UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

REGIONALISM UNDER THE WTO. AN IMPEDIMENT OR A SPUR TO TRADE AND DEVELOPMENT IN THE MULTILATERAL TRADING SYSTEM: A CASE STUDY OF THE EAC.

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LIST OF ABBREVIATIONS

AB	Appellate Body
ACP	African Caribbean and Pacific states
AEC	African Economic Community
AFTA	ASEAN Free Trade Area
AGOA	African Growth and Opportunity Act
ANSA	Angola, Namibia and South Africa
ANZCERTA	Australia-New Zealand Closer Economic Relations Trade Agreement
APEC	Asia Pacific Economic Co-operation
ASEAN	Association of Southeast Asian Nations
ATC	Agreement on Textiles and Clothing
AU	African Union
Benelux	Belgium, the Netherlands and Luxembourg
BLNS	Botswana, Lesotho, Namibia and Swaziland
BLS	Botswana, Lesotho and Swaziland
CACM	Central American Common Market
CAFTA	Central America Free Trade Agreement
CAP	Common Agricultural Policy
CARICOM	Caribbean Community
CEAO	Communaute' Economique de l'Afrique de l'Ouest
CEMAC plus STP	Central African Economic and Monetary Union plus Sao Tome and Principe
CEMAC	Central African Economic and Monetary Community
CEN-SAD	Community of Sahel-Saharan States
CEPGL	Economic Community of the Countries of the Great Lakes/ Communaute' des pays des grands lacs
CEPR	Center for Economic and Policy Research
CER	Closer Economic Relations Agreement
CET	Common External Tariffs
CMMS	Comoros, Madagascar, Mauritius, Seychelles
COMESA	Common Market for Eastern and Southern Africa

CRTA	Committee on Regional Trade Agreement
CTD	Committee on Trade and Development
CTG	Council for Trade in Goods
CUP	Customs Union Protocol
CUs	Customs Unions
CUSTA	Canada and United States Free Trade Area
DCs	Developing Countries
DDA	Doha Development Agenda
DFQF	Duty Free Quota Free
DRC	Democratic Republic of Congo
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EAC	East African Community
EBA	Everything But Arms
EC	European Communities
ECCAS	Economic Community of Central African States
EC-EAC EPA	The Economic Partnership Agreement between the European Communities and the East African Community
ECJ	European Court of Justice
ECOWAS	Economic Community of West African States
ECSC	European Coal and Steel Community
EEC	European Economic Community
EFTA	European Free Trade Association
EPAs	Economic Partnership Agreements
EPG	Eminent Persons's Group
ESA	East and Southern Africa
EU	European Union
EU-MERCOSUR FTA	European Union-Southern Common Market Free Trade Area
EURATOM	European Atomic Energy Community
FDI	Foreign Direct Investment
FTAA	Free Trade Area of the Americas
FTAs	Free Trade Areas

GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GCC	Gulf Cooperation Council
GSP	Generalised System of Preferences
ICITO	Interim Commission for the International Trade Organisation
IEPA	Interim Economic Partnership Agreement
IGAD	Intergovernmental Authority on Development
IMF	International Monetary Fund
IOC	Indian Ocean Commission
KIPPRA	Kenya Institute for Public Policy Research
LAFTA	Latin America Free Trade Area
LAIA	Latin American Integration Association
LDCs	Least Developed Countries
LLDCs	Landlocked Least Developed Countries
MDGs	Millennium Development Goals
MERCOSUR	Southern Lone Common Market
MFN	Most Favoured Nation
MRU	Mano River Union
MTN	Multilateral Trade Negotiations
MTS	Multilateral Trading System
NAFTA	North America Free Trade Agreement
NAMA	Non-Agricultural Market Access
NEPAD	New Partnership for Africa's Development
NTBs	Non-Trade Barriers
OAU	Organisation of African Unity
OCT	Association of Overseas Countries and Territories
OECD	Organisation for Economic Co-operation and Development
ORCs	Other Regulations of Commerce
ORRCs	Other Restrictive Regulations of Commerce
PNG	Papua New Guinea
PTAs	Preferential Trade Agreements
RTAs	Regional Trade Agreements
SA	South Africa

SAARC	South Asia Association for Regional Cooperation
SACU	South African Customs Union
SADC	Southern African Development Community
SADC EPA	The Economic Partnership Agreement between the European Communities and the Southern African Development Community
SADC Group	Botswana, Lesotho, Mozambique, Namibia and Swaziland
SADCC	South African Development Coordination Conference
SAFTA	South Asian Free Trade Area
SAG	Special Agricultural Safeguard
SAPTA	South Asia Preferential Trade Agreement
SAT	Substantially All Trade
SPS	Sanitary and phyto-sanitary standards
SSM	Special Safeguard Mechanism
TAFTA	Transatlantic Free Trade Area
TBT	Technical Barriers to trade
TDCA	Trade and Development Cooperation Agreement
TEAC	Treaty establishing the East African Community
UEMOA	West African Economic and Monetary Union
UK	United Kingdom
UMA	Arab Maghreb Union
UN	United Nations
UNCTAD	United Nations Conference for Trade and Development
UNECA	United Nations Economic Commission for Africa
US	United States of America
USTR	United States Trade Representative
VCLT	Vienna Convention on the Law of Treaties
WB	World Bank
WTO	World Trade Organisation
WW II	Second World War

DECLARATION

I, Justine Namara, declare that this thesis is my own work except where acknowledged in the text.

Signed ……..…

Justine Namara

(Student)

Dated on this ..... day of May, 2009

CERTIFICATION

I certify that I have read, and hereby recommend for acceptance by the University of the Western Cape, the thesis entitled "**REGIONALISM UNDER THE WTO. An Impediment or a Spur to Trade and Development in the Multilateral Trading System: A Case Study of the EAC,**" submitted in partial fulfilment of the requirements of an LL.M. Degree in International Trade and Investment Law in Africa of the University of the Western Cape.

Signed .....

Ms. Patricia Lenaghan

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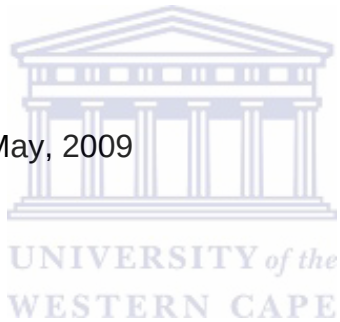

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KEYWORDS

Customs Union

East African Community

Economic Partnership Agreements

General Agreement on Tariffs and Trade

Most Favoured Nation

Multilateral Trading System

Regional Trade Agreements

Regionalism

Southern African Development Community

World Trade Organisation

DEDICATION

In loving memory of my father, Mr. Mwaniki Francis Gichohi.

And To my mother, Mrs. Adreen Kyohairwe.

Thank you very much for the pivotal role that you have played in my life.

May the Almighty God continue to bless you.

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CHAPTER ONE – INTRODUCTION

1.1- INTRODUCTION

The World Trade Organisation (WTO)[1] rules on Regional Trade Agreements (RTAs) date back to the General Agreement on Tariffs and Trade (GATT) 1947.[2] Aside from the GATT 1947, these rules are further contained in the Enabling Clause,[3] and the General Agreement on Trade in Services (GATS).[4] Article XXIV of the GATT, complemented by its Understanding[5] provide the legal foundation for RTAs in the area of trade in goods. Additionally in this area, the Enabling Clause[6] enhances RTAs through its provision for the mutual reduction of tariffs among developing countries (DCs). Whereas, in the area of trade in services, the rules embodying RTAs are set out in Article V of the GATS, which was also negotiated during the Uruguay Round.[7]

It is pertinent to note that ever since the 1960s; RTAs[8] have been a phenomenon involving DCs. There are political reasons for this, notwithstanding the immediate post-

[1] The agreement establishing the WTO was agreed at the Marrakesh Ministerial Meeting and signed by Ministers on April 15, 1994 in Marrakesh, Morocco but entered into force on January 1, 1995. The WTO embodies 50 years of multilateral trade negotiations in the GATT, which liberalised trade and established a substantial body of trading rules. However, the WTO's major mandate as a multilateral institution is to help build prosperity for all peoples of the globe by bolstering a free and fair trading environment. See Goode W., *Dictionary of trade policy terms*, (4ed.) (2003) 235 and 393; Schott J., "Challenges facing the World Trade Organization" in Schott J., (eds.) *The world trading system: Challenges ahead,* (1996) 3; WTO, Doha Ministerial Declaration, WT/MIN(01)/DEC/1, adopted on 14th November 2001.

[2] The GATT 1947 rules are the legal foundation for RTAs to date. The GATT entered into force on 1 January 1948 as a provisional agreement and remained so until it was superseded by the WTO framework on 1 January 1995, therefore from the period of 1948 to 1994, the GATT provided the rules for much of the world trade. The GATT 1947 grew out of the aftermath of the Second World War (WW II), which led to the convening of a United Nations Conference on Trade and Employment in Havana, Cuba. This resulted in the formulation of the Havana Charter (the third "Bretton Woods" institution, the other two being World Bank and the International Monetary Fund), which was never ratified because it was too ambitious, although the International Trade chapter of the Charter was taken out and converted into the GATT in 1947 and had 23 members. The GATT was not an Organisation but only an agreement and the Interim Commission for the International Trade Organisation (ICITO) administered its implementation, located in Geneva. World Trade Organisation, *Understanding the WTO,* (3rd ed.) (revised ed.) (2007) 15 Available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap1_e.pdf (accessed on August 10, 2008) and Das B., *The World Trade Organization. A guide to the framework for international trade,* (1999) 3 – 4.

[3] Article 2C of the WTO General Council Decision of November 28, 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries.

[4] The GATS is the first and only set of multilateral rules governing International trade in services. It was negotiated in the Uruguay Round and developed as a response to the huge growth of the services economy and the greater potential for trading services brought about by the communications revolution. World Trade Organisation, *Understanding the WTO* (n. 2 above) 33.

[5] Understanding on the Interpretation of Article XXIV of the GATT 1994 was negotiated during the Uruguay Round and adopted as part of the Final Act of the Uruguay Round.

[6] It was codified in the framework agreement to the GATT Tokyo Round Accord under the decision entitled "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries." The Enabling Clause was adopted in 1979 and provided less stringent measures for DCs seeking to join RTAs. Haggard S., *Developing nations and the politics of global integration,* (1995) 39.

[7] WTO Secretariat, "The changing landscape of regional trade agreements" (2003). Available at: www.wto.org/english/tratop_e/region_e/sem_nov03_e/boonekamp_paper_e.doc – 2003-12-03 (accessed on August 10, 2008).

[8] In this thesis, the RTAs terminology is used to encompass all preferential trade agreements including but not limited to free trade areas and customs union, which are either in line with Article XXIV or not, that WTO members have negotiated.

Second World War (WW II) period which strongly favoured increased free trade through multilateralism.[9] Regional integration during that period was beneficial to the countries involved, as they were eager to re-establish security and peace, and to reconstruct their economies which had been devastated by the war.[10] Regional trade integration was therefore an instrument used to restore political unity, stability and economic development.[11] As a result, regionalism emerged as a global policy concern during the Uruguay Round of multilateral trade negotiations (MTN)[12] towards the end of the 1980s[13] and it increasingly led to the escalation of RTAs to the extent that by 1999, about 194 RTAs had been notified to the WTO.[14]

The prominence of RTAs has been carried over to recent years in the Multilateral Trading System (MTS)[15] encompassing developed countries, DCs[16] and least developed countries (LDCs).[17] The surge in RTAs has continued unabated since the early 1990s, and as of July 2007 about 380 RTAs had been notified to the GATT/WTO of which, 300 RTAs were notified under Article XXIV of the GATT 1947 or the GATT

[9] Tralac Newsletter on regional trade agreements, "RTA background: Political, economic and development reasons" (2008). Available at: http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news&cat=1051&cause_id=1694. (Accessed on August 10, 2008).

[10] A case in point is the European Coal and Steel Community (ECSC) formed between six European Countries with the aim of cooperating in the trade of coal and steel, which were required for war. The Treaty made it necessary to involve each of these countries if any of them decided to purchase ammunition. Thus, countries could not plot war against each other and this fostered peace and security.

[11] Pomfret R., *The economics of regional trading arrangements,* (1997) 121.

[12] The Uruguay Round of MTNs was launched at Punta del Este, Uruguay on September 25, 1986 and was concluded in Geneva on 15 December 1993. It resulted into a comprehensive set of agreements in the areas of goods, services and intellectual property rights. These agreements came into force on 1 January 1995 and in the process it recreated the GATT that was traditionally dealing with trade in goods, into the WTO which had a wider coverage of areas with no linkage to trade in goods. The Uruguay Round was the eighth and final round of negotiations conducted under the auspices of the GATT. Das B., *The World Trade Organization. A guide to the framework for international trade,* (n. 2 above) 6 – 7; Goode W., *Dictionary of trade policy terms,* (n. 1 above) 393; Palmeter D., "National sovereignty and the World Trade Organization" in Palmeter D., (eds.) *The WTO as a legal system. Essays on international trade law and policy,* (2003) 260.

[13] Draper P, and Qobo M., "Rabbits caught in the headlights? Africa and the "multilateralizing regionalism" paradigm," (2007) Available at: http://www.wto.org/english/tratop_e/region_e/con_sep07_e/draper_qobo_e.pdf . (accessed on August 10, 2008).

[14] World Bank, *Trade blocs,* (2000) 1.

[15] The MTS is the system operated by the WTO, a non-discriminatory arrangement for international trade which came into existence with the GATT in 1947. World Trade Organization, *Understanding the WTO,* (n. 2 above); Goode W., *Dictionary of trade policy terms,* (n. 1 above) 249

[16] In the WTO, there are no definitions provided for "developed" and "developing" countries. However, WTO members can declare themselves to be either "developed" or "developing" countries. Although, other WTO members can challenge the decision of a member in a DC category to make use of provisions available to DCs. WTO, "Who are the developing countries in the WTO?" Available at http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm (accessed March 25, 2009).

[17] A country is declared a LDC on the criteria or indicators adopted by the United Nations' Economic and Social Council which include inter alia per capita GNP, life expectancy, combined primary and secondary enrolment ratio, adult literacy rate, manufacturing share in GDP, and employment share in industry, per-capita electricity consumption, and export concentration ratio. After every three years the same body reviews these indicators and the list of the countries designated as LDCs. Goode W., *Dictionary of trade policy terms,* (n. 1 above) 222. Currently the list holds a number of Fifty countries which include Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Cape Verde, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Lao People's Democratic Republic, Lesotho, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Sudan, Timor-Leste, Togo, Tuvalu, Uganda, United Republic of Tanzania, Vanuatu, Yemen and Zambia. "UN LDCs List," Available at http://www.un.org/special-rep/ohrlls/ldc/list.htm (accessed on March 25, 2009).

1994;[18] an additional 22 under the Enabling Clause;[19] and 58 under Article V of the GATS.[20] As at that date, 205 RTAs were in force.[21]

The proliferation of RTAs in the MTS is mainly attributable to the fact that regionalism is not only regarded as compatible with multilateralism but also that it provides a stimulus for multilateralism.[22] This is based on the fact that RTAs can accelerate global trade liberalisation as it is assumed that liberalisation in RTAs will eventually lead to liberalisation in the MTN[23] and this principle is further enshrined in Article XXIV.[24]

There is also a general consensus that regional integration through RTAs lowers impediments to multilateralism. It has therefore been stated that:

> *".....regionalism may well prove to be the gangplank for developing countries striving to get aboard the global economic vessel."*[25]

RTAs are also said to create "competitive liberalisation" whereby competition between the regional and multilateral processes creates pressure for multilateral results.[26]

Moreover, RTAs have greatly paved way for trade facilitation, reduced the likelihood of conflicts between its members,[27] and caused massive increase in investment as RTAs

[18] Article XXIV allows the members of RTAs to offer more favourable trade terms in goods to other bloc members without extending them to other WTO members.
[19] The Enabling Clause allows automatic exemptions from the MFN treatment in favour of WTO DCs. It permits WTO members to accord more favourable treatment to DCs without according such treatment to other WTO members.
[20] Article V allows the members of RTAs to offer more favourable trade terms in services to other bloc members without extending such services to other WTO members.
[21] WTO, "Regional trade agreements," Available at http://www.wto.org/english/tratop_e/tratop_e.htm (accessed on 10 August 2008)
[22] Yang Y, and Gupta S., "Regional trade arrangements in Africa: Past performance and the way forward," (2005) 6.
[23] RTAs have been described as *"Circles of free trade that expand until they finally converge to form expansive multilateral agreements."* "Regionalism summary," Available at http://www.cid.harvard.edu.cidtrade/issues/regionalism.html (accessed on August 10, 2008).
[24] Lawrence R., "Regionalism and the WTO: Should the rules be changed?" in Schott J., (eds.) *The world trading system: Challenges ahead,* (1996) 42.
[25] Kennes W., "Developing countries and regional integration," Available at http://www.oneworld.org/euforic/courier/165e_ken.htm (accessed on August 10, 2008).
[26] Steinberg R., "Great power management of the world trading system: A transatlantic strategy for liberal multilateralism," (1998) *29 LAW & POL'Y INTL BUS* 211. However, this has adverse effects depending on the nature of the RTAs for instance a RTA can develop a regional stand on capitalism which would make it difficult to reconcile divergence between regions in the multilateral forum.
[27] Yang Y, and Gupta S., "Regional trade arrangements in Africa: Past performance and the way forward," (n. 22 above) 2.

are considered to be one of the principal factors that has accelerated globalisation or the transnational extension of Foreign Direct Investment (FDI) markets.[28]

However, as much as RTAs are viewed as complementary to the MTS, thereby building and strengthening the latter, a contrary view is that they are discriminatory in their very nature, and above all a departure from the Most Favoured Nation (MFN)[29] principle which is a cornerstone of the MTS. The impact of RTAs[30] on global trade liberalisation and economic growth is debatable given the fact that the expected benefits can be undercut simply and/or shelved through distortions in resource allocation, trade and investment diversion.[31]

Consequently, the question of whether RTAs are beneficial to the members involved is increasingly important as the trading world seems to be evolving from a multilateral system to a system in which many countries belong to regional trade blocs. Yet it is argued that, the evolution of the world into competing trade blocs creates a grave risk especially to the DCs, as DCs that do not belong to any regional trade blocs would suffer the most.[32] This was well articulated in Dr. Supachai Panitchpakdi's warning, while addressing the effects of RTAs on the MTS by stating:

> *"..... But by discriminating against third countries and creating a complex network of trade regimes, such agreements pose a systemic risk to the global trading system*."[33]

Furthermore, most cynics[34] perceive the RTAs trend as a return to the past, as they believe that the world trading system is fragmenting today just as it did in the 1930s and

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[28] Yang Y, and Gupta S., "Regional trade arrangements in Africa: Past performance and the way forward," (n. 22 above) 1 – 2.

[29] In the WTO, MFN means the binding general obligation that any concession made to another country must immediately and unconditionally be extended to all other members. It emphasizes that all WTO members must grant each other treatment for trade in goods as favourable as they give to any other country in the application and administration of customs regulations, tariffs and related charges, thus members cannot give more favourable treatment to a product from another member than what it gives to any other member country. Goode W., *Dictionary of trade policy terms*, (n. 1 above) 234; Das B., *The WTO and the Multilateral Trading System. Past, present and future*, (2003)36.

[30] RTAs are normally designed to the advantage of signatory countries.

[31] WTO, "Regional trade agreements: Scope of RTAs." Available at http://www.wto.org/english/tratop_e/region_e/region_e.htm. (accessed on August 10, 2008).

[32] Yang Y, and Gupta S., "Regional trade arrangements in Africa: Past performance and the way forward," (n. 22 above) 6.

[33] Remarks of Dr. Supachai Panitchpakdi, WTO Director General 2002. Panitchpakdi S., "Overview of developments in the international trading environment," (2002) 3 Available at http://trade.wtosh.com/english/res_e/focus_e/focus57_e.htm (accessed on March 24, 2009).

they envision the destruction of the MTS just as Europe, North America, and Asia become "fortresses" in which some trading partners obtain refugee while others are excluded.[35]

Accordingly, there is a great danger that RTAs may destroy the MTS if its members raise up protectionist walls against non-members, Ambassador Richard Gardner thus opined,

> *"For political reasons, the reduction in trade barriers which takes place in such systems [i.e., preferential trade areas] will probably do more to give the participating countries sheltered markets against the outside world than it does to stimulate vigorous competition between them."*[36]

It is for these aforesaid reasons that several discussions have been prompted to examine the impact of RTAs in the MTS. The debate on the impact of RTAs on the MTS has been under scrutiny in the auspices of the WTO. Mr. Pascal Lamy,[37] in his speech, 'Proliferation of Regional Trade Agreements "Breeding Concern"', stated:

> "*Are we in a world where preferential agreements [Regional Trade Agreements] will continue to multiply, eventually reaching some high number after which we will find ourselves in a kind of stable equilibrium? I believe most people think not. I think that it would be fair to say that proliferation is breeding concern — concern about incoherence, confusion, exponential increase of costs for business, unpredictability and even unfairness in trade relations."*[38]

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[34] For example Thurow L., *Head to Head: The coming economic battle among Japan, Europe and America.* (1992). Lester Thurow proclaimed that the GATT is dead and further argued that the world would shift to a tripolar system with blocs centered on Europe, the US, and Japan that would have free trade internally but managed trade among them. As noted in Lawrence R., "Regionalism and the WTO: Should the rules be changed?" in Schott J., (eds.) *The world trading system: Challenges ahead,* (n. 24 above) 42.

[35] Lawrence R., "Regionalism and the WTO: Should the rules be changed?" in Schott J., (eds.) *The world trading system: Challenges ahead,* (n. 24 above) 41.

[36] Gardner R., *Sterling – Dollar diplomacy in current perspective,* (Revised ed.) (1980) 14 as noted in Palmeter D., "Some inherent problems with Free Trade Areas" in Palmeter D., (eds.) *The WTO as a legal system. Essays on International trade law and policy,* (n. 12 above) 143.

[37] The Director General of the WTO, 2008 – 2009.

[38] Director-General Pascal Lamy, in opening the Conference on "Multilateralizing regionalism" in Geneva on September 10, 2007. Available at http://www.wto.org/english/news_se/sppl_e/sppl_e.htm (accessed August 10, 2008).

The concern of the WTO is further exacerbated by the historical settings of some of the members of the WTO, for example, the members in Southern and Eastern Africa are inundated by a number of RTAs which are viewed as a product of colonialism and apartheid.[39] It features a number of RTAs, including, the East African Community (EAC),[40] the Southern African Development Community (SADC),[41] the Common Market for East and Southern Africa (COMESA)[42] and the Southern African Customs Union (SACU),[43] which RTAs have been notified to the WTO.

The EAC which is the focus of this research is the regional intergovernmental organisation of the Republics of Burundi, Kenya, Rwanda, Uganda and the United Republic of Tanzania.[44] The Treaty for the Establishment of the East African Community was signed on 30 November, 1999 and entered into force on 7 July, 2000 following its ratification by the original three partner states – Kenya, Uganda and Tanzania. The Republic of Rwanda and the Republic of Burundi acceded to the EAC Treaty on 18 June, 2007 and became full members of the Community with effect from 1 July, 2007.[45]

This research paper pays particular attention to the EAC because of its unique composition of four LDCs[46] and 1 DC[47] and the fact that three of these countries are landlocked least developed countries (LLDCs).[48] The EAC was notified as a RTA to the WTO under the Enabling Clause on 9 October 2000 and registered as a Custom Union[49] under WT/COMTD/N/14.[50]

The notification of the EAC under the Enabling Clause is due to the nature of composition of members therein and to the fact that the Enabling Clause does not

[39] Tralac Newsletter on regional trade agreements, "RTA background: Political, economic and development reasons," (n. 9 above).
[40] Burundi, Kenya, Rwanda, Tanzania and Uganda.
[41] Angola, Botswana, Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa (SA), Swaziland, Tanzania, Zambia and Zimbabwe.
[42] Angola, Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.
[43] Botswana, Lesotho, Namibia, Swaziland and SA.
[44] Its headquarters are located in Arusha, Tanzania.
[45] EAC, "East African Community. Unity and Development," Available at http://www.eac.int/ (accessed on August 6, 2008).
[46] Burundi, Rwanda, Tanzania and Uganda.
[47] Kenya.
[48] Burundi, Rwanda and Uganda and thus they mainly depend on the harbours of Mombasa (Kenya) and Dar es Salam (Tanzania).
[49] As of to date, the Customs Union has not yet been fully fledged.
[50] Available at http://docsonline.wto.org- WT/COMTD/25 (accessed on August 6, 2008).

require regional trading arrangements to cover substantially all trade, or to achieve free trade in the bloc within ten years after notification. Additionally, it provides an avenue for giving special consideration to the LDCs through making concessions and contributions,[51] allows automatic exemptions from MFN (non-discrimination) treatment in favour of DCs,[52] and thus allows other WTO members to accord more favourable treatment to DCs in many cases without according the same treatment to other WTO members.[53]

On the basis of the aforesaid, this research therefore sought to draw the line between the benefits and impediments of RTAs in the promotion of the MTS, taking into consideration that there is an eminent danger that the RTAs pose to the MTS, which danger has drawn attention to the compatibility of the RTAs to the MTS. Renato Ruggiero[54] expressed this concern when he noted that:

> *"Ensuring that regionalism and multilateralism grow together and not apart is perhaps the most urgent issue facing trade policy makers today."*[55]

At the same time, Pascal Lamy also echoed his concern by warning that RTAs are not the "easy way out" from suspended talks, in that:

> *"[There must be ensurance] that regional trade agreements are complementary – and not a substitute – to the multilateral trading system.....if the multilateral system dies away, so does the positive potential of regional trade agreements."*[56]

For that reason, this research also seeks to draw up recommendations on ways of restricting RTA activity so as to ensure that it complements the MTS rather than undermine it.

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[51] Paragraph 6 and 8 of the Enabling Clause.
[52] Paragraph 1 of the Enabling Clause.
[53] Paragraph 1 and 2 of the Enabling Clause.
[54] Director General, WTO 1996.
[55] Ruggiero R., "Multilateralism and regionalism in trade. Regional accords need to converge," (1996) 1 Available at http://www.usembassy-israel.org.il/publish/press/trade/archive/october/et11030.htm (accessed August 6, 2008).
[56] Pascal Lamy, Director General WTO 2008 – 2009, "Multilateral and bilateral trade agreements: Friends or foes?" (2006) Available at http://www.wto.org/english/news_e/sppl_e/sppl46_e.htm (accessed April 9, 2009).

1.2- OBJECTIVES OF THE RESEARCH

This study explored how RTAs are created under the MTS, whether they impede or spur trade and development within the MTS, and how best they can be designed to promote multilateralisation.

In so doing, it reviewed proposals to amend the RTA provisions so as to curtail the prevalence of RTAs in the MTS and ensure their compatibility to the GATT/WTO bearing in mind that the RTA provisions are meant to be revised as indicated in the Doha Declarations.

This research paper also carried out a comparative analysis of the FTAs that are bound to be formed between the European Union (EU)[57] with the SADC and the EAC through the Economic Partnership Agreements (EPAs) and whether these EPAs are compatible with the coverage of the RTA provisions embodied in Article XXIV of the GATT. Furthermore, the provisions in the framework Interim Economic Partnership Agreement (IEPA) will mainly be critiqued on the basis of whether they provide for trade and development or militate against these objectives which were the essence of negotiating the EPAs. To this end, recommendations shall be made on how best the EAC can be tailored as an RTA to promote trade and development within its members.

Finally this research sought to resolve the question of whether RTAs have outlived their usefulness or not and identified ways in which the MTS can be reconciled with the RTAs and/or aligned to complement each other, moreover, especially in the case of the EAC.

1.3- SIGNIFICANCE OF THE RESEARCH

Currently, RTAs pose a great challenge to the MTS, which challenge is more eminent today than ever when the number and scope of RTAs have massively increased causing the MTS to be overshadowed by the RTAs. Owing to this, the proliferation of

[57] In this thesis, the acronym EU is used interchangeably with the EC acronym but the EC is formally the correct appellation in the WTO context.

RTAs has resulted in too many disputes and, has strained the functionality of the MTS. It is for this very reason that the nature of RTAs were addressed in the WTO Ministerial Meeting in Doha, Qatar, in 2001, which sought to clarify and improve the functions of RTAs, their disciplines and procedures, taking into account their developmental aspects.[58]

However, the collapse of the Doha Round of negotiations in July 2008[59] is set to increase the escalating proliferation of RTAs which seem to provide an easier forum for trade negotiations than the deadlock and/or slow progress of trade negotiations in the MTS.

Most African countries are not an exception to the proliferation of RTAs. This is accentuated by the fact that RTAs are regarded as beneficial to DCs through the developed countries' legal standpoint and this was emphasised by a comment from Mr. Mickey Kantor, the United States Trade Representative (USTR) in 1993:

> *"Regional trading arrangements … can prepare developing nations for admittance to the global trading system … [and] … they can complement global trading and lubricate negotiations."*[60]

Furthermore, RTAs have in recent years; become increasingly appealing to member states in Africa because of the slow rate at which progress is made in the MTN. Additionally, with the increase in membership of the WTO contracting parties, this has consequently resulted into an increase in representative procedures like the "Green Room" consultations, which only accommodate the interests of developed countries. As a result, African countries have responded by forming RTAs to increase their collective bargaining power and thus create a 'voice' during the MTN. At the same time, they build their regional markets because of the fallacy of the duty-free quota-free (DFQF) market access schemes, which are tainted with an increasing rate of non-trade barriers (NTBs),

[58] Paragraph 29 of the WTO, Doha Ministerial Declaration (n.1 above).
[59] WTO News. "Day 9: Talks collapse despite progress on a list of issues." Available on http://www.wto.org/english/news_e/news08_e/meet08_summary_29july_e.htm (accessed on the October 16, 2008).
[60] Financial Times, "Global Village Gathers Speed" October 13, 1993, 11. As citied in Lawrence R., "Regionalism and the WTO: Should the rules be changed?" in Schott J., (eds.) *The world trading system: Challenges ahead,* (n. 24 above) 42.

as a ploy to discourage imports by developed countries and have hence rendered market access futile.[61]

It is imperative, therefore, to address the impact of RTAs in the MTS, given the fact that the interests of DCs and LDCs are more adequately protected under the rules-based, non-discriminatory MTS than under bilateral agreements or RTAs, where the interests of the dominant partner usually tend to prevail.

On the other hand, though a number of scholars[62] have written about the failures and successes of RTAs,[63] the glaring omission has been the extent to which newly formed RTAs, such as the EAC, can be adjusted so as to override previous challenges. As such, the purpose of this study is not only to contribute to the existing literature on RTAs but also to guide members of the EAC on how best they can reap the benefits of their regional grouping without undermining the MTS and further, use the EAC as a policy tool for trade and development.

1.4- SCOPE OF THE RESEARCH

The scope of this research shall be limited to;

1. The concept of regionalism in the MTS from 1947 to date and its impact on trade and development;

2. The GATT 1947 and the GATT 1994 taking into consideration that most African countries' RTAs generally focus on trade in goods;

[61] Erasmus G., "Regional trade arrangements," Tralac News, January 24, 2006. Available at http://www.givengain.com/cgi_bin/giga.cgi?cmd=cause_dir_news_items&cause_id=1694&news_id=42911&cat_id=1184 (accessed on October 10, 2008).

[62] Mathis J., *Regional trade agreements in the GATT-WTO Article XXIV and the internal trade requirement*, (2002); Viner J., *The customs union issue,* (1950); Bhagwati J, and Krueger A., *The dangerous drift to peferential trade agreements*, (1995); Bhagwati J., "Preferential trade agreements: The wrong way," (1996) *27 (4) Law and Policy in International Business 865*; Bhagwati J, and Panagariya A., "Preferential trading areas and multilateralism-strangers, friends, or foes" in Bhagwati J, and Panagariya A., (eds.) *The economics of preferential trade agreements* (1996); Bhagwati J., *Trading choices: The Americas or the world?* (1992); Bhagwati J., *The demand to reduce diversity among trading nations,* (1994); Bhagwati J., *Free trade today*, (2002); Schott, J. *The world trading system: Challenges ahead,* (1996) and Parthapratim P., "Regional trade agreements in a multilateral trade regime: An overview". (2004). Available at http://www.networkideas.org/feathm/may2004/survey_paper_RTA.pdf (accessed on August 10, 2008).

[63] It is prudent to note that there is a lot of literature on RTAs from the economic stand point whereas the legal stand point is usually avoided.

3. A comparative analysis between the EAC and the SADC with specific reference to these regional blocs as RTAs. The EAC is considered in this study because this is its second attempt as a RTA and is considered as a successful RTA[64] which has embodied the regional integration provision encompassed in the EPAs[65] by negotiating the EPA as a bloc unlike the SADC bloc. The SADC EPA configuration not only fragmented the SADC regional process but also overshadowed the SADC objectives of regional integration and raised questions as to the rationale of the EPAs in Africa.

1.5- CHAPTER OUTLINE

CHAPTER ONE – INTRODUCTION/BACKGROUND OF THE STUDY

This Chapter is an introduction to the research, which includes objectives, significance, and the scope of the research, key terms, and the general overview of the chapters.

CHAPTER TWO – FRAMEWORK FOR REGIONALISM UNDER THE WTO

Chapter 2 discusses the conceptual evolution of regionalism under the GATT/WTO, in so doing, emphasis is laid on the departure from the MFN principle, bringing into play the inclusion of Article XXIV of the GATT. Likewise, the rationale for RTAs is highlighted. Moreover, the provisions/disciplines for RTAs in trade in goods in the GATT/WTO are also scrutinised and their usage vis-à-vis other GATT/WTO Articles and Agreements is undertaken and examined as well, with regard to whether the WTO members comply with these rules.

[64] The EC cited EAC as the most successful regional integration process in Africa at an October 2006 WTO trade policy meeting in Geneva. Braude W., *Regional integration in Africa. Lessons from the East African Community,* (2008) 46.
[65] Stipulated in Article 35 (2) of the Cotonou Agreement.

CHAPTER THREE – THE IMPACT OF REGIONALISM ON THE MTS

This Chapter examines the impact of regionalism on the MTS while considering the co-existence of the MTS and RTAs in the world economy. The impact is discussed under the rubric of stumbling blocks versus building blocks, encompassing the issue of whether RTAs complement the MTS or not. In this view, an analysis of the relevant proposals to revise the RTA provisions to ensure their conformity to the MTS and restrain RTAs' prevalence, is undertaken. The WTO Dispute Settlement Body's attempt to clarify and interprete the RTA provisions is also highlighted. In relation to this, a brief study is undertaken on the operation of RTAs in the MTS and in particular, the European Communities (EC), its complementality to the MTS and its schemes in favour of DCs are briefly discussed.

CHAPTER FOUR – REGIONALISM AND AFRICAN COUNTRIES: THE CASE OF THE EAC AND SADC

A comparative analysis between the EAC and the SADC is undertaken in line with their relations with the EC on the IEPAs that the blocs have initialled. The analysis takes into consideration whether the initialled EPAs fall within the scope of Article XXIV of the GATT 1994 and whether their provisions support or divert from the initial trade and development objectives for which the IEPAs were negotiated. An evaluation of the EAC as an RTA aimed at trade and development is also undertaken and its effectiveness analysed under the MTS.

CHAPTER FIVE – GENERAL CONCLUSIONS AND RECOMMENDATIONS

Chapter 5 contains a summary of the conclusions drawn from the whole study and recommendations on addressing the problems of proliferating RTAs, the impediments raised by the RTAs' operation in the MTS and avenues of using RTAs to promote multilateralism as well as trade and development in DCs without circumventing the multilateral rules.

CHAPTER TWO – FRAMEWORK FOR REGIONALISM UNDER THE WTO

2.1- CONCEPTUAL EVOLUTION OF REGIONALISM

Regionalism mainly entails actions by governments to liberalise or facilitate trade on a regional basis, sometimes through free trade areas (FTAs) or customs unions (CUs).[66] However, though regionalism is mainly associated with specific regions or geographical areas, regionalism today is not restricted to geographical proximity.[67]

The evolution of regionalism in the world is traced to various sources but is based primarily on political,[68] economic and social grounds: for example, in Europe it is traced to the aftermath of WW II, and in Africa, it is traced to slavery, the reign of colonialism[69] and Apartheid.[70] It was all about enhancing regional integration[71] as opposed to facilitating free trade.

Over the years regionalism has evolved to deeper economic integration and RTAs[72] have, therefore, been categorised according to the level of integration undertaken by the member states; this can range from the level of shallow integration to deeper forms

[66] Goode W., *Dictionary of trade policy terms*, (n. 1 above) 292.

[67] This is reflected in the definition attributed to a region by Adetula; who described a region as any International grouping which is less than global in scope, and is characterised mutual relevance among members, based upon frequency of contacts and transactions, common aims or attributes, economic complementarily: For example the Alliance of Seventy-Seven and the African Pacific and Caribbean Group (ACP) which are both qualified as regional groupings, even though both have memberships that spans more than one geographical regions. Adetula V., "Regional integration in Africa: Prospect for closer cooperation between West, East and Southern Africa," (2004) 3.

[68] Desires to overcome political rivalries greatly influenced member countries to join regional blocs for example; the EU's merger into a regional bloc was mainly to end the historic hostility between France and Germany, while the Southern Lone Common Market (MERCOSUR) sought to end the arms race between Argentina and Brazil, including its nuclear dimension. Several members of the ASEAN Free Trade Area (AFTA) had experienced armed encounters in the post-war period, while APEC would reduce the risk of intra-Asian and trans-Pacific conflicts which had been prevalent over the past century. Bergsten F., "Globalizing free trade" in Schott J., (ed.) *The world trading system: Challenges ahead,* (1996) 266 – 267.

[69] On the May 25, 1963, an alliance of African States formed the Organisation of African Unity (OAU) for the mutual support, dedicated to eradicate all forms of colonialism from the continent and the full emancipation of independent African States.

[70] In April 1980, South African Development Coordination Conference (SADCC) was formed to counter the apartheid regime in SA, which was however, overtaken by SADC in 1992.

[71] Regional integration has been defined as any inter-state activity designed to meet some commonly experienced political, social, economic, legal or technical need. Haas E., *International integration; The European and universal process,* (2ed.) (1968) 77.

[72] RTAs are agreements undertaken by countries located within a defined geographic area whereby the participating countries align themselves with each other for the purpose of achieving a predetermined form of economic integration. WTO, "Regional trade agreements: Scope of RTAs." (n. 31 above).

of integration. The different types of RTAs include Preferential Trade Areas (PTAs),[73] FTAs,[74] CUs,[75] a Common Market[76] and an Economic Union.[77]

In the MTS, RTAs are modelled either as CUs or FTAs, yet they differ from the defined norms equated to them in the MTS provisions or the analogy given in their definitions: for example, the North America Free Trade Agreement (NAFTA) is a paradigm for deeper integration as it encompasses provisions governing domestic labour standards and other regulatory issues, and not merely the removal of all barriers to trade in the FTA, while some CUs, despite the requisite to eliminate all intra-regional tariffs, still levy tariffs on trade between its members.[78]

2.1.1- REGIONALISM UNDER THE GATT 1947

Notably, the "dis-integration" of the world economy between 1914 and 1945 was the result of two world wars, the economic disorder of the 1920s and the economic chaos of the 1930s.[79] The 1930s in particular saw a great fragmentation of the world trading system, as governments struggled with global depression without the benefit of global economic institutions.[80] This was all due to the lack of legally binding commitments in

[73] This is an arrangement where members impose lower tariff on goods produced within the union with some flexibility for each member country on the extent of the reduction.

[74] Is a preferential trade agreement where parties eliminate all barriers to intra-trade but maintain their separate tariffs vis-à-vis non-members. However, Article XXIV: 8 (b) of the GATT 1994 defines a FTA as a group of two or more customs territories (countries) in which duties and other restrictive regulations of commerce are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

[75] Means a free trade area combined with a common external tariff for non members which may cede sovereignty to a single customs administration. M'Carthey C., "Regional integration: Part of the solution? Or part of the problem?" in Ellis S., (ed.) *People, policies and institutions.* (1996) 213 – 215. However, Article XXIV: 8 (a) (i) and (ii) of the GATT 1994 defines a CU to mean a group of countries forming themselves into one custom territory in which duties and other restrictive regulations of commerce are eliminated with respect to substantially all the trade between the constituent territories of the union (countries) or at least, with respect to substantially all the trade in products originating in these territories (countries) and further, each of these members should apply substantially the same duties and other regulations of commerce to the trade of territories not included in the union.

[76] It is described as a more developed type of CUs which, in addition to the free movement of goods between member states, labour, capital and services can also move without restriction. It has also been noted that Common markets lead to highly integrated economies. Goode W., *Dictionary of trade policy terms,* (n. 1 above) 70.

[77] It is the highest form of integration. It is a common market with unified monetary and fiscal policies including a common currency. Hoekman B, and Schiff M., "Benefiting from regional integration" in Hoekman B, Mattoo A, and English P., (eds.) *Development, trade, and the WTO. A handbook,* (2002) 548 – 550.

[78] The World Bank, *Global economic prospects. Trade, regionalism and development*, (2005) 28.

[79] Blackhurst R., "The WTO as the legal foundation of international commercial relations: Current status and options for the next decade" in Snyder F., (ed.) *Regional and global regulation of international trade*, (2002) 196.

[80] Schiff M, and Winters A., *Regional integration and development*, (2003) 4.

the form of bilateral treaties or effective multilateral institutions.[81] Thus one of the solutions adopted was regional preferences,[82] though this had devastating effects.[83] Therefore, since restrictive commercial policies[84] and bilateralism were viewed as having contributed to the economic depression of the 1930s and to the outbreak of WW II, a strong will among nations was formed to create an international economic order based on a liberal non-discriminatory trading system.[85]

However, this required legally binding constraints on national trade policies, and emphasis on the non-discrimination principle to avoid countries barricading themselves with protectionist walls,[86] coupled with an effective procedure for resolving disputes in order to establish and maintain a liberal world trading system. Thus, the great innovation of the drafters of the Havana Charter (out of which came the GATT by default)[87] was to base the new system not on a large number of bilateral treaties, but on a set of multilateral rules and disciplines.[88] This in essence led to the creation of the cornerstone of the GATT 1947: Article I,[89] which is the extension of unconditional MFN treatment to all fellow signatories.

