

**THE MULTILATERAL TRADE SYSTEM AND THE AFRICAN
REGIONAL INTEGRATION SYSTEMS: THE USE OF SOFT LAW
AND HARD LAW STRATEGIES IN THE SADC, SACU AND
COMESA**

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DECLARATION

I **Nokokure Murangi** hereby declare that this dissertation is my own unaided work except where acknowledged. It is been submitted for the degree Masters of Law (Economic Law) (LLM) in the University of Namibia, Windhoek. It has not been submitted before, for any degree or examination in any other university.

Nokokure Murangi:

Date: 21 October 2004

GLOSSARY OF TERMS

AEC	-	African Economic Community
AU	-	African Union
CMT	-	Committee of Trade Ministers
COMESA	-	Common Market for Eastern and Southern Africa
CRT	-	Committee on Regional Trade Agreements
DSB	-	Dispute Settlement Body
EC	-	European Community
EPA	-	Economic Partnership
EU	-	European Union
GATT	-	General Agreement on Tariffs and Trade
IMF	-	International Monetary Fund
MTS	-	Multilateral Trade System
RIS	-	Regional Integration Systems
SACU	-	Southern African Customs Union
SADC	-	South African Development Community
SADCC	-	Southern African Coordination Conference
WTO	-	World Trade Organization

THE MULTILATERAL TRADE SYSTEM AND THE AFRICAN REGIONAL INTEGRATION SYSTEMS: THE CASE OF THE COMESA, SADC AND SACU

ABSTRACT

The paper seeks to explore the relationship between the Multilateral Trade System (MTS) and the African Regional Integration System(s)(RIS). This is done through the analysis of norm formation on trade in Regional Integration Systems (RIS).

In this analysis, the manner in which the African Regional Integration Systems use the soft and hard law strategies to reproduce themselves institutionally on trade issues is carefully explored. This is done by looking at specific case studies of COMESA, SADC and SACU. This approach will help to reveal the degree of policy awareness and consistency, or lack thereof in the processes that leads to institutional decision-making and outcomes in these Regional Integration Systems. It is the contention of this paper that the African RIS have not sufficiently and efficiently used their own internal institutional processes to allow for a coherent interaction between them and the MTS. In carrying the analysis forward the 'landscape' of tensions and contradictory interactions between the MTS and the RIS is explored. The nexus between the Africa Continental Integration programmes and the RIS programmes is carefully evaluated.

The evaluation of the MTS and its relationship with RIS is further explored to locate the analysis in the historical context. Specific aspects that define the basis of legal regime in the MTS on RIS is revisited in the study in order to ensure and appreciate the continuities and discontinuities in the process of norm formation at the MTS level. The conceptual tools of global legal pluralism are used in the analysis. These tools allow for a multi-disciplinary and ‘multi-site’ approach to the analysis. In short, the tools allow for an open intellectual space within which the analysis takes root. The rationales for the adoption of the conceptual framework are briefly discussed in the paper.

The paper then concludes with the practical analysis with case studies on COMESA, SADC and SACU. Thereafter, conclusions and observations on the relationship between the African RIS and the MTS are offered. The conclusions reveal that the RIS have a ‘haphazard’ approach to norm formation and consolidation. The ‘haphazard’ process does not sufficiently allow for policy consistency within the RIS. This situation in turn weakens and compromises the RIS ability to meaningfully engage the MTS. Consequently, the African RIS is disarticulated. It is finally recommended that the African RIS take the institutional process of norm formation seriously. In this process a sustainable balance between the soft law strategy and hard law strategy must be maintained.

CHAPTER ONE

INTRODUCTION

The Multilateral Trade System and Regional Trade Systems: the landscape of tensions and contradictory interactions

There is a profound tension between trade liberalization efforts at the national, regional and multilateral levels. The tension has partly emanated from the fact that nation states assume different obligations in the context of various regional trade and Multilateral Trade Systems/arrangements to which they belong. This tension has sometimes denied or delayed the possibility for trade policy coherence and harmonization between Regional and Multilateral Trade Systems. Trade liberalization in this situation becomes a ‘patch work’ of programmes and efforts and this situation needs to be addressed.

To the extent that this situation is obtaining, it is necessary to evaluate some aspects that might help to invite new possibilities for policy options and appropriate institutional actions for African countries which belong to both regional and the multilateral trade systems. In carrying this evaluation forward, it is important to underline at the outset that outward orientated development strategies depend on more than free trade or the right economic formulas for domestic, regional and multilateral trade policy.¹ These strategies may as well depend on the ability of regional trade institutions to meaningfully

¹ Trebilcock, M.J. and R. Howse (1995). *The Regulation of International Trade*, p. 516

reproduce themselves through the appropriate use of their treaty instruments and the policy decisions they generate. A good example would be a situation whereby a policy decision would be taken which may be oblivious to the obtaining treaty position of a RIS. This would not encourage a meaningful process of trade liberalization within a RIS.

Thus, while trade liberalization is important in whatever form it manifests itself to the trade agendas and programmes that are being addressed in the context of both regional and multilateral trade systems, other supportive pillars such as the institutional actions that are generated within the regional integration systems must be fully assessed. Dani Rodrik in his article titled trade policy reform as an institutional reform has stated that: *“it is useful to think of institutions broadly as a set of humanly devised behavioral rules that govern and shape the interaction of human beings, in part by helping them to form expectations of what other people will do. All well functioning market economies are embedded in a set of non market institutions, without which the markets cannot perform adequately.”*² It is clear that trade reform at the national level and the attendant supportive institutions are necessary complementary ‘pillars’ in the process of regional and multilateral trade liberalization and integration. All the realms and dimensions must be equally asserted and fully utilized in the process of regional and multilateral trade liberalization.

² Bernard Hoekman (ed), (2001) Development , Trade and the WTO, Washington .DC, The World Bank, p 5

As it has been noted in economic literature, the classical political economists, from Smith through Ricardo and Hume to J.S Mill, regarded the political, legal, and indeed moral conditions for liberal trade as of singular intellectual interest as well as cardinal policy importance.³ This acknowledgement opens up intellectual and academic possibilities for scholars and practitioners of international trade to engage in wide ranging analysis of regional integration systems.

Such an analysis may entail looking at other aspects, which may equally enrich the discourse and analysis on Regional Integration Systems and the Multilateral Trade System. Kele Onyejekwe has observed the following about similar debates in the GATT: *“the discussions of the GATT are often wrongly viewed only as exercises in economics. Because it is hard to separate the economic from the legal at the GATT, the GATT can create or redefine international law from economic’s back door.... Those who worry about the jurisprudence of the GATT are asked: why worry about the legal rules... legal rules don’t matter; as long as the participants have the political will to make the system succeed... As Professor Jackson points out, this idea is plain wrong.”*⁴

The Regional Integration Systems are not an exception in as far as the need to understand them is concerned. They equally deserve a multi disciplinary approach and analysis to better understand them. The norm creating process in Regional Integration

³ Ibid

⁴ Onyejekwe, K Hamline Law Review (17) p92

Systems, “define rights and duties to minimize trouble making”⁵. The closeness of economics and other disciplines becomes important in this regard.

It is a fact of life, that many countries increasingly pursue trade policy and related reforms in the context of the Regional Integration Systems (RIS). Such initiatives can be regarded as an example of international cooperation through which governments seek to adopt better policies and strengthen trade related institutions. Whether RIS will help members integrate into the world economy and benefit from increased trade depends very much on how they are designed and function.⁶ The institutional manifestation in respect of decision-making processes in the RIS becomes important here.

It is for this reason that any evaluation and analysis should transcend the traditional economic analysis on regional integration systems and their relationship with the Multilateral Trade System (MTS). Other aspects (dimensions) may be equally important and will help contribute to the multiplicity of challenges that characterize the relationship between regional integration systems and the MTS. To put it differently, there are different “sites” where the forces that shape the outcome of institutional interaction between the RIS and the MTS play themselves out.

In their assessment of the future of the global trading system, Michael Trebilcock and Robert Howse have identified three major challenges;

⁵ Ibid

⁶ Hoekman , B. (2002) World Trade Review 1 (1) 39

- 1) the management of the interface between trade liberalization and the domestic regulatory state,
- 2) the need to strengthen the legal and institutional foundations of open markets in developing countries and
- 3) the need to address the dangers that regionalism poses to the coherence and sustainability of the global trading order.⁷ The management of the interface between trade liberalization in regional integration systems on the one hand, and the domestic regulatory systems in nation states on the other hand, logically addresses issues of institutional linkages, programmes and actions. This implies the interactions of soft norms and hard norms in the context of both regional integration systems and the national systems. The sustainability and the viability of all these systems are dependent on each other in respect of the elaboration of trade rules and policies. The transformation of national legal systems and processes may be enhanced and given a momentum on the basis of regional rules and regulations, which take hold in this respect. The symbiotic relationship is important for the national, regional, and the global trade system alike.

It may be difficult to understand a situation whereby a state would agree to trade liberalizing measures at the Regional Integration System level and at the same time institute a different regime or a trade measure at the national level which is contrary to

⁷ Ibid, p 500

or frustrating the regionally agreed upon measures. The supra national frameworks and decisions are normally meant to encourage nation states to transform their own internal systems. Dani Rodrik in an article entitled “trade policy reform as an institutional reform”, has observed the following on institutional reform: *“the yard stick that matters is the degree to which trade reform contributes to the construction of a high quality institutional environment at home...a high quality of institutional environment has greater economic payoffs than a liberal trade regime or adherence to the WTO rules”*.⁸ This means that nation states must be seen to promote rules-based regional integration systems which in turn foster domestic reform and logically links with the Multilateral Trade System.

The so-called “dangers that are posed by regionalism” as referred to by Trebilcock and Howse need to be identified and viable solutions to them must be proposed, because “the members of the international system have an interest in establishing a certain degree of predictability with regard to the conditions in which international trade, capital flows, transport etc. take place”⁹. Members of regional integration systems must help to rearticulate this “landscape” if indeed they are to mitigate these “dangers”. Gerrit Faber has observed that *“the more the well being of a state is bound up with international transactions, the more this state will gain from a stable and favorable international*

⁸ Bernard Hoekman et.al (ed) (2002) Development Trade and the WTO, Washington. DC, The World Bank, p 3

⁹ Gerrit Faber (ed) Trade Policy and Development, The Hague, Netherlands, Rotterdam University Press, 1990, p 5

climate, and it is reasonable to assume that the efforts to establish such an international environment will intensify with these potential gains.”¹⁰

The efforts by states have generally resulted in a large variety of forms of international cooperation and the creation of rules. It is at this level of states cooperation that the rules, which govern international trade, are created and this encourages states to fully take advantage of the international trade system. Regional Integration Systems should regenerate themselves and benefit from international trade given that they form part of the system. The exact relationship is complex in view of the multiplicity of interests, motivations and objectives both for the Regional Integration Systems (RIS) and the multilateral trade system.

It is argued by liberal trade proponents that in the context of a globalizing economy the space for “system frictions” should be limited and not be tolerated.¹¹ In as much as all the abovementioned challenges and the so called “dangers” warrant and deserve attention, the preoccupation here would be limited to the study and analysis of the interface between the regional integration systems and the Multilateral Trade System. The interaction has a ‘multi-site’ and ‘multi-agency’ process to it. The “site” that would be looked at for the purpose of this study and the analysis would be the Regional Integration System in Africa (RIS).

¹⁰ Ibid

¹¹ Hoekman, B. (2002) World Trade Review 1 (1) 39

The policy awareness that is espoused by liberal trade proponents requires that the trade policy linkages and the institutional dimensions, which sustain Regional Integration Systems and their interaction with the Multilateral Trade System, be fully appreciated, carefully assessed and studied. There is a potential friction which may arise in process of norm formation in the Regional Integration and the Multilateral Trade Systems. The manner in which Regional Integration Systems reproduce themselves becomes very important and the norms that are generated in this context must be subjected to an evaluation and analysis.

The analysis entails the interaction of the “soft law” and “hard law” dimensions and the policy consequences, which they introduce within regional integration systems. This analysis takes account of the fact that the Multilateral Trade System and regional integration system form part of a dynamic part of actors and relations. Thus the nature and patterns of issues are gradually shifting and relations are constantly rearticulated and re-defined.

The systemic (regional and multilateral) tensions may, in the African RIS, partly emanate from the fact that there is a limited or different awareness about the manner in which African regional integration institutions generally reproduce themselves through the use of soft law institutional strategies on the one hand and hard law institutional strategies on the other hand. The viability and sustainability of regional integration systems rests on the degree to which they sufficiently regenerate themselves.

This simply implies that the express consent of States to regulate their trade interests according to international law in the context of regional integration systems as well as in the multilateral trade system must be in step with institutional policy decisions they take in these frameworks. The importance of recognizing the link between the hard law strategies and soft law strategies as pursued by States in the RIS and the MTS respectively, allow for quick appreciations of the changes in international society and the development of international economic law.

In fact, international economic law does indeed affect fundamental decisions about the allocation of economic and social benefits among states and among their citizens, including benefits such as preferences, wealth and property rights, information and the protection of law itself. It is for all these reasons that the interaction of soft law institutional strategies and hard law strategies in the RIS be appreciated and meaningfully managed.

The extent to which African States benefit or stand to be marginalized in the process of globalization may be a function of how they engage the realms of hard law and soft law strategies in their regional integration systems. In the final analysis, it is the concrete actions that would be produced by the conscious interactions of these two dimensions that would create a logical economic platform which will anchor the African RIS to the MTS.

The soft law institutional strategies refer to the strategies which are by and large generated by the constituted structures and institutions in Regional Integration Systems by way of decisions, resolutions and recommendations which carry with them obligations of cooperation and good faith and may have operative effect on regional systems, while hard law strategies are defined by the treaties and all other standing subsidiary instruments.

Hard law strategies imply norms that create precise legal rights and obligations while soft law strategies are norms whose substance may be vague, un compelling and the relationship between the legal rights and obligations is fragile, and may be weak.¹² Soft law strategies are also known to be “hortatory” or “programmatory” in character and they do not help to strengthen the international normative system.¹³ (The 1963 Moscow Treaty banning certain nuclear weapon tests is usually cited as a good example in international law.)

This paper seeks to look at these aspects and its focus would be limited to the African Regional Integration Systems. The “site” of the African Regional Integration System(s) may tell a story and it is important in as far as the relationship between the MTS and the RIS is concerned. The ‘wealth of this story’ should reveal the nature and the quality of this relationship.

¹² M. Dixon and R. McCorquodale, *Cases and Materials on International Law*, Great Britain, Black Stone Press Limited, 1995, p53

¹³ *Ibid*

CHAPTER TWO

The Evolution of the Multilateral Trade System

The institutional dimensions of the RIS and their interaction with the MTS for the purpose of this paper, can be appreciated against the evolution of international trade policies, system and institutions on the one hand and the evolution of the Regional Integration Systems on the other.

In the immediate post war period barriers at nation's borders were high, and governments and citizens could sharply differentiate international trade policies and domestic policies.¹⁴ International trade policies were only limited to border measures while nations were sovereign over domestic policies without due regard to the impact on other nations.¹⁵

In sum, there were three widely accepted principles after World War II that will help to explain the thrust of the policies that developed and their conditioning effect on developing countries and the subsequent evolution of regional integration systems to which developing countries belong. First, trade agreements concentrated on lowering of border barriers; second developing countries had limited engagement in the world

¹⁴ Supra, n 1, p24

¹⁵ Ibid

economy; and third, when they did engage, they had to be given special treatment¹⁶. As a result of the marginal involvement by developing countries in the global economy they opted for the inward looking development and industrial strategy.

