THE REGULATION OF REGIONAL TRADE AGREEMENTS:
HARNESSING THE ENERGY OF REGIONALISM TO POWER A
NEW ERA IN MULTILATERAL TRADE

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ABSTRACT

This thesis examines the regulation of regionalism by the WTO and the formation and operation of regional trade agreements by developing countries. In particular, this
work focuses on regional integration in Eastern and Southern Africa. The aim of the thesis is to assess the effectiveness of the relevant legal regimes and determine ways in which they can be made more effective, both in terms of their impact on state conduct and in terms of their impact on the economic welfare of the states concerned.

The thesis argues that, with regard to the WTO legal regime, the exemption from the application of Article XXIV, GATT 1994 given to developing countries by the Enabling Clause has contributed to the lack of effectiveness of the WTO regime. For developing countries, on the other hand, the Enabling Clause has deprived them of the legal discipline required to establish effective free trade areas and customs unions. This latter argument is examined through a case study of the Common Market for Eastern and Southern Africa (COMESA). The thesis contends that for COMESA countries to engage in meaningful trade liberalisation, and to participate fully in the WTO, acceptance of greater legal discipline is critical. Such legal discipline can be obtained through compliance with Article XXIV.

The analytical framework employed in the thesis is derived from International Legal Process and, in particular, the theory of compliance developed by Abram and Antonia Chayes. This approach to law is concerned with examining the ways in which treaty regimes work. It posits that states will generally comply with treaty obligations and, in the event of non-compliance, the reasons are likely to be ambiguity, lack of capacity and temporal factors, rather than deliberate disregard of the rules. In order to increase compliance, it advocates the use of process and ‘managerial measures’, such as reporting requirements, review, capacity building and technical assistance, rather than coercive sanctions.

The analysis of the WTO legal regime and the COMESA legal framework confirms these propositions. It is found that the Enabling Clause has deprived the WTO of control over regional arrangements established by developing countries while releasing developing countries of the discipline required for effective intra-regional trade liberalisation. It is also established that ambiguity, lack of capacity and issues of priority have been significant factors in much state conduct regarded as non-complying. In order to enhance the effectiveness of the regimes, the thesis recommends that developing countries be subject to Article XXIV and that ‘managerial measures’ be applied.

These findings have significant policy implications for the future design and implementation of regional trade agreements. They also suggest that the demands by developing countries for continued exemption from the substantive rules and procedures found in Article XXIV are counterproductive. These findings have broader implications for the role of developing countries in the multilateral trading system and point the way for further research regarding the effective implementation of regional trade agreements by developing countries.

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CHAPTER ONE:
INTRODUCTION AND OVERVIEW
1.1 Background and Aims

The fundamental normative principle underlying the multilateral trading system embodied in the World Trade Organization (WTO) is the obligation to conduct international trade in a non-discriminatory manner.\(^1\) Article I of the General Agreement on Tariffs and Trade 1994 (GATT) requires all WTO members to extend most-favoured-nation (MFN) treatment to one another. This duty is subject to two exceptions: Article XXIV, which permits the establishment of regional trade agreements (RTAs), subject to compliance with a number of specified conditions,\(^2\) and The Enabling Clause,\(^3\) which permits WTO members to derogate from the provisions of Article I for the purpose of extending differential and more favourable treatment to developing countries.\(^4\) Unlike Article XXIV, however, the Enabling Clause imposes few substantive obligations on developing countries wishing to extend preferential treatment to one another through the establishment of RTAs.\(^5\)

This thesis argues that the legal regime created by the combination of these two exceptions is detrimental to the effectiveness of the WTO and to the ability of developing countries to engage in effective regional integration.\(^6\)

This thesis sees the creation and maintenance of an open non-discriminatory trading system as being to the mutual benefit of all states.\(^7\) It also acknowledges that

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\(^1\) Members of the WTO pledge to ‘enter into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations’ in order to contribute to the attainment of the Organization’s objectives (emphasis added). Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 UNTS 154, preamble (entered into force 1 January 1995). The objectives of the Organization, which include ‘expanding the production of and trade in goods,’ are also set out in the preamble.

\(^2\) Appendix I sets out the full text of Article XXIV. A detailed analysis of the provisions of Article XXIV is carried out in Chapter Four.

\(^3\) This is the name by which The Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, GATT BISD, 26th Supp, 203, GATT Doc L/4903 (1979) (Decision adopted on 28 November 1979), is commonly known. The full text of the Enabling Clause is set out in Appendix II.

\(^4\) Note that under Article I paragraphs 2 and 3, those preferential arrangements that existed at the time of GATT’s drafting were exempted from the MFN obligation. This thesis is not concerned with these ‘grandfathered’ preferences but with the provisions allowing new preferences.

\(^5\) These requirements are set out and analysed in further detail in Chapter Four. Note that the arguments made in this thesis with regard to the Enabling Clause focus on paragraph 2(c), which is the provision related to the establishment of developing country RTAs. This thesis does not address itself directly to the issue of non-reciprocal schemes such as the Generalized System of Preferences (GSP).

\(^6\) At the outset, it should be noted that this thesis focuses on those provisions related to the liberalisation of trade in goods, not services. Article V of the General Agreement on Trade in Services (GATS) is therefore not analysed in any detail.

\(^7\) This is a view shared by a number of scholars and commentators on international trade. See, eg, Michael J Trebilcock and Robert Howse, The Regulation of International Trade (2nd ed, 1995) xii; John H Jackson, ‘Regional Trade Blocs and the GATT’ (1993) 16 The World Economy 121, 123.
regionalism is here for the foreseeable future. The problem is how to ensure that the WTO legal regime strikes the appropriate balance between upholding the non-discrimination principle and permitting the extension of preferences for the purposes of establishing RTAs, especially in the case of developing countries. This issue is explored in the context of a case study of the Common Market for Eastern and Southern Africa (COMESA). The purpose of the case study is to determine whether the empirical evidence justifies the hypothesis that the WTO legal regime has been detrimental to the ability of developing countries to engage in effective trade liberalisation and regional integration.

This thesis examines the role of the Enabling Clause in weakening the original GATT compromise whereby states were permitted to derogate from the provisions of Article I:1 provided they complied with Article XXIV. It contends that a regime in which developing countries accepted greater legal discipline and all RTAs were subject to Article XXIV scrutiny would benefit both the multilateral trading system and developing countries themselves. In reaching this conclusion, this thesis does not claim that the Article XXIV legal regime is in any way ideal. Article XXIV can be, and has been, criticised on the grounds that it is technically flawed, that it rests on erroneous economic assumptions, and that it has failed to achieve its policy goals.

For analytical purposes, the issues raised in this thesis are addressed through a discussion of four areas: compliance with rules and regime design, concerning legal

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8 Or, in the words of de Melo and Panagariya, ‘perhaps the most fruitful task for us is to reform the rules of the game in such a way that they complement rather than substitute for the multilateral approach.’ Jaime de Melo and Arvind Panagariya, ‘Introduction’ in Jaime de Melo and Arvind Panagariya (eds), New Dimensions in Regional Integration (1993) 3, 10.
9 COMESA is an RTA consisting of 20 African developing countries that was set up in 1994 and notified to the WTO under the Enabling Clause in May 1995. The COMESA case study is found in Chapter Six.
10 It has been argued that just about every provision on RTAs raises an issue on which agreement is hard to reach. Francis Mangeni, ‘WTO Negotiations on Rules on Regional Trade Agreements: African Perspectives’ (Regional Integration Research Network Papers, COMESA, 2002) 15.
12 Hudec lamented that there was ‘no recognized demarcation line between [illegitimate] preferences and legitimate regional integration’ and that half the preference schemes in the world paraded as customs unions and free trade areas under Article XXIV. Robert Hudec, Developing Countries in the GATT Legal System (1987) 222.
discipline and the most effective way of regulating state interaction; the relationship between regionalism and multilateralism, reviewing the rationales for the adoption of the different approaches; the legal regime created by Article XXIV and the Enabling Clause, examining the manner in which the WTO regulates RTAs; and lastly, the COMESA legal regime, assessing whether COMESA members have used the flexibility given to them by the WTO to establish an effective trade liberalisation and integration arrangement. In addressing these issues, the thesis hopes to make an original, positive and substantive contribution to the long-running debate regarding two of the most basic and pervasive policy questions to have faced the international community over the past 50 years: the relationship between RTAs and the multilateral trading system, and the treatment of developing countries in that system.  

In order to assess the validity of the arguments made in this thesis, a legal framework within which the concepts of compliance and regulation can be analysed is required. The framework adopted in this thesis focuses on the central role that process plays in the achievement of joint policy goals. The importance of process in the application of GATT rules was identified more than 30 years ago. In analysing what he described as ‘the false antithesis between legalism and pragmatism,’ Kenneth Dam reiterated the importance of seeing law not just as substantive rules but also as procedures and process that serve ‘to identify common interests in complex situations and to formulate short-term policies for the achievement of long-term objectives.’ The concept of process lies at the centre of the International Legal Process (ILP) school of international law. This thesis employs ILP and, in particular, the ‘managerial model’ of compliance to develop a deeper understanding of compliance.

The managerial model is based on the assumption that states have a propensity to comply with treaty obligations and that, in the event of failure to comply, the causes of non-compliance are more likely to be factors such as ambiguity, limitations on

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13 John Jackson was one of the first legal scholars to identify and address these issues. See John H Jackson, World Trade and the Law of GATT (1969) 27 as well as Chapters 24 and 25. An excellent analysis of the treatment of developing countries in the multilateral trading system is found in Robert Hudec’s book referred to in note 12 above.


15 The ‘managerial model’ was described and conceptualised by Abram Chayes and Antonia Handler Chayes in The New Sovereignty: Compliance with International Regulatory Agreements (1995).
capacity and the temporal dimension of compliance rather than a deliberate decision not to comply. For these reasons, the model argues that the use of ‘management’ measures is likely to be more effective in securing the performance of treaty obligations than the use of coercive enforcement measures.\(^{16}\) What the managerial model does not do is to provide an answer to the question of how and why regimes arise in the first place. This is an essential question because, in the words of Robert Keohane, ‘[t]o understand the conditions under which international cooperation can take place, it is necessary to understand how international institutions operate and the conditions under which they come into being.’\(^{17}\) Drawing upon International Relations (IR) theory to complement ILP enables some propositions regarding the most favourable conditions for cooperation to be formulated.

Accordingly, this thesis contends that there needs to be a change in the way that Article XXIV is conceptualised. Article XXIV needs to be viewed, not as an ‘enforcement’ mechanism with all its connotations of adversarial confrontation, but as a provision that promotes and facilitates the application of a cooperative ‘managerial’ approach to compliance.\(^{18}\) Such a change of perspective would be instrumental in persuading developing countries of the benefits to be derived from accepting Article XXIV scrutiny. This in turn would enhance the prospects for effective regulation of RTAs at the multilateral level and effective integration at the regional level. A focus on process is not to say that norms should be disregarded, however. Quite the contrary. Clear, precise and binding rules are the basis of the propensity to comply. They thus provide the foundation on which the managerial model is built. The limitations of Article XXIV and the Enabling Clause in this regard have made their implementation and application difficult due to lack of agreement on the benchmarks and the procedures to be used in examining RTAs.

Changes to the system aimed at reintroducing discipline to the regulation of RTAs have long been advocated. In 1985, the Leutwiler Group\(^{19}\) decried the distortion and

\(^{16}\) For a detailed discussion of these measures see section 2.3.


\(^{18}\) These two approaches are discussed in more detail in section 2.2.

\(^{19}\) The group, which was made up of seven eminent persons chaired by Dr Fritz Leutwiler, had been invited by Arthur Dunkel, the late Director-General of GATT, in November 1983 to study and report on problems facing the international trading system. It released its report in March 1985. The text of
abuse of the rules permitting customs unions and free-trade areas. In order ‘to prevent further erosion of the multilateral trading system’ it recommended that the rules be clarified and tightened up.\textsuperscript{20} Over the years incremental remedial measures have been taken, the most notable recent step being the adoption of the Understanding on the Interpretation of Article XXIV of GATT 1994.\textsuperscript{21}

Despite these advances, the relationship between regionalism and the multilateral trading system has remained troubled. In 2004, the Sutherland Consultative Board appointed by Supachai Panitchpakdi expressed its concern at the spread of preferential trade agreements and the concurrent erosion of the MFN principle. It proposed, inter alia, that such agreements be subject to meaningful review and effective disciplines.\textsuperscript{22} The need for modifications to be made to the legal regime is not merely of academic interest; the ‘welfare-based’ legal policy has made it easy for developing countries to engage in wasteful, unproductive regional integration initiatives.\textsuperscript{23} In Africa alone, up to 14 different RTAs purport to have a trade liberalisation agenda\textsuperscript{24} whereas in the WTO, 110 RTAs are currently under examination.\textsuperscript{25} The adoption of reports in the WTO has been blocked by persistent deadlocks over the interpretation of the provisions of Article XXIV. It is in this context that WTO Ministers decided to include ‘negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements’ in the Doha Development Agenda launched in 2001.\textsuperscript{26}

\begin{thebibliography}{9}
\bibitem{Leutwiler} the report can be found in Fritz Leutwiler et al, \textit{Trade Policies for a Better Future: Proposals for Action} (1985).
\bibitem{Leutwiler2} Leutwiler et al, above n 19, Proposal 7, 41.
\bibitem{Sutherland} The full text of the Understanding is contained in Appendix III.
\bibitem{Sutherland2} Peter Sutherland et al, \textit{The Future of the WTO: Addressing Institutional Challenges in the New Millennium} (2004) 79.
\bibitem{Fine} Fine and Yeo observed that currently ‘regional integration would appear to be a dead end in terms of its ability to make a significant contribution in any substantive fashion to rapid and sustainable growth in the economies of subSaharan Africa.’ Jeffrey Fine and Stephen Yeo, ‘Regional Integration in SubSaharan Africa: Dead End or a Fresh Start?’ in Ademola Oyejide, Ibrahim Elbadawi and Paul Collier (eds), \textit{Regional Integration and Trade Liberalization in SubSaharan Africa} (1997) 428, 430.
\bibitem{Ministerial} Ministerial Declaration, WTO Doc WT/MIN(01)/DEC/W/1 (2001) [29].
\end{thebibliography}
1.1.1 Why Regionalism?

Regional integration, or ‘regionalism’ as it is sometimes referred to,\(^{27}\) is a particularly fascinating and difficult subject for study because of its inherent complexity. Regional trade agreements are heterogeneous in nature and come in many forms and sizes reflecting the different considerations and objectives of the participating countries.\(^{28}\) Regionalism is also interesting in the sense that its subject matter encompasses at least three different academic disciplines: economics, the international relations branch of political science, and law.

From an economic perspective, regionalism is important because it represents one of two ‘second-best’ alternatives to the ‘first-best’ welfare-maximising model of global free trade.\(^{29}\) For IR scholars, regionalism is significant because it involves a move away from a unilateral or multilateral approach to international relations. Debate in the political science academy has therefore centred on issues such as the dangers posed by competing regional blocs and the fear that large economic powers will use regional agreements to establish themselves as regional hegemons.\(^{30}\)

From the legal perspective, one feature common to all trade blocs, in the context of international trade, is the preferential treatment that partner states accord to each other. Such treatment undermines and weakens the normative force of the most-favoured-nation principle. Under the original GATT, derogations from the MFN principle were only allowed under the conditions specified in Article XXIV. The adoption of the Enabling Clause opened another avenue for undercutting the MFN

\(^{27}\) The term ‘regionalism’ can be used to refer to either the process of the formation of RTAs or the existence of RTAs on the international scene. Winters defined it as ‘any policy designed to reduce trade barriers between a subset of countries, regardless of whether those countries are actually contiguous or even close to each other.’ L Alan Winters, ‘Regionalism vs. Multilateralism’ in Richard E Baldwin et al (eds), *Market Integration, Regionalism and the Global Economy* (1998) 7, 8. The term ‘regional’ in this sense is therefore something of a misnomer, especially in the WTO context where RTAs in the form of customs unions and free trade areas are frequently established between countries that do not form part of the same geographic ‘region’.

\(^{28}\) See Section 1.3 below for brief definitions of some of the classical forms of arrangement.

\(^{29}\) The other ‘second-best’ alternative is a system of non-discriminatory tariffs such as the WTO is based on. Jeffrey A Frankel, ‘Introduction’ in Jeffrey A Frankel (ed), *The Regionalization of the World Economy* (1998) 2. See Chapter Three for a more detailed discussion of the economic theory regarding free trade and the alternatives.

\(^{30}\) Stephen Woolcock, ‘Regional Integration and the Multilateral Trading System’ in Till Geiger & Dennis Kennedy (eds), *Regional Trade Blocs, Multilateralism and the GATT* (1996) 115. Woolcock suggested that by requiring new regional initiatives to be notified to the WTO, the dynamism of regional trade agreements could be harnessed to provide the impetus for multilateral negotiations thereby possibly providing the catalyst for multilateral negotiations on the same measures.
principle by weakening the constraints on preferential conduct. Legal proponents of an open multilateral trading system should therefore seek means by which the integrity of the principle of non-discrimination can be restored.

In light of these interconnections, practical, policy-oriented analyses of regionalism can only benefit from an interdisciplinary approach that takes into account the different perspectives that each of these disciplines brings to the table.\(^{31}\) This thesis adopts such an approach and refers extensively to economic and international relations theory where relevant while retaining its focus on the legal aspect of the issues at hand.

1.1.2 Why Africa?

The choice of Africa as the continent in which the case study was conducted was influenced primarily by two factors: firstly, of all the different regions of the world, Africa has arguably benefited least from globalisation and multilateralism. Notwithstanding the fact that it has 13.5% of the world’s population and 22% of the world’s land area, Africa’s share of global trade amounts to just 2.4% of merchandise exports and 2.2% of the world’s merchandise imports (see Table 1.1 below).\(^{32}\)

Table 1.1: World Merchandise Trade by Region, 2003
(Percentage and billion US$)

<table>
<thead>
<tr>
<th>Region</th>
<th>Exports</th>
<th>Imports</th>
</tr>
</thead>
<tbody>
<tr>
<td>North America</td>
<td>13.7</td>
<td>20.5</td>
</tr>
<tr>
<td>Latin America and the Caribbean</td>
<td>5.2</td>
<td>4.8</td>
</tr>
<tr>
<td>Western Europe</td>
<td>43.1</td>
<td>42.0</td>
</tr>
<tr>
<td>C/E Europe, Baltic States, CIS</td>
<td>5.5</td>
<td>5.0</td>
</tr>
<tr>
<td><strong>Africa</strong></td>
<td><strong>2.4</strong></td>
<td><strong>2.2</strong></td>
</tr>
<tr>
<td>Middle East</td>
<td>4.1</td>
<td>2.5</td>
</tr>
<tr>
<td>Asia</td>
<td>26.1</td>
<td>23.0</td>
</tr>
<tr>
<td><strong>WORLD</strong></td>
<td><strong>100</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

Source: WTO, International Trade Statistics 2004 (Tables II.2, III.1 & III.2)

\(^{31}\) Hudec warns against the danger of unidentified economic assumptions on which legal analysis is based noting that if such assumptions are erroneous, the entire legal policy may do more harm than good. In order to avoid this problem it is necessary ‘to identify underlying economic issues at the outset and for views, if any, about these issues to be made clear.’ Hudec, Developing Countries in the GATT Legal System above n 12, 141.

Secondly, despite a poor track record, regional integration has for a long time been, and remains, the preferred path to economic development and poverty alleviation among developing countries in Africa. The economic plight of the African continent, and sub-Saharan Africa in particular, is undeniable. Half of Africa’s population lives on less than US$1 a day and lack access to safe water, only one in four rural girls attends primary school and due to the AIDS pandemic, health and nutrition indicators are worsening. Despite a plethora of local and international plans, strategies and policies being devised to develop the region, the continent remains mired in poverty. A way has to be found for the continent to reverse its weak trade performance. A substantial improvement in trade performance will hopefully bring about the ‘sustainable high-quality growth’ that will enable the goal of improving living standards to be achieved.

Regional integration undoubtedly holds great promise for developing countries in Africa. Many African countries stand to gain from pooling their meagre resources and thus being able to participate more meaningfully on the international arena. Numerous public statements promoting integration have been made. Though these statements indicate that the necessary political will exists, the rhetoric surrounding integration has not been matched by actions and the record of trade liberalisation has been weak. Substantive action appears to be taking a back seat to formal statements and declarations. The need to devise effective solutions is therefore urgent.

33 Bertil Oden quotes the then Secretary General of the OAU (now the African Union) as saying that ‘[w]ithout integration, Africa will not merely be marginalised, it will be trivialised.’ Bertil Oden, ‘Introduction’ in Bertil Oden (ed), Southern Africa After Apartheid (1993) 11, 11.
37 These benefits are discussed in more detail in Chapter Three.
38 What Hudec referred to as the ‘political theatre’ dimension of international economic law — ‘the tendency of governments to adopt laws and agreements that create the appearance of legal solutions when in reality no solution has been achieved’ — has tended to infect most of the initiatives. Robert Hudec, ‘International Economic Law: The Political Theatre Dimension’ (1996) 17 University of Pennsylvania Journal of International Economic Law 9, 9.
1.2 The Importance of Legal Discipline in International Trade

The power of the arguments made in this thesis relies on an appreciation of the role that law plays within the WTO system and in international trade relations generally. It is therefore worthwhile to briefly restate that role. The multilateral trading system embodied first in GATT and now in the WTO enshrines a multilateral approach to the conduct of international trade.\(^{39}\) In order to ensure that the principle of non-discrimination would be observed, the governments that created the GATT tried to make sure that the Agreement placed ‘effective restraints on every government’s behaviour, including their own.’ It is argued that such a system of restraint works best if it is ‘based on rules agreed to in advance and then applied to individual problems by neutral and objective adjudicators.’\(^{40}\) This will help ensure that the expectations of the parties to the agreement are fulfilled.\(^{41}\) Relying on the goodwill of governments and the ingenuity of GATT officials to reduce trade barriers and promote international trade was unlikely to succeed unless those qualities are accompanied by both substantive law and procedures.\(^{42}\)

With regard to international trade and international relations generally, there are many benefits to be derived from the judicious use of the law.\(^{43}\) Not only does the law provide predictability and stability to the international environment, it is also ‘the most resource-efficient way to resolve conflicts with other countries,’ and ‘the most effective way to negotiate and capture desired policy changes in achievable incremental steps.’\(^{44}\)

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\(^{39}\) Jackson defined multilateralism as ‘an approach to international trade and other relations that recognizes and values the interaction of a number – often a large number – of nation-states. It recognizes the dangers of organizing relations with foreign nations on bilateral grounds, dealing with them one by one.’ John H Jackson, *The World Trading System: Law and Policy of International Economic Relations* (2nd ed, 1997) 158. It has been asserted by Bhagwati that the four principles underlying the GATT system are: that a ‘fix-rule’ system is to be preferred to a ‘fix-quantity’ one; that multilateralism, where trade rules extend without discrimination to all members of the trade regime, is generally preferable to discriminatory arrangements; that markets are to be opened through conventional reduction on trade barriers; and that the adjudication of disputes is to be impartial with both the balance of negotiations and the impartiality of dispute settlement reflecting the perception that the GATT system is the best defence of the weak. Jagdish N Bhagwati, *The World Trading System at Risk* (1991) 3–4.


