

Chapter 8

Tying the region together or tearing it apart? China and transport infrastructure projects in the SADC region

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1. Introduction

China and Africa appear to be economically and politically highly compatible partners: Africa has the resources that China urgently needs. China possesses the means to develop Africa's transport infrastructure, whose poor condition hampers economic development (Foster et al., 2009: 29-51). Moreover, many ruling elites in Africa are more than reluctant to bow to Western conditions of foreign aid and investment such as good governance, including the rule of the law and transparency. China also attaches conditions to its partnership with Africa, too – most importantly the adherence to the one-China principle. Despite this provision, China's development assistance and granting of preferential loans is less contingent on political conditions. Commercial interests matter to the People's Republic. These appear to be easier to accept for African governments (Brown, 2012: 42).

As we show in this chapter, China's interest in transport infrastructure projects in East and Southern Africa is practically always the same: Chinese loans open the door for Chinese enterprises, which then gain key roles in local markets. At the same time, China secures access to important resources. At least in the case of the Sino-Congolese 'minerals-for-infrastructure deal', it is publicly known that off-market access to resources has been prescribed in according agreements as the way to repay the Chinese loans. Leaving aside

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certainly relevant questions on the distribution of benefits from these deals, their presumably negative impact upon the economic paths of the resource-exporting countries, and the implementation of environmental and social safeguards in the context of Chinese investment projects, we investigate the impact of Chinese transport infrastructure projects upon economic integration and, thence, upon the perspectives for economic development in East and Southern Africa. Given that most member states of the Southern African Development Community (SADC) are small economies and struggle to connect their hinterlands or even their economic core zones to overseas markets, transport infrastructure is a key means to facilitate economic growth through regional cooperation and integration. We recognise that building railway lines, roads, and harbours is not sufficient to bring about economic development in the SADC region. There is a need for institutional reform even in the transport sector with, for instance, border stops along the North-South Corridor from the Copperbelt to KwaZulu-Natal taking several days (Draper and Scholvin, 2012: 10). Nonetheless, better transport infrastructure is a necessary condition for growth to happen.

Hypothetically speaking, transport infrastructure projects carried out and/or financed by the Chinese can have two effects on regional integration: On the one hand, it is plausible to assume that they are simply incorporated into the grand designs pursued by the regional states and SADC. This way, they would contribute to better integrating the region and facilitating economic development. On the other hand, a pessimist scenario comes to mind because the basic idea behind Chinese transport infrastructure projects – to get unprocessed resources from the interior parts of East and Southern Africa to China – resembles the European strategies of the colonial era. Today's fragmentation of the SADC region reflects transport corridors that colonial powers built from a few harbours straight to hinterland mining towns. These narrow strips, which reach deep into the continent, were (and still are) connected well to overseas markets, whereas connections from one regional country to another, and even from one transport corridor to another, remain poor. Fragmentation by transport infrastructure for resource extraction may be reinforced by present-day Chinese projects.

In order to find out whether Chinese transport infrastructure projects contribute to regional integration in East and Southern Africa or further fragment the region, we have reviewed scientific literature, especially publications by the Centre for Chinese Studies of the University of Stellenbosch and the South African Institute of International Affairs (SAIIA). We have added information from regional newspapers that are available online, from the

Chinese news agency Xinhua, the LexisNexis database, and from standardised interviews with various experts who specialise either in Sino-African relations or in single countries from the SADC region. Before presenting our empirical findings and deducing what SADC and its member states ought to consider when cooperating with China, we provide the reader with an overview of the present state of transport infrastructure in the SADC region and the approach taken by SADC to upgrading transport infrastructure.

2. Transport infrastructure in the SADC region

The logic of regional cooperation and integration in Africa southwards of the equator changed fundamentally with the democratisation of South Africa in 1994. With the apartheid regime gone, the region's strongest economy turned from an enemy of its neighbours into a partner. Although the regional states have not yet found a way to finance regional infrastructure projects jointly, they are at least coordinating some of their efforts. The Development Bank of Southern Africa (DBSA) is actively involved in so called 'spatial development initiatives' (SDIs). The key idea behind SDIs is that the SADC region lacks sustainable economic growth because it is not globally competitive and, therefore, runs short of overseas investment. The lack of overseas investment is traced back to insufficient transport infrastructure, amongst other factors. The insufficiency of transport infrastructure shall be overcome by public-private partnerships (Jourdan, 1998: 717-719). SDIs are, hence, a method to facilitate economic development with the help of transport corridors that interlink the member states of SADC regionally and globally.

In order to set priorities in the upgrading of regional transport infrastructure, the member states of SADC have agreed on a Regional Infrastructure Development Master Plan (RIDMP). Therein, they identify as high priority the North-South Corridor, which connects the ports of Durban and Richards Bay via Gauteng to the Congolese-Zambian Copperbelt; the Maputo Development Corridor (MDC) from Gauteng to Mozambique's capital; and the Dar-es-Salaam Corridor, which consists of the Tanzania-Zambia (TanZam) Highway and the Tanzania-Zambia Railway (TAZARA). The North-South Corridor and all existing rail connections are mentioned as potential priorities for developing the regional railway network (SADC Secretariat, 2012: 40-53). The Programme for Infrastructure Development in Africa (PIDA), carried out by the African Development Bank (AfDB), gives priority to the North-South Corridor, the Central Corridor, which connects the port of Dar es Salaam to the

landlocked Great-Lakes region, Mozambique's Beira and Nacala Corridors, and the Southern African Hub Port and Rail Programme (African Development Bank, 2012: 13, 18-19).

Yet, the activities of the DBSA on SDIs go beyond what has been identified as priorities by the RIDMP and the PIDA. Presently, the DBSA supports Mozambique's Ministério dos Transportes e Comunicações on the Maputo and Limpopo SDI, which go from Mozambique's capital to the South African and Zimbabwean borders, respectively. Tanzania's National Development Corporation gets advice for the Central SDI from Dar es Salaam to the Great Lakes and the Mtwara SDI, which stretches along the border with Mozambique. In the DRC, several state agencies cooperate with the DBSA on the Bas-Congo SDI from the port of Matadi to Kinshasa. The Walvis Bay Corridor Group gets advice on the Trans-Caprivi SDI from Walvis Bay to Zambia. Less specific cooperation is carried out with the governments of Angola, Namibia and South Africa on a corridor stretching from north to south in the western part of Angola, the ANSA SDI. The most prominent and, regarding the quantity of traffic, most important SDI is the aforementioned North-South Corridor.² The progress made for these SDIs varies considerably. The staff affiliated to the Bas-Congo SDI are still reviewing feasibility studies and drafting strategies on anchor projects (Regional SDI Programme, 2011a). The ANSA SDI is institutionally embedded in Namibia. There have, however, been setbacks in Angola in this regard (Regional SDI Programme, 2011b). For the Tanzanian SDIs, national strategies are in place. Work on anchor projects and transport infrastructure has begun. Efforts to establish links to SDI projects in the Great Lakes region are undertaken (Regional SDI Programme, 2011c). In the case of Mozambique, the Maputo SDI has been the flagship of all SDIs. It dates back to the mid-1990s and serves as a role model. The Limpopo SDI is less advanced. It shall be incorporated into a new SDI concept that addresses the entire south of Mozambique (Regional SDI Programme, 2011d).

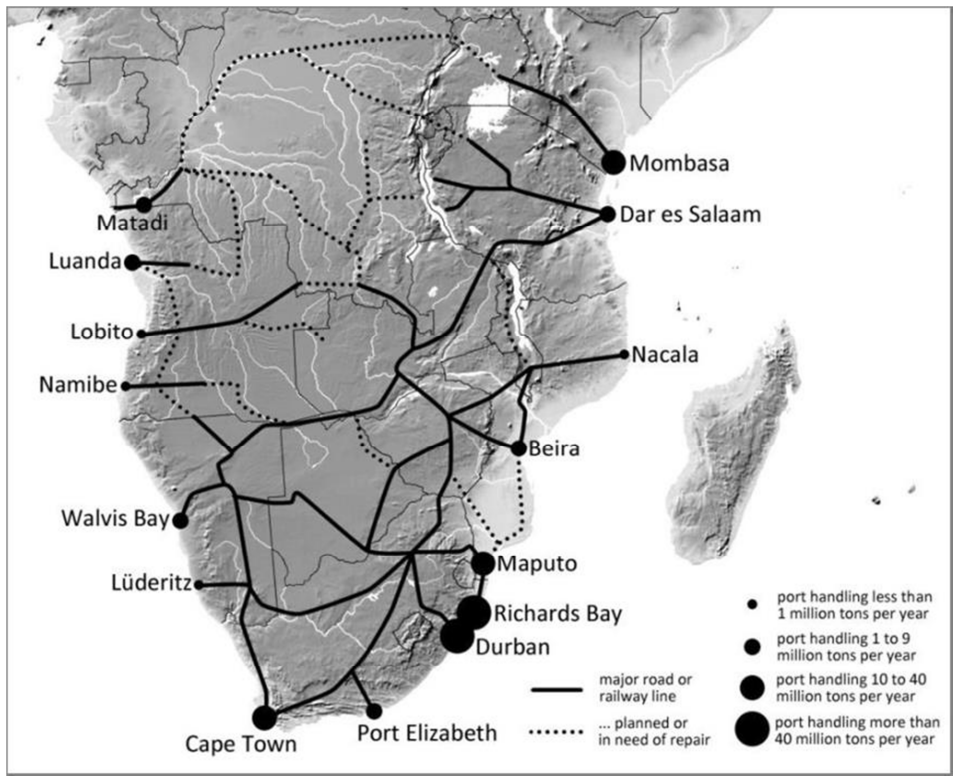
As this overview indicates, the DBSA's Regional SDI Programme does not finance the upgrading of transport infrastructure; it only provides a method for economic policy. The duty of building transport infrastructure and paying for it remains with the national governments, which means that national priorities tend to outweigh the common interests of the region in practice, and transit countries such as Botswana have little incentives to upgrade their railway lines and roads for the benefit of others (Draper and Scholvin, 2012: 20). Apart from that, not only does the realisation of regional transport infrastructure projects lack regional

² A detailed map of these SDIs is available at: http://www.r-sdi-p.com/pdf/flagship_map.pdf

cooperation, but what is more, the existing transport corridors are hardly interlinked, as shown below by Map 1. Only the Coast2Coast Corridor from Maputo to Johannesburg to Walvis Bay and the aforementioned North-South Corridor bind the region together. Being more precise, the Coast2Coast Corridor and the North-South Corridor bind the region to South Africa, which serves as their gateway to overseas markets. South Africa's ports are bigger than those in the other regional countries: Richards Bay handles 80 million tons of cargo per year; Durban 45 million. The largest non-South African harbour on the Indian Ocean is Maputo with 10 million. On the Atlantic, Walvis Bay handles 3 million. Figures for transshipment capacities show South Africa's dominance even more clearly. Due to resulting economies of scale, South Africa's harbours are much better connected, both regionally and globally (Draper and Scholvin, 2012: 15-18). Map 1 shows major transport corridors in the region analysed here, including the most important harbours and their size.

Investment in transport infrastructure is, according to South Africa's role as the gateway of the region, concentrated upon those corridors that start in South Africa. This reinforces a considerable quality gap amongst transport corridors in the SADC region: 59 per cent of the roads along the North-South Corridor are rated 'good' by the World Bank, whereas only 27 per cent of the roads from Lilongwe in Malawi to the Mozambican port of Nacala fall into this category. Seventy-two per cent of the roads from Zimbabwe's capital Harare to Beira in Mozambique are rated as 'fair', indicating serious problems. Many corridors that bypass South Africa consist of a mix of tarred and non-tarred roads (Ranganathan and Foster, 2011: 9, 13). Lobito in Angola has only recently been reconnected to the Congolese border; several hundred kilometres of railway tracks from there to Kolwezi in Katanga province remain overgrown by vegetation. As a result, Durban is, in comparison to Beira and Dar es Salaam, the faster and usually less expensive gateway for the landlocked countries (Ranganathan and Forster, 2011: 15-16, 18-19). Apparently, these intraregional disparities increase the need for cooperation with overseas partners, especially for those regional states that seek to upgrade transport corridors that are not tied to South Africa.

Map 1: Major transport corridors in East and Southern Africa



Source: Adapted from Draper and Scholvin (2012: 17)

3. China’s involvement in transport infrastructure projects in SADC

Chinese companies have become almost omnipresent in transport infrastructure projects in East and Southern Africa. We show in the following sections that projects carried out and/or financed by the Chinese play a key role for many SADC countries. Our analysis is divided into projects on the national scale and projects on the regional scale. With regard to the latter, we find that Chinese transport infrastructure projects appear to comply with the objective of regional integration via transport corridors. As a general finding, it appears that China supports the SADC states in upgrading their transport infrastructure in order to gain access to lucrative construction markets and to natural resources, which does, in contrast to the abovementioned hypothesis, not fragment the region.

Projects on the national level

It appears practically impossible to get a complete picture of China's involvement in transport infrastructure projects in East and Southern Africa given their quantity. Nevertheless, starting with projects limited to the national scale, we can identify different degrees to which the regional states are affected. In Tanzania, for example, two thirds of all road rehabilitation in terms of paving is presently done by Chinese enterprises, and the Tanzanian government owes them USD 254 million for road construction alone (van Valen, 2012: 82-84). One of our interviewees pointed out that Chinese companies seek to exploit coal and iron deposits in south-western Tanzania, in the Liganga and Mchuchuma area. In order to do so, they will need to upgrade transport infrastructure, probably building a new railway line (Expert on Tanzania, 2012). In Zambia, China's AVIC International has been awarded a tender to upgrade the urban road network of Lusaka, a total of 400 kilometres. It is quite likely that Chinese companies, which have by now entered the Zambian market, possess ties to local decision-makers and are working on several rural roads, and will also be involved in the recently announced 'Link Zambia 8000' project which shall tie peripheral areas of Zambia to the existing road network. 2,300 kilometres of new roads are envisaged for the first five-year phase of 'Link Zambia 8000'. Another 3,000 and 2,900 kilometres shall follow in a second and third phase. The USD 120 million that Michael Sata's government plans to invest in the national railway system may also go to Chinese companies (Zambia Daily Mail, 10 October 2012).

Angola is probably the country most affected by Chinese transport infrastructure projects. The money provided by Chinese banks for this purpose amounts to USD 14.5 billion (Shelton and Kabemba, 2012: 60). Using Chinese loans, Angola has built, amongst other things, 830 kilometres of highways (Xinhua Economic News Service, 21 October 2010). Immediately after the end of the civil war in 2002, China Exim Bank and the Commercial Bank of China started to fund transport-related projects. Amongst numerous other projects, Chinese firms were contracted to build or to rehabilitate a highway from Luanda to Uíge province (Foster et al., 2009: 97) and the national railway network, including the 424-kilometre railway line from Luanda to Malange. China Railway Construction Company (CRCC) carried out this USD 350 million project (Xinhua General News Service, 27 August 2010). Angola also purchased railway equipment from China (Xinhua General News Service, 27 August 2010, 19 August 2011). China's apparently high motivation to get involved in Angola is due to oil. The first

major oil-backed loan for transport infrastructure projects in Angola, worth USD 2 billion, was finalised in 2004. In general, such agreements do not only have an impact upon transport infrastructure, but also pave the way for the entry of Chinese construction firms into the booming Angolan market (Alves, 2010: 11-12). Hence, Angola demonstrates that the People's Republic seeks to combine two economic objectives by supporting transport infrastructure projects in the SADC region: access to rapidly growing construction markets and access to natural resources.

In the DRC, we find a comparable situation: the country is resource-rich and has, for several decades, suffered from a civil war. It remains much more unstable than Angola. Transport infrastructure is virtually non-existent in most parts of the DRC. In addition to road and bridge building carried out by the Chinese UN peacekeepers, Chinese National Company of Civil Engineering (CNCTPC) and Sinohydro have been building and rehabilitating important segments of the Congolese transport infrastructure since 2006. Their nationally limited projects include the Boulevard Lumumba from the centre of Kinshasa to nearby Ndjili Airport and the N31 highway through the rain forest from Kasongo to Kindu in South Kivu province (BBC Monitoring Africa, 1 May 2007). Loans from China Exim Bank facilitate such projects but Chinese construction companies have also competed successfully with non-Chinese rivals over projects funded by third parties. Sinohydro, for instance, built a 400-metre bridge in Bandundu province, which was financed by the World Bank. What distinguishes the DRC from all other regional states is the so called 'minerals-for-infrastructure deal' signed in 2009 and worth USD 6 billion. According to this deal, the DRC will get about 3,000 kilometres of railways, 7,000 kilometres of roads, 5,000 housing units, two new airports, 32 hospitals, 145 health centres, two new universities, and four new power stations. In return, China obtains the right to extract 10.6 megatons of copper and 625,000 tons of cobalt, which it will export straight to China. The railway lines and roads that are to be built will partly link the concerned mines to harbours (Financial Mail, 9 July 2010).

A similar pattern applies to Mozambique: as in Angola and the DRC, transport infrastructure in Mozambique has been depleted by decades of civil war; the exploitation of natural resources, which are abundant in some parts of the country, requires transport infrastructure and may finance it. In the early 2000s, Chinese contractors have been involved in the construction of 600 kilometres of roads, i.e. one third of Mozambique's road projects in that time (Boston, 2006: 5). Presently, China Road and Bridge Corporation (CRBC) is

constructing the Maputo ring road and a bridge over Maputo Bay, a project financed to 95 percent by different loans granted by China Exim Bank. The same company is building a new road from Katembe to Ponta de Ouro on the border to KwaZulu-Natal (Expert on Mozambique 2012). Concluded rehabilitation projects by Chinese firms include a 154-kilometre section of the EN1 highway from Inchope to Muxungwe in central Mozambique (Jansson and Kiala, 2009: 9), and another section of the EN1 from Chissibuca to Xai-Xai in southern Mozambique (Mozambique News Agency, 5 April 2011). Both projects were carried out by China Henan International Cooperation Group (CHICO), which has also received a tender for building 200 kilometres of tarred road between Chitima and Mágoé in Tete province (Jansson and Kiala 2009: 9). What is more, Chinese companies have already rehabilitated the Sena railway line, which was the biggest Chinese project in Mozambique in the first half of the 2000s (The Indian Ocean Newsletter, 21 October 2000). The Sena line connects the port of Beira to the mines of Tete province and is essential for their operation. Most of these projects are driven by Chinese investment in the Mozambican mining sector, which is located in the hinterland and poorly connected to the Indian Ocean. In 2010, Wuhan Iron and Steel made a single investment of USD 1 billion in coal mining. Just a couple of weeks later, the Chinese company Kingho expressed its intention to invest USD 5 billion in the country's growing coal sector. Altogether, Chinese business interests have pledged up to USD 13 billion in investment for the next ten years, with a clear focus on agriculture, infrastructure, mining, and tourism (Horta, 2011).