The inward looking approach by developing countries was generally informed by and can be explained on the basis of the disastrous international environment that had prevailed in the 1930's. In part it reflected a skepticism regarding the potential of market forces and faith in the capacity of governments to plan the development process and allocate resources.¹⁷ Shiff and Alan Winters observed that: "The 1930's saw a great fragmentation of the world trading system as governments struggled with slump in demand without the benefit of global economic institutions to provide a liberal focal point."¹⁸

James Mathis has pointed out that: "In the 1930's, regional political hegemony was in vogue and trade policy was an instrument of national power, allegedly used to relegate the small and neutral to the one regional zone of influence or another".¹⁹

The other aspect, which significantly influenced fragmentation in policy-making and which invited a different policy response is colonialism. It had a conditioning effect, for

¹⁶ Supra, n 1, p25

¹⁷ Supra, n 1, p24

¹⁸ Maurice Shiff and Alan Winters, *Regional Integration and Development*, The World Bank , Washington, 2003.

¹⁹ Mathis, J.H. dr. (2001) *Systemic Issues in the CRTA*. p. 129. The Hague: Asser Press.

it had created a system that was biased against developing countries, in particular the producers of primary products.²⁰ The result of this situation was that developing countries instituted and adopted import substitution policies and maintained high tariff barriers and restrictive quotas.²¹

Over time there has been a significant policy and legal shift in the trade policy environment. The pace of international economic activity and the developing interdependence is head spinning because cross border trade and economic activities assumed added significance. Governments increasingly find it difficult to implement worthy policies concerning economic activity because such activity often crosses borders in ways that escape the reach of much of national government control.²² This can be true for diverse subjects as insurance, brokerage, product health, environment protection and many more.²³ This increased weaving together of national economies and the intense concern over the impact of the globalized economy has brought the multilateral trade system to the fore-front of numerous public debates. These debates cut across policy and legal issues, which deserve attention in this evolving environment.²⁴ In responding to these realities, governments have increased their interactions at both the multilateral and regional levels.

²⁰ Ibid

²¹ Ibid

²² Jackson J.H. T (1997) *The World Trading System*, Cambridge, Massachusetts: the MIT press.

²³ Ibid

²⁴ Moore, M.(2000) *The WTO, Looking Ahead* .Fordham International Law Journal 24 (1&2) p 1

The Drive Towards Regional Integration Systems

The drive towards the conclusion of regional trade agreements and the creation of regional integration systems thereof, has gathered pace in the 1990's, and this dynamic unfolding of regional integrations systems has continued unabated. From October 2003, all the 146 World Trade Organization (WTO) Members, with the Exception of Mongolia, currently participate in or are actively negotiating regional integrations systems.²⁵ The period following the launch of the Doha Development Agenda (DDA) in November 2001 has been one of the most prolific in terms of the notification of the regional integration systems: during this two year period a total of 33 regional integration systems have been notified to the WTO, of which 21 cover trade in goods, and 12 cover trade in services. In 2003 alone, 12 regional integration agreements have been signed, negotiations have been started on 9 regional integration systems and 13 have been proposed.²⁶

Over the past five years many WTO Members who traditionally favoured the Most Favoured Nation (MFN) liberalization approach in the fold of the WTO are; among them Australia; New Zealand; Japan; Singapore; Korea; Hong Kong; China; and Chinese Taipei have added the regional card to their trade policy repertoire and appear to be making up for lost time by energetically seeking Regional Trade Agreement (RTA)

²⁵ WTO Secretariat, Regional Trade Agreement Section, The Changing Landscapes of RTAs, Geneva, November 2003, p1.

²⁶ Ibid

partners. While the greatest concentration of RTAs is in the Euro Mediterranean region where over 100 RTAs are currently in force, the main focus of RTA activities have shifted away from Europe towards Asia-Pacific, where Asia Pacific Economic Council (APEC) countries, in particular, are engaged in negotiating RISs either between themselves or with other cross-regional partners.²⁷

In Africa this trend is also notable as represented by various regional integration systems (RIS) such as the Common Market for Eastern and Southern Africa (COMESA), Southern African Development Community (SADC) and the Southern African Customs Union (SACU), which aim to establish free trade areas or customs unions. Overall the regional integration process is gaining depth, although progress is uneven and far from certain due to implementation problems which in some instances arose from the overlapping RIS membership.

South Africa has been active at the cross regional level, with the conclusion of a Free Trade Area (FTA) with the European Community (EC), and it is in the context of the new renegotiated SACU agreement exploring possibilities of similar RTAs with other countries.²⁸ Africa-wide integration initiatives remain in place with the African Economic Community, aiming to establish an African Economic and Monetary Union by 2028. African countries that are participating in overlapping RIS are likely to come under increasing pressure to consolidate their membership as a result of the Economic

²⁷ Ibid

²⁸ Supra note 8, p7

Partnership Arrangement (EPA) negotiations between the EC and the ACP countries. One of the major objectives of the EC strategy is to foster regional integration among the ACP countries by establishing EPAs with groupings already engaged in the regional integration process.²⁹ It is however, not clear if the configuration, which has been agreed to by the various groupings, will support the consolidation thesis.

Increasingly, the conclusion of RTAs is connected to countries' broader policy aims, and include political and security considerations as well as economic³⁰. The recent rapid growth of regional trade arrangements began in the 1990's while the seeds of this development were arguably sown in the 1980's.³¹ The seeming bleak progress in the wake of the inconclusive 1982 GATT ministerial meeting has stimulated a movement towards regionalism.³² The European Union was continuing its move towards deeper and broader economic integration.³³ At the same time, the United States was exploring the preferential trade approach thereby signaling a significant shift away from the GATT and the MFN principle, which has always defined its trade relations with other nations.³⁴ The shift in the case of the United States, and the continuation of the deepening of the integration process by the European Union was happening at the time when the COMECON (a preferential arrangement involving the old Soviet Union and European

²⁹ Ibid

³⁰ Ibid, p1

³¹ World Trade Organisation. (2003) World Trade Report. Regional Trade Agreements. P 46

³² Ibid

³³ Ibid

³⁴ ibid

countries) was disintegrating³⁵. Thus, some of the new integration systems did not of necessity represent increased regionalisation of the international trade regime.³⁶

The former Director General of the WTO, Runatto Ruggiero, in his famous Rome speech has stated the following in regards to the logic about the new wave of regionalism in the era of globalization; *“Perhaps part of the answer could be that in some cases these initiatives are less about advancing regional economic efficiency or cooperation ... and more about securing regional preferences, even regional spheres of influence, in a world market by growing competition for markets, for investment and technology. This, in my view is potentially the most worrying feature of the new regionalism we see unfolding around the world today.”*³⁷ Regionalism can be used as a defensive or an offensive instrument depending on the economic standing of those countries, which seek to establish the Regional Integration Systems.

What is striking about the above mentioned observation on regional spheres of influence is the resemblances of the characterization of the current situation to the preceding situation of the 1930’s. Ruggiero, further observed that: *“What makes this competition more worrisome is that at its heart lies the world’s two major economic players—the United States and the European Union. What we see when we look at the pattern of regional expansion in the world today is essentially two focal points with concentric*

³⁵ Ibid

³⁶ Ibid

³⁷ Mathis J.H.(2003) Regional Trade Agreements in the GATT/WTO. The Hague: Asser Press, p 132. Runatto Ruggiero speech has been cited by Mathis in the abovementioned work.

circles of preferential trade arrangements radiating outwards – almost as if they were competing to see who can establish the greatest number of preferential areas the fastest. If it is true that the strength of the multilateral system for fifty years rested on the strength of transatlantic partnership, it is also partly true that the sudden proliferation of regional arrangements reflects a certain inability of the transatlantic community to coordinate its trade interests and vision.”³⁸ To some extent the move towards the regionalisation of economics and politics reflects the bi-polar tension between the European Union and the United States`. This tension is equally important for the multilateral trade system in that the two powers have great influence in the system. This represents one of the complexities that are associated with the system and the multiplicity of interests and policy motivations.

In view of the above observation, the question of how regional trade arrangements affect the multilateral trading system and the motivations behind the new wave of regionalism cannot be understood solely through the prism of the exchange preferential tariff margins amongst the members of regional systems. The relationship is much more complex.

It is clear that issues of strategic vision about what the economic and trade preferential partnerships should entail and with whom these partnerships should be pursued and eventually concluded is contested even by the two most powerful economies in the

³⁸ Ibid

world. The so-called concentric circles, which radiate the rather powerful dynamic towards the preferential trade arrangements, would need to be engaged by the African RIS in a deliberate and strategic manner. This must be pursued on the basis of responsive institutional arrangements.

Defensive and offensive strategies will need to be pursued by the RIS, but for that to become a reality a soft law strategy need to be harnessed in a way that does not strictly frustrate the treaty obligations and rights as assumed by the members of the RIS. Marginalization in the multilateral trade system is not an option for the developing countries, RIS in general and the African RIS members in particular.

The discussion around the evolution of the multilateral trading system must of necessity take account of the complex and sometimes strategic milieu of considerations, which are associated with the increasing regional integration movements. This is in addition to the complex “deep integration” requirements that are associated with regional integration systems generally. Of importance here is the need to appreciate both the intra-regional considerations and the extra-regional considerations. Increasingly complex mechanisms created by Regional Integration Systems (RIS), such as the rules of origin and bilateral relations and the attempt to understand how the RIS can be synthesized with the multilateral trading system³⁹ or as to what tension exists between both tendencies and why needs to be carefully looked at.

³⁹ Supra, note 8, p 1

It is also important to appreciate the fact that the Multilateral Trade System just like the RIS is governed by “a totality of strategically determined, situationally specific, and often episodic conjunctions of the multiplicity of sites through the world. These sites have institutional, normative and processual characteristics. The totality of these sites represents a new global form of legal pluralism”⁴⁰. It is appreciated in the paper that each site has a history, internal dynamics and distinctive features.⁴¹ Thus, it is not surprising that African regional integration systems RIS will respond and crystallize their programmes differently in comparison to the RIS in the developed part of the world.

Even in the context of the World Trade Organization itself, and in particular the discussions about the systemic issues pertaining to the relationship between regional integration systems and the multilateral trading system do highlight the various characteristics, tendencies and the multiplicity of these sites. This is a fact that underpins the working and the institutional arrangements of the multilateral trade system as whole. New rules and norms are produced and reproduced within the system and the very same logic and dimension holds in respect of the Regional Integration Systems.

⁴⁰ Francis Snyder, *Governing Economic Globalization: Global Legal Pluralism and European Union Law*, Stanford University, California, 2 April 1999. p 2 This paper has greatly helped to inform the conceptual approach that has been adopted by this work. The typology contained herein has been adopted for the purpose of this work with the two sites being the MTS and the RIS. The advantage of the typology is that it allows for a multi-disciplinary appreciation of the elements which inform the MTS and the interaction between it and the African RIS or the lack thereof.

⁴¹ *Ibid*, p 1

It is a fact that “the Uruguay Round created a credible, powerful, and extra-ordinarily, far-sighted structure of trade rules and commercial opportunities for the new millennium. It did not and could not complete the job. Like any institution, it must go on adapting even if the principles of the system are as valid and valuable now as they were more than half a century ago when GATT was created”⁴². The legal basis for the regional integration is contested within the WTO institutions as the MTS evolves. This is because all the regional integration systems do not have common legal features, forms and characteristics. There is simply no one size that fits all the member States. The efforts towards harmonization of the regional integration systems in the WTO will be with us for a long time.

⁴² Sutherland P.D. Concluding the Uruguay Round – Creating the New Architecture of Trade for the Global Economy.(2000), Volume 24, Fordham International Law Journal: p 29

CHAPTER THREE

The Multilateral Trading System and the legal basis for Regional Integration System

The key article of GATT/WTO (1994) that establishes the rules and procedures for the examination of regional trade preferential arrangements is Article XXIV, entitled “Territorial Application – Frontier Traffic – Customs Unions and Free Trade Areas”.⁴³

The WTO rules on regional agreements are designed to minimize the policy possibility that non-parties are adversely affected by the creation of regional arrangements and that the arrangements themselves do not become narrow and discriminatory trading entities.⁴⁴

Article XXIV of the GATT/WTO 1994 spells out the guiding principles for the regional trade arrangements, both customs unions, and free trade areas for trade in goods.⁴⁵ Free trade areas are to facilitate trade between parties and not to raise barriers to the trade of other WTO members.⁴⁶

Further, custom duties and other restrictive regulations are to be eliminated with respect to “substantially” all trade between parties to the agreement. The obligations for a free

⁴³ G.P. Sampson and S. Woolcock, *Regionalism, multilateralism and Economic Integration*, Tokyo, United Nations university Press, 2003, p 5 -6.

⁴⁴ *ibid*

⁴⁵ Refer to the Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations. p 26, (2002).

⁴⁶ *Ibid*

trade area and the customs union are basically the same, except that for the latter each member of the union must apply “substantially the same duties and other regulations of commerce”⁴⁷.

As far as developing countries are concerned, the relevant provision emerged from the Tokyo Round and is commonly referred to as the Enabling Clause.⁴⁸ This includes a number of provisions permitting WTO members to grant differential and more favorable treatment to developing countries to enter into regional and global arrangements amongst less developed members of the WTO for mutual reduction or elimination of tariffs.⁴⁹ They are not subject to the “substantially- all the trade” requirement of Article XXIV, but they must “not raise barriers to trade” for WTO members.⁵⁰

The General Agreement on Trade in Services (GATS) includes an Article on Economic Integration (Article V), which establishes rules that broadly parallel those in the GATT 1994 for goods.⁵¹ However, the negotiators saw no need to provide a GATS equivalent to the distinction between customs unions and free trade areas found in Article XXIV; the relevant Article refers only to economic integration for services, rather than customs unions and free trade areas.⁵²

⁴⁷ Ibid

⁴⁸ Mathis J.H, *Regional Trade Agreements in the Gatt/ WTO*. The Hague, Asser Press, 2002, p131

⁴⁹ Ibid

⁵⁰ *ibid*

⁵¹ Ibid

⁵² *ibid*

The case for developing a critical view of regionalism in the WTO should rest upon factors other than the sheer volume of agreements notified to the GATT/WTO during and after the conclusion of the Uruguay Round.⁵³ Rather the focus could be placed on the quality and the legal character of the agreements being entertained and upon the goals sought to be achieved by the proponents in the light of their other rights and obligations in the WTO⁵⁴. This introduces the need to look at the legal framework upon which the regional integration systems rest. It is upon a rules based system that a coherent liberalization programme would become a reality.

In seeking to appreciate the legal character and other dimensions of the regional integration systems, it is also useful to appreciate the interface of rules and institutions in the WTO, which govern regional trade agreements. This will help to highlight the ‘shifting quick sand’ of norm formation and crystallization within the WTO in general and the institutions that bear upon the evolution of rule making in the area of regional integration in particular.