\(^{42}\) See Dam, *The GATT*, above n 14, 5.

\(^{43}\) This issue is explored in more detail in section 2.4.

In addition, law can create ‘the most predictable conditions for business decisions.’\(^{45}\) This connection between law, business, credibility and regional integration is vital for developing countries in view of the priority that many now place on attracting investment.\(^{46}\) This credibility can also be extended to the domestic level. Thus, states can use law to cement their ‘own liberal trade policies against the internal political pressures of protectionism.’\(^{47}\) Substantive rules are also important domestically because they ‘contribute significantly to the conservation, organization and intensification of’ those moral, economic or political forces that support trade liberalisation in the day-to-day decision-making which is the real source of policy.\(^{48}\)

It is for these reasons that this thesis argues that it is in the interests of developing countries wishing to engage in regional integration and to participate fully in the multilateral trading system that they accept greater legal discipline in matters of international trade law generally and the establishment of RTAs in particular. Developing countries need to see legal discipline and the constraints that it imposes on the conduct of states as an essential element of participation in the rule-based multilateral trading system rather than as a constraint to development. Developing countries bear some of the responsibility for the loss of legal discipline and they need to be at the forefront of its re-introduction. Introducing legal discipline will ensure that the legal regimes that they establish and participate in are effective.\(^{49}\) Legal effectiveness is unattainable where, as is the case now with developing countries due to the Enabling Clause, obligations are reduced to the status of ‘nonlaw’.

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\(^{45}\) Ibid.

\(^{46}\) In this regard, it has been observed that direct investment will be sensitive to the credibility of the announced reform effort... A regional arrangement establishes an external commitment to reform that (weakly, perhaps) binds future governments thereby making the future preservation of reform (slightly, perhaps) more credible.


\(^{48}\) Robert Hudec, ‘GATT or GABB? The Future Design of the General Agreement on Tariffs and Trade’ (1970-71) 80 *Yale Law Journal* 1299, 1311. Also see Hudec, *Developing Countries in the GATT Legal System*, above n 12, Chapter Nine on the impact of GATT legal policy on internal decision-making.

\(^{49}\) In order to be effective, it has been contended that a legal measure ‘must induce the kind of conduct desired (legal effectiveness) and the desired conduct must in turn achieve the economic benefit desired (economic effectiveness).’ Hudec, *Developing Countries in the GATT Legal System*, above n 12, 138.
1.3 Forms of Integration

One threshold issue that bedevils any analysis of regionalism concerns the taxonomy and definition of the many different kinds of trade and integration arrangements. The purpose of this section is therefore to define some of the terms used in researching this area. One pervasive source of confusion encountered in the analysis of RTAs, which is worth mentioning, is that the name given to an arrangement will frequently not be an accurate description of the stage of integration that the parties have actually reached. Titles will often be aspirational, expressing the long-term goals of the parties rather than the actual state of integration at the time of the bloc’s formation.  

Standard economic literature and customs union theory generally recognises four categories or forms of regional integration arrangements representing varying degrees of integration; these are free trade areas, customs unions, common markets, and economic unions. In addition to these four categories, two other categories falling at either end of the spectrum are sometimes considered as forming part of the integration process. These are preferential trade agreements involving significantly less than 100% liberalisation and monetary unions. These categories involve the integration of markets and factors of production (shallow integration) in the first instance, and the integration of economic policy at a later stage (deep integration). The process of integration would thus generally begin with the formation of a preferential trade area and continue all the way up to a monetary union or political union, depending on the level of integration the partners desire to pursue.

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50 Thus, for example, although there is a Treaty Establishing the African Economic Community (discussed in section 5.3.1), there is currently no African economic community in the sense that economists understand the term.
51 For a further discussion of the economic theory underlying the customs union model of integration, see section 3.3.1.1.
53 Total economic integration, defined by Balassa as ‘the unification of monetary, fiscal, social, and countercyclical policies’ together with the ‘setting up of a supra-national authority whose decisions are binding for the member-states’ [see Balassa, ibid 2] can be regarded as an additional step that falls just below political union.
54 Asante argued that each form of integration could be introduced in its own right and ‘should not be confused with stages in a process which eventually leads to complete political integration.’ S K B Asante, Regionalism and Africa’s Development (1997) 22. To support this argument, he cited the transformation of the PTA into COMESA without the stage of the CU being undertaken. However, this example has two flaws. Firstly, a closer examination of the COMESA Treaty reveals that the progressive establishment of a customs union is provided for. Secondly, it is based on the erroneous assumption that the formation of an organisation calling itself a ‘Common Market’ equates to the establishment of a common market in the sense that economists use that term. For a fuller analysis of the trade liberalisation process in COMESA, see the COMESA case study in Chapter Six.
As one moves across the spectrum from shallow to deep integration the amount of autonomy retained by a party over its economic policy reduces. Table 1.2 below depicts this progression.

Table 1.2: Forms of Regional Integration Arrangements

<table>
<thead>
<tr>
<th></th>
<th>Free movement of goods</th>
<th>Common external tariff</th>
<th>Free movement of labour and capital</th>
<th>Harmonisation of fiscal and other economic policies</th>
<th>Adoption of a common monetary unit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preferential trade agreement</td>
<td>×</td>
<td>×</td>
<td>×</td>
<td>×</td>
<td>×</td>
</tr>
<tr>
<td>Free trade area</td>
<td>✓</td>
<td></td>
<td>×</td>
<td>×</td>
<td>×</td>
</tr>
<tr>
<td>Customs union</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>×</td>
<td>×</td>
</tr>
<tr>
<td>Common market</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>×</td>
</tr>
<tr>
<td>Economic union</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>×</td>
</tr>
<tr>
<td>Monetary union</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
</tbody>
</table>

Source: Author’s analysis based on material in this section (1.3).

A preferential agreement can refer to either an arrangement where liberalisation does not extend to the elimination of all trade barriers between parties or to an arrangement that does not cover all economic sectors. Such agreements, which are also known as partial or sectoral trade agreements, usually involve the exchange of preferences in a selected group of product categories or in selected sectors of the economy.

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55 Some authors define and categorise sectoral arrangements separately from preferential agreements. See, eg, William A Amponsah, ‘African Regional Integration: A Pre-Condition toward Multilateral
A free trade area is a bloc within which ‘countries enforce discriminatory trade policies by eliminating all tariff and other political barriers to imports that originate wholly or in substantial measure (as determined by so-called rules of origin) within the trading bloc.’ Free trade area members continue to determine their own tariffs and national trade policies towards non-bloc countries.

A customs union can be defined in terms of three essential features: ‘the elimination of tariffs on imports from member countries; the adoption of a common external tariff on imports from the rest of the world; the apportionment of customs revenue according to an agreed formula.’ It is therefore, in essence ‘a free trade area in which member countries also adopt a common set of external tariffs, quantitative restrictions, and other measures to limit imports from outside of the free trade area.’

In a common market, there is unrestricted movement of labour and other factors of production (capital and enterprise) in addition to the common external tariff and tariff-free movement of goods and services associated with a customs union. An economic union, on the other hand, is a common market enhanced by the harmonisation or close coordination of fiscal, monetary, and other major economic policies (e.g., industrial policies).

In the analysis that follows, it should be remembered that WTO rules only apply to free trade areas, customs unions, interim agreements leading to the creation of an area


57 Balassa, above n 52, 2.
59 DeRosa, above n 56, 4. Robson identified two features that distinguish a free trade area from a customs union: ‘The member countries retain the power to fix their own separate tariffs rates on imports from the rest of the world. The area is equipped with rules of origin, designed to confine intra-area free trade to products originating in, or mainly produced, in the area.’ See Robson, above n 58, 28.
60 Robson, above n 58, 3; Balassa, above n 52, 2.
61 DeRosa, above n 56, 4. Asante classifies COMESA in this category: Asante, above n 54, 22. However, as will be seen in Chapter Six, though nominally a common market, in practice COMESA is currently little more than a preferential arrangement.
or union, and preferential trade arrangements between developing countries as defined in GATT 1994.\(^{62}\)

### 1.4 Methodology and Data

#### 1.4.1 Case Studies

It has been said that international economic law necessitates ‘more empirical study than some other international law subjects.’ However, due to the fact that there are too few ‘cases’ to justify statistical research, an anecdotal or case study approach is often preferable and desirable as a check on theory and sweeping generalisations of any kind.\(^{63}\) Though there are now numerous RTAs, they are so heterogeneous that the risk of making such sweeping generalisations is real. That is why the bulk of the empirical research conducted in this thesis is focussed on one specific RTA: COMESA. Several other factors make the case study a suitable method for conducting research of the kind that this thesis does. One is the fact that, unlike other strategies, the case study is able to deal with a variety of evidence such as documents, interviews and observations.\(^{64}\) The case study is also useful where it is necessary to catch the particularity and complexity of a single case.\(^{65}\)

John Jackson observed that a legal scholar was confronted by two main problems: the choice of subject for research and the approach to that research.\(^{66}\) He expressed a personal preference for a ‘policy research’ approach that shaped research to be useful for ‘active users’ rather than a ‘theory research’ approach. Though there were situations where theory would be relevant for policy, he contended that this had to be ‘good theory’ that had been tested by empirical observation.\(^{67}\) This thesis shares this viewpoint and aims to provide analysis and recommendations that are going to be useful to policymakers in the area of international trade and regional integration in particular. Engaging in a case study provides an opportunity to assess whether one’s proposals are feasible. Apart from this role, the case study will provide a deeper

\(^{62}\) The GATT definitions are found in Article XXIV and the Enabling Clause (see Appendices I and II) and discussed in detail in Chapter Four.


\(^{64}\) Robert K Yin, Case Study Research: Design and Methods (1994) 8.


\(^{67}\) Ibid.
insight into the integration process and, by identifying the factors that have prevented COMESA countries from complying with their treaty obligations, act as a check to the ‘managerial model’.

This case study is based upon material obtained from various documentary sources as well as interviews carried out with a number of COMESA officials. Conducting research of this kind poses various problems to the researcher. Firstly, it is invariably time-consuming and expensive, especially when done from a distance, as was the case in this instance. It is mainly for this reason that the interview schedule was limited to officials working in the Secretariat rather than being extended to include individual country officials. The latter course of action would have entailed visiting several different capitals which was not feasible in a project of this scale. Secondly, at a logistical level arranging the interviews proved to be tricky due to the fact that it was not possible to know until very late which officials would be available and, even if available, there was always the risk of unscheduled meetings coming up. In spite of these obstacles, the insights acquired from engaging in empirical study add to the store of knowledge and originality of the thesis thus making the effort worthwhile.

1.4.2 Documentary Sources

Documentary material for this project was obtained from a wide variety of sources, both primary and secondary.68 Some primary material was available online while the rest had to be collected in the course of two visits to COMESA. Regarding the secondary material, although there is a lot of literature on regional integration in Africa, most of it has been written from an economic perspective. Secondary sources have therefore been of limited value. The most challenging part of the project was getting up-to-date information regarding Africa in general and COMESA in particular. This was true not just for statistics but also for basic international agreements. Though COMESA has a website, the information on the site is not updated regularly, nor is it comprehensive.69 A visit to the COMESA headquarters in Lusaka therefore proved to be an essential element of the project. Due to financial

68 The primary material collected consisted of the constitutive documents, regulations and the minutes of the various COMESA policy organ meetings. The secondary material consisted of newspaper and journal articles, as well as other commentaries and reports. One obstacle encountered regarding the primary documentation is that a lot of it has not been indexed making reference cumbersome.

69 The COMESA website address is <www.comesa.int> at 27 July 2005.
constraints, there was only time for one primary trip to collect data and a brief follow-up visit to get updated information. Unfortunately, on the second trip it was not possible to meet with the interviewees from the first visit due to the fact that they were absent on other engagements.

1.4.3 Interviews

Case study interviews for this thesis were conducted in June 2003. The COMESA officials interviewed were chosen on the basis of two factors: their work in the relevant sectors of COMESA and their willingness to participate in the project. Interviewees were asked questions of an open-ended nature regarding the nature of the work done by COMESA, their role within the organisation and their views on the challenges faced. Table 1.3 below sets out the names, positions and roles of the interviewees.

Table 1.3: Description of Research Participants

<table>
<thead>
<tr>
<th>Name</th>
<th>Position</th>
<th>Nature of Work</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mark Pearson</td>
<td>Regional Integration Adviser</td>
<td>Primarily trade issues; some work on payments systems and investment</td>
</tr>
<tr>
<td>Stephen Karangizi</td>
<td>Legal Director</td>
<td>Provide legal advice to the institution; prepare draft legal instruments; provide legal support to all the organs of the institution; respond to queries from member states, the private sector and others on the legal instruments of the institution.</td>
</tr>
<tr>
<td>Mwansa Musonda</td>
<td>Senior Trade Advisor</td>
<td>Trade aspect of COMESA’s integration programme; implementation of the rule-based system; first port of call where there are disputes regarding the trade aspect of the integration programme or where clarifications are required with regard to trade obligations</td>
</tr>
<tr>
<td>Prakash Hurry</td>
<td>Senior Customs Officer</td>
<td>Customs matters; trade matters (in the absence of the trade officer)</td>
</tr>
</tbody>
</table>

1.5 Layout of the Thesis

The thesis is arranged as follows: Chapter Two sets out the theoretical framework employed in this thesis. It starts by expounding upon the nature of the International

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70 The questions asked of the interviewees are set out in Appendix IV.
Legal Process approach and the nature of the compliance theory postulated by Abram and Antonia Chayes. It then details the central elements of the managerial strategy before exploring the factors that influence the design of institutions and choice of norms, that is, why parties frame obligations in terms of ‘hard’ or ‘soft’ law. The chapter also sets out the interdisciplinary dimension of the theoretical framework. Four of the main approaches to the study of international relations (IR) — realism, institutionalism, constructivism and liberalism — are discussed. IR theory provides a means of incorporating non-legal factors into the analysis of compliance. The schools offer different rationales for why states interact with each other in the way they do and the effects of such interaction. Used in conjunction with legal approaches, IR provides a broader picture of the attitudes that states have toward international law and the conditions under which states comply with their legal obligations. The theoretical propositions derived from this discussion are later applied to the analysis of the WTO and COMESA regulatory frameworks.

Chapter Three explores the factors that influence a state’s decision to adopt a regional approach to international affairs. The chapter starts by reviewing the economic theories underpinning the free trade philosophy. It then describes some of the different models that have been developed to explain and justify the resort to regionalism. Based on these models, the chapter outlines some of the factors that affect the economic benefits conferred by integration. The chapter also looks at the ‘regionalism versus multilateralism’ debate and examines the arguments put forward by proponents of each side. This involves an examination of the principal non-economic reasons for countries engaging in regionalism and the ramifications for legal regulation. The discussion in this chapter brings out the diversity of factors that need to be considered in determining what form of regional agreement to establish.

Chapter Four contains an in-depth analysis of Article XXIV and the Enabling Clause. The provisions, and the manner in which they have been applied, are examined from the perspective of the managerial approach. The chapter starts with a brief historical account of the rationales underlying the inclusion of the two provisions in the GATT. The value of a historical discussion is that it helps identify the policy goals the WTO rules aim to achieve. It then compares and contrasts the substantive and procedural requirements of Article XXIV and the Enabling Clause. The role that the dispute
settlement mechanism has played in the interpretation and application of the rules, before and after the formation of the WTO, is also explored.

Chapter Five develops the analysis from a discussion of multilateral legal principles and doctrine to one of the Eastern and Southern African experience with integration. It discusses the main non-legal factors that have influenced regional integration in Africa and assesses the impact and importance of these factors. It then gives an overview of a few different regional integration initiatives and the legal regimes that have been adopted to achieve their objectives. The aim of these mini-case studies is to provide a context for the critique of the COMESA experience.

Chapter Six contains the COMESA case study. The chapter starts by tracing the historical development of COMESA from its establishment to the present. This history illustrates some of the temporal difficulties associated with determining compliance. It then looks at the provisions of the COMESA Treaty and subjects them to a legal analysis. This involves an examination of the institutional framework, the norm formulation and norm implementation procedures, followed by an analysis of the primary trade-related provisions of the Treaty. It describes the progress that has been made towards liberalising trade between the countries involved and identifies the constraints that have hampered effective regional integration.

Chapter Seven revisits the WTO rules and the law making aspect of regulation. It makes some recommendations for reform in the context of the proposals that have been put forward as part of the Doha Round. The requirement that the proposals should satisfy is that they advance the goal of non-discrimination and they should enhance compliance by states.

Chapter Eight draws upon the analysis of COMESA to make a number of recommendations regarding measures that COMESA countries need to take if they are to engage in effective regional integration and enjoy the benefits of integration. Some of these recommendations are also applicable in the broader African context.

The thesis concludes with a review of the main lessons to be learnt from the analysis and a summary of the recommendations made in the paper.
CHAPTER TWO:
THE ROLE OF LAW IN THE CONDUCT OF INTERNATIONAL TRADE RELATIONS

2.1 Introduction

This chapter sets out the analytical framework employed in this thesis. As was noted in Chapter One, the propositions that will guide the analysis are largely drawn from the theory of compliance and managerial model conceived by Abram and Antonia Chayes. This theory posits that in those instances where states fail to comply with their international obligations, it is primarily due to reasons of ambiguity, lack of capacity and temporal factors. However, these are not the only factors that determine compliance with international obligations and hence the efficacy of the law. WTO law does not exist in a vacuum but is a part of an international political system that provides an additional ‘context for the effectiveness of international institutions.’\(^\text{71}\) It is therefore important to include within the analytical framework, a perspective that allows non-legal factors to be taken into account. Such a perspective is added to the framework by incorporating the insights of the main theories of International Relations (IR).

The aim of this chapter is to expound on this theoretical framework. It is structured as follows: Section 2.2 starts by introducing the International Legal Process (ILP) school. It then describes the propositions underlying the theory of compliance developed by the Chayeses. Section 2.3 provides a detailed account of the elements that comprise the managerial model. This includes a discussion of the role that institutions play in securing compliance. In section 2.4, the factors that influence the design of treaty regimes are discussed. Section 2.5 discusses the contribution that International Relations theory can make to a comprehensive understanding of the international environment within which laws operate. The purpose of the discussion is not to provide an in-depth understanding of the different IR theories, as that would be beyond the scope of this thesis, but to derive some propositions from IR theory regarding how states behave and why they establish regimes.

2.2 International Legal Process

International Legal Process is a school of law that ‘emphasizes understanding how international law works.’\(^{72}\) The approach shows the ways in which international law plays a role in international affairs.\(^{73}\) It does this by ‘examining the role that law and lawyers actually play in international society’ and advocating ‘consideration of how the processes of international law [can] be improved.’\(^{74}\) Rather than concentrating on doctrinal analysis, ILP advocates a focus on ‘the study of the international legal process itself. How – and how far – do law, lawyers, and legal institutions operate to affect the course of international affairs?’\(^{75}\) This focus on process is built on the belief that most legal issues arise not before the courts, but in the policy-making processes that occur outside the courtroom.

2.2.1 Compliance and the Nature of the ‘Managerial Model’

The theory of compliance developed by Abram and Antonia Chayes focuses on the central role of treaties in ‘complex regulatory regimes’.\(^{76}\) It asserts that in the contemporary international system where states establish cooperative regimes to regulate common problems, coercive measures ‘to sanction violations cannot be utilized for the routine enforcement of treaties.’\(^{77}\) As an alternative to coercive

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\(^{72}\) Mary Ellen O’Connell, ‘New International Legal Process’ (1999) 93 *American Journal of International Law* 334, 334. The International Legal Process approach has its roots in the American Legal Process school, which is a school that was developed by Professors Hart and Sacks of Harvard University as a method for answering three questions: ‘What is law for? How does law operate? What is the relationship between law and society?’: at 335.

\(^{73}\) The approach was originally set out in a casebook entitled *International Legal Process*. The casebook contained materials aimed at providing ‘a general introduction to the range and reach, the adequacies and failings of the international legal system.’ Abram Chayes, Thomas Ehrlich and Andreas Lowenfeld, *International Legal Process* (1968) vii.

\(^{74}\) O’Connell, above n 2, 336–337. In this respect, ILP is similar to the Liberal school of IR, which also sees individuals as the primary actors in international affairs. The shared interest in the role of law and institutions illustrates the close relationship between ILP and IR: at 349–351. Section 2.5.5 contains a more detailed discussion of Liberalism in IR.

\(^{75}\) Chayes, Ehrlich and Lowenfeld, above n 3, xi. Despite this focus on process, the authors admit that much of the book involves ‘familiar doctrinal analysis – whether of statute-, treaty- or custom-based norms.’


\(^{77}\) Ibid.
models of compliance, it advocates reliance on ‘a cooperative, problem-solving approach.’

The theory is based on the assumption that there is a ‘general propensity for states to comply with their treaty obligations.’ This assumption is derived from three considerations: efficiency, interests, and norms. The efficiency argument, which is based on standard economic analysis, assumes that states are rational actors. It posits that states will realise that once a treaty establishing an authoritative rule has been adopted, compliance with the rule will save transactions costs by dispensing with continuous recalculation of costs and benefits. It is worth noting that Liberal IR theory disputes the rationalist notion that states are unitary actors. Rather, it asserts that state behaviour is better understood as a function of its relevant components.