However, exceptions were permitted to create trade blocs, such as, FTAs and CUs, and although this concession was hardly used at first,[90] it later gained momentum and contributed to the political reconstruction of Europe through the creation of the

[81] Blackhurst R., "The WTO as the legal foundation of international commercial relations: Current status and options for the next decade" (n. 79 above) 196.
[82] This fragmentation into closed blocs fostered inefficiency and frustrated recovery from the Great Depression. Schiff M, and Winters A., *Regional integration and development*, (n. 80 above) 4.
[83] The regional blocs' policies adopted in the RTAs were mostly concerned with domestic import substitution, maintenance of high tariff barriers and restrictive quotas which were all engineered to achieve scale economies for protectionist policies.
[84] Caused by the trade protection imposed by major trading nations.
[85] Blackhurst R., "The WTO as the legal foundation of international commercial relations: Current status and options for the next decade" (n. 79 above) 196.
[86] This had earlier contributed to the Great Depression scourge and so, the policies adopted were to be based on the MFN principle of non-discrimination. This principle is referred to in Das, B. The WTO and the Multilateral Trading System: Past, present and future. (n. 29 above) 36
[87] The GATT 1947 was part of the Bretton Woods complex of international economic institutions established to reconstitute the international economy following the WW II. Abbott F., "North American economic integration: Implications for the WTO, the EU and Asia" in Snyder F., (ed.) *Regional and global regulation of international trade*, (2002) 78.
[88] Blackhurst R., "The WTO as the legal foundation of international commercial relations: Current status and options for the next decade" (n. 79 above) 196.
[89] It states that any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded to the like product originating in or destined for the territories of all other contracting parties, immediately and unconditionally.
[90] Was only used in reinforcing existing colonial links through the British Imperial Preferences.

Benelux[91] CU in 1947, the ECSC[92] in 1951, and the more far reaching European Economic Community (EEC) in 1957.[93] The EEC's survival and apparent success led to a spurt of regionalism[94] among DCs[95] in the 1960s,[96] and Africa was no exception.[97]

In the 1970s, however, British policy became oriented towards Europe, and the Common Wealth preferences were formally brought to an end when Britain joined the EC in 1973.[98] During the mid 1980s there was a surge in the number of RTAs, which was attributed to the EC's announcement that it was to launch a Single European Market by 1993, and the increasing outreach of European countries in the form of FTAs and CUs.[99] This prompted the United States' (US) change of policy from multilateralism (non-discrimination) to regionalism (discriminatory trade policies) in the mid-1980s,[100] and because of this trend regionalism became a focal point in the Uruguay Round of MTN.

The change in US trade policy from being an icon of non-discriminatory multilateralism[101] to discriminatory preferences with the conclusion of the US – Israel FTA in 1985, paved the way for a new trend in RTAs, which was described as "Second Regionalism."[102] However, with the emergence of the Asia-Pacific Economic Co-

[91] Belgium, the Netherlands and Luxembourg.
[92] France, Germany, Italy, Belgium, Luxembourg and the Netherlands signed the Treaty of Paris on 18 April 1951 and it entered into force on July 25, 1952 with the aim of creating co-operation in the fields of coal and steel for a period of 50 years.
[93] Schiff M, and Winters A., *Regional integration and development,* (n. 80 above) 5.
[94] Jagdish Bhagwati considered this wave of preferential trade arrangements concluded during the 1950s and 1960s as "First Regionalism." The two main surviving arrangements from that time are the EC and EFTA. *Goode W., Dictionary of trade policy terms*, (n. 1 above) 139.
[95] The first integration scheme by DCs was the Latin American Free Trade Area (LAFTA) which was set up in February 1960, although the antecedents of the EAC date back to 1917, and hence to colonial instigation and only in 1967 did an agreement emerge from the constitutionally independent governments. Tussie D., *The less developed countries and the world trading system. A challenge to the GATT,* (1987) 104.
[96] Schiff M, and Winters A., *Regional integration and development*, (n. 80 above) 5.
[97] However, Schiff and Winters project that in the late 1970s the ineffectiveness of these RTAs had become evident as none seemed to have contributed strongly to development, some had collapsed; and the strains of the debt crisis made those that survived largely moribund. Schiff M, and Winters A., *Regional integration and development*, (n. 80 above) 5.
[98] Pomfret R., *The economics of regional trading arrangements,* (n. 11 above) 73.
[99] Park S., "Regionalism, open regionalism and Article XXIV GATT: Conflicts and harmony" in Snyder F., (ed.) *Regional and global regulation of international trade.* (2002) 265.
[100] The US in the mid 1980s changed from one-sided multilateralism towards a two-track approach regarding multilateralism and regionalism as equivalent policy alternatives. This was envisaged by the formation of the US – Israel FTA in 1985, the Canada and US FTA (CUSTA) in 1989 which was extended to Mexico in 1994 in the NAFTA and it became the first pillar of US regionalism policy.
[101] Palmeter, D. "Some inherent problems with free trade areas" (n. 36 above) 144.
[102] Second Regionalism was the term used by Jagdish Bhagwati to refer to the trend towards preferential trade arrangements that began in 1985 with the conclusion of the US – Israel FTA. Goode W., *Dictionary of trade policy terms,* (n. 1 above) 314.

operation (APEC),[103] "Second Regionalism" was replaced by the term "Open Regionalism." This evolved from the open nature of Pacific regionalism, with a strong commitment to the principle of non-discrimination, and a willingness to extend benefits negotiated under the regional bloc (APEC) to non-APEC members.[104]

2.1.2- OPEN REGIONALISM UNDER THE WTO

Open regionalism[105] is considered as a concept that was born in a world economic environment where opposing systems of multilateralism and regionalism co-exist.[106]

Open regionalism came to the forefront during the first stage of the Uruguay Round negotiations in the late 1980s, when the EC had started its initiative to create the Single European Market by early 1993. This led to the deepening and widening of European integration, and, in the same breath, prompted other regions and countries to adopt strategic counter measures and create regional economic blocs of their own.[107]

The move from "closed regionalism"[108] to a more open model was in line with prevailing views about national economic policy. This was because the trade blocs that were formed earlier, in the 1960s and 1970s, were bent on protectionist tendencies and, therefore, restricted trade.[109] Thus to avoid a relapse to the restrictive trade policies,

[103] APEC members consist of Australia, Brunei, Canada, Chile, China, Hong Kong (China), Indonesia, Japan, Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, Philippines, Russia, Singapore, Taiwan (China), Thailand, United States and Vietnam.

[104] APEC's provisions provided that the outcome of trade and investment liberalisation in the Asia-Pacific region would be the actual reduction of barriers not only among APEC economies, but also between APEC economies and non-APEC economies.

[105] Open regionalism is a term which implies that any regional arrangement should be outward-looking and should lower barriers to economies outside the arrangement as well as those within it. Goode W., *Dictionary of trade policy terms*, (n. 1 above) 263.

[106] Park S., "Regionalism, open regionalism and Article XXIV GATT: Conflicts and harmony" (n. 99 above) 269; Grugel has also noted that figuratively new regionalism is geographic, within an economic space, but it is also dynamic, inevitably changing in response to the winds of global trade. Grugel J, and Hout W., "Regions, regionalism and the South" in Grugel J, and Hout W., (eds.) *Regionalism across the North-South Divide* (1999) 10. Whereas, Volcansek has hinted on the fact that the new regionalism is not reflective of geographic proximity as it is mainly about economic globalisation. Volcansek M., "Courts and regional integration" in Snyder F., (ed.) *Regional and global regulation of international trade,* (2002) 166.

[107] Park S., "Regionalism, open regionalism and Article XXIV GATT: Conflicts and harmony" (n. 99 above) 269.

[108] Closed regionalism was widespread, especially in Sub-Saharan Africa for example in the Communaute' Economique de l'Afrique de l'Ouest (CEAO) created in 1973, Economic Community of West African States (ECOWAS) 1975, the Economic Community of the Countries of the Great Lakes/Communaute' des pays des grands lacs (CEPGL) 1976 and the EAC 1967 while in Latin America, the Central American Common Market (CACM) 1960, LAFTA 1960, the Andean Pact 1969 and Caribbean Community and Common Market (CARICOM) 1973. Schiff M, and Winters A., *Regional integration and development,* (n. 80 above) 29.

[109] They were based on a model of import-substituting development and the high external trade barriers in the RTAs were used as a way of implementing this model. *Ibid.*

these RTAs were replaced by RTAs which were more outward looking, and more committed to boosting trade rather than controlling International commerce.[110]

More prominently, open regionalism emerged with the change in US policy[111] towards regionalism,[112] based on the fact that Europe had gained more economic "clout"[113] in the world through its ambitious economic integration programmes in the 1980s. Therefore, the US was keen to restrict the advance of regionalism and to counter the deepening and widening of European integration by the creation of "Fortress Europe."[114] Also, politically, the US did not want to be criticised as discarding multilateralism for its national interest, and thus the US had to adopt a two track strategy in its external policy.[115] As a result of the aforesaid, the US strengthened its participation in FTAs, on the one hand, and adopted a strategy to use APEC as a tool to overcome regionalism, on the other hand.[116] It also used APEC as leverage in negotiations with the EC on further liberalisation of world trade during the Uruguay Round.[117]

Open regionalism has not only been characterised by the non-discrimination principle that it has sought to embody, but also by the nature and scope of the RTAs. Open regionalism encourages both inter-regional and inter-continental blocs,[118] and mergers between regional blocs. For instance, there have been attempts to unite regional trade blocs, by means of proposals for the Transatlantic Free Trade Area (TAFTA), the Free Trade Area of the Americas (FTAA), and the European Union-Southern Common Market Free Trade Area (EU-MERCOSUR FTA), plus the concept of a South American

[110] Some of these new RTAs were resurrected old RTAs. Schiff M, and Winters A., *Regional integration and development,* (n. 80 above) 2

[111] The US was traditionally regarded as a guardian of multilateralism, playing a leadership role in the liberalisation of world trade and global integration of the world economy ever since the creation of the GATT.

[112] See (n. 100 above).

[113] Park S., "Regionalism, open regionalism and Article XXIV GATT: Conflicts and harmony" (n. 99 above) 269.

[114] This term underlined the fear that the formation of the European Community Single Market would turn the Community into an inward-looking market more difficult to penetrate though such fears have not been justified. Goode W., *Dictionary of trade policy terms,* (n. 1 above) 143.

[115] Refer to n. 100.

[116] The Eminent Person's Group (EPG) within APEC, which was formed by the initiative of the US, proposed to adopt open regionalism as the basic concept of APEC at the Jarkata Summit. APEC's approach differed slightly from the notions of the terminology of regionalism as it envisaged achieving "free trade in the region" by 2010 for developed member economies, and 2020 for developing member economies. This idea was similar to FTAs so that it could be regarded as quasi-regionalism. Park S., "Regionalism, open regionalism and Article XXIV GATT: Conflicts and harmony" (n. 99 above) 266.

[117] Park S., "Regionalism, open regionalism and Article XXIV GATT: Conflicts and harmony" (n. 99 above) 266. It has also been stated by Fred Bergsten that considering the very size of the APEC economies, there is an open possibility that APEC could be used to leverage global trade negotiations. Bergsten, F. *APEC: the Bogor Declaration and the path ahead.* (1994) However, the idea to use APEC as leverage by the US in negotiations with the EU in regard to Trans-Atlantic should also not be downplayed.

[118] APEC is considered as the first significant example of inter-regional and inter-continental regionalism.

Free Trade Area. These concepts have been envisaged within the possibility that inter-regional trade agreement mergers could eventually lead to a multilateral framework.[119]

The establishment of the WTO, however, was a symbolic new start for world trade law, and also symbolized a new commitment to more active implementation of that law by the GATT contracting parties. The WTO's conception was nurtured by developments in the early 1990s[120] which created a favourable environment for a stronger multilateral institution to enforce a liberal international trade system based on non-discrimination and supported by all the major trading nations with an ever increasing number of contracting parties and/or countries.[121]

Conclusively, it appeared that regionalism emerged as a potent additional force to multilateralism in the world economy, and the two became equally significant. This was reflected in the mid-1980s when the increasing tendency towards regionalism coincided with the strengthening of the MTS, and this reached its peak in 1995 when the WTO was launched as a consequence of the successfully concluded Uruguay Round Negotiations.[122]

2.2- THE MFN PRINCIPLE IN RELATION TO RTAS UNDER THE WTO

A fundamental feature of the WTO is the "single undertaking" nature of the multilateral agreement.[123] The core principles of the GATT 1947 have been carried over to the GATT 1994[124] and these include the MFN rule,[125] the National Treatment rule,[126] and

[119] Barrier M., "Regionalization: The choice of a new millennium" (2000) *9 Currents International Trade Law Journal 25,* 1. However, this concept is detrimental to DCs and poses a threat to the MTS as it only encompasses free trade among the developed countries especially TAFTA, thereby erecting new discrimination against the poor and less developed countries. Bergsten F., "Globalizing free trade" (n. 68 above) New regionalism is also a departure from the provisions of Article XXIV and therefore, is legally incompatible with the WTO. It is further characterised with the free ride element where members can utilise benefits without taking part in reciprocity of the trade concessions that they are benefitting.

[120] The popular debate in the 1990s was that regionalism had become shorthand for the segmentation of the global economy into a few large blocs. Pomfret R., *The economics of regional trading arrangements*, (n. 11 above) 6.

[121] Pomfret R., *The economics of regional trading arrangements,* (n. 11 above) 155 – 156.

[122] Park S., "Regionalism, open regionalism and Article XXIV GATT: Conflicts and harmony" (n. 99 above) 265 – 267.

[123] This meant that if a country is a member of the WTO, then that country must abide by the WTO rules and regulations unlike the situation in the GATT between 1979 and 1994 when participation in the so-called Tokyo Round codes was optional to which not all GATT signatories acceded, and was a form of conditional MFN treatment, though limited exceptions were primarily given to LDCs. Blackhurst R., "The WTO as the legal foundation of international commercial relations: Current status and options for the next decade" (n. 79 above) 199.

[124] The legal distinction between GATT 1947 and GATT 1994 was to create specifically an avenue of facilitating the institutional transition between the GATT and the WTO by availing time for the old GATT members to become members of the WTO, by remaining members of the

prohibition, except in certain specified circumstances permitting protective measures other than tariffs. Of these core principles, the MFN clause is a key principle of the GATT/WTO. It is contained in Article I of the GATT 1994,[127] and it obliges parties to grant each other equal treatment with regard to inter-party trade,[128] and thus assures equal concessions to all contracting parties.[129]

The MFN clause[130] continues to be the cornerstone of the GATT/WTO, and is the basis for the extension of unconditional MFN treatment to all fellow signatories. The major exception continues to be the provision for RTAs[131] and for preferential treatment of DCs. Ironically, this was not the intention of the earlier drafters, as the clause was specifically designed to outlaw RTAs, and, as a corollary, to prevent the struggle to obtain and secure such arrangements.[132] Thus, RTAs are a contradiction of the MFN clause permitting discriminatory practices in the trading system, thereby limiting the use of the MFN principle.

It is, however, pertinent to note that the MFN clause stalls discriminative RTAs, as was clearly described by John H. Jackson:

former institution at least for a transitional period. Although, all GATT contracting members became WTO members. Abbott, F. North American Economic Integration: Implications for the WTO, the EU and Asia. (n. 87 above) 85.

[125] Article I of the GATT 1994 requires that a product made in one member country be treated no less favourably than a 'like' product that originates in any other country.

[126] Article III which states that once imported goods are inside the border, they are not to be discriminated against, and accorded the same treatment as like directly competitive domestic goods. Though Article I and II are hinged on non-discrimination between its members and between domestic and imported goods, the GATT does not require contracting parties to have tariffs at similar levels or to adopt the same policies.

[127] Article I:1 specifically states that; "*… any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties*."

[128] Lenaghan P., "Trade negotiations or trade capitulations: An African experience" (2006) *17 Berkeley La Raza Law Journal 117,* 2.

[129] The general interpretation was given in Canada – Certain Measures Affecting the Automotive Industry, Panel Report, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, Paras. 10.22 – 10.25

[130] The MFN Clause was first used in the signing of the Cobden-Chevalier Treaty of 1860 between England and France. As every major European country except Russia signed bilateral commercial treaties with France and England and with one another, the MFN clauses in those treaties generalised the tariff concessions, creating "a network of commercial treaties which severely reduced the level of protection throughout Europe." Curzon G., *Multilateral commercial diplomacy.* (1965) 16 cited in Blackhurst R., "The WTO as the legal foundation of international commercial relations: Current status and options for the next decade" (n. 79 above) 196. See also, Mathis J., *Regional trade agreements in the GATT/WTO. Article XXIV and the internal trade requirement,* (2002), 13 – 29 for a full account of the history and evolution of the MFN principle before the GATT 1947.

[131] Article XXIV of the GATT, the Understanding on Article XXIV, Article 2(c) of the Enabling Clause Decision and Article V of GATS.

[132] Tussie D., The less developed countries and the world trading system. A challenge to the GATT, (n. 95 above) 13.

"Without MFN, governments could form trade cliques and groupings more readily. These special groupings can cause rancour, misunderstanding and disputes, as those countries 'left out' of favours resent their inferior status."[133]

The MFN rule represents the non-discrimination clause in the WTO, thus outlawing discrimination,[134] although a distinction is often made between negative discrimination[135] and positive discrimination,[136] with the yardstick being the MFN tariff.[137]

Bhagwati argues that the use of non-discriminatory trade liberalisation rather than preferential trade liberalisation leads to free trade[138] but it has been argued by Dunkley[139] that the much hailed benefits of free trade are contingent, not automatic.

Since the MFN rule obligated each GATT member to extend any tariff (or related) concession granted to one GATT member to all other GATT members, the MFN rule, therefore, had the effect of accelerating the process of trade barrier elimination, since it required a wide dispersal of concessions among GATT members.[140]

It has been argued however that the trade barrier reductions would be faster under bilateral or minilateral negotiating strategies, since governments may be more willing to

[133] He characterised MFN and national Treatment as *"two types of 'economic-equality' norms …."* Jackson, J. *Equality and discrimination in international economic law.* (1983) 225 and 232 in Mathis J., *Regional trade agreements in the GATT/WTO. Article XXIV and the internal trade requirement*, (n. 130 above) 11.

[134] Because of the non-discrimination principle, the MFN greatly assisted in bringing down world tariff barriers to their currently low levels. Markusen, J; Melvin, J; Kaempfer, W and Maskus, K. *International Trade. Theory and evidence.* (1995) 369.

[135] Negative discrimination may be in form of sanctions for example on export restrictions, but it also applies to almost any quantitative restriction on imports. Pomfret R., *The economics of regional trading arrangements,* (n. 11 above) 4

[136] Positive discrimination may simply involve having a separate tariff schedule for, say, DCs, but it can also apply to attempts at economic integration. *Ibid*

[137] Pomfret R., *The economics of regional trading arrangements,* (n. 11 above) 4.

[138] Bhagwati J., *Free trade today,* (2002) 94.

[139] Dunkley G., *Free trade. Myth, reality and alternatives,* (2004). 191 who further states that no key WTO document calls for total free trade as its present rules allow some protection, safeguards, waivers, exceptions and various liberalisation exemptions or extensions for Third World members. Dunkley's position is also echoed in Kreinin E, and Plummer G., *Economic integration and development. Has regionalism delivered for developing countries?* (2002) 5 who are of the view that free trade is a fallacy because of the fact that world trade is riddled with multiple distortions such as tariffs, quotas and exchange controls and thus free trade cannot maximise global efficiency because removal of one distortion cannot guarantee efficiency.

[140] Abbott F., "North American economic integration: Implications for the WTO, the EU and Asia," (n. 87 above) 79.

grant concessions to a limited number of countries for particularised reasons.[141] This has been objected to strongly by Bhagwati who argues that:

> *"...both conventional unilateralism and multilateral trade negotiations reciprocity have a useful role to play in freeing trade, whereas both aggressive unilateralism and* ***preferential trade agreements are a pox on the world trading system.****"*[142]

The WTO and its predecessor, the GATT, are hinged on trade barrier eliminations through negotiations for trade liberalisation[143] and reciprocity. However, the tariff preferences in force in 1947 were granted exemption from the MFN clause, and, as anticipated, the tariff bargaining at the GATT rounds reduced the margin of preference.[144]

It is for this reason that insistence on reciprocity was typically at the heart of MTN under the GATT, and now WTO auspices.[145] However, this manner of reducing trade barriers is also sanctioned by Article XXIV of the GATT.[146]

Consequently, the MFN, or non-discrimination, principle is a fundamental principle underlying the MTS,[147] and its basic objective is to strengthen the multilateral process in international trade policy.[148] Additionally, it is intended to de-politicise the trading system so as to reduce the chances of it breaking down into a system of diplomacy based alliances. Its overall effect should be to distribute the benefits of trade widely among all

[141] In addition, this argument provides theoretical basis for the CU and FTA exception to the MFN principle. Abbott F., "North American economic integration: Implications for the WTO, the EU and Asia," (n. 87 above) 79
[142] Bhagwati J., *Free trade today*, (n. 138 above) 95; Bhagwati, J. *Termites in the trading system: How Preferential Agreements undermine Free Trade.* (2008) 49 – 89.
[143] Trade liberalisation in the MTS is done through Trade Rounds.
[144] The margin of preference is referred to as the difference between the duty applied to imports from these neighbouring countries and imports from third countries.
[145] However, for years, LDCs were exempt from reciprocity under the dispensation of Special and Differential treatment.
[146] Bhagwati J., *Free trade today*, (n. 138 above) 94.
[147] Mathis J., *Regional trade agreements in the GATT/WTO. Article XXIV and the internal trade requirement*, (n. 130 above) 9.
[148] Das B., *The World Trade Organisation. A guide to the framework for international trade*, (n. 2 above) 27.

WTO contracting parties; therefore, the MFN principle was the key "multilateralism" provision in the GATT 1947 and the WTO.[149]

2.3- RATIONALE FOR REGIONAL TRADE AGREEMENTS

Prior to the coming into force of the GATT 1947, there were trading preferences between the contracting parties.[150] Thus, when GATT 1947 was drafted, it recognised that these forms of regional trading preferences had to be accommodated.[151] Article XXIV was, therefore, incorporated as a mechanism for relieving the members of CUs and FTAs of the obligation to extend the preferential treatment granted within CUs or FTAs to non-members.[152] Consequently, these were exempted from the application of the MFN Clause.

RTAs were concluded by member countries despite being parties to the multilateral system (GATT) because of the poor law enforcement capacity in the GATT system.[153] This was vividly spelt out in the Citrus Panel case[154] when the US brought the first complaint under Article XXIV in 1982 concerning the preferential treatment of Mediterranean citrus fruit suppliers by the EC. However, though the Panel agreed with the arguments submitted by the US, the adoption of the Panel's report was blocked by the EC and the Mediterranean countries.[155] Thus, the failure to make any headway through the GATT dispute settlement channels partly influenced the US decision to retaliate with its own RTAs.[156] However, the dispute settlement procedures under the WTO have gone through a crucial change in that, whereas previously consensus was

[149] Abbott F., "North American economic integration: Implications for the WTO, the EU and Asia," (n. 87 above) 79. MFN's role and purpose also tends to define the purpose of the WTO itself. Mathis J., *Regional trade agreements in the GATT/WTO. Article XXIV and the internal trade requirement*, (n. 130 above) 9.

[150] For example, the concept of the European Economic Union was under consideration.

[151] Mainly because the contracting parties are sovereign Nations.

[152] Abbott F., "North American economic integration: Implications for the WTO, the EU and Asia," (n. 87 above) 79.

[153] Grille, E. "Multilateralism and regionalism: A still difficult coexistence." in Faini, R and Grille, E (eds.), *Multilateralism and regionalism after the Uruguay Round,* (1997) 224.

[154] Citrus Panel, EEC-Tariff Treatment of Imports of Citrus Products from Certain Countries in the Mediterranean Region, (L/5776 of February 7 1986).

[155] Likewise, in the Banana cases, EEC – Member States' Import Regimes for Bananas, DS32/R, 3 June 1993 and EEC – Member States' Import Regimes for Bananas, DS/38/R, 11 February 1994, the complaints made were under Article XXIV. They were initiated in 1993 by a group of Central and South American countries against the EC's preferential treatment of bananas imported from Lome' Convention beneficiaries. The Panels again found in favour of the complainants, but the reports were blocked.

[156] Pomfret R., *The economics of regional trading arrangements,* (n. 11 above) 158.

required before proceedings could take place, now consensus is needed to halt the proceedings,[157] that is, Negative Consensus. This has led to more inconsistencies in the rule of law governing the RTAs given the fact that the RTAs that are being notified to the GATT/WTO as being incompatible with its provisions are not being disqualified.[158]

Fundamentally, however, in the late 1980s during the Uruguay Round, the EC was threatening to carry out its initiative to create a single European Market by early 1993, which would lead to the deepening and widening of European integration. This subsequently prompted other regions and countries to adopt strategic counter measures and create regional economic blocs of their own.[159]

The noted EC measure strongly influenced the change in the trade strategies of the US, a renowned advocate of the MTS. The US trade policy change to regionalism resulted in an acceleration of RTAs around the world, including in East Asia.[160] Notably, this change generated a massive wave of regionalism as the US focused to challenge the EC, the initiator of regionalism.[161] However, these changes created doubts about future global trade liberalisation.

RTAs became increasingly appealing to contracting parties in the 1980s due to the sluggish nature of the MTN, and the possible threat of the MTS crumbling into trade blocs. Therefore, countries intent on achieving freer trade moved ahead bilaterally, disregarding the MTN,[162] and this highly motivated the contracting parties to join RTAs to benefit from the so-called free trade benefits anticipated.

Given these prevailing circumstances, the support for RTAs further intensified as doubt was cast over the outcome of the Uruguay Round until late in 1993. This doubt hovered mainly because of the possibility of non-ratification by the US Congress. The mounting

[157] I*bid*
[158] This was clearly seen in the EEC Overseas Association case, in which Article XXIV was clearly abused by the EEC.
[159] This intensity led to US' policy of embracing regionalism for example a FTA with Israel in 1985, CUSTA in 1989 and NAFTA in 1994. Park S., "Regionalism, open regionalism and Article XXIV GATT: Conflicts and harmony" (n. 99 above) 269.
[160] Yang, Y and Gupta, S. "Regional Trade Arrangements in Africa: Past Performance and the Way Forward." (n. 22 above) 4.
[161] The EC was considered the front-runner in Regionalism. *Ibid.*
[162] Bhagwati J, and Krueger A., *The dangerous drift to peferential trade agreements*, (1995) 5.

doubt influenced countries to consider their fallback positions, which led to the proliferation of new RTAs or the revitalisation of existing ones, as well as the debate over 'open regionalism' in the Asia-Pacific region.[163]

The RTAs' trend intensified partly because of the fragility of the WTO. For instance, the 1999 Seattle Ministerial meeting failed to launch the anticipated Millennium Round[164] which was finally convened at Doha, Qatar in 2001. However, this earmarked the frustration with the WTO, especially when taken in conjunction with the negative sequence of events in the GATT/WTO: the failure to launch the round in Seattle in 1999, its shortlived recovery after the Doha Ministerial meeting in 2001, the impulsive breakdown of the talks in Cancun in 2003,[165] coupled with the collapse of the trade talks again in July 2008, have all sparked a renewed enthusiasm for RTAs.

The nine rounds of trade talks in the GATT/WTO history had taken a rather long time to be completed; hence, there were many missed deadlines in respect of the set trade targets by members/contracting parties due to the deadlock of talks. For example the 2001 Doha Round was scheduled for completion by 2005 but to date (May 2009) this has not yet manifested,[166] the Tokyo Round took a timeframe of six years from 1973 to 1979, while the Uruguay Round took eight years from 1986 to 1994. Therefore, members were drawn to RTAs as an alternative to the global regime.[167]

The trade rounds were not negotiated within their timeframes because of major disagreements among members;[168] for example, some members are left quite

[163] Pomfret R., *The economics of regional trading arrangements,* (n. 11 above) 129

[164] Kreinin E, and Plummer G., *Economic integration and development. Has regionalism delivered for developing countries?* (n. 139 above) 1. However, there was already displeasure with the holding of the Millennium Round as countries such as India argued that overloading the WTO agenda by holding a comprehensive Millennium Round may not be realistic unless the obligations under the Uruguay Round are implemented and their impact assessed for example the tangible benefits provided to DCs and LDCs. It was therefore stated that; *"There is a growing feeling that trade liberalisation under the WTO regime has substantially benefited the developed countries. There is a feeling that this must change and it must gear-up its trade diplomacy to extract 'reciprocal concessions from an unwilling west'"*. Jain R., "Indian foreign policy on the threshold of the Twenty-first century" in Snyder F., (ed.) *Regional and global regulation of international trade,* (2002) 155 – 156.

[165] Yang Y, and Gupta S., "Regional trade arrangements in Africa: Past performance and the way forward," (n. 22 above) 4.

[166] The Ministerial meeting of the Doha Round collapsed in July 2008. WTO News, 'Day 9: Talks collapse despite progress on a list of issues.' (n. 59 above).

[167] Bergsten F., "Globalizing free trade" (n. 68 above) 267 for example in the wake of the failed Seattle Ministerial Conference in 1999, Singapore, a former supporter of non-discrimination sought agreements with New Zealand and the US.

[168] Contracting parties can only agree in negotiations if the final package taken back to their governments for ratification is politically acceptable to their electorates, for example the EU, Japan and Korea had major disagreements in the Doha Round as they did not want to make major

dissatisfied with the results, which propel them to seek a regional forum. For instance, at the conclusion of the Kennedy Round (1964 – 1967), Ernest Preeg[169] remarked:

> *"Because most of the accomplishments of the Kennedy Round were in areas where developing countries have smaller export interests, the benefits they derived were smaller".*

Additionally, the potential benefits received from negotiating within a limited forum also motivated the increase in RTAs, as a smaller number of countries around the table would speed up negotiations as opposed to negotiating multilaterally.[170] This has been evident in RTAs, such as, the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA),[171] the EU and the NAFTA, which have gone beyond the GATT and even included areas, such as, competition policy and the environment.[172]

The tendency of RTAs to flourish was also interlinked with obtaining preferential market access.[173] This was because as RTAs multiplied, countries began to feel left out of the markets within the RTAs,[174] and hence began plotting their own RTAs with politically pliable partners. In the end more RTAs were created, thereby causing an escalating expansion of RTAs. New Zealand's Prime Minister, Helen Clark, drew attention to this when she exclaimed that:

reductions of their agricultural trade barriers. Blackhurst R., "The WTO as the legal foundation of international commercial relations: Current status and options for the next decade" (n. 79 above) 205

[169] A member of the US delegation in the Kennedy Round. Preeg E., *Traders and diplomats: A History and analysis of the Kennedy Round of negotiations under the GATT.* (1970) 227 His statement was reflected in the speech of the Peruvian delegate who spoke on behalf of the LDCs. See the GATT, Press release No. 994, 30 June 1967. However though, this approach characterised the early years of the WTO with regular meetings of the Quad (the US, EU, Japan and Canada) which provided issue leadership. This was not only unfair to other DCs which were left out in these negotiations, but also a strong danger of derogating negotiations in the new areas to regional bodies without WTO supervision in that, the drafters of the rules in the regional bodies will determine their content. This therefore supports the view that the interests of the DCs and LDCs in particular, are more adequately protected under the rules-based, non-discriminatory system. Moreover, Haggard indicates that countries like the US focus their efforts on issues that the US would like to bring under multilateral surveillance and rules. Haggard S., *Developing Nations and the Politics of Global Integration,* (n. 6 above) 74.

[170] Article IX of the Marrakesh Agreement establishing the WTO provides that decision making in the WTO will be by consensus and yet given the increase in the number of the WTO members, reaching a consensus in the WTO has proved complicated thereby stalling MTN.

[171] Australia and New Zealand. This Agreement is also popularly known as the Closer Economic Relations Agreement (CER).

[172] Pomfret R., *The economics of regional trading arrangements*, (n. 11 above) 163 – 164.

[173] Pomfret R., *The economics of regional trading arrangements,* (n. 11 above) 14.

[174] Such fears were earlier expressed by the US, India and Australia governments to pursue more RTAs.

"New Zealand's worst fear is for the world to divide into trading blocs ..... in none of which New Zealand has a home. So we are keen to keep working with ASEAN."[175]

Furthermore, RTAs intensified as an avenue to further foreign policy objectives,[176] and to use discriminatory treatment as a bargaining leverage to obtain changes in the trading partners' trade policies.[177]

Therefore, though the rationale for RTAs' formation varies widely, they all have the objective of reducing barriers to trade among member countries. This implies discrimination against trade with non-members. Though the tendency for the proliferation of RTAs is strong, it is without a doubt that the pressures towards non-discrimination are also strong, since all countries benefit from buying from the cheapest source and from having no worse access to export markets than their competitors. It is for this reason that this study seeks to explore ways in which RTAs can be used to complement the MTS, and restrict its usage, so as to reduce its potential for undermining the MTS. This can only be achieved through the strict enforcement of RTA provisions in the MTS, which are analysed below.

2.4- REGIONALISM UNDER THE MULTILATERAL TRADING SYSTEM

The WTO essentially took over the rules established in the GATT Articles and their amendments, which included the rules on RTAs. The multilateral framework, therefore, defines the rules for RTAs and directs their principles and dynamics under specified provisions. The Agreement establishing the WTO stipulates in Article II:2 that it is binding on all WTO members, and Article XVI:4 further provides that each member should ensure conformity to its laws, regulations and administrative procedures with its obligations as provided in the annexed agreements. These provisions are extended to

[175] Helen Clark, Prime Minister of New Zealand, on the New Zealand-Singapore FTA, "Far East Economic Review" August 17, 2000 in Schiff M, and Winters A., *Regional integration and development,* (n. 80 above) 7.
[176] This is mainly because RTAs are a reflection of politics and the economical circumstances of the countries involved. Bhagwati J., *Free trade today,* (n. 140 above) 119.
[177] Pomfret R., *The economics of regional trading arrangements,* (n. 11 above) 327.

WTO members who are intent on joining RTAs: they must abide by the WTO rules and regulations in relation to RTAs which include Article XXIV of the GATT, complemented by its Understanding, the Enabling Clause and Article V of the GATS, which are examined hereunder.

2.4.1- ARTICLE XXIV OF THE GATT

Prior to the drafting of the GATT 1947, it was recognised that some form of accommodation would be necessary for CUs and FTAs,[178] contrary to the argument that the GATT had been specifically designed to arrest and reverse the spread of RTAs that had initially characterised the inter-war period.[179]

The GATT, therefore, incorporated in Article XXIV[180] as a mechanism for relieving the members of CUs and FTAs from the obligation to extend the preferential treatment granted within the CU or FTA to non-members.[181] Article XXIV's underlying principle is that a FTA or a CU, in contrast to a preferential area, must not only be a move towards freer regional trade, but as well, a first step towards freer global trade,[182] in the sense that internal tariffs are completely eliminated on substantially all trade (SAT). Unfortunately, it was noted that apart from the UK-Ireland FTA[183] and the Czech-Slovak CU,[184] no CUs or FTAs presented for review had ever complied with Article XXIV.

The main criterion used in acknowledging FTAs and CUs in the WTO is ensuring that the new trade regime of the FTA/CU is not higher than the previous regime. Specifically, the members of a CU should not "on the whole" establish the common external tariffs (CET) of the Union to be higher and more restrictive than the general incidence of

[178] Abbott F., "North American economic integration: Implications for the WTO, the EU and Asia," (n. 87 above) 79.
[179] Tussie D., *The less developed countries and the world trading system. A challenge to the GATT,* (n. 95 above) 127.
[180] It is the most significant exception to MFN treatment set out in GATT which stated conditions under which the GATT members may form CUs and FTAs.
[181] Abbott F., "North American economic integration: Implications for the WTO, the EU and Asia," (n. 87 above) 79.
[182] Tussie D., The less developed countries and the world trading system. A challenge to the GATT, (n. 95 above) 127.
[183] Dam K., *The GATT: Law and international organization.* (1970), noted in Tussie D., *The less developed countries and the world trading system. A challenge to the GATT,* (n. 95 above) 127.
[184] Crawford J, and Laird S., "Regional trade agreements and the WTO," (May 2000) 8. Available at http://www.nottinghamdistancelearning.com/economics/credit/research/papers/cp.00.3.pdf (accessed March 6, 2009).

duties and regulations in place in each member prior to the formation of the CU,[185] and the members of a FTA are not to individually raise their external tariffs to the trade of non-members after the formation of the FTA.[186] These criteria were intended as a mechanism for limiting the number of CUs or FTAs, since it precluded GATT members from using Article XXIV as a cover for eliminating tariffs on a limited number of goods.[187]

However, the subjective test used to determine whether a CU or FTA should be allowed to maintain its preferential character by Article XXIV, is whether its members have agreed to eliminate substantially all tariffs and other restrictive regulations of commerce (ORRCs) on trade between its members in products originating from their territories.[188] Additionally for a CU, whether substantially the same duties and other regulations of commerce (ORCs) are applied by each of the members in the Union to the trade of non-members.[189]

Article XXIV also sanctioned that these conditions be met gradually as the rules authorised the use of an 'interim agreement,' which should include a plan and schedule for the formation of either a CU or FTA 'within a reasonable length of time' to depart from its provisions.[190] Any contracting party intending to enter a CU or a FTA, or an interim agreement leading to either a CU or FTA, should promptly inform the WTO members, and provide all the necessary information on the proposed Union to them.[191] Moreover, compensation was to be afforded to non-members of a CU in case any contracting party in the Union imposes higher tariffs on non-members than before the formation of the CU.[192]

[185] Article XXIV:5 (a) of the GATT.
[186] Article XXIV:5 (b) of the GATT.
[187] Abbott F., "North American economic integration: Implications for the WTO, the EU and Asia," (n. 87 above) 79 who suggests that the "substantially all" norm demanded a seriousness of purpose.
[188] Article XXIV:8 (a) (i) and (b) of the GATT.
[189] Article XXIV:8 (a) (ii) of the GATT.
[190] Article XXIV:5 (a), (b) and (c) of the GATT.
[191] Article XXIV:7 of the GATT.
[192] Article XXIV:6 of the GATT.

Contrary to this, however, many RTAs notified to the GATT fell below these standards, for example, the Trade Expansion and Economic Co-operation Agreement,[193] and the Agreement of Bangkok,[194] which were clearly outside the scope of Article XXIV of the GATT, were notified yet there was no outright condemnation of these initiatives.[195]

The ECSC[196] Treaty which was signed in April 1951 and submitted to the GATT in October before being ratified by the six national parliaments is worth noting. The ECSC clearly failed to meet the GATT requirements because it only eliminated barriers to trade in coal and steel products among the six but retained barriers to trade with outsiders. This not only made the ECSC discriminatory but also disregarded the essential requirement of eliminating barriers on 'SAT' of the GATT Article XXIV. Nevertheless, in November 1952, the GATT waivers were formally granted for the ECSC, with only Czechoslovakia opposing, although other countries were worried about the precedent it set, and the loss of the GATT authority as such an outright breach was being condoned.[197]

It is because of all these developments that, by the time of the Tokyo Round, Article XXIV was more honoured in its breach than in its observance,[198] and that it was severely criticised by most scholars.[199] It was noted that Article XXIV left a gaping loophole in the unconditional MFN treatment pronounced in Article I.[200]

[193] Signed in December 1967 between India, the United Arab Republic and Yugoslavia. This Agreement was noted to be a purely preferential arrangement with no intention whatsoever of leading to a CUs or a FTA in the long run. It therefore fell below GATT standards because the Treaty contemplated the reduction of MFN rates on an initial seventy-seven items, a further fifty-seven were added in a second stage and lastly, another twenty-seven, which all clearly violated the provision of 'substantially all trade' in Article XXIV. Huber J., "The practice of GATT in examining regional arrangements under Article XXIV." (March 1981)*19(3) Journal of Common Market Studies*, 293.

[194] Signed in 1975 between India, Bangladesh, Laos, Philippines, South Korea, Sri Lanka and Thailand. It was stated that during the examination of the Agreement, the parties to it did not even pretend that it constituted a CUs or a FTA because it neither met the requisites under Article XXIV:5 (a) for formation of a CU neither Article XXIV:5 (b) for formation of a FTA. Huber, J. "The practice of GATT in Examining Regional Arrangements under Article XXIV." (n. 193 above) 286.

[195] Tussie D., *The less developed countries and the world trading system. A challenge to the GATT*, (n. 95 above) 128.

[196] See (n. 92 above).

[197] Pomfret R., *The economics of regional trading arrangements*, (n. 11 above) 89.

[198] Tussie D., *The less developed countries and the world trading system. A challenge to the GATT*, (n. 95 above) 128.

[199] Dam, K. "Regional Economic Arrangements and the GATT: the Legacy of a Misconception" (1963) 30 and Dam, K. *The GATT: Law and International Economic Organization.* (1970) and Lortie, P. *Economic Integration and the Law of GATT.* (1975)

[200] Pomfret R., *The economics of regional trading arrangements*, (n. 11 above) 76.

Major criticisms of Article XXIV ranged from the fact that it was vague[201] to the lack of a meaningful review to which to subject CUs or FTAs according to its set provisions, since the outcome of the review process was controlled by members of the CU or FTA.[202] Therefore, the major criticisms of Article XXIV coupled with the failure of the 50-plus working parties constituted to examine the agreements notified under Article XXIV, which all failed to conform to the GATT consistency, and yet none of them was rejected,[203] reflected major lacunae in the law on RTAs which needed to be resolved.

Evidently, the WTO sought to resolve these lacunae and to clarify several provisions of Article XXIV which were vague and ambiguous. The Understanding on the Interpretation of Article XXIV of the GATT 1994 (Understanding on Article XXIV) was intended to clarify the implementation of the GATT Article XXIV.

