MONITORING REGIONAL INTEGRATION

Editors: André du Pisani | Gerhard Erasmus | Trudi Hartzenberg

Monitoring Regional Integration in Southern Africa

Yearbook 2012

Edited by André du Pisani,
Gerhard Erasmus and Trudi Hartzenberg

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Foreword

The Yearbook for Regional Integration has become a household name in the SADC region, when it comes to monitor the progress or non-progress of the integration within the region.

Celebrating its 12th edition in the current year it has proven to be a platform of scientific discussion and exchange of political views. A closer look at the 2012 issue sheds some light on the variety of subjects that drive or hinder regional integration. They range from the influence of emerging powers like China on the SADC region to the cooperation between MERCUSOR and SACU to the role of legislature in the process of integration. It also reaches beyond the SADC region to take a closer look at developments in Eastern Africa. The thematic approach spans from trade to transport, from energy to the judiciary.

With major elections just lying ahead or just having passed (Angola, Zimbabwe, South Africa, Namibia), with the issue of the SADC tribunal still unsolved, with critical challenges such as the sustainable energy supply not finally addressed, the region once again seems to have arrived at a watershed moment:

What good can the process of regional integration do to provide solutions for the challenges the region is facing? How can Southern Africa arrive at a stage, where the ideas of a common market, free trade, stability, security and sustainability are implemented successfully?

From the standpoint of many western analysts, Africa seems to be the rising continent, full of opportunities and no longer just challenges. But in order to grasp these opportunities Southern Africa needs to have the proper mechanisms in place to facilitate investments and to ensure prosperity for larger parts of its population. These mechanisms are also needed to let the region emerge as one of the new global players, especially when it comes to economic development.

It is against this background that the 12th edition of the Yearbook for Regional Integration should be seen as contribution to further drive the process of integration and to address critical development, challenges, but also successes.

The Konrad-Adenauer-Stiftung is proud to be once again involved in the production of the Yearbook. Our involvement is rooted in the firm belief that a deepening of regional integration can only benefit the people in the region.

Holger Haibach

Resident Representative
Konrad-Adenauer-Stiftung
Namibia & Angola Office

July 2013

Introduction

Trudi Hartzenberg

Member states of the Southern African Development Community (SADC) affirmed their commitment to the establishment of a 'Development Community' in the SADC Treaty.[1] Specifically, the aim is to, amongst other objectives, 'promote sustainable and equitable growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration.'[2]

SADC's *developmental integration strategy* was formalised in 2003 in the Regional Indicative Strategic Development Plan (RISDP), which provides the roadmap for the establishment of an FTA by 2008; a customs union in 2010; a common market in 2015; a monetary union in 2016; and the introduction of a single currency in 2018. In this statement, SADC member states formally adopted what is often referred to as the linear approach to regional integration. The RISDP is not a legally binding instrument, but it enjoys significant political legitimacy, and is often the point of reference with respect to the SADC integration agenda.

The RISDP was adopted by the SADC Council of Ministers in August 2003 as a framework for regional integration, providing strategic direction with respect to SADC programmes, and activities over a 15-year period. The RISDP identified trade, economic liberalisation and development as the key catalytic intervention areas for the achievement of deeper integration and poverty eradication in SADC. 2012 marked an important milestone for the region as it represents the final year of the implementation of the SADC Protocol on Trade, arguably the

[1] Preamble to the SADC Treaty (1992), as amended.
[2] Article 5 of the SADC Treaty.

most important legal instrument in the community's quest for deepened trade and market integration.

A comprehensive Mid-Term Review of the RISDP was launched in 2012 and is still underway to assess the status of, and challenges related to, the implementation of SADC's regional integration agenda and to realign this agenda with the new global, continental, and regional developments.

Tariff liberalisation and derogations

The SADC Protocol on Trade was signed in Maseru in 1996 and entered into force in 2000. Member states agreed to phase down tariffs and eliminate non-tariff barriers over a 12-year period with the aim of establishing a Free Trade Area (FTA). In addition, provision was made for wide-ranging initiatives on customs cooperation and trade facilitation for countries to be able to take advantage of the opportunities provided by the favourable market access under the FTA. SADC launched its FTA, the first step towards deeper integration in the region, in August 2008 when 85 percent of intra-SADC trade amongst participating member states[3] attained duty-free status. Since 2008, the remaining tariff barriers associated with sensitive products have been phased down, and by January 2012, the tariff phase down process was largely complete. Mozambique had, however, negotiated to complete its reduction of tariffs on imports from South Africa by 2015. Several other member states experienced challenges related to their tariff liberalisation. Angola, the Democratic Republic of Congo (DRC), and Seychelles are not yet part of the SADC FTA. Seychelles' tariff offer to join the SADC FTA was submitted in October 2011, and is being considered in the SADC Trade Negotiation Forum (TNF).

Malawi noted budgetary considerations for its delays, and by 2011, only 46% of its tariff reduction offer had been achieved. It has now completed its phase-down to all member states except South Africa. Zimbabwe was granted a derogation (in terms of Article 3(c) of the Protocol on Trade) to suspend tariff phase downs until 2012 (to be completed by 2014), given difficulties in implementing its tariff commitments on sensitive products. Tanzania unilaterally reintroduced a 25% duty on sugar and paper products in 2010 and applied for a

[3] Twelve SADC member states participate in the FTA: South Africa, Botswana, Lesotho, Namibia, Swaziland, Madagascar, Malawi, Mauritius, Mozambique, Tanzania, Zambia and Zimbabwe. Madagascar is currently suspended from SADC following a coup in December 2009.

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derogation until 2015.[4] The tariff liberalisation process, including the provisions in the Trade Protocol related to the granting of derogations, needs to be carefully reviewed.

Non-tariff barriers

Non-tariff barriers (NTBs) continue to frustrate intra-regional trade. Indeed, there has been a proliferation of NTBs in recent years. NTBs impose direct costs as well as delays to doing business, and discourage the private sector from gaining access to markets and creating value chains across the region.[5] The elimination of NTBs forms an important part of the objectives of the SADC Trade Protocol. However, because the majority of NTBs are not easily quantifiable, there is need to develop measurable and verifiable standards to address subjective complaints such as those relating to cumbersome or lengthy customs and border procedures. An online reporting and monitoring system[6] was launched in 2009. This mechanism has been extended to cover all countries involved in the Tripartite FTA negotiations. At the 10th meeting of the SADC Sub-Committee on Trade Facilitation (SCTF) held in June 2012 in Gaborone, it was noted that there were 114 NTBs reported on SADC member states in the online system between June 2011 and May 2012, of which 50 were still to be resolved.

Rules of Origin

The SADC rules of origin (RoO) remain a contentious trade policy issue. Some product specific RoO in SADC, especially for clothing and textiles and agro-processed products, are recognised as restrictive. The clothing and textile industry is important to many SADC member states, and it is argued that RoO are excluding trade opportunities for many member states in these products. While RoO are essential to prevent trade deflection, restrictive rules can effectively deny trade opportunities and impose significant costs on firms. Review and reform of the SADC RoO is thus an important issue on the trade agenda and also for regional industrial development.

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[4] USAID Southern Africa Trade Hub. 2012. *Technical Report: 2012 Audit of the Implementation of the SADC Protocol on Trade*. Gaborone.
[5] Montgomery, K., cited in the Record of the 10th Meeting of the SADC Sub-Committee On Trade Facilitation, 14-15 June 2012, Gaborone, Botswana. Adopted on 15 June 2012.
[6] This online system can be found at www.tradebarriers.org

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Trade facilitation

Trade facilitation is an important means of reducing the transaction costs of cross-border trade and more generally of reducing the costs of doing business in the region. A comprehensive trade facilitation agenda, which includes enhancing behind-the-border inter-agency cooperation and sharing of information as well as cooperation at border posts to ensure that legitimate public policy objectives, such as compliance with health and safety standards, are achieved, while facilitating trade, is a priority for SADC.

Trade in services

Services play an increasingly important role in all SADC economies. The contribution to overall economic activity has increased significantly in the last decade; the sector's contribution to employment creation, in particular smaller businesses, is significant and it is well recognised that it is not possible to be competitive in manufacturing without competitive services inputs. Services such as communication, transport, and financial services are inputs to the full range of economic activities. In addition, services are an important platform for development. Access to quality education, communication and transport services are, for example, essential to poverty eradication. Ironically, there are still many services sectors where the role of government as owner, competitor and regulator holds back the potential of these sectors to contribute to the region's development objectives. A comprehensive services agenda encompassing regulatory reform at national level, as well as liberalisation at regional level, has to be a development priority for SADC.

The Protocol on Trade envisages liberalisation of trade in both goods and services, although until recently, services liberalisation did not feature very highly on the SADC integration agenda. SADC Ministers of Trade adopted the Draft Protocol on Trade in Services in July 2009. The SADC Protocol on Trade in Services was subsequently approved by the 32nd SADC Summit of Heads of State and Government in Maputo, Mozambique in August 2012. The Protocol contains general obligations on member states in the area of trade in services, including most-favoured nation treatment, transparency and domestic regulation, and provides a framework for the progressive removal of barriers to intra-regional services trade, initially in six priority sectors which were agreed on in 2001: communication, construction, energy-related, financial, tourism, and transport services. The first Round of Negotiations on

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liberalisation commitments in the six priority sectors commenced in April 2012; it is expected that the round will be concluded within 3 years.

Product standards

Product standards are an important public policy instrument, yet they increasingly feature as an important NTB both in the region as well as internationally. Firm capacity to meet international standards and the facility to have products certified is an important component of developing competitive industries in the region. Member states signed a Memorandum of Understanding on Standardization, Quality Assurance, Accreditation and Metrology in 2000, and established the SADC Accreditation Service (SADCAS) in 2008 to address issues of accreditation. Industrial development, including the development of regional value chains as well as integration into global value chains, requires the development of capacity to meet international standards; the role of SADCAS to support the capacity of the region's producers to meet these standards should be a priority.

Industrial development

While trade liberalisation is acknowledged to be an important catalyst for regional integration, it is increasingly also recognised that industrial development is limited and that the capacity to produce goods and services, competitively, needs to be addressed too. A SADC Industrial Development Policy Framework, and Work Programme, were adopted by Trade Ministers in November 2012. This framework emphasises the development of synergies in industrial development across the region, with strong focus on the development of regional value chains. The relationship between the Industrial Policy Framework and SADC's trade regime requires analysis, noting, for example, the impact of the RoO regime on industrial development.

SADC's infrastructure development agenda

Infrastructure in support of regional integration and poverty reduction is another priority intervention area for SADC, as articulated in the RISDP. The development of infrastructure (and services) is crucial for promoting and sustaining regional economic development, trade and investment,[7] and as such plays an important role in improving the quality of lives of the people of SADC. The infrastructure development agenda and the services agenda need to be

[7] *SADC Infrastructure Development Status Report for Council and Summit*, September 2009.

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closely coordinated to ensure coherence in key sectors. Physical infrastructure is essential, but without appropriate and facilitative regulatory infrastructure, there will be little benefit in terms of the infrastructure services delivery.

SADC's Regional Infrastructure Development Master Plan (RIDMP) was approved at the Summit in August 2012. Prior to this, SADC finance ministers deliberated how to capitalise, structure, and roll out a proposed US$1 billion SADC Regional Development Fund, realising that the RIDMP could be disabled by a lack of financing. The long-mooted Development Fund, provided for under Article 26A of the SADC Treaty with the objective of facilitating the implementation of regional projects linked mainly to the promotion of trade and infrastructure development, is increasingly being viewed as the answer to the region's infrastructure funding gaps. Operationalising the fund will, however, test SADC member states' political commitment to regional integration.[8]

Financial integration

All SADC member states rely on foreign direct investment (FDI) to augment their productive capacity and support industrial development; lack of domestic savings, a problem compounded by the vast inequalities that still mark the income distributions of most countries, is one of the factors that circumscribes the capacity to generate domestic investment. Access to finance is a perennial challenge especially for small business development. These and other finance and investment issues can seriously constrain SADC's development options, specifically to enhance the capacity to produce goods and services and to trade, both in the region and with other partners. This makes the Finance and Investment Protocol an important partner to the Trade Protocol.

The Protocol on Finance and Investment (FIP) was signed in August 2006 and entered into force on 16 April 2010. The approval and signing of the document has been cited as one of the region's main achievements, providing the legal basis to allow SADC and its member states to mobilise financial resources at regional and domestic levels rather than relying solely on foreign aid.[9] The FIP contains two broad objectives: (i) to improve the investment climate in each member state and thus catalyse foreign and intra-regional investment flows; and (ii) to enhance cooperation, coordination and harmonisation in domestic financial sectors in the

[8] Njini, F. 2012. 'Testing the political will'. *The Southern Times*, 16 July 2012.
[9] 'Finance, investment protocol among region's main achievements'. *Angola Press*, 27 June 2012.

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region. The FIP is supported by the RISDP, which articulates the broader goals that underpin the Protocol, including full regional financial integration, the formation of a monetary union, and the adoption of a single currency.[10]

In 2011, the SADC Secretariat commissioned a baseline study on the state of progress of implementation of the FIP in member states. According to a report on the study's findings published in February 2012,[11] while progress has been made in implementing country-level commitments related to preparation and cooperation,[12] the FIP as a whole is still some way from achieving full regional financial integration. At the national level, seven countries (South Africa, Mauritius, Zambia, Malawi, Namibia, Botswana and Tanzania) have implemented more than half of the FIP country-level commitments, with South Africa and Mauritius nearing full implementation (between 70% and 80% achievement of commitments). The study found that reforms were generally driven by direct national interests, in response to exogenous shocks or in compliance with strong international standards, rather than by compliance with the FIP. Nevertheless, the Protocol remains useful as a regional framework for pursuing international best practice and guiding thinking about appropriate reform.

SADC, the Tripartite Free Trade Area and the Continental Free Trade Area

In October 2008, the 26 member states of SADC, the East African Community (EAC) and the Common Market for East and Southern Africa (COMESA) agreed in Kampala, Uganda to establish a Tripartite Free Trade Area (T-FTA). Subsequently at the African Union Summit in January 2012, Heads of State agreed to establish a Continental Free Trade Area modelled on the T-FTA.

One of the objectives for the establishment of the T-FTA was reported to be the resolution of the problem of overlapping membership. Expectations were that this would mean that the T-FTA would consolidate the trade regimes of the existing RECs into a coherent trade regime. This appears unlikely; indeed, the negotiating guidelines that were adopted by the member states in June 2011 were 'clarified' in December 2012, and it now seems that rather than

[10] 'Striving for Regional Integration: Baseline Study on the Implementation of the SADC Protocol on Finance and Investment'. Brochure, available at: http://www.finmarktrust.org.za/

[11] Short, R. et al. 2012. *Protocol on Finance and Investment Baseline Study: Regional Report.* Gaborone: SADC Secretariat.

[12] At the national level, member states are required by the FIP to commit to domestic preparations for integration by modernising and upgrading domestic financial systems and investment regimes, and to engage in a process of cooperation with other member states (exchange information, build capacity, agree on regional aspirations and standards, and build coordination channels).

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resolving the overlapping membership problem, the T-FTA may compound this problem. The member states have adopted an '*acquis*'[13] to mean that the trade regimes of the existing RECs will remain, and only those member states that are not party to FTAs will negotiate tariff phase-downs.

The T-FTA is anchored on three pillars; the first is the market integration pillar that reflects the traditional trade agenda of the African integration paradigm. The second and third pillars are infrastructure development and industrialisation. These pillars may prove to be less contentious than the first. The infrastructure development programme has already begun with projects such as the North-South Corridor. A work programme on industrial development started in 2012. The latter two pillars are perhaps where there are significant opportunities for developing synergies with the SADC integration programme.

At the Summit of the African Union in January 2012, member states agreed to the establishment of a continental FTA by (indicative date) 2017. Indications are that the T-FTA is to serve as a template for the continental FTA. African integration schemes follow the step-wise movement from FTA to customs union and more advanced forms of integration; yet many African states are reluctant to cede the requisite sovereignty and policy space to regional institutions that is essential for this model to work effectively. Regional secretariats, for example, are generally not given the mandate to act on behalf of the collective, to take initiative to promote the regional integration agenda within the confines of the legal frameworks. Dispute resolution, which is essential for transparency and accountability, remains another contentious area. The suspension of the SADC Tribunal is a case in point.[14]

A regional integration debate

Debate on regional integration in SADC, specifically on the implications of global developments, is seriously lacking at national and at regional levels. The RISDP review provides an important opportunity to encourage an inclusive debate on regional integration in SADC to shape SADC's integration agenda for the 21st century. Appraisal of developments such as the role of global value chains and the development of comprehensive FTAs which

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[13] The term '*acquis*' is borrowed from European Community Law, referring to the body of European Community Law. The very specific interpretation of the term in the case of the Tripartite FTA refers to the tariff regimes, indicating that the tariff regimes of the FTAs in east and southern Africa will not be opened to further negotiations.

[14] Erasmus, G. 2012. What has happened to the protection of rights in SADC? tralac Working Paper, available at: http://www.tralac.org/2012/01/18/what-has-happened-to-the-protection-of-rights-in-sadc/

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focus on services, investment, competition and other new trade issues, needs to feature in a debate including not only governments, but also the private sector and non-governmental organisations. After all, the Treaty[15] exhorts SADC to involve fully key stakeholders in the process of regional integration.

[15] Article 23 of the SADC Treaty (op cit).

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Chapter 1

The domestic status of international agreements: has the South African Constitutional Court chartered a new approach and could regional integration benefit?

Gerhard Erasmus

1. Introduction

The implementation of international trade agreements, including agreements on regional integration, requires national as well as inter-state follow-up measures by the state parties. The domestic implementation of obligations in agreements establishing Free Trade Areas or Customs Unions is critical for the success of regional integration arrangements and for efficient trade governance. The failure to ensure comprehensive implementation of treaty obligations remains a major stumbling block in most African Regional Economic Communities (RECs). Uncoordinated executive practices of member states and insufficient harmonization of national laws result in fragmented outcomes, legal uncertainty, lack of reliable information, administrative duplication, and major trade facilitation obstacles. Cross-border transactions remain unnecessarily costly and investment uncertain, while the rights of private parties are difficult to enforce.

Under such conditions, important benefits of regional integration, such as market access advantages, predictability, rules-based trade and standardized procedures, will not be realized. And the bigger picture is affected; the lack of effective integration undermines competitiveness and sustainable growth in Africa. Most commentators agree that a major part

of the solution 'could be as simple as making it easier to cross [African] borders'.[1] In Africa, where regional integration is lauded as a major aspect of African political cooperation, most of the RECs still suffer from serious design and implementation flaws.[2] The absence of effective mechanisms to enforce the rules of these arrangements must count as one of the obvious examples.

How should domestic courts approach the various legal issues pertaining to trade governance and the implementation of international agreements? How could private rights be given more effective protection? A recent judgment by the South African Constitutional Court demonstrates that more than the consideration of the monist/dualist distinction or the possibility of 'direct applicability' of treaties might be required.[3] The majority judgment is discussed here as it contains important new insights on how international and regional agreements (in this instance, on combating corruption) are to be understood when the adequacy of national legislation has to be judged. The majority of the Judges applied specific international agreements (including a regional protocol) as part of the test for determining the constitutional validity of the relevant municipal legislation.

The discussion below will show how this was done and why the Court considered international agreements as relevant for its ruling. The distinction to be drawn between the domestic and inter-state levels of implementation of international agreements remains an important matter and will also be referred to below. And related questions need to be considered: What is required to promote the community law of RECs? And when is the 'domestication' of international trade agreements required as part of the obligation of state parties to implement international agreements?

2. Does the law of regional economic communities need recognition?

From the legal perspective, regional integration requires clarity about issues such as the nature of the state actions required in order to implement obligations, the national status and application of international agreements, as well as the effect of 'community law' within the member states. The concept 'community law' is used here to refer to the binding legal instruments of a specific REC, such as 'SADC law'. The latter is defined in the Protocol on

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[1]The 2013 World Economic Forum (WEF) on Africa, *Business Times*, 12 May 2013. Africa is the least integrated region in the world.
[2] For a detailed discussion, see the WTO's *2011 World Trade Report*.
[3] *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC).

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the SADC Tribunal to mean '*the SADC Treaty and the SADC Protocols which have come into effect, all subsidiary instruments which have legal effects adopted by the Summit, by the Council or by any other institution or organ of the Community pursuant to the Treaty or Protocols*'. The legal instrument which defines the obligation of the member states with regard to the functioning of the FTA (or the customs union) dimension of a specific REC is of particular importance for promoting regional integration.

Certain basic matters need to be clarified in order to make the case for the recognition of community law as a sui generis branch of international law. The founding instruments must, of course, provide sufficient indication of such an intention or at least that this is a necessary implication. Is the community law sufficiently detailed in order to ensure unified outcomes? Is this corpus of law recognised as uniformly binding? What are the obligations of the member states and how is compliance monitored?

The courts of member states are increasingly called upon to rule on legal issues pertaining to the domestic consequences of international agreements; including those constituting regional community law. When they do so, the analysis usually starts with the provisions in the national constitution on the conclusion and domestic consequences of international agreements, as well as separation of powers issues. Generally speaking, regional community law does not enjoy a sui generis status in the member states; the international legal instruments of the relevant REC (including the founding treaty and trade protocol) are viewed as another typical international agreement.[4]

In a recent case in Mauritius, that Supreme Court dismissed a claim by a local firm that the national tariff on imported raw material used in the manufacturing of automotive paint was in violation of the applicable COMESA Legal Notice issued after the formation of the COMESA FTA. A company registered in Mauritius and exporting automotive paints sourced some of the raw materials from Egypt, another COMESA member. COMESA became a Free Trade Area in 2010 and the member states undertook to eliminate customs duties and not to introduce new ones on products originating from the region pursuant to a Legal Notice issued by the COMESA Council of Ministers. Mauritius later amended legislation and introduced a 40 per cent import tax on paint that included the imports by the applicant. The applicant claimed that it had spent a considerable amount of money on import duties over the period the

[4] EAC law is probably the most advance body of community law. National courts are increasingly called upon to apply legal instruments which are applicable within member states but developed on regional level.

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Regulation was in force. It sought a declaration by the Supreme Court that the Regulation was in breach of Mauritius' obligation und the COMESA Treaty. The national Supreme Court dismissed the claim on the grounds that '*non-fulfilment of Treaty obligations is not enforceable by the national courts insofar as there was no specific legislation to this effect*'.[5]

This is the traditional dualist argument. National courts will continue to adopt this approach in such systems as long as the domestic effect of REC agreements remains unclear and such legal instruments are considered typical treaties. This is a central issue as far as the legal dimension of regional integration is concerned. The COMESA Court of Justice subsequently ruled (in what was described as a land mark decision) that it had jurisdiction over this matter and will hear the case brought by a legal person against this member state.

The matter is pending and the outcome will have important ramifications. They will concern the domestic status of community law in COMESA member states as well as the implications of overlapping membership. Mauritius is a member of SADC too. If it brings its municipal law in line with its obligations under the COMESA legal instruments, it will logically have to do so with regard to SADC and WTO obligations too.

3. What is the implementation of international agreements about and when is domestication required?

International agreements need to be implemented in order to achieve the objectives for which they have been concluded. Dictionaries define 'implementation' as the performance of an obligation. Compliance refers to action (implementation) which is in accordance with the applicable rule or standard.

The nature of the steps necessary for implementing international agreements depends on what the parties have agreed to. The text of the agreement (and the substance of the matter it deals with) should indicate what is required. Ultimately it is a matter of interpretation. International agreements '*shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*'.[6]

The traditional approach is that state parties are in principle free to determine what domestic measures are required in order to comply with international obligations. It is the effect that

[5] *Pylotol Paints v the Republic of Mauritius (Preliminary Application No. 1 of 2007*). From a research note by Kahaki Jere, tralac intern.
[6] Article 31, Vienna Convention on the Law of Treaties, 1969.

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counts. If new legislation is required in order to allow execution of the required measures (because the state lacks the necessary national legislative framework or if the existing law is inadequate), the national legislature will have to enact new law or subordinate legislation (regulations allowed for by enabling legislation) will have to be promulgated. The failure to do so can constitute a breach of the applicable treaty obligations.

Implementation of regional integration agreements are intended to have specific effects and requires follow-up action from the member states within the area of their jurisdiction. These domestic actions need to be valid in terms of national legal/constitutional requirements too, but that is a question to be answered on the municipal level. And it demonstrates why municipal and international obligations should be in harmony. Once an agreement binds a particular state, its authorities cannot invoke national law or the constitution as justification for not respecting its international obligations.

The implementation of agreements establishing regional organizations also depends on the powers enjoyed by regional institutions. In SADC, more than 20 Protocols, in addition to the Treaty, have to be implemented. They cover many different areas and not all are related to trade or integration in the traditional sense of the word.[7] Implementation of SADC instruments generally consists of individual state actions as well as common activities via bodies created under SADC legal instruments.[8] However, the SADC Secretariat does not enjoy 'supra-national' powers.

As a general rule, states are free to determine for themselves what domestic measures are necessary in order to comply with their international obligations. The essential question is whether they are complying with their obligations. The protection of the rights of the other state parties lies in the fact that breaches of treaty obligations result in state responsibility.[9] The remedies or dispute settlement provisions available under such agreements may be invoked or self-help could be possible. In regional integration arrangements more is normally required, such as specific procedures and remedies about the compliance with trade related obligations (tariffs, NTBs, standards, etc.), as well as the monitoring powers of regional institutions. The secretariats of African RECs enjoy very little jurisdiction in this regard; the

[7] The promotion of gender equality is one example. The Protocol on Water Resources involves ad hoc sharing arrangements for specific rivers in the region.
[8] The Annexes to the SADC Finance and Investment Protocol provide examples.
[9] This area of International Law has been codified in the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts.

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member states are sensitive about what they perceive to be actions encroaching on their sovereignty.

4. The domestication of international agreements

When is 'domestication' of an agreement necessary? And what is this process about? Technically, domestication refers to the incorporation into national law by way of a legislative act (of the national legislature) of international law, including international agreements. It involves a domestic procedure; not an international one. It is exceptional as a means of giving effect to international agreements.[10] Clear and specific treaty language will be required to make domestication an internationally binding obligation and a prerequisite for compliance. The reason why this seldom happens in international agreements concluded outside the context of regional integration arrangements is because states are reluctant to agree to such explicit language in the text of an agreement. They will consider it unnecessary, too restrictive (it does not leave space for the consideration of unique local conditions), or anathema to their sovereignty. Constitutional principles on the separation of powers become relevant; the national executive (which normally negotiates and signs international agreements) should not 'legislate' via the direct domestic implementation of international agreements. Domestication can have far-reaching consequences: an international legal instrument becomes national law *ipso facto*.

There is another consideration: international agreements will seldom be appropriate as a (national) legislative instrument because their language is unsuitable as directly applicable national law.

However, international agreements are, as a rule, not self-executing and the domestic dimension of implementation has to be attended to. This raises a pertinent issue – whether state parties have an adequate national legislative framework in place for complying with their international obligations. In the context of regional integration arrangements, this legal basis is vital, because of the nature of the obligations contained in the FTA and trade related instruments. Domestic follow-up action by member states must follow, tariffs have to be aligned to regional schedules, remedies for private parties have to be available, and new obligations, as integration proceeds, must be respected.

[10] Note that the WTO does not require domestication of its agreements by its members.

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The absence of direct effect of international agreements means that when implementation requires action by national authorities, the international agreement in question cannot provide that basis. A separate domestic legal basis is required. National legislation then enters the picture because domestic institutions require an enabling statute in order to perform executive functions. Dualism (as opposed to monism[11]) holds international and internal (national) law to be separate systems. One commentator has explained the consequences as follows:

> *Being separate systems international law would not* as such *form part of the internal law of the state: to the extent that in particular instances rules of international law may apply within a state they do so by virtue of their adoption by the internal law of the state, and apply as part of that internal law and not as international law. Such a view avoids any question of the supremacy of the one system over the other since they share no common field of application: each is supreme in its own sphere.*[12]

Most SADC member states (as former British colonies) follow the dualist approach to international agreements. SADC Protocols dealing with regional integration (such as the Finance and Investment Protocol) usually entail a programme for future action by the member states as well as regional institutions. In many ways this is a starting point for a process which will take time and national effort to harmonise domestic policies, practices and laws. These protocols are legal arrangements between the SADC states which have to facilitate certain outcomes over time. In some areas the integration tempo can be rather slow; this is what political and capacity realities dictated. The Preamble to the Finance and Investment Protocol is a case in point. The objective here is the '*progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the residents of the Member States, [the improvement of] economic management and performance through regional cooperation, and [the creation of] appropriate institutions and mechanisms for the implementation of programmes and operations in the Region*'.

[11] Monism postulates that national and international law form one single legal order. *Brownlie's Principles of Public International Law*, OUP, 8th edition, 2012, p. 48. Some states follow a monist system where treaties can become law without incorporation, if their provisions are considered sufficiently self-explanatory. In monist systems, international agreements can normally only be ratified after they have been approved by the legislature; once this is done the treaties become legally binding in domestic law if they are self-executing. In dualist tradition, ratification is typically an executive function.
[12] Oppenheim, *International Law*, Vol I, 1992, p. 53.

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Trade in goods falls in a different category. The implementation of national measures about tariffs and NTBs is more immediate; the non-discrimination rules of MFN and national treatment rules impact directly on the rights of the state parties and of traders.

Effective regional integration starts, as far as legal imperatives are concerned, with a proper assessment of the requirements regarding implementation with specific obligations, monitoring of compliance and the availability of remedies.

5. The facts of the Glenister case and the majority ruling

The Glenister judgement deals with the constitutional validity of South African legislation that brought into being the Directorate for Priority Crime Investigation (popularly known as the Hawks). The new law disbanded the Directorate of Special Operations (popularly known as the Scorpions). For the majority of the Constitutional Court Judges,[13] two crucial questions had to be answered: Whether the Constitution imposes an obligation on the state to establish and maintain an independent body to combat corruption and organised crime, and, if it did, whether the specialised unit which the impugned legislation had established was sufficiently independent. They, unlike the minority judgment, concluded that the Constitution itself imposes that obligation on the state. To the second question, they held, again unlike the minority judgment, that the requirement of independence had not been met and consequently that the impugned legislation did not pass constitutional muster.

The judgment points out that 'the Constitution is the primal source for the duty of the state to fight corruption'.[14] It then invoked international law in a particular manner:

> *The core ground advanced in order to invalidate the legislation that established the DPCI is that it lacks the necessary structural and operational independence to be an effective corruption-fighting mechanism. And that, for that reason, the impugned legislation is inconsistent with international obligations of the Republic and therefore the Constitution…. The impugned legislation provides in circuitous words that when applying its terms, the need to ensure that the Directorate has the necessary*

[13] The majority opinion was written by Moseneke DCJ and Cameron J. Froneman J, Nkabinde J, and Skweyiya J concurred.
[14] Paragraph 175.

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> *independence to perform its function should be recognised and taken into account.*[15] *The 'necessary independence' is not defined. In order to understand the content of the constitutionally-imposed requirement of independence we have to resort to international agreements that bind the Republic. As we now show, our Constitution takes into its very heart obligations to which the Republic, through the solemn resolution of Parliament, has acceded, and which are binding on the Republic in international law, and makes them the measure of the state's conduct in fulfilling its obligations in relation to the Bill of Rights.*[16]

The judgment notes that a number of anticorruption agreements bind South Africa. They are the United Nations Convention against Corruption, the SADC Protocol against Corruption, and the African Union Convention on Prevention and Combating Corruption.

The relevant constitutional provisions on international law are mentioned and discussed as follows:

> *The Constitution contains four provisions that regulate the impact of international law on the Republic. One concerns the impact of international law on the interpretation of the Bill of Rights.*[17] *A second concerns the status of international agreements.*[18] *A third concerns customary international law. The Constitution provides that it 'is law in the Republic unless it is inconsistent with the Constitution or an Act of*

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[15] Section 17B(b)(ii) of the SAPS Act provides that '[i]n the application of this Chapter the following should be recognised and taken into account… [t]he need to ensure that the Directorate… has the necessary independence to perform its functions'.
[16] Paragraph 178. Footnotes omitted.
[17] Section 39(1)(b) provides that, when interpreting the Bill of Rights, a court, tribunal or forum 'must consider international law'.
[18] Section 231 provides:

'(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.'

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> *Parliament.'*[19] *A fourth concerns the application of international law. It provides that when interpreting any legislation, 'every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'*[20] *In this judgment we are concerned primarily with section 39(1)(b) and with section 231 ....*[21]

A number of specific inferences are then drawn:

- The fact that an international agreement becomes binding on the South African state once approved by Parliament '*does not mean that it has no domestic constitutional effect. The Constitution itself provides that an agreement so approved "binds the Republic". That important fact... has significant impact in delineating the state's obligations in protecting and fulfilling the rights in the Bill of Rights.*'[22]
- The obligations in the cited Conventions impose the duty in international law to create an anticorruption unit that has the necessary independence. However, '*that duty exists not only in the international sphere, and is enforceable not only there. Our Constitution appropriates the obligation for itself, and draws it deeply into its heart, by requiring the state to fulfil it in the domestic sphere. In understanding how it does so, the starting point is section 7(2), which requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights*.'[23]
- The domestic courts' '*obligation to consider international law when interpreting the Bill of Rights is of pivotal importance*.'[24]
- International law must be considered when determining the extent of obligations in the Bill of Rights (in this instance, the combating of corruption through a fully independent institution).[25]
- The consideration of international law in this manner does not amount to the incorporation of international agreements into the Constitution.[26]

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[19] Section 232.
[20] Section 233.
[21] Paragraph 179.
[22] Paragraph 182.
[23] Paragraph 189.
[24] Paragraph 192.
[25] Paragraphs 192 and 194.
[26] Paragraph195.

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- The obligation to ensure that the rights in the Bill of Rights are protected and fulfilled (in this instance via the establishment of an anti-corruption entity with the necessary independence), is constitutionally enforceable. '*It is not an extraneous obligation, derived from international law and imported as an alien element into our Constitution: it is sourced from our legislation and from our domesticated international obligations and is therefore an intrinsic part of the Constitution itself and the rights and duties it creates*.'[27]

- Section 233 of the Constitution (which demands any reasonable interpretation that is consistent with international law when legislation is interpreted) has the effect that there is '*no escape from the manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into our domestic law.*'[28]

- Obligations binding upon the Republic under international law must not conflict with express provisions of the Constitution, including those in the Bill of Rights.[29]

- The general notion that international agreements mostly allow a state party to implement its treaty obligations '*in accordance with the fundamental principles of its legal system*'[30] is accepted. However, it does not mean that the courts should not scrutinize such laws. In this instance, the particular legislation cannot pass muster; the dominant position of the executive in the proposed anticorruption body is inimical to its independent functioning.[31] The safeguards in the Act were found to be inadequate.

6. Does the Glenister decision apply to intentional agreements generally?

The facts of this judgment are about the implementation of the South African Bill of Rights and the question of whether national legislation could pass constitutional muster. It does, however, contain several general statements with wider implications. One commentator has said of the impact of the case that '*fortunately the place of treaties in a challenge to the constitutionality of legislation has now been clarified in Glenister v President of the Republic of South Africa which considered the constitutionality of legislation….*'[32]

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[27] Paragraph 197.
[28] Paragraph 202.
[29] Paragraph 205.
[30] Article 6(1) of the UN Convention.
[31] Paragraph 244.
[32] Dugard, J. 2011. *International Law – a South African P*erspective, 4th edition. Juta, p. 66.

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What new perspectives does this case bring to the debate about the implementation of regional integration agreements? Is the judgment linked specifically to the constitutionality of legislation with a Bill of Rights dimension or are there elements which allow for wider application? It seems safe to argue that where legislation has been adopted to give effect to an international agreement binding on South Africa, including those on regional integration[33], the text of such agreements can now be invoked in order to determine the adequacy of domestic legislation. There is no logical reason for excluding regional integration arrangements from this particular effect of the judgment.

This is a novel development and goes further than the traditional approach. In future, international agreements should not be limited to questions about the interpretation of ambiguous laws only. The Constitutional Court has now ruled that the duty in question (the establishment of an independent anticorruption agency) '*exists not only in the international sphere, and is enforceable not only there. Our Constitution appropriates the obligation for itself, and draws it deeply into its heart, by requiring the state to fulfil it in the domestic sphere. In understanding how it does so, the starting point is section 7(2), which requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights*.'[34] In respect of section 233 of the Constitution (which demands any reasonable interpretation that is consistent with international law when legislation is interpreted), the effect is that there is '*no escape from the manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into our domestic law.*'[35]

The majority view accepts the general notion that international agreements allow a state party to implement its treaty obligations '*in accordance with the fundamental principles of its legal system*'[36], but goes on to qualify this in an important manner: It does not mean that the courts should not scrutinize such laws. In this instance, the national legislation passed in order to implement the obligation in question did not pass muster; the dominant position of the executive in the proposed anticorruption body is inimical to its independent functioning.[37] The safeguards in the Act were found to be inadequate.

[33] The judgment invokes the SADC Protocol against Corruption.
[34] Paragraph 189.
[35] Paragraph 202.
[36] Article 6(1) of the UN Convention.
[37] Paragraph 244.

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These pronouncements are not entirely unambiguous insofar as their application to trade matters is concerned. The final words with regard to the domestic status of regional integration agreements are still to be spoken. The Glenister case opens the door for this debate.

