

THE STATE OF TRADE LIBERALISATION IN GOODS IN SADC

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Abstract

The Protocol on Trade seeks to liberalise trade among Southern African Development Community (SADC) members through the elimination of tariff and non-tariff barriers with the aim of establishing a Free Trade Area (FTA) in the region. The paper revisits the Regional Indicative Strategic Development Plan (RISDP) timelines as far as trade liberalisation is concerned. It shows that while the FTA was launched as per the 2008 deadline, a number of obstacles still remain. These include the failure by some members to achieve the liberalisation threshold, inadequate customs infrastructure, the surge in non-tariff barriers, and the multiple memberships of the SADC countries in other regional trade blocs, which may undermine SADC's objectives. This paper suggests that the solutions to these problems include consolidating the gains achieved from the FTA; getting members whose commitments are outstanding to take steps to align their customs laws to the agreed benchmarks; having members refrain from imposing non-tariff barriers; increasing customs cooperation; and setting realistic time frames.

1 Introduction: the SADC Protocol on Trade

Regional economic integration and the creation of economic groupings such as the Southern African Development Community (SADC) have been identified by governments in the African continent as being the instruments through which to ensure, support and promote economic growth.¹ It is within this context that the SADC Treaty also recognises the importance of economic integration,² and mandates that protocols be adopted to further these objectives.³ The SADC Treaty and the Protocol on Trade form the legal bedrock upon which issues of regional trade integration and trade liberalisation are based.⁴

The Protocol on Trade has a number of objectives. These range from the liberalisation of trade in goods and services on the basis of fair, mutually beneficial and equitable trade agreements;⁵ ensuring efficient production

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¹ The SADC member states are Angola, Botswana, the Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, the Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

² Article 5 of the SADC Treaty stipulates that one of the organisation's objectives is 'to promote sustainable and equitable economic growth and socio-economic development through regional integration'. In order to achieve its objectives, SADC is obliged to, among other things, 'harmonise political and socio-economic policies and plans of Member States, and improve economic management and performance through regional cooperation'.

³ Article 22(1) of the SADC Treaty states that 'Members shall conclude such Protocols as may be necessary in each area of cooperation which shall spell out the objectives and scope of, and institutional mechanisms for, cooperation and integration'.

⁴ The Trade Protocol was adopted in 1996 and came into force in 2000.

⁵ Article 2(1).

within SADC, reflecting the current dynamic and comparative advantages of its members;⁶ enhancing the economic development, diversification and industrialisation of the region;⁷ and establishing a Free Trade Area (FTA) in the region.⁸

Trade liberalisation can bring about numerous gains to trading countries. These include increased investment flows, capital formation, technology transfer, enhanced competition, and increase in the market due to trading countries coming together and taking advantage of economies of scale. There is also strength in numbers for countries in a trade bloc as they are better placed to influence trade terms in multilateral negotiations. However, in the short term, countries that have not adequately prepared may also be faced with various negative socio-economic effects when it comes to liberalising trade. For instance, the increase in competition might pose a threat to livelihoods and result in the loss of employment in countries that are not internationally competitive. Liberalisation will necessarily result in tariff losses, especially in those countries where the tariffs were initially high, and this loss can be quite significant since some governments rely substantially on tariff revenue. The SADC Protocol on Trade acknowledges the related problems that come with trade liberalisation. Article 4(2), for example, stipulates that the dismantling of import duties is to be accompanied by an industrialisation strategy to improve members' competitiveness. A similar line of reasoning is found in the Regional Indicative Strategic Development Plan (RISDP), which will be discussed later on in the paper.

II The institutional framework as established by Article 31 of the Protocol on Trade

In terms of the Protocol on Trade, members have committed themselves to phase out existing tariffs for trade in goods, such as the elimination of import duties,⁹ export duties,¹⁰ non-tariff barriers (NTBs),¹¹ quantitative import restrictions,¹² and quantitative export restrictions.¹³ Members have also committed to harmonising customs procedures within SADC as regards rules of origin,¹⁴ cooperation in customs matters,¹⁵ and trade facilitation.¹⁶

In order to fulfil the Protocol's objectives and commitments, several institutional mechanisms have been created in terms of Article 31 of the Protocol. These are outlined individually below.

⁶ Article 2(2).

⁷ Article 2(4).

⁸ Article 2(5).

⁹ Article 4.

¹⁰ Article 5.

¹¹ Article 6.

¹² Article 7.

¹³ Article 8.

¹⁴ Article 12.

¹⁵ Article 13.

¹⁶ Article 14.

(a) Committee of Ministers Responsible for Trade

The first of these institutions is the principal Committee of Ministers responsible for Trade (CMT), whose responsibility is to oversee the implementation of the Protocol, appoint panels of trade experts to resolve trade disputes that may arise between members regarding the interpretation or application of the Protocol, and supervise the work of any committee or sub-committee established pursuant to the Protocol.¹⁷

(b) The Committee of Senior Officials

The Committee of Senior Officials' functions include reporting to the CMT on matters pertaining to the implementation of the Protocol, supervising the work of the Sector Coordinating Unit, clearing the documents submitted by the Sector Coordinating Unit directed to the CMT, playing the role of liaison between the CMT and the Sector Coordinating Unit, monitoring the implementation of the Protocol, and supervising the work of the Trade Negotiations Forum.¹⁸

(c) The Trade Negotiations Forum

The primary responsibility of the Trade Negotiations Forum (TNF) is to facilitate trade negotiations. The TNF's functions include the garnering of research experts to assess the impact of measures already taken, provide sectoral cooperation. The TNF also has the responsibility of establishing a regional framework for the reduction and elimination of NTBs.¹⁹

(d) Sector Coordinating Unit

Finally, the Sector Coordination Unit is responsible for offering technical and administrative assistance to all the institutions, committees, subcommittees and panels established in terms of the Protocol.²⁰

III Regional trade agreements and the multilateral trading system

Since the 1990s, the number of regional trade agreements (RTAs) has increased globally from 27 to 511.²¹ Out of these RTAs, Free Trade Areas (FTAs) account for 90 per cent, while Customs Unions make up the remaining 10 per cent.²² In terms of the World Trade Organization (WTO), RTAs are

¹⁷ Article 31(2)(a) – (c).