Interaction between regional trade agreements and the multilateral trade rules:

Contradictory tendencies and interpretations

The Singapore Ministerial Conference (1996) called for an end to the ad hoc Working Party Review system of the GATT practice by establishing a standing review committee

⁵³ Ibid

⁵⁴ Ibid, p 136

for regional trade agreements, the so-called Committee on Regional Trade Agreements⁵⁵ (CRTA). The WTO standing Committee on Regional Trade Agreements is assigned to review and qualify the large number of notified agreements and to continue the discussions on systemic issues⁵⁶. The work of this committee is set to represent the mutual interests of regional members to establish more flexible arrangements within autonomous regional regimes; others reflect honest and complex differences of opinion regarding the interpretation of Article XXIV requirements.⁵⁷

There are generally two opposing views of the relation between regional trade agreements and the multilateral trade system. One view has held that Article XXIV only derogates from GATT Article 1, the Most Favoured Nation Principle (MFN). While the other has held that the Article operates as an exception from any and all other provisions of GATT, provided that the regional members do not abridge the rights of third parties to their wider agreement.⁵⁸

The latter view has cited the international law regarding the interpretation of treaties in support.⁵⁹ Thus, from the European Community, “Article XXIV: 4 contained a balance between the legitimacy of forming an RTA and the responsibility as a citizen of the

⁵⁵ Ibid, p 131

⁵⁶ Ibid

⁵⁷ Ibid, p 1

⁵⁸ Mathis J.H. dr. Systemic Issues in the CRTA; Regional Trade Agreements in the GATT/WTO, Asser Press, 2002, p2

⁵⁹ Ibid

GATT to do so in a way which did not raise barriers to third party trade.⁶⁰ In other words, where barriers were lowered legitimately and preferentially between the parties to an agreement, the net position of third parties should not be affected.⁶¹ This was not surprising in light of international law on multilateral treaties, which held that generally, parties to the multilateral agreement could form subsequent agreements between a subset of the membership of the wider agreement, varying their rights and obligations as between themselves, provided they do not abridge the rights of third countries to the wider, underlying agreement⁶². Article XXIV: 4 seemed to do no more than to translate into language of trade policy that wider principle”⁶³

It is made clear from the Turkey Textile Appellate Body Report that the more restrictive view limiting the Article XXIV exception only to Article 1 MFN has not been sustained.⁶⁴ Rather, the proviso of Article XXIV:5 permits the possibility that other GATT Articles might also be violated by regional members when the conditions of the Appellate Body’s test have been met.⁶⁵

However, the EC view that regional members may, “(vary) their rights and obligations as between themselves, provided they did not abridge the rights of third countries”, may

⁶⁰ Ibid

⁶¹ Ibid

⁶² Ibid, p 3

⁶³ Ibid,

⁶⁴ Ibid

⁶⁵ Ibid

also be an overstatement to the extent that such a legal test varies from that formed by the Appellate Body as to non-members.⁶⁶

It is clear from this discussion that the relationship between the regional integration system(s) and the multilateral trading system is still in the process of being clarified within the WTO processes and institutions. It is important however, to note that the WTO Dispute Settlement Body has generated an outline of the features of an interpretive framework for Article XXIV.⁶⁷

While this is significant in respect to the possibility of having the Dispute Settlement Body (DSB) determinations carrying possible legal effects, which might be binding to the Committee on Regional Trade Agreements (CRTA) in the process, the CRTA is a different site, which is politically driven. The fact is that the CRTA operates and exercises its authority in the realm of consensual and political processes while the DSB operates strictly in the legal realm or it is so assumed⁶⁸.

The institutional dichotomy between the DSB and the CRTA in the WTO in regards to the relationship between the MTS and the RIS is not exhaustively clarified. This is notwithstanding the fact that when the DSB was introduced during the Uruguay Round there was a significant degree of excitement around it. John H. Jackson observed that:

⁶⁶ Ibid

⁶⁷ Ibid, p 2

⁶⁸ Ibid

*“the dispute settlement system provides legal text rather than just customary practice to carry out its procedure. These new procedures include measures to avoid blocking which occurred under previous consensus making rules. The agreement also provides for a new appellate procedure, which will substitute for some of the procedures that were vulnerable for blocking”.*⁶⁹

Some have even gone to the extent of questioning the legitimacy of the MFN principle itself, and have associated the principle with the “imperative to defend the market system from the rise of communism”.⁷⁰ It is argued from political economy perspective that the demise of the Soviet model should suggest and set in motion the re-examination of the very legitimacy of the MFN principle.⁷¹ The fact stands that the WTO – MFN principle has not been tested for its capacity to bind the major actors in an economic environment other than that of the Cold War exigency.⁷²

This does not mean that it is not required in the post cold war situation, but the test might be necessary, in order to offer a strong validation for regional integration system(s) and strategies.⁷³ For in the GATT and now the WTO era, the MFN principle has been installed as a point of legal reference for regional endeavours.⁷⁴

⁶⁹ John H. Jackson, *The World Trading System: Law and Policy of Economic Relations*, Cambridge Massachusetts, 1997, p 3

⁷⁰ *Ibid*

⁷¹ James H. Mathis, *Regional Trade Agreements in the GATT/ WTO*, The Hague, Asser Press, p 134

⁷² *Ibid*

⁷³ *Ibid*, p 142

⁷⁴ *Ibid*

For the purpose of this work, it is as such clear that the interactions between legal institution (DSB) and the CRTA, which is at the institutional level political, does manifest different results in the evolution and elaboration of rules governing the regional integration systems in the WTO. Thus, the interaction between the soft-norms (CRTA) creating institutions and hard norms (DSB) creating institutions are worthy of studying and analysis, more so in the context of the relationship between the MTS and RIS and within the RIS themselves. The tendencies, which have been generated by these constellations, are contradictory in some outcomes and mutually supportive in other outcomes. It is in this context that the concept of global legal pluralism is used to help explore and understand these tendencies.

CHAPTER FOUR

Elements of Global Legal Pluralism: A Conceptual Framework

The legal arrangements that are relevant to global economic networks are viewed in one or two ways. They are seen essentially in terms of contracts between nominally equal parties, such as individuals, companies, or states, whose agreement is, consecrated either in bilateral or multilateral form⁷⁵.

Alternatively they are conceived of in hierarchical terms, for example as constituting various regional or international forms of multi level governance.⁷⁶ There is also a new dimension which is espoused by Francis Snyder, and it posits that there is fundamental and growing disjunction between the traditional, normative and hierarchical conceptions of the law governing international trade and the shape of economic networks which are an integral part of economic globalization.⁷⁷ This dimension argues that law and economic relations should not necessarily be expected to be isomorphic.⁷⁸ In fact this statement holds, if one was to look at how multi national corporations project their operations within the global economy. It becomes quite difficult to discern their operations which may cut across a number of countries in the world.

⁷⁵ See Snyder F. Governing Economic Globalisation: Global Legal Pluralism and European Union Law, May 1999,p 10

⁷⁶ Ibid

⁷⁷ Ibid

⁷⁸ Ibid

In order to understand how economic global networks are governed in practice, it is important to appreciate that global economic networks are products of strategic behaviour, and they usually have a particular locus of power and specific hierarchy⁷⁹. Regional integration systems have tended to adapt themselves to new realities and situations and they have recourse to both the hard law and soft law approaches/strategies in order to position them institutionally. This situation generally holds in respect of the RIS interaction on trade and trade related matters.

As part of a family of global economic networks and sites it is important that their strategic behavior be subjected to scrutiny and interrogation. The internal sustainability of regional integration systems is contingent on the axis of interaction between the hard law dimension and the soft law dimension. The quality and magnitude of this interaction may result in a process of self-regeneration and renewal within the Regional Integration Systems.

In the study of this interaction, the realm of the soft law dimension would need to be carefully looked at, in that its reality is not self-revealing. In particular the way in which it generates the values and norms, decisions, resolutions, and recommendations for institutions of regional integration systems and their subsequent interactions with other spheres such the multilateral system and institutions becomes important.

⁷⁹ Ibid

The dramatic growth of economic global networks has to some extent questioned the credibility of lawyers' claims about the hierarchical nature of global economic governance. John H. Jackson observed that "*these puzzles cannot be solved by reference to only one academic discipline, be it economics, or law, or political science. But the only potential for discovering reasonable explanations or solutions for these...requires a pragmatic and empirical analysis of the motivating factors and circumstances of real transactions and government actions.*"⁸⁰ It is in an attempt to appreciate this rather complex reality that the way in which regional integration systems interact internally becomes important and it is in fact worthy of a careful analysis and understanding. This is even more important at the time when globalization has introduced a call for constitutionalization of trade and economic governance at the regional integration system level as well as at the multilateral trade system level.

The debates about the feasibility and desirability of this demand for constitutionalization may be informed by what is obtaining in the process of institutional norm formation that consequently binds member states at the regional integration systems level. This is important. The refined approach to meet the regional liberalization agenda and the attended development objectives ultimately resides in a clear and dynamic understanding of the manifestation of the processes and institutional structures within the regional integration systems.

⁸⁰ John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, Cambridge, Massachusetts, The MIT Press, 1997, p 6

The process, thus, entails the interaction between a hard law strategy and soft law strategy within the RIS. The debate about the need to constitutionalise global and regional governance has to take account of the fact that there may be other sources, manifestations of regional law or development thereof which may question the notion of self contained hard law and which may penetrate and influence the progressive developments in the course of regional consolidation.

While the soft law dimension finds its source in the treaty law in regional integration systems the extent to which the treaty is independent may be questionable. This is because the soft law generating dimension is active and well in the regional integration systems. With at least two levels for these sources in regional integration systems we have a possibility of pluralistic legal orders, which consequently shape the institutional interaction in the Regional Integration Systems on trade matters.

This seems to give a new meaning to the idea of the supremacy of the hard law strategy, it being the only source of all norms and the sole basis for institutional interaction in the regional integration systems. There seems to be a multiplicity of sites within the regional integrations systems, which ultimately condition and in some instances substantively define the landscape and contours of interaction in as far as regional integration institutional systems on trade matters are concerned. The relaxation of the condition that the hard law strategy/dimension be the source of all legal authority has opened up

myriad of new possibilities of pluri-norms settings sites and new forms of institutional interaction within the regional integration systems and between the RIS and the MTS.

In view of the above discussion on the complexities that informs global institutional governance, it is argued that one of the most important concepts and tools that could be used to better understand the global economic and regional economic legal order is global legal pluralism. The essence of this concept resides in the fact that there is a multiplicity of sites where norms and rules are generated, refined and defined. The extent to which this situation sustains the intra and extra institutional interactions is ultimately conditioned by these processual outcomes. It is on the basis of this conceptual awareness that the ability or lack thereof of African regional integration systems to interact with the MTS will be partly explained. The paper will as such adopt this methodology as a tool to understand the interaction between the soft law strategy and the hard law strategy at the institutional level in the context of Regional Integration Systems, RIS in Africa in particular. The dimension of the interaction between regional systems and MTS will be explored.

CHAPTER FIVE

The methodology and rationale for adopting global legal pluralism for the analysis of the relationship between the RIS and the MTS

This paper aims to explore, and within limits appreciate systematically the African regional integrations systems and how they are governed and in this process, how they reproduce themselves by using a “soft-law” and “hard law approaches or strategies” or one at the exclusion of the other. The way in which these approaches are used in the African integration systems, it is argued, did not in the main allow for strategic communication or interface with the multilateral trade system.

It is important to understand these dimensions beyond the traditional trade reforms and their consequent outcomes, which are defined in terms of changes in the levels of tariffs and quantitative restrictions and the shifts in relative prices brought about by these alterations. The actual changes in tariff schedules are typically only a small part of the process.⁸¹

At stake is a deeper transformation of the patterns of behaviour within the public sector, and of the governments’ relationship with the private sector, other stakeholders and the rest of the world. The reform goes beyond particular levels of tariffs and quantitative

⁸¹ B.M. Hoekman and M.M. Kostecki, the Political Economy of the World Trading System, Oxford, Oxford university Press, 2001, p3

restrictions: it sets new rules and expectations regarding how these policy choices are made and implemented, establishes new constraints and opportunities for economic policy more broadly, create a new set of stake holders while disenfranchising the previous ones, and give rise to a new philosophy (alongside a new rhetoric) on what development policy is all about.

Hence, trade reform ends up being much more than a change in relative prices: it results in institutional reform of a major kind. In the language of economics, institutional reform changes not only policy parameters but also behavioural relationships. Correspondingly, the resource allocation and dynamic consequences of trade reform become harder to discern using the type of analysis that is the applied economists' stock in trade. Household behaviour and investment decisions get altered in ways that are difficult to track in the absence of knowledge about "deep parameters" of the economy.

When the reform is well designed and consistent with the institutional needs of the economy, it can spur unexpected levels of entrepreneurial dynamism and economic growth. When it is not, it can result in stagnation that will appear surprising. Viewing trade reform as institutional reform helps clarify the criteria by which trade reform should be evaluated. The yardstick that matters is the degree to which trade reform contributes to the construction of a high quality institutional environment at home. Trade reform can be delivered through national, regional and multilateral systems or agency.

The dimension of Regional Integration Systems and their ability to respond to trade reform requires that rules they construct are supportive of trade reform and that they are generally responsive to new developments in the Multilateral Trade System. As much as the discussions about trade reform and development agenda are usually couched in the language that defines a context in which a domestic institutional pillar invites attention, a regional integration pillar has assumed some added significance in the discourse about trade reform.

Thus, the degree to which the regional integration systems respond to or accommodate the process of rule making that institutionally interacts with the multilateral trade system becomes important. The institutional interface of the soft-law strategy and the hard-law strategy is indispensable to the understanding of how regional integration systems encourage or discourage trade reform in the narrow sense and development in the broader sense. Professor J.H. Jackson has observed that: *“rules have considerable importance to markets that are based on decentralized decision making of private enterprises, which number in millions; for they provide for efficiency, a certain degree of stability, and predictability”*.⁸²

To the extent that Regional Integrations Systems assume subsidiary standing in relationship to the multilateral trade system, and in this context provide for rules and frameworks, which must of necessity, respond to the broader developmental interests of

⁸² John H. Jackson, Perceptions about WTO Trade Institutions, World Trade Review, Vol. 1 No. 1 , 2002, p105.

their member States, and in particular market liberalization, it is important that their processes of norm formation is consistent. It is important that the process of rule/norms making is fully understood and engaged by members to the regional integration systems. For these elements of regional institutions, “are exceedingly important to the durability and success of the social and economic institutions in the world of economic globalization.”⁸³

In fact this is an important aspect that forms part of the new form of global “legal pluralism” which has been referred to above. The paper aims to increase our appreciation and understanding of how regional integration systems are governed, but it does not purport to advance a particular view of law, politics and institutional agenda. The notion of regional integration system is deliberately used in the conceptual framework because it provides for a broader definition which encapsulates the intricacies and complexities that are involved and associated with regional integration systems; be they legal, economic, trade and political.

This will allow for a multi-disciplinary interaction and analysis if necessary or required. Thus, the “sites” in the analysis are limited to the MTS and the RIS. The conceptual framework appreciates that the starting point in the analysis entails strategic actors within regional integration systems. Relations among strategic actors can be envisaged as involving different types of organizations, whether states, regional or international

⁸³ Ibid

organizations. Differently defined, relations can implicate different structures of governance in the context of RIS or MTS.

In this paper, it is posited that African integration systems generally have tended to exhibit a strong inclination towards a ‘soft law’ approach or tendencies and as the adage goes, the systems kept on “pedalling the bicycle just to avoid falling from it.”⁸⁴ As a result these tendencies have introduced a lopsided approach which does not help to sufficiently enhance the relationship between the Multilateral Trading System (MTS) and the African Regional Integration Systems (RIS).

This experience does not allow for the intra-African systems to communicate nor does it allow for the constituent systems to communicate individually with the MTS thereby introducing, it is argued, a dis-articulated relationship which is patched/adjusted as developments unfolds both within the Regional Integration Systems and the Multilateral Trade System. Isaac Takawira has captured the essence of the unfolding developments in respect to the African Regional Integration Systems when he stated the following:

“There are existing institutional tools but all do not agree on how best to use them ... Nepad offers a unique window which Africa’s political and business leaders must grasp because opportunities do not last forever. We need to start doing simple things and

⁸⁴ Robert Staiger, A theory of Gradual Trade Liberalization, University of Wisconsin- Madison, January: Baghwati is credited with the above mentioned adage when referring to the repeated Rounds of Multilateral Trade Liberalization.

