

**FACULTY OF LAW
UNIVERSITY OF THE WESTERN CAPE**

**The legal implications of multiple memberships in regional economic
communities: the case of the Democratic Republic of Congo**

**Research paper submitted in partial fulfilment of the requirements for
the LLM degree**



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2010

DECLARATION

I, **Joseph Tshimanga Sowa**, do hereby declare that this research is my original work and that to the best of my knowledge and belief , it has not previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Works of others or referred to are accordingly acknowledged.

Signed:.....

Date:.....



This research paper has been submitted for examination with my approval as University supervisor.

Signed:.....

Patricia Lenaghan

Date:.....

DEDICATION

To **Dominique Lukono Sowa** (my father) and **Esther Ngalula Sowa** (my mother), I dedicate this work result of their love, sacrifices, perseverance and constant and unforgettable support.



ACKNOWLEDGMENT

This work could have not been successfully completed without the assistance, dedication, advice, guidance of several people to whom I would like to address my appreciation and gratitude, although I wish I could, I will not be able to name all of them here.

First, my gratitude goes to my parents Dominique Lukono Sowa, Esther Ngalula Sowa Pauline Tusse Nazingba for their love, financial as well as material support and sacrifices in every step of my life especially in my education.

Also, I will be ingrate if I fail to mention my supervisor Patricia Lenaghan which has dedicated her time to provide relevant insight to this work despite her busy schedule.

My appreciation goes also to Professor Leeman for his assistance in making sure that no spelling as well as grammatical mistakes spoil this work fruit of hard work.

In addition, I would like to extend my thanks to the staff of the student administration as well as the Law faculty for their assistance in resolving all the administrative matters that I encountered during my curriculum.

I would be invidious if I forgot my classmates: Aziza Kamanzi, Anne Senkwe Nseduluka, Mike, Sharon Neumbo, Allison Joy Basson and all the others for their love and support.

I would like also to thank my family members: Paco Ilunga Sowa, Annie Mbalayi, Marienoel Ntumba Sowa, Helene Ngodo, Claudine Mputu, Ginette Nazingba, Vincent Kapajika, Dieudonne Bantu Kapajika, and all other relatives for being there for me when I needed them the most.

Last not least, my gratitude goes also to the following people: Christine Kayembe, Elia Botowa, Carine Kunsevi, Pastor Erick Nkoto, Alain Boluka, Yannick Ikolo, Bob Bazola, Patrick Kalala, Nelson Chakupewa, Coco, Jenni, Patrick Bopwa, Joel Ntambwe, Missy Bangala, Olivier Kiswaka and to all my other friends and those I could not name here thank you for everything.

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**The legal implications of multiple memberships in regional economic communities:
the case of the Democratic Republic of Congo**



Chapter 1: INTRODUCTION

1.1 Abstract

Prior to the establishment of the World Trade Organization trading rules in 1994, the idea of achieving free trade through reduction and removal of tariff barriers and non tariff barriers on the mobility of goods, services, capital and factors of production between countries has always been on the agenda of most countries throughout the world. For many years one of the ways of realizing such an ambitious initiative has been through regional integration via the establishment of trade groupings, also known as regional economic communities: in Africa we can cite the case of the Southern African Customs Union established since 1910 between South Africa, Botswana, Namibia, Lesotho and Swaziland; in Europe, the European Coal and Steel Community (1946) which led to the establishment of the European Union in 1992. It is also noteworthy to point out that in North America there is the Canada-United States of America Trade Agreement of 1988; the North American-Free Trade Agreement with the accession of Mexico in the early 1990; and the Latin American Free Trade Area of 1960 which led to the *Mercado Común del Cono Sur* in 1989 in Latin America. And lastly, the Asian continent established the Association for Southeast Asian Nations in 1967.

But since the advent of the World Trade Organization's rules, the participation of World Trade Organization member states in regional economic communities, especially those launching a customs union or free trade area, has changed. In fact, the decision of the member states to join, and the conditions set out in the treaty creating and regulating the regional economic communities referred to earlier, are no longer the key factors. A new element, viz compliance with the provisions of Article XXIV of the General Agreement on Tariffs and Trade of 1994, has also become a prerequisite.

Having said that, the Democratic Republic of Congo's (World Trade Organization member state) commitment to the Southern African Development Community, the Common Market for Eastern and Southern Africa, and the Economic Community of Central African States has the potential to violate Article XXIV of the World Trade Organization trading system and cause trade disruption. Indeed, the commitment of the Democratic Republic of Congo to the Common Market for Eastern and Southern Africa

which has just launched a customs union program¹, and to the Southern African Development Community which has launched its free trade area program in 2008 and planning to launch and implement a customs union in 2010.² Also the aspiration of the Economic Community of Central African States to establish a customs union as part of its goal is a subject of concern.³ The violation lies in the fact that once the Southern African Development Community also becomes a customs union, the Democratic Republic of Congo, when implementing, for example, the Common Market for Eastern and Southern Africa customs union program through the maintenance of preferential tariffs for imports from member states participating in the said program, will raise a barrier for imports coming from the Southern African Development Community member states which are not participating in the Common Market for Eastern and Southern Africa customs union program. This will cause trade diversion and violate one of the requirements laid down in Article XXIV of the 1994 General Agreement in Tariffs and Trade. Lolette Kritzinger-van Niekerk and Emmanuel Pinto Moreira share the same point of view when they say:

Whilst it is technically possible (although difficult) for the [Common Market for Eastern and Southern Africa and the Southern African Development Community free trade area] to co-exist, it will be impossible for any member state to belong to more than one regime when (if) they adopt a Common External tariff... and become a Customs Union..., unless each regime adopts the same [Common External Tariff] and the same [Customs Union] regulations. Should [the Common Market for Eastern and Southern Africa] become a [Customs Union]..., those [Common Market for Eastern and Southern Africa] countries that are also participating in the [Southern African Development Community] [Free Trade Area] implementation program may well be in violation of [the General Agreement in Tariffs and Trade of 1994] Article XXIV if they seek to maintain preferential tariffs for imports from the [Southern African Development Community] countries.⁴

¹ COMESA Treaty, Article 4. See also Desmond Kwande - (AFP) “*Les 19 pays africains du Comesa se dotent d'une union douanière*”. <www.mediacongo.net> [accessed on 9 June 2009], “*COMESA launches its custom union*” <www.comesa.int> [accessed on 17 June 2009], Final communiqué of the 13 summit of the COMESA Authority of Heads of state and Government held in Victoria Falls Town (Zimbabwe) on 8 June 2009, on the theme: “*Consolidating Regional Integration through Value Addition, Trade and Food Security*” <www.comesa.int> [accessed on 18 June 2009].

² Amos Saurombe (2009) “Regional Integration Agenda for SADC ‘Caught in the winds of change’ Problems and Prospects” *Journal of International Commercial Law and Technology* 100. See also SADC Regional Indicative Strategic Plan approved by the 2003 Summit.

³ Treaty establishing the Economic Community of Central African States, Article 6.

⁴ Lolette Kritzinger-van Niekerk and Emmanuel Pinto Moreira (2002), *Regional integration in Southern Africa: overview of recent developments* 2f. See also Amos Saurombe (2009) 102.

In addition, it is worthy of note mentioning also other subsequent legal issues that may arise from multiple commitments to regional economic communities. This is also true when a closer look is taken at the difficulties of implementing and harmonizing different set of rules from different regional economic communities. The United Nations Economic Commission for Africa also highlights the same fact when it states:

[Regional economic communities] overlaps also entail added burdens for member States. A country belonging to two or more [regional economic communities] would have to cope with varying meetings, policy decisions, instruments, procedures and schedules in addition to its multiple financial obligations. In the area of trade liberalization for instance, customs officials would have to deal with different tariff reduction rates, rules of origin, trade documentation, statistical nomenclatures etc. applicable to different [regional economic communities]. In the process, customs procedures and paper work could be amplified and, thus, run counter to liberalization in terms of trade facilitation and simplification.⁵

Moreover, the Democratic Republic of Congo is about to join the *Organization pour l'harmonisation du Droit des Affaires en Afrique* (Organization for the Harmonization of Commercial Law in Africa). This organization has one goal: the creation of a uniform legal environment in order to stimulate economic activities and investments within the member states. Gradually, the said laws will replace domestic laws of all member states.⁶ This will only worsen the situation of the Democratic Republic of Congo as it has to join the Southern African Development Community free trade area at a later stage, and take an active part in the Common Market for Eastern and Southern Africa customs union. The last and not the least, the Democratic Republic of Congo belongs to the Economic Community of Central African States which has the intention to launch a customs union as part of its trade liberalization scheme.

Hence, this work postulates that as a World trade Organization member, and according to the principle *Pacta sunt servanda*, the Democratic Republic of Congo should rationalize its by

⁵ UNECA, *Rationalization of Regional Economic Communities: A work in progress* <www.uneca.org> [accessed on 9 June 2009]. See also United Nations Conference on Trade and Development 2009 Economic Development in Africa Report *Strengthening Regional Economic Integration for Africa's Development* 11.

⁶ Barthélemy Cousin and Aude Marie Cartron, *A common legal system providing a reliable legal and judicial environment in Africa for international investors*. <www.cerclehorizon.com> [accessed on 27 April 2009].

choosing to belong to one of the regional organizations in order to capitalize the benefit of its commitment to a specific regional economic community.

1.2 Key words and phrases

Regional integration, regional economic communities, Customs Union, Free Trade Area, Southern African Development Community, Common Market for Eastern and Southern Africa, Economic Community of Central African States, World Trade Organization, Most Favoured Nation principle, Article XXIV of the General Agreement on Tariffs and Trade of 1994.

1.3 Aim of the study

This work will investigate the extent to which the Democratic Republic of Congo's commitment to three regional economic communities, viz the Southern African Development Community, the Common Market for Eastern and Southern Africa, the Economic Community of Central African States, may raise barriers for other World Trade Organization members, and hinder the free circulation of goods which constitutes the main goal of the World Trade Organization trading system. This is highlighted in Article XXIV paragraph 4 of the 1994 General Agreement on Tariffs and Trade which states:

The Members recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or free trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.⁷

⁷ General Agreement on Tariffs and Trade, Article XXIV.

1.4 Problem statement

The agreement that established the World Trade Organization (the General Agreement on Tariffs and Trade of 1994), which aims at promoting free trade among member states on an international level, contains a set of key principles.⁸ Among them we have the Most Favoured Nation (Article I of the 1994 General Agreement on Tariffs and Trade). Under this principle, it is an obligation for a World Trade Organization member that concedes a more favourable advantage to a particular member state to extend it automatically to the others as well.⁹ However, there is an exception set out in Article XXIV of the General Agreement on Tariffs and Trade of 1994. The most favoured nation can only be applied in the implementation of a free trade area and customs union on the condition that the tariff applicable to third countries must not be higher than what it used to be prior to the establishment of the free trade area or customs union.¹⁰ Thus, the participation in more than one custom union is brought into question as a country can't apply two different common external tariffs in other words, a country can't belong to more than one customs union.¹¹ The fact that the Democratic Republic of Congo belongs to the Common Market for Eastern and Southern Africa customs union, and at the same time participates in the Southern African Development Community free trade area program (which plans also to become a customs union in 2010), may have the potential to raise a barrier and discriminate against member states which are only taking part in one of them. The Democratic Republic of Congo in implementing the preferential tariffs under the Common Market for Eastern and Southern Africa customs union regulation will maintain its preferential tariffs for imports originating from the Common Market for Eastern and Southern Africa countries, which in return will restrict the circulation of goods from the Southern African Development Community member states, and vice versa. Through this negative impact on free trade, the violation of Article XXIV of the General Agreement on Tariffs and Trade of 1994 is established without a shadow of doubt.

In the same way, the participation in more than one regional economic community exposes the Democratic Republic of Congo to a web of different regulations and procedures from different regional economic communities. This creates a potential for legal conflict as it is

⁸ World Trade Organization, *Understanding the WTO: the basics* < www.wto.org > [accessed on 3 June 2009].

⁹ General Agreement on Tariffs and Trade, Article 1.

¹⁰ General Agreement on Tariffs and Trade, Article XXIV.

¹¹ *Overlapping membership in COMESA, EAC, SACU and SADC: Trade policy options for the region and for EPA negotiation* summary of findings < Tanzania.fes-international.de > [accessed on 08 June 2009].

going to be difficult, maybe even impossible to implement and comply with different set of regulations at the same time. This idea is reaffirmed by Lolette Kritzinger-van Niekerk and Emmanuel Pinto Moreira when they argue:

Multiple membership of overlapping [regional integration arrangements] with different trade regimes can introduce particular complexities and concerns for such countries – their governments and private sector. Suffice to say that it is particularly joint members of [the Southern African Development Community] and [Common Market for Eastern and Southern Africa] that are increasingly facing confusing and conflicting situations as the respective integration agendas are deepening. Traders have to operate within a number of trade regimes each with its own tariff rates, rules of origin and procedures.¹²

This work argue that the Democratic Republic of Congo which belongs to three regional economic communities (the Southern African Development Community, Common Market for Eastern and Southern Africa and the Economic Community of Central African States) may be in violation of Article XXIV of the General Agreement on Tariffs and Trade of 1994. It is notably the case with the recent adoption of a customs union by the Common Market for Eastern and Southern Africa, the plan of the Southern African Development Community to launch its customs union in 2010, and the aspiration by the Economic Community of Central African States of establishing a customs union as part of its program of trade liberalisation. Also, the risk of not getting the benefit of the above regimes is foreseeable due to the impossibility of implementing diverse set of rules from different regional economic communities without conflicting them.