2.4.1.2- UNDERSTANDING ON ARTICLE XXIV OF THE GATT 1994

The Understanding on Article XXIV re-affirmed the object and purpose of the GATT Article XXIV: for instance it re-emphasized that the RTAs should facilitate trade and not restrict trade of non-members,[204] and eventually lead to free trade multilaterally.[205]

It also clarified the review in terms of Article XXIV, and provided a mechanism for the evaluation and calculation of the 'on the whole' tariff rates or the general incidence of duties and ORCs applied before and after the formation of a CU.[206] Additionally, it stipulated the reasonable transition period for CUs, FTAs or Interim Agreements for

[201] For instance how much intra-union trade constitutes 'substantially all' and how long does a transition satisfy the 'reasonable period of time' condition. Pomfret R., *The economics of regional trading arrangements*, (n. 11 above) 75.
[202] Abbott F., "North American economic integration: Implications for the WTO, the EU and Asia," (n. 87 above) 79 This was because the customary practice of GATT was, decisions on matters such as Article XXIV review were made by consensus, and the members of the CU or FTA under review had the right to block a decision that might have required them to effect a change to their implementation plan.
[203] In this regard, the Chairman of the December 1992 session of the contracting parties called for a 'review of the way in which working parties fulfil their remits under Article XXIV, especially to ensure that the results of their efforts are both clear and meaningful' though however, no review was held. Pomfret R., *The economics of regional trading arrangements,* (n. 11 above) 159.
[204] Paragraph 5 of the Preamble to the Understanding on Article XXIV.
[205] Paragraph 3 and 4 of the Preamble to the Understanding on Article XXIV.
[206] Understanding on Article XXIV:5 paragraph 2.

implementing the reduction of tariffs and other related barriers to be 10 years, except in exceptional circumstances.[207]

The Understanding on Article XXIV also provided for the review of notifications of CUs and FTAs by the working party, and stipulated that interim agreements and periodical reports be made by the CU or FTA members to the Council for Trade in Goods (CTG).[208] In respect of disputes among members of a CU or FTA, it was made clear that a non-member may bring a dispute settlement action in respect of the application of Article XXIV.[209]

Therefore, Article XXIV of the GATT read together with the Understanding on Article XXIV, constitute a central Article of the MTS on RTAs; its purpose was to ensure that regional integration complements and does not threaten the MTS.[210] Consequently, WTO members in a RTA are bound to grant each other treatment as favourable as that given to any other WTO member in both the application and administration of import and export duties and charges,[211] thereby minimising the negative effects of RTAs on WTO members.[212]

2.4.2- THE ENABLING CLAUSE

The 1979 Enabling Clause was adopted and added to the GATT after the Tokyo Round, and it eased the requirements for RTAs among DCs. The main purpose of the Enabling Clause was to enable developing economies overcome their underdevelopment and carry out their duties as GATT members after achieving their economic development.[213]

[207] Understanding on Article XXIV:5 paragraph 3.
[208] Understanding on Article XXIV:6 paragraphs 7, 8, 9, 10 and 11.
[209] Understanding on Article XXIV:6 paragraph 12.
[210] Jackson, J.H. *The Jurisprudence of GATT & WTO – Insights on Treaty Law and Economic Relations.* (2002) 101 – 102.
[211] On an MFN basis.
[212] Park S., "Regionalism, open regionalism and Article XXIV GATT: Conflicts and harmony" (n. 99 above) 275.
[213] Paragraph 7 of the Enabling Clause notes that less-developed GATT members expect that their capacity to make contributions or negotiated concessions under the GATT provisions would improve with progressive development of their economies and trade, and they would expect to participate more fully in the framework of rights and obligations under the GATT. Goode W., *Dictionary of trade policy terms,* (n. 1 above) 169, refers to Paragraph 7 of the Enabling Clause as the Graduation Clause. Park S., "Regionalism, open regionalism and Article XXIV GATT: Conflicts and harmony" (n. 99 above) 276.

The Enabling Clause also permitted DCs to grant preferences to one another in order to promote economic development,[214] and this legitimised RTAs failing to meet Article XXIV conditions. Therefore, various schemes in the 1980s used this legal flexibility[215] to establish sectoral or incomplete FTAs; however, none had any real impact.[216]

Nonetheless, the Enabling Clause mainly authorised contracting parties to accord differential and more favourable treatment to DCs without according such treatment to other contracting parties.[217] The treatment envisaged by this exception included: the Generalised System of Preferences (GSP),[218] differential and more favorable treatment in respect of non-tariff measures covered by the GATT/WTO,[219] regional and global trading arrangements between DCs;[220] and special treatment for the LDCs.[221]

It is worthy to note that the Enabling Clause does not prescribe any specific forms of RTAs, such as FTAs or CUs; so any form of RTA might be permitted under this Clause.[222] Moreover, the Enabling Clause constitutes the legal basis on which individual WTO members may unilaterally grant GSP to DCs,[223] which ultimately meant that donor countries did not need to seek permission to grant preferences to DCs or, even better, preferences to LDCs, for instance, the Everything But Arms Initiative (EBA).[224]

[214] Paragraph 2 (c) and (d) of the Enabling Clause.
[215] For example the Latin American Integration Association (LAIA) comprised of Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela; the Association of Southeast Asian Nations (ASEAN) comprised of Indonesia, Malaysia, Philippines, Singapore, Thailand, Brunei Darussalam, Vietnam, Lao People's Democratic Republic, Myanmar and Cambodia; and the Gulf Cooperation Council (GCC) comprised of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and United Arab Emirates.
[216] Pomfret R., *The economics of regional trading arrangements,* (n. 11 above) 104.
[217] Paragraph 1 of the Enabling Clause Decision. This constituted a relaxation of the MFN Clause. Moreover, in the European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, Report of the Panel, 1 December 2003, WT/DS246/R and the Report of the Appellate Body, 20 April 2004, WT/DS246/AB/R. It was noted in the AB Report in paragraph 90 that; "Paragraph 1 thus excepts members from complying with the obligation contained in Article I:1 for the purpose of providing differential and more favourable treatment to developing countries, provided that such treatment is in accordance with the conditions set out in the Enabling Clause. As such, the Enabling Clause operates as an "exception" to Article I:1."
[218] A system of tariff preferences accorded by developed countries to developing countries. Paragraph 2 (a) of the Enabling Clause Decision further states that the GSP is as described in the Decision of the Contracting parties of 25 June 1971 relating to the establishment of "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries" (BISD 18S/24).
[219] Paragraph 2 (b) of the Enabling Clause Decision.
[220] Paragraph 2 (c) of the Enabling Clause Decision. In the case of non-tariff preferences, the provision in the Enabling Clause stipulates that they should be in accordance with the criteria or conditions which may be prescribed by the contracting parties of the GATT/WTO however; these have never been prescribed so far. Das B., *The World Trade Organisation. A guide to the framework for international trade*, (n. 2 above) 24.
[221] Paragraph 2 (d) of the Enabling Clause. This was also reaffirmed in EC – Tariff Preferences case in paragraph 172. (n. 217 above).
[222] Park S., "Regionalism, open regionalism and Article XXIV GATT: Conflicts and harmony" (n. 99 above) 276. This is however mostly inferred from Paragraph 1 and 2 of the Enabling Clause.
[223] Paragraph 2 (a) and 5 of the Enabling Clause.
[224] The legal basis of the EBA under the WTO is Paragraph 2 (d) of the Enabling Clause, which allows special treatment to be granted to LDCs. Thus the EBA initiative is tied to the existing GSP scheme.

However, though the Enabling Clause is designed to provide an easier option for DCs, it has not acted as a springboard to propel them to develop, as anticipated in Paragraph 7 of the Enabling Clause. In addition to this, unlike Article XXIV, the Enabling Clause provides for compensation to a WTO member if that member can demonstrate that expected benefits have been compromised through trade diversion. As a result, DCs have also expressed great discontent with this requirement, which has caused problems for some members; for example COMESA faces the burden of paying compensation to Sri Lanka because Sri Lanka's tea imports into Egypt have been displaced by Kenyan imports benefiting from COMESA preferences, thus, COMESA is considering reporting under Article XXIV. The member countries of MERCOSUR as well, have also insisted that the bloc notifies under Article XXIV instead of the Enabling Clause.[225]

Besides, under the Enabling Clause safeguards are availed to protect the trading interests of the WTO members. This is because the favourable treatment that is envisaged is not only meant to promote the trade of DCs but also intended not to raise external barriers to the trade of other members or to impede the reduction or elimination of tariffs and other trade restrictions.[226]

Finally, the rules governing RTAs in the MTS have been applied strenuously to seek conformity with other GATT/WTO Articles. However, it has been quite challenging because of clashes in enforcing other GATT/WTO provisions and WTO Agreements vis–a–vis enforcing RTA provisions in the MTS. These challenges are discussed below taking into account the relationship of RTA provisions with other GATT/WTO provisions and WTO Agreements as well.

2.5- RTA PROVISIONS IN RELATION TO OTHER GATT/WTO ARTICLES

In applying the RTA provisions in relation to other provisions, the Panel and the Appellate Body (AB) have adopted a general rule of first considering the test under

[225] Economic Commission for Africa, *Assessing regional integration in Africa,* (2004) 53 Available at http://www.uneca.org/aria1/ARIA%20English_full.pdf (accessed August 6, 2008).
[226] Paragraph 3 (a) and (b) of the Enabling Clause.

which Article XXIV or the Enabling Clause can be invoked before considering these provisions' impact on other GATT/WTO Articles.

In the Turkey – Textiles case,[227] the AB laid down the litmus paper test under which Article XXIV can be invoked as a defence for RTA members, who are in violation of other GATT Articles against other WTO members.[228] The AB, laid down two conditions under which this exception can be justified and/or invoked by a WTO member state in a RTA: first, that the measure in issue should have been introduced upon the formation of the RTA which fully complies with the requirements of Article XXIV:8 (a) and 5 (a), and, secondly, that the member should prove that the formation of the RTA would have been prevented if the member was not allowed to introduce the measure in question.[229]

The Turkey – Textiles case basically laid down the principle that paragraphs 5 and 8 of Article XXIV have to be met before Article XXIV is invoked, with the burden of proof on the contracting party that invokes it.

The above ruling by the AB was echoed by the Panel in the US – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities[230] (herein referred to as the US – Wheat Gluten case).

Similarly, under the Enabling Clause, a parallel principle in the Turkey – Textiles case was applied by the AB in the EC – Tariff Preferences case, where the AB noted (in the case brought by India which claimed that Article I:1 was violated due to discriminatory

[227] WTO, Turkey – Restrictions on Imports of Textile and Clothing Products, Report of the Panel, 31 May 1999, WT/DS34/R, Report of the Appellate Body, 22 October, 1999, AB-1999-5, WT/DS34/AB/R. This case was brought by India against Turkey in 1996 in which India contested Turkey's imposition of quota on imports of textile and clothing products, which were required because Turkey had entered into a Customs Union with the EU. The WTO Panel found that Turkey's measures were inconsistent with GATT Articles XI and XIII and rejected Turkey's assertion that its measures were justified by GATT XXIV. On appeal, the AB upheld the Panel's conclusion on the illegality of the quotas but found that the legal interpretation of Article XXIV by the Panel was erroneous; the AB stated that a Panel should first ascertain whether a RTA complies with Article XXIV before considering other GATT provisions.

[228] The AB in Para 45 stated that *"…Article XXIV may, under certain conditions, justify the adoption of a measure which is inconsistent with certain other GATT provisions, and may be invoked as a possible 'defence' to a finding of inconsistency."* While stating this principle, the AB also took cognisance of the Panel's statement in the unadopted Panel Report of EEC – Member States' Import Regimes for Bananas, DS32/R, 3 June 1993, Para. 358; *"The Panel noted that Article XXIV:5 to 8 permitted the contracting parties to deviate from their obligations under other provisions of the General Agreement for the purpose of forming a customs union…"* footnote 13 to Para 45.

[229] AB Report, (n. 227 above) Para. 58 and in Para 59, the AB noted the essence of the above grounds and stated that it might not be possible to determine whether or not applying a measure would prevent the formation of the RTA without first determining its existence.

[230] Panel Report, WT/DS/166/R, adopted 19 January 2001, Para. 8.180.

treatment of the EC GSP scheme) that the measure in issue ought to be subjected consecutively to a compatibility test with two provisions. The implied test was that the examination of the consistency of a challenged measure with Article I:1 should be undertaken first as a general rule, and if the measure is inconsistent with Article I:1, then the second test would be if the measure was justifiable under the Enabling Clause.[231]

The application of RTA provisions in relation to other GATT Articles has been more cumbersome, however, as reflected in the following cases.

Article I:1 of GATT 1994

In the EC – Tariff Preferences case, the AB emphasised that a complaining party challenging a measure taken pursuant to the Enabling Clause must allege more than mere inconsistency with Article I:1 of the GATT 1994 because only doing so would not amount to the legal basis of the complaint. The party must also identify the specific provisions of the Enabling Clause with which the measure in issue is allegedly inconsistent.[232] The AB also noted that the burden of proof in this case is on the complainant.

Article I of the GATT 1994

In Canada – Certain Measures Affecting the Automotive Industry,[233] Canada invoked the Article XXIV exception with respect to its import duty exemptions granted to motor vehicles originating in certain countries, which were found to be inconsistent with GATT Article I. The Panel in this case rejected this defence because Canada was not granting the import duty exemption to all NAFTA manufacturers, and yet manufacturers from countries other than the US and Mexico were being granted duty free treatment.[234]

[231] AB Report (n. 217 above) Para. 101 – 102.
[232] AB Report (n. 217 above) paragraph 110.
[233] Panel Report, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by the Appellate Body Report, WT/DS139/AB/R, WT/DS142/AB/R (herein referred to as Canada – Autos). See (n. 129 above)
[234] Panel Report, Para. 10.55 – 10.56, this finding was not appealed by Canada and was reaffirmed in the AB Report, Para. 83.

Article I:1 and XIII of the GATT 1994

In the Brazil – Retreaded Tyres case[235] the measures in issue were Brazil's import prohibition on retreaded tyres which constituted the "import ban" and fines[236] which measures however exempted the MERCOSUR countries. The EC in this case raised the issue of whether MERCOSUR was qualified as a CU that fully meets the requirements of Article XXIV:8 (a) and 5 (a).[237] In considering these issues the AB reversed the Panel's findings, and found that the MERCOSUR exemption *"has resulted in the Import ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination."*[238] The AB made this ruling based on the fact that the Panel should have first determined whether the MERCOSUR complied as an Article XXIV agreement before making any determination as to the MERCOSUR exemption being justifiable.

Article XI and XIII of GATT 1994

In the Turkey – Textiles case, the AB upheld the Panel's conclusion and asserted that Article XXIV did not permit adoption of quantitative restrictions by a member (Turkey) upon formation of a RTA which were inconsistent with other GATT Articles, in particular, Articles XI and XIII of the GATT 1994 as well as Article 2.4 of the Agreement on Textiles and Clothing (ATC).[239]

[235] Brazil – measures affecting imports of retreaded tyres. Report of the Panel, 12 June 2007, WT/DS332/R, Report of the Appellate Body, 3 December 2007, WT/DS332/AB/R.
[236] The fines included fines imposed on importing, marketing, transportation, storage, keeping or warehousing of retreaded tyres, the restrictions on the marketing of imported retreaded tyres.
[237] Para. 4.384; 4.397 – 4.400. Party arguments. WT/DS332/R. The EC further argues that the MERCOSUR violated Article XXIV, because it did not substantially liberalise all intra-MERCOSUR trade since the sugar sector and the automotive sector which accounts for 29% of intra-MERCOSUR trade was not liberalised as required by Article XXIV:8 (a) (i). It further argued that the MERCOSUR was applying different duties and ORCs to the trade of third parties and its duties and restrictive regulations of commerce were higher than prior to the formation of the CU, and yet the calculations did not indicate NTBs which were the issue in the present case.
[238] AB Report, (n. 235 above) Para. 233. Therefore, the AB reversed the Panel's findings that the MERCOSUR exemption had not resulted in unjustifiable discrimination.
[239] AB Report, Para. 64 (n. 227 above).

2.6- RTA PROVISIONS IN RELATION TO OTHER WTO AGREEMENTS

In the US – Wheat Gluten case, the Panel noted that:

> *"Article XXIV of the GATT 1994 may provide a defence to a claim of violation of a provision of the GATT 1994, and may also provide a defence to a claim of inconsistency with a provision of another covered agreement if it is somehow incorporated into that provision or agreement."*[240]

Relying on the above analysis in the US – Wheat Gluten case, the applicability of RTA provisions vis-a-vis WTO Agreements is examined below.

2.6.1- AGREEMENT ON SAFEGUARDS

In principle, any safeguard must be applied to all imports (third party imports and regional imports) without discrimination, but only to offset the injury caused by the investigated imports in accordance with Article 2.2 of the Agreement on Safeguards. However, disputes in RTAs have arisen with parties claiming that Article XXIV is a justification for preventing intra-regional safeguards in line with the purpose of Article XXIV:8 of abolishing duties and ORRCs on SAT between RTA members. The AB has analysed this view as reflected in the cases below.

In interpreting the Agreement on Safeguards in light of Article XXIV, the AB in Argentina – Safeguard Measures on Imports of Footwear,[241] after reversing the Panel's findings, made specific reference to footnote 1 to Article 2:1 of the Agreement on Safeguards, and stated that the footnote referred to whom a safeguard measure may be applied. The AB opined that the footnote applied to the case at hand, as it provided that a safeguard measure can be undertaken by a RTA as a whole or on behalf of a RTA member. However, in bringing the facts of the case in perspective with regard to the

[240] Panel Report, WT/DS/166/R, adopted 19 January 2001, Para. 8.180 (n. 230 above).
[241] Report of the Appellate Body, WT/DS121/AB/R, 14 December 1999 Para. 8.83. The basis of the footnote in relation to Article XXIV is to reflect that Article XXIV of the GATT 1994 does not prohibit safeguards on trade within a RTA as Article XXIV:8 permits some internal restrictions which might include intra-regional safeguards as long as substantially all trade is liberalised.

said footnote, the AB found that the safeguard measures at issue were not imposed by MERCOSUR but by the Argentine authorities, which totally disregarded the provisions relating to when a RTA member can impose safeguard measures.[242]

In the US – Korea Line Pipe case,[243] the AB contended that the question of whether Article XXIV of the GATT 1994 serves as an exception to Article 2.2 of the Agreement on Safeguards is relevant in two circumstances. In one of the circumstances listed, the AB states that, in the investigation done by the competent authorities of a WTO member, the imports that are exempted from the safeguard measure are not considered in the determination of serious injury. Thus, the AB stipulated that, if investigation or injury determination is done taking into account RTA members, then the safeguard measure should apply to all imports, and not only third party imports while excluding regional imports.[244]

The AB, while re-iterating the above principle, noted in the US – Wheat Gluten case, that the imports included in the injury determinations made under Articles 2.1 and 4.2 of the Agreement on Safeguards should correspond to the imports included in the application of the measure under Article 2.2.[245]

The above principles have been re-iterated by the AB in the following cases, United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia "US – Lamb,"[246] United States – Definitive Safeguard

[242] AB Report, Para. 106 - 108

[243] United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality line Pipe from Korea, "US – Korea Line Pipe" WT/DS202/AB/R. The Panel had found that the US had properly excluded the NAFTA partners from investigation but the AB rejected this finding. The AB also noted that safeguard measures may be applied only to the extent that they address a serious injury attributed to increased imports Para. 260

[244] Para. 198

[245] AB Report. Para. 96 (n. 230 above)

[246] Appellate Body Report, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001. The US was found to violate the Agreement on Safeguards by excluding Mexico and Canada from the application of the safeguard measure yet the injury determination on which the safeguard was based took account of all imports, including those from Mexico and Canada.

Measures on Imports of Certain Steel Products, "US – Steel"[247] and Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products "Korea – Dairy".[248]

However, Pauwelyn[249] argues that the defence of Article XXIV, as stated in the Turkey – Textiles case, is not available with regard to measures involving safeguards, because the two conditions set by the case cannot be met, or are impractical, under the circumstances. This is because the safeguard measure in issue should have been introduced at the formation of the RTA; thus, impliedly, it would mean that the RTA must be newly formed and not already in existence; yet safeguard measures are introduced after the RTA's formation. As regards the second condition, taking into account the flexibility imposed by the SAT rule, which would permit regional safeguards to be imposed on RTA members, it would be impracticable to argue that the safeguard was necessary, and, if not imposed, would have prevented the formation of the RTA.

2.6.2- AGREEMENT ON TEXTILES AND CLOTHING

In the Turkey – Textiles case, Turkey raised a defence that Article XXIV:5 (a) of the GATT 1994 authorised members forming a CU to deviate from the prohibitions contained in Article 2.4 of the ATC and Articles XI and XIII of the GATT 1994. The Panel rejected this defence.[250] The AB upheld the Panel's conclusion, and opined that Article XXIV did not permit Turkey upon forming a CU with the EC to adopt quantitative restrictions which were found to be inconsistent with Article 2.4 of the ATC as well as Articles XI and XIII of the GATT 1994.[251] However, the AB also provided for an avenue to use Article XXIV as a defence, and thus stated:

[247] Appellate Body Report, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/R, WT/DS259/R circulated on 10 November 2005, adopted 10 December 2005. The US like above excluded imports of Canada, Mexico, Israel and Jordan from the application of safeguard measure and yet the injury determination on which the safeguard was based took account of all imports.

[248] Appellate Body Report, WT/DS98/AB/R, adopted 12 January 2000

[249] Pauwelyn J., "The Puzzle of WTO Safeguards and Regional Trade Agreements." (2004) *7 (1) Journal of International Economic Law*, 131 – 135; see also Mathis J., *Regional trade agreements in the GATT/WTO. Article XXIV and the internal trade requirement*, (n. 130 above) 171 – 191, 226 – 250.

[250] Panel Report, Para. 10.1.

[251] Appellate Body report, Para. 64.

"Article XXIV of GATT 1994 is incorporated in the Agreement on Textiles and Clothing and may be invoked as a defence to a claim of inconsistency of Article 2.4 of the Agreement on Textiles and Clothing, provided that the conditions set forth in Article XXIV for the availability of this defence are met."[252]

All these cases constitute difficulties encountered by contracting parties in the interpretation and use of the provisions that implement RTAs. However, in instances where there is a conflict between the laws relating to the RTA and the WTO, the Vienna Convention on the Law of Treaties (VCLT)[253] can be invoked. This is in line with Article 3.2 of the Dispute Settlement Understanding (DSU).[254] For example, the Panel in the Turkey - Textiles case made a reference to Article 41 of the VCLT.[255] Therefore, Article 31 of the VCLT[256] can also be used in interpreting disputed WTO provisions in RTA cases.[257]

2.7- COMMITTEE ON REGIONAL TRADE AGREEMENTS

The Committee on Regional Trade Agreements (CRTA) was established by the WTO General Council in February 1996 as a response to the proliferating RTAs in place, and the failure of individual Working Parties in the examination of these RTAs. The CRTA's principal duties include: the examination of individual RTAs; assessing the systemic impact of the RTAs on the MTS; and the relationship between the RTAs and the MTS.[258] The rationale for submitting RTA documentation to the CRTA for examination is to guarantee the transparency of the RTAs, and to provide members with an opportunity

[252] Footnote 13 to Para. 45 of the Appellate Body Report.
[253] Vienna Convention Law of Treaties, (VCLT), concluded at Vienna 23 May 1969, entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, 331.
[254] Understanding on Rules and Procedures governing the settlement of Disputes. Article 3.2 provides; "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The members recognise that it serves to preserve the rights and obligations of members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."
[255] Panel Report, (n. 227 above) Para. 9.181.
[256] Which provides for the general rule of interpretation of Treaties, for instance Article 31 (1) provides that; "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."
[257] Mathis J., *Regional trade agreements in the GATT/WTO. Article XXIV and the internal trade requirement*, (n. 130 above) 272. The interpretation rule was first applied in the case of United States – Standards for Reformulated and Conventional Gasoline, 29 April 1996 (AB-1996), 17.
[258] Work of the Committee on Regional Trade Agreements, Available at http://www.wto.org/english/tratop_e/region_e/regcom_e.htm (accessed March 23, 2009).

to evaluate the Agreement's consistency with the WTO Rules.[259] However, no examination report has ever been finalised by the CRTA since 1996 as a result of lack of consensus, neither has it sanctioned any RTA for non-compliance with the WTO rules.[260] Also, the CRTA, experiences difficulty in the completion of its factual examination of a RTA, which process precedes the RTA's legal examination.[261]

It is against this backdrop that the WTO members agreed to clarify the rules relating to RTA provisions, improve their disciplines and procedures,[262] and build a harmonious relationship between the RTAs and the MTS taking into account their role in promoting liberalisation of trade and development.[263] The accord to undertake negotiations on the existing WTO rules applying to RTAs took place at the 2001 meeting of the Fourth Ministerial Conference in Doha, given the impasse in the CRTA's operations. However, the stalled Doha negotiations to date do not only have the impact of causing further escalation of RTAs in the MTS, but also the existence of RTAs which are not compliant with the MTS, given the CRTA's failure to check this non-conformity.

Efforts have been undertaken, however, to change this position, and to revitalise the CRTA through the substantial revision of the work done by the CRTA through the Transparency Mechanism for RTAs,[264] which has clarified further: rules on the notification of new RTAs, and subsequent notification and reporting of changes in an already implemented RTA.[265] Additionally, infrastructural bodies have been entrusted to

[259] Ibid. The examination on RTAs undertaken by the CRTA is conducted on the basis of information provided by the RTA members, through written communications to written questions posed by WTO members or through oral replies to questions asked during the CRTA meetings. After the examination is done, the examination Report is drafted by the Secretariat. Subsequently, consultations are conducted and once the report is agreed upon by the CRTA, it is then submitted to the relevant superior body for adoption.

[260] Some of the problems that the CRTA is plagued with include controversies over the interpretation of the RTA provisions under the WTO for example the discrepancy about Article XXIV:8 and its lack of accord about how much liberalisation in a RTA satisfies the 'substantially all trade' rule. This bottleneck in the CRTA has resulted in its failure to review RTAs' compliance with Article XXIV.

[261] For example in 1993 MERCOSUR was notified to the GATT but a decision by the CRTA on the factual examination by MERCOSUR has since proved futile though at a CRTA meeting in March 2004, the CRTA agreed that MERCOSUR's examination should be concluded not later than March 2005, this has also not come to pass. Report by the Secretariat, WT/TPR/S/140. Available at www.wto.org/english/tratop_e/tpr_e/s140-2_e.doc - 2004-11-28 (accessed March 23, 2009).

[262] Dr. Panitchpakdi S, WTO Director General 2002, warned about the failure to strengthen Article XXIV, that it *"will be to the detriment of all members …but small countries which already suffer from limited negotiating leverage and capacity will be disproportionately affected."* Panitchpakdi S., "The Doha Development Agenda: Challenges ahead," (2002) Available at http://www.wto.org/english/news_e/spsp_e/spsp07_e.htm (accessed March 23, 2009)

[263] Paragraph 4 of the WTO, Doha Ministerial Declaration. (n. 1 above)

[264] Transparency Mechanism for Regional Trade Agreements. Decision of December 14, 2006. WT/L/671

[265] Paragraph 3 to 17 of the Decision on Transparency Mechanism for Regional Trade Agreements (n. 264 above)

implement this mechanism.[266] The new role undertaken through the Transparency Mechanism by the CRTA and the Committee on Trade and Development (CTD) has not had much impact yet, but its objectives seem to have the impact of regulating conformity of RTAs within the MTS, thereby stalling any discriminatory tendencies that RTAs might have on world trade.

2.8- CONCLUSION

The evolution of RTAs encompassed in the GATT/WTO trade disciplines has increased significantly, encompassing a wide range of trade sectors, yet, becoming a prominent feature of the WTO members' trade policies in the MTS. The RTAs' impact on trade has been massive, considering the stalled Doha MTN and the economic success of some RTAs in the MTS. Yet, on the other hand, RTAs have also played a part in restricting international trade through the total disregard of the RTA provisions by contracting parties and this has culminated in various WTO disputes. Furthermore, RTA members have adopted protectionist measures in their regional trade policies. For example, the use of NTBs like restrictive rules of origin, the varied use of trade remedies to the detriment of non-RTA members, and the exclusion of sensitive sectors, like agriculture, from the RTA coverage. These restrictions, if not addressed by the Transparency Mechanism or the next trade talks, have the potential to completely undermine the MTS and cause a failure of the world trading system by its segmenting into economic blocs in which DCs will be left disadvantaged. Therefore, it is prudent to examine the impact that RTAs have on the MTS, and the need to revise RTA provisions which impede the MTS and the operation of RTAs in the MTS.This is undertaken in the subsequent chapter.

[266] Paragraph 18 of the Decision on Transparency Mechanism for Regional Trade Agreements instructs the CRTA to implement the Decision for RTAs falling under Article XXIV of GATT 1994 and Article V of the GATS while the CTD was to implement RTAs under Paragraph 2(c) of the Enabling Clause. (n. 264 above)

CHAPTER THREE – IMPACT OF REGIONALISM ON THE MULTILATERAL TRADING SYSTEM

3.1- AN OVERVIEW OF REGIONAL TRADE AGREEMENTS IN THE MULTILATERAL TRADING SYSTEM

RTAs are altering the global trends of trade in the MTS today, not only because of their overwhelming increase in number but also because of the increased total trade undertaken in these RTAs. The World Bank (WB)[267] statistics indicate that more than one-third of world trade takes place in such agreements, and this share will increase as more RTAs are negotiated in the future.[268] Already this trade covers a widening spectrum of various trade sectors in both North-North Agreements[269] and North-South Agreements[270] irrespective of their level of development. Moreover, virtually all WTO contracting parties are members of a bloc, and many belong to more than one.[271] On the other hand, these RTAs are more beneficial only to some WTO members who are involved in major influential and successful RTAs with high levels of intra-industry trade in both trade in goods and services, like the EU, the NAFTA, the ANZCERTA, and the ASEAN Free Trade Area (AFTA).[272]

The impact of these RTAs on the MTS is intriguing because it encompasses both negative and positive effects. As RTAs have increased tremendously, some WTO members have no option but to join them, for instance Japan, the long standing

[267] The World Bank, *Global economic prospects. Trade, regionalism and development,* (n. 78 above) xi. However the OECD estimates that more than half of International Trade is now covered under RTAs. OECD, "Regional trade agreements," Available at http://www.oecd.org/document/62/0,3343,en_2624_36442957_31839102_/_/_1,00.html (accessed on March 23, 2009) and the CRTA concurs with the OECD in the CRTA, "Note by the Secretariat, Synopsis of 'Systemic' issues related to Regional Trade Agreements." WT/REG/W/37, March 2, 2000.

[268] The expansion of trade blocs reflects in their market power and their ability to reflect the terms of trade in their favour, thus if very successful, the bloc can be detrimental to the rest of the world. Hoekman B, and Kostecki M., *The political economy of the world trading system. The WTO and beyond*, (2ed) (2001) 357

[269] North-North Agreements are trade agreements between developed countries.

[270] North-South Agreements are trade agreements between developed countries and DCs while South-South Agreements are trade agreements between DCs.

[271] Schiff M, and Winters A., *Regional integration and development,* (n. 80 above) 1. RTAs are also in place on every continent.

[272] The EU, the short-lived CUSFTA and the ANZCERTA are renowned for translating their commitments and objectives into policies thereby making significant progress toward their stated aims and thus are regarded as successful RTAs in relation to integration attempts. The WTO states that the number of RTAs that a member participates in is of no relevance but the portion of the world trade that the RTA covers. WTO Secretariat, "The changing landscape of Regional Trade Agreements." (n. 7 above).

exception. In 2001, the Japanese Vice-Minister for Finance drew attention to this when he stated:

> *"We in Japan have finally been forced into pursuing bilateral agreements to free trade, but we must admit to a genuine worry that, in terms of Professor Bhagwati's language of building and stumbling blocks, the bilateral agreements worldwide are blocks of varying size and shape. It is hard to see how they can be used to build multilateral free trade."*[273]

In line with the aforesaid expression, these fears have been widespread because of the increasingly burgeoning RTAs. It is, therefore, quite significant that the impact of RTAs on the MTS should be examined, taking into consideration that the available literature still regards the impact of RTAs on the MTS as a mystery; and, hence, there is still an unanswered question as to whether RTAs are stumbling blocks or building blocks for open global markets.

3.2- IMPACT OF REGIONAL TRADE AGREEMENTS ON THE MULTILATERAL TRADING SYSTEM

The potential threat posed by RTAs was summarised by Dr. Supachai Panitchpakdi when he stated:[274]

> *"Regionalism can be a powerful complement to the multilateral system, but it cannot be a substitute. The multilateral trading system was created after the Second World War precisely to prevent the dominance of rival trading blocks. The resurgence of regionalism today risks signalling a failure of global economic cooperation and a weakening of support for multilateralism. It threatens the primacy of the WTO, and foreshadows a world of greater fragmentation, conflict, and marginalization, particularly of the weakest and poorest countries."*

[273] In Davos in January 2001 as stated in Bhagwati J., *Free trade today*, (2002) 119

[274] Panitchpakdi S, the former WTO, Director General, 2002 on November 26, 2002 as quoted in Parthapratim P., "Regional trade agreements in a multilateral trade regime: An overview," Available at http://www.networkideas.org/feathm/may2004/survey_paper_RTA.pdf (accessed on August 10, 2008)

The debate on the impact of RTAs is, however, twosided. Whereas certain scholars will concur with the former Director-General, other scholars have a different opinion as to the stated impact. The WTO study[275] has however emphasised that the impact of RTAs cannot only be viewed through the narrow angle of preferential tariff margins that the RTAs confer. With this in mind, this study has sought to analyse these views under the rubrics of stumbling blocks and building blocks.

3.2.1- STUMBLING BLOCKS

In November 2000 Mr. Mike Moore[276] expressed great concern that the proliferation of RTAs spurred by globalisation may be a stumbling block to the MTS. He stressed this point in his speech. He said:

> *"Is there a risk that regionalism is becoming a stumbling block, more than a building block, for the new WTO, draining energy from multilateral negotiations, fragmenting international trade, and creating a new international disorder characterized by growing rivalries and marginalization and the possibility of hostile blocks."*[277]

Pomfret[278] concurs, and argues that RTAs are stumbling blocks and may be a retrograde step if they evolve into exclusive blocs which disrupt the multilateral trading patterns towards creating a better MTS.

The reasons given for the opinion that RTAs are stumbling blocks are discussed here under.

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[275] WTO, *Regionalism and the world trading system,* (1995) 48; WTO, *World Trade Report* (2003) 48 it lists other factors such as the systemic implications of excluding particular sectors from RTAs, whether deeper integration involving regulation and 'inside-the-border' areas of policy imparts more discrimination on non-members, and whether efforts at regional integration influence the progress rate in multilateral rule-making and liberalisation efforts.

[276] The WTO, Director General 2000

[277] Speech by Moore M, WTO Director General 2000, "Globalizing regionalism: A new role for MERCOSUR in the Multilateral Trading System," November 28, 2000 Buenos Aires.

[278] Pomfret R., *The economics of regional trading arrangements*, (n. 11 above) 9 additionally, The 2008 Annual Session of the Parliamentary Conference on the WTO in its Report, Substantive theme "Looking beyond Doha" (2008) EP Rapporteur: Carlos Carnero Gonzalez, clearly emphasized that the stumbling blocks outweigh the building blocks. It was asserted that RTAs weaken the MTS, complicate trade, erode the principle of non-discrimination, penalise countries with limited bargaining power and exclude the weakest economies. Available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-409.797+01+DOC+PDF+V0//EN&language=EN (accessed on March 23, 2009).

3.2.1.1- TRADE DIVERSION

The main argument posed against RTAs is that they cause trade diversion as opposed to trade creation in the MTS as elaborated by Bhagwati[279] and Viner.[280] However, though paying heed to the trade creation effects, Bhagwati[281] and Panagariya[282] underscore that trade diversion in RTAs exceeds trade creation.[283] This is mainly because market access for members in RTAs is facilitated by the elimination of tariffs on intra-regional trade, thereby inducing RTA members to move importing from a lower cost non-RTA member to costly RTA members due to the trade preferences offered. This in turn shifts the comparative advantage to less efficient producers or to high cost imports.

Trade diversion is, therefore, created by raising barriers against more efficient non-member producers thus reducing their exports while favouring domestic less efficient RTA producers. Consequently, imports are diverted from cheaper sources outside the trading bloc to more expensive sources inside the bloc, which is undesirable. For example, the raising of Mexican external tariffs on 504 items while the tariffs for items from NAFTA sources were left untouched during the 1994 peso crisis, facilitated a diversion from cheaper non-NAFTA items to more expensive NAFTA items which seemed cheaper due to the preferences conferred on them in the NAFTA bloc. This

[279] The terminologies on stumbling blocks and building blocks were conjured up by Bhagwati in Bhagwati J., *The world trading system at risk*, (1991) 71 and popularised by Lawrence, in Lawrence R., "Emerging regional arrangements: Building blocks or stumbling blocks?" in O'Brien R., (eds.) *Finance and the International Economy,* (1991) 22. Stumbling blocks are used to describe FTAs that impede the development of multilateral trade liberalisation. Goode W., *Dictionary of trade policy terms*, (n. 1 above) 330.

[280] Viner on trade diversion explains that; *"…where the trade-diverting effect is predominant, one at least of the member countries is bound to be injured, the two combined will suffer a net injury, and there will be injury to the outside world and to the world at large."* Viner J., *The customs union issue*, (1950) 44.

[281] Bhagwati J., "Preferential trade agreements: The wrong road," (1996) *27 (4) Law and Policy in International Business* 865.

[282] Bhagwati J, and Panagariya A., "Preferential trading areas and multilateralism – Strangers, friends, or foes" in Bhagwati J, and Panagariya A., (eds.) *The economics of preferential trade agreements*, (1996).

[283] The terms trade creation and trade diversion can also be used to indicate whether RTAs can be regarded as a step towards global free trade or a move towards more protection in the world. Lanjouw G., *International trade institutions,* (1995) 57. Reflecting a research undertaken by Frankel, Stein and Wei (1997), Schiff and Winters indicate that there was trade diversion in the EC, EFTA, NAFTA, MERCOSUR, the Andean Pact, AFTA, the CER and the East Asian Economic Caucus for the period 1970 – 1992 as the results for the individual years indicate increases in intra-regional trade accompanied by significant drops in trade with the rest of the world. Schiff M, and Winters A., *Regional integration and development*, (n. 80 above) 41.

evidently increased US exports to Mexico by 45% between 1993 and 1996[284] while exports from non-NAFTA members to Mexico declined.

The trade diversion effect in RTAs is more prominent in FTAs than CUs because FTA members, unlike members in CUs, apply different tariff rates against non-members, thereby requiring the use of rules of origin to distinguish between regional and external imports, which restrictive rules of origin normally result in trade diversion. For example, regarding the 1972s FTAs between the EEC and the EFTA states, the US argued that the rules of origin adopted in the FTA would result in trade diversion by raising barriers to third countries' exports of intermediate manufactured products and raw materials.[285]

3.2.1.2- SPAGHETTI BOWL

Viner's legacy on trade diversion effects in RTAs is of less significance today as it pales in comparison with the burgeoning RTAs that threaten to undermine the MTS, characterised by overlapping agreements which have therefore led to the so-called "spaghetti bowl"[286] described by Bhagwati[287] as follows:

> *"A 'Spaghetti bowl': a messy maze of preferences as preferential trade agreements formed between two countries, the latter in turn bonding with yet others, each in turn having different rules of origin (as required by the preferences sought to be given and taken, without "leaks" to non-members via entry into members) for different sectors, and so on."*

This so-called spaghetti bowl erodes away the principle of non-discrimination[288] since RTA members continuously confer preferences on each other as against non-members,

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[284] The tariffs against non-members were bound at the GATT/WTO at levels higher than the ones in force, therefore Mexico was left free to raise or double even the external tariffs on 504 import items from non-NAFTA members without violating any bindings despite Article XXIV since NAFTA was in operation. Bhagwati J., *Free trade today*, (n. 138 above) 110.

[285] Hoekman B, and Kostecki M., *The political economy of the world trading system. The WTO and beyond,* (n. 268 above) 362.

[286] The World Bank, *Global economic prospects. Trade, regionalism and development*, (n. 78 above) 38. The 'spaghetti bowl' phrase was also coined by Bhagwati in Bhagwati J., *A stream of windows: Unsettling reflections on trade, immigration and democracy* (1999) 290 - 92

[287] Bhagwati J., *Free trade today*, (2002) 113 - 115

[288] As a result, the WTO report drawn by the consultative board chaired by the former WTO Director General, Peter Sutherland., "The future of the WTO: Addressing institutional challenges in the new millennium" (2005) 19 described the MFN principle as the 'exception' and no longer as

inevitably resulting in overlapping memberships,[289] conflicting policies,[290] and increments in administrative costs amidst the tangled web vis-à-vis third countries: For example, on administrative procedures like customs, technical standards, rules of origin, tariff schedules, and periods of implementation.

3.2.1.3- COMPLEXITY OF RULES OF ORIGIN

Rules of origin are applied by RTA members to determine which products imported from the bloc have undergone sufficient processing within the bloc to benefit from its tariff preferences.[291] However, in the world trade arena today, the crisscross increments in RTAs create a serious obstacle to trade because of the uncertainty as to whether products would meet origin requirements. Tangled with the latter are the costs of enforcing these rules of origin in the many different RTAs that WTO members negotiate.[292] In the case of DCs and LDCs, the costs of enforcement of different rules of origin are quite cumbersome and expensive. This was reflected in the sentiments of Alec Erwin, the then Trade Minister of South Africa (SA), who stated that the poorer countries are least able to manage a trading system riddled by complex preferences and rules of origin.[293]

Rules of origin complexity is especially more prone in FTAs where the extent of intra-regional trade liberalisation depends on rules of origin of the FTAs. Yet, these complex rules of origin can also be used as a protective instrument to limit imports, as they can be altered or manipulated, given their role as a mechanism for applying safeguard restrictions.[294]

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the rule. It referred to the change in the MFN principle caused by the overwhelming 'spaghetti bowl' of RTAs, as the Least Favoured Nation (LFN) treatment.

[289] The WTO is clear about the negative impact that the overlapping memberships would have on the MTS. These overlapping agreements would undermine the transparency of trading rules, create a barrier to trade not only because of the costs involved in meeting a wide range of conditions of trade rules but also likely to introduce uncertainty and opacity in the MTS. WTO, World Trade Report (n. 275).

[290] The conflicting policies not only include different regulations governing imports of the same commodity from different sources like rules of origin but also regulations on technical standards which all increases complexity, costs and uncertainty of trade.

[291] Hudec R, and Southwick J., "Regionalism and WTO rules: Problems in the fine art of discriminating fairly" in Mendoza M, Low P, and Kotschwar B., (eds.) *Trade rules in the making. Challenges in regional and multilateral negotiations,* (1999) 54 - 55

[292] The application of these multiple rules of origin not only entails costs of origin administration for governments, manufacturers, and exporters but as well, eventually gives rise to inefficiencies in resource allocation and specialisation patterns. Garay L, and Cornejo R., "Rules of origin and trade preferences," in Hoekman B, Mattoo A, and English P., (eds.) *Development, trade, and the WTO. A Handbook.* (2002) 121

[293] Bhagwati J., *Free trade today*, (n. 138 above) 117

[294] The WTO Secretariat, *Guide to the Uruguay Round Agreements.* (1999) 119

Furthermore, using rules of origin as a discriminatory trade policy[295] increases trade restrictions against members in RTAs, as well as non-members, causing non-members to barricade themselves with protectionist measures against the RTA members.[296] However, RTA members would rather pay the MFN duty than meet the cumbersome rules of origin or process the rigorous paperwork required to obtain the duty free access in a RTA.[297] This is especially so, if the rules of origin adopted in the RTA are non-cumulative[298] which are not only restrictive but reduce the extent of liberalisation applied in the RTA as well, than cumulative rules of origin.[299]

3.2.1.4- PROTECTIONIST WALLS

Notwithstanding the above, RTAs can implement new forms of protection, not only by erecting new tariffs, implementing complex rules of origin, excluding certain sectors or products from RTA coverage but also by administering anti-dumping and countervailing duties that have protectionist effects. This is because of the dual system implemented in RTAs where competition or anti-trust policy is used among RTA members[300] while anti-dumping duties are used for third parties. This creates distortions and the potential for discrimination against third members because different criteria and conditions apply to invoke such measures,[301] yet it defeats the purpose of creating a transparent MTS.