¹⁸ Article 31(3)(a) – (f).

¹⁹ Article 31(4)(a) – (d).

²⁰ Article 31(5)(a) – (e).

²¹ As of 15 January 2012, 511 RTAs had been notified at the WTO. These statistics include notifications for both goods and services. Of these, 370 were notified either under Article XXIV of GATT 1947 or GATT 1994; 36 under the Enabling Clause; and 105 in terms of Article V of the General Agreement on Trade in Services. Of these agreements, 319 were in force; see http://www.wto.org/english/tratop_e/region_e/region_e.htm, accessed on 16 January 2012.

²² Available at http://www.wto.org/english/tratop_e/region_e/region_e.htm, accessed on 16 January 2012.

the exception to the general rule; however, one might very well argue that in light of their prevalence they now appear to be the norm rather than the exception. Nonetheless, the prevalence of RTAs should not be taken as an indication that they are replacing or substituting the multilateral trading system. Rather, RTAs provide a useful supplement and also accelerate the multilateral process, in that regionalism may result in multilateral agreements that might otherwise have been held up.²³ Normally, an RTA – whether for a customs union or an FTA – would violate the WTO's most-favoured-nation principle, which essentially requires that there should be equal treatment for all trading partners. However, Article XXIV of the General Agreement on Tariffs and Trade (GATT) allows RTAs, provided they satisfy certain specified requirements.²⁴

The motivation for allowing the formation of RTAs is the recognition that, in essence, their purpose is to facilitate trade between the constituent territories and not to raise barriers to the trade of other WTO members who do not belong to that particular RTA.²⁵ Moreover, RTAs also allow for the freedom of trade through closer integration of the economies of the countries who are party to such agreements.²⁶ Furthermore, WTO rules dealing with RTAs mandate that, if any contracting party enters into a customs union or FTA, they are obliged to notify the WTO promptly and make available any such information to WTO members as may be necessary to make such recommendations deemed appropriate.²⁷ Where the members of the notified RTA are not prepared to modify the proposed RTA, they will not be permitted to maintain such agreement or allow it to enter into force.²⁸ It is within this global setting that SADC notified the WTO of its intention to form an FTA in August 2004, and has since then embarked on a process of regional integration.

²³ J Bhagwati *Writings on international economics* (2000) 170.

²⁴ Article XXIV par 8(a) of GATT provides as follows:

'For the purposes of this Agreement,

- (a) a customs union shall be understood to mean the substitution of a single customs territory for two or more custom territories, so that
 - (i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,
 - (ii) subject to the provisions of Paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union'.

Furthermore, paragraph 8(b) of Article XXIV provides as follows:

'A free trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories'.

²⁵ Article XXIV par 4.

²⁶ Ibid.

²⁷ Article XXI par 7(a).

²⁸ Article XXIV par 7(b).

(a) Internal and external requirements – GATT Article XXIV

From a reading of the provisions in GATT Article XXIV, one can identify both internal and external requirements – both of which need to be satisfied. The internal requirement mandates that the parties to a custom union or FTA have to eliminate ‘duties and other restrictive regulations on *substantially all their trade*’.²⁹ While the term *substantially all trade* is not defined, two main schools of thought have emerged, namely the one with a quantitative and one with a qualitative perspective, both of which seek to explain the meaning and content of ‘substantially all trade’.

According to the quantitative school of thought, in order for the requirement of ‘substantially all trade’ to be satisfied, the agreement should exceed a specified threshold, e.g. 80 to 90 per cent of trade.³⁰ The qualitative school, on the other hand, holds that the requirement of ‘substantially all trade’ is fulfilled when the agreement includes the major sectors of economic activity.³¹ Therefore, should an agreement exclude a certain major sector of the economy, such as agriculture, the agreement will have failed to comply with the requirement of ‘eliminating restrictive regulation on substantially all their trade’. As such, in light of the above arguments relating to the two schools of thought, both the qualitative and quantitative requirements need to be satisfied in order to comply with the internal requirement in terms of Article XXIV.³²

The external requirement places an obligation on members of a customs union or FTA to ensure that the trade barriers after the formation of the customs union or FTA are not in the whole higher or more restrictive than before the agreement was adopted.³³ The evaluation as to whether or not such

²⁹ Emphasis added.

³⁰ E Kessie ‘The WTO rules on regional trade agreements’ (2011) Unpublished paper presented at the Annual SADC Law Seminar, University of Cape Town, 18 November 2011.

³¹ Kessie op cit at 20.

³² Kessie op cit at 21.

³³ Article XXIV par 5(a) stipulates that –

‘with respect to a customs union, or an interim agreement leading to the formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement shall not be on the whole higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be’.

Paragraph 5(b) further provides that –

‘with respect to a free trade area, or an interim agreement leading to the formation of a free trade area, the duties and other regulations of commerce maintained in each of the constituent territories applicable at the formation of such a free trade area or the adoption of such interim agreement to the trade of the parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free trade area, or interim agreement as the case may be’.

restrictions are higher than before the agreement for a customs union or FTA was adopted is dealt with in terms of WTO rules.³⁴

However, one needs to note that the formation of RTAs may also result in trade diversion. This occurs when imports from higher-cost partners are substituted for goods previously obtained from countries that are not part of the RTA.³⁵ As a result, trade diversion reduces potential gains from liberalisation with preferential elements.