7. Conclusion

Is it possible to accelerate this process (of compliance with REC law) through the jurisprudence of national courts? Can it be argued that even under the traditional approach (the dualist/monist determined debate about the domestic status of international agreements) followed in most of the RECs, judicial enquiry should engage the issues inherent in the effect of the regulatory measures on trade issues, or when required by the nature of the rights at stake? The steps taken by governments to comply with their international trade obligations (or to benefit from the exceptions provided for) involve a wide spectrum of measures by national agencies. This could include anything from tariff and non-tariff measures, to the regulation of services and service providers, application of health and safety standards, the protection of intellectual property rights, compliance with notification and transparency requirements, licensing, transport, trade remedies, safeguards, etc. These measures can impact directly on firms and individuals within states' jurisdiction, with domestic courts being called upon to review the executive and legislative acts in question.

The need for the judicial protection of private rights within the context of the domestic implementation of trade agreements has become a major aspect of trade governance. The extent to which national systems allow for judicial remedies involving trade related governance issues provides an indication of compliance with specific obligations, as well as a measure for evaluating whether trade regulation is in fact rules-based, as the multilateral trade rules require. Several WTO agreements, for instance, obligate members to provide for effective domestic review procedures and for remedies where necessary.[38] Successful regional integration arrangements do so more comprehensively. The European Union is the most obviously example of the latter. However, in less comprehensive regional arrangements or in those without the supra-national powers of the European Commission, the need for a clear set of rules on implementation, compliance, and the availability of judicial remedies when rights

[38] The Anti-Dumping Agreement is an obvious example.

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are violated remains equally strong. In fact, practice in the African RECs may show that there is an even greater need for rules-based governance.[39]

The judicial protection of the rights of firms or individuals arises typically when applications are brought for the courts to review laws or executive measures pertaining to trade governance and the implementation of trade policies. Such applications may sometimes involve human rights issues, the rights to property or fair administrative action. In many dispensations private parties could, in addition, argue that:

> *[G]overnment measures, including agency decisions, should be declared unlawful on the basis that they are inconsistent with the obligations contained in the WTO agreements. The question for the regional or national court hearing the case is whether it should strike down the national measure on the basis that it cannot be reconciled with the WTO obligation. Sometimes, it will not be clear whether a conflict between the national measure and the WTO obligation actually exists. However, on other occasions, the WTO Appellate Body will have confirmed the existence of the conflict. In such cases, the court will be faced with the sensitive issue of whether the national or the international legal norm should prevail, and whether it should align its view with the domestic body or agency, or the Appellate Body.*[40]

The answers as to the status of community law are ideally to be provided in the founding instruments of a REC or through the development of its regional jurisprudence. This has to be followed by municipal adjustments. Important developments regarding the latter are taking place in the EAC and in COMESA, as the Mauritian case demonstrates. In SADC, the prospects are rather bleak so long as the SADC Tribunal remains suspended. And it has to be mentioned that no disputes about regional trade issues were ever brought to the SADC Tribunal while it was operational between 2005 and 2010. This serves as a reminder that the promotion of the rules-based approach in the RECs will generally need a better understanding of this body of law by the legal profession and the courts. Law schools too should play a more active part in teaching and researching the discipline.

National courts cannot correct basic flaws in regional arrangements but they can play an important role in the bigger picture efforts to promote legal certainty and predictability in the

[39] The SADC Tribunal saga is the obvious case in point.
[40] Lester, S. and Mercurio, B. 2008. *World trade Law – Text, Materials and Commentary*. Oxford and Portland: Hart Publishing, p. 123.

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RECs. The Glenister judgment merits careful study, including its relevance for the implementation of the legal instruments of the RECs.

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Chapter 2

An assessment of the TDCA

Ron Sandrey and Tania Gill[1]

1. Introduction

The Trade and Development Cooperation Agreement (TDCA) between South Africa and the European Union (EU) is an important trade agreement for South Africa, as it enables preferential access to its largest market for many product lines. The Department of Trade and Industry (dti) reports that it was signed in October 1999 after five years of negotiations. It was provisionally but only partially applied from 1 January 2000 and fully entered into force on 1 May 2004, albeit with phasing periods. The TDCA had several objectives that included strengthening dialogue between the parties, supporting South Africa in its economic and social transition process, and promoting regional cooperation and the country's economic integration in southern Africa and in the world economy, as well as expanding and liberalising trade in goods, services, and capital between the parties. It is the trade objective that we concentrate upon here, with an emphasis upon the agricultural trade.

While it is natural that South Africa should be focusing upon the opportunities afforded the Republic through its relationship with the newly-emerging BRIC (Brazil, Russia, India and China) countries, it is crucial to look back and assess the TDCA against the prospects of an enhanced trading and economic relationship with the BRICs. This is especially so in the present policy environment where the Economic Partnership Agreements (EPAs) between the EU and African countries are being vigorously negotiated.

[1] The authors are grateful to Taku Fundira for assistance in data downloading and analysis and an update on the EPA negotiations with the EU. An earlier version of the paper was published as a tralac Working Paper.

Background on the EU-SADC EPA and how it relates to the TDCA

Preferential market access agreements have long been in existence between the European Union and the African, Caribbean and Pacific (ACP) group of countries. From 2000, the Cotonou Partnership Agreement between the ACP countries and the EU has been governing relations; however, following its perceived incompatibility with the World Trade Organisation's (WTO) Article XXIV of the General Agreement on Tariffs and Trade (GATT) 1947, new agreements that are WTO-compatible are currently being negotiated. These are the EU-ACP Economic Partnership Agreements (EPAs). The key principles for the EPAs are reciprocity, differentiation, deeper regional integration, and coordination of trade and aid[2].

In order to facilitate the negotiations of the EPAs, the ACP countries have divided themselves into six regional groups of which the SADC EPA group is one. The EU-SADC EPA is a single negotiated agreement governing how the two regions will cooperate on a wide range of trade-related issues; negotiations on this EPA began formally in 2004 in Windhoek, Namibia. The countries who decided to negotiate under the SADC configuration initially were Angola, Botswana, Lesotho, Mozambique, Namibia, Swaziland and Tanzania, with the latter opting out and choosing to negotiate under the EAC-EPA group. South Africa initially participated in an observatory and supportive capacity, but finally joined in 2007. Negotiations have long been delayed and initial deadlines for completion missed. To date, a controversial interim agreement (IEPA) has been signed by some of the ACP countries. In the SADC-EPA group, Namibia, South Africa and Angola are the only three countries that have not yet signed the interim agreement (meaning that Botswana, Lesotho, Mozambique and Swaziland have signed).

South Africa considers that the three areas of i) tariff negotiations, ii) rules of origin negotiations, and iii) other outstanding contentious issues are the main issues to be addressed. On tariff negotiations, South Africa is seeking improved market access to the EU market over and above what has been agreed under the TDCA. This relates to one line of industrial products (aluminium) and agro-processed products including ethanol, cut flowers, and wine. The EU is considering the request, but has indicated that it requires reciprocity on products that are currently excluded from South Africa's TDCA offer, which include meat, dairy,

[2] Grant, C. 2006. *Southern Africa and the European Union: the TDCA and SADC EPA.* tralac Trade Brief No. 1, May 2006, Stellenbosch. [Online]. Available: http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/20060518_TDCA_SADC_EPA_Grant.pdf

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honey, certain cereal products, wine, and certain cheeses. Currently under the TDCA, South Africa offered 81% market access of agro-products compared to the EU's 61%. On Rules of Origin, the two fundamental issues of regional cumulation and the rules of origin relating to fish remain unresolved. Other concerns from South Africa relate to the introduction of additional issues regarding intellectual property (including geographical indications), sustainable development, and cooperation on taxation matters. For the SADC EPA group, the three main issues of the MFN clause (Art 28), special provision on administrative cooperation (Art. 29), and the inclusion of an agricultural safeguard clause are proving to be contentious and remain unresolved.

The TDCA

Importantly, there are several exemptions to the TDCA. For South African exports to the EU, these are exclusively (excepting some minor cases in aluminium products) in the agricultural sector. Here there are limited or no concessions for the sensitive beef products, the entire fish sector (a food product), most of the dairy products, many fruits, many cereals and cereal products, sugars, many prepared foods, and many alcohol and tobacco products. Similarly for EU imports into South Africa, there are many exemptions concentrated in the agricultural products, but conversely there are a lot of agricultural lines where products enter duty-free. Other exemptions from TDCA concessions are concentrated in the clothing and textile sectors (although there are many concessions there), while the auto sector is treated separately with significant concessions (but not duty-free trade).

The staged implementation phasing period of the TDCA makes it hard to assess the progress of the TDCA, as it really gives no clear starting point for comparative analysis. To overcome this we have taken the average of the 1999 and 2000 December years as the starting point for our pre-TDCA trade, and the average of the 2010 and 2011 December years as the final fully implemented period. This should avoid problems associated with the phasing periods that would have distorted any earlier analysis as well as lessen any annual variations in trade data. As South Africa's major export-oriented trade agreement, albeit one with considerable exemptions, it behoves analysts to examine the trade effects over a decade later. This chapter will provide such an analysis. All trade data is sourced from the Global Trade Atlas, although we have used US dollars for South African data and rand for EU data. Note that as the analysis is all about relative trade performance and not absolute, the use of dollars rather than rand currency is immaterial.

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Key points from the analysis

The overall trade data between South Africa and the EU shows that despite the tariff preferences accorded to the bilateral partners, the relative importance of the EU both as an export destination and import source for South Africa has declined.

For agricultural trade, the EU has remained South Africa's most important export market although its importance has declined in recent years, while similarly it is the main source of agricultural imports and here these imports are increasing their relative share.

Examining South Africa's performance in the EU, we find that the Republic has not met the average European growth rates for either total imports or agricultural imports as the South African trade shares have slowly declined after an initial post-TDCA increase.

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

The overall conclusions were that there appears to be limited evidence that the TDCA has resulted in any significant trade creation.

2. Bilateral trade – the big picture

There are two ways in which we can examine the relative changes to the bilateral trade: The first is by looking at growth rates over a period, while the second is by looking at relative market shares. It is the first that we concentrate upon in this analysis, although the second gives a better overall perspective. This overall perspective is shown in Figure 1 for the big-picture of the **South African data** for the bilateral trade from 1996, expressed in percentage shares of South Africa's merchandise trade. In general, the EU is becoming relatively less important to South Africa as an overall trading partner since the early years of this century. For South African imports, the EU market share started at just over 40 percent in 1999, was

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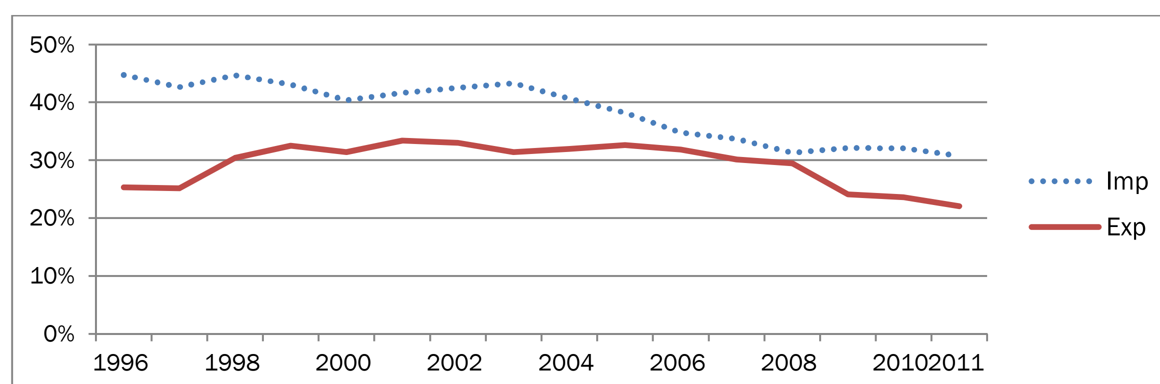
stable through to 2003, but steadily declined from there to 31 percent in 2011. The percentage of South African exports destined for the EU rose initially to be over 30 percent through to 2008 but declined from there to 22 percent in 2011 after the impact of the global crisis of 2009 became apparent. Note that there is a possible underestimation of the percentage of the South African exports destined for the EU as South Africa does not report individual destinations of the exports of some precious metals, and the EU reports significant imports of gold from South Africa.

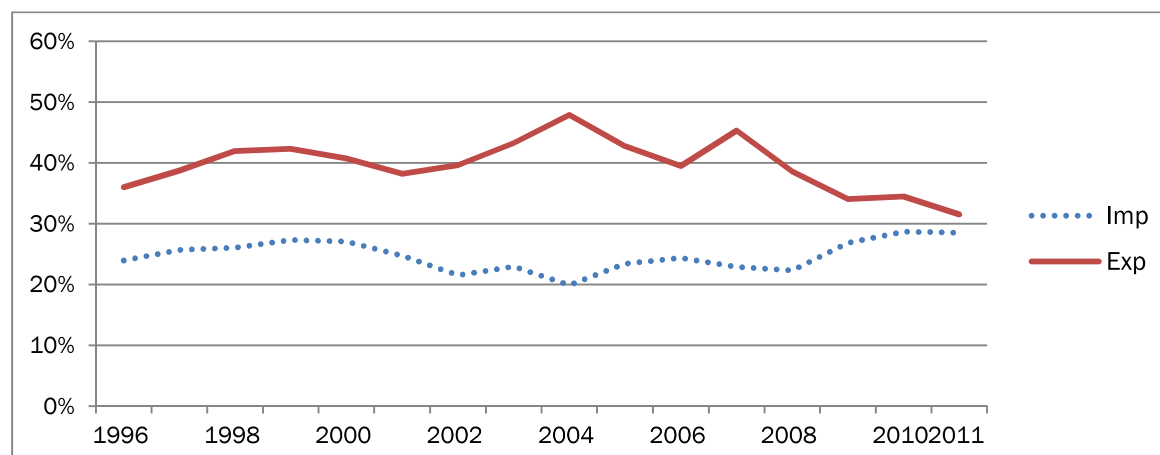
Figure 1: Bilateral EU-South African trade, 1996 to 2011, % share of all merchandise trade, exports to the EU and imports from the EU



Source: Global Trade Atlas

Figure 2 extends the analysis to show the percentage share of South African **agricultural** trade that is conducted with the EU. The imports from the EU have been relatively stable over the period albeit with a decline in the middle period. The share of agricultural exports destined for the EU was initially stable, and then rose during the early years of this century before falling away.

Figure 2: Bilateral EU-South African Agricultural trade, 1996 to 2011 (% share)



Source: Global Trade Atlas

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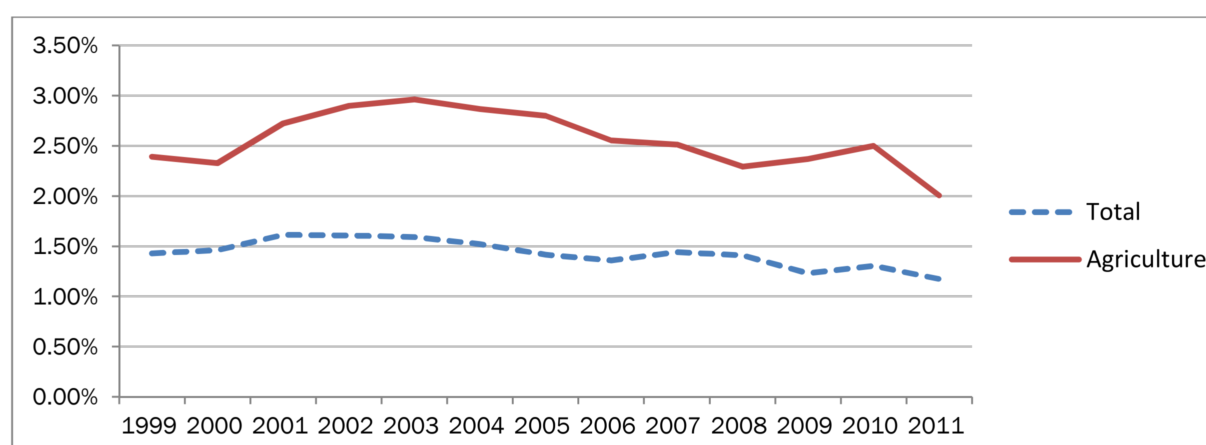
We now turn to EU import data to assess the overall performance of South Africa in that market. This is shown in Figure 3 for both total imports from South Africa and agricultural imports from South Africa, expressed as the overall share in their respective categories. In both instances, the shares rose initially before declining to finish at lower market shares than the starting period. While of course indicative only, this is an early indication that perhaps South Africa has not benefitted from the TDCA, but such a cursory view ignores the counterfactual that South Africa may have done even worse without TDCA preferences. For total merchandise, the South African market share was 1.45 percent during 1999/2000 but this had declined to 1.23 percent by 2010/2011. Similarly, agriculture's share declined from 2.36 percent to 2.23 percent over the same period. From this starting point we can assume that as South Africa has underperformed in the EU market overall, the individual trade lines may similarly underperform overall, but this general assessment hides the variation in HS trade lines that we are seeking to explore.

Figure 3: EU imports from RSA, % share, both total and agriculture



Source: Global Trade Atlas

Table 1 shows the alternative representation, that of growth rates, expressed as the average of 2010/2011 data divided by the 1999/2000 data. Total South African merchandise imports from all sources in the final period were 3.53 times the earlier figure, while imports from the EU increased by a lesser 2.66 times. For agricultural imports, the total increase was 3.93 times, while from the EU the figure was a greater 4.15 times. South African total merchandise exports increased to the world by 3.13 times while those to the EU increased by a much lower 2.23 times. For agricultural exports, the global figure was 2.35 times while the exports to the EU were a higher 3.45 times. Also shown is the **EU data**, where total global imports increased 2.87 times while those from South Africa increased by a lesser 2.50 times. For

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agricultural imports, the global figure was 2.45 times while South African agricultural imports increased by a similarly lesser 2.36 times.

Table 1: Relative changes to RSA-EU bilateral trade, 2010/2011 average over 1999/2000

	All merchandise	Agriculture
South African imports		
Total	3.53	3.93
from the EU	2.66	4.15
South African exports		
Total	3.13	2.35
to the EU	2.23	3.45
EU imports		
Total	2.87	2.50
from RSA	2.45	2.36

Source: Global Trade Atlas

In summary, the overall data show that through to the 2007 year, the EU maintained its share of South African total merchandise exports but declined from there, while the EU market share of South African imports has steadily declined since 2004. For agricultural trade, the EU has remained South Africa's most important market although its importance has declined in recent years, while similarly it is the main source of agricultural imports and in contrast to the other market shares shown, these imports are increasing their relative share. Looking at the reciprocal of South Africa's performance in the EU, we find that the Republic has not met the average all-imports growth rates for either all imports or agricultural imports as the trade shares have slowly declined after an initial rise.

3. The detailed analysis

Following on from this big-picture presentation, we will examine (a) the performance of South Africa in the EU market and (b) the EU in the South African market, and assess the extent to which the TDCA has influenced this performance. Our methodology is to examine the performance of each HS line and assess the performance of those lines against the benchmark of the overall average increase. As outlined above, we take the average of the 1999 and 2000 December years as the starting point for our pre-TDCA analysis and assess the relative change for the average of the 2010 and 2011 December years as the final fully implemented period. In this way, we avoid some of the fluctuations by taking a two-year

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average, and by using the percentage change for the overall average we have a benchmark to assess individual lines against. There are, in essence, two benchmarks: The first is the average increase for all imports into the EU from all sources, while the second is the overall change in South African imports into the EU. **We then apply the 2011 trade data to the assessed categories to complete the analysis**. We provide analysis for, firstly, total merchandise trade, and then secondly, for agricultural trade as defined by the WTO. Finally, we assess changes to the individual tariff lines to see if preferential access is influencing these changes. In adopting this approach, we have worked with the following 11 separate categories of HS 6 trade lines:

- The **'real stars'**, where the line was increasing as a percentage of EU imports from both the world and South Africa, and furthermore the increase from South Africa was above the corresponding increase from the world; South Africa is gaining market share in a strongly growing EU market.
- The **'basic stars'** – as above, except that South Africa's share in these lines was above its overall import share but not above the comparable competitor share in this line. South Africa is doing very well in a growing EU market. Both 'real stars' and 'basic stars' are doing well.
- Two combinations where the increases in the EU lines **are above the EU average**: (a) where the South African line increase is still positive but below the South African average, and (b) where the South African increase is negative.
- Three categories where the increases in the EU lines are still positive but **below the EU average**: (a) where the South African line increase is above the South African average, (b) where the South African increase is below the average but still positive, and (c) where the South African increase is negative.
- Two combinations where the **increases in the EU lines are negative**: (a) where the South African line increase is above the South African average, and (b) where the South African line increase is negative.
- The bottom category (**'real dogs'**), where this particular line is declining overall in both EU imports from the world and from South Africa.
- Finally, **'Undetermined'**, imports from South Africa were zero for one or more of the years under consideration, such that performance could not be assessed.

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In summary, these are:

Categories
1 'Real Stars'
2 'Basic Stars'
3 'Growing Slowly in a Growing Market'
4 'Shrinking in a Strongly Growing Market'
5 'Growing Strongly in a Slowly Growing Market'
6 'Growing Slowly in a Slowly Growing Market'
7 'Shrinking in a Slowly Growing Market'
8 'Growing Strongly in a Shrinking Market'
9 'Growing Slowly in a Shrinking Market'
10 'Real Dogs'
11 'Undetermined'

We emphasise that this is a market share analysis – it says a limited amount about relative profitability of the categories or individual lines. In general, however, we can hypothesise that it is better to be higher on the list than lower. With the South African imports into the EU, we were able to work with 4,529 HS lines for all merchandise trade and 587 lines for agricultural trade. For EU imports into South Africa, we were able to work with 3,240 lines for all trade and 263 lines for agricultural trade.

3.1 South Africa's performance in the EU

Table 2 show how well South Africa has performed in the EU market since the inception of the TDCA, firstly by overall trade and then by agricultural trade. As discussed, the categories are the relative growth rates (which effectively equate to market share) for an average of 2000/2011 over 1999/2000, using the actual imports for 2011. For **all merchandise trade**, South Africa has done well using these criteria: some 25 percent are 'real starts' while another 24 percent are 'basic stars'. Recall that for 'real stars', South Africa is gaining market share in a strongly growing EU market, while for 'basic stars', South Africa's growth rates in these lines are above its overall average in lines where the global EU imports are similarly above their average, but South Africa's growth rates are not as good as the overall competition. Another 8.8 percent is in the good position of at least growing in an overall market that is strongly growing, while some 29 percent is sitting comfortably but not spectacularly in

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categories 5 and 6 where they are at least growing in a market that is itself growing. Limited trade is positioned in categories 7 to 10, and especially so in the lower categories of 9 and 10. For **agricultural** imports, there is less concentration in the 'real and basic stars', more in the middle sections of categories 5 and 6, but less in the lower segments where the growth rates are much lower. Both total merchandise and agriculture have around 5 percent in the 'undetermined' category where the comparisons are not possible. Overall, this detailed analysis provides a better outcome for South Africa than seemed possible by just looking at the big picture.

Table 2: South Africa's overall performance into the EU market in 2011, 2010/2011 compared to 1999/2000

	All trade		**Agriculture**	
	R mill	**%**	**R mill**	**%**
TOTAL	**197,994**	**100**	19,908	**100**
1 'Real Stars'	49,711	25.11	2,855	14.34
2 'Basic Stars'	47,512	24.00	3,894	19.56
3 'Growing Slowly in a Strongly Growing Market'	17,424	8.80	1,010	5.07%
4 'Shrinking in a Strongly Growing Market'	1,531	0.77	165	0.83
5 'Growing Strongly in a Slowly Growing Market'	26,762	13.52	5,016	25.19
6 'Growing Slowly in a Slowly Growing Market'	30,599	15.45	4,977	25.00
7 'Shrinking in a Slowly Growing Market'	9,230	4.66	29	0.15
8 'Growing Strongly in a Shrinking Market'	3,229	1.63	543	2.73
9 'Growing Slowly in a Shrinking Market'	588	0.30	55	0.28
10 'Real Dogs'	1,785	0.90	252	1.27
11 'Undetermined'	9,527	4.81	1,113	5.59

Source: Global Trade Atlas data

The details for total merchandise imports from South Africa into the EU market are shown in Table 3, with the first, second, and third import at the HS 6 line shown, ranked by import value.

Table 4 repeats this HS 6 line exercise for agricultural imports only.

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Table 3: South Africa's overall performance into the EU market in 2011 for *total merchandise*, 2010/2011 compared to 1999/2000

All Categories	R Million	% Share	Import Product by Rand value 2011		
TOTAL	**197,994**	**100**	**First**	**Second**	**Third**
1 'Real Stars'	49,711	25.11	Filter/Purify Machine	Ferrochromium	Iron Ore
2 'Basic Stars'	47,512	24.00	Gold	Platinum	**Grapes**
3 'Growing Slowly in a Strongly Growing Market'	17,424	8.80	Coal	Seat parts	Coal
4 'Shrinking in a Strongly Growing Market'	1,531	0.77	Diamonds	Ferrochromium	Anthracite Coal
5 'Growing Strongly in a Slowly Growing Market'	26,762	13.52	Precious Metal Ores	Cars 1000-1500Cc	**Oranges**
6 'Growing Slowly in a Slowly Growing Market'	30,599	15.45	Diamonds	**Wine must**	Rhodium
7 'Shrinking in a Slowly Growing Market'	9,230	4.66	Gold	Filter/Purify	Fish
8 'Growing Strongly in a Shrinking Market'	3,229	1.63	**Wool, Greasy**	Diamond Dust	Copper Wire
9 'Growing Slowly in a Shrinking Market'	588	0.30	Whiting & Hake	Antennas etc.	Data Processing Storage Units
10 'Real Dogs'	1,785	0.90	Cars >1500 cc	Granite	**Sheep/Lamb Skins**
11 'Undetermined'	9,527	4.81	Platinum scrap	Nickel Ores	Fish Fillets, Frozen, Nesoi

Table 4: South Africa's overall performance into the EU market in 2011 for *agricultural products*, 2010/2011 compared to 1999/2000

Agricultural Categories	R Million	% Share	Import Product by Rand value 2011		
TOTAL	19,908	**100**	**First**	**Second**	**Third**
1 'Real Stars'	2,855	14.34%	Wine	Corn (Maize)	Vege/Fruit/Nuts Prep
2 'Basic Stars'	3,894	19.56%	Grapes	Peaches Nectarines	Apricots
3 'Growing Slowly in a Strongly Growing Market'	1,010	5.07%	Avocados	Grapes, Dried	Ethyl Alcohol
4 'Shrinking in a Strongly Growing Market'	165	0.83%	Fruit Mixes Prepared	Mangoes etc.	Ethyl Alcohol
5 'Growing Strongly in a Slowly Growing Market'	5,016	25.19%	Oranges	Pears	Plums
6 'Growing Slowly in a Slowly Growing Market'	4,977	25.00%	Wine, Must	Apples	Grapefruit
7 'Shrinking in a Slowly Growing Market'	29	0.15%	Coffee	Tobacco	Pineapple tins
8 'Growing Strongly in a Shrinking Market'	543	2.73%	Wool Greasy	Tobacco	Seeds
9 'Growing Slowly in a Shrinking Market'	55	0.28%	Sheep Skins	Citrus Fruits other	Raw Hides
10 'Real Dogs'	252	1.27%	Sheep/Lamb Skins	Orange Juice	Animal Feed
11 'Undetermined'	1,113	5.59%	Lemons	Macadamia Nuts	Grapefruit Juice

Source: Global Trade Atlas data

Of special interest to the TDCA analysis is the extent to which the change in South African imports is driven by tariff concessions into Europe. The big picture is shown in Table 5. Firstly, the bands of tariff concessions and the share of agricultural imports in these bands are shown on the left hand side, while on the right hand side, the main HS 6 lines in these categories are presented. The majority of imports (61%) are in the zero to 4 percent tariff preference points range, but importantly, some 26 percent are in the category where the tariff concession has been between 10 and 20 percentage points. Only one percent are in the 'beyond 20 percentage points' range where preferential access would be expected to be significant.

Further details of the agricultural imports by category and their associated tariff preferences are given in Table 6. Data is given for the means of the tariff preferences and their associated largest and smallest concessions within that category. The 'real stars' category has the lowest preferences of the significant import categories, with only a preference of 0.04 percentage points on average, while the next category of 'basic stars' has a preference of almost one percentage point.

Final details of the agricultural imports and their associated tariff preferences are given in Table 7. The HS 6 lines are ranked by 2011 import values. A perusal of the list shows that there is little discernible pattern between the mean of the tariff preferences and the performance category. Note that the median, largest, and smallest values for tariff concessions are given, as even at the HS 6 line there are different tariff rates into the EU.

Table 5: The overall picture for agricultural imports/tariff concessions resulting from the TDCA

Tariff Concession	R Million	% Share	Import Product		
TOTAL	19,908	100	**First**	**Second**	**Third**
0 to 4%	12,047	61%	Wine, casks	Oranges	Wine
5% to 9%	1,462	7%	Plums	Meat & offal other	Fruit other
10% to 20%	5,184	26%	Grapes	Mandarins	Peaches
Beyond 20%	110	1%	Orange Juice	Tobacco	Fruit Vegetable Juices
Undetermined	1,104	6%	Lemons	Macadamia Nuts	Grapefruit Juice

Source: Global Trade Atlas for trade data and TDCA tariff preferences

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Table 6: Tariff concessions in agriculture – the details by our categories of imports

Categories	R Million	% Share	Tariff concessions (percentage points)		
TOTAL	19,908	**100**	**Weighted Mean**	**Largest**	**Smallest**
1 'Real Stars'	2,855	14.34%	-0.040	-114	0
2 'Basic Stars'	3,894	19.56%	-0.986	-31	0
3 'Growing Slowly in a Strongly Growing Market'	1,010	5.07%	-0.134	-47	0
4 'Shrinking in a Strongly Growing Market'	165	0.83%	-0.240	-64	1
5 'Growing Strongly in a Slowly Growing Market'	5,016	25.19%	-0.298	-57	0
6 'Growing Slowly in a Slowly Growing Market'	4,977	25.00%	-0.080	-81	1
7 'Shrinking in a Slowly Growing Market'	29	0.15%	-0.121	-19	0
8 'Growing Strongly in a Shrinking Market'	543	2.73%	-0.238	-103	0
9 'Growing Slowly in a Shrinking Market'	55	0.28%	-0.001	-13	0
10 'Real Dogs'	252	1.27%	-0.048	-169	0
11 'Undetermined'	1,113	5.59%			

Source: Global Trade Atlas for trade data and TDCA tariff preferences

Table 7: Details of the agricultural imports and their tariff preferences into the EU market

Import Products	R Million	% Share	Tariff Concessions (% Points)[1]			Performance Category
TOTAL	**19,908**	**100.00**	**Mean**	**Largest**	**Smallest**	
Grapes, Fresh	3,388	17.02	-12.10	-19	0	2 'Basic Stars'
Wine	2,540	12.76	-0.65	-16	0	6 'Growing Slowly in a Slowly Growing Market'
Oranges, Fresh	2,235	11.23	-1.74	-16	0	5 'Growing Strongly in a Slowly Growing Market'
Wine	1,425	7.16	-0.35	-12	0	1 'Real Stars'
Apples	980	4.92	-0.62	-8	0	6 'Growing Slowly in a Slowly Growing Market'
Pears And Quinces	960	4.82	-1.67	-8	0	5 'Growing Strongly in a Slowly Growing Market'
Grapefruit	619	3.11	-2.33	-3	-2	6 'Growing Slowly in a Slowly Growing Market'
Plums etc.	578	2.90	-9.60	-14	-7	5 'Growing Strongly in a Slowly Growing Market'
Avocados	542	2.72	-4.67	-6	-4	3 'Growing Slowly in a Growing Market'
Wool	523	2.63	0.00	0	0	8 'Growing Strongly in a Shrinking Market'
Mandarins	511	2.57	-18.27	-32	-16	5 'Growing Strongly in a Slowly Growing Market'
Lemons	390	1.96				11 'Undetermined'
Corn (Maize)	373	1.87	0.00	0	0	1 'Real Stars'
Macadamia Nuts	256	1.28				11 'Undetermined'
Meat & Edible Offal	236	1.19	-7.67	-12	-2	5 'Growing Strongly in a Slowly Growing Market'
Sheep/Lamb Skins	220	1.10	0.00	0	0	10 'Real Dogs'
Grapes, Dried	194	0.98	-3.00	-3	-3	3 'Growing Slowly in a Growing Market'
Fruit Nesoi	179	0.90	-7.33	-9	-6	5 'Growing Strongly in a Slowly Growing Market'

[1] Only the mean is reported here. The median was investigated but not reported on as it added very little information.

Import Products	R Million	% Share	Tariff Concessions (% Points)			Performance Category
Peaches	163	0.82	-18.30	-19	-18	2 ‘Basic Stars’
Pears, Prepared	149	0.75	-13.08	-27	0	6 ‘Growing Slowly in a Slowly Growing Market’
Apricots, Prepared	148	0.74	-11.38	-25	1	6 ‘Growing Slowly in a Slowly Growing Market’
Vege/Fruit/Nuts Prep	127	0.64	-12.33	-19	0	1 ‘Real Stars’
Peaches, Prepared	123	0.62	-12.38	-30	1	6 ‘Growing Slowly in a Slowly Growing Market’
Apricots, Fresh	114	0.57	-19.60	-21	-19	2 ‘Basic Stars’
Peanuts	104	0.52	0.00	0	0	6 ‘Growing Slowly in a Slowly Growing Market’
Import Products Share <0.50%	2,834	14.24				

Source: Global Trade Atlas for trade data and TDCA tariff preferences

3.2 Performance of the EU into the South African market

This section will examine the reciprocal performance of EU imports into South Africa and the influence of the TDCA upon these imports. We start by showing the 'big picture' for, firstly, these imports into South Africa on the left hand side of Table 8, and then the South African imports into the EU that we have just discussed on the right hand side. The 'real stars' categories suggest that South Africa is doing better into the EU market than the converse of EU imports into South Africa, while 'basic stars' are similar. Notable on the penultimate row is that for agriculture, in particular, there is a high percentage of EU imports into South Africa that are 'undetermined'. These lines are likely to be either new trade or a tariff classification change at the HS 6 line by South Africa in recent years.

Table 8: The 'Big Picture' comparing EU imports into South Africa and South African imports into the EU (US$ million)

Categories	EU imports into RSA		RSA imports in EU	
TOTAL	**Total**	**Agriculture**	**Total**	**Agriculture**
1 'Real Stars'	11.51	9.96	25.11	14.34
2 'Basic Stars'	24.24	24.88	24.00	19.56
3 'Growing Slowly in a Strongly Growing Market'	2.32	5.72	8.80	5.07
4 'Shrinking in a Strongly Growing Market'	0.19	0.38	0.77	0.83
5 'Growing Strongly in a Slowly Growing Market'	22.93	5.06	13.52	25.19
6 'Growing Slowly in a Slowly Growing Market'	14.44	15.05	15.45	25.00
7 'Shrinking in a Slowly Growing Market'	1.62	2.17	4.66	0.15
8 'Growing Strongly in a Shrinking Market'	0.07	0.00	1.63	2.73
9 'Growing Slowly in a Shrinking Market'	0.39	0.25	0.30	0.28
10 'Real Dogs'	1.07	0.22	0.90	1.27
11 'Undetermined'	20.69	35.50	4.81	5.59
Trade Value < US$ 1 Million	0.53	0.82		

Source: Global Trade Atlas for data

In Table 9 we show the total imports into South Africa by our performance categories. Again, a significant number (35.75%) are in the 'real stars' or 'basic stars' categories, with passenger vehicles prominent. Again, another significant percentage is also positioned in the 'Slowly growing market' categories, with a very small percentage in the 'Shrinking Markets' or 'Real Dogs'.

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Table 9: South African total Imports from the European Union for all commodities, 2010/2011

Categories	US$ Million	% Share	Import Product		
TOTAL	**28,052**	**100**	**First, by US$ value**	**Second, by US$ value**	**Third, by US$ value**
1 'Real Stars'	3,229	11.51	Airplane	Pass Vehicles	Dumpers
2 'Basic Stars'	6,799	24.24	Pass Vehicles	Medicaments	Pass Vehicles
3 'Growing Slowly in a Strongly Growing Market'	652	2.32	Data Process Mach	Parts Boring Machinery	Data Processing Unit
4 'Shrinking in a Strongly Growing Market'	55	0.19	Polystyrene Nesoi	Urea	Turkey Cuts
5 'Growing Strongly in a Slowly Growing Market'	6,434	22.93	Country Specific	Pass Vehicle	Parts Motor Vehicle
6 'Growing Slowly in a Slowly Growing Market'	4,052	14.44	Parts Adp Machines	Parts Of Seats	Books, Brochure
7 'Shrinking in a Slowly Growing Market'	454	1.62	Diamonds Unworked	Pts For Mechanical Appliance	Parts for Radio, Tv, Etc. Nesoi
8 'Growing Strongly in a Shrinking Market'	19	0.07	Coal	Franking Mach	Tower Cranes
9 'Growing Slowly in a Shrinking Market'	109	0.39	Turbojet Parts	Palladium	Aluminium Rect Plates
10 'Real Dogs'	300	1.07	Digital Adp Mac	Adp Mac&Unts	Polyamide
11 'Undetermined'	5,804	20.69	Light Oils	Phones Cellular	Turbines, Steam

Source: Global Trade Atlas data

Agricultural categories are shown in Table 10, where, as indicated from Table 8, a significant portion of the imports are in the 'Undetermined' category. The dominant imports in 'Real Stars' are chicken cuts; there are suggestions that these imports may be associated with a triangulation of Brazilian trade that is creating some controversy in South Africa.

Table 11 shows the linkages between the tariff reductions under TDCA and their relative share of EU agricultural imports during 2011. Referring back to Table 5, which shows the tariff concessions associated with South African agricultural imports into the EU, we can see that the TDCA has been kinder to EU imports into South Africa than the converse of South African imports into the EU. Table 11 shows that 65 percent of these imports into South Africa have been granted tariff concessions of 10 percent or greater, in comparison with a significantly lower 33 percent into the EU from South Africa. Despite endeavours by the earlier South African trade negotiators to protect South Africa's newly liberalized agricultural sector against European protectionism, the casual evidence suggests that has not been the case.