RTA members can, therefore, erect NTBs to restrict trade against non-members, through actions like anti-dumping,[302] and as a result, trade is not completely free

[295] For example the rules of origin can impose strict requirements like demanding unusually high levels of regional content to qualify for the intraregional tariff preferences. These strict rules can cause manufacturers within the region to shift the sourcing of inputs from outside the region to within the region to ensure that their finished products will qualify for the preferential intraregional duties. Hudec R, and Southwick J., "Regionalism and WTO rules: Problems in the fine art of discriminating fairly," (n. 291 above) 55

[296] Bhagwati J., *Free trade today*, (n. 138 above) 107.

[297] Pomfret R., *The economics of regional trading arrangements*, (n. 11 above) 160. An example was the EC-EFTA RTA

[298] This is a system of rules of origin which restricts the production process of a product to a specified country with no value added from another country, in order to satisfy the criteria in the access rules of the importing country.

[299] This is a system of rules of origin which permits the production or transformation of a product in two or more specified countries in order to satisfy the access rules of the importing country. Goode W., *Dictionary of trade policy terms,* (n. 1 above) 97

[300] RTAs such as the EU, the EEA, the ANZCERTA, and the Canada-Chile FTA use competition policy instruments in place of anti-dumping procedures on trade among the members. Crawford J, and Laird S., "Regional trade agreements and the WTO," (n. 184 above) 4.

[301] Crawford J, and Laird S., "Regional trade agreements and the WTO," (n. 187 above) 17 – 18.

[302] Hindley and Messerlin have analysed that the threat of contingent protection especially anti-dumping has become an important motivation for third countries to seek to join RTAs as opposed to pursuit of MTN. Hindley B, and Messerlin P., "Guarantees of market access and

because of the contingent protection[303] which in the end becomes a vicious cycle and an increased pursuit of protectionism, as reflected in the 1930s.[304] Consequent to this, Bhagwati states that the RTAs might lead to the decay of free trade,[305] or rather a retreat from freer trade, as other sceptics[306] would concur, because RTAs are severely compromised by these protectionist walls. These protectionist walls all highlight the fact that RTAs are stumbling blocks to the MTS.

3.2.1.5- HUB AND SPOKE SYSTEM EFFECTS

Some RTAs replicate the hub and spoke system[307] in that developed countries (hubs) are members of several RTAs with DCs or LDCs (spokes), which only belong to one of these agreements and as such, the hubs have greater negotiating leverage over the spokes. Thus, this system deters multilateralisation because the hub country has negotiated a wide set of bilateral agreements with the spoke countries, in which market access for the spokes is restricted while the hub enjoys improved access to all the spokes' markets.[308] Furthermore, in such an arrangement there is potential for maintaining policies which deter liberalisation of internal trade, because there is scope to exclude sensitive sectors from the coverage of each bilateral agreement,[309] and to include protectionist policies[310] against the spokes. The impact that this has on the MTS is of great magnitude, because these vested interests may be impossible to extricate in

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regionalism," in Anderson K, and Blackhurst R., *Regionalism and the Global Trading System,* (1992) citied in Hoekman B, and Kostecki M., *The political economy of the world trading system. The WTO and beyond,* (n. 268 above) 359.

[303] Hoekman B, and Kostecki M., *The political economy of the world trading system. The WTO and beyond*, (n. 268 above) 347.

[304] In the 1930s, the policies which were adopted were protectionist in nature for example they were more related to enhancing import substitution and the maintenance of high tariff barriers and restrictive quotas and this contributed to the economic depression at the time. Bhagwati however draws a strong distinction between the two eras while he notes on their similarity as well. He states that the protectionism manifested today is in FTAs or the misdirected pursuit of free trade via RTAs, putting the world trading system at a risk or palpable danger. Bhagwati J., *Termites in the trading system. How preferential agreements undermine free trade.*(n. 142 above) 49 – 89.

[305] Bhagwati J., *Free trade today*, (n. 138 above) 119 – 120.

[306] Kreuger A., "Free trade agreements as protectionist devices: Rules of origin," (1993) Working Paper 4352; Krueger A., "Free trade agreements versus customs unions," (1995) Working Paper 5084.

[307] A concept used in the analysis of *free-trade areas*. It postulates that a large country could be a member of several free trade arrangements, but that smaller countries might only belong to one of these arrangements each. The large country would then be the hub, and the others would form the spokes in a series of discriminatory bilateral trade arrangements. Unlike in the case of a free-trade area, where all parties negotiate as equals, under a hub-and-spokes arrangement the larger country generally sets the terms and conditions for membership. Goode W., *Dictionary of trade policy terms*, (n. 1 above) 181.

[308] The World Bank gives an example of the hub and spoke structure through EC and its association with African countries and the US with the Latin American countries. The World Bank, *Global economic prospects. Trade, regionalism and development*, (n. 78 above) 49 – 51.

[309] Snape R, Adams J, and Morgan D., *Regional Trading Arrangements: Implications and Options for Australia* (1993) as citied in Hoekman B, and Kostecki M., *The political economy of the world trading system. The WTO and beyond,* (n. 268 above) 361.

[310] Protectionist tools such as anti-dumping and safeguards.

future attempts to achieve further liberalisation, than if the agreement was applied on an MFN basis.

Moreover, stringent rules of origin are also used to reflect the concept of hub and spoke system as contrasted to area treatment,[311] as rules of origin are prone to abuse and have been used to restrict market access. Spokes, LDCs in particular, face enormous capacity constraints in trying to negotiate and implement multiple RTAs with hubs, yet in contrast, the hubs can essentially replicate rules of origin each time they negotiate a new RTA with the spokes and are able to access all the spokes' markets.[312] This does not only tilt the power in favour of the hubs but also favours them to have more market access to inputs that are available without paying any duties, than any spoke.[313] As a result, this leads to the further marginalisation of these countries in the MTS.

3.2.1.6- EROSION OF PREFERENCES FOR DEVELOPING COUNTRIES

The increase of RTAs in the world impacts DCs negatively especially those in Africa.[314] Their increment reduces DCs' and LDCs' international competitiveness because trade preferences and special and differential treatment accorded to the latter countries by developed countries is eroded and/or loses its significance.[315] This is so because other member countries are in partnership with the developed countries thereby acquiring open market access by virtue of the RTAs than DCs and LDCs. Therefore, the GSP, or schemes like the AGOA, and the EBA all tend to lose the lucrative glow of enhancing developing and least developed countries' market access, which increases their

[311] Mathis J., *Regional trade agreements in the GATT/WTO. Article XXIV and the internal trade requirement*, (n. 130 above) 6 -7 In these RTAs, Hubs have greater bargaining power than the Spokes in regional negotiations thus this normally leads to the Hubs to place undesirable demands on these small countries under these circumstances, which inevitably leads to signing of poor stringent pacts by the Spokes which have poor trade conditionalities and are not favourable to the Spokes. Bhagwati elaborates on this as; *"a process by which a hegemonic power seeks (and often manages) to satisfy its multiple trade-unrelated demands on other weaker trading nations more easily than through Multilateralism."* As quoted in Lawrence, R. "Regionalism, multilateralism, and deeper integration: Changing paradigms for developing countries," in Mendoza M, Low P, and Kotschwar B., *Trade rules in the making. Challenges in regional and multilateral negotiations,* (1999) 44.

[312] For example the EU's conclusion of Cooperation and Association Agreements with the Mediterranean countries and the EU EPAs in relation to the ACP countries, all illustrate the hub and spoke nature of European integration.

[313] For example the original EEC plan and the relationship to later EFTA states.

[314] African DCs and LDCs are mainly dependant on unilateral preference schemes like the GSP schemes, the EBA and the African Growth and Opportunity Act (AGOA) schemes which are directly affected by the proliferation of RTAs.

[315] The World Bank reports that preferences have gradually fallen because most countries have reduced their tariffs across the board to all partners on an MFN or non-discrimination basis while at the same time eliminating barriers preferentially through RTAs. The World Bank, *Global economic prospects. Trade, regionalism and development*, (n. 78 above) 27.

marginalisation.[316] Yet the restrictive rules of origin in these schemes further erode the margin of preference.

Additionally, the regulatory provision, Article XXIV of the GATT 1994 has no provision for special and differential treatment as far as DCs are concerned. Thus, the levels of development are not catered for in the enforcement of those RTAs which fall under the purview of Article XXIV especially the North-South Agreements. Therefore, this only makes the preference erosion for the DCs worse.

3.2.1.7- DISRUPTION OF THE MULTILATERAL TRADING SYSTEM

RTAs, in effect, can reduce the bargaining costs of the MTN. Bhagwati, Panagariya[317] and Krueger[318] argue that if RTAs are promoted, then countries will focus more on regional integration efforts, and less on the MTS which is more desirable.[319] It is evident that in the absence of RTAs, multilateral liberalisation will ensue[320] as opposed to the diversion effect caused by RTAs in terms of scarce political capital, as trade policymakers involved in trade negotiations will have less time and fewer resources available for MTN. Moreover, even if RTAs do not raise their external levels of protection, non-member producers become less competitive because they continue to pay tariffs while competing producers from member countries do not.[321] This therefore weakens the importance of the non-discrimination rule in the MTS.

The introduction of new issues or Singapore Issues which include, government procurement, competition, investment, and trade facilitation into RTAs, especially in North-South RTAs, can be advanced to the MTS, and prove quite disadvantageous to

[316] UNCTAD has estimated that the actual share of imports from DCs receiving GSP treatment is only 17% to the EU, US and Japan markets combined, while a further 28% obtains duty free treatment under RTAs with the remaining 55% paying MFN rates. The low percentage for imports under the GSP is indicative of the impact of proliferating RTAs and yet DCs' imports have to face competition from other countries' imports. Gallagher P., *Guide to the WTO and Developing Countries,* (2000) 31.

[317] Bhagwati J, and Panagariya A., "Preferential trading areas and multilateralism – Strangers, friends, or foes" (n. 282 above).

[318] Bhagwati J, and Krueger A., *The Dangerous Drift to Preferential Agreements.* (n. 162 above).

[319] Sung calls this interest diversion. Park S., "Regionalism, open regionalism and Article XXIV GATT: Conflicts and harmony" (n. 99 above) 267

[320] For example, agriculture was an important part in the formation of the EEC, and, the EEC was more successful in resisting the sector's liberalisation in the MTN than its members would have individually done thus this stalled multilateral liberalisation. Schiff M, and Winters A., *Regional integration and development,* (n. 80 above) 229

[321] Hoekman B, and Kostecki M., *The political economy of the world trading system. The WTO and beyond*, (n. 268 above) 357

the South countries. The use of RTAs as templates to follow in the MTS is wrong because small weak DCs and LDCs accept them and this inevitably leads to the breakdown of the South coalition at the MTN against such issues.[322] Furthermore, Lawrence[323] critiques these Singapore issues, that they may become a pretext for protectionism that denies DCs access to international markets, as many DCs have limited capacities to implement the set standards, regulations and other policies in these new areas.

3.2.1.8- POLITICAL CONFLICT

Strengthening of regionalism may result in serious political or military conflict between regions or countries like in the past.[324] Hence, RTAs are viewed as a reoccurrence of protectionism which would more likely lead to war,[325] thereby causing an impediment to the MTS.

In a nutshell, several scholars[326] have highlighted the fact that RTAs are a stumbling block to the MTS. This study at the outset set out to analyse whether regionalism is an impediment to trade and development in the MTS, and to this end, since RTAs are two-faced, there is evidential value as discussed above to critique RTAs as an impediment to trade and development. However, the other side of the coin that regionalism is a spur

[322] This is particularly detrimental to DCs and LDCs because they do not have enough leverage to affect global trade talks but can only influence developed country policies indirectly through diplomacy or WTO rules especially if they act together thus the breakdown of the coalition of South countries impedes this purpose.

[323] Lawrence R., "Regionalism, multilateralism, and deeper integration: changing paradigms for developing countries," (n. 311 above) 41; In the WTO Report, these issues are also critiqued because they might also impede development in the MTS as different RTAs are likely to adopt different provisions concerning the same policy areas. Thus ensuring their consistency at the multilateral level will not only increase the transaction costs but also uncertainty as regards applicable rules which all tend to hamper trade. WTO, *World Trade Report* (n. 275 above).

[324] Regionalism in the past was characterised by territorial disputes, lack of mutual trust, rivalry, and conflict which normally escalated into war. For instance, it created tensions among member states especially if economic benefits were not shared equally in the RTA, which eventually led to political conflict like the US Civil War, the separation of western and eastern Pakistan which today are, Pakistan and Bangladesh, and the tensions in the EAC which ultimately led to the conflict between Tanzania and Uganda because of misunderstandings that involved large income transfers and growing divergence in incomes from the CET. Economic Commission for Africa, *Assessing Regional Integration in Africa,* (2004) 15 Available at http://www.uneca.org/aria1/ARIA%20English_full.pdf (accessed August 6, 2008).

[325] Mathis J., *Regional trade agreements in the GATT/WTO. Article XXIV and the internal trade requirement,* (n. 130 above) 5.

[326] Viner J., *The customs union issue,* (1950) 44; Bhagwati J., *The world trading system at risk,* (1991); Bhagwati J., "Preferential trade agreements: The wrong road," (1996) *27 (4) Law and Policy in International Business* 865; Bhagwati J, and Krueger A., "The dangerous drift to preferential agreements," (1995); Bhagwati J, and Panagariya A., "Preferential trading areas and multilateralism – Strangers, friends, or foes" in Bhagwati J, and Panagariya A., (eds.) The economics of preferential trade agreements, (1996); Kreuger A., "Free trade agreements as protectionist devices: Rules of origin," (1993) Working Paper 4352; Krueger A., "Free trade agreements versus customs unions," (1995) Working Paper 5084; Hoekman B, and Kostecki M., *The political economy of the world trading system. The WTO and beyond,*(2ed) (2001) 357; Bhagwati J., *Free trade today*, (2002) 110; Lawrence R., "Regionalism, multilateralism, and deeper integration: changing paradigms for developing countries," in Mendoza M, Low P, and Kotschwar B., *Trade rules in the making. Challenges in regional and multilateral negotiations.* (1999) 41.

to trade and development cannot be understated as well, as it has partly led to the economic boom of major trade regions, like the EC.

3.2.2- BUILDING BLOCKS

On the other hand, RTAs have been conceptualised as building blocks[327] to the MTS and therefore regarded as complementing further multilateral trade liberalisation. The WTO[328] analysed this in detail and concluded that:

> *"…to a much greater extent than is often acknowledged, regional and multilateral integration initiatives are complements rather than alternatives in the pursuit of more liberal and open trade. Regional integration agreements contain both higher and lower levels of obligation than the WTO. In the latter case, the WTO complements the liberalisation achieved at the regional level, while the converse is true in the former case."*

The OECD[329] also agrees with the WTO study and reinstates that regionalism has not been detrimental to the MTS but rather complementary. Many scholars[330] have concurred with the above analysis and explicitly stated that RTAs are building blocks to multilateralism. Their analysis on the positive impact of RTAs towards multilateralism is summarised here below.

[327] FTAs are seen by some scholars as building blocks of the MTS, because individual areas can ultimately be combined to bring down trade barriers between even larger areas. Goode W., *Dictionary of trade policy terms*, (n. 1 above) 58

[328] Chapter IV of the WTO independent study on multilateralism and regionalism. WTO, *Regionalism and the world trading system,* (n. 275 above) 56.

[329] OECD, *Regional integration and the Multilateral Trading System. Synergy and divergence,* (1995). This is also manifested in Paragraph 29 of the WTO, Doha Ministerial Declaration, (n. 1 above).

[330] Baldwin R., "Multilateralising regionalism: Spaghetti bowls as building blocks on the path to global free trade," (2006) *29 (11) The World Economy* 1451 – 518; Baldwin R., "A domino theory of regionalism," (1993) Working Paper 4465; Hudgins E., "Regional and multilateral trade agreements: Complementary means to open markets," (1995 - 96) *15 (2 -3) The CATO Journal,* 7; Summers L., "Regionalism and the world trading system" in Bhagwati J, Krishna P, and Panagariya A., *Trading blocs: Alternative approaches to analyzing preferential trade agreements.* (1999) 562; Young S., "Globalism and regionalism: Complements or competitors?" (1993) Policy Monograph 92-02; Bergsten F., "Competitive liberalisation and global free trade: A vision for the early 21st century," (1996) IIE Working Paper 96 - 15; Ethier W., "Regionalism in a multilateral world." (1998) *106(6) Journal of Political Economy*: 1214 – 45.

3.2.2.1- TRADE CREATION

RTAs generate trade creation in the MTS which is facilitated by the change to cheaper imports of RTA members from previously expensive imports of non-members, thereby facilitating the promotion of intra-regional trade.

Through RTAs eliminating internal barriers in a CU, this would lead to more trade between the RTA members as opposed to trade diversion therefore the trade creation effects were more important than the trade diversion effects. This is the case given the fact that RTAs build and increase the momentum towards free trade, which inevitably leads to the strengthening of the MTS or as simply put, are stepping stones on the way to a multilateral agreement.[331]

3.2.2.2- ECONOMIC DEVELOPMENT OF LESS DEVELOPED COUNTRIES

RTAs are stated to contribute to the economic development of less developed countries in that, they provide better market access for DCs and great trading leverage at MTN. Patterson,[332] also argues that RTAs have helped countries in Africa and Latin America to strengthen their bargaining position vis-à-vis major trading partners so as to '*better defend themselves against discriminatory effects of other regional groups*.' As such, DCs with multiple memberships in RTAs benefit greatly because they enjoy preferential access to all markets in the world in which they are party to RTAs while having open borders and such a system would progress to free trade.

[331] The OECD in its Policy Brief summarised the relationship between RTAs and the MTS to involve three elements which are all important to International trade relations and include: The extent the RTAs go beyond existing multilateral trade rules, the extent RTAs diverge from or converge with the multilateral system and RTAs' effects on third parties. OECD Policy Brief, "Regionalism and the Multilateral Trading System," (2003) available at http://www.oecd.org/dataoecd/23/12/8895922.pdf (accessed on March 6, 2009).
[332] Patterson G., *Discrimination in International Trade: The Policy Issues,* (1966) 147.

3.2.2.3- COMPETITIVE MULTILATERAL LIBERALISATION

Baldwin[333] illustrates, in his theory on 'domino regionalism' the benefit of being included in a RTA as reducing the costs of exclusion. According to his theory, there is a spread of liberalisation, which is however strengthened when the multilateral progress loses momentum.

Additionally with RTAs, liberalisation can be successfully transmitted to the MTN, because the foundation of the liberalisation initiatives has been facilitated by the economic agents of the countries,[334] which pave way for eventual multilateral liberalisation.[335]

Besides the aforesaid, RTAs are not only considered to provide blueprints for future multilateral liberalisation in complex and new areas such as government procurement, anti-dumping and investment rules, before being addressed by the WTO, but are also used to exert pressure on trading partners by seeking forum in a limited bloc if an issue has been rejected at the MTN[336] or used to exert pressure for further liberalisation at multilateral negotiations.[337] As such, RTAs act as a spur to the MTS.

[333] Baldwin R., "A domino theory of regionalism," (1993) Working Paper 4465, Baldwin invented the terminology in referral to the decision of the three Scandinavian countries' choice to seek accession to the EU membership in the late 1980s after three decades of resistance and though the countries were politically uncomfortable with the EU, the economic pressures from the Single Market programme were overwhelming. Similarly, is Canada's choice to extend CUSFTA to Mexico because of the US-Mexico trade talks. However, the Domino theory assumes that countries are of equal size and are identical in every respect except for the goods in which they have comparative advantage. The assumption is normally not right depending on the RTA members involved and yet there are also key issues to be considered like the conditions under which accession is granted and whether the parties privy to the RTA have vested interests for trade liberalisation.

[334] Park S., "Regionalism, open regionalism and Article XXIV GATT: Conflicts and harmony" (n. 99 above) 268, Economic agents such as bureaucrats, government, consumers and entrepreneurs.

[335] Lawrence additionally states that a RTA can build up the political support for liberalisation by doing it gradually for example it might reduce the number of import-competing sectors and increase the number of exporters, which could in turn tilt the domestic political debate in favour of full liberalisation. Lawrence R., "Regionalism, multilateralism, and deeper integration: changing paradigms for developing countries," (n. 311 above) 40.

[336] Hoekman B, and Kostecki M., *The political economy of the world trading system. The WTO and beyond,* (n. 268 above) 351. For instance, the US negotiated FTAs in the 1980s because of dissatisfaction with the 1982 refusal of GATT partners to initiate a MTN that covered services trade.

[337] Schiff and Winters while acknowledging other authors indicate that the formation of the EEC led directly to the Dillon and Kennedy Rounds of GATT negotiations as the US sought to mitigate the potential trade diversion in the EEC, secondly the Tokyo Round where the US' desire for a round was induced by the EEC enlargement to include free trade with EFTA and the restrictiveness of the Common Agricultural Policy (CAP) and the Uruguay Round in which the EU was induced by the 1993 Seattle APEC summit to finally concede on agriculture and conclude the Uruguay Round. Schiff M, and Winters A., *Regional integration and development,* (n. 80 above) 229 – 230. WTO, World Trade Report (n. 275 above) 64 acknowledges the example of EC to have induced the US to agree to the early Rounds and indicates that regionalism can be catalyst to further liberalisation at the multilateral level through the process of competitive liberalisation which could help eliminate trade barriers and innovate policies in such areas as investment rules and market regulations.

3.2.2.4- POLITICAL SECURITY

Evidently, political security as a benefit of RTAs is premised on the fact that most RTAs are formed to ease political or military tensions[338] while some RTAs have yielded these results through their creation.[339]

Therefore, given the two diverging views on the impact of RTAs on the MTS and the lack of consensus about their overall effect, RTAs have so far not undermined the MTS.[340] Nevertheless, RTAs have the potential to undermine the role of the WTO and multilateralism and hence pose an inherent risk to the MTS, especially with the apparent discord on the increasing complexity of RTAs. Therefore, though regionalism can spur trade and development in the MTS, it is no substitute for the MTS. Consequently, the MTS should be strengthened as a potent force in trade liberalisation rather than RTAs, since it is more transparent, predictable, and non-discriminatory than the RTAs presented in a spaghetti bowl created with overlapping memberships.

In light of the foregoing, an analysis to revise RTA provisions is considered in lieu of establishing whether the rules are sufficient to restrict the prevalence of regionalism taking into consideration the impact that RTAs have on the MTS.

3.3- ANALYSIS TO REVISE REGIONAL TRADE AGREEMENT PROVISIONS

The scathing critique of the RTA provisions in the GATT/WTO for their failure to prevent the prevalence of RTAs has generated several recommendations and proposals to revise and/or amend the provisions that exempt the formation of RTAs in the MTS. The RTA provisions' controversy was mainly underlined by the emergence of the concept of

[338] For example, for the EC, Germany versus France, MERCOSUR, Argentina versus Brazil. See (n. 68 above).
[339] In the WB analysis, doubling trade between two countries lowers the risk of conflict between them by about 17%. Schiff M, and Winters A., *Regional integration and development,* (n. 80 above) 48.
[340] The WB indicates that there is no strong evidence of significant trade diversion. The World Bank, *Global economic prospects. Trade, regionalism and development*, (n. 78 above) And yet both types of liberalisation can be achieved simultaneously and complementary.

open regionalism[341] considering its potential contribution to multilateralism through reliance on the principle of non-discrimination.

Critics[342] have been labelling Article XXIV as vague, imprecise and an ineffective provision in stalling RTAs and their discriminative effects, thereby it creates a loophole in Article I, the unconditional MFN principle. Yet, most of these criticisms levied against Article XXIV in particular were resolved and clarified in the Understanding on Article XXIV, as discussed in Chapter 2 and consequently, these provisions made it easier to assess whether RTAs meet Article XXIV rules.

However, even though the Understanding clarifies several issues on Article XXIV, questions are still posed on whether the addendum to Article XXIV is sufficient to curb regionalism and strengthen the MTS, or there is still need for revision.[343] This need was clarified at the Doha Declarations.[344] Thus, there have been proposals put forward to revise the RTA provisions by scholars[345] and by WTO member states[346] as well. Despite these proposals being noble, this study will however evaluate their real impact in order to assess their effectiveness.

[341] Park S., "Regionalism, open regionalism and Article XXIV GATT: Conflicts and harmony," (n. 99 above) 275

[342] Haight F., "Customs unions and free trade areas under GATT," (1972) *Journal of World Trade Law* 391 – 410 describes Article XXIV as *"…probably the most abused in the whole agreement and the heaviest cross the GATT has to bear."* Dam K., "Regional economic arrangements and the GATT: The legacy of a misconception," (1963)*30 University of Chicago Law Review* 615 – 665; Dam K., *The GATT: law and international economic organisation,* (1970); Lortie P., *Economic integration and the law of GATT*. (1975).

[343] As the 1997 "checklist" of systemic issues under XXIV prepared by the WTO CRTA reveals that problems still continued to surface and plague Article XXIV despite the Understanding which included problems of interpretation. For example in evaluating the general incidence of duties in a CU, since the "before versus after" tariff test, the assessment is based on averages and therefore ignores "the fact that exports of third parties might be concentrated in a few sectors." WT/REG/W/16 (May 26, 1997) 3.

[344] Paragraph 29 of the WTO, Doha Ministerial Declaration. (n. 1 above).

[345] McMillan J., "Does regional integration foster open trade? Economic theory and GATT's Article XXIV" in Anderson K, and Blackhurst R., (eds.) *Regional integration and the global trading system,* (1993); Mathis J., *Regional trade agreements in the GATT/WTO. Article XXIV and the internal trade requirement*, (2002); Hudec, R and Southwick, J. "Regionalism and WTO rules: Problems in the fine art of discriminating fairly," (1999); Bhagwati J., "Regionalism and multilaterism: An overview," in De Melo J, and Panagariya A., (eds.) *New Dimension in Regional Integration,* (1993); Pomfret R., *The economics of regional trading arrangements*, (1997); Frankel, J and Wei, S. "Open regionalism in a world of continental trading blocs." (1998) IMF Working Paper 98 – 10.

[346] For example Malaysia on behalf of ASEAN members under WT/GC/W/188, Australia WT/GC/W/183, Hong Kong, China WT/GC/W/174, Hungary WT/GC/W/213, Jamaica WT/GC/W/369, Japan WT/GC/W/214, Korea WT/GC/W/171, Romania WT/GC/W/317 and Turkey WT/GC/W/219. These proposals were submitted in Phase 2 of the Preparatory Process for the preparations of the 1999 Ministerial Conference. JOB(99)/4797/Rev.3(6986) 18 November 1999. And, earlier proposals made by the EU and Australia.

3.3.1- THE ENFORCEMENT AND SURVEILLANCE ISSUE

Even with the clarifications of the Understanding, it is of great magnitude that the GATT/WTO has not been effective in curbing the problem of the proliferating RTAs, which are mainly incompatible with its provisions.

The granting of an Article XXIV-based waiver of the MFN rule is predicated on a FTA or CU plan that meets specified criteria. Abbott[347] proposes that the crucial problem of proliferating RTAs can only be controlled by concretely addressing the reform of the existing review mechanisms. These mechanisms are not designed or applied to significantly inhibit regionalisation of the world trading system because the strict rules contained in Article XXIV are not enforced.[348] For example, many RTAs exclude sensitive sectors like agriculture, thus violating the SAT principle in Article XXIV. However, they have not been rejected by the WTO. Hong Kong China,[349] Hungary,[350] Japan,[351] Korea,[352] Romania,[353] and Turkey[354] all stress the importance to improve and facilitate the review mechanisms swiftly pursuant to the existing WTO rules because it is necessary for the credibility of the MTS.

Moreover, to enforce Article XXIV, the WTO needs a mechanism for timely notification of the existence of RTAs, even those under consideration, to assess their compatibility with the rules. Though the Understanding has stipulated the transition time for interim agreements to form CUs or FTAs,[355] this rule is not applied as some agreements have such long periods for implementation that they impliedly justify discriminatory treatment without full internal liberalisation for extensive periods. Furthermore, there is uncertainty

[347] Abbott F., "North American economic integration: Implications for the WTO, the EU and Asia," (n. 87 above) 81
[348] Finger points out that many agreements between DCs are not even close to complying with the GATT rules at all. Finger J., "GATT's influence on regional arrangements" in De Melo J, and Panagariya A., (eds.) *New Dimension in Regional Integration,* (1993).
[349] WT/GC/W/174
[350] WT/GC/W/213
[351] WT/GC/W/214
[352] WT/GC/W/171
[353] WT/GC/W/317
[354] WT/GC/W/219
[355] Understanding on Article XXIV:5 paragraph 3. This rectified the uncertainty caused in Article XXIV: 7 (a) of the GATT.

as to when the members should notify the WTO of the RTAs.[356] These issues all result from the lack of proper rules for the WTO's review and enforcement of Article XXIV which have greatly contributed to the gap between the number of RTAs that exist and those that are actually notified to the WTO.[357] The deficiency in the rules is further encouraged by the fact that there are no consequences for members' failure in abiding by Article XXIV.

Therefore, without reforming the existing review mechanisms, this complacency will be carried on and is largely the cause of the persistence of trade diversion in RTAs because of failure to conform to the required rules.

However, as already indicated in the preceding chapter, efforts to improve the enforcement and surveillance methods are already underway through the Transparency mechanism for RTAs, which was adopted on 14 December 2006.

3.3.2- THE 'SUBSTANTIALLY ALL TRADE' RULE

The SAT rule has been a potent force used to ridicule Article XXIV.[358] The main discord on the SAT rule is its interpretation: whether a quantitative approach requiring a statistical benchmark or qualitative approach of encompassing all sectors or major sectors in the RTA should be adopted.

[356] In practice, most RTAs are in force before they notify the WTO of their existence for example the WTO was notified two months later after the RTA between EU and Turkey was effected. The debate here is normally between WTO members that favour multilateral liberalisation who state that notification should be prior to the entry in force of the RTA against those that favour RTAs. The latter argue that in regard to complexities and political/legal difficulties that might arise in a RTA's ratification, notification of RTAs should be undertaken on a case-by-case basis. WTO Negotiating Group on Rules, *Compendium of Issues Related to Regional Trade Agreements.*. August 1, 2002, TN/RL/W/8/Rev. 1 (02-4246) Para. 1.1.1, 5.

[357] The danger of not notifying RTAs in existence to the WTO not only drags the MTS but is also costly to the WTO as explained by Mr. Boniface Guwa Chidyausiku of Zimbabwe, the then Chairman of the CRTA in 2002 while urging the WTO members to ensure timely notifications of the RTAs. He expressed that recurrent delays in providing the RTA documentation for examination to the CRTA causes difficulties for the CRTA in scheduling its meetings, adds to the delay between first round examinations of the proliferating RTAs and increases on the costs incurred by the WTO on unused resources like interpretation services. WTO. Report of the Committee on Regional Trade Agreements to the General Council. (2002) WT/REG/11, No. 02-6517, November 25, 2002, 2

[358] The WTO CRTA created in 1996 to check the proliferation of RTAs amidst the mounting fear that RTAs might undermine the MTS took cognisance of this fact. It noted in 1997 that reviews of RTAs since the Uruguay Round indicate that the question of how to interpret the SAT requirement have been raised repeatedly within virtually the same parameters as before the Round. WT/REG/W/16 (May 26, 1997), 9. Nevertheless, there is uncertainty whether it refers to the proportion of actual trade covered or to the inclusion of all major trade sectors of the economy.

Analysts such as Bhagwati[359] have criticised the requirement of liberalising SAT in RTAs because the provision is ambiguous and needs clarity on how much 'all' tantamounts to 'substantially all trade'. Bhagwati proposes the qualitative approach, that the SAT provision be amended to read liberalisation of 'all the trade' as a way of preventing RTA members' exclusions in sensitive sectors such as agriculture and steel, which encourages discrimination and impedes DCs' development in North-South RTAs.

Australia[360] as well, urges that the SAT rule should require RTA members to include all sectors.

On the other hand, Turkey has proposed a quantitative approach for RTAs to comply with the SAT rule,[361] with Japan and Hong Kong as well, proposing 95% of intra-RTA trade liberalisation while advocating for a strict interpretation for 'substantial' in the SAT rule whilst the EU[362] had also earlier proposed a quantitative indicator of 80%.[363]

Schiff and Winters[364] have advocated for 95% after 10 years and 98% after 15 years while, Frankel[365] proposes 80% or 90% as an alternative to the SAT rule. His economics analysis underlines that Bhagwati's proposal is too ambitious and idealistic yet even with the total elimination of trade restrictions, its overall impact of increasing welfare would still be unknown.

However, these proposals have drawbacks. Sung[366] analyses that Bhagwati's proposal would facilitate unfair treatment between the existing RTAs and new RTAs if

[359] Bhagwati J., "Regionalism and multilaterism: An overview," in De Melo J, and Panagariya A., (eds.) *New dimension in regional integration.* (1993) 14.
[360] Australia's intent was for the EU to include its Agriculture sector. WTO, Negotiating Group on Rules, *Submission on Regional Trade Agreements by Australia.* TN/RL/W/15, July 9, 2002. The EU counter argued this proposal on the basis of the language used in the SAT rule, that the word 'substantially' does not obligate total liberalisation of all trade.
[361] WTO, Negotiating Group on Rules, *Submission on Regional Trade Agreements, Paper by Turkey,* TN/RL/W/32, No. 02-6502, 3
[362] The EU's proposal was based on initiating a 'balancing approach' in which a RTA's increase of discriminatory trade barriers in one sector like agriculture would be offset by the liberalisation of another sector given that non-RTA members would be 'on the whole' better off after the RTA and in accordance with the provisions. Cho S., "Breaking the barrier between regionalism and multilateralism: A new perspective on trade regionalism" (2001) *42 Harvard International Law Journal* 419, 441.
[363] GATT, 6th Supp. BISD 70, 99 (1958)
[364] Schiff M, and Winters A., *Regional integration and development*, (n. 80 above) 253. They state that the quantified indicator needs to be high because the trade restrictions that countries maintain, constrain trade.
[365] Frankel J., "Regional trading blocs," (1997).
[366] Park S., "Regionalism, open regionalism and Article XXIV GATT: Conflicts and harmony," (n. 99 above) 278.

implemented and yet, its outlook is narrowed only to liberalisation of trade in RTAs, which could lead to the sidetracking of other aspects and effects of RTAs, for instance; deep integration. On Frankel's proposal, Sung,[367] points out other factors that totally cripple it. For instance, identifying the product lines for which the specified percentage of either 80% or 90% of tariffs to be eliminated on all trade is a dilemma because trade volume in one sector is a result of various factors influencing trade relations. However, this is irrespective of the market shifts of demand and supply which also affect the trade flows differently and thus would make it improbable to conform to a specified percentage. Cho[368] stresses further that the quantitative indicator of 80% would result in substantial trade diversion since members like the EU would expand trade barriers in sensitive sectors like agriculture, where DCs have a comparative advantage.

Lawrence[369] and Mathis[370] however vouch for Article XXIV; stating that Article XXIV prevents countries from negotiating agreements that maximise trade diversion and minimise internal adjustment by liberalising trade only in products where members compete with non-members rather than each other. The SAT rule therefore minimises trade diversion and reinforces the basic MFN principle by preventing countries from applying selective liberalisation.

A closer analysis of the proposals would call for a strict interpretation of the SAT rule taking into consideration the different levels of development of regional members in RTAs.

[367] Park S., "Regionalism, open regionalism and Article XXIV GATT: Conflicts and harmony," (n. 99 above) 278 – 279.
[368] Cho, S. "Breaking the barrier Between Regionalism and Multilateralism: A New Perspective on Trade Regionalism." (n. 362 above) 441.
[369] Lawrence R., "Regionalism and the WTO: Should the rules be changed?" (n. 24 above) 47.
[370] Mathis J., *Regional trade agreements in the GATT/WTO. Article XXIV and the internal trade requirement*, (n. 130 above) 2 - 5, 234 – 239.

3.3.3- THE 'NOT ON THE WHOLE HIGHER' RULE

More controversial and riddled is Article XXIV:5[371] which in principle concerns the trade diversion effects to non-members in a RTA. In essence, this is because RTAs discriminate against non-members, leading to a reduction of demand for non-members' products despite external tariffs not being raised. Therefore, although the GATT/WTO provides compensation in case of raising external tariff rates, it adequately fails to address such trade diversion and ignores the impacts that RTAs would have on non-members despite not raising external tariffs.

McMillan[372] proposes a way of curbing trade diversion effects in the RTAs through designing external barriers in the RTA so that the trade volume with non-members remains constant at the pre-RTA level. In so doing, a corresponding reduction of external barriers for interim agreements leading to CUs or FTAs which contain preferential market access provisions for member countries would be required.

McMillan's proposal is however impracticable and thus not enforceable as law because of the uncertainty involved in fostering the proposal such as the likely extent of trade diversion caused by the RTA, the compensation to be paid prior to the agreement and ascertaining the trade diversion effects of the RTA from other economic changes.[373] Moreover, even though a reduction of external tariffs is desirable in global liberalisation, it is only dependent on the open minded nature of the RTA members; otherwise it infringes the principle of state sovereignty.

Additionally, Bhagwati[374] proposes that the lowest pre-union tariff be adopted as a CET in the case of a CU. Essentially, this proposal would eliminate the effects of trade diversion and confine the impact of RTAs to trade creation, thereby leading to

[371] The interpretation of the phrase for CUs that duties and other barriers to imports from outside the Union may not be on the whole higher or more restrictive than those preceding the establishment of the CU became a source of great disagreement among contracting parties. Hoekman B, and Kostecki M., *The political economy of the world trading system. The WTO and beyond,* (n. 268 above) 352.
[372] McMillan J., "Does regional integration foster open trade? Economic theory and GATT's Article XXIV," in Anderson K, and Blackhurst R., (eds.) *Regional integration and the global trading system,* (1993) 293.
[373] Yet this is complex because a reduction in imports from the rest of the world may be influenced by other factors like inflation. Park S., "Regionalism, open regionalism and Article XXIV GATT: Conflicts and harmony" (n. 99 above) 280.
[374] Bhagwati J., "Regionalism and multilateralism: An overview." (n. 359 above) 15 – 16.

improvement of welfare for the RTA members involved. Furthermore, it would provide an incentive for the RTA members to have open membership to include other important trading partners. Thus, this proposal would increase the possibility towards open regionalism which would eventually lead to the strengthening of the MTS. However, the rule would make countries with low tariffs less attractive partners for a CU, and as well, it would lead to the discrimination of RTAs with low tariffs because high tariff countries would be more inclined to form CUs between themselves as well, thereby intensifying the trade diversion effect. This proposal also overlooks the fact that most RTAs are in the form of FTAs.

3.3.4- THE 'OTHER RESTRICTIVE REGULATIONS OF COMMERCE' RULE

Article XXIV:8 on ORRCs and Article XXIV:5 and 8 on ORCs which refer to NTBs, have been the subject of speculation in the GATT/WTO on what they entail.[375] WTO members, have however, argued that this should focus on which measures lead to trade restriction on third parties rather than specifying measures under the purview of ORRCs.[376]

Furthermore, speculation has been placed on whether rules of origin should be included in ORCs or the alternative, ORRCs.[377] Schiff and Winters[378] have proposed that ORCs should be revised to cover the effects of rules of origin on excluded countries and some working parties of GATT/WTO have also argued that rules of origin should be considered within this ambit. However, others have strongly asserted the opposite view.[379]

[375] Schiff and Winters identify that several exceptions to this requirement are indicated explicitly though however other barriers are not like anti-dumping duties and safeguard measures. Schiff M, and Winters A., *Regional integration and development*, (n. 80 above) 248. However there have been questions posed as to what ORRCs entail, whether it entails trade policy measures like rules of origin, customs users' fees, variable levies or quantitative restrictions.
[376] The measures the WTO members identified included anti-dumping duties, preferential rules of origin, technical standards, subsidies and countervailing measures. (WT/REG/M/4, para.60). Crawford J, and Laird S., "Regional trade agreements and the WTO," (n. 184 above) 12 – 13.
[377] Mathis J., *Regional trade agreements in the GATT/WTO. Article XXIV and the internal trade requirement,* (n. 130 above) 168, 251.
[378] Schiff M, and Winters A., *Regional integration and development,* (n. 80 above) 253.
[379] For example, a NAFTA representative in the working party reviews of NAFTA. WT/REG4/M/2 (February 21, 1997) 10.

Hudec,[380] referring to the drafters' intent,[381] argues that this proposal is impracticable. For example, in relation to a CU, the rule is unfeasible because the rules of origin should not be higher or more restrictive after the creation of the CU than before. However, before the formation of the CU, there are no rules of origin as the preferential trade tariffs were non-existent. Moreover, he argues that it is also impractical under Article XXIV:5 (b) for FTAs to impose "higher or more restrictive" duties and regulations of commerce against the trade of non-members, because WTO members use several different methodologies for applying rules of origin.[382]

Mathis[383] however, infers that rules of origin should be considered as ORRCs for the purpose of qualifying under the SAT condition, since there is no requirement for 'pre-formation' comparison other than the duty to eliminate ORRCs.

Therefore, it is proffered that rules of origin cannot be classified under ORCs but under ORRCs; however, this is not stated in the Article XXIV scope. The WTO should consequently clarify the rule on what ORRCs entails as well as ORCs but more specifically, the methodology used to measure these NTBs.

3.3.5- THE CUSTOMS UNION AND FREE TRADE AREAS' TERMS

CUs and FTAs are dissimilar and majorly differ in the application of their external tariffs. For instance, unlike CUs, FTAs do not have a CET applied by all its members and are thus normally faced with trade deflection if rules of origin are inoperative, causing imports from outside the FTA to be brought into the low tariff member countries and then transported duty free to members with higher tariffs.[384]

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[380] Hudec R, and Southwick J., "Regionalism and WTO rules: Problems in the fine art of discriminating fairly," (n. 291 above) 57 – 60; see also, Mathis J., *Regional trade agreements in the GATT/WTO. Article XXIV and the internal trade requirement*, (n. 130 above) 253.

