states.¹¹ The Protocol was notified to the World Trade Organization (WTO) under Article XXIV of the General Agreement on Trade and Tariffs (GATT),¹² and referred by the Council for Trade in Goods to the Committee on Regional Trade Agreements for examination.¹³

An examination of the Protocol's provisions reveals a close connection between the rules set out under the Protocol and the rules found in the WTO Agreements, with a number of rules on different disciplines having been adopted directly from the WTO. Though this approach had the benefit of ensuring that there is no conflict between these provisions, the opportunity to tailor the provisions to the requirements of SADC member states – some of whom are not WTO members – was lost.

The following sections examine various aspects of the EAC and SADC trade regimes, starting with those provisions relating to the free movement of goods. The aim of this discussion is to provide an overall picture of the current state of trade liberalisation in the region as it relates to the duties imposed on the states by the Treaties.

Liberalising the intra-regional movement of goods

The free movement of goods between states generally requires the creation of an FTA within which tariffs on goods originating within the area (as defined in Rules of Origin) are eliminated.

In the EAC, this phase began in earnest with the signing of the Protocol on the Establishment of the East African Community Customs Union on 2 March

11 SADC Protocol on Trade, Article 2.

12 See WTO/World Trade Organization. 2004. *Southern African Development Community Free Trade Area: Notification by Tanzania*. WTO Doc. WT/REG/176/N/1. Geneva: WTO.

13 See WTO. 2004. *Protocol on Trade in the Southern African Development Community*. WTO Doc. WT/REG/176/3. Geneva: WTO.

2004.¹⁴ The Protocol, which entered into force on 1 January 2005, provided for the elimination of customs duties and other charges of equivalent effect on imports; the removal of NTBs to trade; and the establishment of a common external tariff.¹⁵ Because the then three partner states were at different levels of development, the approach taken was progressive and asymmetric, with immediate duty-free movement of goods from Tanzania and Uganda to Kenya, and between Tanzania and Uganda.¹⁶ Goods moving from Kenya to Tanzania and Uganda were divided into two categories: Category A goods were eligible for immediate duty-free treatment, while Category B goods were eligible for a gradual reduction in tariffs.¹⁷

Similarly, within SADC, the Trade Protocol provided for the elimination of barriers to intra-SADC trade and a reduction of tariffs. Such elimination and reduction were to be effected under the principle of asymmetry, and were to be completed within a period of eight years, i.e. by 2008.¹⁸ This is a longer transition period than that adopted by the EAC, even though the SADC process started earlier. The programme devised by member states provided for the five SACU states to take the lead in removing their tariffs. The Protocol also provides for goods to be categorised into different classes for the purposes of tariff reduction. Thus, goods in Category A were to be liberalised immediately; those in Category B were identified for gradual liberalisation; while Category C comprises goods identified as being sensitive and whose tariffs are last to be liberalised.¹⁹

It can therefore be seen that the approaches adopted by the two regional trade agreements are similar: they both try to cater for the economic inequalities prevailing among the participants. However, whereas the internal elimination of tariffs has been concluded within the EAC (which has even proceeded to introduce a common external tariff as part of its efforts to create a customs union), the process is ongoing within SADC.

Rules of origin

Rules of origin are an essential feature of free trade agreements because they are used to determine the goods that are eligible for preferential treatment.

14 The text of the Protocol on the Establishment of the East African [Community] Customs Union (hereafter *EACCU Protocol*) is available at http://www.customs.eac.int/index.php?option=com_docman&task=doc_view&gid=1&tmpl=component&format=raw&Itemid=164; last accessed 14 January 2011.

15 EACCU Protocol, Article 2(4).

16 EACCU Protocol, Article 11(2).

17 EACCU Protocol, Article 11(3)–(5).

18 SADC Protocol on Trade, Article 3(1).

19 Ng'ong'ola, C. 2000. "Regional integration and trade liberalisation in the Southern African Development Community". *Journal of International Economic Law*, 3:485.