Therefore, this highlights the necessity for the Democratic Republic of Congo to rationalize its position. This point of view is also shared by Trudi Hartzenberg when she says:

The key... regional integration arrangements to which southern African countries belong are..., the Southern African Development Community... and the Common Market for Eastern and Southern Africa ...As is well documented, the multiple, overlapping membership of these arrangements and their not-always consonant objectives pose significant challenges to member countries in terms of compliance and effective implementation. In recent years there has been evidence of a more sober approach to

¹² Lolette Kritzinger-van Niekerk and Emmanuel Pinto Moreira op cit 2.

membership of regional integration arrangements, and several countries have, withdrawn from [the Common Market for Eastern and Southern Africa][such as Mozambique withdrew from the Common Market for Eastern and Southern Africa in 1997, Tanzania followed in 2000 and Namibia in 2003].¹³

1.5 Significance of the study

As stated earlier, the advent of the World Trade Organization has changed the way countries trade with each other. Indeed, in the era preceding the establishment of the World Trade Organization free trade was differently conceived and implemented. In fact, in the period preceding the World Trade Organization countries across the world were ratifying bilateral treaties, or establishing regional economic communities. With regard to bilateral agreements, the case of the Methuen Treaty (1703) can be mentioned. This treaty involving England and Portugal in terms of which England granted preferential access to its market for Portuguese wines, and Portugal did the same for English woollens.¹⁴ The Anglo-French commercial Treaty of 1860 is also an example to be cited. In this treaty, France removed all prohibitions and set specific duties not exceeding 30 percent *ad valorem*, or 25 percent after 1865, and Britain reduced the number of dutiable goods from 419 to 48, and the wine tariff was also reduced.¹⁵ The other way of approaching free trade was through the creation of regional economic communities, such as, the European Union, the Southern African Development Community, the Southern African Customs Union, the *Mercado Común del Cono Sur* etc.

As mentioned earlier, free trade prior to the establishment of the World Trade Organization existed only between members to a bilateral agreement or members of a specific regional economic community. The accession to a specific regional entity by a country was determined only by both the country's decision to join and the conditions set out in the agreement creating the said entity regardless of the country participation in any other regional economic community.

Nowadays, i.e. since the establishment of the World Trade Organization, the participation in regional economic communities by World Trade Organization member states must also

¹³ Trudi Hartzenberg 174.

¹⁴ Jaime de Melo and Arvind Panagariya (1993) *New dimension in regional integration* 92.

¹⁵ Jaime de Melo *ibid*.

comply with World Trade Organization rules. This is especially so when those regional economic communities are implementing a customs union scheme as the participation in more than one has the potential to cause trade diversion.

It is, therefore, obvious that the Democratic Republic of Congo's commitment to three regional economic communities (as described earlier) has the potential to be trade divertive. Consequently, such commitments may constitute a violation of Article XXIV of the General Agreement on Tariffs and Trade of 1994, coupled with the difficulty of implementing and harmonising different set of rules from diverse regional economic agreements.

The significance of this study lies in the analysis of the legal issues by the Democratic Republic of Congo's participation in more than one regional economic community within the World Trade Organization multilateral trading system, and other subsequent legal problems resultant from the aforementioned commitment.

1.6 Limitation of the study

The Democratic Republic of Congo is committed to more than three regional economic communities on the African continent but this study will not analyse its multiple memberships to all of them. Therefore, only its participation in the Southern African Development Community, the Common Market for Eastern and Southern Africa and the Economic Community of Central African States will be investigated.

1.7 Methodology of the study

This study will investigate the topic by the use of literature review. Therefore, it will benefit from two types of sources. Primarily, legal sources will be used, such as, the treaties establishing and regulating the regional economic communities concerned. Secondly, books, articles, journals and websites relevant to the topic will be examined.

As the title of this work indicates, the legal implications of the Democratic Republic of Congo's multiple memberships in regional economic communities are the main concern of this work. Therefore, a legal and critical examination of the Democratic Republic of

Congo's commitment to the above-mentioned regional economic communities will constitute the means by which the topic will be investigated.

For that purpose, the first step will be the analysis of the Democratic Republic of Congo's commitment to each of the above-mentioned regional economic communities in order to assess to what extent this World Trade Organization member is participating in the trade liberalisation scheme of each the specified regional economic communities. The second will expose the requirement laid down in Article XXIV of the General Agreement on Tariffs and Trade of 1994 which deals with regional trade agreements. Finally, the study will look at the Democratic Republic of Congo's commitment to each of the regional economic communities (the Southern African Development Community, Common Market for Eastern and Southern Africa and the Economic Community of Central African States) in light of the requirements set out in Article XXIV of the General Agreement on Tariffs and Trade of 1994 with a view to extracting the legal implications of such commitment.

1.8 Overview of the chapters

Chapter 1: Introduction

This part of the work constitutes a map in which the issue to be examined is explained briefly and precisely; how this study is to be undertaken; as well as the structure of the research.

Chapter 2: Conceptual approach

This chapter will be focusing on the definition of the key concepts. Also, the distinction between the concepts 'regional integration' and 'regional economic communities' will be analysed.

Chapter 3: The Democratic Republic of Congo's participation in regional economic communities

The third chapter will examine the participation of the Democratic Republic of Congo in regional economic communities. First, the historical background will be examined.



The second step will look at the critical examination of the Democratic Republic of Congo's commitments to regional economic communities.

Chapter 4: The legal implications for the Democratic Republic of Congo multiple memberships in regional economic communities

In this part of the study, the discussion will be based on the legal implication of the commitment of the Democratic Republic of Congo to the Southern African Development Community, Common Market for Eastern and Southern Africa and the Economic Community of Central African States in the light of Article XXIV of the General Agreement on Tariffs and Trade of 1994. That will be done in two parts. The first aspect to be examined will be the requirement laid down in Article XXIV of the General Agreement on Tariffs and Trade of 1994. The second will investigate the aforementioned commitment from the perspective of Article XXIV of the General Agreement on Tariffs and Trade of 1994

Chapter 5: Conclusion and recommendations

The way out of the negative consequences of multiple memberships will be the key concern in this part of the work.

1.9 Proposed chapters structures

Chapter 1

- 1.1 Abstract.
- 1.2 Key words and phrases.
- 1.3 Aim of the study.
- 1.4 Problem statement.
- 1.5 Significance of the study.
- 1.6 Limitations of the study.
- 1.7 Methodology of the study.
- 1.8 Overview of the chapters.
- 1.9 Proposed chapter structure.

Chapter 2

2.1 Introduction.

2.2 Definition of key concepts.

2.3 Distinction between regional integration and regional economic communities

2.4 Conclusion.

Chapter 3

3.1 Introduction.

3.2 The participation of the Democratic Republic of Congo in regional economic communities.

3.3 Critical approach to the Democratic Republic of Congo participation in regional economic communities.

3.4 Conclusion.



Chapter 4

4.1 Introduction.

4.2 Analysis of regional trade agreements under the General Agreement on Tariffs and Trade of 1994.

4.3 Legal implications for the Democratic Republic of Congo multiple memberships in regional economic communities under the General Agreement on Tariffs and Trade of 1994.

4.4 Conclusion.

Chapter 5

5.1 Introduction.

5.2 Conclusion.

5.3. Recommendations.

Chapter 2: CONCEPTUAL APPROACH

2.1 Introduction

The issue of legal implications generated by the multiple memberships in regional economic communities, taking the Democratic Republic of Congo as a case study, can't be clearly explored if we do not provide an exact understanding of the key terms listed in Chapter 1. Indeed, taking into consideration the controversy surrounding some of them, it is crucial to find out what exactly they mean. However, in the quest for the exact meaning of these key concepts, this Chapter will not give preference to one definition over another. It (this Chapter) will rather present the diverse views and summarise them in taking into account the specific aspects of each. This approach will not only provide a clear idea of the content of the said concepts but also a helpful landmark for further analysis.

Regional integration as it will be defined below, can be manifested in many ways. One is, by the establishment of regional economic communities through the creation of a customs unions¹⁶ or free trade area.¹⁷ The cases of the Southern African Development Community, the Common Market for Eastern and Southern Africa and the Economic Community of Central African States illustrate that.

The World Trade Organization, as a multilateral trading system¹⁸, provides specific rules dealing with regional trade agreements with Article XXIV as an exception to one of its

¹⁶ A customs union is a form of economic integration in which duties and other restrictive regulations of commerce are removed (except those permitted under Articles XI, XII, XIII, XIV, XV and XX of the General Agreement on Tariffs and Trade) on substantially all trade between the participating countries. Also, participating members establish a common external tariff and a revenue sharing mechanism are put in place between member states. Lastly, in international trade and tariffs negotiations, the member states act as a single entity.

¹⁷ A free trade area is an agreement between countries in which duties and other restrictive regulations of commerce are removed (except those permitted under articles XI, XII, XIII, XIV, XV and XX of the General Agreement on Tariffs and trade) and member states are free to set different tariffs on imports from non-members.

¹⁸ World Trade Organization, *Understanding the WTO* <www.wto.org> [accessed on 13 July 2009]. See also GR Winham, *The World Trade Organization: Institution-building in the multilateral trade system* (1998) 21 *World Economy* 353-7. Included in Simon Lester, Bryan Mercurio et al (2008) *World Trade Law: Text, Materials and Commentary* 70ff.

key principles: the most favoured nation principle.¹⁹ It is relevant to refer to the World Trade Organization as the Democratic Republic of Congo signed and ratified the General Agreement on Tariffs and Trade of 1994.²⁰ Also, as mentioned earlier, the World Trade Organization trading system contains a specific set of rules dealing with regional trade agreements.

However, if the manifestation of regional integration can be effected through the establishment of regional economic communities, here the two concepts are different, and it will be of importance to highlight that particular aspect in this part of the work.

The brief presentation of the content of this chapter performed, the following lines will provide more details so to give a clear and complete understanding to the key concepts.

2.2 Definition of key concepts

2.2.1 Regional integration

Prior to provide a meaning to the above-mentioned concept, it is noteworthy to indicate that there is not a unanimously accepted definition of the concept. Legal experts, as well as economists, have divergent approaches when it comes to the meaning of the concept. This is illustrated by the wide range of names and contents given to the concept. Economists use the terms ‘economic integration’ or ‘regional economic integration.’ Lawyers refer to it as ‘a regional integration arrangement’.

This part of the research paper will examine some of the definitions and highlight their common features.

According to Kritzinger-Van Niekerk, the concept ‘regional economic integration’ can be defined by taking the following three aspects into consideration: the geographical scope represented by the number of countries taking part in an arrangement, the substantive

¹⁹ The Most Favoured Nation is one of the key principles of the World Trade Organisation trading system. Pursuant to Article 1 of the General Agreement on Tariffs and Trade, World Trade Organisation member are not allowed to discriminate between their trading partners. In other words, a special favour granted to a member state obliges the member state granting the said favour to extend it automatically to all other member states.

²⁰ World Trade Organization loc. cit.

coverage, i.e. the activity covered in the agreement; and the sovereignty a country is willing to surrender appreciated by the depth of integration scheme.²¹

Dani Venter and Ernst Neuland postulate that economic integration refers to countries grouped in trade blocs through agreement on a regional basis. The said trade groupings aims to secure the benefits for member states countries by means of the removal, or reduction, of tariffs relating to crossborder movement of goods, services, capital and labour among them.²²

Walter Goode notes that a regional integration arrangement is a bilateral or regional agreement not limited to a regional trade arrangement, as it pursues an economic integration agenda *inter alia* through the harmonization of diverse domestic policies.²³

Mothae Maruping talks about regional integration when two or more countries use reciprocal preferential agreements as a mean of unification according to either one or two specific programmes of integration. When the member states reduce the tariffs on imports from fellow member states but not for non-member states, they establish a preferential trade area. The elimination, or reduction, of custom duties in a preferential trade area on goods from member states is a free trade area. Moving a step further, a free trade area in which members apply a common external tariff for goods originating from non-member states is a customs union. The customs union allowing free movement of the factors of production creates a common market. Lastly, when a customs union adds to the free movement of factors of production, by the decision to use a single currency through the merger of monetary and fiscal policies, here the integration programme is called an economic community; and if, in addition, state sovereignty is surrendered, a political union is formed between the member states.²⁴

²¹ Kritzinger-Van Niekerk, L. (2005) *Regional integration: concepts, advantages, disadvantages and lessons of experience* < www.sarpn.org.za > [accessed on 26 May 2009].

²² Dani Venter and Ernst Neuland (2007) *Regional Integration-Economic Partnership Agreement for Eastern and Southern Africa* 8.

²³ Walter Goode *Dictionary of Trade Policy Terms* (2003) 302.

²⁴ Mothae Maruping “Challenges for Regional Integration in Sub-Saharan Africa: Macroeconomic Convergence and Monetary Coordination” < www.fondad.org > [accessed on 28 March 2009].

As stated earlier, there is no consensus as to the exact definition of ‘regional integration’. However, the following can be said to be the main, and common, characteristics of the concept. Regional integration is an agreement, and not merely a simple declaration, which is binding upon its members. It (regional integration) covers specific areas determined in the agreement by the member states such as: trade, industry, education, tourism, labour mobility etc. Regional integration also takes into consideration the geographical aspect, for instance, the European continent, the Asian continent, the American continent, or the African continent. Another component of regional integration is the impact on member state’s sovereignty in some specific instances. Removal, or reduction of tariffs crossborder on movement of goods, services, capital and labour between member states is also part of a regional integration programme. Similarly, member states can harmonize their national policies when launching a regional integration scheme. The regional integration agreement creates not only a grouping, but also secures the benefits for the member states. When implementing a regional integration programme, member states join forces through reciprocal and preferential arrangements. Last but not least, when implementing a regional integration programme, member states make use of a preferential trade area, customs union, common market, economic community and political union.

Regional integration, as described above can be achieved through the creation of regional economic communities.