IV Implementation of the SADC regional integration obligation in terms of the Protocol on Trade and the RISDP

Implementation of the SADC FTA commenced upon the adoption of the Protocol on Trade in 2000. Members committed to having tariffs eliminated on substantial trade within a period of eight years.³⁶ As such, 2008 was the year in which the SADC FTA would be achieved. In keeping with the WTO's provisions on RTAs which require that, among other things, for an FTA to be formed, tariffs need to be eliminated on substantially all trade, SADC members agreed that there should be a total elimination of tariffs on at least 85 per cent of all trade among members by 2008. The year 2010 was supposed to mark the attainment of a customs union; however, this deadline was not met.³⁷

In 2003, the Summit adopted the Regional Indicative Strategic Development Plan (RISDP) wherein members set out the time limits within which to achieve the trade bloc's integration commitments. Members set a period of 15 years for themselves within which they were to achieve total integration. Such integration would have culminated with the realisation of a regional currency among SADC states. In terms of the RISDP's goals, members set various

³⁴ The Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 provides as follows (par 2):

'The evaluation under paragraph 5(a) of Article XXIV of the general incidence of the duties and other regulations of commerce applicable before and after the formation of a customs union shall in respect of duties and charges be based upon an overall assessment of weighted average tariff rates and of customs duties collected. This assessment shall be based on import statistics for a previous representative period to be supplied by the customs union, on a tariff-line basis and in values and quantities, broken down by WTO country of origin. The Secretariat shall compute the weighted average tariff rate and customs duties collected in accordance with the methodology used in the assessment of tariff offers in the Uruguay Round of Multilateral Trade Negotiations. For this purpose, the duties and charges to be taken into consideration shall be the applied rates of duty. It is recognised that[,] for the purpose of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required'.

³⁵ J Bhagwati (ed) *Going Alone: The Case for Relaxed Reciprocity in Freeing Trade* (2002) 425.

³⁶ Article 3(1)(b).

³⁷ Article XXIV par 8 of GATT provides that '(a) a customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories so that (i) duties and other restrictive regulations of commerce (except where necessary those permitted under Articles XI, XII, XIII, XIV, XV and XV) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and (ii) subject to the provisions of Paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union'.

targets related to the liberalisation of trade.³⁸ In essence, the primary purpose of the RISDP is to deepen regional integration within SADC. To that end, it provides members with a comprehensive programme of long-term economic policies.

V Tariff elimination

The elimination of tariffs has been implemented in stages in a process termed *tariff phase-downs*, with the more developed countries dismantling at a faster rate. For the purposes of tariff elimination, members were categorised as *Developed*,³⁹ *Developing*,⁴⁰ or *Least developed*.⁴¹

The elimination process grouped the types of goods into four categories in which tariffs would be dismantled. The tariffs for goods contained in Category A had to be reduced to 0 per cent immediately on the date of the RISDP's implementation. This did not pose any particular problem to SADC members who are also members of the WTO because goods in this cluster were those for which tariffs had already been eliminated in terms of WTO rules.⁴²

Category B allows for gradual liberalisation by using the principle of asymmetry. This meant tariffs would be reduced gradually within the period of eight years, and SADC members had a choice between front-, mid- and back-loading to achieve this goal. Countries in the *Developed* category opted to eliminate their tariffs by way of front-loading, which involves the liberalisation of tariff lines as from the time that the Protocol on Trade was adopted so as to achieve the elimination of tariffs on 'substantially all trade' by about Year 5 of implementation. This can be attributed to the fact that the SACU countries, as members of a customs union, already had a common external tariff; thus, for them to dismantle the tariffs for the purposes of the SADC FTA was less cumbersome in comparison with the procedures entailed for other members. Countries in the *Developing* cluster entered into a gradual process of elimination between Year 4 and Year 8 by mid-loading their tariff-dismantling obligations to attain the required threshold, which would allow for tariffs to be reduced in equal instalments. Countries classified as *Least developed* made use of back-loading, whereby tariff reduction was introduced between 2006 and 2008, during which time the tariff lines were reduced in equal instalments.⁴³ This is similar to the WTO's special and differential

³⁸ The RISDP is a regional plan spanning 15 years. It addresses issues of regional integration, the development framework for this, and the identification of priorities and strategies for achieving SADC's long-term goals. The RISDP seeks to guide SADC members, SADC institutions, regional stakeholders, and the bloc's international cooperation partners in the process of enhancing integration.

³⁹ Mainly South Africa, but the other members of the Southern African Customs Union (SACU) de facto as well, i.e. Botswana, Lesotho, Namibia and Swaziland.

⁴⁰ Mauritius and Zimbabwe.

⁴¹ Angola, the DRC, Madagascar, Malawi, Mozambique, Tanzania and Zambia.

⁴² For example, in this category, SACU's final tariff phase-down offer to its fellow members includes goods such as the products of fish; chicory plants and roots; roses; tomatoes; leeks and other alliaceous vegetables; peas; beans; mixed vegetables; bananas; flours of maize, rice wheat and other cereals; and nickel, copper, cobalt, aluminium and titanium ores and concentrates; see http://www.tralac.org/wpcontent/blogs.dir/12/files/2011/uploads/20060623_SACUOFFGEN_final.pdf, accessed on 1 September 2011.

⁴³ *SADC FTA Handbook* (2008) 7, available at http://www.lesothocanada.gov.ls/home/SADC_FTA_Brochure.pdf, accessed on 20 August 2011.

treatment, where members – particularly the developing and least developed countries – may be given the option of complying with their obligation gradually over a period of time.⁴⁴

Category C contains goods classified as *Sensitive*, i.e. those that are of unique economic importance to a country and are protected from foreign competition with similar goods.⁴⁵ Generally, the categorisation of goods as *sensitive* is based on their revenue earnings, employment creation, or status as an infant industry, which means such goods require a level of protection. Goods classified as *sensitive* include motor vehicles, sugar, textiles and leather products, to mention but a few.⁴⁶ In the commitment schedules, these goods make up 15 per cent of the tariff lines and were initially exempted from the eight-year period of tariff liberalisation. The gradual removal of tariffs on Category C goods was initially scheduled to commence upon the adoption of the FTA in 2008. The year 2010 was scheduled as the deadline for completing the process of eliminating tariffs on Category C products. However, because not all members met this deadline, it was extended to 2012. Information as to which countries have actually failed to meet the deadline and in respect of which products they failed to do so has not been forthcoming.⁴⁷

Category E contains a list of goods that have been totally excluded from the elimination of tariffs. These goods are exempted in terms of Articles 9 and 10 of the Protocol on Trade. Examples include firearms and ammunition.