With regard to interests, the theory posits that in view of the consensual nature of treaties, it is fair to assume that a state’s interests are served by entering into a treaty that it has negotiated since the treaty will represent ‘to some degree,’ an accommodation of its interests. Thus, even though the outcome of the negotiation process may result in a treaty that falls short of the ideals of particular states, if the treaty is well designed, ‘compliance problems and enforcement issues are likely to be manageable.’ This issue of interests is based on the principle of ‘voluntarism’. Voluntarism asserts that states are the creators and addressees of international law

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78 Ibid 3. One weakness with this definition of ‘enforcement’, as Danish correctly pointed out, is that it is limited as it consists ‘almost exclusively of sanctions or the threat of sanctions that have a material, military or economic effect on an international actor.’ Kyle Danish, ‘Book Review: The New Sovereignty’ (1996-1997) 37 Virginia Journal of International Law 789, 804.

79 Chayes, above n 6, 4. This assertion echoes back to Louis Henkin’s famous observation that “[v]iolations of law attract attention and the occasional important violation is dramatic; the daily, sober loyalty of nations to the law and their obligations is hardly noted. It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.’ Louis Henkin, How Nations Behave: Law and Foreign Policy (1968) 42. Alvarez noted that this observation ‘gave voice to what many international lawyers believe as an article of faith.’ Jose E Alvarez, ‘Why Nations Behave’ (1997-1998) 19 Michigan Journal of International Law 303, 306. This assumption was disputed very vigorously by Downs, Rocke and Barsoom who argued that the empirical findings on which the Chayeses’ research was based were ‘dangerously contaminated by selection problems.’ George W Downs, David M Rocke and Peter N Barsoom, ‘Is the Good News about Compliance Good News about Cooperation?’ (1990) 50 International Organization 379, 380.

80 Chayes, above n 6, 4.

81 See section 2.5.5 for a more detailed discussion of Liberal theory.

82 Chayes, above n 6, 4.

83 Ibid 7.
norms and there is no question of there being some representative proportion of states with the ability to speak for all or impose their will on the other states.\textsuperscript{84}

On the issue of norms, the theory contends that for states, as for individuals, ‘[t]he existence of a legal obligation … translates into a presumption of compliance, in the absence of strong countervailing circumstances.’\textsuperscript{85} It thus ‘builds on the parties’ general sense of obligation to comply with a legally binding prescription … bolstered by the requirement of justifying departures from treaty norms that is both a practical and a legal requirement in the international system.’\textsuperscript{86} Norms, as embodied in a treaty, provide the benchmarks or ‘coordination points’ against which a state’s behaviour is measured.\textsuperscript{87} The foundation of the theory is therefore the normative framework provided by the treaty itself.

In order for legal norms to generate compliance, however, it is necessary that those norms be legitimate. For a law to be legitimate, the theory posits that it must emanate from a ‘fair and accepted procedure,’ it should be ‘applied equally without invidious discrimination’ and it should not ‘offend minimum substantive standards of fairness and equity.’\textsuperscript{88} These are difficult standards to apply and the notion of equality is highly controversial. For some authors, the principle of equal treatment stands for the neutrality of the law. Wolf, for example, noted that ‘the principle of equal treatment before the law [was] not justified by the proposition that all people are identical; [but] by the proposition that differences among people are so many and various that criteria for a just differentiation can never be universally agreed upon.’\textsuperscript{89} On the other hand, there are those who argue that equal treatment of unequals is unjust. Yusuf, for example, asserted that the ‘notion that unequals should be treated unequally [was]

\textsuperscript{84} Prosper Weil ‘Towards Relative Normativity in International Law?’ (1983) 77 American Journal of International Law 413, 420.
\textsuperscript{85} Chayes above n 6, 8. This argument relies on the principle of \textit{pacta sunt servanda} for its force. Realists deny that law has such an effect. The Realist position is discussed in more detail in section 2.5.1.
\textsuperscript{86} Ibid 110, 117–123.
\textsuperscript{87} Ibid 110.
\textsuperscript{88} Ibid 127.
aimed at obtaining a correct and equitable application of the principle of equality.°

These conflicting views, which are often heard in debates regarding the application of
domestic laws, have been used as the basis for demanding special and differential
treatment in the multilateral trading system.

It is argued in this thesis that in view of the law’s function as a mechanism for
providing predictability, it is essential that the view espoused by Wolf be adopted and
applied in the WTO. This is not to say that the entire concept of special and
differential treatment should be scrapped. Rather it needs to be carefully rethought
and, to the extent that it completely exempts developing countries from any
substantive obligations, such as is the case with regard to the formation of regional
arrangements under the Enabling Clause, such provisions ought to be abolished.

The presence of these three elements — efficiency, interests and norms — in a treaty
should therefore increase the tendency of states to comply with their obligations.
Likewise, in situations where states do not bear the transactions costs, where the
element of consent is lacking or the norm is otherwise illegitimate, the probability of
non-compliance will be high. Proceeding on the assumption that these three
considerations were present, however, why would states not comply with their
obligations? The model discounts wilful flouting as a source of non-compliance. It
instead identifies three factors that ‘lie at the root of much of the behavior that may
seem to violate treaty requirements: (1) ambiguity and indeterminacy of treaty
language, (2) limitations on the capacity of parties to carry out their undertakings, and
(3) the temporal dimension of the social, economic and political changes
contemplated by regulatory treaties.’

How then is compliance to be defined?

These three elements complicate the appraisal of conduct and reveal that compliance
is often ‘not an on-off phenomenon.’ Rather in any legal system there will be a
number of laws where there will be a zone of compliance within which behaviour will
be accepted as adequately conforming. That is to say, the issue of compliance will be

91 Chayes, above n 6, 10. Though these factors could be considered to be ‘causes’ of non-compliance, the theory posits that they could also be thought of as defences to charges of non-compliance, in which case, if accepted, the conduct would not, strictly speaking, be considered a violation.
Due to this grey zone of compliance, a political process will often be needed to determine what levels of compliance are acceptable, and whether enforcement measures are taken. As a result, the theory contends that the outcome ‘in terms of compliance will reflect the perspectives and interests of the participants in an ongoing political process, rather than some external, scientifically or market-validated standard.’ This is an important insight with regard to the oft-criticised failure of WTO members to recommend the taking of any action against those RTAs that were believed not to conform to the Article XXIV conditions. The RTA examination process is not scientific and expecting the sort of outcome that judicial processes produce is unrealistic. This implies that any hopes that a clarification of the rules alone will lead to more decisive findings on WTO-consistency, are unlikely to be fulfilled.

2.2.2 Relative Normativity and Compliance

This sub-section advances the discussion regarding the ambiguity of legal obligations through a brief analysis of the nature and variety of legal norms from a positivist perspective. This analysis is relevant to an assessment of the efficacy of rules. It is also important because it illustrates the difficulties associated with securing compliance with laws. Prosper Weil, a prominent positivist scholar, asserted that the concept of international law was defined by both its nature and its functions. In his opinion, its nature was to be an aggregate of legal norms dictating ‘what its subjects must do (prescriptive norms), must not do (prohibitive norms), or may do (permissive norms)’ while its object was ‘to ensure the coexistence … and the cooperation of basically disparate entities composing a fundamentally pluralistic society.’ Legal rules thus fulfilled two purposes: they enabled heterogeneous, equal states to live

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92 Ibid 17. Kingsbury came to a similar conclusion, noting that compliance was ‘likely to be understood as a matter of consistency of behaviour with the rule as evaluated by its authoritative interpreters.’ (emphasis added) Benedict Kingsbury, ‘The Concept of Compliance as a Function of Competing Conceptions of International Law’ (1997–1998) 19 Michigan Journal of International Law 345, 352.
93 Chayes, above n 6, 20.
94 Ibid.
95 Weil, above n 14, 413.
96 Ibid 418.
together and they catered to common interests that arose over and above the diversity of states.\(^\text{97}\) In order for international law to actually fulfil these functions, Weil argued that it was necessary for it to constitute a normative order of good quality else it would be a defective tool.\(^\text{98}\) According to Weil therefore, effective ‘good quality’ international law displays three characteristics — voluntarism,\(^\text{99}\) neutrality,\(^\text{100}\) and ‘positivism’ — all three of which must be safeguarded if international law is to continue performing its functions.

The issue of ‘positivism’ is intertwined with the debate regarding the distinction between ‘hard’ and so-called ‘soft’ law. According to Weil, ‘positivism’ should not be understood to mean that it is an essential characteristic of international law that it be ‘posited’ by some formal source. Rather it should be understood as a reference to ‘the necessity of envisaging international law as positive law, i.e., as \textit{lex lata} distinct from \textit{lex ferenda}.\(^\text{101}\) Weil argued that this distinction was slowly being blurred by ‘a trend towards the replacement of the monolithically conceived normativity of the past by graduated normativity’.\(^\text{102}\) Simultaneously, there was a trend towards dilution so that whereas in the past norms ‘had clearly specifiable passive and active subjects’ these categories were becoming blurred.\(^\text{103}\) Though these developments could be viewed as progress in that they reflected the injection of ethics into the law, he argued that vigilance was necessary else ‘the waning of voluntarism in favor of the ascendancy of some, neutrality in favor of ideology, positivity in favor of ill-defined values might well destabilize the whole international normative system and turn it into an instrument that can no longer serve its purpose.’\(^\text{104}\) These observations are central to the argument that the benefits of the Enabling Clause in terms of flexibility do not outweigh the damage it has done to WTO rules.

\(^{97}\) Ibid.
\(^{98}\) Ibid 413.
\(^{99}\) The issue of voluntarism was discussed above (see nn 12–14 and accompanying text) and need not be revisited.
\(^{100}\) Weil, above n 14, 420. Also see above nn 18–20 and accompanying text.
\(^{101}\) Ibid 421. Voitovitch voiced the same concerns, urging supporters of the concept of ‘soft’ economic law to ‘avoid the methodological error of confusing \textit{lex lata}, a system of consensual legally binding norms with \textit{lex desirata}, a sort of “pre-law” rule which can be expected to become a full-ledged law (sic).’ Sergei Voitovitch, \textit{International Economic Organizations in the International Legal Process} (1995) 100.
\(^{102}\) Ibid 421.
\(^{103}\) Ibid 422.
\(^{104}\) Ibid 423.
However, the lack of clarity of obligations cannot be attributed solely to the increasing fusion of *lex lata* and *lex ferenda* decried by Weil and Voitovitch. It can also be credited to a characteristic property of international law, the existence of ‘hard’ law,\(^{105}\) alongside other norms whose substance is of a vaguer, ‘softer’ less compelling nature.\(^{106}\) The existence of ‘soft’ legal norms weakens the ability of international law to constrain the conduct of states and hence makes it harder to regulate state behaviour.\(^{107}\)

The task of enforcing or securing compliance with treaty obligations is further complicated by the existence of ‘unenforceable norms’. These are norms that do not create rights or duties but which nevertheless occupy a place in international law.\(^{108}\) Baxter correctly observed that it was ‘inevitable that in the course of negotiation and compromise, those who write international instruments will set down on paper whatever will secure agreement, even though the resulting product may not neatly fall into the neat categories to which lawyers are addicted.’\(^{109}\) In his opinion, the lawyer’s task was to advocate compromise, so to make agreement possible, not to adopt an either-or posture.\(^{110}\) There are several categories of such ‘unenforceable’ norms, three of which are relevant in the context of this thesis.

**Political Treaties** – These are treaties whereby states enter into alliances, agree to coordinate military action or lay out their agreed policies for the future. These treaties are vulnerable to the operation of *rebus sic stantibus*. In the event of a state failing to

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\(^{105}\) Abbott and Snidal define ‘hard’ law to mean ‘legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law.’ Kenneth W Abbott and Duncan Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54 *International Organization* 421, 421.

\(^{106}\) This is not to say that the normative character of the latter is affected; even though a rule of treaty or customary law is vague, it remains a legal norm. Weil, above n 14, 414. Moreover, it has been noted that under the Vienna Convention on the Law of Treaties, there is no specified form for treaties nor is there a need for treaties to contain any ‘hard’ legal rights or obligations. The dichotomy between ‘hard’ and ‘soft’ law in terms of form may thus not be conclusive. Christine Chinkin, ‘A Hard Look at Soft Law: Remarks’ (1988) 82 *American Society of International Law Proceedings* 389, 389.


\(^{109}\) Ibid 565.

\(^{110}\) Ibid.
abide by the terms of such a treaty nothing can be done to compel it as it was never expected that such treaties would be ‘enforced’.111

**Pacta de contrahendo** – Provisions of a treaty that call for further negotiation towards the conclusion of more detailed agreements comprise another category of ‘soft’ law. Such provisions or *pacta de contrahendo* cannot be enforced if the parties are unable to reach agreement.112 In Chapters Five and Six, it will be seen that such provisions are prevalent in Eastern and Southern African integration treaties, and that they derailed the integration timetable of COMESA. Similar to *pacta de contrahendo* are those provisions of a treaty that are ‘non-self-executing in the sense of requiring further more detailed treaties in order to give effect to the principal treaty.’113

**Hortatory provisions** – Provisions of a treaty that are merely hortatory in the sense that they only call for cooperation by States to achieve certain purposes form another category of unenforceable ‘soft’ law.114 In the *Appeal Relating to the Jurisdiction of the ICAO Council*, Judge Dillard described such provisions as representing ‘ideals and aspirations which, being hortatory, are not considered to be legally binding except by those who seek to apply them to the other fellow.’115 John Jackson noted that the confusion regarding the nature of such provisions, which he termed ‘norms of aspiration’, made it more complex to evaluate compliance with international law norms. He warned that mixing norms of obligation and aspiration in one instrument could lead to tensions as a result of some countries considering a clause to be a norm of obligation when other parties considered it to be a norm of aspiration.117

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111 Ibid 550.
112 Ibid 552.
113 Ibid 552 – 553.
114 Ibid 553.
115 *Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan)* [1972] ICJ Reports 46, 107, n 1.
117 Ibid 762. He defined norms of obligation as being ‘those legal norms toward which the attitude is that a person or country should feel obligated to follow’ while norms of aspiration were those modes of conduct that everyone thought were desirable but towards which there was no feeling of obligation: at 761.
2.3 Central Elements of the Management Strategy

What measures can be taken to increase the effectiveness of a legal regime in the event that parties fail to comply with their treaty obligations? Assuming that the bulk of compliance problems are due to ‘lack of capability, or clarity or priority’, the managerial model posits that compliance can be improved by employing a strategy that addresses these deficiencies. It asserts that the elements of such a strategy include the development of data through reporting activities, verification and monitoring, participation, dispute settlement, capacity building and technical assistance, and treaty adaptation. The following sub-sections describe these elements in more detail. It should be noted that these activities can be undertaken concurrently and on an ongoing basis. They are discussed separately here for purposes of clarity.

2.3.1 Reporting and Data Collection

The first element of the management strategy consists of data collection. Its aim is ‘to generate information about the policies and activities of parties to the treaty that involve treaty compliance and regime efficacy.’ Data collection activities are primarily aimed at enhancing the transparency of the regime. The strategy asserts that transparency promotes treaty compliance in three ways: facilitating ‘coordination converging on the treaty norm among independent actors’, providing reassurance that the actors ‘are not being taken advantage of when their compliance with the norms is contingent on similar action by other (or enough other) participants in the regime’, and exercising ‘deterrence against actors contemplating noncompliance’ (emphasis original). The availability of information thus enables parties to determine whether obligations are being performed and if not, to initiate the process of finding out why not and deciding what consequences should follow.

118 Chayes, above n 6, 22.
119 Ibid 154.
120 This is defined as ‘[t]he availability and accessibility of knowledge and information about (1) the meaning of norms, rules, and procedures established by the treaty and practice of the regime, and (2) the policies and activities of the parties to the treaty and of any central organs of the regime as to matters relevant to treaty compliance, and regime efficacy.’ Ibid 135.
121 Ibid. Goldstein and Martin have argued that although increased transparency in the WTO may reduce incentives for cheating by individual states, it can have the unintended effect of interfering with trade liberalisation by providing antitrade groups with the ammunition they need to mobilise to oppose the conclusion of a treaty. They do admit, however, that at present there is no evidence to suggest that transparency has gone so far as to threaten liberalisation. See Judith Goldstein and Lisa L Martin, ‘Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note’ (2000) 54 International Organization 603.
The question that follows from this is: who is to provide the data? There are two possible options: the party itself or an independent entity set up by the Treaty to perform this function. The model notes that treaty regimes generally provide for self-reporting by the parties rather than for the use of independent agents.\textsuperscript{122} It has been argued that entrusting this function to an independent entity that is not subservient to any of the member states would facilitate cooperation.\textsuperscript{123} Such an independent entity can be an organ of the regime or it can be some other trusted body. This issue is particularly relevant with regard to the WTO’s rules on RTAs which require members to report and provide data regarding the regional trade agreements they establish.\textsuperscript{124}

2.3.2 Policy Review, Assessment, Participation and Supervision

A second element of the strategy involves policy review procedures.\textsuperscript{125} The review process involves exploring the shortfalls of performance and working with parties to understand the reasons for non-compliance and to develop a program for improvement.\textsuperscript{126} It thus involves the participation of all the interested parties. It is argued that the process works because it exerts ‘strong pressures on parties to comply with their obligations’ due to the desire of states to avoid the threat of exposure or shaming and to maintain a reputation for reliability in the international system.\textsuperscript{127} Danish has argued that these measures actually form part of what can be termed a ‘social enforcement’ strategy, as opposed to the ‘material enforcement’ strategy that the managerial school is so opposed to. Such a strategy ‘leverages an international actor’s standing and reputation for good faith throughout the international community.’\textsuperscript{128} The supervision aspect of this element, like data collection, can either be carried out by the parties themselves or by an entity set up to discharge this role.

\begin{itemize}
\item \textsuperscript{122} Ibid 154.
\item \textsuperscript{123} Ignaz Seidl-Hohenveldern, \textit{International Economic Law} (1992) 76. See below section 2.3.6 for further detail on the role of organisations in securing compliance.
\item \textsuperscript{124} See section 4.5.
\item \textsuperscript{125} Chayes, above n 6, 229.
\item \textsuperscript{126} Ibid 230.
\item \textsuperscript{127} Ibid.
\end{itemize}
2.3.3 Capacity Building and Technical Assistance

Capacity building is used to tackle ‘deficits of technical and bureaucratic capability and financial resources.’ The model posits that such deficits act as constraints to the domestic implementation of international obligations. It therefore urges the inclusion of capacity building and technical assistance measures in treaty regimes. Capacity building can take the form of informal interaction between civil servants and the staff of international bodies or more formal training through activities such as the provision of scholarships. Though such programs may ‘involve an element of indoctrination in the goals and philosophy of the’ international organisation, the model argues that the value of the training makes it worthwhile.

It is worth noting that the importance of capacity building is recognised by the WTO. This is reflected in the numerous training courses that it runs for government officials from developing and least developed countries as well as economies in transition. Programs run by the WTO and other donor agencies that illustrate the importance of this factor include JITAP and the Integrated Framework.

2.3.4 Dispute Settlement

It has been argued that uncertainty and incomplete contracting may lead states to deliberately draft obligations in broad terms and to delegate the responsibility of interpreting and applying the terms to administrative and judicial bodies. Ambiguity arising from the shortcomings of language may also lead to differences as to the meaning of treaty obligations or the nature of state conduct. The aim of providing for a dispute settlement mechanism in a treaty regime is to ensure that a method exists for resolving such issues.

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129 Chayes, above n 6, 25.
130 Ibid 198.
132 The Joint Integrated Technical Assistance Programme is run by the WTO, UNCTAD and the ITC whereas the Integrated Framework is an initiative of the WTO, UNCTAD, ITC, World Bank, IMF and UNDP that was first mandated by the WTO’s Ministerial Conference in Singapore in 1996.
133 See section 2.4.4 for a more detailed discussion of uncertainty and incomplete contracting in the design of regimes.
134 Chayes, above n 6, 201.
The managerial model notes that the methods provided for in Article 33 of the UN Charter\textsuperscript{135} all form ‘part of the standard tool kit for the management of a working regime.’\textsuperscript{136} Thus, the model does not necessarily require the inclusion of a formal dispute mechanism. What it contends is needed, is some mechanism for resolving disputes, be it formal or informal. Indeed the use of informal dispute mechanisms corresponds to the cooperative, non-coercive strategy that it promotes. In Chapter Six, it will be seen that although COMESA contains provisions setting up procedures for formal adjudication, member states prefer to resolve their disputes informally.\textsuperscript{137} This often involves the use of either the Council or the Secretariat to resolve disputes.

2.3.5 The Adaptation and Modification of Treaty Norms

This element of the management strategy is aimed at ensuring that the treaty regime responds to ‘inevitable changes in technology, shifts in substantive problems, and economic, social and political developments.’\textsuperscript{138} Because treaty amendment is cumbersome and slow, the model posits that methods may need to be devised that enable faster action, for example, placing regulations in appendices that do not need to be changed by reference to the entire body.\textsuperscript{139} In making use of these alternative methods, however, it is important to ensure that the element of ‘voluntarism’ is retained. Without it, the legitimacy of the treaty can be compromised.

2.3.6 The Role of Institutions in Securing Compliance

One weakness of the managerial approach, as conceptualised in \textit{The New Sovereignty}, is that it overly focuses on treaties and does not place enough of an explicit emphasis on the role played by institutions in applying the managerial tools. Ernst-Ulrich Petersmann highlighted the central role of institutions. Based on a study of a number

\textsuperscript{135} \textit{Charter of the United Nations}, art 33. These include: negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of the parties’ own choice.

\textsuperscript{136} Chayes, above n 6, 201.

\textsuperscript{137} See section 6.4.

\textsuperscript{138} Chayes, above n 6, 225.