2.2.2 Regional economic communities

It is worth mentioning that there is not a unique and generally accepted definition of this concept. Nonetheless, the definitions to be examined will provide an idea of what a regional economic community is.

Sipho Buthelezi looks at regional economic communities as entities which have as a primary goal the promotion of an accelerated but balanced social, economic, political and cultural development of states parties.²⁵

²⁵ Sipho Buthelezi (2006) *Regional Integration Prospects & Challenges for the 21st Century* xiv.

The second definition is found in the Protocol on Relations between the African Union and Regional Economic Communities. Article 1 of the above-mentioned instrument defines ‘regional economic communities’ as:

a regional grouping of...states organized into a legal entity by treaty, with economic and social integration as main objective....²⁶

To sum up, a regional economic community is a regional grouping made up of states as parties. The grouping is established and organised by a treaty with specific objectives such as: economic, political, social and cultural.

Based on the definition of regional economic communities, regional integration in regional economic communities can be effected through the launching of a customs union.

2.2.3 Customs Union

Apart from the definition found in the General Agreement on Tariffs and Trade, this concept has a wide variety of definition, as many scholars in the field have approached it in many different ways.

In light of Article XXIV of the General Agreement on Tariffs and Trade, a customs union is:

... the substitution of a single customs territory for two or more customs territories, so that:

- (i) duties and other restrictive regulation of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or the least with respect to substantially all the trade in products originating in such territories, and,

²⁶ Protocol on Relations between the African Union and the Regional Economic Communities, Article 1.

- (ii) subject to the provision of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the member of the union to the trade of territories not included in the union.²⁷

According to Simon Lester and Bryan Mercurio, a customs union:

eliminates or substantially reduces internal tariffs and barriers within the arrangement while also creating common external tariffs and trade policies for the members of the union.²⁸

Dani Venter and Ernst Neuland argue that a custom union is:

a more advanced form of economic integration where all or most tariff and trade barriers have been removed as in [a] [Free Trade Area]but, in addition there is a common trade policy formulated by the member countries to govern their relationship with non-member countries. Tariff revenues are also shared between the member countries on a prescribed basis.²⁹

Sipho Buthelezi defines a customs union as:

an economic integration of two or more countries which agree to free all trade internally while maintaining a common external tariff on all imports from non-member.³⁰

Miroslav N. Jovanovic notes that:

in a customs union, participating countries not only remove tariff and quantitative restrictions on their internal trade, but also introduce a common external tariff on trade with third countries. The participating countries take part in international negotiations about trade and tariffs as a single entity.³¹

²⁷ General Agreement on Tariffs and Trade of 1994, Article XXIV.

²⁸ Simon Lester and Bryan Mercurio op cit 343.

²⁹ Dani Venter, Ernst Neuland op cit 36.

³⁰ Sipho Buthelezi op cit 2.

³¹ Miroslav N. Jovanovic, *International economic integration* limits and prospects 10.

According to the above definitions, a customs union is a form of economic integration in which duties and other restrictive regulations of commerce are removed (except those permitted under Articles XI, XII, XIII, XIV, XV and XX of the General Agreement on Tariffs and Trade) , on substantially all trade between the participating countries. Also, participating members establish a common external tariff and a revenue sharing mechanism is put in place between member states. Lastly, in international trade and tariffs negotiations the member states act as a single entity.

The other way of manifesting regional integration in regional economic communities is through the establishment of a free trade area.

2.2.4 Free Trade Area

The observation made about a custom union applies *mutatis mutandis* to a free trade area.

Under Article XXIV 8 (b) of the General Agreement on Tariffs and Trade, a free trade area is:

... a group of two or more customs territories in which the duties and other restrictive regulation of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.³²

Sipho Buthelezi regards a free trade area as:

a form of economic integration in which there exists free internal trade among countries but each member is free to levy different external tariffs against non-member countries.³³

Dani Venter and Ernst Neuland define a free trade area as:

a group of countries committed to removing all barriers to the free flow of goods and services between each other but pursuing independent external trade policies.³⁴

³² General Agreement on Tariffs and Trade of 1994, Article XXIV.

³³ Sipho Buthelezi op cit 2.

³⁴ Dani Venter, Ernst Neuland op cit 295.

In the view of Simon Lester and Bryan Mercurio a free trade area:

eliminates or substantially reduces tariffs and trade barriers between members of the agreement but does not affect each member's external trade policy. Therefore, members of a free trade area retain complete autonomy with respect to their external tariffs and trade barriers.³⁵

Miroslav N. Jovanovic equates free trade area with:

... an agreement among countries about the elimination of all tariff and quantitative restrictions on mutual trade. Every country in this area retains its own tariff and other regulation of trade with third countries."³⁶

Finally, a free trade area is an agreement between countries in which duties and other restrictive regulations of commerce are removed (except those permitted under articles XI, XII, XIII, XIV, XV and XX of the General Agreement on Tariffs and Trade), and member states are free to set different tariffs for imports from non-members.

In the following part, attention will be devoted to one of the regional economic communities of which the Democratic Republic of Congo is a member. This regional economic community, which is implementing its regional integration programme through the establishment of a free trade area scheme,³⁷ is the Southern African Development Community.

2.2.5 Southern African Development Community

The Southern African Development Community was formerly known as the Southern African Development Coordination Conference. In July 1979, delegations from Angola, Botswana, Mozambique, Tanzania and Zambia, together with representatives from donor governments and international agencies, convened in Arusha (in Tanzania) at the Arusha

³⁵ Simon Lester and Bryan Mercurio et al loc cit.

³⁶ Miroslav N. Jovanovic loc. cit.

³⁷ Chauvin, S & Gaulier, G. (2002) *Regional integration in Southern Africa* Working paper N° 2002-12. See also Dani Venter and Ernst Neuland op cit 135.

Conference in order to discuss cooperation in the southern part of Africa.³⁸ On 1 of April 1980 a regional economic summit was held in Lusaka, capital city of Zambia where the Lusaka Declaration was adopted as a statement of strategy, entitled ‘*Southern Africa: Towards Economic Liberation*’³⁹ The members’ ultimate goal was the reduction of their dependence on South Africa with respect to rail, air links, port facilities, import of raw materials and manufactured goods, and the supply of electric power.⁴⁰ According to the 1985 Southern African Development Coordination Conference report, the aimed pursued by the member states was not achieved, as they became more dependent on South Africa.⁴¹

In January 1992, the Southern African Development Coordination Conference Council of Ministers held a meeting where the member states approved a proposal for the transformation of the organization.⁴² The organization was enlarged with the admission of new member: Lesotho, Malawi, Namibia and Swaziland. Another remarkable change was the transformation of the organization into a fully integrated economic community. In August 1992, in Windhoek (capital of Namibia), the Southern African Development Community was legally established.⁴³

To date, after the withdrawal of Seychelles in 2004, the Southern African Development Community is made up of 14 countries: Angola, the Democratic Republic of Congo (which joined in 1997), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia (1990), South Africa (1994), Swaziland, Tanzania, Zambia and Zimbabwe.⁴⁴

The Southern African Development Community comprises eight organs: the Summit of Heads of State and Government; the Organ on Politics, Defence and Security; the Council of Ministers; the Integrated Committee of Ministers; the Standing Committee of Officials; the Secretariat; the Tribunal and the SADC National Committees.⁴⁵

³⁸ Siphon Buthelezi op cit 171. See also Dani Venter, Ernst Neuland op cit 131. Jaime De Melo, Arvind Panagariya (1993), *New dimensions in regional integration* 249.

³⁹ Siphon Buthelezi op cit 173.

⁴⁰ Siphon Buthelezi ibid.

⁴¹ Siphon Buthelezi ibid.

⁴² Siphon Buthelezi ibid.

⁴³ Siphon Buthelezi loc cit. See also Dani Venter and Ernst Neuland op cit 132. *The Southern African Development Community* <www.eia.doe.gov> [accessed on 10 June 2009].

⁴⁴ *The Southern African Development Community* loc cit.

⁴⁵ The Treaty of the Southern African Development Community Article 9.

The Southern African Development Community has *inter alia* the following as objectives: the harmonisation of political and socio-economic policies; the encouragement of economic, social and cultural ties across the region; the promotion of the development of human resources; the promotion of technology development and transfer.⁴⁶

Next consideration will be given to the Common Market for Eastern and Southern Africa. This regional economic community has 19 members. The Democratic Republic of Congo is one of the members of this entity (the Common Market for Eastern and Southern Africa) which is implementing its regional integration scheme through the creation of a customs union.⁴⁷ This membership of a second regional trade agreement needs to be highlighted as it raises the issue of its lawfulness into the spotlight, especially given the requirement set out in Article XXIV of the General Agreement on Tariffs and Trade that will constitute the focus of Chapter 4.

2.2.6 Common Market for Eastern and Southern Africa

Unlike the Southern African Development Community, the Common Market of Eastern and Southern Africa had a different genesis. In March 1978, in Lusaka (Zambia), an extraordinary meeting gathered ministers of trade, finance and planning to discuss the creation of a sub-regional economic community.⁴⁸ At the end of the meeting a recommendation was made suggesting the creation of a sub-regional economic community which would start with a sub-regional trade area which would gradually be upgraded to a common market over a period of ten years.⁴⁹ The said meeting ended by the adoption of the '*Lusaka Declaration of Intent and Commitment to the Establishment of a Preferential Trade Area for Eastern and Southern Africa*'. For the establishment of the preferential trade area, the Lusaka Declaration created an intergovernmental negotiating team. Lastly, an indicative timeframe for the activities of the intergovernmental team was agreed upon.⁵⁰

⁴⁶ Treaty of the Southern African Development Community Article 5.

⁴⁷ COMESA Treaty Article 45 loc cit. See also Desmond Kwande loc cit. *COMESA launches its custom union* loc cit. Final communiqué of the thirteenth summit of the COMESA Authority of Heads of state and Government loc cit.

⁴⁸ Dani Venter and Ernst Neuland op cit 145.

⁴⁹ Dani Venter and Ernst Neuland ibid. See also Siphon Buthelezi op cit 94.

⁵⁰ *Integrating Trade and Investment Regionally*: COMESA Q&A, Lusaka, August 1999.

Following the completion of the preparatory work, a meeting of the heads of state and government was held in Lusaka on 21 December 1981. At this meeting, the treaty creating the preferential trade area was signed, and, it entered into force on 30 September 1982 after its ratification by more than seven signatory states, pursuant to the requirement set out in Article 50.⁵¹

In consequence of the objective to transform the preferential trade area into a common market over 10 years, the Treaty establishing the Common Market for Eastern and Southern Africa was signed on 5 November 1993 in Kampala, Uganda. The ratification of the treaty took place in Lilongwe a year later on 8 December 1994.⁵²

Currently, the Common Market for Eastern and Southern Africa has 19 members: Burundi, Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.⁵³

The main institutions of the Common Market for Eastern and Southern Africa are the following: the authority of Heads of States and Governments; the Council of Ministers; the Court of Justice; the Committee of Governors of Central Banks; the Intergovernmental Committee; the Technical Committees; the Secretariat; and the Consultative Committees.⁵⁴

Like the precedent regional economic community, the Common Market for Eastern and Southern Africa has its objectives which are *inter alia*: contribution towards the establishment, progress and realisation of the objectives of the African Economic Community; cooperation in the promotion of peace, security and stability among the member states in order to enhance economic development in the region; and attainment of

⁵¹ Siphso Buthelezi op cit 94. See also Dani Venter, Ernst Neuland op cit 145.

⁵² Dani Venter, Ernst Neuland op cit 146.

⁵³ Dani Venter, Ernst Neuland ibid.

⁵⁴ Treaty of the Common Market for Eastern and Southern Africa, Article 7.

sustainable growth and development of the member states by promoting a more balanced and harmonious development of their production and marketing structures.⁵⁵

The Economic Community of Central African States which is also one of the regional economic communities to which the Democratic Republic of Congo has committed itself. This organization is aspiring to launch its regional integration plan progressively through the establishment of a free trade area, a customs union and a common market.⁵⁶ Moreover, it is also worthy mentioning that this organization is recognized by the African Union as one of the building bloc of the African Economic Community.⁵⁷ This membership is also of importance as it raises the question of its lawfulness, with regard to the General Agreement on Tariffs and Trade of 1994, an issue that will be discussed in more detail in Chapter 4.

2.2.7 Economic Community of Central African States

In December 1981 the leaders of the Central African Customs and Economic Union states convened at a summit meeting. At this meeting the leaders shared a common view about the creation of a wider economic community of Central African states.⁵⁸ It is worth mentioning that was done in principle only, as the first concrete step to establish such an entity only took shape two years later.⁵⁹ Indeed, on 18 October 1983, in Libreville, Gabon, the member states of the Central African Customs and Economic Union and the member of the Economic Community of Great Lakes Countries (Burundi, Rwanda and Zaire today the Democratic Republic of Congo) and Sao Tome and Principe met and adopted the treaty establishing the Economic Community of Central African States.⁶⁰ Angola was also part of the initiative but as an observer and became a full member in 1999.⁶¹ The entity started its activities in 1985 but little has been achieved since 1992 by the organisation due to financial constraints (non payment of membership fees by

⁵⁵ Treaty of the Common Market for Eastern and Southern Africa, Article 3. Dani Venter, Ernst Neuland op cit 147ff.

⁵⁶ *Economic Community of Central African States* < www.ceeac-ecccas.org > [accessed on 18 June 2009].

⁵⁷ *African Economic Community* <en.wikipedia.org> [accessed on 18 July 2009].

⁵⁸ *Economic Community of Central African States* ibid.

⁵⁹ Dani Venter and Ernst Neuland op cit 55.

⁶⁰ *Economic Community of Central African States* ibid. See also Awoumo, CDG, *La coexistence CEEAC-CEMAC: une nécessité? Enjeux*, 17: 29-43. See also Dani Venter, Ernst Neuland 55f.

