Regional Economic Integration Agreements in Southern Africa and the World Trade Organization Guidelines

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Introduction

The General Agreements on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS), and their successor the World Trade Organization (WTO) are instruments which bespeak an ideal of ultimate free global trade with minimum, if any, restrictions or barriers. But this ideal is far from achieved seven decades after the conclusion of the original GATT in 1947 and its subsequent modification in 1994. Free global trade in goods and services has largely remained a mirage for the last two decades the WTO has existed. It remains bedevilled primarily by obstacles referred to as tariff and non-tariff barriers to trade. These impediments are a result of a myriad factors such as the desire by states to exercise control of trade within their territories in an

expression of their sovereignty; varying levels of social and economic development of states; deeply entrenched differences in political ideological inclinations; production of similar primary goods among a host of other reasons. The aforesaid WTO instruments seem to acknowledge the challenges that confront the march towards a truly free global marketplace devoid of barriers. In so acknowledging, the WTO encourages, by providing a framework for a multilateral as well as a regional approach, to achieving the ideal of free global trade. Article XXIV of the WTO/GATT 1994 is one such effort or function. It allows for the formation of Regional Integration Agreements (RIAS) such as Free Trade Areas (FTA) and Customs Unions as building blocks towards a truly international global free trade.

As a practical matter RIAs have turned out to more as a clog to a truly multilateral global free trade by isolating regions and thus delaying the march towards global free trade. The rapid increase in RIAs with overlapping membership by states, multiplicity or duplicity in objectives and mandates, production of similar primary/raw materials, weak administrative and dispute resolution mechanisms which remain moribund, has not helped disabuse the notion or view that RIAs tend to encourage *Regionalism* as opposed to *Multilateralism*, which is the real purpose of the WTO. The two competing schools of thought are therefore interrogated in this paper through the prism of the three major RIAs in Southern Africa to wit: The Southern Africa Customs Union (SACU), The Southern Africa Development Community (SADC) and The Common Market for Eastern and Southern Africa (COMESA). The three are a microcosm of the RIAs in southern Africa and are chosen as case studies because of their histories, scope, mandate and membership which are representative of the character of RIAs in the sub region.

This article therefore assesses the nature, structure and statutory policies attendant to RIAs in Southern Africa in light of the WTO guidelines on regional integration. The study is in essence an introspective look at RIAs in Southern Africa through the lenses of Article XXIV of the WTO ideals on RIAs so as to determine or postulate whether the same accord with the said lofty ideals espoused therein. It will also entail an assessment of whether and how the RIAs in Southern Africa impact on member states' economies in terms of poverty eradication, increased Gross Domestic Product (GDP), and per capita incomes

for their populations.

Regional Integration Agreements in Southern Africa

In this part I will briefly highlight the salient features of the RIAs in Southern Africa under study.

- **The Southern African Customs Union (SACU)**

SACU is the oldest RIA in Southern Africa. It is also equally acknowledged as the oldest customs union in the world.[1]It is said to have a unique history that is impossible to replicate.[2] It encompasses four states namely: South Africa, Lesotho, Botswana and Namibia which joined in 1990 upon its independence. It is a creature of Britain, the four nations' dominant colonial power. Though having existed for over a century, its structures largely remain nascent in comparison to RIAs in the developed world such as the European Union (EU) in terms of implementation of its common external tariff, which is its principal object. For example, the SACU Tariff Board and national bodies which should manage this function for SACU are provided for in the 2002 SACU Agreement, but have not yet been established.[3]

- **The Southern African Development Community (SADC)**

SADC was first created in 1980 as the Southern African Development Co-ordinating Conference (SADCC). Its underlying principal objective was to reduce its members' dependence on the then apartheid South Africa. In anticipation of the democratization of South Africa, SADCC transformed into SADC in 1992 and South Africa joined it in 1994. SADC's predecessors SADCC was not a market integration arrangement in its strict sense but one whose members, known as front line states[4] adopted a broad development mandate. SADCC therefore engaged in cross-border sector specific projects in infrastructure and energy such as the regional development corridors and the Southern African Power Pool. The SADC treaty (and subsequently SADC Trade Protocol) does not elaborate a detailed integration plan but such detail is to be found articulated in the Regional Indicative Strategic Development Plan (RISDP) of 2003. The RISDP articulates a roadmap for SADC integration from a free trade area by 2008, to a customs union in 2010, a common market in 2015, a monetary union in 2016 and the introduction of a single currency in 2018.