In August 2008, the SADC FTA was established after 85 per cent of all trade among member states was tariff-free, with 12 members of the bloc having fulfilled their tariff elimination schedules with the exception of Category C goods.⁴⁸ However, Angola, the Democratic Republic of the Congo and the Seychelles were unable to meet their commitments. With the first two countries, the failure can largely be attributed to their economies undergoing reconstruction following years of war; in the case of the Seychelles, it only rejoined SADC in August 2009. Thus, since these three countries have not been able to eliminate their tariffs to the required standard, they have not yet joined the FTA.

VI Application of Article 3 – the “derogation clause”

In February 2011, Zimbabwe submitted an application to the Committee of Ministers of Trade in terms of Article 3 of the Protocol, which essentially allows for members to derogate from their tariff elimination schedules for

⁴⁴ For instance, Category B of Zimbabwe’s Differentiated Offer to SADC Member States (excluding South Africa) includes products such as fresh sardines, milk, butter, dairy spreads, fresh cut flowers, lubricating oils, petroleum bitumen, and iron chloride; see http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/20060623_ZWOFF_SADC_prelim.pdf, accessed on 1 September 2011.

⁴⁵ In this category, Malawi’s Differentiated Offer to SADC Members (except South Africa) includes products such as turkeys, whey, blue-veined cheese, ivory, ivory powder and waste, leeks and other alliaceous vegetables, ordinary bread, smoking tobacco, and aviation spirit; see http://www.tralac.org/wpcontent/blogs.dir/12/files/2011/uploads/20060623_MWOFF_SADC_prelim.pdf, accessed on 1 September 2011.

⁴⁶ Ibid.

⁴⁷ F Njini ‘SADC limps towards a common market’ *The Southern Times* 21 February 2011 at 3.

⁴⁸ *SADC FTA Handbook* (2008) 8; available at http://www.lesothocanada.gov.ls/home/SADC_FTA_Brochure.pdf, accessed on 20 August 2011.

a specified period if the member believes that the removal of tariffs will have a negative impact on its economy.⁴⁹ Zimbabwe has been facing difficult economic circumstances; its application was premised on the fact that the suspension of tariff elimination obligations of Category C goods would be a means of boosting the government's revenue. Accordingly, the Committee of Ministers for Trade granted the two-year suspension.⁵⁰

Notably, at the time of its application, Zimbabwe was seeking derogation from only some of its Category C products and not all, because it had already eliminated tariffs on some products in that category.⁵¹ In Zimbabwe's case, the derogation will not cause a significant negative impact as far as intra-SADC trade is concerned. This is because SADC exports destined for Zimbabwe only constitute just above 3 per cent of the total exports in SADC, and because the derogation is for a limited period only.⁵² However, the cumulative effect of such derogations can have a negative impact when one considers the broader aim of regional integration, and particularly the fact that all countries are involved in the process tariff phase-downs: any derogation will effectively interfere with the principle of reciprocity operating between SADC members.⁵³

The general terms in Article 3 of the Protocol on Trade are also a cause of concern. The provisions in Article 3 empower the CMT to consider such applications without setting out the procedure or criteria, and leave the CMT to decide on a case by case basis for each application, instead of developing a clear and transparent procedure that will be utilised in all Article 3 applications.⁵⁴ While Article 3(c) enjoins the CMT to develop the appropriate criteria for considering "derogation" applications, to date such criteria have not been forthcoming. Therefore, to close up this lacuna, the CMT should formulate appropriate general rules that will address contentious issues such as the permissible maximum period in which a derogation should exist, the conditions that will trigger the granting of such a grace period, and clarification regarding the supporting documents that are to be part of an application.⁵⁵

⁴⁹ Article 3(1)(c) provides as follows:

'Member States which consider that they may be or have been adversely affected by the removal of tariff and non-tariff barriers to trade, may[,] upon application to the CMT, be granted a grace period to afford them additional time for the elimination of tariffs and non-tariff barriers'.

⁵⁰ T Iwanow 'Impact of derogation from the implementation of the SADC FTA obligations in intra-SADC trade' *Southern Africa Global Competitiveness Hub, Technical Report* (2011) 4; available at <http://satradehub.org/trade-liberalization/sath-content/activities/regional-integration/trade-liberalization/impact-of-derogations-from-implementation-of-the-sadc-fta-obligations-on-intra-sadc-trade>, accessed on 13 September 2011 (hereafter Iwanow 2011).

⁵¹ For example, tariffs for cigarettes, matches, petroleum, tobacco and bottled water have already been eliminated, while tariffs still exist for wheat flour, dairy, meat and petrol products. One should also note that Zimbabwe's tariff schedule for South Africa differs from that which it applies to other SADC members. For example, some Category C exports from South Africa still have tariffs, whereas a zero tariff applies for those specific products for all other SADC members. This is not uncommon, as several other members have different tariff phase-down schedules that apply to South Africa and those that apply to the rest of their fellow SADC members; see http://www.zimra.co.zw/index.php?option=com_zimra&view=tariff&searchword=category+c+products&limit=25, accessed on 3 September 2011.

⁵² Iwanow (2011) op cit note 49 at 4.

⁵³ Iwanow op cit at 5.

⁵⁴ Iwanow op cit at 6.

⁵⁵ Iwanow op cit at 5.