[381] The Uruguay Round negotiators considered the question of rules of origin under ORCs for purposes of Article XXIV but were unable to agree on the language clarifying their treatment under Article XXIV or any new substantive disciplines governing them in RTAs. See Background Note by the Secretariat, "Systemic issues related to 'Other Regulations of Commerce,'" WT/REG/W/17/Rev.1 (October 31, 1997) and MTN.GNG/NG7/W/13 (August 11, 1987) 5 indicating rules of origin as a setback in the application of Article XXIV.

[382] If rules of origin were 'regulations of commerce' under this provision it would mean that no rule of origin for any product could be higher or more restrictive under the FTA than before. Hudec R, and Southwick J., "Regionalism and WTO rules: Problems in the fine art of discriminating fairly," (n. 291 above) 58.

[383] Mathis J., *Regional trade agreements in the GATT/WTO. Article XXIV and the internal trade requirement,* (n. 130 above) 253.

[384] Park S., "Regionalism, open regionalism and Article XXIV GATT: Conflicts and harmony" (n. 99 above) 281.

Lawrence[385] suggests that Article XXIV's concentration on tariff barriers has incapacitated the rules from capturing trade diversion which may occur when FTAs are formed through restrictive rules of origin.

Notably, FTAs carry the burden of protectionist measures improvised through rules of origin. Krueger[386] and Bhagwati[387] therefore, have called for the banning or elimination of FTAs from Article XXIV, which provision should only be premised on CUs because of the intricacies caused by the rules of origin.[388] Moreover, Krueger has further given an impetus to the proposal to ban FTAs based on the fact that rules of origin normally give member firms a vested interest in maintaining protectionism and thereby not only undermine the MTS, but also reduce the incentive of a FTA to engage in external liberalisation.

This proposal is further justified by the fact that it would reduce the number of RTAs[389] in place because countries would not want to give up their independent trade policies by electing to form a CU instead of a FTA.

The banning of FTAs is however an extremely severe recommendation to solve the complex problem posed by rules of origin in RTAs. Yet, there are other less drastic measures like adopting harmonised preferential rules of origin for all products which measure Krueger clearly overlooks. Moreover, to further justify the above argument, Lawrence[390] and Sung[391] point out the relevance of FTAs vis-à-vis CUs, in that FTAs can reduce the likely effects of trade diversion when members in a FTA lower their barriers for non-members. FTAs can therefore create incentives for facilitating reduction

[385] Lawrence R., "Regionalism and the WTO: Should the rules be changed?" (n. 24 above) 49.
[386] Krueger A., "Free trade agreements versus customs unions" (1995) 13 – 14.
[387] Bhagwati J., "Regionalism and multilaterism: An overview" (n. 359 above) 16.
[388] For this basis, Krueger stated; *"… because rules of origin … extend the protection accorded by each country to producers in other FTA member countries … they can constitute a source of bias toward economic inefficiency in FTAs in a way they cannot do with customs unions*."
[389] Most RTAs in place are FTAs.
[390] Lawrence R., "Regionalism and the WTO: Should the rules be changed?" (n. 24 above) 50 – 51 who elaborates that even if the rules of origin were not protectionist in nature, their existence would still require customs officials to inspect all products crossing the internal borders of RTA members, and he argues further that CUs are also problematic considering that they could change their antidumping rules in a way that would raise external barriers for instance the European Union.
[391] Park S., "Regionalism, open regionalism and Article XXIV GATT: Conflicts and harmony" in (n.99 above) 281

in external barriers on the basis that other non-members in a FTA can also carry out reciprocal liberalisation.

3.3.6- THE ENABLING CLAUSE

The Enabling Clause, which permits DCs to form RTAs with less stringent rules than Article XXIV, is another significant source of disarray which has also been included in the proposals to revise RTA provisions. The Enabling Clause essentially removes the 'substantially all' test and allows for preferences between DCs.[392] The particular conflict of the provision is its applicability. It raised concerns about which DCs are eligible and permitted to make use of this provision. As a result, this caused WTO developed members and MERCOSUR's member states to be at loggerheads on the status of notifying MERCOSUR to the GATT under Article XXIV or under the Enabling Clause, in which Argentina, Brazil and Uruguay argued for the latter while the developed countries argued for the former.[393] However, an Understanding worked out by the Chairman of the Committee on Trade and Development provided that the MERCOSUR agreement would be examined "in light of the relevant provisions of the Enabling Clause and of the GATT 1994, including Article XXIV."[394]

However, considering the fact that DCs are adopting outward looking development strategies as a means of development, their stand has changed and refocused on Article XXIV of the GATT as an instrument to lock in policy reforms.[395] Moreover, this has greatly reduced the tensions between developing and developed members of the WTO.[396]

Malaysia[397] has submitted a proposal seeking for the strict compliance of the Enabling Clause in relation to the preferential treatment accorded by developed countries to DCs.

[392] Paragraph 2 (c) of the Enabling Clause. The full removal of internal barriers is therefore not required.
[393] WTO. *Regionalism and the World Trading System.* (n. 275 above)
[394] WT/COMTD/5/rev.1 (October 25, 1995)
[395] Crawford and Laird give an example of Mexico, which has attained development through encompassing the policies in NAFTA, notified under Article XXIV. Crawford J, and Laird S., "Regional trade agreements and the WTO." (n. 184 above) 17
[396] Park S., "Regionalism, open regionalism and Article XXIV GATT: Conflicts and harmony" (n. 99 above) 282.
[397] The proposal was submitted by Malaysia on behalf of the ASEAN members under WT/GC/W/188.

The proposal suggests that an appropriate body be appointed to monitor the compliance of the preferential treatment under the Clause which should be generalised, non-discriminatory and non-reciprocal in nature.

It is without a doubt that the RTA provisions have legal effect to curb the increasing RTAs and downplay their impact to favour the MTS,[398] but this can only be done in accordance with the specified provisions and the necessary multilateral enforcement surveillance to check the RTAs that are not in conformity with the provisions. Therefore, the RTA provisions should be revised with regard to the enforcement and surveillance mechanism, which needs to be reformed to check incompatible RTAs and rigorous enforcement of RTA provisions not only by the RTA members but by the CRTA as well.[399] Additionally, rules on SAT, ORRCs and ORCs should be clarified. The SAT rule should also be revised to reflect the development component, and cater for DCs' interests in North-South Agreements.

The RTA provisions have further been expounded on by the DSU.[400] Thus the renowned submissions to revise some of the Articles because of their ambiguity have been laid to rest to an extent by the interpretations that both the Panel and the AB Reports have adopted with regard to the provisions. These clarifications are further advanced here below.

[398] This is because RTA provisions are said to have deterred potentially discriminatory arrangements like in 1932 the UK and the US refused to waive their MFN rights preventing the implementation of the Ouchy Convention a forerunner of the Benelux CU, and moreover, the RTA provisions have influenced the structure of some RTAs like the US-Canadian and the US-Israeli agreements. Schiff M, and Winters A., *Regional integration and development*, (n. 80 above) 259.

[399] The CRTA's role is of great importance but this role has been undermined because of its failure in verifying the compliance of notified RTAs thus causing the complete failure of the examination mechanisms of RTAs. WTO, Negotiating Groups on Rules. *Compendium of Issues Related to Regional Trade Agreements.* August 1, 2002, TN/RL/W/8/Rev.1 (02-4246). This has led to the critic of the work carried out by the CRTA for instance the 2002 Director General of the WTO, Dr. Supachai Panitchpakdi described the CRTA as being 'moribund' in his speech, "The Doha Development Agenda: Challenges Ahead." (n. 262 above).

[400] Article 7.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) mandates the Panel to *"address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute"* while Article 11 further mandates the Panel to make *"an objective assessment of …the applicability of and conformity with the relevant covered agreements….."*

3.4- INTERPRETATIONS OF REGIONAL TRADE AGREEMENT PROVISIONS BY THE DISPUTE SETTLEMENT BODY

In view of the proposals to revise the RTA provisions in the GATT/WTO, being mainly advanced by economists with not much legal perspective in mind,[401] the interpretation adopted by the Panel and AB not only reinforces the legal intended aspects of the RTA provisions, but clearly interpretes the provisions which seem vague or ambiguous. The case analysis reflects that the RTA provisions are not vague and make economic sense if implemented in line with the letter and spirit of the GATT/WTO but however, as indicated earlier, the RTAs are enlisted on the DDA to be revised or clarified. The interpretations afforded to the RTA provisions by the DSU are highlighted below.

In reference to the term "general incidence" of duties, the AB, while considering the requirements for the WTO compatible CUs, noted in the Turkey-Textiles case[402] that the term 'general incidence' of duties referred to the applied rates of duties[403] as indicated in paragraph 2 of the Understanding on Article XXIV.[404]

The Panel in the Turkey – Textiles case, defined the terminology ORCs, which the AB did not rebut. The Panel referred to ORCs to mean any regulation having an impact on trade within the WTO fields, for example, sanitary and phytosanitary, customs valuation, anti-dumping, technical barriers to trade, environmental standards and export credit schemes.[405]

On the issue of application of ORCs, on whether a new CU member can apply ORCs already applied by other RTA members, the Panel, in the same case, noted that Article XXIV:8 (a) (ii) provides flexibility in the SAT rule, as parties are required to apply

[401] Mathis is of the view that though the economists view Article XXIV as irrational economic wise, it however might have been the drafters' intent for the Article to embody a legal and political view. Mathis J., *Regional trade agreements in the GATT/WTO. Article XXIV and the internal trade requirement*, (n. 130 above) 5.
[402] WTO, Turkey – Restrictions on Imports of Textile and Clothing Products, Report of the Panel, 31 May 1999, WT/DS34/R, Report of the Appellate Body, 22 October, 1999, AB-1999-5, WT/DS34/AB/R. See (n. 227 above)
[403] WTO, *WTO analytical index: Guide to WTO law and practice,* (1ed.) (2003) 392
[404] AB Report on Turkey – Textiles, Para 53
[405] Panel Report on Turkey – Textiles, para 9.150, the Panel also indicated that ORCs is an evolving concept, given the dynamic nature of RTAs.

substantially the same duties and ORCs.[406] The AB also agreed with the Panel and stated that ORCs in a new CU should not be more trade restrictive than the constituent countries' previous policies. The AB further acknowledged the difficulty of quantification and aggregation of regulations of commerce other than duties embodied in paragraph 2 of the Understanding on Article XXIV. However, the AB expounded on this and stated that it might entail a requirement on the examination of individual measures, regulations, products covered and trade flows affected.[407] The AB further agreed with the Panel that the assessement in this regard was an 'economic' test for determining whether specific CUs are compatible with Article XXIV.[408]

The much criticised Article XXIV:8 for its ambiguity and lack of clarity was also tackled by the AB in the Turkey-Textiles case, where the AB addressed the internal trade aspect of a CUs as set out in Article XXIV:8 (a) (i). The AB paid heed to the fact that there is no consensus on the interpretation of SAT by both the GATT/WTO members but noted that it does not imply *all* trade and neither does it imply *merely* some trade. However, in consideration of the exceptions under Article XXIV:8 (a) (i), the AB concurred with the Panel that these terms offered some flexibility to CU members in liberalising their internal trade. The AB however, stressed that the degree of flexibility was limited by the requirement that duties and ORRCs should be eliminated in respect to substantially all internal trade.[409]

Moreover, the AB also further clarified Article XXIV:8 (a) (ii) that constituent members of a CU apply 'substantially the same' duties and ORCs to their external trade with third countries. Additionally, the AB agreed with the Panel that the term 'substantially the same' has both 'qualitative and quantitative components' but also offered a 'certain degree of flexibility.'[410]

[406] The Panel indicated that Article XXIV did not provider a cover for WTO obligations and then went on to state that other WTO-compatible alternatives could have been adopted by Turkey in order to fulfill this obligation. Panel Report on Turkey – Textiles, para. 9.163
[407] AB Report on Turkey – Textiles, para. 54
[408] AB Report on Turkey – Textiles, para. 55; while taking note of the Panel Report, para. 9.121
[409] AB Report on Turkey – Textiles, Para 48
[410] AB Report on Turkey – Textiles, Para 50

However, it is to be noted that though the AB emphasizes that RTA members should retain a certain degree of 'flexibility' in relation to satisfying these requirements of eliminating duties on SAT within the union, and to apply 'substantially the same' external duties to non-member states under Article XXIV, it has still done little to clarify their actual content.[411]

In a nut shell, the GATT/WTO rules governing RTAs have taken on significant importance and have greatly contributed to the understanding of the RTA provisions.[412] This has been enforced by the DSU's role in bringing discipline in case of violation of the rules by RTA members as well as clarity and interpretation of ambiguous provisions. However, this role is limited because affected third parties like DCs may find it quite expensive to bring a complaint before the DSU concerning these RTA violations.

Therefore, it is now indisputable that RTA provisions play a vital part in the proliferation of RTAs in the MTS, if the provisions are not fully enforced or implemented in accordance with the GATT/WTO disciplines. Furthermore, RTAs cannot conflict with WTO commitments if they conform to the RTA provisions. Thus in this view, the dynamic operation of CUs and FTAs in the WTO should be analysed in the MTS vis-a-vis the application of the WTO obligations. This study therefore undertakes a brief analysis of the EC's operation in the MTS vis-a-vis its multilateral obligations, with particular emphasis on its external policies of integrating African countries into the MTS by undertaking preferential schemes such as the former Lome conventions, the Cotonou Agreement and the EPAs that have replaced the latter Agreement plus the EBAs. These preferential schemes have been undertaken with the main objective of facilitating trade and development in DCs; in order to propel DCs into active participation in the MTS. Therefore, given the WB[413] analysis which recommends that DCs benefit more from North-South RTAs than South-South RTAs, this study examines

[411] Cass D., *The constitutionalization of the World Trade Organization. Legitimacy, democracy, and community in the internationa trading system,* (2005) 119

[412] The AB in the Turkey – Textiles Case at Para 60 indicated through recalling its jurisdiction as developed in India-Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, that in future it will if required, assess the overall compatibility of RTAs with WTO Law.

[413] World Bank, *Trade Blocs,* (n. 14 above) 124; The World Bank, *Global economic prospects. Trade, regionalism and development*, (n. 78 above) 68

that aspect in its analysis of the EC RTAs with DCs but further expounds on it in the subsequent chapter.

3.5- THE EUROPEAN COMMUNITY AND THE WTO LEGAL SYSTEM

The EC is benchmarked as a successful RTA in the MTS for its longetivity, and as a model which represents deeper economic integration,[414] with less restrictive rules of origin than the NAFTA,[415] as well as a powerful economic bloc which undertakes a fifth of world trade[416] in goods and a third in the global services market.[417]

3.5.1- HISTORICAL OVERVIEW OF THE EUROPEAN COMMUNITY

The EC became a CU in 1968. Its Treaty in relation to Article XXIV of the GATT 1947 prescribed for the elimination of tariffs and ORRCs on trade between its member states and the establishment of common tariffs applicable to goods originating outside the EC territory. It further stipulated that goods originating outside its territory should be in free circulation within its territory following the payment of the applicable common tariff upon entry into any member state.[418] Additionally, it prescribed a common commercial policy which binds its member states to follow a co-ordinated trade policy program and provided for the free movement of services, capital and persons between its member states.

The EC's regional roots sprout in the period following the WW II when consultations on regional free trade in Europe had been initialled to eliminate barriers to international

[414] Volcansek M., "Courts and regional integration" (n. 106) 165
[415] The NAFTA rules of origin are highly restrictive for example they are applied as sector-specific rules of origin. The most notorious pattern in NAFTA is the triple transformation or yarn-forward rules used for textile products or the requirement that certain apparel products are 100 percent North American to qualify for duty-free movement across NAFTA member countries thus discouraging the use of non-NAFTA fibers, yarn and fabric. Lawrence R., "Regionalism and the WTO: Should the rules be changed?" (n. 24 above) 50 – 51
[416] In the Trade Policy Review, the WTO Secretariat notes that the EC accounts for some 17% of world merchandise trade, with its trade account amounting to €141.8 billion in 2006 and €153.4 billion in 2007. WTO Trade Policy Review Body, *Trade Policy Review. Report by the Secretariat. European Communities.* March 2, 2009 WT/TPR/S/214. Available at www.wto.org/english/tratop_e/tpr_e/s214-00_e.doc - 2009-04-06 (accessed March 3, 2009).
[417] The WTO Trade Policy Review of the European Communities, "Statement by the European Commission." April 6, 2009, Geneva Available at http://trade.ec.europa.eu/doclib/docs/2009/april/tradoc_142759.pdf (accessed April 12, 2009)
[418] In order to be compatible with Article XXIV:5 and 8 of the GATT.

competition.[419] In 1951, the ECSC was established by the Treaty of Paris between Belgium, France, Luxembourg, Netherlands, Italy and West Germany. The ECSC was however a form of sectoral economic integration aimed at establishing free trade in the coal and steel sector only.[420] Thus from the outset, the ECSC was inconsistent with Article XXIV of the GATT 1947 even though GATT waivers were formally granted to the ECSC in November 1952.[421] Therefore, with the failure to fulfil the letter and spirit of the GATT 1947 provisions, the ECSC started on the wrong footing, setting a wrong precedent in the GATT practice on RTAs. On the other hand however, the six member countries did try to reduce the potential conflict by having complete free trade within the ECSC, despite the Belgian and Italian pressure for internal protection of their coal and steel industries respectively.[422] Moreover, the ECSC policies were steadily modified in the next five years, in response to complaints by other GATT trading members,[423] and the ECSC trade policies were reviewed as well by the GATT[424] through annual reports made by the ECSC High Authority.

Additionally, after the incompatibility of the ECSC with Article XXIV, the next conflict raised in regard to the same Article was the discord on the tariff height issue in the EC. The EC's CET was complicated as it supposedly averaged the generally high French and Italian tariffs and the generally low German and Benelux tariffs.[425] Moreover, even with the elimination of tariffs and quantitative restrictions on trade within the EC and the creation of the CET, this did not justifiably mean that trade in goods was totally free

[419] Lanjouw G., International trade institutions, (n. 283 above) 56.
[420] Lanjouw G., International trade institutions, (n. 283 above) 58 – 60.
[421] The GATT waivers were granted because the ECSC was determined and a vote against the bloc would have destroyed the GATT, than the ECSC since the member states had made it clear that the finding of the Treaty of Rome inconsistent with Article XXIV would have held to its withdrawal from the GATT. Therefore, as Finger well put it, at the end of the day, *the GATT blinked*. Pomfret R., *The economics of regional trading arrangements*, (n. 11 above) 89 – 90; see also Finger J., "GATT's influence on regional agreements" (n. 348 above); Snape R., "History and economics of GATT's Article XXIV" in Anderson K, and Blackhurst R., (eds.) *Regional Integration and the Global Trading System* (1993). Therefore, the feasible solution was not to push for the review of the Treaty of Rome in accordance with Article XXIV. For example: The head of the GATT Secretariat in reviewing the Treaty expressed *"the view, with which he thought there was no disagreement, that the incidence of the common tariff was higher than that of the rates actually applied by the member states at the time of entry into force of the Treaty of Rome"* GATT document C/M/8, Para. 6; cited in Schiff M, and Winters A., *Regional integration and development*, (n. 80 above) 258.
[422] Frank I., *The European Common Market.* (1961) 27.
[423] Pomfret R., *The economics of regional trading arrangements*, (n. 11 above) 90.
[424] This was a way of salvaging the GATT's lost authority.
[425] However, despite the protestations by non-members, the EC's CET on manufactured imports gave outsiders better access than earlier CUs which tended to adopt the tariff levels of the most protectionist member. For example the Canadian Confederation and Incorporation of the Prairie Provinces, the Benelux agreement, the German Zollverein and the inclusion of Tanganyika in a customs union with Kenya and Uganda during the 1920s. Pomfret R., *The economics of regional trading arrangements*, (n. 11 above) 90.

within the Community for example as far as internal trade was concerned, there were various types of barriers which hindered cross-border trade.[426]

Therefore, gradually sectoral integration progressed via the establishment of the European Atomic Energy Community (EURATOM) and in 1957; a start ensued on total economic integration within the EEC[427] more in line with the GATT Article XXIV provisions. Thus, in 1967, the ECSC, EEC and EURATOM were merged to form the European Communities (EC), which term is used in the WTO for legal reasons to date[428] although the EC is mainly referred to as the European Community.[429] However, on November 1, 1993 the EC changed to the EU as a result of the Treaty of Maastricht ratified by all member states, which members[430] have increased over time.[431]

The EC member states are individual members of the WTO but the EC negotiates and acts within the WTO as a single body through the European Commission,[432] however,

[426] Thus the intention to eliminate these barriers was the reason behind the idea which was developed during the 1980s of establishing an integrated or internal market which was targeted for in 1992 and this single market was finally created in January 1993. The White Paper on the complete internal market provided for the removal of physical, technical and fiscal barriers, and to ensure the implementation of this comprehensive programme, the member states decided to amend the existing Treaties through the Single Act adopted in December 1985 at the Luxembourg Summit entered into force on July 1, 1987 which clarified and modified the Treaty of Rome. Lanjouw G., *International trade institutions*, (n. 283 above) 62.

[427] Lanjouw G., International trade institutions, (n. 283 above) 60. The EEC was established by the Treaty Establishing the European Economic Community (March 25, 1957) herein referred as the Treaty of Rome. The executive organ of the EEC and EURATOM became the European Commission, which had more limited powers than the ECSC High Authority.

[428] WTO, "The European Communities and the WTO. Member information." Available at http://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm (accessed on March 7, 2009).

[429] Lanjouw G., International trade institutions, (n. 283 above) 20 and 59.

[430] The United Kingdom (UK), Ireland and Denmark acceded to the EC in 1973, followed by Greece in 1981, Spain and Portugal in 1986, Finland, Austria and Sweden in 1995, and in 2004 Cyrus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic and Slovenia while in 2007 Bulgaria and Romania, all-encompassing a number of 27 member states. The EC is also a WTO member in its own right thus making 28 WTO members altogether.WTO, "European Union or Communities?" Available at http://www.wto.org/english/thewto_e/countries_e/european_union_or_communities_popup.htm (accessed on March 7, 2009).

[431] In order to qualify to join the EU, the member states were subjected to fulfil economic and political conditionalities under the 'Copenhagen criteria' whereby the prospective member must have a stable economy, observance for the rule of law, human rights, and the protection of minorities, a functioning market economy, and adopt the common rules, standards and policies that make up the body of the EU law. Thus full membership in the EC is restricted for example the UK had to apply three times before it was admitted, membership for Turkey is still strenuous yet countries like Ukraine and Georgia have not yet been considered. This is because negotiations are complex even when accession has been agreed in principle. Schiff M, and Winters A., *Regional integration and development*, (n. 80 above) 233.

[432] Thus, the EC votes on behalf of all its member states in the WTO but if an individual member state votes, then each member state votes separately and hence there is no vote for the EC. However, the operation of the EC in the WTO raises raises complicated legal problems for the WTO non-EC members who seek to determine responsibility for the EC and its member states' compliance with the WTO Agreement. For instance, references are sometimes made to specific member states particularly where their laws differ or in disputes where an EC member's law or measure is cited or in notifications of EC member countries' laws, such as laws in intellectual property. WTO, "European Union or Communities?" (n. 430 above). The ECJ in Re The Uruguay Round Treaties (Opinion 1/94) [1995] 1 CMLR 205 acknowledged some of these difficulties inherent in "mixed" EU/member state treaties in its advisory opinion on EC-member state adherence to the WTO Agreement. Abbott F., "North American economic integration: Implications for the WTO, the EU and Asia," (n. 87 above) 82. However, Riesenfeld also indicated another complex problem facing the EC. He indicates that difficulties would arise if the EC admits new member states which are not also members of the WTO, although this has so far not happened. Riesenfeld S., "The Changing Face of Globalism," in Abbott F, and Gerber D., (eds.) *Public Policy and Global Technological Integration,* (1997) 67.

this system tends to drag MTN since all the EC member states must first agree on their joint position, which leaves little scope for negotiating with other countries.[433] Moreover, the joint stand by the EC as well limits the leverage of negotiations in the MTS on further trade liberalisation for example in the agricultural sector. This is because the MTN would have made a leeway in this sector, had the EC members been negotiating individually as WTO members.

3.5.2- THE EUROPEAN COMMUNITY VIS-A-VIS ITS WTO COMMITMENTS

In the MTS, the EC is regulated by the WTO Agreement as per Article II:2 which provides that the WTO Agreement is binding on all WTO members, and further stipulates that:

> "*Each member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed agreements*".[434]

The EC's operation within the MTS however has been faced with many hurdles, which reflect that the EC regional policies have impeded the MTS, although the EC has also proved to be complementary to the MTS, spurring multilateralisation. As one of the world's leading exporters and the second largest importer of goods,[435] the EC is an economic force, which may have diminished the importance of the MTS from the European standpoint, but however the less importance being attached to global trade, liberalisation would affect non-members as well as EC members because even large

[433] For example, this laborious decision making within the EC delayed the Uruguay Round, especially on the crucial negotiations on trade in agricultural products. Lanjouw G., International trade institutions, (n. 283 above) 24.

[434] WTO Agreement, Article XVI:4. Likewise, the EC legislation was enacted to be subject to the GATT as clearly reflected in the EC case law for example in the Third International Fruit Community case, Cases 21 – 4/72, [1972] ECR 1219 Para. 18 of the judgment, the European Court held that the Community was bound by the GATT. And in a later case of Nederlandse Spoorwegen Case 38/75, [1975] ECR 1439 Para. 16 and 12 of the judgment, the Court held that as regards the fulfilment of commitments under GATT, the Community had 'replaced' the member states and when the original GATT was superseded by the WTO Agreement (and its associated instruments), the Community was a party, along with the member states. Hartley T., *The Foundations of European Community Law. An Introduction to the Constitutional and Administrative Law of the European Community.* (4ed) (1998) 177 – 178. In later cases, Case 70/87, Fediol [1989] ECR 1781; Case C-69/89, Nakajima [1991] ECR 1 – 2069, the Court while reclaiming the hegemony of the EC legislation provided for exceptions and stated *inter alia* that the GATT 1947 rules could be used to attack Community acts where those acts were either intended to implement a GATT obligation or made reference to specific provisions of the GATT. In Case 92/71, Interfoods [1972] ECR 231the Court also ruled that there is an "indirect effect" of GATT 1947 rules in Community Law, requiring EC measures to be interpreted in light of GATT measures.

[435] WTO Trade Policy Review Body, *Trade Policy Review. Report by the Secretariat. European Communities.* (n. 416 above).

blocs like the EC need external competition to strive for maximum efficiency of production. Therefore, this study analyses the EC in relation to its obligations under the WTO and assesses whether it has impeded trade and development in the MTS or facilitated these objectives, with specific reference to the EC's efforts in integrating DCs into the MTS.

The EC as a RTA is discriminatory in nature as opposed to MFN treatment prescribed under Article I of the GATT 1994, and its discriminatory shortcomings are projected on third party goods and people. This was emphasized in an Article in the Economist:

> *"Historically, the EU (or Community, as it was) has never made liberal trade its highest priority. It is no accident that the hallmark of the EU's external trade policy is not neutrality but discrimination – of an exceptionally developed kind – among its various trading partners".*[436]

In addition to this, the EC has greatly contributed to the profileration of RTAs[437] in the MTS, which RTAs have not only have raised concerns over their impact on the MTS but have caused trade diversion as well. This is because the EC's MFN tariff is applied to only nine WTO members,[438] whose total imports to the EC accounted for 30% in 2005, unlike the decline to 27.5% in 2007[439] attributed to the EC's trade preferences in RTAs with other WTO members. As a result, in the Doha Development Agenda (DDA), WTO members agreed to revise the RTA provisions in the GATT 1994. However, the EC has been reluctant to address this issue.[440]

[436] The Economist, 16 April 1994. As quoted in Cremona M., "Neutrality or discrimination? The WTO, the EU and external trade," in De Burca G, and Scott J., *The EU and the WTO. Legal and constitutional issues*, (2001) 151. This expression acknowledges the EC's choice of trying to thwart market pressures in sectors such as agriculture, steel and coal that led to a Europe that was more protectionist to the outside world.

[437] The EC has concluded several bilateral agreements with other WTO members which include the signed bilateral agreements with Tunisia (1995), Israel (1995), Morocco (1996), Jordan (1997), the Palestinian Authority (1997), Algeria (2001) Egypt (2001) and Lebanon (2002). Partnership and Cooperation Agreements (PCAs) with the Western Balkans, Russia and the Commonwealth Independent States (CIS). FTAs with South Africa (2000), Mexico (2000) and Chile (2003) with other agreements still under negotiation. The World Bank, *Global economic prospects. Trade, regionalism and development,* (n. 78 above) 31.

[438] Australia; Canada; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Hong Kong, China; Japan; Republic of Korea; New Zealand; Singapore; and the United States. WTO Trade Policy Review Body, *Trade Policy Review. Report by the Secretariat. European Communities,* (n.416 above).

[439] Ibid

[440] Even though the EC accepted the issue as part of the DDA, it is reluctant to discuss it because RTA policies are favoured and used by the EC in its external trade policy. Likewise, in the 1999 Seattle Ministerial conference of the WTO in relation to RTAs, the EC neither sought to advance the topic on RTAs nor did it submit any proposals in relation to the discussion on RTAs. WTO document JOB (99)/4797/Rev.2.

Moreover, the developed network of preferential trading agreements with other WTO members has given the EC considerable scope to exercise its cohesive and influential power within the voting system of the WTO to its advantage.[441] Additionally, these RTAs are reflective of its discriminative trade policies and this has resulted in the EC being involved in disputes repeatedly brought forth by complainants in the WTO's DSU,[442] who have criticised its trade polices, including the Lome Agreement[443] and the Common Agricultural Policy (CAP).[444] This has also increased the frequency of investigating the EC Agreements by the WTO's CRTA and the growing intensity of pressure upon the European Court of Justice (ECJ) to ascribe direct effects to WTO norms.[445] However, the critique of the EC has still failed to address the EC 1962 CAP, which fostered protectionism, resulting in massive trade diversion in agriculture[446] and has consequently rendered Article XXIV's SAT rule practically unenforceable.

Furthermore, because of its CAP, the EC has maintained a closed agricultural sector from further trade liberalisation. This is because the EC agricultural sector remains protected by a complex tariff structure, with high rates and tariff quotas, and benefits from high levels of domestic support and export subsidies.[447] The EC tariffs on agricultural products average 17.9% and are four times more than the tariffs charged on

[441] Walker N., "The EU and the WTO: Constitutionalism in a new key," in De Burca G, and Scott J., (eds.) *The EU and the WTO. Legal and constitutional issues,* (2001) 55.

[442] It is the second most active litigant in the DSU, the first being the United States. In the WTO TPR of the EC, it was noted that the EC remains one of the most active members in the WTO DSU as it was involved as a respondent in six cases and likewise initiated six new disputes, and as a third party in thirteen disputes. WTO Trade Policy Review Body. *Trade Policy review. Report by the Secretariat. European Communities.*(n.416 above).

[443] Under the EEC – Import Regime for Bananas, DS38/R, 1994, para 156 – 164, the Panel stated that the trade preferences under the Lome Convention were inconsistent with Article I and XXIV of the GATT because they were non-reciprocal and did not lead to liberalisation of SAT between the EC and the ACP states. See also European Economic Community – Import Regime for Bananas DSU/R January 18, 1994 (Not Adopted) (1995) 34 ILM 177; European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R

[444] Walker, N. "The EU and the WTO: Constitutionalism in a new key," (n. 441 above) 55.

[445] Case C-149/96, Portugal vs. Council, Judgment of 23 November 1999; commented on by A. Rosas, (2000) 37 CMLRev. 797. The ECJ was more willing to require member states to respect GATT Agreements. 55; and Bourgeois, J. "The European Court of Justice and the WTO: Problems and Challenges." in Weiler, J. (ed.) *The EU, the WTO and the NAFTA: Towards a common law of international trade,* (2000) 71.

[446] Notably, the EC's agricultural policy has been a source of disharmony that has affected all trading partners. The EC's adamancy to liberalise agriculture (for instance the simple average external tariff of the original six members of the EC fell from 13 percent in 1958 to 6.6 percent after the Kennedy Round), has led to massive trade diversion in agriculture which has affected and incurred losses for both the EC consumers and poor farmers in DCs. The WB analysis has stated that the EC through its CAP has totally failed to meet the objectives of its founding Treaty and subsequent Treaties which commit the EC to *"the harmonious development of world trade, the progressive abolition of restrictions on International trade, and the lowering of custom barriers."* The World Bank, *Global economic prospects. Trade, regionalism and development,* (n. 78 above) 65 - 67

[447] The WTO members critiqued the EC on the level of protectionism that it inhibts within its agricultural sector. WTO Trade Policy Review Body, *Concluding remarks by the Chairperson. Trade Policy Review. European Communities.* April 6 and 8 2009. Available at http://www.wto.org/english/tratop_e/tpr_e/tp314_crc_e.htm

other goods.[448] Moreover, tariff peaks are frequent in agriculture and these tariffs tend to escalate with any processing made to the foods and beverages and therefore ties DCs into low value added farming as well as basic processing. Yet, many agricultural tariffs are specific rather than based on the value of the import.[449]

Furthermore, the EC in early 2009 re-introducted export subsidies for dairy products.[450] These subsidies not only deter sustainable development in the MTS but also disrupt the livelihoods of poor farmers and further destabilise the MTS because they raise agricultural tariffs as a counter-measure against the EC dumped exports.

The EC has further been critiqued for use of its market power to increase protectionism and to impose unilateral concessions. For example, it has used this power in demanding voluntary restraint agreements and applying anti-dumping provisions in a way that raises external barriers.[451] As a result, the protectionist use of these anti-dumping and countervailing duties has sheltered the EC industries from the global market. [452]

With the EC membership expanding, third non-member countries are bound to be affected. This is because accession to the EC requires the new member to align its external tariffs to the EC's CET thereby becoming part of the EC's extensive preferential trade regime.[453] Non-members can be affected adversely and thus negotiations with other WTO members are deemed necessary to achieve 'mutually satisfactory compensatory adjustment' under Article XXIV:6 and Paragraph 5 of the Understanding on Article XXIV.[454]

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[448] Zahrnt notes that; *"Average EU tariffs on meat amount to 29.7%, for dairy produce 33.2%, for sugar and sugar confectionery 35.7% and for cereals 49.4%. All EU tariffs greater than 100% relate to agricultural products, with isoglucose hit hardest by a staggering 604.3% duty."* Zahrnt, V. "The disappointing picture of EU trade." April 9, 2009. EuropeanVoice.com. Available at http://www.europeanvoice.com/article/2009/04/the-disappointing-picture-of-eu-trade/64589.aspx (accessed April 12, 2009)

[449] These have the effect of distabilising world markets with the fall in world prices. Ibid

[450] Ibid

[451] For example, the EC uses the requirement that the diffusion process for semiconductors must be performed in Europe in order to escape antidumping actions. Lawrence R., "Regionalism and the WTO: Should the rules be changed?" (n. 24 above) 50 – 51

[452] Winters, A. "The EC and Protection: Political Economy" (1994) *38 EUR. ECON. REV. 596*, 601 – 02

[453] Cremona M., "Neutrality or discrimination? The WTO, the EU and external trade," (n. 436 above) 179

[454] Ibid. Positively, this is a rule that the EC has been keen on undertaking as is reflected in Case C-352/96, Italy vs. Council. [1998] ECR 1-6937. Para. 23. Italy had challenged the legality of a Council Regulation implementing agreements entered into by the EC with Thailand and Australia consequent upon the accession of Austria, Finland and Sweden. The Court was prepared to examine the legality of the Regulation for compatibility with the WTO commitments, under the so-called Nakajima principle (the agreements and implementing Regulation were explicitly

With these pitfalls involved, the EC is however considered a successful RTA in the MTS and has been commended by the WTO[455] and WTO members[456] on its stance on multilateral trade and support for DCs.[457] This study therefore takes note of the aspects of the EC RTA which underscore the GATT/WTO obligations and spur multilateralism; and these include, *inter alia,* the EC's commitment to the MTS, which is emphasized through the EC trade policies of supporting the MTS and facilitating the DDA for instance the EC together with its member states have contributed to the DDA Global Trust Fund and financed or co-financed specific activities under the DDA.[458] Furthermore, the EC is committed to facilitating free trade and thus, has undertaken tariff reductions in industrial products.[459] The EC as well, works towards the strengthening of the MTS through trade liberalisation within the bloc,[460] especially through sheltering the protectionist members by liberal policies[461] and in its RTAs.[462] The EC institutional framework has also been aligned to complement the functionality of the MTS.[463] Moreover, the EC, through economic integration, has attained political

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designed to ensure compliance with Article XXIV of GATT 1994. The Court held that; *"if parties themselves have reached agreement on the question of mutually satisfactory compensatory adjustment, the requirement referred to in Article XXIV:6 of GATT must be regarded as fulfilled and cannot therefore serve as a basis for examining the legality of the Regulation."*

[455] "WTO praises EU's stance on multilateral trade and support for developing countries." April 6, 2009. Brussels. Available at http://www.acp-eu-trade.org/library/files/EU_EN_060409_EU_WTO-praises-EU-stance-on-multilateral-trade-and-support-for-developing-countries.pdf (accessed April 12, 2009)

[456] The WTO members commended the EC on its positive economic performance supported by the continuation of its trade reform plus its strong commitment to the MTS including the DDA negotiations as well as providing technical assistance in the multilateral arena and for its non-reciprocal preferences to DCs. WTO Trade Policy Review Body, *Concluding remarks by the Chairperson. Trade Policy Review. European Communities.* (n. 447 above).

[457] However, Valentin Zahrnt argues that the WTO Report on the EU trade policies was biased as it favoured the EU and did not give a partial assessment of the EU's discriminative policies which included the re-introduction of export subsidies, the failure to reduce agricultural tariffs and the discriminative EU RTAs in place. Zahrnt, V. "The disappointing picture of EU trade," (n. 448 above).

[458] WTO Trade Policy Review Body. *Trade Policy Review. Report by the Secretariat. European Communities,* (n. 416 above)

[459] WTO members commended the EC during the EC trade policy review for maintaining generally low tariff protection for non-agricultural products. WTO Trade Policy Review Body, *Concluding remarks by the Chairperson.Trade Policy Review. European Communities.* (n.447 above).

[460] The EC is committed to facilitating free trade in the bloc through undertaking unilateral liberalisation to eliminate tariffs within the Community with no interference by the regulatory sovereignty of the member states. As a result, the EC has successfully eliminated discriminatory barriers to trade like tariffs as well as regulatory restrictions to intra-community trade thus bringing the EC CUs in alignment with Article XXIV of the GATT. This therefore equips the EC in the context of the MTS to deal with the elimination of tariffs and NTBs thus complementing the MTS. Holmes P., "The WTO and the EU: Some constitutional comparisons," in De Burca G, and Scott J., (eds.) *The EU and the WTO. Legal and Constitutional Issues,* (2001) 68; De Burca G, and Scott J., "The Impact of the WTO on EU decision-making" in De Burca G, and Scott J., (eds.) *The EU and the WTO. Legal and constitutional issues.* (2001) 2

[461] EC member states have different preferences as regards the choices between further trade liberalisation and the maintenance of existing protection measures. However, the liberal countries have sheltered the protectionist countries by engulfing them with their liberal principles which the latter countries are forced to replicate and apply as well. Thus, the impact of the protectionist tendencies of these countries in the MTS is strongly curtailed.

[462] The EC has facilitated trade liberalisation in its RTAs as part of a broader policy of promoting multilateralism. These RTAs have facilitated free trade in non-agricultural goods, and limited liberalisation of trade in agricultural products. WTO Trade Policy Review Body. *Report by the Secretariat. European Communities,* (n. 416 above).

[463] This has been highlighted in the EC Trade Policy Report in which the Secretariat noted that the EC's trade polices aim to contribute to the progressive dismantling of restrictions on international trade and lowering of customs barriers under the provisions of the Treaty of Nice in 2001. These objectives are pursued by the EC at the multilateral, bilateral, and unilateral levels. At the multilateral level, the EC has emphasized

stability[464] and economic success and can therefore provide a model for RTAs in policy areas as diverse as competition and the environment,[465] which can be transferred to the MTS.

The EC has additionally strengthened the MTS by seeking to integrate the DCs into the MTS. With the given spurs to multilateralism, as well as trade and development in the MTS, this study focuses on the aspect of the EC integrating African DCs into the MTS.

The EC has shown a strong will to extend unilateral trade preferences to the less developed countries so as to incorporate these countries into the MTS. It has additionally provided trade-related technical assistance within the Aid for Trade framework to facilitate the integration of these DCs into the MTS.[466] Moreover, through its GSP schemes and agreements involving DCs for example the two Yaoundé Conventions, the Arusha Convention,[467] the I, II, III and IV Lome Conventions, and the EBAs, the EC has granted the ACP countries duty free market access on a non-reciprocal basis to the European market for most products except the products covered under the CAP. Whilst the Cotonou Agreement through the EPAs, is now based on reciprocity in order to conform to the GATT/WTO provisions. These schemes' contribution to the trade and development of African countries has however been doubtful as further clarified in the subsequent chapter but only in relation to the EPAs. However, the schemes' evolution is analysed below in relation to the EC's relationship with African Countries.

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the importance of the DDA as a solution in averting trade protectionism in the current economic crisis. WTO Trade Policy Review Body. *Report by the Secretariat. European Communities,* (n. 416 above).

[464] The EC has enjoyed political stability and sustained great economic growth despite the very costly reunification of Germany and a major world monetary crisis. Abbott F., "North American economic integration: Implications for the WTO, the EU and Asia" (n. 87 above) 96.

[465] Walker N., "The EU and the WTO: Constitutionalism in a new key" (n. 441 above) 55; Hoekman and Kostecki acknowledge that the EC's set of policies and rules that apply to movement of goods, services, labour and capital inside the EC is the benchmark for good practice in trade policy, as there are no tariffs, no safeguard mechanisms and full binding of policies in the EC. Although they indicate that, this is different from the EC's external trade policies that apply to non-members. They identify the challenge as pursuing multilaterally what the serious RTAs are implementing internally. Hoekman B, and Kostecki M., *The Political Economy of the World Trading System. The WTO and beyond.* (n. 268 above) 366.

[466] "WTO praises EU's stance on multilateral trade and support for developing countries." (n. 455 above).

[467] This agreement was based on Article 238 of the Treaty of Rome and it was signed on July 29, 1969 between the EEC and Uganda, Tanganyika and Kenya. However, unlike the Yaounde Conventions, it was limited in scope and did not provide for technical and financial clauses or aid benefits from the EDF and yet, some of the important export products for the States were subjected to quantitative restrictions. Moreover, this Agreement was based on the principles of free trade and reciprocity. Mutharika B., "The trade and economic implications of Africa's association with the enlarged European Economic Community," (1974) *10(2) Economic Bulletin for Africa,* 42 .