Namibia has, contrariwise, not seen many Chinese projects. Five years ago, a Chinese enterprise built the B10 road along the Angolan border from Rundu to Nkurenkuru (Xinhua Economic News Service, 2 November 2007). China's role in road construction that fits into regional transport corridors has also been limited in the former German colony, as we show below. South Africa does not appear to be a key destination for Chinese construction companies either, probably because the region's economic powerhouse already possesses relatively dense and good transport infrastructure (Financial Mail, 9 July 2010). Still, China Railway Group is likely to receive a USD-30 billion tender for building a high-speed railway line from Johannesburg to Durban, which shall connect the two cities in 2030 (Business Day, 28 June 2012).

In the course of the preparations for the summit of the United Nations World Tourism Organisation (UNWTO), which will be hosted by Zambia and Zimbabwe in 2013, China has

provided a loan of USD 164 million to Zimbabwe. There is speculation that the Chinese may increase their loan to USD 300 million. The only publicly known condition to this loan is that Chinese companies have to be awarded resulting tenders – most importantly, the expansion of the airport of Victoria Falls (Grassi, 2012: 10). Beyond that, cooperation between China and Zimbabwe on transport infrastructure has only recently been formalised. *The Herald* (24 October 2012) reported in October 2012 that the Zimbabwean government had signed seven memoranda of understanding with a Chinese company to explore ways of cooperating in infrastructure development. Since one of the memoranda is entitled ‘Mines and mining development’, access to natural resources appears to be, once again, the motivation that drives China.

Botswana and Lesotho also benefit, though to a relatively limited extent, from China’s commitment to infrastructure projects in the SADC region. In Botswana, China’s involvement in the infrastructure sector dates back to the 1980s when the Civil Engineering Construction Company rehabilitated national railway lines. More recently, China Construction Botswana Ltd. built a 95-kilometre long road from Dutlwe and Morwamosu in the Kweneng district. The road is expected to become one of the major lines in this part of the country (Foster et al., 2009: 97). Although the Chinese government has supported infrastructure projects in Botswana with preferential loans, the vast majority of according projects carried out by Chinese companies work on public tenders that are awarded by the government of Botswana (Chen, 2009: 5). Again, this does not appear to be exceptional. Based on our research, we share van Valen’s (2012: 84) interpretation that large state-owned enterprises from China bid for tenders from African governments or organisations such as the World Bank, and smaller Chinese firms enter regional markets on the bandwagon of the large state-owned enterprises as service providers.

For Malawi, economic cooperation with China began in December 2007, when the two countries established diplomatic relations. The People’s Republic bought this diplomatic shift away from Taiwan with several aid projects, including a 100-kilometre long road in the very north of the country from Chitipa at the Zambian border to Karonga at Lake Malawi (Xinhua General News Service, 2 April 2008). The project, which has cost the Chinese government USD 70 million until today, is carried out by CRBC (Nyasa Times, 28 January 2012). China’s role in the transport sectors of tiny Lesotho is marginal: Chinese companies built some minor roads in eastern Lesotho more than 10 years ago (BBC Monitoring Africa, 10 December

2001). Presently, there are no major transport infrastructure projects being carried out in Lesotho. Swaziland, which maintains its full diplomatic relations with Taiwan, has not seen any Chinese aid or investment.

Projects on the regional level

Companies from the People's Republic are rarely commissioned to build an entire transport corridor – Angola's Benguela Corridor from Lobito to the Congolese border and the DRC's 'voie nationale' from Kinshasa to Lubumbashi being the prominent exceptions. Chinese projects nevertheless tie into many regional corridors that SADC and its individual member states would like to see upgraded. The small-scale projects, which fit into larger schemes of regional integration, are practically uncountable. Giving some examples, China Geo-Engineering Corporation built the 'Unity Bridge' across the Rovuma River on the Mozambican-Tanzanian border, making it possible, for the first time, to drive from Mozambique to Tanzania (Jansson and Kiala, 2009: 9). Maputo's aforementioned ring road will connect the EN1 highway with the EN4 (Expert on Mozambique, 2012); the EN1 crosses the country from north to south, and the EN4 goes from Maputo to the South African border. In Namibia, Chinese companies have received a tender for maintenance work for a part of the B2 highway from Walvis Bay to Okahandja (Expert 1 on Namibia, 2012; Expert 2 on Namibia, 2012), which is where the Trans-Caprivi Corridor (Namibia to Zambia), the Trans-Cunene Corridor (Namibia to Angola), and the Trans-Kalahari Corridor (Namibia to Botswana and north-eastern South Africa) merge. In southern Angola, CRBC has rehabilitated the road from the border with Namibia near Santa Clara to Ondjiva and from there to Xangongo, including several bridges that shall guarantee transport during the rainy season (Macauhub, 10 September 2009, 4 November 2011). Transport infrastructure from the DRC to Zambia is upgraded by the Chinese as well: in 2006, CHICO completed a 320-metre bridge at the border town of Chembe in the Luapula province (Xinhua General News Service, 17 September 2006).

On a much larger scale, Chinese companies are involved in all transport corridors that are given priority by the regional states. Along the North-South Corridor, China and Zimbabwe seek to rehabilitate Zimbabwe's railway network. Roads along that corridor are to benefit from rehabilitation works carried out by China International Fund Consortium; so is the A3 highway from Harare to Mutare on the Mozambican border (The Standard, 24 October 2012; Trade Compass, 24 October 2012). The A1 highway from Harare to Chirundu might even be

turned into a dual carriageway and the railway line that goes parallel to the A1 from Harare via Chinhoyi to Chirundu may be expanded into Zambia (Xinhua General News Service, 9 November 2009). In 2005, the construction of a bridge across the Zambezi between Botswana and Zambia was announced. The route via Botswana is a secondary branch of the North-South Corridor, which allows bypassing Zimbabwe's busy border stations at Chirundu and Beitbridge. Then, it appeared likely that the USD-70 million project would be carried out by a consortium of both multi-national and local companies that had shown interest in the project, including China National Overseas Engineering Corporation (Xinhua General News Service, 7 August 2005). A key finding of our research is that China has a genuine interest in supporting regional integration in terms of transport corridors, which is reflected in its cooperation with the SADC states on this matter. The rehabilitation of the A3, for example, will be coordinated with works on the adjoining EN6 to the Mozambican port of Beira (Trade Compass, 24 October 2012). The T2 highway from Zambia's capital Lusaka to Chirundu has already been rehabilitated by the Chinese. They focussed on a 35-kilometre escarpment section, where accidents were often seen because of many curves, steep gradients, and poor road conditions. By working on the T2, China has contributed to easing transport on Zambia's busiest highway and a rather poor part of the North-South Corridor, which carries more than 400 heavy trucks every day, making it not only the economic lifeline of Zambia but also the main route from the Copperbelt to global markets (Xinhua General News Service, 27 May 2006).

East Africa has the longest tradition of cooperation with China on transport infrastructure. TAZARA links the port of Dar es Salaam to Kapiri Mposhi in the Zambian part of the Copperbelt. It was opened in 1975 and enabled the landlocked Frontline States to bypass South Africa during the struggle against the apartheid regime. TAZARA was, however, only partly successful – Zambia and Zimbabwe never eased their dependence upon South African ports. Today, TAZARA needs about USD 25 million for locomotive repairs alone (Davies, 2008: 147). In 2012, the Chinese government announced that it would grant Tanzania a loan of USD 42 million for TAZARA. In this context, the Chinese Civil Engineering and Construction Company (CCECC) has secured a USD-5 million contract to build 90 waggons, which shall be used for transporting containerised cargo and metals such as copper and manganese (China Economic Review, 19 October 2010). Loans and technical support for TAZARA appear to be the focus of Chinese involvement in transport infrastructure projects in Tanzania (Expert on Tanzania 2012). As in the past, connecting the Copperbelt to the

Indian Ocean is of great interest to China. China has become the third largest investor in landlocked Zambia; its investment there reached USD 2 billion at the end of the 2010 year (Xinhua General News Service, 19 August 2011). Copper mines are the main destinations of Chinese investment, apparently in order to meet China's rapidly growing domestic demand for metal and raw materials as key inputs for its industrial sector. The output of Chinese-owned mines in Zambia is estimated at between 25,000 and 30,000 metric tons per annum. China Non-Ferrous Metal Company (CNMC) and another smaller Chinese copper firm signed a deal in 2006 to invest USD 220 million to build a 150,000-ton copper smelting plant in Zambia, which started production in 2008. Two years earlier, the Chinese firm CBMI Construction was contracted to construct a new USD 120 million cement plant in Lusaka, commissioned in 2008 (The PRS Group/Political Risk Services, 1 November 2007). What is more, the Chinese Ministry of Commerce approved investments worth USD 450 million in 2009 to establish two special economic zones in Zambia. The zones will concentrate primarily on copper mining, with China Northern Metal Mining Group being the main operator (Horta, 2010).

Since Dar es Salaam is a potential gateway for the Copperbelt, which also highly suits China for its location on the Indian Ocean, the Chinese have been very active in the development of the port of Dar es Salaam; they even consider it a location for another special economic zone. According plans would be carried out by the China Investment and Trade Promotion Centre, which was established in Dar es Salaam in 1997. Bagamoyo, 60 kilometres north of Dar es Salaam, and Kigoma, one of the busiest ports at Lake Tanganyika, are other potential locations for Chinese special economic zones (Jansson et al., 2009: 3-4). Presently, Kigoma is linked to Dar es Salaam by an old but operational railway line and a tarred road that is in very poor condition. Upgrading the railway line and road from Dar es Salaam to Kigoma offers a good prospect for better linking the Great Lakes region to the Indian Ocean and, thus, tying Burundi, the DRC, Tanzania and Uganda closer together. In the late 2000s, Chinese companies began upgrading TAZARA and port facilities in Dar es Salaam. Amongst other things, they provided the port with a new customs building (Davies, 2008: 146-147), which can be seen as an indicator for Chinese interests in making Dar es Salaam more than a mere gateway to Tanzania. China Communications and Construction Company (CCCC) looks forward to constructing two container terminals in the port of Dar es Salaam in the near future. Construction work at the port will possibly involve dredging the port area and the approach channel. The company will also build the container yard at the two terminals where

15,000 tons of cargo shall be handled (World Maritime News, 7 September 2012). Beyond TAZARA, Chinese enterprises are also involved in works on the road from Arusha via Namanga at the Kenyan border to Nairobi, which is a project of regional integration strongly supported by the East African Community (EAC) (Xinhua General News Service, 23 February 2011).

In Angola, we find comparable strategies pursued by the Chinese. Their companies are working on all three major transport corridors, which link the ports of Luanda, Lobito, and Namibe to the Angolan hinterland. On the regional scale, the Benguela Corridor, which starts at the port of Lobito, is most important. It used to link Lobito to the Congolese-Zambian Copperbelt before it was severely damaged during Angola's civil war. China Railway Construction Company currently benefits from a USD-2.3 billion investment by the Angolan government in the Luanda Corridor and the Benguela Corridor (Xinhua General News Service, 19 August 2011). Although nothing is known about a 'minerals-for-infrastructure deal' between Angola and China, it is evident that the Angolan government has acquired this vast amount of money by exporting its oil to China. Moreover, the Namibe Corridor, which links the port of Namibe to the provinces Cuando Cubango and Huíla where copper, iron ore and diamonds are found, shall be connected with Namibia's railway network (Alves 2010: 15) which presently runs from Walvis Bay and Windhoek via Tsumeb and Oshakati to the border. A complete north-to-south railway line, which would interlink the three main railway corridors of Angola, is discussed but does not appear to be at a far stage. Yet, if such a vision is ever put into practice, Chinese companies, which have gained a predominant position in Angola, will, most likely, play a key role (Expert on Angola, 2012). Chinese companies may also build a bridge across the Congo River that would link the exclave of Cabinda to the rest of Angola. Because this project is politically motivated and involves tremendous costs but promises few economic benefits, it will probably not be realised (Expert on Angola, 2012). Luanda's new airport, built by Chinese companies 40 kilometres outside the city, also fits into the frame of regional integration through transport infrastructure. It is projected to have the largest operational capacity for passengers and cargo in Sub-Saharan Africa. It shall make Angola the region's air traffic hub (Alves, 2010: 15). Smaller airports in Angola are upgraded by Chinese companies, too (Expert on Angola, 2012).

4. Conclusion

Our principal aim has been to review China's impact upon the development of transport infrastructure in the continental SADC member countries and to assess its contribution to intraregional connectivity. We have argued that China's participation as a contractor and/or as a financier may yield a positive effect on regional integration and, thus, on economic growth. Alternatively, we have proposed that China may support projects that only aim at linking places of resources extraction to the coast. Such projects would enforce regional fragmentation, much like the transport corridors built in the colonial era. Our findings reveal that China has made major contributions to transport infrastructure in the SADC region during the last decade, mainly by rehabilitating and building railway lines and roads. Although the projects carried out and/or financed by the Chinese are usually limited in their scope and do not constitute entire corridors, they tie well into priorities identified by SADC and its members. Even transport infrastructure that is mainly built or rehabilitated in order to export resources, e.g. Mozambique's corridors that start in Beira and Nacala or TAZARA, appears to bind the regional states together. What is more, resource extraction by the Chinese and transport infrastructure projects realised in this context come along with Chinese investment in special economic zones, as in the cases of Tanzania and Zambia. Further examining these zones would reveal whether Chinese transport infrastructure projects trigger an economic dynamic that goes much beyond our initial expectations.

Thus, we think that challenges linked to China's participation in transport infrastructure projects in East and Southern Africa are not about regional fragmentation; they are of a different nature. First, many of our interviews indicated that the process of project contracting and implementing transport infrastructure projects ought to be rectified. Contracting usually lacks transparency. With regard to implementation, the quality of construction carried out by Chinese companies appears to be a major concern. For instance, one of our interviewees pointed out that Angolans speak of 'disposable roads' built by Chinese construction firms 'as they wash away after one rainy season' (Expert on Angola, 2012). Making the problem of insufficient quality worse, Chinese companies often import all components for their projects from China without taking into consideration what is available for replacement in Africa (van Valen, 2012: 84). Although this matters more for Chinese-built power stations, railway infrastructure, especially locomotives and waggons, are affected, too. The Namibian government, for example, voiced their disappointment with the quality of Chinese

locomotives sold to them in 2004 because their availability rate was slightly less than 40 per cent during their first three years of service (Expert 2 on Namibia, 2012). Second, the poor record of Chinese companies concerning national labour laws and regulations as well as environmental standards requires more attention. As a case in point, workers at Chinese construction sites in Mozambique recently complained not only about their low salaries and the lack of protective equipment but also about racist attitudes and physical assaults (Mozambique News Agency, 28 May 2012, 6 September 2012). In Namibia, Chinese contractors often ignore minimum wages and maximum work hours (Expert 1 on Namibia, 2012). It is most problematic in this regard that our review of newspaper articles from the region revealed a sharp contrast between civil society organisations harshly criticising Chinese companies and African governments often speaking highly of them. Third, trickle-down effects exist but are limited because Chinese companies usually bring their own workers, and import most construction material and equipment. One of our interviewees referred to estimations that there are presently 40,000 Chinese workers in Namibia – how much this matters becomes clear in light of the fact that only 400,000 Namibians possess jobs in the formal economy (Expert 1 on Namibia, 2012). Efforts to tackle this problem have been of limited success. For example, the Namibian Roads Authority announced in March 2012 that two local roads, from Omakange to Ruacana and from Omafo to Outapi, would be built with the help of a Chinese loan. Whilst Chinese companies have to be awarded the tenders, the governments of China and Namibia agreed that 15 per cent of the contract value will be subcontracted to Namibian small and medium-sized enterprises (The Namibian, 15 March 2012).

For sure, the abovementioned problems should be priorities in bi- and multilateral negotiations with the involved Chinese entities, i.e. its government, banks, and construction companies. As we have shown in this chapter, China's main strength lies in providing additional funds to capital-starved governments through loans and special credit lines, and, arguably, in carrying out transport infrastructure projects at comparatively low costs. Because of these advantages, China has already contributed much to tying the region together and paved the ground for the further involvement of Chinese companies in the development of transport infrastructure in East and Southern Africa.

References

- African Development Bank. 2012. *Programme for Infrastructure Development in Africa: Interconnecting, Integration and Transforming a Continent*. [Online]. Available: <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/PIDA%20note%20English%20for%20web%200208.pdf>
- Alves, A. C. 2010. The Oil Factor in Sino-Angolan Relations at the Start of the 21st Century. SAIIA Occasional Paper No. 55. Johannesburg: South African Institute of International Affairs. [Online]. Available: http://www.saiia.org.za/images/stories/pubs/occasional_papers/saia_sop_55_alves_20100225.pdf
- Bosten, E. 2006. China's Engagement in the Construction Industry of Southern Africa: The Case of Mozambique. Presentation at a workshop on 'Asian and other Drivers of Global Change' in St. Petersburg, 19.1.2006. [Online]. Available: [http://www.die-gdi.de/CMS-Homepage/openwebcms3.nsf/\(ynDK_FileContainerByKey\)/ADMR-7B7HWH/\\$FILE/EmmyBosten.pdf?Open](http://www.die-gdi.de/CMS-Homepage/openwebcms3.nsf/(ynDK_FileContainerByKey)/ADMR-7B7HWH/$FILE/EmmyBosten.pdf?Open)
- Brown, D. E. 2012. *Hidden Dragon, Crouching Lion: How China's Advance in Africa Is Underestimated and Africa's Potential Underappreciated*. Carlisle Baracks, PA: Strategic Studies Institute.
- Chen, A. Y. 2009. China's Role in Infrastructure Development in Botswana. SAIIA Occasional Paper No. 44. Johannesburg: South African Institute of International Affairs. [Online]. Available: http://www.saiia.org.za/images/stories/pubs/occasional_papers/saia_sop_44_chen_20090930.pdf
- Davies, M. J. 2008. Special Economic Zones: China's Developmental Model Comes to Africa. In R. I. Rotberg (ed), *China into Africa: Trade, Aid, and Influence*. Cambridge: Brookings Institute Press, 137-154.
- Draper, P. and Scholvin, S. 2012. The Economic Gateway to Africa? Geography, Strategy and South Africa's Regional Economic Relations. SAIIA Occasional Paper No. 121. Johannesburg: South African Institute of International Affairs. [Online]. Available: www.saiia.org.za/images/stories/pubs/occasional_papers_above_100/saia_sop_121_%20draper%20%20scholvin_20121005.pdf

Expert on Angola. 2012. Chinese Transport Infrastructure Projects in Angola. Written interview conducted 24 September 2012.