*demonstrate quick wings. From these we can put the pieces of the parcel together to form the complete picture”.*⁸⁵

The tension between the soft law dimension and hard law dimension from an institutional standpoint, is not only limited to the African RIS alone. A recent illustration of this is the tension that came about as a result of a decision by the EU finance ministers not to impose a fine on Germany and France for breaking EU budget laws.⁸⁶ In November, EU finance Ministers agreed to accept a political commitment from the countries to bring their budget deficit back into line rather than impose a harsher penalty or force them to make budget cuts.⁸⁷ Liz George of the CNN observed that “Petro Solbes, the European Affairs Commissioner’s push for action could cause another dangerous rift-not only between France and Germany and Europe smaller nations, but also between the member nations and the European Union Institutions.”⁸⁸ It is significant to note the fact that the European Union has a solid and ‘rooted’ institutional foundation that is not comparable with African RIS in terms of history and tradition. While this is the case, some member states deemed it necessary to use the soft law strategy to institute a policy action which was in contradiction with the standing European Union treaty provisions. The issue here is about the deliberate use of a soft law strategy to override a standing hard law position. Thus, the complexities that are

⁸⁵ Africa Summit 2002, Accelerating Regional Integration: Africa’s Regions as building Blocks of the Nepad, World Economic Forum, 2002. This is a statement made during the forums deliberations.

⁸⁶ Liz George, Appeal Could Spark EU Budget row, CNN report, January ,13, 2004. The report is highlighting the tension between the Executive of the European Union, the Commission and the institution that is presided over by the EU Finance Ministers.

⁸⁷ Ibid

⁸⁸ Ibid

associated with the integration process pose a challenge even to the EU Member States and their institutions.

The Caribbean provides an interesting illustration of the potential tensions (the soft law dimension interactions) that may exist amongst regional partners as well as how their resolution (or failure to do so) may affect the capacity of the region to actively participate in the international negotiations.⁸⁹ The Regional Negotiating Machinery (RNM) has been developed as a regional body, following the realization by some Caribbean leaders that such an institution could help the region in addressing the pressing demands resulting from the international negotiations agenda (in particular the Free Trade Agreement of the Americas (FTAA)).⁹⁰

Endorsed by the conference of Heads of Government of CARICOM in 1997, the RNM received strong political backing. This support was vital to ensure an effective role for the RNM in the conduct of the post Lome agreement and the FTAA negotiations, as well as preparations for the WTO negotiations. By agreeing to pool resources together and develop collective expertise, the CARICOM and in fact CARIFORUM countries were expecting to increase their influence and control on the negotiations.⁹¹

⁸⁹ San Bilal, Preparing for the Negotiation of Preferential Trade Agreements with the EU: Preliminary Lessons from Some developing countries, ECDM, 22-23 May 2003, Nairobi, Kenya

⁹⁰ Ibid

⁹¹ Ibid

But the RNM has to some extent also been the victim of its own success. Strong leadership within the RNM reduced the perceived role of some national leaders in the Caribbean, who became increasingly skeptical towards a regional body whose power and influence was becoming too dominant. As a result of a political and strategic disagreement, the RNM was significantly reformed; some of its charismatic leaders left the institution.⁹²

Beyond the internal bickering at the regional level, which is of little relevance outside the Caribbean, the RNM crisis manifests an interesting feature: tension that exists between a regional entity in charge of preparing and conducting negotiations, which requires at least a partial (if only implicit) delegation of authority by the member states, and the natural desire by member governments to fully control the destiny of their economies and hence the trade negotiation process. This is a common principal – agent problem. The principals, in this case the Caribbean states, delegate some of their authorities (tasks) to an agent, the RNM in charge of helping in the preparation, and on some occasions conducting some international trade negotiations. The problem for the principals (i.e. the Caribbean governments) is to retain sufficient control on the agent (i.e. RNM) to ensure a proper implementation of their desired strategy while providing sufficient flexibility and autonomy to the agent to carry out its tasks.⁹³

⁹² Ibid

⁹³ Ibid

In the case of the RNM, at least some Caribbean states felt that the RNM was taking too much autonomy, and thereby following an agenda of its own. The RNM leaders, for their part, felt they were trying to provide the required impulse to the negotiations, while following the directions provided by member states. It is clear that a delicate balance was required.⁹⁴

What is more important for the purpose of this paper is the institutional interface between the member states and the RNM and the soft law strategy/approach that was deployed by the member states to reform the negotiating machinery. It is this intricate interface that is often used by the RIS to re-articulate their approaches and strategies. In any other comparable situations recourse could be had through the standing regional court systems to delineate and define the powers or the operational parameters of the Member states on the one hand and the Regional negotiating machinery on the other.

Thus, the institutional interaction at the soft law level is a significant aspect that needs to be looked at in the context of Regional Integration Systems in general and the African RIS in particular. If the issue is carefully and systematically addressed, it may provide answers to questions of consistency in approach or lack thereof, coherence in respect to the treaty objectives, implementation of regional programmes and activities, and institutional interaction in RIS.

⁹⁴ Ibid

In assessing this experience the construction of the institutional setup as contained in the constitutive instruments (hard law) as well as specific trade instruments (regional court systems-case law) that raise issues in regards to their lack of coherent approaches to the MTS will be looked at.

The paper further argues that part of the rationale why this is the case, resides in the fact that the objectives that the Treaties seek to service are specific to regional integration systems which in turn raise issues in regard to the need for coherent approaches on the part of Regional Integration Systems. In the case of African RIS, it is important for their own internal considerations in that they are defined to be the building pillars of the envisioned African Economic Community by 2028 and that harmonization will be required at that point in time. Thus, the form and the process in terms of how ‘blocks’ evolve seem to be greatly neglected in the analysis of the RIS systems in Africa. If this is not the case the agent do not seem to greatly reflect a coherent and a sustainable degree of awareness.

This paper will not address the merits and de-merits of the theory of gradual trade liberalization; which argues that the initial trade liberalization is a necessary condition for maintaining the momentum⁹⁵. It is only limited to the assessment of the RIS and gives due attention to the significance and the interface of soft law and hard law in as far

⁹⁵ Robert Staiger, A Theory of Gradual Trade Liberalization, University of Wisconsin- Madison, January 1994.

as they help to redefine the Regional Integration System(s) and their consequent interaction with the Multilateral Trade System.

At the RIS level the soft law dimension in principle is assumed not to have a binding force while it may have practical legal effects. The soft law dimension in RIS and their influential tendencies can be appreciated if it is juxtaposed against *lex-mecatoria*: the contract or treaties which are generally understood to be the central devices but also primary sources of law and means of self legitimation in the context of the RIS. The evaluation takes account of the fact that state actors do define, develop, enter and ratify these instruments at the Regional Integration System level. While this is the case, the institutional set up in the context of the RIS as represented by various political councils and principal technical experts (officials) do help to generate soft law on behalf of their sovereign authorities which in some cases supercede/override the standing treaty position(s).

Thus, while deploying the conceptual tool of global legal pluralism which by its very nature extends further and has broad application beyond the purposes of the current work, it must be noted that the conceptual tools will be limited to the analysis, evaluation, assessment, of the dimensions; soft-law and its interaction with hard law in the Regional Integration Systems and implications in respect of the RIS interaction with the MTS.

The paper will not debate “ Where concrete norms are produced” but will look at the distortionary effects/dis-articulations or manifestation of the institutional soft law dimension on the one hand, and the hard law dimension on the other hand on the Regional Integration Systems. The idea ultimately is to appreciate the efficacy of these institutional approaches and constellations in the RIS. The understanding of the institutional bases as a result of the interface between the soft law and hard law dimensions will partly explain the ability or inability of the RIS to relate to the MTS. Three RIS case studies in Africa; COMESA, SADC, and SACU will be looked. Thereafter some observations and conclusions will be finally made.

CHAPTER SIX

The Nexus between African Continental Integration and the Regional Integration Systems: Constricting or Confusing requirements?

The obligations, which have been assumed by member states of the African Regional Integration Systems such as SADC as a result of the proclamation of the African Economic Community, demonstrate a different degree of awareness in the application of both the soft law and hard law strategies between these systems. There are specific requirements that are stipulated and contained in the Constitutive Act of the African Union which are rigorous.

This in turn has implications for Regional Integration Systems in Africa in general and their consequent ability or inability to fully interact with the Multilateral Trade System. The frameworks within which the respective objectives are spelled out indicate different emphases and approaches. This calls for and necessitates a careful thinking about the form, the magnitude of the issues and the systemic interaction between the Continental system and the African Integration Systems generally.

In the case of the SADC Member States, they have undertaken specific commitments and have set themselves specific objectives as laid out in Article 5 of the SADC Treaty⁹⁶. These objectives are: the

- a) achievement of development and economic growth, alleviate poverty, enhance the standard and quality of life of the people of Southern Africa and support of the socially disadvantaged through regional integration;
- b) evolve the common political values, systems and institutions;
- c) promote and defend peace and security;
- d) promote self sustaining development on the basis of collective self reliance, and the interdependence of Member States;
- e) achieve complementarity between national and regional strategies and programmes;
- f) promote and maximize productive employment and utilization of the resources of the region;
- g) achieve sustainable utilization of natural resources and effective protection of the environment and
- h) strengthen and consolidate the longstanding historical, social and cultural affinities and links among the people of the region.⁹⁷

⁹⁶ See the Consolidated Text of The Treaty of the Southern Development Community as Amended , p5

⁹⁷ Ibid.

These objectives will only be attained through institutions and structures that SADC has put in place. The institutional structures are put in place to merely service the specific aims, objectives and aspirations of the SADC member states. The specificity of this situation is contained in the language of the Treaty such as in paragraph (a) which speaks of the “quality of life of the people of Southern Africa”, and paragraph (d) which lay emphasis on the “complementarity between “national and regional strategies and programmes.” At no point in the Treaty objectives is there a clear statement, which stresses the need for the relationship, in an expressed and eloquent manner between the SADC integration programmes and the African Continental integration programmes. This clearly demonstrates that the relationship on trade integration matters between SADC and the African Union still needs to be worked on by the two respective integration systems. This silence is a clear indication of the disjointed nature of the relationship between the African RIS and the Continental integration processes and system.

The SADC Trade Protocol represents an important pillar in as far as trade and economic integration is concerned. The process in this context is underpinned by a gradual approach to trade liberalization.⁹⁸ The final outcome of the SADC trade protocol is expected to conform to the provisions and requirements of Article 24 of the World Trade Organization. The aforementioned outcome is fully taken account of in the preambular

⁹⁸ See the SADC Trade Protocol, P1

statement to the Protocol, which is “mindful of the results of the Uruguay Round of Multilateral Trade Negotiations on global trade liberalization”.⁹⁹

While this process is unfolding within the SADC, the African Economic Community has been constituted through the adoption of the so called Constitutive Act of the African Union of July 2000.¹⁰⁰ The Act has stipulated its objectives in Article 3; and amongst these objectives Para (c) calls for the acceleration of the political and socio-economic integration of the continent; Para (i) provides that the necessary conditions which enable the continent to play its rightful role in the global economy and international negotiations should be created, and Para (l) stipulates that the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union must be coordinated and harmonized.¹⁰¹

The Continental integration imperatives as encapsulated in the Constitutive Act have set a stage, or indeed have defined a landscape for Regional Integration Systems in Africa. This reality will require that the Regional Integration Systems engage the processes at the multilateral, continental and regional levels in a balanced and objective manner. In order to achieve the above stated aims and objectives of the AU, the method by which Regional Integration Systems engage their internal processes institutionally will need to be deliberately studied and actively pursued. It is on the basis of clarity of issues and all

⁹⁹ Ibid

¹⁰⁰ Refer to The Constitutive Act of the African Union

¹⁰¹ Refer to the Constitutive Act of the African Union.

their dimensions that the Continental integration programmes and the African Regional Integration programmes can be eventually harmonized and be made to communicate to one another.

The timeframe to the Continental integration must be shortened as provided for in the Preamble which states that: member states are “convinced of the need to accelerate the process of implementing the Treaty establishing the African Economic Community in order to promote the socio –economic development of Africa and to face more effectively the challenges posed by globalization.”¹⁰² To the extent that the African Economic Community must address the challenges that are introduced by globalization, the systemic and institutional interaction between the AEC (African Economic Community) and the African Regional Integration Systems becomes even more critical.

However, the question that needs to be asked is whether or not the time frames that have been put in place by the Continental integration machinery are realistic and can fairly link to the African Regional Integration Systems time frames? COMESA for instance, has set specific timelines and targets for its regional trade liberalization programmes in responding to its specific circumstances and requirements. How does this connect with the envisioned Continental timeframes?

¹⁰² Ibid.

In this context, the regional integration objectives that need to be addressed through the (RIS) Regional Integration Systems will have to compete in certain instances with the continental objectives for resources and attention. Dani Rodrik has observed that: *“institutional change is costly and requires the expenditure of scarce human resources, administrative capabilities, and political capital. The priorities implied by global insertion will not always coincide with the priorities of a more fully developmental agenda.”*¹⁰³ SADC and other African Regional Integration Systems must drive their own regional integration programmes while at the same time establish the link to the Continental programmes. This is an enormous challenge for the Regional Integration Systems generally.

The implications as a result of the obligations, which have been introduced by the African Economic Community for their member states who are at the same time members of the Regional Integration Systems, could be profound, in particular, in the realm of trade and economic integration. These implications are not only limited to the liberalization and globalization agendas but includes the management of the liberalization and globalization processes as well as capacities and capabilities required to address the broad range of issues that liberalization and globalization processes bring about.

¹⁰³ Bernard Hoekman, (ed) (2001) Development, Trade and the WTO, Washington .D.C, The World Bank, p 9

The provisions of Article 5 of the Draft Protocol on the Relations between the African Union and regional economic communities¹⁰⁴ have stringent requirements for the RIS: it states that: *“the regional economic communities shall take steps to review their treaties and where necessary establish a definitive connection to the Union and in particular provide*

- (a) in their treaties as their final objective the establishment of the Community;*
- (b) legal links to this Protocol, the Protocol of the African Union, the Treaty and the treaties of the African economic communities;*
- (c) for alignment of their sectoral programming to the sectoral programme of the African Union, and*
- (d) the eventual absorption at stage 5 set out in Para (2)(f) of Article 6 of the Treaty, of the regional economic communities into the African Common Market as a prelude to the Community.”*

The above-mentioned stipulations and requirements remain to be seen if they will be realistically and faithfully implemented by member states. If one was to go by the past record of implementation of programmes and decisions at the Continental level and the timeframes thereto, the requirements have not met the test of time. They always had to be revised and readjusted.

¹⁰⁴ Refer to the Draft Protocol on Relations between the AU and RIS.

African Regional Integration Systems will have to do a careful and clear analysis about how they intend to respond to the politically driven agenda of Continental integration processes while at the same time keep in step with their members' obligations in the context of the Multilateral Trade System which might have other objectives and focus. This "mix" or "approach" has to come together in a way that does not take away from the specificities, objectives and programmes for which the Regional Integration Systems are founded. Political aspirations and ideals in the context of Continental integration forms part of a milieu of other complex important factors, and as such the African Regional Integration Systems should carefully think through the strategic engagement of this dimension. Thus, the 'over- projection' of the political dimension is not always a solution to a consolidated regional trade integration process. At the extreme, it might have distortionary effects on the Regional Integration Systems.

The specific integration issues that the Regional Integration Systems in Africa need to deal with range from classical trade liberalization objectives to broader socio-economic developmental objectives which go beyond trade liberalization agenda and all its associated aspects as seen in the multilateral trade context. This of necessity may require that the 'political drivers' at the Continental level take aboard the myriad of issues and factors, which help to shape the outcomes at the regional integration levels. Simply put, politics alone should not be allowed to distort the institutional decision making processes at both the Continental and regional integration levels.