⁶¹ *Economic Community of Central African States* ibid.

member states) as well as the war in the Great Lake region.⁶² In 1998, in Libreville, Gabon, an extra-ordinary meeting presided by the president of Burundi Pierre Buyoya was held in order to re-launch the operations of the organisation and the Heads of States present expressed their commitment to the resurrection of the organisation.⁶³

The institutions of the Economic Community of Central African States are: the Conference of Heads of States and Government; the Council of Ministers; the Court of Justice; the Secretariat; the Consultative Committee and Any specialized technical committee established by this treaty.⁶⁴

The entity's main goal was the establishment of a Central African common market and economic union by 1995. The main goals of the entity are *inter alia*: the elimination of custom duties as well as imports and exports taxes between the member states; the fast development of landlocked countries, especially the less developed member states, the harmonisation of national policies with a view of promoting activities of common interest, particularly in the fields of industry, transport, energy, tourism, agriculture, money and finances, trade, education and culture, science and technology; and the promotion of the free movement of people, goods, services, capital and establishment rights between the territory of the member states.⁶⁵

Since 1994, the commitment of countries to regional trade agreements (especially for those that ratified the General Agreement on Tariffs and Trade of 1994) is regulated by the World Trade Organization. The organization deals *inter alia* with trade liberalisation issues, especially those initiated in regional economic communities through its Article XXIV of the General Agreement on Tariffs and Trade.⁶⁶

⁶² "Economic Community of Central African States" *ibid*.

⁶³ "Economic Community of Central African States" *ibid*.

⁶⁴ Treaty establishing the Economic Community of Central African States Article 7 < www.iss.co.za > [accessed on 17th July 2009].

⁶⁵ Treaty establishing the Economic Community of Central African States Article 4 "Economic Community of Central African States" *loc.cit*.

⁶⁶ World Trade Organization *loc.cit*.

2.2.8 World Trade Organization

We can't talk about the World Trade Organization without mentioning the 1947 General Agreement on Tariffs and Trade. Indeed, prior to the establishment of the World Trade Organization as we know it today, international trade was governed by the 1947 General Agreement on Tariffs and Trade which was considered to be a provisional set of rules and organization.

The historical background of the World Trade Organization reveals that on the agenda of political leaders during the era preceding the adoption of the 1947 General Agreement on Tariffs and Trade was the creation of a third institution dealing specifically with the trade aspects of international economic cooperation as two other institutions had been already created (the International Monetary Fund, and the International Bank for Reconstruction also known as the World Bank). For that purpose more than 50 countries took part in the negotiations aimed at creating an International Trade Organization as a specialized agency of the United Nations. The draft of the International Trade Organization was ambitious in that it encompassed areas beyond world trade fields such as: rules on employment, international investment, services, restrictive business practices and commodity agreements. The above-mentioned countries plan was to establish the International Trade Organization at a United Nations Conference on Trade and Employment in Havana (Cuba).⁶⁷

At the same time, in December 1945, 15 countries started negotiating an agreement with a view of reducing tariffs. Given the end of the Second World War, the intention was to contribute to trade liberalisation and to stop the era of protectionism which had prevailed since the early 1930s. With regard to the first round of negotiation aimed at reducing tariffs, a package of trade rules was agreed upon, and 45,000 tariff concessions were made, constituting a fifth of the world's total. Meanwhile, the number of countries grew to 23 by the time, on 30 October 1947, the agreement was signed. On 30 June 1948 the tariff concessions entered into force through the "Protocol of Provisional Application",

⁶⁷ World Trade Organization loc cit. See also Simon Lester and Bryan Mercurio loc. cit.

and that was also the date on which the 1947 General Agreement on Tariffs and Trade came into force.⁶⁸

The same 23 negotiating parties to the 1947 General Agreement on Tariffs and Trade were also part of a larger group of countries which wanted to negotiate the International Trade Organization Charter. In order to avoid any kind of conflict, one of the provisions of the 1947 General Agreement on Tariffs and Trade gave the green light to its members to accept certain rules of the International Trade Organization Charter. In order to protect the tariff concessions made under the General Agreement on Tariffs and Trade, the member states were strongly convinced that the best way to do that was “swiftly” and “provisionally”. In addition, the 1947 General Agreement on Tariffs and Trade member states indicated how they would consider the relationship between the 1947 General Agreement on Tariffs and Trade and the International Trade Organization Charter. The 1947 General Agreement on Tariffs and Trade member states also permitted the possibility of not creating the International Trade Organization.⁶⁹

Less than a month after the signature of the 1947 General Agreement on Tariffs and Trade, at the Havana Conference in Cuba, the International Trade Organization Charter was finally a step closer to its birth, as most the member present at the said gathering were agreed. Unfortunately, the ratification of the International Trade Organization Charter posed problems in some legislatures among which the United States Congress, notwithstanding that the United States had been the leading country in that process. That led to the death of the International Trade Organization.⁷⁰

The 1947 General Agreement on Tariffs and Trade was for 48 years the set of rules governing international trade. Through a series of multilateral negotiations, also known as “trade rounds”, the 1947 General Agreement on Tariffs and Trade retain its content, as each trade round brought about a change to the initial text without replacing it. The five first rounds focused more on further tariff reductions: the Geneva Round (1947), the Annecy Round (1949), the Torquay Round (1951), the Geneva Round (1956), and the Dillon Round held in Geneva (1960-1961).

⁶⁸ World Trade Organization *ibid.* See also Simon Lester and Bryan Mercurio *ibid.*

⁶⁹ World Trade Organization *ibid.*

⁷⁰ World Trade Organization *ibid.* See also Simon Lester and Bryan Mercurio *ibid.*

The Kennedy Round (1964-1967) dealt with anti-dumping measures and also development. The Tokyo Round (1973-1979) concentrated its work on tariffs, non-tariffs, and a framework agreement. Lastly, the Uruguay Round (1986-1994), which took the longest ,and tackled issues, such as: tariffs, non-tariff measures, rules, services, intellectual property, dispute settlement, textiles, agriculture etc...It also led to the creation of the World Trade Organization on 1 January 1995.⁷¹

Even though the objectives of the World Trade Organization have raised controversy among scholars, the institution defines its main goals as follows: it is a negotiation forum; it provides a set of rules; and it helps settle disputes arising among members.⁷²

Moreover, the institution set out the following as principles of the multilateral trading system: non-discrimination between members, freer trade by means of reduction in trade barriers, predictability through binding trade commitment, promotion of fair competition, and favourable treatment for developing countries.⁷³

The World Trade Organization is made up of the following as governing bodies: the Ministerial Conference, the General Council, the Dispute Settlement Body, the Trade Policy Review Body, the Council for Trade in Goods, the Council for Trade Related Aspects of Intellectual Property Rights, the Council for Trade in Services and the Trade Negotiating Committee.⁷⁴

As of 23 July 2008 the World Trade Organization comprises 153 members.⁷⁵

As foreshadowed, the World Trade Organization promotes four key principles, among which is the principle of non-discrimination through the Most Favoured Nation principle. This principle will be briefly described as an entire chapter Chapter 4 is devoted to explore its content in detail.

⁷¹ World Trade Organization *ibid.* See also Simon Lester and Bryan Mercurio *ibid.*

⁷² World Trade Organization *ibid.*

⁷³ World Trade Organization *ibid.*

⁷⁴ World Trade Organization *loc cit.*

⁷⁵ World Trade Organization *ibid.*

2.2.9 Most Favoured Nation principle

The Most Favoured Nation principle is one of the key principles of the World Trade Organisation trading system. Pursuant to Article 1 of the General Agreement on Tariffs and Trade, World Trade Organisation member are not allowed to discriminate between their trading partners. In other words, a special favour granted to a member state obliges the member state granting the said favour to extend it automatically to others member states.⁷⁶

It is worth mentioning that as a capital requirement, it covers trade in goods (Article 1, described earlier), trade in services (Article 2), and the trade related aspects of intellectual property (Article 4), even if it is adapted to the specific characteristic of each of them. However, some exceptions are allowed.

First, countries party to a customs union or free trade area are allowed to discriminate against goods originating from countries which are not taking part to the above-mentioned program subject to strict conditions. The first condition is the notification to the Council of Trade in Goods the World Trade Organization competent body in this matter) by a World Trade Organization's member which is willing to enter in a free trade area or customs union. The second is the elimination of duties and other regulations of commerce. The last one prohibits the member of a customs union or free trade area from imposing tariffs which are generally higher or more restrictive than those existed prior to the establishment of the customs union or free trade area.⁷⁷

Secondly, differential and more favourable treatment may be accorded to developing countries without extending it to other contracting parties. Similarly, the less developed countries are permitted to enter into regional or global arrangement in by which, they can grant each other reduction or elimination of tariffs, based on criteria set out by them, on products imported from one another;⁷⁸

⁷⁶ General Agreement on Tariffs and Trade of 1994 loc cit. See also Appellate Body Report, *EC-Bananas* loc cit.

⁷⁷ General Agreement on Tariffs and Trade of 1994, Article 1.

⁷⁸ The Uruguay Understanding on the Interpretation of Article XXIV.

Lastly, countries are allowed to discriminate against other trading partners by entering into an agreement liberalizing trade in services among them, but subject to three conditions. Firstly, the agreement must have a substantial sectoral coverage. Secondly, the agreement must provide for the elimination of substantially all discrimination as prescribed in Article XVII with respect to the relevant sector.⁷⁹

The World Trade Organization when promoting non-discrimination by means of the Most Favoured Nation principle set out an exception allowing its members through Article XXIV to discriminate on strict conditions. As Chapter 4 will go into much detail, this part of the work will just provide a superficial description of the content of this provision.

2.2.10 Article XXIV

This provision of the General Agreement on Tariffs and Trade of 1994 covers one of the exceptions to the Most Favoured Nation principle. It is concerned with trade in goods whereas Article V of the General Agreement on Trade in Services deals with trade in services.

First and foremost, the provision in paragraph 4 states that free trade areas and customs unions are '*desirable*', but should be a facilitating tool of trade rather than means of raising barriers to trade with other contracting parties.⁸⁰

Article XXIV contains both a procedural and a substantive requirement that members must comply with. The procedural requirement is notification to the World Trade Organization by the member which desires to join a free trade area or customs union⁸¹. The substantive aspect is made up of two rules. The first one is the obligation not to raise the general level of protection and make access for goods and services originating from non-members more expensive (the external trade requirement).⁸² The obligation to liberalise substantially all trade among participating countries, also known as the internal trade requirement, is the second rule.⁸³

⁷⁹ General Agreement on Tariffs and Trade of 1994, Article V.

⁸⁰ General Agreement on Tariffs and Trade of 1994 loc. cit.

⁸¹ General Agreement on Tariffs and Trade of 1994 *ibid*.

⁸² General Agreement on Tariffs and Trade 1994 *ibid*.

⁸³ General Agreement on Tariffs and Trade of 1994 *ibid*.

Lastly in paragraph 5, World Trade Organization members are allowed to enter into interim agreements provided the said agreement is finalised within a ‘*reasonable period of time*’. It also requires that the interim free trade area or customs union includes a plan for the finalisation of the customs union or free trade area.⁸⁴ In the same way, World Trade Organization’s member states acceded to the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade of 1994, in which *inter alia* the term ‘reasonable period of time’ should be understood not to be more than 10 years, unless detailed on the reasons are given why a longer period of time is granted in the interim agreement.⁸⁵ It is also worth indicating that the General Agreement on Trade in Services does not contain a similar provision.

As one of the ways of achieving regional integration is through the formation of regional economic communities, it is relevant to distinguish between concepts regional integration and a regional economic community.

2.3 Distinction between regional integration and a regional economic community

As highlighted earlier, regional integration and regional economic communities are linked. Indeed, the creation of a regional economic community is one of the ways in which countries manifest their regional integration plan. Although the two concepts are linked, they are different in essence. To demonstrate that difference, the examples of real regional integration scheme and regional economic community will be used.

The Southern African Development Community is an agreement of sovereign countries situated in the southern part of Africa. The agreement creates an entity which is a regional economic community. The entity has its own institutions, different from those of the member states. Similarly, the organization is not governed by the constitution of one of the member states but by the agreement (the treaty establishing the organization). In addition, the member states specify the areas in which they will collaborate and cooperate. Last but not least, the member states of the organization agree to achieve specific objectives together. First, the member states put free trade on their agenda.

⁸⁴ General Agreement on Tariffs and Trade of 1994 *ibid*.

⁸⁵ The Uruguay Understanding on the Interpretation of Article XXIV *loc cit*.

Secondly, the free movement of people is also part of the package. Thirdly, here the use of a single currency by the member states, as well as the establishment of democracy and respect for human rights in their respective countries.⁸⁶

As far as free trade is concerned, the organization launched its free trade area scheme through the trade protocol signed in 1996 by 11 members, and which has been in force since 2000. A free trade area programme consists of the removal of all trade restrictions (custom duties, quotas, export subsidies, technical barriers to trade etc...) to the mobility of goods and services among them, except those permitted under Article XXIV of the General Agreement on Tariffs and Trade.⁸⁷ In the case of this organization, tariff reduction schedules, rules of origin of goods and services, elimination of non-tariff barriers, harmonisation of customs and trade documentation, and dispute settlement mechanisms, constitute the components of the integration plan.⁸⁸

With respect to the free movement of people, the Southern African Development Community is planning to launch a common market in 2015 but before that a customs union is expected to be formed. The common market is a customs union in which the free movement of the factors of production (people, labour, and capital) is allowed among members.⁸⁹

Regarding a single currency, the Southern African Development Community is expected to launch a monetary union, also known as an economic union, in 2016. In a economic union members harmonise monetary as well as fiscal policies, and the use of a common currency is also a feature of this form of integration scheme.⁹⁰

Finally, referring to the above-mentioned example, the Southern African Development Community is the regional economic community and the regional integration scheme is achieved by the establishment of a free trade area since 2000, the plan to launch a customs union in 2010, followed by a common market in 2015, and the economic union in 2016. At the end of the integration process in the area specified in the protocol,

⁸⁶ Chauvin , S & Gaulier, G loc cit.