Expert on Mozambique. 2012. Chinese Transport Infrastructure Projects in Mozambique. Written interview conducted 28 September 2012.

Expert 1 on Namibia. 2012. Chinese Transport Infrastructure Projects in Namibia. Written interview conducted 29 September 2012.

Expert 2 on Namibia. 2012. Chinese Transport Infrastructure Projects in Namibia. Written interview conducted 6 October 2012.

Expert on Tanzania. 2012: Chinese Transport Infrastructure Projects in Tanzania. Written interview conducted 12 October 2012.

Foster, V., Butterfield, W., Chen, C. and Pushak, N. (2009). Building Bridges: China's Growing Role as Infrastructure Financier for Sub-Saharan Africa. Trends and Policy Options No. 5. Washington DC: The World Bank. [Online]. Available: http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2009/04/13/000333038_20090413020329/Rendered/PDF/480910PUB0Buil101OFFICIAL0USE0ONLY1.pdf

Grassi, S. 2012. Diamonds – China's Best Friends? Chinesische Außenpolitik in Simbabwe jenseits von Grand Strategy und Koordinierung. Internationale Politikanalyse. Berlin: Friedrich-Ebert-Stiftung. [Online]. Available: <http://library.fes.de/pdf-files/iez/09300.pdf>

Jansson, J. and Kiala, C. 2009. Patterns of Chinese Investment, Aid and Trade in Mozambique. Stellenbosch: University of Stellenbosch. [Online]. Available: <http://www.ccs.org.za/wp-content/uploads/2009/11/CCS-Mozambique-Briefing-Paper-October-2009.pdf>

Jansson, J., Burke, C. and Hon, T. 2009. Patterns of Chinese Investment, Aid and Trade in Tanzania. Stellenbosch: University of Stellenbosch. [Online]. Available: <http://www.ccs.org.za/wp-content/uploads/2009/11/CCS-Tanzania-Briefing-Paper-October-2009.pdf>

Jourdan, P. 1998. Spatial Development Initiatives (SDIs): The Official View. *Development Southern Africa*, 15(5): 717-725.

Horta, L. 2010. China Building Africa's Economic Infrastructure: SEZs and Railroads. Jamestown Foundation China Briefs, 10(15). [Online]. Available: http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=36661

Ranganathan, R. and Foster, V. 2011. The SADC's Infrastructure: A Regional Perspective. Policy Research Working Paper No. 5898. Washington DC: The World Bank. [Online]. Available: http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2011/12/05/000158349_20111205143855/Rendered/PDF/WPS5898.pdf

Regional SDI Programme. 2011a. Summary Status Report: The Democratic Republic of Congo (DRC) SDI Program (Sept 2011). [Online]. Available: <http://www.r-sdi-p.com/pdf/4.%20SUMMARY%20STATUS%20REPORT%20-%20DR%20CONGO%20SEPTEMBER%202011.pdf>

Regional SDI Programme. 2011b. Summary Status Report: The Angola Namibia South Africa (ANSA) SDI Program (Sept 2011). [Online]. Available: <http://www.r-sdi-p.com/pdf/3.%20SUMMARY%20STATUS%20REPORT%20-%20ANSA%20SDI%20SEPTEMBER%202011.pdf>

Regional SDI Programme. 2011c. Summary Status Report: The Tanzanian Phase 2 SDI Program (June 2011). [Online]. Available: <http://www.r-sdi-p.com/pdf/6.%20SUMMARY%20STATUS%20REPORT%20-%20TANZANIA%20SEPTEMBER%202011.pdf>

Regional SDI Programme. 2011d. Summary Status Report: The Mozambique Phase 2 SDI Program (Sept 2011). [Online]. Available: <http://www.r-sdi-p.com/pdf/5.%20SUMMARY%20STATUS%20REPORT%20-%20MOZAMBIQUE%20SEPTEMBER%202011.pdf>

Shelton, G. and Kabemba, C. (eds.). 2012. *Win-Win Partnership? China, Southern Africa and the Extractive Industries*. Johannesburg: South Africa Resource Watch.

SADC Secretariat. 2012. *Regional Infrastructure Development Master Plan. Transport Sector Plan*. Gabarone: Southern African Development Community. [Online]. Available: [http://www.ridmp-gis.org/sadecdocs/English/SADC%20RIDMP%20-%20Transport%20Sector%20Plan%20\(English%20-%20Aug%202012%20v1\).pdf](http://www.ridmp-gis.org/sadecdocs/English/SADC%20RIDMP%20-%20Transport%20Sector%20Plan%20(English%20-%20Aug%202012%20v1).pdf)

Van Valen, M. 2012. China Africa: You Want It; They Can Build It. *Africa Report*, 42: 82-84.

Chapter 9

The MERCOSUR-SACU Preferential Trade Agreement: a step forward in South-South relations?

Marumo Nkomo and Belén Olmos

1. Introduction

Interregional South-South relationships have increased in recent years. The rise of inter-regional trade between South America and Africa is an often overlooked example. On the basis of bilateral relations established initially with South Africa, MERCOSUR and SACU reached an agreement on the creation of a PTA in 2008.

MERCOSUR and SACU play prominent roles in Latin America and Africa respectively. MERCOSUR is a customs union comprising Argentina, Brazil, Paraguay (currently suspended), Uruguay and Venezuela (Bolivia, Chile, Colombia, Ecuador and Peru are associate countries). The bloc was established in March 1991, following the adoption of the Treaty of Asunción. SACU dates back to 1910 and is the world's oldest customs union; its members consist of Botswana, Lesotho, Namibia, South Africa and Swaziland.

In April 2008 in Buenos Aires, Argentina, years of negotiation culminated in an agreement between the parties on outstanding issues that were hindering the completion of the PTA. This was a significant step towards the eventual establishment of a Free Trade Area (FTA) between the parties – something which would constitute a major political coup in the deepening of interregional South-South relations.

This chapter will discuss the background, content and implications of the MERCOSUR-SACU PTA, providing an analysis of the agreement's key outcomes. The following structure

is adopted: Section 1 lays out the theoretical framework, placing the PTA within the context of South-South cooperation. Section 2 is devoted to the study of the negotiations and the content of the agreement. Section 3 examines the main advantages for MERCOSUR, while Section 4 repeats this exercise from the SACU perspective. Finally, the authors' conclusions are summarised.

2. Analytical framework: deepening South-South cooperation

South Atlantic relations, in other words the transatlantic relationships between Southern Africa and South America, have expanded enormously over the past 20 years. This is the result of various events. A brief analysis of the dynamics of the South Atlantic relations and of the factors that facilitate the interregional partnership is in order.

The reciprocal interactions between Southern Africa and South America are quite complex and multilevel. In general, the relations between Africa and Latin America rely on historical, cultural, and ethnic ties. Therefore, the interplay between the two regions is not new. The interregional alliance dates back to the 1960s and 1970s. In this period, African and Latin American countries embarked on measures to build bilateral relations and joined the Non-Aligned Movement (NAM), cooperating in multilateral organisations. The relations (in particular those between South America and Southern Africa) intensified in the 1990s acquiring new contours, content and strength.

Various factors have contributed to alternative ways of connecting and have given rise to a new model of interregional partnership, as follows:

The international context in the 1990s and the end of the cold war: From a historical point of view, until the 1990s, regional organisations on both sides of the Atlantic had as their main objective the achievement of development within their respective regions. During the cold war, the predominance of a polarised world and the persistence of colonial ties exercised a strong influence in foreign relations preventing African and Latin American countries from establishing independent relations among them. After the end of the cold war, interregional relations took a great leap forward. The democratic transitions in Latin America and in South Africa facilitated interregional contact. Visits by heads of states and cooperation in different international fora increased. The governments prioritised their relations with other southern countries, analysing various possibilities for improving the cooperation through integration

and coalition. Some initiatives, such as a transatlantic security agreement between Brazil and South Africa, attracted the attention of other countries on both sides of the Atlantic.

In the 1990s, a number of circumstances brought African and Latin American countries together. Besides the similar historical colonial paths (even though Southern African countries are younger than their South American counterparts), there was a mutual understanding of the political and socioeconomic challenges after an era of autocratic regimes and limited international interaction faced by these countries. The return to democracy in Africa and in Latin America occurred almost simultaneously. At the same time, these countries were gaining presence in the international sphere together with the increasing globalisation. In this complex scenario, Latin America and Africa share similar problems, challenges, and objectives both at domestic and at international level. Consequently, the new international context characterised by various parallel processes of democratisation, globalisation and the increase of free trade fostered the new interaction among the South Atlantic partners.

The paradigm of interregionalism and South-South relations: In addition to the changes experienced by African and Latin American countries in the 1990s, there was a shift in the approach to external relations that favoured the consolidation of the South Atlantic alliance. A new paradigm of South-South relationships emerged: Latin American and African countries supported the relations with other southern countries instead of improving the relations with developed countries of the north.

Concurrently, a new model of interregional relations is in place, consisting of relations among countries and organisations (more specifically those of integration) on both sides of the Atlantic. Different organisations are involved in these interregional relations. Apart from SACU and MERCOSUR, there are other organisations such as the Community of Portuguese Language Countries. This framework incorporates various initiatives. Indeed, one of the main objectives of the South Atlantic coalition is to strengthen the positions in different multilateral fora such as the World Trade Organisation (WTO), the United Nations (UN), and the G20+ group. In addition, the regions aim at increasing their influence over decision making at a global level. For instance, MERCOSUR and SACU countries are actively participating in different multilateral organisations to enhance their bargaining power in global decision making. South Atlantic cooperation and collaboration in multilateral organisations have proved to be more effective when countries like South Africa and Brazil managed to include developing countries' needs on the global agenda.

The regional leadership of Brazil and South Africa: With regard to the bilateral relations, the importance of the Brazil-South Africa axis must be mentioned. Both countries have recently assumed a prominent position in biregional relations. The leadership of Brazil and South Africa has strengthened the alliance between their respective regions. Brazil has consolidated its role in Africa in various fora including the Community of Lusophone States. Former presidents Cardoso and Lula both contributed to boosting the political bonds between Brazil and South Africa. The statesmen encouraged multilateral cooperation between South American and African countries, acting as ‘the driving force behind the build-up of SACU-MERCOSUR relations’ (White, 2004). Furthermore, within the framework of IBSA (the trilateral forum among India, Brazil and South Africa), these countries support the progression towards more constructive South-South relationships and economic alliances than the ones established in the past. The success of this alliance relies on shared goals in terms of strengthening South-South relationships.

At the same time, the common position of Brazil and South Africa in the global political economy has led the way toward greater cooperation on a number of issues. As previously mentioned, Brazil and South Africa have achieved an active prominence in multilateral fora. At the UN, they have consolidated their positions as possible candidates for a permanent seat in the eventual reform of the Security Council. In practice, their cooperation has been more effective in the WTO. Besides, both Brazil and South Africa are members of most of the UN organisations, the Group of 20 Developing Nations, and the Group of 77 Developing Nations (G77), among others. In sum, Brazil and South Africa have risen to prominent leadership positions in their respective regions and in the international arena, sharing (together with other countries) the leadership of the South-South initiative.

Regional integration and external relations: At the beginning of 1990s there was a shift in the priorities toward continental integration. In Africa, this led to the establishment of the African Union and the New Partnership for Africa’s Development (NEPAD). In Latin America, the existing integration organisations (such as the Andean Group and the Central American Community) were reformed and new integration processes emerged. As a result of this new wave of regional integration, MERCOSUR was created in 1991. At the same time, external relations entered the agenda of policy makers and thinkers. The foreign policy attitude shifted and together with local regional integration, governments included the improvement of the relations with partners of the global South. The strategic partnership

between South America and Southern Africa became a priority for both sides. This increasing importance of the South-Atlantic linkage has encouraged more constructive interaction – more specifically, with regard to the relations between MERCOSUR and SACU, which have been intensified.

Having examined the factors which have facilitated the South Atlantic partnership, it is worthwhile to have a look at the various features of current South Atlantic relations. As for the content, South Atlantic relations comprise different dimensions and take place at different levels (White, 2004: 524). Thus, the South Atlantic partnership shows a wider scope of activities and involvement. The various facets include cooperation in security and peace, protection of the environment, and economic issues.

Security issues have been at the centre of the Zone of Peace and Cooperation of the South Atlantic (ZPCSA). The military and political interaction between the two regions has increased in recent years. ZPCSA represents a relevant forum for deepening of security procedures and it could prove to be more effective together with the MERCOSUR-SACU approach.

In the realm of environmental issues and sustainable development, a significant example of multilateral cooperation was seen at the World Summit on Sustainable Development (WSSD), first at the Rio Conference in 1992 and then at the Johannesburg Conference in 2002. From an economic standpoint, the objective is to strengthen the commercial ties and the conclusion of trade agreements to reinforce the role of the states as prominent actors in the global political economy. Even if there have been quite important trade flows, agreements linking the countries of both regions are less frequent. In this context, the PTA negotiated and signed between MERCOSUR and SACU in 2008 has the potential to represent a significant achievement for the South Atlantic alliance.

3. Negotiation and content of the PTA

Negotiations: In December 2004, SACU and Mersosur concluded negotiations and signed a PTA in Belo Horizonte, Brazil. The agreement constituted a tangible manifestation of the increased South-South cooperation being pursued by members of the two trading blocs since the 1990s. Technical issues around Rules of Origin, Sanitary and Phytosanitary (SPS) regulations, customs cooperation as well as cooperation in the automobile sector could not be agreed in Brazil.

Between 2005 and 2008, several rounds of negotiations took place and 300 new product lines were added to the PTA. The outstanding issues were finally ironed out during the final round of negotiations which was held on 17 and 18 April 2008 in Buenos Aires, Argentina. However, parties still could not reach a consensus on cooperation in the auto sector and, as a result, it was agreed to put negotiations regarding autos on a separate track so that the PTA could be finalised.

Implementation of the PTA is still pending and is expected to take place upon ratification by all the member states (MERCOSUR-SACU FTA Art. 36). On the SACU front, Botswana and South Africa have ratified the PTA. On the MERCOSUR front, Argentina, Brazil and Uruguay have completed the internal ratification processes.

Content of the PTA – an overview: A striking characteristic of the PTA is that it is technocratic rather than political in nature. It bears none of the best aims, vague, development oriented hyperbole normally associated with regional instruments involving developing countries. This Agreement clearly states that it merely seeks to establish fixed preference margins as a first step toward the establishment of an FTA between the contracting parties (MERCOSUR-SACU PTA Art. 2).

Chapters I-X provide a broad overview of the agreement's substantive content and Chapter XI sets out how the instrument is to be administered. Chapter XII binds the parties to explore avenues of further market access opportunities being granted, while Chapter XIII introduces a dispute settlement mechanism. The remaining chapters deal with formalities such as amendments and modifications, incorporation of new members, entry into force, withdrawal, and the establishment of depositories.

The PTA refers to MERCOSUR and SACU as contracting parties or parties while the individual member states that are signatory to the PTA are referred to as signatory parties.

The treaty adopts a comparable approach to the WTO when it comes to liberalisation of trade in goods. A number of similarities with the General Agreement on Tariffs and Trade (GATT) can be discerned. For instance, the PTA establishes that the progressive reduction of tariffs is to serve as the primary means of liberalising trade between the contracting parties (MERCOSUR-SACU PTA Art. 7 and GATT Art. XI). In practice, however, a multitude of non-tariff barriers are applied and the eventual FTA will need to address some of these. The definition of non-tariff restrictions in the PTA, like its GATT counterpart, is broad enough to

capture a multiplicity of measures that would hinder trade between the contracting parties (Ibid.).

Like GATT, the PTA incorporates schedules of products that will benefit from tariff preferences and progressive liberalisation (MERCOSUR-SACU PTA Art. 3, 5 and 29 and GATT Art. II). Annex I to the PTA lists the products emanating from SACU that will be granted tariff preferences by MERCOSUR, while Annex II contains SACU's market access offering to MERCOSUR. In order to benefit from the preferences provided, the products listed in Annexes I and II must comply with the detailed Rules of Origin contained in Annex III.

Once the goods of a contracting party have entered the domestic market of its trading partner, those products are to be afforded national treatment in accordance with GATT Article III. This is important if the market opening is to be meaningful because the preferences granted could easily be nullified if uneven conditions of competition prevail once the goods have entered the trading partner's market.

Flexibility is provided, however, for parties to protect infant industries through safeguard measures and to utilise trade defence measures where domestic industries are harmed by increased competition from imported products (MERCOSUR-SACU PTA Art. 6, 14 and 15).

Annex IV contains the provisions on safeguard measures. The PTA preserves the right of signatory parties to institute safeguard measures consistent with GATT and the WTO Agreement on Safeguards where an unexpected surge in imports occurs (MERCOSUR-SACU PTA Art. 1, Annex IV and GATT Art. XIX). The agreement also introduces a right for both parties and individual signatory parties to institute preferential safeguards on imported products for which tariff preferences have been given under the PTA.

Trade defence measures are also available in the form of antidumping and countervailing measures. Broadly speaking, such measures are used to shield domestic industries from unfair trade practices by exporting industries. The application of these measures must be consistent with WTO law, in particular, Articles VI and XVI of GATT, along with the Agreement on Implementation of Article VI of GATT (commonly referred to as the Antidumping Agreement) and the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

Contracting parties are provided further flexibility in the granting of tariff concessions since they are free to apply general and security exceptions provided in GATT Articles XX and XXI (MERCOSUR-SACU PTA Art. 13).

The PTA seeks to ensure that technical regulations and standards, conformity assessment procedures, and metrology of the signatory parties do not become unnecessary barriers to trade. There are two main elements in the PTA's approach to achieving this objective. First is the reaffirming of existing rights and obligations of signatory parties under the WTO Agreement on Technical Barriers to Trade (TBT Agreement) (MERCOSUR-SACU PTA Art. 19). The second is mutual cooperation and intensification of joint work in the field of standards (MERCOSUR-SACU PTA Art. 20 and 21).