The reality of having declared an African Economic Community at the Continental level through a politically driven institutional process is important from an institutional perspective. But, it also introduces tensions in the context of the Regional Integration Systems (RIS) in that the objectives that need to be serviced and attended to are different in the Regional Integration Systems and amongst the Regional Integration Systems themselves. Sometimes the ‘political drivers’ tend to substitute the reality of economic and trade integration agenda with political platitudes and non-implementable programmes. Regional integration does not always rest well with lofty political aspirations.

The logic of integration in the SADC, COMESA and other systems is informed by different context and imperatives from the continental ones, although similar considerations and vision might have informed all these processes. The argument is not whether or not institutional politics in its “raw or pure” form is good or bad, but is more about the degree and the policy direction that tend to be manifested in Regional Integration Systems through the use of a political dimension.

The objectives of regional integration systems are informed by a set of specific factors and realities as obtaining in regional context while the Continental objectives and interests are broad and general in outlook and orientation. This basic orientation characterizes the institutional approaches in both the continental and regional integration

frame works. In fact, the distinct identities of the RIS systems and their specificities are products of their own situations.

It is for instance clear that the integration in the COMESA region is underpinned by a market liberalization approach/model while the SADC has a development cooperation approach/model with a gradual shift to market liberalization model to it. Kasende observed that: *“the current Comesa economic integration programme places weight on trade liberalization through the removal of tariffs and non tariff barriers as well as the elimination of administrative and institutional barriers to trade flows and transit traffic facilitation.”*¹⁰⁵

The histories of both of these Regional Integration Systems have to a large extent been conditioned by their basic approaches to integration generally. This is important to note because, while the broader agenda entails regional integration issues, the institutional processes that attend to the programmes and activities in the various regional integration contexts, are conditioned by different circumstances and orientation. It is for this reason that the soft law dimension that generated the Continental objectives may be seen to have minimally distorted the regional integration objectives and focus. It may be that a three level harmonization or entailing the RIS systems, Continental system and the Multilateral system might be required.

¹⁰⁵ See Kasende Louis and others, Trade Reforms and Integration in Africa, Regional Trade Agreements: The Comesa Experience. Mauritius, p 7

Benno Engels has distinguished two factors which affect the motivation and background to regional cooperation: a) the traditional rationale that is guided by economic theory of regionally restricted trade and cooperation promotion and b) impetus from the current international environment.¹⁰⁶ This typology seem to hold in respect of the evolution of Continental integration which has pronounced politically driven agenda and Regional Integration Systems which have in some areas both economic/trade driven agenda in addition to a 'muted' political dimension. This is important to note in that the Continental integration in Africa has been energized and given impetus by developments in the international arena. While the trade and economic integration in the context of Regional Integration Systems has been informed by factors that are endogenous to their own situations and realities.

The paradigm shift has become discernible in the 1990's, particularly after the outcome of the Uruguay Round of negotiations. It is at this point that the dynamic of globalization has been introduced into the working and the operations of regional integration systems. The member states that belong to the regional integration systems have assumed obligations which necessitated and called for trade policy adjustments both at the national and at the regional levels. Thus the wave of globalization is being felt in African Regional Integration Systems generally.

¹⁰⁶ See Meyns P. From Coordination to Integration: Institutional Aspects of the Development of the SADC, 1997, In *The Regionalisation of the World Economy and Consequences for Southern Africa*, Edited by H. Dieter, p 163, Metropolis – Verlag , Marburg.

In this context, the politics of multilateral trade might have greatly contributed towards the speeding up of the Continental integration movement in Africa, while at the same time economic considerations have catalyzed and to some extent have spurred the movement towards regional integration in Africa. The stress here is more on the need to appreciate the ‘drivers’ of regional integration movement at the Continental as well as at the sub–Continental levels.

Further, it would appear that a practical problem with the Constitutive Act which does not explicitly state that the Regional Integration Systems constitute the building blocs of the African Union introduced “constructive ambiguity” in view of the different treaty obligations which have been assumed by its Member States elsewhere. While, this lack of specific linkage is glaring and notable, the view that is contained in Article 33(2) of the Constitutive Act of the African Union¹⁰⁷ overrides all other obligations, which have been assumed elsewhere.

It states that: “the provisions of this Act shall take precedence over and supersede any inconsistent or contrary provisions of the Treaty establishing the African Economic Community”. This stated Treaty position could introduce different outcomes in as far as the member states’ obligations in their own contexts and other multilateral arrangements are concerned. Has the normative political dimension taken full account of the total reality of the member states’ obligations elsewhere?

¹⁰⁷ Refer to the Constitutive Act of the AU

Member states of the WTO who are at the same time members of the African Union may be constricted in carrying out their obligations in respect of Article II (1) of the World Trade organization which states that: *“the WTO shall provide the common institutional frame work for the conduct of trade relations amongst its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.”*¹⁰⁸ What will happen to the said member states if their obligations in the WTO are overridden by the Treaty position of the African Union?

It would seem that a tension and a contradiction in respect of this situation could arise in as far as trade institutional governance is concerned. Institutional harmonization in this context may pose a challenge to the African Union members. Again at issue here is not the source of the legal position but the manner in which a soft law is generated for the African RIS.

The fundamental tension as illustrated above, does not take away the need for Regional Integration Systems and agreements, but it only calls for harmonized institutional procedures and interface. To the extent that a member state has assumed specific obligations in a particular forum it should not be oblivious to the very same obligations in a different forum. Strategic institutional imperatives, interests and objectives call for a deliberate degree of awareness, which ultimately would help to sustain a balanced

¹⁰⁸ See The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations, p4

process of institutional interaction between Regional Integration Systems and the Multilateral Trade System.

Generally, Regional Integration Systems are said to be good news when they bring regions closer together, create new profitable trading opportunities and allow for inclusive market opening.¹⁰⁹ They are also deemed to be bad news when they discriminate unduly against third parties and frustrate the attainment of multilateral objectives, which are built on a non-discrimination principle.¹¹⁰ Governments have not generally challenged the primary unifying role of the Multilateral Trading System, which is at the core of trade relations among nations.¹¹¹ Given this unity of purpose governments need to do more to ensure that coherence and compatibility of regional trade arrangements with the Multilateral Trade System is maintained.¹¹² This implies a strong commitment to advancing the multilateral trade agenda as well as ensuring that regional agreements are designed to support and not to compete with the WTO system.¹¹³

The good intentions, commitment, and purposive statements by governments have not subsumed and neither have they taken away the tensions between Regional Integration Systems and the Multilateral Trade System. Garry P. Sampson and S. Woolcock capture

¹⁰⁹ The World Trade Organisation. (2003). World Trade Report, p II

¹¹⁰ Ibid

¹¹¹ Ibid

¹¹² Ibid

these tensions fully when he states: that: *“In the space of one decade, the world has witnessed both the successful conclusion of the most ambitious round of multilateral trade negotiations in the history of humankind and the launching of another. At the same time the world has seen a proliferation of regional trading arrangements unprecedented at any period in history. To say the least, these parallel developments appear to be paradoxical: on the one hand non-discrimination is the pillar of the Multilateral Trading System; on the other all but 2 of the 140 plus members of the WTO (World Trade Organization) are parties to at least one - and some as many as 26 preferential trade arrangements. By definition the corner stone of these regional trading arrangements is preferential treatment for some members of the Multilateral Trading System, and discrimination for others. Given this apparent anomaly, it is not surprising that the question has been posed of whether regional trading arrangements hinder or contribute to the good functioning of the Multilateral Trading System.”*¹¹⁴. The paradoxical existence of the Regional Integration Systems and Multilateral Trade Systems is here to stay, however, what is critical is the degree to which their institutional dimensions are fully understood and appreciated.

In addition, it is important to appreciate the fact that the locus of political space has by and large remained in the domain of nation states. This obviously and consequently, had a tremendous influence on the institutional interface within the Regional Integration Systems and between them and the Multilateral Trade System. Other important issues,

¹¹⁴ Sampson G.P. and S.Woolcock. (2003). *Regionalism, Multilateralism, and Economic Integration*. Tokyo: United Nations University Press. p. 3

which are usually mentioned to justify the active political dimension in Regional Integration Systems are those of peace and security.

To the extent that issues of peace and security affect the crystallization and consolidation of Regional Integration Systems, it is important that they are taken aboard politically. But, this awareness may not be accentuated in a way that will subsume the core business of regional integration, which is trade and economic integration.

The sense here is that the political considerations, which to a large extent have underpinned and defined the African continental integration may have taken away from African regional integration agenda and focus. This means that a guarded and focused approach, which takes economic and trade considerations into account must be adopted at the Continental level. For it is on the basis of economic integration that ultimately political integration can be sustained. This is notwithstanding the fact that ‘good politics’ may help sustain ‘good economics’ in these systems generally, but a balanced approach is necessary and is ultimately called for.

The political dimension allows for the enabling environment through which trade can take place, but this dimension should not substitute for the logic, which informs trade and economic integration. It is important to take the political dimension aboard in any analysis that is meant to evaluate the manner in which integration institutions and systems interact with the multilateral trade system; because the political factors

sometimes may generate decisions which may distort or may legitimately sustain the said interaction. But politics as mentioned above is not always the logical substitute for good economics and the disciplining arm of law.

Ultimately and in the final analysis, it is the nation states which exercise political decision making in the context of regional integration systems these decisions have a bearing on Regional Integration Systems' ability to rearticulate their realities/situations in a manner that sustains a logical interaction with the multilateral trade system.

It is thus important for the national political actors to be made aware of the intricate nature of the institutional decision making processes which consequently interlink with the Regional Integration and Multilateral Trade System's policy space. The political actors who provide agency to these processes must maintain consistency of approach in all these forums.

The fact that the world economic policy space has partly been integrated while the political policy space has remained in the domain of nation states has legal and institutional ramifications for Regional Integration Systems in general and the Multilateral Trade System in particular. This reality has raised fundamental issues in respect of the economic and institutional governance at national, regional and

multilateral levels ¹¹⁵ Thus, where economic decision making has been ceded to the Regional Integration Systems level, the political actors which make decisions at the national level, must at all times be seen to support and sustain the regional and in some situation the Multilateral Trade System decisions and legal positions. This awareness between the two spheres is central to the smooth functioning of the Regional Integration Systems and the Multilateral Trade System. The symbiotic relationship may always be harnessed and encouraged.

Further, the fact that the political space is in the domain of the national political actors, political considerations thereof may condition the legal and economic institutional views and outcomes in Regional Integration Systems in ways that would ensure that the rights and obligations that would accrue may be in conflict or may be in support of rights and obligations of the same members elsewhere, in particular in the multilateral trade setting. The political decision mechanisms may not be necessarily averse to the developments in the Regional Integration Systems, but the process within which they generate decisions may not be value free.

Perhaps, the fact that the African Union has taken a constricting view in as far as its Treaty position on regional integration systems is concerned, may be a reflection or an expression of a particular view of institutional politics and economics. It is however,

¹¹⁵ Miguel R. Mendoza et.al, Trade Rules in the Making, Challenges in Regional and Multilateral Negotiations, Organization of American States, Brooking Institution Press, Washington D.C 1999, p23

important to note that the instrumentalization and the actualization of these institutional views are delivered through the institutional soft law and hard law strategies.

In addition, it may as well be that the African Union subscribes to a developmentalist approach to integration rather than a classical market liberalization approach to trade liberalization. This view can be sustained by its broad focus on development as compared to market liberalization in particular. If this assumption holds, it may be argued that the AU supports an approach which allows for the general socio-economic development to inform the agenda and the process of trade liberalization overall.

If this view holds then the awareness and approach by the AU is not new. Rugie's concept of the so-called embedded liberalism has addressed the various considerations in as far as trade liberalization is concerned¹¹⁶. The essence of the concept was to devise a form of multilateralism that is compatible with the requirement of domestic stability and this concept seems to be particularly relevant in this instance¹¹⁷.

In the case of the process of Continental integration the requirements of 'Continental stability' may dictate a different approach. At the heart of this approach/concept lies the need for a compromise. The need for a compromise in the construction of rules, which govern and address the 'twin pillars' of trade liberalization and developmental concerns,

¹¹⁶Gerrit Faber (ed) Trade Policy and Development, The Hague, Rotterdam University Press, 1990, p91.. Kees Hellingman refer to Ruggie's discuss on embedded liberalism in his contribution on: "The international legal order for trade."

¹¹⁷ ibid

is important. This may mean that rules may not be constructed in a way that does not ultimately allow for a sustainable and a coherent process, flexibility, compromise, and a balanced outcome in rule making between the Continental and Regional Integration Systems.

Thus, a process of a deliberate political institutional interface at the level of national, regional, Continental and Multilateral Trade Systems must be initiated by the member states. This will help to foster mutually reinforcing tendencies and outcomes at all levels. This is obviously not easy, but it is nevertheless important for the members of Regional Integration Systems. It is also an important condition and requirement for the member states to logically engage the globalizing world economy and all its related processes.

The process of removal of barriers to free trade and closer integration of national economies will need to be carefully managed, more so in the context of regional integration systems to which developing countries belong. This may obviate a situation whereby a conflict of obligations could arise. Regional Integration Systems must ultimately be used as instruments upon which developing countries can engage the multilateral system in a coherent, strategic and a systematic manner.

Institutional interactions and governance is important for Continental, Regional Integration Systems and the Multilateral Trade System in particular and the international economic institutions in general. The fact that the members of WTO system have agreed

to “*strive for greater global coherence of policies in the field of trade, money and finance, including cooperation between the WTO, the IMF, and the World Bank for that purpose*”¹¹⁸ reflects a great degree of awareness about the need to maintain coherence.

It is through these interactions that the economic and trade policy coordination and coherence can be maintained at all levels. The above-mentioned arguments “imply that Regional Integration Systems will have to be designed and pursued in outward orientated manner, consistent with the achievement of genuine multilateral trade liberalization”.¹¹⁹ For, it is only if this consistency is maintained, that the overall process of globalization becomes meaningful for the Least Developing Countries and Developing Countries in general.

Joseph Stiglitz has observed that: “*the way globalization has been managed, including the international trade agreements that have played such a large role in removing those barriers and the policies that have been imposed on developing countries in the process of globalization, need to be radically rethought.*”¹²⁰ This rethinking should extend to the mechanism within which the rights and obligations arise in the context of the negotiations and the institutional interactions between regional and multilateral systems.

¹¹⁸ Refer to paragraph three to the WTO Declaration as contained in the Legal Texts: The Results of the Uruguay Round of the Multilateral Trade Negotiations.

¹¹⁹ Kasekende, Louis and others, Trade Reforms and integration in Africa: Regional Trade Agreements: The Comesa Experience, Mauritius, p 5

¹²⁰ Joseph Stiglitz, Globalization and its Discontents, W.W Norton & Company, New York, 2002, p xi

It serves no one if the rules and norms that are generated are retarding economic progress in the Regional Integration Systems or in the Multilateral Trade System itself. To put it differently, it will not be in the best interests of the Regional and Multilateral Trade Systems if the rules and norms that are elaborated in the context of these processes do not to reinforce a meaningful interaction between the two systems.

The development objectives that African regional systems seek to service extend beyond the broad but yet important objectives of trade liberalization in the Multilateral Trade System. Professor Erasmus captures the essence of this situation in the context of the new SACU agreement when he states that: "... SACU is a regional organization which serves the needs of its Member States, and on the other hand it is part of **the bigger picture** and the global trading system where the rules of the WTO and other trade agreements apply."¹²¹

The fact that the area of focus for the Regional Integration Systems may be narrow and specific compared to the general broad objectives as defined in the Multilateral Trade System may invite institutional responses, which are specific to each setting. But the institutional responses must at the end of the day be balanced against the broad range of policy objectives, which must be serviced and implemented by Member States.