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Without rules of origin, imports from third party countries would be able to enter the FTA through the country with the lowest external tariffs before moving on to the other FTA member(s), thus depriving the latter of customs revenue.²⁰ Though fully-fledged customs unions do not require rules of origin because the member states apply a common external tariff to imports, both the EAC and SADC require these rules due to the progressive nature of the integration and the many exemptions to the common external tariff.

Thus, the EACCU Protocol provides that goods are to “be accepted as eligible for Community tariff treatment [only] if they originate in the Partner States”.²¹ For purposes of determining whether goods originate in the Community, the Protocol contains a detailed Annex setting out the EACCU’s Rules of Origin.²² Since the scope of this article does not allow for a comprehensive analysis of the Rules of Origin, the discussion will be limited to a description of the broad requirements.

The regulations set down four different criteria under which goods can be accepted as originating in member states. The first criterion categorises goods that are wholly produced in a partner state.²³ The second categorises goods produced wholly or partially from imported material where the cost, insurance and freight (c.i.f.) value of the imported materials does not exceed 60% of the total cost of the materials used. The third criterion categorises goods whose value added accounts for at least 35% of the goods’ ex-factory cost. The fourth and last criterion categorises goods considered as originating in the partner states are those goods that are classified or become classifiable under a tariff heading other than that under which they were imported.²⁴ Though these rules are fairly straightforward, there have been disputes between the partners over their application. For instance, there was a refusal by Tanzania to allow vehicles that had been assembled in Kenya to enter Tanzania duty-free on the ground that they did not meet the requirements of the Rules.²⁵

Similarly, within SADC, an Annex to the SADC Protocol sets out the Rules of Origin used to determine which goods are eligible for preferential treatment as “originating goods”.²⁶ These Rules provide for two different criteria under

20 The phenomenon is known as *trade deflection*.

21 EACCU Protocol, Article 14.

22 East African Community Customs Union (Rules of Origin) Rules, Annex III.

23 Examples of such goods include mineral products extracted from the ground of a partner state, vegetable products harvested within a partner state, and live animals born and raised within that state. See EACCU (Rules of Origin) Rules, Rule 5(1).

24 EACCU (Rules of Origin) Rules, Rule 4(1).

25 See Omondi, George. 2010. “Origin rules row denies firms free EAC access”, *Business Daily*, 7 July 2010. Available at <http://www.businessdailyafrica.com/Company%20Industry/Origin%20rules%20row%20denies%20firms%20free%20EAC%20access/-/539550/953418/-/471rl4/-/>; last accessed 14 January 2011.

26 SADC Protocol on Trade, Article 12; SADC Protocol on Trade, Annex I.

which products can be considered as originating in a member state. The first categorises goods that have been wholly produced in any member state.²⁷ The other criterion categorises goods considered as having originated from a member state, namely those goods that –²⁸

... have been obtained in any Member State incorporating materials which have not been wholly produced there, provided that such materials have undergone sufficient working or processing in any Member State within the meaning of paragraph 2 of this Rule.

Paragraph 2 then goes on to refer to a separate Appendix setting out the conditions to be fulfilled by such products. This is a much more complex approach than that adopted by the EAC, and does not lend itself to easy application by the business community. The danger of such a complex Rules of Origin regime is that it will discourage traders from seeking the benefits of lower tariffs as the time and expense of satisfying the Rules will be daunting. As a result, the tariff framework will be underused and the goodwill of those for whom it was created will be lost.

The elimination of non-tariff barriers

The issue of NTBs is generally a cause of great concern within RTAs. The gravity of the situation was laid bare by the Permanent Secretary of Kenya's Ministry of East African Community, David Nalo, when he stated that the business community within East Africa loses more than US\$9 million annually due to NTBs.²⁹ This is despite the EAC Treaty obliging partner states –³⁰

... to remove all the existing non-tariff barriers on the importation into their territory of goods originating from the other Partner States and thereafter to refrain from imposing any further non-tariff barriers.