VII Non-Tariff Barriers

Besides tariffs barriers to trade that can be dealt with by elimination and refraining from raising them beyond the levels that existed at the time the Protocol on Trade entered into force, except in those circumstances specified in the Protocol,⁵⁶ NTBs are also a major threat to trade integration in the region. Furthermore, NTBs have contributed to the implementation problems faced by the trade bloc. NTBs are any regulations to trade other than tariffs or other discretionary policies that restrict international trade.⁵⁷ In some situations, NTBs are deliberate actions by members to impede trade such as export quotas, export prohibition, export licensing, export duties and levies.⁵⁸ In these circumstances NTBs are prompted by protectionist objectives and are incompatible with GATT and WTO principles. In other situations, NTBs are the result of legitimate actions, for example, measures that prohibit the trading of goods that might pose a health risk to consumers, raise public safety concerns, generate security issues, and call for environmental protection.⁵⁹ However, these genuine measures lose their legitimacy in cases where they are employed in such a manner that they hinder trade, increase costs, or are applied for illegitimate purposes.

(a) NTBs at the WTO

Within the WTO, several agreements have been adopted dealing with various bureaucratic issues that may hinder trade. These include import licensing, the valuation of goods at customs, and pre-shipment inspection. The Agreement on Import Licensing Procedures stipulates that import licensing procedures should be simple, transparent and predictable. These administrative procedures, as used in international trade, need to be applied in a manner that is fair and equitable. Furthermore, such import licensing mechanisms are to be neutral in application, and administered in a fair and equitable manner.⁶⁰ In the event of a dispute relating to importing licensing procedures and practices, the Agreement stipulates that such disagreements are to be settled in terms of the WTO's Dispute Settlement Understanding.⁶¹

The Agreement on Customs Valuation aims for a fair, neutral and uniform customs system for the valuation of goods so as to avoid the use of fictitious and customs values.⁶² The Agreement on Customs Valuation has also established

⁵⁶ Article 5(2), which deals with the elimination of export duties, states the following: [Article 5] 'shall not prevent any Member State from applying export duties necessary to prevent the erosion of any prohibition or restrictions which apply to exports outside the Community, provided that no less favourable treatment is granted to Member States than to third countries'.

⁵⁷ 2004 Inventory Report on NTBs in SADC.

⁵⁸ Even at international level, while tariffs have been eliminated, NTBs have increased. As a result, the WTO has adopted several agreements which appear to deal with some aspects of NTBs, such as the Agreement on Customs Valuation, the Government Procurement Agreement, the Agreement on Importing Licensing Procedures, the Agreement on Sanitary and Phytosanitary Measures, the Subsidies and Countervailing Measures Agreement, and the Technical Barriers to Trade Agreement.

⁵⁹ Article 9 of the Protocol on Trade.

⁶⁰ Article 1(3) of the Agreement on Import Licensing Procedures.

⁶¹ Agreement on Import Licensing Procedures Article 6.

⁶² Also known as the Agreement on Implementation of Article VII of GATT 1994.

the Committee on Customs Evaluation for the Council for Trade in Goods. This Committee is responsible for issues relating to customs evaluation at the WTO. Customs officials are also empowered to request further information where they have reason to doubt the accuracy of the declared value of imported goods.⁶³

The Agreement on Preshipment Inspection governs the preshipment practice whereby specialised private companies check shipment details such as price, quantity and quality of goods ordered overseas. The Agreement stipulates that such practices have to comply with GATT principles and obligations. These obligations include non-discrimination, transparency, avoidance of unreasonable delay, and the use of specific guidelines for conducting price verification.

(b) Non-Tariff Barriers within SADC

To cater for the negative impact that NTBs have on the liberalisation of trade, Article 6 of the Protocol on Trade stipulates that members are required to adopt measures to eliminate NTBs and to refrain from imposing any new ones.⁶⁴ In 2007, a study was commissioned to analyse the nature and scope of the NTBs plaguing intra-regional trade in several trade blocs, namely the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and SADC. The overarching effect of these NTBs is that they impede the individual trade blocs from fully benefiting from trade preferences among member countries, as they negatively impact regional trade, business costs and market access. The study found several NTBs, including the time-consuming customs procedures at border posts, substantial paper bureaucracy, and the requirement by other members that import duties and taxes are to be paid in cash.⁶⁵

These NTBs certainly have a negative impact on intra-SADC trade. World Bank data has shown that, on average, it takes 91 days to fulfil all the trading requirements for intra-SADC trade, compared with 60 days that it takes for trade between SADC and Organisation for Economic Co-operation and Development (OECD) countries.⁶⁶ The NTBs discussed above, namely those relating to time-consuming customs procedures and substantial paper bureaucracy, have largely been resolved by trade facilitation. For example, the Sub-committee on Customs Cooperation has developed a single administrative customs declaration form termed the *SADC Customs Document* (SADC – CD). This form incorporates all the various declarations that were a requirement at each member's border. This is a noteworthy achievement if one takes into

⁶³ WTO Ministerial Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value; available at http://www.wto.org/english/docs_e/legal_e/42-dvall.pdf; accessed on 20 November 2011.

⁶⁴ Article 6 of the Protocol on Trade stipulates that, '[e]xcept as provided for in this Protocol, Member States shall, in relation to intra-SADC trade: Adopt policies and implement measures to eliminate all existing non-tariff barriers and refrain from imposing any new non-tariff barriers'.

⁶⁵ Imani Development *Inventory of Regional Non-Tariff Barriers: Synthesis Report* (2007) 2.

⁶⁶ E Mudzonga 'Implementation challenges for the SADC FTA: Tariff and Non-tariff Barriers' *Implementation Challenges for the 2008 SADC FTA and Beyond: Liberalising Trade in Southern Africa* (2008) 14.

account that most members in the trade bloc are landlocked. In addition, the transshipment of goods within the Community has also been made easier by allowing a single bond to be used for goods that cross several borders before reaching their destination within the Community.

Joint efforts between COMESA, the EAC and SADC have brought about positive results in respect of the monitoring and elimination of NTBs. An online procedure which allows for the reporting, monitoring and resolving of NTBs has been put into effect.⁶⁷ A meeting held by the SADC Sub-committee on Trade Facilitation in July 2011 produced positive feedback in relation to the elimination of NTBs.⁶⁸ Available data shows that, as of September 2011, 366 NTB complaints had been lodged online. Of these, 260 have been resolved, with 106 pending.⁶⁹ However, there is inadequate documentation to support the claims that some of the reported NTBs have been resolved. This is mainly because the reports made regarding the alleged NTBs may be subjective or vague, making it difficult to effectively assess the notifications.⁷⁰

Since NTBs are inherently problematic as far as their classification is concerned, members have agreed to recategorise them according to WTO standards.⁷¹ Of the NTBs reported so far, a substantial number relate to those connected to administrative entry procedures. This is evidence of problematic procedures needing attention. For instance, some of the NTBs imposed by countries seem to be “retaliatory” in nature.