Similarly, in the field of SPS measures, the parties reaffirm their rights and obligations under the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement). The objective of the PTA when it comes to SPS measures is to facilitate trade between the signatory parties in goods which are deemed to require SPS measures, whilst safeguarding human, animal and plant life (MERCOSUR-SACU PTA Art. 1 of the of Annex VI).

In assessing whether the MEROSUCUR-SACU PTA conforms to the WTO provisions that deal with preferential trading regimes, it bears mentioning that the MERCOSUR-SACU PTA is neither an FTA nor a customs union. An FTA is defined as a group of two or more customs territories in which duties and other trade barriers are eliminated on substantially all trade between the parties (GATT Art. XXIV(8)(a)), while a customs union is a customs territory that constitutes two or more customs territories and in which all members apply a common external tariff (GATT Art. XXIV(8)(b)).

In WTO terms, the agreement concluded between SACU and MERCOSUR is an interim agreement leading to the formation of an FTA (GATT Art. XXIV(5)(b)).

Opting to form an interim agreement before establishing an FTA gives the parties at least 10 years to ensure that implementation of the agreement conforms to GATT Article XXIV (GATT Art. XXIV (5)(c) and Article 3 of the Understanding on the Interpretation of Article XXIV of the GATT). This provision sets out the conditions that a regional trading bloc must conform to in order to legitimately operate within the permitted derogations from the most favoured nation doctrine.

4. The main advantages of the PTA for MERCOSUR

To better understand the impact of the MERCOSUR-SACU FTA on MERCOSUR member states, it is worth providing an overview of the South American integration process. MERCOSUR, created in 1991 by the Treaty of Asunción, is a customs union which aims at developing as a common market. The original members are Argentina, Brazil, Paraguay (as mentioned in the introduction above, Paraguay's membership is currently suspended) and Uruguay. Venezuela applied for full membership in 2006 but only became a member state in July 2012.

Over the past 10 years, two further relevant modifications in MERCOSUR must be noted: the establishment of the MERCOSUR Parliament in 2006-07 and the reform of the dispute settlement mechanism with the establishment of the Permanent Review Tribunal in 2002-04 which contributed to enhancing integration within MERCOSUR. In many respects, the current stage can be seen as crucial (Olmos Giupponi 2012). This is also true in the field of external relations where MERCOSUR has been expanding commercial ties with third countries and with other international organisations, in particular regional economic blocs (Franca Filho, 2010).

In the realm of South Atlantic relations, MERCOSUR is seen as a natural partner for South Africa and SACU in Latin America (White, 2004: 527). For MERCOSUR, the South Atlantic and, more specifically the relations with South Africa, were deemed relevant since the end of the 1990s due to the influence of Brazil as a regional leader. This led to the launch of formal relations between South Africa and MERCOSUR in 1998. President Mandela was the first non-MERCOSUR head of state invited to attend and address the MERCOSUR Heads of State Summit (XIV Meeting in Ushuaia). In 2000 President Mbeki was invited to attend the summit on the occasion of the signature of the Framework Agreement for the Creation of a Free Trade Area between South Africa and MERCOSUR. This agreement had as a main goal to 'strengthen the existing relations between the parties, promote the expansion of trade and commence negotiations for the creation of a free trade area' (Wheeler, 2003). On the SACU-MERCOSUR common agenda there are a number of issues of mutual importance such as 'people-centred development, democracy, economic and market integration and social responsibility' (White, 2004: 527).

In December 2000, MERCOSUR and South Africa signed the Framework Agreement for the Establishment of a Free Trade Area. However, in the First Round of Negotiations (October 2001), MERCOSUR proposed negotiating an Agreement on Fixed Tariff Preferences (APTF) as a precursor to an FTA, which was accepted by South Africa. According to White (2004) in his assessment of SACU-MERCOSUR relations, until the beginning of the 2000s they were considered as a 'long process with little progress'. The signature of both agreements in December 2004 and in December 2008 represented a decisive development in the biregional relationships.

With this background in mind, the main questions concerning the MERCOSUR-SACU FTA which are worth highlighting are identified. One issue which is seen as problematic is that of the economic commonalities that exist between SACU and MERCOSUR. Both regions are competitive in the same products at the same time of the year and in the same markets. On the one hand, Brazil and Argentina produce a higher amount of better quality goods at a lower cost than South Africa in the agricultural sector. On the other hand, certain industries (such as the automotive industry) are more competitive in South Africa than in MERCOSUR countries' industries (White, 2002: 529), although automobiles are not included in the scope of the current PTA.

Scholars have profusely discussed the viability and feasibility of an FTA between SACU and MERCOSUR (Celli et al., 2010). The signature of the 2008 PTA was a long-desired goal in MERCOSUR external trade relations (Franca Filho, 2010: 150). After twelve rounds of negotiations between MERCOSUR and SACU, all member states evaluated the signature of the agreement as positive (MERCOSUR, 2008).

MERCOSUR has been involved in different international trade negotiations (Ibid.: 151). This PTA represents the first agreement signed with African countries in order to improve market access for MERCOSUR products. This second agreement consists of more detailed provisions with a clear commitment of MERCOSUR and SACU states to advance and strengthen biregional relations.

In terms of trade, while the deal includes a larger number of products, it details the applicable tariff for each of them. Therefore the treaty contains fixed preferences without a trade liberalisation programme, but with the commitment of the parties to deepen the trade preferences in the future. As for the similarities and differences with other trade treaties, the

PTA concluded with SACU has similar characteristics to MERCOSUR-India (in force since 1 June 2009) in terms of trade promotion and cooperation in strengthening South-South trade. For instance, both of them rely on the WTO rules and entail similar obligations in terms of settlement of disputes, general requirements, Rules of Origin, and distinctions among different products.

Nonetheless, there are distinguishing characteristics. For example, in the agreement with India asymmetries are not addressed in the text whereas in the PTA with SACU special and differential treatment is granted for SACU's less developed members as part of the core principles (Celli et al., 2010: 53).

During the negotiating process, MERCOSUR focused on relevant issues for the region including customs cooperation, the automotive industry, SPS measures, and Rules of Origin. The substantive part of the negotiations consisted of the definition of the lists of products that would be covered by the agreement. Because this is a fixed tariff preference agreement, it was necessary to determine the products to be included and the margin of preference to be given to each of them. To this end, consultations were held with the private sector, after which each member of MERCOSUR prepared a list of products that was subsequently consolidated and sent to SACU. Similarly, SACU sent a reciprocal list to MERCOSUR. Thereafter each party responded to the request of the other, establishing the margin of preference that it could grant for each product.

It is worth noting that this agreement was negotiated for a limited number of products but that the governments assumed the commitment to expand the list in order to achieve an FTA as explained above. In the case of preferences granted by SACU to MERCOSUR, it is observed that of the 1062 products listed in Annex II, 283 obtained a preference of 10%, 144 obtained 25%, 167 obtained 50% and 470 products obtained a preference of 100%.

As for the offer of MERCOSUR to SACU, it comprised 1052 products. Brazil is the only one of the four members of MERCOSUR which granted preferences to all products included in the offer. Nearly three-quarters of the products included in the offer received 100% of preference of the four countries of the bloc. In the case of Argentina, 768 products received 100% of preferences, 53 products obtained 50%, 89 products received 25%, 128 products received 10%, and 14 products did not receive any preferences.

The long negotiation process to conclude the MERCOSUR-SACU PTA reflects, in part, the difficulties created by the existence of the nine countries involved, with wide disparity between them. Indeed, this was a negotiation between two trading blocs, each of which had, first, to go through a process of internal negotiation among partners to achieve the necessary consensus and, then, bargained with the counterpart.

In the negotiations within MERCOSUR, internal differences were observed among its economies, their diverse and, in some cases, divergent interests. A similar situation certainly occurs among the members of SACU. These internal asymmetries are particularly important in the case of the smaller economies of both blocs. As a result, much of the work of the last rounds was devoted specifically to satisfying the interests of these smaller economies.

With regard to the agreement's conditions, it is expected that the MERCOSUR and SACU PTA will have differentiated impacts on each MERCOSUR member state. For Argentina and Brazil, this offer means a specific market opening which provides tariff improvements for many products. However, for Paraguay or Uruguay, a comprehensive offer of this type is not necessarily beneficial, as their export structures are much more concentrated. Therefore these countries typically demand the opening of the market for a very small set of agricultural products that usually find high tariff barriers in international trade, such as dairy products, meat and oil, without which any tariff concession has a minimal impact on their economies.

This concentration of interest in 'problematic' products tends to result in extensive negotiation processes. Given the characteristics of MERCOSUR, in practice market access is granted to the major economies (Argentina and Brazil), which are those that have the most substantial benefits. However, it may be also useful for Paraguay and Uruguay to negotiate through MERCOSUR. Indeed, the typical way to overcome these obstacles is to offer market access itself as compensation. Additionally, in trade negotiations the bloc promotes special and differentiated treatment for smaller economies. In the particular case of this negotiation, that meant that specific concessions were made to Paraguay and Uruguay on nine goods very relevant to these partners: meat, wheat, soybeans, soybean oil and sunflower, among others.

5. Main advantages for SACU

Before assessing the potential implications for SACU, it is necessary to provide some background information on the institution and provide some context on the economic dynamics that exist between the member states.

SACU is the world's oldest customs union. It was established during the British colonial era with the signing of the 1910 SACU Agreement by the territories that are now South Africa, Botswana, Lesotho, Namibia and Swaziland. The 1910 Agreement was replaced in 1969 during a period when most African countries gained independence from colonial regimes. Currently, the customs union is governed by the 2002 SACU Agreement which was negotiated after the fall of apartheid in South Africa.

South Africa is by far the largest economy in the SACU membership. The country's Gross Domestic Product (GDP) of US\$408.2 billion dwarfs that of Botswana, Lesotho, Namibia and Swaziland (BLNS). SACU aims *inter alia* to facilitate cross-border movement of goods between the territories of the member states (SACU Agreement 2002 Art. 2(a)), promote conditions of fair competition within the common customs area (SACU Agreement 2002 Art. 2(c)), and promote the integration of members into the global economy through enhanced trade and investment (SACU Agreement 2002 Art. 2(f)).

A key feature of SACU is the revenue-sharing formula. It determines how the funds raised from all customs, excise and additional duties are to be distributed among the member states. The proportion that each member state will receive is calculated by taking into consideration the following three elements: customs, excise and development.

The customs component is allocated according to each country's share of total intra-SACU trade; the excise component is allocated on the basis of GDP; and lastly, the development component is fixed at 15% of the total excise pool and distributed to all SACU members according to the inverse of each country's GDP per capita.

Applying this formula, South Africa receives the biggest share since its trade flows and the size of its economy are significantly greater than those of the BLNS. Having said this, the developmental component of the revenue-sharing formula ensures that South Africa's regional hegemony is not proportionately reflected. For example, in 2008-2009, South Africa contributed over 98% to the revenue pool yet received less than half (Grant and Chapman,

2011). This constitutes a redistribution of revenue from South Africa to BLNS. The rationale for the application of such a formula is to compensate BLNS for industrial polarisation and agglomeration that has benefited South African industries and rendered BLNS dependent on imports from South Africa.

Given the major economic disparities between South Africa and the other SACU member states, it would be misleading to lump the countries together. Assessing the potential benefits for SACU that would result from the PTA and subsequent FTA should be done from the perspective of gains to South Africa on the one hand and gains to BLNS on the other.

SACU exports to MERCOSUR consist mainly of primary and intermediary goods such as metals, minerals and chemicals. This is borne out to a large extent in MERCOSUR's offer to SACU, where extensive concessions are made in the Harmonised System 2007 category of Chemicals and Allied Industries (MERCOSUR-SACU PTA Annex 1) while there are some concessions made in the Metals and Minerals Products categories.

Most MERCOSUR exports to SACU are in the field of agriculture where Brazil and, to a lesser extent, Argentina are particularly strong. This is despite the fact that the major player in the SACU grouping, South Africa, is an important agricultural exporter which has been a strong protagonist in efforts to liberalise the global agricultural scene. This has been most evident in fora such as the WTO where South Africa is a member of the Cairns Group coalition of 19 aggressive agricultural exporting countries. This illustrates the relative lack of diversity in interregional trade between the two blocs mentioned in Section 3 above.

Hence, an analysis of the concessions made by the two blocs reveals some new market openings for SACU industrial products and greater access for MERCOSUR in an area where South Africa has globally competitive incumbents.

According to a simulation that assessed the likely impact of eliminating interregional tariff barriers between MERCOSUR and SACU, South Africa is expected to benefit (Sandrey et al., 2010). The simulation predicts that in the case of an agricultural market opening by SACU, total welfare gains are likely to arise due to increased allocative efficiency and lower prices induced by greater competition which should in turn augment consumer welfare. These benefits, it is believed, would outweigh the losses incurred by the South African agricultural sector due to increased imports from MERCOSUR. Where non-agricultural market access

concessions made by MERCOSUR are concerned, large gains are predicted for South Africa in chemicals, rubber, plastics and non-ferrous metals (*ibid*).

The situation is different, however, from the BLNS perspective. These countries rely heavily on the income derived from the revenue-sharing formula. For example, in 2005 SACU revenues as a percentage of GDP amounted to 21.5% and 17.6% in Lesotho and Swaziland respectively (Flatters and Stern, 2005). Trade liberalisation reduces the pool of revenue available for distribution to these countries.

Therefore it appears that the elimination of barriers to MERCOSUR-SACU trade would yield marginal benefits to South Africa from the perspective of trade and more so from the welfare outlook. These benefits are unlikely to be translated to BLNS.

6. Conclusion

The 1990s witnessed a surge in political impetus for cooperation between developing countries. This has been translated into the formation of coalitions in various fora and increased manifestation of the trend toward greater South-South cooperation.

Desirous of strengthening intraregional economic ties between South America and southern Africa, MERCOSUR and SACU have been working toward the creation of an FTA encompassing both of these economic communities. As a first step to achieving the FTA, the parties have agreed on a PTA that aims to liberalise trade in goods between the countries concerned.

The PTA and eventual FTA are likely to yield some benefits to the countries that are economically dominant in both regions. The same cannot be said of the prospects for the smaller countries experiencing increased trade.

Having said that, the chapter's analysis of the negotiations and expected effects of the MERCOSUR-SACU market opening envisaged in the PTA, demonstrates the relevance of this treaty for the relations between the two blocs and the future of interregional South Atlantic cooperation. Hence, the true value of the PTA and subsequent FTA lies in their potential to facilitate closer economic ties and the political impetus they could lend to this objective.

References

- Celli, U., Salles, M., Tussie, D. and Peixoto, J. 2010. *MERCOSUR in South-South agreements: in the middle of two models of regionalism*. UNCTAD Virtual Institute USP-FLACSO Joint Research Project Analysis of South-South Cooperation in Trade. [Online]. Available: http://www.dianatussie.com.ar/downloads/Celli_Salles_Tussie_Peixoto_MERCOSUR-in-South-South-Agreements1.pdf
- Flatters, F. and Stern, M 2005. *Implementing the SACU revenue-sharing formula: customs revenues*. [Online]. Available: http://qed.econ.queensu.ca/faculty/flatters/writings/ff&ms_nt_sacu_rsf.pdf
- Franca Filho, M. 2010. External relations. In Franca Filho, L., Lixinski, M.B. and Olmos Giupponi (eds.). *The Law of MERCOSUR*. London: Hart Publishing.
- General Agreement on Tariffs and Trade 1994.
- Grant, C. and Chapman, G. 2011. *Southern African Customs Union: myths and reality*. [Online]. Available: <http://www.saiia.org.za/feature/southern-african-customs-union-myths-and-reality.html>
- MERCOSUR-SACU PTA 2008.
- MERCOSUR. 2008. *Joint Communiqué issued at the conclusion of the MERCOSUR-SACU Preferential Trade Agreement negotiations*. San Miguel de Tucumán: MERCOSUR. [Online]. Available: http://www.mercosur.int/innovaportal/file/3379/2/cmc_2008_acta01_comunicado_0in_mercosur-sacu.pdf
- Olmos Giupponi, B. 2012. International Law and sources of law in MERCOSUR: An analysis of a 20 year relationship. *Leiden Journal of International Law*, 25(3): 707-737, September.
- SACU Agreement 2002.
- Sandrey, R. et al. 2010. *South Africa's way ahead: shall we samba?* Stellenbosch: tralac. [Online]. Available: <http://www.tralac.org/2010/04/14/south-africas-way-ahead-shall-we-samba/>

Wheeler, T. 2003. *South African relations with Latin America and the Caribbean*. UNISA Latin America Report, 19 (1).

White, L. 2002. *South Africa-MERCOSUR: long process, little progress*. Johannesburg: South African Institute of International Affairs.

White, L. 2004. South Atlantic relations: from bilateral trade relations to multilateral coalition building. *Cambridge Review of International Affairs*, 17(3): 523-537, October.

Chapter 10

Institutional anchoring of regional integration in the East African Community

Dirk Hansohm and Leonard Kwinga

1. Introduction

Measured in terms of agreements, the process of regional integration (RI) in the East African Community (EAC) is very impressive. However, signing agreements is only a first step, their implementation quite a different one. Like in other RI agreements, in Africa and elsewhere, many of the difficulties only begin when agreements are signed. Focusing on having agreements and support to this process may actually divert and delay the integration process. It is too often assumed in discussions and statements that what is agreed to is more or less done.

To be effectively implemented, RI agreements need to be translated into laws, both at the regional and/or national level. These laws may have to be translated into regulations to be effective; organisations may have to be set up; or existing organisations may have to change their mandate, structure, and work. More fundamentally, at an institutional level, behaviour patterns (largely internalised), beliefs, and cultures have to change.

Institutions are at the centre of understanding the process of economic change, because they are the incentive structure of economies. They are the 'rules of the game'; organisations are the players, the institutional arrangements (North, 1990, 2005). The underlying institutional structure is the combination of formal rules, informal constraints, and their enforcement characteristics.

The culture of a society is the cumulative structure of rules, norms, and beliefs that we inherit from the past that shape our present and influence our future. Institutional change is usually incremental. It is important to recognise that the way in which institutions and beliefs developed in the past influences present choices – there is a degree of path dependence.

This means that local knowledge is important and there are limits to transfer best-practice ‘blueprints’ to build institutions at the cost of experimentation.