This provision is reiterated in the EACCU Protocol, which also requires its partners to formulate a mechanism for identifying and monitoring the removal of NTBs.³¹ In spite of these provisions, complaints by traders about the existence of NTBs are frequent. As Mr Nalo lamented, "even after one NTB is

27 Examples of such goods are mineral products extracted from the ground or seabed of member states, vegetable products harvested there, and live animals born and raised there. See SADC Protocol on Trade, Annex I, Rule 4.

28 SADC Protocol on Trade, Annex I, Rule 2(1)(b).

29 MEAC/Ministry of East African Community. 2010. "Non-tariff barriers costing East African businesses millions". *Jumuiya News* [a magazine of the Ministry of the East African Community], 18(July–September):30.

30 EAC Treaty, Article 75(5).

31 EACCU Protocol, Article 13.

removed there is always another way of erecting a new one with the same or more capacity of hindering trade”.³²

The issue of the use of sanitary and phytosanitary (SPS) measures as NTBs to trade, for instance, has been a long-running source of irritation for partner states. For example, Uganda has maintained a ban on the import of Kenyan beef for a number of years. It only lifted a ban on the import of Kenyan bull semen after Kenya had lifted a ban on the import of Ugandan chicks into the Kenyan market.³³ Neither the EAC Treaty nor the EACCU Protocol contains any specific provisions allowing partners to regulate the use of either SPS measures or technical barriers to trade. It can be assumed, therefore, that these disciplines are governed by WTO Rules since all the partners are also WTO members.

As a means of combating NTBs, and pursuant to Article 13 of the Protocol, a system known as the *Monitoring Mechanism for the Elimination of Non-tariff Barriers in EAC*³⁴ has been developed jointly by the EAC and East African Business Council Secretariats.³⁵ The framework created by the mechanism is aimed at monitoring the existence of NTBs and suggesting ways through which they can be eliminated.

The legal position in SADC is similar to that of the EAC. Recognising that NTBs can often serve as obstacles to the free movement of goods, the SADC Trade Protocol requires member states to “adopt policies and implement measures to eliminate all existing forms of NTBs” and “refrain from imposing any new NTBs”.³⁶

With regard to SPS measures, which can sometimes act as barriers to trade, the SADC Protocol contains an explicit reference to international standards. It requires members to “base their SPS measures on international standards, guidelines and recommendations”.³⁷ Where consultations are required for purposes of recognising the equivalence of specific SPS measures, these are to be done in accordance with the WTO’s SPS Agreement.

Similarly, for standards and technical barriers to trade, SADC members are to use relevant international standards as the basis of their standards-related

32 MEAC (2010:31).

33 Kazooba, Charles. 2009. “Uganda now lifts ban on Kenyan semen, beef still off the menu”. *The EastAfrican*, 19–25 January, pp 1–2.

34 Sic.

35 See “Non-tariff Barriers (NTBs) Monitoring Mechanism: Overview”. Available at http://www.eac.int/trade/index.php?option=com_content&view=article&id=114&Itemid=41; last accessed 12 January 2011.

36 SADC Protocol on Trade, Article 6.

37 SADC Protocol on Trade, Article 16.

measures.³⁸ Such international standards-based measures are presumed not to create unnecessary obstacles to trade.³⁹

Quantitative restrictions are also sometimes used as an alternative to tariffs for purposes of restricting trade. In order to avoid this outcome, the use of quotas within SADC is to be progressively eliminated, although members may apply quotas in situations where tariffs under the quotas are more favourable than those outside them.⁴⁰

This area of NTBs is one where the two regional trade agreements have adopted broadly similar approaches even though, institutionally, the EAC would appear to be ahead of SADC. This is one area where SADC would be able to learn from the EAC, especially with regard to the involvement of the private sector in monitoring NTBs.

Non-discrimination

One of the dangers faced by any party to a trade agreement is the possibility that one's partner(s) will discriminate against one by granting more favourable treatment to domestic goods and producers than to imports. National treatment provisions are, therefore, a common feature of trade agreements. The EAC Protocol imposes a national treatment obligation on partner states, obliging them to treat domestic products and those of partner states alike. Specifically, partners are to ensure that they do not enact legislation or apply administrative measures which directly or indirectly discriminate against the same or similar products of partner states.⁴¹ In addition, they are not to impose on imports from partner states any kind of internal taxation that is in excess of that imposed on similar domestic products.⁴² These provisions have generally not proved to be controversial in the Protocol's implementation.