3.6- THE EUROPEAN COMMUNITY AND AFRICAN COUNTRIES

3.6.1- HISTORICAL OVERVIEW

The unique relationship between the EC and African countries is mainly based on historical ties centred on the EC's colonial legacy in Africa. This was later transferred through accords and enriched by successive treaties between the two continents. In 1957, the founding Treaty establishing the EEC, the Treaty of Rome incorporated a provision for the Association of Overseas Countries and Territories (OCT),[468] but, with the independence of the EEC colonies, Yaoundé 1 and 2 Conventions were concluded specifically in reference to African Francophone States including Madagascar.

In January 1973,[469] with the accession of the UK to the EEC, preferential coverage was expanded to cover the UK's former colonies under its hegemony. These colonies were situated in Africa, the Caribbean and the Pacific.[470] As a result, a merger was formed and the ACP group was formed.[471] A co-operation agreement was later signed with these States on February 28, 1975 in Lome capital of Togo, as the first so-called Lome Convention.[472] The Lome I accord was extended in the successive accords, Lome II,[473] III[474] and IV.[475] However the ACP-EU relationship failed to improve the ACP's trade

[468]These included the African colonies. Dodoo C, and Kuster R., "The Road to Lome" in Von Geusau A., (ed.) *The Lome Convention and A New International Economic Order,* (1977) 16; the OCT was considered by many GATT members to be a continuation of the colonial preferences schemes. Jackson J., *World Trade Law and the Law of GATT,* (1969) 609 cited in Mathis J., *Regional trade agreements in the GATT/WTO. Article XXIV and the internal trade requirement,* (n. 130 above) 73

[469] Treaty Concerning the Accession of Denmark, Ireland, and the United Kingdom of Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community, January 22, 1972, 1972 O.J. Spec. Ed. 5

[470] This was because the EEC development policy which was more inclined to French Africa was not acceptable to Britain and yet it would be inconsistent with the provisions of the Treaty of Rome to maintain separate preferences. Pinder J., "The Community and the developing Countries: Associates and outsiders," (1973) *1 Journal of Common Market Studies* 53.

[471] ACP group was composed of the Anglophone and Francophone African States which were Botswana, Burundi, Cameroon, Central African Republic, Congo, Guinea, Guinea Bissau, Equatorial Guinea, Upper Volta, Kenya, Lesotho, Malawi, Malagasy, Mali, Mauritius, Mauritania, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Chad, Togo, Uganda, Zaire, Zambia, Liberia and Ethiopia, as well as the Caribbean and Pacific States of the Bahamas, Barbados, Fiji, Grenada, Guyana, Jamaica, Tonga, Trinidad and Tobago, and Western Samoa. "ACP: Lome Convention." Available at http://homepages.uel.ac.uk/ben2417s/EUAid3.htm (accessed on March 21, 2009)

[472] This was an outcome of eighteen months of negotiations between the EEC and the ACP group. ACP/EEC Convention of Lome, February 28, 1975, 19 *O.J.Eur.Comm*. (No. L 25) 2 (1976).

[473] The Lome I accord was extended when negotiations between the ACP and the EC were revived in 1978 and concluded on 31 October, 1979. Lome II was scheduled to enter into force on 1 March, 1980 and last for five years. It was no different from its precursor apart from the inclusion of another compensation system known as the SYSMIN scheme. "ACP: Lome Convention." (n. 471 above) and Carl, B. Trade and the developing world in the 21st century, (2001) 303 – 04.

[474] The Lome III was signed on December 8, 1985 between the 10 EEC member states and the 67 ACP States with the inclusion of new members. These Conventions (Lome I, II and III) were alike and their differences emanated from the different compensation schemes that had been developed. Ibid; Lenaghan P., "Trade negotiations or trade capitulations: An African experience" (n. 128 above).

performance and development and thus there was need to re-evaluate the relationship taking into consideration that the EU itself had increased its membership to include countries which totally lacked historical ties with the ACP group plus the WTO's critique of these non-reciprocal Agreements in favour of DCs.

However, an exception was made for LDCs under Paragraph 2 (d) of the Enabling Clause. Thus, with the EC Council Regulation No. 416/2001, EBAs were enacted[476] providing for DFQF access to 919 agricultural products from ACP LDCs[477] and over 50% of the liberalised tariff lines covered meat and dairy products, beverages and milled products.[478] However, the EBAs had duty free tariff quotas for rice and sugar.[479] These EBAs came into effect on the March 5, 2001 and were tied to the existing GSP Schemes.[480] However, unlike the other EC GSP schemes, the EBAs are not subject to renewal, revision and have no time limitation.[481] Moreover, they are also subject to safeguard measures if imports of products increase more than the usual levels of production and export capacity.[482]

3.6.2- RECENT TRENDS IN THE EUROPEAN COMMUNITY AND AFRICAN COUNTRIES' RELATIONS

In view of the marginal impact of Lome I, II, III and IV Conventions on the ACP's performance in trade and the further liberalisation of world trade plus the GATT/WTO's

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[475] On December 1989, the 12 EC States and the 68 ACP States signed the Lome IV Convention. Unlike its precedessors, Lome IV covered a 10 year period and it expanded the preferential treatment and removed some quota restrictions. Ibid

[476] EBAs were enacted on February 28, 2001 amending EC Regulation No. 2820/98

[477] Market access was only for ACP LDCs and not non-ACP LDCs thus Article 174 (2) (b) of the Lome Convention imposing non-discrimination among ACP States was eliminated in the Cotonou Agreement.

[478] It however exclusively excluded armaments from its preferences. European Commission, "EU acts to integrate least developed countries into world trading system," Available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/01/714&format=HTML&aged=0&language=EN&guiLanguage=en (accessed on March 6, 2009)

[479] These are to be liberalised in October 2009. The WTO Trade Policy Review of the European Communities, *Statement by the European Commission* (n. 417 above).

[480] The EBA had to be WTO compatible yet also in line with the ACP regime. Its objective was to promote development, strengthen regional integration, and ensure compatibility with WTO principles.

[481] For instance when a country is excluded by the UN from the list of LDCs, it is withdrawn from the list of beneficiaries under the EBA.

[482] The safeguard measures were brought into place by the insertion of a new paragraph in Article 28 of the EC GSP Regulation imposing these safeguard measures to apply especially to sensitive products such as bananas, rice and sugar, and also in regard to the CAP and the ACP-EU Protocols should the impact of the Imports disrupt EU mechanisms. Olarreaga M, and Ng F., "Tariff peaks and preferences," in Hoekman B, Mattoo A, and English P., (eds.) *Development, trade and the WTO. A handbook.* (2002) 106 However, the designation of these products as sensitive products and the imposition of these safeguard measures removed the likely preferences which the LDCs could enjoy because these were products of export interest to them.

insistence on reciprocity, the EC had to conclude future ACP-EC trade relations in conformity with the WTO. Therefore, the Cotonou Agreement[483] which was brought into place with the intention of phasing out trade preferences in order to comply with the WTO Agreements. Under this Agreement, DCs were to receive non-reciprocal trade preferences under a WTO waiver for a transitional period, but by 2008, these preferences were to be phased out or renegotiated and replaced with EPAs,[484] which were to conform to WTO requirements of reciprocity and trade liberalisation.

The Cotonou Agreement entered into force on April 1, 2003[485] with an underlying objective of poverty eradication. It was subject to a twenty year period with subsequent revision every five years. The timeline for commencement for the reciprocal set of EPAs was targeted for 2008 to be premised on the establishment of FTAs between the ACP and the EC. These EPAs' impact on African countries is discussed in the subsequent chapter.

Succinctly, the EC has, through the above schemes, tried to integrate the African DCs and LDCs into the WTO. However, these schemes have to a great extent imposed stringent conditions on the sovereignty of these African countries[486] and reflected a power imbalance in negotiations. This is because the EC has greater bargaining leverage over these African states,[487] and yet the EC has the prerogative to unilaterally withdraw these concessions and/or preferences for example the EBAs. The tilted angle which finds Africa at the edge has also been manifested in the poor pacts that African states have signed with the EC, and this has curtailed the growth of trade and development in these states as reflected in the above treaties. Such dependency on

[483] Was signed on June 23, 2000 between the ACP States and the EC.
[484] The non-reciprocal tariff preferences were to be maintained till December 31, 2007 although incompatible with the WTO law; however, the WTO had given an exceptional waiver for this.
[485] Following ratification of the member states of the EC and at least two-thirds of the ACP States and this number was reached on February 27, 2003.
[486] For example on 11 October 1999, the Trade and Development Cooperation Agreement (TDCA) was signed between the EC and SA. The EC in the four years of difficult negotiations imposed stringent conditions which overstepped the sovereignty of SA but which, SA conceded so as to conclude the Agreement. Like the discontinuance of the generic names of sherry, port, grappa and ouzo on the international market which had been used by South African producers and to faze them out on the domestic market as well. Lenaghan P., "Trade negotiations or trade capitulations: An African experience" (n. 128)
[487] This is mainly because the preferences are voluntary and thus subject to political whim. Moreover, the agreements are signed on the terms of the EC covering issues such as rules of origin, excluded sectors and the use of antidumping duties, without a substantial input from these developing African countries.

unilateral preferences, through regional agreements, is futile for African states because of the trade inequalities, uncertainty, limited product diversification and the cushioned safeguards that the EC can impose. Therefore, although North-South Agreements enhance DCs' competitiveness in the international trading system, these agreements have considerable disadvantages as well. Thus, it is clear that the MTS is best suited for African DCs and LDCs, as it provides a better platform for negotiations in availing better and certain market access without undermining their sovereignty. A review of two African RTAs, the EAC, and SADC is undertaken in the subsequent chapter in light of the above appraisal. This study specifically analyses the provisions of the initialled IEPA for the EAC and SADC group, their interlinkages with the WTO rules and whether the provisions support or retreat from the trade and development objectives set up in the EPAs.

3.7- CONCLUSION

The MTS is experiencing mounting tension between RTAs which promote deeper economic integration and global trade law under the WTO. This tension is increasing with the potential hazards that RTAs have on the MTS, plus the total disregard of the MFN principle and the flagrant abuse of the RTA provisions embodied in the GATT/WTO. This has led to an escalating increase in discriminative RTAs which the CRTA has failed to check because of ambigious provisions providing for RTAs in the GATT/WTO including rules on what amounts to SAT, ORCs and ORRCs. These controversies have been addressed in proposals to have the RTA rules revised as mandated by the Doha Declarations. However, the controversies still persist. With the deadlock in the Doha talks, new RTAs are being negotiated encompassing these controversial aspects, hence deterring trade and development in the MTS, but more especially in DCs. This is because of the impact that profilerating RTAs have on DCs. Yet, North-South RTAs emphasize the substantial liberalisation of trade in goods among members, thereby disregarding the different levels of development among these members. Thus, though the EC is committed to enhancing trade and development in the MTS, by integrating DCs into the MTS through FTAs with African DCs, this remains

a dilemma to African RTAs which are expected to conform to FTAs prescribed under Article XXIV of the GATT. Therefore, although RTAs can spur trade and development in the MTS as reflected by the EC's operation in the WTO, multilateral rules on RTAs need to be revised and enforced in order to provide for the interests of DCs and LDCs, as well as constrain the activities of RTAs to conform to multilateral obligations, while encompassing the developmental aspects. This will maintain a strong MTS which can ensure that global economic integration is widely enjoyed.

CHAPTER FOUR – REGIONALISM AND AFRICAN COUNTRIES: THE CASE OF THE EAC AND SADC

4.1- AN OVERVIEW OF REGIONALISM IN AFRICA

The history of regionalism in Africa was mainly an outcome of the colonial era which instigated African nationalism exhibited through the Pan-African Movement, a clique which sought for political and economic emancipation of the continent.[488] Its ideals were manifested into regional economic co-operation arrangements after independence of the former colonies with the exception of a few which were created as regional integration entities with a bias in trade.[489] In line with this underlying foundation, Africa however found herself immersed with a number of RTAs all reflective of their members' zeal in political and economic liberalisation and operating under the mandate to carry out economic integration.[490] These RTAs were however, mainly founded on the basis of geographical proximity or contiguity of the member countries and political cooperation through economic ties.

Thus, with the underlying theme of Pan-Africanism in mind, the regional economic communities[491] created in Africa were intended to act as building blocks in a process which would eventually lead to full continental integration as the African Economic Community (AEC)[492] and this is prescribed for under the AEC Treaty under the monitoring mechanism of New Partnership for Africa's Development (NEPAD). In addition, these RTAs were pictured in five African regions with an ultimate aim of

[488] Adedeji A., "History and prospects for regional integration in Africa." March 5, 2002 available at http://www.uneca.org/eca_resources/Speeches/2002_speeches/030502adebayo.htm (accessed April 4, 2009)
[489] ECOWAS, the PTA or the regional bloc presently known as COMESA, and the Economic Community of Central African States (ECCAS).
[490] Economic Commission for Africa, *Assessing Regional Integration in Africa II. Rationalizing Regional Economic Communities.* (2006) 45 Available at http://www.iss.co.za/dynamic/administration/file_manager/file_links/ARIA2.PDF?link_id=4057&slink_id=7010&link_type=12&slink_type=13&tmpl_id=3 (accessed April 4, 2009)
[491] This study takes note that these regional economic communities did not fall under the purview of the RTAs specified under the WTO but refers to these blocs as RTAs because some of them were classified under the Preferential Trade Area category of RTAs.
[492] The AEC was established under the OAU, which was succeeded by the African Union (AU). Under the Abuja Treaty, it was stipulated that the creation of the AEC would be carried out in six stages over a 34 year period (1994 – 2027), ending in an economic union with a common currency, full mobility of the factors of production and free trade among the 53 countries in the continent.

eventual unification under the AEC umbrella.[493] Thus in West Africa, ECOWAS co-existed with the West African Economic and Monetary Union (UEMOA), the Mano River Union (MRU), and the Community of Sahel-Saharan States (CEN-SAD). While in Central Africa, the Economic Community of Central African States (ECCAS) coexisted with the Central African Economic and Monetary Community (CEMAC) and CEPGL. In Southern Africa, the SADC, SACU, and the Indian Ocean Commission (IOC) share space with COMESA which also covers East Africa and parts of North and Central Africa. In addition, East Africa has EAC and Intergovernmental Authority on Development (IGAD), while North Africa also has the Arab Maghreb Union (UMA).[494]

However, although this study recognises the main objective of RTAs formed in Africa as stepping stones to AEC, it does not attempt to divulge into this discussion nor discuss African RTAs in the context of providing stepping stones to the AEC as it evidently falls out of the scope of this study.

African RTAs on the other hand, were protectionist in nature marred with import substitution policies in place which largely caused their early demise in the 1970s. Contrary therefore, the reincarnation of regionalism in Africa from the 1980s and 1990s was driven by new economic trade policy changes in the global trading system. These included the sprout of the North-South Agreements,[495] the development of the WTO which consequently led to significant reductions in tariffs and NTBs and led to greater integration of world markets plus a 25% increase in world trade.[496]

[493] Powell S., "Economic Partnership Agreements: Building or shattering African regional integration," (2007) 19 Available at http://www.traidcraft.co.uk/OneStopCMS/Core/CrawlerResourceServer.aspx?resource=9FD55997-128D-4C78-9A10-F498BAA06068&mode=link&guid=cb7f5a0d8b8d4abe962aa5abb037e3aa (accessed April 4, 2009)

[494] Economic Commission for Africa, *Assessing Regional Integration in Africa II. Rationalizing Regional Economic Communities,* (n. 490 above) 2

[495] The developed countries sought greater integration with the less developed countries through these bilateral trade agreements.

[496] Africa's share in world trade in exports had declined from 10% in the 1960s to 2% in 2000 which was mainly attributed to the decline in world agricultural trade. Economic Commission for Africa. *Assessing Regional Integration in Africa II. Rationalizing Regional Economic Communities,* (n. 490 above) 2. However, with the new economic changes in regionalism in Africa, trade amongst African countries despite being low registered an increase from US $ 3 billion in 1980 to US $ 6 billion in 1997 and US $ 11 billion in 2001. Therefore intra-regional share of total trade increased from 3% in 1980 to 7.8% in 2001, although the share of intra-regional trade flows in world merchandise exports in 2001 was a mere 0.2%. Olivia M, and Rivera-Batiz L., "How should Africa position itself in the international trading system?" in World Economic Forum, (eds.) *The Africa Competitiveness Report 2004,* (2004) 44. Available at http://d.scribd.com/docs/dcyrijo8srgm7laaoy5.pdf (accessed April 4, 2009).

Additionally, Europe's trade policies of integrating African countries into the world trading system also further facilitated this new regionalism trend in Africa, taking into consideration that the EC has had more impact on Africa than any other regional group and is Africa's major trading partner. The EC's relationship with Africa dates far back to the trade and development agreement that the EEC entered into with its former colonies,[497] this relationship later transcended into various trade agreements but to date it is reflected in the Cotonou Agreement. Under the Cotonou Agreement, African countries agreed to conclude new WTO compatible agreements with the EC in the form of FTAs[498] progressively removing barriers to trade between them and enhancing co-operation in all areas relevant to trade,[499] therefore the preferential non-reciprocal agreements in place[500] were replaced with WTO compatible trade agreements.[501] The move to reciprocity apart from the need to conform to WTO requirements was further supported by the EC's argument that the traditional tariff preferences were ineffective as ACP countries' share of EU imports declined from 7% to 3% between 1975 and 2000[502] and because the existing non-reciprocal trade agreements had not promoted sustainable development of these countries as set out in the Cotonou objectives.[503] Thus on June 17, 2002, the EU Council adopted the EC's negotiating directives for EPAs[504] and these negotiations for EPAs[505] were launched on September 27, 2002 in Brussels and later the regional negotiations were also launched.[506]

The EPAs were eventually established along region lines in the ACP which included; the Caribbean Community (CARICOM), the Pacific, ECOWAS plus Mauritania, the

[497] The Treaty of Yaoundé 1 in 1963.
[498] In line with Article XXIV: 5 (b) of the GATT 1994
[499] Article 36 (1) of the Cotonou Agreement
[500] The preferential non-reciprocal agreements were characterised in the Lome Conventions.
[501] Article 36 – 38 of the Cotonou Partnership Agreement provided for the creation of EPAs between the EC and the ACP regional configurations.
[502] European Commission, "Update on Economic Partnership Agreements," March 23, 2009. Available at http://trade.ec.europa.eu/doclib/docs/2009/march/tradoc_142689.pdf (accessed April 10, 2009)
[503] This was discussed in the "Green Paper on the EU-ACP relations: a new partnership for the 21st century" adopted by the European Commission on November 20, 1996 and was a major subject for discussion in the preparations leading to the Cotonou Agreement.
[504] Council doc.No. 9930/02 of June 12, 2002, ACP 89, WTO 62. As cited in the Commission of the European Communities, "The trade and development aspects of EPA negotiations." (2005) Commission staff working document. SEC(2005) 1459. Available at http://www.fes.de/cotonou/downloads/official/ACPEU/EU+TRADOC_ACP+NOV.+2005.PDF (accessed on April 4, 2009)
[505] EPAs were defined in the Cotonou Agreement as the major instrument of economic and trade co-operation. Despite their independent legal standing, they were an integral part of the Cotonou Agreement, and were considered as an instrument for development. European Commission, "Economic Partnership Agreements. Start of negotiations. A new approach in the relations between the European Union and the ACP countries." (2002) Available at http://www.deljam.ec.europa.eu/en/ndocs/EPA%20Brochure.pdf (accessed April 4, 2009)
[506] The negotiations with West Africa were launched in October 2003, Central Africa in October 2003, Eastern and Southern Africa in February 2004, the Caribbean in April 2004 and Southern Africa or SADC in July 2004, while with the Pacific in September 2004. Ibid

SADC Group, the EPA for East and Southern Africa (ESA), and the Central African Economic and Monetary Union plus Sao Tome and Principe (CEMAC plus STP).[507] However, some of these configurations have since been distorted.[508]

In Africa, most non-LDCs concluded interim EPAs with the EU with the exception of Nigeria, Democratic Republic of Congo (DRC), Gabon, and South Africa (SA). The initialled EPAs in place therefore include both EPAs initialled by individual countries like Cameroon,[509] Côte d'Ivoire,[510] Ghana[511] and EPAs initialled by regions like the EAC,[512] the ESA Group,[513] and the SADC Group.[514] Under these EPAs, the EU would grant the African countries market access consisting of duty free treatment for all products except arms and quota free for all products with transition arrangements for rice and sugar unlike the market access provided under the Cotonou agreement[515] and the GSP schemes.[516]

The negotiations leading to the eventual initialling of the EPAs generated extreme speculation from both critics and supporters arguing for and against the benefits of the

[507] Kingah, S. "The revised Cotonou Agreement between the European Community and the African, Caribbean and Pacific States: Innovations on security, political dialogue, transparency, money and social responsibility." (2006)*50 (1) Journal of African Law*, 59 – 71 School of Oriental and African Studies. United Kingdom. Available at http://journals.cambridge.org/download.php?file=%2FJAL%2FJAL50_01%2FS0021855306000064a.pdf&code=61bc43aac53b4bb814e1b68b258da7cd

[508] The EPAs have been signed by individual countries as well as by some regions thereby dismantling the regional configurations. For instance, CARIFORUM signed a full-fledged EPA with the EU apart from Haiti which only initialled the agreement but however did not sign, while in the CEMAC process, it is only Cameroon that signed a goods only EPA thus dismantling the CEMAC process, an interim EPA with six ESA member states was also initialled, plus the emerged EAC EPA configuration. While in the Pacific, only two Pacific countries, Papua New Guinea (PNG) and Fiji, initialled an interim EPA, in SADC only Namibia, Botswana, Lesotho, Swaziland and Mozambique initialled the interim EPA while the other member states joined different regional configurations with South Africa not initialling at all and in West Africa, even though all 16 countries except Mauritania are members of ECOWAS, only 2 West African countries, Cote d'Ivoire and Ghana, initialled bilateral interim EPAs with the EU. European Commission, "Update on Economic Partnership Agreements. March 23, 2009," (n. 502 above).

[509] The EC signed a goods only interim EPA on January 15, 2009 with Cameroon.

[510] The Côte d'Ivoire EPA with the EC was initialled on December 7, 2007.

[511] The Ghana EPA with the EC was initialled on December 13, 2007.

[512] Burundi, Kenya, Rwanda, Uganda and Tanzania initialled the interim Framework Economic Partnership for the East African Community (EC-EAC EPA) on November 27, 2007.

[513] EC initialled an interim EPA at the end of 2007 with six ESA member states, Comoros, Madagascar, Mauritius, Seychelles (CMMS), Zambia and Zimbabwe.

[514] Botswana, Swaziland, Lesotho, Mozambique and Namibia.

[515] Under the Cotonou Agreement, the EC offered African countries duty free access for all products except 1000 product lines including certain meats, dairies, vegetables (tomatoes, onions), wines, cereals and sugar among others and quota free access for all products except rice, sugar, bananas and beef. Rammos T., "General overview of the Economic Partnership Agreement between the EC and the East African Community," 16 – 17 February 2009. Dar es Salaam. Available at http://trade.ec.europa.eu/doclib/docs/2009/february/tradoc_142362.pdf (accessed April 4, 2009)

[516] Under the GSP schemes, the EC offered duty free for all products except for 1000 Cotonou products plus oranges, garlic, corn, aluminium, cocoa butter and powder, tuna, pineapple, textile among others and duty free for all products except rice, sugar, bananas and meat. Rammos T., "General overview of the Economic Partnership Agreement between the EC and the East African Community," (n. 515 above).

EPAs for African countries and the likely impact of the comprehensive signed EPAs which, is massive but two-faced. Thus on one side, it was argued that:

> *"Only full EPAs can deliver a comprehensive approach to trade and development in ACP regions."*[517]

Whereas, on the other end, it was asserted that EPAs failed to harness trade for development and that:

> *"Europe is using its unequal bargaining power in the negotiating room to push its controversial vision of development."*[518]

The above argument is compounded by the fact that EPAs undermine regional integration and contradict development objectives.[519] This study while recognising these impacts only seeks to examine whether the provisions in the interim EPAs support the EPAs' objectives of trade and development in the EAC and SADC regions or whether they retreat from these objectives taking into consideration that trade and development were the main objectives set out in the EPAs.[520] These two regional blocs are the primary focus of this study.

4.2- THE IMPACT OF ECONOMIC PARTNERSHIP AGREEMENTS ON AFRICAN COUNTRIES

The positive impact of EPAs on African countries is advocated by the EC which has been very vocal[521] about the benefits that will accrue to African countries after signing

[517] European Commission, "Update on Economic Partnership Agreements. March 23, 2009." (n. 502 above).
[518] Stated by Oxfam as cited in Action for Southern Africa, "EPAs: An Update," February 2008. Available at http://www.actsa.org/Pictures/UpImages/pdf/EPAs%20update_Feb%202008.pdf (accessed April 10, 2009)
[519] Action for Southern Africa, "EPAs: An Update," (n. 518 above)
[520] Paragraphs 1.1, 1.2 and 2.9 of the Commission of the European Communities. "The trade and development aspects of EPA negotiations." (2005) Brussels. Commission staff working document. SEC(2005) 1459. (n. 504 above).
[521] The EU Trade Commissioner, Peter Mandelson has been quite outspoken on the benefits of the EPAs for African countries, emphasizing that the EPAs facilitate regional integration which enhances intra-regional trade and leads to the reduction on the dependence of the EC market, which argument is however hindered by the EPAs advocated for by the EC. Peter Mandelson's emphasis: *"The ACP economies are too small to go it alone and most trade more with Europe than they do with their neighbours. This means that regional integration has potential - joining forces and stepping up economic links. Most ACP countries currently depend on their exports to the EU. Take the case of Ghana: 49% of their exports go to the EU, exports to its neighbour Benin only accounts for 2.6%. In Cameroon, 61% of exports go to the EU, and 55% of imports come*

the EPAs. The EC in this regard has aggressively pushed African countries to negotiate the EPAs before set deadlines without much critic on the EPAs' possible impact on African economies, it has additionally threatened to withdraw trade concessions from these countries in case they refused to sign the EPAs[522] and impose higher tariffs as well from January 1, 2008.[523] As a result, many African countries were hard-pressed to comply irrespective of their expectations on what EPAs should deliver, and were pushed to secure any agreement to retain their EC trade preferences. Thus, this not only meant that many of the interim agreements which were concluded were negotiated in a hurry but only a handful of their provisions were actually negotiated[524] and yet, in haste the African countries were forced to initial the interim EPAs outside their regional configurations under which they had been negotiating with the EC.

However, by initialling[525] the interim EPAs, African countries are not obliged to implement their terms until entry into force[526] of the agreements. These initialled texts however are sufficient for WTO notification to enable the countries to continue with their preferential trading regimes with the EC without disruption.

The EC mainly advocates for the EPAs on the ground that EPAs will facilitate African intra-regional trade, address the problem of overlapping memberships, and facilitate investment necessary for regional integration and additionally facilitate regional integration through sufficient funding thus the assertion that EPAs are beneficial to

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from the EU. Eliminating barriers between neighbouring countries and creating real integration would favour trade exchanges and boost economic growth. It would also create bigger markets more attractive to investors and would facilitate trade with landlocked countries." European Commission, "Africa, Caribbean, Pacific. Economic Partnership Agreements: FAQS." June 26, 2006. Brussels. Available at http://ec.europa.eu/trade/issues/bilateral/regions/acp/fs280606_en.htm (accessed April 27, 2009).

[522] The EU threatened that it would not maintain preferential market access of ACP goods upon the expiry of the waiver by December 31, 2007 and stated that GSP+ would only be available in 2009 thus the non-LDC ACP countries which did not negotiate the EPAs would only retain the GSP scheme but later provided the provision for an interim EPA realising that no ACP state would be ready to sign a comprehensive EPA by December 31, 2007. SEATINI, "EPAs state of play," (2008) available at http://www.seatini.org/publications/epas/EPA%20State%20of%20play.html (accessed April 10, 2009).

[523] Mannak M., "International call for action against EPAs," (March 1, 2008) South Bulletin: Reflections and Foresights. Available at www.**south**centre.org/index.php?option=com_docman&task=doc_download&gid=742&Itemid= (accessed April 10, 2009)

[524] Trade Justice Movement, "Economic Partnership Agreements (EPAs): Assessing recent developments in EPA negotiations against the UK Government's 2005 position," December 17, 2007 Available at http://www.tjm.org.uk/download/TJMepaanalysis1207.pdf (accessed April 10, 2009).

[525] Article 10(b) of the Vienna Convention of the Law of Treaties (VCLT) states that initialling an agreement demonstrates that the text is authentic and definitive and ready for signature or ready for provisional application for example, the granting of unilateral preferences by the EU under the EPA Regulation (Council Regulation 1528/2007 of December 20 2007 [2007] OJ L348/1, in force on January 1 2008)

[526] This means after the agreement has been ratified, which ratification entails an expression of consent by parties to be bound by the treaty as indicated in Article 11 of the VLCT. This has been the means adopted in the interim and full EPAs.

African countries. However, critics[527] have argued otherwise and have adversely labelled the so-called benefits of the EPAs for African countries "The Four Empty Claims."[528]

This is because contrary to the objective of facilitating intra-regional trade, reciprocal EPAs would undermine intra-regional trade in Africa, as African producers would be severely affected by the competition posed by the EU imports thereby losing the incentive of producing value added products which would face stiff competition from more efficient subsidised EU imports. Thus, EPAs would serve to increase Africa's dependency on the EU, as they would only be able to export raw materials which do not generate increments in profits unlike value added goods.[529] As such, African intra-regional trade would decline, as the United Nations Economic Commission for Africa (UNECA) study[530] reflects that elimination of tariffs on 80% of ACP trade with EU would displace 22% growth of ACP regional trade: For example, EU's exports to Rwanda would increase from 27.4% to 32.2% displacing exports of regional trading partners[531] while COMESA would lose US $ 242 million through a 5.8% decline in intra-regional trade with the EU earning more than US $ 1,152 million through an increment in its exports to COMESA countries.[532] A similar impact was noted in the ECOWAS countries.[533]

[527] Powell S., "Economic Partnership Agreements: Building or shattering African regional integration." (n. 495 above).
[528] Powell S., "Economic Partnership Agreements: Building or shattering African regional integration." (n. 495 above) 28.
[529] Ibid. A clear example is the sugar industry in Swaziland which had expanded from the sugar value chain to include higher value added sugar exports which it supplied to its regional members in SACU. However, the TDCA between the EU and SA risks undermining its access to regional markets as its provisions not only dismantles tariffs on processed sugar and sugar containing products entering the region but risks flooding the regional markets with EU sugar imports which will be subject to no duties by 2012, with half of the duties eliminated in 2008. Thus as a result, Swaziland sugar producers will be constrained to limit their sugar exports to raw sugar at lower prices and bereft of the benefits gained from domestic value addition.
[530] UNECA; "Are the EPAs a first best option for ACP countries?" *Journal of World Trade.* Available at www.acp-eu-trade.org/library/files/Perez EN 0306 UNECA Are-EPAs-a-Firstbest-Optimum-for-ACP-countries.pdf (accessed April 4, 2009)
[531] UNECA. "Assessing the consequences of the Economic Partnership Agreement on the Rwandan Economy." (March 2005) Available at http://www.uneca.org/atpc/work_in_progress.asp (accessed April 4, 2009)
[532] Powell S., "Economic Partnership Agreements: Building or shattering African regional integration," (n. 495 above) 28 citing the UNECA study in UNECA. "Assessment of the Impact of the Economic Partnership Agreement between the COMESA Countries and the European Union." September 2005.
[533] In the ECOWAS countries, it was estimated that the net trade diversion would amount to US $ 365 million, of which US $ 35.6 million reflected forgone exports of ECOWAS to the rest of the world, in which Ghana would lose approximately US $ 23 million in exports, Nigeria US $ 4.5 million, Burkina Faso US $ 2.9 million, Benin US $ 2.7 million, Cote d'Ivoire US $ 1.8 million and Mauritania US $ 250,000. Ibid citing the study carried out by UNECA in UNECA. "Assessment of the Impact of the Economic Partnership Agreement between the ECOWAS Countries and the European Union" December 2005. Working paper, 18 – 20.

Besides the loss of intra-regional trade due to trade diversion, these EPAs would undermine intra-regional trade through their impact on further regional fragmentation.[534]

Moreover, the contention that EPAs would address the problem of overlapping memberships in Africa is misplaced because the EU has acted contrary to this objective.[535] This is because the splintering of the SADC configuration was a result of the EU's push to sign a bilateral with SA, the Trade Development and Co-operation Agreement (TDCA) rather than under the region's EPA.[536] Additionally, the EU's argument that the introduction of bilateral investment rules in EPAs will not only facilitate regional integration but also foster investment in Africa is shammed by the fact that the EU has repeatedly dismissed requests by African countries for technical assistance in promoting investment initiatives.[537] As well, the contention that EPAs will facilitate regional integration through sufficient funding by the EU is a matter which the EU has persistently downplayed, only supporting sectors of interest to it,[538] which funds provided are attached with conditionalities to exert pressure on African countries to perform per the EU's objectives and thus undermining African states' sovereignty.[539]

Furthermore, in Africa the EPA gains may be minimal because 34 out of the 47 African countries negotiating the EPAs are LDCs which can avail the EU EBAs alternative preferential scheme, thus the value of preferences reaped in the EPAs will amount to nil

[534] This is particularly so if a member of a RTA opted out of the EPA and in order to restrain EU imports from being trans-shipped into the country through the EPA, it puts in place extra procedures to regulate the EU imports which makes it harder to reduce barriers to intra-regional trade, compounded by different rules of origin of EU originating and regionally originating goods. Thus, a study carried out by ODI indicates that EPAs will increase NTBs in their intra-regional trade thereby deterring regional integration. Stevens C., *Economic Partnership Agreements and African integration: a help or a hindrance?* (2005) 1 - 4

[535] Powell S., "Economic Partnership Agreements: Building or shattering African regional integration." (n. 495 above) 39

[536] Ibid. As a result of the TDCA, countries like Zambia, Zimbabwe, Malawi and Mauritius left the SADC EPA to negotiate with the ESA region and Tanzania with the EAC because they were avoiding trading under the stringent terms that the EC had negotiated with the SA under TDCA requiring SA to liberalise 86% of its trade.

[537] For example, on SADC's request, the EC stated; "*request for support without commitment is not acceptable*." EC Staff Working Document, accompanying document to the Communication from the Commission to the Council, 'Communication to Modify the Directives for EPA Negotiations with ACP Countries and Regions', COM 2006 673, final paragraph. Cited in Powell S., "Economic Partnership Agreements: Building or shattering African regional integration," (n. 495 above) 41. However, the UNCTAD Report is clear that investment rules are not productive in Africa if no structural changes in the improvements to production and infrastructure are undertaken. UNCTAD, *Economic development in Africa: Rethinking the role of FID* (2005).

[538] Powell S., "Economic Partnership Agreements: Building or shattering African regional integration," (n. 495 above) 44 - 48 as a result, sectors like agriculture and infrastructure have been neglected with the focus of funding only for trade liberalisation.

[539] Powell S., "Economic Partnership Agreements: Building or shattering African regional integration" (n. 495 above) 49 – 50. For example the Economic Integration Support Programme for the BLNS which was rejected by the BLNS countries due to the economic conditionalities attached to the funding designed to address the impact on the countries from the implementation of the TDCA. Additionally, the speech by EU Development Commissioner, Louis Michel in 2006 indicating that funds will not be available to African states unless they were organised in EPA compatible configurations.

in five to ten years' time for African countries.[540] This preference loss will result from preferential access to EC markets by Central America, Andean countries, ASEAN and India among others with which the EU is already negotiating FTAs. Thus, the likely impact of EPAs on African countries is largely questionable as to its so-called benefits.

This study however seeks to analyse the drive for trade and development initiatives in the African RTAs in particular EAC and SADC. The regions' initialled EPA texts will be examined in relation to the provisions' support or deviation from the trade and development objectives envisaged in the Cotonou Agreement and the EPAs. However, due to the overlap in the provisions of both the interim EC-EAC and SADC EPAs, which may tend to border on the same traits, this study takes recognisance of such an overlap and argues both regions' provisions jointly in the initialled EPAs to avoid duplication in the study of these provisions' objectives. However, it makes note of divergent approaches in the provisions of both the interim EC-EAC EPA and the SADC EPA.

4.3- AN OVERVIEW OF THE INITIALLED ECONOMIC PARTNERSHIP AGREEMENTS IN THE EAC AND THE SADC

4.3.1- THE ECONOMIC PARTNERSHIP AGREEMENT FOR THE EAST AFRICAN COMMUNITY (EC-EAC EPA)

The EAC region is a geographically and economically homogeneous region committed to regional integration and comprised of five member states including Burundi, Rwanda, Tanzania, Uganda,[541] and Kenya.[542] In 2005, the EAC established a CU which envisages achieving a fully fledged Union with overall complete elimination of internal tariffs to zero by 2010. Furthermore, the EAC is fast tracking its economic integration process and is already negotiating a more far-reaching common market, however the integration agenda of the EAC is strongly political in nature as its ultimate goal is to

[540] Kwa A., "South Centre cautions African countries when approaching Economic Partnership Agreements," (February 2, 2009) available at http://www.insouth.org/index.php?option=com_publicationz2&publicationz2Task=publicationz2Details&catid=0&publicationz2Id=238&Itemid=77 (accessed April 4, 2009)
[541] All of which are LDCs.
[542] A DC.

become a federation.[543] It is with these traits that the EAC emerged as a separate EPA configuration to launch its negotiations rather late in the state of play of various EPA negotiations. The EC-EAC EPA was formed in order to retain preferential market access to the EC,[544] before the expiry of the trade regime set out in Annex V of the Cotonou Agreement on December 31, 2007, and the WTO waiver covering that trade regime.

With all these attributes and after so many haggles however,[545] the EAC trade ministers signed the framework Interim Economic Partnership Agreement (IEPA) with the EU on November 27, 2007 in Kampala, mainly covering trade in goods and fisheries, and it was considered as a stepping stone towards a full EPA.[546] This came in the wake of the August 2007 summit where it was unanimously agreed by the heads of states[547] that in order to consolidate the EAC CU and maintain the CET, member states should explore negotiating an EPA with the EU as a bloc.[548]

The eventual accord to negotiate as a bloc was followed by consensus of the EAC trade ministers to form a joint negotiating position on October 11, 2007. However, their motives were still intricately linked to forming an EPA which was both compatible with the ESA and SADC group, to safeguard the EAC as well as to preserve the composition of the existing EPA configurations.[549] However, this proved quite futile as the EAC tariff liberalisation schedule was based on the EAC CET and the negotiations also considered the EAC's composition of sensitive products as a bloc as against the interests of the other members in the two blocs. Thus, the disagreement at this stage, culminated into the EAC's resolve to present a harmonised market offer to the EC as a

[543] European Commission, "Fact sheet on the interim Economic Partnership Agreements. The East African Community (EAC)," January 2009. Available at http://trade.ec.europa.eu/doclib/docs/2009/january/tradoc_142194.pdf (accessed April 4, 2009)
[544] The 4 LDCs were guaranteed to have preferential market access to the EC through the DFQF EBA Initiative but their trading partner Kenya faced a different predicament as a DC which did not qualify for such treatment under the EBA Initiative.
[545] Tanzania was indecisive on leaving SADC to join the EAC EPA as a bloc, while the other four member states were also still negotiating under ESA-EC EPA.
[546] European Commission, "Fact sheet on the interim Economic Partnership Agreements. The East African Community (EAC)," (n. 543 above)
[547] Burundi, Kenya, Rwanda, Tanzania and Uganda.
[548] Wolfe B., *Regional integration in Africa. Lessons from the East African Community,* (n. 64 above) 312 although this had always been the EAC's position in theory since the April 2002 Summit decision on negotiating ACP, EU and WTO trade deals as a bloc, as well as the decisions of the Secretariat and EALA though the member states were still under divergent EPAs with Tanzania under SADC and the rest under the ESA bloc.
[549] Wolfe B., *Regional integration in Africa. Lessons from the East African Community,* (n. 64 above) 313.

bloc under the EAC CU and consequently, its members were excluded from market offers made by other EPA configured blocs in which they were originally party to.[550]

With the EC's consent on November 14, 2007,[551] the representatives of the EC and EAC finally agreed to the ongoing negotiations of an EC-EAC EPA which would cover trade in goods and market access, development co-operation and fisheries.[552] However, in a final negotiating agenda for the EAC IEPA in February 2008, it was mutually agreed that negotiations would also encompass trade in services and the so-called Singapore issues. From January 1, 2008, the initialled EPA was to be applied provisionally with the attendant regulations and transitional arrangements adopted to prevent any disruption to trade between the EAC member states and the EU.

This study takes note of the fact that various meetings between the EAC and the EC representatives have been held before and after the initiation of the IEPA with an aim to ratify and notify the EPA to the WTO, as well as to conclude the complex process of negotiating a comprehensive EPA by July 2009. This study however does not divulge in those meetings or negotiations but analyses the provisions of the initialled EC-EAC EPA with an underlying premise to explore whether the provisions support or diverge from their main objective of promoting trade and development in the EAC.

4.3.2- THE INTERIM ECONOMIC PARTNERSHIP AGREEMENT FOR THE SADC GROUP

The SADC Treaty was signed in 1992 with the objective of creating a development community that would achieve economic integration while enhancing its trade.[553] The bloc aims to provide balanced economic growth and development, political stability and security for all its members[554] through regional cooperation and integration. The SADC

[550] On the ESA group, this occurred after consultations between EAC and COMESA in late October 2007.
[551] The meeting was held in Brussels.
[552] Wolfe B., *Regional integration in Africa. Lessons from the East African Community*, (n. 64 above) 313
[553] SADC replaced the SADCC.
[554] Angola, Botswana, the DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, the Seychelles, Tanzania, South Africa, Swaziland, Zambia, and Zimbabwe.