Though not a legally binding instrument, the RISDP bears significant political legitimacy and is recognized as a blueprint towards the integration of SADC member states. The SADC approach has been likened to that of the East African Community (EAC)[5]. Both are said to be based on the linear model or linear Market Paradigm[6] with the only striking difference being that whereas the EAC envisages a political federation, the SADC Integration only ends at economic integration. Article 16 of the SADC treaty establishes the SADC tribunal whose role is to interpret the treaty and its subsidiary instruments and to adjudicate upon such disputes as may be referred to it. It can also give advisory opinions to the summit of heads of states and government and council of ministers if called upon.

- **The Common Market for Eastern and Southern Africa (COMESA)**

COMESA began as the Preferential Trade Area (PTA) in 1981 and was, by way of treaty transformed into COMESA in 1994. Its objectives go beyond economic integration to include promotion of peace and security, besides developing the member states' natural and human resources. It establishes a Free Trade Area (FTA) and a Customs Union. It currently consists of 19 members[7]. COMESA has established a trade and development bank, a clearing house, leather institute, Association of Commercial Banks and a Reinsurance company. The COMESA Court of Justice is also established under Article 7 of the treaty and became operational in 1998. Like SADC and most other RIAs, its hierarchy of decision making starts with the summit of heads of states at the apex, council of ministers responsible for policy making, technical committees and several advisory bodies, in that order.

The WTO/GATT Article XXIV Substantive Requirements/Guidelines on RIAs

The WTO/GATT is an effort towards a multilateral free trade system or regime with minimum or no barriers, be they tariff or non-tariff. However, in recognition of the fact that a truly global free trade system is still a distant ideal, the WTO/GATT recognises and acknowledges RIAs as viable vehicles or building blocks towards a multilateral trade system. Thus Article XXIV of the GATT/WTO 1994 encourages the establishment of RIAs and proceeds to prescribe ideals for RIAs. Sub-paragraphs 8(a) and 8(b) of the afore-quoted Article XXIV define a

Customs Union and a Free Trade Area, respectively. Article XXIV in a nutshell prescribes rules of engagement, regulations or requirements for effective establishment and management of FTAs and Customs Unions. These are the substantive concern of this study. From a reading of Article XXIV afore-quoted the following prerequisites of an RIA/FTA are discernible:

- ***Substantial Trade coverage***

First and foremost an RIA, be it an FTA or Customs Union, should cover substantially all the trade in goods within members of the RIA. This is in accordance with Article XXIV paragraph 8 of the GATT.

- ***Abolition of internal trade Restrictions***.

RIAs/RTAs also have to remove all tariffs and quantitative restrictions within a reasonable time. The elimination of discrimination and the granting of national treatment are required to take place either at the date of entry into force of the agreement or within a reasonable time frame. RIAs/RTAs should not result in stricter or severer barriers to trade for non-members or third parties. Third parties should not suffer upon liberalization through RTAs.

- ***Minimum Requirements on Preferential Rules of Origin.***

Article XXIV prescribes a minimal, if any, rules of origin so as to discourage discrimination of goods from third party states. The rationale can be understood from the reasoning that rules of origin exist to not only discourage “trade deflection” but also ensure that imports of product will not always enter the region through low tariff countries hence depriving the other members of revenue and any protection the tariff may provide to the higher tariff party’s enterprise.

- ***Ultimate Multilateral Aspiration***

Under Article XXIV paragraph 4 of GATT and indeed running through the entire edifice of the article is an emphasis on the ultimate goal of multilateral free-trade with minimum, if any, restrictions. The article seems, even in its rather permissively couched language, to deliberately not only acknowledge the place of RIAs as building blocks towards multilateralism but also encourage free trade with third parties and growth of the RIAs into much larger viable multilateral

trade systems. Three critical elements are apparent in the various RTAs/FTAs entered the world over. First, is the concept of preferential treatment without discrimination of non-members trading within the bloc of members. Secondly, that RTA/FTAs must eliminate duties and the restrictive regulations in commerce or substantially all trade, meaning elimination of tariff and non-tariff barriers to trade in both goods and services. This, Schulze suggests, should be achieved progressively with an aim of the attainment of a complete or true free trade within a reasonable time. Thirdly, that RTA/FTAs should not provide for duties or tariffs higher or more restrictive than those existing in the party nations or prior to the agreements.[8] An analysis of Article XXIV mirrors, in all respects, three principles identified above. The three will provide yardsticks against which the conformity or otherwise of the Southern African RIAs with WTO guidelines on RIA shall be measured.