\textsuperscript{139} Ibid 225–227.
of existing organisations, he argued that one of the prerequisites for successful economic integration was the existence of a strong, independent community organ.\textsuperscript{140}

Sergei Voitovitch went into more detail, noting that:

International legal regulation in any field, including that of economic relationships, appears as two interconnected facets: (1) \textit{the system} of three principal components: the subjects, object and mechanism of legal regulation (the static or institutional aspect); (2) \textit{the process} comprising the two basic phases: law-making and law-implementation, which functionally link the subjects, object and mechanism of legal regulation into an operating system (the dynamic or functional aspect).\textsuperscript{141} (emphasis original)

Ignaz Seidl-Hohenveldern reiterated and expanded on the central role of institutions in regulation. He argued that in order for international cooperation to work, cooperating states needed an entity that would collect, verify and exchange data between them while not being subservient to any of them.\textsuperscript{142} However for such an entity to function, he argued that it had to be seen as legitimate, that is, all its member states needed to ‘consider its actions as the result of their common will and effort.’\textsuperscript{143} The entity, or organisation, therefore needed at least two organs in order to be effective: one where the members could agree on its common aims and another independent organ that would express the common ‘will towards the individual member states, as well as towards other subjects of international law.’\textsuperscript{144}

These observations have important implications not just for the kinds of institutions that states should establish but also for the makeup of organisations. An organisation that is ‘universalist’ in nature, such as the WTO arguably is, or has been in the past, is unlikely to be endowed with a central organ having strong independent powers while one that is more ‘purist’ might be keener to ensure compliance with the obligations taken on by member states.\textsuperscript{145} It is worth noting however, that the contrary argument

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\begin{itemize}
\item \textsuperscript{140} Ernst Ulrich Petersmann, ‘Theory and Comparative Legal Aspects of Economic Integration among Developing Countries’ in Frederick E Snyder and Surakiart Sathirathai (eds), \textit{Third World Attitudes Toward International Law} (1987) 453, 460.
\item \textsuperscript{141} Voitovitch, above n 31, 163.
\item \textsuperscript{142} Seidl-Hohenveldern, above n 53, 76.
\item \textsuperscript{143} Ibid 76
\item \textsuperscript{144} Ibid 77. See also John Jackson, \textit{The World Trading System: Law and Policy of International Economic Relations} (2nd ed, 1997) 111, highlighting the importance of norm formulation and norm implementation.
\item \textsuperscript{145} A ‘universalist’ organisation will have ‘a tendency to accept any interested State as a member, even at the price of accepting that State on its own special terms,’ while one that is purist will have a
\end{itemize}
may be made. That is, in a purist organisation, the members share in the goals of the organisation and hence are more likely to comply with their obligations whereas in a universalist organisation, the members may not be so homogenous. Hence, they may be in more need of the pressure that a strong central organ would apply to induce them to comply with their obligations.

The following section discusses some of the factors that studies have shown to influence the decisions of states regarding the strength and precision of obligations as well as the extent to which strong, independent organs are included.

2.4 Factors Influencing Regime Design

This section builds on the discussion of the role of institutions in securing compliance by discussing the factors that influence regime design. This analysis incorporates a discussion of the advantages and disadvantages of ‘legalisation’ in the facilitation of international cooperation. The discussion is relevant to the evaluation of the efficacy of regulatory regimes because it reveals that in a substantial number of instances, it will not be the goal of states to design regimes that are as effective and efficient as domestic regimes but rather to alleviate the consequences of an anarchic environment.

The creation of strong international institutions, especially those with a strong, formal dispute settlement mechanism, has been referred to as a part of the process of ‘legalisation’. Abbott and his colleagues defined ‘legalisation’ in terms of the particular set of characteristics that institutions may or may not possess, measured along three dimensions: obligation, precision and delegation.\textsuperscript{146} Reich on the other hand, saw the process as being one of ‘juridicization’, which he envisaged as encompassing developments on both a substantive and procedural level.\textsuperscript{147} He asserted that in the context of trade relations this process was clearly reflected in the


\textsuperscript{147}Arie Reich, ‘From Diplomacy to Law: The Juridicization of International Trade Relations’ (1996-97) 17 North Western Journal of International Law and Business 775, 777.
enforcement and dispute settlement mechanism of GATT.\textsuperscript{148} Where these scholars all agree is that strong international institutions are an essential dimension of the process of ensuring compliance with obligations by states. The strength of the organs created by treaties, together with the strength of the norms themselves, can thus serve as an indicator of the extent to which states value compliance with treaty obligations.

2.4.1 The Minimisation of Transaction Costs

There are several aspects to the issue of transaction costs: the negotiation of the rules, the management of the agreed rules and the enforcement of the commitments arising from the rules. The negotiating costs involved in the creation of an institution or instrument can be reduced by the use of ‘soft’ law. Though any agreement entails some negotiating costs, such as coming together, learning the issue, and bargaining, these costs are greater for legalised agreements which usually require greater care in their negotiation and drafting.\textsuperscript{149} As a result, negotiating an agreement is generally a lengthy, complex process. Using soft law can mitigate these costs by allowing states to use ambiguous language and provide for recourse to soft forms of delegation. Such ‘soft’ delegation permits states to retain some control over the outcome of disputes if adverse conditions arise.\textsuperscript{150} Soft law is thus seen as being easier to achieve than hard law because it is considered to offer more effective ways of dealing with uncertainty and facilitating compromise.\textsuperscript{151}

The negotiating history of GATT offers a good example of the use of soft legalisation to overcome the problems posed by hard law in a costly contracting environment. The ITO Charter, which proposed binding commitments over a wide range of issue-areas, proved to be difficult to negotiate and, once signed, was unable to overcome political resistance to its terms within the US Congress. The GATT, which took its place, contained far-fewer binding commitments, no central institution and was only adopted ‘provisionally’.\textsuperscript{152} There was therefore less resistance to its operation.

\textsuperscript{148} Ibid 793.
\textsuperscript{150} Ibid, 435.
\textsuperscript{151} Ibid, 423.
\textsuperscript{152} Ibid, 436. Also see section 4.2.1 for a further discussion of the history of GATT with regard to the MFN principle.
With regard to management, legalisation reduces transaction costs by ensuring that information is provided efficiently as well as setting out the bounds within which proposals for settling disputes and devising new rules will occur. In such an environment, unauthorised coercive behaviour will also be seen to be illegitimate. With regard to the issue of enforcement, ‘demandeurs’ will generally seek ways of reducing or responding to violations by others. By offering a range of institutions and procedures for monitoring and dispute settlement, legalisation will make it harder for a unitary state to behave opportunistically and renege on trade agreements thus reducing the costs of enforcement.

One feature of many dispute settlement mechanisms is that only states have standing to bring a dispute. In the area of trade, however, the transactions costs of a failure to comply with an obligation are often borne by the private sector. The state itself may not be aware of the existence of a breach until it is brought to its attention and even then, the party affected has to rely on the state to take its case forward. It may therefore be worthwhile to establish dispute settlement mechanisms where private parties are able to make complaints and seek to have states made accountable.

2.4.2 The Enhancement of Credibility

It is argued that legalisation enhances credibility in several ways. Firstly, it increases the precision of individual commitments. It also improves coherence between individual commitments and broader legal principles, and lastly, by granting interpretive authority to third parties, legalisation constrains self-serving autointerpretation. The latter is a real danger where obligations are drafted using ambiguous language and the task of interpreting compliance is left with the parties themselves. From a strictly legalistic viewpoint, this is one of the main weaknesses of the Article XXIV process and of the institutional frameworks of many RTAs.

153 Abbot and Snidal, above n 79, 430; Goldstein and Martin, above n 51, 630.
154 Abbott and Snidal, above n 79, 430–431.
155 States that have worked to obtain commitments from others.
156 Abbott and Snidal, above n 79, 431. Goldstein and Martin, above n 51, 630.
157 Shell, for example, has argued that institutional reforms should be made to the WTO to give standing to not only states but also to businesses and ‘groups that are broadly representative of diverse citizen interests.’ G Richard Shell, ‘Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization’ (1994-95) 44 Duke Law Journal 829, 910.
158 Abbott and Snidal, above n 79, 427.
Legalisation also enhances credibility by enhancing the costs of reneging through the effects that violations will have on the reputation of the violator. This can take several forms: The interpretation and application of hard legal commitments by an arbitral or judicial body under accepted standards and procedures will increase the reputational costs if a violation is found.\textsuperscript{159} Similarly, at a normative level, violations of commitments will entail reputational costs reflecting disapproval for breaking international law and its strong emphasis on good faith and the \textit{pacta sunt servanda} principle.\textsuperscript{160} Lastly, legalisation can enhance credibility by encouraging the internalisation of rules by domestic bodies and the use of legal discourse that disqualifies arguments based largely on interests and preferences.\textsuperscript{161}

2.4.3 The Modification of Political Strategies

A legalised institution incorporating a judicial or arbitral organ offers alternative dispute resolution techniques to the more political techniques such as negotiation. This can be an incentive to states who would wish to take advantage of such techniques for the political benefits they might receive from them. For instance, it may be easier to convince a sceptical domestic audience of the need to undertake an unpopular measure if it is presented as ‘legally’ required, thus lowering the political cost.\textsuperscript{162} Trade liberalisation measures such as the elimination of tariffs that protect uncompetitive domestic sectors fall into the category of measures that may benefit from such ‘legal’ justification. The contrary argument can also be made, however. That is, prudent governments on both sides of trade agreements might be ‘reluctant to lock themselves into binding arbitral or adjudicative dispute settlement mechanisms’ because they will appreciate that disruptions leading to unilateral departures from the agreement are driven by powerful domestic forces.\textsuperscript{163}

\begin{itemize}
\item \textsuperscript{159} Ibid.
\item \textsuperscript{160} Ibid, 428.
\item \textsuperscript{161} Ibid, 429.
\item \textsuperscript{162} Ibid 432–433.
\end{itemize}
2.4.4 Incomplete Contracting and Uncertainty

The difficulties associated with writing complete contracts mean that writing an agreement that anticipates every eventuality is virtually impossible. Opportunistic behaviour will therefore be a real risk. In such situations, states can draft the rules in broad terms and delegate the responsibility of interpreting and applying the rules to administrative and judicial institutions. Such agreements will generally set out standards rather than provide for strict rules.\footnote{Abbott and Snidal, above n 79, 433.} Although this approach avoids the costs of having no agreement at all, it will generally entail high sovereignty costs. The presence of uncertainty may thus make legalisation undesirable especially if parties want to avoid the possibility of being caught in unfavourable commitments.\footnote{Ibid 442, noting that such an approach is especially suitable to agreements dealing with environmental issues where the science may not be exact. States may also opt for a non-binding agreement with precise terms (an instrument with ‘political obligations’) and thereby buy themselves time to see how the agreement might work in practice. Such nonbinding agreements will normally have a strong normative element to them. Note however, that such nonbinding agreements are different in nature from the ‘political treaties’ discussed above. See n 41 above and accompanying text.} By reducing the ability of governments to opt out of commitments, legalisation can make governments more reluctant to enter into agreements that do not cater for the uncertain environment of international trade.\footnote{Goldstein and Martin, above n 51, 604.} Using soft law can provide a way out of this.

2.4.5 Safeguarding Sovereignty

The sovereignty costs to a state of accepting a binding legal obligation range from basic differences in outcome on disputed issues to deeper losses of authority over decisions in key areas.\footnote{Abbott and Snidal, above n 79, 436.} This is true at both the multilateral and the regional level. At the lower end of the scale, loss of sovereignty will involve commitments to limit behaviour in particular instances while at the upper end, agreements might entail a state accepting external authority over internal affairs. The sovereignty costs of the latter kind of commitment are higher due to the fact that changes may be required to governance structures in circumstances where the public will feel alienated from the decision-makers.\footnote{Ibid 437.} One way of getting around this is to provide for a body through which the public’s voice can be heard. In Chapter Five, it will be seen that the East...
African Community has taken a step in this direction by establishing the East African Legislative Assembly.

It has been noted that delegation of dispute resolution responsibility in particular can lead to unexpected sovereignty costs especially where the state has limited control over the centralised judicial decision-maker. In such situations, ‘soft’ law plays a role by helping states limit sovereignty costs through the use of strategies such as imprecise rules with low obligations. Weak legal institutions also lessen sovereignty costs.

In the context of the multilateral trading system, it has been argued that the trend towards the use of ‘hard’ law in the WTO may represent a danger to increased trade liberalisation. This is based on the argument that by providing more and better information about the effects of liberalisation, legalisation can create incentives for proprotectionist groups to mobilise and pressure their governments to adopt policies favouring them. Conversely, ‘[l]egal commitments mobilize legally oriented interest and advocacy groups … and legitimise their participation in domestic decision making.’

### 2.4.6 The Promotion of Compromise

Possibly the most valuable benefit conferred by soft law is that it provides flexibility and hence facilitates compromise. Where agreement between states on all the aspects of an agreement is difficult or protracted, a soft instrument can establish general goals that all parties agree to. Thus states are able to adapt their commitments to their particular situations. This scenario is one that is particularly visible in the WTO where developing countries are now given wide latitude to liberalise trade according

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169 An example frequently cited to illustrate this point is that of the European Court of Justice, which is credited with advancing European Law into areas not contemplated by the drafters of the Rome Treaty.
169 It is argued that concerns over sovereignty will not arise in relation to all issue areas and in some areas such as matters of a technical nature, states will perceive sovereignty costs as low and will correspondingly be willing to agree to ‘hard’ laws. Trade is one such area where, despite the significant costs involved, states have been willing to enter into legalised agreements due to their perceived benefits. This is partly due to lesser conflicts of interest between states and partly to strong domestic support from beneficiaries of a strong system. Abbott and Snidal, above n 79, 438–441.
170 Goldstein and Martin, above n 51, 609-615.
171 Abbott and Snidal, above n 79, 428.
172 Ibid 445.
to their capacity. The drawback of this strategy is that the elements of predictability and stability are correspondingly reduced.

Summary
The discussion of regulation to this point has developed in two directions. It has examined the different elements that comprise the managerial model of inducing compliance and it has discussed some of the factors that impinge on the design of institutions. The underlying premise has been that save for the presence of ambiguity, lack of capacity and temporal factors, states will comply with their legal obligations. In the following section, the political and systemic factors that impact on the effectiveness of institutions are brought into the framework through a brief discussion of International Relations theory.

2.5 International Relations Theory, the Creation of Regimes and the Effect of Law on State Behaviour
Regional integration and international trade in general inherently entail cooperation between states. Robert Keohane observed that ‘all efforts at international cooperation take place within an institutional context of some kind, which may or may not facilitate cooperation.’ The previous sections have discussed institutions from a legal perspective based on an assumption that states will comply with their treaty obligations. Thus a lawyer analysing the conduct of states in an institutional context will conclude that the behaviour of states is causally related to the institutions created and treaties that they voluntarily enter into.

However, when International Relations (IR) scholars interpret that same behaviour, they often come to different conclusions depending on the underlying assumptions

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175 The Chayeses note that ‘foreign policy practitioners operate on the assumption of a general propensity of states to comply with international obligations.’ Chayes, above n 6, 3.
176 The discipline of International Relations is primarily concerned with the study of international politics. Two good introductory texts on International Relations are Scott Burchill et al, Theories of International Relations (2nd ed, 2001) and Robert Jackson and Georg Sørensen, Introduction to International Relations (1999).
that they make about the nature of the international system. The principal schools of IR theory, which can be grouped according to these analytical assumptions, ‘all shed light on the assumptions underpinning different visions of international law, and all have implications for the efficacy of specific international rules.’

With regard to integration, International Relations theory can therefore be used to formulate some propositions regarding the circumstances under which states cooperate and ways in which the regimes created for this purpose can be improved. It is in this context that IR and four of the main theoretical traditions within it are discussed in this thesis.

2.5.1 The Relationship Between IL and IR Approaches

Before discussing the main schools of IR theory, it may be useful to review some of the similarities shared by the two disciplines and to go into more detail regarding the ways in which proponents of interdisciplinary scholarship have claimed that IL and IR can benefit each other. IR scholars, like international lawyers, are concerned with the interaction of states and their behaviour.

Also like law, IR has no single agreed way of studying the subject. Contemporary scholars within the disciplines typically employ different approaches proceeding from divergent assumptions. In employing IR it is therefore important to be clear about the assumptions upon which one is proceeding.

Regarding the uses to which IR can be put, it has been argued that although International Relations is not directly applicable to doctrinal or normative inquiries, it

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179 Anne-Marie Slaughter notes that ‘international lawyers and international relations scholars study and thus must conceptualize the same phenomenon – the behaviour of the principal actors in the international system.’ Slaughter, ‘Liberal International Relations Theory’, above n 107, 718.
180 Three caveats can be added to this general observation: firstly, the disciplinary borders between International Law and International Relations are not always clear; secondly, within each discipline the lines dividing each approach may be obscured; and thirdly, ‘even within the same scholarly approach of a single discipline, a broad spectrum of perspectives may exist’ (emphasis original). Beck, Arend and Vander Lugt, above n 108, 4.
can serve a useful function to International Law scholars by situating legal rules and institutions in their political context. This has the benefit of reducing the abstraction and self-contained character of doctrinal analysis, channelling normative idealism in effective directions, and suggesting some of the implicit preferences scholars have for particular sources of law. Abbott suggests that IR theory is most valuable to lawyers because of the manner in which it carries out three intellectual tasks: description, explanation, and institutional design.

With regard to the task of description, he notes that IR theory can assist lawyers by providing a rich description of legal institutions incorporating political factors that shape the law such as the interests, power, and governance structures of states and other actors, the information, ideas and understandings on which they operate and the institutions within which they interact. On explanation, Abbott notes that a scholar applying IR theory can choose to treat legal rules and institutions as either ‘dependent variables’, that is phenomena to be explained, or as ‘independent variables’, that is explanatory factors. Analyses of law as a dependent variable help scholars to understand the functions, origin and meaning of rules and institutions, while analyses that treat law as an independent variable help in the assessment of ‘the workings and effectiveness of legal arrangements in the real world.’ This knowledge can then be used to predict future developments and design institutions capable of affecting behaviour in desirable ways. The third use of IR theory, the design of institutions is a function of their explanatory role. Abbott argues that complementary interdisciplinary research can help international law scholars by strengthening their ability to perform tasks such as ‘designing effective agreements, procedures and institutions and carrying out the more detailed planning and drafting needed to bring them to fruition.’

182 Ibid.
183 Ibid. Slaughter, Tulumello and Wood note that IL scholars have used IR to ‘diagnose substantive problems and frame better legal solutions; to explain the structure of function of particular international legal rules or institutions; and to reconceptualize or reframe particular institutions or international law generally’. Slaughter, Tulumello and Wood ‘International Law and International Relations Theory’, above n 108, 369.
185 Ibid 363.
186 Ibid.
There are numerous schools of IR theories, each based on a distinct vision of international politics. For the purposes of this thesis, the taxonomy adopted by Abbott, consisting of Realism, Institutionalism, Liberalism and Constructivism will be used. The following sub-sections provide brief overviews of these four approaches to International Relations.

2.5.2 Realism: Agreements as Reflections of Underlying Power Distributions

The Realist school is said to be ‘the most influential theoretical tradition in International Relations.’ According to Realists, ‘the international system is a competitive environment where states struggle with each other for survival’ and order can only be obtained through the balancing of interests that occurs as states pursue power. In such anarchical conditions, power differentials are considered sufficient to explain important events. Realists thus concentrate their research on interactions between the major powers. Realists make the following assumptions about the international system:

- the international system is anarchic;
- states are the primary actors in the international system;
- states are unitary actors;
- states inherently possess offensive military capability giving them the capacity to hurt each other;
- states can never be certain about the intentions of other states;
- states are motivated by the survival instinct; and

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188 Abbott, ‘International Relations Theory’, above n 108, 361. Note that the proposition that there are four principal schools of IR is not universally shared by International Relations scholars let alone International Lawyers. Jackson and Sorenson, for instance, identify three ‘established’ theories: Realism, Liberalism and International Society: Jackson and Sorenson, above n 106, xvi. Anne-Marie Slaughter also identified three principal schools of IR: Realism, Institutionalism and Liberalism. Slaughter, ‘Liberal International Relations Theory’ above n 107, 718.

189 Scott Burchill, ‘Realism and Neo-realism’ in Scott Burchill et al, *Theories of International Relations* 70, 70.


- states think strategically about how to survive.\textsuperscript{192}

Thus, according to the Realist school, if one wishes to understand international behaviour, one ‘must first understand the underlying power distribution in the international system.’\textsuperscript{193} Realists deny that legal rules and institutions have any real independent force and claim that states will use normative arrangements as mere tools in their pursuit of power. Thus, to a Realist, legal rules are ‘epiphenomenal’ and only affect the behaviour of international actors marginally, if at all.\textsuperscript{194}

Realism has been criticised by a number of authors. Koh, for instance, argued that the assumptions that the international system is anarchic, that states are the primary actors, that states behave rationally, and that the principal interest of states is security, are ‘demonstrably false’.\textsuperscript{195} Thus, when it comes to international trade regulation, rules are not epiphenomenal and the entire history of the GATT was focused on negotiating detailed rules setting out how states are to act and finding ways in which those rules can be enforced. While accepting that the approach demonstrated a notable explanatory power, especially with regard to the Cold War, Arend noted that it had three main shortcomings: an incorrect assumption that the anarchical nature of international society inevitably led to insecurity and thus competition for power; an assumption that the identity and interests of states were exogenously determined; and lastly, a failure to differentiate legal rules from other types of rules.\textsuperscript{196}

When applied to the field of international trade, the Realist school argues that the patterns of international trade are shaped by alliance politics and that power politics is at the centre of the formation of RTAs.\textsuperscript{197}


\textsuperscript{193} Ibid 114.

\textsuperscript{194} Ibid 116; see also, Abbott, ‘International Relations Theory’, above n 108, 365.


\textsuperscript{196} Arend, ‘Do Legal Rules Matter?’ above n 120, 116–117.

2.5.3 Institutionalism: Agreements as Contracts for Securing State Interests

The Institutionalist approach is based on the assumption that states create institutions and regimes and that institutions and regimes can play significant roles in affecting the behaviour of international actors. Institutionalism can be traced back to the interwar years when scholars first undertook the study of international organisations. It was not until the 1970s, however, that it took shape as a distinct approach to International Relations. In that time, it has been referred to by a variety of titles, and has evolved from the study of formal institutions to the study of international regimes. Regime theorists have argued that institutions serve a purpose in their own right and do not exist merely as a corollary to powerful states.

The ‘functionalist’ school took regime theory a step further and, using rational choice techniques, explained that the pervasiveness and persistence of regimes was a result of rational calculations by participating states. Though sharing a number of assumptions with the Realists (that states are the primary actors in the international system, that the international system is anarchic, that states behave as unitary and rational actors and that states seek to maximise their interests), ‘rationalist institutionalists argue that the creation of institutions and regimes can independently influence state behavior.’ They also argue that ‘states seek something in international affairs in addition to naked power, most notably wealth and domestic stability.’ Functional analysis of the kind carried out by contemporary Institutionalists, ‘tries to understand what it is that international agreements, rules and institutions actually do for states – why states go to the trouble of creating such things, maintaining and expanding them, complying with them and attempting to enforce them.’