⁸⁷ General Agreement on Tariffs and Trade of 1994 loc cit.

⁸⁸ Chauvin , S & Gaulier, G op cit 135.

⁸⁹ Dani Venter and Ernst Neuland op cit 36. See also Siphon Buthelezi op cit 3.

⁹⁰ Dani Venter and Ernst Neuland ibid. See also Siphon Buthelezi ibid.

member states will no longer have the competence to act individually as the power to do so will have been given to the Southern African Development Community.

2.4 Conclusion

In conclusion, this Chapter has paved the way for further investigation as it has provided an understanding of the content of key concepts' content necessary to carry out efficiently our analysis in the rest of this work. That was possible through the presentation and analysis of the different views reflected in legal instruments, historical data as well as diverse scholarly opinions.

Although the ten key concepts differ from one another, they complement each other. Indeed, integration done on a regional basis translates the commitment of member states to make concessions and sacrifices with a view to unifying their economies and eventually their politics. For that purpose they agree to surrender their sovereignty to a common entity (regional economic community) which is legally different, and will serve as a monitoring and implementing body for the area specified by the members. This is the case for three African regional economic communities, viz: the Southern African Development Community, the Common Market for Eastern and Southern Africa and the Economic Community of Central African States.

In the same way, a regional economic community needs specific schemes to achieve the desire of member states to give effect to their integration plan. When the idea of member states is to progressively reduce tariffs with the objective of eliminating them within their respective territories, they agree to establish a free trade area. If they choose to go a step further in establishing a common external tariffs vis-à-vis import originating from non members states, they form a custom union.

As far as trade liberalization is concerned, customs union and free trade area constitute two programs whose formation are strictly regulated by the World Trade Organization trading rules (Article XXIV of the General Agreement on Tariffs and Trade of 1994). In fact, the World Trade Organization promotes among its members two key principles. One of these is the Most Favoured Nation principle which imposes on a member state granting preferential treatment to another specific member a duty to extend it automatically to all

other member state.⁹¹ In the same way, the World Trade Organization allow member states to discriminate on strict and specified conditions (notification and internal and external trade requirements) which is an exception to the Most Favoured Nation principle laid down in Article XXIV of the 1994 General Agreement on Tariffs and Trade.

Lastly, as indicated, this Chapter did not tackle the issue of the Democratic Republic of Congo legal commitment to the aforementioned organizations but rather presented an overview of the organization to which it (the Democratic Republic of Congo) belongs. The preceding aspect is going to be dealt with in a separate Chapter (Chapter 3). Also, this part of the paper did not analyse in much detail the requirement laid down in Article XXIV of the General Agreement on Tariffs and Trade with regard to the formation of a customs union and a free trade area as it will be dealt with in Chapter 4.

Chapter 3: THE DEMOCRATIC REPUBLIC OF CONGO'S PARTICIPATION IN REGIONAL ECONOMIC COMMUNITIES



3.1 Introduction

As mentioned in the title of my work, the legal implications of the Democratic Republic of Congo in regional economic communities constitute the main focus of this research. Consideration will therefore be first given to the task of finding evidence of the Democratic Republic of Congo's commitment to the above-mentioned regional economic communities. From there, attention will be devoted to the legal issues raised by such commitment.

The preliminary step in this part of my research will provide a historical background of the commitment of the Democratic Republic of Congo into regional economic communities. The second step goes into much detail regarding the extent to which the Democratic Republic of Congo is committed to regional economic communities. To conclude, a summary of the content of this chapter is given.

⁹¹ 1994 General Agreement on Tariffs and Trade *ibid*.

3.2 Historical background

The commitment of the Democratic Republic of Congo to regional economic communities was not solely motivated by a particular decision of the Democratic Republic of Congo. Instead, that decision was part of a movement of most of Sub-Saharan countries.⁹² This wave had been noticed soon after most of Sub-Saharan states got rid of colonial dependence.⁹³ First, some African leaders pleaded for the economic integration of Africa without any practical realization on the ground.⁹⁴ It was only in the 1970s and 1980s that economic integration entities were created.⁹⁵ Two reasons justified this interest for regional integration by most of Sub-Saharan countries: the political vision of African unity and the fact that regional integration was regarded as a way of easing the importation of substitution of industrialisation policies.⁹⁶

With regard to the particular case of the Democratic Republic of Congo, the commitment to regional economic communities can be traced back to the late 1960's. It was exactly in April 1968, soon after taking power, that the late president Mobutu, initiated the creation of the "Union of the Central African States". The decision followed the stability of the country established under his regime⁹⁷ and also to the fact that regional integration was one of Mobutu's tools available at hands to expand its power politics in Central Africa.⁹⁸ In the course of the event, he succeeded to convince Chad and the Central African Republic to join the organization (Chad and the Central African Republic were former member of the early established *Union Douanière et Economique de l'Afrique Centrale* in English the Central African Customs and Economic Union). Chad and the Central African Republic decided to leave the *Union Douanière et Economique de l'Afrique Centrale* (the Central African Customs and Economic Union) following a perpetual internal tension with the two coastal countries Gabon and the Republic of Congo.⁹⁹

⁹² Kritzinger-Van Niekerk op cit. See also Jaime De Melo, Arvind Panagariya op cit 234.

⁹³ Kritzinger-Van Niekerk ibid.

⁹⁴ Kritzinger-Van Niekerk ibid.

⁹⁵ Kritzinger-Van Niekerk ibid.

⁹⁶ Kritzinger-Van Niekerk loc cit.

⁹⁷ Bureau of African Affairs (2009), *Background Note: Democratic Republic of the Congo* <www.state.gov> [accessed on 12 July 2009].

⁹⁸ Thomas Stevens, Hans Hoebeke and Koen Vlassenroot, *Politics of regional integration in Central Africa* Institute for International Studies <www.iss.co.za> [accessed on 22 June 2009].

⁹⁹ Thomas Stevens, Hans Hoebeke and Koen Vlassenroot ibid.

No later than in December 1968, the Central African Republic withdrew from the “Union of the Central African States” and in 1971 rejoined the *Union Douanière et Economique de l’Afrique Centrale* (the Central African Customs and Economic Union) caused by what appeared to be a French intervention.¹⁰⁰ The withdrawal of the Central African Republic and the foreseeable limited economic contribution of Chad and the Central African Republic (due their status of landlocked countries) gave no chance to the organization (the Union of the Central African States) to live longer.¹⁰¹

In 1977, the president Mobutu tried again to launch another organization named the “Economic Community of Central African Countries” which would comprise the *Communauté Economique des pays des Grands Lacs* (Economic Community of Great Lakes Countries) and the *Union Douanière et Economique de l’Afrique Centrale* (the Central African Customs and Economic Union) members. Once again this failed. A few years later, Gabon suggested a similar project, but in a very different manner this time. Indeed, Gabon was motivated by the objectives set out in the 1980 Lagos Plan of Action, which pleaded for the creation of an African Economic Union. The project was succeeded by the signatory of the treaty creating the *Communauté Economique des Etats d’ Afrique Centrale* (the Economic Community of Central African States) on the 18th of October 1983 in Libreville (Capital of Gabon).¹⁰² The organization comprised the Central African Customs and Economic Union members (Cameroon, the Central African Republic, Chad, the Republic of Congo, Gabon and Equatorial Guinea), the Economic Community of Great Lakes Countries members (Burundi, the Democratic Republic of Congo and Rwanda), Sao Tome and Principe, Angola (with observer status but joined officially in 1999).¹⁰³

The Democratic Republic of Congo’s commitment to regional economic communities does not cover only Central Africa with the Central African Customs and Economic Union but includes also the Eastern and Southern part of Africa.

¹⁰⁰ Thomas Stevens, Hans Hoebeke and Koen Vlassenroot *ibid*.

¹⁰¹ Thomas Stevens, Hans Hoebeke and Koen Vlassenroot *ibid* .

¹⁰² Thomas Stevens, Hans Hoebeke and Koen Vlassenroot *ibid*.

¹⁰³ Economic Community of Central African States <www.ceeac-eccas.org> [accessed on 12 June 2009].

In Eastern Africa, the Democratic Republic of Congo, Burundi and Rwanda established the Economic Community of Great Lakes Countries in 1976.¹⁰⁴ As well documented, the Democratic Republic of Congo is in Central Africa and launching an organisation with Eastern African countries which raises the question of the rationale behind a close tie with Eastern Africa countries.

In quest of answers, a closer look at the legal instrument creating the entity reveals that mutual economic development was the main goal of the organisation assigned itself to achieve.¹⁰⁵ However, years later, facts on the ground sufficed to prove that mutual economic development was far to be the key motive upon which the organization was established. In fact, political and security concerns justified the creation of the organization. The political motivation was the fact that the president Mobutu was in search of regional leadership in the region against Uganda and Anglophone Africa. Therefore, he chose as allies Rwanda and Burundi to be part of the project. Concerning the security reason, Mobutu was facing internal unrest especially in the Eastern part of the country and it appeared a necessity to get the support of Rwanda and Burundi, especially with the threat that constituted Laurent Désiré Kabila with its *Parti de la Revolution Populaire* (Party of the People's Revolution). The materialization of such political and security agenda was translated by a strong political and personal relationship between the president Mobutu and the Rwandan president Juvénal Habyarimana. However, the relationship between the Democratic Republic of Congo and Rwanda on one side and Burundi on the other turned out to not be peaceful. In fact, the intervention of the Democratic Republic of Congo and Rwanda into the Burundi's internal affairs as well as border incidents brought mistrust among the members of the Economic Community of Great Lakes Countries and had a negative impact on the activities of the organization in general.¹⁰⁶

The situation worsened when a series of armed conflict took place in the Great Lakes region. First, the Rwandan armed conflict in 1990 resulted in the massive killing of the

¹⁰⁴ United Nations, *Treaty Series*, vol. 1092 <www.un.org> [accessed on 6 June 2009].

¹⁰⁵ Convention Establishing the Economic Community of Great Lakes States Article 2.

¹⁰⁶ Arsène Mwaka Bwenge (2006), *D'une CEPGL à une autre : quelles alternatives dans les stratégies actuelles d'intégration et de coopération pour le développement ?* in *repenser le développement en Afrique : au delà des impasses, les alternatives*. Dakar: Codesria. <<http://lodel.ehess.fr/ceaf/document>> [accessed on 28 July 2009].

civilian population.¹⁰⁷ The second conflict in the list was the disastrous civil war in Burundi in 1993.¹⁰⁸ The last is the complex war in the Eastern part of the Democratic Republic of Congo in 1998, as it opposed the Democratic Republic of Congo troops with its allies (Namibia, Angola and Zimbabwe) against rebel forces backed by the Rwandan and Ugandan troops.¹⁰⁹ The peace-less situation in the Great Lake region did not help the organization to achieve its objectives. It should also be noted that the first two attempts to bring peace among member states had failed (the 1994 to 1995 under the president Mobutu's regime, the second in 1997 under the president Laurent Désiré Kabila which never took place).¹¹⁰ It was only the 2004 attempt that succeeded in 2007, essentially following the involvement of the international community.¹¹¹

However, despite an overall negative achievement, the organization can be credited with notably the freedom of movement in the region through the so called 'Economic Community of Great Lakes Countries Card'. The construction of the Ruzizi dam and the agricultural programmes are also part of the list.¹¹² At last, recent trends towards the normalization of relations, especially through the exchange of ambassadors between the former enemies the Democratic Republic of Congo and Rwanda, as well as the meeting of both political leaders lately, gives hope for future cooperation plan in which the resuscitation of the organization (the Economic Community of Great Lakes Countries) may constitute the main feature.¹¹³

¹⁰⁷ United Nations, Economic and Social Council, *Special Rapporteur, on his mission to Rwanda from 8 to 17/04/1993* by Mr. B.W Ndiaye, E/CN.4/1994/Add.1, 11/08/1993 <www.un.org> [accessed on 26 July 2009]. See also BBC, *UN admits Rwanda genocide failure* <www.bbc.co.uk> [accessed on 28 July 2009].

¹⁰⁸ United Nations, Security Council, Resolution 1040, SC/6165, 29/01/1996. See also Amnesty International, *Burundi Between hope and fear* <www.amnesty.org> [accessed on 26 July 2009] University of Pennsylvania (African Studies Center), *Burundi: Recent UN statements 12/28/95* <www.upenn.edu> [accessed on 26 July 2009].

¹⁰⁹ United Nations, Economic and social Council, *Report on the situation of human rights in the Democratic Republic of Congo, submitted by the Special Rapporteur Mr. Roberto Garretón in accordance with Commission on Human Rights resolution 2000/15* E/CN.4/2001/40, 1/02/2001 <www.afrol.com> [accessed on 26 July 2009]. See also Suliman Ali Baldo, *Rampant human rights abuses and occupation of the Democratic Republic of Congo by Foreign Armies* <www.hrw.org> [accessed on 26 July 2009].

¹¹⁰ Arsène Mwaka Bwenge op cit 4. See also Thomas Stevens, Hans Hoebeke and Koen Vlassenroot op cit 171.

¹¹¹ Thomas Stevens, Hans Hoebeke and Koen Vlassenroot op cit 170.

¹¹² Thomas Stevens, Hans Hoebeke and Koen Vlassenroot ibid.

¹¹³ Ignatius Ssuuna, *Rwanda diplomats reacts to Democratic Republic of Congo, Rwanda naming of envoys* <www.allAfrica.com> [accessed on 11 July 2009]. See also Jeune Afrique, *Kinshasa et Kigali font la paix* <www.jeuneafrique.com> [access on 12 July 2009], Sunday Times, *Kabila, Kagale meet in DRC* <www.thetimes.co.za> [accessed on 12 July 2009].