Table 12 extends this tariff preference analysis to present the preferences as measured in percentage points by category.

The major agricultural imports from the EU ranked by 2010/2011 average import value and their associated tariff preferences and our Categories are shown Table 13. Whiskies, the main import, is a 'Basic Star' that enjoys a 15 percentage point tariff advantage, while both soybean oil and wheat are 'new' imports, which have a 10 percentage point and zero tariff advantage, respectively.

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Table 10: South African imports from the European Union for agricultural commodities, 2010/2011

Categories	US$ Million	% Share	Import Product		
TOTAL	**1,592**	**100**	**First, by US$ value**	**Second, by US$ value**	**Third, by US$ value**
1 ‘Real Stars’	159	9.96	Chicken Cuts	Beer	Bread, Pastry etc.
2 ‘Basic Stars’	396	24.88	Whiskies	Meat Of Swine	Cocoa Preps
3 ‘Growing Slowly in a Strongly Growing Market’	91	5.72	Whey	Liqueurs And Cordials	Brandy
4 ‘Shrinking in a Strongly Growing Market’	6	0.38	Turkey Cuts	Vegetables Dried	Natural Gums
5 ‘Growing Strongly in a Slowly Growing Market’	81	5.06	Pet Food	Vegetable Seeds	Casein
6 ‘Growing Slowly in a Slowly Growing Market’	240	15.05	Food Preps Nesoi	Animal Feed	Waters
7 ‘Shrinking in a Slowly Growing Market’	35	2.17	Animal Guts etc.	Malt	Edible Fats & Oil
8 ‘Growing Strongly in a Shrinking Market’		0.00			
9 ‘Growing Slowly in a Shrinking Market’	4	0.25	Pectin Substances	Seeds	
10 ‘Real Dogs’	4	0.22	Vegetable Saps	Flakes, Potatoes	Water, Aerated
11 ‘Undetermined’	565	35.50	Soybean Oil	Wheat	Soybean Oil
Trade Value < US$ 1 Million	13	0.82			

Source: Global Trade Atlas

Table 11: Trade Preference on EU Agricultural Imports into South Africa, 2010/2011

Tariff Preference Categories	% Share	Import Product		
TOTAL	100.00	**First**	**Second**	**Third**
Less than 1%	28.84	Wheat	Meat Of Swine	Chicken Cuts
1% to 9%	6.38	Waters	Beer	Sunflower Seeds
10% to 19%	41.03	Whiskies	Soybean Oil	Soybean Oil
20% to 30%	18.66	Food Preps Nesoi	Pet food	Potatoes, Frozen
Beyond 30%	5.09	Cheese	Whey	Cigarettes

Source: Global Trade Atlas data and SACU Tariff Schedule

Table 12: Average Trade Preference on EU Agricultural Imports into South Africa by category, 2010/2011

Categories	% Share	Tariff Preference		
TOTAL	**100.00**	**Mean**	**Largest**	**Smallest**
1 'Real Stars'	9.96	11.60	0	21
2 'Basic Stars'	24.88	22.67	0	96
3 'Growing Slowly in a Strongly Growing Market'	5.72	16.40	0	96
4 'Shrinking in a Strongly Growing Market'	0.38	5.60	0	25
5 'Growing Strongly in a Slowly Growing Market'	5.06	18.50	0	96
6 'Growing Slowly in a Slowly Growing Market'	15.05	18.61	-15	96
7 'Shrinking in a Slowly Growing Market'	2.23	7.81	0	96
8 'Growing Strongly in a Shrinking Market'	0.00			
9 'Growing Slowly in a Shrinking Market'	0.25	0.00	0	0
10 'Real Dogs'	0.35	10.89	0	96
11 'Undetermined'	36.13	12.83	0	100

Source: Global Trade Atlas for trade data and SACU Tariff Schedule

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Table 13: Agricultural imports from the EU, 2010/2011 average value in US$ and Tariff Preferences

HS line	Description	EU imports	Tariff Preference	Categories
	Total	1591.5		
220830	Whiskies	252	15	2
150790	Soybean Oil	199	10	na
100190	Wheat	95	0	na
210690	Food Preparations Nesoi	77.5	20	6
020329	Meat Of Swine	53	0	2
020714	Chicken Cuts	49	0	1
150710	Soybean Oil	43	10	na
230910	Dog And Cat Food	37.5	0	5
230990	Animal Feed	29.5	20	6
220210	Waters	28	5	6
180690	Cocoa Preparations	27	17	2
200410	Potatoes, Frozen	26	25	
220300	Beer	22.5	5	1
190590	Bread, Pastry, etc	19.5	21	1
230110	Flour Meal Inedible	18.5	0	1
040690	Cheese	16.5	96	2
110720	Malt, Roasted	16	0	1
150910	Olive Oil	15.5	10	2
190110	Food For Infants	15.5	20	na
040410	Whey	14.5	96	3

Source: Global Trade Atlas for trade SACU Tariff Preferences

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Chapter 3

South African agricultural imports and policy space[1]

Ron Sandrey

1. Introduction

With the exception of the 2007 year, South Africa has been a net exporter of agricultural products, although we note that this is exaggerated by the use of FoB values instead of CiF to value imports. During 2011, agricultural exports were $7,227 million with imports at $6,331 million.

The main sources of imports in the 'bigger picture' sense during 2011 were the EU followed by Mercosur and ASEAN, while the main products by HS 6 line were wheat, rice, palm oil, and soybean products. The fastest growing individual source over the last 15 years has been Brazil, followed by China and Thailand, while the fastest growing products at the HS 6 line have been palm oil, chicken cuts, and wheat.

Our assessment of the border tax collected based upon the SACU Tariff Schedule was $309.5 million or 4.89 percent overall.

Examining policy space to increase border taxes, we found, firstly, that some $1,667 million or 26.5 percent of the total was effectively immune from increased tariffs as at least 40 percent, and in many instances 100 percent, of the lines were sourced from EU with TDCA rates or from SADC with its associated zero duty access; and secondly, that $2,203 million or 34.8 percent of the total was associated with Tariff Rate Quota (TRQ) lines where increasing applied tariffs may be complicated.

[1] This is a shortened version of a Working Paper by the same name published by tralac.

Another $863 million (13.6% of imports) were in lines where the applied rates are equal to the bound rates at zero, while a further $72 million (1.14%) were where the applied rates were above zero but still equal to the bound rates.

This left only $1,867 million or 29.5 percent of the imports where there was clear policy space to increase tariffs. However, some $845 million (13.5 % of total imports) were in four lines of animal feeds that are direct inputs into South African domestic animal or poultry raising sectors and as such, increasing tariffs would raise domestic costs. Another $121 million are actually processed fishery products. **Deleting these animal feeds and fishery imports reduces strictly agricultural policy space to $901 or 14.3 percent of the total agricultural imports. The clear-cut policy space is limited.** Notably, some $245 million of these imports are in HS 020714, frozen chickens and chicken cuts from Brazil and the EU, products that are causing consternation in trade policy circles.

Background

South Africa has traditionally been an agricultural exporting country, as displayed in Table 1. This holds true for every year shown except 2007, where there was a trade deficit of 75 million US dollars. Note, however, that this profile of a trade surplus owes its existence in part to the way in which South Africa reports trade statistics, as, unlike most countries, South Africa reports import data as the equivalent of FoB (free on board) values. This means that transport and associated costs are not reported against the imports by South Africa, as is the normal convention, and this consequently underestimates imports against the norm by perhaps as much as 10 percent. To gain a perspective on the balance, the top portion of the table also shows the trade balance as a percentage of agricultural exports, with the most recent 2011 surplus being 12.4 percent of the exports. The table also shows both exports and imports to put the data into perspective, along with the associated trade data for both the EU and SADC partners. Not shown is that in the most recent 2011 year, there was a large surplus with Zimbabwe, Mexico, Mozambique and Angola, and conversely, large deficits with Argentina, Brazil, Thailand, Indonesia, United Sates, and Malaysia.

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Table 1: South Africa's agricultural trade profile, US$ million

	1996	2000	2005	2006	2007	2008	2009	2010	2011
Trade Balance									
World	760	846	1,436	770	-75	688	1,206	1,521	896
% exports	29.5%	37.7%	35.4%	19.9%	-1.8%	12.4%	21.4%	23.6%	12.4%
EU	492	536	1,120	773	935	1,054	730	808	469
SADC	358	287	529	471	336	1,027	934	1,134	1,152
Exports									
World	2,577	2,243	4,057	3,865	4,243	5,535	5,626	6,455	7,227
EU	927	914	1,733	1,526	1,923	2,136	1,916	2,223	2,277
SADC	473	406	697	637	563	1,226	1,129	1,375	1,475
Imports									
World	1,817	1,397	2,620	3,094	4,318	4,847	4,420	4,934	6,331
EU	435	378	613	753	988	1,082	1,186	1,416	1,807
SADC	115	119	168	166	227	199	195	241	323

Source: Global Trade Atlas

The objective for this chapter is, firstly, to examine agricultural imports in detail and then switch to trade policy measures associated with these imports. In particular, this means an examination of the possible 'policy space' that South Africa has to curtail imports through tariff adjustments. The policy space examination will review and update a 2008 paper by Sandrey et al. We note at the outset that while we are fully aware of South Africa's obligations under its SACU commitments and how these in effect mean that South Africa does not have its own tariff schedule (but SACU does), we shall treat the schedule as being South Africa's for simplicity.

The data

Extending the analysis beyond Table 1, this section will look at imports in more detail by both source and composition in recent years. Data is shown for 1996, the first year available, 2000, 2005, and the three most recent years of 2009, 2010 and 2011. In addition, to indicate the growth or otherwise of these imports, a term 'ratio' is introduced where this is the ratio of imports in 2011 over the comparable value in 2000. A ratio higher than the overall increase means that source/HS line is increasing faster than the overall comparator, while conversely, a ratio lower means it is decreasing relative to the comparator. Presenting the data in US millions does not detract from the main purpose of this section or the policy space

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examination, which is to emphasise the changes in these import flows rather than their absolute value in rand.

Table 2 extends Table 1 and shows agricultural imports by source in more detail. The EU remains the main source, followed by the South American regional bloc of Brazil, Argentina, Uruguay and Paraguay (Mercosur), the 10-nation Asean regional bloc, the four BRIC countries of Brazil, Russia, India and China (note that Brazil is listed twice here, as it is in both Mercosur and BRIC), and then the African sequence of, firstly, the whole of Africa, and then the so-called tripartite FTA grouping with its associated sub-regional SADC grouping. A perusal of the Africa data shows that SADC accounts for most of the South African agricultural imports from the entire continent. Argentina tops the rankings for the individual countries, followed by fellow Mercosur Brazil and then Thailand and the United States.

Looking at the ratio we see that since 2000, the EU has gained modestly (a ratio above the overall world total indicates a gain), while both Mercosur and Asean have strongly increased. The Mercosur increase has been fuelled by Brazil, as Argentina has increased modestly, while Brazil is also fuelling the BRICs. China, in the final entry, is also growing strongly. These shifts have been, in part, at the expense of the United States whose imports have declined in percentage share terms.

Table 2: South African agricultural imports from world, $ million and changes 2011/2000

	1996	2000	2005	2009	2010	2011	ratio
World	1,817	1,397	2,620	4,420	4,934	6,331	4.5
EU	435	378	613	1,186	1,416	1,807	4.8
Mercosur	236	204	650	1040	975	1,298	6.4
Asean	232	182	401	901	991	1,145	6.3
BRIC	118	106	534	806	824	1,047	9.9
Africa	190	139	207	256	315	384	2.8
TFTA Members	137	123	184	226	274	358	2.9
SADC	115	119	168	195	241	323	2.7
Argentina	193	161	316	608	589	781	4.9
Brazil	40	32	324	415	362	495	15.5
Thailand	72	62	188	483	463	482	7.8
United States	312	161	209	172	267	428	2.7
China	25	36	97	264	299	313	8.7

Source: Global Trade Atlas

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Table 3 presents the main import HS 6 lines during 2011. Wheat topped the list in 2011, although in earlier years rice had been the main import, and in 2010, both palm oil and soybean cake were above wheat. Not shown is that this top-10 represents 48.8 percent of the total, a share that has risen since the 34.4 percent in 1996. Palm oil, soybean oil, and chicken cuts have been the growth imports as shown by the ratio.

Table 3: South African agricultural import lines from world, $ million and changes 2011/2000

		1996	2000	2005	2009	2010	2011	ratio
HS 6		1,817	1,397	2,620	4,420	4,934	6,331	4.5
100190	Wheat	145	83	176	282	274	600	7.2
100630	Rice	138	128	221	450	411	472	3.7
151190	Palm Oil	52	46	104	232	302	412	9.0
230400	Soybean cake	65	68	119	297	341	360	5.3
150790	Soybean Oil	1	0	79	64	225	296	na
220830	Whiskies	73	52	140	202	262	294	5.7
020714	Chicken Cuts	23	30	114	144	147	245	8.2
210690	Food Preps	32	47	91	115	129	157	3.3
240120	Tobacco	21	20	62	161	142	141	7.1
151211	Sunflower Oil	73	43	20	92	102	111	2.6

Source: Global Trade Atlas

In summary, it can be seen that South African agricultural imports are generally very concentrated by both product and source of many of these major products. This, as we shall see in the next section, has major implications for trade policy options and in particular the policy space available.

2. Tariffs and tariff policy space

Sandrey et al. (2008) discussed how, under trade liberalisation of the 1990s, South African border tariffs were reduced and export subsidies were eliminated through unilateral reductions that went beyond the mandatory requirements negotiated under the Agreement on Agriculture. This was, however, somewhat balanced by the introduction of the WTO tariff rate quota (TRQ) regimes for several product lines. The authors went on to analyse individual agricultural imports to assess whether the policy space exists for an option of increasing agricultural tariffs to afford some protection to domestic producers. The critical parts of this analysis were commitments given to multilateral trading partners through the World Trade

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Organisation (WTO), and regional partners through the Trade and Development Cooperation Agreement (TDCA) with the EU and preferences granted to SADC, along with the space that South Africa had reserved through its WTO Bound rates.

Thus, in a background to the WTO, two aspects of tariff policy are important. One is bound versus applied tariff rates, while the other is the TRQs. On the first issue, bound tariffs are those where South Africa has made a commitment to WTO members that it will not exceed these rates, while the applied tariff is the one that is actually 'applied' or levied at the border. Associated with applied rates are the MFN or most favoured nation rates at which all imports not under some special concession rate enter the country. The applied rate is usually but not always below (and in some instances substantially below) the bound rates, thus giving 'policy space' where the applied rates could be raised to the bound rates. TRQs are special access commitments where a country agrees to imports of a commodity line that has reduced TRQ rates that are below the MFN rate, and in South Africa's case, the TRQ rate is a maximum of 20 percent of the bound rate for the agreed quantity of imports, after which the MFN rate will apply. Complicating TRQs in South Africa's case is the situation where, although technically under TRQ administration, many of the TRQ lines are operating in an environment where the restrictions operate in name only and the applied rate is actually the TRQ rate or below and not the higher bound rate.

To assist in this analysis, Sandrey et al. (2008) selected five different categories of agricultural imports:

- No policy space, as either (i) the applied rates were at or very close to the WTO bound rates or (ii) the combined percentage market share from the preferential sources of the EU and SADC is at least 40 percent;
- Maybe there is some limited space, but the current applied rates were within a maximum of 6.4 percentage points of the bound rates;
- Where there was room to increase the applied rates but these imports are an essential feedstuff for the animal or poultry industries in South Africa;
- Where there was room to increase the applied rates but this product is a basic food in South Africa and other analyses has shown that increasing tariffs hurts the poor and generates a welfare loss to South Africa (wheat); and

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- Where the applied tariffs could be raised, as there clearly is policy space.

In summary, Sandrey et al. found that policy space available to South African agriculture was limited. Some 14.1 percent of the 2005 imports were 'locked' by the WTO bound rates, with an additional 7.5 percent almost at those bound rates. Another 22.9 percent was effectively 'locked' with at least 50 percent sourced from the EU/SADC, combined with an additional 15.2 percent 'almost locked' with at least 40 percent of the imports from these same destinations. This gave a total of 59.7 percent that was, for all practical purposes, locked into the current tariff policy regime.

Of the remaining imports, another 14.6 percent constituted animal feed inputs. Any increase in these tariffs would directly pass a cost increase on to South African poultry and meat producers, and ultimately on consumers. Imports of wheat (6.7% of the total) are also sensitive. While there was policy space to increase the wheat tariff, South Africa is a net importer of this staple food. This left a grand total of 19.0 percent of all imports where at least some policy space is available. Even here, most of these imports are subject to WTO TRQ obligations and thus not totally under the control of South African trade policy authorities.

2.1 The update on policy space

This section will move on six years and re-examine the policy space issue based upon 2011 agricultural imports. We have taken a slightly different approach, so the final percentage shares of each of the modified categories are not directly comparable. The issue of increasing agricultural tariffs needs to be put into perspective. In 2011, South Africa imported agricultural products worth $6,331 million. Based on the Tariff Schedule, these imports attracted $309.5 million in duties, with all but $6,45 million of this from non-EU or SADC imports. This gives an overall tariff rate of 4.89 percent. By value, most of the duties were collected on palm oil ($40.9m), chicken cuts (HS 020714 - $23.1m), other food preparations ($17.8m), sunflower seeds ($11.1 m), and two lines of tobacco with $10.64 and $9.68 million, respectively. As we will show, there are limited opportunities to increase these tariffs, so increasing government revenues cannot realistically be considered a motive for such a move. This leaves purely protectionist motives and a reversion from South Africa's liberalisation moves of the immediate post-Apartheid period. Let us now examine current policy space.

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2.1.1 'Preferential trade plus TRQ constraints'

There are two issues to examine here: The first is the preferential imports from the EU under the TDCA and the imports from SADC under the SADC agreement, while the second is the issue of TRQs. There are overlaps between these two issues, as (a) many of the preferential imports are in TRQ lines, (b) similarly, many of the TRQs are in preferential access EU/SADC preferential trade lines, and (c) in some TRQ lines there are no access preferences available to EU imports. In addition, as indicated above, the TRQ regime is a complex one, as in many of the lines the TRQ regime is not rigidly enforced, and our analysis of trade at the HS 6 digit line level complicates a thorough analysis. Therefore, to specially assess the policy space in these TRQ lines requires a more detailed analysis, but suffice to say that as a generalisation we can examine where trade seems to be operating in TRQ delineated lines and leave a more detailed analysis for later.

Firstly, the EU and SADC imports along with the TRQ imports are shown in Table 4. Line two shows that of the global imports worth $6,331 million in 2011, some $1,807 or 28.5 percent were from the EU. Another $323 million were from SADC, giving a combined $2,130 or 33.6 percent from the EU and SADC together, while $2,203 million or 34.8 percent were in lines associated with TRQs. Lines three and four show, firstly in line three, the values of the imports where the combined EU plus SADC share was at least 40 percent, and then in line four, the percentage of the imports from that source that were in lines where the combined share was at least 40 percent. Thus, some $1,459 or 80.7 percent of the imports from the EU were in lines where the EU and SADC combined imports dominated, and a combined EU/SADC figure of $1,677 million or 78.7 percent of the EU/SADC total were similarly in the dominating lines. Of these, some 33.5 percent were in TRQ associated HS 6 lines.

Line five in Table 4 shows that, overall, some 26.5 percent of the total global imports were in EU/SADC dominated lines and therefore cannot be realistically considered for tariff increases. Lines six and seven provide more details on the TRQ lines: Some 36 percent of imports from the EU ($650m) were in lines associated with TRQs, while the similar data for SADC imports shows $207 million or 64.1 percent of these SADC imports.

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Table 4: South African agricultural imports from EU and SADC plus TRQ lines

Category	EU	SADC	EU+SADC	TRQ
Total US$ million (World $6,331m)	1,807	323	2,130	2,203
Relative % share world total	28.50%	5.10%	33.60%	34.80%
EU +SADC >40% line US$ m	1,459	218	1,677	739
EU+SADC >40% line (%)	80.7%	67.5%	78.7%	33.5%
EU+SADC >40% line % World	23.0%	3.4%	26.5%	11.7%
US$ m Total in TRQ lines	650	207	857	
% Total in TRQ lines	36.0%	64.1%	40.2%	

Source: Author calculations

Table 5: Main imports where the combined EU/SADC share is above 40 percent

$1,677 mi or 26.5% total		World $m	% Share	Tariffs %		
HS line	Definition	6,331	EU SADC	Bound	MFN	TRQs
220830	Whiskies	294	90.5%	67.0	15	Yes
150790	Soybean Oil	296	80.1%	49.0	10	
210690	Food Preparations	157	56.1%	99.0	20	Yes
520100	Cotton	102	86.3%	60.0	10	Yes
240120	Tobacco	141	49.6%	44.0	15	Yes
150710	Soybean Oil	74	83.8%	81.0	10	Yes
020329	Meat Of Swine	76	77.6%	37.0	0	
230910	Pet Food	48	87.5%	37.0	0	
230990	Animal Feed	63	55.6%	37.0	20	
180690	Cocoa Preps	42	78.6%	21.0	17	
090240	Black Tea	41	80.5%	170.0	100	
220210	Waters	37	70.3%	0.0	5	
220300	Beer	26	96.2%	8.5	5	
100590	Maize	23	100.0%	50.0	0	
200490	Frozen vegetables	21	100.0%		25	

Source: Global Trade Atlas data, Author calculations

Table 6 moves on to examine the main imports associated with TRQs, where the main import is wheat. Here, the bound rates are 72 percent and therefore the theoretical TRQ rate would be 14.4 percent, but as the MFN applied rate is zero, it is safe to assume that wheat is not coming

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in under the TRQ rate. It could, in theory, be raised significantly from the current zero rate, but as Sandrey et al. (2008) outline, PROVIDE (2005) analysed the welfare implications of such an increase in the wheat tariff, tracing the effects through the value chain from farmers to consumers, and showed that most households would suffer a loss in welfare as final bread and bakery product prices increased. The next three products show that a significant share of the market is held by EU/SADC and, although not shown, these imports are duty-free. Indeed, only the final entry of frozen beef attracts EU duties at the same level of the 40 percent MFN rate.

Table 6: Main imports in tariff lines associated with TRQs

$2,203 m or 34.8% of total		World imp $ m	% Share	Tariffs %	
HS code	Description	6,331	EU SADC	Bound	MFN
100190	Wheat	600	11.8%	72.0	0
220830	Whiskies	294	90.5%	67.0	15
210690	Food Preparations	157	56.1%	99.0	20
240120	Tobacco	141	49.6%	44.0	15
151211	Sunflower Oil	111	0.0%	61.0	10
520100	Cotton	102	86.3%	60.0	10
020712	Meat Chickens	89	7.9%	82.0	0
150710	Soybean Oil	74	83.8%	81.0	10
090111	Coffee	71	9.9%	119.0	0
170111	Cane Sugar	52	1.9%	105.0	0
020727	Turkey Cuts	36	8.3%		0
100300	Barley	31	0.0%	41.0	0
020230	Beef Frozen	23	21.7%	160.0	40

2.1.2 Bound rate constraints

The next category of 'untouchables' are where the bound rates are zero and accordingly the same as the MFN rate. Imports during 2011 were $863 million (13.6 percent of imports), and are shown in Table 7. Some 55 percent of this category is in rice imports, and significantly, no imports are from either the EU or SADC.

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Table 7: Main imports where the bound rates are zero

$863 mill or 13.6% total		World imp $ m	% Share	Tariffs %	
HS line	Description	6,331	EU SADC	Bound	MFN
100630	Rice	472	0.0%	0.0	0
050400	Animal Guts	76	11.8%	0.0	0
350510	Dextrin etc.	36	27.8%	0.0	0
010110	Purebred Animal	25	28.0%	0.0	0
180500	Cocoa Powder	25	24.0%	0.0	0

Following on from the zero bound rates there is another category comprising of those lines where the bound rates are equal to the MFN rates. Thirteen million US dollars of these imports are from the EU and the TDCA rates are all zero. Half of the imports are sugar confectionary and another quarter is cheese, both with around one quarter of the imports from the EU at preferential zero duties.

Table 8: Main imports where the bound rates equal MFN rates

$72 mill or 1.14% total		World imp $ m	% Share	Tariffs %	
HS line	Description	6,331	EU SADC	Bound	MFN
170490	Sugar Confectionary	37	27.0%	37.0	37
040630	Cheese	14	28.6%	95.0	95

2.1.3 The remaining trade

Following on from the above examination of (a) where the combined EU and SADC import share is at least 40 percent, (b) where there is a TRQ associated with the HS 6 line (and recognising the complexities associated with this generalisation), and (c) where the bound rates are either zero or equal to the MFN rates, we are left with imports of **$1,867 million or 29.5 percent of the total** in 2011. Only $158 million (8.7% of EU imports) are remaining, as are an even lower 1.9 percent ($6 million) of the SADC imports. In this analysis we have ignored the SACU/Mercosur agreement, but note that some $607 or 46.8 percent of the Mercosur total are included here.

The main imports in these HS lines are shown in Table 9. However, we note that the top three imports of palm oil, soybean oilcake, and palm kernel are all animal feeds that are significant

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imports into the South African domestic animal and poultry sectors. Thus, increasing tariff rates on these inputs directly raises costs in South African agriculture with little or no offset of protecting the domestic production of these inputs. When $18 million of sunflower seed oilcake are added to these three imports, we find that their total is $845 million or some 13.5 percent of total imports.

In reality, accepting the feed input logic, there is some **$1,022 of total imports where there is a clear case for raising tariffs. This is 16.1 percent of the total**. Note especially that Table 20 contains imports of HS 020714 – chicken cuts – with 37.1 percent sourced from the EU in 2011. Imports of these products from Brazil are causing consternation in agricultural trade policy circles. Note also that there are imports of $121 million (1.9%) in what are actually fisheries products under the WTO definitions but have been reported here as they are processed foodstuffs. **Deleting these imports reduces strictly agricultural policy space to $1,901 or 14.3 percent of the total agricultural imports. The clear-cut policy space is limited.**

Table 9: Imports where there is policy space between bounds and MFN

$1,397 m or 22.1% total		**World imp $ m**	**% Share**	**Tariffs %**	
HS line	Description	6,331	EU SADC	Bound	MFN
151190	Palm Oil	412	0.7%	81.0	10
230400	Soybean Oilcake	360	0.0%	33.0	0
151329	Palm Kernel	55	0.0%	81.0	0
170199	Sugar	47	0.0%	105.0	0
110710	Malt	45	20.0%	99.0	0
200979	Apple Juice	40	0.0%	26.0	0
HS Lines that are Unbound (including processed Fisheries products in Chapter 16)					
$470 m or 7.4% total					
HS line	Description				
160413	Sardines	61	1.6%		0
160414	Tunas	31	0.0%		25
160520	Shrimps	10	0.0%		0
	all prepared fish in HS 16	121			
020714	Chicken Cuts	245	37.1%		15
071333	Kidney Beans	62	0.0%		10
020629	Beef Offal	16	0.0%		0

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Reference

Sandrey, R., Karaan, M. and Vink, N. 2008. Is there policy space to protect South African agriculture? *South African Journal of Economics,* 76:1 March: 89-103.

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Chapter 4

How can Aid for Trade facilitate green growth and sustainable development in southern and eastern Africa?

Willemien Viljoen

1. Introduction

While climate change can be considered a universal environmental problem, for developing and least developed countries, it represents a critical issue. The implications of climate change for African countries are highly distinctive. Among African countries are some of the economies most vulnerable to the effects of climate change due to their reliance on agriculture as a major source of exports, growth and development, as well as their low adaptation capacities. The lack of energy security and self-sustainability is also problematic for sustainable development, while the potential of renewable energy generation for economic growth and development is yet to be recognised. It is projected that by 2020, 75 million to 250 million people in Africa will be exposed to increased water stress, and yields from rain-fed agriculture could decrease by up to 50%, posing a severe challenge for food security in the region (UNEP and WTO, 2009).

Although climate change is expected to affect Africa more severely than any other region, past industrialisation and development in most African countries have made limited contributions to the accumulated stock of carbon with only a small portion of current economic activity contributing to global emissions. For most regions, the most important issue pertaining to climate change is how to limit or reduce greenhouse gas emissions due to the contribution of their economic activity to the stock of carbon and global emissions. However, for African countries, the focus should rather be on adapting to changes in current patterns of production, trade, growth and development. Although there are some mitigation

actions African countries can take, the most important aspect of mitigation for Africa is the implication of those mitigation strategies chosen by the rest of the world.

In an effort to adapt to, and mitigate, the potential negative effects of present and future climate change, developing countries need to build a green economy which largely depends on technological innovation and the dissemination of low-carbon technologies, facilitated by international trade and investment. A green economy can take advantage of new growth trajectories that can be more responsive to poverty alleviation and economic diversification. Refocusing policies and investment to target specific economic sectors, including renewable energy, agriculture, forestry and tourism can be conducive to inclusive growth and employment, while making a significant contribution to achieving the Millennium Development Goals. This includes attracting investment to further the utilisation and development of Africa's abundant renewable energy resources. Currently, only approximately 7% of Africa's known hydro potential is being utilised, while an even smaller proportion of the continent's potential for wind and solar energy has been developed (Kibbaj and Katseli, 2004). Green growth and development can enhance the value the poor derive from agriculture, fisheries and forestry; reduce the vulnerability of the poor to the impacts of climate change; drive new innovative technologies; and generate economic benefits by opening up new export markets.

Trade plays an important role in the transition to a green economy in linking production and consumption. Several African countries, including Uganda, South Africa and Egypt, have showed competitive capabilities in certain green economy sectors, such as sustainable agriculture, forestry, bio-energy, and environmental goods and services. Creating these capabilities can create a number of production and development opportunities to satisfy growing national, regional, and international demand for 'green' goods and services. Accelerating and strengthening regional integration efforts can enable African countries to create larger markets for intra-African trade in green goods and services and provide incentives for investment in domestic and regional production, while directing trade in clean products and new technologies. However, increased market access opportunities alone are not sufficient for African countries to gain a larger market share in global trade and the world market. What is required is additional financial and technical assistance through mechanisms like the Aid for Trade initiative. Aid for Trade can increase Africa's participation in international trade by strengthening trade-related infrastructure and supply-side capacities;

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promoting the development of productive capacities and capabilities in green sectors; and supporting more sustainable production processes in Africa.

The focus of this chapter is to determine the manner in which Aid for Trade projects and programmes can assist countries in southern and eastern Africa to mitigate and adapt to the impact of climate change in moving to a green economy by focusing on green growth and sustainable development. Firstly, a brief overview of Africa's climate change vulnerabilities on the regional and sectoral level is provided to establish the urgent necessity for a transition to a green economy. Due to their critical importance for economic growth, development and trade in Africa, the sectors focused on are agriculture, fisheries and aquaculture, and tourism. Secondly, the chapter focuses on the important contribution of a green economy in generating economic and environmental benefits for African economies. Thirdly, the concept and categories of Aid for Trade are outlined, and the flow of Aid for Trade commitments and disbursements to African countries is analysed. Fourthly, the links between Aid for Trade initiatives and the green economy are established to determine the role of current and future Aid for Trade programmes and projects in assisting African countries to refocus policies and strategies on green growth and sustainable development. Although Aid for Trade has been utilised to facilitate green development projects in many African countries, these have been negligible when compared to total Aid for Trade flows. Lastly, the chapter highlights some of the challenges faced by countries in southern and eastern Africa in moving to a green economy.

2. Climate change vulnerabilities

African countries are faced with a variety of environmental challenges which can hamper the economic and industrial development of these economies. Not only are agriculture, tourism and fisheries among the largest sources of employment, economic growth and exports for many countries on the African continent, but they are also the sectors which are most vulnerable to climate change and other environmental risks. One of the main reasons for Africa's vulnerability to the effects of climate change and climate variability is the 'low adaptive capacity' coupled with developmental challenges in the majority of African countries. Adaptation in most African countries is hampered by low Gross Domestic Product (GDP) per capita, poverty, weak institutions, low levels of education and limited access to capital, including markets, infrastructure, and technology (UNFCCC, 2007).

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The extent to which climate change can impact on global, regional, national, and sectoral production and trade depends mainly on the increase in average global temperatures. There is a correlation between the increase in average global temperatures and the negative impacts on agriculture, forestry, fisheries, and tourism. This shows that mitigation is needed to avoid the negative impact of such temperature increases, while adaptation is necessary to compensate for those impacts associated with higher average global temperatures which are 'unavoidable'.

The projected regional impacts of climate change show that African countries are among the countries most vulnerable to the impact of climate change (UNEP and WTO, 2009).

- It is expected that temperatures throughout the continent in all seasons will be higher than the global average, with an annual decrease in rainfall in southern Africa and an increase in eastern Africa.
- It is projected that between 75 and 250 million people will be affected by water shortages by 2020, while the yields from rain-fed agriculture are expected to be reduced by up to 50% in some African countries by the same year.
- It is also projected that there will be an increase of between 5% and 8% in arid and semi-arid land in Africa by 2080.
- An increase in the frequency and intensity of extreme weather events is expected.
- Due to higher water temperatures, it is expected that there will be a dramatic decrease in fish stocks.
- Higher expected temperatures and increased water stress can contribute to deforestation and degradation of grasslands.
- It is also estimated that the coastal infrastructure in approximately 30% of African countries (including cities in Egypt and South Africa) is at risk due to the rise in sea levels.

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2.1 Regional climate change vulnerabilities

2.1.1 East Africa

The east African region consists of primarily arid and semi-arid land with increasing temperatures, while the frequency, intensity, and severity of droughts have been increasing over the last three decades. Future projections show that there will be an increase in the mean temperature in the region, while it is expected that the overall average annual rainfall in the region will increase. However, the overall increase in annual rainfall can be separated into changes expected in the southern and northern parts of the region. According to projections (Oliver et al., 2010), the southern parts of east Africa will experience reduced rainfall, while the northern parts can expect an increase. These estimates predict that:

- in Ethiopia, temperatures will increase by between 1.1 and 3.1 degrees Celsius by 2060;
- Kenya will experience an increase in temperature of between 1 and 2.8 degrees Celsius by 2060 with an increase in mean rainfall by up to 48% by 2090;
- the mean annual temperature in Tanzania will increase by between 2 and 4 degrees Celsius by 2060 and there will be a reduction of between 6% and 9% in the annual flow of the Pangani River in the northern parts of Tanzania; and
- Uganda will experience an increase in annual rainfall coupled with an increase in the proportion of rain falling during the raining season.

The changes in temperatures and rainfall patterns can have various effects on crop yields and productivity, availability of surface water, land degradation, and human, plant and animal health.

- Changes in rainfall and rainfall variability hamper crop production planning and management with an increased risk of crop damage.
- Increased temperatures lead to increased evapo-transpiration with the result of fewer surface water resources.
- More frequent and intense droughts can lead to desertification and increased land degradation.

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- Increased temperatures, rainfall, and extreme weather events can directly contribute to an increase in infectious diseases which can be detrimental to animal, plant, and human life.

2.1.2 Southern Africa

Southern Africa is seen as one of the regions most vulnerable to the impact of climate change due to low adaptive capacity along with a high dependence on rain-fed agriculture. Currently, the region is semi-arid with high rainfall variability and frequent droughts and floods. Climate change projections show that temperatures are expected to increase by between 0.3 and 3.6 degrees Celsius by 2060; a decrease in rainfall will be experienced over most of the region and there will be an increase in the mean, minimum, and maximum temperatures with an overall increase in the number of hot days and heat waves (Davis, 2011).

The specific sectoral impacts associated with an overall increase in temperatures and decrease in rainfall in the region include the following:

- a decrease in crop productivity, crop yields, soil nutrients, livestock productivity, water quality, and water availability;
- an increase in the incidence of floods, water pollution, pests and pathogens in the agricultural sector and animal diseases;
- an increased need for infrastructure for the proper irrigation of crops;
- changes in biodiversity and vegetation, adversely affecting trade derived from crop and livestock and land use;
- nature-based tourism will be at risk due to changes in the temperature and rainfall patterns which have an influence on the distribution of animal and plant species; for example, in South Africa, an expected loss of between 51% and 61% of the indigenous plant species, fynbos, by 2050; and
- flooding in heavily-populated low-lying areas, including the coastal areas in Tanzania, Mozambique, South Africa, Namibia, Angola, Mauritius, and the Seychelles due to the rise in sea levels (Davis, 2011).

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2.2 Sectoral climate change vulnerabilities

2.2.1 Agriculture

Agriculture is one of the most vulnerable sectors, both directly through the increase in temperatures and extreme climatic events, and indirectly through changes in evaporation and precipitation. Agricultural production relies mainly on rainfall irrigation and will be put under severe stress in many African countries as a result of climate change. This is especially the case for subsistence farmers and agricultural production in Sub-Saharan Africa. A vast amount of agricultural land will be lost due to shorter growing seasons and lower agricultural yields. It is expected that there will be a general decline in all subsistence crops, including sorghum in Ethiopia and Zambia.

The main impact of global warming on agricultural production can be summarised as follows:

- Higher temperatures affect plant, animal and farmers' health, encourage pests and reduce water supply, increasing the risk of growing aridity and land degradation.
- Modified precipitation patterns will enhance water scarcity and associated drought stress for crops, and alter irrigation water supplies. They also reduce predictability for farmers' planning.
- The enhanced frequency of weather extremes may significantly influence both crop and livestock production. It may also considerably impact or destroy physical infrastructure for agriculture.
- The rise in sea levels is likely to influence trade infrastructure for agriculture, may inundate producing areas, and alter aquaculture production conditions.