RIAs in Southern Africa and their Compatibility with Article XXIV of the WTO/GATT Guidelines

- **Benefits of RIAs**

RIAs may provide “a depth of international trade reform” and achieve free-trade at a much faster rate than agreements reached among the entire membership of the WTO which numbers 153.[9] According to Gantz, following frustrations in achieving free global trade, particularly after the stalling of the Doha Development Agenda[10] round of talks under the WTO, more states are of the thinking that trade liberalization may be achieved more easier in a sub-global level. This, to him, is the real motivation for the proliferation of RIAs in what is generally referred to as *Regionalism*, a concept he suggests has emerged and manifested itself particularly after the GATT 1994. Debate still persist on whether by entering into an RIA or RTA, a state thereby being required to make internal legislative and policy adjustments such as to its tax regime, such state is less likely to adopt protectionist policies since that would trigger retaliatory acts or requests for dispute settlement by other parties. He however is optimistic that although RIAs are often criticized as a claw-back to the doctrine of state sovereignty and its exercise, entering into RIAs would discourage protectionist internal policies of member states and would be good for free global trade.[11] One other benefit of RIAs is that it gives an opportunity to negotiating states to learn from that experience in readiness for

global trade negotiations. It acts either as an incubation laboratory for ideas on free trade with the ultimate intention of escalating the same to the global platform. RIAs particularly in the developing world and specifically in Africa were conceived on a pan African platform and are said to espouse an aura of comradeship and lend a strength in numbers to emerging economies particularly in multilateral negotiations with bigger and better economically endowed trading partners **s**uch as the EU, USA and within the context of the WTO.[12]

- **Limitations of RIAs**

The flipside to the afore-discussed benefits or merits of RIAs is a host of bottlenecks or demerits which limit RIAs in Southern Africa from achieving the ideals set out in Article XXIV of the WTO/GATT 1994. These will now follow. The principal goals of regional integration are: benefit for all and improvement of and development of both the economies and lives of the residents of the party states.[13] However, the weaknesses and challenges undermining integration in Southern Africa include: high and chronic poverty levels, stunted economic growth, poorly developed infrastructure, multiple membership of regional economic communities and low industrialization. These have stifled or hindered the full achievement of the ideals of regional economic communities and/or industrialisation in Southern Africa. Other systemic, normative and institutional limitations to meaningful integration are highlighted below.

- **The Linear Market Paradigm**

The linear Market paradigm is a term coined by Trudi Hartzenberg .[14] Hartzenberg argues that this model, favoured by most RIAs in Africa is marked by “stepwise integration of goods, labour and capital markets and eventually monetary and fiscal integration”. In other words, African RIAs are inspired by an aspiration to evolve over time into a single economic unit, some even into a political federation.[15] This model of integration is criticised on two fundamental grounds. First, that supply side constraints may be more significant than the linear integration model. In essence, that a deeper integration agenda that encompasses services, investments, competition policy and other behind-the-border issues can address the national level supply side constraints better effectively as compared to an agenda which focuses

exclusively on border measures. Secondly, is that the continent itself is not only geographically and politically but also economically fragmented and marginalized. As a result, Africa continues to engage on the periphery of the global economy and its share of the world trade continues to shrink. The low per capita income levels and small populations which result in small markets exacerbates the already dire situation.[16] Most sub-Saharan countries produce similar primary agricultural good or raw materials without value addition. This therefore makes trade among them unviable. Many sub-Saharan African economies are also landlocked. These factual prepositions are true for Southern Africa RIAs hence contributing to high costs of doing business. Intra-regional trade has remained low. Empirical data is demonstrative of this fact. More than 80 percent of Africa's exports are still destined for outside markets with the EU and the US forming more that 50% of this total. Asia and China are the other significant markets. On the other hand, Africa imports more than 90per cent of her goods from outside the continent[17]. One therefore questions the appropriateness of the linear model in addressing the real problems that inhibit regional and global trade performance. The proliferation or rise in the number of RIAs in sub-Sahara Africa has done little to promote intra-regional trade or indeed to enhance the global trade performance of African countries.

- **Inherent Discrimination**

The very fact that RIAs are agreements only binding among state parties, it therefore follows that they are by nature discriminatory and are thereby in conflict (though this conflict is legally permissible) with the non-discrimination principle under Article 1 GATT 1994 (most favoured nation treatment). Geographically discriminating arrangements also find place in RIAs and tend to be designed so as to increase regional rather than global trade. It has been argued that in fact such geographical arrangements are often of minimal economic benefit and may actually cause more economic harm than benefit [18]. This can be said to be true for the Southern Africa RIAs under scrutiny which are mostly geographically discriminatory.