In Eastern Africa, the Democratic Republic of Congo extended its interest in regional integration schemes by joining the Common Market for Eastern and Southern Africa. That was done in 1994 at the inaugural Summit in Lilongwe (Capital of Malawi).¹¹⁴

The commitment of the Democratic Republic of Congo to the Southern African regional integration program had been materialized when it joined the Southern African Development Community in 1997.¹¹⁵ That followed the coming into power of Laurent-Désiré Kabila which, after launching a military campaign, succeeded to overthrow Mobutu's regime.¹¹⁶ Once in power, Laurent-Désiré Kabila proclaimed himself new president of Zaire and renamed it the Democratic Republic of Congo.¹¹⁷ With the support of Zimbabwe and Angola, the Democratic Republic of Congo acceded to the Southern African Development Community Treaty. Given the general crisis in which the precedent regime left the Democratic Republic of Congo, one would ask the following question: Was the move of the Democratic Republic of Congo towards the Southern African Development Community motivated by the potential economic, social and political benefit of belonging to such organisation?

According to the facts, and sharing the same view as most experts and observers, it appeared that the Democratic Republic of Congo's decision to join was purely based on an urgent political and survival basis. In fact, the military campaign launched by Laurent-Désiré Kabila could have not been successful without the support of the neighbouring states of Rwanda and Uganda. Soon after the success of the military campaign, Laurent-Désiré Kabila did not get rid of its backers as his Army Chief as well as the Secretary General of the *Alliance des Forces Démocratiques pour la Libération du Congo-Zaire* in English Alliance of Democratic Forces for the Liberation of Congo-Zaire (the new ruling party) were Rwandan citizens. Moreover, the Rwandan Patriotic Army (the Rwandan Armed Forces) remained operating on the Congolese territory along with the *Forces Armées de la République Démocratique du Congo* (the Armed Forces of the Democratic Republic of Congo). In July 1998, a year later after taking office, Laurent-Désiré Kabila decided that its allies should leave the territory of the Democratic Republic of Congo.

¹¹⁴ Ashish K. Vaidya (2005), *Encyclopaedia of trade, Labor, and Politics* <books.google.co.za> [accessed on 26 July 2009]. See also COMESA Treaty Article 1.

¹¹⁵ SADC Treaty Article 1. See also Siphon Buthelezi op cit 174, Dani Venter, Ernst Neuland op cit 131.

¹¹⁶ Bureau of African Affairs loc cit.

¹¹⁷ Bureau of African Affairs ibid.

That decision did not please Laurent-Désiré Kabila's allies and a major part of foreign troops disobeyed the order. On the 2nd of August 1998, the tension led to a clash between the baker troops and the Congolese armed forces nationwide. Two days later, Rwanda and Uganda reinforced their presence by sending new troops which flew to the Bas-Congo province (one of the province close to the Capital city Kinshasa) in the view of overthrowing Laurent- Désiré Kabila and replace him.¹¹⁸ The new Congolese army had no military capacity to face the coalition Rwanda and Uganda and therefore the need to gather military support from outside was the only way out. As the Economic Community of Central African States could not provide such support, the only remaining option was to call upon the Southern African Development Community. In support to the Congolese government and in light of the Southern African Development Community Mutual Defence Pact and Protocol on Politics, Defence and Security Cooperation (whose implementing and monitoring body was at that time chaired by Zimbabwe), the Angolan, the Namibian and the Zimbabwean troops got involved in the conflict. Their involvement was rewarded as the foreign troops retired in the Eastern part of the country even though the intervention took place without a clear mandate of the Southern African Development Community, due to a lack of consensus on a common position.¹¹⁹

To the above facts, it is noteworthy indicating that the Democratic Republic of Congo did neither sign nor ratified the Southern African Development Community Trade Protocol. This corroborates the statement made above concerning the reason behind the Democratic Republic of Congo accession to the Southern African Development Community.

After this overview of the historical background of the participation of the Democratic Republic of Congo in regional economic communities, the following part will critically approach the participation of the Democratic Republic of Congo in regional economic communities.

¹¹⁸ Bureau of African Affairs *ibid*.

¹¹⁹ Thomas Stevens, Hans Hoebeker and Koen Vlassenroot *op cit* 173. See also Naison Ngoma (2004), *Hawks, doves or penguins? A critical review of the SADC military intervention in the DRC* Occasional paper 88 <www.iss.org.za> [accessed on 26 July 2009].

3.3 Critical approach of the Democratic Republic of Congo commitment in regional economic communities

As described earlier, the Democratic Republic of Congo's commitment to regional economic communities is not a recent phenomenon. It has been also illustrated that the Democratic Republic of Congo's interest in the above-mentioned entities is not limited to Central Africa, but include also the Eastern and Southern part of Africa. However, it will be of huge importance to find out more about the extent to which the Democratic Republic of Congo has legally committed itself to the above-mentioned regional economic communities.

3.3.1 The commitment of the Democratic Republic of Congo to the Southern African Development Community

The assessment of the commitment of the Democratic Republic of Congo to the Southern African Development Community can be adequately understood if the approach to regional integration is highlighted.

The Southern African Development Community's approach to regional integration is not solely focused on trade issues only.¹²⁰ Indeed, the Southern African Development Community has a sectoral cooperation approach to regional integration.¹²¹ This is reinforced by the number of protocols that are part of the legal framework of this entity. The Southern African Development Community has 32 protocols covering not only trade but also other areas.¹²² The following constitute some of the areas covered: tourism, legal assistance, extradition, forestry, culture, sport, information and fisheries.¹²³

The Democratic Republic of Congo signed and ratified some of the protocols and expected to do so with the others. Among the protocols not signed and ratified by the Democratic Republic of Congo, the trade protocol is one of them.¹²⁴ In other words it means that the Democratic Republic of Congo is not taking part to the free trade area

¹²⁰ Lolette Kritzing-van Niekerk and Emmanuel Pinto Moreira op cit 2.

¹²¹ Lolette Kritzing-van Niekerk and Emmanuel Pinto Moreira ibid.

¹²² SADC <www.sadc.int> [accessed on 15 July 2009].

¹²³ SADC ibid.

¹²⁴ Thomas Stevens, Hans Hoebeke and Koen Vlassenroot op cit 173. See also Dani Venter, Ernst Neuland op cit 135.

created by the Southern African Development Community trade protocol on 7 August 2000.

The reason provided by the minister of Foreign Affairs and International Cooperation of the Democratic Republic of Congo is the fact that the Democratic Republic of Congo is not ready.¹²⁵ This can be verified, as the Democratic Republic of Congo economy revolved around three major trans-border basins, which are the Katanga (in the South East of the country), the Bas –Congo (in the Western part of the country) and the Kivus (in the Eastern part). All those three basins are barely connected to the rest of the country in terms of communication and infrastructure.¹²⁶ Also, the fact that the Congolese authorities are struggling to establish an efficient control over its borders and trade flows leaves informal network imposing their rules.¹²⁷ However, it should be pointed out that the Democratic Republic of Congo is taking part in the Common Market for Eastern and Southern Africa custom union launched recently.¹²⁸ The reason of readiness put forward by the Congolese authorities is therefore questionable given the fact that a custom union is a deeper commitment compared to a free trade area.¹²⁹

The commitment of the Democratic Republic of Congo is not limited to the Southern African Development Community. The next part of the research focuses on the commitment of the Democratic Republic of Congo to the Common Market for Eastern and Southern Africa.

3.3.2 The commitment of the Democratic Republic of Congo to the Common Market for Eastern and Southern Africa

As foreshadowed in the case of the Southern African Development Community, the assessment of the Democratic Republic of Congo's commitment to the Common Market for Eastern and Southern Africa depends on the approach this entity has towards regional integration.

¹²⁵ Radio Okapi, *SADC: zone de libre échange, la RDC n'est pas prête* <www.radiookapi.net> [accessed 18 July 2009].

¹²⁶ Thomas Stevens, Hans Hoebeke and Koen Vlassenroot loc cit.

¹²⁷ Thomas Stevens, Hans Hoebeke and Koen Vlassenroot op cit 174.

¹²⁸ COMESA treaty Article 45, see also Desmond Kwande - (AFP) loc cit. COMESA loc cit.

¹²⁹ Mothae Maruping loc cit.

This entity follows a different approach compared to the Southern African Development Community. In fact, here only trade (removal of tariffs and non-tariffs barriers) and trade-related issues (trade and investment, trade and competition policy, trade and labor migration, trade and finance etc...) are at the centre of the organization's regional integration plan.¹³⁰ For this reason, this organization has embodied everything in one treaty, which is the treaty creating the entity.

The Common Market for Eastern and Southern Africa trade liberalization measures encompass *inter alia*: a complete elimination of tariffs and non-tariffs barriers to trade, the removal of custom duties, a free movement of capital, labor, goods, the adoption of a common external tariff.¹³¹

Recently, according to Article 45 of the Common Market of Eastern and Southern Africa treaty, the entity has launched its custom union plan to which the Democratic Republic of Congo is taking part.¹³² This participation raises concern, as the country's official declared that the Democratic Republic of Congo is not ready to take part to this kind of undertaking.¹³³

Last but not the least, to be analysed is the commitment of the Democratic Republic of Congo to the Economic Community of Central African States.

3.3.3 The commitment of the Democratic Republic of Congo to the Economic Community of Central African States

A closer look at this organization's regional integration legal framework reflects some similarities with the approach of the Southern African Development Community. Indeed, this organization does not deal exclusively with trade liberalization and trade related issues which are *inter alia* peace and security, parliamentary activities, and agriculture.

Its trade liberalization programme is supported by a series of protocol which constitutes an appendix to the main treaty. The following constitute the organization protocols:

¹³⁰ Lolette Kritzingervan Niekerk and Emmanuel Pinto Moreira loc cit.

¹³¹ COMESA Treaty Article 4. See also Dani Venter, Ernst Neuland op cit 148.

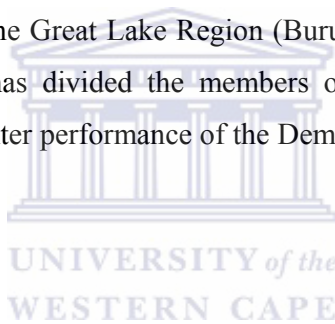
¹³² COMESA treaty Article 45, see also Desmond Kwande - (AFP) loc cit. COMESA loc cit.

¹³³ Thomas Stevens, Hans Hoebeke and Koen Vlassenroot loc cit.

protocol on non tariff barriers, protocol on the fund for compensation for loss of revenue, protocol on the rules of origin of goods to be traded between the member states of the Economic Community of Central African States, protocol on customs cooperation within the Economic Community of Central African States etc...

The trade liberalization's main goal is the creation of a customs union through the elimination of custom duties among member states and the establishment of a common external tariff.¹³⁴

With respect to the Democratic Republic of Congo, it means that as a party to this agreement, the country is an active stakeholder of this plan. However, the current situation in which the country finds itself as highlighted is a serious threat to its implementation.¹³⁵ Also, the fact that the organization has not been operating since 1992, due to the series of war in the Great Lake Region (Burundi, the Democratic Republic of Congo and Rwanda) that has divided the members of this entity are reasons to put forward, to explain the counter performance of the Democratic Republic of Congo in this entity.¹³⁶



3.4 Conclusion

In summary, this chapter highlighted the reason behind the participation of the Democratic Republic of Congo in regional economic communities as well as to what extent it (the Democratic Republic of Congo) is committed to the above-mentioned regional economic community. That has been done through a historical background as well as a critical view of the said participation.

This chapter has also revealed the role that politics plays in regional integration in general and in the specific case of the Democratic Republic of Congo.

¹³⁴ Treaty establishing the Economic Community of central African States, Article 27.

¹³⁵ Thomas Stevens, Hans Hoebcke and Koen Vlassenroot loc cit.

¹³⁶ United Nations, Economic and Social Council loc cit. See also BBC loc cit. United Nations, Security Council, Resolution 1040, SC/6165, 29/01/1996 loc cit. Amnesty International loc cit. University of Pennsylvania (African Studies Center) loc cit. United Nations, Economic and Social Council loc cit. Suliman Ali Baldo loc cit.

First the decision to join a specific regional economic community by every country in general and in the specific case of the Democratic Republic of Congo is a political decision, not only because taken by political authorities but also because it takes into consideration the political interest a specific country (in this case the Democratic Republic of Congo) is expecting to gain in belonging to a specific regional economic community.

In the same way, it has revealed that a country needs to have a clear and proper foreign policy with regard to trade liberalization through the participation into regional economic community especially in the case of the Democratic Republic of Congo.

Also, it has highlighted the role that political stability can play as the adequate environment for the implementation of a trade liberalization plan on a regional and international level especially given the series of armed conflict that have hindered the trade liberalization process in the great lake region and the central African region.

Lastly, this part of the work did not deal of the commitment with the Democratic Republic of Congo to the afore-mentioned entities within the context of the World Trade Organization which will constitute the focus of chapter 4.

Chapter 4: THE LEGAL IMPLICATIONS FOR THE DEMOCRATIC REPUBLIC OF CONGO MULTIPLE MEMBERSHIPS IN REGIONAL ECONOMIC COMMUNITIES

4.1 Introduction

The commitment of the Democratic Republic of Congo to three regional economic communities (the Southern African Development Community, the Common Market for Eastern and Southern Africa and the Economic Community of Central African States) has been sufficiently elaborated in the previous chapter. This has been performed from the perspective of the specific trade liberalization plan as approached by each entity.