Institutionalist scholars identify a broad range of interests that depend on cooperation between states but where obstacles exist that prevent states from cooperating. They

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198 Arend, ‘Do Legal Rules Matter?’, above n 120, 120.
203 Shell, above n 87, 858.
therefore analyse ways in which rules and institutions can overcome these conditions.\textsuperscript{205} States will calculate that there are benefits to be gained from cooperating in the creation of regimes and institutions and in following the rules of the institution even if the rules conflict with their immediate self-interest.\textsuperscript{206} These benefits include the reduction of transaction costs, the stabilisation of expectations, the lengthening of the ‘shadow of the future’, and the provision of decentralised enforcement of regime rules through the creation of reciprocity.\textsuperscript{207} The interests of the state remain paramount, however, and where the state believes that its long-term interests are no longer served by the regime it will not feel constrained by them.\textsuperscript{208}

Though Institutionalists accept the traditional sources of international law in their analyses, their focus is on the role of treaties.\textsuperscript{209} Treaties are regarded as ‘contracts’ that are entered into with the aim of furthering interests and resolving problems of coordination, collaboration, or domestic politics.\textsuperscript{210} Institutionalist theory suggests that legal rules will have an impact in areas of ‘low politics’, that is areas not striking at the state’s core security interests, where the benefits of cooperation would outweigh those of unilateral action and states would have great incentives to follow legal rules. On the other hand, in areas of ‘high politics’ the state would act in accordance with international rules only when the rules coincided with their underlying goals. In the areas of ‘high politics’, state action would be more likely to be influenced by underlying political and economic goals.\textsuperscript{211} With regard to regionalism, it contends that governments engage in integration in response to functional needs such as increasing economic welfare.\textsuperscript{212}

\textsuperscript{206} Arend, ‘Do Legal Rules Matter?’ above n 120, 120.
\textsuperscript{207} Ibid 120–121.
\textsuperscript{208} Ibid 121.
\textsuperscript{211} Arend, ‘Do Legal Rules Matter?’ above n 120, 123. Arend notes that this conclusion might lead a cynic to conclude that ‘international legal rules do not matter in the most important areas of international politics.’ at 124.
Constructivism: Agreements as Covenants for Creating State Identities and Interests

The Constructivist approach to IR has its roots in the diverse family of approaches known as critical theory. What the different members of this family have in common is that they claim that the fundamental structures of international politics are social. The basic assumptions underlying the Constructivist school are similar to those underlying Realism and Institutionalism. That is, states are the primary actors in the international system, states behave as unitary actors, and the structure of the system is anarchic.

Constructivists differ from Realists and Institutionalists in two important ways, however. Firstly, they assume that the structure of the international system is a ‘social structure’ or construct comprising three elements: shared knowledge, material resources, and practices. Thus, material elements of the structure only take on significance as states develop shared expectations and the structure consists of both material and non-material elements, such as norms of behaviour. The second distinguishing feature of Constructivism is its belief that ‘the interests and identities of states are created and evolve through interaction with the international system.’ States thus help to constitute the structure of the international system through their interactions and the structure in turn shapes their identities and interests. This has two implications for the role of legal rules in the international system: Firstly, the Constructivist understanding of the system as a social structure implies that legal rules are a part of the structure and, secondly, the claim that participation in a structure changes the identity and interests of an actor implies that participation in a legal system can alter how the actor sees itself and what it identifies as its interests.

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214 Arend, ‘Do Legal Rules Matter?’ above n 120, 125. Christian Reus-Smit writes that ‘[c]onstructivism is characterised by an emphasis on the importance of normative as well as material structures, on the role of identity in shaping political action, and on the mutually constitutive relationship between agents and structure.’ Reus-Smit, above n 143, 209.
216 Ibid 129. Another way of putting this is to say that Constructivists assert that states’ identities are not exogenously determined but are ‘constituted through interaction on the basis of shared norms such as international law, sovereignty and anarchy.’ Slaughter, Tulumello and Woods, above n 108, 373.
With regard to the nature of treaties, Constructivists see agreements as ‘covenants’ that manifest normative commitments. 218 On the issue of regional integration, Constructivist theory argues that a common sense of identity plays a central role in the process of integration. 219

2.5.5 Liberalism: Agreements as Embodiments of Domestic Interests

Liberal theory differs from the three other IR schools examined in this thesis in that it sees individuals and private groups as the primary actors in both international and domestic politics. 220 Though states are not insignificant, Liberals see their preferences or interests as being determined by domestic politics, that is to say, states act as agents or surrogates for their constituencies. 221 As a result, preferences can vary widely and the behaviour of states can change unpredictably depending on which set of preferences is prevailing. 222 A key proposition made by Liberals is that the behaviour of states will reflect their preferences. Thus in the negotiation process, the strength of a particular preference will determine the degree to which the state will be willing to compromise or concede to obtain that preference. 223

Transnational Liberals highlight the role of private individuals and groups such as business and labour in the creation of international rules and institutions. They would therefore reject doctrines that limit the creation of international law to States unlike (other more ‘mainstream’) liberals who would accept the traditional sources of law but question claims of universality. 224

218 Abbott and Snidal, above n 79, 424. Constructivists typically focus on nonstate and intragovernmental actors, often motivated by moral or social concerns, view international agreements as ‘covenants’ embodying shared norms and understandings, and understand ‘covenants as operating through persuasion, imitation, and internalizations to modify intersubjective understandings of appropriate behaviour, interests and identities: at 425.
219 Cho, above n 127, 424.
220 Abbott, ‘International Relations Theory,’ above n 108, 366. Note that in this sense, Liberalism differs little from the neofunctionalist approach and its ascribing of ‘a dynamic role to individuals and interest groups in the process of integrating pluralist communities.’ Martin and Simmons, above n 1, 735.
221 Governments are seen to represent some segment of domestic society and that segment of society whose interests will be represented will depend on the type of government in question. Burley, ‘A Dual Agenda’ above n 108, 228.
With regard to the issue of compliance, Liberal theory contributes three important insights. Firstly, it goes beyond the rationalist assumption of the state acting as a single actor and suggests that state behaviour may be better understood as a function of various relevant components (such as individual ministries or the Legislature) and by the analysis of the roles of those components. In addition, it places the state and its components within a matrix of transnational interactions with other like states and institutions with the attendant implication that compliance will involve conformity with different sets of laws created and directed at different actors. Lastly, Liberals speculate that regime type may be important in determining compliance and that democratic governments may do a better job of implementing international agreements than other kinds of government.225

2.6 Conclusions

This Chapter set out to provide a conceptual framework for the analysis carried out in the remaining Chapters of this thesis. Several observations can be made as a result of this discussion. The first is that the task of determining whether states are complying with their obligations frequently entails a subjective judgment. The relative normativity of the law provides flexibility and enables creative interpretations of legal obligations to be made. As a result, evaluations of effectiveness need to go beyond assessing conformity of state behaviour with rules to the question of determining whether the underlying objectives of the regime are being met. This in turn involves examining the factors that led up to the creation of the regime, that is to say, the history of the regime needs to be understood.

Another observation that emerges from the discussion is that the appearance of legitimacy is essential to the effectiveness of any legal regime. Legitimacy is derived from both the procedure that produces the law and the appearance of equity. This latter element is especially controversial in view of the debate over the equality of states in the international system. While some scholars argue that in order to cater for the common interests of heterogeneous states, law must be neutral, others argue that states are not equal and unequal states should be treated unequally. Resolving these conflicting positions is one of the key tasks facing legal scholars.

225 Kingsbury, above n 22, 357.
A last observation that can be made is that the context in which a regime is created has an impact on its effectiveness and on the way that its norms are interpreted and applied. Thus, knowledge of the regime’s objectives permits an accurate judgment to be made as to the effectiveness of the regime.

That being said the discussion revealed that there are a number of features that enhance the effectiveness of a legal regime. Because these are general propositions, they are equally applicable to the WTO legal regime as they are to individual regional trade agreements. The first feature that the analysis showed to be key to effective regulation is clearly framed, precise norms. Norms are the basis on which regulation and compliance are founded. Thus, clear and legitimate norms are essential to effective regimes.

The discussion also highlighted the importance of well-thought out procedures. The aim of such procedures, which include data collection, verification, review and dispute settlement, is to enhance transparency. Transparency provides reassurance to all the partners that obligations are being kept and, in the event, of non-compliance, it allows the partners to decide what measures should be taken.

The third essential element is an appropriate institutional framework. Such a framework should ideally consist of at least one organ in which the states can express their will and another charged with the task of ensuring that that will is implemented. From a Liberal perspective, it is not enough to provide institutions that give standing to states alone. Provision should also be made for other non-state actors to participate in the norm-formulation and norm-implementation processes.

In the following chapters, the analysis of the Article XXIV – Enabling Clause legal regime and COMESA will be conducted primarily along these lines, that is to say, the regimes will be evaluated in terms of their norms, the institutional framework within which the norms operate and the procedures that exist to implement them. However, before that, the next chapter discusses some of the different objectives that states aim at accomplishing through a regional approach.
CHAPTER THREE:
REGIONALISM, MULTILATERALISM AND FREE TRADE – THEORETICAL PERSPECTIVES

Economists divide notoriously because they look at different facts, or interpret the same facts differently in viewing reality with contrasting theoretical models in their computers or at the back of their minds.226

4.1 Introduction

As was argued in Chapter Two, identifying the function or objective of any institution is essential if any meaningful evaluation of that institution is to occur.227 In the case of the multilateral trading system embodied in the WTO, the legal rules are partly intended to reflect and to promote the conduct of trade according to welfare-maximising conventional economic principles.228 Economic principles and models therefore form an important part of the context within which the rules operate.229 However, to say that the WTO is simply a free trade organisation founded on economic principles of efficiency would be inaccurate; WTO rules regulate trading relations between states and, in formulating trade policy, states often have diverse policy goals, such as achieving equity in the distribution of wealth and improving the overall quality of life of their citizens.230

227 Voitovitch observed that identifying the objective of regulation was important for juridical analysis in any field since the efficiency of legal instruments depended on how law-makers realised the character of the relationships they intended to regulate. Sergei A Voitovitch, *International Economic Organizations in the International Legal Process* (1995) 3. Further, ‘the efficiency of a legal system is best seen in the manner in which its normative provisions are transformed into practice’: at 105.
229 In the words of Jackson, ‘[t]he economist tells us what should be done, while the lawyer is left to figure out how to do it.’ John Jackson, *The World Trading System: Law and Policy of International Economic Relations* (2nd ed, 1997) 28. Jackson also noted that the study of international economic law intrinsically contained ‘a strong component of multi-disciplinary research and thinking.’ The economics component of international economic law was required not just because it was important for understanding the policy motivations of many of the international rules on the subject, but also because it was ‘important to understand some of the criticisms of economic analysis, and to treat with scepticism some of the economic “models.”’ John Jackson, ‘Reflections on International Economic Law’ (1996) 17 *University of Pennsylvania Journal of International Economic Law* 17, 19.
230 Stephen Woolcock, ‘Regional Integration and the Multilateral Trading System’ in Till Geiger and Dennis Kennedy (eds) *Regional Trade Blocs, Multilateralism and the GATT* (1996) 115, 123. Also see Jackson, *World Trade*, above n 3, 5 noting that the objectives of ‘preserving peace, the desirability of human liberty, and other social goals relating to the quality of life or the distribution of economic assets as well as political control are among the goals which can sometimes conflict with goals of maximizing production of goods and services.’
In some cases, however, states opt to pursue their policy goals, whether economic or non-economic, through regional rather than multilateral mechanisms. Frequently these mechanisms serve multiple objectives thus rendering an evaluation of their effectiveness difficult. In such cases it is necessary to identify the objectives of the regional bodies if one wishes to evaluate their effectiveness. It is in this context that this chapter surveys some of the theoretical considerations that have been posited to explain why states sometimes opt for regional rather than multilateral cooperation. The survey will show that within the economic community, different models of regionalism have been developed to explain or to promote different objectives. These different models have a direct effect on the legal provisions because the absence of a universal economic principle makes it all the more difficult to formulate a workable legal framework promoting the implementation of that principle. The chapter seeks to accomplish two other objectives: firstly, to identify some of the factors that determine the economic rewards conferred by a regional arrangement, and secondly, to identify and analyse some of the non-economic factors that influence the decision to engage in regional integration, especially from a developing country viewpoint.

The chapter is arranged as follows. Section 3.2 describes the distinction between regional integration and regional cooperation. The next section (3.3) revisits the economic rationale advanced for free trade. Section 3.4 analyses integration from an economic point of view. It starts by discussing two different models of integration: market integration and development integration. It then proceeds to examine some of the effects that integration is posited to have. Section 3.5 discusses the factors that economists argue have a significant bearing on whether or not integration is economically beneficial.

In section 3.6 the political economy of regional integration and the so-called ‘regionalism versus multilateralism’ debate is discussed. This entails an examination of the main non-economic reasons for engaging in regionalism. Section 3.7 focuses on the political aspect of integration. It looks at some of the political reasons that influence the decision to integrate. These reasons can often be the key reasons behind the formation of RTAs. The chapter concludes by identifying the points that will be examined in greater detail in the following chapters.
4.2 Regionalism: Regional Integration or Regional Cooperation?

In Chapter Two, it was noted that the managerial approach posits that two of the main causes of non-compliance with legal obligations are the ambiguity of the rules setting out the required conduct and the temporal factor associated with bringing one’s conduct into conformity with the rules. With regard to the issue of regionalism, these two factors often come into play as a result of the confusion over whether the purpose of the rules is to promote regional integration or regional cooperation. It may therefore be useful to clarify the meanings of these terms.

Regionalism is sometimes used to refer to regional integration. In this sense it usually means ‘economic integration.’ This is a term commonly used by economists to denote ‘a state of affairs or a process involving the combination of separate economies into larger economic regions.’ Citing Willem Molle, Asante argued that in the static sense, regionalism refers to the situation where ‘national components of a larger economy are no longer separated by economic frontiers but function together as an entity’; while in the latter, dynamic sense it refers to the process of eliminating economic barriers between states. This process was outlined in Chapter One.

The term regionalism can also be used to refer to regional cooperation, which is a broader concept referring to any interstate activity ‘designed to meet some commonly experienced need.’ Balassa distinguished the two concepts as follows:

> Whereas cooperation includes actions aimed at lessening discrimination, the process of economic integration comprises measures that entail the suppression of some forms of discrimination.

The elimination of economic barriers between cooperating states would therefore not be a prerequisite for the success of a regional cooperation scheme whereas it is the essence of integration. Cooperation is thus a broader term than integration in that it can include actions such as infrastructural improvements or measures to protect the

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232 Ibid.
233 Ibid.
234 See Chapter One, nn 51–54 and accompanying text.
235 Asante, above n 6, 20.
environment, which do not entail any suppression of discrimination between two separate economies.

It has been argued that under African conditions the term ‘economic integration’ has a different connotation from that mentioned above and that the characteristics of African economies ‘make it unrealistic to apply the term in the same sense as used in the developed countries.’ According to this argument, economic integration in an African context is a process ‘whereby two or more countries in a particular area voluntarily join together to pursue common policies and objectives in matters of general economic development … to the mutual advantage of all the participating states.’ Asante observes that the essence of this definition is the voluntary nature of the process and the demonstration by states of their willingness to ‘pursue certain policies in close consultation with the other states.’ For the purposes of his work, he chooses to use the terms cooperation and integration interchangeably and to define the term regional integration as being both a process and a terminal condition.

The difficulty with using the terms interchangeably is that it creates the impression that any two or more countries that are cooperating are engaged in a process that will eventually lead to integration. However, there are many areas where states can cooperate to meet a common need without having any intention of integrating their economies. One example that springs to mind is the adoption of global technical standards.

In the context of this thesis, therefore, the position is taken that there is a clear difference between the processes of ‘integration’ and ‘cooperation’. Cooperation carries with it a non-obligatory connotation whereas regional trade agreements signal a firm commitment to take affirmative steps to reduce barriers to trade between the parties involved. This is not to say that cooperation arrangements do not have their uses. Loose cooperation may be a better strategy to employ where one country is

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238 Ibid.
239 Asante, above n 6, 20.
240 Ibid 20-21. Citing Ernst Haas, he states that while integration ‘is concerned with how and why states cease to be sovereign’, cooperation ‘may help describe steps along the way to regional cooperation’.
unable to reciprocate the trade liberalisation measures being taken by its partners or where the countries involved are concerned with preserving their sovereignty.

4.3 The Economic Justification for Global Free Trade

This section revisits the economic arguments in favour of free trade. The aim of the discussion is to provide support for the proposition made in Chapter One that an open non-discriminatory trading system benefits all states. This discussion is also important firstly, because in evaluating the effectiveness of the WTO’s rules on RTAs, it is necessary to recall what the MFN rule is designed to achieve and secondly, because it serves as a reminder that both the MFN principle and the regional approach are, in economic terms, ‘second-best’ options.241

The free trade philosophy has as its goal the most efficient use of resources on a global basis. In order to achieve this goal, proponents of free trade advocate the elimination of barriers to the movement of goods and factors of production and the elimination of discrimination on the basis of nationality among the nations of the world.242 Adam Smith’s *The Wealth of Nations* presented the first cogent synthesis and argument in favour of global free trade as the optimal trade policy. Smith attacked ‘mercantilism’ and the protectionist government policies it promoted. He argued that ‘mercantilist’ policies led to a massive misallocation of resources and were in conflict with *laissez-faire* capitalism.243 In his opinion, a system of free, competitive domestic and foreign markets would direct the employment of resources to those sectors where they would be most productive thus ensuring the maximum

243 ‘At the heart of the pro-liberalization argument is the widely held belief that free trade maximizes national and world welfare.’
244 The term ‘mercantilism’ originated with Smith and connotes five basic elements: that a favourable trade balance is required to maximise the accumulation of precious metals; that economic policy must always be assessed in light of its effect on the national stock of gold and silver; that national advantage had to be the overriding policy objective; that policies promoting industry should be adopted to increase investment and employment; and that rapid population growth and a large labour force were necessary to keep wages and prices low, thus encouraging exports. Leonard Gomes, *The Economics and Ideology of Free Trade* (2003) 3–4.
level of economic welfare and the promotion of social harmony.\textsuperscript{244} For Smith, the basis of international trade lay in the concept of absolute advantage.\textsuperscript{245}

What the concept of absolute advantage could not explain was why countries would still trade in situations where one country had an absolute advantage in the production of all goods. David Ricardo,\textsuperscript{246} James Mill\textsuperscript{247} and Robert Torrens\textsuperscript{248} provided the answer to this theoretical puzzle in the early 19\textsuperscript{th} century.\textsuperscript{249} They extended Smith’s theory and came up with a formulation of international trade that showed that countries could gain from trade even where they had no absolute advantage in the production of any commodity.\textsuperscript{250} They demonstrated that the efficiency gains resulting from specialisation in commodities in which a country had comparative advantage would result in extra outputs that could be shared out as consumption gains between the countries in question.\textsuperscript{251} The comparative advantage theory rests on two assumptions about the nature of the market: constant returns and perfect competition. By ensuring that production is located according to comparative advantage, the theory asserts that global free trade will ensure that consumers and firms are able to purchase from the cheapest source of supply.\textsuperscript{252}

This principle of comparative advantage has formed the core of the classical theory of international trade for the past two hundred years.\textsuperscript{253} At the time of the GATT’s formation, the theoretical case for free trade based on comparative advantage was

\textsuperscript{244} Ibid 4.
\textsuperscript{245} This is the idea that every country has sectors of the economy where they are more efficient than other countries and that mutual gains can be made through the exchange of the goods produced by those sectors. See Gomes, ibid 30–35 for a more detailed discussion of Smith’s views.
\textsuperscript{246} David Ricardo, The Principles of Political Economy (1817).
\textsuperscript{247} James Mill, Commerce Defended (1808).
\textsuperscript{248} Robert Torrens, The Economist Refuted (1808) and An Essay on the External Corn Trade (1815).
\textsuperscript{249} Gomes, above n 18, 36.
\textsuperscript{250} See Gomes, ibid 35–42 for an account of the economic rationale for comparative advantage. On the issue of who among Ricardo, Mill and Torrens should be credited for discovering the principle, Gomes argues that the three should be regarded as having come up with the principle simultaneously, that is, that it was a case of multiple discovery: at 42.
\textsuperscript{252} Maurice Schiff and L Alan Winters, Regional Integration and Development (2003) 33.
unchallenged. Developments in international trade theory during the 1970s and 1980s, however, called into question the extent to which comparative advantage explains trade. These new models, which emphasised increasing returns and imperfect competition, have opened the possibility that government intervention in trade … may under some circumstances be in the national interest after all. Based on these new models, two arguments against free trade were made; one based on strategic trade policy and the other on externalities.

It has been pointed out that the new trade theory suffers from some weaknesses. These include the difficulties of formulating useful interventionist trade policies due to the empirical difficulties of modelling imperfect markets, general equilibrium considerations and the fact that gains from intervention are likely to be dissipated by the entry of rent-seeking firms. When added to political economic considerations such as the possibility that the adoption of such measures by one country could lead to retaliation by other countries and the likelihood that intervention programs would be captured by special interest groups, free trade remains the right economic policy for countries to adopt.

The relevance of these arguments for this thesis is that they provide support for the proposition that the adoption of interventionist policies, such as are inherent in the partial liberalisation arrangements authorised by the Enabling Clause, is unadvisable.

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255 The strategic trade policy argument ‘holds that government policy can tilt the terms of oligopolistic competition to shift excess returns from foreign to domestic firms,’ that is to say, ‘at least under some circumstances a government, by supporting its firms in international competition, can raise national welfare at another country’s expense.’ Ibid 134–137.
256 The externality argument is an old idea that has been given new life by the new models. It rests upon the ‘proposition that protection can be beneficial when an industry generates external economies’ and thus ‘it may be desirable to deviate from free trade to encourage activities that yield positive external economies.’ Ibid 134–138.
257 Ibid 138–141.
258 Ibid 141–143. For a more detailed discussion regarding the political economy of regionalism, see section 3.7.
4.4 The Economic Rationale for Regional Integration

Theoretical Models of Integration

Economists employ different approaches in their analyses of regional integration. In Chapter One, six forms of regional integration arrangements were identified and defined: preferential trade agreements, free trade areas, customs unions, common markets, economic unions and monetary unions. These forms of arrangement are associated with the market integration model of integration. Not all integration strategies fit neatly into this model however. As a result, other models of integration have been formulated that attempt to provide a more accurate description of the nature of these other non-traditional trade blocs and the benefits they confer. One of the difficulties for analysis raised by this multiplicity of models is that WTO rules only apply to traditional free trade areas and customs unions. As a result, where one of the other models more accurately describes the mode of integration adopted by a group of countries, WTO rules do not easily apply.