¹²¹ Erasmus, G. The Legal Aspects of the New SACU Agreement. Seminar with the Liaison Technical Committees of SACU, September 2002, p 2

The attempts to implement the broad range of policy objectives, sometimes result in a lack of an appropriate institutional interaction between regional and multilateral systems. It is because of this lack of interaction at the institutional level that the dimension of institutional interaction between the Multilateral Trade System and the Regional Integration systems becomes important for analysis and interrogation. It is at the level of this interface that the institutional quality, character, and magnitude of the Regional Integration Systems can be appreciated through an appropriate use and a “mix” of soft law and hard strategies.

The interests of the Regional Integration Systems (RIS) members from developing countries will only be taken seriously at the level Multilateral Trade System, and will only be sustained at the same level, if appropriate and solid regional institutional mechanisms are in place. An appropriate institutional mechanism defines an institutional set up through which a sustained interaction of the hard law strategy and the soft law strategy have a clear interface and by extension reflect a policy awareness and a space which sustains an appropriate balance of policy outcomes. It is only if this balance is kept in mind that the regional objectives and programmes will be serviced.

In order to appreciate the quality of the mentioned interaction between the Multilateral Trade System (MTS) and Regional Integration Systems in as far as the rule making is concerned; it is important to look at the structure and the institutional character of the RIS and their processes of self-regeneration. In doing this, the hard law strategies and

the soft law strategies of institutional governance in Regional Integration Systems need to be looked at closely.

It is at this level that the quality of the regional integration systems is shaped and re-shaped institutionally. In fact, this dimension may reveal a lot in as far as the crystallization and a consolidation of the Regional Integration Systems is concerned. The awareness about how Regional Integration Systems reproduce themselves institutionally and how they as a consequence address their trade and development economic challenges is imperative. It is in fact at this level that a firm basis is laid which helps to anchor the relationship between the MTS and the RIS.

In some instances active or passive interaction between the soft law and hard law dimensions is conditioned by the extent to which the RIS generally respond to the construction of rules and disciplines in the Multilateral Trade System. Members in the regional integration systems may assume contradictory obligations or may assume different political institutional views depending on the extent to which they engage the Multilateral Trade System and its institutions. It may be safely assumed that the lesser the regional integration members participate in the construction and the evolution of the trade rules and system at the multilateral level, the lesser they will appreciate in some situations the contradictory tendencies that may emerge within RIS and between RIS and the MTS.

The institutional agencies that member states use in these interactions and interfaces have varied degrees of policy awareness as well. In the context of the African Union, for instance, Ministries responsible for foreign affairs were the leading agencies in the negotiations that lead to the foundation of African Economic Community, while the negotiations in the Regional Integration Systems (RIS) were lead by the Ministries responsible for trade and economic affairs. This situation has produced biases in favour of the orientation of one agency or the other and different results were produced and harnessed. This is not usually a reflection of a policy vacuum at the national level, but more about what happens when institutions at the African Continental level manifest trade and economic decisions and results collectively.

As indicated above, the African Union trade agenda is politically driven because of the fact that the political ministries were driving the processes while in the context of the Regional Integration Systems and the Multilateral Trade System the ministries responsible for trade and economic affairs were mainly driving these processes. This aspect is important to note, because it has a bearing on the interaction between the hard law dimension and the soft law dimension in the Regional Integration Systems and these regional systems' consequent ability to communicate with the Continental and the Multilateral Trade Systems.

The reality is that the evolution of rules and disciplines in both realms are constructed to manage trade liberalization and through it to foster economic development for and

within the RIS. Thus, trade liberalization processes in both RIS and MTS must sufficiently generate mutually reinforcing tendencies at the institutional levels so as to ensure that members who belong to the RIS and MTS do not assume different obligations that may reinforce and in some instances introduce tensions and disarticulations of envisioned development objectives in the RIS systems.

In this process of interaction, the distinctive nature, and characteristics of RIS must be taken account of in the elaboration and construction of rules at the MTS level. It is also important for the RIS to engage and adapt themselves to the progressive developments in the MTS. These of necessity require a flexible institutional mechanism within the RIS. The architecture and the constellation of the institutional mechanism is a critical aspect, which may help define the quality, the nature and the depth of the interaction between the MTS and the RIS as earlier mentioned.

The flexibility and the space that is allowed for by a “soft law creating institutional mechanism” in regional integration systems sometimes provide for quick adaptation of the RIS or conversely retard meaningful interaction between the RIS and the MTS. The “soft law creating mechanism” assumes the subsidiary but albeit an important role that is played by the supportive institutions, such the council of ministers, committees of senior officials and the summits of Heads of State and Governments. While the treaty instruments and the objectives that are encapsulated therein define the hard law strategy.

These two pillars anchor the institutional self-regenerations in Regional Integration Systems.

It is for this reason that the institutional structures and dimensions of the African RIS must be carefully appreciated, interrogated and studied.

This approach will help to highlight the efficacy with which the African RIS manage trade relations and programmes given their different institutional frame works and in particular their relationship with the MTS.

In addition, this is important if the developmental interests of the RIS members are to be sustained and defended when they are potentially eroded by the rules in the MTS. The flexibility provided for in the RIS institutional set-up, if fully and better understood, will ensure that the MTS and RIS are mutually reinforcing and thereby mitigate against the potential disarticulation of the RIS development objectives and interests.

This is notwithstanding, the fact that institutional structures in the Regional Integration Systems may be put in place to respond to different needs and requirements as defined by member states. Member states may for example, emphasize political objectives in the Regional Integration Systems rather than economic and trade objectives in which case the institutional dimension would be influenced by these political considerations.

This paper will not question the legitimacy of a particular institutional form of one RIS or another but will only help to highlight some aspects of the quality and the magnitude of the institutional interactions between the MTS and the RIS. Three Regional Integration Systems will be looked at as case studies. These systems are the SADC, COMESA, and the SACU.

CHAPTER SEVEN

The Southern African Development Community: The Institutional Analysis and Dimension on Trade

The Southern African Development Community (SADC) traces its origins to the Southern African Coordination Conference (SADCC). The SADCC has been established against the backdrop of destabilization by the South African Apartheid regime of the region.¹²²

Its foundation was firmly rooted in a political response by the independent African neighbours of South Africa.¹²³ With the demise of South Africa SADCC had to be rearticulated in order for it to respond and accommodate a new political and economic order.¹²⁴ The re-articulation has introduced a significant dimension of trade and economic regional integration: which meant that the deepening of trade and economic relations was deemed to be important by the member states.¹²⁵

The founding of the Southern African Development Community (SADC) at the SADCC Summit in Windhoek, Namibia in 1992 was of decisive importance for the development

¹²² Mandaza, I. et al. (1994) Southern Africa in Search of a Common Future. Printing and Publishing House of Botswana, Gaborone: Botswana, p1. Also see Dieter, H. et al. (1997) The Regionalisation of the World Economy and Consequences for Southern Africa. Metropolis – Verlag, Marburg, p 165

¹²³ Refer to Dieter, H. et al. (1997) The Regionalisation of the World Economy and Consequences for Southern Africa, Metropolis – Verlag, Marburg, p 165.

¹²⁴ Ibid

¹²⁵ Ibid

of regional cooperation in Southern Africa, and at the same time the first towards the institutional reorganization of SADCC.¹²⁶ The focus of this reorganization introduced a move away from regional coordination of development projects to programmes of regional integration.¹²⁷

There was therefore, a shift from functional cooperation, which defines; regional projects identification upon which funding was sought on a sectoral basis and which was ultimately driven by the respective member states.¹²⁸ One of the co-founders of the SADCC, the former president of Tanzania, Julius Nyerere, described the conference's institutional peculiarities as follows: *SADCC is ... unusual in Africa because of its structure. It does not consist of Headquarters and Secretariat, which initiates and organizes everything, with member countries trying to direct and keep budgetary control through periodic Ministerial and Summit meetings. Instead all members are actively concerned in the initiation and implementation of all SADCC projects, with each having the responsibility for coordinating and promoting a particular sector. This structure enabled the Secretariat to remain small and effective, while monitoring and coordinating the work of the coordinators. Even more important, this structure enhances the active involvement of all Member States in both the work and the benefits of cooperation.*¹²⁹

¹²⁶ Ibid, and refer to the SADC Declaration, 17 August 1998, Printing and Publishing Company Botswana, p i

¹²⁷ Ibid

¹²⁸ Dieter, p.167

¹²⁹ See Dieter. p. 166

The observation by President Nyerere points to the loose form of cooperation, which was endemic in the SADCC. The individual member states administered the sectoral programmes of cooperation; and they funded these programmes on their own responsibility.

The peculiar institutional arrangements of the SADCC serves to affirm the point that institutional soft law creating dimension in SADCC was weak because of the structure that was in place then. The institutional norm creation generally was weakened by the fact that institutional decentralization did not in particular allow for active interaction of the soft law creating institutions. This has meant that a sectoral focal point could adopt a decision without due regard to the decisions elsewhere in the SADCC.

A corollary aspect that was missing within SADCC has been the court system. In the absence of such an institution it would seem very difficult for a matter that could arise in the process of regional integration to be addressed effectively and urgently. This is important, because the court system allows for a balanced institutional approach, more so in a situation where member states would take positions that would be deemed to be frustrating the objectives of the Treaty. The court system or an equivalent mechanism disciplines hard law and soft law dimensions/strategies, outcomes, and policy positions which member states may adopt and eventually implement and which the treaty

provisions may not directly sustain. Thus, norm generation and regeneration is disciplined by a functional court system in Regional Integration Systems.

On the basis of the aforementioned situation, it can be argued that the efficiency and efficacy with which the SADCC institutions were to interact with other regional trade systems such as the PTA and the multilateral trade system (MTS) was compromised as a result of its structure and institutional architecture. The deepening of regional cooperation, more so in the realm of trade was a necessary condition for active soft law creating institutional interaction within the SADCC. This to some degree has informed the shift from the SADCC to the SADC. This situation would eventually allow governments and other stakeholders to cultivate strategic positions on the basis of a much more solid institutional and systematic approach within the regional systems.

The freedom of South Africa in 1994, in addition to the conclusion of the Uruguay Round of Multilateral trade negotiations gave impetus to the deepening of regional integration in SADCC and as a result the SADCC treaty had to be re-articulated and transformed in order for it to respond to the new political and economic realities in the region. This transformation has taken account of the fact that South Africa had to be engaged by the countries in the region on a fundamentally new and positive basis.

The regional strategic imperatives and requirements dictated that the SADCC had to take account of the developments within the region as well as to make strategic

reorientation of trade policies and practices by SADCC member states in order for it to offer a logical–strategic frame work within which international trade issues and developments can be engaged and sufficiently addressed.

The reorganization of SADCC regional institutions had to be created at the center so as for these institutions to service the objectives and programmes of the new Treaty. There was as such, a partial shift of rights from member states to these new and envisioned regional institutions.

The Windhoek Declaration has aptly captured the institutional shift when it states that: *“Successful regional integration will depend on the extent to which there exist national and regional institutions with adequate competence and capacity to stimulate and manage efficiently and effectively the complex process of regional integration. Integration will require mechanisms capable of achieving the high level of political commitment necessary to shape the scope and the scale of the process integration”*.¹³⁰

*This implies strengthening the powers and capacity of regional decision making, coordinating and executing bodies.*¹³¹ *Integration does imply that some decisions which were previously taken by individual states, are taken regionally, and those decisions taken nationally give due considerations to regional positions and circumstances.*¹³²

¹³⁰ See the SADC Declaration and Treaty, Printing and Publishing Company of Botswana, 1998, p. 9

¹³¹ Ibid

¹³² Ibid

*Regional decision-making also implies elements of change in the locus and context of exercising sovereignty”.*¹³³

The Standing Committee of Officials, the Integrated Committee of Ministers, the Council of Ministers, Committee of Sectoral Ministers such as the Committee of Ministers of Trade, the Organ on politics, Defense and Security Co-operation and the Summit of Heads of State or Government, just to mention but some institutions, represented the new institutional pillars of SADC as provided for in Article 9 of the SADC Treaty.¹³⁴ In as far as the institutional mechanisms that are entrusted with responsibility to implement and manage the Trade Protocol in SADC are concerned, they are the Committee of Senior Officials, the Trade Negotiating Forum, and the Committee of Ministers responsible for trade.¹³⁵

These institutions have become very important in that they directly contribute to the generation of soft law within the SADC. They generate the SADC soft law dimension through decisions, recommendations and resolutions they adopt on trade matters within SADC. While these institutions represent a marked improvement from the SADCC, the new situation has raised fundamental issues as well. The functional relationship between the Committee of Senior Officials (CMT) and the Trade Negotiating Forum (TNF) is

¹³³ Ibid

¹³⁴ See the SADC Declaration and Treaty, p.8

¹³⁵ See SADC Protocol on Trade, p 17

spelled out in Article 31 of the Trade Protocol¹³⁶. The Committee of Senior Officials supervises the TNF.

This institutional arrangement is a curious one in that the sitting members of the TNF are usually the same senior officials who transform themselves into the CMT. How does this situation foster an institutional constellation, which ultimately allows for binding decisions that are consistent with objectives and the spirit of the Declaration? The fact is that this situation does not render itself to the sustenance and enhancement of checks and balances in respect of institutional decision-making in the system.

Specifically, the Declaration calls for a regional arrangement within which the “capacity, the coordination and execution of regional decisions” are made on the basis of efficiency and efficacy.¹³⁷ The Declaration would seem to provide for a logical process that would foster a meaningful soft law creation within the SADC. This is an aspect that needs to be addressed in a manner that would sustain inter–institutional interaction on trade matters in the SADC. The subsidiarity principle in the TNF and the CMT, and the need to recourse to the Committee of Senior Officials by the TNF is institutionally weakened in this regard.

¹³⁶ Ibid

¹³⁷ See Declaration, p. 8

An attendant aspect, which is equally important, is the one which relates to the settlement of disputes in Article 32 of the Trade Protocol¹³⁸. The onus in respect of the settlement of disputes resides with member states. There is however a lack of a clear institutional linkage between this process and the institutional arrangements as elaborated and contained in Article 31 of the Protocol.¹³⁹

It is important to establish this connection, in that this process does to some extent help to generate a significant degree of soft law on trade and trade related matters. The achievement of “the common economic, political, social values and systems”¹⁴⁰ as contained in the Windhoek Declaration may become a reality if these ‘loose ends’ are sufficiently brought together.

This connection will further enhance and uphold the SADC objectives as provided for in Article 5(b) which calls for the need to promote common political values, systems and other shared values which are transmitted through institutions which are democratic, legitimate and effective, and (d) which also calls for promotion self-sustaining development on the basis of collective self reliance, and the interdependence of Member States.¹⁴¹

¹³⁸ See Trade protocol, p.19

¹³⁹ See the P. 17-18

¹⁴⁰ Refer to the Declaration, p. 9

¹⁴¹ See the Treaty, p. 5

The settlement of disputes in respect of trade introduced an important dimension to the SADC trade institutions, but it has not gone far enough, in that it does not generate a body of case law. The situation may improve with the new addition of the Tribunal. However, the emphasis here is more on the need to have an effective norm creating or generating institutions within SADC on trade and trade related matters.

In the event that a member has taken a decision which is not supported by other SADC members, but in a situation where the concerned member is insistent and claims that this decision is taken on the basis that it “gives due consideration to regional positions and circumstances”¹⁴² as allowed for in the Declaration, then which institution would afford this particular member the interpretation about what constitutes a legally substantive norm and consistency in this respect? How would a logical balance prevail in respect of the generation of soft law and a hard law strategy, which will ultimately sustain the objectives of the SADC Treaty?