Global warming has significant consequences for agricultural production, trade, and the food security of developing countries. Figure 1 depicts the projected impact of climate change on agricultural productivity by 2080 (Hoffmann, 2011).

Figure 1 indicates that the majority of African countries will experience a loss in agricultural productivity of between 5% and 25% by 2080. Countries expected to experience a loss in agricultural productivity of more than 25% include Namibia, Botswana, Sudan and Zambia, while South Africa and Ethiopia can expect a loss in agricultural productivity of between 15% and 25% by 2080. It is also projected that Angola, Mozambique, and Tanzania will lose

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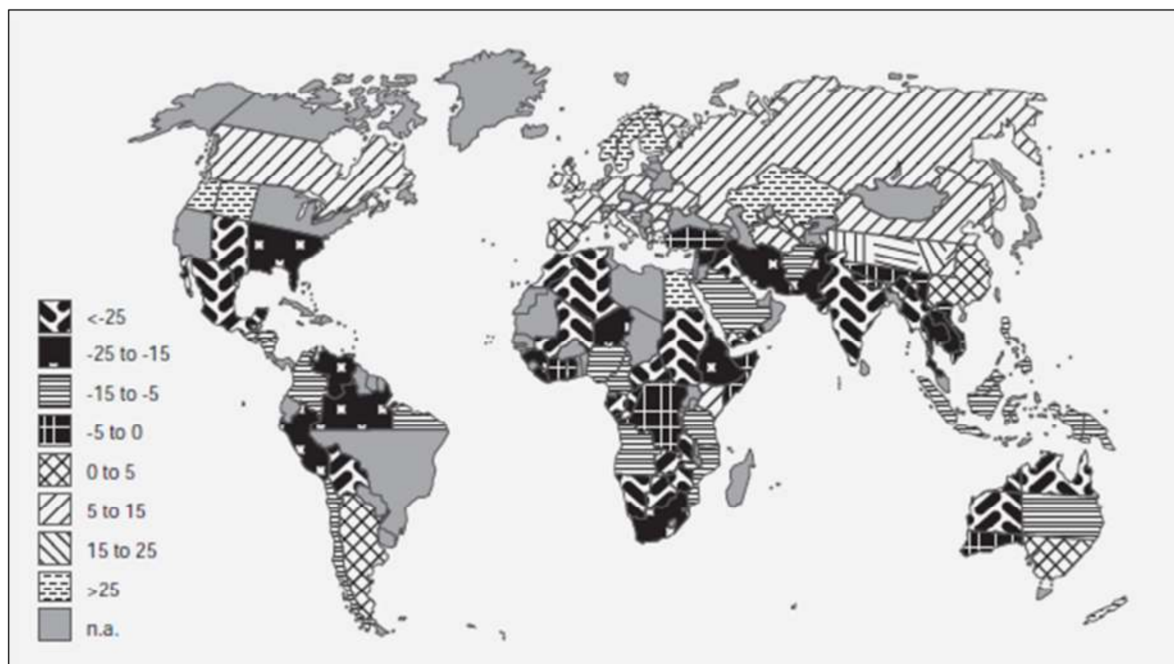
between 5% and 15% of agriculture productivity by the same year. Some of the only African countries in which an increase in agricultural productivity is expected by 2080 are Kenya (between 5% and 15%) and Egypt (more than 25%). This draws a bleak picture for ensuring future food security in the African region.

Figure 1: Projected change in agricultural productivity by 2080 due to climate change



Source: Hoffmann (2011)

2.2.2 Fisheries and aquaculture

The fishing industry is a crucial sector in supporting national, regional, and international trade in most African countries and is one of the leading export commodities in Africa. Dependence on fish proteins, a lack of alternative sources of food, employment and undiversified economies make African countries socially, economically, and ecologically vulnerable to the effects of climate change on fisheries and aquaculture. Countries in eastern and southern Africa which have been identified as among the countries most vulnerable to the impacts of climate change on fisheries include Angola, the Democratic Republic of Congo (DRC), Mozambique, Zambia, Malawi, Uganda, and Zimbabwe (Williams and Rota, 2010).

Small-scale fisheries and aquaculture are among the sectors that are most vulnerable to the impacts of climate change. These include a decline in productivity, migration of species and even localised extinction, and increased risks of more extreme climatic events. In general, climate change will have a negative effect on fisheries in low-lying areas. While fish farmers

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may benefit from increased temperatures and rising sea-levels which increase the areas available for aquaculture, these benefits may be negated by reduced water quality and availability, and increased incidence of diseases. Climate change is projected to impact fisheries and aquaculture in three main areas (Williams and Rota, 2010):

- Inland fisheries due to changes in rainfall and rainfall patterns and an overall increase in temperatures;
- Reef fisheries in east Africa due to increased coral reef damage; and
- Coastal infrastructure and ecosystem devastation in low-lying coastal areas due to the rise in sea levels.

2.2.3 Tourism

Tourism is one of Africa's fastest growing industries. Almost all forms of tourism in Africa are based on or associated with natural resources, including fauna, flora and biodiversity. However, due to the close connection between tourism, the environment and climate itself, tourism is a highly climate-sensitive economic sector, similar to agriculture and energy. There are four broad categories of climate change effects that are expected to impact the tourism sector and global tourism destinations (Simpson et al., 2008):

- Direct climatic effects, including increased temperatures and the frequency or magnitude of extreme climatic events;
- Indirect environmental changes, including changes in water availability, loss of biodiversity, increased natural hazards, damage to infrastructure, and increased incidence of diseases;
- Mitigation policies, including national and international policies to curb greenhouse gas emissions which can, for instance, increase transport costs that can change the travel patterns of tourists; and
- Indirect societal changes, including an increased risk to future economic growth and political stability that can reduce discretionary wealth available for tourism activities and have negative tourism-demand repercussions for countries identified as climate change security hotspots.

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Climate change will have a severe impact on the existing tourism sector and industries in all countries in southern and eastern Africa. Temperature and rainfall changes will, for instance, have an adverse effect on tourism in Tanzania due to the melting ice cap of Kilimanjaro, and on the Victoria Waterfalls in Zambia due to decreased water availability (Davis, 2011). The tourism industry in South Africa will also be adversely affected due to a range of climate-change impacts, including a change in biodiversity in the National Parks, extreme climatic events on the KwaZulu-Natal coastline, and changes in crop growth in the Winelands region (Golder Associates, 2012).

3. The green economy

Although there is no universally accepted definition of a green economy, one can broadly describe the concept as a set of economic activities that result in improved human well-being and social equity, while significantly reducing environmental risks and ecological scarcities. The term 'green economy' highlights the economic dimensions of sustainability, or stated differently, shows that sustainability relies on improving the economy. The notion of a green economy has more than just an environmental facet, and can rather be seen as an enabling component to reach the overarching goal of sustainable development. As a subset of sustainable development, green growth focuses on fostering innovation, investment, and competition in activities that can give rise to new sources of economic growth. It requires synergy between economic growth and environmental stewardship.

Converting to a green economy means moving away from the systems that generated and contributed to climate, food, and economic crises towards a system of production, distribution, and consumption that proactively addresses and prevents these crises. A green economy requires structural change in the economy, which involves a technological revolution which will impact production structures and consumption patterns. This has two vital implications for any country shifting to a green economy: the first pertains to the dissemination of new technologies while the second to the domestic policy responses by developing countries. New technologies are likely to originate from developed and emerging market economies, which raise issues regarding how these technologies will be disseminated to developing and least developed countries. Developing countries need to implement active developmental policies which can drive innovation and transformation in their economies to new dynamic green activities. This will include production sector policies. Additionally,

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changes in trade patterns associated with the dissemination of new technologies play a vital role in the structural change needed for such transitions.

In a green economy, income and employment growth is predominantly driven by public and private investment to reduce carbon emissions and pollution, enhance energy and resource efficiency, and prevent the loss of biodiversity and ecosystem services. African countries are highly dependent on natural resources as a source of economic activity and ensuring the livelihoods for people who depend on soil, forest, fisheries, and other sources of nature. Natural resources sustain most of the tourism activities and associated services in Africa, which are becoming more important in terms of external trade and employment creation. However, the potential for future economic growth and development is at risk due to environmental degradation, climate change, desertification and other environmental risks. A green economy can offer an opportunity to mobilise resources for a low-emission, climate resilient development path. By shifting African economies towards green economies, it is possible to enhance current economic growth and human development by creating the opportunity for green growth and employment without exposing future generations to significant environmental risks. A green economy can generate both environmental and economic benefits. It can enable countries to address the global challenge of climate change, loss of biodiversity and desertification, while creating the opportunity for new export markets (for example, in bio-fuels and renewable energy technology) and even assisting countries to maintain and improve existing market shares. From a development perspective, the shift to a green economy can increase the value the poor can derive from agricultural, fisheries and forest activities. It can also reduce the vulnerability of the poor to the impact of climate change and create opportunities for innovation. A green economy can also increase the opportunities for investment; provide energy to rural communities; increase the sustainability of agriculture; enhance ecotourism opportunities; lead to sustainable urbanisation; and enhance those services sectors needed to support these activities. These changes require policies and investment to sustain and enhance natural resources, while the economic system needs to develop to enable African countries to improve its terms of trade and increase productivity.

Limited access to energy is one of the greatest challenges faced by African countries in achieving their Millennium Development Goals (MDGs). Sustainable and reliable energy sources are one of the key contributions a green economy can make to African economies.

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The transition to a green economy, associated with an increased demand for renewable energy technologies, can stimulate innovation and economies of scale, which can attract private-sector investments and small-scale business and household investments. Between 2009 and 2010, African countries showed the highest percentage increase in global investments in renewable energy of all developing countries. This included investments in solar thermal and wind power in Egypt, and investments in wind, geothermal, small-scale hydro and biofuel projects in Kenya. However, on the global scale, African projects attract a negligible share of investments in green economy projects and programmes.

The transition to a green economy requires new public and private sector financial resources and action in three key areas: (a) capitalising on natural resources in a sustainable manner; (b) green industrialisation; and (c) enabling policies and institutions. The level of industrialisation in most African countries creates the opportunity for industrial development which is supported by clean, efficient, and resource-saving technologies. These technologies can increase energy and resource efficiency in the utilisation of natural resources and thereby avoid wasteful consumption and undue economic costs and risks of resource depletion. The required enabling environment associated with a shift to a green economy creates an important role for the government through public investment, fiscal policies, regulations, government procurement, and the creation of markets.

However, an important question remains: How can African countries shift their current economic activities to those associated with a green economy without further burdening the current generation with high transformation costs?

4. Aid for trade

Aid for Trade initiatives represent development assistance programmes offered by developed countries to support the development of basic economic infrastructure and address the need for developing and least-developed countries to expand trade and participate more effectively in the global trading system in order to enhance economic growth and development. The aim of Aid for Trade is to enhance the capacity and capabilities of suppliers in developing countries to improve their competitiveness in international markets, enabling developing countries to reach their developmental goals by harnessing the potential of trade as an engine for economic growth (Ancharaz and Riad, 2010).

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Aid for Trade supports trade liberalisation through technical assistance to improve the capacity of developing countries to export through the utilisation of efficient infrastructure and institutions. By attempting to ensure that there is no reduction in supply and infrastructure constraints, Aid for Trade focuses on the positive impact international trade-related reforms and improved market access conditions can have on economic development and poverty alleviation.

Traditionally, Aid for Trade initiatives are undertaken in the following six categories:

- Trade policy and regulation, including assistance with the implementation of trade agreements and institutions required to comply with rules and standards;
- Trade development, such as trade finance, business facilitation, and trade/investment promotion;
- Trade-related infrastructure, which includes all forms of physical infrastructure like roads, transport and storage, communications, and energy but excludes water supply and sanitation;
- Building productive capacity, entailing any activity which contributes to improving a country's ability to produce goods and services;
- Trade-related adjustment, that is, measures that mitigate the economic cost of trade liberalisation; and
- Other trade-related needs.

Using the QWIDS (Query Wizard for International Development Statistics) database, the commitments and disbursements of Aid for Trade to African countries from 2002 can be determined. The database provides data on the flow of aid to more than 150 developing countries and territories, and includes project-level data which is based on aid flows reported to the Creditor Reporting system (CRS). The CRS is based on aid flows reported by members of the Development Assistance Committee (DAC) and other providers and allows the tracking of aid commitments and disbursements in US dollars (million). The CRS does not provide data that is an exact match to the different Aid for Trade categories, but an approximation is made under the following headings:

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- Technical assistance for trade policy and regulations, which includes trade policy and administrative management, trade facilitation, regional trade agreements, multilateral trade negotiations, and trade education and training;
- Economic infrastructure, providing an aid commitment proxy for trade-related infrastructure and including data on aid flows for communications, energy, and transport and storage;
- Productive capacity building, including trade development activities in the sectors of banking services, agriculture, tourism and industry;
- Trade-related adjustments, including contributions used to assist countries with the implementation of trade reforms and adjustments to trade policy measures implemented by other countries.

Although these headings are not a complete match to the Aid for Trade categories, the CRS provides sufficient overlap in the categories to indicate the Aid for Trade commitments and disbursements made to developing countries, in general, and to African countries in particular. Aid flows are divided into two main sources in the database: official development assistance (ODA) and other official flows (OOF). ODA comprises loans, grants, equity investments, and grant-like flows to countries and territories on the DAC list and multilateral development institutions. The DAC list contains those middle- to low-income (based on the Gross National Income (GNI) per capita as defined by the World Bank) and least developed (as defined by the United Nations) countries and territories which qualify to receive development assistance. OOF comprise aid flows which are official sector transactions, but do not meet the criteria of ODA.

The QWIDS data shows that there was a dramatic increase (21% compound growth rate) in the Aid for Trade commitments to African countries between 2002 and 2010, from US$5.8 billion in 2002 to US$26.9 billion in 2010. The majority of the commitments consist of grants, followed by loans and other official flows. Equity investments and grant-like flow commitments account for a very small percentage of flow commitments over the time period.

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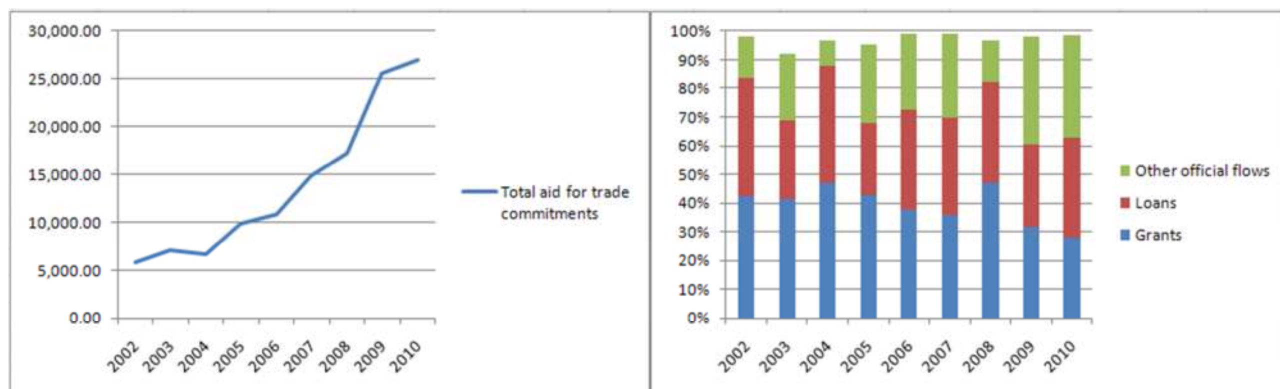
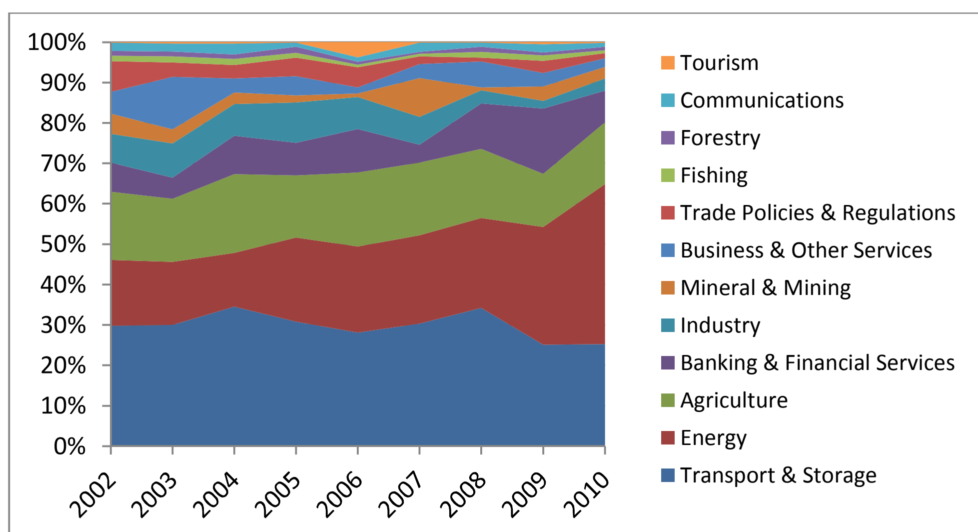
Figure 2: Aid for trade commitments to all African countries



Source: QWIDS (2012); tralac calculations

The broad category-specific flow commitments (Figure 3) show that most Aid for Trade commitments over the time period were for transport and storage, energy, and agriculture. However, between 2002 and 2010, the year-over-year growth rate shows that there was a decrease in the contribution of transport and storage (2%) and agriculture (1%) as a percentage of total flow commitments. The categories with the most significant decrease in contributions as a percentage of total flow commitments were trade policy and regulations (20%), business and other services (11%), industry (10%), and communications (9%). The categories which have become more important as contributors to the total Aid for Trade commitment flows are energy (12%), tourism (2%), and banking and financial services (1%).

Figure 3: Category-specific flow commitments



Source: QWIDS (2012); tralac calculations

The table below shows the Aid for Trade commitments for economic infrastructure, productive capacity building, and trade policy and regulations for specific African countries

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and regional configurations between 2002 and 2010 in US dollars (million). The data shows that Aid for Trade commitments in the East African Community (EAC) (61%), the Southern African Development Community (SADC) (57%), and the Common Market for Eastern and Southern Africa (COMESA) (56%) have mostly been made for the improvement of economic infrastructure, with the least number of commitments made in the area of trade policy and regulations (2% of the total Aid for Trade commitments to all EAC, SADC and COMESA countries).

Table 1: Aid for Trade commitments for specific African countries

	Economic Infrastructure (2002-2010)	Building productive capacity (2000-2010)	Trade policy & regulations (2002-2010)
EAC (5)	10 665.86	6 506.70	208.26
Burundi	338.04	385.64	24.79
Kenya	3 581.15	1 732.68	57.15
Rwanda	647.60	631.76	16.12
Tanzania	3 543.54	2 225.86	54.60
Uganda	2 555.53	1 530.76	55.60
SADC (15)	19 144.58	14 039.06	444.57
Angola	166.41	317.18	4.74
Botswana	639.29	1 656.75	1.19
DRC	2 196.15	1 369.14	206.56
Lesotho	118.83	68.63	2.06
Madagascar	990.59	2 395.08	3.32
Malawi	423.22	784.75	23.39
Mauritius	258.96	410.45	31.40
Mozambique	2 210.25	1 330.06	27.90
Namibia	341.42	330.13	5.14
Seychelles	0.22	56.28	0.04
South Africa	7 301.32	1 643.97	41.59
Swaziland	35.02	130.85	0.29
Tanzania	3 543.54	2 225.86	54.60
Zambia	891.36	1 047.21	38.98
Zimbabwe	28.00	272.72	3.36
COMESA (19)	25 983.50	19 411.96	1 258.02
Burundi	338.04	385.64	24.79
Comoros	35.96	36.50	0.42
Djibouti	258.41	17.70	0.46
DRC	2 196.15	1 369.14	206.56

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	Economic Infrastructure (2002-2010)	Building productive capacity (2000-2010)	Trade policy & regulations (2002-2010)
Egypt	9 181.66	5 729.18	773.44
Eritrea	184.15	156.69	0.18
Ethiopia	3 509.56	2 040.09	15.68
Kenya	3 581.15	1 732.68	57.15
Libya	32.73	13.21	0.37
Madagascar	990.59	2 395.08	3.32
Malawi	423.22	784.75	23.39
Mauritius	258.96	410.45	31.40
Rwanda	647.60	631.76	16.12
Seychelles	0.22	56.28	0.04
Sudan	835.19	671.27	6.46
Swaziland	35.02	130.85	0.29
Uganda	2 555.53	1 530.76	55.60
Zambia	891.36	1 047.21	38.98
Zimbabwe	28.00	272.72	3.36

Source: QWIDS (2012); tralac calculations

- Aid for Trade commitments in the EAC were made mostly for projects and initiatives in Tanzania and Kenya, accounting for 34% and 31%, respectively, of the value of total commitments made to all EAC member states between 2002 and 2010. These commitments were mainly for the development of economic infrastructure.
- Over this time period, South Africa (27%), Tanzania (17%), DRC (11%), Mozambique (11%), and Madagascar (10%) were the SADC member states which received the most Aid for Trade commitments, while Seychelles (0.2%) and Swaziland (0.5%) received the least, in value terms.
- Egypt, Ethiopia, and Kenya were the main recipients of Aid for Trade commitments in COMESA, accounting for approximately US$15.6 billion, US$5.5 billion and US$5.3 billion, respectively, of all Aid for Trade commitments made to COMESA member states from 2002 to 2010.

The data on Aid for Trade disbursements shows there was a significant increase in the year-over-year growth rate (17%) in the funds allocated to Aid for Trade activities and programmes between 2002 and 2010. Although there was a decrease of 8.5% in disbursements between 2009 and 2010, aid disbursements to all African countries increased

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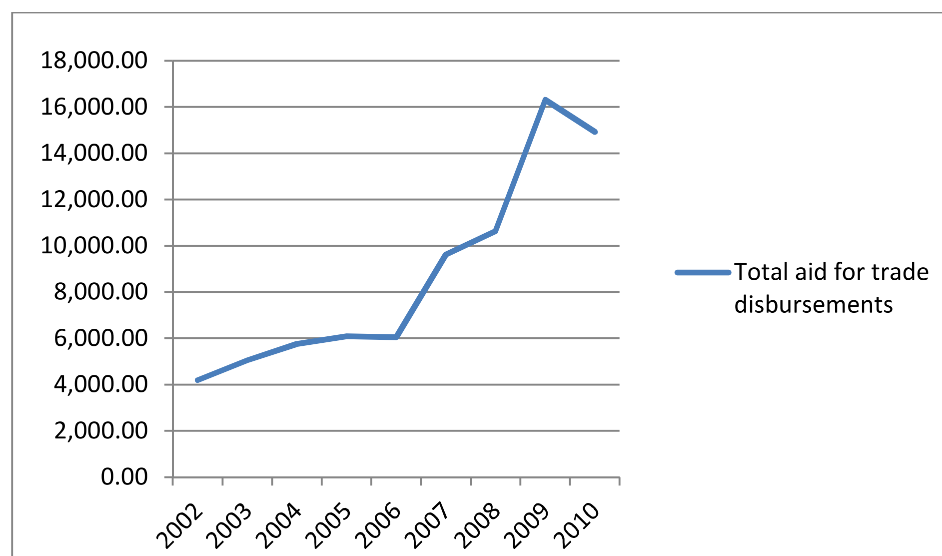
by approximately US$10.7 billion over the previous eight years. Over the time period, the majority of the disbursements were made through grants and loans.

Figure 4: Aid for Trade disbursements to all African countries



Source: QWIDS (2012)

In 2010, the majority of disbursements were made in the categories of transport and storage, energy, agriculture, banking and financial services, and business and other services. However, if we compare the 2010 data with disbursements in 2002, the results show that there has been a significant change in the composition of disbursements over the last eight years. In 2002, Aid for Trade funds flowed mostly to transport and storage, agriculture, banking and financial services, energy, and trade policy and regulations. Between 2002 and 2010, aid for activities and programmes on trade policy and regulations decreased significantly as a component of total aid disbursements. In 2010, trade policy and regulations aid contributed only 3%, compared to the 9% it contributed to total Aid for Trade disbursements to all African countries in 2002.

According to the above, since 2002, energy, banking, and business services have become major components of Aid for Trade funds to African countries, with aid contributors moving away from the traditional aid sectors of industry and mineral resources and rather moving in the direction of providing aid flows to the development of services sectors. Between 2002 and 2010, the categories in which the greatest increases in aid disbursements took place were energy (31% compound growth), business and other services (30% compound growth), tourism (28% compound growth), communications (18% compound growth), and transport and storage (18% compound growth).

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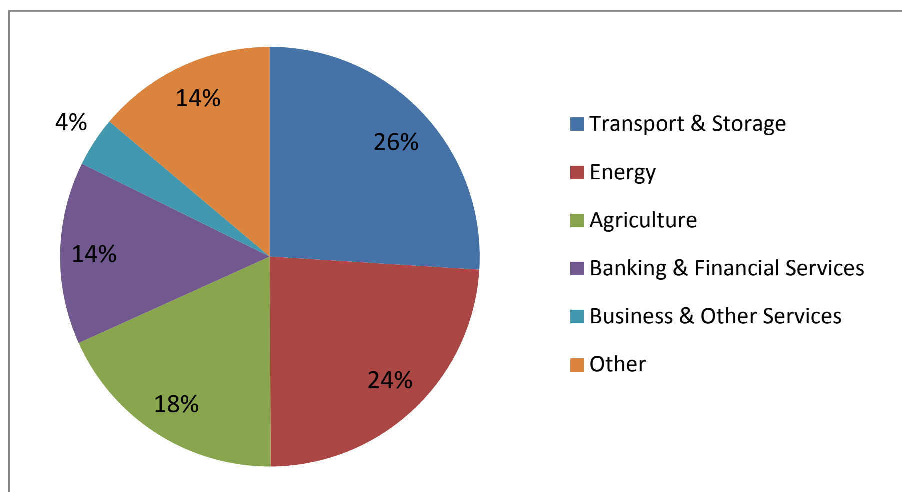
Figure 5: Categories of disbursements, 2010



Source: QWIDS (2012); tralac calculations

5. Aid for Trade as a driver for green growth and sustainable development

International trade is seen as one of the most important tools in a strategy which is aimed at sustainable development and the transition to a green economy; however, enhanced market access opportunities on their own are not enough. The role trade can play in a green economy depends on how the gains and losses of moving to a green economy are distributed among the members of society and how trade will impact on the economic, social, and environmental pillars of sustainable development. Sustainable trade is about trading environmental goods and services and ensuring that trade makes a positive contribution to the three pillars of sustainable development. International trade and trade law can contribute to a green economy in the following ways:

- Liberalising trade of environmental goods and services;
- Decreasing the use of fossil fuel subsidies;
- Assisting countries to gain access to cleaner technologies by means of intellectual property rights;
- Attracting investment for green infrastructure and production; and
- Moving developing countries away from their over-dependence on natural resources as a source of exports, economic growth, employment, and development.

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A shift towards a green economy and sustainable development requires trade liberalisation measures to be combined with financial and technical assistance through Aid for Trade initiatives in order to increase Africa's participation in international trade. While enhancing the ability of developing and least developed countries to contribute to international trade, more environmentally-focused Aid for Trade programmes, activities, and initiatives can also strengthen environmental goods and services' trade-related infrastructure and limit supply-side constraints in the region. Aid for Trade can be an important mechanism in the creation of an enabling environment for green growth by targeting those areas where there are limited incentives for private investment, especially essential infrastructure and human and institutional capacity building. This can assist developing and least developed countries to improve supply-side capacity and build a resilient economy, both of which are needed to adapt to and mitigate the effects of climate change.

For Aid for Trade initiatives to be successful in pushing African economies towards green economies, the focus has to shift towards creating trade conditions which will lead to sustainable development, incorporating both environmental improvement and poverty alleviation. These objectives can be achieved by not only assisting African countries to maintain their existing market share, but also by opening up new export markets for African economies in environmentally-friendly goods and services. For Aid for Trade to promote sustainable development, initiatives to enhance international trade and environmental stewardship in a sustainable development context are required. Three key priority areas can be identified:

- Additional resources for enhancing institutional, infrastructural, information, and implementation capacity;
- Aid for Trade for capacity building in domestic analytical and assessment capacities, since sustainable development requires the capacity to analyse and assess the cross-sectoral impact of trade policy within the framework of sustainable development; and
- Resources for improved policy processes and implementation, including international policy-making capacities, domestic implementation capacities, and stakeholder participation capacities.

Under the different Aid for Trade initiatives categories, aid flows can be provided in different sectors of the economy:

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- Capacity building initiatives to develop an analytical framework to assess the impact of trade agreements and policies on all areas of the economy, including the environment and the natural resources of a country;
- Developing productive capabilities in specific green economic sectors;
- Building the necessary capacity to support sustainable production and process methods in African countries;
- Assistance in identifying viable and feasible markets for environmentally-friendly goods and services;
- Building the technical capacity of countries to meet the standards, regulations, and requirements applicable to trade in environmental goods; and
- Investment in specific sectors like renewable energies, agriculture, tourism, and forestry.

Aid which can support sustainable development under the five Aid for Trade categories includes the following:

- *Trade policy and regulations:* Training government officials in trade policy which has an influence on trade in environmental goods and services and bilateral or regional negotiations on trade and environmental issues; the improvement of domestic implementation capacity; and enhancing the capacity of countries to challenge WTO-inconsistent use of trade policy instruments in climate change initiatives.
- *Trade development:* Institutional and business services support for environmental goods and services and enhancing the capacity of countries to comply with carbon border taxes.
- *Trade-related infrastructure:* Construction and renewal of trade-related infrastructure, including sustainable systems for energy, water, and transport.
- *Building productive capacity:* Building and supporting capacity to produce and trade environmental goods and services.
- *Trade-related adjustments:* Enabling conditions for countries to benefit from liberalising trade in environmental goods and services.

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Specific areas of the African economy in which Aid for Trade programmes can make a significant contribution in greening the economy include agriculture, water resources, energy, and ecotourism. Agriculture plays a vital role in the transformation to a green economy due to the importance of the sector for livelihoods, poverty eradication, and its contribution to economic growth and development in most African countries. A green economy will have to address the impact of climate change and ecosystem degradation on agricultural productivity and the production of rain-fed agriculture. This will require new approaches to production in order to reduce externalities, including water pollution and soil erosion, while promoting the use of organic inputs to increase productivity and farmer income. Box 1 below shows some Aid for Trade initiatives, mostly in the cotton sector, aimed at building a sustainable agricultural sector and creating sustainable practices in southern and eastern Africa.

Box 1: Aid for Trade and green growth projects

Bio Trade Initiative Programme in Uganda (BTIU)

The BTIU is an Aid for Trade initiative to promote sustainable development through the sustainable commercial use of biodiversity-based products and services in Uganda. The initiative was introduced in 2003 to enhance trade and investment in biological resources to ensure sustainable use thereof. The initiative has been implemented under the Uganda Export Promotion Board and forms part of the country's strategy for export diversification and the integration of trade into environmental conservation and poverty alleviation. The objectives of the BTIU are to create an enabling environment for bio trade, disseminate information and create awareness, provide technical assistance, promote bio trade products in the domestic and international markets, and integrate issues of sustainability into the production process. Although the BTIU has faced some challenges, including enterprise level capacity inadequacies, low levels of technology, unclear national standards and limited value addition initiatives, some results have been achieved. In the past two years the main focus of the BTIU was to create an enabling environment which included a review of the wildlife trade policy in accordance with the requirements of the Convention on International Trade in Endangered Species (CITES) regulations and to take into account the interests of the private sector, streamlining methodologies and approaches for sustainable resource use, creating awareness and distributing information on the project, exploring export opportunities, and assessing capacity needs (Jaramillo 2011).

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Cotton Made in Africa (CMiA)

CMiA aims to develop a supply of sustainable cotton for the mainstream cotton market by ensuring that the cotton sourced by participating retailers meets certain commodity-specific sustainability requirements. CMiA has active sustainable cotton programmes in various African countries, including Mozambique and Zambia. Components of the programme include capacity building, trade finance and creating an enabling environment in the cotton sector. In 2009 the CMiA projects involved a total of approximately 100 000 farmers who produced approximately 32 000 tonnes of CMiA sustainable cotton in the 2008/2009 growth season (ODI 2009).

Lango Organic Cotton Project (LOCP)

This project is based in the Lira District of northern Uganda with the aim of assisting farmers in gaining access to the domestic and international organic cotton market. The project provides assistance with project management, research, extension services, training and certification support. Existing project structures have also been extended to support farmers with certification and marketing of organic sesame and chilli which are the crops planted in rotation to cotton. In 2007 approximately 1 000 tonnes of LOCP cotton was produced which accounted for approximately 0.68% of global organic cotton production for the year (ODI 2009).

East African Organic Product Standard (EAOPS)

The EAOPS was adopted in 2007 by the member countries of the East African Community as the single official standard for organic agriculture production in the region. The EAOPS was the result of a multi-stakeholder process which included consultations and participation by national governments, the private sector, NGOs and international institutions. It is expected that the EAOPS will contribute to agriculture in general, the environment and the developmental goals of the member states of the EAC. The EAOPS is implemented by various private certification companies and export outlets that work with smallholder farmers and large-scale agricultural producers. Currently, Kenya has 27 domestic and five international certification companies and bodies, Tanzania has six foreign (and one domestic) certification companies and associations and Uganda has five each of international and domestic certification bodies (UNEP 2010).

The development of sustainable fisheries and aquaculture is also an important aspect of a green economy. This includes policies for green fisheries, including the establishment of protected areas, eco-labelling, removal of fishery subsidies, habitat restoration, and the introduction of market-based policy instruments.

Tourism-related activities based on biodiversity can additionally make a major contribution to growth and development by enhancing the natural capital through a transition to a green

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economy. However, this will require investments in protected areas, reforestation, and the rehabilitation of valuable ecosystems. Ecotourism, seen as tourism in natural surroundings, can be a very important source of green growth for African countries given that most African countries are endowed with rich natural resources which can be utilised for this purpose. Ecotourism is generally built on community-led tourism activities and operations which preserve the natural eco-system while generating employment for unskilled labourers in rural communities. However, these activities normally do not require vast capital outlays and investment, making it an ideal industry to foster economic growth in African countries with natural-resource abundance and capital scarcity.

Aid in these sectors can mainly be utilised for the improvement of economic infrastructure and the building of productive capacity. Economic infrastructure, which can be associated with a green economy, includes increased energy resources through hydropower and renewable energy development programmes, and the enhancement of water resources through the building of dams and modernising water distribution systems. Programmes applicable to agriculture and the development of ecotourism can be classified under productive capacity building. Aid can be utilised for agricultural research, soil rehabilitation, changes in crop mix, the development of climate change resistance crops, and the development and promotion of ecotourism services. Using the AidData Research Database (2012), some examples of green growth and development projects in southern and eastern Africa under the heading of economic infrastructure and productive capacity building can be provided.

The AidData Database provides project-level data on all aid initiatives (commitments and disbursements) by various donors (bilateral, multilateral, etc.) to a variety of countries by region (Africa, Americas, Asia, Europe, Oceania, and others). The project-level data is organised by purpose code (agriculture, forestry and fishing, banking and financial services, energy generation and supply, etc.) which is further defined by the CRS activity code within each broad-purpose classification. Depending on availability, the database provides data from 1945 up until the end of 2011.

To illustrate some Aid for Trade projects and programmes that have contributed to greening economies in southern and eastern Africa, the data was refined in the following manner: (a) in the Africa region, data was limited to the information available for countries which are members of COMESA, the EAC and SADC for the years 2002 to 2011; (b) only the purpose codes which correspond to the CRS headings associated with Aid for Trade initiatives were

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included, which fell within the following categories: transport and storage; agriculture, forestry and fishing; banking and financial services; business and other services; communications; energy generation and supply; industry, mining and construction; and trade and tourism; and (c) the remaining projects were narrowed down further through a comparison between the activity codes assigned to each project and the project descriptions. This required an evaluation of each project to establish whether the activity code and project description fell under projects and programmes associated with green growth and sustainable development. Depending on the project description, this included, for instance, projects to improve or develop hydroelectric power plants, solar energy, or wind power for the purpose of energy generation and supply; soil improvement and erosion control under the heading of agriculture; and afforestation, reforestation, and erosion control under the heading of forestry. This allowed for the inclusion of only those aid flows which fall in the sphere of Aid for Trade projects associated with green growth and sustainable development, as defined by the concept of a green economy.

Table 2 shows an abstract of the green Aid for Trade programmes and projects found in southern and eastern Africa between 2002 and 2011. The table provides examples of areas in which Aid for Trade has been utilised for specific green economy purposes in specific African countries. Between 2002 and 2011, the majority of aid flows for green development fell in the categories of either economic infrastructure or productive capacity building. Aid for Trade has mostly financed major projects in renewable energy, creating sustainable agriculture, and building low carbon transportation networks while also supporting smaller projects such as feasibility studies, pilot projects, and technical training.