Market Integration (Customs Union) Theory

Market integration theory (or customs union theory as it is better known) envisages a linear process of trade barrier elimination from free trade area to the deepest level, political union. Customs union theory, which forms the core of the subject of international integration, is a relatively young branch of economics. When the GATT was established in 1947, customs unions were included in Article XXIV in spite of the fact that there was no economic theory regarding their effect on world economy. They were simply regarded as being steps towards global free trade. This position changed in the fifties when the discriminatory aspect of customs unions led Jacob

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259 This was a point made by Jagdish Bhagwati in the epigraph quotation in relation to economists in general: see above, n 1.
260 See section 1.3.
261 See Bela Balassa, above n 11. The different forms of integration associated with the market integration or customs union theory were discussed in section 1.3.
262 This view is best captured as follows: ‘Free trade theory maximizes world welfare; a customs union reduces tariffs and is therefore a movement towards free trade; a customs union will, therefore, increase world welfare even if it does not lead to a world-welfare maximum.’ Richard G Lipsey, ‘The Theory of Customs Unions. A General Survey’ (1960) 70 Economic Journal 497, quoted in Tom Østergaard, ‘Classical Models of Regional Integration – what Relevance for Southern Africa?’ in Bertil Odén (ed), Southern Africa after Apartheid (1993) 27, 29.
Viner to question the assumption that customs unions increased world welfare. According to Viner, the true criterion for determining whether a customs union was beneficial should have been whether it created trade or diverted it.

The works of Viner and later Meade led economists to question whether an increase in the volume of trade should be the main determinant of whether a trade bloc increased welfare and to suggest that the important issue was whether the trade bloc created trade or diverted it. Customs union theory has influenced some of the most trenchant criticism aimed at Article XXIV. Such criticism is directed at the fact that the conditions in Article XXIV do not mandate consideration of the impact of the creation of a customs union or free trade area on the allocation of world resources. It should be noted that one weakness with Viner’s theory is that it did not consider the possibly substantial gains that increased economic growth and competition within the customs union might bring about.

Moreover, the relevance of the market integration model to developing countries in general and Africa in particular has been questioned. It has been argued by McCarthy that the most favourable conditions for trade creation are not characteristic of developing countries and that as a result, regional integration among developing countries is likely to have immaterial effects on their patterns of trade. Aly has offered a similar criticism of the classical laissez-faire economic model. He argued that laissez-faire integration did not work in the African context because trade is conducted on a very limited scale between African countries.

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264 When trade creation occurs, ‘two classical sources of gains from trade apply: real resources are saved by shifting production in the direction of comparative advantage, and consumers benefit from facing lower (undistorted) prices.’ Where each member of a trade bloc displaces cheaper imports from the rest of the world with more expensive partner imports, trade diversion occurs and both countries suffer losses. Trade diversion can therefore be defined as ‘the social cost incurred by importing countries as high-cost suppliers displace low-cost ones.’ Schiff and Winters, above n 27, 33–35.
266 See, eg, Kenneth Dam, ‘Regional Economic Arrangements and the GATT: The Legacy of a Misconception’ (1963) 30 University of Chicago Law Review 615, 623.
268 McCarthy, above n 17, 5.
269 Ahmad A H M Aly, *Economic Cooperation in Africa* (1994) 43. Other factors that he identified as inhibiting the operation of the laissez-faire model include structural disequilibria, the domination of the manufacturing sector by multinationals, the indispensability of customs revenues, the scarcity of foreign exchange and problems with the distribution of benefits.
circumstances, continuing with the model was useless because it had ‘proved not only insufficiently workable but even harmful to the integration process in Africa.’ The difficulty with these arguments is that they condemn the market integration model on the basis of the current low levels of trade which is precisely what the adoption of the model is aimed at achieving.

Development Integration Theory

Development integration can be defined as a combination of market integration, with its focus on the removal of tariff and non-tariff barriers to trade, and production integration, which focuses on cooperation in the planning and implementation of productive activities. Development integration theory was developed as a response to the perceived shortcomings in customs union theory, as applied to developing countries. In this connection, McCarthy argued that there was an important difference between the way that developed and developing countries view regional integration:

For developed economies, the emphasis has fallen on the welfare-enhancing static outcome of trade creation. In contrast, the dynamic consequences to be derived from a larger market have been the main explanation of regional integration’s developmental role in less developed countries. Regional economic integration is intended to facilitate structural change in developing countries by promoting economic diversification through industrialization.

Development integration is characterised by ‘the conscious intervention by the regional partners to promote cooperation and interdependence’ and by ‘efforts to secure an equitable distribution of the benefits from regional integration.’ This latter feature often involves the use of distributive measures such as compensatory and corrective mechanisms to ensure that all participants benefit equally from integration. As a result, such arrangements can be complex to create and implement. Analysis of the old East African Community and of the Southern African Customs Union (SACU) show that compensatory mechanisms do not always work

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270 Ibid 92.
271 Stephen Njuguna Karingi, Mahinda Siriwardana and Eric E Ronge, , Implications of the COMESA Free Trade Area and Proposed Customs Union: Empirical evidence from five member countries using GTAP Model and Database (2002) 40. Also see Østergaard, above n 37, 33–34.
272 McCarthy, above n 17, 4.
273 Østergaard, above n 37, 34.
and that the countries being compensated still miss out on investment.\textsuperscript{275} Such arrangements are therefore beset by implementation problems.\textsuperscript{276} The difficulty with implementing the development integration model from a legal perspective is that it requires an \textit{ex ante} determination of how the benefits from trade barrier elimination will be distributed.

\textbf{The Economic Effects of Regional Integration}

The following sub-sections examine the possible effects of regional integration, defined as the elimination of barriers to trade between two or more states, on various common indicators of economic welfare.\textsuperscript{277} Some of the most commonly cited theoretical arguments in favour of regional integration are essentially the same as those cited in favour of a free trade policy: that it allows for the exploitation of comparative advantage within the region; it allows nations to specialise in the production of the products best suited to their resource and labour endowments, without the interference of tariff or other impediments to trade; and it leads to more rapid economic growth in the region and an improved standard of living as a result of increased intra-bloc trade.\textsuperscript{278} This examination shows the importance of careful structuring of the RTA to avoid negative effects on both members and non-members.

Regional Integration, Market Size and Economies of Scale

There are at least four types of economic gains to be obtained from a larger size: increased competition, exploitation of economies, variety of product and reductions in internal inefficiencies.\textsuperscript{279} The desire to achieve economies of scale associated with larger size is one of the most influential factors in the pursuit of regional integration, especially among developing countries. It is important to note however, that all these benefits can be obtained through multilateral trade liberalisation and the adoption of

\begin{itemize}
\item \textsuperscript{275} See sections 5.3.2 and 5.3.4, regarding SACU and the EAC respectively.
\item \textsuperscript{276} Østergaard, above n 37, 35–39.
\item \textsuperscript{277} This sub-section has benefited greatly from a World Bank publication entitled \textit{Regional Integration and Development}, which contains findings from a research project on regionalism from the viewpoint of developing countries led by Maurice Schiff and L. Alan Winter’s and carried out at the World Bank. It should be noted that the opinions in the publication are the authors’ own and do not reflect those of the World Bank.
\item \textsuperscript{278} Mark S Leclair, \textit{Regional Integration and Global Free Trade: Addressing the Fundamental Conflicts} (1997) 1.
\item \textsuperscript{279} Schiff and Winters, above n 27, 50–51.
\end{itemize}
an open domestic economy. For developing countries, regional integration is said to offer a possible route for overcoming the disadvantages of smallness because it offers the additional benefit of allowing countries to pool their economic resources. This factor is discussed in further detail in Chapter Five in the context of African countries.

Integration and Traditional ‘Gains from Trade’

One of the factors that make regional integration an attractive policy option for individual states is that it can lead to ‘gains from trade’. It has been argued that integration raises the amount of goods available for consumption and leads to lower prices for the populations of the participants. From a global perspective, however, the creation of RTAs, especially large ones, can have an effect on non-members’ terms of trade through their impact on world prices. This effect may be either negative or positive. The effect can be positive if the exports of the bloc members reduce in price due to greater efficiencies, or it can be negative where the price of rest-of-the-world exports falls.

With regard to trade diversion and creation, the results are similarly ambiguous. Where there is a loss of exports due to trade diversion, the ability of the non-member to buy imports is reduced. What this means for the WTO legal regime is that, from an economist’s viewpoint, increased compliance with the provisions of Article XXIV will not unequivocally lead to an increase in global economic welfare. Incorporating a test based on trade creation or diversion to approve the existence or establishment of RTAs is therefore likely to prove unsatisfactory and difficult.

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280 Ibid 50.
281 See section 5.2.2.
282 Schiff and Winters, above n 27, 213–215.
283 In order to determine whether or not there has been a welfare gain for the non-member, the resulting losses must be balanced against the gain from consuming the resources that were to be consumed in producing the lost exports: Ibid 213.
The Effect of Regional Integration on Economic Growth

The principal objective of trade policy is economic growth.\textsuperscript{284} An open economy is associated with positive economic growth. Traditional economic theory holds that economic growth is ‘set exogenously according to rates of population growth and technical progress.’\textsuperscript{285} Modern endogenous (self-generated) growth theory stresses the role of knowledge in fostering productivity and growth and holds that increases in knowledge capital can have a permanent positive effect on growth.\textsuperscript{286}

It has been argued that this has important implications for decisions regarding the countries with which RTAs should be formed. A developing country wanting to benefit from knowledge spillovers by forming an RTA will usually be better off choosing a partner with ‘a high – and quickly growing – stock of knowledge’ such as a developed country than with another developing country.\textsuperscript{287} In the long-term however, non-discriminatory trade liberalisation or unilateral free trade is probably the optimal policy for a developing country to adopt due to the fact that it may not be possible to predict which areas will generate the most knowledge in future.\textsuperscript{288} However, it should be noted that spillovers are also affected by other factors such as geography, language and history.

Though it is difficult to see how the WTO’s legal regime can be structured in a way that ensures that RTAs result in an increase in long-term economic growth, this insight suggests that developing countries might benefit more from so-called ‘North-South’ trade agreements than from ‘South-South’ agreements. The ongoing negotiations between the European Union and the ACP countries regarding Economic Partnership Agreements (EPAs) could therefore bring about a boost to ACP countries through spillover effects associated with investment.\textsuperscript{289} This factor is discussed in more detail in section 3.4.2.6.

\textsuperscript{284} Ibid 124.
\textsuperscript{286} ‘An economy benefits from foreign knowledge, first, according to how open it is in general and, second, according to whether it imports mainly from those countries that have the largest knowledge stocks.’ Schiff and Winters, above n 27, 129.
\textsuperscript{287} Ibid 130–131.
\textsuperscript{288} Ibid 132.
\textsuperscript{289} See section 5.4.2 for more discussion of the EPA negotiations.
The Effect of Integration on Industry: Agglomeration

The effect of regional integration on industry and especially its location, is a key explanatory factor behind the enthusiasm of many developing countries for regional integration. In the 1950s and 1960s when many developing countries in Africa gained their independence, industrialisation was regarded as synonymous with economic development. Countries therefore competed to attract industries to set up on their territories. Regional integration was seen as having a favourable impact on industrialisation.

Though comparative advantage and historical factors play a role in determining where industries set up, these are not the only forces in a bloc that can influence the location of industrial activity. Agglomeration forces are also key determinants in where industries locate.\(^{290}\) Trade liberalisation can affect the balance of centripetal and centrifugal forces. When done on a preferential basis, it ‘affects both the locational attractiveness of the bloc relative to the rest of the world and the relative attractiveness of individual bloc members.’\(^{291}\) Though the results are not conclusive, research tends to show that in some South-South RIAs the forces of both comparative advantage and agglomeration are at work, ‘leading industry to agglomerate in the relatively richer and initially more industrialized members.’\(^{292}\) Where this happens, tensions can arise between the countries and this can lead to the break up of the bloc or non-implementation of obligations. This unequal sharing of benefits is commonly cited as having contributed to the break-up of the original East African Community.\(^{293}\)

Agglomeration can end up with industrial growth being concentrated in the more developed member states of an RTA with enterprises seeking to locate in the largest economy as a safeguard against the possibility of the break-up of the arrangement.\(^ {294}\) Because the countries will have gone into integration in the belief that it would lead to

\(^{290}\) Clustering arises from the interaction between centripetal forces such as technological externalities, availability of skilled labour and linkages between buyers and sellers that make it attractive for firms to locate close together, and centrifugal forces associated with high areas of economic activity such as congestion, pollution, prices of land, competition and consumer dispersion. Schiff and Winters, above n 27, 137–138.

\(^{291}\) Ibid 140.

\(^{292}\) Ibid 142.


\(^{294}\) McCarthy, above n 17, 10.
balanced growth, tensions are likely to arise when integration results in the unequal
distribution of the growth. This inequality is likely to pose a political threat to the
very survival of the RTA unless measures such as industrial planning programs, fiscal
incentives or fiscal compensation are put in place to ensure the balanced distribution
of benefits.\textsuperscript{295}

The Effect of Integration on Incomes

The issue of incomes is closely linked to that of industry. The level of income is a
common indicator of economic welfare. The evidence regarding the effects of RTAs
on income is mixed.\textsuperscript{296} The issue of what effect RTAs have on the incomes of partner
states, that is whether incomes converge or diverge, has been addressed by various
economists. Venables’ research showed that FTAs with high-income partners (such
as North-South FTAs) are more likely to lead to convergence than divergence. He
noted that where manufacturing clustered in a few locations, divergence of income
levels of members was likely to result. Thus, divergence forces were more likely to
operate in FTAs between low-income countries.\textsuperscript{297}

The Role of Integration in Stimulating Investment

Attracting investment is one of the main objectives of countries pursuing regionalism.
The UNCTAD report on Least Developed Countries 2004 noted that international
trade could not work to reduce poverty where the levels and efficiency of investment
were not adequate to support sustained economic growth.\textsuperscript{298} Integration can attract
investment in two ways. Firstly, the creation of a larger market makes a trade bloc
more attractive for investors who desire the benefits of economies of scale. Secondly,
it has been argued that integration has important implications for investment attraction
because the credibility of economic reform can be enhanced by embedding the reform
in an integration agreement.\textsuperscript{299} Poor credibility may result from reversal of previous

\textsuperscript{295} Ibid 12.
\textsuperscript{296} Schiff and Winters, above n 27, 125.
\textsuperscript{297} Anthony J Venables, ‘Regional Integration Agreements: a force for convergence or divergence’
\textsuperscript{298} UNCTAD, \textit{Least Developed Countries Report 2004} (2004) XII.
\textsuperscript{299} See Wilfred J Ethier, ‘Regional Regionalism’ in Sajal Lahiri (ed), \textit{Regionalism and Globalization:
promises of reform, opportunistic raids on investors or destructive redistribution.\textsuperscript{300} In order to obtain this latter benefit, however, it is necessary that the trade agreement on which the bloc is based contain binding obligations that the parties comply with. Alternatively, the same effect can be obtained by using a trade agreement to lock in a larger partner’s trade policies and to signal that a country has changed its spots from reliance on inward-looking policies to more outward-looking policies.\textsuperscript{301}

Trade blocs associated with the first wave of regionalism placed great store on investment policies that were activist and interventionist.\textsuperscript{302} Such policies generally failed and have now been discredited.\textsuperscript{303} It should be noted that blocs are not necessary to induce investment and that general reforms such as stabilisation, market liberalisation and privatisation are likely to be more than enough to increase investment.\textsuperscript{304}

**Factors Affecting Benefits Conferred by Regional Integration**

Various factors affect how rewarding (economically) a trade bloc is to the countries involved. This section provides a brief description of these factors. In discussing these factors, a couple of points need to be noted. Firstly, to the extent that the RTAs examined in this thesis are already in existence, some of the factors will be more relevant to a discussion of how they can be rationalised or improved than to a review of their origins. In addition, as will become apparent later on in the thesis, the current WTO provisions do not provide any guidance for Members with regard to the factors that they should consider in deciding whether or not to engage in regional integration.

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\textsuperscript{300} Schiff and Winters, above n 27, 107.
\textsuperscript{301} Ibid 111.
\textsuperscript{302} Ibid 103.
\textsuperscript{303} Ibid 104. They give the example of the agreement between Cote d’Ivoire, Ghana and Togo in 1976 to have Togo build a cement factory to serve the entire region. Disagreements in how to manage the industry led to each country building a cement factory of its own.
\textsuperscript{304} Ibid 115.
Choice of Partner(s)

The issue of which countries actually make up a trade bloc can be crucial to the success of the bloc not just economically but also in terms of signals sent to outsiders. Thus, Mexico is said to have entered into NAFTA with the intention of not just securing access to the American market but also as a means of securing its domestic liberalisation measures against the danger of future policy reversal. One of the most important contemporary issues for a developing country is whether to opt for a North-South or South-South RIA.\textsuperscript{305} A North-South RTA has several advantages for the southern partner some of which have already been mentioned.\textsuperscript{306} Where manufactures are concerned, the lower trade barriers will theoretically result in domestic prices falling, increased consumption and reduced production of high-cost substitutes. However for these gains to be attained the northern partner’s costs must be close to the global minimum and one has to be confident that prices will actually fall.\textsuperscript{307} On the other hand, domestic manufacturers in the Southern partner will be worried about the threat of increased competition possibly leading to the failure of industries and attendant job losses.\textsuperscript{308}

Choice of Form of RTA

The issue of what form of regional integration a country should adopt is crucial to its viability. One issue that a country wishing to form a trade bloc needs to consider is whether it should take the form of a free trade area or a customs union. Customs unions are generally more efficient than free trade areas but they require greater coordination and more sacrifice of sovereignty. Thus, although the operation of a customs union is generally more complex to administer due to the need for members to have a common trade policy, the necessity for rules of origin in a free trade area

\textsuperscript{305} In practice, many countries do not pursue an either/or trade policy regarding regional integration but choose to pursue both paths simultaneously. Thus, for instance, COMESA countries are pursuing trade liberalisation between themselves at the same time that they are conducting negotiations with the European Union regarding the establishment of Economic Partnership Agreements (EPAs).

\textsuperscript{306} See section 3.4.2.2 for a discussion of the benefits that a North-South RTA confers in the context of knowledge spillovers.

\textsuperscript{307} Schiff and Winters, above n 27, 73–74.

\textsuperscript{308} This concern also affects the Northern partner which will be worried about competition from lower-cost producers in the developing country partner. This was a significant source of contention in the debate over NAFTA as well as the ongoing debate in the US over the ratification of the US – Central America FTA.
means that they too are not free of possible complications. Where the aim of the
participants is to engage in policy integration or higher forms of integration, customs
unions are generally chosen as entry points to the higher form.

In the context of African countries, this factor is relevant to an assessment of the
desirability of following through on the provisions of the Treaty establishing the
African Economic Community in which African countries have committed
themselves to forming a continent-wide bloc.

**Number of Trade Agreements Entered Into**

This is one of the key systemic issues facing the WTO and is closely related to the
choice of partners. The optimum number of blocs that a country should be a part of is
a matter of heated contention. On the one hand, it is argued that combining multiple
blocs especially with one’s main trading partners, can substitute for free trade.
However, multiple blocs can also lead to the phenomenon of ‘hub-and-spoke’
regionalism with investment preferring to locate in the hub, which will often be a
developed country. This will have negative consequences for the spoke countries.
Moreover, overlapping blocs raise issues regarding coherence of policies and
conflicting obligations.

The multiplicity of trade blocs and other intergovernmental organizations can hinder
integration. This is especially so in the African context where the practice of
multiple memberships makes the task of horizontal coordination difficult because the
same country could be progressing at a different pace in the different blocs to which it
belongs. This is both costly in terms of monetary commitment where a country may
find itself having to pay membership dues in several RTAs, and destabilising in terms
of membership. WTO rules are neutral on this question. Neither Article XXIV nor
the Enabling Clause set any limits on the number of RTAs that a country can enter
into. However, by weakening the constraints on developing countries forming RTAs,

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309 Schiff and Winters, above n 27, 78–82.
310 See section 5.3.1 for a more detailed discussion of the African Economic Community.
311 Schiff and Winters, above n 27, 75.
312 Ibid 78.
313 Teshome Mulat, ‘Multilateralism and Africa’s Regional Economic Communities’ (1998) 32(4)
Journal of World Trade 115, 120.
314 Ibid 122–123.
the Enabling Clause removes one possible source of restraint on extensive preferences.

**External Trade Policy Stance**

The type of external trade policy that an RTA adopts will be a key determinant of whether members derive any economic benefits from the arrangement. It was noted in section 3.4.2.2 that an open economy is associated with economic growth.315 Economic theory suggests that an RTA should pursue an open external trade policy primarily because this will reduce the chances of trade diversion.316 The level of tariffs that a customs union adopts has a direct effect on whether the bloc is trade creating or trade diverting. It can also have an effect on the prices that consumers pay for goods within the customs union. If the common external tariff is set at a level that forces consumers in one of the partner states to pay higher prices than they did prior to the formation of the CU, this can lead to tensions within the bloc as nationals of that state will feel that they are being exploited. At a more technical level, it will be seen in Chapter Four that Article XXIV of GATT endeavours to prevent trade diversion by obliging countries entering into RTAs not to raise duties above their levels prior to the formation of the RTA in question.317 However, this can only affect those tariffs that have been bound. For unbound tariffs, there will be no obligation not to raise such levels.

**RTAs and Taxes**

The issue of taxes and the loss of government revenue due to the reduction or elimination of tariffs is central to the viability of an RTA, especially where developing countries are concerned. This is a real problem in Africa where some countries raise ‘as much as half of government revenue’ through trade taxes.318 If measures are not taken to mobilise alternative revenue sources then budget problems can easily arise. As shall be seen in Chapter Six, this issue has been a major obstacle to the formation of a customs union in COMESA.319

315 See section 3.4.2.1.
316 Schiff and Winters, above n 27, 82–93.
317 See section 4.3 for a more detailed analysis of this provision.
318 Schiff and Winters, above n 27, 94.
319 See section 6.5.2.
Another issue that falls to be considered under this head is that of compensation. It was noted above that the development integration model is characterised by the presence of compensatory mechanisms that are designed to ensure the equitable distribution of benefits.\textsuperscript{320} Trade blocs such as SACU have mechanisms for transferring revenue from one country to another that may have suffered a loss as a result of the formation of the RTA. However such mechanisms are difficult to devise and administer.