A case in point is the recent decision adopted by the Committee of Ministers of Trade (CMT), which was endorsed by the Council of Ministers on regional configuration on trade negotiations between SADC and the European Union.¹⁴³ This decision has revealed a serious weakness in the manner in which SADC institutions and processes

¹⁴² See the Declaration

¹⁴³ The Launch of the Economic Partnerships Arrangement negotiations was done in Windhoek, Namibia in July 2004. At this launch the SADC eight countries agreed to go into this negotiation as SADC.

generate decisions on important matters, which may undermine or negatively impact on the institution.

The group of so-called eight countries (Namibia, South Africa, Botswana, Swaziland, Lesotho, Angola, Mozambique and Tanzania) has decided to enter into trade negotiations and will possibly conclude these trade negotiations as the SADC, while the remaining group of five countries (Malawi, Zimbabwe, Zambia, Mauritius and the Democratic Republic of the Congo) adopted a decision, which is contrary to the one taken by the so-called group of eight. Some of the members of the group of five have decided to configure as ESA (Eastern and Southern Arrangement) while some member states have to declare themselves on the configuration they would associate with. This process is significant in as far the institutional governance and the generation of soft law in SADC is concerned, because the issues that are raised have far reaching implications for the SADC as a treaty based institution.

On the one hand, obligations would flow from these undertakings that would be entered into by the so-called group of eight and these obligations relate to the two parties, namely, the SADC and the EU. This essentially means that the group of eight would be assuming rights and obligations for the SADC Treaty as an entity while the EU would do the same for her member States. The Draft SADC–EC Joint Road Map is revealing in this regard for it states as one of its negotiating principles that: *“the SADC-EC EPA will be based on regional integration initiatives of the SADC countries. The negotiations*

*will therefore be designed and sequenced so as to complement and support the regional integration process and programmes, the harmonization of regional rules and the consolidation of the SADC regional market.*¹⁴⁴

On the other hand, as the so called group of five would still be members to the same Treaty which is SADC, this would seem anomalous from the institutional stand point. How would the same Treaty assume and give rise to rights and obligations in respect of its entire membership without some of its members being party to the process that would accrue these very same rights and obligations? This situation is legally anomalous and should as a matter of institutional logic, be addressed. A different legal situation would have obtained if the SADC members have entered into a legal arrangement to which some of the membership would have sought derogation on some of the provisions of an agreement between the EU and SADC.

It is expected that the outcome of the so-called SADC-EU economic partnership arrangements (EPA's) will have to conform to requirements of Article 24 of WTO on regional integration arrangements.¹⁴⁵ In fact the SADC-EC Road Map states as one its principles that: *“the SADC–EC EPA shall be compatible with the WTO rules and*

¹⁴⁴ Refer to the Draft SADC- EC Road Map which was adopted on 8 July 2004, Windhoek, Namibia, p 2

¹⁴⁵ The WTO has made it clear that the preference regime would only be in place until the negotiations and results are finalised. The results once finalised will be compatible with Article 24. This is indeed the principle which has been agreed to between the two parties.

*principles then prevailing taking into account the evolutionary nature of the relevant WTO rules, in particular in the context of the Doha Development Agenda.”*¹⁴⁶

A lack of a common position and vision in the SADC on the EPA arrangements will greatly contribute to a situation whereby some of its members will have to carry obligations at the exclusion of the others. This, obviously, will take away from the need to have a comprehensive and a consistent approach on the multilateral trade system in the SADC. The ability of SADC to have a consistent approach on the multilateral trade system will be greatly compromised in this situation.

It would seem that a lack of common position in this matter does not enhance regional integration in SADC. The SADC–EC EPA under its principle on legitimacy calls for the need *“to establish its legitimacy in all the parties to the agreement through its contribution to sustainable development. It is therefore essential that the negotiation process be paralleled by concerted efforts, **within SADC and EU Member States**, to generate the involvement of all relevant stakeholders in the negotiation process, and public support for the negotiations and their outcome”*¹⁴⁷. To what extent this legitimacy principle would relate to the SADC as an institution comprehensively becomes even more confusing.

¹⁴⁶ See the SADC – EC Road Map, Windhoek, Namibia, 8 July 2004, p 2

¹⁴⁷ Ibid

The reality is that the SADC institutional basis on trade matters is the Trade Protocol. If it is weakened by a lack of institutional cohesion, approach, and decision-making then the platform to engage the multilateral trade system is also weakened. Perhaps, it is important that the members of SADC be more on the side of cautious approach on these matters than it is currently the case.

The different tariff regimes that would come about as a result of this EPA negotiation will not be sustained in a regional context in which SADC members have opted for different frameworks for the negotiations. The assumption of different obligations in the context of the EPA negotiations will present a trade policy challenge to the SADC member States. A lack of institutional cohesion in this regard would serve to strategically weaken the SADC in the process of the negotiations with the EU, because the “negotiations capital” of the SADC member states will be greatly diminished and dissipated. One can only imagine the difficulties, which the SADC members will have to deal with in respect of tariff reduction and eventual elimination commitments within SADC. The harmonization of the external trade regime and the internal regulatory systems within SADC member States would pose a major challenge to the region. SADC member States would have to deal with the issue of different external trade regimes obtaining as result of the outcome of the EPA negotiations.

This situation has propelled the SADC into an institutional-legal identity crisis and a crisis which by and large has been generated through a soft law creating mechanism

called the Committee of Ministers of Trade. It goes without saying that this situation will result in a distorted regional integration programmes and outcomes for the SADC member countries. “Deeper economic cooperation and integration on the basis of equity and mutual benefit” as called for in the Declaration seemed to have been compromised in this situation.¹⁴⁸

There are those who argue that the decision by the so-called group of eight countries has sustained an SADC legal position while the contrary decision by the so-called group of five countries has weakened it. What is instructive and of profound interest, in respect of this obtaining situation, is the way and the manner in which, binding decisions are generated through the soft law creating mechanism within the (CMT) SADC.

The fact the CMT has agreed to create a side mechanism by way of the so-called SADC trade unit¹⁴⁹ at the Secretariat points to a dysfunctional overall SADC trade institutional mechanism. This trend could set a dangerous precedence for other countries within the SADC to follow. The SADC trade unit is not a standing SADC institution such the Directorate for Trade and Investment. The creation of the SADC trade unit speaks volumes about the dysfunctional institutional arrangement, which has been generated by the decision of the SADC-CMT.

¹⁴⁸ See the Declaration, p. 4

¹⁴⁹ This is an arrangement that has been put in place to backstop the EPA negotiations.

The position that is stipulated and contained in Article 29 of the Trade Protocol states that: *“Member States shall, to their best endeavour, coordinate their trade policies and negotiating positions in respect of relations with third countries or group of third countries and international organizations as provided for in Article 24 of the Treaty, to facilitate and accelerate the achievement of this Protocol¹⁵⁰”*

Again, the decision by the Council and the contrary decision by the so-called group of five countries have substantially weakened this standing legal position as provided for in the Protocol.

The institutional divide in respect of the Council decision on the SADC–EU economic partnership negotiations may compromise SADC’s ability to put into place an effective trade framework. This decision by Council, which is a soft law creating institution, may have trickle down effects which will greatly slacken the implementation of the SADC trade protocol. This may have compromised the processes that would lead to the eventual finalization of the Protocol.

The fundamental point here which is linked to the discussion above, is that from a fair and a balanced institutional sense, it is important for the SADC to put in place a functional court system that would attend to the process of norm creation in general and

¹⁵⁰ See the Trade Protocol, p. 17

that would allow for the generation of a balanced approach in as far as soft law strategies and outcomes in particular is concerned.

The tendency worldwide has always been pointing to the need to avoid costly and lengthy adjudication processes, which are usually brought about by courts and dispute settlement mechanisms in general. This view is fair and acceptable, but regional institutional consolidation would always require commensurate supportive institutional structures in place. One would have expected the above laid out scenario in SADC to have been legally clarified by a competent legal authority before any final decision by the SADC member states.

Article 16 of the SADC Treaty (1) stipulates that: *“the Tribunal shall be constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it,”* while sub article (4) provide that *the Tribunal shall give advisory opinions on such matters as the Summit or the Council may refer to it.*¹⁵¹ The weaving together of hard law strategies and soft law strategies is important in regional integrations systems and SADC is not an exception. It would be expected of the Tribunal in this situation to pronounce itself on the CMT decision if the Tribunal was fully functional and operational. The current situation is that the Tribunal is not operational although that it forms an integral part of the Treaty.

¹⁵¹ See the Treaty, p 14

Another case in point, to demonstrate the importance of a functional soft law creating mechanism in SADC, is the decision on membership contributions by the Council of Ministers. The last Council meeting in Luanda, Angola in August 2003 has avoided the suspension of Angola, DRC and the Seychelles from attending the SADC meetings consistent with the requirements of the Treaty. The decision was taken on the basis of political solidarity and in view of the political situation which is obtaining in these countries. The provisions of Article 33(3) allow Council to sustain the sanctions as defined therein.¹⁵² In all seriousness why should member states enjoy the rights and access to SADC institutions without assuming obligations that come with this access?

The wisdom and the decision of Council on this matter may be sustained on the basis of other factors and considerations such as political solidarity and regional stability. It is also, equally important for the Council as a soft law creating institution to balance its institutional decision making against the standing Treaty position.

The institutional divide in respect of the Council decision on the SADC–EU economic partnership negotiations may compromise SADC’s ability to put into place an effective trade framework. This decision by Council, which is a soft law creating institution, may have greatly slackened the implementation of the SADC trade protocol and it may have compromised the process that would lead to its eventual finalization.

¹⁵² See the Treaty , p. 21

Another dimension, which should be looked at within SADC, is the way in which different sectors generate decisions through the various Protocols systems. A good illustration in this regard, is the negotiations on trade in services, which the TNF has started to work on. This is an important step in the right direction in as far as services liberalization in SADC is concerned.

But, since services trade cut across many sectors and in areas like tourism and environment there is an existence of standing protocols within SADC, it would seem logical that a harmonized institutional approach should be adopted within SADC so as to ensure policy coherence by the various sectors. The challenge remains and members States must start to ponder about these issues seriously and begin to move away from the situation of sectoral rivalries and competition on policy matters and direction to a situation of policy stability.

In the long run a lack of a balanced approach by the soft law creating institutions will disproportionately deny the benefits that could be enjoyed by and accrue to those member states which are in step with the Treaty requirements and obligations in particular and SADC generally. In SADC a positive awareness of the soft law creating mechanisms and their ability to interact effectively would invite an outcome that may be balanced and beneficial in the long run.

This awareness must incorporate a hard law-creating dimension for mutually sustainable institutional benefits and outcomes. In this context, the central and important role that should be played by the Secretariat and its institutions will need to be refined and enhanced. The right mix and balance would be achieved only on the basis of a creative approach, thinking and deliberate institutional leadership within the SADC.

CHAPTER EIGHT

The Southern African Customs Union: The Institutional analysis and Dimension on Trade:

The Southern African Custom Union was founded on 29 June 1910 in Potchefstroom with South Africa, Basutholand (now Lesotho), Swaziland, and Bechuanaland (now Botswana) as the founding members.¹⁵³ The agreement was in force until the British Protectorates received independence in the mid-1960s. The agreement was then renegotiated in 1969 and a new agreement was put into place.¹⁵⁴ At independence in 1990, Namibia joined the agreement as a de facto member because Namibia was treated by South Africa as a member of SACU.¹⁵⁵

At the dawn of a new dispensation in South Africa in 1994, and with the new challenges, which were introduced by the Uruguay Round of negotiations and results, member States of SACU decided in 1994 to renegotiate a new reconstituted and democratized agreement.¹⁵⁶ These negotiations lead to the finalization of a new agreement in October 2002. The agreement has now entered into force in July 2004.

¹⁵³ Kirk, R. et al. The new Southern African Customs Union, Africa Region Working Papers Series no. 57, June 2004, p.2

¹⁵⁴ Ibid

¹⁵⁵ Ibid

¹⁵⁶ The finalisation of the UR refocused attention on the SACU agreement by the Member States. The new dispensation in Southern Africa catalysed the process.

The (1969) SACU agreement was essentially administered on behalf of all its members States by the Republic of South Africa.¹⁵⁷ Thus, there was an absence of a joint decision making process. It provided for South Africa to determine the external tariff policy of the customs union on a unilateral basis without due input by other members: all changes to customs tariffs, rebates, anti-dumping and countervailing duties were effected by the South African Minister of Trade upon the recommendation of the South African Board of Tariffs and Trade.¹⁵⁸ The South African Minister of Finance determined excise policy.¹⁵⁹ The Customs Union Commission administered SACU as an institution on a part time basis and there were no effective procedures to ensure compliance or to resolve disputes¹⁶⁰. This type of a situation did not render itself suitable to an active interaction between the soft law and hard law creating mechanism within SACU. These realities underlined and gave impetus to the emergence of a new regional integration landscape for the SACU countries.

With the advent of the new SACU agreement, a concrete basis had been laid for an effective institutional norm generation and institutional arrangement, which is transparent and democratic in its decision-making. This would hopefully allow for a working and a responsive institutional framework. There is clearly a move away from a “mono-management” of the institutional set up to a collective institutional constellation

¹⁵⁷ Kirk, R. et al *The new Southern African Customs Union* , p. 2

¹⁵⁸ *Ibid*, p. 5

¹⁵⁹ *Ibid*

¹⁶⁰ *Ibid*, p. 6

and management within which other member states in addition to South Africa will have to be active and positively involved in the running of the institution.

The new agreement has defined in Article 2 the following objectives amongst others:

- a) to facilitate the cross-border movement of goods between the territories of the Member States,
- b) to create effective, transparent and democratic institutions which will ensure equitable trade benefits to Member States; and
- c) to promote the integration of Member States into the global economy through enhanced trade and investment; and facilitate development of common policies and strategies¹⁶¹.

The enumerated objectives allow for a process through which collective and democratic decision-making becomes a reality by this newly created institution. This will allow for an active generation of a soft law dimension, more so in view of the establishment of the SACU institutions. Article 7 of the new agreement has defined the establishment of the SACU institutions as the following:

- a) Council of Ministers;
- b) Customs Union Commission;

¹⁶¹ See the Southern African Customs Union Agreement, Ministry of Trade Industry, Windhoek , Namibia, December 2003, p.5

- c) Secretariat;
- d) Tariff Board;
- e) Technical Liaison Committees and
- f) Ad hoc Tribunal.¹⁶²

In terms of the authority and decision making of the SACU, the Council as provided for in Article 8(1) shall be the supreme decision making body.¹⁶³ It shall be responsible for the overall policy direction and function of SACU institutions, including the formulation of policy mandates, procedures and guidelines for SACU institutions. The Commission, made up of senior officials, and an independent Tribunal to arbitrate on any disputes, shall assist the Council. All decisions by SACU institutions shall be made on the basis of a consensus.¹⁶⁴

This agreement is obviously an improvement as compared with the 1969 agreement. It allows for a joint decision making process in all aspects of the customs union and creates a number of new genuinely independent institutions. The institutional structure of the new agreement has not been fully tested and its operational reality and its ability to generate a significant degree of soft law dimension still remains. The interface between the soft law dimension and the hard law dimension in the SACU still remains to be tested.

¹⁶² See the SACU agreement, p 10

¹⁶³ Ibid

¹⁶⁴ Ibid

This situation notwithstanding, it is not clear why the SACU Member States in the fold of the SADC agreed to enter into negotiations with the European Union given the legal position as contained in Article 31 of the SACU agreement¹⁶⁵. The Article 31(2) calls and mandate members to establish a common negotiating mechanism for the purpose of undertaking negotiations with third parties.¹⁶⁶ It also prohibits members to negotiate and enter into new preferential trade agreements without the consent of other members.¹⁶⁷

The decision by SACU Member States was not in congruence with the standing legal position as per the SACU Treaty. This anomaly may be explained on the basis of the fact the SACU as an institution, is not yet sufficiently consolidated. It is, however, important that the SACU avoid these types of legal situations in the future.