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Table 2: Project-level aid in specific African countries

Year	Country	Project Name	CRS Classification	Project Description
2002	Rwanda	Energy Rehabilitation	Economic Infrastructure - Hydroelectric power plants	Repair and modernisation of three hydroelectric power plants, including erosion and flood protection measures, capacity building schemes and improvement of institutional capacity
	Mozambique	Energy Generation	Economic Infrastructure - Hydroelectric power plants	Development of a hydroelectric power plant using the Zambezi river
	South Africa	Rural Electrification	Economic Infrastructure - Solar energy	Implementing solar energy as a source of energy generation for rural electrification
2003	Namibia	Climate Change Enabling Environment	Economic Infrastructure - Energy policy and administrative management	Enhance the capacity to participate in initiatives for the transfer of technology, assess the available information on technology transfer and adaptation in the energy sector, facilitate and coordinate cooperation and communication between national and international institutions in the energy sector and assist Namibia to reduce uncertainty in the factors related to GHGs
	South Africa	Solar Water Heaters	Economic Infrastructure - Energy policy and administrative management	Provide parallel support to a Solar Water Heater Business Plan in RSA to overcome market barriers for widespread use of solar water heaters and increase employment opportunities, improve electricity demand management and reduce greenhouse gases (GHGs)
	Tanzania	Sustainable Agriculture	Productive Capacity Building - Agricultural extension	Cooperation with farmers in Kimkumaka through training and exchange visits to improve food production without causing damage to the environment and human health
2004	Lesotho	Sustainable Agriculture and Natural Resource Management Programme	Productive Capacity Building - Agricultural development	Improvement of food security, nutrition and income with a specific focus on agricultural diversification and intensification with attention given to the sustainable use and management of natural resources
	Eritrea	Wind Energy Application Assessment	Economic Infrastructure - Power generation/renewable	Assessment of the technical, economic and environmental feasibility of promoting wind energy technologies, specifically focused capacity building and installation of wind farms and wind-diesel hybrid systems
	Rwanda	Reversing Deforestation	Productive Capacity Building - Forestry development	Reversing the effects of deforestation in the western region of Rwanda

Year	Country	Project Name	CRS Classification	Project Description
2005	Kenya	Green Zones Development Support Project	Productive Capacity Building - Forestry development	Forest regeneration and conservation for the improvement of rural income and livelihoods
	Botswana	Renewable Energy-based Rural Electrification Programme	Economic Infrastructure - Power generation/renewable	Reducing GHGs through the removal of barriers for large-scale dissemination of solar technology
	Ethiopia	Renewable Energy Project	Economic Infrastructure - Power generation/renewable	Promoting private sector led off-grid rural electrification with solar and hydro-electric power
	Zambia	Renewable Energy-based Electricity Generation	Economic Infrastructure - Power generation/renewable	Development of sustainable models for renewable electricity generation and distribution
	Madagascar	Afforestation and Ecotourism	Productive Capacity Building - Forestry development	Project related to the afforestation of the rain forest in Madagascar and the development of associated ecotourism activities
2006	Tanzania	Wind Energy Project	Productive Capacity Building - Small and medium-sized enterprises development	Pilot project to develop partnerships in wind energy power generation
	Burundi	Integrated Rural Development Programme	Productive Capacity Building - Agricultural land resources	Programme for the improvement of soil and water conservation, reforestation and agricultural extension services
2007	Uganda	Energy for Rural Transformation Project	Economic Infrastructure - Power generation/renewable	Project for the promotion of solar energy and energy generated from small renewable energy sources, including hydro-electric power
	Ethiopia	Humbo and Soddo Community-based Natural Regeneration Project	Productive Capacity Building - Forestry development	Sequestration of carbon in a native forest while reducing poverty in the areas of Humbo and Suddo, including the restoration of forest and the habitat of threatened animal species
	Egypt	Solar Thermal Hybrid Project	Economic Infrastructure - Power generation/renewable	To improve the attractiveness of solar thermal technology through education and capacity building to reduce the cost of the technology in the long-run
	Zimbabwe	Coping with Drought and Climate Change	Productive Capacity Building - Agricultural policy and administrative management	Pilot project to develop coping mechanism to reduce the vulnerability of small-scale farmers to extreme climatic events
	South Africa	Clean Energy Governance Programme for the Western Cape	Economic Infrastructure - Power generation/renewable	Development of a provincial-level Integrated Energy Policy and supportive institutional capacity and regulatory arrangements

Year	Country	Project Name	CRS Classification	Project Description
	Mozambique	Rural Sector Electrification	Economic Infrastructure - Solar energy	Development of rural electrification from solar photovoltaic sources
	Sudan	Agricultural Enabling Environment	Productive Capacity Building - Agricultural policy and administrative management	Support for agricultural policies, laws, regulations and institutions that adopt improved technology, promote investment and enhance natural resources
2008	Uganda	Buseruka Hydropower Plant	Economic Infrastructure - Power generation/renewable	Construction of a mini-hydropower plant to support small-scale renewable energy to the Buseruka area of Uganda
	Egypt	Sustainable Transport	Economic Infrastructure - Transport policy and administrative management	To reduce the growth of energy consumption and GHGs of the transport sector while mitigating local environmental and other problems of increased traffic
	Egypt	Bioenergy for Sustainable Rural Development	Economic Infrastructure - Power generation/renewable	Advance the use of renewable biomass as a source of energy to promote sustainable rural development and reduce GHGs from conventional energy sources
	Kenya	Sustainable Ecotourism for the Community of Kasigau	Productive Capacity Building - Tourism policy and administrative management	Project to develop ecotourism activities to provide the community with alternative livelihoods
	South Africa	Renewable Energies and Energy Efficiency	Economic Infrastructure - Energy policy and administrative management	Financing renewable energies and measures to increase energy efficiency to reduce GHGs from industries, households and transport
2009	Rwanda	Sustainable Energy Development Project	Economic Infrastructure - Power generation/renewable	Strengthen and consolidate the Rwandan Energy Market to enhance the policy and institutional framework of the renewable energy and energy efficiency subsectors
	Zambia	Adaptation to Droughts and Climate Change	Productive Capacity Building - Agricultural development	Development of adaptive capacity of subsistence farmers and rural communities to the effects of climate change
	Madagascar	Forest Management, Organic Farming and Trade	Productive Capacity Building - Plant and post-harvest protection and pest control	Project for establishing the Integrated Sustainable Development and Trade Fair
	Malawi	Environment and Energy	Economic Infrastructure -Energy policy and administrative management	Development of national strategies, polices and action plans which integrate the environmental provisions of the Millennium Development Goals

Year	Country	Project Name	CRS Classification	Project Description
	Zimbabwe	Energy and Environmental Programme	Economic Infrastructure - Energy policy and administrative management	Programme to enhance the capacity for environmental planning and management, strengthening energy and environmental policy and legal framework; to enhance national dialogue on sustainable land and agricultural reforms
	Mozambique	Capacity Building Clean Development Mechanism (CDM) Support	Economic Infrastructure - Power generation/renewable	Support for various activities to enhance capacity and develop the required documentation to have certain activities and programmes in the energy sector assessed in terms of the CDM mechanism
	Madagascar	Dialogue Forum	Economic Infrastructure - Energy policy and administrative management	Dialogue Forum on renewable energy sources between the Ministry of Energy, Ministry of the Environment, research institutions and the private sector
2010	Comoros	A Solar Lighting Project	Economic Infrastructure - Power generation/renewable	Initiative between India and the Comoros to develop solar lighting in the Comoros
	Malawi	Irrigation, Rural Livelihoods and Agricultural Development	Productive Capacity Building - Agricultural water resources	Rehabilitation of the irrigation system, capacity building and market access support for sustainable small-scale irrigation development to make food supply resilient to extreme climatic events
	Namibia	Energy Efficiency Programme in Buildings	Economic Infrastructure - Energy policy and administrative management	Nationwide adoption of energy-efficient technology and practices to reduce GHGs
	Egypt	Wind Power Development Project	Economic Infrastructure - Power generation/renewable	Develop infrastructure and business modules to scale up wind power utilisation and generation
	DRC	Agricultural Capacity Building to Respond to the Threats of Climate Change	Productive Capacity Building - Agricultural development	Development of the agricultural system to reduce the vulnerability of small-scale farmers to the impact of climate change and improve food security
2011	Lesotho	Smallholder Agriculture Development Programme	Productive Capacity Building - Agriculture	Sustainable increase in the productivity of smallholder farmers through capacity building, investment and improvements in natural resources and management thereof
	Egypt	Kom Ombo Solar Power	Economic Infrastructure - Power generation/renewable	Construction and operation of the solar power plant to provide a reliable renewable power supply

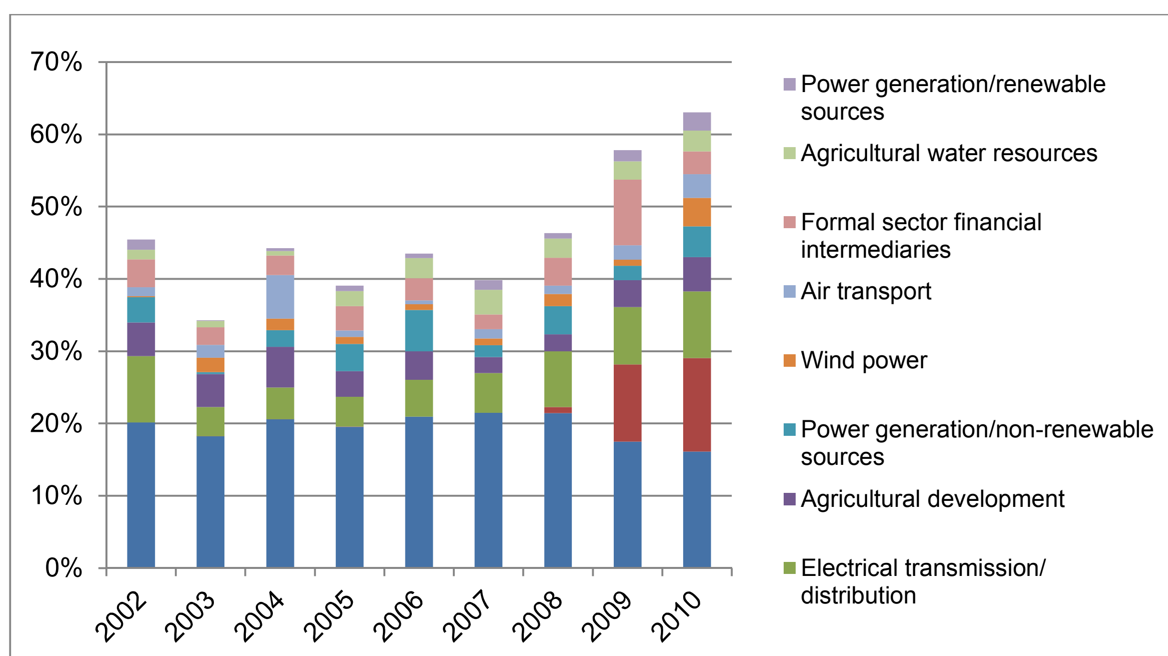
Source: Aiddata.org (2012)

6. How green is Aid for Trade?

Although Aid for Trade has been utilised for a variety of green growth and development projects, the remaining question is to determine whether Aid for Trade has made a significant contribution to 'greening' the economies of southern and eastern Africa over the last eight years or whether the opportunity exists for aid to make a greater contribution to the transition of African economies towards green growth and sustainable development.

Figure 6 below shows the QWIDS (2012) Aid for Trade commitments data for all African countries by detailed sector between 2002 and 2010. The graph shows the top 10 detailed sectors in which the most aid commitments were made over the time period in all African countries. According to the data, wind energy and power generation from renewable energy sources are the only environmentally-friendly sectors under the top 10 detailed sectors of Aid for Trade commitment recipients. Over the time period, only approximately 1% of all aid commitments were made in each of these two sectors, while aid commitments for road transport projects constituted, on average, 20% of all Aid for Trade commitments between 2002 and 2010. Although there was a slight increase in the value of aid commitments in wind power (from 1% in 2009 to 4% in 2010) and renewable energy (from 2% in 2009 to 3% in 2010) projects and programmes, the number of aid commitments in these sectors as a percentage of total Aid for Trade commitments is still comparatively limited.

Figure 6: Aid for Trade by detailed sector



Source: QWIDS (2012); tralac calculations

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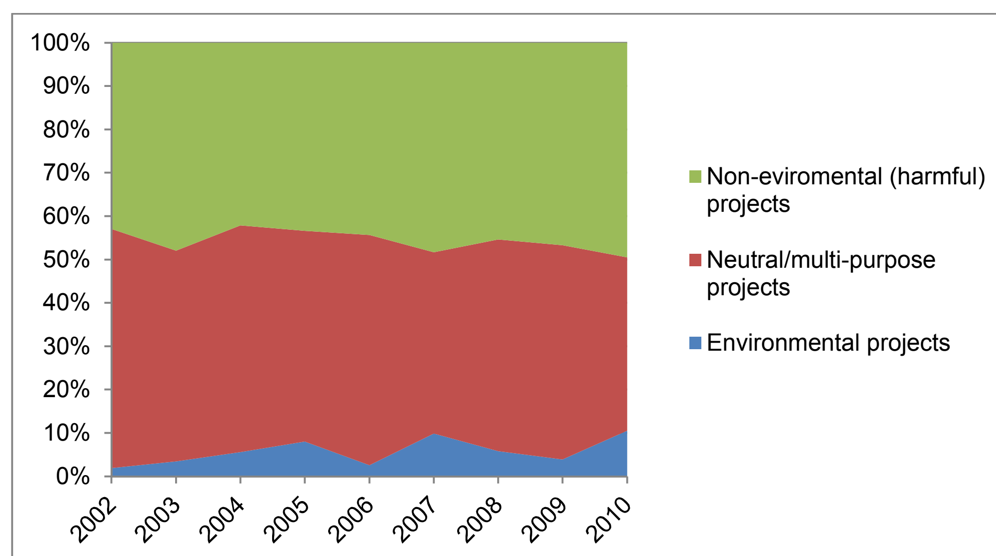
Figure 7 below broadly indicates whether aid flows, under the Aid for Trade categories, were provided for sustainable or green development projects between 2002 and 2010. To determine whether Aid for Trade commitments have been 'greened', the QWIDS (2012) classification of all African Aid for Trade commitments over the last eight years were divided into the following three categories: (a) environmental projects; (b) neutral/multi-purpose projects; and (c) non-environmental (harmful) projects. The categorisation was based on the description of the detailed sectors according to each sector's CRS code to provide a broad overview of the purpose of Aid for Trade commitments made over the time period. Environmental projects include mainly commitments for renewable energy, including wind, solar, and hydro-electric power. The non-environmental (harmful) projects category includes commitments made for projects and programmes related to road and air transport, coal-fired power plants, and power generation from non-renewable energy sources. The neutral/multi-purpose project category is a very broad category. This includes all aid commitments made to projects and programmes which are either environmentally neutral (telecommunications, monetary institutions, multilateral trade negotiations, etc.) or can be either environmentally neutral/beneficial or possibly harmful depending on the project-level aid purpose (forestry development, agrarian reform, tourism policy, administrative management, etc.).

Figure 7: Detailed sector aid per environmental/non-environmental purpose



Source: QWIDS (2012); tralac calculations

The data indicates the following:

- The major share of Aid for Trade commitments have been made in the sectors which can be classified as being for a non-environmental (harmful) purpose, with the least

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number of commitments made for projects and programmes which have an environmentally beneficial purpose.

- Between 2002 and 2010 there was a slight decrease in the aid commitments made to multi-purpose projects (4%), while commitments to non-environmental and environmental projects and programmes increased by 2% and 24%, respectively, over the same time period.

According to the data, there has been an increase in aid commitments and disbursements for green growth and sustainable development projects in most African countries over the last eight years, making an increasing contribution to greening African economies. However, as a percentage of total Aid for Trade commitments, aid towards green growth and development has been minimal so far. Given the vulnerability of economies in southern and eastern Africa to the impacts of climate change, and the significant role aid can potentially play in enabling African countries to benefit from a green economy, future Aid for Trade projects and programmes should be more environmentally-focused.

7. Challenges in the transition to a green economy

Shifting to a green economy has various potential benefits for countries in the region, but due to the nature and structure of most African economies, there are various obstacles and challenges which will have to be overcome to attain the goal of green growth and sustainable development. The pivotal challenge for all African countries in shifting to a green economy is to strike a balance between improving employment, wealth, and social services while also reducing absolute utilisation of, and dependence on, natural resources and fostering a greater reliance on less carbon-intensive and renewable energy sources in every country.

Due to the uneven distribution of natural resources within the different African countries in the region, the continent-wide shift to a green economy will need to take cognisance of a regional displacement of resources. A transition to a green economy requires a significant investment to facilitate structural changes in the economy, including a change in the production function, improving infrastructure, and enhancement of technological capacity and capabilities. These challenges create an opportunity for Aid for Trade initiatives by developed countries. Even more challenging than changing the production function of African economies is the need to create national, regional, and international demand for green goods and services by providing incentives to change consumption patterns.

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One of the major requirements and possible barriers to a transition to a green economy in many African countries is the political will to shift countries towards green growth and development. This can pose a challenge to, in particular, countries like South Africa, where the economy is highly dependent on the utilisation of fossil fuels and conventional energy sources. Structural constraints of African countries which can hamper the shift towards a green economy and sustainable development include the following:

- high dependency on agriculture and natural resources;
- limited access to alternative energy and inefficient infrastructure;
- poor institutions, bureaucratic delays, and unclear regulations;
- large information diseconomies;
- limited technical expertise and a lack of physical, financial and human capital; and
- low economic diversification.

These challenges must be addressed in order to facilitate the shift towards a green economy. Trade-related challenges to smooth the transition should include environmental regulations, standards, labelling and certification standards applicable to the trade in environmentally-friendly goods as well as unilateral border tax adjustments to protect domestic firms in the importing market and green subsidies and domestic support measures. A transition to a green economy would also require abandoning trade protectionism and must not lead to new conditional requirements for developing countries that can restrict trade, financing, official development assistance, and other forms of institutional assistance. African countries need to enhance their ability to address these measures to fully benefit from new market-access opportunities available due to a greener economy. Governments must play an intricate part in the transition to create an enabling environment for technology transfer, financial assistance, and market access to promote public and private sector investment in eco-friendly green production.

8. Conclusion

The expected impact of climate change and global warming on the overall natural environment, agriculture, and natural resources in most African countries poses a serious challenge to the economic growth and industrial development of these countries. This is due mainly to the overreliance of these economies on their natural resource base as the driver of

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economic growth, development, employment and international trade, coupled with the low adaptive capacity in the majority of African countries. The expected changes in temperatures, precipitation, rainfall patterns, sea levels, and extreme weather events can have a severe impact on tourism, trade, and food security in most southern and eastern African countries.

Refocusing economic and developmental policies to incorporate aspects of sustainable development and green growth can generate both environmental and economic benefits for African countries. A green economy can foster innovation, investment and competition, creating new export-market opportunities, enhancing present economic growth trajectories, and allowing for a low-emission, climate-resilient development path while addressing the challenge of climate change, biodiversity loss, and desertification. However, the transition to a green economy requires trade liberalisation coupled with new public- and private-sector financial resources and technical assistance. This creates an opportunity for more focused Aid for Trade initiatives to play a vital role as a driver for green growth and sustainable development. Incorporating Aid for Trade projects into economic policies and developmental strategies focused on green growth and sustainable development recognises the complex relationship between trade and the environment. Not only can trade and trade-related policies have a significant impact on the environment, the environment can also have a severe impact on trade. This is especially the case in African economies dependent on natural resources and agricultural production as the main sources of international trade, employment, economic growth, and industrial development.

Under the different categories of Aid for Trade initiatives, aid flows to support sustainable development and green growth can be provided in different sectors of the economy. This includes trade-related infrastructure (hydro-electric plants, wind power and solar energy) and building productive capacity (ecotourism, afforestation and reforestation, forestry erosion and desertification control, agricultural soil improvement, erosion control, etc.). Over the past few years, African countries have been receiving an increasing share of aid flows from all donors, with an increasing focus on Aid for Trade projects and programmes aimed at sustainable development. Over the last eight years, the major portion of aid flows for green development has been in the categories of economic infrastructure and productive capacity building. Aid for Trade has mostly financed major projects in renewable energy, creating sustainable agriculture, and building low-carbon transportation networks, while also supporting smaller projects like feasibility studies, pilot projects, and technical training. According to the data,

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there has been an increase in aid commitments and disbursements for green growth and sustainable development projects in most African countries in recent years, making an increasing contribution to greening African economies. However, more needs to be done in this regard.

To ensure success in green economy aid initiatives, developed and developing countries can utilise lessons learned from previous experiences with Aid for Trade initiatives. Aid for Trade initiatives in other sectors of the economy have shown that there is no 'one-size-fits-all' design to incorporate Aid for Trade in African economies with differing economic structures, institutions, economic growth rates, and stages of development. Programmes must complement any country's national development and economic programmes, future plans and structures, and be fully integrated into the overall development and poverty alleviation strategies of the country.

Any initiative must create clear and transparent criteria for monitoring the attainment of goals, targets and timelines. Initiatives must be strictly based on needs; they must focus on building integrated analytical and assessment capacities, stakeholder participation, policy making, and implementation capabilities. One of the most important factors required for a successful transition to a green economy through Aid for Trade is an enabling domestic environment, including supportive domestic regulations, legislation, financial assistance, and technological advancement.

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Chapter 5

What scope is there for regional industrial policies in the SADC Regional Economic Community?

Harry Zarenda

1. Introduction

This chapter expands on some themes raised in an earlier Trade Law Centre (tralac) Working Paper dealing with Regional Industrial Policies for the Southern African Development Community (SADC) (Zarenda, 2012). In that paper, certain pertinent, yet tentative, issues were raised relating to the design and construction of such a policy. These will be dealt with in more detail in this chapter.

As highlighted in the above-mentioned discussion paper, the consideration by SADC of a comprehensive Regional Policy Framework document is important in the light of renewed efforts by national governments (within the region) to implement viable industrial policies for their respective countries. For example, the release earlier this year by South Africa's respective ministries of the revised Industrial Policy Action Programme (South Africa Department of Trade and Industry, 2012), a prospective Special Economic Zones Bill, and the enhanced New Growth Policy has indicated that, for the dominant country in the region, little emphasis is placed on encouraging broader industrialisation for the region. Additionally, the acceptance in December 2012 of the broad National Development Plan (2011) as the overarching framework for future economic policy in South Africa will raise the intensity of the debate concerning how the Development Plan can be compatible with a focus and commitment to regional industrial policies within a Regional Economic Community (REC). The visions for a future industrial policy for other members of the Southern African Customs Union (SACU), highlighting some of the binding constraints of the present scenario for

Botswana, Swaziland, Lesotho and Namibia, have been well argued by Sandrey (2012). On the much broader geographical level (SADC), a possible potential for more coordinated industrial policies that would enhance the region's industrialisation levels, as well as overcome some of the identified binding constraints, has been given further priority in light of the imminence of the Tripartite Free Trade Agreement.

Additionally, towards the end of 2011, the SADC Secretariat released a report of the review of the Regional Indicative Strategic Development Plan (RISDP), and one of the conclusions of this Review Report advocated that continued support for interventions and policies to enhance the region's productive capacity and competitiveness is required. There has only been limited success in the SADC region with respect to the area of industrialisation (tralac, 2012).

What this chapter sets out to do is to try and provide some clarity on the debate by expanding on some of the challenges and potential for more regionally integrated industrialisation strategies. The chapter begins by reproducing in outline some of the more recent approaches to the issue highlighted by the United Nations Industrial Development Organisation (UNIDO) and the United Nations Conference on Trade and Development (UNCTAD) Report (2011). This report emphasises the dramatically-changed world environment of the 21st century which, in turn, has induced a shift in thinking on how to implement viable and sustainable industrialisation strategies and policies.

The second theme of this chapter explores how more recent theoretical approaches to the issue in question have been adapted in light of these changes. The chapter concludes with an expanded vision for a more integrated approach and a suggested institutional role that SADC and its relevant organs can play in this transformation strategy.

2. The context of the UNIDO/UNCTAD Report

Much of the focus of the UNIDO/UNCTAD Report details the issue for individual countries but, as will be suggested in this chapter, the key elements can be transposed to a wider regional framework. In providing a detailed analysis of the practicalities of nurturing industrial transformation for a country (or, relevant to the theme of this chapter, countries bound by established regional integration arrangements), the report cites work done by Lauridsen (2010: 38) relating to the dynamics of industrial policy. These include:

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a) fostering new industrial capacity

b) diversifying production

c) creating intersectoral and interindustry linkages

d) promoting learning

e) improving productivity

f) shifting economic activity towards higher value-added activities which provide access to more dynamic and rewarding niches in the world

Lauridsen, recognising the difficulties of drawing the exact boundaries of the above, therefore simplifies these to distinguish three separate approaches – these indeed form the core of the UNIDO/UNCTAD focus on framing an industrial policy (UN, 2011: 38):

- an upgrading of existing manufacturing industries towards more competitiveness (industrial upgrading and modernisation)
- the fostering of backward and forward linkages and complementarities between sectors and industries across the region (industrial deepening)
- diversifying the region's industrial base through new productive activities (industrial diversification)

While acknowledging that industrial policy is essentially a national prerogative and that there is no 'one-size-fits-all' set of policies, the UNIDO/UNCTAD document advocates that an approach which takes cognisance of the importance of regional integration is essential, given the existing economic diversities and regional imbalances prevalent in most regions. In light of the realities of the SADC region, a new comprehensive framework emphasising those intervention mechanisms with a regional linkage, such as improving the competitive environment for the industrial sector, promoting competitive regional value chains, and enhancing cross-border linkages that build a diversified SADC industrial 'fabric' around priority sectors, should be prioritised. Otherwise the historical polarisation tendencies will be magnified.

Another dominant theme throughout much of the UNIDO/UNCTAD Report places emphasis on an active public-private stakeholder dialogue in the formulation, implementation, and

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evaluation of industrial strategies and measures – an important development given that the private sector is going to be the prime ‘driver’ of industrialisation. This aspect within a SADC context has been given further impetus with the release in 2012 of an International Trade Centre Report on the profiles of business associations in the Southern African Region (ITC, 2012). More attention will be devoted to this topic in the final section of this chapter.

From the viewpoint of SADC, the rationale for the envisaged more focused approach to the issue of a regional industrial policy framework (that would incorporate a much more coherent and coordinated approach) is that it will hopefully enable dynamic gains from economies of scale and a clustering of industrial activities in regional activities and specialisation, rather than the present situation of a winner-takes-all scenario.

Apart from the above conventional arguments advocating the benefits of regional integration in sustaining industrialisation, the UNIDO/UNCTAD document also introduces one of the key elements more specific to the present framework of industrial policy (UN, 2011: 98-100). This entails the promotion of global value chains and production network linkages, which are key components for the enhancement of competitiveness. It is really this dynamic that differentiates the current theoretical analyses of industrial policies and strategies from those of the protectionist import substitution eras prevailing during much of the 20th century. This can have hugely positive implications in framing and successfully introducing a comprehensive industrialisation programme for the region and can take the form of a notion of regional value chains. Such a concept of the value-added chain across a region would entail the consideration of a full range of value-generating activities required to produce a product or service across national borders involving different production phases and different modes of delivery to final consumers. A more detailed analysis of the UNIDO/UNCTAD considerations will be presented in the next section. Consideration in this regard will also be given towards the consideration of a resource-based industrialisation strategy for the region based on a paper by Jourdan (2012) dealing with the issue. In this paper, the author considers how Africa’s unique natural resource base could provide a springboard to achieving industrialisation and development objectives if the ‘seminal resources linkages, industries and clusters are realised’ (Jourdan, 2012:1).

This approach (influenced and dictated by shifts in mass production and worldwide global production techniques) recognises the reality of the current global environment – a far shift from earlier policies whereby import substituting industrialisation policies were entirely

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driven by the state and tended to be equated with self-sufficiency, in the attempted protection of industries.

Allied to the above are the fundamental changes in integrated production resulting from recent globalisation and technology patterns – the issues of the dominance of China and India in global shifts of industrial production, as well as the international mobility of 'productive' capital. Also, the commitments to trade liberalisation under the guidance of the WTO since the 1990s have further entrenched the inability of national governments in the present environment to influence their industrialisation efforts as directly as was the case in the past.

3. Changing theoretical perspectives regarding the advent of 'new' industrial policies

The overall impact of the more recent global scenario factors mentioned above has necessitated a new paradigm in development thinking with regard to the pursuit of industrial policy. What could have had relevance in the latter half of last-century patterns of industrialisation, using East Asian models as a template, can only have limited relevance in the present dramatically changed environment of the 21st century. Added to this is the global economic crisis prevalent since 2008, which should highlight for developing countries the need to reconsider their long-term industrialisation and development strategies. While the commodity boom during 2003-2008 allowed many of these countries to enjoy accelerated growth and increased contributions of the manufacturing sector to overall growth, these benefits have been lost since 2008 and many of these countries have suffered a decline in the growth of their Gross Domestic Product (GDP) and consequent 'deindustrialisation' and increasing unemployment. Chang (2012: 2) presents an interesting interpretation of the 2008 global financial crisis, arguing that it has enhanced the legitimacy of industrial policy in a number of ways. Firstly, it prompted some major industrial policy actions – both defensive and proactive – by several of the 'rich' countries that preached against such policies. Secondly, having originated from the overdevelopment of the financial sector, the crisis restored the legitimacy of such policies even in countries like the United States and Britain where they had been regarded as a 'taboo'. Also, the impressive performance of China and Germany during the crisis could be due to their being sympathetic to industrial policy interventions.

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As the South Centre's comprehensive document dealing with industrialisation for Least Developed Countries (LDCs) outlines, the exposure of the manufacturing sector to severe external competitive pressures due to changes in the 'rules of the games in international competition' particularly, has increased the need to restructure and nurture their industries (South Centre, 2010). This South Centre Report rejects the one-size-fits-all proposal, given the diverse nature of countries. The report highlights some general guidelines, supplemented by specific policy proposals for the successful implementation of industrialisation strategies in the present environment. These guidelines also take cognisance of the need for a combined role of market and government in coordinating economic activities (thus rejecting the picking-of-winners approach characterising the previous development paradigm). The South Centre Report, additionally, points out that for smaller countries, the need for regional cooperation and industrialisation (incorporating industrial collaboration, production sharing and joint industrial policies) is a crucially important component in the process. This would require a mode shift in thinking with regard to the need to implement 'a dynamic, flexible and targeted industrial policy based on the principle of dynamic, rather than static, comparative advantage' (Ibid.: iii). More specifically, the South Centre Report argues that regional integration provides a dynamic component to sustainable industrialisation, through the recognition that specialisation and the division of labour leads to trade expansion rather than the reverse: trade leading to a division of labour and specialisation (Ibid.: 65). Concerted policy measures and efforts by the countries concerned are required for the building-up of supply capacity, as market forces alone will not lead to such a division of labour.

Reverting back to the UNIDO/UNCTAD Report (2011) mentioned in the previous sections of this chapter, a considerably detailed framework addressing important areas relating to rationale, design, implementation, and coordination of industrial strategy in the present era is presented. The starting point of the UNIDO/UNCTAD Report is the rejection of a 'universal blueprint' approach (Ibid.: 34). The focus in the document relates to issues of industrial diversification, industrial deepening, and industrial upgrading. As mentioned above, the UNIDO/UNCTAD Report also acknowledges the critical role that regional integration and 'global value chains' can perform in industrial policies. While realising that the responsibility for industrial development rests primarily with national governments, the report is explicit that regional integration has enormous potential for the realisation of national industrial development objectives (Ibid.: 79). The report almost exclusively focuses on the demand side of the issue. But, additionally, supply factors are critical, and apart from the obvious benefits

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stemming from rectifying poor infrastructure, high regulatory burdens, political instability and so on, regional integration could, if effectively implemented, assure a much more coherent set of industrial policies that would provide the core for a much more sustainable move to industrialisation for the region, rather than an incoherent and inefficient set of industrial policy measures.

The importance of global value chains in the present international industrial configuration is one of the central arguments in the UNIDO/UNCTAD Report (Ibid.: 98) and it is worth expanding on this issue.

Production is being increasingly segmented in different stages located in different countries, according to the competitive advantages of each location. This so-called globalization of the value chain or global value chains allows producers to improve on competitiveness by making better strategic use of available global endowments, to lower costs. It also creates opportunities for a greater number of countries to take part in the global industrialization process and in so doing spur their own national industrial development.

This more dynamic viewpoint relating to specialisation and value addition can certainly be transposed to a regional framework, incorporating a notion of regional value chains in order to deepen regional integration. Critical to this is the enhancement of skill and infrastructural development, institutional change, and the political will by member states to prioritise a more collective set of industrialisation policies based on a shared vision, focusing on economic diversification within the region rather than inefficient duplication and replication. A key ingredient of this approach is the identification of linkages, areas of harmonisation and coordination in the design and implementation of a more broad-based policy.

In terms of designing a regional industrial policy taking cognisance of such linkages, a focus on natural resource linkages and global value chains could in the case of SADC countries (or any other REC) present a viable starting point. A recent policy research paper by the Economic Commission for Africa (2011) focuses on global value chains for agricultural firms in developing countries. As far as Africa is concerned, there seems vast potential for African agricultural producers to consolidate their role as suppliers to these global value chains, and to access large markets through large scale retailers (ECA, 2011: 42).

Jourdan (2012: 12) extends this argument substantially to incorporate what he refers to as 'a sustainable resource-based industrialisation and development strategy'. The author's focus is

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on African Regional Economic Communities and takes as a starting point the rich and diverse resource base of the continent possibly offering an industrialisation strategy that goes beyond supplying raw materials to the rest of the world (Jourdan, 2012: 12). The core of this is the establishment of a requisite economic infrastructure across the region that would foster crucial resource linkages into local, regional, and subcontinental economies (Ibid.). According to Jourdan (Ibid.), 'This deepening of the resource sector through up-, down-, and sidestream activities could form core industrialisation nuclei for African Regional Economic Communities' economies….' He explores further how resource linkages can bring a whole range of interconnected industrial clusters into play through up-, down- and sidestream linkages, and examines the crucial component in this analysis which relates to the interconnectedness between sectors incorporating production, consumption, and the crucial role of services to the successful introduction and evolution of such an industrialisation strategy.

Although this chapter will not go into detail with regards to the crucial role of the services sector in designing and formulating a regional industrial strategy, it should be obvious that deliberations and protocols at the SADC level (or any other bilateral and multilateral levels), regarding liberalisation of trade in goods as well as services, consider the symmetrical relationship between the two. Priority sectors such as construction, finance, energy, communication, transport, and tourism have both direct and indirect linkages to industrialisation, providing not only crucial intermediate inputs into industries (thus affecting competitiveness), but also strong output linkages which provide a foundation for a viable industrial strategy. There is undoubtedly a high correlation between successful industrialisation strategies and the growth of an efficient services sector which is symmetrical rather than unidirectional. Future considerations by SADC into a regional industrial set of initiatives ought to take this into account.

Sceptics of the above insights may argue that the requisite change in conditions necessitating a changed mode of thinking and prescription on industrial policy in the current era lacks a theoretical basis and does not define a role for the state. An industrialisation strategy at a regional level would appear to incorporate many complex considerations that are non-viable. Some may claim the approach is unable to analyse the institutional realities and political economy considerations, so essential if such policy shifts are to be sustainable. It is difficult enough to devise a national industrial strategy let alone a broader regional one.

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The recommendations included in the deliberations of UNIDO/UNCTAD as well as in the South Centre, however, do not reject a framework incorporating a crucial role in devising industrial policies for the state or other broader-based institutions. In fact, a strong theoretical paradigm has emerged of late regarding the importance of industrial policies in transforming developing countries in the present environment into a high-performing, sustained, catching-up and strong transformation trajectory. This is the key focus in an employment working paper by the International Labour Organisation (ILO) dealing with the frameworks and paradigms relating to industrial policies and capabilities in developing countries (Nubler, 2011). The working paper begins by arguing that industrial policies can be regarded as a 'powerful instrument to support recovery following the economic crisis and to… follow the development example of very successful developing countries in rapid catching up'. The key issue is that, despite the history of failure in many instances of such policies, with bureaucrats not being good at picking winners and government interventions being prone to political capture, a consensus within different theoretical paradigms considering industrial policies has recently emerged, agreeing that the states have an integral role in shaping growth and development for their economies through such policies. Industrial policies are essential to support growth and development initiatives. The difference between these recent approaches rests in the nature and scope for such policies. Nubler (2011) differentiates three recent separate theoretical perspectives dealing with industrial policy that have depicted the analysis of industrial policy since the 1980s, *viz*. the 'Growth Perspective' (Commission on Growth and Development, 2008), the 'Institutional Perspective' (Hausmann, Roderik and Sabel, 2007), and the 'Evolutionary Perspective' (Chang, 2009; Nelson, 2008). The paper provides an excellent insight into how these three approaches differ in focus and scope, ranging from the growth approach (reflecting the most limited form of intervention) to the evolutionary approach with the widest set of interventions. There is an overall consensus within all of these strands of thinking, namely that the justification for government and institutional intervention in the area of industrial policy is based on market failure. The particular failures alluded to, relating to present circumstances, in each of the above approaches are identified as coordination, information, and organisation problems.

In another recent paper by Harrison and Rodriguez-Clare (2010: 5-6), the authors strongly advocate that the future of successful industrial policies for developing countries in the present environment be guided by 'soft' industrial policies which aim to develop a process whereby government, industry, and cluster-level private organisations collaborate on

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interventions that can directly increase productivity. 'The idea is to shift the attention away from interventions that distort prices ("hard industrial policies") to interventions that deal directly with the coordination problems that keep productivity low in existing or raising (sic) sectors' (Ibid.). The origins of this type of argument can be attributed to the earlier work of Hausmann and Roderik (2003), which in turn suggested that the long-running discussion about 'picking winners' be sidestepped by subsidising private efforts to 'discover' new areas of comparative advantage or by simply working with existing industries and clusters to deal with the coordination failures that limit their productivity and expansion.

Thus, in place of the 'picking winners' strategy (dependent on tariffs and other trade barriers, export subsidies, and tax breaks for local investors and foreign corporations), there is a growing consensus on helping particular industries and clusters by increasing the supply of skilled workers, encouraging technology adoption, and improving regulation and infrastructure, irrespective of whether this represents a nation state or a wider regional organisation. The chronic shortage in coordination, information, organisational and educational skills can be regarded as crucial 'market failures' and should be placed at the core of the policy through a more penetrative focus on these aspects at national as well as at collaborative regional levels.