In efforts to facilitate trade, a model customs statute has been developed in order to provide a benchmark in respect of the harmonisation of customs procedures and practices. The idea is that members will then formulate or amend their respective customs legislation and procedures in line with the model statute, and ensure the harmonisation of customs procedures and, ultimately, facilitate trade. One-stop border posts (hereinafter OSBPs) have also been created in a bid to facilitate trade. Examples can be found at Lebomba – Ressano Garcia,⁷² Chirundu,⁷³ and Forbes – Machipanda.⁷⁴ OSBPs not only save time, they also enable scarce resources to be optimally allocated when customs authorities from two countries perform identical functions. It also improves enforcement through cooperation, and enables the sharing of information to better combat fraud.⁷⁵ Specific gains have been attained at each of these OSBPs. For example, at the Chirundu OSBP, passengers and commercial vehicles now stop only once at one facility for both countries to complete their border formalities. Furthermore, the waiting

⁶⁷ See www.tradebarriers.org, accessed on 20 September 2011.

⁶⁸ Ninth Meeting of the SADC Sub-committee on Trade Facilitation, 27 July 2011, Gaborone, Botswana.

⁶⁹ Available at www.tradebarriers.org, accessed on 20 September 2011.

⁷⁰ Imani Development *Inventory of Regional Non-/Tariff Barriers: Synthesis Report* (2007) 4.

⁷¹ Category 1 – Government participation in trade and restrictive practices; Category 2 – Customs and administrative entry procedures; Category 3 – Technical Barriers to Trade; Category 4 – Sanitary and Phyto-sanitary Measures; Category 5 – Specific Limitations; Category 6 – Charges on imports; Category 7 – Other procedural problems.

⁷² At the border between South Africa and Mozambique.

⁷³ At the border between Zambia and Zimbabwe.

⁷⁴ At the border between Mozambique and Zimbabwe.

⁷⁵ M Pearson ‘Trade facilitation in the COMESA – EAC – SADC Tripartite Free Trade Area’ (2010) *Trade Law Centre for Southern Africa Working Paper* 10.

period for clearance of commercial traffic, which was initially between three to five days, has now been reduced to a day or merely a few hours, due to the upgrading of infrastructure to make the OSBP fully operational.⁷⁶

VIII The levels of trade among SADC Members

It has become common knowledge that SADC is fraught with economic asymmetries. Consequently, regional integration will not occur within the ambitious timelines that have been envisaged in the RISDP.⁷⁷ However, asymmetrical economies should not be taken to mean that integration cannot or will not occur. Rather, such asymmetries might mean that the integration process might take a longer than initially anticipated. SADC is made up of eight low-income countries, and three middle-income countries, with South Africa being the most developed in terms of overall economic size. South Africa contributes at least 70 per cent of the region's total income, in stark comparison with Lesotho and Malawi's contribution of 1 per cent.⁷⁸ The trade patterns are asymmetric, with South Africa being not only the largest exporter, but also the largest importer in the region.⁷⁹

While most tariffs have been lowered, one also has to determine whether this has actually translated into increased volumes of trade within SADC. There appears to be a paucity of trade data in the SADC region, which has mainly been attributed to member states not submitting their individual trade statistics to the United Nations Statistical Division (UNSD).⁸⁰

During the period 2000–2006, while there was generally an increase in intra-SADC trade, an analysis of the data reveals that most of the countries' exports were destined for South Africa, and constituted close to 70 per cent of total intra-SADC exports.⁸¹ On one extreme, there are those countries that heavily rely on South Africa as the destination of their exports; and on the other, there are countries whose trade volumes with South Africa are significantly low. For example, Swaziland exports to South Africa account for more than three

⁷⁶ Ibid.

⁷⁷ Iwanow (2011) op cit note 49 at 13.

⁷⁸ P Kalenga 'SADC and the challenge of CU status in 2010' *Implementation Challenges for the 2008 SADC FTA and Beyond: Liberalising Trade in Southern Africa* (2008) 93. However, South Africa also has its problems: the economic policy in respect of dealing with the high level of inequality and unemployment in the country may have an effect on regional integration in SADC.

⁷⁹ See P Drape, P Alves & M Kalaba 'South Africa's international trade diplomacy: Implications for regional integration' (2006) 1 *Regional Integration in Southern Africa* 14 (hereafter Drape, Alves & Kalaba 2006). The study which collated data for the period 2000 – 2004 analysed commodities at Harmonised Systems (HS) Code 4, with an emphasis on the top twenty HS Code 4 exports ranked by average share in South Africa's imports.

⁸⁰ M Kalaba & M Tsedu 'Implementation of the SADC Protocol and the intra-SADC trade performance' (2008) *Southern African Development Research Network Policy Brief* 3. In 2008, the International Trade Centre (ITC) pointed out that only half of the countries in SADC had submitted their trade flow data to the UNSD, making it difficult to determine with accuracy the extent of the trade among SADC members. However, other regional organisations such as the Southern African Development Research Network (SADRN) have collected trade statistics from individual SADC countries in order to create a picture of the state of trade among members of the regional trade bloc.