While the 1980s were the heyday of structural adjustment/policy reform in developing countries, since the 1990s, the disillusion of the impact of policy reform led to a recognition of the underlying institutions and an emphasis on institutional development (second generation institutional reforms).

However, is it realistic to expect that a political leader or an aid agency can readily change institutions? This can be described as a top-down view (Easterley, 2008). In this technocratic view, government has a crucial role and experts can go about prescribing best practices of institutions that can be applied in the short term in order to make possible a functioning market economy.

The contrasting bottom-up view holds that institutions grow out of local traditions and will only change gradually. In this context, the rapid policy-induced introduction of a new system may not only have little success – it may actually have negative impacts. As Easterley (Ibid.) reports, when an alternative formal system is introduced alongside the informal network all at once, this allows opportunistic individuals to cheat their partners in the informal network. For instance, land titling as part of land reform in Africa brought new uncertainties into the complex traditional system. Likewise, new regional legislation in parallel with a weak and evolving national legal system is likely to create similar ambiguities and opportunities for abuse.

All in all, historical evidence, contemporary research, and common sense (even without a comprehensive theory of institutions) suggests that institutional change is gradual; attempts at rapid, top-down change can even have negative consequences (Ibid.).

This also means that there are limits to the all too common – also in regional integration – approach to learn from and apply best practices. However, best practices ignore local context; they are non-contextual (Rodrik, 2008).

While it is easy to list the functions that good institutions perform, it is only possible to describe the shape they should take in the local/national context. However, the type of institutional reform promoted by multilateral organisations such as the World Bank, the International Monetary Fund (IMF), and the World Trade Organisation is heavily biased toward a best-practice model. The problem is that, typically, developing economies are far from functioning market economies – they are riddled by imperfections and distortions. In this context it is important to keep an eye on how proposed solutions affect multiple distortions. Dealing with the institutional landscape in developing economies requires a ‘second-best mindset’ (Rodrik, 2008).

Current international relations are increasingly legalised, but international legalisation displays great variety. International actors choose to order their relations through international law and design treaties and other legal arrangements to solve specific substantive and political problems. However, they choose softer forms of legalised governance when those forms offer superior institutional solutions (Abbott and Snidal, 2000).

Hard law can be defined as legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law.

The benefits of hard laws are that they reduce transaction costs, strengthen credibility of commitments, expand their available political strategies, and resolve problems of incomplete contracting. Costs are that they are rigid, restrict actors’ behaviour and even their sovereignty.

On the other hand, soft law begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision, and delegation: Soft law facilitates compromise, is frequently dynamic (initiates a process and a discourse that may involve learning and other changes over time), and provides a rational adaptation to uncertainty.

It is important to note that legalisation reflects a series of trade-offs: the relative costs and benefits depend on context. Also, international politics and international law are not alternative realms, but are deeply intertwined.

Soft law is valuable on its own, not just as a stepping stone to hard law. It provides a basis for efficient international ‘contracts’, and it helps to create normative ‘covenants’ and discourses that can reshape international politics.

The European Union (EU) is by far the most progressed and the deepest enterprise of RI. It has served as a yardstick and as an example to many – and as a deterrent to others. In Africa, regional integration agreements (RIAs), such as the East African Community (EAC) and the Southern African Development Community (SADC), have borrowed heavily from the EU model.

Against the cautionary discussion above, should the EU serve as an example for Africa/the EAC? The answers are both yes and no. In the first place, the EU is *sui generis* (Winters, 2010; see also Kirchner, 2006; Best, 2007; McCarthy, 2012 on the euro monetary union). It was born out of the ashes of devastated post-Second World War Europe. Its prime motivations were political and for security reasons. Economic integration was an instrument to build a peaceful West Europe – it was not its prime objective. The EU integration process was not driven by the careful calculation of economic costs and benefits, still less by trade negotiators, as international negotiations normally are, but by a grand vision which had fortunate economic side effects (Winters, 2010).

Naturally, despite the destruction of war, the level of economic development was much higher than in developing countries. Accordingly, the EU was able to establish a complex system of fiscal transfers that increased greatly during the last three decades – distribution is a major consideration in much of EU decision making.

Continental Europe has a tradition of strong and competent bureaucracy. It engaged in a wide variety of issues around which agreement and bargaining occur, and had a high degree of harmonisation, mutual recognition of policies, and institutionalisation. The EU RI process implied a degree of transfer of competencies to the union. It also resulted in a widespread feeling of a common identity and/or mutual obligations among the people of the union (Kirchner, 2006).

These particular conditions that explain the emergence of selective supranationalism in Europe in the 1950s do not seem to exist elsewhere – and certainly not together – and they cannot be replicated at will.

Europe's unique outcome in terms of integration is the result of its unique political and cultural history; it is therefore not surprising that others are not able to emulate it. Nonetheless, they can still learn from Europe in the sense that some policies may be adaptable to their own circumstances (Winters, 2010). In essence, the EU can be seen as a model for

what may happen when regional integration is deepened – a step for which the EAC is preparing.

When supranational bodies are established, both governance and capacity are important – but exactly these are major challenges in developing countries. Common policies are almost certainly necessary in order to ‘level the playing field’, for no member is likely to accept factor mobility if policies for competition and labour can vary substantially across the union. Integration is likely to be more successful if accompanied by liberalisation which makes the burden of creating common policies smaller (Winters, 2010).

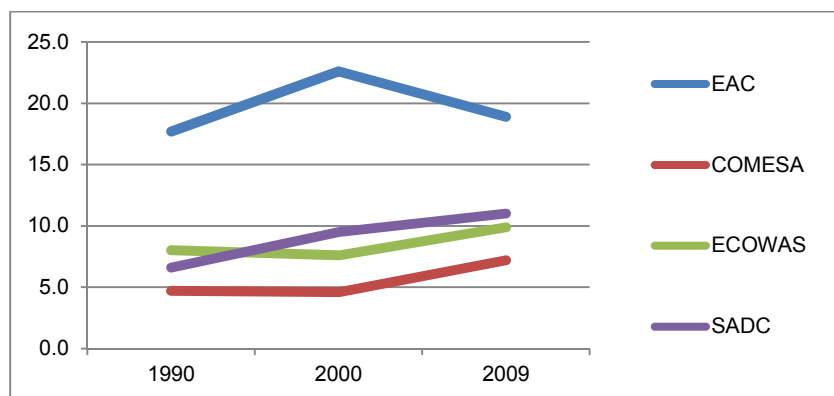
2. EAC and its progress

In addition to the EAC Treaty (2000) that formulates very deep integration steps, including monetary union and political federation (with this last step going further than any other RI agreement worldwide), the region has signed protocols on a customs union (2005) and a common market (2010) stipulating free movement of goods, services, capital and labour, while a protocol on a monetary union is currently being negotiated.

After the first EAC, founded in 1967, broke up in 1977, efforts on regional cooperation between Kenya, Tanzania and Uganda soon restarted and the EAC was re-established in 1999 with a new EAC Treaty that became effective in 2000. In 2003, the East African Legislative Assembly (EALA, with the EU parliament the only regional parliament worldwide that has the authority to pass laws) and the East African Court of Justice (EACoJ) were inaugurated.

In addition to its deepening, the EAC has also widened: in 2007 Burundi and Rwanda became EAC members. Currently, the applications for membership of South Sudan and Somalia – reflecting the recognition of the region’s success – are being considered. In addition, Sudan was interested in joining (but its application was rejected because it does not share borders with the EAC) and so was the Democratic Republic of Congo (DRC).

How successful was the RI effort in eastern Africa in measurable results? The RIA aims in the first place at integrating the regions economically, of which trade is the main dimension. The following graph shows the importance of regional trade in the key African RIA.

Figure 1: Merchandise exports within bloc (% of total bloc exports)

Source: World Bank (2011)

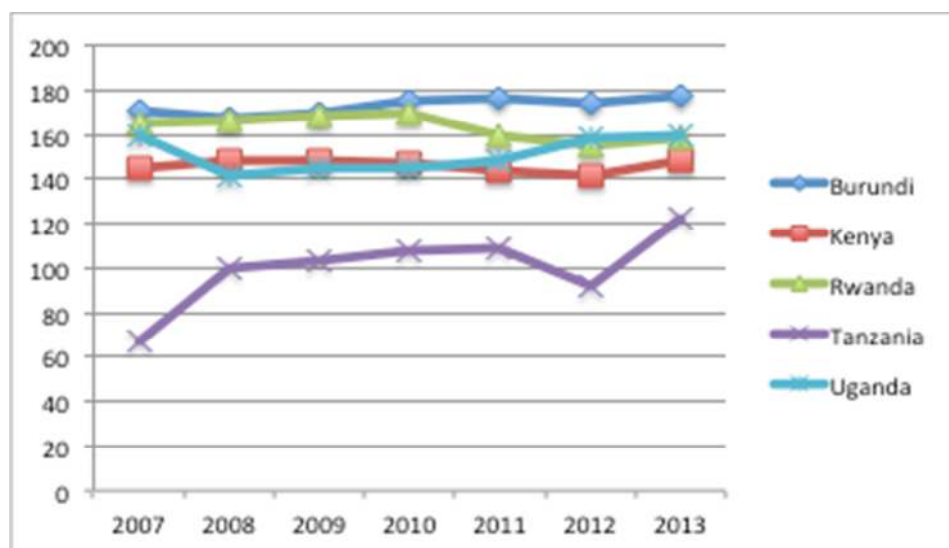
The graph shows that the EAC countries trade much more (about double) with each other than with those in the other African RIAs. This is significant and grounds for optimism, as it defies the traditional argument that South-South trade (trade among developing countries) will not be successful as the countries are not ‘natural trade partners’. Because they tend to export agricultural or mineral goods, while importing industrial goods, there is no potential for much trade – key trade partners will rather be the North (industrial countries) – and thus trade agreements with them are more important.

These assumptions are clearly confirmed by the data on the Common Market for Eastern and Southern Africa (COMESA), the Economic Community of West African States (ECOWAS), and SADC. The data of EAC provides more grounds for hope. When the still numerous barriers to regional trade within EAC are gradually removed, it can be expected that trade will grow significantly. At the same time, the main markets are likely to remain the richer countries in Europe, Asia, and America. Furthermore, increasing trade following RI is not necessarily all positive. It may divert trade from more efficient producers rather than create new trade. No data is available to distinguish these two effects. The net effect of regional trade integration depends on the balance of trade creation and diversion.

It is also doubtful to which degree this high integration is due to the EAC. First, the trade was already relatively high when the new EAC had just started (2000). More importantly, the share of regional trade declined after 2000. This gives a sobering perspective on the efforts of trade liberalisation and confirms the impression that the reductions in tariffs have largely been replaced by non-tariff measures (NTM). All in all, the data can more readily be taken to show the degree to which EAC countries are natural trade partners.

Another indicator of the degree of effective integration is the ease of trading across borders (see Figure 2).

Figure 2: Trading across borders in the five EAC partner countries (2007-2013)



Source: World Bank, www.doingbusiness.org

Note: all surveyed countries (185 in 2013) are ranked from 1 (easiest) to 185 (most difficult)

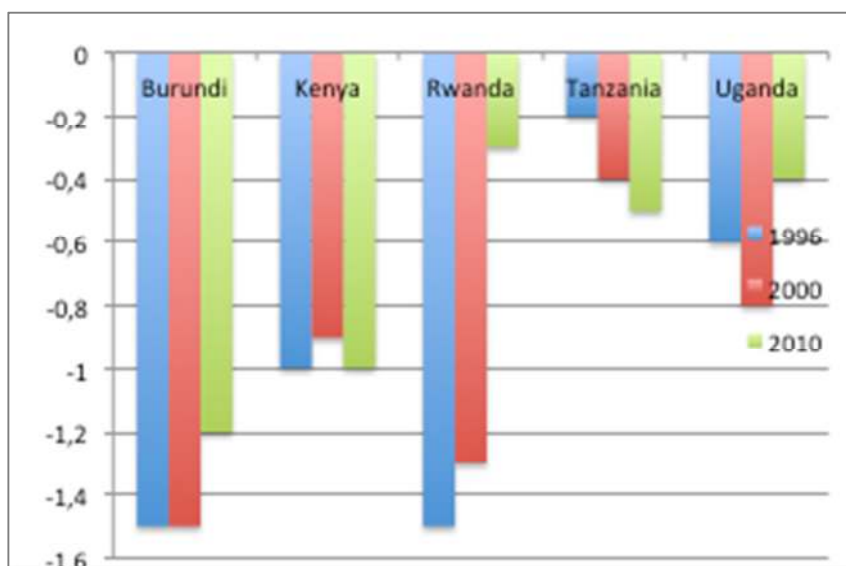
The graph shows that all EAC partner countries, except Tanzania, continue to be among the most difficult environments, despite customs unions, common market protocols, and all the related measures to reduce non-tariff barriers (NTBs) and improve practices. Despite signing the customs union and common market protocols, no progress has been visible over the past six years in ease of trading with other countries.

As argued above, the quality of governance, in particular of the rule of law (see Figure 3) and of qualifications (see Figure 4), is another indicator of the scope and potential of RI.

Rule of law captures perceptions on the extent to which agents have confidence in and abide by the rules of society, and, in particular, the quality of contract enforcement, property rights, the police and the courts, as well as the likelihood of crime and violence. Figure 3 shows that the level of quality is highly variable among countries. Second, while the worst performers (Burundi and Rwanda) are improving, others have a mixed record.

Regulatory quality captures perceptions of the ability of the government to formulate and implement sound policies and regulations that permit and promote private-sector development. Figure 4 shows a similar figure as the one of rule of law, except that Kenya's record has also been continuously improving.

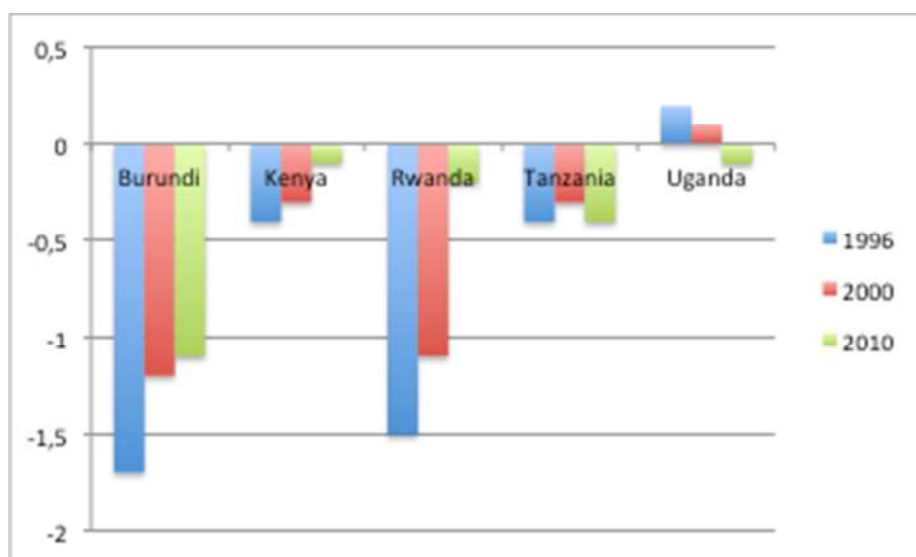
Figure 3: Quality of rule of law (1996-2010)



Source: www.govindicators.org

Note: values for countries vary between -2.5 (worst) to 2.5 (best)

Figure 4: Regulatory quality in EAC (1996-2010)



Source: www.govindicators.org

Note: values for countries vary between -2.5 (worst) to 2.5 (best)

3. Weaknesses in the institutional framework

The institutional framework of the EAC comprises:

- the Summit (Heads of State), providing political direction;
- the Council (Ministers for EAC), the policy and decision-making organ;

- the Secretariat, the executive organ that is to implement policy decisions;
- the EALA; and
- the EACoJ.

A recent review of the EAC (EAC Secretariat, 2011) identified a number of weaknesses:

- While providing continuous and well documented leadership, the summit had limited interface with the organs and institutions.
- The tasks of the secretariat are limited to facilitating the decisions made by the council. It has no mandate to follow up on the implementation of the decisions on its own initiative. Further, due a lack of clear demarcation between the council's administrative role and that of the secretariat, the latter was not able to fully execute its tasks. Its structures are also weak and misaligned with other offices' tasks and functions.
- In general, the relationship between the organs is not clearly defined and institutionalised in the systems and processes of the EAC. The institutions are detached from the secretariat and their structures and systems are not aligned to others.
- EALA and EACoJ are dependent on the administration of the secretariat, which prevents effective autonomy. The capacity of both is also too limited to cover an expanding realm of responsibility.
- While the private sector contributes in several ways to the EAC RI process, there is no institutionalised mechanism for its participation and that of the wider civil society in policy formulation and negotiation processes.
- There is no institutionalised feedback mechanism on the implementation of programmes in the partner states by the representative executing agencies and Ministry for EAC (MEACs) affairs, except through council meetings.
- Following a summit decision in 2005, each EAC member has established a Ministry for EAC affairs in order to drive and integrate the integration process. Their role is to be the focal point for each partner state's EAC-related activities. These functions are compromised by understaffing and limited communication within and among the

executing line ministries. Furthermore, there is no policy framework to ensure and monitor execution of directives.

- At the same time/on top of these current teething problems, as part of the deeper integration of EAC, the MEACs will have to strengthen their capacity in order to play a leading role in ensuring consistency of the process.

The following gives some examples of the EAC's institutionalisation challenges.

4. The Customs Union Protocol: NTBs

As elaborated in the EAC Treaty Article 75, the custom union incorporates elimination of NTBs as part of efforts to facilitate the free movement of goods between partner states. Article 75 stipulates that partner states should remove all existing NTBs and refrain from imposing any new barriers. In order to help this process, in 2007 EAC states established a NTB monitoring mechanism, as envisaged in both the Treaty and CU Protocol. Further, an EAC Time Bound Programme on elimination of NTBs was approved by the Council of Ministers in September 2009. In the 22nd meeting of the council it was decided that legally binding enforcement mechanisms on elimination of NTBs should be developed.