The SADC Protocol on Trade, like the EACCU Protocol, provides that members are to accord to goods traded within SADC the same treatment as goods produced nationally in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.⁴³ This is a mandatory requirement.

Having been formed with the goal of establishing a customs union as a step on the road to eventual political federation, the EAC constitutive documents do not provide for the application of a most-favoured-nation (MFN) principle.

38 SADC Protocol on Trade, Article 17(1).

39 SADC Protocol on Trade, Article 17(2).

40 SADC Protocol on Trade, Article 7.

41 EACCU Protocol, Article 15.

42 EACCU Protocol, Article 15(2).

43 SADC Protocol on Trade, Article 11.

This confirms that, legally, partner states are obliged not to engage in any individual trade negotiations with third parties, but to negotiate as a single entity. This is reinforced by the provisions of Article 37, which requires the Community “to co-ordinate its trade relations with foreign countries so as to facilitate the implementation of a common policy in the field of external trade”. Discrimination by partners through entering separate, more favourable agreements with third parties would, thus, be avoided.

Where trade relations with third parties are concerned, the SADC position is different from that adopted by the EAC in that the SADC Protocol contains an MFN treatment clause.⁴⁴ Members are permitted to grant or maintain preferential trade arrangements with third countries, provided that such arrangements do not impede the objectives of the Protocol and that “any advantage, concession, privilege or power granted to a third country under such arrangements is extended to other Member States”.⁴⁵ The implication of this provision for Tanzania, which is an EAC partner state, is that the privileges and advantages granted to the other EAC members should be granted unconditionally to all the other SADC members. Though the SADC Protocol goes on to provide that member states are not obliged to extend preferences of another trading bloc of which they were a member at the time of the Protocol’s entry into force,⁴⁶ this provision would not save Tanzania. This provision would appear to have been included to cater for the position of SADC’s SACU members. This anomalous situation is a clear example of the legal pitfalls created by the overlapping membership syndrome.

Trade remedies

Unfair trade practices are a common complaint from businesses forced to deal with competing imports. The EAC tries to cater for such practices by providing for the availability of anti-dumping duties, countervailing duties, and safeguarding measures.

With regard to dumping,⁴⁷ the Protocol prohibits dumping if it either —⁴⁸

... causes or threatens material injury to an established industry in any of the Partner States, materially retards the establishment of a domestic industry

44 SADC Protocol on Trade, Article 28(1).

45 SADC Protocol on Trade, Article 28(2).

46 SADC Protocol on Trade, Article 28(3).

47 *Dumping* is defined in the Protocol as being “the situation where the export price of goods imported or intended to be imported into the Community is less than the normal value of like goods in the market of a country of origin as determined in accordance with the provisions of this Protocol”. See EACCU Protocol, Article 1.

48 EACCU Protocol, Article 16(1).

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therein, or frustrates the benefits expected from the removal or absence of duties and quantitative restrictions of trade between the Partner States.

The procedures to be followed in applying anti-dumping duties within the EAC are set out in the EACCU (Anti-dumping) Regulations.⁴⁹ The Regulations provide that, where the investigation is initiated against another partner state, the Regulations apply; but where the investigation is against a foreign country, the provisions of the WTO Agreement apply.⁵⁰ However, given the definition of *dumping* in the Protocol, which refers to the importation of goods “into the Community”, it is not clear whether it would be legally permissible to impose anti-dumping duties on a partner state. The Regulations would appear to contradict the Protocol in this regard, and it remains to be seen what effect this will have when an attempt is made to apply them.