⁸¹ Kalaba & Tsedu op cit 14.

quarters of its total exports, which include sugar and clothing.⁸² Mauritius is the least dependent on South Africa, with only 1.5 per cent of its exports destined for South Africa. This is mainly because Mauritius exports sugar to the European Union and clothing to the United States markets.⁸³ On the other hand, twelve per cent of Tanzania's total exports go to South Africa.⁸⁴

This situation reveals that, while exports have indeed increased, the increase is attributed to trade outside the SADC region. Several factors, such as supply side constraints and infrastructure bottlenecks, have contributed to the low levels of intra-SADC business transactions. Mauritius is a case in point: the government's investment into infrastructure has been done largely on an ad hoc basis, without taking into account long-term factors such as the need to develop an institutional framework and environment conducive to investment and the improvement of infrastructure for the purpose of advancing trade.⁸⁵

The trade data available also reveals a worrying trend when one analyses the types of commodities that are being traded among countries. SADC's export basket remains largely undiversified, and constitutes trade in products that are concentrated mostly in the primary and basic processing sector in the form of either agricultural product or minerals.⁸⁶ However, this is essentially the broad pattern of how the African continent as a whole interacts with the rest of the global economy.

IX Loss of tariff revenues

As mentioned earlier on, tariff reduction also has a negative impact on the fiscal policies of those countries which rely heavily on trade revenues. This is certainly true for a number of countries in SADC, among them Lesotho and Swaziland: in 2004, the trade revenue in these two countries contributed to more than half their total revenues. Thus, it is important to realise that achieving the FTA is not an end but a means of achieving regional development and improving the lives of the region's inhabitants. Therefore, in the medium to long term, it is imperative that trade reforms be accompanied by complementary policies and institutional mechanisms.

X Transport costs and infrastructure

The state of the infrastructure in member countries is a cause of concern. These include poor road, rail, air and port facilities. High transport costs and the poor state of most transport networks are a prominent feature in Africa,

⁸² Drape, Alves & Kalaba (2006) op cit note 78 at 55. Swaziland has an abundance of sugar, and its huge exports of sugar and clothing to South Africa may be attributed to the African Growth and Opportunity Act (AGOA) preferences which have resulted in the increase in capacity, thereby making clothing producers more competitive in the South African market.

⁸³ Ibid at 48. Products exported to South Africa include diamonds, woven cotton products, and equipment for chemical and physical analyses.

⁸⁴ Ibid at 56. This consists mainly of tobacco and precious stones.

⁸⁵ Southern African Development Research Network 'Southern African Development Community: Reaping the benefits of regional economic integration' (2011) *Southern African Development Research Network Policy Brief 1*.

⁸⁶ Drape, Alves & Kalaba (2006) op cit note 78 at 62.

and are also relevant within SADC.⁸⁷ In the absence of well-maintained transport infrastructure and optimally priced transport systems, economic prosperity and poverty alleviation may not be realised to their full extent.⁸⁸ In short, transport makes markets work. Inadequate linkages among transport modes in Africa are the primary cause of the long delays experienced, and raise costs in the movement of international freight. Moreover, landlocked countries are the ones most affected by these issues. As a result, there has been a growing movement toward regional collaboration to facilitate trade along key transport corridors. In order to deal with the problems associated with inadequate transport, funding for improving transport infrastructure has been on the rise. For instance, in southern Africa, the 2006 – 2009 period saw US\$1 452 million set aside to address the problems in the transport sector.⁸⁹

XI Multiple memberships

Belonging to more than one RTA presents various problems. This is particularly relevant within SADC, if one considers its intention to set up its own customs union. Belonging to more than one RTA may result in conflicting objectives among the various trade blocs to which a country belongs. Such overlapping may negatively impact on the implementation of the objectives of each of the RTAs involved. Moreover, one also has to consider the issue of scarce resources: membership to any trade bloc means that administrative fees must be paid. This clearly results in the wasteful use of resources (certainly for developing and least developed countries) since a country will be required to pay the administrative fees for each of the trade blocs to which it belongs. For instance, within SADC, certain members – such as Mauritius, the Seychelles, Swaziland, Zambia and Zimbabwe – also belong to COMESA.

Some have suggested that a country cannot belong to more than one customs union, and that the negative consequences of ignoring this fact will eventually come to the fore, especially when both COMESA and SADC become customs unions. In such a scenario, where each respective customs union adopts a common external tariff, countries will find it impossible to enforce two different common external tariff regimes. On the issue of multiple memberships, WTO rules do not expressly prohibit members from belonging to more than one customs union. It is submitted that one of the reasons against belonging to more than one customs union has to do with the practical issues: it would be cumbersome to enforce more than one common external tariff. WTO rules are ambivalent in this area, and members are still

⁸⁷ I Mwanawina 'Deepening Integration in SADC: Zambia's economic policies in line with SADC Targets' *Regional Integration in Southern Africa* (2007) (7) 83.

⁸⁸ T Heinemann 'How chronic transport challenges impede development in Africa'; available at <http://www.trademarksa.org/news/how-chronic-transport-challenges-impede-development-africa>, accessed on 4 September 2011.

⁸⁹ The funding came from various multilateral organisations such as the African Development Bank, the World Bank, and the European Community; available at <http://www.icafrica.org/en/infrastructure-issues/transport/>, accessed on 20 September 2011.

engaged in negotiations to clarify and strengthen them in the Doha Round of negotiations.⁹⁰

XII Beyond the SADC FTA – the Customs Union and Monetary Union

As discussed previously, in terms of the RISDP, 2010 was the deadline by which members needed to have completed negotiations and by which the SADC FTA would have attained the status of a customs union. However, the deadline was missed, and the plans of setting up a SADC customs union have been postponed indefinitely.

The primary difference between an FTA and a customs union is that, with the latter, a common external tariff has to be negotiated among its members. With a customs union, there is no need for internal customs control among members for the purpose of import duties; therefore, there is no need for rules of origin because once a product is in the customs territory it has already levied a duty or it originates from within the customs territory. Nonetheless, there are a number of essential issues that require consensus before an FTA can become a customs union.