Also, it should be pointed out that apart from being member to the above-mentioned organization, the Democratic Republic of Congo is a member of the World Trade Organization and this organization (the World Trade Organization) has specific and strict rules regarding regional trade agreements, especially the participation of its members in two particular programmes (customs union and free trade area).

As the Democratic Republic of Congo is taking part to the Common Market for Eastern and Southern Africa's customs union¹³⁷ and is a member of the Southern African Development Community which has launched its free trade area with the plan of establishing a custom union in 2010 (even if the Democratic Republic of Congo has not yet ratified the trade protocol).¹³⁸ Last, but not the least is the participation of the Democratic Republic of Congo to the Economic Community of Central African States trade liberalization plan which encompasses the establishment of a custom union.¹³⁹

The said commitment to three regional economic communities by the Democratic Republic of Congo raises legal concern as it has the potential to violate Article XXIV of the General Agreement on Tariffs and Trade of 1994.

This chapter will therefore tackle the legal implication of such commitment within the context of the World Trade Organization. First, the legal requirement as set out in the General Agreement on Tariffs and Trade of 1994 will be presented. The second step will confront the commitment of the Democratic Republic of Congo to the above-mentioned regional economic communities to the requirement of Article XXIV of the General Agreement on Tariffs and Trade of 1994.

4.2 Analysis of regional trade agreements under the General Agreement on Tariffs and Trade of 1994¹⁴⁰

Analysing regional trade agreements under the General Agreement on Tariffs and Trade of 1994 will be based on the examination of Article XXIV. However, it will appear

¹³⁷COMESA Treaty, Article 45 loc cit. See also Desmond Kwande loc cit. *COMESA launches its custom union* loc cit. Final communiqué of the thirteenth Summit of the COMESA Authority of Heads of state and Government loc cit.

¹³⁸Amos Saurombe loc cit. See also SADC Regional Indicative Strategic Plan approved by the 2003 Summit loc cit.

¹³⁹Treaty establishing the Economic Community of Central African States Article 6 loc cit.

¹⁴⁰Article XXIV para 4, 5 (b) and (c), 7 (a), 8 (b).

incomplete to study the requirement set out in Article XXIV without discussing the most favoured nations. Indeed, Article XXIV of the General Agreement on Tariffs and Trade is an exception to the most favoured nation principle.

4.2.1 Article XXIV as an exception to the most favoured nation principle

The understanding of Article XXIV of the General Agreement on Tariffs and Trade of 1994 requires an investigation of the most favoured nation principle. The most favoured nation principle is one of the key principles of the World Trade Organization's trading system.¹⁴¹ This principle makes compulsory the extension to all World Trade Organization's member of a favourable treatment granted by one them to a specific World Trade Organization's member.¹⁴² Nonetheless, the World Trade Organization trading rules allows members to discriminate through the involvement of its member into a free trade area or a customs union under strict conditions.

The following lines deal especially with the condition as set out in Article XXIV of the General Agreement on Tariffs and Trade of 1994.

4.2.2 Regional trade agreements under the General Agreement on Tariffs and Trade of 1994

Article XXIV of the General Agreement on Tariffs and Trade of 1994 is the legal basis upon which regional trade agreements is dealt within the World Trade Organization trading system.

The first aspect to be looked at in the analysis of Article XXIV is paragraph 4. Indeed, this paragraph is relevant as it provides the purpose of a free trade area and customs union prior to distinguish the two integration schemes.¹⁴³ According to paragraph 4, free trade area and customs union should facilitate and not raise barriers to the trade of other World Trade Organization members with the member of such integration plans.¹⁴⁴

¹⁴¹ World Trade Organization loc. cit. See also Simon Lester and Bryan Mercurio loc cit.

¹⁴² World Trade Organization ibid. See also Simon Lester and Bryan Mercurio ibid.

¹⁴³ General Agreement on Tariffs and Trade of 1994 loc cit. See also Simon Lester and Bryan Mercurio op. cit 352.

¹⁴⁴ General Agreement on Tariffs and Trade of 1994 ibid. See also Simon Lester and Bryan Mercurio ibid.

The second point to be tackled is found in paragraph 5 (c). According to this part, World Trade Organization's members have the green light to join an interim agreement on the condition that the free trade agreement or customs union is implemented within a reasonable timeframe. In this particular instance, the interim agreement has to encompass a plan for the implementation of the free trade area or customs union.¹⁴⁵

Lastly, this provision (Article XXIV) set specific requirements. The first one is procedural (the notification) and the two remaining are substantive (the internal and external requirement).¹⁴⁶

Regarding the first requirement, World Trade Organization's member willing to join a free trade area or customs union related to trade in goods have the obligation to notify the Council of Trade in Goods of their desire to do so.¹⁴⁷ As spelt in the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade of 1994, the Council of Trade in Goods must transfer the notification to the Committee on Regional Trade Agreements for examination of the free trade area or customs union in order to assess its compatibility with World Trade Organization trading rules.¹⁴⁸ In the case of trade in service, the Council of Trade in Services is the body competent to transfer the notification to the Committee on Regional Trade Agreements but it is not compulsory.¹⁴⁹ It is worth mentioning that World Trade Organization members do not need a green light from the Committee on Regional Trade Agreements to implement a free trade area or customs union. In addition, pursuant paragraph 7 (a) of Article XXIV, the notification must be carried out before the completion of the agreement establishing the free trade area or the customs union¹⁵⁰ even if in practise most of free trade areas or customs unions are notified after their full completion.¹⁵¹ However, in Africa since 2 July

¹⁴⁵ General Agreement on Tariffs and Trade of 1994 *ibid*. See also Simon Lester and Bryan Mercurio *ibid*.

¹⁴⁶ General Agreement on Tariffs and Trade of 1994 *ibid*. See also Simon Lester and Bryan Mercurio *ibid*.

¹⁴⁷ General Agreement on Tariffs and Trade of 1994 *ibid*. See also Simon Lester and Bryan Mercurio *op cit* 353.

¹⁴⁸ General Agreement on Tariffs and Trade of 1994 *ibid*. See also Simon Lester and Bryan Mercurio *ibid*

¹⁴⁹ General Agreement on Trade in Services of 1994, Article V. See also Simon Lester and Bryan Mercurio *loc. cit.* 'Council for Trade in Services-North American Free Trade Agreement-Joint Communication from Canada, Mexico and the United States of America', WTO Doc. S/ C/N/4, (1March 1995).

¹⁵⁰ Simon Lester and Bryan Mercurio *ibid*.

¹⁵¹ General Agreement on Tariffs and Trade of 1994 *loc. cit.* See also Simon Lester and Bryan Mercurio *op cit* 354.

2006 the Assembly of the African Union has refrained itself from recognising new regional economic communities than the previous through a moratorium.¹⁵²

With respect to the external trade requirement, Article XXIV (5) of the General Agreement on Tariffs and Trade of 1994 states that it depends on whether a free trade area or customs union is concerned.¹⁵³

Concerning a free trade area, Article XXIV: 5 (b) requires that duties and other regulations of commerce in application at the creation of the free trade area or adoption of the interim agreement to the trade of the territories of non members to such free trade area should not be higher or more restrictive than the same duties and other regulations of commerce existing in the territory of the member of the free trade area prior to the establishment of the free trade area.¹⁵⁴ Briefly speaking, members of a free trade area are not supposed to change their external protection in such a way that non members are negatively affected.¹⁵⁵ The goal pursued is to remove trade barriers within the territories of the free trade area members and not to raise barriers with non members of the free trade area.¹⁵⁶

With regard to a customs union, the external trade requirement is made up of two obligations: the first is the obligation not to make the overall level of protection more onerous or restrictive than what it used to be prior the formation of the customs union.¹⁵⁷ The second is the obligation to compensate non-members in circumstances where the duties in some member states of the customs union have been increased in accordance with the level considered normal for the customs union.¹⁵⁸

¹⁵² SARDC, *Regional integration and its link to ICBT* <databases.sardc.net> [accessed on 28 October 2009].

¹⁵³ General Agreement on Tariffs and Trade of 1994 loc cit. See also Simon Lester and Bryan Mercurio op cit 357.

¹⁵⁴ General Agreement on Tariffs and Trade of 1994 loc cit. See also Simon Lester and Bryan Mercurio ibid.

¹⁵⁵ Simon Lester and Bryan Mercurio ibid.

¹⁵⁶ Simon Lester and Bryan Mercurio ibid.

¹⁵⁷ General Agreement on Tariffs and Trade of 1994 loc cit. See also Simon Lester and Bryan Mercurio op cit 358. The Uruguay Understanding on the Interpretation of Article XXIV loc cit.

¹⁵⁸ General Agreement on Tariffs and Trade of 1994 ibid. See also Simon Lester and Bryan Mercurio op cit 359. USTR, United States and European Communities Reach Agreement on Enlargement: Compensation Package, Press Release, <www.ustr.gov> [accessed on 26 October 2009].

Lastly, the internal trade requirement for both the free trade area and the customs union is the most controversial issue, as there is no consensus on the meaning of the terms 'substantially all trade' and 'other restrictive regulations of commerce'.¹⁵⁹ Indeed, neither the working parties nor the scholars could agree on the exact meaning of the two concepts.¹⁶⁰ Even a closer look at the case submitted to the panel and the Appellate Body in the *Turkey-Textiles*¹⁶¹ case did not provide a clear and exact meaning. In fact, the Appellate Body indicated that 'substantially all the trade' refers to the amount of trade situated between some and all trade among the members.¹⁶² The same can be said in the case *US- Line Pipe*.¹⁶³ The US in this case submitted proofs that the North American Free Trade Area removed custom duties on 97 % of the parties' tariffs which constituted more than 99% of the trade among the parties taking into consideration the volume. Responding to the US, the panel after due analysis of the evidence, found that the North American Free Trade Area complied with the requirement set out in Article XXIV: 8(b). However, the panel did that without providing a clear definition of the concept 'substantially all the trade'. The appellate body on the same case (*US- Line Pipe*) reserved itself to comment on this finding and stated that it had no legal effect.¹⁶⁴

The above analysis provided the legal basis upon which regional trade agreements is dealt with within the context of the World trade Organization. The following part will confront the multiple memberships of the Democratic Republic of Congo to the legal requirement as set out in Article XXIV of the General Agreement on Tariffs and Trade of 1994.

4.3 The legal implications for the Democratic Republic of Congo's multiple memberships in regional economic communities

After revealing the evidence that the Democratic Republic of Congo belongs to three regional economic communities (The Southern African Development Community, the

¹⁵⁹ Simon Lester and Bryan Mercurio op cit 361.

¹⁶⁰ Simon Lester and Bryan Mercurio ibid. See also European Communities- Agreements with Portugal, 19 October 1973, GATT BISD. (20th Supp, 1974) at 171. The Working Party report on EEC, GATT Doc BISD 6S/100 at para 34. The European Economic Community, 29 Nov 1957, GATT BISD. (6th Supp) at 70, sect D, para 34. European Free Trade Association, 4 June 1960, GATT BISD. (9th Supp, 1961) at 70 para 48.

¹⁶¹ A Mitchell and N Lockhart, *Legal requirements for PTAs Under the WTO's* included in S Lester and B Mercurio (eds) *Bilateral and Regional Trade Agreements: Commentary, Analysis and Case Studies*.

¹⁶² A Mitchell and N Lockhart, loc cit.

¹⁶³ A Mitchell and N Lockhart ibid.

¹⁶⁴ A Mitchell and N Lockhart ibid.

Common Market for Eastern and Southern Africa and the Economic Community of Central African States), it is time to place this commitment within the context of the World Trade Organization trading rules in order to decipher the legal implications generated.

The Democratic Republic of Congo belongs to three regional economic communities with the potential of violating Article XXIV of the General Agreement on Tariffs and Trade of 1994. Indeed, the Democratic Republic of Congo's commitment to the Common Market for Eastern and Southern Africa which has launched its customs union plan.¹⁶⁵ In addition, the Democratic Republic of Congo is also part of the Southern African Development Community which is implementing its free trade area scheme with the aim of implementing its customs union in 2010.¹⁶⁶ Lastly, the Democratic Republic of Congo is member of the Economic Community of Central African States which has as part of its trade liberalisation plan the establishment of a customs union.

The above raises a concern as a World Trade Organisation member can't belong to more than one customs union.¹⁶⁷ Indeed, once the Southern African Development Community had launched its customs union plan in 2010 the situation of the Democratic Republic of Congo will be a violation of Article XXIV of the General Agreement on Tariffs and Trade of 1994. This will be worsened if the Economic Community of Central African States also materialised its trade liberalisation plan which includes the establishment of a customs union. In this situation, the Democratic Republic of Congo will seek to preserve preferential tariffs in each of those regional economic communities with the risk of raising barriers to the import of other members which are not part to each of those regional economic communities. This is a violation of the purpose of Article XXIV: 4 according to which the purpose of a customs union is to make trade flowing easily and not to raise barriers to the trade of non member of the customs union.¹⁶⁸ It also infringe paragraph 5 of the same provision which prohibit members to increase duties or make

¹⁶⁵ COMESA treaty Article 45, see also Desmond Kwande - (AFP) loc cit. COMESA loc cit.

¹⁶⁶ Amos Saurombe (2009) loc cit. See also SADC Regional Indicative Strategic Plan approved by the 2003 Summit loc cit.

¹⁶⁷ Lolette Kritzinger-van Niekerk and Emmanuel Pinto Moreira (2002) loc cit. See also Amos Saurombe (2009) loc cit. Cord Jakobeit, Trudi Hartzenberg et al (November 2005) loc cit.