FTA was notified to the WTO[555] under Article XXIV of GATT 1994 however, the FTA was officially established in August 2008.[556]

Negotiations of the SADC EPA were officially launched in July 2004 and the groundwork was set with mutual agreement on undertaking preparations until December 2004, and thereafter substantive negotiations would ensue from January 2005 to July 2007.[557]

Likewise, in the SADC EPA, various meetings and negotiations were held till the initiation of the interim EPA and after its initiation, which this study does not dwell into[558] but analyses the provisions of the interim SADC EPA which was finally initialled by the SADC group. However, it will note that the SADC Interim EPA was negotiated in accordance with the objectives for EPAs set out in the Cotonou Agreement[559] and the negotiating directives for the EPAs with ACP States adopted by the EC Council on June 12, 2002. Furthermore, it will also take note of the negotiations held in December 2004 where consensus was raised to include Sanitary and Phytosanitary measures (SPS), technical barriers to trade (TBT), and regional integration in the negotiations in 2005.[560] While in July 2005, three additional areas were also proposed to be incorporated in the negotiations that included market access for agricultural, non-agricultural and fisheries products, rules of origin and trade facilitation.[561]

The various negotiations culminated into the initialling of the SADC interim EPA on November 23, 2007 by Botswana, Lesotho, Swaziland and Mozambique while Namibia initialled on December 5, 2007 with some reservations based on the position that its concerns during the EPA negotiations would be addressed in the future negotiations

[555] WTO documents: WT/REG176/N1/Rev.1, 27 August 2004; WT/REG176/1, 8 October 2004; and WT/REG176/Rev.1, 19 November 2004.
[556] http://www.sadc.int/ (accessed on April 4, 2009).
[557] Kruger P., "Update on the SADC EPA negotiations," December 22, 2006. Tralac News. Available at http://www.tralac.org/unique/tralac/pdf/20061222_SADC_EPAUPDATE.pdf (accessed on April 4, 2009).
[558] It should be noted that the ongoing negotiations were undertaken with members like South Africa, Angola and Tanzania, which however did not initial the final agreement.
[559] The ACP-EC Partnership Agreement signed in Cotonou on 23 June 2000 as revised in Luxembourg on 25 June 2005.
[560] Kruger P., "Update on the SADC EPA negotiations," December 22, 2006. (n. 557 above).
[561] Erasmus G., "The Interim SADC EPA Agreement: Legal and Technical Issues and Challenges." Available at http://www.icoh2009.co.za/unique/tralac/pdf/20080129_Erasmus_Discussion_InterimSADC_EPA.pdf (accessed April 4, 2009).

leading to a comprehensive EPA.[562] However, some member states of SADC did not initial the EPA for example SA which intended to continue its trade relations with the EC under the TDCA, while Tanzania joined the EC-EAC EPA configuration and Angola postponed its decision to join till it deemed possible.[563] However, the EU and SADC negotiators have confirmed that the agreement is open to other parties in the region to join if they wished.[564] Thus although SA is indicated as a party in the initialled IEPA, it did not initial the agreement and this study only recognises the members that initialled the IEPA and how this IEPA has supported or retreated from the trade and development objectives of the EPAs.

The initialled interim SADC EPA like the EC-EAC EPA was gravely criticised for its provisions and this study critiques both the EPAs' provisions in their support for trade and development objectives as well as its divergence from these objectives.

4.4- TRADE AND DEVELOPMENT OBJECTIVES IN THE INTERIM ECONOMIC PARTNERSHIP AGREEMENT FOR THE EAC AND THE SADC REGIONS

The EC-EAC EPA and the SADC EPA facilitate trade and development by providing DFQF access to the EU markets on a reciprocal basis which ensures the availability of market access. This market access is guaranteed and cannot be withdrawn unlike unilateral EU preferences[565] because it is based on reciprocity. In the EC-EAC EPA, the market access offer is based on a secure, long term and predictable basis[566] free from customs duties as emphasized in Article 10 under conditions defined in Annex I. The DFQF market access[567] therefore supports the trade and development objectives in the EC-EAC EPA since the EC is a major trading partner of the EAC, which accounts for the total value of EAC trade flows of approximately €4.3 billion or 0.12% of EU

[562] Erasmus G., "The Interim SADC EPA Agreement: Legal and Technical Issues and Challenges," (n. 561 above). At the request of Namibia, a Joint Declaration was attached to the interim agreement which referred to the SADC EPA concerns that needed to be resolved in the framework of the Full EPA negotiations.
[563] Angola expressed its intention of acceding to the full EPA once the agreement was concluded, thus did not initial the interim agreement and exports under the EBA initiative from January 1, 2008. "EPA Negotiations: Where do we stand? SADC. Last update: April 1, 2009." Available at http://www.acp-eu-trade.org/index.php?loc=epa/SADC.php (accessed April 4, 2009).
[564] Ibid.
[565] For example the GSP schemes.
[566] Article 5 (a) and Article 2 (f) of the EC-EAC EPA.
[567] With transitional arrangements for rice and sugar.

imports.[568] Moreover, the EAC's main exports to the EU are dominated by a few products which were previously subjected to duties under the Cotonou Agreement such as plants, flowers, coffee, vegetables, fish, and tobacco.[569]

In addition to this, the DFQF access supports trade and development taking into consideration that the withdrawal of the EC trading preferences would have subjected Kenya to the GSP[570] as the fallback position if the country had not initialled the EPA. Yet, under the GSP, Kenya's products to the EU would have been subjected to increased tariffs of approximately between 5.3% and 15.7% and its horticultural products which comprise of 69% of total Kenyan exports would have been subjected to an 8% tariff rise.[571]

In the SADC EPA, the trade and development component is supported as well through provision of DFQF market access for the SADC group. Article 25 (1) provides the SADC group with DFQF market access for their exports to the EC.[572] Like the EC-EAC EPA, the guaranteed improved market access for the SADC group facilitates trade and development especially to the three DCs[573] like Namibia and Botswana who are key beef exporters which product now receives DFQF access to the EU market unlike under the Cotonou Agreement where it was subjected to import quotas. Thus, the IEPA provisions have enabled the SADC group to continue to enjoy preferential access to EU markets which has since January 1, 2008 become more preferential with the elimination of all duties and quotas.[574]

[568] European Commission, "Fact sheet on the interim Economic Partnership Agreements. The East African Community (EAC)," (n. 543 above).
[569] The EU however mainly exports machinery, chemicals and vehicles to the EAC. *Ibid*.
[570] This is because the 4 LDCs would be covered under the EBAs alternative to have DFQF access to the EC.
[571] Kenyan Ministry of Trade and Industry estimates as citied in Wolfe B., *Regional integration in Africa. Lessons from the East African Community*, (n. 64 above) 320. This is worse for the LDCs in the EAC as well because most of their trade is with Kenya, for example Uganda. See Ministry of Tourism, Trade and Industry, "An overview of the East African Community –EU Framework Economic Partnership Agreement (EPA); what is in it for Uganda?" available at http://www.mtti.go.ug/EPA.pdf (accessed April 10, 2009).
[572] With transition arrangements for rice and sugar as stipulated in Article 25 (3) and Annex 2.
[573] Botswana, Namibia and Swaziland.
[574] For example, Botswana and Namibia's beef products. The trade increase for Namibia is significant because Namibia had a beef quota of 13 thousand tons p.a. and the value of that trade which was to receive DFQF mainly in beef, fish and table grapes is about Namibian $ 1.1 billion a year. Emma Mbekele, Press & Information Officer of the European Commission in Namibia as quoted in Goosen L., "Step by step removal of obstacles to EPA," Namibia Economist. March 20, 2009. Available at http://www.economist.com.na/index.php?option=com_content&view=article&id=11081:step-by-step-removal-of-obstacles-to-epa&catid=540:letters-a-opinions&Itemid=61 (accessed April 10, 2009).

Furthermore, the SADC EPA reflects the trade and development objectives envisioned in the EPAs because it encompasses a development component that is not envisaged in the EC-EAC EPA. Article 1 (a) and 3 of the SADC EPA embraces the main objective of sustainable development of the trade partnership to contribute in reducing and eventually eradicating poverty in line with the Millennium Development Goals (MDGs).[575] This sets out the fact clearly that trade and development are on the agenda of the EPA. Moreover, the benefits accruing to the LDCs (Mozambique and Lesotho are recognised as LDCs by the United Nations)[576] in the group are cast more clearly as their interests are taken into consideration in aiding their development rather than the LDCs' mere forsaking of non-reciprocal DFQF market access for full reciprocity with the EC.[577]

Furthermore, Article 35 (2) of the Cotonou Agreement[578] provides that EPAs would facilitate regional integration initiatives considering that regional integration is a key for facilitating the countries' integration in the world economy. In facilitating regional integration, intra-regional trade is enhanced which therefore supports trade and development. These provisions are echoed in the EC-EAC EPA in Paragraph 9 of the Preamble and Article 2 (b) and 4 (b) which underline the main aim of the EPA as regional integration to be used as a tool to build larger markets, develop economies of scale and attract investment. Unlike in the SADC EPA, these provisions are upheld by the EAC bloc and have supported trade and development because they aim to facilitate the overall goals of the EAC in creating a common market by 2010.[579] This is because the provisions support EAC's collective efforts to attain the goals of the EPA jointly, and

[575] MDGs were drawn from the actions and targets contained in the Millennium Declaration that was adopted by 189 nations and signed by 147 member states during the UN Millennium Summit in September 2000. These targets have been divided into eight goals that reflect the world's main development challenges and are to be achieved by 2015. The MDGs include eradication of extreme poverty and hunger, attainment of universal primary education, promotion of gender equality and empowerment of women, reduction in child mortality, improvements in maternal health, combating HIV/AIDS, malaria and other diseases, ensuring environmental sustainability and establishment of a Global Partnership for Development. Available at http://www.undp.org/mdg/basics.shtml (accessed April 27, 2009) for further reference, see, United Nations, *The Millenium Development Goals Report 2008*, Available at http://www.un.org/millenniumgoals/pdf/The%20Millennium%20Development%20Goals%20Report%202008.pdf (accessed April 27, 2009).

[576] Mozambique and Lesotho.

[577] Presentation by Pearson M., "Challenges of the SADC EPA Negotiations. The development component." June 26, 2007, Available at http://www.ecdpm.org/Web_ECDPM/Web/Content/Download.nsf/0/6EDE9FCCE919E86DC1257308004F70FE/$FILE/SADC%20EPA%20Development%20Component%20Pearson.pdf (accessed April 9, 2009).

[578] Is read in line with the SADC EPA.

[579] The negotiations for the establishment of the EAC Common Market were launched on April 14, 2008 in Kigali, Rwanda. EAC Newsletter, "EAC launches Common Market negotiations in Rwanda. Minister leads call for "bold commitment" to regional unity," April 18, 2008. EAC Update Issue No. 2008/02. Available at www.**eac**.int/downloads/e-newsletter/doc_download/12-**eac**-update-issue-no-2.html (accessed April 9, 2009).

in so doing, this fosters the development of intra-regional trade thereby promoting trade and development.[580]

Moreover, the EU has set as one of its main principles in the agreement to contribute in addressing the production, supply and trading capacity of both the EAC and the SADC group in their IEPAs.[581] Additionally, the IEPAs support asymmetrical liberalisation between the members of the EAC and SADC group taking into consideration their different levels of development.[582] These provisions reflect the will to support trade and development in the two regions.

The IEPAs hold a commitment to ensure that the EPAs are used as a tool for development and therefore recognises the fact that the EAC and SADC group need financial assistance in a bid to promote the trade and development needs for the regions. Thus, Paragraph 8 of the Preamble, Article 2 and 36 of the EC-EAC EPA provide for economic and development cooperation and acknowledges the need for development and aid for the EAC.[583] Likewise, in the SADC EPA, Article 8[584] states that financing concerning development co-operation and the implementation of the agreement would be carried out within the framework of the rules and relevant procedures provided for by the Cotonou Agreement[585] as the sole aim of supporting the implementation of the interim EPA as a priority.[586]

Moreover, unlike the EC-EAC EPA terms, in the SADC EPA, the EC is willing to facilitate the SADC group to assess other financial instruments as well as facilitate other donors willing to further the efforts of the group.[587] And in order to promote transparency while utilising the EPA, a regional development financing mechanism would be set up

[580] This was stressed by Mr. Thanos Rammos, the EC Trade Coordinator for the EC-EAC EPA, *"[The] EPA therefore acts as a catalyst to consolidate the existing Customs Union while respecting EAC political choices."* Rammos T., "General Overview of the Economic Partnership Agreement between the EC and the East African Community." (n. 515 above).
[581] Article 4 (e) of the EC-EAC EPA and Articles 1 (e) and (d) of the SADC EPA.
[582] Articles 2 (g) and 4 (c) of the EC-EAC EPA and Article 1 (f) of the SADC EPA.
[583] The Article further stipulates that the EC would contribute towards the resources required for development from the 10th EDF Regional Indicative Programme, Aid for Trade and the EU budget.
[584] Article 8 of the SADC EPA is under the detailed chapter II which is quite elaborative on financing development co-operation
[585] It further emphasizes that the financing is done in particular with the programming procedures of the EDF and within the framework of the relevant instruments financed by the general budget of the EU.
[586] Article 8 (2) of the SADC EPA.
[587] Article 8 (4) of the SADC EPA.

such as an EPA fund to provide a useful instrument for efficiently channelling development financial resources and for implementing EPA measures, which the EC agrees not only to support but contribute to as well.[588] Therefore, these provisions seek to support the trade and development objectives enshrined in the EPAs.

Contrary however, the trade and development goals of the IEPAs are just a rhetoric as some of the provisions in the EC-EAC EPA and the SADC EPA are not only a move away from the intended objectives of trade and development but would also operate to deter the capacity of trade and development in the EAC and SADC. This is because the IEPAs' coverage is very wide and the stringency of the disciplines incorporated therein goes beyond what is required under the WTO rules and shows that the IEPAs have drifted away from Article XXIV requisites and the objectives of enhancing trade and development in the EAC and the SADC group which was clarified in the negotiations with the EC. This study therefore emphasizes the divergence of the provisions in the IEPAs from the intended trade and development goals of the EAC and the SADC group EPA.

4.5- DIVERGENCE FROM THE TRADE AND DEVELOPMENT OBJECTIVES IN THE INTERIM ECONOMIC PARTNERSHIP AGREEMENT FOR THE EAC AND THE SADC

4.5.1- STRINGENT LIBERALISATION COMMITMENTS

The EC-EAC and SADC EPAs are indicative of agreements that have detoured from the objective of enhancing trade and development in the regions because the FTAs that the IEPAs bring into place require sweeping liberalisation commitments over limited time frames.[589] Article 11 and Annex II (a), (b) and (c) of the EC-EAC EPA which includes four LDCs, commits these members to 82% liberalisation of imports from EU. It further stipulates that 62% of the EU imports will be liberalised after two years, and 80% after 15 years and only 2% of liberalisation will ensue after over a period of more than 15

[588] Article 8 (5) of the SADC EPA.
[589] These IEPAs are also indicative of the fact that the governments were rushed into signing them because they do not make economic sense for the economies' strive for development especially the LDCs.

years yet 51% of this is at zero percent.[590] This implies significant liberalisation in a very short period, yet currently only 22% of Rwanda's and 0% of Burundi's imports have a zero tariff.[591]

In the SADC group,[592] Article 26 (1) and Annex 3 of the SADC EPA commits Botswana, Lesotho, Namibia and Swaziland (BLNS) to an even higher percentage of 86%, which liberalisation will take place over two years and only 3 tariff lines are given a 10 year transition period. In addition to this, Article 26 (2) and Annex 4 of the SADC EPA commits Mozambique, an LDC to 80.5% and most of this liberalisation is to take place upon immediate entry into force of the agreement, yet 12% of Mozambique's trade is at a tariff of zero percent.[593] Furthermore, Article XXVIII bis of GATT 1994 para 3 (a), (b) and (c) would provide more scope for liberalising the bulk of imports for less developed countries as it takes into consideration their needs and the use of tariff protection to assist in their economic development as well as revenue purposes. These stringent liberalisation schedules therefore create limited flexibility for member states in the EAC and SADC group to adjust to the structural changes to accommodate the EC goods and new trading regime especially the LDCs.

Furthermore, Annex I of the EC-EAC EPA and Annex 2 of the SADC EPA indicate the exclusion of some of their most vulnerable sectors[594] from immediate liberalisation as well as the exclusion of the EC imports from liberalisation in the regions. However, these exclusion lists are limited and will not foster economic growth or development to the EAC and SADC group. For instance, the EAC as a whole is excluding 19.7% of imports from liberalisation and yet very few of these products are agricultural

[590] Trade Justice Movement, "Economic Partnership Agreements (EPAs): Assessing recent developments in EPA negotiations against the UK Government's 2005 position," (n. 524 above).
[591] Ibid
[592] The SADC EPA has different liberalisation schedules for BLNS and Mozambique as noted in Article 26; this deters regional integration, and undermines economic integration of the SADC member states. Yet, this is worsen as the SADC members in the ESA-EC EPA have totally different liberalisation schedules from the ones indicated in the interim SADC EPA, for example, goods excluded in the ESA-EC EPA are not indicated at all in the exclusion list of the interim SADC EPA, and yet, over 75% are being excluded by just one member.
[593] Trade Justice Movement, "Economic Partnership Agreements (EPAs): Assessing recent developments in EPA negotiations against the UK Government's 2005 position," (n. 524 above).
[594] In the SADC-EPA, 44 sensitive tariff lines liberalisation is envisaged in 2015, 3 further lines will not be liberalised until 2018 for BLNS while for Mozambique, liberalisation will take place immediately though, some additional 100 lines will be liberalised by 2018.

products[595] contrary to the fact that the four LDCs are agricultural economies. In the SADC EPA, 2.8% of the value of BLNS imports from the EU is excluded.[596]

Therefore, this unprecedented liberalisation exposes industries and agricultural producers in the EAC and SADC group to highly competitive EU exports which could lead to widespread loss of jobs and adversely affect livelihoods[597] and threatens both current and future industries.[598] It would also lead to loss of vital government revenue that would otherwise be spent on health, education, or infrastructure.[599] Yet, the study undertaken by UNECA[600] clearly indicates that African EPAs should only liberalise not more than 60% of all their trade to the EC in order to attain economic development without undermining their markets. Thus, these agreements eliminate virtually all the policy space from the EAC and SADC group, which will no longer be able to use tariff policy to develop their economies[601] and totally disregards the emphasis that the EPAs' founding objective was trade and development.

[595] All these are goods with a CET of 10% or more and entail mostly clothing and other light manufactures contrary to the fact that the 4 LDCs in the EAC bloc are mainly agricultural economies. The 19.7% average however varies from Uganda's low of 17.3% to a high for Burundi of 23%. Stevens C, Meyn M, and Kennan J., *The New EPAs: Comparative analysis of their content and the challenges for 2008,* (2008) 26 Available at http://www.fes.de/cotonou/OTHER_BACKGROUND_TRADE/ECDPM_NEWEPA_02APRIL2008.PDF (accessed April 4, 2009)

[596] Most of these items face tariffs of over 10% and above but unlike the EAC, these tariffs can go up to a possible 96% and mainly entail a wide range of agricultural and manufactured goods, clothing, textiles and motor vehicles. However, some items on the list are duty free. Ibid 46 the exclusions focus on agricultural goods and some processed agricultural goods because of the need to protect infant industries or sensitive products in these SADC group countries.

[597] The EU subsidised exports in products like diary, meat, wheat would have a greater impact on rural areas, where the vast majority of poor people live and carry out farming and trade in these products as a way of life. Oxfam International and TWN Africa, "A matter of Political will. How the EU can maintain market access for African, Caribbean and Pacific countries in the absence of Economic Partnership Agreements," (2007) available at http://www.oxfam.org.uk/resources/policy/trade/downloads/joint_epas_twnafrica.pdf (accessed April 4, 2009).

[598] For example, according to analysis carried out for the Kenyan Ministry of Trade, 65% of Kenya's industries would be vulnerable to unfair competition with the EU subsidised imports, and these vulnerable firms include food processing, textiles, and paper and printing which employ more than 100,000 people. Kenya Institute for Public Policy Research and Analysis (KIPPRA), "Assessment of the Potential Impact of Economic Partnership Agreements (EPAs) on the Kenyan Economy, on behalf of Kenyan Ministry of Trade and Industry," September 2005

[599] According to impact assessment studies by the International Monetary Fund and the European Commission, between 8% and 12% of government revenue could be lost through implementation of an EPA. Khandelwal P., "COMESA and SADC: Prospects and Challenges for Regional Trade Integration," (2004) WP/04/227 International Monetary Fund Available at http://imf.org/external/pubs/ft/wp/2004/wp04227.pdf (accessed April 4, 2009) and PriceWaterhouseCoopers, "Qualified Preliminary EU-ACP SIA of the EPAs: Phase One (Final Draft)" (2004) Final Report (revised) February 2, 2004. Available at http://trade.ec.europa.eu/doclib/docs/2005/january/tradoc_121195.pdf (accessed April 4, 2009) This assessment is higher than member states expenditures on health.

[600] African Trade Policy Centre, *EPA Negotiations: African countries. Continental Review. Review Report,* February 19, 2007 available at http://www.africa-union.org/root/au/AUC/Departments/TI/EPA/DOC/Comprehensive_Review_of_EPAs_Negotiatons_in_Africa_ACP___Final_Report.pdf (accessed April 4, 2009)

[601] This tool is yet highly recommended and widely recognised as having been instrumental in the creation of the East Asian tiger economies. Trade Justice Movement, "Economic Partnership Agreements (EPAs): Assessing recent developments in EPA negotiations against the UK Government's 2005 position," (n. 524 above).

4.5.2- MOST FAVOURED NATION CLAUSE

The MFN clause incorporated in the EPAs is extremely cumbersome and a clear drift from the goals of trade and development in both the EC-EAC EPA and the SADC EPA. Contrary to the separate negotiations held in which both the EAC and SADC group strongly objected to this clause, it was however included in the IEPAs and yet there is no requirement in the WTO[602] or the Cotonou agreement[603] for its inclusion. Moreover, it clearly goes beyond the requirements of Article XXIV:5 (b) of the GATT 1994 on FTAs. However, Articles 16 (2) and 28 (2) of the EC-EAC EPA and SADC EPA respectively require the EAC and SADC group to extend to the EC any more favourable treatment that they subsequently agree in another FTA with any major trading country.[604] This clause specifically deters the trade and development objectives of the EPAs because it creates a serious setback on future South-South Agreements as member states would be reluctant to negotiate any preferential trade terms with the initialled EAC and SADC EPA states because they would have to extend such preferences to the EC. This curtails trade and development objectives because South-South agreements are a viable alternative to the EPAs, which alternative loses the lucrative glow because of the incorporated MFN clause in the IEPAs.

In addition to this, the MFN clause is a clear retreat from the trade and development goals because the clause's incorporation severely undermines the scope for the EAC and SADC to engage in negotiations with other trading partners and make decisions about market openings. This is because it locks these regions into giving the same treatment to the EU that they would give to any other major trading partner such as Brazil or China thus allowing the EU to maintain a position of dominance relative to

[602] The compatibility of this clause with the requirements of the rules of the WTO raises concern as FTAs are an exception to the MFN rule in the WTO which prohibits discrimination and this has been discussed in the Turkey Textile case (n. 227 above) and the Banana cases (n. 155 above). This detour in the IEPAs has prompted Brazil and other WTO members to raise this matter in the WTO General Council and have argued strongly that it is in conflict with the Enabling Clause's objective to promote regional integration among DCs.

[603] The Cotonou Agreement in Articles 36 and 37 provide for the benchmark and foundation of the new trade arrangements with the EC which emphasize WTO compatibility, regional integration, and integration into the global economy and not regional MFN treatment for the EC.

[604] A major trading company was defined in Article 16 (6) and 28 (5) of the EC-EAC EPA and SADC EPA respectively to mean any developed country, or any country accounting for a share of world merchandise exports above 1 percent in the year before the entry into force of the IEPAs, or any group of countries acting individually, collectively or through an economic integration agreement accounting collectively for a share of world merchandise exports above 1.5 percent in the year before the entry into force of the IEPA.

competitors.[605] In addition, this is quite ironical of the 'equal partnership' status of the EPAs and a clear indication of the divergence from the intended trade and development goals as it is quite queer that the EC did not incorporate such a provision in its FTA with Mexico nor in its trade agreement with SA under the TDCA.

Furthermore, the EC has already negotiated several FTAs with other nations which FTAs are exempt from this clause[606] which is unlike the EAC and SADC group which might desire to negotiate these economic integration agreements in future to boost their trade and development capacity. Thus, this only serves to incapacitate the trade and development goals of the regions and hence a divergence from these objectives.

4.5.3- DUTY FREE QUOTA FREE MARKET ACCESS CONDITIONALITIES

Contrary to the main objective of the EPAs to provide DFQF access to EU markets in order to promote trade and development in the ACP, the provisions of the IEPA reflect that this main objective was discarded. The EC-EAC[607] and the SADC EPA[608] all provide that DFQF market access is provided with the exception of two important products including sugar and rice which products the EU has persistently protected from tariff liberalisation as reflected in its CAP.[609] This limits access to the EU markets in these products yet sugar is a key export of Swaziland. Moreover, in return for the market access, the EU has drawn certain concessions from the EAC and SADC group for example the commitments to negotiate the Singapore issues thus reflecting the divergence from the criteria of building trade and development in these regions.

[605] Trade Justice Movement, "Economic Partnership Agreements (EPAs): Assessing recent developments in EPA negotiations against the UK Government's 2005 position," (n. 524 above).
[606] Article 16 (3) and 28 (4) of the EC-EAC EPA and the SADC EPA provide respectively that the terms of the MFN clause only apply to the agreements entered into by the parties after signing the IEPAs.
[607] Article 5 (a) and 10 of the EC-EAC EPA
[608] Article 25 of the SADC EPA
[609] For example, the EU Sugar Regime has been greatly criticised in the WTO because it has not been liberalised with the constant supply of export subsidies. The ACP countries were however given limited access through the EU Sugar Protocol which is subject to revision under Article 36.4 of the Cotonou Agreement or termination under Article 10 of the Sugar Protocol. European Commission,"Background on the EU proposal to denounce the Sugar Protocol and market access for ACP sugar under EPAs," September 14, 2007 Available at http://trade.ec.europa.eu/doclib/docs/2007/september/tradoc_135921.pdf (accessed April 10, 2009)

4.5.4- EXPORT TAXES

Article 15 (1) and 24 (1) of the EC-EAC and the SADC EPA respectively forbid the introduction of new export taxes and more specifically in the SADC text, against increment in the applied ones except for specific circumstances and after the authorisation of the EPA council[610] or consultation with the EC party.[611] These articles deviate from the trade and development goals that the IEPAs are meant to embody as the prohibition of export taxes will negatively impact on the regions' development and diversification of its economies. This is because export taxes are important not only for raising revenue but for encouraging diversification, for promotion of greater local value added processing and local employment creation.

Additionally, these provisions diverge from the trade and development objectives of the IEPAs and are out of scope from the WTO requisites for compatibility under Article XXIV of the GATT because export taxes and duties are acceptable under the WTO provisions of Article XI GATT 1994.[612] This is because WTO members are free to impose export taxes on products as long as they are not set at a level which amounts to an export ban.[613] Thus these IEPAs provisions are not only being used to circumvent the multilateral rules on trade in goods but have diverged from the EPA intent of facilitating trade and development in the regions to the EC's selfish interests of accessing the regions' raw materials in order to maintain the competitiveness of its industries.[614]

[610] Article 15 (2) of the EC-EAC EPA
[611] Article 24 (2) of the SADC EPA
[612] The scope of Art XI GATT has been established in the Japan – Trade in Semi- Conductors case Panel Report adopted May 4, 1988 BISD 35S/116
[613] Matsushita M, Schoenbaum T, and Mavroidis P., *The World Trade Organization: Law, practice, and policy.* (2ed) (2006) 593 – 594.
[614] Kwa A., "South Centre cautions African countries when approaching Economic Partnership Agreements," (n. 540 above). This atitude of the EU in securing and maintaining cheap natural resources so as to facilitate its manufacturing industry and boost its export products is reflected in its push for trade liberalisation in the natural resource sectors including fisheries, forests and minerals of which African countries have a comparative advantage. Hall, R. Undercutting Africa. Economic Partnership Agreements, forests and the European Union's quest for Africa's raw materials. (2008) available at http://www.foe.co.uk/resource/reports/undercutting_africa.pdf (accessed April 4, 2009) Thus these IEPA provisions are also reflective of this major aim by the EU.

4.5.5- INFANT INDUSTRY CLAUSES

The EPAs' intent to foster trade and development in the regions should be reflected in accommodative infant industry clauses to ensure that the EAC and the SADC group can mitigate the dangers caused by excessive EC import surges for the regions' existing infant industries and new sectors. However, these Infant industry clauses are very limited as envisaged in the IEPAs for example Article 21 (5) (b) and 34 (5) (b) of the EC-EAC EPA and SADC EPA[615] respectively which contain the so-called infant industry safeguard clauses are very restrictive especially in the EAC comprised of four LDCs. The EAC's imposition of these clauses is restricted to 10 years while Botswana, Namibia and Swaziland are restricted to 12 years and Lesotho and Mozambique as LDCs to 15 years. These clauses are further limited only to mitigating the damage of import surges for existing sectors[616] and yet no protection is accorded to the new industries conforming to the same requirements, though infant industries will constantly be established as the regions aspire to increase trade and development. This therefore perpetuates unfair import competition for EAC and SADC producers reflecting the fact that these IEPAs are a draw back from the trade and development objectives.

Additionally, these provisions are out of scope with the WTO Agreement which recognises the protection of infant industries in Article XXVIII bis para 3 of the GATT 1994. Thus, the IEPAs are a retreat from the trade and development objectives that they sought to embody as well as fall out of the parameters of Article XXIV of the GATT 1994.

4.5.6- INADEQUATE SAFEGUARD CLAUSES

The EAC and SADC group are further availed inadequate safeguards in the IEPAs which do not differ significantly from the applicable ones at the WTO, which have

[615] Article 24 (2) also recognises the need to protect infant industries.
[616] This is contrary to the old clause in Part IV of the EEC Treaty and the Yaoundé Conventions, which allowed an ACP country to retain or introduce customs duties which corresponded to its development needs or its industrialisation requirements, or which are intended to contribute to its budget.

proved inadequate for DCs plus the difficulty in their implementation.[617] Articles 20 of the EC-EAC EPA and 33 of the SADC EPA contain these inadequate safeguard clauses which will not be able to protect the EAC and SADC producers from import surges that they are vulnerable to, particularly in the agricultural sector. The IEPAs as well provide for the use of the Special Agricultural Safeguard (SAG) under Article 5 of the WTO Agreement on Agriculture[618], but the EAC and SADC group members are not party to this agreement. Thus, they are unable to use this safeguard mechanism which is only available to the EC, though the EC has agreed to exempt the EAC and SADC group exports from imposition of these multilateral safeguards but only for the first five years of the agreement's implementation.[619]

In addition to this, the safeguard clauses in the EAC and SADC EPA are limited by a number of onerous procedures that have impeded their effective use in the context of other trade agreements. They do not contain the Special Safeguard Mechanism (SSM)[620] and yet, they are of limited duration.[621] Thus, this curtails trade and development and is a divergence from these objectives in the IEPAs.

4.5.7- STANDSTILL CLAUSE

The standstill clause is envisaged in Article 13 of EC-EAC EPA and Article 23 of the SADC EPA which binds all tariffs (including the tariff lines on sensitive products) from entry into force of the agreement. The clause requires the immediate freezing of all tariffs at their applied rates and their progressive liberalisation thereby removing the ability of the members to use tariffs as a development tool as well as eliminating critical

[617] For example the safeguard measures under Article XIX of GATT 1994 are not readily availed to DCs because of the stringent nature of the requirements needed to impose them in Article XIX:2 yet the measures are applied on a non-discrimination basis. Thus, if a contracting party undertakes a safeguard action without consensus in respect of the measure from interested contracting parties, affected contracting parties have freedom to retaliate by suspending substantially equivalent concessions in Article XIX:3.

[618] Unlike safeguard measures in Article XIX, the SAG is not applied on a non-discrimination basis. It is imposed based on price and volume triggers of the agricultural products imported. Article 5 (1) (a) stipulates that the SAG measure can be invoked when the volume of agricultural imports exceed a trigger level or when the price of agricultural imports falls below the trigger price in Article 5 (1) (b).

[619] Article 20 (3) of the EC-EAC EPA and 33 (3) of the SADC EPA.

[620] SSM is a safeguard measure to enable DCs raise farm tariffs in the face of a surge in imports or collapse in prices, needed to protect subsistence farmers from unexpected shocks arising from opening up their borders. It makes imposition of a safeguard measure for DCs easy as it does not require compensation like in SAG, however, this is one of the reasons that led to the failure of the Doha talks as it was opposed by the US which feared that its agribusinesses would lose new markets as it made painful cuts in its farm subsidies.

[621] Article 21 (1) of the EC-EAC EPA and Article 34 (1) of the SADC EPA.

policy space. For example, a high proportion of the EAC member states' tariffs already have zero tariffs which is estimated at approximately 51% because of previous liberalisation.[622] Thus with the incorporation of this clause, their policy space would not only be eliminated but it would also prevent the region from industrialisation and increasing their domestic agricultural production.[623] However, under WTO rules, these tariffs are bound[624] at relatively high rates giving members the important flexibility to raise tariffs from zero to their bound rate if needed, and yet rates can be increased beyond the MFN tariff rates subject to renegotiation of bindings under Article XXVIII of the GATT 1994. Thus, this is indicative that this provision in the IEPAs does not only fall out of scope with Article XXIV of the GATT 1994 but is also a departure from the trade and development objectives of the IEPAs.

4.5.8- INTRODUCTION OF NEW ISSUES

In the roadmap to the EPAs, the EC stressed the rhetoric that the EPAs would deliver trade and development and were being negotiated in only trade in goods and market access, but this objective has since been waylaid as these objectives have lost their initial focus. This is because the EPAs are advancing issues that have previously been rejected at the WTO.[625] For instance, in the EAC and SADC group IEPAs, there are commitments to conclude negotiations on the Singapore issues[626] which are not even required for WTO compatibility[627] and are in clear contravention of the EAC and SADC's collective position during the EPA negotiations.

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[622] Trade Justice Movement, "Economic Partnership Agreements (EPAs): Assessing recent developments in EPA negotiations against the UK Government's 2005 position," (n. 524 above).

[623] Kwa A., "South Centre cautions African countries when approaching Economic Partnership Agreements." (n. 540 above).

[624] Tariff binding is the commitment not to increase a rate of duty beyond an agreed level, thus once a rate of duty is bound, it may not be raised without compensating the affected parties. Available at http://www.wto.org/english/thewto_e/glossary_e/tariff_binding_e.htm (accessed April 4, 2009).

[625] It has been argued that the EU through the EPAs is simply trying to bring through the back door issues that have been rejected at the WTO's Doha round. Kwenda S., ''EPAs will prevent African states from achieving MDGs,'' April 11, 2009. Available at http://ipsnews.net/africa/nota.asp?idnews=46464 (accessed April 14, 2009) This is quite reflective of why the Sutherland Report was biased with the impact of North-South Agreements, arguing that *"…if such requirements cannot be justified at the front door of the WTO they probably should not be encouraged to enter through the side door."* Sutherland R, et al. *The Future of the WTO: Addressing Institutional Challenges in the New Millennium,* (n. 288 above) 23.

[626] The Singapore issues were rejected during the WTO's 5th Ministerial Conference in Cancun by a group of countries known as the G90 which collectively represent the majority of DCs in the WTO and include the ACP, the Africa Union (AU) and the LDCs. The rejection of the Singapore issues however led to the collapse of the Ministerial Conference in 2003.

[627] For example in the WTO, government procurement falls under the purview of plurilateral agreements in Annex 4 which WTO members are not obliged to sign and ratify.

Article 37 of the EC-EAC EPA provides for further negotiations on issues which encompass the controversial Singapore issues,[628] which issues are not even on the WTO agenda. Likewise, Article 67 of the SADC EPA provides for ongoing negotiations to extend the scope of the interim EPA to encompass other areas to be included in the comprehensive negotiated EPA which parties have agreed to. These areas listed include the Singapore issues[629] which the SADC EPA trade ministers had originally recommended to exclude from negotiations in their strategic framework proposal to the EC in March 2006 because they were not requisites for WTO compliance.[630] The EC was however adamant to include these issues, and as a bridge, unlike the EC-EAC EPA, Article 67 (III) of the SADC EPA reads that negotiations in competition and government procurement would only be envisaged once adequate regional capacity has been built.[631] The inclusion of the Singapore issues in EPA negotiations which are contentious issues at the WTO with no accord to their operation at the MTS level is a clear sign that the IEPAs have drifted away from their main objective of enhancing trade and development in the EAC and SADC.

4.5.9- TRADE IN SERVICES

Furthermore, contrary to the members' mandates, the IEPAs have also been extended to encompass trade in services which is not a requisite under the Cotonou Agreement.[632] Under Article 37 (d) of the EC-EAC EPA,[633] the parties agree to continue negotiations in trade in services while under Article 67 (I.) (a) (1) and (2) of the SADC

[628] Article 37 (e) (i), (ii) and (v) of the EC-EAC EPA.
[629] Article 67 II.(a), II.(b) and III of the SADC EPA.
[630] Roux W., "EU-SADC post 2007 trade: The final wake up call for Namibia and the rest of the SADC Region," March 8, 2007, Tralac News. Available at http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=42460&cat_id=1076 (accessed April 9, 2009).
[631] The provision of regional capacity is also not adequate because there is no specification of when and how the regional capacity would be built in the IEPA and this lack of certainty as regards to the capacity to have it incorporated and implemented is a setback to SADC's objectives of building on trade and development. Further, the incorporation of the Investment chapter in the SADC EPA in Article 67 (2) (II.) (a) Which while excluding South Africa and Namibia recognises the SADC Protocol on Finance and Investment in its implementation is likely to cause complex implications for all the SADC members because this Protocol encompasses all the 14 SADC members and is not yet even in force with some of its annexes not yet drafted. Erasmus G., "The interim SADC EPA: legal concerns raised by Namibia," Available at ohjelmat.yle.fi/files/ohjelmat/u3219/Gerhard_Erasmus_THE_INTERIM_SADC_EPA__nr_2_.doc (accessed April 10, 2009)
[632] Article 41 of the Cotonou Agreement only commits the member states to comply with their obligations under the GATS.
[633] This provision is further linked in the same chapter V with economic and development cooperation in Article 37 (h).

EPA,[634] the parties commit to finalise negotiations in services not later than 31 December 2008, including a liberalisation schedule for one service sector for each participating SADC EPA state.[635] This is a setback to the regions' trade and development targets because this will waylay their goals and cause enormous costs in implementation for example an IEPA in services requires notification to the WTO under Article V of GATS and the substantive requirements for FTAs in services will have to be complied with, which constitutes a challenge for these regions which have never entered into regional agreements on trade in services. Thus including services[636] into the IEPA is not only a flawed process but deviates from the trade and development criteria that the IEPAs are meant to encompass.

4.5.10- THE EUROPEAN UNION SUBSIDIES

Articles 18 (4) of the EC-EAC EPA and 36 (4) of the SADC EPA explicitly allow the EU to continue to subsidise its own products unlike its earlier contention that export subsidies[637] would be eliminated for its products. This constitutes a major deviation from the trade and development objectives encompassed in the EPAs because the clause allows EU goods to be subsidised in the EU domestic market which operates as a market barrier to EAC and SADC goods exported to the EU market. Moreover, this is also likely to lead to a surplus of cheap domestically subsidised products exported to these regions which will replace the EAC and SADC goods. This therefore means that the EAC and SADC group members will face unfair competition both in the EU market

[634]These negotiations are limited to Botswana, Lesotho, Mozambique and Swaziland. The other SADC members may also join but its implementation will greatly impact on regional policies and deeper integration of the entire SADC region. Erasmus G., "The interim SADC EPA: legal concerns raised by Namibia," (n. 631 above).

[635] This raises the question of as why would the SADC members would liberalise the sectoral services sectors even before the terms of this liberalisation have been negotiated.

[636] Trade in services should only be included if there is considerable economic support from the EC because it is vital to development and integration in the global economy. However, opening up the services industry would have disastrous effects for instance on the health sector as governments would transfer their responsibilites to provide these services to the public to the private sector. Therefore, health care would only be availed to the wealthy people in the regions which adversely affect the livelihoods of poor people. Kwenda S, "EPAs will prevent African states from achieving MDGs," (n. 625 above).

[637] A subsidy is defined in Article VI:3 of the GATT 1994 and Article 1 of the Agreement on Subsidies and Countervailing Measures (SCM). In the WTO, the issue of subsidies has been very controversial as regards their application both in the SCM and in the Agreement on Agriculture. The EU has come under attack under the two agreements over its use of subsidies as a way of undermining free trade and causing poverty for farmers for instance in the EC – Export Subsidies on Sugar, DS265, 266, 283. Likewise, at the Doha round the EU came under attack over its agricultural subsidies prompting the Director General, Mr. Pascal Lamy to propose that the EU slashes its payments to its farmers by 80% so that its maximum threshold falls to 24 billion euros in a bid to break the deadlock and secure the Doha trade pact. The Economic Times, "Key points of compromise text issued by WTO head." July 27, 2008. Available at http://economictimes.indiatimes.com/Economy/Key_points_issued_by_WTO_head/articleshow/3286924.cms (accessed April 12, 2009)

and in their own domestic markets, which will most likely lead to closure of their domestic industries.

4.5.11- REGIONAL INTEGRATION INITIATIVE

The EPAs envisaged promotion of trade and development through regional integration by facilitating intra-regional trade. This rhetoric has since proved a mockery to this objective especially in the SADC group.[638] Whereas Articles 1 (b), 2 (3) and 4 of the SADC EPA provide for regional integration as an underlying objective, the SADC EPA has proved quite an impediment to the regional integration process in Southern Africa as the EPA negotiations led to the fragmentation of SADC and SACU's regional process.[639] In the SADC bloc for example, due to the cumbersome provisions in the IEPA, Namibia delayed to initial the IEPA and SA has remained reluctant to initial the IEPA too.[640] This has led to further divisions in SADC with BLS and Mozambique eager to sign the EPA, and the emergence of Angola, Namibia and SA (ANSA) group reluctant to sign and ratify the EPA.[641] This has dire consequences for the region's trade and development objectives for example SA has indicated that if the SADC EPA members who belong to the SACU CU[642] implement the interim SADC EPA, it would consider withdrawing from the SACU and yet, Lesotho, a LDC relies on the SACU revenue pool for more than half of its government's revenue.[643] Moreover, not only has the SADC EPA fragmented the SADC members but it has also violated the SACU CU provisions

[638] Speaking at the launch of the SADC FTA the former South African president, Mr. Thabo Mbeki argued that EPAs *"will have a profound – and even limiting – impact on the process of deepening integration at the regional level."* "EPA negotiations: SADC configuration: Executive brief. The situation on January 1, 2008." (October 2008) available at http://agritrade.cta.int/en/content/view/full/2494 (accessed on April 4, 2009)

[639] This is because South Africa had negotiated a FTA with the EC under the Trade, Development and Co-operation Agreement (TDCA) which was extended de facto to the BLNS. Consequently, because of the TDCA, the other SADC member states were a bit sceptical to form an EPA with the EC under SADC as the provisions of the TDCA would be extended to them. Thus, Zimbabwe and Zambia opted not to negotiate under SADC but instead negotiated under the ESA configuration. While, Mauritius negotiated under the Indian Ocean-EPA configuration, Tanzania under the EC-EAC EPA and the DRC opted to join the Central African – EPA configuration. The diverse EPA groups have fragmented the SADC region and these bogs down the SADC objectives of a CU by 2010. Yet, if SADC were to move ahead in its implementation, it would lead to increased costs in dealing with the challenges of regional integration like diverse strategies in trade related issues and services, and additionally, the costs involved in negotiating an agreement with different protocols. These costs all serve to constrain trade which pinch would later be felt on the regional economies thus deterring trade and development in the region. Thus the IEPA's goal was diverged.