Despite all these consecutive steps, NTBs continue to exist and actually to increase. There are almost daily reports in the newspapers. The latest initiative (to impose legally binding mechanisms) started with an assessment of the effectiveness and efficiency of National Monitoring Committees (NMCs) since they were operationalised in 2007/08. This identified a number of weaknesses (Ihiga, 2012). These include:

- poor institutional set-up;
- lack of legal recognition within the Partner States' national laws and hence lack of mandate to enforce NTB elimination;
- poor changes in the behavioural patterns amongst EAC businesses and business associations which still demonstrate strong nationalistic approaches to the NTBs debate, leading to protection of national markets;
- inadequacy of the assumption of political and technical goodwill in identification, elimination and monitoring of NTBs;

- poor or even lack of NMCs secretariats (except in the case of Rwanda), leading to poor NTBs inventory, impacts to businesses, and coordination, prioritisation and action planning for the NTBs elimination process;
- inadequate capacity of the EAC Court of Justice to handle NTB disputes;
- inadequate provisions of the EAC Treaty, which does not expressly recognise NMCs as part of the EAC decision-making organs;
- inconsistent attendance at NMC meetings leading to poor institutional memory and lack of efficient follow-up of requisite actions in the NTBs elimination process;
- lack of budgetary provisions in support of NMCs responsibilities, both at national and regional level, coupled with lack of national NTB strategies and poor relationships with donors to support the process (except in the case of Rwanda);
- poor scheduling and structuring of NMC meetings, which are held on an *ad hoc* basis across all the partner states contrary to provisions of the NTBs Monitoring Mechanism;
- poor links between NMCs and the EAC Secretariat due to the lack of established NMC secretariats to which the EAC Secretariat can refer reported and resolved NTBs, council and/or summit decisions, and planned actions for elimination NTBs for the purpose of information and dissemination to businesses at national level;
- poor quality of the NTBs identification mechanisms including gaps in the Time Bound Programme, leading to inadequate prioritisation and sequencing of the NTBs elimination process; and
- Bottlenecks in awareness creation and sensitisation/communications strategy at the national level (except for the Rwanda NMC).

Currently, no enforcement mechanism is in place. This list covers almost all features of the challenges to reducing NTBs and monitoring this process. The EAC experience only confirms those of other developing regions: reducing NTBs is cumbersome, resource-intensive, and a lengthy process that only succeeds with strong political commitment. Lessons from the EU are of limited value, as the EU has a far stronger regional administration and a much better resource endowment for the execution of regional decisions. Nevertheless, some lessons

could be taken; for example, applying mutual recognition in standards and streamlining necessities of intra-Regional Economic Communities trade to ‘essential requirements’. A lesson from the Association of South-East Asian Nations (ASEAN) could be the implementation of the principles of open regionalism – encouraging partner states to adopt and adhere to World Trade Organisation (WTO) rules (World Bank, 2008).

Out of 13 identified weaknesses of NMCs above, only one refers to their lack of legal recognition. This suggests that measures on the strict legal level will at best promise partial success. Transparency and monitoring will definitely play key roles. There is a need to inculcate a culture of transparency, fair competition, and respect for trade regulations.

5. Common Market Protocol: integration of labour markets

The Common Market Protocol guarantees the free movement of EAC citizens as persons (Art. 7) and as workers (Art. 10) within all EAC member countries. Together with the free movement of goods, services, capital, and rights of residence and establishment, they are essential components of a full and effective common market. Such a common market, in turn, is a precondition for making a monetary union a useful instrument. In its absence, the introduction of a monetary union would be premature: it would not bring sizable benefits while carrying costs (as a common monetary policy in structurally different economies would not benefit all and could even be negative for some) and substantial risks.

The knowledge on the regional labour market is very limited. However, its integration remains inadequate. The regional market is fragmented by restrictive policies and regulatory heterogeneity. Constraints to skilled labour mobility include differences in national systems of skills recognition, taxation, social security, health coverage (with lack of portability of the latter two), and insufficient labour market information. The harmonisation of labour, employment and social policies, laws and programmes is planned, but not yet realised.

In addition to different legal systems, differences in language and cultural norms and values impede the harmonisation process.

Inequalities in key labour and employment indicators pose a significant constraint to the EAC integration process (e.g. cross-country, gender and age-related disparities in employment growth, employment-population ratio, labour-force activity and inactivity rates, labour productivity, and employment elasticity).

There are glaring differences between legislation and practice although many attractive issues in relation to labour migration are enshrined in the legislation in East Africa. The practice is different; this makes labour migration difficult and the practice unpredictable (Musonda, 2006: 41).

A close cooperation in harmonisation of higher education policies is evident among the original three EAC members (Kenya, Tanzania and Uganda) through the EAC-sponsored Inter-University Council of East Africa.

6. Competition policy

In order to have an effective common-market economy in the EAC, competition will need to be regulated and maintained. Only a market that ensures competition will be a true market economy.

With the increasing integration in the EAC, more and more enterprises are operating in more than one country and making cross-border investments. This is especially noteworthy for retail store chains and banks. Thus, there is a need to have a regional framework ensuring competition. In its absence, these big players may easily gain a position that allows market abuse through practices such as price fixing, sharing of markets, and so forth.

In 2006, the Regional Competition Act was passed by the EALA that established an EAC Competition Authority (Art. 37). The act is to prohibit anticompetitive practices and to guarantee a level playing field for all market participants, and to provide consumers access to products and services at competitive prices and better quality (Art. 3). It applies to all cross-border activities and sectors, although not to 'sovereign acts of the partner states' (Art. 4). The act also allows subsidies in the national interest (Art. 14).

In 2010, competition regulations were passed to implement the Act of 2005, dealing with mergers and acquisitions, subsidies, permission of concerted practice complaints, and investigations.

However, the Regional Competition Act and its regulations are not yet operational. Currently, only Kenya and Tanzania have fully functioning national competition laws and institutions. The other member countries are in preparatory stages to establish such regulations. Thus, the

basis for regional competition policy is as yet incomplete; national competition authorities are required to enforce some of the provisions of the Regional Competition Act.

7. Private sector/non-state actor participation

The private sector drives economies. While the EAC governments set the legal framework and are to ensure a favourable environment for entrepreneurial activities, it is private individuals that need to use this environment to make business. Thus their participation in the EAC regional integration process is vital, starting from the negotiation phase, in order to ensure that the results conform to the needs of business.

Likewise, consumers are the end beneficiaries of all economic activity. In addition to business owners, labour is the other key production factor. Both consumer and labour representative organisations need also to be involved in the EAC RI process in all its phases in order to ensure that their interests and concerns are taken into account. This is important in its own right, but is also vital in order to ensure longer term sustainability. As recent surveys have indicated, although the overall opinions and expectations of the EAC among its citizenry are positive, there are fears and concerns about the planned deepening of the community (EAC, 2011b). Many of these are in fact well grounded (see following section) and need to be taken seriously, not only by managing public opinion, but also by addressing the substantial concerns with appropriate mechanisms. In this process, the non-state actors should play a vital role.

8. Monetary union and deeper integration

The EAC Treaty foresees not only a monetary union, but also a political federation as the final step of integration. Although the political federation process is still in a very early stage, on the monetary union the negotiations on a protocol are already in their final stages. However, their full implementation would change the economy and the lives of its citizens considerably. In fact, already the real implementation of the common market will have this effect.

Importantly, the institutions for these steps are as yet largely either to be established or considerably strengthened and capacitated, as the major preconditions for a sustainable and successful integrated east Africa.

A key challenge is the fact that all of the member states are themselves going through major economic and political reform processes. Although some would argue that these national processes should first be finalised before deeper integration, this is not a feasible option. In the same manner, it would not be reasonable to argue that regional integration should overtake or bypass the national processes of integration and reform. Rather, practically, the two processes should continue in parallel. However, this parallel development creates exactly the challenges of ambiguity and opportunities for abuse as discussed above.

For one, these are at different stages and face different challenges. For instance, in the field of political and governance reform, Kenya is certainly the most advanced with its new constitution of 2010 that raises the level and standard of governance considerably, if this is compared with the country's shocking experience of the 2008/09 post-election violence. At this point, neither is Kenya willing to water down its constitutional provisions in order to come to a common regional agreement, nor are the other EAC members prepared to raise their own standards to the new Kenyan one. Thus, it is hard to imagine a political federation at the present time.

For the monetary union (MU), emphasis was laid on finalising the negotiations on a protocol in 2012, in order to 'maintain momentum' of the RI process. However, this deadline was missed, and it is now hoped to finalise negotiations in 2013. An MU promises economic benefits by eliminating the costs of money changing in a region and by stimulating competition, as prices become comparable. Doing business becomes easier with the lower costs of economic transactions and with the elimination of exchange rates.

However, these benefits are not without cost. National governments lose important policy instruments of exchange rates and interest rates. In an MU, these instruments are transferred to the regional level. This is only appropriate if the region is one common market with full mobility of all production factors. In this case, one monetary policy will be adequate for the entire region. Otherwise, what will be adequate for one country will be at the cost of others.

The Draft Protocol of the MU takes care of the need of economic convergence (that will follow implementation of the common market). Thus, conscious lessons from the debt crisis in the Eurozone countries are taken. The data, some of which is reported above, indicates that the EAC economy, despite rising trade, investments and migration, is still a long way from being an integrated one.

In addition to vigorously addressing the NTBs, EAC governments also need to put in place common standards and harmonised regulations to make the common market effective. Also, regional financial markets, even before monetary union, would help to pool domestic savings needed for financial deepening. Well-designed regional infrastructure projects would also help overcome the bottlenecks of physical infrastructure.

However, in addition to convergence of economic indicators, economic policies and the approach to economic policy will also need to converge. In other words, an MU is close to a political federation. An MU without a common policy, notably in fiscal policy, is not possible. This is probably the most important lesson of the 'euro crisis'.

Another important aspect concerns distributional effects of RI. The effects and benefits of a RIA are not necessarily, or actually likely to be, equal for all partner countries. While the overall welfare benefits of integration are clearly positive, not each state's benefits are likely to be equal. In fact, some areas and some economic actors, even whole countries, may lose, at least in relative terms.

While each of the five partner states has an equal voice in the integration process, the states are in fact highly unequal. For instance, the economic size of Kenya, the largest member, is 19.5 times as large as that of Burundi, the smallest member. Kenya's per capita income is four times as high as Burundi's. Furthermore, Kenya and Tanzania lie at the coast, while Burundi, Rwanda and Uganda are land-locked. It is not surprising that Kenya and Tanzania are more integrated into the world economy than the others.

It is obvious that the effects of the integration of such different countries will be different for each of the members. Thus, some policy interventions will be necessary if balanced development is to be reached. In fact, the history of regional integration shows that only schemes that managed to reach satisfactory results for all members have been successful and sustainable.

The EAC partner states are aware of the need to address distributional effects. Among the fundamental principles of the East African Community are 'equitable distribution of benefits' and 'cooperation for mutual benefit'. These are stipulated not only in the EAC Treaty (Art. 6), but also in the Customs Union and Common Market Agreements. The Customs Union Agreement stipulates that 'the Council shall approve measures to address imbalances arising from the establishment of the Customs Union' (Art. 35).

However, no systematic steps have been taken or even considered to translate these provisions into implementable measures. In this respect, the EAC can learn from existing deeper RIAs. In Africa, there is the Southern African Customs Union (SACU), the world's oldest customs union (since 1920) which has a common pool for its custom revenue that is distributed among the members, giving special attention to the small countries (Botswana, Lesotho, Namibia and Swaziland). In fact, this customs revenue is a major part of the budget of Lesotho and Swaziland, while it is insignificant for South Africa. SACU has managed to alleviate differences in per capita incomes. However, its overall effects are rather ambiguous, as the smaller countries have not managed to diversify their economies. In the new SACU Agreement of 2002 there are plans to implement a common industrial policy, but SACU members have not been able to implement this.

The other example for a systematic effort to reach a balanced deep regional integration is the EU. Reducing welfare differences across the EU regions and countries has been one of the main EU objectives since its foundation. Substantial funds have been invested to achieve it. The EU cohesion policy, built into the EU treaties since 1986, has been given the objective of reducing the gap in the different regions' levels of development in order to strengthen the economic and social cohesion of the region and to boost the emergence of a regional identity.

Structural funds are at the heart of the EU cohesion effort and absorb almost one-third of the EU budget. The funds are directed at stimulating growth and employment in the least developed regions, innovation and the knowledge-based society, adaptability to economic and social changes and the quality of the environment and administrative efficiency. Regions with a Gross Domestic Product (GDP) less than 75% of the EU average, and countries with a Gross National Income of less than 90% of the EU average, are eligible for these funds.

Studies show that over the long term, convergence among the EU member countries – a catch-up of the poorer to the richer countries – has in fact occurred. However, the convergence was accompanied by divergences over the shorter term and among regions within countries. Both concentration and dispersion are in operation.

The overall convergence was not uniform, but dependent on the quality of national policies. It can also not be exclusively attributed to the EU policy, but also to other supportive factors and policies. In fact, there are a number of shortcomings of the EU structural funds. The effectiveness of many instruments has been low as compared with spending. Confusion is

created by the multiple objectives of current EU policy. There are also multiple, both overlapping and competing, instruments. All in all, numerous lessons, positive and negative, can be learnt from the EU efforts to create balanced development in regional integration.

However, the EU is not the EAC. Firstly, the EU member states were and still are now at a considerably higher level of economic development when embarking on regional integration. Markets were much more developed, allowing smooth economic transactions. Economic integration promised much more immediate and substantial benefits. Secondly, integration also allowed the EU to undertake its massive convergence programme.

In contrast, the richer and more developed EAC countries, such as Kenya, face massive challenges of poverty and inequality at home. Nevertheless, the efforts at regional development need to be raised to the EAC level. Measures need to be taken to counter tendencies of marginalisation of these areas in the process of deepening integration; rather, their participation in the development process should be stimulated and encouraged.

Three kinds of measures could be considered. Most important will be a universal provision of basic services, such as in health and education, that would alleviate discrimination of rural areas. Such measures increase the mobility of people and enable them to gain from regional development. Second are policies and investments connecting backward and outlying areas to the centres of prosperity (by road, railway, telecommunication, and the internet). Prosperity causes economic activity to spill over, but only to those places that are well connected to these prosperous parts. In the third place are targeted funds for backward regions. Such programmes should aim to strengthen the comparative advantages exhibited by different areas. Incentives for agriculture are prime candidates. Some places are suited for farming, others for industry, and others for services. Targeted funds should not aim to counter such natural differences, but rather to enhance capacities to use them.

9. Conclusion

The following lessons may be taken for the EAC from the preceding discussion:

Best practices cannot be simply or easily transferred to the EAC. While being a latecomer to RI as compared to the EU, SACU, SADC and others (in addition to its own predecessor), the local context of east Africa as well as its contemporary situation is different.

In order to take lessons, and also to monitor and evaluate progress, prime attention should not be given to formal institutions only. Rather, the view needs to be broadened to include the underlying change.

In particular, in addition to improved communication with, and involvement of, the various concerned stakeholders in the RI process, this process needs to be more strongly based on research and analysis. As a part of this endeavour, progress and results of the EAC RI process need to be continuously monitored and evaluated. At present, such efforts are at an infant stage. By providing hard data about the economy, and interpreting these data, policy research can provide a basis for an informed process of decision making and of a discussion of the costs and benefits as well as risks of particular courses of action. Information from the public on the economy and policy options will underpin the public discussion and thus strengthen governance.

RI does not only hold promise, but its possible positive results also imply costs – costs that are borne by some countries. It is important not only to allay fears and concerns by arguments, but also by mechanisms that compensate for the losses/losers by providing avenues for gain.

Such measures need to be taken before steps toward deeper integration – monetary union and political federation – are conceptualised. RI is not merely a technical and legal process; it involves economic changes and it is deeply political.

It is important for the EAC to be both effective and sustainable, and for the progress and deepening to be done in line with the growth in capacities to deal with it. In this context, among the many objectives and processes, prioritisation and sequencing should take place.

References

- Abbott, K.W. and Snidal, D. 2000. Hard and soft law in international governance. *International Organization*, 54(3): 421-456.
- Best, E. 2007. *The European integration process as an example for other regions?* Paper presented at the Conference: 50 years of European integration: Foundations and perspectives, 23-24 March.
- EAC. 2011a. *EAC Development Strategy. 2011/12-2015/16*. August.
- EAC. 2011b. *Report of the Team of Experts on addressing the fears, Concerns and challenges of the East African Federation*. October.
- EAC. 2012. *Meeting of task force approximation of national laws in EAC context*. Report session 6-10/2/2012 Kigali.
- EAC Secretariat. 2011. *Institutional review of EAC organs and institutions*. Final Report. Kigali, March.
- Easterley, W. 2008. Design and reform of institutions in LDCs and transition economies. *American Economic Review: Papers and Proceedings*, 98, 2: 95-99
- Ihiga, S. 2012. *Development of a legally binding mechanism on elimination of non-tariff barriers in the East African Community*. Revised synthesised final draft report.
- Kirchner, E.J. 2006. *The European Union as a model for regional integration: The Muslim world and beyond*. Jean Monnet/Robert Schumann Paper Series, 6, 1. Jean Monnet Chair of the University of Miami, in cooperation with the Miami European Union Center.
- McCarthy, C. 2012. *Monetary union: the experience of the euro and the lessons to be learned for the African (SADC) monetary union*. tralac Working Paper S12WP02.
- MEAC. 2012, *Progress in harmonization of national laws to conform to the EAC*. CMP 12 March. Unpublished report.
- Musonda, F.M. 2006. *Migration legislation in East Africa*. Geneva: ILO.

North, D.C. 1990. *Institutions, institutional change and economic performance*. New York: Cambridge University Press.

North, D. 2005. *Understanding the process of economic change*. Princeton: Princeton University Press.

Omolo, J. 2011. Labour and employment inequalities in the context of the East African regional integration process. *In Society for International Development, Regional Office for East Africa*. Nairobi: East African integration. Dynamics of equity in trade, education, media and labour, pp. 173-215.

Republic of Kenya (RoK). 2010. *Taskforce on the EAC CMP legal reforms: final taskforce report*. Nairobi: Government Printers.

Rodrik, D. 2008. Second-best institutions. *American Economic Review: Papers and Proceedings*, 98, 2: 100-104.

Winters, A. 2010. *Europe is sui generis – but it provides lessons for developing countries*. Prepared for the Annual Conference of the Global Development Network, Prague, 16-18 January.

World Bank. 2011. *African development indicators*. Washington D.C.

World Bank. 2012a. *Doing business indicators*. Washington D.C.: World Bank. [Online]. Available: www.doingbusiness.org

World Bank. 2012b. *World governance indicators*. Washington D.C.: World Bank. [Online]. Available: www.govindicators.org

Chapter 11

Chinese investment in Southern Africa with a Macanese accent?