¹⁶⁸ General Agreement on Tariffs and Trade of 1994 loc cit. See also Simon Lester and Bryan Mercurio loc cit.

regulations more restrictive than what they used to be prior to the establishment of the customs union.¹⁶⁹

The other legal implication is the difficulty of implementing different set of rules from different regional economic communities in order words it will result in legal conflict.¹⁷⁰

4.4 Conclusion

In conclusion, this part of the research has revealed that the commitment of the Democratic Republic of Congo to three regional economic communities (the Southern African Development Community, the Common Market for Eastern and Southern Africa and the Economic Community of Central African States) has the potential to violate Article XXIV of the General Agreement on Tariffs and Trade of 1994.

In order to reach the above conclusion, the first part of this chapter was devoted to the examination of Article XXIV of the General Agreement on Tariffs and Trade of 1994 which is the legal basis upon which regional trade agreements is dealt with within the context of the World Trade Organization. The overall analysis of this provision was clear, even though it left unresolved the controversy surrounding the internal trade requirement especially the exact meaning of the concept ‘substantially all trade’

As a second step, the Democratic Republic of Congo’s commitment to three regional economic communities (the Southern African Development Community, the Common Market for Eastern and Southern Africa and the Economic Community of Central African States) was put under the scrutiny of the legal requirement set out in Article XXIV of the General Agreement on Tariffs and Trade of 1994.

After investigating the issue of the legal implication of the Democratic Republic of Congo’s commitment to the above-mentioned regional economic communities, the following part will be devoted to the general conclusion of the research as well as some recommendations.

¹⁶⁹ General Agreement on Tariffs and Trade of 1994 *ibid*.

¹⁷⁰ UNECA, *Rationalization of Regional Economic Communities: A work in progress* <www.uneca.org> loc cit .See also United Nations Conference on Trade and Development 2009 Economic Development in Africa Report loc cit. Cord Jakobeit, Trudi Hartzenberg et al (November 2005) op cit 49.

Chapter 5: CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

Although the legal implication of multiple memberships of the Democratic Republic of Congo in regional economic community was the main focus of this work, some other facts did retain our attention.

The next point devoted to the conclusion will deal with other subsequent findings.

5.2 Conclusion

As stated above, the main focus of this research paper was the legal implication of the commitment of the Democratic Republic of Congo in regional economic communities. Nonetheless, this topic brought to light other relevant findings.

Regional economic community requires that specific programs to be launched in order to materialized the integration plan of the member states. When progressively the members reduce their tariffs line with a view of eliminating them within their respective territories, they create a free trade area. In addition to the precedent, the decision to establish a common external tariffs vis-à-vis import originating from non members states constitutes the institution of a customs union.

It, also revealed that, as part of most trade liberalization plans, customs union and free trade area are two programs whose formation are strictly regulated by the World Trade Organization (Article XXIV of the General Agreement on Tariffs and Trade of 1994). In fact, the World Trade Organization promotes among its members two key principles. One of these is the Most Favoured Nation principle which obliges its member granting preferential treatment to another specific member to extend it automatically to all other member states.¹⁷¹ Furthermore, the World Trade Organization allow member states to discriminate on strict and specified conditions (notification and internal and external trade requirements) which constitute an exception to the Most Favoured Nation principle.

¹⁷¹General Agreement on Tariffs and Trade of 1994 *ibid*.

In addition, politics plays an important role in regional integration in general and in the specific case of the Democratic Republic of Congo. This is true, as the decision to join a specific regional economic community by every country in general and in the specific case of the Democratic Republic of Congo is a political decision, not only because taken by political authorities but also because it takes into consideration the political interest of a specific country in this case the Democratic Republic of Congo was in quest of establishing its hegemony in a specific region.

Furthermore, it also showed how important a clear and proper foreign policy is with regard to trade liberalization for a country, especially with respect to its participation into regional economic community particularly in the case of the Democratic Republic of Congo.

Moreover, it indicated the relevance of political stability as the appropriate environment for the implementation of a trade liberalization plan on a regional as well as on an international level especially given the series of armed conflict that hindered the trade liberalization process in the great lake region and the central African region.

Furthermore, the examination of Article XXIV of the General Agreement on Tariffs and Trade of 1994, which is the legal basis upon which regional trade agreements is dealt with within the context of the World Trade Organization. The analysis provided not only the purpose of regional trade agreements (for a free trade area and a custom union) but also the requirements laid down for the formation of a free trade area and a customs union. However, the uncertainty on the controversial issue of the internal trade requirement particularly on the exact meaning of the concept ‘substantially all trade’ remains unsolved.

Finally, the membership of the Democratic Republic of Congo to three regional economic communities (the Southern African Development Community, the Common Market for Eastern and Southern Africa and the Economic Community of Central African States), taking into account their respective trade liberalization plan is a matter of legal concern. Indeed, this participation has the potential of not complying with Article XXIV of the General Agreement on Tariffs and Trade of 1994. This may also lead to legal conflict as

it will be difficult for the Democratic Republic of Congo to implement different body of rules from different regional economic communities.

Finally, the next part of this research is discussing the recommendation to the issue of legal implications generated by the multiple memberships of the Democratic Republic of Congo in regional economic communities.

5.3 Recommendations

The first recommendation is to advise the Democratic Republic of Congo to choose one regional economic community and withdraw from others in order to avoid being in violation of Article XXIV of the General Agreement on Tariffs and Trade of 1994 (agreement to which the country committed itself). This is also true as the multiple memberships of the Democratic Republic of Congo in the abovementioned regional economic communities has the potential of raising barriers to the trade of non members. In the same way, taking into consideration the economic and political situation of the Democratic Republic of Congo which is recovering from a complex crisis¹⁷² it is likely for the country to loose foreign direct investment opportunities with the risk of affecting job creation and the transfer of technology. Also, the decision to choose one specific regional economic community and withdraw from the others will allow the country to implement easily one trade liberalization program of the regional economic community to which it will commit itself as no legal conflict will arise and market predictability will be promoted.

Finally, the Democratic Republic of Congo should choose the regional economic community that meet its political and economic interest. This calls the adoption of a clear and proper foreign trade policy by the political authorities of the Democratic Republic of Congo. The foreign trade policy should take into account not only the attractiveness of foreign direct investment but also the transfer of technology from foreign companies to the local manpower. That will be achieved if the political authorities involve the private sector, the civil society, and the consumer and public bodies in the elaboration of that policy.

¹⁷² ADB and OECD, *Democratic Republic of Congo*, 252 ff.

BIBLIOGRAPHY

Books

Dani Venter and Ernst Neuland (2007) *Regional Integration-Economic Partnership Agreement for Eastern and Southern Africa*, Institute for Business Innovation.

Dirk Hansohm, Willie Breytenbach et al (2003), *Monitoring Regional Integration in Southern Africa*, Namibian Economic Policy Research Unit and the Konrad Adenauer-Stiftung.

Jaime de Melo and Arvind Panagariya (1993) *New dimension in regional integration*, Centre for Economic Policy Research, Cambridge University Press.

Lolette Kritzing-van Niekerk and Emmanuel Pinto Moreira (2002), *Regional integration in Southern Africa: overview or recent developments*, Regional Integration and Cooperation Africa Region, The World Bank.

Miroslav N. Jovanovic (1998), *International economic integration Limits and prospects* (Second edition), ROUTLEDGE, London and New York.

Simon Lester, Bryan Mercurio et al (2008) *World Trade Law: Text, Materials and Commentary*, HART PUBLISHING, OXFORD AND PORTLAND, OREGON.

S Lester and B Mercurio (eds) *Bilateral and Regional Trade Agreements: Commentary, Analysis and Case Studies*.

Sipho Buthelezi (2006) *Regional Integration Prospects & Challenges for the 21st Century*, School of Public Management and Development, University of Fort Hare, IKHWEZI AFRIKA PUBLISHING, Volume 1.

Walter Goode *Dictionary of Trade Policy Terms* (2003), Fourth edition.

Chapters in books

A Mitchell and N Lockhart, *Legal requirements for PTAs Under the WTO's* included in S Lester and B Mercurio (eds) *Bilateral and Regional Trade Agreements: Commentary, Analysis and Case Studies*.

GR Winham, *The World Trade Organization: Institution-building in the multilateral trade system* (1998) *World Economy*. Included in Simon Lester, Bryan Mercurio et al (2008) *World Trade Law: Text, Materials and Commentary*.

Trudi Hartzenberg (2003), *The new SADC Agreement: Implication for regional Integration in Southern Africa*. Included in Dirk Hansohm, Willie Breytenbach et al, *Monitoring Regional Integration in Southern Africa*.

Journal articles

Amos Saurombe (2009), 'Regional Integration Agenda for SADC' Caught in the winds of change' Problems and Prospects" in *Journal of International Commercial Law and Technology*.

International treaties

COMESA Treaty.

General Agreement on Tariffs and Trade of 1994.

Protocol on Relations between the African Union and the Regional Economic Communities.

Treaty Establishing the Economic Community of Central African States.

Treaty of the Southern African Development Community.

Non-treaty instruments

Council for Trade in Services-North American Free Trade Agreement-Joint Communication from Canada, Mexico and the United States of America', WTO Doc. S/C/N/4, (1March 1995).

The SADC Regional Indicative Strategic Plan (2003).

Final Communiqué of the Thirteenth Summit of the COMESA Authority of Heads of State and Government (2009).

United Nations, Security Council, Resolution 1040, SC/6165, 29/01/1996.



The Uruguay Understanding on the Interpretation of Article XXIV.

Reports

ADB and OECD, *Democratic Republic of Congo*.

Awoumo, CDG, *La coexistence CEEAC-CEMAC: une nécessité? Enjeux*.

Chauvin, S & Gaulier, G. (2002) *Regional integration in Southern Africa* Working paper N° 2002–12. October. Paris: CEPII.

Integrating Trade and Investment Regionally: COMESA Q&A, Lusaka, August 1999.

The Working Party report on EEC, GATT Doc BISD 6S/100. The European Economic Community, 29 Nov 1957, GATT BISD. (6th Supp) at 70, sect D, European Free Trade Association, 4 June 1960, GATT BISD. (9th Supp, 1961).

United Nations Conference on Trade and Development, *Economic Development in Africa Report 2009, Strengthening Regional Economic Integration for Africa's Development*, United Nations New York and Geneva 2009.

Websites

African Economic Community <en.wikipedia.org>.

Amnesty International, “*Burundi Between hope and fear*” <www.amnesty.org>.

Arsène Mwaka Bwenge (2006), *D'une CEPGL à une autre : quelles alternatives dans les stratégies actuelles d'intégration et de coopération pour le développement ?* in *repenser le développement en Afrique : au delà des impasses, les alternatives*. Dakar: Codesria. <<http://lodel.ehess.fr/ceaf/document>>.

Ashish K. Vaidya (2005), “*Encyclopaedia of trade, Labor, and Politics*” <books.google.co.za>.

BBC, *UN admits Rwanda genocide failure* <www.bbc.co.uk>.

Barthélemy Cousin and Aude Marie Cartron, *A common legal system providing a reliable legal and judicial environment in Africa for international investors*, <www.cerclehorizon.com>.

Bureau of African Affairs (2009), “*Background Note: Democratic Republic of the Congo*” <www.state.gov>.

COMESA, *Comesa launches its customs union*, <www.comesa.int>.

Cord Jakobeit, Trudi Hartzenberg et al *Overlapping membership in COMESA, EAC, SACU and SADC: Trade policy options for the region and for EPA negotiations* summary of findings <Tanzania.fes-international.de>.

Desmond Kwande - (AFP), *Les 19 pays africains du Comesa se dotent d'une union douanière* <www.mediacongo.net>.

Economic Community of Central African States <www.ceeac-eccas.org>.

Ignatius Ssuuna, “*Rwanda diplomats react to Democratic Republic of Congo, Rwanda naming of envoys*” <www.allAfrica.com>.

Jeune Afrique, *Kinshasa et Kigali font la paix* <www.jeuneafrique.com>.

Kritzinger-Van Niekerk, L. (2005) *Regional integration: concepts, advantages, disadvantages and lessons of experience* <www.sarpn.org.za>.

Mothae Maruping *Challenges for Regional Integration in Sub-Saharan Africa: Macroeconomic Convergence and Monetary Coordination* <www.fondad.org>.

Naison Ngoma (2004), *Hawks, doves or penguins? A critical review of the SADC military intervention in the DRC*, Occasional paper 88.

Radio Okapi, *SADC: zone de libre échange, la RDC n'est pas prête*. <www.radiookapi.net>.

UNECA, *Rationalization of Regional Economic Communities: A work in progress*
<www.uneca.org>.

United Nations, Economic and Social Council, *Special Rapporteur, on his mission to Rwanda from 8 to 17/04/1993* by Mr. B.W Ndiaye, E/CN 4/1994/ Add.1, 11/08/1993
<www.un.org>.

United Nations, *Treaty Series*, vol. 1092 <www.un.org>.

United Nations, Economic and social Council, *Report on the situation of human rights in the Democratic Republic of Congo, submitted by the Special Rapporteur Mr. Roberto Garretón in accordance with Commission on Human Rights resolution 2000/15*
E/CN.4/2001/40, 1/02/2001 <www.afrol.com>.

University of Pennsylvania (African Studies Center), *Burundi: Recent UN statements 12/28/'95* <www.upenn.edu>.

USTR, United States and European Communities Reach Agreement on Enlargement: Compensation Package, Press Release, <www.ustr.gov>.

SARDC, *Regional integration and its link to ICBT*. <databases.sardc.net>.

Suliman Ali Baldo, *Rampant human rights abuses and occupation of the Democratic Republic of Congo by Foreign Armies* <www.hrw.org>.

Sunday Times, *Kabila, Kagale meet in DRC* <www.thetimes.co.za>.

The Southern African Development Community <www.eia.doe.gov>.

Thomas Stevens, Hans Hoebeke and Koen Vlassenroot, *Politics of regional integration in Central Africa* Institute for International Studies <www.iss.co.za>.

World Trade Organization, *Understanding the WTO: the basics*, <www.wto.org>.



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