Monitoring Regional Integration in Southern Africa

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Foreword

Regional and especially economic integration holds potential and strong benefits for Africa. But this is true only if Africa could succeed in identifying a successful formula to counter challenges confronting the project of regional integration. I call it a project because it is, and, according to existing and new evidence available, will remain work in progress for the foreseeable future. Such challenges include capacity issues, financial and resources concerns, expertise, overlapping membership of Regional Economic Communities and, most importantly, the political will to succeed with the project.

The subject of regional integration and the topics it comprises are complex issues that need time to study and research. A platform to discuss and present findings of such work is necessary and always crucial, now more than ever. The Monitoring Regional Integration Yearbook, now in its 13th edition, is therefore necessary. It is for this reason that the Konrad Adenauer Foundation is pleased to be associated with the yearly publication.

This 13th edition of the publication critically examines strengths and weaknesses in the development of southern Africa as a region. It also reveals interesting findings and data about issues confronting the region as it struggles to find its feet in the challenging process of regional integration.

This annual publication has now become a household name in the region as it has made a mark as one of the best publications to consult on issues related to regional integration. It therefore serves as a reliable source of reference for students, academics, researchers, analysts, policy-and-decisionmakers, as well as other interested people, across the region and beyond.

The Konrad-Adenauer-Foundation is proud to be part of this successful undertaking that also marks the length and strength of our relationship with a partner in this project, namely the Trade Law Centre (tralac) over the years.

We trust that our relationship and this project in particular, will both continue to blossom unabated.

I therefore wish everyone happy reading.

Dr Bernd Althusmann
Resident Representative
Konrad Adenauer Foundation

Introduction

Trudi Hartzenberg

The southern African regional integration agenda is at an important juncture. While the broad development vision and objectives of both the Southern African Development Community (SADC) and the Southern African Customs Union (SACU) remain valid, it is an opportune time for new thinking about the pathways to achieve those development objectives. The defining features of the 21st century geopolitical, political-economy and broad economic landscape provide new challenges and require new policy approaches to achieve development outcomes.

Developments during the past year (2013/2014) are testimony to a process of appraisal of the existing integration models and the challenges of negotiating new pathways to development outcomes. In the context of African integration initiatives, there are key emerging themes. Concern about the loss of sovereignty, which manifests also in trade policy discussions as a concern about loss of policy space, is increasingly evident, especially as regards traditional border measures such as the import tariff. This fundamentally contradicts the linear model of regional integration. A systematic cession of tariff policy space, for example, is required when member states move from a free trade area (FTA) to a customs union as member states implement a common external tariff. Further along the linear model, a sacrifice of monetary policy space is required when a monetary union is established. What is increasingly clear is that safeguarding policy space is a major policy preoccupation, with very little appetite for concluding agreements that involve sacrifice of policy space.

A second important theme is the lack of compliance with commitments already undertaken. This raises questions about the rules-based nature of regional integration in Africa. Compliance is essential to ensure a transparent and predictable environment for investment, production and trade. Lack of compliance, or even reversal of tariff reductions, suggests that member states may not view regional integration arrangements as rules-based. An effective dispute settlement arrangement provides checks and balances in a rules-based system so that noncompliance can be effectively challenged. Since private parties are the agents of regional integration, there is a distinct rationale for them to have standing in a dispute settlement forum, especially in a region where governments do not have a record of litigating against each other. At the 2014 Summit a new protocol on the SADC Tribunal was approved.[1] It provides only for interstate disputes, marking a retrogressive step from the previous protocol that provided standing for private parties.

Another important trend is the increasing emphasis on a 'developmental regional integration' agenda. This approach is anchored on three pillars: market integration, industrial development and infrastructure development. The general articulation of this developmental regional integration agenda is appealing. However, the broad policy statements are not followed by a comprehensive practical agenda to address competitiveness challenges. Particularly important for the formulation of such a comprehensive agenda for developmental regional integration is the involvement of nonstate actors such as the private sector and workers. There is still a marked absence of such involvement in regional integration initiatives in Africa. This contrasts markedly with the Asian model of regional integration, where the private sector, in particular, often prompts integration policy development. The flag is said to follow the trade in this region; in Africa the dominant trend is still for trade to follow the flag, with governments leading the development of the integration agenda.

Industrial development, a key focus in the 'developmental regional integration discussion,' has traditionally been formulated to address supply-side constraints. The policy focus is currently on the promotion of value addition, beneficiation of resources and participation in regional and global value chains. The regional dimensions of the policies or strategies to achieve these objectives are still to be clearly defined. The predominant interventions are border measures such as the import tariff, restrictive rules of origin, export taxes and other regulatory restrictions favouring local sourcing. New thinking is required about policies and

[1] See 34th SADC Summit Communiqué (2014).

measures to promote the development of diversified industrial activities in the region.

The integration of small and fragmented markets matters for lowering the costs of doing business in the region and for promoting industrial development. The dynamic effects of market integration, including the facilitation of economies of scale and scope, attraction of investment to the region, are where the competitiveness gains will be found. The experience of negotiating free trade agreements in Africa, however, provides evidence of a mercantilist approach to regional integration. The focus is still predominantly on export promotion, especially by the larger economies of the region. The fact that imports may well be important to promote industrial development and further enhance export performance through value addition is not yet factored into the policy debate. This in essence runs contrary to a developmental regional agenda. Although significant tariff liberalisation has been achieved, this is still undermined by restrictive rules of origin for key products where there is potential for increasing intraregional trade. In the case of SADC, the rules of origin go beyond their function of preventing transhipment of products from third countries to protecting existing industries from increased intraregional competition. Access to the markets of the large African economies can provide significant opportunities to boost intra-African trade and build regional value chains. It is a pity that protectionist interests in a regional context may well provide opportunities for imports from other regions of the global economy, rather than supporting regional trade and industrial development.

While the market integration agenda in Africa has predominantly addressed market-access issues affecting trade in goods, the liberalisation of services remains a contested area. This is despite the fact that services make an increasingly important contribution to production, trade and employment. Services feature in every economic activity, also enhancing the productivity of capital and labour and the facilitation of trade in goods.

SADC recognises the importance of services in its regional integration agenda, having adopted protocols on Transport and Communication, and other services sectors. These have not delivered the regulatory reform required for effective market integration. SADC member states are also, since April 2013, negotiating a trade in services protocol. They are following the General Agreement on Trade in Services (GATS) approach, focusing on market access and national treatment. A services market integration agenda requires more than trade-in-services liberalisation. The infrastructure services sectors are a case in point. The SADC Infrastructure Development Master Plan adopted by Summit in 2012 recognises the importance of infrastructure for market integration. A very important lesson is that access to quality, reliable and competitively priced services (for example transport, energy, telecommunications) requires more than physical infrastructure; it is also about the regulations that govern those sectors. For market integration a services regulatory reform and harmonisation agenda are essential.

A good example is the transport sector. If the regulatory framework governing transport services is not harmonised among neighbouring countries, trade competitiveness, especially for the many landlocked countries, will be compromised, resulting in high transaction costs of cross-border trade and regional value chains and production networks. The often-quoted impact of different axle load limits across countries is a good example.

The trade and market integration agenda outlined in the SADC Trade Protocol (TP) includes the liberalisation of movement of goods, services, people and capital and also the elimination of non-tariff barriers and other trade facilitation measures. In addition to the SADC Treaty, the TP and other specific legal instruments, SADC member states have also adopted a strategic plan, specifically to map the implementation of the economic integration agenda. The Regional Indicative Strategic Development Plan (RISDP) was adopted by SADC member states in 2003. The RISDP is SADC's 15-year strategic plan (2003-2018) designed to provide an operational strategy covering a wide range of issues and sectors, namely trade and economic liberalisation; infrastructure development and services in support of integration; human and social development, food security and agriculture; sustainable natural resource use and climate change; statistics; private-sector development; gender; and science and technology. SADC views this as a 'developmental regional integration' strategy, with the ultimate objective to promote sustainable and equitable economic growth and development and to accelerate poverty alleviation, as articulated in the SADC Treaty. The RISDP is premised on the linear integration model[2] with consecutive stages of integration, starting with the establishment of an FTA by 2008, a customs union by 2010, a common market by 2015, a monetary union by 2016, and economic union with a single currency by 2018. The SADC decision to adopt this approach to economic integration should also be viewed in the context of SADC member states' membership in the African Union (AU). Its Abuja Treaty (1991) commits members through their Regional Economic Communities (RECs) to coordinate and harmonise their policies, culminating in the establishment of the continent-wide African Economic Community (AEC).

It is important to note that although the RISDP is not a legally binding instrument, it does enjoy significant political legitimacy. The milestones in the RISDP go well beyond those envisaged in the TP. The TP makes specific reference to the achievement of a free trade area, but not to the other milestones such as the customs union, common market, monetary union or single currency. Starting in 2012 and continuing through 2013 and into 2014, member states embarked on a comprehensive mid-term review of the RISDP. This process provides an opportunity to appraise not only implementation matters, but also more fundamental issues such as the appropriateness of the model to address 21st century integration challenges. This is particularly important given the recent decisions at the SADC Summit, as reflected in the Communiqué[3]:

> Summit directed that industrialisation should take centre stage in SADC's regional integration agenda. To this end, Summit mandated the Ministerial Task Force on Regional Economic Integration to develop a strategy and roadmap for industrialisation in the region.

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[2] McCarthy (2007).
[3] See *34th SADC Summit Communiqué* (2014).

> Summit noted progress in the review of the Regional Indicative Strategic Development Plan and directed its finalisation and the preparation of an Implementation Plan in order to provide guidance towards the implementation of SADC programmes.

To support these decisions, Summit further decided that an Extraordinary Summit should be held in April 2015, focusing on industrialisation in the region. In preparation for this important forum, it is opportune to reflect on the scope of the regional integration debate during the past year and the implications for the preparatory work that is to be undertaken by the Ministerial Task Force on Regional Integration and other stakeholders on the specific matter of industrialisation. This will be done in the context of SADC's broader trade and market integration agenda. SADC's Industrial Policy Framework which is anchored on the Industrial Upgrading and Modernisation Programme (IUMP) was adopted by the SADC Committee of Ministers of Trade (CMT) in June 2009.

SACU member states are also working on industrial policy matters. They are currently reviewing the first phase of a study to develop common policies on industrial development, as provided for in Part 8 of the 2002 SACU Agreement. The first phase focuses very much on a situation analysis, with the aim of establishing, among others, the extent of value-chain linkages across the customs union region. The second phase is to implement industrial-policy options and specific interventions.

Discussion on regional industrial policy matters is complex, with industrial policy usually viewed as a national policy prerogative. Discussion on industrial development in the SACU context needs to take into account the broader fault lines of global industrial organisation and restructuring. The role of global value chains, how different value chains are structured, how they function, what drives them: are all important questions to consider. A key focus of an industrialisation discussion needs to include the development of a services agenda.

Competitive services inputs are essential to industrial competitiveness. Services are not explicitly covered in the SACU Agreement, but that does not preclude the possibility of developing a services agenda. This agenda could focus on priorities such as regulatory reform and harmonisation in key services sectors. Such an approach also provides an opportunity to promote coherence in the infrastructure development, trade facilitation and services agendas. SACU has undertaken a sector study on transport, for example, and is currently commissioning a study on cabotage and third-country-rule matters. This presents an opportunity to develop a transport-sector development strategy, which can contribute to market integration and lower the costs of doing business in SACU.

These developments in industrial policy in SACU need to be cast in the broader context of a much more fundamental debate on the future of SACU. The 2002 Agreement provides for a democratisation of relations among South Africa, Botswana, Lesotho, Namibia and Swaziland (BLNS). The revenue-sharing formula reflects an economic and trade reality in terms of which South Africa contributes the bulk of the revenue and revenue shares significantly favour the BLNS. In a presentation to the South African Parliamentary Portfolio Committee on Trade and Industry, Minister of Trade and Industry, Rob Davies (2013), indicated that while South Africa contributes around 98% to the common revenue pool consisting of customs and excise duties, BLNS receive around 55% of the proceeds. He noted that this asymmetry is seen as 'compensation' for BLNS' lack of policy space to determine tariffs and for the price-raising effects of being subjected to tariffs that primarily protect South Africa's industry. The 2002 Agreement provides for the establishment of institutions, including a SACU Tariff Board, National Bodies and a Tribunal. None of these exists at this stage. South Africa's International Trade Administration Commission (ITAC) performs the function of the SACU Tariff Board, in terms of a mandate based on a 2006 SACU Council decision.

A Summit was held in 2011 to discuss challenges facing the customs union. These included the negotiations with the European Union to conclude an Economic Partnership Agreement,[4] as well as the revenue-sharing arrangement, and the notable decreases in customs revenue at the time. A five-point plan was drafted

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[4] The SACU states Angola and Mozambique constitute the SADC EPA group; all, except Angola initialled a draft agreement with the European Union on 15 July 2014.

to provide the basis for addressing these matters as well as providing a framework for a 'deeper development and integration' project. The five-point plan included the review of the revenue-sharing arrangement, promotion cross-border industrial development, trade facilitation, development of SACU institutions and strengthening coordination in trade negotiations. Progress has been made in the area of trade facilitation and coordination in trade negotiations, but very little progress has been made on the revenue-sharing arrangement. South Africa views this as an important prerequisite for meaningful work on the regional industrial and infrastructure development.

Lack of progress on SACU institutions reflects significant divergence in perspectives and priorities among SACU member states. Divergence is particularly evident with regard to the role of the import tariff. South Africa views the tariff as an important instrument of industrial protection, while the BLNS view the tariff primarily as a revenue-generating instrument. Closely related is the divergence on the use of rebates. BLNS are concerned about revenue foregone, while South Africa views this as a means to promote industrial development.

SACU's future is currently difficult to discern; no Council meeting has taken place since July 2013.[5] It is clear, however, based on the deliberations in the portfolio committees of the South African Parliament, noted earlier, that the future of SACU as well as that of SADC relies very much on the regional integration agenda of the region's hegemon, South Africa. Countries in the southern African region represent important markets for South Africa's exports, especially industrial products.[6] A thriving region is therefore in South Africa's interest. Access to the South African market, especially for products such as clothing and textiles, produced in many countries in the region, is essential to achieve the important broad objective of industrial development, and more specifically the objectives of promoting regional value chains and beneficiation. This would promote more balanced investment, production and trade in the region, contributing to the development outcomes envisaged in the region's founding integration treaties.

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[5] See http://www.sacu.int/main.php?id=391.

[6] See http://www.tralac.org/images/docs/4792/africa-south-africa-trading-relationshipsynopsis.pdf

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Chapter 1

Revisiting export competitiveness: The World Bank's most recent economic update for South Africa

Harry Zarenda

1. Introduction

Earlier in February 2014, the World Bank's Africa Region Poverty Reduction and Economic Management researchers presented their most recent economic update on South Africa, which brought into focus the notion of 'export competitiveness' (World Bank, 2014). In the foreword to the document by Asad Alam (the Bank's Country Director for South Africa), the central conclusion highlighted and investigated in depth how opportunities for growth are available through 'export competitiveness', particularly trading such goods and services with other Sub-Saharan African countries, and how, in combination with strategic shifts in economic policy (which will be elaborated on later), export competitiveness can ignite economic growth and help South Africa realise its goals of creating jobs and reducing poverty and inequality. These objectives are in line with both the National Development Plan (National Planning Commission, 2013) and the New Growth Path (South Africa 2011) which had earlier identified the export sector as an engine for faster, more inclusive and job-intensive growth.

This trade brief will present a summary of the World Bank document and its approach will concentrate on the notion of export competitiveness, examining not only the conceptual difficulties associated with such a construct, but also whether, in fact, the extensive focus on this strategy will indeed provide the anticipated benefits that the World Bank envisages. In clarifying this standpoint, it must be pointed out that this briefing paper does not at all dispute the substantial contribution that export growth can yield to an economy, nor that the determinants of a successful export policy are unimportant. The brief does not argue for a reversion back to the simplistic and outdated thinking that dominated debates on the trade strategies throughout the 1960s and 1970s. Rather, this brief argues that the relevant question that ought to be asked is whether the extensive focus on 'export competitiveness' comprehensively addresses the inherent structural deficiencies in an economy such as South Africa's.

2. Recent economic developments in South Africa

This discussion forms the first section of the update and presents an updated overview of several of the key economic indicators affecting the country. Acknowledging the anticipated improvement in global growth over the period 2013-2016, with high-income economies expected to recover, the update highlights that this improvement appears to have proved elusive thus far in South Africa's case (World Bank, 2014: 1, and 7-9). Moderate growth in both private consumer and investment expenditure, together with low confidence and uncertainty, persistently high unemployment and labour unrest brought into focus structural problems and a certain vulnerability in the economy, and these were reflected in a substantial depreciation of the currency to the lowest levels in a decade. This section contains both useful and updated data and diagrams showing how South Africa's growth performance (using indicators such gross output, exports, capital flows, employment generation and widening current account deficits, *inter alia)*, has remained static in relation to that of other major trading partners, other developing countries, the BRIC countries (Brazil, Russia, India and China), and some of this country's regional trading partners. Policymakers in South Africa are obviously aware of the need to reignite export growth as a strategic priority; evidence of this has been explicitly articulated by various ministries of the South African Government in the New Growth Plan (South Africa 2011), the National Development Plan (National Planning Commission 2013) and the most recent version of the Industrial Policy Action Plan (South Africa, 2013). Exports are seen as the source of reigniting and reinvigorating growth in the economy; hence the focus on the design of successful export strategies is regarded as being the key element of this quest for growth. The dominant theme in Section 2 of the update deals with methods to enhance export competitiveness. This will be the principle focus in the rest of this trade brief.

3. Export competitiveness

What is commendable in reading the World Bank South African update in its assessment of the country's export competitiveness, is how the World Bank has attempted to move away from sole reliance on broad aggregate trade figures and has supplemented these with 'a unique dataset containing information on the exports of some 20 000 South African firms spanning 2001-12' (World Bank, 2014: 17). This dataset reduces the importance of the large mineral sector, allowing for comparison with 'peer group' countries such as South Africa's BRICS partners and countries such as Chile, Colombia, Thailand and Turkey – countries that are regarded as similar in population size, income and export baskets. Apart from, additionally, allowing an examination of service exports, the data can incorporate the manufacturing sector to a greater extent than aggregated data. The dataset, (based on the World Bank's Trade Competitiveness Diagnostic Toolkit) is used as a complement to the usual aggregate analysis extracted from the various United Nations (UN) organisations, the International Monetary Fund (IMF) and South African statistical sources such as Statistics South Africa (Stats SA), the Reserve Bank and South African Revenue Services (SARS). The firm-level analysis is primarily drawn from SARS and covers transaction data received from some 20 000 firms over a ten-year period or so and includes data on individual export transactions not only by value and volume, but also by product and destination. By including detailed South African firm-level data, the approach recognises the principle that *it is not countries that export – rather it is firms*. As will be discussed in a later section in this brief, incorporating this micro-focus represents an important shift in direction for studies on competitiveness.

The World Bank update does recognise the limitations of this dataset. Firstly, the set depends on the accuracy, coverage and quality of the data available from various UN and SARS databases but, in South Africa's case, important data relating to the Southern African Customs Union (SACU) is not included. The second major problem, relating to the dataset, comprises the estimation of unit export values over the period. Additionally, while this dataset provides broad insights into 'how individual firms enter and exit export markets, expand and diversify, these…provide no information on firms' other characteristics, including size, ownership, investment levels and productivity' (World Bank, 2014:18). Thus, some of the fundamental determinants of performance appear to be missing.

Using the dataset, a detailed analysis, both graphical and statistical, is presented suggesting that, during the past decade or so, South African exports have underperformed. Export growth in real terms has stagnated, and South African exporters have made only marginal inroads into global markets (World Bank, 2014:3). This applies to minerals, non-minerals and services where it is found that South Africa has 'lagged behind those of its peers and not lived up to potential' (Ibid.). Additionally, as far as 'concentration of exporters' are concerned, there appear to be a few 'super-exporters' dominating South Africa's export sector in both mineral and non-mineral sectors and, despite this dominance, the top firms in this cluster appear to be losing dynamism and competitiveness. The update cites a distribution figure of the top 5% of South Africa's exporting firms accounting for more than 90% of its exports (Ibid.: 20). These exporters appear not to have taken fully exploited opportunities in both markets and products nor in large markets such as BRICs (Ibid.: 3). Furthermore, the 'super-exporters' tend to trade products that are 'technologically sophisticated and highly capital-intensive' (Ibid.) which, while indicating a higher level of competitiveness, underutilises South Africa's pool of unskilled labour and fails to create enough jobs to contribute to employment growth and poverty reduction.

The World Bank update, then, looks at the regional Sub-Saharan African market and identifies several key elements emerging from the patterns of trade within this market. It considers that this market represents the key destination for South Africa's non-mineral exports; opportunities within this market appear to have, thus far, been lost. According to the data, trading in this market has remained somewhat smaller and shorter lived than exports to traditional markets (Ibid.). This, in the opinion of the update, suggests that, for South African firms, 'lower competitiveness in regional markets is allowing the less efficient firms to enter and exit opportunistically' (Ibid.).

The above rather detailed analysis of export trends in the World Bank's update document does give prominence to several of the problems that impact on South African firms with regard to their lack of export competitiveness. The update then stipulates **three key areas** presently where opportunities exist to promote such competitiveness and spur growth in South Africa's export sector:

- *Boosting domestic competition to increase efficiency and productivity*:
  The arguments used to justify this as a key area for improvement involve the notion of total factor productivity, particularly in the lagging manufacturing sector. Accepting that there is a positive correlation between allocative efficiency and those firms with the highest market shares, 'high domestic entry barriers as documented by the South African Competition Authority and protection from imports preserve the market share of less productive and innovative firms in some sectors' (Ibid.: 31). An increase in domestic competition, aligned with the reduction of industry concentration, weakens the (negative) link between a firm's market share and productivity (Ibid.). An important component of competition policy ought to be trade policy, and with regard to this the World Bank update argues with reference to multilateral and regional initiatives, that those liberalising reforms which were introduced in the 1990s ought to be renewed and intensified. Increased competition will enhance firms' incentives to focus on export markets, and to increase their strategic commitment to exporting (rather than adopting exports as a temporary reactive approach to lagging domestic conditions). Another possible area for state policy could be support for the development of medium-sized exporters to generate diversification; innovation and job creation through export markets (Ibid.).

- *Alleviating infrastructure bottlenecks, especially in the provision of power and infrastructure, and removing distortions in access to pricing of trade logistics with regard to rail, port, information and communication technologies:*
  These are some of the so-called 'trade facilitation' measures so essential in boosting exports. In essence, the reduction of input and trade costs is

regarded by the update as a priority for South Africa to raise productivity and develop its export capacity. The areas considered involve the high barriers (in the form of high costs and unreliable availability) imposed on potential exporters by transport, electricity and communications suppliers and technologies in the country. These are distortionary and discourage the development of new sectors (Ibid.: 34).

- *Promoting deeper regional integration in goods and services to open export opportunities and build supply-side competitiveness:*
  The World Bank update regards this as providing the potential for unlocking the country's non-mineral and service exports (Ibid.). Given that South Africa's major growth in exports in the past few years emerged from increased trade with the rest of Africa – despite the continent being regarded as a region where the barriers to trade are among the highest in the world and the cost of trading across borders in the continent is more than twice the cost in East Asia and the Organisation for Economic and Cooperation Development (OECD) countries (Ibid.) – the potential for further export growth in this area is considered to be substantial. This market also offers an ideal opportunity to generate not only the right conditions for the emergence of 'Factory South Africa' but also for a regional value chain that could feed into global production chains. South Africa could play the central role in such a chain, leveraging the scale of the regional market and exploiting sources of comparative advantage across Africa in order to reduce production costs and provide other countries in the region with a platform for reaching global markets (Ibid.: 3).

The above summary of the World Bank update concentrates on some of the essential points regarding the approach, methodology and rationale supporting the central conclusions and recommendations of the document. It certainly offers a new approach by incorporating useful firm-level data, which allows for a better understanding of the underlying trends and comparisons and enables a more informed approach to policy making. The conclusions regarding the need for substantially enhanced export performance are not questionable as such. The focused recommendations by the World Bank regarding areas of opportunity to both promote competitiveness and spur export growth in South Africa are obviously important – but do these get to the crux of the issue and, more importantly, will the central focus on these issues alone provide a sustainable growth strategy to achieve the policy objectives articulated in some of South Africa's various more recent policy documents?

The concluding section of this document will consider these issues.

4. Conclusion – towards a more generic interpretation of 'competitiveness'

Much of the analysis and recommendations included in World Bank's South African update has considered the notion of 'competitiveness' as applying principally to export expansion, and while the conclusions and recommendations stemming from this update can be considered important stepping stones in enhancing this country's export drive, the question that comes to mind is whether the World Bank in this update has truly got to grips with the meaning of competitiveness. Genuine competitiveness (along the lines of the Michael Porter connotation) regards substantial productivity improvements at the heart of the process (Porter, 1990; Porter, 1998; Porter, 2005). Productivity improvements are emphasised because this is the critical driver of long-term sustainable prosperity. This outcome can be considered as the relevant objective of economic policy (Ketels 2010). In one of Porter's less abstract formulations he considers what matters for competitiveness: 'almost everything… The schools matter, the roads matter, the financial markets matter and customer sophistication matters. These and other matters of a nation's circumstances are deeply rooted in a nation's institutions, people and culture. This makes improving competitiveness a special challenge, because there is no single policy or grand step that can create competitiveness, only improvements that inevitably take time to accomplish' (Porter, 2005).

While Porter's analysis argues that stable institutions, sound macroeconomic policies and market liberalisation may be necessary for economic development, he contends that these are far from sufficient and often neglect the fact that wealth is created at a microeconomic level of the economy (Ibid.:2). Economic development rests with the microeconomic environment and unless there is an improvement in this, macroeconomic, political, institutional, legal and social reforms will not bear fruit. It is microeconomic competitiveness that should be at the core of the policy agenda of every nation (Ibid.: 3).

Along similar lines, Ketels (2010), using the Porter-influenced new growth approach relevant to the present era), questions whether the focus on export-led growth strategies provides the right solutions to the requisite growth strategies. The debate should be shifted to those actual policies that can increase competitiveness in general rather than exports per se (Ketels, 2010).

What is fundamental according to Ketels is that, empirically, the link between exports and prosperity is less robust and the causal relationship from one to the other less clear than would be necessary to confidently put exports at the centre of growth strategies. Viewed alternatively, export orientation works if some other fundamental conditions are in place. A policy focus on exports can also lead to insufficient attention being paid to domestically oriented or more traditional sectors. Doubts prevail as to whether an export strategy represents the best lever to achieve sustained growth (Ibid.).

Given an acceptance (even in the World Bank update) that firms (rather than countries) remain the source of exports from a country, increased trading of these locally produced goods with the rest of the world can be considered as an intermediate indicator. This enables and contributes to competitiveness rather than being the fundamental driver of competitiveness. Ketels (Ibid.) argues that competitiveness strategies should be applied across the entire economy rather than just the export-oriented sectors. The objective should be overall higher productivity and this achievement would attract Foreign Direct Investment (FDI), generate jobs and increase exports. This represents a long-term target for the economy, rather than the more intermediate outcome such as export expansion per se. Exports can be driven up by policies that do not raise productivity or long-term prosperity. What this more generic approach to competitiveness involves is that, even though there may be overlap in individual policies recommended in these two approaches, the export-oriented approach suggested by the World Bank may not be wrong. The danger is that it may be incomplete (Ibid.: 8).

This brief has attempted to provide a constructive assessment of the World Bank's most recent update on South Africa. The update, as regards its approach, logic, argument and method, does provide a useful assessment of some of the barriers to exports from this country. Its recommendations regarding overcoming these barriers may be useful in encouraging increased exports, particularly to the rest of the subcontinent. Whether this can lead to a sustainable export drive is another question that has been raised in the brief. Recent work, cited above and predominantly influenced by the work of Michael Porter, on the true nature of competitiveness in firms suggests that such a concept arises from substantially improved productivity in various firms and industries. Export competitiveness is the result rather than the cause of competitiveness enhancement generally. The approach taken in this brief differs substantially from the outdated industrial policy approach, whereby selected industries were favoured through governments defying the competitive environment with ill-advised and ill-implemented policies. This revised approach (suggested in the brief) urges that the core of the issue be addressed. A better understanding of the nature of competitiveness has important implications for an improved design framework for future growth and prosperity.

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Chapter 2

Export taxes in the South African context

Ron Sandrey

1. Introduction and background

Trade distortions and negotiations around these trade distortions focus heavily on the issue of import taxes. The issues are well known, as along with better access for the exporters there are two issues that are crucially important for developing countries. These issues feature in merchandise goods negotiations on import tariffs, whether they are unilateral, bilateral or multilateral. The first of these are tariff and other border revenues, the second the complex issue of employment. The latter is important for Africa in particular, where neither alternative employment nor welfare nets are available to those losing their jobs, while the former, which is of little interest to most developed countries, can be very important for many developing countries.

As much of the emphasis on trade negotiations is on import tariff rates some explanation about these rates is appropriate. The important tariff rate is that applied at the national border on imports, and this is appropriately referred to as the **applied** rate. There are, however, many rates lower than these applied rates levied on imports from partners where concessions have been granted in previous negotiations. These are called **preferential** tariffs. Finally, there are tariffs in 'WTO speak', and here the concept of a '**bound'** tariff is introduced. The bound rate is a rate, which WTO countries agree not to exceed in the applied rates, and often these bound rates are above (and sometimes significantly above) the applied rate. This in turn explains both the concept of 'water in the tariff' meaning that there is this gap between bound and applied rates and, as WTO negotiators operate on bound and not applied rates, why a WTO agreement may or may not reduce the applied tariff rates at a border. Given that export taxes do not play a role in the WTO they have no equivalent to the bound rate yet; however, they may do so in the future.

Finally, within these tariffs are **ad valorem** tariffs that are assessed as a percentage of the value of an import. There are also **specific** tariffs that are levied on a per unit basis and do not vary with the price of a good as is the case with ad valorem tariffs. An export tax can be either of these.

Overshadowed by these import taxes is the mirror image of export taxes. An export tax can be considered a mirror image of an import tax in that it has a mirror effect by raising prices in the export market but lowering them in the home market, thus creating similar distortions. It may or may not be levied in a non-preferential manner, but a trading partner can be exempt under preferential agreements. It attracts less attention because, as Ruta and Venables (2012) point out, the focus of the WTO is on trade policy towards imports, not exports, and while import tariffs cannot be set at a rate higher than the 'bound' rate, exports face no such restrictions. Article XI of the General Agreement on Tariffs and Trade (GATT) specifies that exports should not be subject to quantitative restriction (with some exceptions) but places no restriction on the levels of export taxes that can be used. Some new WTO members have, however, accepted restrictions on export taxes as part of their accession protocol (e.g. China, Mongolia, Saudi Arabia, Ukraine and Vietnam). This is not to be confused with export subsidies, where, similarly, there is an asymmetry in the WTO treatment of export subsidies on agricultural and manufacturing products. While subsidies to the latter are prohibited by the Subsidy and Countervailing Measures (SCM) Agreement, the Agreement on Agriculture envisages reduction commitments (but not the elimination) of export subsidies to agricultural products. Meanwhile, in the third major commodity category trade policy in natural resources has largely been policy by exporters, not policy by importers, as in general many natural resources are free of import duties.

Export taxes have become a somewhat controversial issue in the WTO, and an interesting departure from the multilateral efforts to reduce global barriers to trade. A number of importing countries, for example Japan, argue that their food supplies could be disrupted if exporting countries restrict or tax exports and they propose disciplines on export restrictions. Others, such as Switzerland, go further and want them eliminated completely, but with the standard WTO flexibility for developing countries. Most participants seem to agree that some disciplines are needed to ensure that supplies are available for importing countries. Issues that have been raised in the WTO context include (a) the **symmetry between imports and exports,** where some countries argue (while others disagree) that the disciplines in this subject should be seen as part of balancing measures on the imports with those on exports; (b) the need to **support domestic processing, where** developing countries argue that taxes or restrictions on raw material exports are sometimes needed in order to promote domestic processing industries, particularly when importing developed countries charge higher tariffs on processed products than on raw materials ('tariff escalation'); and (c) certain countries state that, for national security reasons, some restrictions are needed to prevent exports of hazardous and other prohibited products. This last point seems to be more generally accepted.

Crosby (2008) in discussing export taxes at the WTO outlines that although general WTO rules do not discipline members' application of export taxes, members could agree (and several recently acceded countries, including China, have agreed) to legally binding commitments. Some members have proposed the establishment of a new multilateral WTO Agreement on Export Taxes as part of the Doha Development Agenda, but with little traction. Although there is some talk of challenging export taxes as de facto export prohibitions or as indirect subsidies, export taxes remain one of the last significant aspects of multilateral trade policy that lie beyond the scope of current rules. For all the wisdom and foresight framed into GATT and the WTO agreements, the drafters appear to have either missed the issue of export taxes, underestimated future concerns, or perhaps intentionally reserved this area to the Contracting Parties as 'policy space'.

2. The economics of export taxes

An export tax is simply a tax imposed by a country on a specific export commodity, although there are variations on this. This in turn means that the economic effect is the mirror image of a decrease in preferential import tariffs whereby preferential trade agreements create both trade creation and trade diversion. Trade creation is new trade from a Free Trade Agreement (FTA) partner, which would not have existed otherwise, and, generally speaking, that is a good thing. But often much of this may just be trade diversion away from other, non-preference partners, and that may be bad – bad in the sense that it has resulted from an artificial advantage under the FTA in that one is not buying from the world's lowest cost supplier. Similarly, with an export tax there will be a negative trade creation because imports overall decrease as the price increases; and there will also be trade diversion in the import market away from the country imposing the export tax. This then reverts back to relative market power as the final result. A 'big country' with a dominant market share will be able to increase overall prices and thus benefit from a terms-of-trade effect, whereas a 'small' country will likely lose market share.

Piermartini (2004) points out how efficiency losses stem from distortions caused by the export tax and how they affect both producers and consumers. Production distortions result from too little being produced in the exporting country and too much being produced in the importing country. While a tax on exports discourages efficient local producers in the exporting country, it conversely sees foreign producers in the importing country producing domestically when they originally could have purchased more cheaply abroad. Overall, consumer distortions result. This means that too much of the taxed good is being consumed domestically in the exporting country because of the reduced domestic price, while, conversely, foreign consumers consume too little as the import price increases. While these generalisations hold true across the two economies, there will, as always, be winners and losers within each country as substitution effects and other factors come into play.

Other arguments for export taxes include food security and a form of subsidy to domestic consumers as the domestic price is lowered below the international market price. A similar domestic argument can also operate as an indirect subsidy to domestic manufacturing by lowering the domestic price of inputs (the Chinese argument in 1988 when Pakistan imposed an export tax on raw cotton). The most important economic argument, however, is probably the simple one of providing domestic revenues. This is likely to be most effective when the sector concerned is earning super profits as occurs in some mining sectors in times of high international prices and when a country has trouble in challenging a multinational entity to pay taxes in the host country or alter the royalty conditions. The terms-of-trade justification is also a powerful argument for export taxes in a sector where an exporter has a dominant market share. By restricting its exports, a country that supplies a significant share of the world market in a commodity can raise the world price of that commodity to its advantage.[1] And the use of export taxes introduces an interesting environmental question, namely whether export taxes can help to preserve valuable resources and reduce pollution.

Piermartini (2004) asks the following questions about an export tax:[2]

> Does an export tax improve a country's terms of trade?
> (Yes it can, but only under restrictive large country assumptions and then possibly not over an extended time period as substitution effects kick in.)
>
> Does it reduce the volatility of domestic price of commodities and stabilise income?
> (Maybe, but an export tax is a second-best policy option for income stabilisation; its success will depend on appropriate design, the government’s pursuing a long-term sustainable spending programme, and the country’s enjoying adequate political and institutional flexibility.)

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[1] The classic example here is the OPEC oil cartel which maintains global oil prices significantly above where they would be otherwise.

[2] The answers in brackets are partly from Piermartini and partly from tralac.

Does it reduce inflationary pressures?
(Maybe, but there are complex interactions at play here. An export tax as a control for inflationary pressures depends on the structure of the product market, and in the long term they might yield opposite consequences to those intended.)

Does it favour export diversification?
(This is a variation of the infant industry argument, and Piermartini concludes that the evidence and theoretical arguments seem to suggest that export taxes on raw commodities may not be a suitable measure to achieve sustained development – distributional effects, imperfections in internal and international markets and the possibility of negative environmental consequences all suggest caution.)

Is it an appropriate response to tariff escalation?
(Yes, in principle an export tax on unprocessed goods can work to compensate for the supposed disadvantage created by developed country tariff escalation, but it is largely a second-best argument and as with export diversification relies on some restrictive assumptions.)

Does it ease government revenue collection?
(Yes, export taxes can be more readily applied and are more transparent. They may, however, contribute to revenue instability unless some sound policies to prevent this are put in place.)

Does it increase the income of the poor?
(Possibly, but again this is only likely to happen under a series of somewhat restrictive conditions and assumptions.)

These general conclusions to the same or similar economic arguments are reached by Ruta and Venables (2012) in their World Bank study on natural resources trade practices and policies. Bouet and Laborde (2010) similarly examine the economic arguments associated with export taxes and go further by mathematically representing the effects and presenting computer simulations to mimic the real-world outcomes in agricultural products when export taxes are introduced. They outline the standard economic arguments in support of export taxes, namely that (i) export taxes can raise the world price of exports and therefore improve terms of trade; (ii) export taxes can reduce the domestic price of the taxed commodity and benefit final consumers of this commodity; (iii) export taxes can reduce the domestic price of the taxed commodity and benefit intermediate consumption of this commodity; (iv) export taxes increase public revenue which is beneficial in a country where fiscal receipts on a domestic base are small; and (v) export taxes are a means of redistributing income from domestic producers to domestic consumers and the public sector.

The above-mentioned paper examines one crucial aspect of export taxes in that they are typically 'beggar-thy-neighbour' policies that deteriorate terms of trade and real incomes of trading partners. This then leads to the consideration of retaliation by partners whose terms of trade have been negatively affected by initial export taxes. They demonstrate that these trading partners can react by either reducing import tariffs or augmenting export taxes depending on the status of either net importer or exporter of the commodity. They point out that the 2006-2008 food crisis clearly illustrates the point about retaliation and counter-retaliation of either reduced import duties or augmented export taxes. They offer some policy conclusions: (i) first, this process implies the implementation of noncooperative policy equilibrium which worsens world welfare and calls for an international cooperation; (ii) while large countries can implement 'beggar-thy-neighbour' policies which increase national welfare at the expense of trading partners, small countries do not have this policy option and changes in their own policy neither improves their welfare nor hurts their partners' situation; (iii) there is a key asymmetry between net exporters and net importers of an agricultural commodity in a situation of food crisis as net exporters can benefit from increase in world prices while net-importers are hurt and have no capacity to retaliate efficiently.

3. Some examples of the use of export taxes globally

During the recent global food crisis some developing countries imposed export taxes and restrictions on their exports of agricultural products such as rice, and there are examples of where these restrictions have remained. Bouet and Laborde's work (2010) contains an annex table listing the implementation of export restrictions of 25 countries during the food crisis of 2006-2008.

Another recent example is the four types of export restraints (including export taxes and export quotas) that China imposed on the export of some raw materials, mainly minerals of which China is the leading global producer. The United States (US) took on a WTO case against China on the grounds that these measures cause higher prices in the world market and give Chinese domestic industries an unfair advantage.[3] This is despite China agreeing to eliminate all export taxes as a condition of its WTO membership, and a WTO panel found that China did violate these conditions and requested that China resisted from imposing them. China argued that at least some of these measures were designed to conserve natural resources that had a finite supply and/or reduced Chinese pollution.