At the outset, members are required to put in place a common objective and rationale for the customs union as well as common trade and industrial policies.⁹¹ There needs to be consensus on the common external tariff (CET) structure and the distribution of custom revenues to partner countries, as well as on the administration of the customs union's institutions.⁹² Moreover, partners need to trust in each other's abilities to enforce the agreed CET: if a member is suspected of not enforcing the CET, it may lead to disgruntled members adopting alternative measures to goods emanating from third party countries.⁹³

Two options have been put forward as the form of the CET that may be adopted. On the one hand is the complex CET, which is based on the existing SACU tariff and the simple uniform tariff structure.⁹⁴ The main hurdle with the complex CET is that most benefits would accrue to the dominant trading country – in this case South Africa – because the majority of SADC countries export outside the trade bloc, whereas a large part of South Africa's exports are destined for members within the region. This gives South Africa a substantial tariff advantage over its fellow SADC member states.⁹⁵ The

⁹⁰ In the Doha Ministerial Declaration WT/MIN(01)/DEC/1 par 29, members agreed 'to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations shall take into account the developmental aspects of regional trade agreements'.

⁹¹ E Mudzonga 'Implementation challenges for the SADC FTA: Tariff and Non-tariff Barriers' *Implementation Challenges for the 2008 SADC FTA and Beyond: Liberalising Trade in Southern Africa* (2008) 12.

⁹² Ibid.

⁹³ F Flatters *Implementing the SADC FTA – Where are we, what next? Southern Africa Global Competitiveness Hub Technical Report* (2010) 22; available at <http://satradehub.org/trade-liberalization/sath-content/activities/regional-integration/trade-liberalization/sadc-fta-issues>, accessed on 28 September 2011.

⁹⁴ SADC Secretariat. *Evaluation of an Appropriate Model for a SADC Customs Union. Policy Brief* (2007) 3.

⁹⁵ SADC Secretariat op cit 4.

more palatable tariff structure is the simpler one, as it would allow for greater economic gains. Such gains would depend on the level of the tariff: the lower the average tariff, the lower the scope for trade diversion and the greater the potential for countries to undergo economic integration.⁹⁶

Regarding the mechanism for sharing tariff revenues, it is up to the members to decide on the basis for sharing revenue, and whether in certain circumstances some form of compensation may be necessary. Most customs unions adopt the “destination principle”, which effectively means that tariff revenue accrues to the country where the import is finally consumed. The significant attraction with this principle is that it still allows countries a measure of control over the revenue they collect; this, in turn, means that the revenue-sharing formula will no longer be necessary. This approach should not be favoured, however, because the benefits of forming a customs union will be defeated as a disproportionate share of tariff revenue may accrue to the dominant country.⁹⁷ The acceptable option would be the “entry principle” combined with a revenue-sharing formula. With this mechanism, revenue is collected at the point at which a product first enters into the customs union; such revenue is then distributed among members according to a predetermined structure. This means, again, that countries will have to agree on the formula and whether or not compensation is required in certain cases.

While a customs union is not a political union, it still requires its members to demonstrate a willingness to relinquish some aspects of their national sovereignty to an intergovernmental body, to surrender some independent decision-making powers, and to address the problem of overlapping membership – particularly since it is not possible for a country to belong to more than one customs union. One of the problems associated with belonging to a customs union is that it curtails a country’s freedom to engage in trade negotiations with external potential trade partners.⁹⁸ Therefore, the establishment of a customs union will be a lengthy procedure. In the interim, in light of the issues connected with a customs union, members need to adopt an approach that will ensure that all members fulfil their obligations towards a future SADC Customs Union.

However, since the 2010 deadline for achieving a customs union was not met, plans seem to be on hold. SADC members are now contemplating the creation of the grand African Free Trade Area, which will comprise COMESA, EAC and SADC member states. It is still unclear what the position will be, i.e. whether the achievement of the SADC Customs Union will be a priority or whether the grand FTA will now take precedence.

In terms of the RISDP timelines, 2016 is the target date by which members have agreed that they will attain the status of a monetary union and set up the legal and administrative framework for the establishment of a SADC central

⁹⁶ Ibid.

⁹⁷ SADC Secretariat op cit 5.

⁹⁸ F Flatters *Implementing the SADC FTA – Where Are We, What Next?* Southern Africa Global Competitiveness Hub Technical Report (2010) 22; available at <http://satradehub.org/trade-liberalization/sath-content/activities/regional-integration/trade-liberalization/sadc-fta-issues>, accessed on 28 September 2011.

bank. By 2018, members are set to adopt a regional currency for the monetary union. It is doubtful whether these deadlines will be achieved, since the building block of achieving a customs union has not been laid down as yet.

XIII Concluding remarks and observations

Despite the current problems, the SADC FTA is still very much a work in progress. The FTA still needs to be fully implemented with the total removal of tariffs, and with the remaining countries fully meeting their commitments. Countries also need to make a deliberate effort to comply with their obligations in terms of the Protocol on Trade, consolidate the FTA gains achieved thus far, and set manageable and practical agendas. In this regard, Angola, the DRC and the Seychelles have to be in the process of submitting their tariff proposals in order to align their customs laws and procedures with the required benchmarks. As indicated earlier herein, trade facilitation measures such as the harmonisation of customs procedures, increased customs cooperation, the adoption of the single administrative document for customs clearance, the establishment of OSBPs, and the utilisation of the single bond have certainly improved SADC trade. Furthermore, it is acknowledged that most members have fulfilled their tariff elimination obligations. However, a surge in NTBs has been detected. Since the problem of NTBs seems to be pervasive among countries in SADC and in other trade blocs in the African continent, the joint efforts between SADC, the EAC and COMESA to eliminate such barriers have shown positive results. Nonetheless it is up to countries to refrain from continually creating such impediments. The lack of data on trade statistics from some countries makes it almost impossible to determine the exact levels of trade within the SADC FTA. Notwithstanding this lack of data, the trade statistics that are available have shown generally low levels of trade among SADC members, with most of the trade taking place being agriculture-based. As already noted, this is not a feature peculiar to the SADC FTA: it is a reflection of how the African continent generally interacts with the rest of the world as far as international trade is concerned. A solution to this problem would be to embark on diversification by way of investing in sectors with the potential to be globally competitive, and so fully realise the opportunities presented by the SADC FTA.