[640] "EPA negotiations: SADC configuration: Executive brief. The situation on January 1, 2008," (n. 638 above).

[641] "EPA negotiations: SADC configuration: Executive brief. The situation on January 1, 2008," (n. 638 above). The ANSA expressed opposition to certain terms of the interim EPA, as well as the signature by some members of the group which in their view would have negative implications for regional integration. Their concerns related to the text of the interim agreement provisions on the MFN clause, infant industry protection, export taxes and levies, quantitative restrictions, free movement of goods, as well as impact on food security and definition of parties.

[642] The SACU CU was notified to the WTO under Article XXIV of GATT 1994 as a CU under WTO document WT/REG231 referenced in WT/REG231/2

[643] Hartzenberg T., "Message for 2009 – Trudi Hartzenberg," (February 21, 2009) Available at http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&news_id=58839&cause_id=1694 (accessed April 4, 2009)

and rendered it in jeopardy[644] for instance Article 31 (3) of the SACU Agreement.[645] This signifies the arbitrary abuse of the SACU provisions which would later impact the regional bloc's composition and hence the IEPA has deterred from its objectives for regional integration as well as trade and development.

Therefore, it is without a doubt that the IEPAs' provisions in the EAC-EC EPA and the SADC EPA have some commendable strong points which sustain the objectives of trade and development in the regions but nonetheless, there are some provisions which deter these objectives. The divergence from these objectives is contrary to the EPA principles and the scope provided for RTA commitments under Article XXIV of the GATT 1994. The IEPAs would bring in trade liberalisation reforms and the certainty of a wide market access once the rules of origin are determined, as opposed to the withdrawal of the preferential treatment had the regions not initialled the IEPAs. More important however, these EPAs would have a severe impact on both the EAC and SADC group, as it will most likely lead to a decline in trade because of strong competition from subsidised EC imports and loss of jobs. Thus the cumbersome terms in the EPAs should be renegotiated as provided for in the WTO Transparency Decision,[646] otherwise the regions' governments[647] should pay heed to the negative impacts that these EPAs carry before signing the agreements.

In view of the divergence of the provisions in the initialled EPAs from enhancing trade and development in the EAC, this study explores avenues and other alternative options of sustaining trade and development in the EAC region in accordance with the MTS, without limiting its potential on the initialled EPA to achieve these goals in the region. This part of the study is limited to the EAC because it is factually a FTA in transition to

[644] Erasmus G., "The Interim SADC EPA Agreement: Legal and Technical Issues and Challenges," Available at http://www.icoh2009.co.za/unique/tralac/pdf/20080129_Erasmus_Discussion_InterimSADC_EPA.pdf (accessed April 4, 2009)

[645] The provision requires consensus of all SACU member states before preferential trade agreements are concluded with third parties, the negotiations and initialling of the interim SADC EPA proved that the consensus requirement had been displaced with, as Botswana, Lesotho, and Swaziland (BLS) initialled the interim SADC EPA separately, Namibia initialled with reservations and South Africa did not initial at all.

[646] WTO General Council, Transparency Mechanism for Regional Trade Agreements, Decision of December 14, 2006. (n. 264 above). It provides for the possibility of renegotiating an already notified agreement.

[647] The governments should as well pay heed to the public outcry against the EPAs by the different communities in the economies for example the business community, the civil society and the farmers who would mostly be affected. In the EAC, the local Civil Society Organisations (CSO) have called against the signing of the EPAs. Kamndaya S., "Bloc warned against signing EPA blindly," April 9, 2009. The Citizen, Tanzania Available at http://www.bilaterals.org/article.php3?id_article=14810 (accessed April 12, 2009).

becoming a CU. However, the CU is not yet fully fledged, but since it was notified to the WTO under the Enabling Clause, it is therefore compatible with the RTA regimes under the MTS. SADC on the other hand, was notified under Article XXIV as a FTA to the WTO but still maintains tariffs on intra-regional trade and thus not compatible with Article XXIV:5 (b) of GATT 1994. Moreover, SADC has moved ahead in negotiating these rigid provisions[648] which momentum the EAC has not yet built to its disadvantage as a result of the small nature of its economies.

4.6- THE EAST AFRICAN COMMUNITY

The Treaty establishing the EAC (TEAC) was signed on November 30, 1999 resurrecting the old EAC,[649] and came into force on July 7, 2000 upon ratification of the three partner states.[650] The EAC was then notified to the WTO under the Enabling Clause on October 9, 2000 as a CU under WT/COMTD/N/14.[651] Article 5 (2) of the TEAC provided for the establishment of a CU and thus, in line with this undertaking the EAC Customs Union Protocol (CUP) was signed on March 2, 2004, ratified in December 2004 and came into effect on January 1, 2005. Rwanda and Burundi later

[648] The EC Trade Commissioner Catherine Ashton stated that most of the major concerns expressed by the ANSA group were resolved. These concerns include allowing export taxes for food security and industrial development needs. The accord on the protection of infant industries not to be time-bound, while quantitative import restrictions would align with WTO rules with an extra provision for safeguard measures against imports for food security reasons. The agreement by the EU to assist in the flow of goods and simplification of customs procedures between the SADC signatories and on the issue of maintaining the integrity of the SACU CET in light of the different regimes of the EPA and the TDCA, have been resolved through the changes in the TDCA tariffs for all SADC members. The definition of parties in the SADC EPA has also been resolved thus SACU does not have to legally include Angola and Mozambique in the Union. However, other pressing issues like the MFN clause and the Singapore issues have not been resolved which the Commissioner stresses will be settled in the negotiations on the full EPA. Servaas V., "EC urges SADC on over EPA," April 8, 2009 Inter Press Service, Windhoek. Tralac News. Available at http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=64440&cat_id=1026 (accessed on April 12, 2009).

[649] The EAC has had a long history of regional integration which precedes from 1917 when Kenya and Uganda first formed a customs union which Tanganyika (Tanzania without Zanzibar) joined in 1927. The three countries also had close economic relationships in the East African High Commission (1948-61), the East African Common Services Organisation (1961-67), the old East African Community (1967-77) and the East African Cooperation (1993-99). IMF, "Trade Integration in the East African Community: An Assessment for Kenya," (2005) WP/05/143 Available at: http://www.imf.org/external/pubs/ft/wp/2005/wp05143.pdf (accessed April 4, 2009) The old EAC between Uganda, Kenya and Tanzania existed from 1967 to 1977 when it eventually collapsed due to political and personal reasons between the Ugandan head of state and the Tanzanian head of state, economic divergences and problems of dominance and divergent notions of equity. See also Onyango, O. "Who owns the East African Community?" (November 23, 2005) Kampala available at www.deniva.or.ug/files/articles_**who-owns**.doc (accessed April 4, 2009); Namara J., "A critical review of the 1999 Treaty establishing the East African Community in search of a closer co-operation." (2005) Makerere University, Kampala. Unpublished Paper.

[650] Republic of Kenya, the Republic of Uganda and the United Republic of Tanzania, and this Treaty followed on a FTA dating back from 1999.

[651] The notified Text of the Treaty is referred to in WT/COMTD/25 though the parties to the Treaty were then only the three founder states which are the Republic of Kenya, the Republic of Uganda and the United Republic of Tanzania. Available at http://docsonline.wto.org/imrd/directdoc9.asp?RN=0&searchtype=browse&q1=%40meta%5FSymbol%22WT%FCCOMTD%FCN%FC14%22&language=1&ct=DDFEnglish&bm= (accessed August 6, 2008).

acceded to the EAC by signing the Treaty of Accession on July 1, 2007,[652] and with this enlargement, the EAC[653] constituted a strong and large market of a combined population of 120 Million people with a combined GDP of US$ 41 billion,[654] covering an area of approximately 1,822,800 sq. km.[655]

The EAC's participation in the WTO is of paramount importance to the bloc because it operates within the MTS and not in isolation and thus complements the MTS by enhancing the competitiveness of the regional market. Furthermore, the EAC provides a strong foundation for the member states' participation in the world economy. In the multilateral arena, the EAC members were and are still individual original WTO members.[656] The EAC members however are neither signatories nor observers to any of the WTO plurilateral agreements, neither have they been involved directly in any WTO dispute settlement proceedings.[657] The EAC member states do accord at least MFN treatment to all their trading partners.[658] Under the Enabling Clause, EAC members are eligible for various non-reciprocal trade preferences from developed partners for example the GSP and the AGOA schemes but their use remains limited. This is because the non-reciprocal preferences limit their product coverage in products in which the EAC has the greatest comparative advantage[659] and subject them to MFN tariff peaks. In addition to this, these products are further subjected to complex rules of origin and yet these preferences are uncertain and can be revoked or modified unilaterally without EAC members' accord.[660]

[652] To facilitate the accession and accommodate the Republic of Burundi and Republic of Rwanda in the EAC, Article 48 of the Treaty Establishing the EAC providing for the membership of the East African Legislative Assembly has been amended.
[653] The EAC region after enlargement was bordered by the Indian Ocean and Somalia to the east and Ethiopia and Sudan to the north, DRC in the west and Zambia, Malawi and Mozambique to the south.
[654] Ministry of East African Community, "Notes for Hon Minister for the East African Community," April 2008. Available at www.meac.go.ke/index.php?option=com_docman&task=doc_download&gid=24&Itemid=46 – (accessed April 10, 2009).
[655] East African Centre for Constitutional Development (Kituo Cha Katiba), "Fact Finding Missions," Available at http://www.kituochakatiba.org/index.php?option=com_content&task=view&id=21&Itemid=3 (accessed April 10, 2009).
[656] Tanzania joined the GATT on 9 December 1961, Uganda on 23 October 1962, Kenya on 5 February 1964, while Burundi joined the WTO on 23 July 1995 and Rwanda on 22 May 1996
[657] However, both Kenya and Tanzania have participated as third parties in the disputes brought separately by Australia, Brazil, and Thailand, on European Communities-export subsidies on sugar WT/DS265/R, WT/DS266/R, and WT/DS283/R, 15 October 2004. WTO Secretariat, *Trade Policy Review. EAC*. WT/TPR/S/17/ (2006) available at http://www.wto.org/english/tratop_e/tpr_e/tp272_crc_e.htm (accessed April 4, 2009)
[658] WTO Secretariat, Trade Policy Review, EAC. WT/TPR/S/17/ (2006) available at http://www.wto.org/english/tratop_e/tpr_e/tp272_crc_e.htm (accessed April 4, 2009).
[659] For instance agricultural goods, textiles, clothing and footwear.
[660] The uncertainty is also projected in the inclusion of non-trade conditions for assessinsg the available preferences for example political, labour, social and environmental conditions. For instance, due to the outdated labour laws in Uganda, the American Federation of Labour and Congress of Industrial Organisations, a US trade union federation had submitted a petition to revoke Uganda's trade privileges under AGOA,

With the limited trade concessions therefore, the EAC has faced key challenges within the regional economy in trying to comply with its multilateral obligations as a RTA.[661] However, the bloc has also gained potential benefits and opportunities as a bloc to facilitate trade and development in its member states in accordance with the MTS. This study therefore addresses the challenges and explores the potential benefits that the EAC as a RTA under the MTS can derive as a bloc to spur trade and development in the region in light of its commitments under the WTO. The challenges are briefly outlined below.

4.6.1- CHALLENGES FACED BY THE EAST AFRICAN COMMUNITY

4.6.1.1- NON-TARIFF BARRIERS

In 2006, the WTO Trade Policy Review Body examined the trade policies and practices of the EAC as a CU under the WTO. The Report noted that non-tariff measures were a hindrance in the full establishment of the EAC CU.[662] These NTBs have been and still are a hindrance to the EAC's policy goals to spur trade and development in the region and are incompatible with the MTS rules.

Stakeholders in the region[663] have noted that the usage of the NTBs is still quite prevalent as regional importers and exporters are still faced with transit fees, duplicated customs point, police roadblocks, heavy paperwork, different administrative requirements coupled with delays caused by untrained customs officials.[664] This is further highlighted by Kenya's increased level of protectionism especially against

which petition the US government had accepted. Wolfe B., *Regional integration in Africa. Lessons from the East African Community*, (n. 64 above) 198.

[661] These challenges include improving their multilateral commitments through reduction of bound rates, enlargement of the scope of bindings on goods and services, elimination of applied compound tariffs (all bound duties are ad valorem), and removal of other duties and charges which would constitute the ORRC in order to increase the predictability and credibility of the EAC trade regime. WTO Secretariat, *Trade Policy Review. EAC,* (n. 657 above)

[662] WTO Secretariat. *Trade Policy Review. EAC.* (n. 657 above); WTO Trade Policy Review Body, *Concluding Remarks of the Chairperson EAC Trade Policy Review,* 25 and 27 October 2006 available at http://www.wto.org/english/tratop_e/tpr_e/tp272_crc_e.htm (accessed April 4, 2009).

[663] As per the investigative research carried out by Wolfe B., Regional integration in Africa. Lessons from the East African Community, (2008)

[664] Wolfe B., *Regional integration in Africa. Lessons from the East African Community*, (n. 64 above) 7.

Ugandan products[665] in order to counter the increased competition that its industries are facing. These constitute an impediment to the operation of a CU and would fall under the purview of ORRCs had the EAC been notified under Article XXIV of the GATT 1994 than the Enabling Clause, which would have rendered the CU incompatible with the GATT Article XXIV provisions. Furthermore, these NTBs are contrary to Article 13 of the EAC CUP which commits the partner states to eliminate all existing NTBs on intra-EAC trade with immediate effect and refrain from introducing new ones.[666]

4.6.1.2- OVERLAPPING MEMBERSHIPS

The WTO Secretariat[667] noted in the Trade Policy Review of the EAC that the EAC countries' membership in overlapping trade agreements deters the further liberalisation of trade and investment in the bloc and makes the trade regimes complex, difficult to manage and limits the proper functioning of the EAC as a CU. The analysis carried out by the WTO is still evident today and impedes the region's trade and development policies and its functionality in the MTS.

Overlapping membership by the EAC member states is a major concern as the EAC members belong to a variety of RTAs including COMESA,[668] SADC,[669] IGAD[670] and the ECCAS,[671] which provide for economic integration and have objectives and aims similar to the EAC. These overlapping memberships in different blocs have affected the EAC as parallel principles are duplicated, wastage of time commitments and resources in

[665] Kenya's protectionism system aggressively blocks the exports from other member states through enforcing NTBs such as non-standardised weighbridges, customs reforms and port delays and yet Kenya is the main transit country for a large proportion of EAC imports and exports, therefore this negatively affects trade throughout the entire region. Ibid 131

[666] A study on Non-Tariff Barriers and Development of a Business Climate Index in the East Africa Region. March 2005, funded by the Deutsche Gesellschaft fur Technische Zusammenarbeit (GTZ). Referred to in Kenya's profile. However produced by the East African Business Council (EABC) revealed that the main barriers in place in the EAC indicating the administrative barriers, business registration and licensing, customs procedures, police road checks, road axle regulations and control, and standards and certification requirements. Furthermore, although the $50 business visa for EAC citizens was abolished, various NTBs are still in place which drag down business operations in the region. For example in Kenya, the problem of weigh bridges and road blocks, while in Tanzania the transit charges, and there are common NTBs in all the member states which include slow custom procedures as well as xenophobia and national stereotypes which only deeper integration can counter. Available at http://www.state.gov/e/eeb/ifd/2008/100889.htm (accessed April 10, 2009).

[667] WTO Trade Policy Review Body, *Concluding Remarks by the Chairperson. EAC Trade Policy Review*, (n. 662 above); WTO Secretariat, *Trade Policy Review. EAC,* (n. 657 above).

[668] Kenya, Burundi, Rwanda and Uganda.

[669] Tanzania.

[670] Kenya and Uganda.

[671] Rwanda and Burundi, although however, the ECCAS does not encompass the decision on deeper integration like the COMESA and SADC

facilitating their membership status yet these resources are limited and would have been channelled to develop the region through improvements on infrastructure and moreover, this detracts the EAC's multilateral efforts. For example, in the events leading to the negotiations of the EC-EAC EPA, the member states wasted a lot of resources trying to negotiate different EPAs under different blocs like Tanzania under the SADC EPA configuration and the rest under the ESA-EPA configuration.[672] This is further strained by the fact that Tanzania is still adamant to leave SADC and join COMESA so that all regional members belong to one bloc yet the longer Tanzania remains in SADC, the more its economy will be severely damaged when it withdraws.[673]

Furthermore, the parallel membership in regional blocs also creates complex application of rules of origin in the EAC CU as different rules would apply to the member states in the different regional blocs.[674] Yet these blocs create an incentive for possible dumping as the region has constantly faced an influx of cheap goods from Southern and Eastern Africa[675] like Egyptian goods have been dumped in Uganda through Kenya.[676] These overlapping memberships contradict the principles set out in the WTO and the EPA rules which state that a country should belong to one CU at a time, given the contradictory tariffs that would result.

4.6.1.3- COMPLEXITY IN ADMINISTERING THE COMMON EXTERNAL TARIFF

During the EAC Trade Policy Review, WTO members expressed concern over the lack of harmonisation within the EAC in certain key trade areas. These were identified as customs procedures, other duties and charges on imports, and fees on production, internal taxes which all undermine the utility of having a CET.[677] These measures however, have not been addressed by the EAC and still constitute an impediment to trade and development of the EAC's operation in the MTS.

[672] Burundi, Kenya, Rwanda and Uganda.
[673] Wolfe B., *Regional integration in Africa. Lessons from the East African Community,* (n. 64 above) 255.
[674] For example Tanzania in SADC, COMESA and EAC.
[675] Wolfe B., *Regional integration in Africa. Lessons from the East African Community*, (n. 64 above) 159.
[676] Wolfe B., *Regional integration in Africa. Lessons from the East African Community*, (n. 64 above) 161.
[677] WTO Trade Policy Review Body, *Concluding Remarks by the Chairperson, EAC Trade Policy Review*. (n. 662 above); WTO Secretariat, *Trade Policy Review. EAC,* (n. 657).

The CET is the most important feature that defines CUs in the MTS.[678] The EAC CET comprises of three major bands which include 0% tariffs on raw materials, 15% on semi-processed goods and certain capital inputs, and 25% on finished goods.[679] The CET top band was set for 25% which differed from the EAC members' external tariffs before its formation.[680] Currently, Kenya has eliminated all tariffs on imports from EAC states while Tanzania and Uganda have partially eliminated tariffs on imports from Kenya from 25% to 15% and 10% to 6% respectively, while Rwanda and Burundi being members of the COMESA FTA did not charge any tariff on Kenyan goods.[681] However, Rwanda and Burundi are not obligated to apply the CET till June 2009.[682] The main objective of this asymmetrical liberalisation is to prepare the Ugandan and Tanzanian industrialists to compete with Kenya's stronger industrial base.

A problematic area concerning the CET was the existence of overlapping memberships. The existence of parallel memberships completely violated the principles set out by the CET as the EAC was faced with the problems of preventing indirect trade flows through COMESA into Tanzania and the illegal import of SADC products in Uganda and Kenya through Tanzania.[683] In trying to resolve this, the EAC has used its resources to try to renegotiate its existing trade agreements to adhere to the CET and bring the regional blocs' CET to align with the EAC bloc's CET.[684]

Furthermore, in the Doha negotiations, LDCs were exempted from making any tariff reductions on industrial products[685] however, DCs are required to undertake commitments to reduce tariffs. This however undermines the administration of the EAC

[678] Article XXIV:5 (a) of the GATT 1194. It is the common tariff enforced at the external borders of a regional economic community. Wolfe B., *Regional integration in Africa. Lessons from the East African Community*, (n. 64 above) 125.
[679] *Ibid.*
[680] Uganda had its maximum tariff at 15%, while Kenya and Tanzania were set at 40%. Dr. Stahl proposes that the CET was a compromise between the protectionist interests for Kenya's more developed industrial sector and to minimise her customs revenue losses with Uganda's interest as a landlocked country impacted by higher transport costs to keep the tariffs low. Stahl M., "Tariff Liberalisation impacts of the EAC Customs Union in Perspective," (2005) Tralac working paper no. 4/2005 available at http://www.acp-eu-trade.org/library/files/Stahl_EN_2005_GTZ_EAC-Customs-Union-Tariff-Liberalisation-in-Perspective.pdf (accessed April 10, 2009)
[681] Ministry of East African Community, "Notes for Hon Minister for the East African Community," (n. 654 above).
[682] Kakimba M., "Updates and timelines of EAC Common Market negotiations," (December 11, 2008) New Times, Kigali, Rwanda Available at http://www.bilaterals.org/article.php3?id_article=14040 (accessed April 4, 2009).
[683] Wolfe B., *Regional integration in Africa. Lessons from the East African Community,* (n. 64 above).
[684] Only achieved with COMESA which is to apply 25% as its CET and not SADC
[685] Paragragh 14 of the Draft Modalities for Non-Agricultural Market Access (NAMA). Third Revision. July 10, 2008

CET as Kenya's tariff cuts as a DC will have a direct impact on the LDCs in the CU which are exempted from offering any concessions.

Therefore, these constraints impede the EAC's operation in the MTS as they present stumbling blocks to the MTS' functionality. If these constraints are addressed however the bloc would be used as building block to the MTS taking into consideration the small nature of the EAC economies. This is because if constraints like NTBs are eliminated, it would give providence to increase intra-regional trade and its international trade as well, which spurs trade and development in the MTS as well as reduces the region's dependence on foreign trade.

Nevertheless, the EAC has potential benefits that spur trade and development of the EAC bloc under the MTS. These benefits aid the EAC bloc to use regionalism as a policy tool to achieve trade and development in the region and to act as a stepping stone to further integration in the MTS. These potential benefits are summarised below.

4.6.2- BENEFITS OF THE EAST AFRICAN COMMUNITY

The benefits of the EAC bloc in the MTS are inclined to spur economic integration and development of the member states through trade creation. These benefits include, a wider market access for goods in the region, comparative advantage in production for the member states' industries, elimination of the duplication of major infrastructure while rationalising and sharing its cost, promotion of transparency and reduction of corruption through integrated supra-national institutions[686] which would rid the region of problems such as xenophobia and national stereotypes.

The EAC provides market access for goods that member states have comparative advantage[687] in, for example, Uganda has comparative advantage in the agricultural sector with a growing agri-business in sunflowers, cotton and poultry and a largely,

[686] Wolfe B., *Regional integration in Africa. Lessons from the East African Community*, (n. 64 above) xiv
[687] The theory of comparative advantage is based on the fact that since two countries can not be identical in their natural and human resource endowments, the differences in the resources give each country a 'comparative advantage' over other countries in some products.

primary economy with limited manufacturing capacity. On the other hand, because Kenya has no thriving agricultural sector, it is therefore a frequent importer of regional agricultural goods which boosts Uganda's agricultural exports. While, Tanzania has comparative advantage in textiles and leather, fish production, grainmilling and expanded food processing export industries, with the mining (gemstones and gold) and horticulture as booming sectors,[688] Kenya on the other hand, has comparative advantage in manufactured goods. Therefore, this increases intra-regional trade thus facilitating trade creation in the bloc because the members have different goods of export interest to them[689] and reduces their dependence on foreign trade. As a result, trade within the EAC has grown by 20%.[690]

The bloc facilitates trade creation by providing a wider access to markets in the region for example Rwanda and Burundi provide new markets for EAC goods and points of entry for booming markets in Southern Sudan and the Eastern DRC, hence the EAC enhances open competition in the region for goods from Rwanda and Burundi.[691] Moreover, as much as the three LLDCs are landlocked, they provide Kenya which is sea locked access to booming inland regional markets.[692]

The harmonisation of standards and policies also potentially increases trade and development in the region for example the undertaking of joint infrastructure projects enabling the region not only to utilise its resources carefully but have sufficient funds for the project through joint funding, as well as not to duplicate efforts.[693]

EAC as a bloc also provides greater negotiating leverage for the five member states than if single member states undertook negotiations with an external trading partner alone. This was quite evident in the IEPA negotiations which exhibited the EC-EAC EPA

[688] Wolfe B., *Regional integration in Africa. Lessons from the East African Community*, (n. 64 above) 14.
[689] However, Uganda, Burundi and Rwanda are highly dependent on primary and agricultural goods and to an extent, Tanzania as well.
[690] Statement by EAC Director General Ambassador, Julius Onen, reported in New Vision online, Mugabe D., "EAC trade up 20 percent," April 9, 2009. Available at http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=64527&cat_id=1026 (accessed April 12, 2009)
[691] Wolfe B., *Regional integration in Africa. Lessons from the East African Community*, (n. 64 above) 4.
[692] Like DRC and Southern Sudan.
[693] For example if the proposed hydroelectric power plant in Uganda is undertaken as an EAC project, it would not only benefit Uganda but the entire region in providing stable and sufficient power which is one of the greatest constraints of industries in EAC. Wolfe B., *Regional integration in Africa. Lessons from the East African Community*, (n. 64 above) 178.

as a better agreement than other IEPAs negotiated by single states for example the Cameroon EPA.

Moreover, economic integration in the EAC as a regional bloc can lead to political security if deeper integration is achieved in the bloc. For example, economic integration has fostered peace through collaborations on political conflicts, like the accession of Rwanda and Burundi has not only stabilised their economies, but it has also eased the mistrust of Tanzania and Uganda against Kenya thereby increasing Tanzania's trade with Kenya.

Furthermore, the regional bloc also lessened the impact of the political chaos that ensued after the Kenyan general elections held on December 27, 2007 in which over 1,500 Kenyans were killed and nearly 250,000 were internally displaced by the violence. Without regional co-operation, this crisis would have been much worse but because of this co-operation,[694] Uganda and Tanzania allowed refugees to cross their borders and offered them humanitarian support.[695] Furthermore, the EAC Development Strategy[696] plans to facilitate political security through establishing a regional mechanism for conflict management and resolution.[697]

Therefore, with the onerous impediments that the EAC faces as a regional bloc, the EAC has benefits of developing into a major economic bloc within the MTS. This is however only probable if the EAC undertakes structural reforms in its regional process addressing the eminent recurring issues of NTBs, overlapping memberships as well as diversifying its regional exports in order to increase the trade flows between the five member states and with external trading partners.

[694] EAC Ministerial Sectoral Council. January 11, 2008.
[695] EAC Ministerial Sectoral Council. January 11, 2008.
[696] EAC, *2006 – 2010 EAC Development Strategy,* Available at www.eac.int/about-eac/quick-links/unido-norad-programme/doc_download/159-eac-development-strategy-2006-2010.html (accessed April 4, 2009)
[697] This would help address security issues which undermine investment initiatives in the region like the 23 year war waged in the Northern part of Uganda.

4.7- CONCLUSION

Regionalism in Africa has been slow in facilitating trade and integration of African economies in the MTS despite its common goal being free and open trade. The inherent problem however, revolves around Africa's capacity constraints. Thus, the EC's approach to resolve this problem through the EPAs would have been a commendable aid to African countries given the fact that the EPAs can lead to trade liberalisation reforms and provide certainty of DFQF wide EC market access as opposed to the withdrawal of the preferential treatment. However, treating the EC and small regional blocs in Africa like the EAC or the bigger SADC as equal partners in trade through the EPAs tilts the scale in favour of the EC due to their different levels of development. Furthermore, this would not pave way for the integration of the EAC and SADC economies in the MTS, or increase their trade, economic growth, or development because this reciprocal trade with the EC threatens to flood their markets with more competitive subsidised European goods, which would inhibit the development of weaker, infant industries which would eventually lose business. As a result of the aforesaid, unemployment and poverty levels would exacerbate in both the EAC and SADC which would lead to a decline in trade and development hence deterrence from their multilateral obligations. Moreover, the embedment into the interim EPAs of provisions such as the MFN clause, the introduction of Singapore issues, standstill clause and export taxes whereas they are not requisites for the EPAs to be WTO compatible is a clear sign of the provisions deviation from the trade and development objectives. Therefore, these IEPAs should be renegotiated with an overall emphasis on promoting trade and development in these regions. Likewise, these regions should promote their intra-regional trade as a viable option of reducing dependence on foreign trade, especially the EAC which should restructure its economies in the RTA setup to align with the MTS for example address the NTBs in place and rationalise its overlapping memberships.

CHAPTER FIVE – CONCLUSIONS AND RECOMMENDATIONS

5.1- INTRODUCTION

At the outset this study sought to query the concerns raised by the proliferation of RTAs in the MTS, which mainly emerged in the Uruguay Round, and was carried over to the establishment of the WTO. Owing to the latter, the MTS evolved from a single trading system to a dual trading system in which virtually all WTO members belong in more than one regional trade bloc. RTAs in the MTS are twofold, since they can spur multilateral liberalisation but as well, pose an eminent danger of destroying the MTS by erecting protectionist walls against non-members, resulting into trade diversion and causing the fragmentation of the MTS into trade blocs. This creates a grave risk for DCs, which are excluded from these trade blocs. Against this backdrop, this study set out to analyse the impact of RTAs on the MTS, their compatibility with the MTS as well as avenues of constraining their activities in the multilateral arena. This was done in addition to addressing the impediments they pose to DCs. Specifically; reference was made to the proposed FTAs between the EU and African RTAs, in particular the EAC and the SADC group. This study also focused on the EAC's operation in the MTS. Consequently, this chapter highlights the detailed conclusions and recommendations of the study with a view to promoting multilateralism.

5.2- CONCLUSIONS AND RECOMMENDATIONS

In light of the previous discussions, it can be concluded that RTAs are permanently embedded in the MTS and cannot be eliminated, as their creation in the GATT/WTO has increased significantly, becoming a prominent feature of the WTO members' trade policies. The proliferation of RTAs has, however, led to the crisscross web referred to as the 'spaghetti bowl' which has not only disrupted the multilateral system, but also risked causing trade diversion and raising restrictions on international trade. The escalating number of RTAs has resulted partly from the stalled MTN. They have further inhibited protectionist measures through the multiple use of restrictive rules of origin, the varied

use of trade remedies to the detriment of non-RTA members and the total disregard of RTA disciplines in their operation. These restrictions have the potential to completely undermine the MTS and cause its failure, with it segmenting into economic blocs where DCs will be left disadvantaged. It is, therefore, vital to check the prevalence of RTAs in the MTS. Thus **it is recommended that further trade liberalisation is achieved in the trade rounds by greatly reducing the MFN tariff rates, thereby diminishing the prospects of the WTO members joining regional blocs, as tariffs in the MTS will generally be as low as the preferential tariff rates in the RTAs.**

This study also emphasised the issue that RTAs tend to increase when the MTS loses momentum. For example, the stalled Doha Round is a setback to the MTS, given that it sidetracks negotiations from the deadlock MTN to the regional level. This, has negative consequences for the MTS and the WTO because negotiations at a regional level normally involve vested interests which are impossible to extricate in future attempts at liberalisation, like the exclusion of certain important sectors in RTA coverage, and yet even these negotiations even exclude DCs. Therefore **it is recommended that the WTO works towards the conclusion of the Doha Round, as this will further re-inforce confidence in the MTS, and consequently member governments in the WTO will strengthen their support for the MTS and refocus on their multilateral obligations, thereby curtailing the discriminatory tendencies of RTAs. This will greatly enable the WTO members to further promote multilateralism in their RTA policies.**

The NTBs raised by the restrictive multiple rules of origin in RTAs are an additional setback in the MTS. Preferential rules of origin are quite difficult to harmonise in the WTO, thus this study **recommends that general preferential rules of origin with multilateral guidelines should be adopted, or, emphasis be placed on individual preferential rules of origin to being in accordance with Annex II of the Agreement on Rules of Origin. Alternatively, if preferential rules cannot be applied, the Doha round should revise Article XXIV and include rules of origin in ORRCs in order for**

the rules to be subjected to liberalisation of SAT in the RTA. This will reduce the tendency to use rules of origin as a discriminatory trade policy.

This study additionally sought to consider the significant issue of whether RTA provisions can restrict the prevalence of discriminating RTAs in the MTS, thereby limiting their negative impact. This study noted that the RTA disciplines are inadequate to prevent the surge of these discriminating RTAs, because they are not rigorously enforced and there are no consequences for failure to abide by the provisions. Consequently, these disciplines have been subjected to abuse by the WTO members. The CRTA entrusted with the task of verifying WTO compliance by the RTAs, as well as assessing the effectiveness of the notified RTAs, has failed to check this abuse due to the ambiguity of the provisions, and hence, there are many discriminatory RTAs in the MTS which are not notified to the WTO. Therefore, it is **recommended that the WTO should work towards the conclusion of the Doha Round so that ambiguous RTA provisions which have failed to constrain the formation of discriminative RTAs are clarified. Moreover, the Doha Round should address the revision of the enforcement and surveillance mechanisms for RTAs, and the systemic issues that have hindered the examination of RTAs, like the question of what constitutes SAT, ORRCs and ORCs, as well as address the varied application of trade remedies in RTAs. However, in addressing these issues, the Doha talks should ensure that the outcome of the negotiated rules serves to promote multilateralism and disregards discriminatory trade tendencies in RTAs. Furthermore, the outcome of the Doha talks on RTAs should be adopted by new RTAs as well as existing RTAs and no exception should be given to 'grandfather' RTAs that had been notified to the WTO to remain subject to the conformity conditions that prevailed at that time.**

This study also highlighted the fact that the trade diversion effect in these RTAs is propelled by the existence of discriminative RTAs in the MTS which are not notified to the WTO. This was acknowledged in the Doha negotiations, and a draft decision was adopted by the General Council in July 2006 to provide for rules on early announcement

and notification of RTAs to the WTO, as well as on procedures to enhance transparency. It is, **recommended therefore, that the provisional Transparency Mechanism should be adopted as fully operational in the MTS to guide the WTO members in their RTA trade policies, thereby curtailing discriminatory trade policies in RTAs because members in the bloc are required to notify all changes in a RTA. This is especially important for NTBs which are too burdensome and non-transparent, as such preventing DCs from making use of increased market access opportunities that arise out of lower tariffs in North-South RTAs.**

The lack of clarity in the provisions increases the flagrant abuse of the RTA disciplines, thereby making RTAs stumbling blocks to the MTS, despite the fact that the provisions are meant to be revised at the Doha Round. However, with the prolonged Doha negotiations, clarification of RTA disciplines is thus postponed although complaints still arise. It is **recommended that the WTO DSU should further engage in interpreting the RTA provisions in disputes where these provisions are in question, to ensure that RTAs conform to the rules. This would form a body of 'common law' on multilateral rules relating to RTAs, thus minimising the discriminatory tendencies of the operation of RTAs in the MTS.**

It was noted that RTAs have been prevalent in Africa as well as in most parts of the world. However, in Africa, they have been relatively unproductive and quite slow in facilitating trade and integration of African economies in the MTS despite the common goal of free and open trade. Therefore, to ensure that RTAs enhance the integration of African economies in the MTS, the EU proposed to negotiate FTAs with African regions and countries through EPAs compatible with Article XXIV of the GATT 1994. This is because the effective integration of these economies in the MTS is crucial for the attainment of the MDGs, as well as for the achievement of sustainable development and the eradication of poverty. Accordingly, DCs and LDCs in Africa committed themselves to the proposed EPAs on the understanding that Article XXIV would be revised during the Doha Round to reflect the necessary special and differential treatment in favour of DCs.

However, these proposed pending FTAs raise earlier concerns on the nature of the RTAs already formed, their scope, and the lack of a development component in Article XXIV upon which the FTAs are premised. Inevitably, treating the EC and small African blocs, like the EAC and the SADC as equal partners in trade through the EPAs based on the restrictive interpretation of Article XXIV by the EC as it relates to the definitions of SAT and the transition periods, tilts the scale in favour of the EC due to their different levels of development. This is because reciprocal trade with the EC threatens to flood their markets with more competitive subsidised European goods, which would inhibit the development of their weaker infant industries, eventually leading to loss of business. As a result of the aforesaid, unemployment and poverty levels would exacerbate in both the EAC and the SADC, which would lead to a decline in trade and development thereby causing the deterrence from fulfilling their multilateral obligations. Therefore, since the overarching goal of the Doha Round was to re-balance the MTS in favour of DCs and deliver a development enhanced outcome, it is **recommended that the Doha Round should also be negotiated and concluded taking into consideration the development component in RTAs, by incorporating special and differential treatment in Article XXIV to DCs in North-South Agreements: like the EC-EAC EPA and the SADC EPA, in order to cater for the uneven levels of development and commitments taken up by DCs vis-a-vis commitments taken by developed countries.**

The RTAs negotiated by African DCs can as well undermine their economies and their participation in the MTS because of the capacity constraints faced in negotiating these RTAs. For example, the EAC and the SADC EPAs are expected to be development tools to the regions, but this is highly improbable. This is so because the IEPAs do not address the development concerns projected through flexibility vis-à-vis depth of liberalisation, asymmetry, length of transition periods, trade coverage with its exceptions, and financial assistance from the EU which is not guaranteed.

In addition to this, these IEPA provisions envision out of scope provisions from Article XXIV of the GATT 1994 which would greatly undermine the rationale for FTAs for these blocs such as the MFN clause, the introduction of Singapore issues, the standstill clause and export taxes. Above all, these clauses are not requisites for the EPAs to be WTO compatible under Article XXIV, and clearly deflect from the IEPA trade and development objectives, and have the effect of reducing the policy space in these regions. Thus, these provisions have the impact of causing greater marginalisation of the members in the EAC and the SADC group. It is therefore **recommended that the WTO should provide technical assistance in the form of advisory services to DCs in negotiating RTAs with developed countries, given their capacity constraints in assessing the costs and benefits of RTAs. This has been quite evident in the EPAs that the EU is negotiating with the DCs in particular the EAC and the SADC EPAs.**

The IEPAs have not only failed to address the development dimensions of the EPAs adequately, but have also resulted into regional fragmentation and weakening rather than strengthening of regional integration initiatives like the SADC as well as further limiting development since these negotiations were hurriedly concluded. In line with this, **the initialled IEPAs should be re-negotiated and a benchmark should be set to conform to Article XXIV of the GATT 1994, eliminating all provisions which fall out of the parameters of Article XXIV, as these clauses limit the regions' policy space and undermine regional integration efforts in the IEPAs. These include the MFN clause, the standstill clause, and the provision to freeze taxes and duties plus the Singapore issues. The EAC and the SADC member states should as well undertake these EPA negotiations collectively in their regional configurations because they retain better bargaining leverage in negotiations with the EU as a region rather than as individual member states.**

Furthermore, the IEPA provisions are quite stringent as regards safeguard clauses which are controlled by the EU, the inability to increase the tariff rates which are restricted to the Uruguay Round bound rate yet, the EU, in practice, raises its tariffs

beyond this rate with reference to Article 5 of the Agreement on Agriculture. Moreover, there is a lack of binding commitment to facilitate financial assistance to these regions to undertake structural changes in relation to the EPA implementations. Thus, the **EAC and the SADC group negotiators should undertake further negotiations in line with achieving more liberal safeguard clauses which can be adopted directly without being decided by the EU, and for the ability to raise tariffs beyond the Uruguay Round bound rate. In addition, there is need for, the adoption of more flexible infant industry clauses, which are not limited to imposition of duties when injury has occurred or threatening to occur, but likewise, on competitive goods that threaten to undermine the infant industry. The EAC and the SADC negotiators should negotiate for further binding commitments on the provision of adequate, predictable and additional resources, besides the EDF, for dealing with supply-side constraints, structural adjustment costs of opening their markets to European products, building production and trade capacities for the regions.**

This study also undertook a review of the EAC's operation in the MTS. As one of the RTAs in the MTS, the EAC has to work within the WTO framework. The impediments faced by the EAC in its multilateral obligations included NTBs, overlapping memberships and lack of harmonisation of its CET. Yet, the harmonisation of the EAC CET is subject to further distortion if Kenya, a DC undertakes commitments to reduce its tariffs on industrial products as a result of the Doha talks on NAMA. This is because the other four members in the CU are LDCs, and are exempted from offering any concessions. This will inevitably have a direct impact on these LDCs. Therefore, it is **recommended that the EAC should work on fulfilling its multilateral obligations in terms of trade liberalisation, with the overall elimination of NTBs, to ensure its compatibility with the functioning of the WTO. The Doha Round negotiations should also take into consideration the effects of undertaking commitments by DCs which are in CUs with LDCs.**

The challenges of NTBs and lack of harmonisation of the CET in the EAC are associated with its capacity constraints to implement these much needed reforms to

conform to its multilateral obligations. Thus, it is **recommended that the bloc seeks technical assistance and capacity building from the WTO's Aid for Trade package adopted at the 6th WTO Ministerial Conference in Hong Kong, aimed at helping DCs build supply-side capacity and trade related capacity in order to reap the benefits of trade opportunities.**

The impediment raised by overlapping memberships of the EAC members to the MTS is a crucial one as it deters further trade and investment liberalisation as well as the bloc's multilateral obligations. Thus, the EAC should rationalise its overlapping memberships by addressing the objectives that the member states seek in other blocs and thereby limit the need to join other RTAs. **This study suggests that the EAC, the SADC and the COMESA should further explore the negotiations leading to a FTA between the regions or alternatively, the EAC member states should withdraw from all other economic communities in which member states negotiated as individual members and not as a bloc. This will not only facilitate the smooth implementation of the CET but will also curb the problem of dumping goods from non-members into the regional bloc.**

Without the aforesaid recommendations, the issue of whether RTAs are a building or stumbling block shall remain. Yet, there is need to make headway in as far as the success of RTAs is concerned especially now when crucial reforms are needed to quell the proliferation of RTAs, as well as to restrain their discriminative tendencies and spur trade and development in the MTS. RTAs can indeed support the MTS but can never be a substitute for it. Thus the MTS should be upheld by the WTO members in view of the fact that the interests of DCs and LDCs are more adequately protected under the rules based non-discriminatory MTS than under bilateral agreements or RTAs, where the interests of the dominant partner usually tend to prevail. Therefore, the WTO members should further commit themselves to the MTS and the successful conclusion of the Doha talks which have the forum to address most issues raised, enhance trade and development in the MTS by providing increased and secure market access for DCs'

exports and enhancing development conditions, poverty reduction and achievement of the MDGs.

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