Unlike the case with the EAC, which has a detailed annex on dumping, the SADC Trade Protocol’s provisions regarding anti-dumping measures are brief and only require members to comply with WTO provisions in applying such measures.⁵¹

On the issue of subsidies and countervailing duties, EAC partner states are not prohibited from granting subsidies; but there is a notification obligation requiring them to notify other partner states in writing of any subsidies that operate directly or indirectly to distort competition.⁵² Where goods that have benefited from subsidies are imported into the EAC, the Community may levy countervailing duties equal to the amount of the estimated subsidy, pursuant to the provisions of the annexed Subsidies and Countervailing Measures Regulations.⁵³

Regarding subsidies, the SADC Protocol simply provides that subsidies that distort or threaten to distort competition in the SADC region are forbidden. members are accordingly permitted to levy countervailing duties, in accordance with WTO provisions, for the purposes of offsetting subsidies.⁵⁴

With regard to safeguards, the EAC Treaty permits a partner state that suffers serious injury due to the application of the provisions of Chapter Eleven to

49 EACCU Protocol, Annex IV. Article 1 of the EACCU Protocol defines *anti-dumping measures* as “measures taken by the investigating authority of the importing Partner State after conducting an investigation and determining dumping and material injury resulting from the dumping”.

50 EACCU Protocol, Anti-dumping Regulations, Regulation 4.

51 SADC Protocol on Trade, Article 18.

52 EACCU Protocol, Article 17.

53 EACCU (Subsidies and Countervailing Measures) Regulations, Article 18.

54 SADC Protocol on Trade, Article 19.

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take necessary safeguarding measures.⁵⁵ This provision is reiterated in the EACCU Protocol.⁵⁶ Further provisions in the Protocol regarding safeguards state, inter alia, that safeguarding measures can be applied to —⁵⁷

... situations where there is a sudden surge of a product imported into a Partner State, under conditions which cause or threaten to cause serious injury to domestic producers in the territory of like or directly competing products within the territory.

The application of such measures is to be done in accordance with the provisions of the Safeguard Measures Regulations.⁵⁸

On safeguards, the SADC Protocol on Trade provides that —⁵⁹

... a Member State may apply a safeguard measure to a product only if that Member State has determined that such product is being imported to its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

The Protocol links the determination of “a serious injury” to the WTO Agreement on Safeguards,⁶⁰ thus ensuring that there is harmony between SADC and WTO requirements. Therefore, it can be seen that, in regard to both the EAC and SADC, it is imperative that the members establish strong and effective domestic bodies charged with the duty of determining whether serious injury is being or has been inflicted on the state concerned.

As an institutional measure, the EAC is required to establish a Committee on Trade Remedies to handle matters pertaining to rules of origin, anti-dumping measures, subsidies and countervailing duties measures, safeguarding measures, and Dispute Settlement Mechanism Regulations.⁶¹ The Committee is to be composed of nine members, qualified and competent in matters of trade, customs and law.⁶² The purpose of the Committee is to work through investigating authorities established in each partner state in the initiation and conduct of investigations. The Committee is charged with the duty of, inter alia, making affirmative or negative determinations on investigations, recommending

55 EAC Treaty, Article 78.

56 See EACCU Protocol, Article 36. *Safeguard measures* are defined in Article 1 of the Protocol as “protective measures taken by a Partner State to prevent serious injury to her economy as provided under this Protocol”.

57 EACCU Protocol, Article 19(1).

58 EACCU Protocol, Annex VI (Safeguard Measures) Regulations.

59 SADC Protocol on Trade, Article 20.

60 SADC Protocol on Trade, Article 20(2).

61 EACCU Protocol, Article 24(1).

62 EACCU Protocol, Article 24(2). It was not possible to establish if this provision has been changed to cater for the expansion of the EAC to include Burundi and Rwanda.

provisional measures, and reporting to the Council on all matters referred to it. The Committee is also charged with the administration and management of the Dispute Resolution Mechanism.⁶³ If not operationalised with great care, these provisions have the potential to lead to a conflict of interest between individual states and the Community as a whole.