The decision against China was made rather on the conditions of its accession than on WTO principles. The WTO regulation dealing with export restrictions is relatively limited, offering ample 'policy space' for domestic policy considerations, and does not specifically ban export taxes and the like. Members do agree, however, that some disciplines may be needed to ensure that supplies are available for importing countries, and, as a start, suggest having them converted into some tariff-equivalent type of number.

World Bank data showing the percentage of total tax revenues collected as taxes on exports as at 2011 from a selection of countries that relate to some extent to South Africa is shown in Table 1. The top three by a significant margin are the Russian Federation, Belarus and Kazakhstan, all with energy exports, while

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[3] See http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds394_e.htm.

Indonesia and Ethiopia (and Cambodia, not shown) are the only others above Morocco's 1.57% (also not shown) and Malaysia's 1.54%. South Africa ranked in 25th place on the full list, with a percentage reported as 0.008 (rounded to 0.01 in the table).

Russia, the stand-out in Table 1, is a major producer and exporter of oil and natural gas, and its economy largely depends on energy exports. Its economic growth continues to be driven by energy exports, given its high oil and gas production and the elevated prices for those commodities. Oil and gas revenues accounted for 52% of federal budget revenues and over 70% of total exports in 2012.[4] Russia is not a member of OPEC, an export cartel of oil producing nations. In Belarus **goods manufactured for export are exempt from excise tax** but export duty is applied to timber, oil, minerals, and food stuffs exported from Belarus to countries other than Russia, Kazakhstan, Kyrgyzstan and Tajikistan (the Eurasian Economic Community).[5] For Kazakhstan, export duties on crude oil at a rate of US$40 per tonne are applicable, while the other export tax categories are aluminium at 15%; wool, fine or coarse animal hair at 10%; hides and skins at 20%; some articles of iron or steel used for railway track construction at 20%; and copper waste and scrap at 15%.[6]

The WTO reported in its 2009 Trade Policy Review of South Africa[7] that it levies an export tax on unpolished diamonds. Export levies were also imposed on some agricultural goods to finance activities such as advertising and research and development. A number of products remain subject to export controls (including prohibitions) but, like import controls, these controls are maintained on grounds of safety, security, and the environment.

[4] See http://www.eia.gov/countries/cab.cfm?fips=rs.
[5] See http://www.belarus.by/en/invest/investment-climate/taxation.
[6] See http://madb.europa.eu/madb/barriers_details.htm;jsessionid=4481A7D8CD38EED3BB8FCBAE183291EB? barrier_id=095274&version=5.
[7] See http://www.wto.org/english/tratop_e/tpr_e/tp322_e.htm.

Table 1: Taxes on exports (% of tax revenue)

Country	1990	2000	2005	2009	2010	2011
Russian Federation			37.63	40.99	41.84	44.61
Belarus			3.74	21.30	5.95	15.98
Kazakhstan		0.05	0.53	9.44	14.22	13.06
Indonesia			0.02	2.83	2.82	3.30
Ethiopia	2.81			14.53	3.90	3.23
Malaysia		2.12	2.59	1.08	1.65	1.54
Egypt.	0.02		0.00	0.28	0.48	0.15
Ghana	12.37		3.06	0.36	1.54	0.06
Norway				0.02	0.02	0.02
India	0.06	0.20	0.05	0.01	0.02	0.02
South Africa			**0.00**	**0.01**	**0.01**	**0.01**
Botswana	0.02			0.00	0.01	0.01
Australia			0.01	0.00	0.01	0.00

Source: World Bank

While data for Russia with its energy export taxes is included in Table 1, similar data for OPEC countries is not. Their 'export tax' to total revenues percentages would be significant. *The Economist* recently reporting on OPEC[8] outlined how oil stocks in industrial countries were at their lowest in five years, and that this was beneficial for the oil-exporting OPEC cartel. But the longer-term future for OPEC, which produces about a third of the world's daily consumption, is another matter. When demand is weak, its members can curb production to prevent the price plummeting. But when demand is healthy, its ability to curb new producers is limited as there are plenty of new producers. This situation is accentuated by increasing US production of crude oil and its substitute gas which is reducing US imports as well as boosting exports of fuels other than exports of the largely banned crude oil. That in turn frees crude from other places to be exported to

[8] See *The Economist*, 22 February 2014, print edition.

Europe and Asia. For the oil exporters, the conditions that that have propped up the prices in recent years are likely to change, and in particular supplies from Iraq, Iran and Libya are set to increase. This would exert downward pressures on prices and would leave OPEC with some interesting decisions. Its natural response may be to cut production, but its record of enforcing quotas is at best patchy. Asking Saudi Arabia and the Persian Gulf producers to cut production unilaterally would cede market share to their hated rivals, Iran and Iraq, while increasing production would lower the price. OPEC's best hope is considered to be continued American protectionism. Any easing of the restrictions on the export of liquefied natural gas (LNG) or crude will exert more downward pressure on the oil price, and while this may be a good thing globally it would not sit well with American consumers who crave cheaper petrol for cars and propane for heating.

WTO reports

The following summary is a short discussion gleaned from recent (2013) WTO Trade Policy Reviews of countries that are to some extent similar to South Africa. They are Indonesia, Mexico, Brazil, Vietnam and Argentina. **Indonesia**[9] has introduced new export taxes on leather and wood (2%-25%); crude palm oil (0%-40%); raw cocoa (0%15%); and mineral ore products (20%). The main objective of these measures is to encourage value-added processing within Indonesia. Secondary considerations are to secure domestic supply and to safeguard the environment. According to the authorities, this policy seems to have been successful in achieving its objectives. It was noted, for example, that the export tax on raw cocoa had succeeded in attracting more than US$200 million in Foreign Direct Investment (FDI).

The types of export taxes and duties applied by **Mexico**[10] remain the same as those indicated at the time of the previous review. Mexico imposes an export tax on a small range of rather eclectic and somewhat esoteric goods. The revenues are insignificant, and the objective is to maintain supply in the domestic market. These goods include shells and claws and other parts of turtles; bitumen and

[9] See WTO (2013: WT/TPR/S/278 2013).
[10] See WTO (2013: WT/TPR/S/195 2013).

related products; human organs and similar parts; exotic animal skins; and historical and archaeological items and antiques.

Brazilian law provides for the application of an export tax of 30%, which may be decreased or increased to up to 150% in order to address foreign exchange or trade policy objectives.[11] In practice, the export tax is zero-rated, except on raw hides and skins, cigarettes, and arms and ammunition. During the review period, the rates applied on these products remained unchanged at 150% for cigarettes and arms to most South and Central American countries and the Caribbean, and 9% on hides and skins.

Vietnam[12] levies export duties on certain products, mostly metals, raw hides and skins, and wood products, in accordance with the Law on Export and Import Duties, in effect since 2006. The taxes are applied on a Most Favoured Nation (MFN) basis, but the export tax regime has undergone numerous changes since 2006. For example, export duties have been increased on crude oil (from 4% to 10%), some wood products, and precious stones. Coverage has been expanded to, *inter alia*, notably minerals, agar wood, metal ores and concentrates, coal, rubber, diamonds, gold, and silver. Other items such as cashew nuts, packaging materials, parquet flooring, doors and frames, and ingots and semi-finished products of iron or non-alloy steel are no longer subject to export duty or are temporarily zero-rated. Vietnam levies royalties on natural resources, such as basic metals and minerals, timber, water, crude oil, and natural gas used in domestic production or exported.

Argentina[13] uses export duties as price policy tools to soften the impact of exchange rate fluctuations on domestic prices, especially those of essentials forming part of the family basket, and as a fiscal measure depending on the situation of the public finances. The country regards export duties as a valid development tool that enables developing countries to cease being mere suppliers of raw materials. But when applying export taxes, Argentina must

[11] See WTO (2013: WT/TPR/S/283 2013).
[12] See WTO (2013: WT/TPR/S/287 2013).
[13] See WTO (2013: 97, WT/TPR/S/277 2013).

consider the consequences of any significant changes in the international prices of agricultural products. Argentina imposes taxes on all but a few exports, including significant taxes on key hydrocarbon and agricultural commodity exports, in order to generate revenue and encourage development of domestic value-added production.[14] The WTO reported that in 2012, rates varied between 5% and 100%, whereas in 2006 the maximum rate was 45%. The 5% rate is the general rate and applies to 97.5% of the tariff universe. The other rates applied are from 10% to 100%, depending on the goods. The 100% rate, which did not exist in 2006, applies to natural gas. During 2011, export taxes as a percentage of total tax revenues were valued at 20.5% and as a percentage of the total value of merchandise exports they were valued at 15.7%. This is extremely high and we note that this does not reconcile with the World Bank data from Table 1.

The WTO (2009)[15] reports that at that time Mozambique imposed an export tax of between 18% and 22% of the f.o.b. customs value on raw cashews. Although no other specific export tax appeared to be applied, certain items, which are almost entirely exported, are subject to charges, e.g. cotton, fishery products, forestry products, and mining products.

Export taxes and South Africa

There has been a renewed interest in South Africa in the use of export taxes. Thomashausen (2011) provides a background and outlines that since 2009 export taxation for **ferrochrome and ferrochromeore** has been sought by South African ferrochrome producers as they seek help to protect and enhance the beneficiation of ferrochrome ore and exports of ferrochrome. They want both a quota on chromite ore exports and a duty of $100 per ton of ore to be payable on chromite ore exported.

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14 See http://www.ustr.gov/about-us/press- office/speeches/transcripts/2013/march/us-statement-argentina-tpr.

15 See WTO Trade Policy Review Mechanism (TPRM) for Mozambique (2009:WT/TPR/S/209):https://docs.wto.org.

World demand for ferrochrome is driven by China, the largest producer, as stainless steel demand is expected to rise because its domestic demand greatly outpaces its local supply. South African producers are claiming that a chrome export tax will increase prices of chrome ore, and this will in turn reduce its capacity in China's domestic ferrochrome industry and enable South African producers to regain their advantage in ferrochrome production. This may or may not provide a window of opportunity, and within that window South African technology must, as always, improve to maintain a competitive advantage. Similarly, South African chrome ore exports may be offset by an increased supply from other sources such as Kazakhstan. In imposing a constraint to the market it is a prerequisite to have at least some degree of market power to capture the benefits. While South Africa is a major supplier of product HS 2610 (chromium ores and concentrates), it is not the only supplier. Over the last three years the International Trade Centre (ITC) trade database shows that South Africa has about a 45% market share, with Turkey and Kazakhstan second and third suppliers. Similarly, over the last few years China has generally imported between 70% and 85 % of these exports. Thus, there is a power struggle between South Africa and China.

South Africa currently has an export tax on unpolished **diamonds** of 5% of the total value. The aim of the Diamond Export Levy is to

1. promote the development of the local economy by encouraging the local diamond industry to process (cut, polish, etc.) diamond(s) locally
2. develop skills
3. create employment.

The third area where an export tax is being mooted is on **iron ore** and steel. A report by an interdepartmental task team led by the Department of Trade and Industry has recommendations that include 'the introduction of export taxes on iron ore and steel, where appropriate'.[16] South Africa is the seventh largest

[16] See http://mg.co.za/article/2012-12-06-government-may-impose-export-tax-on-iron-ore-steel, and Mineweb 6 Dec 2012 at http://www.mineweb.com/mineweb/content/en/mineweb-fast-news?oid=165673&sn=Detail and 6 Dec 2012 at http://www.fin24.com/Economy/Cabinet-OKs-iron-ore-steel-report-20121206.

producer of iron ore and has also traditionally been the fourth largest exporter worldwide. It does not have the market power here that it has in the chrome sector, as Australia in particular has greater iron ore reserves and production, as well as geographical dominance with better access to China. India also has a geographical advantage over South Africa in terms of exporting to China, and Brazil is likewise a strong exporter as its ore has a more desirable lower phosphorous content.

Over the last few years, China has dominated the global imports of iron ore with around two-thirds of the total, while Australia, followed by Brazil and South Africa dominate as global exporters. India raised its tax on iron ore exports to 30% in 2012 and has seen its position slipping from the third largest exporter of iron ore in 2010 to eighth in 2012 according to ITC trade data. Chinese import data provides a salutary lesson on the dangers of imposing an export tax. In 2008, India had a 22.7% share of the Chinese imports of HS 2601 (iron ores and concentrates) by value. During 2013, this reduced to a mere 1.4%. South Africa's share remained between 5.2% and 5.8% over the last three years while in the top place Australia climbed above a 50% share in 2013, from 35.9% in 2008.

Policy space

Policy space is always an issue to consider, and we have seen this where there are no WTO obligations to consider. There are, however, some regional and bilateral agreements that may be relevant. Thomashausen (2011) outlines how South Africa must consider any responsibilities or obligations it may have in this area. The 2002 SACU Agreement Article 25(1) recognises the right to impose export restrictions such as export taxes, provided agreement on these measures is reached by the Southern African Customs Union (SACU) Council of Ministers. Similarly, Article 1 of the SADC Protocol on Trade of August 1996 provides that 'Export duties' mean any duties or charges of equivalent effect imposed on, or in connection with, the exportation of goods from any Member State to a consignee in another Member State'. Article 5 of the Protocol states that 'Member States shall not apply any export duties on goods for export to other Member States' and this 'Article shall not prevent any Member State from applying export duties necessary to prevent erosion of any prohibitions or restrictions which apply to exports outside the Community, provided that no less favourable treatment is granted to Member States than to third countries'.

South Africa also has a Trade, Development and Cooperation Agreement (TDCA) with the European Union (EU), and this agreement contains provisions relating to export taxes in Article 19(3) that states: 'No new customs duties on imports or exports or charges having equivalent effect shall be introduced, nor shall those already applied be increased, in the trade between the Community and South Africa from the date of entry into force of this Agreement'. South Africa would seem to be constrained from introducing export taxes regionally to the EU countries. China is, however, the target of likely export taxes, and while South Africa does not have binding constraints with China it would seem incongruous to be specifically targeting new friends in the BRICS.

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Chapter 3

The Tripartite FTA: Background and overview of progress made in developing new harmonised Rules of Origin

Eckart Naumann

1. Rules of Origin: a sticking point for African regional trade agreements?

Rules of Origin (RoO) are instruments used to determine the real source and economic origin of traded goods. Different types of RoO, however, serve different objectives. Nonpreferential RoO are used by countries for various commercial policy objectives, and are criteria that define the origin of goods with the purpose of capturing and classifying trade flows for statistical and record-keeping purposes, for labelling and related marking purposes, for the implementation of policies around antidumping duties and safeguard measures, government procurement and so forth. On the other hand, preferential RoO are those contained in specific preferential trade arrangements (PTAs) and are thus, in effect, bilateral arrangements tailored to the specific trade regime. They are used to *determine* the economic origin of a traded good in the context of trade within a specific preferential trade area, and may or may not be more restrictive than a country's standard origin criteria. The ultimate objective of preferential RoO is to facilitate preferential trade between preferential trade partners without opening such a trade regime up to goods simply transshipped from third countries.

Since PTAs are by definition aimed at facilitating greater trade flows between member countries, the design of the underlying RoO plays a critical role in achieving this objective. Practice has shown that herein often lies the greatest challenge, be it relating to the design of preferential RoO or its implementation and application.

One of the underlying challenges relating to the design of RoO – including in Africa – lies in the fact that there is no common binding standard that would help facilitate the process of designing 'appropriate' RoO conforming perhaps to some best practice standard. The WTO Agreement on Rules of Origin is not prescriptive to preferential RoO. While the World Trade Organisation (WTO) and the World Customs Organisation, under the Harmonisation Work Programme (HWP), are collaborating on designing a *harmonised* set of RoO criteria in the allocation of origin under the *nonpreferential* trade framework, this process (which was to be completed by mid-1998) has yet to be finalised, with little prospect of completing the work in the foreseeable future. That it is a major challenge to harmonise RoO is thus abundantly obvious, and serves as a reminder about the inherent difficulties associated with harmonising preferential RoO between different regional trading blocs. In this context it should be recalled that, given the inherent nature and far-reaching implications of RoO and the range of different methodologies available to determine origin, there is arguably no obvious methodology that would satisfy all RoO objectives in an optimal manner.

More than a dozen regional trade arrangements are in place among African countries. While this in itself is a large number, since most require their own regional RoO, the major challenge lies in the fact that a high degree of overlap exists among these arrangements. This situation, while unsustainable especially where it involves customs unions, also creates serious difficulties for trade policies and the administration of trade flows in the context of preferential RoO. For example, dual membership of a customs union and a separate free trade area (that not all customs union members are a party to) effectively introduces additional regional trade barriers and undermines the free circulation of goods – particularly within the customs union. This issue is frequently raised in the context of the East African Community (EAC), where Tanzania is a member, on the one hand, of a customs union, while also falling under the Southern African Development Community (SADC) Free Trade Agreement (FTA).

In the absence of a unified RoO standard, there has been a proliferation of RoO regimes in African Regional Trading Agreements (RTAs). While the majority employ a broadly generic approach to determining the preferential origin status of regionally traded goods, they are often substantially different in detail and application. For example, in east Africa the Common Market for Eastern and Southern Africa (Comesa) and EAC trade blocs ostensibly use very similar RoO regimes, although they are in fact significantly different given the number of exceptions to the base rule, with lengthy annexes covering products for which product-specific rules apply.

SADC rules are based on a fundamentally different structure compared to any other of the intra-Africa RoO regimes, and are more closely aligned to the model employed in EU preferential trade arrangements. In fact, the SADC rules were eventually largely based on the EU RoO structure[1], at a time when a common across-the-board approach to origin determination was rejected, and replaced in the context of SADC's *amended* trade protocol. This followed an increasing number of exceptions and disagreements among member states on the make-up of the preferential RoO (were it to be based on an across-the-board approach). The current negotiations towards a Tripartite FTA between Comesa, EAC and SADC have thus been made significantly more complicated by virtue of their respective approaches to preferential RoO to date. An update is further down.

In West Africa, the Economic Community of West African States (Ecowas) region follows a broadly generic approach to origin determination which, not unlike the case with the EAC and Comesa, contains a list of exceptions, for example where the application of one of the generic tests (change in tariff heading test) does not apply or where 'additional conditions' have been imposed by 'a Regulation of the Council of Ministers'.[2] Provisions such as these ostensibly deal with technical deficiencies and unwanted impacts of following a generic approach, but illustrate the difficulty of merging technical, political and policy imperatives into a RoO framework.

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[1] South Africa, a key party to the SADC FTA, had shortly before concluded a bilateral agreement with the EU, with RoO based on the 'EU model'.

[2] From the ECOWAS RoO text(Art. 4(1)): 'The above rule shall be accompanied by a list of exemptions mentioning the cases where the change in the sub-heading is not a determining factor, or imposing additional conditions'.

In CEMAC – theoretically a customs union (a fullyfledged customs union should, however, not require internal RoO due to the common external tariff and common market-access arrangements) – substantial obstacles to free trade are present and restrictive RoO still remain in place. For example, deficient transportation infrastructure is often identified as a key impediment to trade in the region (IMF, 2004). To make matters more challenging, the RoO that are still in place are not applied and administered consistently, which further hampers regional trade under the Central African Economic and Monetary Community (CEMAC) preference. An International Monetary Fund (IMF) research report previously found that intra-CEMAC trade accounts for only 1.5% of total CEMAC trade (Gamo and Tsangarides, 2007: 5). The CEMAC preferential trade rules impose a minimum 50% local raw material content requirement or minimum value addition of 40% for origin to be conferred. In terms of the regional context, the development of regional trade is further hampered by the geographic configurations and membership of the Economic Community of West African States (Ecowas) and CEMAC respectively (for example, Nigeria and Cameroon, and DRC and Republic of Congo respectively belong to different RECs with different origin requirements, despite arguably being 'natural' and neighbouring trade partners).

RoO in African trade regimes span a wide range of methodological approaches in the determination of preferential origin status. However, the conditionalities that they impose, by and large, go well beyond one of the key objectives for RoO, namely the avoidance of trade deflection; this is often influenced by protectionist attitudes relating to incumbent operators more generally, or specific national industries. Their implementation and consistent application also continue to be a challenge for customs authorities and traders alike, often resulting in the creation of unnecessary RoO-related trade barriers. The (African) RoO history and experience, in the absence of any international or WTO multilateral best-practice standards that go beyond mere guiding principles, and given the inherent challenge associated with RoO, are likely to create difficulties for the realisation of any practical benefits accruing to traders, for example under a (future) African continental FTA.

SADC, Comesa and EAC are presently negotiating towards a Tripartite FTA, which *inter alia* requires harmonised RoO for the three RECs. An update is provided below.

2. Background

In December 2010, a second version of draft legal documents – comprising the Tripartite FTA main agreement and its annexes – was published. These documents contain *inter alia* an Annex on Rules of Origin (RoO) – Annex 4 – which will eventually regulate the main requirements relating to the minimum local processing required to trade on a preferential basis within the 26-country Tripartite FTA bloc.

It needs bearing in mind that the draft agreements are technical documents prepared to assist moving the TFTA negotiations forward. They do not represent the outcome of any form of negotiation and the final format of the agreed Agreement and its annexes may (and is likely to) be substantially different to the draft documents. In fact, there had originally been fairly extensive discussion on what status to lend to these draft legal documents – in other words whether these documents represent 'merely' technical inputs or whether they form the basis for further negotiation. Consensus was reached that the documents would be viewed as an initial basis for negotiation.

Since the work on preferential RoO has not yet been completed, the usual *caveats* apply, and nothing is generally considered as final until signed and incorporated by the member states.

3. The draft Tripartite FTA Annex on Rules of Origin

The TFTA RoO Annex is structured in a similar way as the RoO contained in EU trade agreements. The SADC FTA in turn is broadly based on the EU model notwithstanding a range of substantive differences especially with regard to a few of the product-specific 'local processing' requirements. Notably, the draft TFTA Annex originally proposed a general methodological basis for determining origin, based on a percentage criterion, unless an alternative mechanism is prescribed in the relevant Annex (to the RoO). This aspect is similar to the model employed in the Comesa and EAC regions, although, notwithstanding this apparently generic approach to setting RoO criteria in the latter agreements, in practice the approach used was rather more product-specific with lengthy annexes setting out the list of products for which the generic approach did not apply. Similarly, the original TFTA draft RoO text explicitly left open this option, whereby goods listed in a yet-to-be determined annex' would also be subject to an alternative RoO.

In summary, the 2010 draft TFTA RoO were structured as follows:

- An across-the-board percentage-based approach is used in determining 'substantial transformation', apart from goods listed in an annex for which alternative rules would apply (details still to be agreed on)

- The percentage test (would be) based on either the value of non-originating materials (VNOM) or the value of originating materials (VOM), with 70% and 30% thresholds respectively. Each would be based on the ex-works (factory) price of the good claiming preference, or the imported materials, respectively. This is a similar denominator as employed in the SADC RoO and in EU trade agreements and is generally considered the most user-friendly for traders. (Note: Later working versions of the draft – in terms of the TFTA RoO Technical Working Group discussions – saw this methodology updated to only reflect the 70% non-originating input threshold.)

- The rules would consider the TFTA as one territory for origin purposes, meaning that full regional cumulation would be permitted. In other words, member states can jointly meet the origin requirement, provided that at least some value-adding local processing (simple processing) takes place. This is a common RoO provision in reciprocal preferential trade areas and potentially one of the most important provisions to lessen the restrictiveness of origin requirements while also enhancing prospects for regional trade integration.

4. Negotiations towards new TFTA Rules of Origin – the status quo

Formal TFTA negotiations began with the launch of the TFTA midway in 2011 but the technical work relating to the RoO began only at the end of that year. The work of the Technical Working Group (TWG) on Rules of Origin continues and the seventh meeting was set to take place in Bujumbura, Burundi, in May 2014.

The key challenge to negotiating RoO under the TFTA is largely twofold: on the one hand, how to agree to common rules applicable to the full TFTA bloc given that the current SADC RoO regime is substantially different to the regimes employed by Comesa and EAC (which in turn contain their own differences); and on the other hand, how to deal with the 'opportunity' presented by these RoO negotiations given that the previous respective RoO regimes were often considered as not necessarily conducive to regional trade integration.

Much work has been completed by the TWG although at this stage (May 2014) but significant work still remains to be done. It is therefore not expected that the original negotiating schedule to conclude Phase 1 of the TFTA negotiations (which includes market access and RoO) will be completed within the planned three years from the launch of negotiations as envisaged. This is notwithstanding the relatively advanced stage of negotiations and the progress made to date.

The focus of the RoO TWG's work has been on finalising the various provisions of the RoO Protocol (which includes the basis for determining origin, definitions for wholly obtained, simple processing, cumulation, various fisheries provisions to the extent that they pertain to the wholly obtained provisions, and various administrative aspects) and dealing with the challenge of harmonised-list rules (the product-specific criteria that are contained within the annex).

With respect to the latter, it has become clear – and this was entirely foreseeable – that product-specific rules would be necessary not only to deal with the many anomalies and shortcomings presented by (following) a common generic RoO approach but also as a mechanism for harmonising the currently divergent approaches to determining origin employed in the Comesa, EAC and SADC FTAs respectively. The original implied approach of following a generic (primarily percentage-based) RoO formula, as envisaged by the draft RoO published in 2010, has thus in effect been replaced by a product-specific approach.

From a practical perspective, the TWG had agreed that the negotiations on product-specific rules would focus on cases where *dissimilar* rules are applied rather than opening negotiations on all product lines. An assessment of instances where dissimilar product-specific rules apply subsequently found a large number of such instances, and the comparative matrix compiled for this purpose comprises well over 100 pages. In comparison, the matrix of *similar* RoO also comprises over 100 pages while the matrix of *common* rules comprises a little less than 50 pages. Since individual dissimilarities can potentially involve lengthy consultation and negotiation, the outstanding task of achieving a harmonised RoO outcome is one not to be underestimated.

Example of dissimilar rules Comesa/SADC/EAC

Product	Comesa	SADC	EAC	Comment
Fire-resistant equipment of fabric covered with foil of aluminised polyester:	Manufacture from materials classified in a heading other than that of the product, except from materials of other headings of this chapter.	Manufacture from yarn or manufacture from uncoated fabric provided the value of the uncoated fabric used does not exceed 40% of the ex-works price of the product.	Spinning of natural and/or man-made staple fibres or extrusion of man-made filament yarn, in each case accompanied by knitting (knitted to shape products) or dyeing of yarn of natural fibres accompanied by knitting (knitted to shape products).	SADC alternative rule is similar to EAC first alternative rule except for the different value thresholds Comesa represents Change of Chapter (CC) rule.

While the product-specific 'list rules' (Annex to the RoO Protocol) are being reviewed, significant progress has been made on finding common ground with respect to the main RoO Protocol, and specifically the general RoO provisions. The previous meeting of the TWG on RoO took place in Mauritius in December 2013 and this overview is primarily based on outcomes from that meeting and any further subsequent updates, pending further finalisation expected to be completed at the meeting scheduled for Burundi in late May.

- **Definition of 'wholly obtained':** These provisions describe product categories (and associated conditions) under which a good will be classified as being wholly produced in the TFTA member state. This is by virtue of being a growth or extraction (in its entirety) within the member state – examples include minerals, vegetable and animal products – or by being produced exclusively from materials wholly obtained within the TFTA member state (for example, processed agricultural products, such as bread, where the wheat is grown, harvested and processed locally). The wholly obtained provisions also include the all-important and sensitive provisions relating to fisheries and vessels and these remain contentious and unresolved (see next bullet point).

- **Fisheries provisions:** RoO relating to fish are contained both in the main RoO Protocol as well as in the product-specific annex ('list rules'). The main protocol, however, links the originating criteria for any fish caught by the vessel that is engaged in the fishing activity. This set of conditions is in part rooted in the indivisibility of fish (in other words, most fish products – apart from perhaps canned fish – will not contain partially nonoriginating content) but also in the fact that the fishing sector is considered highly sensitive economically, strategically and politically. There is currently broad agreement in the negotiations that for fish to be considered as originating in TFTA member states, the vessel will need to be registered within the TFTA and also sail under the flag of a TFTA member state. In addition, the current proposal sets additional criteria relating to the nationality of officers, of crew, and of equity/ownership relating to such vessels (with either of the criteria having to be met, and the actual percentage as yet not determined).

However, some of the Indian Ocean island states that are party to the TFTA have proposed the insertion of additional criteria, which would act as an optional alternative to the current officer/crew/equity provisions. These interventions from Seychelles and Mauritius in particular are based on the notion that the other criteria are 'challenging for small island states' and that they could not be fulfilled due to the lack of financial, technical and human resources. Instead, Mauritius is proposing that the optional alternative criteria would simply require that the vessels be owned by a person qualified to be the owner of such vessel in a TFTA member state, while the Seychelles proposal entails that the alternative criteria (to the officer/crew/equity provisions) should simply require that the vessel should have a valid licence to fish in the Exclusive Economic Zone (EEZ) (200-mile) of the TFTA member state. The implication is that Seychelles considers that it should be the TFTA member state that manages the criteria according to its national economic interests, regulations and prerogatives.

These matters were to be considered by the 7th TWG meeting in Burundi in May 2014.

- **Processing not conferring origin:** Owing to inherent weaknesses in the available RoO methodologies, provisions that describe processing that on its own or in combination will not lead to local economic origin to be conferred on a product are an integral part of most RoO regimes. For example, these criteria (also known as 'simple operations') include processes such as *simple breaking-up into parts, mixing, preserving, dusting*, etc. While the list of insufficient processes has largely been agreed, there remains some uncertainty around certain 'milling' operations and specifically what would be defined as 'simple milling'. This has implications for some agriculture processing sectors. On whether to delete 'simple milling operations' from the list of 'simple' processes, as proposed, the matter remains unresolved and was set to be finalised at the TWG meeting in Bujumbura.

- **Administrative matters involving certification:** Some RoO regimes permit duly authorised authorities ('competent authorities') to administer the certification of preferential origin (for example, chambers of commerce), while in others this responsibility falls exclusively on customs authorities. While the current draft text still refers to 'customs authorities' in relation to this task, proposals to change this to 'competent authorities' had been considered previously and agreed to, and this issue was subsequently flagged at the last TWG meeting. In fact, the Tripartite Trade Negotiations Forum (TTNF) has since directed the TWG to adopt the term 'competent authorities' as being tasked with the administration of origin certification.

- **Trade in goods related to 'aid' flows:** SACU made a recent intervention relating to trade in agricultural goods (whether or not processed in any way) where these were obtained or partially obtained by any TFTA member state 'from food aid or monetization or similar assistance measures, including arrangements based on non-commercial terms', proposing that these would not be eligible for any preferential treatment in regional trade under the TFTA RoO provisions.

5. Way forward and summary of outstanding issues

It is clear that significant progress has been made on the TFTA RoO negotiations with the six TWG meetings held to date. While much of the main protocol text has been agreed, with few exceptions (mainly relating to fisheries, the definition for 'insufficient processing', some value or weight tolerance provisions), a large portion of work still lies ahead.

This relates to the challenge of harmonising the product-specific rules, where – despite an understanding that the common and overlapping rules would for now be accepted as agreed and the focus is on similar and altogether dissimilar rules (between Comesa, EAC and SADC) – the matrix of dissimilar rules extends to over 100 pages and concerns a majority of the product-specific provisions. Implicit in this task is the challenge – and opportunity – of designing RoO that are (more) conducive to regional trade and possibly represent improvements on previous rules.

The outcome of any product-specific RoO deliberation will likely have significant impacts on affected traders within the TFTA, and consequently these issues will undoubtedly be informed by many national and regional sensitivities. It is worth reflecting again on the joint Harmonisation Work Programme of the WTO and World Customs Organisation relating to nonpreferential RoO, which has been tasked since 1995 with developing harmonised RoO relating to nonpreferential trade between WTO Member States, to better understand the remaining challenge and associated complexities in agreeing to harmonised product-specific rules under the TFTA. This is particularly so given the decision to design rules that factor in product-specific prerogatives rather than designing an across-the-board set of standards for determining preferential TFTA origin for regional trade.

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Chapter 4

A new approach to investment governance in southern Africa

Sean Woolfrey

1. Introduction

Investment governance is an issue that has become the subject of much debate in policymaking and scholarly circles recently. The United Nations Conference on Trade and Development (UNCTAD, 2013) notes that 'investment policymaking is experiencing a paradigm shift' as more and more countries are confronting the challenge of how to ensure that governance frameworks established to promote and attract cross-border investment flows actually support inclusive growth and sustainable development without unduly constraining domestic policy space. Recent developments in southern Africa show that countries in the region are also taking steps to address this challenge and to establish investment governance frameworks that provide an appropriate balance between private and public interests.

After providing a brief introduction to the prevailing characteristics of investment governance at the global level, focusing in particular on the prevalence and content of bilateral investment treaties, and giving an overview of investment governance within the Southern African Development Community (SADC), this chapter examines two recent developments in the SADC region pertaining to investment governance: South Africa's ongoing overhaul of its investor protection framework and the publication of the *SADC Model Bilateral Investment Treaty Template* (SADC, 2012). The chapter shows that these two developments encompass striking similarities with regard to the treatment of foreign investors and investment and argues that these developments herald the emergence of a new approach to investment governance in the region, one that differs quite significantly from the status quo both globally and in southern Africa. Finally, the chapter warns that while there might be good reasons for countries in the region to adopt new approaches to investment governance, the approach suggested by these recent developments carries the risk of deterring much-needed foreign investment in the region.

2. Global investment governance

Most states are keen to attract foreign investment, and therefore have an incentive to assure foreign investors that investments in their territory will be safe from expropriation and discriminatory treatment. However, in the absence of binding international rules or agreements, an investor has little recourse should a host state decide to expropriate their investment once it has been made. The possibility of expropriation or the introduction by a host state of a measure which negatively impacts an investment is a significant risk for foreign investors, who would naturally prefer some form of guarantee that their investments will not be directly or indirectly expropriated in the future. In addition, investors would prefer not to have to rely on protections contained in the domestic legislation of a host state, as domestic laws canalways be amended or repealed unilaterally by the host state itself.

Past efforts to establish multilateral rules on foreign investment have failed to bear fruit, and today there is no overarching global investment treaty such as is available for international trade in the form of the various World Trade Organisation (WTO) agreements. Instead, legal disciplines pertaining to the relationship between international investors and host states have been developed largely through bilateral instruments, particularly through the use of treaties for the protection and promotion of foreign investment – the so-called 'bilateral investment treaties' (BITs) – and, more recently, the inclusion of dedicated investment chapters in free trade agreements (FTAs) (UNCTAD, 2007: 1).

BITs emerged during the second half of the twentieth century as the first international agreements focused exclusively on the treatment of foreign investment (UNCTAD, 2007: 1). The first BIT was signed in 1959 by the Federal

Republic of Germany and Pakistan. Over the next three decades the number of concluded BITs grew steadily, and by the end of the 1980s, 385 BITs had been signed, with 63 countries party to at least one (UNCTAD, 2000: iii). The 1990s saw extremely rapid growth in the conclusion of BITs, and by the end of that decade the number of concluded BITs had grown to 1,857, with 173 countries party to at least one (Ibid: iii).

The typical pattern of BIT relations also began to change during the 1990s. Early BITs had generally been concluded between a developed and a developing country, usually at the behest of the developed country. Through these BITs, the developed, typically capital-exporting country, sought to ensure a higher standard of protection for its investors than that provided for under the national laws of the developing country, while the developing country sought to use the BIT as a means to promote itself as a favourable investment destination (Ibid.: 1). During the 1990s, however, it became more common for developing and transition economies to sign BITs between themselves, and the number of BITs between developing and transition economies grew from 63 at the end of the 1980s to 833 at the end of the 1990s (Ibid.: iii). Increasingly, these countries began to approach BITs with the twin objectives of attracting inward investment and protecting their outward investments (Ibid.: 2).

Since the end of the 1990s the number of concluded BITs has continued to grow. In addition, it has become increasingly common for FTAs, economic partnership agreements (EPAs) and similar economic integration arrangements to include chapters dealing specifically with investment. Today's international investment governance regime comprises over 3,100 international investment agreements (IIAs), including 2,787BITs, of which approximately 2,095 are in force, and 340 'other IIAs', of which approximately 269 are in force.[1] Moreover, almost every country is party to at least one IIA (UNCTAD, 2013: 4). Given the sheer number of BITs in force and their similarity in terms of structure, coverage and provisions, these instruments have become the most important pillar of international investment governance today.

[1] According to UNCTAD information (see http://investmentpolicyhub.unctad.org/IIA).

3. Bilateral investment treaties

BITs are binding international agreements between two states under which each party undertakes certain obligations with respect to private investment in its territory by nationals and firms of the other party. The main features of BITs, including their objectives, structure and underlying principles, have not changed significantly since the early years of BIT practice. Traditionally, BITs have focused on ensuring nondiscriminatory treatment of foreign investors and investments, protecting investments from expropriation and nationalisation and providing for dispute settlement, and these issues remain at the core of today's BITs. Although the exact content and wording of BITs provisions differ from treaty to treaty, most BITs include provisions addressing: the scope and application of the treaty; the admission of investments; general standards of treatment, including fair and equitable treatment, full protection and security, national treatment and most-favoured-nation (MFN) treatment; guarantees and compensation in respect of expropriation; compensation in respect of damage to investments due to war and civil disturbances; free transfer of funds; and dispute settlement, including both state-state and investor-state dispute settlement (UNCTAD, 2007).

Among the most important specific provisions typically found in BITs are those dealing with the scope of application of the treaty, general standards of treatment of covered investors and investments, expropriation and investor-state dispute settlement. In terms of the geographical scope of application, BITs guarantee certain rights and protections to investments made in the territory of each of the contracting parties by investors originating from the other party; the term 'investor' is typically defined as a natural person or legal entity from one of the contracting parties. Nationality or citizenship of a contracting party generally ensures that a natural person is covered by the BIT, while many BITs use the place of incorporation or constitution as the sole criterion to determine if a particular legal entity is covered (Ibid.: 15).

In terms of the temporal scope of application, most BITs specify that they shall remain in force for a minimum fixed period, usually 10 or 15 years, with each party able to terminate the treaty at the end of this period subject to the provision of prior written notice (Ibid.: 20). After this initial fixed term has expired some BITs provide that the treaty shall continue to be in force indefinitely, subject to the right of either contracting party to terminate the treaty by providing written notice to the other party before the intended date of termination (Ibid.: 21). Other BITs, and particularly older-generation BITs, establish additional fixed terms for the renewal of the treaties, often for 10 years. Many BITs also provide that covered investments shall continue to be protected for a certain period of time – usually 10 or 15 years – even after the treaty has been terminated.

In terms of general standards of treatment, most BITs oblige the contracting parties to provide 'fair and equitable treatment' and 'full protection and security' to covered investments. There is some controversy around the fair and equitable treatment standard, as it lacks a precise meaning. Some scholars argue that it obliges contracting parties to treat covered investments 'in accordance with the international minimum standard' (Ibid.: 28) in customary international law. Others, however, insist that the term should be assessed on a case-by-case basis (Ibid.). While some BITs give guidance on this by spelling out what is meant by fair and equitable treatment under that particular treaty, many do not. BITs generally also oblige the contracting parties to provide national treatment and MFN treatment to covered investments (at least at the post-establishment phase). The former standard refers to the requirement to grant investors of the other contracting party treatment 'no less favourable' than that granted to local investors (Ibid.: 33). The MFN treatment standard obliges each contracting party to treat investors and investments from the other contracting party no less favourably than it treats investors and investments from any third country.