The issues above are particularly pertinent with regard to debates on how to implement a successful regional industrial strategy. Provision has to be made for a set of coordinating as well as organisational proposals, and to how these issues can be addressed in policy recommendations. With regard to SADC, there is a vital role that the organisation can play in providing such functions. The secretariat can provide the organisational, coordinational, and informational support and ensure that a transparent and participatory set of structures is put in place involving both public and private stakeholders throughout the defined region. This would necessitate various committees structured to ensure not only policy dialogue and implementation but also the further exploration and viability of regional value chains in identified priority sectors.

A starting point for such an exercise would involve the compilation and analysis of existing industrial census data for the region as well as an attempt to incorporate updated regional input-output tables, depicting both backward and forward linkages; upstream, downstream and sidestream activities; import content; and so forth. This process could enable governments within the region to identify the list of tradable goods and services that are

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currently available in the region. It could also help to identify and indicate which private domestic firms are established and could participate in the strategy. Additionally, this recommendation could also indicate and prioritise the obstacles preventing such firms from upgrading, or alternatively, reflect the barriers that limit entry to such industries by other firms. This would involve the incorporation of respective organisations such as the SADC Banking Association, the SADC Private Sector Forum, Associations of Chambers of Commerce and Industry, the Mining Industry Association, Confederation of Agricultural Unions, and Transport Associations into a revamped Private Sector Stakeholders' Forum. An overarching forum (comprising individual countries represented by ministerial delegations as well as representation from the Stakeholders Forum) dealing with regional industrial development could be established with a view to implementing industrialisation policy at a national level in a manner that is consistent with the broad regional objectives.

These recommendations will help provide a focus on the key strategic elements relating to industrial upgrading, deepening, and diversification in the region.

4. Conclusion

This chapter has expanded on some of the issues raised in a previous tralac Working Paper (Zarenda, 2012) and has attempted to look in some greater detail at more focused crucial and challenging elements that should be considered by SADC in its deliberations regarding a regional industrial policy. The chapter has introduced readers to some of the more critical elements of the debate and has attempted to present these while adopting a theoretical perspective more appropriate to the changed global environment of the 21st century, when compared to the presently outdated models of industrial policy that were dominant in the 1970s and 1980s. Industrial policy has up to now had a rather mixed history, with several of the success stories (principally in East Asia) during the abovementioned era serving as a model for all countries to follow. Developing countries attempting to replicate this model in later years have experienced failures. The dramatically changed global environment of the present has not only forged a change in the theoretical approach to the subject in that it has exposed a different set of market failures necessitating urgent institutional interventions, but has also presented a new challenge to governments as to how to implement sustainable and successful industrial policies. The one-size-fits-all scenario has been rejected.

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Regional integration (particularly in a southern African-SADC context) at present can possibly offer some viable opportunities for a differentiated pattern of industrialisation for each of the member countries – these would incorporate considerations of both demand and supply issues within an institutional framework such as the SADC organ. This chapter has attempted to identify that the starting point for such a strategy incorporates an identification of natural-resource-based industrialisation and that a simultaneous focus on relevant service-sector components allied to this be incorporated. Additionally, the importance of relevant private-sector associations has been emphasised.

The overriding question that sceptics will raise relates to the practicality of such a cooperative regional strategy. Would individual nation states within an arrangement such as SADC be willing to sacrifice their autonomy, policy independence, and narrow, sectional, selfish interests for a more collective set of rewards? If implemented properly, however, and if there is a genuine commitment by members of SADC to move away from their self-centred national interests to a broader vision, there could be a collective, positive-sum game inherent in this new industrial policy. One possible way in which this question could be answered is through conducting a comprehensive cost-benefit analysis. With detailed discussions relating to the future introduction of the Tripartite Free Trade Agreement, some of the above issues could also serve as a focal point in the evolution of this agreement.

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Chapter 6

Regional energy cooperation in SADC: is the Southern African Power Pool currently powered by external funding?

Johannes Muntschick

1. Introduction

Since the end of the Cold War, a wave of New Regionalism (Hettne, 1999; Robson, 1993) can be observed in various parts of the globe. Many of these new organisations emerged in the southern hemisphere (e.g., Association of South-East Asian Nations (ASEAN), Economic Community of West African States (ECOWAS), Mercado Comun del Sur (Mercosur), Common Market for Eastern and Southern Africa (COMESA) and the Southern African Customs Union (SADC)) although preconditions for successful regional integration are less favourable compared to economically more interdependent and industrialised regions in the north, for example, Europe and North America. Regional integration organisations in the so-called South[1] generally comprise developing countries which exhibit comparably stronger (economic) relations to extra-regional actors than to partners within their own region. Nevertheless, regionalism in the South has come into existence and sometimes displays considerable dynamics. However, there is evidence that the progress, dynamics, and effectiveness of regional integration organisations and their inherent cooperation projects are not always entirely under control and influence of the regional actors.

[1] The term 'South' encompasses regions with predominantly developing, non-industrialised countries in the southern hemisphere. Formerly often referred to as so-called 'Third World', these regions today comprise several newly industrialising countries and emerging powers (Söderbaum and Stålgren, 2010: 2).

Focusing on Africa, the Southern African Development Community (SADC) is one of the most realistic and promising examples of the new regionalisms (Mair and Peters-Berries, 2001). The organisation was founded in 1992 and succeeded the Southern African Development Coordination Conference (SADCC). The latter was established in 1980 by several black-majority-ruled countries to combine efforts to counterbalance the negative impacts of apartheid South Africa's then destabilising policies. Today, SADC's overall aim is to foster socioeconomic development in a broad range of issue areas – particularly related to economy, infrastructure and security – by means of institutionalised regional cooperation (Oosthuizen, 2006).

A central part of regional infrastructure cooperation in SADC is dedicated to the energy sector in general and to electricity in particular (Isaksen and Tjønneland, 2001: 39; SADC, 2004). While several countries in southern Africa have traditionally relied on long-term bilateral contracts for electricity trading, the end of apartheid in South Africa paved the way for a more comprehensive approach to the problem of regional energy shortages, on the one hand, and excess supply on the other hand. This led to the foundation of the Southern African Power Pool (SAPP)[2] as a SADC body in 1995. Within the framework of SAPP, the Short-Term Energy Market (STEM) was established in April 2001. The latter was followed by a more competitive market, the Day Ahead Market (DAM), which became operational by the end of 2009. Furthermore, SAPP aims *inter alia* to coordinate members' energy policies and construction of power generation capacities, to maintain and extend the regional power grid and to create common regional standards of quality and supply.[3]

While SAPP as an institution is generally regarded as a success and particularly by regional actors appraised as a shining example of regional infrastructure cooperation in SADC, little is known about its institutional effectiveness. Since surplus electricity generation in the region diminished by 2006 due to power shortages in the Republic of South Africa (RSA), the establishment of DAM shortly afterwards is quite puzzling. This chapter aims to analyse the emergence, dynamics, and effectiveness of institutionalised regional electricity cooperation in

[2] A power pool can be defined as arrangement between two or more interconnected electric systems that are planned and operated to provide power in the most reliable and economical manner for their combined load requirements. Thus, pooling together total production from all power plants facilitates the dispatching of excess capacity from some partners to meet demand from others (cf. Economic Commission for Africa, 2004: 22).

[3] The author thanks Dr Lawrence Musaba, SAPP Coordination Centre Manager, for providing some useful documents on SAPP.

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SADC with a focus on recent developments in SAPP, particularly the performance of STEM and DAM.

After introducing a theoretical framework for better understanding the general purpose and benefits of institutionalised regional cooperation and the ambivalent impact of external actors in the following section, the chapter turns to southern Africa and highlights the demand for regional electricity cooperation in Section 3. Taking the influence and impact of important regional and external actors into account, the chapter explains in Section 4 the establishment, institutional structure and financing of SAPP, and analyses its effectiveness with special regard to STEM and DAM. Based on empirical data, it elucidates that intraregional electricity trade over DAM today covers only a marginal part of total trade between SAPP member states. The chapter comes to the conclusion that external funding provides major incentives for continuous and deeper regional electricity cooperation in SADC, despite the fact that the regional power crisis has caused diminishing potential for intraregional trade from the year 2006 onwards. The result is a functional DAM which is not very effective with regard to its overall performance but is likely to be maintained as long as external incentives for regional cooperation within SAPP's framework are continuously provided.

2. Theorising regionalism: the demand for institutionalised regional cooperation and the impact of external actors

Regionalism can be interpreted as a planned, multilateral, and state-led organisation of interdependence within a confined regional space that gives rise to a cluster of various, multidimensional, or specific regional cooperation projects and related institutions (Bach, 2003: 22; Stein, 1982: 316). The demand for international cooperation is caused by international and regional cooperation problems which arise from complex interdependence between states. Perceiving the latter as rational actors in the international arena, states are incited to engage in institutionalised cooperation provided that expected benefits surpass the payoffs of unilateral action or an uncoordinated *status quo* (Hurrell, 1995; Keohane, 1984: 15). Institutions help to solve regional cooperation problems by reducing uncertainty and generating mutual trust among actors involved, providing transparency and information on their actions, offering a framework for negotiations, and consequently facilitating overall policy coordination. Furthermore, institutions can 'lock-in' international agreements and ensure participants' credible commitment and compliance. Ideally, institutions promote cooperation among their members by monitoring mechanisms that incite and reward

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cooperative behaviour and sanction deviance. In a regional context, functioning and effective institutions thus help to achieve better policy outcomes for all actors involved and add to the welfare and development a region and its member states (Keohane, 1982, 1984; Rittberger and Zürn, 1990: 90-91).

Relative power distribution among actors can influence the occurrence and design of institutionalised cooperation projects. States in a central position – i.e. those on which others are dependent – occupy a relatively strong power position and are essential for the success of any regional organisation: they can foster or inhibit the process of regional integration and may hinge their engagement and participation in regional cooperation projects on the willingness of compromise and concessions of their weaker regional partners (Gehring, 1994: 216; Moravcsik, 1998: 64-65). Hence, an institutionalised regional cooperation agreement/ project not only reflects the constellation of the states' prevailing preferences but particularly the relative power-position of the involved states (Keohane, 1988: 387; Zürn, 1993: 70).

Countries and regional integration organisations in the southern hemisphere generally exhibit a pattern of strong and asymmetric extraregional interdependence to third actors – particularly with regard to the economic realm or the meaning of donors' funding. This economic disequilibrium distinguishes the situation in the South from the one in North with regard to plain structure (Krapohl and Muntschick, 2009). Be it a legacy of colonialism or not, this structural 'background variable' is in any case assumed to have a significant impact on the emergence, dynamics, and effectiveness of institutionalised regional cooperation projects and regional integration organisations in the developing world (Young, 1969: 727; Zimmerling, 1991: Chapters 3-5).

Strong and asymmetric extraregional interdependence between one or more regional parties and third, external actors can change a genuine regional problematic situation into a more cooperation-aversive situation and thus impede its solution (Axline, 1994: 26). In practice, this can be the case when regional actors with strong extraregional relations prefer to cooperate with promising external parties instead of initiating, maintaining, or intensifying integration within their less promising region (Muntschick, 2012). However, a similar pattern of extraregional interdependence can also become conducive to the formation of regional cooperation projects if third parties act altruistically and assist in facilitating institutionalised regional cooperation, for example, providing payments, increasing cooperative gains, reducing costs of implementation, and improving institutional functionality (Axline, 1994: 24-

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25; Burns and Buckley, 1974). In practice, this can be the case when external actors make the provision of financial resources conditional on regional cooperation efforts or on an existence of regional institutions. Thus, regional actors become enticed to cooperate because the cooperation gains are fuelled from 'outside' (Muntschick, 2012).

From a plain theoretical perspective based on the aforementioned ideas of cooperation theory, the following, rather generalising assumption on regionalism in the South – like in SADC – can be drawn:

> The emergence, design and dynamics of regional integration in the South is more unstable and more difficult to achieve if southern states exhibit a pattern of strong and asymmetric extraregional interdependence and are therefore subject to external influence.

3. The demand for regional electricity cooperation in southern Africa

Access to electricity and security of supply is a vital need for individual households as well as the economies of entire nation states. Due to its strategic importance, this essential part of a country's infrastructure touches both the issue area of economy and security. In general, socioeconomic development without sufficient energy and electricity is impossible at present times (Tshombe, 2008: 93).

General demand for institutionalised regional electricity cooperation in southern Africa stems from the clear benefits of an (increasingly) interconnected regional power grid and integrated electricity market: Participant member states stand to particularly profit from better supply security since combined systems are less vulnerable to disturbance in transmission lines or unexpected outages of power plants. Furthermore, an integrated regional power system favours economic efficiency through an exploitation of economics of scale. It can reduce member countries' costs to meet national peak demands in electricity consumption and diminish losses resulting from excess production which could be traded to members with insufficient electricity generation capacity. For countries being in a position as potential importers of electricity within a power pool, additional benefits stem from a deferment of investments for new power plants and less cost for providing operating reserve facilities. Furthermore, risks and costs of planning and constructing new electricity generation capacities could be reduced for an individual country by distributing these on all participants

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– and thus future beneficiaries – of the respective regional cooperation arrangement. Electricity-exporting countries stand to additionally benefit by lowering costs for existing spinning reserves and gain revenues by selling such excess power (Lopes and Kundishora, 2000: 214; Matinga, 2004: 92-93). Hence, an interconnected regional electricity network and market would not only provide for better supply security in southern Africa but also cause more cost efficient production, an optimised use of power generation and transmitting infrastructure, and eventually lower consumer prices.

Country-specific demand for institutionalised regional electricity cooperation in SADC can be deduced from structural characteristics based on the ratio of electricity generation and consumption of individual member countries at the time prior to the first arrangement:

With the birth of the new SADC, the organisation's (mainland) members with significantly insufficient electricity generation capacity in relation to their national consumption were Zimbabwe (–388 MW), Botswana (–128 MW), Lesotho (–76 MW), Swaziland (–75 MW), Mozambique (–36 MW), Namibia (–14 MW) and Tanzania (–1 MW) in the year 1996 (SAPP, 1998: 20). Against this background, these countries' demand for regional cooperation, for structural reasons, roots in their position as net importers of electricity.

In contrast, considerable electricity surplus was generated in countries like South Africa (+2 160 MW), the former Zaire (+1 985 MW), Zambia (+604 MW), and to some extent Angola (+145 MW) and Malawi (+7 MW) back in 1996. Particularly South Africa's parastatal Eskom, by far the largest power producer in the region – then operating 22 heavily subsidised power plants commissioned in the course of autarky policies at the time of apartheid – represented an enormous source of comparably cheap excess electricity (Grynberg and Velia, 2012: 243-244; SAPP, 1998: 20). These countries' demand for an interconnected regional market stemmed from plain structural reasons related to individual countries' surplus production and their position as likely net exporters of electricity. Due to its vast surplus generation during the 1990s, Pretoria strongly favoured an expansion of the regional power grid and regional institutions – preferably promoting standards of its own national power utility – that would serve its own export intentions by facilitating additional regional trade in electricity.

While intraregional demand- and supply-side imbalances of individual SADC countries have been cushioned to a considerable degree by long-term (bilateral) contracts, pressuring demand

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for additional short-term access to electricity crystallised in many SADC countries in the mid-1990s against the background of increasing numbers of blackouts, operational problems of (dilapidated) power generation systems, and lack of national reserve or spinning capacities (SAPP, 1998). The prevailing imbalances and inequalities of the electricity situation in the SADC region were further amplified by seasonal circumstances and related periodical peaks in consumer consumption (e.g. caused by air conditioners or electric heaters), lack of adequate power transmission lines,[4] insufficient interconnectivity of national power grids, and uncoordinated national energy policies (Rugoyi, 1998).

Demand and benefits have also been estimated by profound scientific research: Studies from the early 1990s calculated the potential savings of an integrated regional approach to power sector development in SADC of about 20% for the period from 1995 to 2010 compared to costs arising if countries would individually develop their national power sectors (Matinga, 2004: 92). A study conducted by a World Bank funded think tank in the mid-1990s predicted savings of up to 100 million US dollars to be realised in a centralised and competitive power pool compared to (existing) bilateral trading agreements. At the same time, estimates of South African economists accounted for US$130 million in savings by such a regional approach (Sebitosi and Okou, 2010: 1450). More recent projections for 2015 revealed considerable potential for intraregional electricity trade in SADC, especially in north-south direction from hydro-plants the Democratic Republic of the Congo (DRC) to the mining and manufacturing industries in South Africa and Zimbabwe (Rosnes and Vennemo, 2009: 46). According to other very recent scenarios, US$1.1 billion in annual energy costs could be saved by further deepening regional electricity integration in SADC (Ranganathan and Foster, 2011: 41). Regional costs for infrastructure, and particularly power plant construction, could be reduced by US$3 billion over a 20-year period if coordinated regional planning would prevail over countries' individual utility expansion (Sebitosi and Okou, 2010: 1451).

Structurally motivated demand, official statements, and scientific research studies can be condensed to a common denominator: all member states could improve their national security of power supply, socioeconomic development, and societal welfare by creating a regional electricity market, facilitating and improving short-term cross-border trade, and connecting their power grids within the framework of an institutionalised common power pool. In the

[4] On average, between 5 and 25% of an individual SADC country's generated power is lost due to old and decayed power transmission lines (SAPP, 2007: 29).

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language of political science, such an institution would represent a regional 'club-good' of which only participant member states can benefit.

Intraregional electricity interdependence within SADC

The SADC region indicated strong patterns of asymmetric intraregional interdependence prior to institutionalised regional electricity cooperation. For many decades up until the year 2006, South Africa was the regional centre of gravity concerning power production and electricity supply. During the time of apartheid, its national power utility Eskom pursued a massive expansion of generation capacity. The South African parastatal owns and today operates about two dozen central-station power plants. This makes Eskom Africa's largest energy utility and the company ranks among the world's top five electricity producers (Daniel and Lutchmann, 2006: 497).

The availability of cheap South African electricity led to a distinctive pattern of intraregional dependency on Eskom, as it was not economical for several smaller countries' utilities to build sufficient own-generation facilities as their national demand was rather small (Eskom, 2010a). Particularly Botswana, Lesotho, Namibia and Swaziland were heavily dependent on Pretoria's surplus generation (Economic Consultants Associates, 2009: 9-13).

As early as 1996, South Africa's Eskom had a very elevated position among regional electricity utilities with an available net installed capacity of about 32 000 megawatt (MW). This was more than 10 times the installed capacity of the (then) Zaire (2 480 MW), Mozambique (~ 2 000 MW) and Zambia (1 774 MW), which represented the three biggest power producers in the region (SAPP, 1998: 17). Intraregional asymmetry in electricity relations additionally mirrors the pattern of transmission lines in southern Africa. According to a recent map provided by the Southern African Power Pool, the RSA is depicted like a hub in an incomplete spoke and maintains radial connections to all of its neighbours. Besides Zambia and Zimbabwe, however, virtually all other SADC members are only connected to one or two neighbouring countries of the organisation.[5]

[5] Reference to a map produced by SAPP: http://www.sapp.co.zw/images/pp-sapp-grid.gif

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The asymmetric pattern of electricity interdependence in southern Africa laid ground for South Africa's dominant position in the region in this issue area.[6] This was emphasised by Eskom's ownership of essential parts of the subcontinent's electricity infrastructure and the country's role as SADC's most important surplus producer back in the mid-1990s. Against this background, South Africa is, for structural reasons, expected to be the major driver for regional electricity cooperation in SADC and is in a central position to assert its preferences with regard to institutional arrangements and governing institutions.

Extraregional electricity interdependence of SADC

Extraregional relations of SADC member countries in the issue area of electricity have been marginal with respect to areas beyond southern Africa. The region and its countries are neither dependent on electricity imported from overseas nor does a noteworthy, interconnected external export market for trade in surplus electricity exist.[7] Since physical or trade-based extraregional electricity relations have been virtually non-existent, external actors or competing extraregional policy alternatives for electricity cooperation are for plain structural reasons at first glance not likely to significantly interfere with any agenda on regional electricity cooperation within SADC.

While SADC is neither dependent on extraregional electricity imports nor on an important external market for making revenues by selling possible excess energy, the organisation is nevertheless strongly dependent on external funding. In 2006/07, nearly 60% of SADC's whole budget of about US$46 million was financed by external actors, namely by the European Union. The rest was procured by SADC members, to the most part South Africa (Tjønneland, 2006: 2). Currently, the 10th European Development Fund (EDF) 2008-2013 programme provides for the 'Region of Eastern and southern Africa and the Indian Ocean' to the sum of €645 million in total, and for the SADC region €116 million in particular (European Community – Region of Eastern and southern Africa and the Indian Ocean, 2008: 44).

[6] Grynberg and Velia (2012: 243) argue that South Africa's apartheid regime nurtured these conditions of electricity dependence by its smaller neighbours by providing them with exceptionally cheap electricity in order to have a 'potentially powerful instrument of international policy'.
[7] The DRC joined SADC a little later in 1997. The country is not regarded as an extraregional actor prior to the institutionalisation of regional electricity cooperation in SADC because Kinshasa was involved in the negotiations for establishing SAPP from the very beginning (Njiramba, 2004).

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With special regard to regional energy and particularly electricity cooperation, SADC has traditionally attracted considerable funding from external actors, too. During the time of apartheid, the old SADCC received external support for renewal, interconnection, and expansion of regional transmission lines. From the late 1990s until 2006, several external actors – *inter alia* USAID and the World Bank – facilitated regional energy and electricity cooperation in SADC by means of financing feasibility studies and providing technical assistance to the later SAPP and its Coordination Centre (Economic Consultants Associates, 2009: 40-41). In 2002, the EU launched, for example, the Energy Initiative for Poverty Eradication and Sustainable Development which aims, in particular, to improve access to electricity in developing countries. Part of this initiative is the European Energy Facility with a budget of €220 million. Part of it is earmarked to support institutionalised energy cooperation and electricity infrastructure in southern Africa. In 2006, energy cooperation became explicitly part of the then €23 billion EDF budget. A review of EU-Africa cooperation issued in 2007 argued to introduce better internal market principles to Africa, as part of an Africa-EU Energy Alliance (European Commission, 2007). Putting the focus on SADC, outstanding support for electricity cooperation came from Europe, namely Scandinavian countries and the EU (Economic Consultants Associates, 2009: 40-41).

According to available data[8], external funds have contributed quite significantly to SAPP's total assets and annual budgets. In the past few years, the share of external funding oscillated between 12 and 46%, levelling off to a good 20% in the very recent years (see Figure 1). Hence, external support is surely not a negligible factor at all.

[8] Data extracted from SAPP's annual reports. Slight inaccuracies may exist due to minor changes in SAPP's accounting policies on grant funds from the year 2009 onwards (cf. SAPP, 2010: 36).

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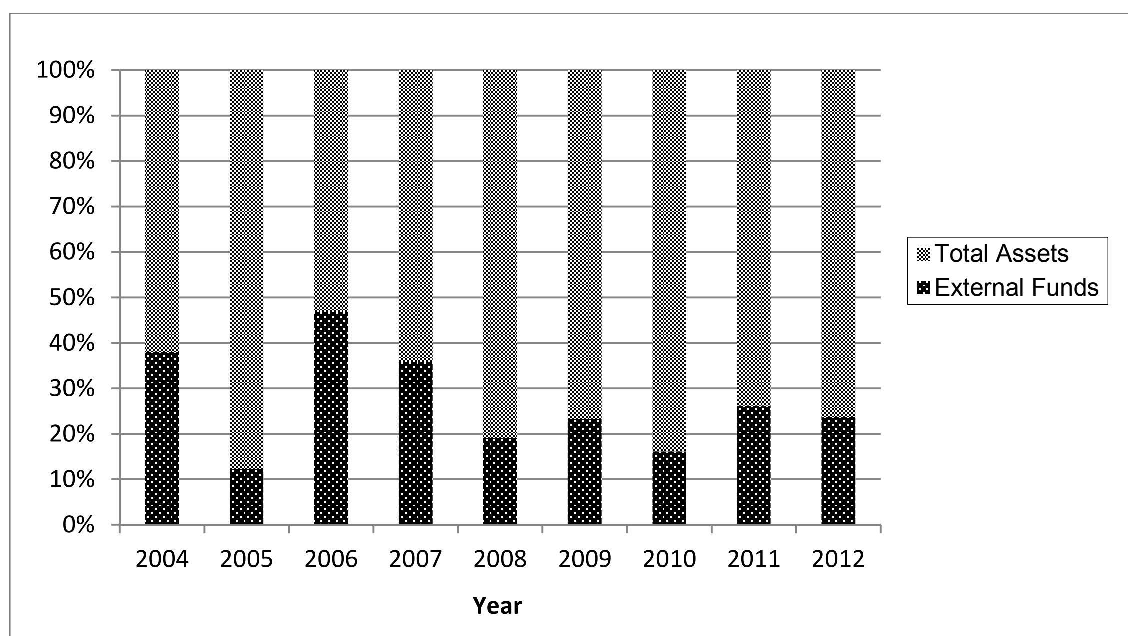
Figure 1: External funds as percentage of SAPP's total assets



In absolute figures, the inflow of external funds available to SAPP accounted for between less than US$100 000 and more than US$2.7 million during the time period observed (see Figure 2). Since the millennium, SAPP adopted a new approach to attract external funding by convening regular donors' meetings. At such occasions – taking place in 2001, 2005 and 2009 so far – the power pool would present itself to the international donors' community and clarify its priority projects in regional electricity cooperation. This strategy seems to have worked out. As the figure below indicates, the inflow of external funds directly available to the pool increased significantly each year following a donors' convention.

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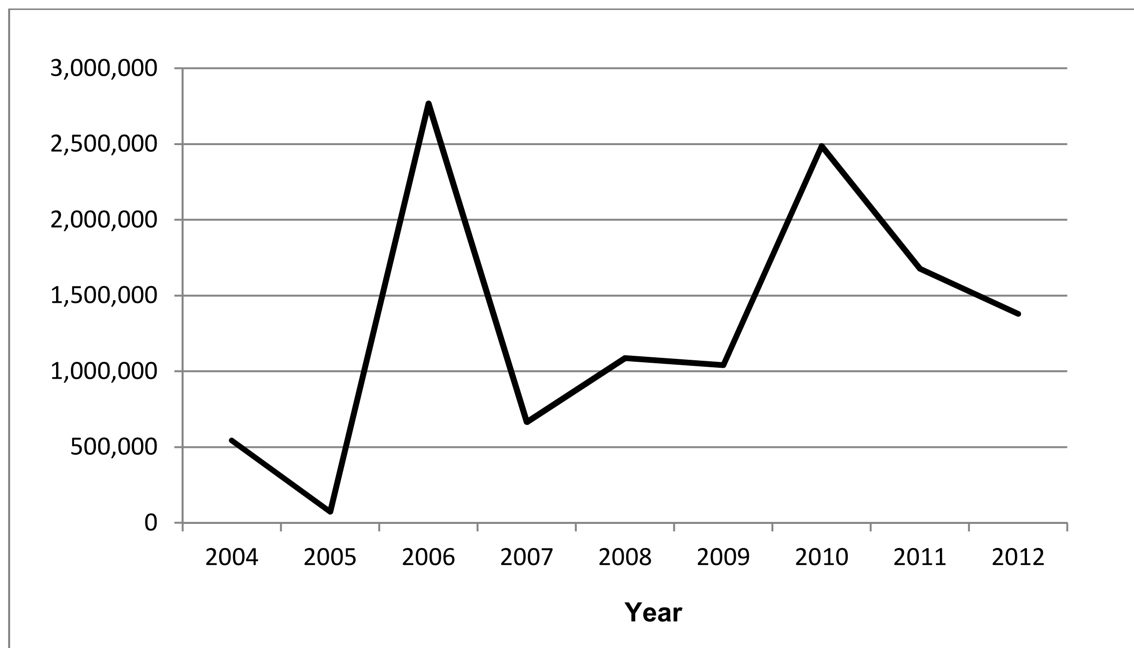
Figure 2: Inflow of external funds to SAPP (US$)



Against this background, a comparably strong and asymmetric extraregional interdependence of SAPP as an organisation on external actors can be assumed. External donors' funds cover a significant share of the power pool's available assets and contribute substantially to the organisation's operability and performance. Regional electricity cooperation within SAPP's framework is consequently, for plain structural reasons, prone to external impact – be it positive and supportive or negative and interfering. Due to their importance as lead donors, Scandinavian countries and the EU are in a likely position to exert influence on the establishment, design, and effectiveness of institutionalised regional electricity cooperation in southern Africa.

4. The Southern African Power Pool: powered by external funding?

Electricity cooperation in southern Africa is not an entirely new phenomenon. Back in 1958, the colonial administrations of the DR Congo (formerly Belgian Congo) and Zambia (formerly part of the Federation of Rhodesia and Nyasaland) initiated the first bilateral project which led to the construction of a transnational power line between the cities of Nseke and Kitwe (SAPP, 1998: 1). During apartheid time, early regional electricity cooperation in southern Africa included the development and strengthening of transmission lines among SADCC members in order to reduce dependency on South Africa. Notwithstanding political or racial aversions, several long-term bilateral agreements on cross-border electricity trade had been contracted among countries within the region – particularly between the RSA and

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some of its smaller neighbours – already before the mid-1990s. However, most of these long-term bilateral contracts provided only for an electricity trade of preconceived fixed volumes. They were therefore too inflexible to adequately react to unexpected peaks in consumers' consumption and steadily increasing domestic demands. Another weakness of long-term bilateral contracts was that they could not protect an importer against unforeseen problems occurring in their supply partner, such as station outages, system failures, power line disruptions, and so forth (Bowen et. al., 1999: 187; Economic Consultants Associates, 2009: 8, 19-23; Economic Commission for Africa, 2004: 35-37).

A severe drought in southern Africa in 1992 caused nation- and region-wide power shortages due to dwindling hydro-electricity generation capacities and amplified the demand for regional electricity cooperation in SADC. In view of the drought's impact and the uneven distribution of regional power generation resources with large hydro-electricity reserves and power stations in the north (e.g. the Kariba or Inga Dam) and the major coal deposits and thermal power plants in the south (particularly in Gauteng), regional cooperation in the form of short-term transnational electricity trade and an interconnection of national power systems became high on the agenda for many SADC countries (Economic Commission for Africa, 2004: 39; AEEP, 2012 : 14). Against this background, even the drought seems to have had a catalysing effect on regional institution building.

On 28 August 1995, the SADC countries – apart from the island states of Madagascar, Mauritius, and the Seychelles – signed an Intergovernmental Memorandum of Understanding (IMoU) which led to the establishment of the Southern African Power Pool. The Inter-Utility Memorandum of Understanding and an agreement between operating members were signed shortly afterwards in order to structure institutional governance, interaction, and responsibilities of SAPP's members (SAPP, 1995). According to its own account, the power pool's pivotal aim is 'to provide reliable and economical electricity supply to the consumers of each of the SAPP members'.[9] The significance of the founding act is revealed by international comparison: the SAPP was the first regional power pool in the South (i.e. beyond North America and Europe) with a formally institutionalised framework. The following utilities are members of the Southern African Power Pool (SAPP, 2012):

[9] Information according to SAPP: http://www.sapp.co.zw

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Table 1: Members of SAPP (2011)

Country	Name of utility	Status	Installed Capacity (MW)
Angola	Empresa Nacional de Electricidade (ENE)	non-operating	1 187
Botswana	Botswana Power Corporation (BPC)	operating	202
DR Congo	Société Nationale d'Electricité (SNEL)	operating	2 442
Lesotho	Lesotho Electricity Company (LEC)	operating	72
Malawi	Electricity Supply Commission (ESCOM)	non-operating	287
Mozambique	Electricidade de Moçambique (EDM)	operating	233
Mozambique	Hidroeléctrica de Cahora Bassa (HCB)	observer	2,075
Namibia	Namibia Power Corporation (NamPower)	operating	393
South Africa	South Africa's Electricity Supply Commission (Eskom)	operating	44 170
Swaziland	Swaziland Electricity Company (SEC)	operating	70
Tanzania	Tanzania Electricity Supply Company (Tanesco)	non-operating	1 008
Zambia	Copperbelt Energy Corporation	independent*	~ 80
Zambia	Zambia Electricity Supply Corporation (ZESCO)	operating	1 812
Zimbabwe	Zimbabwe Electricity Supply Authority (ZESA)	operating	2 045

* Independent Transmission Company

All operating member countries are signatories of all documents governing SAPP and are interconnected regionally through at least one partner of the SAPP network. Angola, Malawi, and Tanzania are still non-operating members because they are not yet connected to the regional grid. They participate in all SAPP activities besides those related to the operation of the pool.[10] Initially, countries were represented in the institution by their national electric power utilities only. With the adoption of the revised IMoU in 2006, however, private and state-independent electricity providers may also become members of SAPP (SAPP, 2012: 4).

SAPP is embedded in SADC's organisational framework and complies with central provisions of its agenda (cf. SADC, 1995: 8; SADC 2004). All the agreements concerning the power pool have to be consistent with the provisions of the SADC Treaty. While SAPP is managed through the SADC Secretariat, the member states' energy ministers are ultimately responsible for strategic policy making in the power pool. However, daily operating routines are carried out by the members' power utilities with a substantial degree of autonomy

[10] Information according to SAPP: http://www.sapp.co.zw/viewinfo.cfm?id=93&linkid=2&siteid=1

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(Economic Commission for Africa, 2004: 40; Economic Consulting Associates, 2009: 28; SAPP, 2012: 4). In the year 2000, the SAPP Coordination Centre was established in Harare. Its main tasks are to coordinate the power pool's activities, monitor the operation of the pool, and facilitate the implementation of SAPP's objectives, particularly the formation and management of the common regional electricity market (Hammons, 2011: 400-401).

Regarding the Operating Guidelines, which define the specific regulations for plant operation, transmission, safety and sharing of costs, it is widely acknowledged that South Africa successfully asserted its national interests in the interstate/inter-utility negotiations and therefore most significantly influenced SAPP's institutions and regulatory framework in this respect (Economic Consulting Associates, 2009: 1; Tshombe, 2008). For example, SAPP reached an agreement on frequency control of its regional power grid 'through a negotiated target of at least 90% within the frequency band of 49.95 and 50.05 Hz' (SAPP, 1998: 9). This regional standard reflects the South African grid's standard frequency of 50 Hz to which all of Eskom's power generators are synchronised (Eskom, 2010b).

South Africa's influence and design features on the power pool are not surprising since important transmission lines, interconnectors, and hubs of SAPP's power network are on South African soil and operated by South Africa's energy giant Eskom. The latter should not only represent Pretoria in SAPP but also 'ensure that generation options outside South Africa are afforded a reasonable opportunity as South Africa plans for its future capacity needs' (South Africa Department of Minerals and Energy, 1998). This reflects South Africa's strong and early interest in a regional power pool that could provide access to electricity-generating capacities beyond its own borders in the future, particularly to the vast hydro-energy potential in the DRC (Daniel and Lutchmann, 2006: 499). The strong power position of South Africa in SAPP prevails until today since Eskom still dominates the interconnected system by far, providing about 84% of installed net capacity (Economic Consulting Associates, 2009: 10; Hammons, 2011). Fortunately, according to SAPP officials, the potential impact of South Africa's outstanding 'electric capabilities' and its associated dominance 'is not an issue of concern among Member States' of SAPP (cf. Matinga, 2004: 98). This indicates that the RSA has played the role of a benevolent regional hegemon in this issue area so far.

The costs of financing SAPP and operating the SAPP Coordination Centre are for the most part covered by members' annual contributions (based on a formula codified in the IMoU), the STEM/DAM participation fees (calculated on the basis of traded volumes) and, to a

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considerable degree, by donors' funds and grants. The relative importance of external donors' funding to SAPP as an organisation has been illustrated earlier (cf. Figures 1 and 2) and becomes even more apparent with regard to the financing of the big regional electricity infrastructure projects. In this respect, Norway, Sweden, the European Union, the World Bank, USAID, Denmark (and the South African government-owned Development Bank of Southern Africa as regional donor) have contributed substantially to the planning, commissioning, and completion of regional electricity infrastructure through technical support and, particularly, financial means (Economic Consultants Associates, 2009: 41-44). Since its foundation, SAPP made progress to expand its regional power grid and enhance the interconnectedness of its members by completing the following projects (information taken from Hammons, 2011: 402-403):

- building a 400 kV interconnector linking Matimba (South Africa) and Insukamini (Zimbabwe) via Botswana in 1995
- establishing the 330 kV Mozambique-Zimbabwe interconnector in 1997
- connecting the Phokoje substation to the Matimba transmission line in 1998
- restoring of 533 kV power lines between Cahora Bassa (Mozambique) and the Apollo substation (South Africa) in 1998
- building a 400 kV power line between Camden (South Africa) via Edwaleni (Swaziland) to Maputo (Mozambique) in 2000
- building a 400 kV power line connecting Aggeneis (South Africa) and Kookerboom (Namibia) in 2001
- building a 400 kV power line connecting Arnot (South Africa) and Maputo (Mozambique) in 2001
- establishing the 220 kV Zambia-Namibia interconnector in the Caprivi in 2006

Furthermore, a coordinated refurbishment, demothballing, and commissioning of (new) power plants in the region have been on SAPP's priority list since surplus supplies diminished in SADC. However, the most central project on SAPP's agenda was the formation of a regional electricity market in order to facilitate intraregional power trade.