The Political Economy of Regionalism (The ‘Multilateralism versus Regionalism’ Debate)

It was noted in Chapter One that for political scientists, regionalism was an important issue because it represents a move away from a unilateral or multilateral approach to international relations. The key systemic issue from a global point of view is whether the world is better served by a broad multilateral system or by regional blocs.\textsuperscript{321} Two possible ways of approaching this question have been suggested. The first is to examine the potential effects of the formation of a bloc on the participants’ trade policies while the second involves asking whether trade blocs offer a faster route to global free trade. With regard to both these issues, regionalism has been said to affect the progress of multilateralism by altering the internal incentives for trade liberalisation, by affecting the way in which trade bloc members interact, and by changing interactions between RTAs and the rest of the world.\textsuperscript{322} With regard to developing countries, RTAs may alter their propensities for non-discriminatory liberalisation and their willingness to support and protect the multilateral system.\textsuperscript{323} The purpose of this section is to discuss some of these factors and evaluate whether they do indeed indicate that a regional approach does not endanger or is complementary to multilateralism.

\textsuperscript{320} See section 3.4.1.2.
\textsuperscript{322} Schiff and Winters, above n 27, 223.
\textsuperscript{323} Ibid 223.
Proponents of regionalism argue, inter alia, that it can provide a faster, alternative track to multilateralism by allowing for faster, more efficient negotiation of agreements, as well as allowing a majority within a trade bloc to exert more pressure on recalcitrant members to comply with trade rules than would be possible in a multilateral forum. Frustration with the GATT is frequently cited as a reason why countries sought to engage in regionalism in the 1990s. According to this argument, the large and diverse number of members in the GATT was making it more difficult to achieve progress toward resolving new and difficult issues such as trade in services and intellectual property.

Jagdish Bhagwati challenged the truth of these assertions. With regard to the claim that regionalism is quicker, he pointed out, inter alia, that the first wave of RTAs were much less successful than the GATT in lowering tariffs, that even with enormous political support, it took the European Community over thirty years to form a single market and that there is a world of difference between announcing the formation of an FTA or CU and its implementation. Regarding the efficiency argument (that regionalism produces better results), he asserted that in bilateral negotiations, weaker states may be forced to agree to the demands of strong states ‘in ways that are not exactly optimal from the viewpoint of the economic efficiency of the world trading system.’ Such concessions may later distort the result of multilateral negotiations. Lastly, on the argument that RTAs make trade liberalisation irreversible, he noted that GATT also created commitments and that regional agreements had been known to fail.

Many of these factors are apparent when one examines the regional integration process in Eastern and Southern Africa. In Chapter Five, it will be seen that the regional integration process has been slow and that it has been characterised by past

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328 Ibid 552–553.
329 Ibid 553–554.
failures, none more dramatic than the collapse of the East African Community in 1977. The following sub-sections examine some of these reasons in more detail.

**Domino Regionalism**

There are three possible responses to the creation of a trade bloc: to join it, to create a new one or to remain outside. Where countries join an RTA, this would appear to be a prima facie move towards wider free trade. This was one of the reasons why the decision to include a customs union exception in the GATT was relatively uncontroversial.

One obstacle to multilateral liberalisation that proponents of regionalism overlook is the fact that members of the RTA may not wish to let non-members in as there needs to be someone outside the bloc to be exploited. In order to overcome this obstacle, Bhagwati recommended that a commitment be built into Article XXIV that countries should ‘look favourably at accepting new members into a union …, so that these arrangements more readily serve as building blocks of, rather than stumbling blocks to, GATT-wide free trade.’ In promoting what has come to be called ‘open regionalism’ this proposal underrates the political considerations that go into the determination of whether and with whom to engage in regional integration as well as the legal obstacles to drafting a clause that would amount to any more than an hortatory provision.

**Regionalism as Insurance**

Countries may wish to join a bloc to avoid being outside the bloc when almost everyone else is in. Being on the outside would have the effect of either negatively affecting the country’s terms of trade or resulting in the country’s markets being closed to it in the event a trade war broke out. There are two ways in which joining

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330 The phrase ‘domino regionalism’ was coined by Baldwin to describe the process by which Scandinavian countries joined the EU in the 1990s following 30 years of resistance. See Richard E Baldwin, ‘A Domino Theory of Regionalism’ in Richard E Baldwin, Pertti Haaparanta and Jaako Kiander (eds), *Expanding Membership of the European Union* (1995).

331 See section 3.4.1.1.


333 Schiff and Winters, above n 27, 236–238.
a bloc offers assured market access to participants. Firstly, it enables the avoidance of
day-to-day harassment in the conduct of trade and secondly, it promises the provision
of a safe haven if total trade war breaks out. The first of these two factors is
especially important where ‘policy integration’ occurs.

A ‘prudent’ desire to hedge against the failure of multilateral GATT negotiations and
the deterioration of the multilateral trading framework has been cited as one reason
why Canada entered into an FTA with the US. Canada, and later Mexico, also
wanted to avoid being the object of unfair trade rules such as anti-dumping or
countervailing duties.

**Trade Blocs as Forums for Increasing Negotiating Strength
and Facilitating Negotiations**

One objective of integration is to increase the ability and bargaining power of member
states to conduct effective negotiations with third countries. For developing
countries, one easy way to do this is to pool their limited resources. Developed
countries on the other hand might seek to increase their negotiating strength by
creating a large market that is attractive to third parties. This factor has played a
significant role in enhancing the participation of developing countries in the ongoing
Doha Development Agenda negotiations. It will be seen in Chapter Seven that the
Least Developed Countries, the ACP group and the African group have all been able
to submit proposals embodying their suggestions as to the best way forward.

With regard to the facilitation of negotiations, logic suggests that having fewer parties
at a negotiation should improve the chances of arriving at a settlement. As Braga and
Yeats rightly observe, ‘[o]ne can easily imagine that negotiations between two or

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334 Ibid 237.
337 Whalley, ‘Why Do Countries Seek Regional Trade Agreements?’ above n 111, 72.
339 Whalley gives the example of the EU which had as one of the rationales behind its creation the idea
that European countries acting cooperatively might be able to get better leverage in negotiations with
the US. Whalley, ‘Why Do Countries Seek Regional Trade Agreements?’ above n 111, 72.
three government officials with similar goals is much more advantageous than talks among 96 diverse countries.\textsuperscript{340} However, the facilitation of progress in negotiations is not guaranteed because of the complexity of agreeing joint positions in the first place. Thus, for example, customs unions need to establish procedures for determining their negotiating positions. Such mechanisms have recently been put in place by SACU and are being established in the EAC.\textsuperscript{341}

\textbf{Trade Blocs as Forums for Negotiating Tactically}

Some countries enter into RTAs for tactical purposes, that is, they may wish to use an RTA to further their multilateral goals and vice versa.\textsuperscript{342} Thus, for instance, it is sometimes argued that RTAs provide a better forum for negotiating ‘tough’ issues. The difficulty with this argument is that until recently RTAs had not advanced much further with trade liberalisation than the WTO. Moreover, it is arguable that if it were not for the WTO, issues such as agriculture would remain deadlocked due to the willingness of many RTAs to exclude them from their coverage.\textsuperscript{343}

The use of RTAs for tactical reasons might also be harmful to the multilateral system. There is a risk that major powers can use RTAs to reinforce their desired positions ahead of multilateral negotiations. For instance, where a major power such as the US enters into a series of free trade agreements with other less powerful countries, it can use the leverage of the agreements to include provisions that it would not be able to get accepted in a multilateral forum. Having accepted the provisions bilaterally, the countries would be in a difficult position to resist their later inclusion multilaterally. RTAs could also provide unsuitable blueprints for multilateral liberalisation. Lastly, building rival teams in support of divergent positions could make final negotiations more difficult. Thus, in order to ensure the primacy of multilateralism, it has to be ensured that where regionalism is more effective, the subsequent switch to multilateralism can be managed.\textsuperscript{344}

\textsuperscript{340} Braga and Yeats, above n 100, 235 at n 16.
\textsuperscript{341} See sections 5.3.2 and 5.3.4.
\textsuperscript{342} Whalley, ‘Why Do Countries Seek Regional Trade Agreements?’ above n 111, 74.
\textsuperscript{343} See nn 102–104 and accompanying text.
\textsuperscript{344} Schiff and Winters, above n 27, 241.
Regionalism as Politics

Regional integration has ‘tie-ins’ to non-economic matters\(^{345}\) and can be undertaken for non-economic reasons such as national security, peace and assistance in developing political and social institutions. In aiming for these goals, it is desirable that they be achieved efficiently and that heed be paid to the economic cost of these goals. This section takes a look at some of these issues in order to determine how they affect and influence regional integration. The aim is to see how these factors can best be addressed in formulating laws. One of the difficulties facing the lawyer is how to balance the aspirations of politicians, who make the decisions regarding whether or not to enter into an agreement, with the lessons of economic theory.

Peaceful Relations

The existence of a relationship between free trade and peace has long been touted.\(^{346}\) A similar relationship between poverty and civil conflict has also been identified.\(^{347}\) Integration and economic interdependence facilitates political cooperation in a number of ways. Firstly, it provides ‘a more efficient and less dangerous way to accumulate benefits and resources, contributing to the obsolescence of war as a means for profit.’ In addition, the fact that states would want to retain the gains of trade can act as a disincentive for conflict. Lastly, there can be an indirect effect in modifying preferences towards more conciliatory positions.\(^{348}\)

Schiff and Winters have offered similar views: increasing economic interdependence increases the stake that each country has in the other’s economic welfare; increased interaction between people and governments can lead to increased trust between

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345 Jackson, ‘Perspectives on Regionalism in Trade Relations’, above n 96, 874.
346 The relationship has been associated with the economic liberalism of Smith and Ricardo and traced as far back as the work of Montesquieu and his observation that ‘the natural effect of commerce [was] to lead to peace.’ It has also been associated with the Manchester School and the work of Richard Cobden who argued that the era of peace in mid-nineteenth century Europe was due to the economic interdependence brought about by the free trade brought about by the repeal of the Corn Laws. See Filippo Andreatta, Pier Giorgio Ardeni and Arrigo Pallotti, ‘Swords and Plowshares: Regional Trade Agreements and Political Conflict in Africa’ 2, citing Montesquieu ‘De l’esprit de lois’ and P J Cain, ‘Capitalism, War and Internationalism in the Thought of Richard Cobden’ (1979) British Journal of International Studies, October.
347 The UNCTAD Report on Least Developed Countries notes that ‘civil conflict is clearly a major cause of poverty’ and ‘[c]ivil peace is necessary condition for a virtuous trade-poverty relationship.’ See UNCTAD, above n 73, XV.
348 Andreatta, Ardeni and Pallotti, above n 121, 2–3.
them; and, by increasing security of access to the partner’s strategic raw materials, the chances of a trade embargo are reduced. However these effects are limited as research has shown that the pacific effects of regional integration are only possible if the bloc is between ‘relatively evenly balanced partners’ and ‘benefits are distributed in a relatively equal way’.

The signing of the Treaty of Rome creating the European Economic Community in 1957 following the 1952 establishment of the European Coal and Steel Community, and the ensuing integration that has taken place in Europe is the example most often cited in support of this argument and held up as the model to be followed in other regions of the world.

The failure of regional integration to bring about peace on the African continent has led some authors to question the strength of the standard liberal hypothesis and to point out some of its weaknesses. This failure has been linked to three factors: one economic, one political and the other to do with the international system itself. Economically, it is argued that the connection could be valid but ‘inapplicable to the African case because local RTAs have not (yet) produced a sufficient amount of trade to reach a critical threshold.’ Politically, it is argued that the lack of an open, political climate in most of Africa has prevented the adoption of a free trade policy that is in the interest of everyone. The international level argument rests on the fact that integration can also be responsible for negative externalities due to the fact that the benefits are infrequently equally shared between the parties to the bloc in question. Thus, smaller actors may see interdependence as a ploy by a larger state to ‘reinforce a regional hegemony.’ Moreover, in instances where states are in conflict, they may see interdependence as a source of weakness and seek to reduce it,

349 Schiff and Winters, above n 27, 188.
350 See Andreatta, Ardeni and Pallotti, above n 121, 3; Jackson, ‘Regional Trade Blocs and GATT’ above n 101, 122. The role played by economic interaction in promoting peace has led to the suggestion that the exchange of sectoral preferences between nations in the Middle East could facilitate the securing of political reconciliation in the region. Rather than Article XXIV-compatible FTAs being established, sectoral trade agreements providing for certain economic sectors would be formed as these would be more viable than higher forms of integration. See David Karasik, ‘Securing the Peace Dividend in the Middle East: Amending GATT Article XXIV to Allow Sectoral Preferences in Free Trade Areas’ (1997) 18 Michigan Journal of International Law 527
351 Ibid 4–5. This argument consists of two related strands. The first is to the effect that though a policy of free trade and economic interdependence may be in the interests of all consumers protectionist pressures may prevent such a policy from being adopted. The second strand of this argument is to the effect that the influence of interest groups can at least be moderated by the need to have elections in democratic states whereas there is no need for such an electoral test in autocracies.
352 Ibid 6.
hence exacerbating conflict. This would appear to suggest that a minimum amount of stability is required for integration to expedite cooperation rather than conflict, something which may be lacking in Africa.

It is worth noting that regional integration can also pose a danger to security where the bloc is motivated by economic reasons but asymmetric distribution of benefits and costs results in frictions among member countries. In such instances security losses may occur. To avoid such an outcome, many RTAs provide for a compensation mechanism to ensure that members who lose out in liberalisation are compensated.

### Regional Integration and the Nation-State – The Issue of Sovereignty

Sovereignty is often discussed in the context of its potential to hinder integration. This arises from the fact that integration entails an inevitable loss of autonomy over what were once internal decisions. In Chapter Two it was noted that there are a variety of legal strategies that can be adopted by states seeking to safeguard their sovereignty. These include framing commitments in broad terms and retaining the authority to interpret the obligations. They can also choose to establish institutions with weak central organs, that is, retain the ‘international’ nature of the institution rather than make it ‘supranational’.

It has been argued that the issue of sovereignty is one of the chief barriers to developing countries achieving regional integration. Post-colonial leaders, intent on concentrating political power around themselves, shied away from ceding any sovereignty to regional bodies fearing that it would negate their exercise of authority. As a result of this adherence to the sovereignty principle and the failure to form

355 Ibid 7.
356 Schiff and Winters, above n 27, 194.
358 See section 2.4.5.
significant regional institutions, it is contended that many African integration initiatives have failed to achieve much of substance.\textsuperscript{360}

However, integration can also be used to enhance sovereignty. It was noted above that trade blocs can used as forums for increasing negotiating strength.\textsuperscript{361} Thus, ‘[b]y pooling sovereignty, members of [a bloc] may be able to preserve and enlarge it and thus strengthen the concept of national identity and integrity.’\textsuperscript{362} Countries pooling their sovereignty in this way can form an alliance against external powers that they would be unable to stand up to by themselves. Regional integration can also be used to strengthen the voice of small countries in negotiations. In the latter instance, countries with limited resources are able to pool their resources thus enabling them to participate more effectively.\textsuperscript{363} Thus for instance, Swaziland and Lesotho are only able to engage in free trade negotiations with parties such as the US and EFTA by virtue of their participation in the Southern African Customs Union (SACU).

**Other Political Factors**

Other factors that may motivate the formation of a bloc include a desire by one country to control migratory flows from other countries.\textsuperscript{364} A country may also wish to improve the economic welfare of one’s partner and thus contain problems within that partner.\textsuperscript{365} In addition, trade blocs can be used to strengthen democracy and political institutions. Where a trade bloc has strong ‘club’ rules, the bloc can serve as a vehicle for strengthening democracy. In order for this to occur, there has to be some value derived from being a member of the ‘club’ and there has to be a credible threat

\textsuperscript{360} Ibid 42–44. He goes on to propose that a workable model for regional integration among developing countries should oblige them to remain within the arrangement and that there should be some external body charged with the duty of penalising a state that withdraws from the arrangement without authorisation.

\textsuperscript{361} See section 3.6.3.

\textsuperscript{362} Schiff and Winters, above n 27, 202.

\textsuperscript{363} Ibid 202–203.

\textsuperscript{364} Ibid 196.

\textsuperscript{365} Schiff and Winters give the example of the EU entering into Euro-Mediterranean Agreements with North African countries in a bid to control illegal immigrants from the latter. They also cite the creation of NAFTA as an example of the US aiming to help Mexico export more goods and fewer people; Ibid 196–198.
of action in the event of breach of the rules. This is one benefit that can only be obtained through bilateral or regional action as there is no multilateral substitute.

From a Liberal IR perspective, it can also be noted that the formation of a trade bloc may be influenced by the presence of pressure groups from the private sector or labour. For such groups, the formation of a trade bloc can have a material impact on their welfare. When a trade bloc creates trade, producers in import-competing sectors stand to lose and they will therefore lobby against liberalisation. Though exporters who stand to benefit from the opening of markets can be mobilised to act as a counter-lobby, they are likely to lobby harder for a guaranteed regional market than for multilateral liberalisation which does not offer them a guarantee of benefiting from concessions. In planning an institutional framework, there is therefore a need to ensure that sectors that can benefit from market opening are brought into the fold. This will provide a useful counterweight to protectionist sentiment.

**Conclusion**

The aim of this Chapter was to investigate the objectives that states seek to accomplish through the establishment of regional trade agreements. The discussion revealed that there are a wide number of such objectives ranging from economic, political-economic to purely political goals.

With regard to the economic factors, it was first seen that the economic justification for global free trade based on comparative advantage remains as valid today as it was when it was first conceived. It was also seen that for individual countries, as opposed

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366 Ibid 198–201.
367 Thus, for instance, the Kenyan sugar industry has been vigorous in lobbying the Kenyan government to enable safeguard measures to be imposed on the import of cheaper sugar from other COMESA Members. See, for example, ‘Kenya Defies COMESA on Sugar Imports’, The EastAfrican, 8 March 2004.

In a world of nation-states the benefits from restricting imports generally are much more concentrated in politically more powerful producer interest groups (including labor) of the importing nation than are the losses (which are widely dispersed among many users and exporters in the importing country or among exporters from other nations who do not have much of a direct political voice in the importing country).

to the world as a whole, there are theoretical arguments to be made for interventionist economic policies but that these policies are hard to implement and invite retaliatory policies from other countries. The discussion also showed that many of the benefits that regionalism is said to bestow, such as gains from trade, economic growth, and economies of scale, are achievable through a policy of non-discrimination. In order to engage in effective regional integration, it is therefore important that the positive benefits that flow from regionalism are emphasised and the structures put in place to facilitate the achievement of those benefits.

On the issue of the ‘regionalism versus multilateralism’ debate, it was seen that though there are a number of benefits to be gained from entering into RTAs, there are also dangers posed by the adoption of such policies due to the risk of abuse by some states. Moreover, many of the same benefits can be obtained either from unilateral trade policy measures or multilaterally agreed rules. This means that careful consideration must be given to the appropriate legal safeguards that can be put in place at both regional and multilateral levels to accentuate the positive effects and minimise the potential harm.

The conclusion to be drawn from this discussion is that in analysing the effectiveness of the WTO rules and the RTAs that developing countries have formed, it will be necessary to identify the objectives that the relevant countries are pursuing and, in the light of those goals, to evaluate the extent to which those legal regimes expedite the attainment of those goals.
CHAPTER FOUR:  
THE WTO’S REGULATORY REGIME FOR REGIONAL  
TRADE AGREEMENTS: A MANAGERIAL  
PERSPECTIVE

4.1 Introduction

This chapter analyses the WTO’s regulatory regime for regional trade agreements from a managerial perspective. The primary aim of the analysis is to develop the argument that, by exempting developing countries from the application of Article XXIV, the Enabling Clause has weakened the capacity of the WTO to effectively regulate RTAs. The chapter also aims to show that, though more rigorous, the provisions of Article XXIV are flexible enough to cater for the interests of developing countries. This is important because, in order for developing countries to consent to Article XXIV jurisdiction, as this thesis advocates they do, it is essential to demonstrate that it can cater for their interests.

In Chapter One, it was noted that one of the reasons for creating GATT was to ensure that effective constraints would be placed on the trade policies of the contracting parties. All the parties would therefore be able to rely on it to ensure that their expectations were fulfilled. In order to assess the effectiveness of the WTO regime, it is therefore necessary to specify what those expectations were. Having identified the objectives of the drafters, the next task will be to understand and assess the mechanisms that they established to secure compliance with the regime’s norms. The analysis conducted in this chapter will thus involve not just a doctrinal comparison of Article XXIV and the Enabling Clause but also a discussion of how these exceptions came to be included in the rules of an organisation dedicated to the elimination of discrimination in international trade. It is essential to have a clear understanding of the purposes that the rules serve in order to assess their effectiveness and to formulate proposals for the improvement of the rules in the event that they are proving to be ineffective.

369 See section 1.2, n 41 and accompanying text.
The chapter is arranged as follows: Section 4.2 examines the pedigree of the non-discrimination principle in GATT. It traces the history of the principle of non-discrimination in international trade from the 19th century through to its incorporation into the GATT in 1947. The analysis shows that there was never universal agreement as to its supremacy. Thus, exceptions to its application were included. Specifically, this section reveals that the aim of eliminating preferences was never really achieved as a result of the numerous compromises that had to be made both in the drafting of GATT and its early application. It will also be shown that as the years elapsed, consensus regarding even these exceptions proved to be inadequate to satisfy the increasing membership of developing countries in the GATT.

Section 4.3 examines the substantive requirements. The analysis will highlight, first, those areas where the Enabling Clause requirements differ from those found in Article XXIV and, second, those areas that exhibit ambiguity. It will be seen that the Enabling Clause allows developing countries to engage in partial liberalisation whereas Article XXIV requires the elimination of substantially all barriers. However, it will also be seen that the way in which Article XXIV has been applied together with its allowance for the notification of interim agreements means that its provisions are not as ‘hard’ as one would imagine judging from the protests of developing countries.

Section 4.4 evaluates the procedural requirements of Article XXIV and the Enabling Clause. This entails an analysis of the notification and examination rules. It will be seen that the requirements are similar in that both require members to provide information regarding the RTAs that they establish. Section 4.5 examines the relationship between the dispute settlement provisions and the rules on regional arrangements. It also discusses the contribution that the dispute settlement mechanism has made to the application and interpretation of the rules.