The need to address the risk of expropriation has historically been one of the main motivating factors behind the conclusion of BITs (Ibid.: 44). BITs generally allow for contracting parties to expropriate foreign investments provided that the expropriation is carried out on a nondiscriminatory basis, for a public purpose, under due process of law and against the payment of compensation. Most BIT expropriation clauses cover expropriation and nationalisation (generally without explicitly clarifying the distinction between the two terms) as well as measures having an equivalent effect to expropriation or nationalisation, sometimes termed as 'indirect expropriation' or 'deprivation' (Ibid.: 46). In terms of compensation, the vast majority of BITs apply the standard of 'prompt, adequate and effective' (Ibid.) compensation, generally requiring that such compensation reflect the actual price of the investment. The terms 'market value' or 'fair market value' are often used in this regard (Ibid.: 48).

Finally, most BITs include a provision on investor-state dispute settlement. This provides investors with a way to directly defend their rights under a BIT without having to depend on diplomatic protection from their home country or rely on dispute settlement provisions contained in the laws of the host state. Investor-state dispute settlement provisions in BITs usually specify the different arbitration venues available to investors should a dispute with a host state arise, as well as the procedures for appointing arbitrators and the contracting parties' obligation to consider the arbitration award as final and binding and to provide for its enforcement (Ibid.: 100). The International Centre for the Settlement of Investment Disputes (ICSID) and the ICSID Additional Facility Rules are the forums most commonly referred to in BITs, but many BITs mention other forums such as the Court of Arbitration of the International Chamber of Commerce (ICC) in Paris or the Arbitration Institute of the Chamber of Commerce of Stockholm as possible arbitration venues (Ibid.: 110). BITs generally also provide for the submission of disputes to ad hoc arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). Where BITs provide for more than one possible arbitration venue, they usually grant the investor the right to designate the forum in which the dispute will be adjudicated (Ibid.: 111).

4. Bilateral investment treaties in southern Africa

Southern African countries are no strangers to the use of BITs. Indeed, certain SADC member states have been party to such treaties since the 1960s. According to the United Nations Conference on Trade and Development (UNCTAD), every one of the 15 SADC member states is party to at least one BIT, and together they have signed approximately 253 BITs to date, of which around 106[2] are currently in force (See Table 1). Of those treaties in force, the vast majority (75) are with European countries, while only nine are between SADC member states and other African countries. The most common partner states for SADC BITs are Germany (which currently has BITs in force with 13 SADC member states) and Switzerland (which has BITs in force with 10 SADC member states). Mauritius (22), South Africa (20) and Mozambique (19) are the SADC member states with the most BITs currently in force.

Table 1: SADC member states' bilateral investment treaties

Member state	BITs signed	BITs in force	Other party to BITs in force (year of entry into force)
Angola	10	4	Cape Verde (1997), Germany (2007), Italy (2007), Russia (2011)
Botswana	9	2	Switzerland (2000), Germany (2007)
DRC	18	5	Germany (1971), Switzerland (1973), France (1975), Belgium & Luxembourg (1977), United States (1989)
Lesotho	3	3	United Kingdom (1981), Germany (1985), Switzerland 2010)
Madagascar	11	8	Germany (1966), Switzerland (1966), Norway (1967), Sweden (1967), France (2005), Mauritius (2005), China (2007), Belgium & Luxembourg (2008)
Malawi	6	2	Egypt (1999), Netherlands (2007)
Mauritius	40	22	Germany (1973), France (1974) United Kingdom (1986), China (1997), Pakistan (1997), South Africa (1998), Portugal (1999), Czech Republic (2000), India (2000), Indonesia (2000), Romania (2000), Singapore (2000), Switzerland (2000), Mozambique (2003), Barbados (2005), Madagascar (2005), Sweden (2005), Finland (2008), Korea (2008), Belgium & Luxembourg (2009), Burundi (2009), Senegal (2009)

[2] This discrepancy with Table 1 is due to the fact that four intra-SADC BITs (Madagascar-Mauritius, Mauritius-Mozambique, Mauritius-South Africa and Mozambique-South Africa) were double counted in the table.

Member state	BITs signed	BITs in force	Other party to BITs in force (year of entry into force)
Mozambique	25	19	Portugal (1998), South Africa (1998), Algeria (2000), Indonesia (2000), China (2002), Cuba (2002), Denmark (2002), Italy (2003), Mauritius (2003), Netherlands (2004), Switzerland (2004), United Kingdom (2004), Finland (2005), United States (2005), France (2006), Germany (2007), Sweden (2007), Vietnam (2007), Belgium & Luxembourg (2009)
Namibia	14	7	Germany (1997), Switzerland (2000), Netherlands (2004), Spain (2004), Finland (2005), France (2006), Austria (2008)
Seychelles	4	1	Cyprus (1999)
South Africa	46	20	Paraguay (1974), Cuba (1997), Denmark (1997), France (1997), Korea (1997), Switzerland (1997)*, Austria (1998), China (1998), Germany (1998)**, Mauritius (1998), Mozambique (1998), United Kingdom (1998), Czech Republic (1999), Finland (1999), Italy (1999), Sweden (1999), Russia (2000), Argentina (2001), Greece (2001), Iran (2002)
Swaziland	5	2	Germany (1995), United Kingdom (1995)
Tanzania	19	9	Germany (1968), United Kingdom (1996), Finland (2002), Sweden (2002), Italy (2003), Netherlands (2004), Denmark (2005), Switzerland (2006), Canada (2013)
Zambia	11	2	Germany (1972), Switzerland (1995)
Zimbabwe	32	6	Serbia (1997), China (1998), Netherlands (1998), Denmark (1999), Germany (2000), Switzerland (2001)
Total	**253**	**110**	

Source: UNCTAD Investment Policy Hub

*Due for termination on 30 October 2014

**Due for termination on 23 October 2014

The BITs signed to date by SADC member states largely follow the standard form and content of traditional BITs. In particular, these BITs provide for fair and equitable treatment and full protection and security of investments, as well as for national and MFN treatment of investors and their investments. They also generally prohibit nationalisation and expropriation, except where these are carried out in a nondiscriminatory manner, for a public purpose, under due process of law and against the payment of prompt, adequate and effective (full market value) compensation, and provide foreign investors with the right to refer disputes to international arbitration under, *inter alia*, ICSID or UNCITRAL rules.

5. The SADC Protocol on Finance and Investment

BITs are not the only sources of legal protection for foreign investors in southern Africa. Another relevant, but often overlooked, layer of the investment governance regime in the region is the set of obligations regarding foreign investment contained in the SADC Protocol on Finance and Investment (FIP). The FIP, which was signed in August 2006 and entered into force in April 2010 following ratification by two-thirds of the SADC member states, is one of a number of protocols signed by the SADC member states to give effect to the SADC Treaty (Van Roessel, 2011). In line with the treaty, these protocols are meant to 'spell out the objectives and scope of, and institutional mechanisms for, co-operation and integration' (SADC Treaty: Article 22). Having entered into force, these protocols are legally binding on the SADC member states that are party to them.

The FIP aims to 'foster harmonisation of the financial and investment policies' of the SADC member states so that these policies are made 'consistent with objectives of SADC' and to 'ensure that any changes to financial and investment policies in one state party do not necessitate undesirable adjustments in other State Parties' (Article 2). In terms of investment, the stated objective of the FIP is to ensure that state parties 'co-ordinate their investment regimes and cooperate to create a favourable investment climate within the Region as set out in Annex 1' (Article 3).

Annex 1 of the FIP (the Investment Annex) deals with cooperation on investment. The scope and substantive protections contained in the Investment Annex resemble, but in certain important respects differ from, equivalent provisions typically found in BITs (Claypole, 2013). For example, the definition of 'investor' contained in the Investment Annex is less clearly defined than in typical BITs. The only requirement of the Investment Annex is that an investor must be 'a person that has been admitted to make or has made an investment' (Article 1). Significantly, this definition does not limit protected investors to nationals or companies of the state parties to the FIP. This is an important departure from the scope of typical bilateral or regional investment treaties, which usually contain precise definitions of investors by reference to their nationality or place of incorporation (Kotuby Jr et al., 2014). The effect of the Investment Annex's broad definition of 'investor' is that the substantive protections contained in the annex appear to apply to all foreign investors in the territory of a state party to the FIP, not only those investors from the other state parties to the FIP.

The main substantive protections of the Investment Annex are contained in Article 5 (Investment protection) and Article 6 (Investors of the third state). Article 5 deals with expropriation and nationalisation and provides that i[i]nvestments shall not be nationalised or expropriated in the territory of any state party except for a public purpose, under due process of law, on a non-discriminatory basis and subject to the payment of prompt, adequate and effective compensation'. This treatment corresponds to the customary international law standard found in most BITs, whereby states may only expropriate foreign property if certain conditions are met, including the payment of prompt, adequate, and effective compensation. Unlike many BITs, however, Article 5 does not expressly cover 'indirect expropriation' or measures 'having effect equivalent to' nationalisation.

Like most BITs, the Investment Annex includes a provision on fair and equitable treatment. In particular, Article 6(1) provides that '[i]nvestments and investors shall enjoy fair and equitable treatment in the territory of any State Party'. While the Investment Annex does not guarantee national treatment, it does provide for MFN treatment, as Article 6(2) states that the fair and equitable treatment referred to in Article 6(1) 'shall be no less favourable than that granted to investors of [a] third State'. Article 6(2) could be interpreted to import into the Investment Annex more favourable protections contained in state parties' investment treaties with third parties (Claypoole, 2013). In other words, a foreign investor in a given FIP State party can potentially use the MFN provision in the FIP to invoke more favourable rights and protections contained in a BIT concluded by that state party, even if the investor is not covered by that BIT.

These substantive protections are qualified by other provisions in the Investment Annex. Article 7 (General exceptions) provides that State Parties may in accordance with their respective domestic legislation grant preferential treatment to qualifying investments and investors in order to achieve national development objectives', while Article 14 (Right to regulate) states that '[n]othing in this Annex shall be construed as preventing a state party from exercising its right to regulate in the public interest and to adopt, maintain or enforce any measure that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns'.

Arguably the most significant aspect of the Investment Annex is that it entitles covered investors to refer disputes against the state parties to international arbitration under ICSID or UNCITRAL Rules. Article 28 (Settlement of investment disputes) provides that:

1. 'Disputes between an investor and a State Party concerning an obligation of the latter in relation to an admitted investment of the former, which have not been amicably settled, and after exhausting local remedies shall, after a period of six (6) months from written notification of a claim, be submitted to international arbitration if either party to the dispute so wishes.

2. Where the dispute is referred to international arbitration, the investor and the State Party concerned in the dispute may agree to refer the dispute either to:

    (a) The SADC Tribunal;

(b) The International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the ICSID Convention and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or

(c) An international arbitrator or ad hoc arbitral tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.

3. If after a period of three (3) months from written notification of the claim there is no agreement to one of the above alternative procedures, the parties to the dispute shall be bound to submit the dispute to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties to the dispute may agree in writing to modify these Rules.

4. The provisions of this Article shall not apply to a dispute, which arose before entry into force of this Annex.'

Under Article 28(1), foreign investors have the right to refer a dispute against a state party to international arbitration provided that the dispute relates to an 'admitted investment', local remedies for dispute settlement have been exhausted, and at least six months have passed since the state party was notified of the claim against it. The requirement to exhaust local remedies is significant as it means that an investor must submit a dispute to a local court before resorting to international arbitration. Article 28(2) sets out three choices of fora for international arbitration: (a) the SADC Tribunal; (b) ICSID and the ICSID Additional Facility; (c) adhoc arbitration under UNCITRAL rules. However, given recent developments pertaining to the SADC Tribunal,[3] private investors in the SADC

[3] The SADC Tribunal was suspended in May 2011 following the case of Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe. In August 2012 a SADC Summit resolved that a new tribunal should be created and that its mandate be limited to the interpretation of the SADC Treaty and protocols relating to disputes between member states (Claypole, 2013; KotubyJr et al., 2014).

region are effectively left with two options for international arbitration: ICSID or UNCITRAL rules. Under Article 28(3), if the investor and state party involved in the dispute cannot agree on a forum, the dispute will be submitted to arbitration under UNCITRAL rules.

In summary, despite certain qualifications and a lack of clarity around its definitions of 'investor' and 'investment' – and therefore the scope of application of the annex – the Investment Annex of the SADC Protocol on Finance and Investment contains important protections for foreign investors in the region (Kotuby Jr et al., 2014). In particular, it contains a number of substantive protections that resemble those typically found in BITs, including the right to fair and equitable treatment; a prohibition on nationalisation of investments; the right to prompt, adequate and effective compensation in respect of expropriation; and the right to submit investment disputes against the host state to international arbitration under ICSID or UNCITRAL rules. Crucially, these protections are available to any admitted foreign investor in the territory of a FIP state party, and not just those investors from other state parties. Furthermore, the MFN provision contained in the FIP could be interpreted as importing – and thereby 'multilateralising' – the protections contained in each of the FIP state parties' own BITs.

The FIP and the various BITs signed by the SADC member states have created a framework for investment governance in southern Africa that provides foreign investors with a number of protections moreorless consistent with the standards of protection found in customary international law. There are signs, however, that at least some of the SADC member states are unhappy with these standards and the 'risks' they pose for domestic policy space and that they are exploring alternative approaches to investment governance that place more emphasis on preserving a host state's right to regulate in the public interest. The following sections describe two recent developments in the region that suggest that a new approach to investment governance and investor protection is emerging in southern Africa.

6. South Africa's overhaul of its investor protection framework

Following South Africa's transition to democracy in 1994, the country embarked on a series of BIT negotiations with major trading partners. There was much uncertainty around South Africa's economic policy at this time, and signing BITs provided a way for the country to assure foreign investors that their investments would be secure under the new regime. Consequently, between 1994 and 1998, South Africa signed 27 BITs, over half of which were concluded with European countries.[4] These BITs adhered closely to the standard BIT format discussed above, and guaranteed covered investors, *inter alia*, fair and equitable treatment, national and MFN treatment, fair market value compensation in respect of expropriation and recourse to investor-state dispute settlement.

In 2007, a group of European mining investors registered a claim against South Africa with ICSID (Piero Foresti and others v Republic of South Africa [hereinafter 'Foresti']), alleging that aspects of South Africa's Black Economic Empowerment requirements violated the terms of the country's BITs with Italy and the Belgo-Luxembourg Economic Union. The claimants, two Italian families and a Luxembourg-based holding company, all operating in the South African granite mining and processing industry, argued that certain provisions of South Africa's Minerals and Petroleum Resources Development Act (MPRDA),[5] which came into effect on 1 May 2004, effectively expropriated their mineral rights.

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[4] During this period and subsequently, South Africa negotiated a number of BITs with African, Asian and Latin American countries, but the majority of these were never ratified and have therefore not entered into force.

[5] Act 28 of 2002. The MPRDA, which forms part of South Africa's Black Economic Empowerment (BEE) programme, effectively transferred all mineral rights in South Africa to the state and required mining companies to apply to convert their 'old order mineral rights' into 'new order rights' by 2009. In order to be granted exploration or mining licences, mining firms had to fulfill a number of requirements set out in the MPRDA and in the Mining Charter, including transferring shareholding stakes to historically disadvantaged South Africans (HDSAs) and increasing the number of HDSAs in management positions (Peterson & Garland, 2010: 6)

Although the Foresti case was eventually settled, it prompted the South African Government to initiate a comprehensive review of its BITs in order to 'fully assess the risks and benefits' (Davies, 2014) of these treaties. The Government's Bilateral Investment Treaty Policy Framework Review (Review), carried out between 2008 and 2010, found, among other things, that the relationship between BITs and FDI flows into South Africa is somewhat ambiguous; that the country's BITs contain a range of ambiguous provisions; that some of these provisions are inconsistent with the South African Constitution and that South Africa's BITs tend to promote the commercial interests of investors over issues of public interest (South Africa, 2009).

In the light of these findings, the South African Cabinet took the decision in 2010 to overhaul the legal framework for investment protection in South Africa. In particular, the Cabinet decided that: i) South Africa would terminate its existing BITs and would only renegotiate these treaties or enter into new BITs if there were compelling economic and political reasons to do so; ii) any new or renegotiated BITs would be based on a new model BIT that would address the risks contained in the country's existing BITs; and iii) a new Investment Act would be developed which would codify BIT-type protections into South African law, ensuring these were consistent with the South African Constitution (Carim, 2013a; Davies, 2014).

Following this decision, the South African Government began notifying affected partners of its plans to terminate its BITs in line with the termination processes set out in the respective treaties (Carim, 2013b). In September 2012, the Government officially notified the Belgian Embassy in South Africa of its intention not to renew its treaty with the Belgo-Luxembourg Economic Union, and in March 2013 this became the first South African BIT to be terminated. Over the following year, South Africa also terminated its BIT with Spain and submitted official notice of its intention to terminate its BITs with the Netherlands, Germany and Switzerland.

On 1 November 2013, the Government published the draft Promotion and Protection of Investment Bill ('the Bill'), which sets out the rights and obligations of local and foreign investors and of the Government and which, when it becomes law, will establish a new legal framework for investor and investment protection in South Africa, one based on national legislation rather than on BITs.

The Bill includes provisions dealing with many of the issues typically addressed in BITs, including national treatment, security of investment, expropriation and dispute settlement. However, some provisions typically found in BITs – including South Africa's own BITs – are not included in the Bill. Notably, the Bill does not include an obligation on South Africa to provide fair and equitable treatment to foreign (or local) investors. Furthermore, the actual content of some of the provisions contained in the Bill differs quite substantially from that contained in equivalent BITs provisions. For example, while South Africa's BITs guarantee full protection and security to covered investors, the Bill states only that South Africa must accord foreign investors and their investments an 'equal level of security as may be generally provided to other investors and subject to available resources and capacity' (Section 7(1)).

More significant is the draft Investment Bill's treatment of expropriation. South Africa's BITs prohibit the nationalisation or expropriation of foreign investments as well as any 'measures having an equivalent effect', except where this is undertaken in a nondiscriminatory manner for a public purpose and in line with domestic law. By contrast, the Bill states that investments 'may not be expropriated except in accordance with the Constitution and in terms of a law of general application for public purposes or in the public interest' (Section 8(1)). The Bill also explicitly highlights a number of acts which 'do not amount to acts of expropriation', including measures which have an 'incidental or indirect adverse impact on the economic value of an investment' and measures which aim to protect or enhance 'legitimate public welfare objectives, such as public health or safety, environmental protection or state security' (Section 8(2)).

In explicitly listing a number of measures that are not to be interpreted as expropriation, and in omitting any reference to 'measures having an equivalent effect', or to the requirement that expropriation must be carried out in a 'nondiscriminatory' manner, the Bill provides a much narrower conceptualisation of expropriation than that contained in South Africa's BITs, but one which is nevertheless consistent with South African law and the South African Constitution. In doing so, it reduces the scope for a foreign investor to submit a claim for damages against the South African Government on the basis that a particular law or administrative act amounted to an indirect expropriation of its investment, as the European mining investors claimed in the Foresti case (Lang, 2013: 3).

Moreover, unlike South Africa's BITs which guarantee fair market value in respect of expropriation, the Bill specifies that compensation for expropriation 'must reflect an equitable balance between the public interest and the interests of those affected', and that market value is just one of a number of factors to be considered when determining how this standard is to be applied, alongside 'the current use of the investment', 'the history of the acquisition and use of the investment' and 'the purpose of the expropriation' (Section 8(3)). Again, this is consistent with the South African Constitution's treatment of compensation in cases of expropriation. Importantly, the Bill also fails to include a provision guaranteeing foreign (or local) investors the right to refer investment disputes to international arbitration. Instead, the Bill provides for an investor to initiate a mediation process, approach 'any court, competent, independent tribunal or statutory for the resolution of a dispute' or refer a dispute to arbitration under South Africa's Arbitration Act of 1965 (Section 11).

Finally, the Bill places significant emphasis on protecting the sovereign right of the South African government to regulate and legislate in the public interest and expressly reserves the right of the South African government to 'redress historical, social and economic inequalities', 'promote and preserve cultural heritage and practices and indigenous knowledge', 'foster economic development, industrialisation and beneficiation' and 'achieve the progressive realisation of socio-economic rights' (Section 10(1)), through, *inter alia*. taxation, subsidies or grants, government procurement processes and other measures (Section 4(3)).

From the South African Government's point of view, the shifting of the country's investor protection framework from the use of BITs to domestic legislation is intended to bring the governance of foreign investment in line with the South African Constitution, to create a level playing field between local and foreign investors and to ensure a better balance between the interests of foreign investors and the right of the South African government to introduce policy measures in the public interest (Davies, 2004). From the point of view of foreign investors currently covered by one of South Africa's BITs, however, this new approach represents a potential downgrade in investor protection.

Even if the Promotion and Protection of Investment Bill codified the exact same rights and standards of protection as found in South Africa's BITs, which it clearly does not, the move from BITs to domestic legislation would still result in less certainty and predictability for foreign investors (or at least those previously covered by a BIT). This is because a BIT is a legally binding treaty which can only be amended or terminated according to the procedures set out in the treaty itself. Domestic legislation, on the other hand, is open to unilateral amendment by the state in question. Whereas a foreign investor covered by a BIT can be reasonably sure that the protections provided for in that BIT will apply for at least the initial fixed term of the treaty itself (plus any specified period of post termination application), an investor relying on similar rights and guarantees provided for in the laws of the host state cannot be totally sure that those laws will not be changed or removed in the near future. Indeed, the need to address this concern is one of the reasons why BITs have become such widely used instruments.

7. The SADC Model Bilateral Investment Treaty Template

Another recent development signaling a shifting approach to investment governance in southern Africa was the publication in 2012 of the SADC Model Bilateral Investment Treaty Template ('Model BIT'), developed in line with the overall goal of the SADC Protocol on Finance and Investment to promote the harmonisation of SADC member states' investment policies and laws (SADC, 2012). The Model BIT, which was prepared by a drafting committee consisting of representatives from Malawi, Mauritius, Namibia, South Africa and Zimbabwe[6] and a Senior Advisor from the International Institute for Sustainable Development (IISD), is not a legally binding document, but a template intended for use by SADC member states in the development of their own model BITs or as a guide for future investment treaty negotiations (Ibid.).

The Model BIT is structured in the form of a traditional investment treaty, but provides a menu of differing model clauses for fleshing out the provisions usually found in BITs, as well as commentary on the rationale for – and suitability of – the different options presented. The Model BIT advocates an approach that aims to provide an appropriate balance between the interests of foreign investors and the SADC member states' development objectives. Indeed, it recommends that the preamble of SADC member states' BITs should be used to explicitly state this aim, so as to prevent 'unintended expansive interpretation of substantive provisions in favour of investors' (Ibid.: 6). According to the Model BIT, BIT preambles should also be used to 'reaffirm the right of State Parties to regulate' in order to meet national policy objectives (Ibid.: 5).

What is particularly interesting about the Model BIT is that it proposes a number of significant deviations from the standard BIT provisions found in SADC member states' existing treaties. For example, on the issue of nondiscrimination, the Model BIT recommends against the inclusion of an MFN provision, arguing that BITs, as bilateral agreements, should not be used to establish 'unintended multilateralization' (Ibid.: 22). In addition, while the Model BIT includes a provision on national treatment, it recommends that SADC member states limit the scope of this provision by scheduling a list of nonconforming measures and excluded sectors or subsectors to which the national treatment provision will not apply (Ibid.: 20-22).

The Model BIT also cautions against the inclusion of a fair and equitable treatment provision, and recommends that the SADC member states should rather include a provision on 'fair administrative treatment' (Ibid.: 22-24). The fair

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[6] Representatives from Angola, Botswana, Mozambique and the Seychelles also participated in the final drafting committee meeting (SADC, 2012).

administrative treatment formulation was developed and proposed by the South African Government and aims to avoid the most controversial aspects of the fair and equitable treatment formulation while still addressing state actions towards an investor that should create a liability. The approach is narrower in scope than the fair and equitable treatment approach, uses the language of governance standards rather than investor rights and sets a relatively high threshold for a 'breach of natural justice' (Ibid.: 24).

On the issue of expropriation, the Model BIT follows the standard BIT approach to expropriation, with three exceptions. Firstly, it recommends omitting the condition that an expropriation be nondiscriminatory. Secondly, it advocates the use of a 'fair and adequate' standard of compensation and suggests that such a standard need not necessarily be determined on the basis of full market value, but could instead be determined on the basis of an 'equitable balance between the public interest and interest of those affected' (Ibid.: 24-26). Finally, the Model BIT recommends that SADC member states include a clause stating that a nondiscriminatory measure 'designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment', does not constitute an indirect expropriation (Ibid.: 25).

Unlike many older generation BITs, the Model BIT includes a number of specific obligations on investors pertaining to issues such as corruption, compliance with domestic law, the provision of information, environmental and social impact assessments, environmental management, minimum standards for human rights and labour standards, corporate governance and transparency (Ibid.: 32-38). In order to address the enforcement of these obligations, the Model BIT also recommends the inclusion of a provision allowing counterclaims by a host state so that breaches of these investor obligations can be taken into account in any dispute settlement proceedings initiated under the relevant treaty (Ibid.: 39). Furthermore, the Model BIT recommends the inclusion of a provision stating that a host state 'may initiate a civil action in domestic courts' against an investor for damages arising from an alleged breach of the relevant investor obligations (Ibid.: 39).

In order to emphasise the broader objective of an appropriate balance between the rights and obligations of investors and host states, the Model BIT proposes the inclusion of a provision confirming that the treaty 'does not alter the Host State's basic right to regulate' and specifying that nondiscriminatory measures taken by a state party to comply with its international obligations under other treaties shall not constitute a breach of the agreement in question (Ibid.: 40). The Model BIT also recommends the inclusion of a provision recognising a host state's 'right to pursue development goals' and to take measures necessary to address 'historically based economic disparities suffered by identifiable ethnic or cultural groups' due to past 'discriminatory or oppressive measures against such groups' notwithstanding any other provision of the agreement (Ibid.: 40-41). This exclusion is particularly relevant in the light of the BEE measures adopted in some southern African countries.

The Model BIT also draws on Article XX of the General Agreement on Tariffs and Trade (GATT) and other regional and bilateral agreements by including a list of exceptions for SADC member states to specify in their BITs. These concern *inter alia* measures relating to public morals and safety; protection of human, animal or plant life or health; conservation of natural resources; environmental protection; prudential matters; taxation measures; nondiscriminatory measures of general application taken in pursuit of monetary, credit or exchange rate policies; and protection of national security (Ibid.: 46-47).

Finally, on the critical issue of dispute settlement, the Model BIT takes the view that SADC member states should not include a provision granting investors the right to bring disputes directly against host states (Ibid.: 55). In other words, it recommends omitting the investor-state dispute settlement provision found in almost all BITs. Instead, the Model BIT recommends the inclusion of a state-state dispute settlement provision that deals with disputes between the state parties over the interpretation or application of the treaty, but which also allows state parties to claim damages on behalf of an investor for an alleged breach of the treaty (Ibid.: 52-54). The Model BIT further recommends that state parties should only be able to submit a claim to arbitration on behalf of an investor if the investor has first exhausted local remedies or if the state party can demonstrate that no appropriate domestic remedies are available.

Taken together, the proposals and recommendations contained in the Model BIT, including the recommendation that state parties schedule exceptions to the national treatment provision, the proposal to include a fair administrative treatment provision instead of a fair and equitable treatment provision and the recommendations against guaranteeing fair market-value compensation in respect of expropriation or allowing for investor-state dispute settlement, add up to an approach that is somewhat at odds with the traditional standards and provisions contained in the BITs previously signed by SADC member states. This approach is also not entirely consistent with the provisions contained in the Investment Annex of the SADC Protocol on Finance and Investment. If SADC member states adopt the recommendations in the Model BIT as the basis for future BITs, the standard of protection provided to foreign investors under those future treaties will be quite different to the standard of protection currently available to foreign investors in southern Africa, especially if, as discussed below, the Investment Annex of the FIP is amended.

8. Conclusion

SADC countries are not alone in exploring new approaches to investment governance. Changing global economic realities, such as the rise of developing countries as both sources and recipients of foreign investment, the growing importance in the world economy of transnational corporations and their international production networks and the movement of many governments away from a 'hands-off' approach to economic policy, have contributed to something of a paradigm shift in investment policymaking of late (UNCTAD, 2013). One significant recent trend has been the ongoing reassessment by numerous countries of their BITs and other IIAs. Some governments, such as those of the United States and Canada, have recently revised their model BITs (United States Department of State, 2012; Titi, 2007), while others, such as those of Bolivia and Venezuela have terminated existing BITs (Luque, 2013). These actions are partly a response to an increasing number of international investor-state claims. A record 58 investor-state disputes were filed in 2012, and by the end of that year the total number of known treaty-based disputes reached 514 (UNCTAD, 2013). In addition, some of these recent claims touch upon sensitive public policy issues.

Scholars and policymakers are also increasingly questioning the rationale of BITs and the role they play in promoting FDI. The empirical literature is somewhat divided over whether BITs play a significant role in promoting FDI flows to developing countries, with some studies suggesting that BITs do promote FDI flows to developing countries (Busse et al., 2008), and others finding 'little evidence that BITs have stimulated additional investment' (Hallward-Driemeier, 2003: 22) in developing countries. As noted above, the South African Government's review of its BITs found that the relationship between these instruments and foreign investment flows into the country is somewhat ambiguous.

In the light of this, new approaches to investment protection and promotion are emerging through developments at the national and regional level and the advocacy work of international organisations such as the IISD and UNCTAD (UNCTAD, 2013). These approaches place more emphasis on investment promotion, and, in particular on ensuring that the foreign investment being attracted through investment protection instruments actually supports the sustainable development goals of host states. These new approaches also seek to ensure the preservation of appropriate regulatory space for host state governments.

This chapter has highlighted two recent developments in southern Africa which suggest that at least some of the countries in the region are seeking to adopt new strategies for promoting and protecting foreign investment in their territories. In addition, these two developments (South Africa's overhaul of its investor protection framework and the publication of the SADC Model BIT Template) illustrate two different methods that SADC countries could use to implement a new investment governance regime. These countries could follow South Africa's lead by terminating their existing BITs and replacing them with domestic legislation, or they could continue to use BITs as key instruments of investment governance, but seek to negotiate treaties that incorporate the recommendations contained in the SADC Model BIT Template.

There are striking similarities between the recommendations contained in the Model BIT and the provisions of South Africa's draft Promotion and Protection of Investment Bill. In line with the Model BIT recommendations, the Bill makes no provision for fair and equitable treatment, does not oblige the payment of fair market-value compensation in respect of expropriation and does not guarantee investors the right to take disputes to international arbitration. Given these similarities it would seem that both developments suggest the emergence of a new approach to investment governance in southern Africa that omits many of the standards that have long been central to BITs and other instruments of investment governance.

If, as seems to be the case, certain countries in the region are seeking the removal of these standards from their national investment governance frameworks, there is a strong likelihood that they will also push for a renegotiation of the Investment Annex of the SADC Protocol on Finance and Investment. This is because the Investment Annex essentially guarantees foreign investors in the region, *inter alia*, fair and equitable treatment and prompt, adequate and effective compensation in respect of expropriation, and the SADC member states that are party to the FIP are bound by these obligations regardless of whether they have removed such guarantees from their own BITs (or domestic investment legislation). Furthermore, if a SADC member state does not comply with these obligations, a foreign investor is able to invoke the provision on investor-state dispute settlement in the FIP Investment Annex to submit a claim against the relevant host state to international arbitration. If the FIP Investment Annex is not renegotiated, efforts to specifically omit standards such as fair and equitable treatment and investor-state dispute settlement from new investment governance instruments would be somewhat pointless as these standards would still apply under the FIP.

Finally, while there may be good reasons for SADC countries to explore new approaches to investment governance that provide a more ‘appropriate’ balance between the interests of foreign investors and the right of governments to regulate in the public interest, it is at least possible that efforts to discard of principles such as fair and equitable treatment, the guarantee of fair market value compensation in respect of expropriation and the right of investors to submit disputes against host states to international arbitration may actually decrease the attractiveness of southern African countries as investment destinations, and as a result lead to lower levels of investment into the region. As this would surely not be a result that would be in the interests of the region’s publics, it is crucial that policymakers in the region assess carefully whether there are actually any advantages to doing away with these principles, and, if so, whether these advantages outweigh the potential risk of reduced investment in the region.

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Chapter 5

The admission of foreign legal practitioners in South Africa: a GATS perspective

J.B. Cronjé

1. Introduction

In 1995 South Africa made legally binding commitments to liberalise legal services under the World Trade Organisation (WTO) General Agreement on Trade in Services (GATS). The commitments allow foreign legal practitioners to establish a commercial presence in and transfer personnel, including legal practitioners, to South Africa (WTO, 1994). The present paper attempts to analyse South Africa's commitments under GATS in the light of current and proposed legislation governing the admission and enrolment of foreign legal practitioners in South Africa.

2. Background

The legal services sector has experienced several changes as a consequence of the growth in international trade. All over the world lawyers are required to provide services and advice to their clients who do business across borders. Businesses and organisations involved in international transactions need reliable, up-to-date and integrated services covering all aspects of such transactions.

The demand for these legal services is mostly about international law and business law, including corporate restructuring, privatisation, cross-border mergers, acquisitions, intellectual property rights, financial instruments and competition law. The clients are, as a rule, corporations. Occasionally, individuals also require international legal services but thesis usually limited to domestic law matters such as real estate, criminal offences, divorces, and so forth.

In order to meet the demands of corporate clients, law firms started to establish international networks of local firms from different countries operating under the same brand name or in integrated international partnerships. International networks range from loose associations of independent local practices to fully integrated multinational companies. Integrated international partnerships tend to specialise in business and international law, whereas networks, due to their decentralised and local character, often also engage in the provision of domestic law legal services.

South Africa's legal services sector has not escaped these changes. The proliferation of South African companies doing business in Africa and an increasing number of foreign businesses using South Africa as a springboard to do business in other parts of the continent necessitated local legal firms to expand their offering to clients to include cross-border legal advice. South Africa's five biggest law firms, Bowman Gilfillan, Cliffe Dekker Hofmeyr (allied with Anglo-American multinational law firm, DLA Piper), Edward Nathan Sonnenbergs, Norton Rose South Africa (incorporated as Deneys Reitz Inc.) and Webber Wentzel (in alliance with Linklaters), all provide legal services to their clients in different forms throughout Africa. For example, Bowman Gilfillan Africa Group operates offices in Kenya, Tanzania and Uganda and has a working relationship with a Nigerian firm. Edward Nathan Sonnenbergs has established offices in Burundi, Rwanda and Uganda. The Cliffe Dekker Hofmeyr Piper Africa Group consists of affiliated member firms or relationship firms in Botswana, Zambia, Tanzania, Rwanda, Kenya, Uganda, Ethiopia, Mauritius, Egypt and Ghana. Norton Rose operates in Morocco and Tanzania and Webber Wentzel is associated with Africa Legal Network, an independent alliance of twelve African law firms in Botswana, Burundi, Ethiopia, Kenya, Malawi, Mauritius, Mozambique, Kenya, Sudan, Tanzania, Uganda and Zambia.

Another important phenomenon which has influenced changes in the legal services sector is legal process outsourcing. Many law firms increasingly outsource legal support services to other law firms or to legal support services companies, often located in another country. Outsourced legal work includes secretarial functions (e.g. document preparation, storage), billing, legal research and writing, contract drafting and review, litigation support services, and electronic discovery services. Traditionally, most of the outsourced work is done by junior lawyers or paralegals in law firms. South Africa has become one of the most popular international destinations for legal process outsourcing; the local legal profession is able to offer highly trained English-speaking professionals at an attractive price.

It is clear from the aforementioned that South Africa is involved in international trade in legal services; this consists mostly in the transmission of legal documents or advice via the post or telecommunications devices and, to a lesser extent, through the temporary stay of persons travelling abroad as self-employed professionals or as employees/partners of foreign-based law firms. They provide mainly advisory legal services as foreign legal consultants in international law, the law of their home country or the law of a third country for which they possess a qualification. In most cases legal counselling, as opposed to lawyers/advocates whose main role is representation before a court, is limited to matters involving transactions, relationships and disputes that do not involve court proceedings (WTO, 1998).

Domestic law or host-country law plays a limited role in international trade in legal services due to the national character of the law and legal education. As a result, locally established foreign firms are often required to employ locally qualified lawyers if they wish to expand their businesses to provide host-country law services. This happened in 2012, for example, when the global law firm, Baker & McKenzie, took over Dewey & LeBoeuf's Johannesburg offices, and when the Canadian firm, Fasken Martineau merged with the South African firm, Bell Dewar. One of the world's leading global law firms, White & Case LLP, established offices in South Africa as far back as 1995 and employs a number of locally qualified lawyers. The liberalisation of legal services can therefore lead to increased employment of local lawyers by locally established foreign firms and legal support services companies, attract foreign investment, and help to create opportunities abroad for local businesses. This demands market access opportunities for foreign legal providers to establish offices and to practise their profession in another country which in turn necessitates mechanisms to verify and recognise their academic and professional qualifications.

3. South Africa's GATS commitments on legal services

South Africa is a member of the WTO and must adhere to and implement the provisions of GATS. Each WTO member state must set out the negotiated commitments it undertakes in a schedule of specific commitments which is annexed to GATS and forms an integral part thereof. Noncompliance with any GATS provision or specific commitment enables any other WTO member state to institute dispute settlement proceedings under its enforcement regime, the Understanding on Rules and Procedures Governing the Settlement of Disputes.

In services sectors where commitments are undertaken, the schedule must specify the terms, limitations and conditions on market access (GATS Article XVI); the conditions and qualifications on national treatment (GATS Article XVII) for each of the four modes of supply; where appropriate the time-frames for implementation of such commitments; and the date of entry into force (GATS Article XX).

GATS Article I defines trade in services as the supply of a service:

- from the territory of one member into the territory of any other member (Mode 1/cross-border supply),
- in the territory of one member to the service consumer of any other member (Mode 2/consumption abroad),
- by a service supplier of one member through commercial presence in the territory of any other member (Mode 3/commercial presence),
- by a service supplier of one member through presence of natural persons in the territory of any other member (Mode 4/temporary movement of natural persons).

Once a member state has undertaken liberalisation commitments in a specific services sector, it is under an obligation not to maintain or introduce discriminatory and/or quantitative measures unless it has been listed in the member state's schedule of specific commitments.

In the WTO's Services Sectoral Classification List (WTO, 1991) 'legal services' is classified as 'professional services' under the 'business services' sector. This entry corresponds with the Central Product Classification (CPC) number 861 of the United Nations Provisional CPC and is subdivided and defined in different categories. The classification and definition of legal services in the Provisional CPC has evolved over time. The Provisional CPC has been revised three times with the most recent revision, CPC Version 2, completed in 2008. South Africa's WTO GATS commitments have remained unchanged and are still as classified and defined in the Provisional CPC of 1991 as follows:

> **Legal advisory and representation services concerning criminal law**
> Legal advisory and representation services during the litigation process, and drafting services of legal documentation in relation to criminal law. Generally, this implies the defence of a client in front of a judicial body in a case of criminal offence. However, it can also consist of acting as a prosecutor in a case of criminal offence when private legal practitioners are hired on a fee basis by the government. Included are both the pleading of a case in court and out-of-court legal work. The latter comprises research and other work for the preparation of a criminal case (e.g. researching legal documentation, interviewing witnesses, reviewing police and other reports), and the execution of post-litigation work, in relation to criminal law.
>
> **Legal advisory and representation services in judicial procedures concerning other fields of law**
> Legal advisory and representation services during the litigation process, and drafting services of legal documentation in relation to law other than criminal law. Representation services generally consist of either acting as a prosecutor on behalf of the client, or defending the client from a prosecution. Included are both the pleading of a case in court, and out-of-court legal work. The latter comprises

research and other work for the preparation of a case (e.g. researching legal documentation, interviewing witnesses, reviewing police and other reports), and the execution of post-litigation work, in relation to law other than criminal law.