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4.1 The Short-Term Energy Market

Right from the beginning, the EU provided US$0.7 million directly to SAPP within the framework of the ACP-EU Energy Facility under the 9th EDF from 2000-2007, mainly for capacity building in network operations (European Commission, 2009:19-20). Driven by regional demand and fuelled by external financial and technical support (Economic Consulting Associates, 2009: 40), the Short-Term Energy Market was established in April 2001 in order to provide a regional market for trading surplus electricity which was not covered by long-term contracts. This has been regarded as the central project of institutionalised regional electricity cooperation in SADC at the turn of the millennium. As an antecedent to a fully integrated and competitive market, only the member states' national power utilities were allowed to participate in STEM.

Depending on whether they demanded or wished to sell electricity, the SAPP members submitted each day before 9:00 their bids and offers to the power pool's Coordination Centre. The latter matched bids and offers on the same day after market's closure and published the results to all participants who would then eventually enter into a contract.[11] However, market prices were only matched at the sellers' offers – a practice which later turned out to constrain trade (Hammons, 2011: 406). For STEM being operational, the SAPP's Coordination Centre provided transparent information on current sales offers and demand, monitored the capacity of the interconnected power transmission lines, gave logistical support, and finally organised the contracts on trade and wheeling of the electricity (Economic Commission for Africa, 2004: 28-29). Thus, STEM as an institution operated quite effectively, as one would expect from an institution that provides benefits for its creators.

During the early months of operation, up to 120 GWh were traded through STEM with monthly volumes oscillating between 20 and 60 GWh until mid-2005. Since then, however, regional electricity trading through STEM diminished to an average of only less than 20 GWh per month until the end of 2006 (see Figure 3).[12] Shortly afterwards, STEM became dormant and was finally closed down due to power shortages and lack of tradable surplus generation electricity in the region.

[11] South Africa's influence on SAPP's institutional framework is revealed again in the STEM regulations since '(o)ffers, bids and the published settlement amounts shall be in either South African Rands (ZAR) or the United States Dollar (USD)' (SAPP, 2003: 45).
[12] Data according to SAPP's annual and monthly reports.

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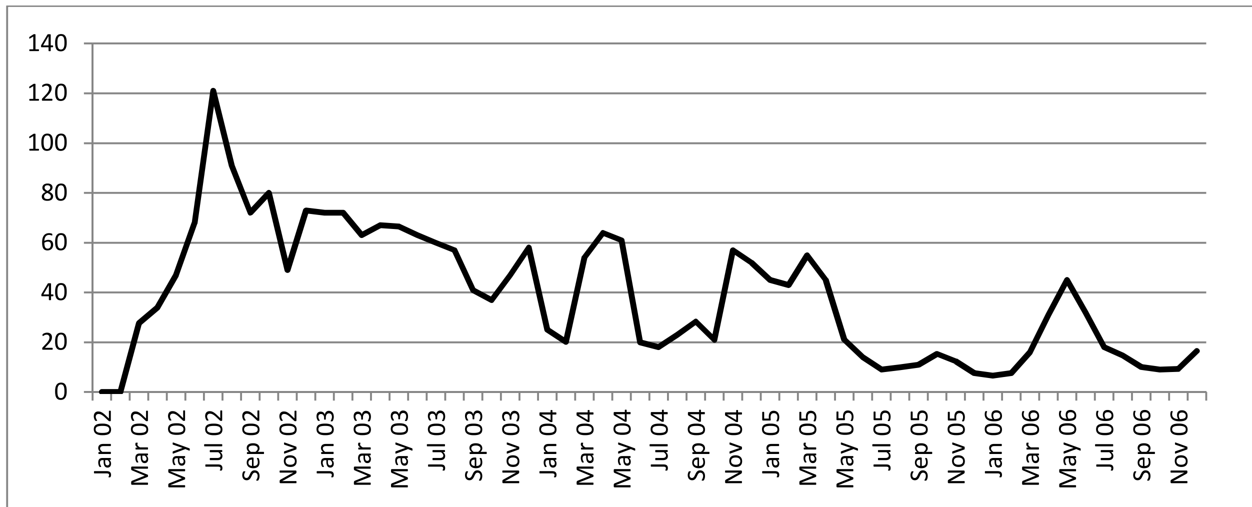
Figure 3: SAPP electricity trade through STEM in GWh (2002-2006)



During its time of operation, surplus electricity trading in the STEM market was only partially crowned with success: STEM trade volumes covered only about 5 – 10% of total regional trade in electricity. A major problem was that the market was neither fully liberalised nor competitive yet. On the one hand, demand almost always exceeded the available supply offers in STEM; on the other hand, the sellers did not benefit from higher prices offered by buyers because trade was concluded at the sellers' price offers. Pricing mechanisms thus constrained trade and the STEM mechanisms were inflexible insofar as serving bilateral agreements generally took priority over other, potentially more efficient, dispatch of surplus supply (Economic Commission for Africa, 2004: 46-49, 72). Nevertheless, evidence from data on electricity trade between some SAPP members – particularly between Eskom, on the one side, and NamPower, LEC, HCB and SEC on the other – has nevertheless proven that trade through STEM caused about 50% lower wheeling charges compared to the ones inherent to the bilateral trade agreements. This can surely be regarded as an additional incentive for trading electricity on a competitive regional market rather than bilaterally on the ground of inflexible long-term contracts (Disenyana and Samuel, 2009: 19).

The diminishing surplus generation supply was a most crucial factor in STEM's decline. However, the region's electric infrastructure also did not yet meet the prerequisites for a fully operational regional electricity market because free power transmission was constrained by, for example, lack of interconnectors, poor transmission lines, and obsolete generation techniques (Economic Consultants Associates, 2009: 29).

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4.2 The Day Ahead Market

Despite increasing overall power shortages in the SADC region and diminishing trade via STEM, SAPP members began planning for a more competitive market from the year 2003 onwards in order to fuel regional trade in electricity, enhance security of supply, and initiate better pricing policies of the national power utilities. The development of the competitive electricity market started in January 2004 when the government of Norway and SAPP signed an agreement that provided the latter with a grant of kr 35 million NOK (about US$7.5 million) for the establishment of its envisaged competitive regional electricity market. This inflow of external donors' funding directly initiated the institutionalisation of DAM during the time period 2004/2005 (Economic Consulting Associates, 2009: 40-41; Hammons, 2011: 407; Tjønneland et al., 2005: 37). Additionally, the government of Sweden gave a grant of kr 9.8 million SEK (about US$1.5 million) for the development of an adequate and long-term transmission-pricing policy as an accompanying measure (Madlala, 2006).

In 2009, DAM became operational as a new trading platform. It allows more direct trade between interacting partners comparable to an auction market with SAPP's Coordination Centre acting as market operator. Against the background of the revised IMoU, DAM is in principle open to other, independent power producers and distributors in order to weaken the national power utilities' tacit monopoly and increase competition (Economic Consultants Associates, 2009: 29-30). This implied the birth of a competitive market. By March 2011, eight SAPP members (BPC, EDM, Eskom, LEC, NamPower, SEC, ZESCO, and ZESA) signed the governing documents of DAM and can trade on its platform (SAPP, 2012: 20).

However, the pattern of demand and supply changed after 2005/2006 when South Africa's internal electricity production capacity was not able to generate vast surplus supply any longer. The main reason for electricity shortages and the power crisis in the RSA was the fact that the country did not keep up with the exponentially increasing national electricity demands by means of installing or refurbishing power generation capacities (Grynberg and Velia, 2012: 236; Segwai, 2007). This had an impact on the functionality and effectiveness of the newly established DAM (SAPP, 2011: 3). Until now, DAM traded volumes have been rather low and have oscillated between only 2 and 10 GWh during the time period of August 2010 and November 2012 (see Figure 4).[13]

[13] Data according to SAPP's annual and monthly reports; latest available data from November 2012.

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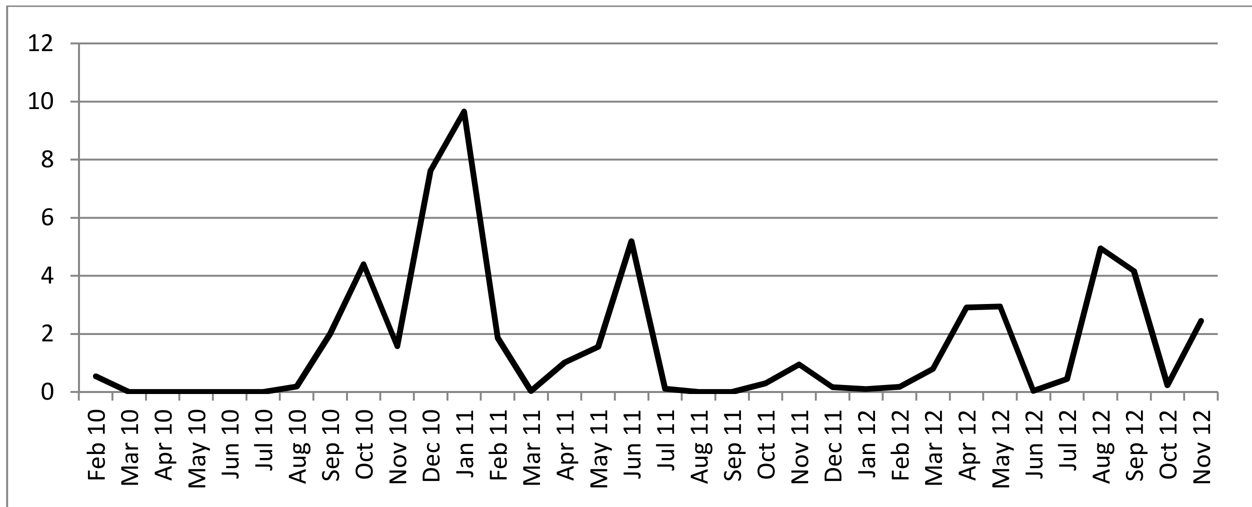
Figure 4: SAPP electricity trade through DAM in GWh (2010-2012)



According to official SAPP statements, low trade volumes occur because SAPP members have yet to adjust to the new trading platform, and are particularly due to unsuccessful market cross caused by mismatches of potential buyers' and sellers' prices. In general, however, average DAM clearing prices of electricity have been lower than typical bilateral prices on a long-term contractual basis. This implies that the competitive market had been institutionalised and is currently operating although the traded volumes are rather negligible. So far, electricity trade over DAM covers a value of about 2%, only a very marginal part of the total (bilateral) electricity trade between the SAPP member states. This figure is well below the regional proportion that was traded through STEM. However, the number and volumes in sales bids and buys bids are in general much higher compared to the volumes that are actually traded (Economic Consultants Associates, 2009: 29; SAPP, 2011: 2). This gives reasons to assume that significant short-term trade potential is yet untapped but so far constrained due to imperfect interconnection and insufficient power line capacities.

5. Conclusion

While SAPP as an institution is generally regarded as a success (Economic Commission for Africa, 2004: XI; SADC, 2011: 44), its effectiveness concerning the facilitation and promotion of intraregional electricity trade is actually questionable. The power pool currently not only suffers with an incomplete power grid with poor and failure-prone interconnectors and transmission lines, but particularly with the regional power crisis and diminished surplus supply which is caused by rising national consumer demands and chronic lack of investments in national electricity (generation) infrastructure. Today, volumes in short-term regional

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electricity trade over DAM are well below the proportion of electricity traded in the former STEM (Economic Consultants Associates, 2009: 29; SAPP, 2011: 2). Hence, any perfectly institutionalised power pool is rather useless if there is no (surplus) electricity left to trade or if inadequate capabilities of power lines put constraints on potential trade. Since surplus electricity generation in the region already diminished by 2006, particularly due to power shortages in the RSA, the institutionalisation of DAM shortly after the closure of STEM remains puzzling at this point – at least for plain functional reasons.

The formation of STEM seems to have been rooted in genuine regional demand and has proven to be fairly effective during its time of operation. DAM as an institution nevertheless materialised despite the fact that the underlying cooperation problem – demanding a platform for short-term electricity trade on the grounds of imbalances in regional demand and supply of electricity – had already been mitigated in light of regional power shortages. The DAM market was surely not a salient solution to the latter problem. Nonetheless, external incentives and support from donor countries – namely from the EU and Norway – probably enticed SADC and SAPP to press ahead with the establishment of DAM and thus to engage in deeper institutionalised regional (electricity) integration (Hammons, 2010: 402). The result is currently a functional DAM which operates principally on a daily basis but does not perform well according to traded volumes. Despite its low degree of effectiveness, however, DAM is likely to be maintained – or even extended – as long as external incentives for regional cooperation in this issue area are provided.

DAM – like SAPP as an organisation – is exposed to external influence and its institutional performance is likely to be at risk under the following two conditions:

- If the region continues to be affected by power shortages due to low generation capacities or insufficient interconnectedness, internal motivation for SADC countries to engage in electricity cooperation and establish or maintain relevant regional institutions will diminish due to low prospects for individual benefits.
- If SADC and SAPP members will not generate demand for institutionalised regional electricity cooperation from within their region, or if external support fails to materialise – and South Africa as regional key country does not step in to fill the gap – then the relevant institutions remain strongly dependent on external actors and are likely to become paralysed.

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Some SADC member states – particularly Botswana and also recently, South Africa – seem to increasingly follow national energy strategies which are not focused on regional electricity cooperation within SAPP but rather aim at autarky, self-sufficient power generation and future export (Grynberg and Velia, 2012). The poor performance of DAM and the diminishing generation capacities add to the rationality of such unilateral policy options from a confined national perspective. However, they bear the potential to undermine the regional cooperation project and the 'club-good' provided by SAPP. For the power pool to become more effective, regional electricity infrastructure has to be enhanced by overcoming the lack of investment in (national) energy infrastructure, building additional and more capable transmission lines, interconnecting all mainland SADC countries to the grid, and tapping the huge hydro-generating potentials in the DRC. With external technical and financial support helping to remove such bottlenecks, SAPP – and even DAM – may have the potential to become significantly more effective and benefical for the whole of SADC and its individual member states.

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Chapter 7

The role of regional judiciaries in eastern and southern Africa

Elisa Tino

1. Introduction

Traditionally, African states have shown a strong attachment to their own national sovereignty which they gained with difficulty after a long time of European colonialism. This fact, and the current fragility of national governments, explains why the African states have been deciding to establish mainly *intergovernmental organisations* since the 1960s and the 1970s. In fact, this legal model of interstate cooperation is able to suit the states' needs for granting their national sovereignty.[1] Their reluctance to cede the exercise of some sovereign powers to an international organisation translates into a low degree of institutionalisation of interstate cooperation and into the conferral of few not very relevant functions to the regional entity. Coherently, judicial institutions have a marginal role; that is the reason why the African continent has been perceived as having no litigation culture. In fact, intergovernmental organisations are governed by principles and rules of international law. Generally, member states cooperate by adopting non-binding acts; if they decide to bind each other, they adopt agreements or protocols, only binding signatory parties and not directly creating rights and obligations for individuals. So, potential disputes involve member states exclusively and to settle them they prefer to resort to diplomatic and political means in order to preserve their national sovereignty.

[1] There is extensive literature available on the distinction between intergovernmental and supranational organisations. Among the most recent contributions are Schermers and Blokker (2011), Klabbers and Wallendahl (2011), and Diez de Velasco Vallejo (2010). From a socio-political perspective, see Schmitter (2011: 8-11). Regarding regional organisations in general, see Pennetta (2011).

In some cases, statutory treaties provide for judicial bodies, but member states often prefer not to establish them and to keep on resorting to negotiation or to other political-diplomatic means.[2]

However, over the last two decades, the African continent has faced a new trend, a so-called 'judicialisation process'[3]. This means that some African regional and sub-regional economic organisations, whose statutory treaties provided for a judicial settlement of disputes, have established their own judicial bodies.[4] This judicialisation process seems to be the consequence of a more general trend to strengthen and improve regional interstate cooperation on normative and institutional levels.[5] Moreover, it also seems to be linked to the concrete realisation of some statutory objectives, such as the establishment of free trade areas or customs unions aiming at a common market.[6] In essence, the increasing 'maturity' of interstate cooperation, both from a normative-institutional and material point of view, and the strengthening of regional identity groups, raises the demand for legal certainty, uniformity in interpretation and application of the law of the organisation, and homogeneity in protection of different interests; this is the reason why the need for autonomous and permanent regional judicial bodies has arisen[7].

This judicialisation process has concerned some sub-regional economic organisations in Sub-Saharan Africa and particularly in the southern and eastern regions[8], namely the East African Community (EAC)[9] and the Common Market for Eastern and Southern Africa (COMESA)[10].

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[2] In this sense there are many examples in Africa: the Communauté économique des Pays des Grands Lacs, the Union du Maghreb Arabe, the Southern African Customs Union, and the Economic Community of Central African States.

[3] The judicialisation process at regional level can be placed within a more general trend towards the proliferation of international tribunals. See Del Vecchio (2009); Sreenivasa Rao (2004: 929-961); Baudenbacher (2003); SFDI (2003); Oellers-Frahm (2001); and Abi-Saab (1999: 919-933).

[4] Regarding the judicialisation of African regional and sub-regional organisations, see Erasmus (2008); Tchikaya (2006: 459-486); Lehmann (2005: 54-62); Burgorgue-Larsen (2003: 203-264); and Kamto (1998: 107- 150).

[5] See Schroeder and Müller (2011: 358-372).

[6] Indeed, the establishment of new nongovernmental organs (Parliamentary Assembly, Commission, Committee representing stakeholders' interests), the adoption of secondary law creating rights and obligations directly to individuals, and the enforcement of trade law within regional organisations, determine new kind of disputes. Litigation involves just member states no more. It also concerns individuals' rights and nongovernmental organs' interests. So, political and diplomatic means are not suitable to solve this new kind of dispute any longer, resulting in the need for an independent regional judicial body.

[7] Obviously, from the economic and financial point of view the establishment of a judicial body improves and increases investors' confidence in the region.

[8] Until now the judicialisation process has also concerned some other sub-regional economic organisations, such as the Economic Community of West African States (ECOWAS), the Union Economique et Monètaire de l'Ouest Africain (UEMOA) and the Communauté Economique et Monètaire de l'Afrique Centrale (CEMAC). Moreover it has concerned the Organisation pour l'Harmonisation du Droit des Affaires *(*OHADA), which is not an economic organisation. It aims at the harmonisation of national legislations.

[9] See the Treaty for the establishment of the East African Community (1999), amended in 2006 and in 2007.

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It also concerned the Southern African Development Community (SADC)[11], which established its Tribunal in 2000 and made it operational in 2005. However, in 2010, the SADC Summit suspended the Tribunal pending a review of its role, functions and terms of reference, and in 2012 it closed it down. This was the final decision of a long-term 'diatribe' between the SADC Tribunal and Zimbabwe originating from the latter's failure in complying with the Tribunal's judgments.[12]

Moving from the analysis of institutional aspects and case law of these regional judicial bodies, the aim of this chapter is to assess their role in enhancing interstate cooperation. Regarding the SADC Tribunal, I will refer to rules provided for in the Protocol on Tribunal signed in 2000, bearing in mind the most recent events.

2. Regional judicial bodies: general features

The COMESA, EAC and SADC Treaties rate the judicial body among the main organs of their regional organisations[13]. The COMESA and the EAC Treaties also contain detailed rules about their composition, role and functions, and confer to their courts the task to adopt their own rules of procedure[14]. In contrast, the SADC Treaty provides only for the establishment of a Tribunal whose composition, functions, powers and rules are prescribed in a protocol to be adopted by the Summit later. Actually, COMESA, EAC and SADC member states did not establish their courts contextually to the establishment of their regional organisations. The COMESA Court has been functioning since 1999[15] and the EAC Court (EACJ) has been operational since 2001[16].

As provided for in the Treaty, SADC member states signed the Protocol establishing the Tribunal and regulating its jurisdiction in 2000[17]; it provided for ratification by signatory

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[10] See the Treaty establishing the Common Market for Eastern and Southern Africa (1993).
[11] See the Treaty of the Southern African Development Community, (1992) and the Agreement amending the Treaty of the SADC (2001).
[12] About the SADC Summit decision to close the Tribunal, see Erasmus (2012); Fritz (2012: 1-8); and Scholtz and Ferreira (2011: 331-358).
[13] See EAC Treaty Art. 9; COMESA Treaty Art. 7; SADC Treaty Art. 9.
[14] See EAC Treaty Art.23-47 and COMESA Treaty Art.19-44. In the EAC and COMESA Treaties provisions regulating their courts have the same wording.
[15] There is no extensive legal literature on the COMESA Court of Justice. See Torino (2010: 99-113); Maonera (2005); and O' Keefe (2004: 176-189).
[16] Regarding a general description of the EACJ, in legal literature, see Ruhangisa (2012); Piscitelli (2010: 131-147); Ruhangisa (2006); and Ojienda (2005: 220-240). Regarding EACJ's jurisprudence, see Van Der Mei (2009a: 403-425)
[17] See the Protocol on Tribunal and Rules of Procedure thereof (2000). From a descriptive perspective about the SADC Tribunal, see Pugliese (2010: 23-49); Ruppel (2009b: 173-186); and Ruppel and Bangamwabo (2008).

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states in accordance with their constitutional procedures. This provision, read together with the SADC Treaty Article 22(4), entailed that the Protocol on Tribunal entered into force after the deposit of the instruments of ratification by two-thirds of the members[18]. However, in 2001, member states amended the SADC Treaty and in Article 16(2) clarified that the Protocol establishing and regulating the Tribunal 'shall… form integral part of the Treaty'[19]. Then, in 2002, they also adopted an Agreement amending the Protocol on Tribunal which repealed the articles of the 2000 Protocol on Tribunal providing for ratification[20]. In light of these amendments, the Protocol on Tribunal constituted an integral part of the SADC Treaty and became binding on all member states without the need for its further ratification by them. Thus, the SADC Tribunal was operational starting from 2005.

Regarding the structure of these regional judicial bodies, similarly the COMESA, EAC and SADC member states decided to establish permanent and independent courts entitled with wide jurisdiction and powers. COMESA and EAC divided their courts in a First Instance Division and in an Appellate Division, so that every first-instance ruling can be appellate[21]. In contrast, the SADC Tribunal had a unitary structure, so its judgments were final.

Clearly, the number of judges is different from one judicial body to another; they are appointed by the Summit of Heads of State and Government from among persons recommended by the member states[22].

Each court has its own president; in the COMESA and EAC systems he is appointed by the supreme intergovernmental organ of the organisation. In SADC he is elected by the Tribunal from among its members[23].

Originally, just 11 out of the 14 member states signed the Protocol on Tribunal. Botswana and Madagascar signed it later. So SADC is governed by the principle of variable geometry operating also on the institutional level. Regarding the variable geometry in African regional organisations, see Gathii (2011).

[18] Until now, just five member states have ratified the Protocol on Tribunal. Zimbabwe did not ratify it.

[19] See the Agreement amending the Treaty of the SADC (2001). Actually, the Amendment Agreement was signed by 13 out of the 14 member states, including Zimbabwe, thereby concluding the process of its adoption and entry into force pursuant to SADC Treaty Art. 36(1). Regarding some possible interpretations and critical remarks on such amendments, see Ebobrah (2010: 199-213).

[20] See the Agreement amending the Protocol on Tribunal (2002). As provided for in Article 21, this Amendment Agreement 'shall enter into force on the date of its adoption by three-quarters of all Members of the Summit'. It has been in force from the 3rd October 2002.

[21] First Instance Division rulings can be appellate for points of law, lack of jurisdiction, or procedural irregularity (EAC Treaty Art. 35 A).

[22] See SADC Protocol on Tribunal Art. 4; EAC Treaty Art. 24; COMESA Treaty Art. 20.

[23] See EAC Treaty Art. 24(4) and (5); SADC Protocol on Tribunal Art. 7; COMESA Treaty Art. 20(1).

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3. Jurisdiction and competences

Generally, the role of judicial bodies in an economic integration process depends on their jurisdiction and on the powers member states agree to confer to them.

Similarly, the COMESA, EAC and SADC Treaties provide that the judicial body ensures the adherence to law in the interpretation and application of the treaty[24]. To do this, they are entitled to adjudicate upon a) disputes concerning member states' violation of obligations arising from the treaty and other subsidiary instruments[25]; b) disputes concerning the legality of the organisation's acts[26] and of its organs' actions[27]; and c) disputes between the organisation and its staff[28]. They are also competent to give advisory opinions[29] and to adjudicate upon matters referred to them through preliminary reference[30].

These three regional courts also have in common the binding nature of their jurisdiction for those states which expressly accept it. In fact, the ratification or the adoption (as in the case of the SADC Tribunal) of the normative instrument establishing the judicial body implies *ipso facto* the member states' acceptance of its jurisdiction, without requiring their further consent case by case.

The SADC Protocol also provided expressly that the Tribunal had exclusive jurisdiction over all disputes between member states and SADC, between natural/legal persons and SADC, between SADC and its staff. Nothing was stated about the Tribunal's exclusive jurisdiction over disputes between member states; in consequence, it is conceivable that it did not have exclusive jurisdiction over this kind of dispute. This conclusion is confirmed by the fact that some protocols adopted within SADC establish other dispute settlement mechanisms to solve interstate litigations arising out from their application. In particular, the SADC Protocol on Trade provides for an arbitral mechanism and the resort to the Tribunal is possible just to

[24] See EAC Treaty Art. 23(1); COMESA Treaty Art. 19; SADC Treaty Art.16(1). Particularly, SADC Protocol on Tribunal Art. 14 clarifies that 'The Tribunal shall have jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and this Protocol which relate to: (a) the interpretation and application of the Treaty; (b) the interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of the Community, and acts of the institutions of the Community; (c) all matters specifically provided for in any other agreements that Member States may conclude among themselves or within the community and which confer jurisdiction on the Tribunal'.

[25] See EAC Treaty Art. 28-29; COMESA Treaty Art. 24-25; SADC Protocol on Tribunal Art. 15 and Art. 17.

[26] See EAC Treaty Art. 28 and 30; COMESA Treaty Art. 24 and 26; SADC Protocol on Tribunal Art. 17-18.

[27] See EAC Treaty Art. 28; COMESA Treaty Art. 24; SADC Protocol on Tribunal Art. 15, 17-18.

[28] See EAC Treaty Art. 31; COMESA Treaty Art. 27(1); SADC Protocol on Tribunal Art. 19.

[29] See EAC Treaty Art. 36; COMESA Treaty Art. 32; SADC Protocol on Tribunal Art. 20.

[30] See EAC Treaty Art. 34; COMESA Treaty Art. 30; SADC Protocol on Tribunal Art. 16 and Rules of Procedure Art. 75.

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appeal the panel reports[31]. In contrast, other protocols provide that any dispute regarding their interpretation or application which cannot be settled amicably shall be referred to the Tribunal[32]. So, in those cases, the resort to the judicial body is just potential and residual, not compulsory[33].

Regarding the jurisdiction of COMESA and EAC courts, its exclusivity is not stated expressly in the treaties, but can be inferred by some provisions. In fact, similarly, COMESA Treaty Article 34(1) and EAC Treaty Article 38 provide that 'any dispute concerning the interpretation or application of this Treaty or any of the matters referred to the Court pursuant to this Chapter shall not be subjected to any other method of settlement other than those provided for this Treaty'. Thus, it is implicitly stated that these two courts have an exclusive jurisdiction[34].

However, notwithstanding this provision, some protocols adopted within the EAC establish other mechanisms to solve disputes arising out from their application, which erode the jurisdiction of the court[35]. Particularly, the Customs Union and the Common Market Protocols are examples[36]. The first provides that, failing an amicable settlement, the dispute may be brought before the East African Committee on Trade Remedies established under Article 24 of the Protocol[37]. However, in light of the EACJ's mandate to ensure the adherence to EAC law and taking into account that the Customs Union Protocol is part of it, the provision and the establishment of such a committee seems to be contradictory, because they deprive the EACJ of its own jurisdiction.

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[31] See Southern African Development Community Protocol on Trade (1996) and SADC Protocol on Tribunal Art. 20A. An appeal can be limited to issues of law covered in the panel report and legal interpretations developed by the panel. Regarding the establishment of parallel SADC dispute resolution mechanisms, see O' Keefe (2004 176-189) and Pauwelyn (2004: 231).

[32] See, for example, Protocol on extradition (2002); Protocol against corruption (2001); Protocol on the control of firearms, ammunition and other related materials (2001); Protocol on culture, information and sport (2001); Protocol on Health (1999); and Protocol on combating illegal drugs (1996).

[33] Some other protocols provide that, failing the amicable settlement of disputes through direct negotiation, the matter shall be referred to the intergovernmental organs of the organisation (the Council or the Summit) for determination. Failing this solution, the dispute shall be referred to the Tribunal. See the Protocol on the facilitation of movement of Persons (2005) and Protocol on Education and Training (1996).

[34] With reference to the problem of overlapping jurisdiction within the COMESA, see Kayihura (2010: 583-592).

[35] See Ruhangisa (2010: 575-582).

[36] Protocol on the establishment of the East African Customs Union (2004); Protocol on the establishment the East African Community Common Market (2009).

[37] Moreover, the Customs Union Protocol provides that any party may challenge the decision of the committee on grounds of fraud, lack of jurisdiction or other illegalities, referring the matter to the court in accordance with EAC Treaty Article 28 (2). Thus, the court has only a potential and residual jurisdiction over these matters.

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Contrariwise, the Common Market Protocol does not establish a new dispute resolution body, but it gives to national courts the competence to solve disputes arising from its interpretation and application. So, once again, the EAC Court is 'deprived' of its jurisdiction but, in that case, matters concerning the Common Market could be referred to it through the preliminary reference[38].

In essence, the exclusive jurisdiction of the EACJ is intended to function in a restrictive way, namely only in relation to the jurisdiction of other international/regional courts and not to other mechanisms established within the EAC.

3.1 Contentious competences

As already mentioned, in order to ensure the respect of the law of the organisation in interpretation and application of the treaties, the regional courts are entitled to wide competences which seem to be largely inspired by those provided in the EU judicial system[39].

Firstly, the regional courts may settle disputes concerning a member state's infringement of treaty obligations. In particular, EAC Treaty Article 29 and COMESA Treaty Article 25 confer on the Secretary General the competence to activate this procedure which is divided into two phases. When the Secretary General considers that a member state has failed to fulfil an obligation or has infringed a provision of the treaty, he may submit his findings to the member state concerned in order that it can submit its observations on the findings (precontentious phase)[40]. If the state concerned does not submit its observations to the Secretary General within the prescribed time, or if the observations submitted are unsatisfactory, the Secretary General shall refer the matter to the Council which shall decide whether the matter should be referred by the Secretary General to the court immediately or be resolved by the Council. Clearly, the matter shall be directed to the court only if the Council fails to resolve it (contentious phase). As it is evident, in COMESA and EAC infringement procedures, the Secretary General's power is not as discretionary as the European Commission's power. In fact, the COMESA and EAC Secretary General cannot autonomously decide to refer the matter to the court, but must first direct it to the Council. In

[38] It is evident that the role of the EACJ in the realisation of the Common Market solely depends on the discretion of the national judges to refer the matters for interpretation by the court. Until now, no preliminary references on common market issues have been brought before the EACJ.
[39] See Alter (2012: 135-154).
[40] Evidently, this phase is actually similar to that regulated by Treaty on Functioning of European Union (TFEU) Article 258.

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essence, involvement of the Council in this procedure underlines the intergovernmental nature of interstate cooperation within COMESA and EAC. Moreover, the Secretary General does not have an exclusive power to activate such infringement action. Where a member state or an individual considers that another member state is in breach of an obligation or of a treaty provision, they can refer the matter directly to the court without involving the Secretary General in a precontentious phase[41].

In contrast, the SADC Protocol on Tribunal did not provide for an infringement procedure comparable to that of the ECJ[42]. It simply conferred to the Tribunal the competence to settle disputes between member states, individuals and member states, and SADC institutions and member states. It did not specify the object or the procedure of these judicial actions. In any case, in light of the Tribunal's mission (to ensure the adherence to SADC law) and of the cases brought before it during its activity, we can assert that it could hear and determine matters concerning member states' failure of SADC obligations.

As already mentioned, the COMESA, EAC, and SADC judicial bodies can solve disputes against the institutions of the organisation[43]. Once again, the SADC Protocol on Tribunal did not explain the object of this action. It simply provided that claims against SADC institutions were brought before the Tribunal by a legal/natural person and by each member state[44]. In contrast, the COMESA and EAC Treaties prescribe a clear and complete regulation for such judicial action. In particular, they provide that a person, who is resident in a member state, and each member state may refer the legality of any act or action of the institutions for determination by the court[45]. The legality of such acts or actions is assessed on the ground they are *ultra vires*, unlawful, an infringement of the treaty provisions, or the outcome of misuse or abuse of power[46]. It is worth noting that, differently from the EU judicial system, the claimant (both natural/legal persons and member states) does not have to allege a specific interest or the violation of its own right which justifies his resort to the court. Both member states and legal/natural persons are supposed to have a general interest in the respect of the

[41]See EAC Treaty Art. 28 and 30 and COMESA Treaty Art. 24 and 26. It is worth noting that in the COMESA judicial system, the natural/legal persons have to first exhaust local judicial remedies before referring the matter of member states' infringement to the court.

[42] See SADC Protocol on Tribunal Art. 15 and 17.

[43] See EAC Treaty Art. 28 and 30; COMESA Treaty Art. 24 and 26; and SADC Protocol on Tribunal Art. 17-18.

[44] SADC institutions do not have the right to challenge the legality of a SADC act before the tribunal.

[45] In the EAC judicial system, the claimant may challenge the legality of any act of every EAC institution. In the COMESA system, only the acts of the council may be challenged before the court.

[46] EAC Treaty Art. 30 and COMESA Treaty Art. 26 indicate expressly which SADC acts can be challenged before regional courts: these are regulations, directives, and decisions. This list is to be considered as imperative.

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law of the organisation. Moreover, in COMESA and EAC, an institution may not challenge the legality of an act adopted by another institution.

Then, pursuant to COMESA Treaty Article 24 and EAC Treaty Article 28, the courts may also hear and determine the legality of an institution's action. Particularly, when a claimant considers that an institution has failed to fulfil its obligation under the treaty, he may refer the matter to the court for adjudication. In the COMESA system, only the council's action may be challenged. In contrast, the EACJ may determine the legality of actions of every EAC organ and institution[47].

Within judicial contentious competences, it is worth mentioning the power of the COMESA and EAC courts and the SADC Tribunal to settle disputes between the organisation and its staff.[48] Rules regulating this kind of judicial action are actually synthetic, so it is not clear what the procedure and the main object are. However, by analysing cases filed to these regional judicial organs, it seems that the claimant does not have to exhaust administrative procedures before resorting to the court, as happens in the EU judicial system.

In conclusion, it is worth underlining that, similarly to the ECJ, the COMESA Court may also hear actions for damages[49]. In fact, it is provided that 'the Court shall have jurisdiction to determine claims by any person against the Common Market or its institutions for acts of their servants or employees in the performance of their duties'. Unfortunately, the conciseness of such a provision together with the lack of relevant jurisprudence about this matter leaves some questions open, particularly in relation to the requisites to resort to the court, the criterion to assess whether the damage is imputable to the organisation, and to determine its extent and its refund. Regarding the claimant, the COMESA Treaty gives any legal/natural person the right to resort to the court for an action for damages[50].

3.2 Preliminary ruling

In order to ensure the uniform interpretation and the correct application of the law of the organisation in each member state, the EAC, COMESA and SADC judicial systems provide

[47] It is also worth noting that in the COMESA system, only member states may refer these kinds of matters to the court. In contrast, in the EAC system, the right to resort to the judicial body is extended also to natural and legal persons.
[48] See EAC Treaty Art. 31; COMESA Treaty Art. 27 (1); and SADC Protocol on Tribunal Art. 19.
[49] See COMESA Treaty Art. 27(2).
[50] In particular, the expression 'any person' could be intended to include not only natural and legal persons who are resident in a member state, but also persons belonging to third countries.

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for a preliminary ruling procedure[51]. It establishes a mechanism of dialogue and cooperation between the regional court and national judges, which is important to grant the unity and coherence of the law of the organisation[52]. Substantially, the preliminary ruling procedure in such systems is regulated similarly to that provided for in the Treaty on Functioning of European Union (TFEU) Article 267. So, when a question concerning the interpretation or application of the law of the organisation is raised before any national court, this one may/must refer the matter to the regional court to give a preliminary ruling, if it considers that this ruling is necessary to enable it to give its judgment. As it is clear, this is an incidental procedure, so that the regional court will not implement its findings on any matter that will be referred to it by the national court. Its findings only aim at assisting the national court in making a decision on a matter that may be right before it. Moreover, the preliminary ruling is not automatic whenever a question of interpretation or application of the law of the organisation arises; it should be necessary to enable the national court to give its judgment. So this vests a very wide discretion in the national court to ascertain whether the preliminary ruling reference to the regional judicial body is necessary. However, as in the EU system, the COMESA and SADC national courts, against whose judgments there are no judicial remedies under national law, have to refer a case pending before them to the regional judicial organ. In contrast, the EAC Treaty does not make a distinction among national courts and seems to confer on each of them the same obligation to refer a preliminary ruling to the EACJ, where all conditions are fulfilled. In any case, the preliminary ruling may/must be referred only where a particular case pending before a national court raises specific kinds of questions, namely those concerning the interpretation or application of treaty provisions. Similar to the EU example, in the EAC and COMESA judicial systems, the question to be referred to the court may also concern the validity of acts adopted respectively by EAC and COMESA organs.

As the European example shows, the interaction of the regional judicial bodies and the national courts through references for preliminary rulings is essential in making the law of the organisation effective and in developing a uniform jurisprudence in the region. Much as the preliminary ruling mechanism is crucial to the application of the law of the organisation at

[51] See EAC Treaty Art. 34; COMESA Treaty Art. 30; and SADC Protocol on Tribunal Art. 16 and Rules of Procedures Art. 75-77.

[52] Regarding the role of preliminary ruling in regional judicial systems outside Europe, see Virzo (2011: 285-313).