Fernando Dias Simões

1. Introduction

With the development of China's economic reform, involvement in international cooperation platforms has become one of China's key interests. Beijing's diplomacy has become more creative (Zhu, 2010: 217), and its new attitude has been labelled as a 'charm offensive'¹. One of the most eloquent vectors of this new policy concerns the promotion of high-level contacts between China and the Portuguese-speaking countries (PSCs). The 'Lusophone world' spans four continents and comprises eight countries: Portugal in Europe; Brazil in South America; Angola, Cape Verde, Guinea-Bissau, Mozambique, and São Tomé and Príncipe in Africa; and East Timor in Asia. These groups of territories have in common the Portuguese language and, to some extent, the Portuguese culture, and are part of a network of about 250 million people. The Community of Portuguese Speaking Countries (CPLP), founded in 1996, pursues political and diplomatic cooperation among the member states and, *inter alia*, the implementation of projects aimed at promoting and spreading the Portuguese language, namely through the International Portuguese Language Institute. It comprises Portugal and Brazil (countries where Portuguese is the first language of practically everyone); five African states (Angola, Cape Verde, Guinea-Bissau, Mozambique, and São Tomé e Príncipe – where Portuguese is the first language of a minority of the population and the national lingua franca); and East Timor, in Asia (where Portuguese is an official language but Tétum is the lingua franca). In the Macau Special Administrative Region of the People's Republic of

¹ See, for instance, Kurlantzick (2007).

China, a territory which was administered by Portugal until 1999, Portuguese is still recognised as an official language, together with Chinese. In spite of this, Macau is not a formal member of the CPLP, on the premise that membership is so far limited to states.

According to official figures from the China Customs Service published in Macau, trade between China and the PSCs from January to July 2012 totalled US\$75.91 billion, a year-on-year rise of 20%. In this period, China imported goods worth US\$53.12 billion from the eight PSCs and exported goods worth US\$22.78 billion.²

Chinese investment in Africa is becoming especially relevant. On a quest to secure raw materials and energy resources to support the exponential growth of its economy, China has become the fastest-growing investor in the continent. Angola and Mozambique are two of the most important Chinese commercial partners. From January to July 2012, Angola sold goods to China worth US\$20.86 billion, primarily oil, and bought goods to the value of US\$2.09 billion. During the same period, trade with Mozambique totalled US\$751 million as a result of Chinese imports from Mozambique worth US\$227 million and exports to Mozambique worth US\$524 million.

2. Macau as a cooperation platform

Macau has long performed a role as an economic cooperation service platform between China and the PSCs. Since the 16th century, this tiny territory has been connected with the Lusophone world, gathering acquaintances and networks that continued after the return to China in 1999. Macau has all the essential conditions to serve as the preferential doorway for PSCs' products and services to enter the mainland. Major trade and economic events have been held in Macau, such as the Macau International Trade and Investment Fair, allowing visitors to explore potential business opportunities. Benefiting from the historical bond, a flexible economic system and the advantage of language ability, Macau can serve as a platform to assist enterprises that hope to enter or expand the Chinese market (Sun, 2011: 252).

The most impressive symbol of Macau's strategic role as a platform between China and the PSCs is the Forum for Economic and Trade Cooperation between China and Portuguese-

² Available online: <http://www.macauhub.com.mo/en/2012/08/31/trade-between-china-and-portuguese-speaking-countries-totals-us75-91-billion-in-first-seven-months-of-2012/>

Speaking Countries (Macau Forum)³. The Forum is essentially a multilateral organisation composed by China and the PSCs, aiming at promoting mutual development by enhancing cooperation and promoting trade relations between those countries and developing and implementing common projects in various domains.⁴ China is well aware that Macau plays a unique and constructive role in promoting economic and trade cooperation between the Chinese mainland and the PSCs. China's interest regarding the Lusophone world evidences the Chinese understanding over the potentialities which derive from the use of the Portuguese language (*Lusofonia*) as a means of strategic projection. China is developing a remarkable presence in the Lusophone world, and the Macau Forum is offering China vast economic and diplomatic gains – although it is increasingly facing competition from Brazil and India for the lucrative African market. Nevertheless, China has established a strong position in the Lusophone world and, in spite of the competition, is dedicated to keeping it (Horta, 2012).

During the third Ministerial Conference of the Macau Forum in November 2010, participating parties signed the Action Plan for Economic and Trade Cooperation for 2010-2013. The Action Plan calls for the promotion of Macau as a centre for arbitration of commercial disputes between enterprises on the mainland and the PSCs. According to point 13.7 of the Action Plan, the ministers agreed to analyse the comparative advantages of Macau in the knowledge of Chinese and PSCs' legal systems, promoting Macau as one of the venues for arbitration regarding eventual disputes concerning trade between Chinese and PSCs' entrepreneurs.⁵

Endorsing Macau as a centre for arbitration of commercial disputes between Chinese and Portuguese-speaking enterprises makes perfect sense.⁶ In the last decades, arbitration has become the most popular mechanism for resolving international commercial disputes. In a world subject to increasing globalisation, there is a clear tendency to settle international conflicts by means of arbitration. In our opinion, it may also offer several advantages for the resolution of commercial disputes between Chinese and Angolan or Mozambican companies.

³ See <http://www.forumchinapl.org.mo>

⁴ São Tomé and Príncipe is an observer, since it does not have diplomatic relations with China due to its diplomatic recognition of the Taipei Government in 1997.

⁵ The Portuguese version of the Action Plan reads: '13. Outras Áreas de Cooperação (...) 13.7 Os Ministros acordaram em analisar o aproveitamento das vantagens comparativas de Macau no conhecimento dos sistemas jurídicos da China e dos Países de Língua Portuguesa, promovendo Macau como um dos locais de arbitragem para a resolução de eventuais conflitos decorrentes do intercâmbio comercial entre os empresários da China e dos Países de Língua Portuguesa'.

⁶ See Simões (2012: 375-389).

3. Arbitration in China

Along with rapid economic development, the People's Republic of China (PRC) has experienced rapid improvement of its judicial system. According to data collected by the World Bank, enforcing a contract in China requires 34 procedures, takes 406 days and costs 11.1% of the value of the claim. Globally, China stands at 16 in the ranking of 183 economies on the ease of enforcing contracts (World Bank, 2012: 93).

The PRC Arbitration Law 1994 was adopted at the Ninth Meeting of the Standing Committee of the Eighth National People's Congress on 31 August 1994, and came into force on 1 September 1995.⁷ This law was not influenced by the United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, adopted by the United Nations in 1985. The Model Law, one of the most important arbitration laws worldwide, was elaborated with the purpose of unifying the rules of international commercial arbitration, to be adopted by the different states or territories with or without changes. It was formulated under the aegis of the United Nations and therefore contains input from a wide variety of countries. It is generally seen as an international standard for arbitral procedure and has formed the basis of many national arbitration laws. It is especially interesting to notice that, differently from the mainland, the Special Administrative Regions of Hong Kong and Macau have adopted legislation based on the Model Law (Hong Kong in 1990 and Macau in 1998).

In the Chinese legal system, a distinction is to be made between 'domestic arbitration', 'foreign-related arbitration', and 'foreign arbitration'. Domestic arbitrations are those in which there are no foreign elements to the dispute. Foreign-related arbitrations are those that arise from economic, trade, transportation and maritime activities involving a 'foreign element', but where the arbitral proceedings are governed by an arbitral institution that is established in the PRC.⁸ They are regulated by Chapter VII of the PRC Arbitration Law 1994 ('special provisions for Arbitration Involving Foreign Elements'). Finally, we talk about 'foreign arbitrations' where there is a dispute with foreign interests that is conducted by a

⁷ See Tao (2008); Prostler (2011).

⁸ Article 66 of the PRC Arbitration Law 1994: 'Foreign-related arbitration commissions may be organized and established by the China Chamber of International Commerce. A foreign-related arbitration commission shall be composed of one chairman, a certain number of vice chairmen and members. The chairman, vice chairmen and members of a foreign-related arbitration commission may be appointed by the China Chamber of International Commerce'. The best-known foreign-related arbitral institution is the China International Economic and Trade Arbitration Commission (CIETAC), which was established in 1956 to resolve economic and trade disputes between a foreign entity and a PRC entity.

foreign arbitral institution or an ad hoc arbitration that takes place outside of the PRC. The PRC Arbitration Law 1994, however, does not refer to such cases.

Another major feature of the Chinese Arbitration system is the non-recognition of ad hoc arbitration. In order to be valid and binding, Article 16 of the PRC Arbitration Law 1994 requires an arbitration agreement to contain a designated arbitration commission that will govern the arbitration. This requirement applies to both domestic and foreign-related arbitrations in the PRC. An arbitration agreement providing for ad hoc arbitration will be considered to be invalid (due to failing to fulfil the requirements in Article 16) and will not prevent a PRC People's Court from accepting jurisdiction to hear a dispute arising between the parties to it. As a result, ad hoc arbitration is not practised in the PRC.

Regarding the very important issue of recognition and enforcement of foreign arbitral awards, a party seeking to enforce a foreign award in the PRC will need to apply to the competent PRC People's Court for enforcement. The competent court for the enforcement of a foreign award is the Intermediate People's Court at the place of the respondent's domicile or where its property is located. The Intermediate People's Court shall handle the matter pursuant to the terms of any international treaties concluded or acceded to by the PRC, or in accordance with the principle of reciprocity.⁹

China is a contracting state to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards since 22 April 1987. As a result of this convention – probably the most important milestone in the entire history of international commercial arbitration (Greenberg et al., 2011: 9) – there are now more than 130 countries which have accepted the obligation to give effect to arbitration awards made in other countries which are also party to the New York Convention. However, in its Declaration of Accession, the PRC made two reservations. First, the 'reciprocity reservation': the PRC will apply the Convention only to recognition and enforcement of awards made in the territory of another contracting state. According to the second reservation made by the PRC (the 'commercial reservation'), the PRC will only apply the New York Convention to disputes arising out of legal relationships, whether contractual or not, that are considered commercial under national PRC law.

⁹ Article 267 of the PRC Civil Procedure Law, adopted on 9 April 1991 at the Fourth Session of the Seventh National People's Congress, and revised according to the Decision of the Standing Committee of the National People's Congress on Amending the Civil Procedure Law of the PRC as adopted at the 30th Session of the Standing Committee of the 10th National People's Congress.

Apart from the abovementioned limitations on reciprocity and commerciality, the competent Intermediate People's Court can only refuse the enforcement of a foreign award for the reasons provided in Article V of the New York Convention (e.g. for serious procedural deficiencies or violation of the public policy of the PRC). According to the Circular on Relevant Issues on Handling Foreign-related Awards and Foreign Awards by People's Courts, issued by the PRC Supreme People's Court on 28 August 1995, if the competent Intermediate People's Court refuses to enforce a foreign award, this fact shall be reported to the Higher People's Court. If the Higher People's Court intends to also declare the award to be unenforceable, it must first seek the approval of the PRC Supreme People's Court.¹⁰

As mentioned above, the PRC Arbitration Law does not recognise agreements that lead to ad hoc arbitration. However, the PRC Arbitration Law 1994 is silent on whether or not international arbitral proceedings (seated outside of the PRC) can be conducted on an ad hoc basis. On 3 December 1999, the Beijing Higher Court issued an opinion stating that an ad hoc award is enforceable in the PRC under the New York Convention if the award has been issued in another contracting state to the New York Convention and the law of that state recognises ad hoc arbitration.¹¹ Article 16 of the Interpretation of the Supreme People's Court concerning Several Matters on Application of the Arbitration Law of the People's Republic of China confirms that an ad hoc arbitration governed by foreign law and conducted outside of the PRC will be recognised and enforceable by the PRC People's Courts.¹²

China has also been a contracting state to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention, or Convention ICSID) since 6 February 1993. According to the Washington Convention, if an investor from a contracting state has made an investment in another contracting state, disputes relating to that investment can be submitted for arbitration to ICSID. The PRC has made a reservation to the Convention. Pursuant to Article 25(4) of the Convention, the Chinese Government would only consider submitting to the jurisdiction of the International Centre for Settlement of Investment Disputes controversies over compensation resulting from expropriation and nationalisation. Any award rendered by an ICSID arbitral tribunal within the scope of the above limitation must, in theory, be enforced by a PRC People's Court as though the award were a final judgment of a Chinese court. The award shall not be subject to

¹⁰ Available online: <http://www.cietac.org/index/references/Laws/47607b54284b037f001.cms>

¹¹ Available online: http://www.gzac.org/info_view.asp?VID=699. Chinese text only.

¹² Available online: http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=76602

any appeal or to any other remedy except those provided for in the Convention (Articles 53 and 54 of the Convention).

Finally, China has also been a signatory to the Convention that established the Multilateral Investment Guarantee Agency (MIGA), a member of the World Bank Group, since 30 April 1988. MIGA aims at promoting foreign investment and provides political risk insurance to companies covering losses resulting from any kind of risks, such as war, expropriation or non-payment of judicial or arbitration decisions against a host state. MIGA has also its own arbitral rules to solve disputes arising under its guarantee agreements, which are quite similar to ICSID arbitration rules.

4. Arbitration in Angola

Angola is experiencing a period of fast economic development. It is also one of the largest recipients of Chinese investment in Africa. This is due partly to the abundance of natural resources like oil and minerals but also to the various initiatives by the government to attract foreign investments such as the improvement of the regulatory framework or the implementation of fiscal and financial incentives. Presently, however, the process of resolving a commercial dispute through the courts in Angola is far from effective. According to data collected by the World Bank, enforcing a contract requires 46 procedures, takes 1011 days and costs 44.4% of the value of the claim. Globally, Angola stands at 181 in the ranking of 183 economies on the ease of enforcing contracts (World Bank, 2012: 85).

The Angolan Government has been paying increasing attention to dispute settlement mechanisms in the last years. The Voluntary Arbitration Law (Law no. 16/03 of 25 July 2003) provides a general legal framework and other laws provide for arbitration as an alternative method to solve particular disputes, for instance, the Private Investment Law (Law no. 11/03 of 13 May 2003) and the Petroleum Activities Law (Law no. 10/04 of 12 November 2004).¹³

The Voluntary Arbitration Law is based on the former Portuguese Voluntary Arbitration Law of 1986. Hence, it does not shadow by the UNCITRAL Model Law on International Commercial Arbitration, as the former Portuguese law did not follow the Model Law.¹⁴ This

¹³ For a general perspective see *Miranda et al. (2012)* and *Miranda and Leonardo (2010)*.

¹⁴ The new Portuguese Arbitration Law (Law no. 63/2011, of 14 December) entered into force on 14 March 2012. It is clearly influenced by the 2006 version of the Model Law. As the Portuguese Government publicly stated in September 2011, the purpose of the new Arbitration Law is to provide Portugal with a modern arbitration law and make the country internationally arbitration friendly, notably when the dispute involves

law follows a system of ‘mitigated dualism’: it governs both domestic and international arbitration. In this way, Angola has only one law to govern all arbitration proceedings. However, such a law provides for some special rules which will only be applicable in the case of ‘international’ arbitrations (Chapter VII). According to the Voluntary Arbitration Law, arbitration will be of an international nature when international trade interests are at stake, in particular when the parties to the arbitration agreement have business domiciles in different countries at the time of the agreement’s execution; the place of performance of a substantial part of the obligations resulting from the legal relationship from which the dispute arises is situated outside the countries where companies have their business domiciles; or when the parties have expressly agreed that the scope of the arbitration agreement is connected with more than one state (Article 40).

This law allows for both institutional and ad hoc arbitration. Decree no. 4/06 of 27 February 2006, governs licensing procedures for the constitution of arbitration centres. According to said decree, the minister of justice is the entity empowered to authorise the constitution of such centres. The law, however, falls short of current practice with respect to international arbitration (Ajayi and Rosario, 2009:10). In fact, it suffers from several shortcomings when compared with the international standard provided by the Model Law. Regarding the finality of awards, the Law of Voluntary Arbitration contains diverse provisions for domestic and international arbitration. An appeal on the merits is admissible in domestic arbitration provided that the parties have not waived such right (Article 36). Differently, in the case of international arbitration the rule is that awards are final and binding and will not be subject to appeal on the merits unless the parties have agreed otherwise (Article 44).

Regarding the very important issue of recognition and enforcement of foreign arbitral awards, the scenario in Angola is not very encouraging for foreign parties. In fact, Angola is not a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Therefore, in an arbitration process subject to the Voluntary Arbitration Law, the successful party is limited to enforce its award in Angola and has to go through the Angolan judicial process. On the other hand, Angolan courts will not be obliged to recognise and enforce foreign arbitral awards, except in the case of existence of a bilateral agreement with the foreign country where the award was rendered. Hence, the recognition and

companies or other economic operators from Portuguese-speaking countries or when the applicable law is the law of one of such countries. Thus, Portugal now follows a Model Law approach on commercial arbitration, based on the version of the Model Law as adopted in 2006.

enforcement of foreign awards will have to undergo the normal proceedings pursuant to Article 1094 and following of the Angolan Code of Civil Procedure. The competent court for such requests is the *Câmara do Cível e Administrativo* of the Supreme Court.

Angola is also not a member of the Washington Convention. However, the country has been a signatory to the Convention that established the Multilateral Investment Guarantee Agency (MIGA) since 19 September 1989.

5. Arbitration in Mozambique

The process of resolving a commercial dispute through the courts in Mozambique is still far away from what would be desirable. According to the World Bank, enforcing a contract requires 30 procedures, takes 730 days and costs 142.5% of the value of the claim. Worldwide, Mozambique stands at 131 in the ranking of 183 economies on the ease of enforcing contracts (World Bank, 2012: 86).

The Mozambican legal framework governing arbitration is set forth in Law on Arbitration, Conciliation and Mediation (LACM), Law no. 11/99 of 8 July.¹⁵ This is a fairly modern and sophisticated statute which is mainly based on the Portuguese Arbitration Law. The law governs both domestic and international commercial arbitration. Like in Angola, the Mozambican legislator follows a system of ‘mitigated dualism’. The same law governs all arbitration proceedings, providing for some special rules which will only be applicable in the case of ‘international’ arbitrations (Chapter VIII). The definition of international arbitration set out in the LACM follows the one adopted in the Model Law. According to Article 52, arbitration will be of an international nature when international trade interests are involved, in particular when parties to an arbitration agreement have business domiciles in different countries at the time of the arbitration agreement’s execution or when parties have expressly stipulated that the subject matter of the arbitration has connections with more than one country. The law is, for the most part, based on the Model Law. In fact, no major differences can be identified between both texts, since the LACM has adopted the Model Law’s most salient features.