Legal advisory and representation services in statutory procedures of quasi-judicial tribunals, boards, etc.
Legal advisory and representation services during the litigation process, and drafting services of legal documentation in relation to statutory procedures. Generally, this implies the representation of a client in front of a statutory body (e.g. an administrative tribunal). Included are both the pleading of a case in front of authorised bodies other than judicial courts, and the related legal work. The latter comprises research and other work for the preparation of a non-judicial case (e.g. researching legal documentation, interviewing witnesses, reviewing reports), and the execution of post-litigation work.

Legal documentation and certification services
Preparation, drawing up and certification services of legal documents. The services generally comprise the provision of a number of related legal services including the provision of advice and the execution of various tasks necessary for the drawing up or certification of documents. Included are the drawing-up of wills, marriage contracts, commercial contracts, business charters, etc.

Other legal advisory and information services
Advisory services to clients related to their legal rights and obligations and providing information on legal matters not elsewhere classified. Services such as escrow services and estate settlement services are included.

Added to this definition and classification of legal services, countries differentiate between foreign legal practitioners who are allowed to practise domestic law, international law and the law of their home country or of a third country. In each case a further distinction can be made between advisory services or consultancy services and representation services which allow foreign legal practitioners to present a client before a domestic count or arbitral tribunal in the host country. The distinction between advice and representation is derived from English law, where the profession of solicitor (counselling) is separated from that of barrister (court representation). South Africa maintains a similar distinction although separation between the two professions is nowadays less rigid than in the past (WTO, 1998).

Based on this definition and classification, South Africa made specific commitments on the establishment of a commercial presence (Mode 3) and the temporary transfer of personnel (Mode 4) to South Africa. The commitments are limited to the supply of legal advisory services in foreign, international and domestic law and legal representation services in domestic law by a locally established legal entity. Such an entity must be owned or controlled by natural or legal persons of any other WTO member state. The specific commitments include undertakings on market access and national treatment on legal services under Modes 3 and 4 (WTO, 1994). GATS commitments on national treatment require the absence of all discriminatory domestic measures that may modify the conditions of competition to the detriment of foreign legal practitioners (GATS Article XVII). The obligation on national treatment prohibits both *de jure* and *de facto* forms of discrimination. Therefore the national treatment obligation requires foreign legal practitioners to be granted equal opportunities to compete with local legal practitioners. With respect to market access South Africa is not allowed to maintain or adopt quantitative restrictions, unless otherwise specified in its schedule of specific commitments (GATS Article XVI). The only trade-restrictive market-access measure entered into South Africa's schedule of specific commitments is the prohibition on advocates from forming partnerships or companies (WTO, 1994). However, this is not a discriminatory measure because it applies equally to foreign and domestic legal practitioners practising law.

The country made no commitments under Modes 1 and 2 and is therefore not prohibited from limiting or restricting the supply of legal services from across border into the country or consumption of legal services abroad. Cross-border trade typically covers situations where clients receive legal services from abroad via the post or telecommunications devices. No market access or national treatment commitments were undertaken on the cross-border supply and the consumption abroad of legal services. South Africa can therefore maintain or introduce restrictions on cross-border trade in legal services, if they are applied in a nondiscriminatory manner to all WTO members.

South Africa's full liberalisation commitment on the establishment of a commercial presence by foreign law firms prohibits it from maintaining or introducing conditions on market access and national treatment. A foreign legal firm has the right to establish a practice in South Africa to provide legal advisory services on domestic, foreign and international law and legal presentation services concerning domestic law. These firms are allowed to transfer professional staff under Mode 4 to South Africa for a limited period of time. South Africa made commitments on the temporary movement of service suppliers in the horizontal section of its schedule of specific commitments (WTO, 1994). The relevant commitments grant market access and national treatment to the following categories of persons that are engaged in the provision of legal services:

- Temporary presence for a period of up to three years, unless otherwise specified, without requiring compliance with an economic needs test, of the following categories of natural persons providing services:
- Intra-corporate transferees - natural persons of the following categories who have been employed by a juridical person that provides services within South Africa through a branch, subsidiary, or affiliate established in South Africa and who have been in the prior employ of the juridical person outside South Africa for a period of not less than one year immediately preceding the date of application for admission:
- Executives – natural persons within the organisation who primarily direct the management of the organisation or establish goals and policies for the organisation or a major component or function of the organisation, exercise wide latitude in decision making, and receive only general

supervision or direction from higher-level executives, the board of directors, or stockholders of the business.

- Managers – natural persons within an organisation who primarily direct the organisation, or a department or subdivision of the organisation, supervise and control the work of other supervisory, professional or managerial employees, have the authority to hire and fire or recommend hiring, firing, or other personnel actions and exercise discretionary authority over day-to-day operations at a senior level.
- Specialists – natural persons within an organisation who possess knowledge at an advanced level of continued expertise and who possess proprietary knowledge of the organisation's product, service, research equipment, techniques, or management.
- Professionals – natural persons who are engaged, as part of a services contract negotiated by a juridical person of another member in the activity at a professional level in a profession set out in Part II, provided such persons possess the necessary academic credentials and professional qualifications, which have been duly recognised, where appropriate, by the professional association in South Africa.

In other words, foreign legal firms may establish a commercial presence in South Africa and transfer personnel, including professional staff members, to work as legal practitioners for a period of up to three years, provided they possess the necessary academic and professional qualifications which have been recognised by the professional body in South Africa.

Apart from the specific undertakings on legal services and their accompanying obligations on market access (GATS Article XVI) and national treatment (GATS Article XVII) South Africa must comply with the general GATS obligations on most-favoured-nation (MFN) treatment (GATS Article II), recognition of qualifications (GATS Article VII) and domestic regulation (GATS Article VI).These obligations bind all WTO members irrespective of whether scheduled commitments have been undertaken.

The MFN treatment provision in GATS Article II obliges a member state to grant all WTO members treatment that is no less favourable than that it accords any other member. It prohibits the application of measures that discriminates between WTO member states. The only exceptions to the MFN treatment obligation include measures listed as MFN exemptions in accordance with the GATS Annex on Article II Exemptions (GATS Article II(2)), mutual recognition agreements (GATS Article VII) and economic integration agreements (GATS Article V). To date, South Africa has not made or applied for an exemption on legal services or concluded economic integration agreements on services or mutual recognition agreements. South Africa is party to negotiations for the conclusion of an economic integration agreement, the Southern African Development Community (SADC) Protocol on Trade in Services. The negotiations have not been concluded and may include commitments on the liberalisation of legal services in the SADC region. The same consideration could later apply to the second phase of the Comesa-EAC-SADC[1] Tripartite Free Trade Agreement negotiations. It would be necessary for all the parties involved in these negotiations to consider the implications of GATS Article V.

The provision of market access to foreign legal practitioners to establish law firms and to transfer professional staff members should not be confused with the recognition of their academic and professional qualifications. The recognition of education and other qualifications obtained abroad should be viewed separately from market-access commitments. A member state is under no obligation to recognise the education or experience obtained, requirements met, or licences/certification granted in any other member state. GATS Article VII(1) provides that a member state may recognise foreign qualifications, licences, and so on, granted in a particular country. Recognition can be achieved through harmonisation or otherwise, be based upon an agreement with any other member or may be accorded unilaterally provided such recognition is not accorded in a manner that would constitute a means of discrimination between countries (GATS Article VII(1) and (3)). This provision is an exception to the MFN treatment obligation. In the case of an agreement between two or more

[1] The Common Market for Eastern and Southern Africa, the East African Community and the Southern African Development Community.

countries, other countries must be afforded the opportunity to negotiate their accession to such agreement (GATS Article VII(2)). These agreements must be notified to the WTO (GATS Article VII(4)). To date, South Africa has not concluded any mutual recognition agreements.

Where WTO members, such as South Africa, accord recognition unilaterally, other member states must be afforded the opportunity to demonstrate that education, experience, licences or certifications obtained or requirements met in that member state should be recognised (GATS Article VII(2)). Unilateral recognition measures should also be notified to the WTO.

GATS provides, where appropriate, that recognition of qualifications should be based on common international standards and criteria for the recognition and practice of the relevant services trades and professions (GATS Article VII(5)). For example, the International Bar Association developed and adopted guidelines contained in its *General principles for the establishment and regulation of foreign lawyers* and *Standards and criteria for recognition of the professional qualifications of lawyers.* These standards and criteria should be considered by South Africa when it develops regulations or concludes agreements on the recognition of foreign legal practitioners. South Africa's General Council of the Bar, the Law Society of South Africa, the Law Society of the Cape of Good Hope, the Kwazulu-Natal Law Society, the Law Society of Northern Provinces, and the Corporate Lawyers Association of South Africa are all members of the International Bar Association.

GATS Article VI obliges member states to bring their domestic regulations in line with their WTO obligations. Article VI provides that in sectors where specific commitments are undertaken all domestic measures affecting trade in that service must be administered in a reasonable, objective and impartial manner (GATS Article VI(1)). The motivation for this obligation is to prevent an erosion of the value of commitments through nondiscriminatory and nonquantitative impediments concealed in domestic regulation or in the administration thereof. If a member state makes commitments in a professional services sector, such as legal services, it must provide for adequate procedures to verify the competence of professionals of any other member state (GATS Article VI(6)). In cases where authorisation and registration are required, licensing and qualification requirements must be based on objective and transparent criteria and may not be trade-impeding or needlessly burdensome (GATS Article VI(5)). Local licensing or qualification authorities must inform a foreign applicant of their decision concerning an application and, if requested, provide information concerning the status of the application (GATS Article VI(3)). An affected applicant has the right to challenge any administrative decision affecting trade in services including decisions concerning the verification of professional competences, qualifications and licences and have such decisions reviewed by local courts or tribunals (GATS Article VI(2)(a)). Where judicial, arbitral or administrative tribunals and procedures are not independent of the agency entrusted with administrative decisions, member states must ensure that the applicable procedures in fact provide for an objective and impartial review of administrative decisions (GATS Article VI(2)(a)). It is therefore essential to evaluate existing and proposed legislation regulating the legal profession in the light of South Africa's legal commitments under WTO law. This may then result in the need for incorporating the relevant GATS provisions into the law of the land.

4. The admission and enrolment of foreign legal practitioners in South Africa

The legal profession in South Africa is divided into advocates and attorneys and are regulated by the General Council of the Bar of South Africa and the Law Society of South Africa respectively. No dual practice is allowed, but there are efforts in South Africa to change this dispensation. Legal practitioners are regulated by different laws and each has its own set of admission requirements. The legislation differentiates between the potential recognition of foreign-obtained academic qualifications and foreign-obtained professional qualifications for the admission and enrolment of foreign legal practitioners.

South Africa's qualification assessment system

In general, the recognition of foreign qualifications by the South African Qualifications Authority (SAQA) as established by the National Qualifications Framework Act 67 of 2008 entails both an evaluation of a qualification that informs a decision to recognise a foreign qualification and a formal acknowledgement of that qualification allowing the qualification holder to access employment or further studies in South Africa. SAQA's function is to compare foreign qualifications with South African qualify-cations and to make a recommendation on the recognition of that qualification in South Africa. Its recommendations are intended to be general guidelines and are not binding on other institutions such as professional bodies or education and training institutions. Its recommendations are merely to clarify structural comparability and serve as a point of departure for further context specific assessment.

In terms of Article 3 of the Admission of Advocates Act 74 of 1964, a person can be admitted to practise and enrol as an advocate if that person is:

- over the age of 21 years and is a fit and proper person to be admitted;
- duly qualified;
- a South African citizen or a permanent resident.

In the case of academic qualification requirements, a person is considered duly qualified if such person has obtained:

- a four-year Legum Baccalaureus (LLB) undergraduate degree at a South African university; or
- a postgraduate LLB degree at a South African university after completing a bachelor's degree other than an LLB degree at a South African university or a degree that has been admitted to the status of a bachelor's degree by a South African university and after completing a period of study for such degrees for not less than five years in the aggregate; or

- a degree of a university in a country which has been designated by the Minister of Justice and Constitutional Development after consultation with the General Council of the Bar of South Africa (Article 3(2)(a)).

In last-mentioned case, it should be noted that it is a country which has to be designated, not a specific degree. In addition, such a degree must also be certified as equivalent to the South African LLB degree by the law faculty of a South African university. Namibia (GG, 2003a), Zimbabwe (GG, 2003b), Nigeria (GG, 2000a and 2003c) and Lesotho (GG, 2004) are the only countries that have been designated by the minister for this purpose. Law degrees from universities in these countries could be certified as of the same or higher status than the local equivalent for the purpose of meeting the academic qualification requirement for admission and enrolment.

In other words, unless a person has obtained a degree from a university in a designated country he or she must complete a South African undergraduate LLB degree or at least a postgraduate LLB degree if their foreign academic qualification has been admitted to the status of a bachelor's degree by a South African university. Measures providing for the recognition of academic qualifications through the designation of certain countries constitute a violation of the MFN treatment obligation, but could be justified as a form of unilateral recognition under GATS Article VII. Unilateral recognition measures should be notified to the WTO. However, recognition of foreign academic qualifications does not automatically translate into professional recognition which is, as mentioned, a separate process regulated by the particular professional body.

In the case of professional qualification requirements, any division of the Bar in the country may admit a legal professional practising outside the country to practise in South Africa provided the person has been admitted as an advocate in a designated country, resides and practises as an advocate in that country, is fit and proper to be admitted, and has no disciplinary proceedings pending or contemplated against him or her (Article 5). Namibia (GG, 2003a), Zimbabwe (GG, 2003b), Nigeria (GG 2000a and 2003c) and Lesotho (GG, 1993a) are the only countries that have been designated countries in terms of this particular provision. Advocates from these countries may be allowed to practise across border in South Africa. This provision constitutes a violation of the MFN treatment obligation because it is not applied in a nondiscriminatory manner to all other WTO member states and has not been listed as an exemption in the Annex on Article II Exemptions.

The general requirements for admission and enrolment as an attorney are prescribed by the Attorneys Act 53 of 1979. A person can be admitted and enrolled as an attorney if that person:

- is over the age of 21 years and is a fit and proper person to be admitted and enrolled;
- is a South African citizen or permanent resident;
- has served under articles of clerkship for a period of:
    1. two years after obtaining a four-year LLB degree from a South African university; or
    2. two years after obtaining a postgraduate LLB degree at a South African university after completing a bachelor's degree other than a LLB degree at a South African university or a degree that has been admitted to the status of a bachelor's degree by a South African university and after completing a period of study for such degrees for not less than five years in the aggregate; or
    3. two years after obtaining a degree at a university outside the country which has been designated by the minister after consultation with the presidents of the various societies and provided the degree has been certified as equivalent to the South African degree by the law faculty of a South African university together with a supplementary examination, if required; or
    4. three years after obtaining any degree other than an honorary degree at a South African or designated country's university; or
    5. three years after he or she has passed the secondary school examination or equivalent and served for a period of two years as a clerk to a judge of the supreme court; or
    6. five years after he or she has passed the secondary school examination or equivalent;

- has passed the practical examinations.

Any person who has satisfied all the requirements for a degree in 1, 2 and 3 above and has completed an approved four-month training course or has performed community service for a period of one year is exempted from service under articles of clerkship for a period of one year.

The Act provides for three exceptions to the general admission requirements by allowing the minister to recognise the academic qualifications of certain countries (Article 2(1)(aB)), exempt certain foreign qualified permanent residents from vocational training and practical examinations (Article 13), and allow attorneys practising in certain countries to be permitted to practise in South Africa (Article 17).

First, regulations issued under Article 2(1)(aB) of the Attorneys Act provide that Zimbabwe (GG, 1988), Namibia (GG, 2003d), Swaziland (GG, 2003e) and Nigeria (GG, 2000b) have been designated by the minister for the recognition of their law degrees, provided a law faculty at a South African university has certified its law degrees as equivalent and provided the applicant has passed a supplementary examination, if required.

Second, regulations issued under Article 13 of the Attorneys Act provide that permanent residents who have been admitted as attorneys in Zimbabwe before 22 May 1981 are exempted from vocational training and practical examinations, provided they have been admitted and enrolled as attorneys in that country and have practised there for at least five years. If they have practised for less than five years, they must practise as a professional assistant of an attorney for a period of three years before they may start practising for their own account in South Africa. Equally, any person that has been admitted as a notary or conveyancer in Zimbabwe before 22 May 1981 is for the purposes of admission exempted from practical examinations in South Africa. Zimbabwe is the only country which has been designated under this particular provision (GG, 1982).

Third, regulations issued under Article 17 of the Attorneys Act provide that practising attorneys residing in Lesotho may be admitted and enrolled as attorneys in South Africa (GG, 1993b). The designation of certain countries in terms of Article 17 of the Act confers cross-border practising rights to foreign legal practitioners provided they reside and continue to practise in their home countries. This is a violation of the MFN treatment obligation since the measure is not applied in a nondiscriminatory manner to all other WTO member states and has not been listed as an exemption in the Annex on Article II Exemptions. GATS Article II(3) provides an exception to the MFN provision for locally produced and consumed services between 'contiguous frontier zones' of 'adjacent countries'. A similar provision in favour of frontier traffic is found under WTO General Agreement on Tariffs and Trade (GATT) XXIV(3)(a)) allowing freedom of normal economic activity within a restricted zone on each side of the frontier. Certain questions arise as to the extent of the frontier, the locality of production and consumption of the service and whether the exception applies to all modes of supply (Footer, 2005). However, the ability of Lesotho lawyers to practise across the border is not limited to a specific geographical area in South Africa even though most, if not all, trade in legal services is in all likelihood confined to the adjacent Free State province of South Africa. Nevertheless, this measure would not justify the violation of the MFN treatment obligation. The special dispensation for (mostly) neighbouring WTO member states predates South Africa's GATS commitments and will have to be reviewed. If South Africa wishes to maintain the status quoin this particular case and in the case of advocates, it will have to apply to the WTO for a waiver from its MFN treatment obligation. The GATS Annex on Article II Exemptions provides that 'any new exemptions applied for after the date of entry into force of the WTO Agreement shall be dealt with under paragraph 3 of Article IX of that Agreement'. This paragraph provides that the WTO members may in 'exceptional circumstances' decide 'to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements' including GATS, provided such decision is 'taken by three-fourths of the members'. Waivers are granted for a limited period of time and extensions have to be justified. If an application for a waiver is rejected and the member state does not withdraw the inconsistent measure it risks the possibility of any member invoking dispute settlement procedures under the WTO's dispute settlement system against it.

The nationality or permanent residency requirement for the admission of legal practitioners is an example of a measure that would qualify as a limitation on national treatment. In practice, a person can overcome the nationality requirement by taking up permanent residency, but this imposes an additional burden on foreign legal practitioners by requiring them to take up residency in South Africa. This might also lead to the loss of their home-country residency. The residency requirement should be entered as a national treatment condition in the country's schedule of specific commitments.

Another national treatment limitation that should be scheduled relates to the local qualification requirement. The requirement that all legal practitioners, excluding those from designated countries, must be graduates from South African universities appears origin-neutral but discriminates *de facto* against foreign legal practitioners. The vast majority of locals would be graduates from national universities whereas the vast majority of foreigners would have graduated in other countries, even though nothing prevents them from enrolling at a local university. In practice, this local qualification requirement places an additional burden on all foreign legal practitioners wanting to practise in South Africa regardless of the nature of the legal services they wish to supply. This places them at a competitive disadvantage vis-à-vis their local counterparts. It also means that unless a foreign legal practitioner also completes a South African law degree, his or her professional competence cannot be verified by the professional body as required by GATS Article VI(6).

5. Academic qualification requirements under the Legal Practice Bill

The Legal Practice Bill B20 of 2012 intends to provide, among other things, for the restructuring of the profession, a single professional body, and the admission, enrolment and registration of foreign legal practitioners in South Africa. In terms of Article 24(1) of the Bill, a person may only practise as a legal practitioner if he or she is admitted and enrolled to practise. The definition of a legal practitioner in the Bill includes a registered advocate or attorney. The separation between the two branches will remain. The only real concession to this is that advocates may, in certain circumstances, take instructions directly from the public. This change will abolish the referral rule of practice that applies to advocates. The current referral rule of practice provides that an advocate may only provide legal services upon receipt of a brief from an attorney. However, such advocates will in future be required to hold fidelity fund certificates and be subject to the same accounting requirements as attorneys. The possible change will not create new implications for South Africa's obligations under GATS.

The basic requirements for the admission of attorneys and advocates will remain in place. The admission requirements in the Bill include that a person is duly qualified, is a South African citizen or permanent resident, and is fit and proper to be admitted. In addition, the applicant must undertake all the practical vocational training requirements and pass a competency-based examination or assessment for candidate legal practitioners.

A person will be considered duly qualified to be admitted and enrolled as a legal practitioner if that person has obtained the four-year LLB degree at any university in the country or a law degree in a foreign country which is equivalent to the LLB degree and recognised by SAQA. It means that the evaluation of all foreign academic qualifications will in future be done by SAQA and not by the law faculties of local universities as is currently the case with law degrees obtained in designated countries. The minister will also not be required to designate countries to make their legal qualifications receptive to recognition. The legal academic qualifications of any country could in principle meet the minimum qualification requirements. The requirement that the minister must designate such a country will then fall away.

6. Admission and enrolment requirements of foreign legal practitioners under the Legal Practice Bill

Apart from obtaining recognition for foreign-obtained academic qualifications, foreign legal practitioners will in future have to meet all other qualification requirements including the citizenship or permanent residency requirement. Obtaining a permanent residency permit could take up to five years if a foreigner has been residing in the country on the basis of a work permit. According to the Immigration Act 13 of 2002, permanent residency permits may also be issued to foreigners who, among other things, have received a permanent work offer, possess extraordinary skills or qualifications, or intend to establish a business in South Africa. This application process can take up to eight months (Department Home Affairs, 2013).

In addition, foreign legal practitioners are required to undergo practical vocational training in South Africa. This can take up to two years. In addition, they have to pass a competency-based practical examination before they will be admitted and enrolled as a legal practitioner in South Africa.

Article 24(3) of the Bill makes provision for certain exceptions to the general admission and enrolment requirements. Subsection 3 provides that the minister may, after consultation with the yet-to-be-established professional body (the South African Legal Practice Council) draw up regulations in respect of admission and enrolment in order to:

(a) determine the right of foreign legal practitioners to appear in South African courts and to practise as legal practitioners in South Africa:

(b) give effect to any reciprocal international agreement to which the Republic is a party, regulating –

 (i) The provision of legal services by foreign legal practitioners; or

 (ii) The admission and enrolment of foreign legal practitioners; or

(c) if it is in the public interest, permit a person or category of persons concerned, to expeditiously commence practising as a legal practitioner by virtue of his or her academic qualifications or professional experience.

The Bill confers powers on the minister to regulate market access of foreign legal practitioners into the country after consultation with the professional body. Regulations adopted in terms of subsection 3 will have to comply with GATS obligations, including South Africa’s specific commitments on legal services.

The proposed Article 24(3)(a) provides for the regulation of cross-border supply of legal services. These regulations may impose conditions and limitations on the scope of legal advisory and representation services supplied across border by foreign legal practitioners not established in South Africa without necessarily violating SA's GATS commitments. Foreign legal practitioners practising across border may, for example, be prohibited from appearing in local courts or from rendering advice on foreign, international or domestic law if they are not fully qualified and admitted in South Africa. They may also, for example, be required to use a certain title and make disclosure reasonably designed to inform the public of their status.

Article 24(3)(b) of the Bill provides for the preferential liberalisation of legal services. It also provides for the conclusion of mutual recognition agreements. However, preferential trade agreements and mutual recognition agreements must meet the conditions of GATS Articles V and VII respectively. They must be notified to the WTO and are subject to scrutiny. The one thing the provision does not offer is the unilateral recognition of other WTO members' academic and professional qualifications. Existing unilateral recognition arrangements will remain in force under the new Act. However, their continuation should be reviewed in light of the Bill's call for reciprocity in the recognition of foreign legal practitioners.

According to Article 24(3)(c) of the Bill, the minister may permit any individual or category of persons to commence practising by '*virtue of his or her academic qualifications* ***or*** *professional experience*' [own emphasis] if it is in the public interest. This might be problematic – academic qualifications alone can surely not suffice. It is unclear what circumstances would allow the minister to deviate from the general admission and enrolment requirements to permit a person or category of persons to commence practising in South Africa. The rationale for the inclusion of the provision is unclear because it could pave the way for certain persons or category of persons to gain the right to practise without having to comply with normal admission requirements and procedures.

One possible reason for the inclusion of the provision could in part be explained by a historical perspective in the context of a similar provision in the Attorneys Act. Article 81(1) of this Act provides for the admission of a certain class or classes of persons to practise in South Africa. In the 1980s, under the previous political dispensation, attorneys practising in the South African homelands of Transkei (GR, 1987a), Bophuthatswana (GR, 1987b), Venda (GR 1989) and Ciskei (GR, 1988) were allowed to practise in the rest of the country. It was the only time when a certain class of persons considered as 'foreign legal practitioners' were recognised to be admitted to practise in the country. The statehood of the South African homelands was always contested. However, this particular regulation was later amended to include practising attorneys from Lesotho (GG, 1993b).

Another historical fact could explain the inclusion of this provision in the Bill. With the arrival of a new political dispensation in South Africa the Recognition of Foreign Legal Qualifications and Practice Act 114 of 1993 was enacted to provide for the exemption of certain qualification requirements for South Africans who had obtained foreign legal qualifications or practised outside the country while living in exile. It allowed certain citizens to gain access to the legal profession without having to requalify in South Africa. This Act has since ceased to have effect after its original purpose had been fulfilled and is scheduled to be repealed in the new Bill.

These two acts addressed specific policy objectives at the time and were transitional in nature. Their rationale has fallen away and the same reasoning cannot justify the inclusion of this particular provision in the new Bill.

7. Conclusion

The current qualification requirements for the admission and enrolment of attorneys and advocates present an insurmountable barrier to foreign legal practitioners wanting to practise in South Africa. South Africa will not reap the potential benefits of liberalisation, such as increased employment opportunities for local lawyers created by locally established foreign firms and legal support services companies, attracting foreign investment and helping to create opportunities abroad for local businesses, if it fails to adapt to the reality created by international trade, fails to conform to standing obligations and fails to commit to further liberalisation of legal services. The existing legislation governing the admission of foreign legal practitioners in South Africa appears to be in conflict with specific aspects of its commitments and obligations under the WTO GATS.

- Under certain circumstances qualified foreign legal practitioners from designated countries are exempted from vocational training and practical examinations. In the case of foreign lawyers, cross-border practising rights are granted in respect of certain designated countries. Although South Africa has not made any GATS commitments on cross-border supply of legal services, the special treatment provided to certain foreign lawyers appears to constitute a violation of the MFN treatment obligation under GATS Article II. South Africa will need to obtain a waiver from the WTO to maintain the measure for a limited period of time. If not, any WTO member may invoke dispute settlement proceedings against it to seek the withdrawal of the inconsistent measure.
- South Africa unilaterally recognises the academic and professional qualifications of some (mainly) neighbouring WTO members. Most of these arrangements predate South Africa's GATS commitments and should be reviewed. Nonetheless, recognition can be justified as an exception to the MFN obligation. Where recognition occurs, it should as far as possible be based on common international standards and criteria, such as those of the International Bar Association. The unilateral recognition of some WTO members' qualifications places an obligation on South Africa to afford any other WTO member adequate opportunity to demonstrate that education, experience, licences and certifications obtained or requirements met in that other member state should also be recognised. In addition, GATS Article VII(4) places an obligation on South Africa to notify the Council for Trade Services of such measures. South Africa is yet to notify the Council of its existing unilateral recognition measures.
- The permanent resident and local qualification requirements constitute national treatment limitations under GATS Article XVII and should, if maintained, be entered into the country's GATS schedule of specific

commitments. This would require the modification of the country's schedule of specific commitments and, if requested by an affected member, negotiation of compensatory adjustments. However, it is envisaged that the academic qualification requirement for the admission and enrolment of foreign legal practitioners is set to be brought in line with South Africa's GATS commitments under the Legal Practice Bill.

- It is envisaged under the Legal Practice Bill that recognition of other countries' qualifications will no longer occur unilaterally but in terms of reciprocal international agreements only. These agreements will have to be notified to the WTO. Moreover, once the new legislation enters into force, South Africa will be under an obligation to inform the WTO of the new law.

The taking-up of specific commitments under GATS creates certain policy implications for a country. Nothing in GATS prevents a country from maintaining or introducing technical or commercial regulations to meet national policy objectives. However, it does determine to a certain extent how a country can regulate its scheduled services sectors. GATS provisions and specific commitments are binding international obligations and noncompliance will have legal consequences for South Africa. It is therefore under an obligation to ensure that any regulation on the admission and enrolment of foreign legal practitioners made under existing and future legislation fully complies with the country's GATS obligations and commitments.

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Chapter 6

Terms of trade in agricultural trade

Xolisiwe Yolanda Potelwa, Tshimangadzo Mugobi and Ron Sandrey[1]

1. Introduction

South Africa has traditionally been a net exporter of agricultural products, but in recent years the gap between these exports on the one side and imports on the other has been narrowing, even slightly favouring imports. Indeed, if South Africa followed the international norm and assessed import values as including costs of freight and insurance the reverse situation would apply as South Africa would become a net importer of agricultural products.

The objective of this paper was to assess whether South African agricultural export prices had on average risen more than the comparable import prices in the last six years, a period leading up to and immediately following the global commodity crisis. We find that this has indeed been the case for the last three years but that for the two–year period 2008-2009 import prices rose faster.

We use the Global Trade Atlas data, with this data denominated in rand (ZAR).

Agricultural trade has always been important to South Africa. Historically, the balance of trade was positive, but in recent years the gap has been narrowing. This is shown in Figure 1 for the period 2007 through to and including 2012 (the period we will be using for our terms-of-trade analysis). Note that we will be using

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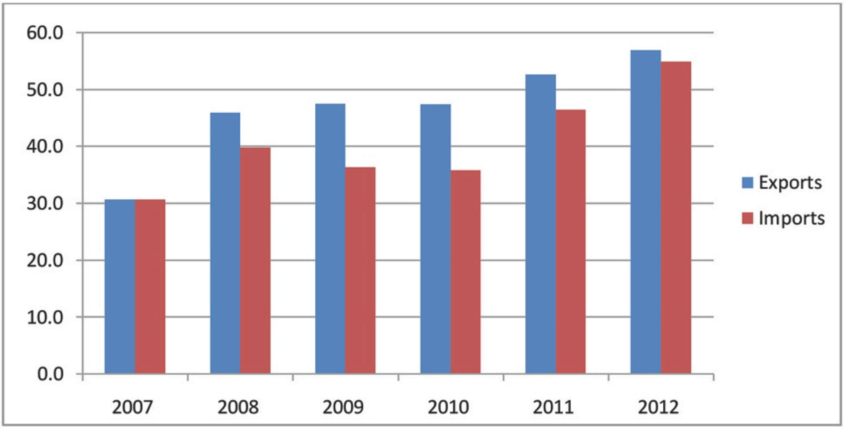
the World Trade Organisation (WTO) definition for agricultural trade, a definition that basically refers to Harmonised System (HS) codes 1 (live animals) through to 24 (tobacco) inclusive, minus the fisheries products, plus other categories such as caseins, hides, and wool and cotton.

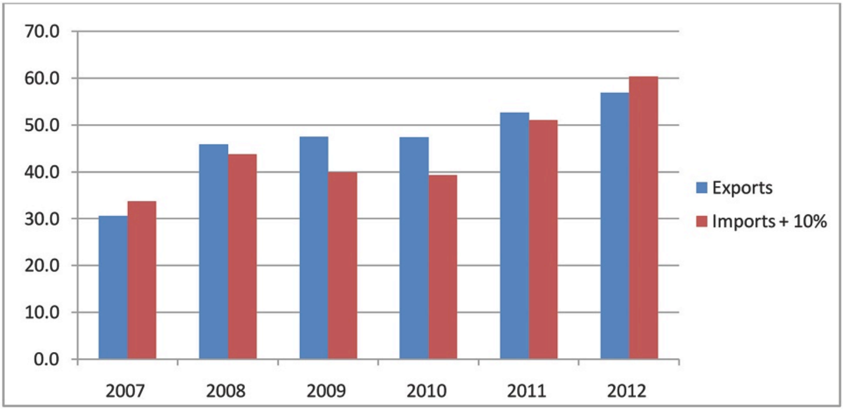
Figure 1: South African Agricultural trade 2007 to 2010, rand (millions)



Source: Global Trade Atlas, tralac analysis

Caution needs to be taken, however, in interpreting this export dominance too literally, as South Africa is one of very few countries that report its imports in terms of free on board (f.o.b.) values. Most countries add the costs of freight and insurance to give the cost, insurance, and freight (c.i.f.) values to these imports. Given that the difference could be around 10% overall (and significantly higher for some products) the actual costs to South Africa of these imports would be closer to the export figure and indeed possibly above it in some years. This is shown in Figure 2 where we duplicate Figure 1 but add 10% to import values to reflect this definitional difference.

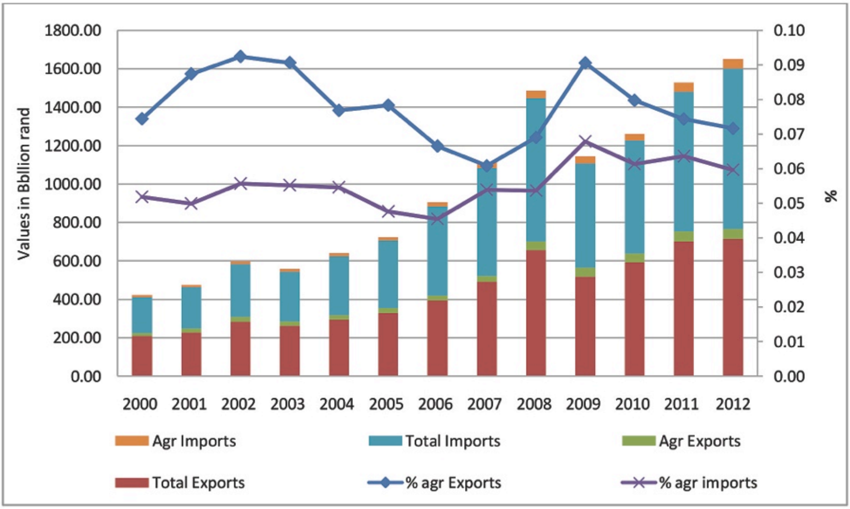
Figure 2: South African Agricultural trade 2007 to 2010, rand (millions) – with 10% added to import values



Source: Global Trade Atlas, tralac analysis

This data is brought together in Figure 3 where the relative shares of agricultural exports and imports (as reported) in the total trade are introduced. The rand values are shown in billions on the left-hand axis while the shares are shown on the right-hand axis. These shares are re-examined and discussed in the next two tables. Following the downturn in the 2008 global crisis both agricultural exports from and imports into South Africa have been showing increasing values although both their relative shares of the South African total trade are declining. Thus, while agriculture is doing well it is losing ground overall. This is especially so in the export shares, as agriculture consistently lost ground through from 2002 to the pre-crisis year of 2007 when it went close to converging with the import share.

Figure 3: South Africa agricultural trade performance, rand (billions) and share of total trade



Source: Global Trade Atlas (GTA)

The next series of tables extend the big-picture analysis by showing firstly the import profile followed by the export profile for the most recent 2007 to 2012 years inclusive. Table 1 shows that as a percentage of total import trade the agricultural share increased over the period to end at 6.58%, marginally below the high point of the 6.70% share in 2009. Similarly, the percentage share of the top 15 HS 4 trade lines shown has marginally increased to 54.06% of the total agricultural imports over the period. By HS 4 codes, the imports are headed by rice, a product that has been at the top except for the 2011 year when wheat took the top place.

Table 1: South African agricultural import details, rand (millions) and % shares of total imports

Imports South Africa Rand (millions)						
	2007	**2008**	**2009**	**2010**	**2011**	**2012**
Total,R (millions)	5,622,252	7,446,572	5,419,814	5,856,946	7,263,522	8,330,209
Agriculture, R (millions)	30,645	39,794	36,294	35,759	46,412	54,836
% agriculture	5.45%	5.34%	6.70%	6.11%	6.39%	6.58%
Top 15, R (millions)	13,469	20,223	18,542	19,007	25,074	29,642
Top 15 % agri	43.95%	50.82%	51.09%	53.15%	54.02%	54.06%
Description						
Rice	2,046	3,698	3,704	2,985	3,496	5,566
Wheat	1,815	3,612	2,337	2,003	4,346	3,761
Palm oil	1,376	2,435	1,963	2,188	2,992	3,336
Soybean oilcake	1,477	2,596	2,466	2,477	2,606	2,808
Chicken	1,215	1,259	1,191	1,076	1,795	2,494
Whiskies	1,490	1,710	1,637	1,904	2,144	2,295
Soybean oil	672	1,202	552	1,616	2,180	1,869
Sunflower oil	795	407	714	749	806	1,844
Preps NESOI*	960	1,178	962	943	1,141	1,323
Tobacco	483	732	1,342	1,045	1,021	929
Sugar	32	163	281	221	341	758
Beans	356	333	428	437	451	697
Pork	289	266	357	415	553	679
Chicken meat	122	39	123	445	646	679
Animal guts	340	591	483	504	555	605

Source: Global Trade Atlas, tralac analysis

* NESOI means 'Not either specified or included'

Table 2 extends the import analysis and shows that by absolute value (as measured by market share) the big increase has been in rice (up by 3.5 percentage points), followed by palm oil and sugar with increases of 1.6 and 1.3 percentage points respectively. Both whisky and food preparations not elsewhere specified declined by 1.7 percentage points. The top five HS 4 lines have represented 30% or above over the last five years.

Table 2: South African commodities by % shares of total agricultural imports at HS 4

Description	% share of imports					
Rice	6.7%	9.3%	10.2%	8.3%	7.5%	10.1%
Wheat	5.9%	9.1%	6.4%	5.6%	9.4%	6.9%
Palm oil	4.5%	6.1%	5.4%	6.1%	6.4%	6.1%
Soybean oilcake	4.8%	6.5%	6.8%	6.9%	5.6%	5.1%
Chicken	4.0%	3.2%	3.3%	3.0%	3.9%	4.5%
Top five	**25.9%**	**34.2%**	**32.1%**	**30.0%**	**32.8%**	**32.8%**
Whiskies	4.9%	4.3%	4.5%	5.3%	4.6%	4.2%
Soybean oil	2.2%	3.0%	1.5%	4.5%	4.7%	3.4%
Sunflower oil	2.6%	1.0%	2.0%	2.1%	1.7%	3.4%
Preps NESOI	3.1%	3.0%	2.7%	2.6%	2.5%	2.4%
Tobacco	1.6%	1.8%	3.7%	2.9%	2.2%	1.7%
Sugar	0.1%	0.4%	0.8%	0.6%	0.7%	1.4%
Beans	1.2%	0.8%	1.2%	1.2%	1.0%	1.3%
Pork	0.9%	0.7%	1.0%	1.2%	1.2%	1.2%
Chicken meat	0.4%	0.1%	0.3%	1.2%	1.4%	1.2%
Animal guts	1.1%	1.5%	1.3%	1.4%	1.2%	1.1%

Source: Global Trade Atlas, tralac analysis

As displayed in Table 3, oranges moved into the top export spot in 2012. Wine declined and maize did not duplicate its 2011 export levels. Again, the exports are concentrated with the 2012 top 15 HS lines representing over 50% of the total in each year. Notable is that imports of sugar from Table 1 are closing in on the traditionally strong export values of that commodity as shown in Table 3.