Trade facilitation

Trade facilitation refers to those measures that can be taken to assist the movement of goods once formal trade barriers are eliminated. It is defined in the EACCU Protocol as meaning “the co-ordination and rationalisation of trade procedures and documents relating to the movement of goods from their place of origin to their destination”.⁶⁴ As part of the effort to facilitate trade, partners are required to simplify their trade documentation and procedures.⁶⁵ For purposes of customs nomenclature, the partners have agreed to adopt the Harmonised Commodity Description and Coding System.⁶⁶ As a result, the possibility of conflict regarding the proper classification of goods has been minimised.

SADC member states are also required to take measures to facilitate the simplification and harmonisation of trade documentation and procedures.⁶⁷ These measures include reducing the cost of all trade documentation and procedures by aligning intra-SADC and international documentation on the United Nations Layout Key, and reducing the number of documents required to a minimum.⁶⁸ Members are also required to standardise the documents by using internationally accepted standards, practices and guidelines as a basis for designing their documents and the information required to be in them.⁶⁹ In order to ensure that these provisions are complied with, a Subcommittee on Trade Facilitation is to be set up by the Committee of Ministers responsible for trade matters.⁷⁰ This institutional set-up differs from that contained in the EAC framework, in that the responsibilities of the Subcommittee are far fewer than those of the EAC’s Committee on Trade Remedies.

63 EACCU Protocol, Article 24(4).

64 EACCU Protocol, Article 2(1).

65 EACCU Protocol, Article 7(1).

66 EACCU Protocol, Article 8(2).

67 SADC Protocol on Trade, Article 14.

68 SADC Protocol on Trade, Annex III (Concerning Simplification and Harmonisation of Trade Documentation and Procedures), Article 3.

69 SADC Protocol on Trade, Annex III, Article 4.

70 SADC Protocol on Trade, Annex III, Article 6.

External relations

The issue of member states' relations with third parties is closely linked to that of non-discrimination. Although it is an intrinsic characteristic of customs unions that their members conduct their trade relations with third parties as a unit, the EAC requires members to honour their commitments in respect of other international organisations to which they belong.⁷¹ This provision means that Tanzania, which was already a member of SADC and had signed the SADC Trade Protocol before the EAC came into being, is not required to terminate her obligations under SADC. However, this can clearly lead to confusion in the event that Tanzania's EAC obligations clash with her SADC obligations. Furthermore, it illustrates the lack of a coherent trade policy.

Given the existence of overlapping regional trade arrangements in the southern African region when SADC was formed, it was necessary to cater for those countries that were already party to other agreements. In order to achieve this, SADC members are permitted to maintain preferential trade and other trade-related arrangements that existed at the time the Protocol entered into force.⁷² They are also permitted to enter into new preferential trade arrangements among themselves, provided these are not inconsistent with the provisions of the Protocol.⁷³ This is an application of the principle of asymmetry, and enables members who wish to liberalise trade amongst themselves at a faster pace to do so. Though this has the benefit of ensuring that members that are economically constrained do not hold back their fellows, it also undermines the legally binding nature of the obligations in the Protocol.

Despite not being obliged to conduct negotiations as a unit, members are exhorted to "coordinate their trade policies and negotiating positions in respect of relations with third countries or groups of third countries and international organisations".⁷⁴ This appeal can be seen in the ongoing negotiations with the European Union (EU) regarding Economic Partnership Agreements (EPAs), where a group of SADC countries – Angola, Botswana, Lesotho, Mozambique, Namibia, South Africa and Swaziland – are negotiating as a group. However, the weakness of this provision is also visible from the fact that six other members – the Democratic Republic of the Congo, Madagascar, Malawi, Mauritius, Zambia and Zimbabwe – are negotiating under the eastern and southern Africa configuration, while Tanzania is negotiating an EPA with her EAC partners.

71 EACCU Protocol, Article 37(1).

72 SADC Protocol on Trade, Article 27(1).

73 SADC Protocol on Trade, Article 27(2).

74 SADC Protocol on Trade, Article 29.

Having provided this overview of the key legal provisions regulating integration within the EAC and SADC, the following section briefly outlines some challenges facing integration.

Challenges facing regional integration

The review of the status of regional integration in the two bodies reveals that there are a number of challenges that will need to be overcome in the years ahead. Some of these challenges are historic in nature; others are the consequence of loosely drafted instruments, while yet others are implementation-related.