- **Rules of Origin**

Although Article XXIV of the GATT 1994 bespeaks elimination or near elimination of tariff and non-tariff barriers to trade (save for necessary

circumstances or for limited periods) rules of origin remain common place. The rules exist in almost all FTAs and are always complex. They pose a real potential for disputes both in their administration and comprehension. Ideally the rules are designed to prevent trade deflection in a free trade area where external trade barriers such as tariff levels differ. They are employed to also discourage producers from using what Gantz calls “final assembly screw-driver operations” where such producers use non regional parts and components from duty free states or regions to enjoy the free trade status of the RIA[19]. Rules of origin are a critical non-tariff barrier to export and import trade and are difficult or near impossible to enforce by developing countries’ customs authorities.

- **The “Spaghetti Bowl” problem**

This is a term coined from the works of Professors Bhagwati and Panagariya, [20] in which they argue that the multiple membership of countries in RIAs has resulted in overlapping of tariff regulations, objectives, divided loyalty and other obligations with the undesirable effect of “a hub and spoke system”[21] of RIAs with complex and multiple regulation which has in turn led to the weakening of the global trade system. It equally creates an enforcement nightmare to customs officials and observance difficulties to traders. This is a situation whose consequences even the WTO secretariat has warned of.[22] In the Southern African context, SACU members are also parties to an economic partnership agreement with the EU. South Africa is also a party to a free trade agreement with the EU which four other member states of SACU have not accepted.[23] Some state parties to SADC are also members of the COMESA, while some member of the EAC are also members of the SADC and COMESA [24]. Perhaps the only saving grace is the tripartite agreement signed between the members of SADC, COMESA and EAC to merge into the three blocs into one RIA.[25]

- **Negotiating Imbalances, Administrative costs, and Geography**

There is a real capacity problem within developing nations with regard to negotiations with the cost of negotiating RIAs outweighing the benefits of training large and well qualified trade bureaucrats to conduct complex negotiations simultaneously at both WTO and RTA levels.[26] This leads to unbalanced negotiations with bias towards the well-funded and prepared larger

states. The states in Southern African are at different stages of development and economic prosperity. South Africa for instance is the highest ranked economy in sub-Sahara Africa, has a sea port and a relatively large population. [27] Its institutions are more advanced or developed.[28] Its partners in RIAs formed in the region mostly comprise of land locked nations with low populations, low GDP and low per capita incomes.[29] Obviously, the result in an uneven negotiating playing field, with South Africa seemingly engaging to draw advantage in its favour. Geographical proximity can both be a blessing and a curse depending on the prism through which you view the matter. RIAs with more complementary economies and exports may use geographical proximity to their advantage.[30] However in countries in many parts of sub-Sahara Africa, including Southern Africa, the rail and road infrastructure per capita among other infrastructural deficiencies, particularly in land locked countries makes geographical contiguity a disadvantage rather than benefit of entering into n RIA.

- **Conclusion**

Having traversed both the principles enunciated by Article XXIV of GATT and the major RIAs in Southern Africa, it is a fair conclusion to posit that Southern Africa RIAs are founded on both pan African and economic justifications. They are structured towards conforming to the prescriptions of the WTO regulations aforesaid but are bedevilled by a myriad of impediments that are classical to RIAs in sub-Sahara Africa. This has hindered their realization of the said RIAs often quite lofty and ambitious objectives and aspirations. Intra Africa trade remains at its lowest ebb and perhaps this sad state of affairs can only be remedied by the actualization of the envisaged Africa Economic Community (AEC). To this extent RIAs, such as those under study in this paper, offer viable building blocks and learning curves for negotiating in the much larger multilateral trade system.

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[1] Established in 1910.

[2] Hartzenberg, T., *Regional Integration in Africa*: Trade law Centre for Southern Africa (Tralac) WTO Manuscript October 2011 Staff Working Paper ERSD 2011-14.

[3] *Supra* Note 2 at p.7.

[4] The front line states included Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe.

[5] *Supra* note 2 at p.6.

[6] The linear model (also referred to as the linear Market paradigm) is discussed in more detail in part 4.2(a) of this paper.

[7] Burundi, Comoros, D R Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Seychelles, Swaziland, Madagascar, Malawi, Mauritius, Rwanda, Sudan, Uganda, Zambia and Zimbabwe.