Table 3: South African agricultural export details, rand (millions) and % shares

Exports South Africa (millions)						
	2007	**2008**	**2009**	**2010**	**2011**	**2012**
Total, R (millions)	491,462	656,154	518,229	592,691	701,747	715,610
Agriculture,R (millions)	30,643	45,903	47,483	47,350	52,593	56,867
% agriculture	6.23%	7.00%	9.16%	7.99%	7.49%	7.95%
Top 15, R (millions)	16,087	24,238	24,523	24,615	29,289	29,855
Top 15, % agri imp	52.50%	52.80%	51.65%	51.99%	55.69%	52.50%
Description						
Oranges	2,778	3,696	3,365	4,401	4,475	4,782
Wine	3,651	4,545	4,343	4,014	3,657	3,633
Grapes	2,201	2,585	3,022	3,071	3,107	3,532
Maize	111	3,911	3,444	1,929	5,561	2,950
Apples	1,495	1,978	1,957	1,821	2,113	2,595
Wool	1,030	1,143	1,227	1,240	2,026	2,299
Wine	981	1,533	1,473	1,481	1,600	2,071
Pears	845	916	1,163	1,178	1,224	1,308
Prep NESOI	491	641	699	811	1,099	1,096
Soybean oil	4	20	52	195	558	955
Sugar	542	716	1,059	929	719	950
Ethyl alcohol	628	854	823	1,339	741	930
Cigarettes	510	476	674	741	700	926
Mandarins	426	572	599	662	740	924
Lemons	393	653	622	802	969	901

Source: Global Trade Atlas, tralac analysis

By absolute value (as measured by market share) the big increase has been in maize exports which are up by 4.8 percentage points, although 2007 was a low point (Table 4). Wine was the 'biggest loser', declining by 5.5 percentage points over the period.

Table 4: South African commodities by % shares of total agricultural exports at HS 4

Description	% share of exports					
Oranges	9.1%	8.1%	7.1%	9.3%	8.5%	8.4%
Wine	11.9%	9.9%	9.1%	8.5%	7.0%	6.4%
Grapes	7.2%	5.6%	6.4%	6.5%	5.9%	6.2%
Maize	0.4%	8.5%	7.3%	4.1%	10.6%	5.2%
Apples	4.9%	4.3%	4.1%	3.8%	4.0%	4.6%
Top five	**33.4%**	**36.4%**	**34.0%**	**32.2%**	**36.0%**	**30.8%**
Wool	3.4%	2.5%	2.6%	2.6%	3.9%	4.0%
Wine	3.2%	3.3%	3.1%	3.1%	3.0%	3.6%
Pears	2.8%	2.0%	2.4%	2.5%	2.3%	2.3%
Prep NESOI	1.6%	1.4%	1.5%	1.7%	2.1%	1.9%
Soybean oil	0.0%	0.0%	0.1%	0.4%	1.1%	1.7%
Sugar	1.8%	1.6%	2.2%	2.0%	1.4%	1.7%
Ethyl alcohol	2.0%	1.9%	1.7%	2.8%	1.4%	1.6%
Cigarettes	1.7%	1.0%	1.4%	1.6%	1.3%	1.6%
Mandarins	1.4%	1.2%	1.3%	1.4%	1.4%	1.6%
Lemons	1.3%	1.4%	1.3%	1.7%	1.8%	1.6%

Source: tralac analysis

2. The main suppliers of imports and destination of exports

South Africa's main agricultural trading partners are shown below, first in Table 5 for import sources and secondly in Table 6 for export destinations. Since 2009 the European Union(EU) has regained its top position as agricultural import source from the Mercado Comun del Sur (Mercosur)[2], mainly by virtue of its consistent share as Mercosur soared and then faded somewhat. Both Asean and Africa in second and third places respectively have had consistent shares over the period.

Table 5: Main sources of South African agricultural imports, rand (millions) and % shares

Agricultural Imports from, R (millions)						
	2007	**2008**	**2009**	**2010**	**2011**	**2012**
Total agr	30,645	39,794	36,294	35,759	46,412	54,836
EU	6,920	8,918	9,655	10,298	13,229	15,709
Mercosur	9,068	10,773	8,709	7,116	9,367	11,503
Asean	4,139	7,905	6,475	6,447	7,661	7,751
Africa	1,966	2,131	2,140	2,284	2,790	3,438
Top 4 as % agr	72.1%	74.7%	74.3%	73.1%	71.2%	70.0%
% shares of agricultural imports						
EU	22.6%	22.4%	26.6%	28.8%	28.5%	28.6%
Mercosur	29.6%	27.1%	24.0%	19.9%	20.2%	21.0%
ASEAN	13.5%	19.9%	17.8%	18.0%	16.5%	14.1%
Africa	6.4%	5.4%	5.9%	6.4%	6.0%	6.3%

Source: GTA data, tralac analysis

Export destinations shown in Table 6 highlight that two main aggregate destinations, Africa and the EU, account for over 60% of the total exports,

[2] Argentina, Brazil, Uruguay and Paraguay.

although that figure has been moving down from the high of 70.3% in 2008. Similarly, the EU's relative share has been declining over the period and is now almost two percentage points below Africa despite that in 2007 it has doubled the Africa share. Sandrey and Gill (2013) discuss and analyse this declining export share of South Africa's agricultural exports to the EU despite fairly favourable access terms under the Trade, Development and Cooperation Agreement (TDCA).

Table 6: Main destinations of South African agricultural exports, rand (millions) and % shares

Agricultural exports to, rand (millions)						
	2007	**2008**	**2009**	**2010**	**2011**	**2012**
Total agriculture	30,643	45,903	47,483	47,350	52,593	56,867
Africa	6,652	14,805	15,802	14,552	15,347	18,144
EU	13,912	17,453	16,326	16,483	16,576	17,063
Top 2 as % agr	67.1%	70.3%	67.7%	65.5%	60.7%	61.9%
% shares of agricultural exports						
Africa	21.7%	32.3%	33.3%	30.7%	29.2%	31.9%
EU	45.4%	38.0%	34.4%	34.8%	31.5%	30.0%

Source: GTA data, tralac analysis

3. Trade details

The next series of tables reviews, firstly, the main imports by HS 4 for these top four import sources and, secondly, the main exports to the top two export destinations. Using HS 4 lines alleviates the problems that we will discuss later when we assess the average prices by HS 6; the reason is that only HS 6 and not HS 4 codes changed in agriculture during 2012. We start with imports from the EU, the main import source shown in Table 7. The large increases in recent years have been in soybean oils and chickens. The latter is proving problematic as these imports have been adding to the traditional imports from Mercosur and causing consternation in South African farming and trade-policy circles.

Table 7: Agricultural imports from the EU, rand (millions) and market shares

From EU	2007	2008	2009	2010	2011	2012
Total	189,462	232,914	174,296	188,107	222,809	239,101
Agricultural	6,920	8,918	9,655	10,298	13,229	15,709
Agriculture as % total	3.65%	3.83%	5.54%	5.47%	5.94%	6.57%
Commodity						
Ethyl alcohol	1,473	1,754	1,700	1,968	2,225	2,430
Soybean oil	25	162	54	1,326	2,193	1,916
Meat, poultry	32	37	29	83	760	1,456
Preps NESOI	541	647	558	518	643	777
Animal feed	277	365	348	418	555	650
Top 5 as % agriculture	33.9%	33.2%	27.9%	41.9%	48.2%	46.0%

Source: GTA data, tralac analysis

Imports from Mercosur are heavily concentrated, with the top five HS 4 lines contributing some 78% of the total during 2012 (Table 8). As outlined above, the imports of chicken are causing problems in South Africa, and the imports of sugar are relatively recent and go a long way inforcing open the Southern African Customs Union's (SACU) protected sugar sector. Imports of wheat vary by source between years, and this accounts for the large changes in Mercosur imports as shown.

Imports of palm (and other products associated with coconut oils) oil and rice dominate the commodity mix from the Association of South-East Asian Nations (ASEAN) as shown in Table 9. Coffee has been stable while imports in nuts are growing rapidly. Again, the imports are highly concentrated with around 80% represented by the top five lines.

Table 8: Agricultural imports from Mercosur, rand (millions) and market shares

From Mercosur	2007	2008	2009	2010	2011	2012
Total	19,279	22,580	18,209	16,998	20,422	22,685
Agricultural	9,068	10,773	8,709	7,116	9,367	11,503
Agriculture as % total	47.0%	47.7%	47.8%	41.9%	45.9%	50.7%
Commodity						
Soybean oilcake	1,475	2,520	2,437	2,473	2,606	2,808
Wheat	476	1,948	502	273	1,558	2,403
Chicken	1,328	1,344	1,310	1,451	1,638	1,670
Sunflower seed, oil, etc.	881	451	762	582	400	1,187
Sugar	212	417	403	276	689	883
Top 5 as % agriculture	48.2%	62.0%	62.2%	71.0%	73.6%	77.8%

Source: GTA data, tralac analysis

Table 9: Agricultural imports from ASEAN, rand (millions) and market shares

From ASEAN	2007	2008	2009	2010	2011	2012
Total	28,902	39,311	33,188	37,078	45,108	57,782
Agricultural	4,139	7,905	6,475	6,447	7,661	7,751
Agriculture as % total	14.3%	20.1%	19.5%	17.4%	17.0%	13.4%
Commodity						
Palm oil	1,358	2,414	1,957	2,172	2,932	3,221
Rice	1,379	3,191	2,765	2,406	2,512	2,073
Coconut oil, etc.	188	392	217	295	409	376
Coffee	178	391	178	208	259	242
Nuts	47	90	75	77	151	142
Top 5 as % agriculture	76.1%	81.9%	80.2%	80.0%	81.8%	78.1%

Source: GTA data, tralac analysis

The imports from Africa largely exclude intra-SACU imports as these are only partially reported in the Global Trade Atlas data for South Africa. Cotton, tobacco and tea have traditionally been the dominant trading lines and they have been relatively consistent through the time period (Table 10).

Table 10: Agricultural imports from Africa, rand (millions) and market shares

From Africa	2007	2008	2009	2010	2011	2012
Total	44,182	72,378	43,259	45,765	55,639	82,263
Agricultural	1,966	2,131	2,140	2,284	2,790	3,438
Agriculture as % total	4.45%	2.94%	4.95%	4.99%	5.01%	4.18%
Commodity						
Cotton	373	422	397	372	651	498
Tobacco	257	415	407	357	488	394
Tea	150	196	296	288	255	315
Oilcake	97	145	134	133	92	237
Bran	64	91	51	50	98	179
Top 5 as %	47.9%	59.5%	60.0%	52.5%	56.8%	47.2%

Source: GTA data, tralac analysis

As discussed earlier, agricultural exports to the continent have grown rapidly in recent times, and this is highlighted in Table 11. Notable is the large increase in soybean oil exports from virtually a zero base, a commodity which South Africa itself imports in substantial quantities. Sugar exports have been consistent, and need to be viewed in conjunction with South African sugar imports from Mercosur (Brazil).

Table 11: Agricultural exports to the Africa, rand (millions) and market shares

To Africa	2007	2008	2009	2010	2011	2012
Total	63,185	95,562	85,343	85,538	100,372	119,197
Agricultural	6,652	14,805	15,802	14,552	15,347	18,144
Agriculture as % total	10.5%	15.5%	18.5%	17.0%	15.3%	15.2%
Commodity						
Sugar	1,032	1,079	1,388	1,443	1,162	1,187
Preparations NESOI	417	559	623	765	972	1,040
Apples & pears	314	485	459	564	768	943
Sunflower oils, etc.	60	204	491	711	664	624
Soybean oil	4	22	55	200	608	1,005
Top 5 as %	27.5%	15.9%	19.1%	25.3%	27.2%	26.4%

Source: GTA data, tralac analysis

As one would expect with such a long history the South African agricultural exports to the EU have been consistent over this period. The traditional fruits continue to dominate (if wine is regarded as a fruit product), and the market share of the top five lines shown in Table 12 has consistently been around 66%.

Table 12: Agricultural exports to the EU, rand (millions) and market shares

To EU	2007	2008	2009	2010	2011	2012
Total	14,8292	19,2611	124,995	140,074	153,916	145,941
Agricultural	13,912	17,453	16,326	16,483	16,576	17,063
Agriculture as % total	9.4%	9.1%	13.1%	11.8%	10.8%	11.7%
Commodity						
Wine	3,536	4,503	4,450	4,003	3,697	3,712
Citrus	1,992	2,696	2,224	2,628	2,726	2,932
Grapes	1,993	2,334	2,585	2,434	2,340	2,579
Apples & pears	1,507	1,597	1,730	1,433	1,435	1,532
Dates, avocados, etc.	278	334	275	404	271	602
Top 5 as %	66.9%	65.7%	69.0%	66.1%	63.2%	66.6%

Source: GTA data, tralac analysis

4. Terms of trade

Of special interest for this paper are the agricultural terms of trade as expressed as the average unit values of imports vis-à-vis the corresponding index of average unit values in exports. Our objective is to provide a broad view of the agricultural trade in recent years and to examine the components of these terms of trade. In essence, are export prices increasing faster than import prices overall? Our data source is the Global Trade Atlas (GTA) data and we use the 2007 to 2012 December-year periods as our analysis period. The data is expressed in South African rand, and this can possibly give a distorted picture when the rand depreciates as it has over the last year or so. However, the index that we use combined with our presentation in Figure 1 of agriculture's share of total trade alleviates many of these problems.

The GTA gives the absolute value of trade at the HS 6 line level along with the volume and consequently average unit value data. We use this unit value data and index the first 2007 average values to 100. From there we assess the relative changes from the index on a line-by-line basis, and to obtain the final index values we weight each of the import and export index values by their share of the agricultural trade to give an annual figure for each. This indexing allows different absolute price levels and average values expressed in terms of kilogram, for example, to be adjusted to form an overall index.

Note that our index is based on the initial 2007 year, and possibly an anchor to the most recent 2012 year may give a slightly different result. In technical terms, this is the dilemma of the **Paasche Index,** also called a 'current weighted index' (a weighted harmonic average of the price relatives that uses the actual expenditure shares in the later period t as weights) versus the **Laspeyres Index** (the weighted arithmetic average that uses weights from a previous period). The weights we used to calculate the index are the Laspeyres Index based on the 2008 weights, and this will give an index marginally above the Paasche Index. This is explained in technical detail by Statistics South Africa at their website.[3]

A problem that arose was the changes to the international HS codes during 2012. Several of the codes (and some for significant trade lines) were affected, and this necessitated an adjustment to the data to reconcile the new codes against the old codes. This problem did not arise in the analysis to date, because to date we have been using the HS 4 codes. We are confident, however, that we were able to reconcile the data to an acceptable level.

Table 13 forms the essence of this paper. When indexed to 2007 the weighted average of the prices per line shows that at 2012 the export price index of 192.3 was ahead of the import index of 179.2. This was also the case for the previous two years, but was not the case for 2008 and 2009. Figure 4 shows the same data presented in graphical form.

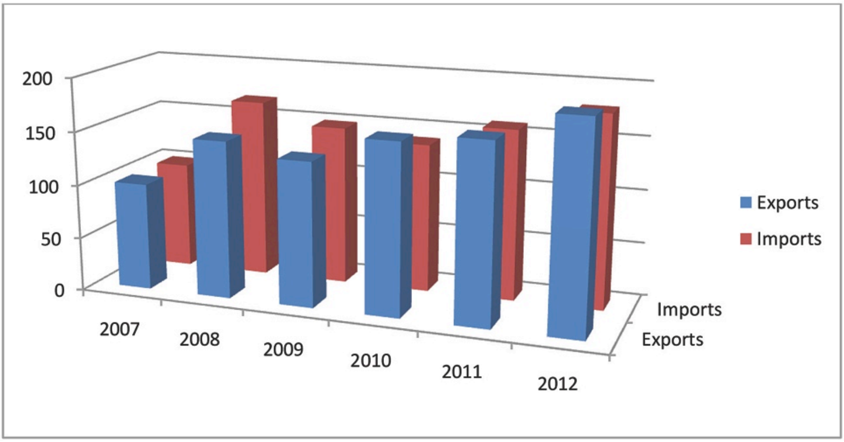
[3] See http://www.statssa.gov.za/cpi/documents/Note_on_CPI_Laspeyres,_ Paasche_and_ Fischer_indices_2013.pdf.

Table 13: Weighted average price index for South African agricultural exports and imports

Year	2007	2008	2009	2010	2011	2012
Exports	100	146.8	134.9	159.2	166.4	192.3
Imports	100	167.1	148.4	138.7	158.9	179.2

Source: GTA data, tralac analysis

Figure 4: Weighted average price index for South African agricultural exports and imports



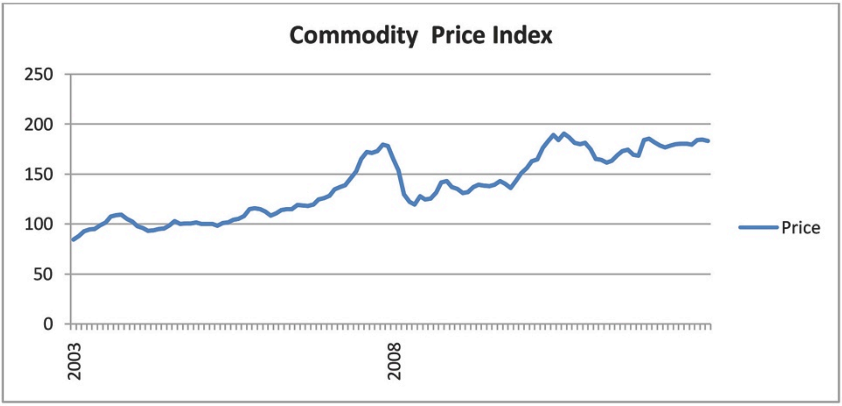
Source: GTA data, tralac analysis

Overall, our analysis suggests that since the global commodity price crisis of 2008 South Africa has emerged with its agricultural export price weighted index marginally above that of its import price index. This analysis is, of course, a static one and says little about responses to the price changes except to state that as a weighted average these changes are partially taken into account.

A wider perspective on global average prices is given in Figure 5. This data is sourced from Index Mundi and gives us the monthly values as distinct from the annual data available from GTA under our subscription agreement. The

IndexMundi includes cereal, vegetable oils, meat, seafood, sugar, bananas, and oranges price indices, so it has a reasonable approximation to South African trade. Note the large price jump in mid-2008 below the decline to lower levels before gradually moving back to a more consistent line around the mid-2008 highs.[4]

Figure 5: The IndexMundi global commodity food prices



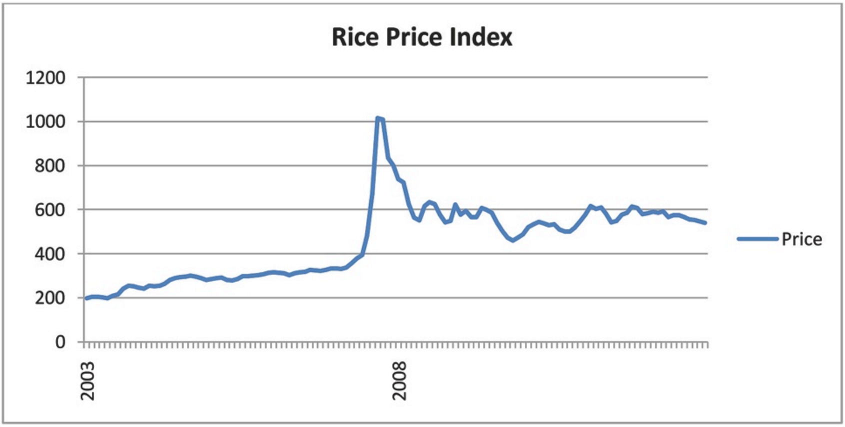
Source: IndexMundi (www.indexmundi.com)

Note: The index includes cereal, vegetable oils, meat, seafood, sugar, bananas, and oranges price indices.

To further illustrate the price changes we introduce two further graphs from the IndexMundi. The first of these in Figure 5(a) shows the global rice price index, and given that rice has been the major import into South Africa over the period this index will have a significant bearing on our weighted index values. Note that the rice index rapidly declined to around half of its mid-2008 peaks before stabilising. Conversely, in Figure 6 the orange index declined but not by nearly as much. Also note the seasonal variation in the orange index, but again given that we are working with annual data we cannot duplicate that index.

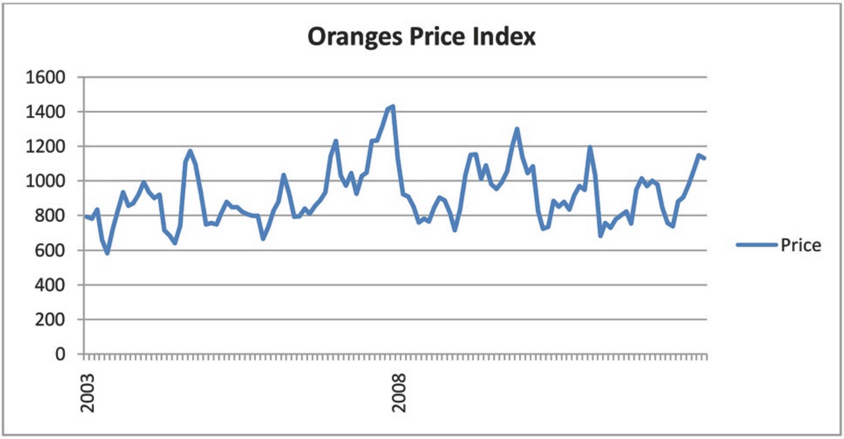
[4] See http://www.indexmundi.com/commodities/?commodity=oranges&months=120.

Figure 5(a): The IndexMundi global rice price



Source: IndexMundi

Figure 6: The IndexMundi global orange price



Source: IndexMundi

An overview of import and export products is shown below in Tables 14 and 15. Note that these products are analysed at the HS 6 line level and thus may not reconcile with our broader HS 4 aggregations used to date. The trade values are shown for each line over the six-year period along with the unit value index of the prices. We note that these prices are as obtained from the South African Revenue Service (SARS), and as it is a statutory declaration to present accurate data on theses trade items we have to assume that the data is correct. The two top import source and export destinations (as downloaded from the International Trade Centre (ITC) are also shown for each line.

Table 14: South African agricultural imports of selected products

	Index average price of imports						Imports in Rand (million)						
Product	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**Main suppliers 2012**
Rice	100	272	234	191	184	200	2,046	3,698	3,704	2,985	3,496	5,566	Thailand (34.5%), China (32.8%)
Palm oil	100	168	128	136	177	180	1,376	2,435	1,964	2,188	2,992	3,336	Indonesia (50.2%), Malaysia (46.2%)
Soy oilcake	100	178	202	165	176	235	1,477	2,596	2,466	2,477	2,606	2,808	Argentina (100%)
chicken cuts	100	123	116	163	181	208	1,215	1,259	1,191	1,076	1,795	2,495	Brazil (29.3%), Netherlands (25.9%)
Whiskies	100	115	124	129	128	131	1,490	1,710	1,637	1,904	2,144	2,295	UK (82.1%), Ireland (8.8%)
Soybean oil	100	174	122	134	176	198	672	1,202	552	1,616	2,180	1,869	Netherlands (39.2%), Spain (35.5%)
Sunflower seed	100	174	118	132	184	188	795	407	714	749	806	1,844	Argentina (59%), Ukraine (17.3%)
Food preps NESOI	100	116	140	120	132	136	960	1,178	962	943	1,141	1,323	US (18.6%), Netherlands (12.3%)
Tobacco	100	127	189	167	152	178	483	732	1,342	1,045	1,021	929	Brazil (29.8%), Zimbabwe (26.6%)

Source: GTA (2013); ITC (2013) and own calculation

Table 15: South African agricultural imports of selected products

	Index average price of exports						Exports in Rand (million)						
Product	**2007**	**2008**	**a009**	**2010**	**2011**	**2012**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**Main destination**
Oranges	100	125	119	145	166	159	2,778	3,696	3,365	4,401	4,475	4,782	Netherlands (17.7%), Russia (10.6%)
Wine	100	150	128	140	146	182	3,651	4,545	4,343	4,014	3,657	3,633	UK (15.9%), Germany (11.3%)
Grapes	100	128	145	154	163	174	2,201	2,585	3,022	3,071	3,107	3,533	Netherlands (42.8%), UK (19.5%)
Maize	100	218	112	83	116	157	111	3,911	3,445	1,929	5,561	2,951	Mexico (88.3%), Mozambique (5.7%)
Apples	100	123	129	133	141	149	1,495	1,978	1,957	1,821	2,113	2,595	UK (26.8%), Malaysia (11.9%)
Wool	100	102	89	105	150	166	1,030	1,143	1,227	1,240	2,026	2,299	China (63.2%), Czech Republic (16.1%)
Wine	100	173	195	197	207	200	981	1,533	1,473	1,481	1,600	2,071	UK (25.2%), Germany (17.2%)
Food preps NESOI	100	86	93	95	92	98	491	641	699	811	1,099	1,097	Zimbabwe (20.1%, Nigeria (11.7%)
Soybean oil	100	290	178	176	215	246	4	20	52	195	558	955	Zimbabwe (94.5%), Zambia 3.35%)
Cane sugar	100	66	219	242	298	309	542	716	1,059	929	719	950	Mozambique (25.7%), Zimbabwe (22.7%)

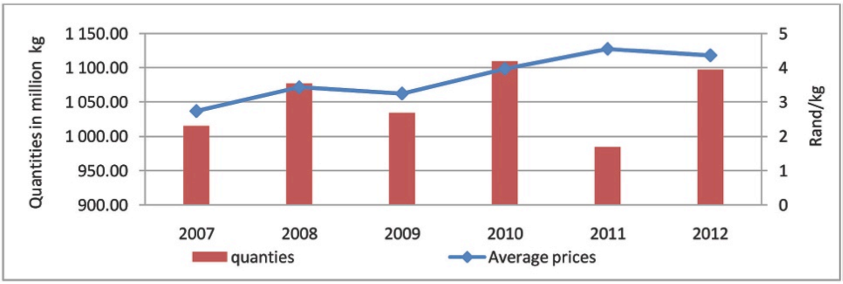
Source: GTA (2013); ITC (2013) and own calculation

5. Selected details of the South African agricultural import and export prices and volumes

South African agricultural exports

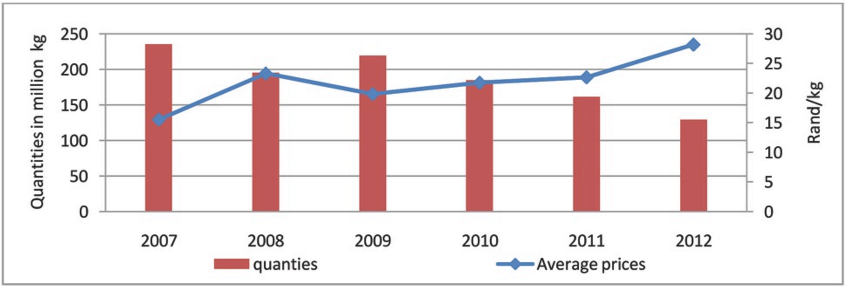
In this section we augment the trade data discussed above by showing the changes in quantities along with the average value index data for the export commodities of oranges, wine, grapes, maize and apples. Again note that this data is at the HS 6 detailed line level, and is again expressed in rand for values and in kilogram (millions) for volume. The volumes are, of course, only of comparable relevance for the particular HS 6 line and direct comparison between commodities is not possible, except, of course, in general terms. We present that data with no comments upon it.

Figure 7: Oranges (HS 080510)



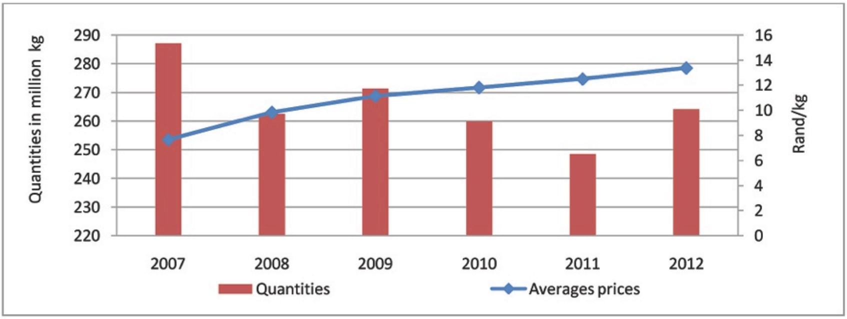
Source: Global Trade Atlas (GTA)

Figure 8: Wine (HS 220421)



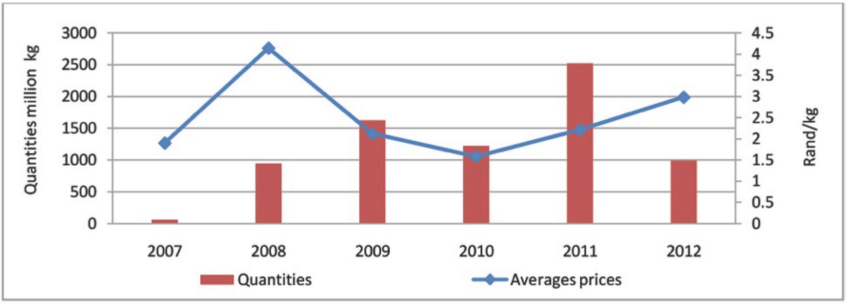
Source: GTA

Figure 9: Grapes, fresh (HS 080610)



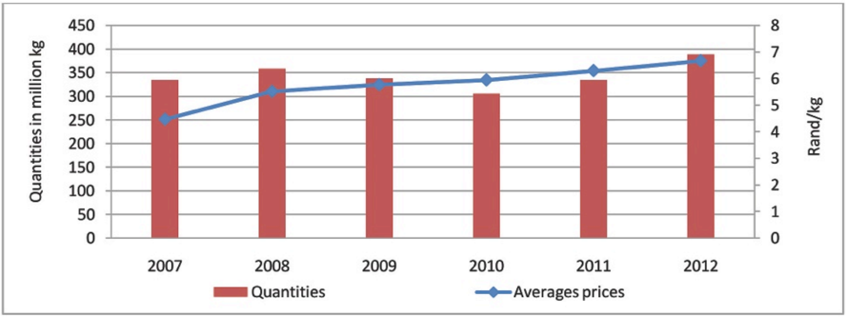
Source: GTA

Figure 10: Maize (HS 100590)



Source: GTA

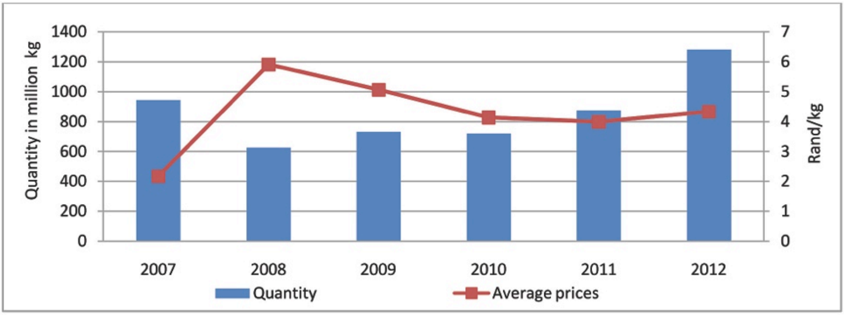
Figure 11: Apples (HS 080810)



Source: GTA

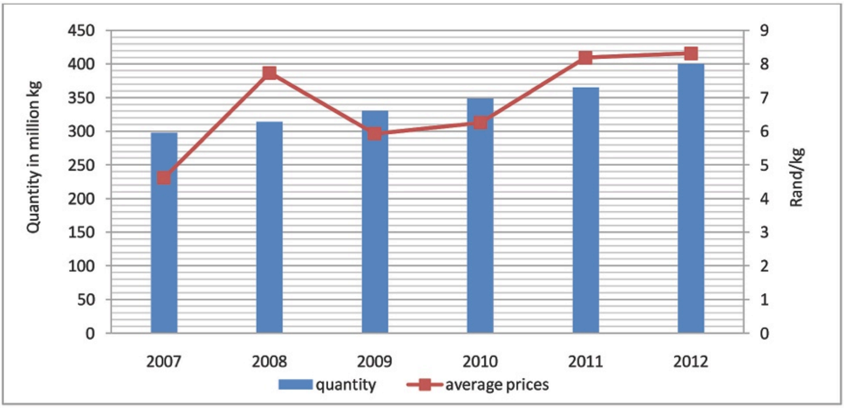
South African agricultural imports

Figure 12: Rice, semi- or wholly milled, polished, etc. or not (HS 100630)



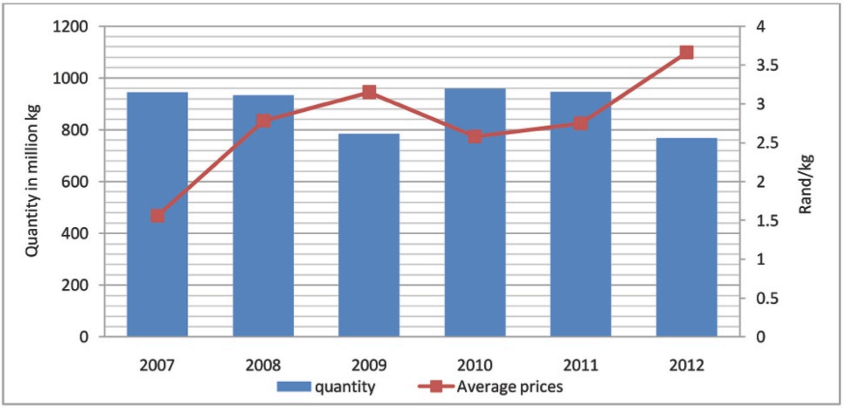
Source: GTA

Figure 13: Palm oil (HS 151190)



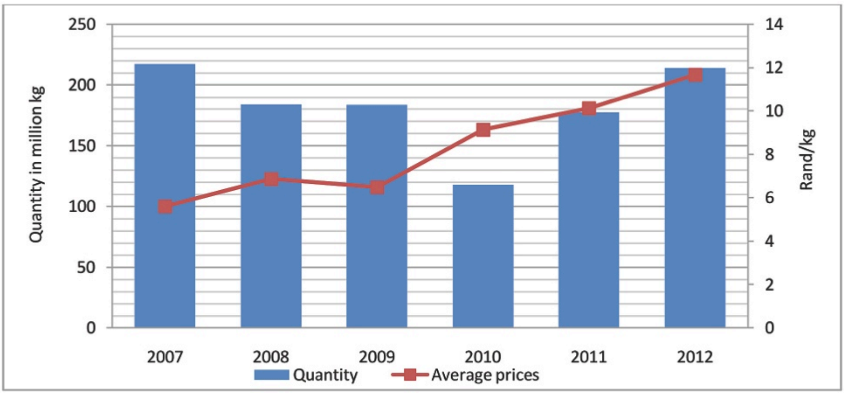
Source: GTA

Figure 14: Soybean oilcake (HS230400)



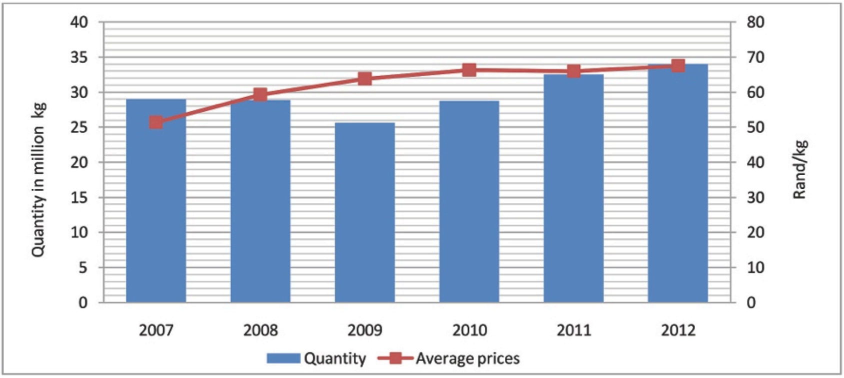
Source: GTA

Figure 15: Chicken cuts (HS 020714)



Source: GTA

Figure 16: Whiskies (HS 220830)



Source: GTA

Brazil

Using the same GTA data source we were able to assess the relative performance of Brazilian agriculture against the analysis we have presented for South Africa. Table 16 shows the export mix and performance of Brazil over the same six-year period, with the data expressed in South African rand (ZAR) to make it comparable. Indeed, in the lower two lines we have shown the South African agricultural exports by value (also rand in millions) and the relative size of Brazil compared with South Africa. The Brazilian exports are about ten times the value of South Africa's.

The top ten HS 4 agricultural exports from Brazil during 2012 are listed in Table 16, and these ten exports account for 80% of the total agricultural exports in recent years. Soy products (including chickens that are, as it were, walking soy bean products) and sugar dominate the top positions, and most of the commodities shown have performed consistently over the period.

Table 16: Brazilian agricultural exports, R million and % shares

		South Africa Rand (million)					
		2007	2008	2009	2010	2011	2012
Total exports		1,130,429	1,631,293	1,272,091	1,471,798	1,861,442	1,992,273
Agricultural exports		313,626	478,201	454,286	464,172	592,829	684,818
agricultural exports % Total		27.7%	29.3%	35.7%	31.5%	31.8%	34.4%
HS 4	Commodity						
1201	Soybeans	47,367	87,294	95,697	82,035	115,785	141,522
1701	Sugar	35,945	46,288	68,478	92,818	109,165	106,835
0207	Poultry	30,658	49,286	41,185	43,458	52,722	57,063
2304	Soy oilcake	20,819	35,884	38,072	34,470	41,171	54,444
0901	Coffee	23,951	35,072	31,693	37,679	58,799	47,106
1005	Corn (Maize)	13,392	11,941	11,013	15,726	20,342	45,510
0202	Beef	19,069	30,276	22,049	24,749	25,515	30,286
2401	Tobacco	15,425	22,337	24,467	19,808	20,963	26,341
2009	Fruit juice	16,723	17,866	14,791	13,997	18,730	20,066
2207	Ethyl alcohol	10,429	19,894	11,010	7,377	11,121	18,288
Top 10% of agr exports		74.5%	74.5%	78.9%	80.2%	80.0%	79.9%
SA agricultural exports							
SA agricultural exports R billion		30,643	45,903	47,483	47,350	52,593	56,867
SA agriculture as % of Brazilian		9.77%	9.60%	10.45%	10.20%	8.87%	8.30%

Source: GTA data, tralac analysis

The relative change in Brazilian export prices against the South African Index is shown in Table 17. Over the last three years South Africa has been above the Brazilian average values across all products, but Brazil did better in the commodity boom of 2008 and its immediate aftermath in 2009. Computing the Brazilian index for imports would be of little relevance, as Brazil imports very few agricultural products – what do you give somebody who has everything?

Table 17: Brazilian and South African export price index comparison

Year	2007	2008	2009	2010	2011	2012
Brazil Export Index	100	152.4	143.9	145.7	185.6	203.7
SA Export Index	100	146.8	134.9	159.2	166.4	192.3

Source: GTA, tralac calculations.

Reference

Sandrey, R. and Gil, T. 2012. An assessment of the TDCA. *In* Hartzenberg, T. et al. (eds.), *Monitoring Regional Integration.* Stellenbosch: tralac and Konrad Adenauer Stiftung publication.

Chapter 7

SACU trading relationships: old friends versus new friends – a preliminary examination of the regional trade data

Ron Sandrey

1. Introduction

In recent years much focus has been on the 'new' Southern African Customs Union (SACU) trading relationship with Brazil, Russia, India and China (the BRIC countries). The objective of this chapter is to assess this 'new' relationship and to test whether or not the attention given to it may be clouding the importance of the older and traditional trading relationships with the European Union (EU) and the United States (US), and as subset of this BRIC relationship we will assess whether or not the BRIC relationship is in turn clouded by the dramatic rise of China as a trading partner. The meteoric rise of China has been the dominating feature of global trade in the last thirty or so years, and while oil price spikes and their resultant crises have featured before, the rise of China has been relentless.