In its consolidation as an institution, SACU should look for a new model of representation in its institutional structures. That is, a move away from the ministries responsible for finance as the lead ministries on SACU affairs might be necessary, given the fact that SACU is in main a trade agreement and not a revenue agreement. This old model has been inherited, because of the revenue implications as a result of the old agreement. The fact is that there is a new situation in place and change should be unavoidable.

¹⁶⁵ Ibid, p.27

¹⁶⁶ Ibid

¹⁶⁷ Ibid

The change is necessary in order to obviate a situation through which a significant degree of a soft law dimension could be generated by the ministries responsible for finance as a result of the old model, which may not consciously link to the operations of the MTS and other RIS. It is important, that the SACU authority deals with the issue of leading ministries in SACU as a matter of policy and urgency. This is even more necessary, because the responsibility for the MTS and other RIS resides with the trade ministries generally in SACU governments and the SACU region. This will allow for a policy space, which will help foster the required consistency and coherence in respect of the development of an active soft law dimension within SACU.

In addition, the fact that SADC and COMESA hope to finalize their respective processes, which will eventually culminate into their respective customs unions, should encourage the SACU member States to ponder over the ramifications of the envisioned customs unions for her Member States. This is important, because all SACU countries are Member States of the SADC. It is a fact that a country cannot belong to two customs unions at the same time. Thus, an appropriate policy response by SACU members will ensure institutional consistency and approach. This situation may compel the SACU to look at its hard law strategies in this respect. Its treaty may need to be revised to accommodate or to allow it to anticipate these developments.

The SACU member States should also, at this initial stage, move to consolidate this arrangement more so in the context of the negotiations that SACU has undertaken with the United States, Mercosur and the willingness that has been expressed by member States to initiate negotiations with India, Nigeria and China. The consolidation will afford the SACU arrangement the opportunity to fully coordinate their strategies and policies and thereby generate a balanced degree of a soft law dimension. This is important, because, too often the South African government seem to initiate and propose the overall programme for the negotiations. This situation might be untenable and may deny the SACU as law based institution the possibility to openly debate the efficacy of entering into negotiations with third parties. This may not augur well for an institutional process, which will have to be balanced in terms of its decision-making.

The argument by some that South Africa has different economic and trade requirements does not take away the need for an effective decision making process. Indeed, the small and vulnerable economies within the arrangement should have legitimate expectations to see to it that a decision that would affect them should be taken fairly and transparently. This approach will be in consonance with the objectives of SACU as laid out in Article 2 of the Treaty.¹⁶⁸

As a Custom Union, SACU will have to move deeper and wider into other trade and trade related issues which are being driven and undertaken in the multilateral trade

¹⁶⁸ See the SACU agreement , p.7

context. These issues range from intellectual property rights to service trade, to mention two. It is important for SACU to keep in step with the multilateral system in general and with the range of issues that are being addressed at this level. SACU should consciously and deliberately develop new disciplines and harmonize policies as called for in the SACU agreement¹⁶⁹, if it is to remain in step with the developments in the multilateral trade system generally. In as far as the intra-SACU harmonization is concerned, the creation of new disciplines in areas such as competition policy, industrial development policy, and agricultural policy is necessary for the new custom union agreement as well. It is through these common policies that a dynamic customs union will become a reality.

¹⁶⁹ See the SACU agreement, p.7

CHAPTER NINE

The Common Market for Eastern and Southern Africa (COMESA): the Institutional analysis and dimension on Trade

COMESA as it is commonly known is a successor market integration arrangement after the then Preferential Trade Arrangement for eastern and southern African states.¹⁷⁰ The PTA was founded on 21 December 1981 in Lusaka, Zambia. The Treaty entered into force on 30 September 1982.¹⁷¹ The United Nations Economic Commission for Africa (UNECA) and the Organization of African Unity (OAU) were supportive and instrumental in its foundation.¹⁷²

In the preferential arrangement the trade liberalization programme followed an approach through which member states had to adopt a Common lists of group of products for liberalization. Member states had to express import or export interests on the selected commodities as identified in the Common Lists.¹⁷³

In January 1993 the PTA authority abolished the Common lists approach and agreed to a wholesale liberalization programme on a preferential basis as long as the trade products

¹⁷⁰ Victor Murinde ,(2001) The Free Trade Area of the Common Market for Eastern and Southern Africa, Sydney, Ashgate, p 13 -14

¹⁷¹ Ibid

¹⁷² Ibid, p 31

¹⁷³ Ibid, p 14

met the PTA rules of origin.¹⁷⁴ Subsequent to this programme and with the transformation of the PTA into COMESA the basic approach entailed a market integration programme, which called for the reduction and the eventual elimination of the tariff and non-tariff barriers to intra regional trade.¹⁷⁵ As a result of this process of trade liberalization, Member States eventually declared the COMESA Free Trade Area in October 2000.¹⁷⁶ This FTA process will be followed by the Customs Union in 2004.¹⁷⁷

Eight major organs underpin the COMESA institutional framework.¹⁷⁸ These organs are provided for under Article 7(1) of the COMESA Treaty and are: The Authority, the Council of Ministers, Court of Justice, the Committee of Governors of Central Banks; The Intergovernmental Committee, The Technical Committees; the Secretariat and the Consultative Committees.¹⁷⁹ The Authority is made up of Heads of State and Government and it is the Supreme Policy organ of the Common Market.¹⁸⁰ It is also responsible for the general policy direction and it controls the performance of the executive functions of the Common Market and the achievement of its aims and objectives as laid out in Article 8.¹⁸¹

¹⁷⁴ Ibid

¹⁷⁵ Ibid

¹⁷⁶ Ibid

¹⁷⁷ Ibid

¹⁷⁸ Ibid, p 41, Also see also the Comesa Treaty, p 21

¹⁷⁹ Refer to the Comesa Treaty, p 21

¹⁸⁰ Ibid, p22

¹⁸¹ Ibid, p 23

Generally, the soft law and hard law dimensions in COMESA are fully developed and they operate in a balance. At the core of the COMESA institutional interaction resides a Court of Justice as defined in Article 19 of the Treaty.¹⁸² The Court operates independently and there is no intrusion by the other Organs of COMESA. Article 8(3) has spelled out the binding nature of the decisions and directives of the Authority and the Court is exempted and not bound by the Authority's decisions.¹⁸³ The Court thus functions independently and without interference by the Member States. The decisions of the Court are binding and final on the parties.

It is provided for in Article 26 of the Treaty, for the Court to pronounce on matters between State parties and other private parties. Natural and legal persons may refer matters to be heard by the Court. This development is significant in that the so-called "agencies of restraint" are accessible to non-state parties. The process of regional consolidation permeates through to other structures in member States. This dimension will help foster an open climate through which other structures than State Parties can help in the generation and progressive development of regional soft law.¹⁸⁴

The injunction on November, 21, 2002 by the COMESA Court to temporarily halt an order by the Kenya's Court of Appeal against the standard Chartered Financial Services,

¹⁸² Ibid, p 33

¹⁸³ Ibid, p33

¹⁸⁴ Refer to Kasende, Louis and others, *Regional Trade Arrangements: The Comesa Experience*, Mauritius, p 1. The concept of agencies of restraint entails the need to put in place regional institutions which will help to consolidate the process of regional integration.

to pay the amount of 251 million Shillings until a dispute is determined is an interesting example that demonstrate the Court system's ability to help generate and consolidate the norms in the COMESA regional integration system.¹⁸⁵ It is also interesting to note, that the COMESA Court take precedence over decisions of the national courts.¹⁸⁶ The Court system and its development have no equal in as far as the regional integration systems in Africa are concerned.

In as far the operation of Council is concerned, it is the second highest Organ of COMESA.¹⁸⁷ Its ability to consistently generate the soft law in COMESA has been generally within the framework of COMESA Treaty.

There are however, questions raised in regard to the seeming rubber-stamping of decisions that would be generated by the subsidiary organs such the Sectoral ministerial meetings that are convened under the auspices of the Secretary General's Office.¹⁸⁸ A question may be raised, if it is proper for the Secretary General to be driving the process of decision making through this "side device" which feeds its decisions and recommendations into the Council of Ministers decision making process without matters being opened or revisited at this level? The so-called "side device" is important in that it may be argued that it helps to facilitate the process of decision making and thereby

¹⁸⁵ See the Daily Nation, 21 Nov. 2002, Nairobi, Kenya, p19

¹⁸⁶ Refer to the Comesa Treaty, Article 31 p 38

¹⁸⁷ Victor Murinde (ed) (2001) The Free Trade Area of the Common Market for Eastern and Southern Africa, Sydney, p 42

¹⁸⁸ Ibid.

quicken the resolution of matters. The question is not about expediency and the ability to expedite the process, but it is more on the implications of decisions that are so generated and the balance that they invite in as far as the overall institutional processes are concerned.

It may be argued that the influence of the Secretary General's Office is overly extended in as far as soft law generation is concerned. The perennial issue of the extension of the derogation for Swaziland and Namibia not to implement the COMESA tariff regime has usually been extended through "this side" mechanism. It has worked well for Namibia and Swaziland, but can it equally be argued that it has also worked well for the rest of the membership? In short, what are the implications of this mechanism for the generation of decisions in the organization and for the organization? Is it proper that a few sectoral ministers, such as trade ministers in this instance should bind the entire membership through this mechanism?

The same mechanism was also used to grant Egypt and Libya observer status in COMESA which eventually resulted in Egypt being admitted as a member even though it did not belong to the eastern and southern African region. The fact is that this decision has distorted the landscape of regional integration systems in Africa in that COMESA has shifted to the terrain of a general continental integration system like the African Union.

These few pointers clearly show that COMESA is not without challenges in as far as sustaining a healthy balance between the soft law dimension and the hard law dimension or in as far as disciplining the soft law dimension goes. There are obviously areas which need the deliberate attention of member States in order to ensure consistency and coherency in decision-making in the institution.

In addition, the launch of the Eastern and Southern Africa (ESA) Economic Partnership Agreement Negotiations on 7 February 2004, with the clear and unequivocal backing of the COMESA regional system has profound implications for the COMESA member States and its regional integration programmes¹⁸⁹. As in the SADC, it is not clear why the COMESA member States would prefer assuming obligations in this respect outside their own regional trade regime and system.

The so-called ESA is an amorphous arrangement, which does not have a solid legal basis to it. This essentially would mean that each Member State would have to potentially assume rights and obligations in respect of the results of the EPA negotiations.

This does not seem to be a regional integration enhancing approach or strategy. In fact, it would seem to take away from the treaty based approach on regional integration and liberalization, which has been adopted and sustained by COMESA.

¹⁸⁹ Refer to the EPA Negotiations for the ESA Group. Progress Report to the meeting of ACP and G- 90 Senior Officials and Ministers, Mauritius, 9 – 13 July 2004.

The essence of this discussion resides in the fact that COMESA soft law generating institutions seem to have been oblivious to this legal reality. One would be tempted to ask if this did not introduce a legal deformity in respect of the regional integration agenda by COMESA and her subsequent basis to engage the multilateral trade system.

CHAPTER 10***The Results of the Use of the Soft Law and Hard Law Strategies in the African Regional Integration Systems:***

The assessment of the three regional integration systems clearly reveals that there is a lot that should be done by the member States that belong to these systems to ensure a situation which will foster and generate a sufficient degree and balance of both the soft law and hard law strategies within their respective regional integration systems. An awareness of the inter-institutional interaction within African regional integration systems is of fundamental importance. It is also time that the institutional dimensions of regional integration systems be given due attention in the discourse on regional integration generally.

The subject matters that these institutions address themselves to cannot foster a logical linkage with the issues at the level of MTS if the above-mentioned awareness does not exist. So far, the interaction between the MTS and the African RIS has been marginal and a lot needs to be done by them. The manner and the institutional methods which they apply to generate decisions do not deliberately suggest a sufficient consciousness and basis that would foster a sustained interaction with the MTS in as far as the norm creation is concerned.

In as far as the discussion in CHAPTER SEVEN on SADC is concerned, SADC has generated a significant degree of soft law, which by and large is disjointed and would require a serious re-focusing of its institutions and processes. Within SADC the intra soft law generating institutions do not sufficiently communicate with one another and this is a problem which need to be attended to efficaciously. The development of hard law generating institutions such as the court system is very slow and its at beginning stages. This dimension is urgently required so as to ensure that there is a balance in the system in as far as norm creation is concerned. The decision by some SADC member States to enter into negotiations with the European Union on behalf of the SADC Treaty indicates a distorted and high degree of insensitivity in as far the application of the hard law and soft law strategies in SADC are concerned. This situation urgently calls for the establishment of the SADC Court System in order to ensure the required balance between the two strategies. Equally, the institutional device that is provided for through the Committee of Trade Ministers would need to be looked at in order to evaluate the quality of the soft law strategies it generates for SADC.

CHAPTER EIGHT on SACU, as indicated in the analysis, shows that her institutions are new and they are yet to be tested in as far as norm creation goes. However, two worrying issues have been shown through the analysis. SACU member States have remained silent when a decision was taken to carry negotiations with the EU through the fold of the SADC EPA negotiations. This does not carry the hard law strategy's position, which is contained in Article 8 of its Treaty. The treaty explicitly calls for the

negotiations with third parties to be undertaken on a collective basis and this is not the case in as far the negotiation with the EU go.

Additionally, SACU, unlike SADC and COMESA, does not have a Court System in place, she only has a dispute settlement mechanism which does not generate any law. The system is weak and does not put in place a sufficient basis for generation of balanced hard law and soft law strategies within SACU. It is however hoped that the new agreement will imbibe a new lease of life into the institution.

In respect of Chapter NINE on COMESA: COMESA has on balance generated a significant degree of a soft law dimension, which is generally and in main balanced against its treaty positions. The discussion in this chapter reveals that the soft law strategies in COMESA in some instances were not used in a manner that took cognizance of its obtaining hard law strategy.

The decision to extend the derogation to Swaziland and Namibia through the Sectoral Ministerial meetings that are convened under the auspices of the Secretary General's office may raise questions in as far as their implications for the institution as whole are concerned.

Obviously, the ramifications of this soft law strategy has meant that the rest of the member States had to buy in on a decision to which they were not party to and to which

they were generally expected to accord cooperation in good faith. The same device was also used in admitting Egypt and the granting of observer status to Libya even though the two States are not from Eastern and Southern Africa as the name COMESA would suggest. It may be argued that the imbalance in this respect was in favour of an extended soft law strategy and thus, COMESA did not invite a conscious institutional balance in respect of the aforementioned decisions.

The COMESA decision on the configuration through the Eastern and Southern African Arrangement (ESA) for the purpose of undertaking negotiations with the European Union did not sustain the hard law strategy in COMESA. This is because the said negotiations are being undertaken outside of the COMESA regional legal framework.

The fact that COMESA has a fully-fledged and functional court system augurs well for the future. The sustainable and a balanced hard law strategies and soft law strategies in COMESA may be effectively disciplined by the Court System in the future.

The reality is that the nature and the quality of norm generation in regional integration systems must invite a clear and systematic approach, more so, as far trade matters are concerned. The fact is that these systems would need to pass the test at the multilateral trade level. If the structure of the norms they create do not by and large interact with the multilateral trade system's structure and norms the result would be an unwarranted

tension. The evidence as a result of the study invites regional systems to take this dimension seriously. As it is, there exists a weak link between both systems norm structures and systems. The Regional integration systems need to do a lot more in this regard.

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