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national level, to date it has not been tested in any regional organisation under consideration[53]. This is probably an indication that COMESA, EAC and SADC law is not well-known within their own regions, even by the judicial community. Maybe national courts, especially those acting in the last resort, should reconceptualise their own role[54]. As accustomed to as they are of being the final arbiters on the meaning of the rule of law, they will have to get used the idea that in the fields covered by the law of the organisation, they no longer have the last word and are expected to collaborate with the regional court[55]. A positive dialogue between national and community justice through a preliminary ruling mechanism would accelerate the legal integration in the region. It would also create more awareness on rights flowing from the law of the organisation and the member states' obligations pertaining to these rights.

3.3 Advisory opinion

In addition to judicial contentious competences, COMESA, EAC and SADC courts may also give advisory opinions[56]. These can be requested by the intergovernmental organs of these organisations (namely, the Summit and the Council). EAC and COMESA Treaties grant the right to request an advisory opinion also to each member state and limit the object of such a request to questions of law arising from the treaty which affects the organisation. On the contrary, nothing about this was provided for in the SADC normative instruments which

[53] In this region, the first reference for preliminary ruling was referred to the High Court of Kenya and it is still pending before the EACJ

[54] National judges' difficulty in reconceptualising their own role in light of the law of the organization was clearly expressed by the Zimbabwean High Court in *Etheredge v The Minister of State for National Security Responsible for Lands, Land Reform and Resettlement and Another* (2009). In this ruling, the judge stated that:

> 'I have examined the protocol [on Tribunal] very carefully and I have not observed therein any reference to the courts of any of the countries within SADC. If indeed the intention was to create a Tribunal which would be superior to the courts in the subscribing countries that intent is not manifest in the document presented to me. The supreme law in this jurisdiction is our Constitution and it has not made provision for these courts to be subject to the Tribunal. This court is a court of superior jurisdiction and has an inherent jurisdiction over all people and all matters in the country, and its jurisdiction can only be ousted by a statutory provision to that effect. I do not have placed before me any statute to that effect and the protocol certainly does not do that.'

Regarding this ruling and its implications in literature, see Ebobrah and Nkhata (2010: 81-92).

[55] National judges' lack of awareness that they are part of a regional organisation and subject to its legal order is evident in the Supreme Court of Mauritius ruling *Polytol Paints & Adhesives Manufacturs Co. Ltd v The Minister of Finance* (2009). The claimant had filed an action in the Supreme Court requesting leave to challenge the legality of a State regulation, imposing a 40% customs duty on specified products, on the grounds it was in breach of the COMESA Treaty. The Supreme Court of Mauritius dismissed the claim by stating that 'in the absence of any specific legislation to that effect, non-fulfilment by Mauritius as a member State of its obligations, if any, under the Treaty is not enforceable by national courts'. The Supreme Court's conclusions seem to be too shallow and superficial. In fact, considering that a question concerning the application of the Treaty was before it, it could have requested the COMESA Court to give a preliminary ruling thereon. Probably, it was under obligation to refer such matter to the regional court pursuant to the COMESA Treaty Article 30(2). In 1963, ECJ's judges facing a similar matter expressed the innovative principle of *direct effect* (Van Gend an Loos v Netherlands Inland Revenue Administration, case 26/62, 5 February 1963).

[56] See EAC Treaty Art. 36; COMESA Treaty Art. 32; and SADC Protocol on Tribunal Art. 20.

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stated simply that 'the Tribunal shall give advisory opinions on such matters as the Summit or the Council may refer to it'[57]. Moreover, the COMESA and EAC Treaties and the SADC Protocol on Tribunal are silent about the effect of such advisory opinions. However, being 'opinions' only, they are not supposed to be binding[58].

4. Individuals' role in regional judicial systems

Historically, individuals have not been granted access to judicial bodies under Africa's economic integration processes. Only the recent wave of integration treaties has bridged this gap[59]. In particular, the COMESA and EAC judicial systems grant individuals direct and wide access to the regional courts[60]. Firstly, they may challenge the legality of any act adopted respectively by COMESA and EAC organs and institutions, without alleging their own interest or the violation of their own right to justify their claim[61]. Evidently, they are supposed to have a general interest in granting the protection of the organisation's legal order[62]. However, their wide right has a 'territorial' limit: only a legal or a natural person, who is resident in the territory of a member state, may resort to the regional court[63]. Maybe the provision of such a 'bond' balances the absence of limits relating to the acts to be challenged. Moreover, it is worth noting that in the COMESA judicial system, the requisite of 'residence' is not necessary in the action for damages to challenge 'acts of their servants or employees in the performance of their duties' (COMESA Treaty Art. 27(2)).

Then, in contrast to the EU judicial system, COMESA and EAC natural and legal persons may resort to the regional court directly when they consider a member state to have failed its

[57] SADC Protocol on Tribunal Art. 20.
[58] Until now, regional courts have not yet exercised this competence. Only EACJ gave an advisory opinion.
[59] Regarding the individuals' access to regional justice in Africa, see Onoria (2010b: 143- 161). Regarding the individuals' access to regional courts in developing countries, see Tino (2013: forthcoming).
[60] See EAC Treaty Art. 30 and COMESA Treaty Art. 26.
[61] From this point of view, the EAC and COMESA Treaties grant to individuals a wider right to access regional justice than that provided for in the EU judicial system. In fact, in TFEU Art. 263, legal and natural persons may challenge exclusively the legality of an 'act addressed to that [them] or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures'.
[62] This point was better explained by the EACJ in *Sitenda Sebalu v EAC Secretary General, the Attorney General of Republic of Uganda* (2011). In accordance with the EAC Treaty Art. 30, it stated that 'a claimant is not required to show a right or interest that was infringed and/or damage that was suffered as a consequence of the matter complained of in the Reference in question. It is enough if it is alleged that the matter complained of infringes a provision of the Treaty in a relevant manner'.
[63] In the EU judicial system, every natural and legal person may resort to the ECJ aside from his residence or citizenship.

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obligations or to be in breach of the law of the organisation[64]. In the EAC system such a right has no limit, whereas in COMESA, individuals have to exhaust domestic judicial remedies before referring the matter to the court for determination[65].

Even the SADC Protocol on Tribunal granted individuals direct access to regional justice[66]. They might resort to the Tribunal against both SADC institutions and member states. Nevertheless, in the latter case, they should have exhausted all available remedies under the domestic jurisdiction before referring the matter to the regional judicial body[67].

However, in their last Summit, the SADC Heads of State and Government, who had already suspended the Tribunal, decided that a new protocol should be negotiated and that its mandate should be confined to disputes between member states concerning the interpretation of the SADC Treaty. This means that the Tribunal will be unable to receive or to adjudicate upon disputes between natural and legal persons and member states. More generally, individuals' direct access to regional justice would be granted no more, so rendering an effective judicial remedy nugatory in the SADC context. This Summit's decision expresses the unwillingness of member states to be sued in an international forum, which is seen as interference in their own internal affairs and a threat to their national sovereignty.

It is to be noted that until now, in SADC but also in COMESA and EAC, most of the cases heard by regional judicial bodies were filed by a legal or a natural person who disputed above

[64] In the EU judicial system, individuals may challenge the legality of national acts in respect of the EU law exclusively before national judges. Moreover, they may not directly activate an infringement action before the ECJ; they may only request the European Commission to act.

[65]At first sight, the exhaustion of local remedy seems to be a limit in a regional judicial system. But in light of the preliminary ruling procedure, it can be also seen as an important instrument for using law to push forward the integration process. In fact, actions before national courts involving questions of interpretation of the treaty could be referred to the regional court through a preliminary reference. So, this would facilitate closer cooperation between national and regional courts, ensuring that national judges become active players of the law of the organisation.

[66] See the SADC Protocol on Tribunal Art. 15 and 18.

[67] The SADC Tribunal expressed its opinion about this matter in *Mike Campbell (PVT) and others v Republic of Zimbabwe* (2008), stating that 'the rationale for exhaustion of local remedies is to enable local court to first deal with the matter because they are well placed to deal with the legal issues involving National law before them. It also ensures that the international tribunal does not deal with cases which could easily have been disposed of by national courts' (par. 19-21). Then it explained that '[where] the municipal law does not offer any remedy or the remedy that is offered is ineffective, the individual is not required to exhaust local remedies. Further, where… the procedure of achieving the remedies would have been unduly prolonged, the individual is not expected to exhaust local remedies'.

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all member states' failure in fulfilling treaty obligations[68]. This is an indication of the population's awareness of its own rights and its willingness to have them enforced.

It is clear that the member states' decision to establish a permanent court reveals their intention to subject their interstate cooperation to the rule of law, thus moving from a power-oriented organisation to a rule-oriented one[69]. In this sense, individuals' direct access to justice is very important. In fact, it provides a means for overcoming the traditional reluctance of states to sue each other; it performs the constitutional function of limiting the power of governments to decide which disputes are worth litigating; and it enhances the legitimacy of the organisation's legal order. Indeed, through litigation, individuals can effect legal change within it. That is why the SADC Summit's decision represents a giant step backwards for economic integration within the organisation which aims at being a rule-based regional system.

5. Applicable law and enforcement of regional judgments

As already mentioned, regional judicial bodies are required to settle regional disputes ensuring adherence to the law of the organisation The SADC Protocol on Tribunal Article 21 expressly provided that, in doing so, the Tribunal applied not only the treaty but also primary and secondary SADC law, and developed its jurisprudence taking into account applicable treaties, general principles and rules of public international law, and any rules and principles of the law of member states.[70]

In contrast, the COMESA and EAC Treaties do not expressly provide what the applicable law in regional courts is. Pursuant to what is prescribed in the EAC Treaty Article 23 and in the COMESA Treaty Article 19, it seems to be limited to treaty provisions only. However, an analysis of the jurisprudence reveals that these courts used to have regard for rules and

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[68] On more than one occasion, EACJ had to consider preliminary objections from defendants alleging the lack of *locus standi* by individuals and legal persons. It consistently upheld that natural and legal persons have access to the court under the EAC Treaty Art. 30, which is a basic right to the regional justice mechanism enabling the peoples to 'participate in protecting the integrity of the Treaty' (East African Law Society and others v The attorney general of the republic of Kenya, the attorney general of the republic of Tanzania, the attorney general of the republic of Uganda, the Secretary General of the East African Community, (2008).

[69] Relevant legal literature deals with 'constitutionalism' of international organisations with reference to their placing under rule of law and the consequent establishment of a judicial system. In particular, see Klabbers and Wallendahl (2011).

[70] For instance, in *United Republic of Tanzania v Cimexpan (Mauritius) Ltd, Cimexpan (Zanzibar) Ltd & Ajaye Jogoo* (2010), the SADC Tribunal referred to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (United Nations General Assembly Resolution 39/46, 10.12.1984) to examine the definition of 'torture'.

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agreements of international law (such as the Vienna Convention on the Law of Treaties) and for the jurisprudence of other international or regional courts[71].

At the end of all proceedings, the regional courts deliver a judgment which is final and binding[72]. In the COMESA and EAC systems, regional rulings concerning the interpretation of treaty provisions have precedence over decisions delivered by national courts on a similar matter[73]. So, in some way the primacy of regional jurisprudence is granted and, as a consequence, national judges have to comply with it when they apply the law of the organisation in domestic disputes[74]. Moreover, due to the compulsory nature of regional judgments, all member states and the institutions of the organisation have to take, without delay, the measures required to implement them[75]. In particular, in the COMESA and EAC systems, the execution of a judgment of the regional court which imposes a pecuniary obligation on a person is governed by rules of civil procedure in force in the member state in which execution is to take place[76].

In contrast, the SADC Protocol on Tribunal Article 32 provided that the execution of regional rulings was governed by rules of civil procedure for registration and enforcement of foreign judgments in the territory of the member state in which the judgment is to be enforced. So, the rulings of the Tribunal were assimilated to judgments delivered by foreign Tribunals, as if the SADC law system was alien to national law systems of member states.

As already mentioned, member states and institutions are under obligation to take all necessary measures to implement regional rulings. Clearly, if they fail, they are liable to an infringement procedure or to an action for failure to act. Moreover, the COMESA Treaty and

[71] In order to find pertinent and comprehensive answers to particular questions or simply to corroborate their own conclusions, EAC judges quote rulings of other national and international tribunals. For example, in *East African Law Society and others v Attorney General of the Republic of Kenya and other* (2008), they cited the holding by the Supreme Court of the Philippines in *Benito Ang. V Judge R.G. Quilata and others* (2003) and the ICJ ruling *Barcelona Traction, Light and Power Company Limited (Belgium v Spain)* (1970). In other cases, EACJ drew inspiration from the jurisprudence of the European Court of Justice (ECJ).

[72] As already mentioned, in the COMESA and EAC judicial systems, only the Appellate Division rulings are final.

[73] See the EAC Treaty Art. 33(2) and COMESA Treaty Art. 29(2).

[74] Obviously, whenever national judges do not respect this provision and do not comply with judgments rendered by the regional court on matters concerning the law of the organisation, the member state they belong to would be subject to an infringement action.

[75] See the EAC Treaty Art. 38(3); COMESA Treaty Art. 34(3); and SADC Protocol on Tribunal Art. 32(2). In the COMESA and EAC judicial systems, only the council (no other institution) is under the obligation to take all necessary measures to implement regional judgments.

[76] See the EAC Treaty Art. 44 and COMESA Treaty Art. 40. It is worth noting that these provisions are similar to TFEU Art. 299.

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the SADC Protocol on Tribunal also provide a specific mechanism of enforcement to be applied if a member state fails in complying with a ruling of the court against it[77].

In accordance with the COMESA Treaty Article 34(4), the court may prescribe sanctions as it shall consider necessary to be imposed against a party who defaults in implementing its decisions. As it is evident, the COMESA Court has a wide discretion. Indeed, it is entitled to a faculty, not to an obligation, to impose a sanction, and the exercise of such a faculty depends on its discretionary assessment regarding whether this sanction is necessary or not[78]. Moreover, as provided in the Rules of Procedure Article 58, such sanctions consist of a fine whose amount is defined by the court at its discretion. Then, broadly, the COMESA Treaty provision refers to 'a party' who defaults on implementing a court's decision, so including not only member states but also COMESA institutions. Finally, it is worth noting that the absence of states' intervention and the central and discretionary role of the regional court seem to give to this enforcement mechanism a sort of 'supranational' nature[79].

In contrast, in the SADC system, the last decision was up to the Summit. Indeed, the Tribunal was just entitled to ascertain a member state's non-compliance with its judgment[80]. Then it had to report its findings to the Summit for the latter to take appropriate action. Obviously, this mechanism reflected the intergovernmental nature of interstate cooperation within SADC[81]. Actually, this procedure of enforcement applied with reference to the failures by Zimbabwe to comply with the Tribunal's decisions in the Campbell and Gondo cases[82]. The Campbell judgment involved the unlawful expropriation of private land without compensation[83], while the Gondo case concerned a provision of the State Liability Act of Zimbabwe which was considered to be in breach of the SADC Treaty insofar as it provided that state-owned property was immune from execution, attachment, or process to satisfy a

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[77] The EAC judicial system does not provide an enforcement mechanism of the EACJ's rulings.

[78] This treaty provision is too synthetic and it does not explain who may activate the court's intervention.

[79] In this case, the term 'supranational' is used to emphasise the lack of governments' intervention in such a mechanism. The enforcement procedure in COMESA seems not to be subject to politics; it allows the interest of the organisation to prevail over that of the member states.

[80] Any failure by a member state to comply with a decision of the Tribunal was referred to it by any party concerned.

[81] For a general description and critical considerations about this enforcement mechanism of regional judgments, see Mkandawire (2010: 567-573); Oppong (2010: 115-135); Ruppel (2009a: 213-235); Ruppel and Bangamwabo (2008: 21-63); and Thomashausen (2002: 26-37).

[82] See *Mike Campbell (PVT) and others v Republic of Zimbabwe (interim order)* (2007); *Mike Campbell (PVT) and others v Republic of Zimbabwe* (2008); *Mike Campbell (PVT) and others v Republic of Zimbabwe* (2009); and *Gondo and others v Republic of Zimbabwe* (2010).

[83] Regarding the Campbell case in legal literature, see Chigara (2009: 530-533); Di Lieto (2009: 432-436); and Ruppel (2009b: 173-186).

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judgment debt of the state[84]. In both instances, the Tribunal ruled that Zimbabwe's legislation violated human rights, democracy and rule of law, and so it was in breach of Article 4(c) and Article 6(2) of the SADC Treaty requiring member states to comply with these principles. Twice Zimbabwe refused to comply with the Tribunal's judgments alleging the invalidity of the Tribunal Protocol and the 2001 Amendment Treaty. According to the Zimbabwean Government, they both lacked the two-third ratifications to enter into force[85]. As provided for in the SADC Treaty, the Tribunal referred the instance of Zimbabwe's non-compliance to the SADC Summit for 'appropriate action'. Both the SADC Protocol on Tribunal and the Rules of Procedure did not explain what 'appropriate action' meant. Maybe the Summit might have adopted economic sanctions or suspension of the noncompliant state. Surprisingly, in 2010, it decided to suspend the Tribunal pending a review of its role and functions[86]. In 2011 it extended the suspension for another year and in 2012 closed it down[87]. It also mandated the SADC Ministers of Justice to begin the process of amending the Tribunal Protocol. But, as mentioned, in the Maputo Final Communiqué, the Summit disregarded completely their recommendations[88] and stated that a new Protocol on Tribunal would have to be negotiated between member states and its jurisdiction would be limited to resolving disputes between member states[89].

The Summit decision means that, beyond the domestic court context, within the SADC legal and natural persons will have no forums in which their government's unlawful actions might

[84] Regarding the Gondo case in legal literature, see Ashimizo (2011: 203-205).
[85] To justify its non-compliance with the Tribunal's judgments, Zimbabwe claimed that the Protocol on Tribunal was not binding upon it, because it has not been ratified by the requisite two-thirds of the total membership of SADC as provided for in the Protocol on Tribunal Article 38, and that the amendment of the SADC Treaty had not yet entered into force (since it has not yet been ratified by two-thirds of the total membership of SADC as required). Moreover, Zimbabwe had not ratified either of them. However, those arguments do not seem to be well grounded. Indeed, even the Zimbabwean High Court dismissed the government's arguments as 'essentially erroneous and misconceived' (*Gramara Ltd v The Republic of Zimbabwe*, 2010). However, it did not enforce the SADC judgment because it was in conflict with public policy (*Gramara Ltd v The Republic of Zimbabwe*, 2010). The arguments of both the Zimbabwean Government and the High Court were contested by the South African Supreme Court of Appeal which registered and enforced the SADC Tribunal's ruling (*Government of the Republic of Zimbabwe v Fick &others*, 2012). Regarding this ruling, see Erasmus (2012).
[86] See Scholtz (2011: 197-201).
[87] See Communiqué of the 30th Jubilee Summit of the SADC Heads of States and Government 2010; Communiqué of the Extraordinary Summit of the SADC Heads of States and Government 2011; and Final Communiqué of the 32nd Summit of SADC Heads of State and Government 2012.
[88] The SADC Ministers of Justice were conscious that they would need to propose some amendments to the Tribunal Protocol which might dissolve the antagonism felt for it by the Summit. They drafted a revised protocol which would have ousted the Tribunal's capacity to hear human rights cases. Their proposed amendments anticipated an optional protocol relating to human rights, which individual member states would have had to agree to before the Tribunal could adjudicate on human rights matters. Importantly, the proposed amendments preserved access to the Tribunal for natural and legal persons.
[89] It was to be expected that the Summit would determine to reconstitute the Tribunal to prevent the possibility of future political embarrassment to any member of the kind yielded by the rulings against Zimbabwe. This would be achieved by removing the right of individuals to approach the Tribunal.

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be recognised and in which they might secure justice. This clearly violates individuals' rights to access to regional justice and to effective remedies. Moreover, the Summit decision to suspend the Tribunal and, then, to close it down is a violation of the principle of judicial independence and, more generally, of the rule of law within SADC. That is why two dispossessed Zimbabwean commercial farmers, Ben Freeth and Luke Tembani, have recently decided to request the African Commission on Human and Peoples' Rights for an advisory opinion to determine whether the closure of the SADC Tribunal is legal or not. A similar request for the advisory opinion about the lawfulness of the SADC Heads of State decision had previously been lodged by civil society at the African Court on Human and Peoples' Rights. Clearly, if the African Court and Commission rule that the closure of the Tribunal is illegal, it will be a definitive legal determination about the lawfulness of the SADC Summit's actions. SADC will not be able to ignore such possible ruling, given that it is required to coordinate its policies and programmes with those of the African Union.

In sum, the SADC Summit decision represents a step backwards in the quest for democracy in the region and shows member states' failure in the very first test of accountability under the rule of law and basic principles of human rights. Actually, the SADC still remains a power-oriented system[90].

6. Regional jurisprudence: an overview

Firstly, the analysis of the jurisprudence of these regional courts reveals that cases brought before them are relatively few[91]. The potential cost of litigation, the lack of awareness of the integration process and of rights flowing from it, and low intra-African trade may account for this. Moreover, the utilisation of the regional courts to litigate economic integration issues has been scanty. In fact, most disputes, especially those referred to the COMESA Court[92] and the

[90] See Erasmus (2011: 17-34)

[91] Since its establishment, the EACJ seems to be the most active judicial body in the southern and eastern African region. However, the number of its judgments is not comparable to that of ECJ in its first years of activity. Additionally, in general, procedural and interlocutory matters have defined the regional judicial bodies' early decisions.

[92] See *Martin Ogang v Eastern and Southern African Trade and Development Bank (PTA Bank) and Dr. Michael Gondwe* (2001); *Eastern and Southern African Trade and Development Bank (PTA Bank) v Martin Ogang* (2001); *Kabeta Muleya v Common Market for Eastern and Southern Africa and Erastus Mwencha* (2002); and *Bilika Harry Simamba vs. Common Market for Eastern and Southern Africa* (2002). For a critical analysis of the COMESA Court's jurisprudence, see Torino (2010) and Oppong (2008).

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SADC Tribunal[93], have concerned relationships between the regional organisation and its staff.

It is also worth noting that almost all judgments resulted from actions instituted by individuals alleging breach of the law of the organisation[94]. In particular, they often disputed wrongful acts by member states in violation of human rights. In fact, although they do not have an express competence on human rights[95], both the SADC Tribunal and the EAC Court heard disputes involving such matters. They drew their jurisdiction from the general engagement in respect and protection of human rights provided for in their treaties[96]. Thus, in the Katazabi case, the EACJ stated that even if it will not assume 'jurisdiction to adjudicate on human rights disputes', it cannot 'abdicate from exercising its jurisdiction on interpretation under Article 27(1) merely because the reference includes an allegation of human rights violation'[97]. It then used the same arguments to justify its competence in the cases of *Independent Medical Unit v the Attorney General of the Republic of Kenya* (2011) and of *Plaxeda Rugumba v EAC Secretary General of the Republic of Rwanda* (2011).

Similarly, in the Campbell and Tembani (2009) cases[98], before adjudicating the disputes, the SADC Tribunal had to justify its competence on human rights matters. Taking into account that it was entitled to respect SADC law, the Tribunal stated that its competence on such matters derived from the application of SADC Treaty Article 4(c)[99] and from the rules of international law that it had to apply in accordance with the SADC Protocol on Tribunal Article 21.

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[93] See *Ernest Francis Mtingwi v the SADC Secretariat* (2008); *Clement Kanyama v SADC Secretariat* (2010); *Angelo Mondlane v SADC Secretariat* (2010); and *Bookie Monica Kethusegile-Juru v the Southern African Development Community Parliamentary Forum* (2010). For a synthetic and critical analysis of such jurisprudence, see Klazen (2010: 147-155).

[94] Among the cases brought before regional judicial bodies, only one involved interstate litigation, namely *Ethiopia v Eritrea* (2001). The case was finally settled out of court.

[95] EAC Treaty Art. 27(2) provides that the jurisdiction of the EACJ can be extended to human rights matters by concluding a specific protocol. This has not been adopted yet.

[96] They both considered that EAC Treaty Art. 6 and 8 and SADC Treaty Art. 4(c) were the right legal basis to found their mandate on human rights matters.

[97] *Katabazi and 21 others v Secretary General and Attorney General of the Republic of Uganda* (2007).

[98] See *Luke Munyandu Tembani v the Republic of Zimbabwe* (2009). In this judgment, the SADC Tribunal ruled that the Zimbabwe Agricultural Finance Corporation Act was in breach of Article 4 and 6 of the SADC Treaty, because it authorised the Agricultural Bank of Zimbabwe to obtain possession of debtors' properties and did not give to the latter the right to resort to national courts for compensation. The SADC Tribunal considered that this provision violated member states' obligation to respect human rights, democracy and the rule of law, as provided for in the SADC Treaty Art. 4.

[99] SADC Treaty Art. 4(c) provides that the organisation and its member states shall also act in accordance with the principles of human rights, democracy, and rule of law.

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As it is clear, the behaviour of both the SADC Tribunal and the EACJ reveals their attitude to extend their own jurisdiction and to develop their autonomous jurisprudence on human rights matters through a broad interpretation of treaty provisions, without losing sight of their main task, namely that of ensuring the correct and uniform interpretation and application of the law of the organisation[100]. Finally, it is worth noting that in their judgments on human rights matters, both the SADC Tribunal and the EACJ refer to the *African Charter on Human and Peoples' Rights* as the main normative instrument to be applied[101].

In contrast to the COMESA Court and the SADC Tribunal, the EACJ did not adjudicate only on disputes between the organisation and its employees or on human rights matters, but it also heard and determined issues somehow concerning the regional integration process. Firstly, in the Anyang' Nyong'o case, it had the opportunity to explain the legal nature of the organisation law system and the relationship between EAC law and national law[102]. This reference concerned the issue of whether the procedure adopted by the Kenyan National Assembly to elect the nine Kenyan members of East African Legislative Assembly (EALA) was compatible with the EAC Treaty Article 50. The result was that the EACJ had to interpret such article to settle the dispute before it and in doing so, it addressed some more general legal issues concerning the effect of EAC law. In particular, it defined the extent of the state's participation in an integration process like EAC stating that '…one such hurdle is balancing individual state sovereignty with integration. While the Treaty upholds the principle of sovereignty equality, it must be acknowledged that by the very nature of the objectives they set out to achieve, each Partner State is expected to cede some amount of sovereignty to the Community and its organs in limited areas to enable them to play their role'. As it is clear, such words are fairly similar to those pronounced by the ECJ in the Van Gend and Loos (1963) case; evidently, East African judges drew inspiration from them. Their reference to the ECJ's jurisprudence became clear when they addressed the relationship between EAC law and national law, especially the question of which legal implications had the conclusion that

[100] From this perspective, the EACJ and the SADC Tribunal attitude is somehow comparable to that of the ECJ which developed its own jurisprudence on fundamental rights over the years, insofar as this was functional to the economic integration process and even though the statutory treaty did not confer on it a specific competence on such matters.

[101] EAC Treaty Art. 6 provides expressly that 'the fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include… good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'.

[102] See *Anyang' Nyong'o & others v the Republic of Kenya* (2007). For a precise analysis of such ruling ,see Onoria (2010a: 74-94); Oppong (2008); Mutai (2008); and Onoria (2008: 509-525). From a comparative point of view to the ECJ's jurisprudence, see Van Der Mei (2009b) and Van Der Mei (2009a: 403-425).

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the Kenyan rules breached EAC Treaty Article 50. To answer this question, they cited as authorities on this subject the ECJ's rulings in the Van Gend and Loos (1963), *Costa v Enel* (1964), Simmenthal (1978) and Factortame (1990) cases, to make the point that where there is a conflict between the law of the organisation and national law, the former is given primacy in order for it to be applied uniformly and effectively[103]. Evidently, the EACJ considered the ECJ's jurisprudence an important source of inspiration to solve disputes brought before it. However, it did not go so far as to actually lay the foundations for an autonomous East African legal order or to formally declare the primacy of EAC law over the law of member states, as the ECJ did. The EACJ simply ruled that the Kenyan election rules were in breach of the EAC Treaty Article 50[104]. It is worth noting that such judgment is relevant not only for the EACJ's attitude to take guidance from the ECJ, but also for member states' reaction. Indeed, the EACJ's interim ruling stating that Kenyan election rules were *prima facie* at odds with EAC Treaty and the consequent suspension of the inauguration of the EALA were not highly regarded by member states[105]. They considered this ruling a judicial interference in political matters, so they responded by amending the treaty provisions concerning the judicial power. In particular, the main amendments concerned the extension of grounds for removing a judge from office and the court's jurisdiction[106]. Thus, member states agreed to limit the regional judicial power they themselves decided to establish to protect the rule of law. They therefore contradicted their earlier decision to place law above politics in their organisation. Evidently, such behaviour by member states reveals their lack of recognition and awareness that being part of a common project and a common 'supranational' entity implies a loss of sovereignty and the possibility of being bound against one's own will[107].

[103] For purposes of illustration, the EACJ also referred to the Factortame case (1990), where the ECJ held that a UK rule, according to which courts could not issue an injunction against the Crown, undermined the full effectiveness of community law and thus had to be dis-applied.
[104] According to the court, pursuant to EAC Treaty Art. 50, National Assemblies must establish the procedure for election rather than for nomination of EALA members. Then, the EACJ ended its judgment with a general observation concerning the need for ensuring the uniformity of EAC law, because it could 'weaken the effectiveness of Community law and in turn undermine the achievement of the objectives of the Community'. So it held 'the urgent need for harmonization'.
[105] In the Anyang' Nyong'o case, the claimants complained about the incompatibility of Kenyan elections rules of EALA members with EAC Treaty Art. 50 and filed a reference in the court with interlocutory application for an interim order to prevent the nine persons elected by the Kenyan Assembly from taking office. In its interim ruling EACJ stated that Kenyan election rules were *prima facie* at odds with the EAC Treaty and that the claimants as well as the EALA and the EAC would suffer irreparable damage if it would turn out that one-third of the EALA members were not legally elected. As a result, the inauguration of the EALA was suspended. See *Anyang' Nyong'o and 10 others v the Republic of Kenya and 5 others (interim ruling)* (2006).
[106] The court's jurisdiction was limited providing that it does not 'include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States'. The amendments also concerned the restructuring of the court into two divisions.
[107] For a critical analysis of such amendments, see Onoria (2010a: 74-94).

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Then, the core question of whether such amendments of the EAC Treaty were lawful was addressed to the EACJ in *East African Law Society and others v the Attorney General of Kenya* (2008). After careful reasoning, the judges concluded that the lack of people's participation in the impugned amendment process was inconsistent with the spirit and the intention of the treaty, particularly the amendment of the provision on the grounds that removing or suspending judges infringed EAC Treaty Article 38(2). However, the court refused to declare, as claimants had requested, that the entire amendment process was of no legal effect[108]. Maybe surprisingly, in such ruling the court decided to apply the doctrine of prospective annulment, so it meant that its decision did not have retrospective effect. The EACJ had already applied this doctrine in the Calist Mwatela case[109], to which it expressly referred. In that case, the court held that the decision of the Council of Ministers in 2001 to establish the Sectoral Council on Legal and Judicial Affairs violated the EAC Treaty on the grounds that the council was not exclusively composed of ministers, as the treaty prescribed. However, it refused to annul the decision establishing such a council with reactive effect. In support of this holding, the EACJ referred to the ECJ's Defrenne ruling, embracing its legal reasoning[110]. In this ruling, the Luxembourg Court stated that, even though its judgments have retroactive effect in principle, it may limit the effect of its rulings in time if retroactive application would be at odds with the principle of legal certainty. So, referring to the ECJ's ruling, the EACJ not only applied the doctrine of the prospect annulment but also embraced European judges' legal reasoning. Thus, it is evident that the EACJ sought guidance from the EU judicial experience and, actually, it considered the ECJ's jurisprudence to be 'of persuasive value for [this] Court… although it is not binding' (*the Democratic Party – Mukasa Fred Mbidde v EAC Secretary General – Attorney General of Uganda*, 2011: par. 33). So it is not surprising that in its first advisory opinion, the EACJ used the European integration process as a term of comparison and suggested it was to 'study and possibly emulate some of the examples of application of [European] concepts to deepen integration and to borrow a leaf from the European Union core and periphery approach' (EACJ Advisory Opinion – Application n.1/2008). In particular, the EACJ had to give its opinion about the

[108] For a critical comment, see Van Der Mei (2009: 403-425) and Van Der Mei (2009).
[109] See *Calist Mwatela and others v the East African Community* (2006). For an analysis of this judgment, see Van Der Mei (2009b).
[110] See Defrenne case (1976). In this ruling, the Luxembourg Court stated that, even though its judgments have retroactive effect in principle, it may limit the effect of its rulings in time if retroactive application would be at odds with the principle of legal certainty. So, referring to the ECJ's ruling, the EACJ not only applied the doctrine of the prospect annulment but also embraced European judges' legal reasoning.

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compatibility of the variable geometry with consensus[111]. It therefore founded its reasoning on the EU example and likened the principle of variable geometry to the European *enhanced cooperation.* It considered the EU examples of the Schengen Agreement and of the Monetary Union to demonstrate that 'the principle of variable geometry has been internationally applied to deepen integration'. Finally, in light of the EU experience, the EACJ concluded that 'the principle of variable geometry can comfortably apply and… guide the integration process'[112] because it is compatible with consensus.

Finally, it is worth noting that the EACJ is not the only regional court in eastern and southern Africa seeking guidance from the ECJ's jurisprudence. Even COMESA judges advised to 'take guidance especially from the rich jurisprudence of the European Court of Justice' (*Kabeta Muleya v Common Market for Eastern and Southern Africa and Erastus Mwencha*, 2002) in order to interpret the COMESA law and particularly the Rules of Procedures, because 'the jurisdiction and the rules of Procedures of our Court are modelled on those of the European Court of Justice' (Ibid.). So, it is actually true that '…while decisions and judgments of the European Court of Justice do not bind our Court, they are of enormous persuasive value' (Ibid.).

This 'attitude' of eastern and southern African judges to draw 'inspiration' from the ECJ's jurisprudence concerns a more general trend to *unidirectional fertilisation* involving not only African but also southern and central American regional courts[113]. In concrete terms, this trend consists of 'borrowing', stating, and applying legal principles elaborated by the ECJ (considered as an authoritative source of 'inspiration') in different integration processes[114]. This phenomenon is to be considered favourably, because it contributes to the circulation of relevant legal principles to develop and strengthen regional integration processes and because it tends to make the jurisprudence of several regional judicial bodies fairly homogeneous regarding similar legal issues.

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[111] It is to be clarified that in the EAC, variable geometry is one of the operation principles governing the integration process, as provided for in EAC Treaty Article 7. Consensus is the decision-making mechanism used by the Summit to adopt EAC acts.

[112] EACJ Advisory Opinion – Application n.1/2008.

[113] Regarding the influence of the ECJ's jurisprudence on other regional judicial systems, in general, see Pirker (2011); Tatham (2010: 137-158); Brown (2008: 219-245); Baudenbacher (2004: 381-399); Burgorgue-Larsen (2003: 203-266); and Jacobs (2003: 547). In particular, regarding Latin American regional judicial bodies, see also Belén, Ulate Chacón, Olmos Giupponi (2011); Mejía Herrera (2011:14-34); Marinai (2010: 283-315); and Alonso García (2009).

[114] Probably, the phenomenon of unidirectional fertilisation could be explained by the fact that these judicial bodies are 'young' and don't have their own legal precedents to refer to in order to solve regional disputes.

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Moreover, it is to be noted that African judges don't borrow passively the ECJ's jurisprudence. On the contrary, they quote it in a pertinent way and, even if they often follow the European judges' legal reasoning, they don't always reach their same conclusions. So, although they expressively draw inspiration from the European judicial experience, they seem to preserve their autonomous decision capability.

7. Conclusion

From the legal perspective, it is undeniable that by signing and ratifying normative acts establishing regional courts and conferring on them *ipso facto* a compulsory jurisdiction to hear and determine the interpretation and application of the law of the organisation, the member states transformed the erstwhile interstate cooperation into a rules-based regional system. In essence, they decided to create and accept a regional system under the rule of law.

Moreover, looking at the institutional framework and the powers of such regional judicial systems, it is clear that African states have set in place courts which may mimic (more or less) the ECJ. This is particularly true regarding the COMESA and EAC judicial bodies. In other words, such courts have all required judicial instruments to play an active role in their regional integration process, as the ECJ did and goes on doing. Moreover, their own first rulings and constant references to European jurisprudence, seen as a source of authoritative inspiration, reflect their willingness to firmly protect the rule of law and to play a proactive role in regional organisations.

However, such willingness encounters various obstacles in external non-judicial factors. Firstly, as mentioned, cases referred to regional courts until now dealt largely with issues not directly related to the economic integration processes. This is due to the traditional reluctance of states to sue each other, the non-utilisation of the preliminary ruling procedure, the relative dearth of substantive law from the organisations, and a general lack of political will to see the judicial branch as a key component in the integration process. Secondly, regional courts' attitude to act as the 'engine' of the integration process is neutralised by member states' behaviour. In fact, the events that happened within SADC and EAC reveal states' contradictory willingness. Indeed, by establishing permanent regional courts, they agreed to respect and adhere to the rule of law and to accept judicial review of their legislative powers. They seemed to recognise that for a regional integration process to be successful, the rule of law should prevail over political power and create legal accountability. However, the events

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described demonstrate that states' commitments, which they accepted by signing and ratifying the treaty, do not necessarily imply their willingness to transform such commitments into practical reality. The decision of the SADC Summit to close the Tribunal and of EAC member states to amend the treaty and the court's jurisdiction revealed a strong conviction that the last word on regional integration should not be for courts, which are fragile 'creatures' and depend on states' acceptance of their legitimacy and authority. Evidently, such regional organisations still remain power-oriented systems.

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