This current thesis has been inspired by two recent tralac publications. The first is the tralac book *BRICS: South Africa's way ahead* by Sandrey et al.(2013b) evaluating the BRIC relationship, while the second is a *Hot Seat* comment from Sean Woolfrey (2013) on 'Old friends, new friends and close friends'.

Obtaining trade data for such an analysis has been difficult, and especially so for the BLNS (Botswana, Lesotho, Namibia and Swaziland) countries of SACU. We have used the Global Trade Atlas (GTA) commercially obtainable data for South Africa, the EU and the BRIC countries; both Comtrade and the International Trade Centre (ITC) for much of the data; and the United States International Trade Commission (USITC) data for the US. We are especially conscious of the problems in reconciliation of these different trade sources. We are also conscious that the reported merchandise trade between South Africa and the BLNS countries is a major problem and that this data must be treated with caution in some instances. This also applies to transhipment of many trade lines through South Africa to the BLNS, and although many of these trades may be small, collectively they become significant. In addition, a recent tralac paper by Sandrey et al. (2013d) analysing South Africa's trading relationships with China using GTA data found that reconciliation of the trade data between these two partners is difficult. This so because of South Africa's 'undisclosed destination' for gold in particular and China's reporting of a very substantial import from South Africa in 'special products' that does not seem to balanced by South African exports distorting the trade data.

For the analysis in this paper we have used the late 1990s or the year 2000 as our base year for analysis, with the 2012 year usually being the end point. This reference time period may influence our results, but we feel that it provides a solid platform to work from.

Another backdrop to this picture is the role that intra-African trade is playing in the region; this refers to the 'close friends' discussed by Woolfrey (2013). This is only peripherally examined in the paper, but is certainly worth examining in more detail. Closer to home in earlier work Sandrey (2007) discusses the trade-related problems associated with the SACU tariff revenue pool and the way in which the BLNS countries are 'living in the shadow of the mountain' with South Africa, making large monetary distributions to them which are significantly above what their individual tariff revenues would have been in the absence of SACU. This South African revenue redistribution to the BLNS countries is now becoming an important and increasingly controversial issue (Grynberg, 2013; Benjamin, 2013), and, as 'very close friends', adds another dimension to the new-versus-old-friends examination. Grynberg takes the issues presented by Sandrey and argues a compelling case that this is a political rather than an economic situation whereby the BLNS and SACU have only one real friend. He argues that this is because South African President Jacob Zuma would not want to be written into the region's history as the man who 'crippled the Namibian and Botswana economies and created two more Zimbabwes' (Swaziland and Lesotho) (Grynberg, 2013).

Such a political-economy examination is outside the scope of the current paper but it raises an interesting subset of questions as to where both the immediate neighbours and the wider African continent sit between the new and old friends. Some of this debate is related to the source of Southern African Development Community (SACU) imports, for the traditional imports from the EU and increasing ones from the SADC members are entering South Africa at preferential tariffs while the Asian growth is paying nonpreferential most favoured nation (MFN) tariffs. While these increasing largely Asian imports may be contributing tariffs they are significantly impacting upon the regional manufacturing (and consequently employment) capacity (Sandrey et al., 2013a). Who are the 'real' friends?

Also outside the scope of this paper is the next level of trade analysis to assess the extent to which trade to the BRICs or new friends in trade creation (trade that features either new lines or trade that has increased from a low base) or trade diversion or trade with the BRICs that is being deflected away from old friends as they become either better markets for established exports or cheaper sources for established imports. The distinction is important. Trade creation in exports is generally a good thing as it represents new opportunities. Trade diversion in imports on the one hand is likely to be beneficial if it offers a wider range of imports to consumers at presumably lower costs but on the other hand it may be seriously impacting upon regional industrial capacity. The latter will, in turn, have a serious effect on regional employment.

Investment is another factor that similarly could be examined under the new-versus-old-friends thesis. Sandrey (2013a) examined South Africa's foreign direct investment (FDI) data for the three years of 2008 to 2010 inclusive and found that Europe was the main destination for assets (59.8%) and the main source for liabilities (63.3%), with this followed by the Americas for both. Both Africa and Asia were more important as an investment destination than as an investment source. Asia had the biggest FDI increase in assets by percentage over the period but Europe's increase by value remained the largest. In 2010 most of the total South African assets (43%) were held in portfolio assets abroad (with 77% held in Europe), followed almost equally by direct and other investments. Looking at the new friends (BRICs), China was the fourth most significant destination for South African assets held abroad (mostly FDI associated with banks), while, despite popular belief, China only ranked as the number nine source of FDI in 2010. Perhaps old friends are the true friends for investment...

2. An examination of SACU's trading relationships

For South Africa, its old friend the EU remains the top trading partner while the US continues to be important but has been overtaken by China. Overall, the new friends are making dramatic inroads, but these are mainly China and to a lesser degree India. The close friend (non-SACU Africa) is gaining ground overall as a trading partner, while with the other even closer friend, the BLNS (Botswana, Lesotho, Namibia and Swaziland) group, it is too hard to say as unreliable trade data does not allow a judgement. Conversely, for the BLNS the EU (mainly the UK), the US South Africa completely dominate their reported trade flows as the new friends are mostly just blips on the radar.

This section will examine the recent profile and performance of the SACU countries and their patterns for the new-versus-old-friends debate. We start by looking at the SACU export and import data to assess changes in trade flow destinations and sources respectively. First up is the South African perspective as shown in Tables 1 and 2, starting with the market shares for South Africa's import of old and new friends' sources. The right-hand column of Table 1 shows the percentage change as measured by the average of 2011/2012 over the average of 2000/2001. The overall change in import values over this period was 287% (meaning that imports at the end two years were nearly four times their levels at the starting period). Both old friends, the EU and the US, are below that increase (181% and 152% respectively), meaning that they are both losing market share as shown in the body of the table. Conversely, the lower half of table highlights the dramatic growth of BRICs, and in particular China and India. Brazil's growth has been above the South African import average (396% versus 287%), but Russia's has been below the overall figure, albeit with a very low market share. Thus, the 'new friends' here are really China and India. They are still below the 'old friends' in aggregate, but they have made significant market share growth against both 'old friends' (the EU and the US).

Also shown is the relative position of Africa, SADC and the BLNS to highlight regional trends. Note that the BLNS countries have made a dramatic growth rate from a zero base, but that is a statistical oddity as South Africa has only recently been publishing BLNS bilateral trade data. Similarly, we have generally included both SACU and SADC in subsequent analyses but again note that for imports into SACU an unknown percentage of transhipments may or may not be correctly reported by exporting partners as SACU, or rather South Africa, as the first point of landing. Overall, imports into South Africa from non-BLNS Africa have grown almost as much as BRIC imports.

The comparable export destinations shares are shown in Table 2, and here the decline of 'old friends' is more apparent. The EU steadily lost its importance as BRICs increased their 3.32% share in 2000 to almost approach the EU's 2012 share of 20.4% with a BRICs share of 17.20 %. Similarly, the US declined over the period, although its percentage change is higher than the less than impressive performance of the EU. This, coupled with the spectacular performance of exports to BRICs in general and China in particular, gives credence and some prima facie evidence to the new versus old friend's belief. In law accepting that a *prima facie* case exists requires a critical examination to test that evidence, and that is the objective of this paper. Again, note that the data buried in the table shows that non-BLNS Africa is again almost as important as the combined BRICs (with 'Unidentified' similarly very close to China's share). Analysis at the next product level down is needed to glean more information as to where this export growth is coming from. Is it trade diversion to Asia away from the old friends, or is it a seismic shift in the portfolio to new trade creation? That question is outside the scope of this paper.

Table 1: South Africa's import sources, market shares in %

South African imports % shares							
Partner/Year	2000	2003	2006	2009	2011	2012	%change
World	100%	100%	100%	100%	100%	100%	287%
EU	40.36%	43.27%	34.78%	32.13%	30.71%	28.73%	181%
US	11.79%	9.70%	7.56%	7.57%	8.09%	7.35%	152%
Africa-BLNS	3.18%	3.66%	6.21%	7.87%	7.44%	9.75%	916%
BLNS	0.00%	0.01%	0.59%	0.23%	0.21%	0.12%	na
BRIC	6.02%	9.87%	14.75%	18.58%	19.95%	20.74%	1128%
China	3.69%	6.47%	10.00%	13.09%	14.12%	14.37%	1303%
India	0.94%	1.22%	2.33%	2.89%	3.98%	4.52%	1625%
Brazil	1.09%	2.07%	2.02%	1.93%	1.67%	1.65%	396%
Russia	0.30%	0.11%	0.39%	0.66%	0.18%	0.20%	216%

Source: GTA

An update on South African trade data was obtained from the South African Revenue Services (SARS).[36] This data is for the year October 2013, and is expressed in percentage shares for firstly the export destinations and then the import sources as shown in Table 3. The totals in rand (millions) are given on the bottom line. Although not shown, measured as percentage change over the 2013/2010 periods, imports (138%) increased faster than exports (114%), while regionally Asia increased its market share above the comparable changes for Europe and America. The largest increase in both exports and imports, however, occurred in Africa. This can be seen by the changes in market shares. Thus, over this time period 'new' friends continued to flourish while 'old' friends languished and the third party (Africa) was doing the best of all!

36 See http://www.sars.gov.za/ClientSegments/Customs-Excise/TradeStatistics/Pages/Bilateral-trade.aspx.

Table 2: South Africa's import sources, destinations shares in %

South African exports % shares							
Partner/Year	2000	2003	2006	2009	2011	2012	%change
World	100%	100%	100%	100%	100%	100%	223%
EU	31.41%	31.38%	31.86%	24.09%	22.06%	20.44%	113%
US	12.07%	9.52%	10.44%	8.09%	8.59%	8.68%	154%
Africa-BLNS	12.88%	14.29%	12.86%	16.40%	14.28%	16.32%	261%
BLNS	0.00%	0.00%	0.00%	0.00%	0.00%	0.29%	na
BRIC	3.32%	4.40%	5.74%	13.59%	16.77%	17.20%	1368%
China	1.14%	2.54%	3.52%	9.29%	12.12%	11.60%	2683%
India	1.42%	1.13%	1.35%	3.41%	3.48%	4.21%	773%
Brazil	0.67%	0.51%	0.70%	0.59%	0.86%	0.91%	241%
Russia	0.10%	0.23%	0.17%	0.30%	0.32%	0.47%	1095%
Unidentified	13.16%	13.31%	9.04%	10.33%	10.79%	10.35%	157%

Source: GTA

Table 3: South African trade, October year on year data, % shares and rand (millions) totals

	EXPORTS				IMPORTS			
	2010	2011	2012	2013	2010	2011	2012	2013
AFRICA	15.2%	15.0%	17.7%	18.3%	7.6%	7.6%	9.7%	9.5%
EUROPE	27.3%	25.6%	23.2%	24.4%	34.0%	32.6%	30.1%	31.1%
AMERICA	11.7%	11.3%	11.9%	11.0%	12.0%	12.6%	12.0%	10.6%
ASIA	33.8%	35.7%	35.3%	36.5%	44.2%	45.1%	46.4%	47.2%
OCEANIA	1.3%	1.0%	1.2%	1.1%	1.9%	1.8%	1.6%	1.5%
Unclassified	10.5%	11.2%	10.6%	8.6%	0.2%	0.2%	0.2%	0.2%
Stores	0.3%	0.2%	0.2%	0.2%				
TOT R (millions)	584,318	701,198	714,157	666,443	587,204	725,763	831,056	813,020

Source: SARS

In this next section we have used the ITC data for analysis of Botswana, Lesotho, Namibia and Swaziland's trade relationships. For Lesotho, the ITC reports using mirror data, while for Swaziland we have used the official Swaziland data as reported for the 2003 to 2007 period rather than the 2008 to 2012 period as for the other countries.

Botswana

We start the BLNS analysis by examining Botswana's reported merchandise trade. Table 4 shows the ITC reported import profile from 2008 to 2012 inclusive, with the dominance of firstly South Africa and then the EU highlighted. Imports from China spiked in 2011 but then reverted to actually be below their earlier levels.

Table 4: Botswana: Imports, $ (millions) & % shares

Exporter/Year	2008	2009	2010	2011	2012
World	5,211	4,728	5,657	7,272	8,025
South Africa	77.31%	76.06%	72.80%	65.71%	62.79%
EU-27	11.27%	11.87%	13.26%	13.18%	20.03%
US	1.29%	2.17%	1.32%	2.15%	1.96%
BRIC	3.76%	3.93%	5.66%	12.32%	4.15%
China	2.89%	3.27%	4.88%	10.93%	2.78%
India	0.82%	0.62%	0.74%	1.36%	1.36%
Brazil	0.05%	0.02%	0.02%	0.01%	0.01%
Russia	0.00%	0.01%	0.01%	0.02%	0.00%

Source: ITC

Table 5 showing Botswana's export trade data again highlights that the EU and South Africa dominate. However, this time the patterns are reversed from imports in that the EU is now the dominant export partner rather than South Africa. The BRICs countries are actually reported as losing market share from 2008, while the US maintains a market share of just over 1%.

Table 5: Botswana: Exports, $ (millions) & % shares

Importer/Year	2008	2009	2010	2011	2012
World	4,951	3,456	4,693	5,882	5,971
EU-27	59.06%	58.89%	61.04%	65.23%	65.21%
South Africa	18.30%	14.67%	12.92%	13.50%	13.10%
US	1.00%	1.32%	1.21%	1.07%	1.22%
BRIC	5.21%	2.47%	1.77%	2.07%	1.92%
India	0.44%	0.15%	0.87%	1.28%	1.14%
China	4.77%	2.33%	0.90%	0.78%	0.78%
Russia	0.00%	0.00%	0.00%	0.00%	0.00%
Brazil	0.00%	0.00%	0.00%	0.01%	0.00%

Source: ITC

The new friends are making little progress in Botswana, although we caution that the reported data may not necessarily report transhipments of Chinese imports from South Africa.

Lesotho

Not reported in Table 6 is that the ITC records that during 2012 some 28.6% of the imports into Lesotho were from Taiwan, with this figure an increase from the consistent 20% level of previous years. This special feature of Lesotho is almost certainly fabric and related inputs into the clothing sector for Lesotho's export of finished garments to the US, as shown in the export data. Again, as South African trade data may not necessarily report BLNS exports, the market share for South Africa is likely to be an underestimation.[37]

[37] This is an interesting statistical oddity, as Lesotho is heavily dependent upon revenue from the SACU tariff pool, and this money is distributed on the basis of relative SACU shares of imports from South Africa.

Table 6: Lesotho: Import market source shares

Exporter/Year	2008	2009	2010	2011	2012
Total $ (millions)	308	259	299	255	265
US	0.43%	6.43%	3.79%	5.16%	6.24%
EU-28	6.79%	5.42%	3.97%	4.53%	3.35%
South Africa	0%	0%	0%	0%	1.64%
BRIC	37.34%	24.25%	25.94%	37.08%	42.68%
China	25.84%	19.47%	19.86%	28.71%	35.66%
India	11.50%	4.76%	6.06%	8.30%	6.81%
Russia	0.00%	0.02%	0.02%	0.07%	0.21%
Brazil	0.00%	0.00%	0.00%	0.00%	0.00%

Source: ITC

Old friends dominate the Lesotho export profile, with over 90% of the exports going to either the US or the EU. Table 12 using SACU Secretariat data, however, refutes this figure and suggests that 48.9% of Lesotho's exports went to South Africa.

Table 7: Lesotho: Export market destination shares

Importer/Year	2008	2009	2010	2011	2012
Total $ (millions)	669	482	535	784	652
US	58.75%	65.50%	58.29%	50.35%	49.29%
EU-27	37.22%	29.45%	34.64%	43.26%	43.70%
South Africa	0.01%	0.00%	0.17%	0.00%	0.01%
BRIC	0.30%	0.37%	1.18%	1.26%	1.44%
China	0.25%	0.35%	0.85%	0.95%	0.83%
India	0.04%	0.00%	0.29%	0.29%	0.59%
Russia	0.00%	0.01%	0.03%	0.02%	0.01%
Brazil	0.01%	0.01%	0.02%	0.01%	0.01%

Source: ITC

Namibia

Table 8 reports on Namibia's imports, and here it is pleasing to note that the 2010 72.4% share from South Africa as reported by the SACU Secretariat in Table 12 is the same figure as reported here. The BRICs countries, dominated by China as always, are marginally losing market share as are both the EU and the US.

Namibian exports are dominated by the EU's share of around one-third, with this figure increasing over the period. South Africa is next (although the 2010 figure of 28.96% to South Africa is significantly above the Table 12 SACU figure of 20.7%). Exports to BRIC are low and declined in relative terms.

Table 8: Namibia: Import market-source shares

Exporter/Year	2008	2009	2010	2011	2012
World $ (millions)	4,689	6,208	5,980	6,457	7,132
South Africa	67.82%	69.85%	72.43%	75.77%	69.67%
EU-27	15.73%	13.63%	11.67%	8.58%	8.35%
US	2.02%	1.40%	1.22%	0.81%	0.63%
BRIC	7.46%	8.35%	5.01%	5.81%	4.77%
China	3.27%	5.33%	3.43%	4.14%	4.03%
India	3.46%	2.07%	1.11%	1.20%	0.53%
Brazil	0.54%	0.91%	0.44%	0.40%	0.16%
Russia	0.19%	0.05%	0.04%	0.07%	0.04%

Source: ITC

Table 9: Namibia: Export market destination shares

Importer/Year	2008	2009	2010	2011	2012
World $ (millions)	4,729	5,871	5,848	5,901	5,377
EU-27	28.84%	25.39%	35.69%	35.54%	35.19%
South Africa	31.82%	33.82%	28.96%	29.11%	17.36%
US	5.51%	4.52%	4.57%	6.98%	3.74%
BRIC	5.30%	5.68%	3.15%	2.48%	3.00%
China	5.24%	4.93%	2.91%	2.15%	2.74%
India	0.01%	0.61%	0.18%	0.22%	0.21%
Russia	0.05%	0.14%	0.05%	0.10%	0.04%
Brazil	0.00%	0.00%	0.00%	0.00%	0.01%

Source: ITC

Swaziland

The ITC uses mirror data to report the most recent trading years for Swaziland, and that data is shown in Tables 10 for imports and Table 11 for exports. South Africa is the dominant source of imports despite losing some market share, while the EU is strongly in second place. China seemed to make some inroads in 2011 but reverted back to previous levels again in 2012. India with just over 1% of the market is the only other BRIC country reporting meaningful trade to Swaziland (mirror reportings). Note also that Namibian imports in 2012 were above those from the BRIC countries.

Table 10: Swaziland's import profile, % market shares

Exporters/Year	2008	2009	2010	2011	2012
World $ (millions)	5,211	4,728	5,657	7,272	8,025
South Africa	77.31%	76.06%	72.80%	65.71%	62.79%
EU	11.27%	11.87%	12.76%	13.17%	20.03%
US	1.293%	2.167%	0.092%	0.065%	0.070%
Namibia	0.560%	0.600%	1.213%	0.850%	5.652%
Lesotho	0.001%	0.001%	0.001%	0.116%	0.151%
BRIC	3.759%	3.929%	5.657%	12.321%	4.148%
China	2.890%	3.272%	4.884%	10.927%	2.783%
India	0.816%	0.625%	0.744%	1.364%	1.356%
Brazil	0.049%	0.022%	0.023%	0.013%	0.009%
Russia	0.004%	0.010%	0.006%	0.018%	0.001%

Source: ITC (mirror data)

As shown in Table 11, new friends made very little impact upon Swaziland's export profile. Exports to the EU were marginally increasing, while those to South Africa remained comfortably in second place despite losing some market share. China is reported as actually having lost market share.

Table 11: Swaziland's export market destination, % market shares

Importers/Year	2008	2009	2010	2011	2012
World $ (millions)	4,951	3,456	4,693	5,882	5,971
EU	59.07%	58.89%	61.04%	65.23%	65.21%
South Africa	18.30%	14.67%	12.92%	13.50%	13.10%
US	1.00%	1.32%	1.21%	1.07%	1.22%
Namibia	1.15%	0.53%	0.36%	0.53%	1.87%
China	4.77%	2.33%	0.90%	0.78%	0.78%
Swaziland	0.023%	0.048%	0.025%	0.074%	0.024%
Lesotho	0.020%	0.013%	0.015%	0.017%	0.022%
Russia	0.000%	0.001%	0.001%	0.000%	0.001%

Source: ITC (mirror data)

The alternative SACU Secretariat trade data

The SACU Secretariat[38] reports on trade data, with the 2010 data the latest that we were able to download (Table 12). For Botswana's trade and Swaziland and Namibia's imports, the SACU data reconciles only reasonably well. It is not even close for Lesotho (where the missing South African data in the tables above dominate the trade) or for Swaziland's exports. Lesotho's imports as reported by SACU are wildly different from the ITC data; in the SACU data some 92% of the imports are from South Africa while the BRIC countries are not even mentioned! Only Lesotho's imports show overall BLNS-BRIC trade at more than 5% of the total in the eight tables for the BLNS above, and, as noted, that figure for Lesotho is disputed by SACU. Clearly, further investigation is warranted on BLNS trade but the general picture of old-friends dominance holds up notwithstanding Lesotho's imports.

[38] See http://www.sacu.int/publications/trade_statistics/2012/merchandise_trade_statistics.pdf.

Table 12: BLNS trading relationships, $ shares, 2010 year

	% Export to		% Imports from	
Country/partner	RSA	Other	RSA	Other
Botswana	13.1	55.4 UK	72.4	9.2 UK
Lesotho (2009)	48.9	31.8 US	95.2	2.5 Japan
Namibia	20.7	14.0 UK	72.4	12.3 UK
Swaziland	56.7	6.8 US	87.6	2.9 China

The EU relationship

This segment introduces a summary of the trade performance of the SACU countries in the EU market since 2000. Table 13 starts by profiling the EU imports, with the data expressed in dollars (millions) for imports from SACU but in billions for the EU totals. The upper third of the table shows the SACU imports in dollars (millions) with the percentage change in the right-hand column expressing the change for an average of 2011/2012 over a base period of 2000/2001. The average EU increase was 163%, but the aggregate SACU increase of 124% was below that figure. This is mostly a result of the imports from South Africa (RSA) being below the overall average at 102%, or just over doubling during the period. In aggregate, the BLNS countries did well, driven by strong performances from Botswana and Lesotho (albeit from a low base).

Table 13: EU imports from SACU, 2000 to 2012 inclusive, $ (millions) & % shares

Partner/Year	2000	2003	2006	2009	2011	2012	% change
Total $ (billions)	9,129	10,587	17,000	16,842	24,040	23,082	163%
Imports from SADC / SACU, $ (millions)							
SACU	14,321	19,318	27,175	22,357	36,653	31,761	124%
BLNS	1,092	2,523	4,153	1,690	6,677	6,119	324%
Botswana	483	1,735	2,270	517	4,090	3,891	421%
Lesotho	21	7	80	142	341	283	1578%
Namibia	467	645	1,650	835	2,013	1,714	211%
RSA	13,229	16,795	23,022	20,667	29,976	25,641	102%
Swaziland	121	136	152	196	233	231	83%
% of EU total Imports							
SACU	1.569%	1.825%	1.599%	1.327%	1.525%	1.376%	
BLNS	0.120%	0.238%	0.244%	0.100%	0.278%	0.265%	
Botswana	0.053%	0.164%	0.134%	0.031%	0.170%	0.169%	
Lesotho	0.002%	0.001%	0.005%	0.008%	0.014%	0.012%	
Namibia	0.051%	0.061%	0.097%	0.050%	0.084%	0.074%	
RSA	1.449%	1.586%	1.354%	1.227%	1.247%	1.111%	
Swaziland	0.013%	0.013%	0.009%	0.012%	0.010%	0.010%	

Source: GTA

Table 14: EU exports to SACU, 2000 to 2012 inclusive, $ (millions) & % shares

Partner/ Year	2000	2003	2006	2009	2011	2012	% change
World $ (billions)	7,826	9,872	14,589	15,335	21,736	21,725	176%
Exports to SADC/SACU, $ (millions)							
SACU	109,901	154,705	249,921	227,392	374,196	347,748	223%
BLNS	3,174	4,178	3,679	8,367	17,331	24,971	537%
RSA	106,727	150,527	246,242	219,025	356,864	322,777	213%
Botswana	1,535	1,716	1,122	2,714	8,529	14,966	629%
Namibia	1,383	2,030	1,985	5,215	8,323	9,603	518%
Swaziland	186	200	330	295	354	287	91%
Lesotho	70	232	242	142	125	114	33%
% of EU total exports							
ACU	1.404%	1.567%	1.713%	1.483%	1.722%	1.601%	
BLNS	0.041%	0.042%	0.025%	0.055%	0.080%	0.115%	
RSA	1.364%	1.525%	1.688%	1.428%	1.642%	1.486%	
Botswana	0.020%	0.017%	0.008%	0.018%	0.039%	0.069%	
Namibia	0.018%	0.021%	0.014%	0.034%	0.038%	0.044%	
Swaziland	0.002%	0.002%	0.002%	0.002%	0.002%	0.001%	
Lesotho	0.001%	0.002%	0.002%	0.001%	0.001%	0.001%	

Source: GTA

Table 14 shows the comparable data for EU exports to SACU. Here the EU global increase in exports of 176% is marginally above the increase in imports over the same period (Table 13) while the increase of 223% in exports to SACU is significantly higher than the 124% increase in imports from SACU. This less than salutatory performance (from a purely mercantilist perspective) from SACU is confirmed in the lower segment of the table which shows an increase in EU market shares for their exports to SACU that is driven by exports to South Africa in particular.

This broad aggregate picture tells only part of the story. It is essential to dig deeper into the data to assess trade performance. Sandrey and Gill (2012) did this by examining the performance of both South Africa and the EU in their respective partner import markets. They found that the overall trade data between South Africa and the EU confirmed that despite the tariff preferences accorded to the bilateral partners the relative importance of the EU both as an export destination and import source for South Africa declined. Examining South Africa's performance in the EU they confirmed our finding above that South Africa did not meet the average European growth rates for either total imports or agricultural imports; this is so as the South African trade shares slowly declined after an initial post-Trade, Development and Cooperation Agreement (TDCA) increase.

For the detailed performance assessment Sandrey and Gill (2012) analysed the growth rates for trade lines at the HS 6 digit levels using the pre-TDCA 1999/2000 average trade as the starting point and the 2010/2011 trade as the end point.[39] These changes were benchmarked against the overall growth rates for both (a) total import market and (b) the South African or EU import share as appropriate and the trade lines assigned to a series of categories developed. These categories looked at how well both the overall market and the relevant South African or EU import share was performing. These changes were then assessed against the tariff preferences from the TDCA Agreement to seek a linkage between market share growth and tariff preferences.

For **all merchandise trade** South Africa performed well in the EU market. It was found that some 25% of the imports into the EU by value were 'real stars' in that they were shining brightly in an EU growth market while another 24% were 'basic stars' in that they were doing very well but without the brilliance of 'real stars'. The 'real stars' were where South Africa was gaining market share in a strongly

[39] This paper uses the 2000/2001 years as a base to measure 2011/2012 trade against.

growing EU market, while for 'basic stars' South Africa's growth rates in these lines were above the overall average in lines where the global EU imports were similarly above their average, but where South Africa's growth rates were not as good as the overall competition. Another 8.8% were in the good position of at least growing in an overall market that is strongly growing, while some 29% were settled comfortably but not spectacularly where they were at least growing in a market that itself was growing. Overall, this detailed analysis provides a better outcome for South Africa than seemed possible by just looking at the big picture. For the reciprocal performance of EU imports into South Africa and the influence of the TDCA upon these imports it was found that 'real stars' categories suggest that South Africa is doing better into the EU market than the converse of EU imports into South Africa, while 'basic stars' were similar. The overall conclusions were that there appears to be limited evidence that the TDCA has resulted in any significant trade creation.

Sandrey et al. (2013d) then examined the South African-Chinese trading relationship using this same methodology (along with assessing how consistent the trade data reporting is between the two partners – an issue that is pertinent to this current paper). They found that there are significant differences in the trade data reporting, and especially between South African exports on the one side of the equation and Chinese imports on the other. This difference is not only at the aggregate level but at the detailed level as well where the bilateral data can seldom be reconciled. Contributing to the aggregate level differences on the Chinese side is its reporting of a massive value defined as 'special products' that does not have an easily available explanation. Importantly, South Africa is not competing well in the Chinese market against its major competitors at the detailed level despite appearing to do so when only the increased aggregate export trade flows are taken into account.

These two studies confirm that just reviewing aggregate trade data can lead to a simplistic conclusion; to properly address the new-versus-old-friends analysis one must look at more details for individual trade lines.

The US relationship

The analysis of US imports from SACU is shown in Table 15, with the data expressed in US dollars (millions) for imports from SACU but in billions for the US totals. The upper third of the table shows the SACU imports in dollars (millions) with the percentage change on the right-hand column expressing the change for an average of 2011/2012 over a base period of 2000/2001. The average US increase was 90%, and all the SACU countries except Swaziland exceeded that figure – they were therefore increasing the US market share over the period, with both Botswana and Namibia doing especially well albeit from a low base. The main SACU contributor, South Africa, marginally increased its market share as evidenced by the increase of 110% (above the US average of 90%). Also notable from this segment of the table and the middle segment showing individual market shares is that Lesotho had a strong presence over the period. The lower segment aggregates the data for both BLNS and SACU.

Table 15: US imports from SACU, 2000 to 2012 inclusive, $ (millions) & % shares

Country/ Year	2000	2003	2006	2009	2011	2012	% change
US $ (billions)	1,205	1,250	1,845	1,549	2,187	2,251	89.8%
South Africa	4,204	4,888	7,497	5,877	9,473	8,669	110.1%
Botswana	41	14	252	132	293	217	727.3%
Lesotho	140	393	408	304	384	311	94.5%
Namibia	42	123	116	328	436	231	734.1%
Swaziland	53	162	156	110	83	67	27.5%
% share of US market							
South Africa	0.349%	0.391%	0.406%	0.379%	0.433%	0.385%	
Botswana	0.003%	0.001%	0.014%	0.009%	0.013%	0.010%	
Lesotho	0.012%	0.031%	0.022%	0.020%	0.018%	0.014%	
Namibia	0.004%	0.010%	0.006%	0.021%	0.020%	0.010%	
Swaziland	0.004%	0.013%	0.008%	0.007%	0.004%	0.003%	

Summary tables, subtotals & % shares							
SACU $	4,479	5,580	8,429	6,750	10,671	9,494	118.0%
SACU %	0.372%	0.446%	0.457%	0.436%	0.488%	0.422%	
BLNS $	275	692	932	873	1,197	825	228.0%
BLNS%	0.023%	0.055%	0.051%	0.056%	0.055%	0.037%	

Source: USITC

Table 16 duplicates Table 15 except that this time it is for US *exports* to SACU. The 2012/2011 average exports to both Swaziland and Namibia were below the overall US base period; exports to South Africa were comfortably above that base; Lesotho was significantly above the US export base (albeit from a low Lesotho base). The overall result is that exports to SACU in 2011/2012 were 135% percent (more than double) the 2000/2001 base. South Africa is driving this result as the BLNS exports only very marginally increase over the period. Note, however, the large decline in South Africa's market share in 2009 and the impact that had on the overall SACU share for that year.

The special access provisions for imports from SACU are shown in Table 17. The Africa Growth and Opportunity Act (AGOA) programme did not start until 2001, but by 2012 virtually all the imports from both Lesotho and Swaziland were imported under this preferential scheme. Neither Botswana nor Namibia used AGOA to any extent in the later years, while around one-quarter of the South African imports were under the scheme. Note that the total shown in the table may not reconcile with the categories as minor trade in pharmaceuticals and civil aircraft have been omitted.

Table 16: US exports to SACU, 2000 to 2012 inclusive, $ (millions) & % shares

Country/ Year	2000	2003	2006	2009	2011	2012	% change
Total $bill	692,821	693,257	904,380	1,300,136	1,277,504	1,480,552	87.2%
Lesotho	0.9	5.1	4.0	16.6	13.2	16.5	1657%
Swaziland	67.1	8.2	12.1	14.6	20.2	40.0	-23.8%
Botswana	31.5	25.9	26.9	93.3	43.8	48.0	22.8%
Namibia	80.2	28.0	126.9	202.3	137.4	194.9	-1.1%
RSA	3,085	2,821	4,462	4,461	7,294	7,553	146%
% share of US market							
Lesotho	0.000%	0.001%	0.000%	0.001%	0.001%	0.001%	
Swaziland	0.010%	0.001%	0.001%	0.001%	0.002%	0.003%	
Botswana	0.005%	0.004%	0.003%	0.007%	0.003%	0.003%	
Namibia	0.012%	0.004%	0.014%	0.016%	0.011%	0.013%	
RSA	0.445%	0.407%	0.493%	0.343%	0.571%	0.510%	
Summary tables, subtotals & % shares							
SACU $	3,264	2,888	4,632	4,787	7,509	7,853	135%
BLNS SS	180	67	170	327	215	299	4.6%
SACU %	0.471%	0.417%	0.512%	0.368%	0.588%	0.530%	
BLNS %	0.026%	0.010%	0.019%	0.025%	0.017%	0.020%	

Source: USITC

Table 17 US imports from SACU by programme, actual US dollars, 2000 and 2010 – 2012.

Country	Import Program	2000	2010	2011	2012
Botswana	AGOA (ex GSP)	0	11,558,504	15,478,526	10,426,741
	GSP	2,921,625	7,713	1,584,767	1,757,255
	No program	37,584,930	158,146,649	276,222,513	204,337,399
	Total - Botswana	40,509,805	169,738,950	293,285,806	216,546,405
Lesotho	AGOA (ex GSP)	0	280,341,602	314,311,152	300,608,996
	GSP	0	50,015	24,178	8,654
	No program	140,149,739	18,534,330	70,015,755	9,953,635
	Total - Lesotho	140,149,739	298,925,947	384,351,085	310,571,285
Namibia	AGOA (ex GSP)	0	5,279	12,828	215,604
	GSP	154,264	741,853	134,304,000	935,536
	No program	42,036,850	194,289,343	302,020,961	230,128,787
	Total - Namibia	42,191,114	195,036,475	436,337,789	231,279,927
South Africa	AGOA (ex GSP)	0	1,902,140,378	2,464,830,811	2,384,108,742
	GSP	583,175,612	1,200,195,930	1,332,574,784	1,294,108,245
	No program	3,610,382,039	5,081,516,156	5,660,843,456	4,970,809,662
	Total - South Africa	4,203,656,562	8,199,239,198	9,473,431,885	8,669,101,144
Swaziland	AGOA (ex GSP)	0	92,798,432	77,121,089	62,373,329
	GSP	11,956,956	18,274,701	71,362	333,606
	No program	40,549,146	3,840,665	6,097,161	3,909,128
	Total - Swaziland	52,576,931	114,913,798	83,289,612	66,646,960

Source USITC

China

Table 18 reports on the relative position of South African exports in the Chinese import market over the period 2000 to 2012 inclusive. The right-hand column shows that the overall average of these imports increased to be 7.6 times their early values by the latest two years. Imports from the EU slowly declined in market share, while those from Africa increased markedly. South Africa, where imports increased some 24.7 times, is clearly driving the SACU and the SADC results. We do, however, caution that Sandrey et al.(2013) raise a concern over this South African import data as reported by China in the GTA.

Table 18: Chinese import statistics, $ (millions) for total, percentage shares and increase for 2012/2011 over 2000/2001

Source/ Year	2000	2003	2006	2009	2011	2012	Increase
World $ (million)	225,095	413,096	791,794	1,003,893	1,741,430	1,817,344	7.6
EU	13.91%	13.33%	11.45%	12.74%	12.13%	11.69%	6.3
Africa	2.46%	2.02%	3.59%	4.19%	5.17%	6.03%	19.3
SADC	1.38%	1.06%	2.00%	2.54%	3.52%	4.55%	27.8
SACU	0.46%	0.46%	0.54%	0.90%	1.86%	2.48%	34.7
BLNS	0.002%	0.013%	0.020%	0.039%	0.019%	0.026%	34.6
RSA	0.46%	0.45%	0.52%	0.86%	1.84%	2.45%	34.7
Botswana	0.000%	0.000%	0.001%	0.006%	0.006%	0.006%	large
Lesotho	0.000%	0.000%	0.000%	0.000%	0.000%	0.000%	12.0
Namibia	0.002%	0.009%	0.015%	0.031%	0.013%	0.013%	30.8
Swazi.	0.000%	0.004%	0.003%	0.001%	0.000%	0.006%	14.3

Source: GTA

A similar pattern emerges in Table 19 where Chinese exports to Africa in general and to SADC, SACU and South Africa all increased at about double the average overall figure. Although exports to the EU increased marginally lower than the average figure and those to the US declined marginally, the combined exports to these 'old' destinations still make up about one-third of the Chinese total. They may be old friends but they are still good friends of China!

Table 19: Chinese export statistics, $ (millions) for total, percentage shares and increase for 2012/2011 over 2000/2001

Destination/ Year	2000	2003	2006	2009	2011	2012	Increase
World $ (millions)	249,240	438,473	969,324	1,202,047	1,899,281	2,050,109	7.7
EU	16.46%	18.02%	19.58%	19.66%	18.74%	16.29%	8.1
US	20.92%	21.10%	21.00%	18.36%	17.07%	17.16%	6.4
Africa	2.01%	2.31%	2.74%	3.94%	3.80%	4.12%	14.3
SADC	0.54%	0.61%	0.82%	1.01%	1.11%	1.23%	16.7
SACU	0.42%	0.48%	0.62%	0.65%	0.76%	0.78%	14.2
BLNS	0.013%	0.021%	0.028%	0.041%	0.053%	0.036%	19.8
South Africa	0.407%	0.463%	0.595%	0.613%	0.704%	0.748%	13.9
Botswana	0.004%	0.005%	0.006%	0.014%	0.032%	0.009%	31.9
Lesotho	0.004%	0.006%	0.007%	0.004%	0.004%	0.005%	6.2
Namibia	0.003%	0.009%	0.014%	0.022%	0.015%	0.021%	24.8
Swaziland	0.001%	0.002%	0.001%	0.001%	0.002%	0.001%	10.0

Source: GTA

India

Indian imports from both South Africa and SACU declined in market shares over the period shown, while those from the BLNS increased significantly (albeit from a low base). Note also that the increase from SADC was above the world average, indicating that non-SACU SADC imports must have increased even faster as SACU is below the average.

Table 20: Indian import statistics, $ (million) for total, percentage shares and increase for 2012/2011 over 2000/2001

Source/Year	2000	2003	2006	2009	2011	2012	Increase
World $ (millions)	50,577	71,183	172,876	257,658	465,076	490,413	9
SADC	2.79%	2.95%	1.74%	3.48%	3.45%	3.52%	11.3
SACU	2.48%	2.72%	1.49%	1.93%	2.03%	1.79%	6.9
RSA	2.48%	2.72%	1.43%	1.90%	2.01%	1.76%	6.8
BLNS	0.003%	0.007%	0.052%	0.025%	0.023%	0.032%	121
Botswana	0.000%	0.000%	0.000%	0.002%	0.008%	0.013%	large
Lesotho	0.000%	0.000%	0.000%	0.000%	0.001%	0.001%	529
Namibia	0.001%	0.005%	0.013%	0.016%	0.003%	0.002%	30
Swaziland	0.002%	0.002%	0.039%	0.007%	0.012%	0.016%	93

Source: GTA

Table 21: Indian export statistics, $ (millions) for total, percentage shares and increase for 2012/2011 over 2000/2001

Destination/ Year	2000	2003	2006	2009	2011	2012	Increase
World $ (millions)	42,299	57,457	121,259	165,202	307,086	297,261	7.1
SADC	1.70%	1.81%	2.89%	2.67%	3.02%	3.38%	13.5
SACU	0.75%	0.86%	1.76%	1.21%	1.49%	1.73%	14.9
RSA	0.73%	0.78%	1.72%	1.13%	1.42%	1.67%	14.8
BLNS	0.02%	0.08%	0.03%	0.08%	0.07%	0.06%	15.3
Botswana	0.01%	0.01%	0.01%	0.01%	0.01%	0.02%	9.9
Lesotho	0.00%	0.01%	0.00%	0.01%	0.01%	0.01%	190
Namibia	0.01%	0.01%	0.01%	0.03%	0.02%	0.02%	9.6
Swaziland	0.00%	0.05%	0.00%	0.02%	0.03%	0.02%	49

Source: GTA

All the African export destinations shown in Table 21 have performed above the overall Indian export average. This is driven by exports to South Africa, as they dominate SACU and provide a destination for about half of the Indian exports to SADC. Overall, India is a good 'new' friend.