The primary historical challenge facing trade liberalisation in the eastern and southern African region – and which has manifested itself in the proliferation of overlapping regional trade agreements – is the lack of a coherent, realistic policy to guide the process. Though the 1980 Lagos Plan of Action and the 1991 Treaty Establishing the African Economic Community set out an overall vision of a united Africa,⁷⁵ they inadvertently laid the groundwork for the proliferation of regional trade agreements: with all the bodies having the same overall goal, there was no disincentive to joining as many as were available in the name of ‘solidarity’ with one’s neighbours. Once this had been done, however, the challenges posed by sovereignty and parochial interests have proved to be an obstacle to actual liberalisation.

The most recent effort – in the form of the tripartite COMESA–EAC–SADC negotiations – to harmonise the trade regimes of these different bodies is promising; but, given the different objectives of the three bodies, such negotiations do not offer much hope of a short-term solution.

The challenge to integration posed by the nature of the constitutive instruments is that, from a legal perspective, the parties concerned will not find it easy to comply with the obligations contained therein. For example, some of the language setting out the obligations is ambiguous, and the time frames required to comply with them are unrealistic. Moreover, many provisions contain overambitious targets together with lavish exceptions that totally undermine the objective of creating rules-based organisations.

The implementation-related challenges primarily revolve around capacity – or, to be more precise, the lack thereof. Capacity limitations have proved to be a hindrance to regional integration both at the national and the regional level. Lack of capacity manifests itself in a number of ways, including financial and human resources. With regard to financial limitations, member

75 For more on the African Economic Community, see Mutai, Henry Kibet. 2007. *Compliance with international trade obligations*. Alphen aan den Rijn: Kluwer Law International, pp 104–109.

states sometimes have problems meeting their financial obligations. An example of this is Burundi, which was allowed to pay only US\$1 million of its budgetary contribution for the 2007/8 and 2008/9 financial years, instead of its full contribution of US\$4.5 million.⁷⁶ This inability to finance expenditure means that there is an over-reliance on external investors and donors. In the 2008/9 financial year, for example, 20% of the EAC budget was sourced from development partners. This lack of capacity among the eastern and southern African states is exacerbated by their membership of many arrangements.

From the human resources perspective, there is a severe lack of expertise in both the legal and economic sectors. The few experts there are find themselves overstretched when faced with the demands at the multilateral (WTO and EU), regional and bilateral levels. The EAC and SADC Secretariats are also faced with the same financial and human resource constraints.

Conclusion

Regional integration in both the EAC and SADC holds a lot of promise for the states concerned, but a number of steps need to be taken in order to get regional integration and trade liberalisation back on track.

The first thing that needs to be done is to address the legal lacunae in the agreements that permit continued protectionism. If the member states are truly serious about trade liberalisation, then more needs to be done about increasing intra-regional trade through the elimination of tariffs and the reduction, if not complete removal, of exceptions – which usually concern the very goods where partners have a comparative advantage!

The second issue that needs to be addressed is the capacity deficit. A successful economic policy can only be devised by properly trained economic experts. Once a coherent, well-thought-out policy has been devised, then legal experts are required to transform the economic goals into binding legal instruments. Moreover, after the instruments have been adopted, sufficient expertise is required to implement the provisions, monitor their implementation, and resolve disputes that arise from them.

The last issue that will need to be addressed as a matter of urgency is the harmonisation of the trade policies of eastern and southern African states. Only when this has been done will the cost of doing business in the region come down and trade increase. The current initiative in the guise of the tripartite talks is commendable, but it will need to be closely monitored and ramped up significantly in the next few months.

76 Kezio-Musoke, David. 2008. "Burundi allowed to pay only \$1m to EAC budget". *The EastAfrican*, 7–13 July:24.

Regional trade integration strategies under SADC and the EAC

Finally, it is to be hoped that this survey of the strategies adopted within the EAC and SADC will stimulate further, more intensive research on the areas highlighted in this article.