[8] Schulze, H.G.A.W, 1997. *International Tax-Free Trade Zones & Free Ports*. Durban. Butterworths p.69.

[9] Gantz, D.A., "Regional Trade Agreements" in Daniel Bethlehem *et a*l (Eds) 2009 *The Oxford Handbook of International Trade Law*. Oxford. Oxford University Press, at p. 241.

[10] Also referred to as the Doha Development Round, is the current multilateral trade-negotiation round of the World Trade Organization (WTO) which commenced in 2001 and whose objective is to lower trade barriers around the world and hence facilitate increased global trade.

[11] *Supra* note 9 at p. 242.

[12] Forere M. "Is the discussion of the United States of Africa Premature? Analysis of ECOWAS and SADC Integration Efforts". 2012. *Journal of Africa Law* 56 1(2012) 29-54. Forere argues that the pan African sentiment influenced the formation of most RIAs in Africa shortly after most African states gained independence and that perhaps this explains the motivation behind the envisaged African Economic Community and the ultimate aspiration of an Africa Union government. This pan African sentiment was the quest for a new found ambition for self-reliance and economic independence (from their imperial or colonial masters) by newly independent states. She however warns that this sentiment does not help absolve the continent and its RIAs from the chronic ailments that restrict its achievement of a truly free global trade. Beyond

inspiration, it offers little solution to the real issues that hold back intra Africa trade.

[13] Rathumbu, I.M., 2008. *Regional Economic Integration and Economic Development in Southern Africa.* Unpublished Master's Thesis (UNISA).

[14] *Supra,* note 3 at p.1.

[15] For example, the East Africa Community has as one of its objectives, its evolution into a political federation. See also Bachinger, and Hough J "New Regionalism in African of integration". 2009. *Africa Insight* Vol. 3912 at p. 43-44 A similar aspiration is shared by the African Union through the African Economic Community with an ultimate envisaged goal of an African government. For insights into the economic –political aspirations and the transitional problems, see Forere *Supra* note 12.

[16] *Supra* note 2 at p. 3 Trudi Hartzenberg observes: "In 2008, 12 SSA (Sub Sahara Africa) states had populations of less than US $ 2 million while 19 had a gross domestic product (GDP) of less than US 5 billion, six of which had a GDP of less than US $1 billion" Further empirical data can be seen in the analysis by Gibb, R. "The State of Regional Integration. The Intra and Inter-Regional Dimensions in Regional Integration in Southern Africa" in Clampman, C., 2001. *Regional Integration in Southern Africa*. Johannesburg. South African Institute of International Affairs.

[17] *Ibid,* p. 9-12.

[18] *Ibid*, p. 3 the writer further observes: "Low per capita densities of rail and road transport infrastructure which in colonial times was designed to transport primary products to ports. Poorly developed cross country connections are the outcome".

[19] Gantz*, supra* note p. 9 243-244.

[20] In Bhagwati, J., and Panagariya A., (Eds,) *The Economics of Preferential Trade Agreements (*Washington DC: AE Press, 1996) at 7.8-27.

[21] This is Gantz' s description of the "spaghetti bowl" problem*. Supra*, note 9 p. 244. Also see the same problem discussed by Bachinger, K and Hough, J.,

“New Regionalism in Africa; Waves Integration" 2009. *Africa Insight* Vol. 39/2 at P.43-44 “… today every African country is an average member of four different trade blocs, creating the famous spaghetti bowl of RIAs. The Plan of the AU (African Union) is to integrate the various RIAs into one large economy with the ultimate goal of unifying the continent and create a United States of Africa by 2030”.

[22] *Ibid.*

[23] Kirk R., and Stern, M., “The New South African Customs Union. Agreement 2005. *The World Economy 28(2) 169.*

[24] For example, Zambia, Tanzania and Zimbabwe are members of both SADC and COMESA. Tanzania is also a member of EAC.

[25] A tripartite summit of the heads of states and governments of COMESA, SADC and EAC countries was held in Kampala, Uganda on 22nd October 2008. The summit approved the expeditious establishment of a Free Trade Area encompassing the member states of the three RIAs. This agreement is seen as an important step towards the building of the African Economic Community envisaged in the Abuja Treaty. The tripartite Agreement was signed by member states of the three blocs on the 10th day of June, 2015.

[26] *Supra* Note 9 p. 244.

[27] See Hartzenberg, *supra* note 2 p. 13 for a detailed comparison of the economies of Southern Africa. [28] *Ibid.* [29] I*bid.* [30] See Gantz, *Supra* Note 9 p. 244.

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