Other BRIC countries and Japan

A summary of the changes in the trading relationships with the BRIC countries of Brazil and Russia along with Japan is shown in Table 22 which reports on the ratios of trade in 2012/2011 over the average of 2000/2001. While the actual data is not shown, it can be seen that with both Brazil and Japan South Africa has performed about the same as the world average, although better as an export destination than an import source. With Russia South Africa has performed better than the average. The BLNS performance has been mixed.

Table 22: Trading relationships with Brazil, Russia and Japan, trade ratio of 2011/2012 over 2000/2001

	Brazil		Russia		Japan	
	imports	exports	imports	exports	imports	exports
World	4.0	4.4	8.6	4.7	2.4	1.8
RSA	3.4	4.8	10.7	10.1	2.6	2.5
BLNS	11.5	14.3	12.5	1.2	2.4	4.1
SACU	3.5	4.8	10.9	9.1	2.6	2.5
SADC	3.2	6.1	8.3	5.7	2.5	2.7
Africa	4.7	7.3	7.0	7.4	4.0	2.8
BRIC	18.4	20.3	20.1	6.8	3.4	5.1
EU	3.1	3.3	8.0	4.4	1.8	1.2
China	26.3	28.6	38.2	6.6	3.3	5.0
US	2.6	1.9	5.6	3.9	1.1	1.0

Source: GTA

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Chapter 8

Political drivers of Africa’s regional economic integration. Lessons from the Maputo and North-South Corridors[1]

Bruce Byiers and Jan Vanheukelom[2]

1. Introduction

1.1. Motivation and purpose

There is long-standing, broad consensus on the need for greater economic connectedness in Africa. Policies to ‘de-fragment’ Africa (Brenton and Isik, 2012) are intended to promote economic transformation through expanded markets, investment and employment creation, thus laying a path towards inclusive growth and poverty reduction. Regional markets may also offer opportunities as a testing and learning ground for exporters due to similar tastes and lower barriers to market access in the African region (Hoppe and Aidoo, 2012).

But despite the rhetorical and political consensus, there is slow progress in implementing regional commitments. This lack of movement towards the free

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[1] This study builds on the European Centre for Development Policy Management (ECDPM)-South African Institute of International Affairs (SAIIA) project on the Political Economy of Regional Integration in Southern Africa (PERISA) financed under the EU-South Africa Dialogue Facility, particularly the work by Byiers and Vanheukelom(2014) but also work carried out for the African Development Bank as background to the 2013 *African Development Report on Leveraging Regional Integration for Inclusive Growth*.

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movement between national markets of goods, services, people and capital is frequently blamed on a combination of factors, namely lack of political will and lack of capacity. Yet it is necessary to better understand what these twin deficiencies actually entail. 'Political will' is something of a black box combining a range of different influences and interests that need to be better understood, while capacity constraints can apparently be overcome in specific circumstances – often where there is 'political will'– bringing back the need to analyse this term further.

At the same time, there is little agreement on what effective regional integration looks like, or should look like. Regional integration involves a complex combination of formal interstate processes with myriad in-country measures relating to formal trade agreements, formal and informal trade practices, regulatory mechanisms, macroeconomic policies, industrial and agricultural policies, and many more infrastructure and other projects and processes with cross-border implications. Different regions are further characterised by different levels of aspiration and ambition.

Indeed, looking at African regional agreements from a legal point of view, Gathii (2011) argues that African Regional Trading Agreements (RTAs) are explicitly designed to be 'flexible' cooperative agreements 'establishing flexible regimes of cooperation as opposed to containing rules requiring scrupulous and rigorous adherence'. They also adopt a 'broad array of social, economic and political objectives without giving salience to any set of objectives' and expressly build on the principle of 'variable geometry', affording poorer countries more time to implement agreed trade and other commitments. While these insights therefore challenge those who would measure the performance of African regional integration against Western standards of institutional design and effectiveness, they nonetheless further underscore the need to understand the political economy (PE) of *why* these preferences are adopted.

There is an expanding literature examining where and why African political elites promote national socioeconomic development. The study of the political economy of regional integration in Africa has received considerably less attention.

While much of the existing literature on regional integration looks at it as a country-to-country process, it is also necessary to relate this to within-country political processes to understand when and where political elites will succeed in supporting different aspects of the regional integration agenda.
The key underlying question addressed in this paper is therefore as follows: When do key actors, especially political elites, credibly engage and commit to implement regional integration agreements?

This paper contends that only by understanding the politics at the national level and the interaction of politics with regional processes can one gain insight into regional integration outcomes. Based on a review of the relevant literature, we use five analytical lenses to systematise knowledge about the drivers and obstacles to regional integration. These lenses are foundational or structural factors; formal and informal institutions; actors and incentives; sectoral characteristics; and external drivers. While their relative importance varies according to context and by case, the paper posits that these lenses help to systematically identify and understand drivers and constraints to regional integration and can thereby contribute to informing a broader dialogue on how positive outcomes can be supported. These types of analysis may also help identify opportunities for realistic and more effective support strategies to regional integration and inclusive growth.

The paper applies these lenses to two corridor initiatives in the Tripartite Comesa-EAC-SADC[3] region – namely the NSC and the MDC. Although two very different corridors, this comparison highlights the relative success of the MDC in aligning national political interests at a high level through the close personal connection between South Africa's Nelson Mandela and Mozambique's Joaquim Chissano, itself an outcome of long-standing political support for the African National Congress (ANC) by FRELIMO. In addition, the MDC is characterised by a limited scope and number of actors, even taking account of the wide array of different government and private-sector actors involved in some way. The anchor investment of the Mozalaluminium smelter just outside Maputo had an important

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[3] East African Community, Southern African Development Community, Common Market for Eastern and Southern Africa.

influence on driving the process, while the whole project took place at something of a critical juncture at the end of apartheid and Mozambique's civil war.

The context for the NSC is very different, raising questions about the value of promoting such a broad and multicountry corridor. Given the involvement of up to eight countries if the NSC spurs are included, interests are clearly more difficult to align at an economic or political level. Private-sector demand for an improved NSC is far less obvious than in the MDC case, while there is no specific external factor that is creating pressure for governments and other actors to speed up and ensure effective implementation of the NSC. That is not to say that the NSC is not advancing, but rather that progress is likely to be slow given the wide range of incentives and actors, and the ostensibly limited common interest.

The findings suggest that regional processes are successfully implemented where they contribute to achieving national priorities, and where this is revealed through actions rather than through mere policy statements and according to the interests of influential domestic actors and their interaction with ruling elites. This seems more likely to occur when the scope of the project is narrower, the concerns about national sovereignty or policy space are respected, the alignment of actors greater, the number of actors involved smaller, and subsequently, the potential outcomes regarding winners and losers clearer. Applying a PE analysis to more narrowly defined cross-border initiatives may therefore be instrumental in identifying opportunities for more inclusive regional-integration dynamics in areas such as infrastructure investments and cross-border movements of goods, people and finance.

1.2. Regional integration context

The blueprint for regional integration is commonly taken from Balassa's seminal book of 1961. This describes five forms of economic integration: a free trade area (FTA), a customs union (CU), a common market (CM), an economic union, and complete economic integration.

Although frequently understood as a linear sequence of deepening integration towards a regional ideal, as Baldwin (2011) points out, these forms of economic integration were never intended to represent an ideal sequence but instead to describe different possible levels of integration.

The eight African regions recognised by the African Union (AU) have adopted this sequential model, with varying degrees of implementation, as shown in Table 1.[4] As the table shows, of the eight Regional Economic Communities (RECs), the East African Community (EAC) has progressed furthest in attaining its integration objectives. The EAC is the most advanced community and launched its Common Market in 2010. The Common Market for Eastern and Southern Africa (Comesa) launched its CU in June 2009. The Economic Community of West African States (Ecowas) and Southern African Development Community (SADC) have made progress in building their FTAs with Ecowas adopting a common external tariff in October 2013, while SADC is now aiming to consolidate its FTA before aiming for a CU, originally planned for 2013. The Economic Community of Central African States (ECCAS) launched its FTA in 2004 but is facing enormous challenges in implementing it. The Arab Maghreb Union (AMU), the Community of Sahel and Saharan States (CEN-SAD) and the Intergovernmental Authority on Development (IGAD) are moving slowly and are still in the stage of cooperation among their member states (AUC, 2013).[5]

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4 The African Union recognises eight RECs in Africa. These are the Arab Maghreb Union, the Community of Sahel-Saharan States, the Common Market for Eastern and Southern Africa, the East African Community, the Economic Community for Central African States, the Economic Community of West African States, the Intergovernmental Authority on Development and the Southern African Development Community.

5 Nonetheless, additional regional configurations exist that have not followed this linear path with implications for progress in the related AU-recognised RECs. The Southern African Customs Union (SACU) stems from quite specific historic circumstances and went straight to a CU without having been an FTA with implications for SADC integration. Other examples include the Central African Economic and Monetary Union (CEMAC) and the West African Economic and Monetary Union (UEMOA), with implications and challenges for ECCAS and Ecowas countries and their regional integration processes.

Table 1: Status of integration

RECs	Date	*FTA*	*Customs Union*	*Common Market*	*Monetary Union*	*Political Federation*
AMU	1989					
CEN-SAD	1998					
COMESA	1994					
EAC	2001					
ECCAS	1983					
ECOWAS	1975					
IGAD	1998					
SADC	1996					

Sources: AfDB (2013) and AUC (2013)

Notes: achieved (green); envisaged (blue); not planned (grey)

While this represents progress as regards formal commitments and may not be the correct measure on which to judge such agreements (Gathii, 2011), regional integration progress can perhaps best be understood in terms of regional trade and integration into the world economy. While the combined exports of all eight RECs grew at 5.2% over the period 2007 to 2011 (notably the period including the global recession from 2008) intra-African exports grew at only 3.2% over the same period. As such, while these more than doubled between 2005 and 2006 (AfDB, 2011b), the average share of intra-African exports in total merchandise exports therefore remains low, estimated at 11%, compared with 50% in Asia, 21% in Latin America and the Caribbean and 70% in Europe (UNCTAD, 2013).

Further, while these averages hide considerable variation and trends in intra-Africa trade across RECs, half of intra-African trade takes place within the SADC region, between South Africa and its neighbours (AfDB, 2011a). Indeed, 26 countries counted South Africa among their five main export destinations (UNCTAD, 2013) suggesting a considerable level of concentration in intra-African trade. Although these figures clearly exclude what may be vibrant informal trade (see Afrika and Ajumbo, 2012; Lesser and Moisé-Leeman, 2009), the implication is that regional trade in Africa has substantial room to grow.

These challenges are further underlined by the literature on transport costs in Sub-Saharan Africa. According to Raballand and Teravaninthorn (2009), roughly 70% of the African population live more than two kilometres from an all-season road, while even in SADC, where road conditions are relatively good, the effective speed of road transport is estimated to be between 6 and 12 km per hour, due to time-consuming borders and roadblocks (Ranganathan and Foster, 2011). Nonetheless this is higher than the effective speed of 4 km per hour for rail. Road delays are estimated to cost US$300 per day (TMSA, 2012) further highlighting the need to improve transport and regional integration within Sub-Saharan Africa.

1.3. Structure of the paper

The remainder of this paper is organised as follows. Section 2 provides an overview of the literature on political-economy analysis and regional integration. On the basis of that literature and the issues raised, it also presents an analytical framework for a PE approach of regional integration processes and dynamics. Section 3 applies the framework to the NSC and the MDC. Section 4 summarises a number of key insights and their implications for policymakers seeking to promote development outcomes from regional integration processes.

2. Political economy, development and regional integration

Since the 1990s there has been a surge in efforts to understand governance, institutions, and policies for inclusive and sustainable development. This growing literature points to the fact that beyond economic considerations, policy reforms take place in a context of complex, long-term, and nonlinear processes that are determined by the unique history and institutions and the economic and PE underpinnings of a country. Political-economy analysis of policies to promote regional integration must therefore complement an understanding of these national processes with analysis of the dynamics between the international centres of power and influence, and analysis must also show how domestic politics relate to this interaction. The following literature provides some conceptual guidance on what has been analysed in this regard, and what findings, insights and tools can be used to develop a PE framework and approach to apply to regional integration.

2.1. The political economy of development

The question of why there is such persistent variance between policy commitments and effective implementation increasingly preoccupies development practitioners and concerned stakeholders. Attempts to move the policy research agenda beyond the explanation of 'political will' and 'capacity constraints' have pointed in the direction of the relations between business and politics, the nature of ruling elites within particular political settlements, the types of incentives that shape the policy choices and the capacities and preparedness to ensure implementation. For example, research into when and why ruling elites pursue and implement policies in support of the productive sector or of effective economic transformation, and the implied hard choices in terms of redistributing economic benefits and prioritising among sectors, has provided useful pointers in this respect (Whitfield and Therkildsen, 2011).

There is now broad consensus that a well-performing economy rests on a 'foundation of good governance' that includes transparent and predictable decision making, oversight mechanisms; accountability of how resources are used; committed public officials; a political process viewed as legitimate; the protection of property rights; a regulatory apparatus curbing the worst forms of fraud, anticompetitive behaviour and moral hazard; a moderately cohesive society exhibiting trust and social cooperation; and social and political institutions that mitigate risk and manage social conflicts (Levy, 2010; Rodrik, 2007). Yet building effective and accountable institutions in developing countries based on such 'best-practice' formal institutions has proved a major challenge with ongoing debates around the causal relations and linkages with development outcomes and trajectories of change.

By moving away from a view of development as a linear process towards some ideal state which can be achieved by following 'best practice' development models, attention has shifted towards 'good enough governance' (e.g. Grindle, 2004), to 'best fit' policies, to 'work with the grain' (Booth, 2011) in support of 'appropriate institutions' (Rodrik, 2008; Levy, 2010).[6] This involves a shift from emphasis on formal institutions, the so-called formal 'rules of the game', to the interactions between formal and informal institutions. Informal institutions are those unwritten rules that are not enforced by formal agencies. These include habits, customs, cultures and values (e.g. North, 1991). Taking a best-fit approach implies that reformers understand the interplay between formal and informal institutions and take that as the starting point for developing support strategies for institutional reforms. Institutional reforms such as measures to attract private investors through public-private partnerships stand a better chance when formal rules of the game are reinforced by informal institutions.

Political survival is now more widely assumed to be the key motivation for ruling elites (often ruling coalitions), also informing their decision logics in policy areas such as productive sector support (Geddes, 1994; Bueno de Mesquita et al., 2005; Moore and Schmitz, 2008; Leftwich, 2011; Khan, 2010 and 2012; Whitfield and Therkildsen, 2011). When governments face the choice between their own political survival and longer-term interests in stability and collective development, whether at the national or regional level, they tend to prioritise the former in ways that may not align with the latter, and may even undermine or compromise it. Furthermore, political survival in a democracy depends on being able to maintain a ruling coalition and win elections. This may include the use of patron-client relations by ruling coalitions. Such relations imply favours or patronage by ruling elites for clients in exchange for electoral or other support. This creates strong incentives for 'rent-seeking', including aid to cement alliances and to serve these clients for maintaining or gaining a hold on power. As such, while patronage may play an important role in maintaining political stability and social cohesion, it can also undermine productive investment (Unsworth and Williams, 2011). It is therefore also important to have an understanding of the nature of political competition (Khan, 2010 and 2012) and of state-society bargaining processes (IDS, 2010), as well as the distribution and management of economic rents, and

6 As Rodrik (2008) points out, this idea of the need for 'appropriate' institutions goes at least as far back as Gerschenkron (1962).

how particular political systems influence ruling coalitions and create political incentives (Khan, 2006; Kelsall, 2013; Therkildsen and Whitfield, 2011; Whitfield, 2012; Buur and Whitfield, 2013).

2.2. Political economy of regional integration

While the above literature focuses on processes within nationstates, applying the political economy lens to regional processes brings both parallels and additional complexity. These can be examined in terms of the negotiation process and implementation of agreed measures. The regional protocols and treaties represent rules-based, formal agreements reflecting inter-state interests and balances of power. Yet the implementation takes place at national level, mediated through domestic political power relations and games, which reflect – among other things – the system and types of distribution of economic rents and the other factors referred to above.

Mansfield (1999) observes that 'while it is frequently acknowledged that political factors shape regionalism, surprisingly few systematic attempts have been made to address exactly which ones most heavily influence why states choose to pursue regional trade strategies and the precise nature of their effects'. This observation remains valid for regional integration in Africa at large.

While political economy analyses attempt to move away from adopting a linear view of development, a more political approach to regional integration similarly might build on Gathii's (2011) insights that the purpose of regional integration is very different in Sub-Saharan Africa than in other regions. There may therefore be explicit recognition that rules-based regional trade agreements are at risk of what Pritchett et al. (2010) call isomorphic mimicry – institutions that superficially take the form of institutions in functional states but do not fully play the necessary roles or functions and are not backed by supporting traits such as transparency, accountability and enforcement mechanisms. Taking this consideration into account would imply that analysis focuses less on designing best practice policies associated with the 'next stage of integration' than why particular forms of integration are adopted and what drives implementation. It invites reformers to identify policies to strengthen integration within the given political-economic context.

The additional complexity brought by moving from national to regional processes may helpfully be considered as a 'two-level game' of regional diplomacy and domestic politics (Putnam, 1988), where governments are essentially negotiating at two levels: domestic and international. In his model, governments are constrained domestically by pressure groups that determine the possible boundaries of a given agreement (the domestic 'win-set'). At the regional level, governments seek to satisfy domestic pressures while being constrained by their negotiating partners' own win-set. Agreement occurs when there is an overlap in win-sets. Outcomes in the form of successful agreement and implementation will only occur where the demands of international agreements align with organised domestic interests, relating back to the literature discussed above on political settlement and competition.

Inter-state bargaining around regional integration may also relate to how regional objectives are framed or conceptualised. Hentz (2005) sets out three views of regional integration in southern Africa in the post-apartheid period: i) regional developmental cooperation, ii) regional market integration, and iii) adhoc cooperation. Each reflects a different vision and has been pursued by different interest groups or coalitions at different times. Hentz refers for example to regional developmental cooperation as reflected in the initial model of the Southern African Development Coordination Conference (SADCC) until 1992, or in public ANC statements. Regional market integration, on the other hand, is more in line with the de facto SACU rules of the game and with business interests that envisage the more linear path to integration that was adopted in the Lagos Treaty and ultimately adopted by SADC. Adhoc cooperation comprises large investment projects, such as the Lesotho Highlands Water project, the Cahora Bassa Dam, and Maputo Port, where interest groups have been more narrowly related to specific project components. How these different interest groups organise and pressure governments and elites, and how these national elites then interact at a regional level may then determine the model applied in practice and the ultimate form of implementation.

It is therefore important to map out the interactions of these more international dynamics with national-level dynamics. Studies such as Carère et al. (2012) rely on public choice or game theoretic constructions to conceive how agents interact at the national level around regional integration, while Flatters (2002) focuses on the domestic political economy of SADC countries to explain the relatively restrictive rules of origin on textile. In what may be an overly sceptical view, Soderbaum and Taylor (2008) suggest that 'instead of investing in regional projects that promote broad-based development as a regional collective good, the ruling elites will much more likely seek to control what material benefits of state sovereignty they can muster to strengthen their own political authority, as well as to benefit personally, often financially. This helps explain in part why so many regional projects fail in Africa–what remains in such circumstances are often ad hoc arrangements, invariantly financed by the donor community'. Again, this points us to the need to understand both political processes at the national level, and how these interact at a regional level.

Increasingly, research is undertaken at sector level with a focus on the PE dimensions that help explain the under provision of key regional public goods. The provision of public goods and services in a regional context – in areas ranging from infrastructure, trade facilitation, management of common pool resources, peace and security, and so forth– is difficult as it requires a high level of trust and cooperation, not just in one country but between two or more (Sandler, 2007; DfID, 2011). DfID (2011) also draws attention to a category of literature about less visible and less formal forms of regionalism, 'regionalism as experienced'. Authors such as Trémolières (2007), Soderbaum and Taylor (2007; 2008) point to the relevance of uncovering such on-the-ground regional realities as informal practices, as well as the long-lasting prevalence of informal intraregional activities that often predate colonial times. These informal processes may also interact with formal processes of regional integration.

The role of the private sector as potential driver and beneficiary of greater regional integration is a key element underlying and linking some of these national and regional dynamics. Looking at the private-sector role in regional integration in the SADC region, Bertelsmann-Scott et al. (2013) conclude that the fact that 'they chose to cooperate at the regional level in policy debates and push for certain outcomes, as in the case of telecommunications and banking, shows that benefits are to be had from active participation'. Lamy (2010) advances the hypothesis that 'when private sector operators have an issue to settle, they generally tend to settle it at the highest level, to which they have their own particular access channels. By solving their conflicts individually, they gained a competitive advantage with respect to their rivals, who are left to struggle with administrative formalities'. This underlines the distinction between operating through formal and informal channels in the context of regional trade agreements.

This type of analysis helps to reveal those stakeholders that are likely to perceive regional integration as a threat, and in turn influences political consideration by leaders and decision makers seeking to maximise political support within a given set of political institutions. This then has implications for the support that outside actors provide and the results they can hope to achieve.

2.3. An analytical framework: five political economy lenses

Building on the growing academic research and policy insights as summarised above, this section draws further on country- and sector-level political-economy analyses. An initially small number of donors such as the UK, Netherlands, EC and World Bank developed analytical tools for informing their country programming or strategy development, for problem solving or feeding policy dialogue with partner countries. Generally speaking, the depth and scope of studies have varied as the purposes for undertaking such studies also varied. For the purpose of studying regional integration, one has to recognise that the unit of analysis is much more varied and broader.

We propose to combine five lenses that help view the complexities of regional integration processes and structure available information. The five lenses help understand the country-specific context and dynamics in which key stakeholders operate, and how structures, institutions and global drivers influence incentives of political elites. Such an understanding may help better assess the scope for promoting further regional integration in the formal arenas of regional integration as well as in the arena of cross-border cooperation among states and between state and non-state actors. It may also point to areas where more fine-grained PE analysis is required. Table 2 lists the five lenses and introduces examples in the national arena and in the arena of the formal regional institutions.

(a) Structural factors

Structural or foundational factors relate to contextual aspects such as historical, geographical or certain deeply ingrained economic characteristics. These are hard to transform in the medium and even longterm. The history of state formation and a country's sources of income can clearly influence current contexts, be it broad-based taxation, or extractive rents from a limited number of sectors or actors.[7] The type of colonisation (for example, nature of extraction, colonial administration, political institutions) and of decolonisation (with or without liberation struggle, protracted or abrupt, etc.) are historical processes that have also profoundly shaped the types of political, economic and sociocultural institutions that create incentives for different sets of actors in the present. Structural factors also include the income level and size of an economy, the level of concentration of economic activity, and employment in key sectors such as agriculture and the extractive sector that influence regional processes of integration whether at the level of broad regional negotiation processes or at the level of functional cooperation between stakeholders from neighbouring countries.

(b) Formal and informal institutions

Institutions or the 'rules of the game' are crucial for understanding how economic growth, political competition, social development, and policies affecting the

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[7] 'Access to high levels of rents and unearned income can reduce elite incentives to bargain with citizens and encourage elite predation' (OECD, 2011: 26). 'Rents' can be understood as income flows that are additional to market-based profits and wages. 'The category includes revenues from natural and administratively created monopolies, subsidies, natural resources and, not least important, corruption and aid. Some of the rents are economically efficient or socially beneficial, others are not' (Booth and Therkildsen, 2012: 10).

nature of regional integration come about or function. While formal and informal institutions interact and influence one another in every country, the influence of informal institutions is likely to be higher in developing countries. Andrews (2013) draws attention to two key observations: firstly, while formal institutions tend to capture the eye, in reality they thrive on the basis of less visible beliefs, norms, and cultural mechanisms, or informal institutions. Secondly, in order to obtain a fuller picture of how formal institutions function – and influence policy and implementation decisions – one has to understand the interrelatedness between formal and informal institutions. Rodrik (2007) provides a third consideration: markets are underpinned by multiple non-market institutions, and 'the plausible variation in institutional setups is larger than is usually presupposed'.

Institutions are therefore understood as combinations of formal rules of the game (constitution, the legal setting that regulates political competition, etc.) and a host of informal arrangements. Winning or retaining power may depend on informal practices such as exclusive patronage benefits (jobs, money, access to services or monopoly privileges to supporters or 'clients'). Or it may depend on appealing in more or lesser degrees to personal (ethnic or other sources of identity) or impersonal themes and issues. Failing to understand such political and economic interactions between formal and informal institutions may result in a failure to examine and identify where opportunities lie for policy reforms in support of regional integration.

(c) Actors, political elites and agency

Different actors seek different objectives through regional integration. The literature points to the importance of assessing how the structural and institutional context interacts with key actors and how this affects policy choices and behaviour. Such interactions may, for example, create incentives for certain actors to act collectively in support of development outcomes, or conversely, for rent seeking, or for 'crony' relationships with exclusive benefits for a few. When analysing development processes, three types of actors/agents seem to matter particularly: political elites, state bureaucrats and sector actors (including civil society, firms, farms and households) and should be the focus of this element of the analysis. Particular attention needs to be paid to the way political and economic structures and institutions shape incentives for the ruling elite or coalition, or how these incentives affect the time horizon within which they develop and implement policies. Indeed, these elites may be under pressure not to undertake those actions that are required for economic transformation (or regional integration for that matter) as it may weaken their position within the broader contextual dynamics of the political settlement and the elite composition.

(d) Sector characteristics, public goods and governance implications

The fourth analytical lens sharpens the focus on the characteristics and linkages with governance and accountability relations of a specific sector or of particular public goods. As enumerated by Harris et al. (2013) the political salience and visibility of a service or a sector at national level will create incentives or disincentives for politicians and service providers to commit to providing quality services to citizens and to be accountable. Road construction and rehabilitation tend to be better vote catchers than the cumbersome and less salient task of road maintenance. Secondly, more visible policies imply more easily attributable credit or blame, depending on information asymmetries. Thirdly, the balance of power between policymakers and other actors involved in service delivery is also important, with monopoly-provided services implying less incentive for state oversight or improved performance. And finally, services that are frequent, predictable and area-based may make it easier for citizens to mobilise collectively and to make demands for service delivery. Understanding the nature of specific aspects of reform processes in this way may help to further inform on where or to what degree the incentives of relevant actors are likely to be affected.

(e) External factors influencing the political economy context: global drivers

National- and sector-level actors and factors influence regional integration dynamics. Yet there are also external drivers that may affect domestic stake-holders in their resolve to engage in regional integration processes. Certain global dynamics or processes may shape domestic institutional and political incentives. Examples of such powerful drivers include the sources of rents and unearned income (including aid), opportunities for concealing and moving illicit assets, foreign investments, global and regional security threats and responses, international legal measures and sanctions against domestic elites, and reputational pressures on political elites from regional and international actors. Such drivers may push in directions that result in positive development outcomes, for example through global consumer and media pressures for legally produced and certified goods (timber, diamonds, etc.). But these drivers can also impact negatively on domestic institutions and governance arrangements.[8]

3. Applying the political-economy approach

Based on this understanding of the literature, this section provides some illustrative examples from two corridor initiatives from southern Africa. Due to space considerations, these examples do not constitute a full political-economy analysis of each case but instead illustrate the application of the concepts and approach described to different aspects of regional integration.

Given the growing focus on corridors in southern Africa, this analysis compares the Maputo and North-South Corridors.[9] Given that Zambia sits at the midpoint of the NSC and as a landlocked country might be expected to have most to gain, it is informative to look at the NSC in terms of the politics that surround it from a Zambian perspective.

Established as a flagship project of the Comesa-EAC-SADC Tripartite initiative, the NSC is an attempt to coordinate and harmonise programmes in trade, trade facilitation and infrastructure through improvements to road, rail and ports.[10] While the NSC remains a work in progress, launched at a donor conference in

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8 Disentangling such influences is an intricate exercise as there are multiple drivers influencing country- and sector-level actors and institutions simultaneously, with different impacts over time. Therefore the OECD (2011) has developed an analytical tool that helps to assess those global dynamics with a particular relevance to or impact on the domestic political economy, and the type of incentives they create for political and economic elites.

9 See also Byiers and Vanheukelom (2014).

10 It also aims at Increasing the power generation and energy trade potential of the Southern African Power Pool with new power generation and transmission investments, but these are not taken into account in this chapter.

Zambia in 2009, the MDC dates from the mid-1990s and has already led to improved road and rail connections, reduced border times, and related major industrial investments in Mozambique.

Applying the five lenses above can help identify important differences between the two corridor initiatives with potential implications for policymakers. The main issues discussed under each lens are summarised in the following table.

Five lenses	Maputo Development Corridor	North-South Corridor
Structural factors (Regional & national)	- 2 countries – Maputo port & South African economic heartland - History: getting labour in and minerals out - FRELIMO support to ANC - Post-apartheid South Africa - Post-civil war Mozambique - Fiscal constraints – so need to consider Public Private Partnership (PPP) - South African-Mozambican income disparities	- Composed of frontline states - Eight countries along one corridor with five landlocked countries, two ports - Extractive resources important - Major trade route - Chirundu border (Zimbabwe/Zambia common institutions
Formal/ informal rules of the game	- Light on formal structures - Powerful informal arrangements – trust	- Part of Tripartite FTA, Nepad Spatial Development Programme - Agreements to reduce Non-Tariff Barriers (NTBs) - Presidents/donors buy-in for One Stop Border Post (OSBP)

		- Wariness of South African in the region - Zambia rural roads focus – more political than economic
Actors	- Presidents, - Key civil servants - Key RSA & international private-sector drivers - PS Associations: MCLI - Close business-party relations? - Local people/businesses?	- WTO Aid for Trade, donors, - Dispersed private sector interests, - Incumbent winners from current conditions - Difficult to identify potential beneficiaries e.g. Zambia exporters - Dispersed political & economic interests
Sector-specific features	- Regional public goods – not provided by private sector - Economic density allows for toll roads - Few linkages to local economic actors	- Zambia: rural road construction is politically salient - NTBs and one-stop border posts - Transport market key
Global and regional drivers	- Improving competitivity/ trade by lowering costs an overarching goal – 15 million tons to the sea - Market liberalisation/ privatisation policies in both countries - Increased focus on corridors, SDIs, economic linkages	- Incentives from multilateral banks and donors - Incentives from resource-dependent China - Competition for investors - South African hegemony

The NSC and MDC: foundational factors

Beginning with geographical factors, the NSC links the port of Dar es Salaam to the port of Durban through the Copperbelt in the Democratic Republic of Congo (DRC) and Zambia, with spurs also linking to Malawi, totalling 8599 km of roads in seven countries. Overall, spurs included, the NSC project links eight countries, five of which are landlocked, with likely implications for coordination and satisfying different national-level interests. The MDC links the far shorter distance from the Gauteng industrial heartland of South Africa with the port of Maputo in Mozambique, also focused therefore on two interlocutor countries.

Other foundational factors relate to the underlying historical basis of the corridors. For the most part, corridors in southern Africa build on pre-independence road and rail connections built to serve the interests of capital- and labour-intensive mines in the region. South Africa relied heavily on migrant labour from around the region, including from southern Mozambique and from at least 1895 shipped out coal and other minerals along the railroad from the Witwatersrand to the then Lourenço Marques, now the Maputo Corridor.

The MDC project can therefore be understood as the reconstruction of a pre-existing link to satisfy a range of needs at the time. A clear foundational factor of the MDC then was the post-apartheid shift in regional relations marked by regime change in South Africa after the first non-racial, democratic elections in 1994, and by peace and democracy in Mozambique as of 1992 after a decade of apartheid destabilisation and 17 years of South African backed civil war. As such, the two neighbours were in the process of designing strategies to reform their economies, re-establish improved diplomatic and economic links, and attract public and private investment. The two presidents backed the idea of the highly symbolic and highly economically attractive transport corridor between Maputo and Gauteng. The South African government conceived the MDC as a so-called Spatial Development Initiative (SDI), with explicit developmental objectives besides the central economic, infrastructural and investment purposes.

So these events coincided with the Mozambican economic recovery plans, providing propitious circumstances for the two governments to come together around a single project. Fiscal deficits and the alignment of interests at both sides of the border resulted in a swift agreement on the need to carry out the road rehabilitation through a public-private partnership, one of the first in Africa, and in implementation arrangements that ensured that investments materialised, although at different speed for different components.

Clearly the NSC emerged from very different historical origins. The predecessor to Comesa took shape in 1978 with the proposal for a subregional Preferential Trade Area (PTA), which was finally established by treaty in Lusaka in 1981. The PTA treaty called for a gradual transition to a common market that began in 1993 with the signing of the Comesa Treaty. Among other things, the Comesa Treaty Article 28 aspires to 'the completion of all inter-state missing links, especially the inter-state rail and road links, and the construction of local and domestic ones … to enhance the much needed intra-regional co-operation with neighbouring countries' as well as 'establishment of common border posts'.[11] The Tripartite Initiative then emerged from Comesa and SADC, both of which can also trace back their roots to the Frontline States movement.

In terms of infrastructure development at the northern end of the North-South Corridor this builds on the TAZARA rail, the TanZam Highway, and the TAZAMA crude oil pipeline between Tanzania and Zambia, itself a product of Zambia's need for an alternative outlet to apartheid South Africa's ports for its copper production, to Zimbabwe's period of minority rule until 1980 and to Mozambique's continued period of colonisation until 1975 and subsequent civil war. The re-establishment of connections in the postapartheid period may also benefit from the common institutional legacy among Zambia, Zimbabwe and South Africa, with Zambia and Zimbabwe having been part of the Federation of Rhodesia and Nyasaland (now Malawi) from 1953 until 1963.

[11] See http://www.comesa.int/attachments/article/28/COMESA_Treaty.pdf.

MSC and MDC: Formal and informal institutions

Building on this understanding of the main foundational factors, one can compare the institutional structures and arrangements around the NSC and MDC initiatives.

In looking at the MDC, although part of the SADC region and a potentially important access port for countries beyond South Africa and Mozambique (Botswana, Swaziland and Zimbabwe, for example) the MDC has taken shape independently from formal regional frameworks and procedures. As such, it built very much on the geohistorical factors mentioned, but also on close informal connections between the two countries based on Mozambican support for the ANC during the apartheid years, and a close relationship between Presidents Mandela and Chissano that generated a degree of trust and common purpose. This allowed a formal memorandum of understanding to be drawn up quickly and provided conditions conducive for attracting investors.

Although discussed for many years at the Comesa level, the NSC gained increased momentum with the Aid for Trade initiative launched in 2005 at the World Trade Organisation (WTO) ministerial meeting in Hong Kong, and was launched at a 2009 donor conference in Lusaka as a package of projects that together would form one connected corridor. This has since been followed by donor support, particularly from institutions such as the UK Department for International Development (DfID), with the setting up of a project preparation unit in Lusaka, Zambia, to identify parts of the NSC project and prepare these for seeking finance and project implementation. The importance of institutional alignment can be seen in one of the major successes of the NSC initiative, namely the Chirundu One-Stop Border Post (OSBP). Heralded by many as a success although still subject to numerous challenges, this initiative has managed to build on the similar judicial arrangements in Zambia and Zimbabwe, somewhat facilitating the ease with which cross-border institutional cooperation has taken place.

The NSC and MDC actors

As the above narrative suggests, movement towards completing the MDC was supported by a range of geographical and historical factors, and the MDC extended beyond the more formal regional integration processes. In part, this was also because of the actors involved. A factor conducive to the project was, as mentioned above, the personal understanding and trust between Presidents Mandela and Chissano, and their shared struggles against apartheid South Africa and colonialism. This meant not only that initial agreements were quickly met, but also that the MDC was given priority within both national bureaucracies due to the presidential drive in either country.

Beyond public policymakers and implementers, the private sector also played a large part in launching and implementing a viable transport corridor. Not only was road rehabilitation and maintenance carried out under a Public Private Partnership (PPP) arrangement with a long-term private concession, but the corridor initiative was accompanied by multimillion dollar aluminium smelter investments, Mozal I and II, and an accompanying industrial park. Given the need for Mozal to import almost everything, and export almost all outputs, key aspects for the Mozal investment related to access to electricity from South African Eskom, and access to the ports. Although some have criticised the lack of integration and the development impact of Mozal and other investments in the Beluluane Industrial Park (see Byiers and Vanheukelom, 2014), the investments nonetheless helped to drive the MDC project forward, with subsequent pressure to continue to improve the road and rail infrastructure, border post and ports.

New private-sector associations were created by mostly private actors to attract investors, monitor progress in multiple components of the MDC, and facilitate exchanges on new development opportunities. The Maputo Corridor Logistics Initiative (MCLI), for example, is such a private-sector association of (mostly South African) firms using the corridor, but also has linkages with civil society, donors and public authorities at different levels on both sides of the border. The MDC has also been a positive development for Maputo elites who gained easier access to retail and tourism services in South Africa, while the concession company in charge of the main road along the corridor and the company operating the container scanner at the port also represent business interests for some high-level Mozambican politicians. While not a driving force, this clearly also factors into the political economy of the process of MDC implementation and further development.

While the MDC is narrow in scope, the NSC is clearly a much broader, more ambitious undertaking with correspondingly greater coordination challenges and less clearly identified beneficiaries. The NSC is also very much about building infrastructures and improving border posts, with little ostensible direct involvement of the private sector, either through the promotion of accompanying investments or in consultation. Indeed, in Zambia, a country that might be expected to be a major beneficiary of the NSC, private-sector discourse is clearly more focused on general business conditions and meeting the demands of the markets of Eastern Angola and the DRC. At the same time, there is a domestic constituency that fears competition from South African producers, while government is prioritising infrastructure investments in rural roads, probably with the expectation that regional transport connections and investments will be taken care of through regional channels.

The one significant and oft-cited success of the NSC has been the Chirundu OSBP between Zambia and Zimbabwe, the first of its kind in Africa. While far from perfect, this project has managed to streamline procedures for border crossings, cutting times for freight crossing the border from days to hours. Although large initial gains were made when the OSBP was opened in December 2009, increasing traffic flows as well as the need to keep improving procedures suggest that these gains have been difficult to maintain within the current institutional context and incentives. Indeed, interagency coordination across borders as well as intra-governmental relations prove to be extremely cumbersome, especially when particular agencies are able to create and capture rents through their control of border traffic and to exclude others.

This brief summary highlights numerous issues. One is that the relative success of the Chirundu OSBP also relates to a narrower scope of ambition and actors involved. The motivation relates in part to efforts to provide early successes for the NSC initiative, the marginally lower complexity of institutional alignment between Zambia and Zimbabwe than with other neighbouring countries, and the fact that the Chirundu border represents one of the greatest trade bottlenecks in the region. Perhaps as a sign that the NSC has so far not been championed, President Zuma of South Africa was recently put forward in this role through New Partnership for Africa's Development (Nepad) and the African Union (AU).