¹⁵ See Miranda, Sá and Cunha (2012).

Regarding the finality of awards, and pursuant to Article 44 of the LACM, an award may only be challenged through setting-aside proceedings. It is not possible to have an appeal on the merits.

Regarding the recognition and enforcement of foreign arbitral awards, Mozambique adopted the New York Convention on the Recognition of Foreign Arbitral Awards, with effect from 9 September 1998. Under Article I(3) of the Convention, Mozambique declared that it would enforce an award rendered in another contracting state's territory on the basis of reciprocity (reciprocity reservation). Hence, the procedure to have a foreign arbitral award recognised and enforced through the Mozambican courts is made in accordance with the New York Convention.

Mozambique has also ratified the Washington Convention, which entered into force on 7 June 1995. Finally, the country has also been a signatory to the Convention that established the Multilateral Investment Guarantee Agency (MIGA) since 23 November 1994.

6. Conclusion

China, Angola and Mozambique stand at different levels of economic and judicial development. While the enforcement of a contract in China takes 406 days, it takes 730 days in Mozambique and 1011 days in Angola. The costs involved are also diverse: enforcing a contract in China costs 11.1% of the value of the claim; in Angola it costs 44.4% of the value of the claim; while in Mozambique costs rise to an incredible 142.5% of the value of the claim! Arbitration has become the most popular mechanism for resolving international commercial disputes. This mechanism is particularly relevant in the African context as, in many countries, the judicial system is one of the main constraints pointed out by investors to the development and growth of the national private sector. The process of economic development that both Angola and Mozambique are undergoing, with the inherent multiplication of commercial, economic and industrial relations, stresses the need to supply these countries with mechanisms that confer greater legal security, predictability and effectiveness to the dispute mechanisms resolution. Alternative conflict settlement mechanisms like arbitration encourage investment and consequently promote economic growth. They are therefore seen by investors as a useful alternative to the drawbacks often associated with the judicial system. By enhancing alternative dispute resolution mechanisms and establishing rules and institutions that are international and respect local views, the

government will promote legal security and predictability within the commercial environment.

As shown above, the legal landscape for resolving international commercial disputes in China, Angola and Mozambique varies. Especially important, some of them have a more active approach regarding the recognition and enforcement of foreign arbitral awards than others. All countries are signatories to the Convention that established the Multilateral Investment Guarantee Agency. However, only China and Mozambique are contracting states to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. China subscribed two reservations: the reciprocity reservation and the commercial reservation, while Mozambique only subscribed the reciprocity reservation. On the other hand, China and Mozambique are members of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, unlike Angola. Finally, only Macau and Mozambique have domestic laws that follow the UNCITRAL Model Law's pattern.

Arbitration is usually the preferred mechanism for resolving cross-border disputes, due to the ease of enforceability of an award under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. However, Angola is not a party to any of the major conventions with regard to enforcement or recognition of arbitral awards. Since the country is not a party to the New York Convention, the enforcement of foreign awards in Angolan territory may be especially difficult. Thus, this fast developing country has not taken measures to bring its arbitration practice fully in line with international standards. Presently, foreign arbitral awards will be recognised in more limited circumstances and enforcement will often be conditional on reciprocity between Angola and the state where the award was made. Accession to the New York Convention is not only desirable but crucial (Ajayi and Rosario, 2009: 9). It creates an international framework for the enforcement of arbitral awards. The adoption of the convention would reveal a substantial effort by Angola to support international arbitration and thus promote reliance and safety on commercial contracts. This would increase investor confidence that their awards will be enforced. There are reports according to which the Angolan Government is considering subscribing the New York Convention, but to date that has not happened.

Furthermore, Angola has not adopted a Model Arbitration Law (e.g., the Model Law or the OHADA Uniform Act). The Angolan Government should consider the adoption of a modern

arbitration law, preferably shadowing the Model Law. The United Nations' Model Law is considered as a good example of 'soft law', i.e. an instrument of normative nature with no legally binding force and which is applied only through voluntary acceptance (Bonell, 2005: 229). The main purpose of this instrument was to assist countries in reforming and modernising their laws on arbitration. It has been noted that the future of commercial arbitration in Africa greatly depends on the adoption of the Model Law (Asouzu, 2006: 81).

On the other hand, due to the difficulty in recognising and enforcing foreign judgements from ordinary courts in mainland China, arbitration is likely to remain the preferred option for the settlement of international commercial disputes with Chinese counterparties. Furthermore, China is assuming an increasing role in international commerce, so international arbitration is likely to continue growing as a method of resolving disputes involving Chinese companies. The Asian arbitration market is experiencing a boom. A greater number of companies are choosing arbitration seats in Asia. Chinese companies are increasingly willing to arbitrate outside of mainland China. For several reasons already mentioned, arbitration is the best procedure for the settlement of commercial disputes between Chinese and Angolan or Mozambican companies.

If the Macau Forum is really interested in promoting Macau as one of the venues for arbitration regarding eventual disputes concerning trade between Chinese and PSCs' entrepreneurs, it should, first of all, encourage Angola to adhere to the New York Convention. This would allow all involved jurisdictions (in this case, Macau, China, Angola and Mozambique) to be members of the same legal network, mutually recognising and enforcing arbitration awards rendered in any of the other jurisdictions. This is the most important step ahead that should be promoted by the Ministerial Conference. The New York Convention was a milestone for the development of international commercial arbitration, providing the basic legal framework that assures the effectiveness of foreign arbitral awards.

As a second focus point, the Macau Forum could discuss the possibility of harmonising the different domestic arbitration laws. Only Macau and Mozambique follow the Model Law pattern. The Law in Angola is still influenced by the former Portuguese Law, which is clearly outdated. China, on the other hand, can learn valuable experiences from the cases of Macau but, especially, Hong Kong, which now follows the Model Law and is internationally recognised as a leading seat for commercial arbitration. Furthermore, Hong Kong amended its legislation in 2010 to adapt to the newest version of the Model Law (2006). If the members of

the Macau Forum are to adopt a common legislation, or at least harmonise some of their rules, they should inspire themselves in the most recent trends on international commercial arbitration, clearly promoted by the UNCITRAL Model Law.

Of course, such changes depend upon political and legislative determination. The third Ministerial Conference took place in November 2010. The Action Plan for Economic and Trade Cooperation ends in 2013. However, no measures of development of point 13.7 of the Action Plan have taken place. As far as we know, this has not been more than a political declaration, and no practical measures have ensued. The first step would, of course, be the appointment of a task force to analyse the comparative advantages of Macau in the knowledge of Chinese and PSCs' legal systems, made of representatives of each of the involved jurisdictions. We hope political speeches will turn into effective actions.

In our opinion, Macau is the ideal place for the arbitration of such disputes. The seat of arbitration is an important legal concept. In fact, the seat's law provides the supporting framework for the arbitration. Following the trend in modern international arbitration, Macau shadows the UNCITRAL Model Law on International Commercial Arbitration, with a very limited degree of judicial control. Macau's courts may be called on to provide assistance during the arbitration. Macau provides a good legal framework and its courts are reasonably efficient in case supportive measures are needed.

Macau has two laws on arbitration. The first is the Decree-Law no. 29/96/M of 11 June (Law of Voluntary Arbitration), which regulates the matters of arbitration in general. The second is the Decree-Law no. 55/98/M of 23 November that completes that framework with a law specifically devoted to 'international' commercial arbitration. The latter corresponds almost in full to the Model Law. In this way, Macau has been following the Model Law since 1998. However, Macau has not yet introduced any changes according to the amendments made to the Model Law in 2006.

Furthermore, parties (companies from China, Angola and Mozambique) may be relieved to know that Macau is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. As already mentioned, China subscribed the Convention in 1987. On 19 July 2005, China declared that the convention shall apply to the Macau Special Administrative Region, subject to the statement originally made by China upon accession to the Convention. This means that Macau will apply the convention only to

recognition and enforcement of awards made in the territory of another contracting state and only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law. Therefore, if carried through to the end, the arbitration proceedings will lead to a decision which is enforceable against the losing party not only in Macau, but also in mainland China and in Mozambique, under the provisions of the convention. There are limited grounds to refuse enforcement. This is far more effective than the enforcement of foreign judgments, which would be dependent on bilateral conventions between China, Angola and Mozambique. If Angola were to subscribe to the convention, the triangle would be closed, and arbitral awards rendered in any of these countries (or in Macau) would be enforceable in all these jurisdictions.

Besides its sound judicial system and reasonably arbitration-friendly legal framework, there are also several features of Macau which may additionally be seen as beneficial for the parties.

First of all, Macau has comparative advantages due to cultural proximity and language ability. Macau profits from the knowledge of Chinese and Portuguese cultures and customs. Chinese and Portuguese are both official languages practised in the territory's local media and learning institutions. Macau can play a role as a facilitator with all its multilingual human resources to bring the two parties together. Macau can also assist in the translation procedures, owing to a long experience in translation services (Chinese-Portuguese-Chinese) (Sun, 2011: 252).

Secondly, Macau has a legal system similar to that of Angola and Mozambique, as its juridical framework is Portuguese based. Thus, Macau may offer legal consultancy regarding the knowledge of Angolan and Mozambican legal systems. Macau has, for instance, a Civil Code and a Commercial Code that have a markedly Portuguese influence. This can be a significant asset in terms of know-how, learning and ability to influence the capacity of businesses. Although Macau is not a part of the CPLP, its contemporary Portuguese-language Commercial Law is also a valuable resource for law reform efforts within the framework of the CPLP (Del Duca, 2010: 109).

Although it is common to talk about a 'Lusophone world', uniting different countries and continents, the existence of a 'Lusophone legal system' is open to discussion. Some authors, although acknowledging the existence of clear similarities between the different legal systems of the PSCs, reject the existence of a 'Lusophone legal system'. Some of the arguments used

are the lack of a specific theory regarding the legal system; the application, in some African countries, of customary law instead of the official law; or the existence of several factors that impede the inclusion of all PSCs in the same legal system, like the European Union, Mercosur or several African organisations (Moura Vicente, 2012: 89). Others accept the existence of a Lusophone legal system.¹⁶ According to Menezes Cordeiro (2010), the Portuguese-speaking legal system has its own legal family, closely related to the Roman-German family, yet different (Ibid.).

Despite encompassing countries which have a common legal background, the CPLP has not engaged in any law reform purposes. Unlike the case of its francophone African counterpart, the *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (OHADA), the CPLP's constitutive documents do not reflect a direct role for the organisation in the creation of supranational legislation or in the resolution of international disputes. According to one author (Del Duca, 2010: 108), the 'CPLP is a vessel, as yet largely unfilled, through which dual goals of law reform and promotion of Portuguese language might be pursued'. For the time being, there does not appear to be any probability of reforms to provide the organisation with legislative or judicial institutions like those of the European Union and of OHADA. Language promotion through law reform could, however, easily be considered within the CPLP's purposes. In the absence of legislative tools and law-making institutions, the approaches of restatements, expert association working groups and model laws could offer a good opportunity of aligning the CPLP's goal of language promotion with law reform to support international commerce (Ibid.). As regards arbitration, in 2006 the Portuguese Language Lawyers Union (UALP) affirmed its support to the creation of a centre of mediation, conciliation and arbitration in the Portuguese speaking space.¹⁷ However, this project is yet to come to existence.

Although the existence of a 'Lusophone legal system' is disputed, the similitude between legal frameworks in the Portuguese-speaking world cannot be argued. A common history left a clear trace and the influence of Portuguese law is still evident today. Not very long ago, Macau (1999) enacted Civil Codes which follows the Portuguese one very closely. More recently, several PSCs have approved legislation which has a clear Portuguese inspiration; for example, Angola enacted the new Company Laws in 2004, highly influenced by the

¹⁶ See Menezes Cordeiro (2010).

¹⁷ See online: <http://allafrica.com/stories/200607270774.html>

Portuguese Company Law of 1986; and Mozambique adopted of a new Commercial Code in 2005, also clearly marked by the Portuguese tradition.

Such a clear similarity between the legal systems of PSCs brings undeniable advantages. The existence of common legal values and, above all, of a common language, makes it easier to boost commercial exchanges and deepen long-lasting relationships between Lusophone companies. Again, arbitration may have an important role to play when disputes between the involved parties arise.

Furthermore, Macau has all the necessary facilities. Since the opening of the gaming industry in 2002, Macau has been growing into an international and metropolitan city. Macau is also interested in strengthening its experience in the organisation of international conventions and meetings. Macau's ability to act as the coordinator and organiser for international events has been consolidated in recent years (Sun, 2011: 252). The territory has very good infrastructures for exhibitions, fairs and conferences, plus it has low taxes. Macau still depends, to a large extent, upon the casino's revenues, so the government is striving to balance the weight of the gambling industry by promoting Macau as a services platform, thus revitalising its historic role as a hub. The central government in Beijing also wants to give Macau a special role within the country, changing its profile from a mere gaming city to a platform for cooperation between China and the world. The goal is to establish Macau as an international conference hub, and further developing the MICE (Meetings, Incentives, Conventions and Exhibitions) industry as well as creative and cultural industries. As cooperation between China, Europe and Africa becomes more intensive, it is believed that Macau's platform function will be more noticeable and diversified (Ibid.).

Bearing in mind the snowballing importance of arbitration in the global economy, particularly regarding the commercial realm, and acknowledging the status of Macau as a true melting pot of different cultures and experiences, we can say that Macau may find in arbitration a new 'vocation'. Besides assuming its role as an economic platform between China and the PSCs, Macau may perform a whole new role as a legal services platform, providing arbitration and translation-related services. This will enable Macau to fulfil its role as a liaison platform between China and the Lusophone world, and it may also be a very meaningful step towards the consolidation of the principle of 'one country, two systems' (Antunes Pires, 2011: 92; 498).

Macau should look into the future without forgetting its own historic role, not attempting to copy what others have done or are doing. The history of Macau is made up of encounters and mutual discoveries. This is an historic heritage that Macau should not waste. In the words of Mei-Cheong (2005: 12; 20), ‘when we talk about Macau’s success story, the underlying factor of this success, which we should never forget, is the Macau spirit of mutual respect and mutual tolerance to promote harmony in plurality. Even though commercial contracts have little or nothing to do with ‘respect’ or ‘tolerance’ (after all, money is what counts...), Macau may still play a special role in the settlement of such disputes, by offering a familiar and suitable seat for arbitration between two very different worlds – China and Africa.

References

- Ajayi, O. and Rosario, P. 2009. Investments in Sub-Saharan Africa: the role of international arbitration in dispute settlement. [Online]. Available: http://works.bepress.com/oladiran_ajayi/2
- Antunes Pires, C.S. 2011. Síntese Histórica e Situação Actual da Arbitragem e do Reconhecimento de Decisões do Exterior na RAEM. Panorama do Singular e Paradigmático Papel da Região como sólida ponte entre a China e os Países Lusófonos. *Administração*, 92, 24: 471-498.
- Asouzu, A. 2006. Some fundamental concerns and issues about international arbitration in Africa. *African Development Bank Law Development Review*, 1, 81.
- Bonell, M. J. 2005. Soft law and party autonomy: The case of the UNIDROIT principles. *Loyola Law Review*, 51, 229.
- Del Duca, P.L. 2010. *Choosing the language of transnational deals: practicalities, policy, and Law reform*. Chicago: American Bar Association.
- Greenberg, S., Kee, C. and Weeramantry, J. R. 2011. *International commercial arbitration. An Asia-Pacific perspective*. Cambridge: Cambridge University Press.
- Horta, L. 2012. The Macau Forum: a Chinese diplomatic success. [Online]. Available: <http://www.eastasiaforum.org/2012/03/09/the-macau-forum-a-chinese-diplomatic-success/>
- Kurlantzick, J. 2007. *Charm Offensive: How China's soft power is transforming the world*. London: Yale University Press.
- Mei-Cheong, G.N. 2005. *Macau's contribution to China's modernisation along history*. MRI Forum 12. The Macau Sino-Latin Foundation.
- Menezes Cordeiro, A. 2010, O Sistema Lusófono de Direito. [Online]. Available: http://www.oa.pt/Conteudos/Artigos/detalhe_artigo.aspx?idc=30777&idsc=112471&ida=112722
- Miranda, A.P., and Leonardo, C. 2010. Lei Angolana da Arbitragem Voluntária. Uma análise descritiva. *Revista de Arbitragem e Mediação*, 25.

Miranda, A.P., Leonardo, C., and Fernandes, J. 2012. Angola. [Online]. Available: http://www.mirandalawfirm.com/uploadedfiles/20120405_c4ed40.pdf

Miranda, A.P., Sá, F.R. and Cunha, C.C. 2012. Mozambique. [Online]. Available: http://www.mirandalawfirm.com/uploadedfiles/20120405_03033c.pdf

Moura Vicente, D. 2012. *Direito comparado*, vol. I. Coimbra: Coimbra.

Prostler, T.C. 2011. The rise of an arbitration giant: an overview of the development of the Chinese Law on Arbitration and the CIETAC rules. [Online]. Available: http://www.maa.net/uploads/VJ/3._Prostler_Tom_C.pdf

Simões, F.D. 2012. Macau: a seat for Sino-Lusophone Commercial Arbitration. *Journal of International Arbitration*, 29, 375-389.

Sun, I. H. 2011. Macao and Chinese foreign relations: a possible platform for China and Portuguese-speaking countries. In Hao, Y. and Wang, J. (eds.), *Macao and Sino-U.S. relations*. Plymouth: Lexington Books.

Tao, J. 2008. *Arbitration Law and practice in China*. Alphen aan den Rijn: Wolters Kluwer.

World Bank 2012. Doing business 2012, economy profile: China. [Online]. Available: <http://www.doingbusiness.org/~media/fpdkm/doing%20business/documents/profiles/country/chn.pdf>

Zhu, Z. 2010. *China's new diplomacy: rationale, strategies and significance*. Surrey: Ashgate.

This 12th edition of the yearbook, *Monitoring Regional Integration in Southern Africa*, provides a review of different aspects of Southern Africa's regional integration agenda during 2012. Regional integration remained a focal point of the development strategies of the countries in this region, and the integration processes remained complex and challenging. An important reflective exercise was undertaken during the past year with the mid-term review of the Regional Indicative Strategic Development Plan. As this publication goes to print, the final version of this review has not yet been released.



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