Sectoralcharacteristics

A particularly important aspect necessary to understand the politics of corridor development relates to the specific characteristics of the road and transport subsectors and related regulatory policies.

The MDC served an important symbolic purpose by reconnecting Maputo to the South African hinterland, re-establishing an age-old connection and facilitating flows of workers and consumers. Perhaps because of the perceived benefits of this, daily commuters from Matola, a suburb of Maputo, are generally willing to pay the toll to use the short section of the toll road between Matola and Maputo, contributing to the overall upkeep and maintenance of the road, but also creating problems for the government given public resistance to increases in toll fares.

In a different way, the case of Zambia also highlights the political specificities of roads. Zambia is landlocked, yet President Sata's government prioritised a national road construction programme over the regional infrastructural flagship programme of the Tripartite Free Trade Area. As mentioned, roads have a particular political resonance, and in Zambia political dynamics have meant that even where roads have been considered to carry insufficient traffic to merit tarmac, and where they are considered to be in a suitable state, the government has committed to 'pave Zambia', probably because of its vote-catching potential.

External drivers

While external factors have perhaps not played a major role in the realisation of the MDC, international investment in the form of Mozal have been pivotal, with the continuing high prices for aluminium providing sufficient incentives for a second phase to be initiated. International demand for coal from South Africa has also put pressure on existing South African ports, providing increasing incentives to use the port of Maputo and thereby affecting demand for use of the MDC as an outlet to the sea.

In the case of the NSC, there is an important global demand for minerals which remains a driver behind corridor development. The majority of Zambian copper exports, for example, are being channelled through Durban although these southbound trucks are reportedly subject to less time-consuming controls than general merchandise. As important, it seems, have been the efforts from external development partners. As described, the NSC was launched as a pilot Aid for Trade project, in this way building on a combined interest from African countries in the region and on the WTO's renewed enthusiasm for linking trade and aid. Countries in the region were increasingly looking for more systematic ways to support regional integration through infrastructure financing and coordination.

While both the NSC and the MDC are very different types of ventures, this examination through the five political-economy lenses clearly highlights some of the likely drivers for success as well as the obstacles in such ventures. Without greater private-sector involvement in the NSC, particularly in terms of encouraging accompanying investments, it seems that current efforts may struggle to overcome the complex process of preparing, coordinating and implementing regional infrastructure projects, particularly if political elites in the key beneficiary states do not put their weight behind such reforms.

4. Conclusions

The economic and other arguments backing the case for greater or deeper regional integration – from the modest to the highly ambitious integration models – are convincing and in certain cases overwhelming. Still, regional integration in Africa as promoted and embodied by the formal institutions – primarily the RECs, the AU, and the numerous regional agreements and protocols – continues to be at great variance with actual implementation by the member states. Therefore this paper proposes a political-economy approach to understanding when it is that key actors credibly engage and commit to implementing regional economic agreements.

The literature review and the two cases highlight the complexities involved in regional integration in Africa. They also focus on some of the major knowledge gaps, particularly regarding the national actors and factors influencing cross-border cooperation and the nexus between domestic politics and institutionalised regional integration processes.

Based on the literature, we propose five political economy lenses that together help systematise the existing information and make tacit knowledge more explicit for that purpose. Such a political-economy approach to both formal regional integration dynamics and functional integration processes helps to deepen the understanding about the political feasibility of reforms by taking a closer look at the relations between structure, (formal and informal) institutions, sector-specific characteristics, global drivers and how these create political and other incentives for key stakeholders over time.

Some of the insights drawn from the political economy literature and from the cases can be summarised as follows:

- 'Notwithstanding the economic case for regional integration, the mobilisation of political will faces considerable obstacles' (Foster and Briceno-Garmendia, 2010: 21). The formal agendas and aspirations of regional integration in Africa through the regional institutional bodies remain valid. But one needs to unpack the degree of political will and capacity to implement policy decisions or agreements at the RECs level, and distinguish this from policy decisions as 'signals' in response to incentives (for example flowing from the high-level regional forums where state leaders make big decisions or from expectations and conditionalities flowing from the engagement with external funders) without the institutional arrangements in place for ensuring follow-through of the multiple and hard tasks needed for implementation.

- In the absence of a grand design of effective regional integration or a best-practice model there is value in paying more attention on 'less-than-optimal' or 'good enough' processes of functional or cross-border co-operation. Regional projects range in complexity and scope from bilateral cooperation on one-stop border posts, for example, to multicountry and multisector investment programmes such as the NSC.
- Given the importance of incremental integration processes that demonstrate results, build institutions, and strengthen stakeholders in their resolve to overcome collective-action constraints, the five lenses can help identify the context-specific potential for aligning interests and strengthening trust. This seems more likely with less unwieldy programmes, or with processes entailing a narrower agenda, where a smaller number of key stakeholders are involved with interests and incentives that are more tangible and to a certain degree aligned.
- The comparison between the Spatial Development Initiatives of the MDC and the NSC seems to confirm this conclusion. Furthermore, as Foster and Briceno-Garmendia (2010) suggest, taking a spatial perspective on infrastructure investments provides a helpful conduit for prioritisation of infrastructure investments in transport infrastructure, but also for reflection and dialogue about cross-sectoral linkages and the potential returns from bundling multiple infrastructure investments in a particular spatial area (see also Torero and Escobal, 2005, 2010).
- Market failures play out in the economic sphere, but also in the *political market* as highlighted by the example of the road sector. Typical sector characteristics such as the political salience of road construction and rehabilitation create incentives for incumbent elites to prioritise investments in road construction (as an effective vote catcher) rather than less visible necessities such as institutional reforms for making these investments sustainable. Such political and economic market failures need to be properly assessed and addressed by reformers as they tend to be multiplied in the context of cross-border cooperation or regional public goods provision.

Political-economy diagnostics combined with transparency and dialogue among multiple state and nonstate stakeholders can further inform the feasibility of regional integration reforms and cross-border cooperation. Diagnostics can help (re)orient support efforts – including those by donors – and can also point to critical knowledge gaps that require filling through appropriate and fine-grained research efforts.

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Chapter 9

Safeguards: the WTO law and regional trade agreements

Willemien Viljoen

1. Introduction

The proliferation of regional trade agreements (RTAs) and the ongoing multilateral trade negotiations to expand and deepen trade liberalisation reflect global trend towards more transparent and less restricted international and regional trade. However, when domestic markets are opened to international competition, domestic firms can be subject to pressure from import-competing firms requiring temporary protection for a particular industry.

Safeguard measures were included in Article XIX of the General Agreement on Tariffs and Trade (GATT) 1994 and later expanded under the World Trade Organisation (WTO) in the Agreement on Safeguards, to provide temporary relief for the domestic industry when experiencing a sudden surge in imports. One of the most important elements of multilateral safeguard measures is the principle of nondiscrimination: this implies that any multilateral safeguard taken needs to be applied to all imports irrespective of the source. Under the WTO system safeguards can be invoked when a surge in imports is unforeseen and causes, or threatens to cause, serious injury to domestic producers of a similar product. However, safeguards should only be a temporary measure that may only be imposed to the extent of correcting any injury caused. Safeguard measures are not limited to particular types and can take the form of suspended obligations or the modification of tariff concessions, including increased tariffs, surcharges and quantitative restrictions.

The utilisation of global safeguards in accordance with Article XIX of GATT 1994 and the WTO Agreement on Safeguards has been widely analysed. The implycation of these multilateral trade rules on the utilisation of safeguard measures among regional trading partners is yet to be clarified. The requirements of the global safeguard mechanism, including the nondiscrimination and compensation requirements pose various application challenges for countries, especially least developed and developing economies. As a result of these challenges (including financial and technical capacity constraints), many RTAs include provisions on bilateral or regional safeguard measures. The aim of these measures is to address harm that arises from the trade concession made in accordance with the specific regional or bilateral trade arrangement. Safeguard provisions in regional arrangements generally fall in one of the following categories:

- Parties to the agreement maintain their rights and obligations to use multilateral safeguards on all imports with no provision made for bilateral or regional safeguard measures.
- Multilateral safeguard and bilateral or regional safeguard provisions are included in the RTA. In these arrangements the bilateral or regional safeguard measure needs to be applied to intraregional imports and the multilateral safeguard on imports from countries not party to the trade agreement.
- The use of safeguards is prohibited among RTA members. Five RTAs have prohibited the use of any safeguard on intraregional trade. These are the Australia-Singapore FTA, the Canada-Israel FTA, the New Zealand-Singapore FTA, the European Community (EC) and the Mercado Común del Sur (Mercosur).

The relationship between the implementation of regional or bilateral safeguards on intraregional trade, the retention of rights to utilise multilateral safeguards on intraregional and/or extraregional trade and the prohibition of implementing multilateral safeguards on intraregional trade are an already complex puzzle which is further complicated by Article XXIV of GATT. This article states the requirements countries need to fulfil when establishing a customs union or free trade area. As a general rule, according to Article XXIV:8 of GATT, member states are required to eliminate 'duties and other restrictive regulations of commerce' with respect to 'substantially all trade' among member states when establishing a customs union or free trade area. These requirements can have the following implications for RTA members:

- If safeguard measures are regarded as 'duties or other restrictive regulations of commerce', these measures should be eliminated from intraregional trade. This means that maintaining safeguard measures (global, regional or bilateral) on intraregional trade can potentially challenge the compliance of an RTA with the qualitative threshold of 'substantially all trade'.
- If safeguards are not per se prohibited, they should be applied in accordance with the Most Favoured Nation (MFN) requirement of GATT and the Agreement on Safeguards. This means that the discriminatory application of a global safeguard on only third-party imports or only on the imports from trading partners under an RTA can be in violation of the WTO rules.

This is one economic and legal debate that is yet to be resolved. WTO jurisprudence also does not provide definitive guidance, even though these questions have been raised in various WTO disputes. The compatibility of retaining multilateral safeguards and the introduction of regional or bilateral safeguards in a regional trade arrangement are yet to be addressed in a decisive manner.

The paper provides a review of safeguards in RTAs to identify and highlights select issues for countries to consider when negotiating trade arrangements. This is especially the case in the context of integration arrangements among unequal partners at diverse levels of industrialisation and with unequal experience and capacity in safeguards at the negotiations table. To identify the challenges pertaining to safeguards in RTAs that countries can potentially face, the brief examines the different views on three pertinent issues:

- Does Article XXIV of GATT preclude the application of safeguard measures between member states of an RTA.

- If safeguards are not per se prohibited under GATT, can the discriminatory application of safeguards, in excluding imports from regional trading partners, be justified under Article XXIV of GATT?
- If safeguards are not per se prohibited, can safeguards be applied in a discriminatory fashion on the imports only from bilateral or regional trading partners?

2. Background

Safeguards are allowed under Article XIX of GATT and the rules for their application are contained in the Agreement on Safeguards. To utilise these measures a party has to demonstrate that a product is being imported into its territory in such increased quantities and under such circumstances that cause or threaten serious injury to the domestic industry producing a like product. A safeguard is a temporary measure that can be used to protect a domestic industry from import-competing products and has a basic time limit of four years which can be extended to eight years under certain circumstances.

Safeguard measures are often grouped with antidumping measures and countervailing duties which are considered as trade remedies or contingent protection measures. However, there are two major differences between the implementation of antidumping and countervailing measures compared to the implementation of safeguards. The key difference between safeguard measures on the one hand and antidumping and countervailing measures on the other, is that the latter two address unfair trade practices, while safeguards provide temporary relief to domestic industry that faces harm from a surge in import competition. The standard of injury that needs to be proven in order to utilise safeguards vis-à-vis antidumping and countervailing measures also differs. Safeguards can only be used if increased imports cause serious injury to the domestic industry of the importing country. From a legal point of view this standard of injury is considered to be a higher standard compared to the requirement of material injury in the case of antidumping measures and countervailing duties. However, the true and practical distinction between serious and material injury is rather vague. According to Article 4.1 of the Agreement on

Safeguards serious injury means a 'significant overall impairment', but no further clarification is provided within the agreement. This can pose a practical challenge for countries if a safeguard measure is challenged in the WTO, based on the argument that serious injury or threat thereof has not taken place. The arguments of the interested parties in such a case will have to amount to a battle of quantification and numbers to determine the true meaning of serious injury in the specific case. However, to date the Appellate Body has not heard any dispute solely based on the question surrounding the determination of serious injury. This has led to little guidance on the meaning of serious injury, except for stating that the standard of injury is higher than that of material injury and that it is an exacting legal standard (Appellate Body Report: *United States – Safeguard measures on imports of fresh, chilled or frozen lamb meat from New Zealand and Australia,* 2001) without any further qualification.

The second difference is related to the manner in which safeguard duties are levied on the injurious imports. According to GATT Article XIX and the WTO Agreement on Safeguards, safeguard measures have to be applied on an MFN basis. There are minor exceptions to this requirement, related to the Special and Differential Treatment provisions for developing and least developed countries. This means that the basic rule is that a safeguard measure has to be applied to the specific harmful product imported into the domestic industry, irrespective of the source of the imports. Antidumping measures and countervailing duties, on the other hand, can only be applied to those import products that originate from specific countries and are the export product of the specific exporters responsible for the dumping or country responsible for the subsidisation.

Economic arguments to explain the inclusion of safeguards in trade agreements are based on the analysis of the welfare effects of these measures. Safeguards are seen as adding flexibility to trade agreements, facilitating tariff liberalisation during trade negotiations, and providing insurance against adverse shocks. Governments are more likely to make greater tariff concessions given the fact that a safety valve is in place to protect the domestic industry in the case of import surges which can cause harm. There are also numerous opposing views regarding safeguards in RTAs. One such a counterargument is that maintaining safeguards can reduce the credibility of a trade agreement when governments are not fully committed to trade liberalisation. This can result in firms expecting the use of safeguards in future and thus not efficiently reallocating productive factors.

In a recent exercise to map the existence of safeguard provisions in RTAs, Crawford et al. (2013) found that approximately half of the 232 RTAs investigated made no specific reference to the rights and obligations of member states to utilise the WTO safeguard mechanism. These RTAs include half of the EU's RTAs and intra-Africa RTAs including the 2002 SACU Agreement and the SADC Trade Protocol. About a fifth of the 232 RTAs evaluated contain an explicit provision in which the trading partners maintain their rights and obligations under the WTO Agreement on Safeguards. These RTAs can also be divided into those that either made no or minimal substantive modifications in the application of the GATT provisions and the Safeguards Agreement. The agreements with no substantive modifications include the RTAs of Association of Southeast Asian Nations (ASEAN), Australia and the United States (US). Those RTAs with modified safeguard provisions pertain mainly to either excluding the application of safeguards under the WTO law from regional dispute settlement mechanisms (including the ASEAN-Japan RTA and the Chile-China RTA) or the specification that bilateral and global safeguards may not be applied to the same product and the same time (including the EU-Republic of Korea RTA and the China-Costa Rica RTA). Two RTAs (Singapore-New Zealand and Singapore-Australia) exclude the imports from their RTA partner from the implementation of a global safeguard mechanism; 26 RTAs state that imports from the member states may be excluded from the implementation of global safeguards if certain conditions (such as that the imports are not a substantial cause or threat of injury) are met; and 34 RTAs state that imports from the member countries shall be excluded if imports from a member state meet the specific conditions (that is, imports are not a substantial share of total imports and do not contribute a significant portion to the injury caused or threat thereof). The majority of RTAs studied permit the use of a bilateral safeguard mechanism on their intraregional trade. Two RTAs explicitly prohibit the use of bilateral safeguard measures. A further 36 RTAs contain no specific bilateral safeguard provisions on goods in their legal texts, though some of these RTAs provide for safeguards in case of balance of payment difficulties, infant industry protection and special safeguards for agricultural goods.

3. Safeguard measures in regional trade agreements

Safeguard provisions provide for discriminatory treatment in two instances: 1) when excluding partner countries from global safeguard actions and 2) when excluding third countries and only imposing bilateral or regional safeguard actions on partner countries. This has, however, never been tested for WTO compatibility, although this is a crucial deviation from one of the guiding principles of the WTO Agreement on Safeguards, namely that of nondiscriminatory application of safeguard measures irrespective of source. In recent years most FTAs provide for special and differential safeguard mechanisms that share the same or similar grounds as the global safeguard mechanism for the invocation of measures. According to WTO rules, safeguard measures must be applied to both third-party importers and regional importers. Safeguard measures may not be selective and must be applied to all imports, including those that do not cause injury. However, bilateral safeguard mechanisms only address the adverse effects of the bilateral agreement and are for this reason only applicable to the contracting parties or member states.

With the conclusion of GATT, bilateral and regional safeguard mechanisms in RTAs have become a remedy of special and limited nature. When there is an adverse effect due to an increase in imports that is the specific result of the additional trade liberalisation measures under an RTA, the importing countries can invoke these safeguard measures as stipulated under the specific rules of the regional arrangement.

The majority of RTAs leave the signatories' rights to apply trade remedies unaffected, with only small number of RTAs addressing these issues through the modification of the substantive and procedural aspects of the WTO rules. But to the extent that RTAs adopt special or additional rules on trade remedy and safeguard actions on members' trade, they can effectively increase the level of discrimination against non-members. This increase in discrimination can occur when RTA members abolish trade remedy and safeguard actions against the trade of RTA members but not against non-members' trade. It could occur when RTA members adopt rules that strengthen disciplines on trade remedy actions against the trade of RTA members but not against the trade of non-members. While moves to strengthen disciplines on trade remedy actions against RTA partners or to abolish trade-remedy actions against RTA partners outright appear good for trade, the welfare effects are ambiguous. They may simply lead to intraregional imports substituting for cheaper sources of imports from non-members (trade diversion).

There are three different arguments regarding safeguards in RTAs. The first is that safeguards must be abolished with regard to intraregional trade due to the requirements for both an FTA and a customs union set out in Article XXIV of GATT. The second is that safeguards must be applied to both intraregional and extraregional imports, otherwise non-parties to an RTA will bear a disproportionate burden to the effects of the safeguard. This argument is based on the WTO MFN principle. The third argument is that RTA members have the discretion to apply safeguards on intraregional imports because RTA countries are entitled to incorporate their own rights and obligations for intraregional trade into bilateral and regional treaties – this takes place to the extent that it would not infringe on the rights of third-party countries.

These arguments demonstrate the complex nature of interpreting the provisions of Article XXIV, Article XIX and the Agreement on Safeguards together with the interaction between these multilateral rules and the rights of countries to govern their participation in a regional or bilateral trading relationship.

3.1 The compatibility of multilateral safeguard measures with the requirements of Article XXIV of GATT

GATT allows for regional trade agreements as an exception to the WTO MFN principle, but only if duties and other restrictive regulations of commerce (ORRCs) on 'substantially all trade' are eliminated. This phrase seems to include the elimination of antidumping measures, countervailing duties and safeguards from trade among trading partners that are party to a regional arrangement. The argument has been made that when multilateral safeguards are imposed, the regional deal does not comply with the requirements set out in GATT Article XXIV. This is because the requirement of restrictions that have to be eliminated on 'substantially all the trade' in the region is not met. This view is strengthened by the fact that Article XXIV:8(a) and (b) allow, where necessary, RTA members to exclude certain GATT provisions, which do not include the articles pertaining to antidumping measures, countervailing duties and safeguards, from the general requirement to eliminate ORRCs. Due to GATT Article XIX not being listed within this article, multilateral safeguards on intraregional trade are not seen to be a restrictive policy that can continue within a regional trade arrangement.

The question of whether RTA partners must be excluded from the application of a safeguard measure, given that Article XIX is not included in the list of bracketed exceptions contained in Article XXIV:8, has attracted the attention of a number of legal scholars, but has not been resolved in the WTO. In addition, limited jurisprudence exists with regard to the consistency of safeguards in RTAs with GATT Article XXIV.

The general consensus among economic and legal scholars seems to be that safeguards can be seen as ORRCs. However, there are diverse opinions whether safeguards, as ORRCs, must be eliminated from RTAs in accordance with the requirements of Article XXIV. This divergence is mainly based on the interpretation of the exclusion list contained in the article. In terms of Article XXIV:8(a) and (b) ORRCs need to be eliminated 'except, where necessary, those permitted under Article XI, XII, XIII, XV and XX'. These articles pertain to quantitative restrictions and the non-discriminatory administration thereof, restrictions to address balance of payment difficulties, foreign exchange arrangements and general exceptions. While many scholars state that these exclusions only illustrate the exceptions to the elimination of ORRCs rule, numerous opposing views follow the interpretation that the exclusion list is exhaustive. These varying views can lead to one of the following two implications:

a) If the list is exhaustive it means that safeguards, such as ORRCs, must be eliminated from RTAs contingent on the 'substantially all trade' requirement.
b) If the list is illustrative it means that the mere fact that Article XIX is not included in the list does not mean that safeguards must be eliminated in RTAs. If necessary, safeguards can be retained in an RTA.

However, whether the list is interpreted as being either illustrative or exhaustive, the conclusion remains the same in that safeguards are ORRCs. To establish either a customs union or free trade area ORRCS must be eliminated subject to the qualification of 'substantially all trade'. This leads to the conclusion that if a safeguard measure is applicable to a substantial portion of intraregional trade it should be eliminated according to the strict interpretation of Article XXIV.

The lack of a formal definition or qualification attached to the term 'substantially all trade' further complicates the issue. Currently there is no agreement between the WTO member countries on the meaning and interpretation of 'substantially all trade'. In the Turkey-Textiles dispute settlement case the Appellate Body tried to clarify the issue by stating that 'substantially all trade' clearly not to mean all the trade, but is also significantly more than just some of the trade. This lack of a universally accepted understanding of the term 'substantially all trade' has also formed part of systematic debate in the WTO under the Doha Development Agenda. In terms of the application of ORRCs, the African, Caribbean and Pacific (ACP) group of countries have been arguing for a flexible interpretation for developing countries. This will preserve their ability to utilise trade remedies, even though they are part of an RTA. To maintain this flexibility, the ACP countries are supporting a trade volume, rather than a tariff-line approach to quantify the 'substantially all trade' requirement. The tariff-line approach is more stringent because it aims to ensure comprehensive coverage of all major sectors and will not allow flexibility to exclude certain sectors, like agriculture. The trade-volume approach is more flexible in that it measures the share of intraregional imports that is free from duties as a percentage of total imports. Irrespective of how 'substantially all trade' is quantified, scholars have come to the conclusion that safeguards in RTAs need to be eliminated on a case-by-case basis. This is especially true in the case of safeguards applied to import products that form part of the substantial intraregional trade requirement. However, even if a safeguard is applied on import products that fall outside the ambit of 'substantially all trade', it can still be seen as being against the basic premise of an RTA which has the overarching goal of liberalising trade among member states.

3.2 The right of member states to maintain regional or bilateral safeguards in RTAs

Countries have the right to enter into regional or bilateral trade arrangements and to determine their rights and obligations vis-à-vis their trading partners that are party to an RTA. This implies that members of an RTA have the right to include safeguard measures that only affect the imports of those countries that are a part of the regional or bilateral deal.

The global and bilateral safeguard mechanisms are different institutions dealing with problems that arise from different free-trade initiatives. Bilateral safeguards normally only allow for a tariff increase or a suspension of any further tariff reduction, while under the global safeguard mechanism there are also other measures such as quantitative restrictions available for the importing country to invoke. The bilateral safeguard mechanisms are usually seen as a temporary measure that can only be invoked during the transitional period and are meant to apply only to the trade of other RTA members. Bilateral actions provide a temporary escape hatch for members when as a result of undertaking the commitments under the agreement, i.e. reducing preferential tariffs, increased imports from RTA partners result in serious injury to the domestic industry. Triggering the safeguard provision in the RTA allows a member to relieve itself of its RTA obligations temporarily, with the period of relief providing the beleaguered domestic industry the opportunity to adjust towards free trade. Most RTAs state that these safeguards cannot be applied after the transitional period has lapsed. The time period for how long these safeguards are applicable will depend on the transitional period set out in the agreement. In some instances these measures can be extended, but only with the permission of the partner country. In fact, these actions are worded in that way – bilateral safeguards – in a number of RTA agreements. But even in those RTAs where this distinction is not explicitly made, the safeguard provision is clearly meant to address emergency situations that occur as a result of the preferential treatment accorded to partners' imports. On the other hand, the global safeguard mechanism does not contain a specific time limit in the same way as the bilateral or regional safeguard mechanisms. The global safeguard can be invoked at any time period, not only during the liberalisation period, as long as the requirements for the application of the mechanism are met. If the global safeguard is invoked there are strict time periods that must be adhered to.

Due to the fact that bilateral safeguard measures are only applicable to member countries, the question can be posed as to whether the application of a safeguard measure on intraregional imports, according to a regional arrangement, against a member country is allowed in terms of GATT Article XXIV. In terms of this question, scholars follow a similar line of argument as the arguments used for the retention of global safeguard measures in RTAs. RTA member states have the freedom to maintain bilateral or regional safeguards in RTAs as long as these safeguards are not applied in such a way that they will affect the rights of third-party countries. Also, these safeguard measures should be permitted in terms of Article XXIV of GATT in so far as they are temporary measures that are not applied on the substantial part of intraregional trade. Thus, apart from the RTA member states enjoying the freedom to draft provisions that govern intraregional trade, the qualification of 'substantially all trade' once again provides flexibility to RTA members to allow for the utilisation of safeguards that pertain specifically to intraregional trade. However, there are some scholars that find this justification for regional or bilateral safeguards incorrect and suggest that Article XXIV requires the mandatory abolition of bilateral or regional safeguards and that the intraregional trade to which any type of ORRC remains applicable cannot be counted towards the fulfilment of the 'substantially all trade' requirement.

3.3 The implementation of safeguards on an MFN basis

The MFN requirement in the WTO Agreement on Safeguards requires that a multilateral safeguard be applied to all imports, irrespective of the source. This means in principle that safeguards must even be applied to those imports that have not caused or threatened injury. However, the extent to which a measure can be applied is further defined in the agreement by stating that a safeguard can only be applied to the extent that it will remedy the specific injury. According to Pauwelyn (2004) the MFN requirement can have two implications for implementing multilateral safeguards. The first is that the WTO provisions require countries to implement restrictions on the imports of even those countries that have not caused injury. The second is that the provisions actually act as a disincentive for countries that are party to an RTA to apply safeguards. This is because countries will have to apply the measure on imports from all sources, even imports deriving from regional or bilateral trading partners.

However, Pauwelyn (2004) is of the opinion that this will only be the case when the injury determination is based on the totality of imports. He argues that if a country which is a member of an RTA wants to implement a global safeguard measure, the country, in the injury determination, can either evaluate all imports or only imports from third-party countries. A country is also not prohibited from taking the imports from only one source country into account to determine serious injury and implement a safeguard measure based on these findings. Once the existence of serious injury or threat thereof has been established, it is not required that the totality of the injury be caused by imports from one country. It is only required that the injury that a country wishes to rectify be caused by the imports under investigation and that injury caused by other factors (like structural changes or labour unrest in the domestic industry) is not attributed to the surge in imports. This means that if a country only examines the imports of third-party countries or even only one country to determine injury, the application of the safeguard measure must be limited to the extent of the injury caused by the imports from those third-party countries or an individual country, excluding any injury caused by intraregional trade or any other factors.

Although there has been no definitive finding on whether regional trading partners can be excluded from the application of a global safeguard measure, the issue has been raised in numerous WTO disputes. These include Turkey-Textiles[1],

[1] See Appellate Body Report, *Turkey – Restrictions on imports of textile and clothing products* (1999).

Argentina-Footwear[2], US-Wheat Gluten[3] and US-Line Pipe[4]. However, in all these cases the dispute settlement body has refrained from answering the relevant question and their final findings were based on other arguments made by the relevant parties.

In Turkey-Textiles (1999), the only case concerning RTAs (and in this case a customs union) so far, the Appellate Body ruled that Article XXIV may justify a measure which is inconsistent with other GATT provisions. In the context of the formation of a customs union this defence is only applicable when two conditions are fulfilled: (a) the party claiming such defence must demonstrate that the measure is introduced upon the formation of a customs union that fully meets the requirements of Articles XXIV:8(a) and 5(a), and (b) the formation of the customs union would be prevented if it were not allowed to introduce the measure which is inconsistent with other GATT provisions. Although this suggests that Article XXIV might justify a departure from the nondiscriminatory application of safeguard measures this has not been tested in the WTO.

In Argentina-Footwear (2000), the Appellate Body supported the Panel's reasoning that there is an implied 'parallelism between the scope of a safeguard investigation and the scope of the application of safeguard measures'. Thus, if imports from all sources are included in the investigation, safeguard measures must be applied to imports from all sources, including RTA partners. In this case the Appellate Body (paragraph 114) concluded:

> Argentina, on the facts of this case, cannot justify the imposition of its safeguard measures only on non-MERCOSUR third country sources of supply on the basis of an investigation that found serious injury or threat thereof caused by imports from all sources,

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[2] See Appellate Body Report, *Argentina – Safeguard measures on imports of footwear* (2000).

[3] See Appellate Body Report, *United States – Definitive safeguard measures on imports of wheat gluten from the European communities* (2001).

[4] See Appellate Body Report, *United States – Definitive safeguard measures on imports of circular welded carbon quality line pipe from Korea* (2002).

> including imports from other MERCOSUR member states. However, as we have stated, we do not agree that the Panel was dealing, on the facts of this case, with a safeguard measure applied by a customs union on behalf of a member state. And we wish to underscore that, as the issue is not raised in this appeal, we make no ruling on whether, as a general principle, a member of a customs union can exclude other members of that customs union from the application of a safeguard measure.

In US-Wheat Gluten (2001), the Appellate Body determined that to include imports from all sources in the determination that increased imports are causing serious injury, and then to exclude imports from one source from the application of the measure, would be to give the phrase 'product being imported' in the Agreement on Safeguards a different meaning. The Appellate Body also ruled that if there was any gap between imports covered under the investigation and imports falling within the scope of the measure (i.e. RTA partner imports included in the investigation, but excluded from the application of a global safeguard), this could be justified only if the competent authorities 'establish explicitly' that imports from sources covered by the measure satisfy the conditions for the application of the safeguard measure.

In the US-Line Pipe case (2002) the Panel found that GATT XXIV could, in certain circumstances, prevail over Article XIX and that Article 2.2 of the Safeguards Agreement did not prejudge the interpretation of the relationship between GATT Articles XIX and XXIV:8. The Panel concluded that Article XXIV could provide a defence against claims of discrimination if imports from RTA members were excluded from the application of a global safeguard measure. However, the Appellate Body did not consider it necessary to address that issue and declared the Panel's finding on the use of Article XXIV as a defence to be moot and of no legal effect. Thus the central question of the relationship between Article XXIV and the Safeguards Agreement remains unresolved.

Although the issue regarding the discriminatory application of safeguard measures was raised in the above cases, the dispute settlement bodies failed to definitively address the questions regarding the interaction between multilateral and regional safeguards and the requirements of Article XXIV. However, it seems that a different interpretation of the parallelism requirement, as defined in the Argentina-Footwear case, is currently being used as justification to exclude regional imports from the application of a global safeguard measure. The Appellate Body found that if the injury determination was based on all sources of imports, the measure should also be applied to all sources of imports (including imports from RTA countries with an agreement that does not allow for the utilisation of safeguard measures on intraregional trade). It seems that a wide interpretation of this finding is now serving as the justification for the discriminatory application of a global safeguard measure. Global safeguards are now commonly being applied only to those imports that were taken into account in the determination of injury. In other words, we are back to the interpretation of the requirements of the Agreement on Safeguards according to Pauwelyn (2004). A country party to an RTA can exclude intraregional imports from the implementation of a global safeguard measure as long as these imports are excluded from the injury determination as well. Also, injury caused by any other factors including intraregional imports, may not be attributed to the surge in imports from third-party countries. This will ensure that a global safeguard will only be applied to the imports from third-party countries to the extent necessary to remedy to injury caused.

4. Implications for negotiations and implementation of RTAs

The unanswered questions surrounding the role of multilateral, regional and bilateral safeguards in RTAs and the interaction between the Agreement on Safeguards and Article XXIV have various implications for the negotiation of future trade agreements and the implementation of provisions in existing RTAs.

The requirement of an unforeseen surge in imports to utilise a safeguard measure poses a unique challenge within the context of a global versus a regional or bilateral safeguard measure. This is so in the case of negotiating future trade agreements and in implementing existing commitments under RTAs. The initial debate surrounding the requirement that an unforeseen development should have resulted in the surge in imports that led to the implementation of a global safeguard measure was focused on whether demonstrating an unforeseen development was truly necessary. This was based on the fact that this requirement was omitted from the requirements for a global safeguard measure in the Agreement on Safeguards, although it was included in Article XIX of GATT. This debate was settled with the findings of the Appellate Body in the United States – Steel Safeguards (2002)[5] dispute that an unforeseen development was one of the important issues of both law and fact that needed to be demonstrated, irrespective of the fact that it was omitted from the Agreement on Safeguards. In the Dominican Republic – Safeguard Measures (2012)[6] the Dominican Republic challenged the meaning of unforeseen development, for the first time in the WTO, with the argument that the entry-into-force of a free trade agreement formed the basis of an unforeseen development necessitating a global safeguard mechanism. The Panel rejected this argument by stating that Article XIX:1(a) of the GATT 1994 allows a safeguard to be applied only if, as a result of obligations incurred under the GATT 1994, an importing member is confronted with an unforeseen development that it did not foresee or expect when it incurred these obligations. In the true sense of the word, obligations incurred under an RTA are by nature not obligations incurred in terms of GATT. This means that if a country wants to implement a global safeguard measure a determination of the source of the imports needs to be made to ascertain whether this remedy is available to it in the specific circumstances. If the economic situation necessitating a safeguard measure is due to concessions made under a preferential trade agreement a country should take action in accordance with the trade agreement and not in terms of GATT and Agreement on Safeguards.

[5] See Appellate Body Report, *United States – Definitive safeguard measures on imports of circular welded carbon quality line pipe from Korea* (2002).

[6] See Panel Report, *Dominican Republic – Safeguard measures on polypropylene bags and tubular fabric from Honduras* (2012: paragraph 7.142).

The implications for future trade agreement negotiations can be summarised as follows:

1. RTAs among unequal partners mean that import surges from the larger, more developed countries pose specific challenges to small, less industrialised countries party to the trade negotiation process. Many modelling exercises conclude unambiguously that the larger economies will benefit from regional trade liberalisation, as they increase their import penetration of regional markets. This means that the right to utilise safeguards is pertinent for less developed economies to protect their domestic industries against harm caused by the concession agreed upon in the RTA. This is irrespective of whether provision is made for the utilisation of the multilateral safeguard mechanism or regional safeguards among the trading partners. However, to ensure that countries can effectively exercise their right to protect industries, they must ensure that the legal and institutional framework and bodies are in place. This can potentially pose a challenge for less industrialised economies with a lack of legal, institutional and financial capacity.

2. Countries will have to assess whether regional or global safeguards are the best policy option to address a surge in imports in the case of each RTA under negotiation. In terms of global safeguards these measures will have to be taken in accordance with the WTO law, which can be complex and expensive and poses challenges for countries with insufficient capacity. Any dispute that arises from the implementation of a global safeguard will also have to be referred to the WTO Dispute Settlement Mechanism. In the case of regional safeguards countries have the right to determine their own rules of the game. This means that the rules for safeguard implementation can be adapted according to the needs and capabilities of the individual parties to an RTA. Because a regional safeguard only pertains to intraregional trade, any dispute that arises due to its implementation will be referred to a regional forum in terms of the agreement. This is due to the fact that the dispute resolution body of the WTO will not be able to give a specific answer to this dispute and will not

be the appropriate forum. An intraregional safeguard mechanism can, however, be brought to the WTO as part of another WTO dispute. Thus, countries will have to decide from the outset of the negotiations process the most appropriate safeguard mechanism and the forum in which they would like to address disputes, given the economic and legal situation of each party to the specific RTA.

3. If trading partners are to conclude an RTA that provides for the utilisation of regional or bilateral safeguards, the agreement must also provide for the necessary regional forum to be created to address any disputes that may arise from using these measures. The trading partners need to ensure that provision is made for the creation and operationalisation of a regional dispute settlement body that will be able to effectively resolve any disputes that may arise between parties when a regional or bilateral safeguard is applied.

4. Countries will have to keep the complex relationship between Article XXIV, the Agreement on Safeguards and the MFN principle in mind when they negotiate regional agreements. A quantification of the 'substantially all trade' requirement might be necessary to ensure that any safeguard taken will not have an implication for the legality of the negotiated RTA in terms of the internal trade requirement. Countries will also have to take cognisance of the fact that the implementation of a safeguard on intraregional trade might require a case-by-case analysis prior to implementation to ensure compliance with Article XXIV.

In assessing the impact of the Agreement on Safeguards, Article XXIV and the MFN principle on implementing safeguards under existing RTAs, the key implication is that RTA members have to ensure compliance with the internal trade requirement whenever a safeguard measure is taken. Whether countries use the global safeguard mechanism or a regional safeguard, each measure will have to be evaluated to ensure that these ORRCs are not implemented on substantial intraregional imports. Also, if countries continue to follow the wide interpretation of the parallelism requirement by excluding intraregional imports from multilateral safeguards, they run the risk of being challenged at the multilateral level. This can pose serious challenges for those countries which lack financial and institutional capacity and capabilities to defend their case on the WTO platform.

5. Conclusion

The utilisation of multilateral safeguards is governed by GATT Article XIX and the WTO Agreement on Safeguards. Although the Agreement on Safeguards requires that safeguard measures must be applied on an MFN basis, the argument has been made that this requirement does not apply to intraregional imports under an RTA. This is based on the interpretation of the requirement to eliminate ORRCs in terms of 'substantially all trade' to establish an FTA or customs union in terms of GATT Article XXIV.

The general interpretation of Article XXIV is that safeguards are ORRCs that need to be eliminated from intraregional trade. This is especially the case where countries wish to implement a safeguard measure on imports that also form a part of the substantial trade among countries party to an RTA. However, if a safeguard measure is applied only to extraregional imports, in order to comply with the 'substantially all trade' requirement, countries run the risk of applying safeguards in a possibly WTO-inconsistent manner due to the MFN principle in the Agreement on Safeguards. The interaction among the Agreement on Safeguards, the MFN principle and Article XXIV is a highly complex puzzle that is yet to be solved. Although the question of discriminatory application has been raised at the WTO dispute settlement bodies a definitive finding on the matter is yet to be made. This has led many countries applying a wide interpretation of the parallelism requirement as stated in the Argentina-Footwear case. According to this wide interpretation, when countries apply a safeguard, the measure must be applied to all sources of imports that were included in the injury determination during the investigation. In other words, countries that are party to an RTA and want to implement a safeguard measure on extraregional imports, can do so, just as long as only the imports from these third parties were taken into consideration when injury was determined. Whether this interpretation of the parallelism requirement is allowable will have to be tested by the WTO dispute settlement bodies. Until such a time, the requirements in Article XXIV, Article XIX and the Agreement on Safeguards are open for different interpretation and selective implementation.

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Argentina – Safeguard Measures on Imports of Footwear, WT/DS121/AB/R, adopted 12 January 2000.

Dominican Republic – Safeguard measures on polypropylene bags and tubular fabric from Honduras, WT/DS418/R, adopted 31 January 2012.

Turkey – Restrictions on imports of textile and clothing products, WT/DS34/AB/R, adopted 19 November 1999.

United States – Definitive safeguard measures on imports of circular welded carbon quality line pipe from Korea, WT/DS202/AB/R, adopted 8 March 2002.

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United States – Safeguard measures on imports of fresh, chilled or frozen lamb meat from New Zealand and Australia, WT/DS178/AB/R adopted May 2001.