In section 4.6, some conclusions are drawn regarding the measures that can be taken to enhance the effectiveness of the rules.
4.2 The Status and Function of the MFN Principle in GATT

This section reviews the history behind the adoption and application of the MFN principle in the GATT. The aim is to clarify the context in which the principle was incorporated into GATT.

4.2.1 History of the MFN Principle Prior to the Formation of GATT

The origins of the principle of non-discrimination in international trade date back the repeal of the Corn Laws by the United Kingdom in 1846.\(^\text{370}\) The principle then began to spread with the conclusion of the Anglo-French (Cobden-Chevalier) Commercial Treaty of 1860. This is considered the first treaty to incorporate a MFN clause.\(^\text{371}\) The clause was designed to ensure that when one country extended trade concessions to another country, the latter country could not later undermine those preferences by extending a better deal to third countries.\(^\text{372}\) Use of the MFN clause flourished for a few years thereafter then declined as most major European powers, save Britain, retreated behind high tariff walls and pursued the gains of trade through colonial acquisitions.\(^\text{373}\)

Following World War I, however, world trade collapsed leading to the infamous ‘beggar-thy-neighbour’ trade policies and the Great Depression of the 1930s.\(^\text{374}\) In the aftermath of the Second World War, one of the goals of the US planners of the post-war trading system was to avoid a return to the preferential arrangements and discriminatory trade practices of the interwar period, which they blamed for the length of the Depression. They therefore built the principle of non-discrimination, in the form of Article I, into the GATT.\(^\text{375}\)

4.2.2 The Incorporation of the MFN Principle into GATT: Compromise

The MFN principle, as incorporated in the GATT, was intended to apply to all tariffs, whether or not covered by a concession, as well as to all other rules and formalities


\(^{371}\) Trebilcock and Howse, above n 2, 18.

\(^{372}\) This would reduce the incentive of those who negotiated agreements to hold back concessions lest a partner who entered later got a better bargain. See Frankel, above n 2, 2.

\(^{373}\) Trebilcock and Howse, above n 2, 18–19.

\(^{374}\) Ibid 19–20.

applying to imports and exports.\textsuperscript{376} In order for GATT to gain widespread acceptance, however, the US negotiators behind its drafting had to compromise and include two exceptions to the principle. These were the preferential arrangements ‘grandfathered’ into Article I and the CUs and FTAs permitted by Article XXIV.\textsuperscript{377} It has been argued that it was necessary to include the RTA exception because there was a general awareness and consensus that customs union exceptions, being common clauses in commercial treaties as derogations from the MFN principle, would have to be included in the General Agreement.\textsuperscript{378} Moreover, with the unification of Western Europe being a central plank of US foreign policy, banning customs unions was inconceivable.\textsuperscript{379} In addition, the US believed that the formation of customs unions would not hamper the liberalization of trade so long as the regional arrangements acted as halfway houses on the road to non-discriminatory and freer trade.\textsuperscript{380} It is therefore clear that from the very beginning there was no chance that the GATT would contain an outright ban on preferences. The issue was where to draw the line.

This was a major concern of the US. She feared that the RTA exception would undo the gains achieved by Article I by permitting preferential arrangements to be introduced through ‘a back-door route.’\textsuperscript{381} Thus, with regard to existing preferential arrangements which were ‘grandfathered’ into the GATT, Article I provided, inter


\textsuperscript{377} Dam, The GATT, above n 8, 19. Note that because the non-discrimination principle could also be undermined by the discriminatory application of non-tariff barriers, the GATT contained a number of other non-discrimination clauses such as Article III:7, Article XIII and Article XVII:1.


\textsuperscript{379} Devuyst, above n 10, 19.


\textsuperscript{381} Dam, ‘Regional Economic Arrangements and the GATT’ above n 12, 618. The draft proposed by the US had only provided for a customs union exception but following pressure from developing countries this exception was extended to cover free trade areas. The UK and US vigorously opposed the addition of free trade areas on the grounds ‘that the proposed rules of exception were too vague and allowed for unilateral interpretations by the beneficiaries’; Kock, above n 7, 44–45. It is somewhat ironic that, as later events showed, the fears of the UK and US were well-founded, and that these fears have been true not just for free trade areas, but also for customs unions.
aliana, that the then existing margins of preference were not to be exceeded.\textsuperscript{382} In the case of Article XXIV, the provisions laid out the parameters that acceptable customs unions and free trade areas would have to fall within and the procedures that parties establishing such agreements would have to follow. One of the most significant conditions was that the customs unions and free trade areas would have to involve the elimination of almost all the barriers on intra-regional trade.\textsuperscript{383} In Chapter Three, it was noted that this requirement has been the subject of considerable criticism from economists.\textsuperscript{384} However, as Roessler correctly pointed out, a ‘proposal to judge [RTAs] in the light of economic efficiency considerations … cannot easily be transformed into a rule of conduct capable of influencing the behaviour of governments negotiating a regional agreement.’\textsuperscript{385} A requirement that an agreement cover substantially all the trade, on the other hand, could easily be transformed into a rule of law with which governments could comply at the time of negotiating the agreement.\textsuperscript{386} Moreover, the requirement served ‘a useful domestic policy function’ by ensuring that a government would be able to resist protectionist pressures that would push for only trade-diverting preferences to be exchanged.\textsuperscript{387}

Article XXIV therefore made both legal and political sense. In addition, the procedural provisions would enable third parties to scrutinise the trade measures that would be introduced upon the introduction of the agreement. This would assist them determine whether their interests would be affected.

\subsection*{4.2.3 Developing Country Grievances: Legitimacy of GATT Rules Called Into Question}

In Chapter Two, it was noted that one of the considerations that increases the likelihood of a state complying with legal rules is a belief that the rule serves its interests. At the time the GATT rules were drawn up, it has been argued that there was a general consensus among the small group of countries that participated in the

\footnotesize
\begin{itemize}
\item \textsuperscript{382} \textit{GATT} \textsuperscript{1947}, 30 October 1947, 55 UNTS 194, art I:2 (entered into force provisionally 1 January 1948).
\item \textsuperscript{383} This condition is discussed further in section 4.3.1.
\item \textsuperscript{384} See Chapter Three nn 38, 39 and accompanying text.
\item \textsuperscript{385} Frieder Roessler, ‘Regional Integration Agreements and Multilateral Trade Order’ in Kym Anderson and Richard Blackhurst (eds), \textit{Regional Integration and the Global Trading System} (1993) 311, 313.
\item \textsuperscript{386} Ibid.
\item \textsuperscript{387} Ibid 314.
\end{itemize}
negotiations about the objectives of the Agreement and the means of attaining those objectives.  

One area in which consensus did not exist was the preferred path to economic development. The US believed that developing countries ‘could best develop by participating fully in a multilateral non-discriminatory system with the lowest possible levels on tariffs and no quantitative restrictions’, while developing countries were of the view that economic development ‘required the creation of import substitution industries.’

For such industries to survive it was asserted that high tariffs and the use of quotas were needed. Eventually a compromise in the form of Article XVIII was reached. It allowed developing countries to protect their import-substituting industries through the use of quantitative restrictions.

By the 1960s however, it had become clear that developing countries were failing to benefit from the system and consensus regarding the fairness of the rules began to fray. The spark for the discontent was provided by the publication of the Haberler Report. The Haberler Report showed that developing countries were not benefiting from the GATT and that this state of affairs was primarily the result of the developed countries practices. This cast into doubt the fairness and legitimacy of the rules.

In response to the Report, a new doctrine postulating ‘a link between trade and development but not in the global perspective inherent in the GATT doctrine’ began to assert itself. Developing countries called for the relaxation of the stringency of the rules, including that on non-discrimination, in their favour. This can be

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388 Olivier Long, Law and its Limitations in the GATT Multilateral Trade System (1985) 88. Hudec asserts that ‘[o]f the original 23 contracting parties of the GATT, ten were developing countries’. Robert E Hudec, Developing Countries in the GATT Legal System (1987) 23. Curiously, of the ten that he names, neither Southern Rhodesia nor South Africa is included.
390 Dam, The GATT, above n 8, 226.
391 Dam describes it as representing ‘at one and the same time, almost to the point of caricature, the passive legislative approach to trade problems which was typical of the early GATT.’ Dam, The GATT, above n 8, 277. See also Finger, ‘Development Economics and the GATT’ above n 22, 208.
392 Gottfried Haberler et al, Trends in International Trade (1958) (‘Haberler Report’).
393 ‘The substance of the report was that the predicament of the underdeveloped countries was due in no small measure to the trade policies of the developed countries.’ Dam, The GATT, above n 8, 228–229. See also Hudec, Developing Countries, above n 20, 41.
394 Long, above n 20, 90.
395 Martin Wolf writes that developing countries engaged in an assault on the system, including the principle of non-discrimination, arguing that ‘equal treatment of unequals is unjust’ and urging discrimination in their favour. Martin Wolf, ‘Two-Edged Sword: Demands of Developing Countries
attributed in part to the realisation that, for many developing countries, import-competing industries needed both protection at home and a market larger than was available domestically in order to flourish. Thus, the use of the free trade area provision that they had fought for so hard at the Havana Conference would not serve their purposes. In sum, they needed a legal means to get access to large markets while protecting their own domestic markets.

The fight for such rules took place in both the GATT and in the UN. In 1964, the latter had organised the United Nations Conference on Trade and Development (UNCTAD) to address developing country concerns. The formation of UNCTAD thus provided an arena within which developing countries could press for preferential market access to developed countries. Indeed at one stage there was a threat to desert the GATT for UNCTAD if their demands were not met. The developing country pressure finally succeeded in having Part IV added to GATT in 1965.397 The new provisions reflected a less prohibition-oriented approach to the problem of reducing barriers to trade and relieved less developed countries of the requirement of offering ‘reciprocity’ in tariff negotiations with developed countries (Article XXXVI:8).398

Back in UNCTAD, the pressure for preferential market access did not ease and though the US was initially opposed to these proposals, in 1968 she reversed her position and supported a ‘generalized system of preferences’. This system would permit developed countries to grant tariff preferences to almost all developing countries, without reciprocity, on a wide range of products.399 The hope of the US was that its participation in the GSP would act as leverage in convincing the EEC to abandon its policy of ‘reverse preferences’ with certain Mediterranean and African countries.400 The agreement in principle to adopt the GSP was reached during UNCTAD’s second conference in 1968. However, it was not implemented in GATT until 1971, when the Contracting Parties adopted the Decision on ‘Generalized

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397 See Dam, The GATT, above n 8, 236–242; Hudec, Developing Countries, above n 20, 50–59 for a more detailed analysis of the circumstances that led to the addition of Part IV. Part IV actually entered into force on 27 June 1966 for those countries that had accepted it.
398 Dam, The GATT, above n 8, 22.
399 Hudec, Developing Countries, above n 20, 63.
400 Ibid. For a more detailed discussion of the reverse preferences issue, see James H Mathis, Regional Trade Agreements in the GATT/WTO (2002) 75–79.
It is important to note that, in accepting the GSP Scheme, developed countries were not prepared to assume any new obligations to the developing countries. They refused to accept any obligation to grant preferences. The Decision allowed developed countries to choose the products to include in their schemes meaning that they could safe keep their industrial and agricultural interests.

Simultaneously with the negotiations leading up to the GSP, developing countries were formulating a complementary scheme to increase access to other developing country markets. The precursor for this scheme was the Agreement negotiated by India, Egypt and Yugoslavia for which a waiver had been granted in 1968. The proposed initiative would involve an exchange of preferences amongst themselves on selected products on a reciprocal basis. This initiative was undertaken primarily under the auspices of the Committee on Trade and Development. The objective of the initiative was to allow developing countries to expand trade among themselves by widening ‘the markets they provided for one another’s exports.’ After prolonged negotiations, a Decision was taken in 1971 waiving the provisions of Article I to allow the Protocol Relating to Trade Negotiations among Developing Countries (PTN) to be implemented.

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401 Generalized System of Preferences, GATT BISD, 18th Supp, 24, GATT Doc L/3545 (1971) (Decision of 25 June 1971) (‘GSP’). The Decision waived the provisions of Article I in its application to developing countries for an initial period of 10 years: at [a]. Actual implementation in GATT is said to have had to wait until 1973 when a deal was finally struck that partially involved the EEC abandoning the ‘reverse preferences’ in return for the US not challenging the GATT-legality of the special preferences contained in the Lomé Conventions (the EEC claimed that the Lomé preferences were FTAs under Article XXIV). Hudec, Developing Countries, above n 20, 68 n13.

402 The Decision expressly stated that the grant of tariff preferences was not ‘a binding commitment.’


405 The Committee on Trade and Development had been formed in 1965 primarily to keep under review the application of the provisions of Part IV.


407 Trade Negotiations among Developing Countries, GATT BISD, 18th Supp, 26, GATT Doc L/3636 (1971) (Decision of 26 November 1971) (‘PTN’). The Protocol entered into force in 1973. At the end of its first five years of operation, a Review was issued that indicated that trade among its participants had increased substantially. However, there was very limited participation by developing countries. Of the 52 developing countries (out of a total of 77) that were contracting parties to GATT (see Hudec, Developing Countries, above n 20, 24), only 17 of them were participating, of whom only two, Egypt
to the extent necessary to permit each contracting party participating in the arrangements set out in the Protocol … to accord preferential treatment as provided in the Protocol with respect to products originating in other parties to the Protocol, without being required to extend the same treatment to like goods when imported from other contracting parties;

The Decision also provided in paragraph (e) that the CONTRACTING PARTIES will review annually, on the basis of a report to be furnished by the participating countries, the operation of this Decision in the light of the aforementioned objectives and considerations and after five years of its operation carry out a major review in order to evaluate its effects. Before the end of the tenth year the CONTRACTING PARTIES will undertake another major review of its operations with a view to deciding whether [the] Decision should be continued or modified.

It is therefore clear that this waiver, like the GSP, was intended as a temporary measure, subject to review at a later date. It has been argued that in agreeing to this scheme, which was in effect giving ‘developing countries new and greater legal freedom to use protection and discrimination in their own markets,’ developed countries were making up for their refusal just six months earlier to accept a binding obligation to extend GSP. Seen in this light, the PTN was a cynical ploy to remove the spotlight from the developed countries’ own harmful trade policies that had been identified in the Haberler Report but which had not been acted upon in any meaningful manner. The tragedy is that developing countries took the bait and proceeded to entrench this discretionary right to discriminate against each other rather than seeking an effective solution to the problems that they faced such as meaningful global reduction of tariffs and other barriers to trade.

Developing countries thus came to believe that this discretion was a concession to be jealously safeguarded. It is therefore no surprise that when the Enabling Clause was adopted providing that:

Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties,409,

and Tunisia, were African. Five-year Review by the Contracting Parties of the Decision Concerning the Protocol Relating to Trade Negotiations among Developing Countries, GATT Doc No. L/4710 (1978).
409 Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, GATT BISD, 26th Supp 203, GATT Doc L/4903 [1] (Decision of 28 November 1979) (‘The Enabling Clause’).
this privilege extended not just to the GSP\textsuperscript{410} but also to ‘regional arrangements’ involving developing countries.\textsuperscript{411}

One significant feature of the Enabling Clause is that it did not contain any reference to Article XXIV. This left the question of whether it created a new framework for developing countries unclear. Based on the preceding analysis, however, there is a strong argument to be made that the Clause was aimed at extending to the PTN the same permanent waiver extended to the GSP, rather than at creating an alternative procedure for developing countries to establish RTAs.\textsuperscript{412} Be that as it may, the Enabling Clause, in practice, has been used as cover for developing country RTAs. The adoption of the Enabling Clause profoundly changed the legal nature of developing country obligations and weakened the normative force of the non-discrimination principle.\textsuperscript{413}

4.2.4 \textit{The Impact on Legal Discipline of the Wider Policy Changes}

The preceding analysis has traced the incorporation of the MFN principle into the GATT, the exception to its application provided by Article XXIV, and the subsequent weakening of that exception by the Enabling Clause. It is important to remember that this debate on policy was going on in tandem with a debate over whether the most effective way to achieve the organisation’s goals was through a strict legal application of the rules or to rely more on diplomacy. This debate goes back to the negotiation of GATT.

It has been argued that the drafters of GATT realised that for it to succeed in achieving its aims, it had to regulate the governmental policies and measures affecting international trade in such a way that nations could rely upon GATT legal norms as

\textsuperscript{410} Ibid [2(a)].
\textsuperscript{411} Ibid [2(c)].
\textsuperscript{412} Indeed, in discussing the two waivers, Hudec makes only a parenthetical remark with regard to the significance of the Enabling Clause, noting ‘(Nine years later, in 1979, both waivers would be made permanent in the so-called Enabling Clause decision.)’ Hudec, ‘Developing Countries’, above n 20, 64.
\textsuperscript{413} Hudec described the Enabling Clause as ‘\textit{a de facto} amendment of GATT’. Ibid 85.
being representative of what other countries would do.\textsuperscript{414} However, at the same time a compromise had to be constructed between conflicting international economic interests.\textsuperscript{415} In aiming for these goals, GATT therefore had to deal with situations that could not easily be reconciled by logical legal processes.\textsuperscript{416} In Chapter Two, it was noted that constructing a compromise between conflicting objectives is usually achieved through the use of ‘soft’ law. Dam described this as a tension between the principles of ‘legalism’ and ‘pragmatism’.\textsuperscript{417} He contended that whereas ‘legalism’ was predominant in the drafting of GATT, ‘pragmatism’ came to the forefront in the administration and interpretation of the Agreement.\textsuperscript{418} This claim is supported by Long who argues that ‘legalism’ was able to dominate in GATT’s early years because consensus regarding its objectives ‘was obtained without difficulty … because the objectives were clear and shared by the relatively small number of countries participating in the GATT.’\textsuperscript{419}

The difficulty with these arguments is that they downplay the many compromises that had to be made in order to achieve an agreement that was acceptable to all the parties that participated in the negotiations. These include the provisions for preferences in Articles I and XXIV as well as exceptions regarding balance of payments measures and measures to protect infant industries. These provisions should not be overlooked but regarded as representing an acceptable compromise between the goal of non-discrimination and the realities of world in which preferences existed. As Hudec cogently pointed out:

\begin{quote}
Although there was a fairly solid consensus about the rules that ought to be written, no major government felt that it could promise any important changes in existing practice for the sake of those rules. Exceptions to the rules had to be carved out in almost every case.\textsuperscript{420}
\end{quote}

\begin{footnotes}
\footnotetext[415]{Ibid 755-56.}
\footnotetext[416]{Ibid 756.}
\footnotetext[417]{‘Legalism’ refers to the approach to the drafting of international agreements whereby draftsmen attempt to foresee all of the problems that may arise in a particular area and write down highly detailed rules in order to eliminate any disputes or doubts about the rights and obligations of each agreeing party in future. ‘Pragmatism’ on the other hand, is an approach to the drafting and administration of international agreements that places emphasis on mutual agreement on objectives, and rules on rights and obligations are regarded as formalities to be avoided whenever possible. Dam, \textit{The GATT}, above n 8, 3–4.}
\footnotetext[418]{Ibid 4.}
\footnotetext[419]{Long, above n 20, 88.}
\end{footnotes}
Thus, the extent to which GATT can be considered to have been a product of shared consensus should not be exaggerated.

The decline of legal discipline in the GATT is commonly associated with an increased disregard for written rules. The concurrent rise in the pragmatic approach has been attributed to a variety of factors. One was the formation of the EEC in 1957.\textsuperscript{421} The formation of the EEC changed the entire dynamics of the GATT by introducing a new powerful player even as it removed five European countries from direct participation at the table.\textsuperscript{422} GATT now had to deal with a situation where non-compliance with the General Agreement by a major power with both economic and political might had to be tolerated as it would have been impractical to obtain compliance from it if it was determined not to comply.\textsuperscript{423} This was the case with regard to the examination of the Treaty of Rome and, in particular, the relationship between the EEC and its Overseas Territories.\textsuperscript{424} Despite the strong feelings of the non-EEC members of the Working Party that the agreements between the EEC and the territories were not consistent with the provisions of Article XXIV, the consensual nature of GATT proceedings meant that no recommendations could be made.\textsuperscript{425}

Other factors that have been identified as contributing to the rise of the pragmatic approach are the lack of an effective sanctioning mechanism and the ambiguity regarding the nature of some of the obligations. With regard to the issue of sanctions, Jackson argues that ‘[w]ith little in the way of meaningful sanction or other device to ensure compliance with its rules, it [was] not surprising that discrepancies between the practice and the technical rules of GATT would develop.’\textsuperscript{426}

\begin{footnotes}
\item[422] Robert Hudec, The GATT Legal System, above n 7, 209.
\item[423] Jackson, World Trade, above n 46, 758.
\item[424] See Chapter Three of James H Mathis, Regional Trade Agreements in the GATT/WTO: Article XXIV and the Internal Trade Requirement (2002) for a detailed analysis of the legal issues raised by this relationship.
\item[426] Jackson, World Trade, above n 46, 16. In this respect, Jackson would appear to have been lamenting the lack of ‘coercive sanctions’ as opposed to the co-operative measures favoured by the Chayeses. See section 2.2.
\end{footnotes}
An additional factor that added to the pressure for a change was the increase in the number of developing countries with GATT membership. This meant that developing countries gained more of a voice and were able to press harder for changes in the rules to their benefit. The limited capacity of the large number of developing countries that joined GATT also meant that many found difficulty with the restraints. For developing countries, the fight for special and differential treatment in the 1970s was based on ‘a right to protect [Article XVIII], and a right to preferential market access [Part IV, Article 36 of GATT].’ These developments on the legal front, allied with the prevailing economic principles resulted in developing countries being freed from virtually all constraints on their economic and trade policy. It was noted above that the release of the Haberler Report led to the adoption of a doctrine linking trade and development. It has been argued that the principle of differential treatment which accompanied this doctrine was acquiesced to by developed countries ‘either through a liberal interpretation of the relevant GATT principles, or through taking cognizance of the measures without passing judgment or through tolerant treatment of measures that are known but not notified.’

In sum, the following observations can be made regarding the above developments. From a legal perspective, the danger in a pragmatic approach that ignores legal provisions by looking at the ends and not the means is that one of the goals of laying down a set of regulations – predictability – ends up being lost. Non-compliance with the law can thus easily lead to a lack of respect for the law. From a policy point of view, it needs to be remembered that the policy goal of GATT was to make discrimination predictable. As Hudec argued, compliance with Article XXIV would mean that for the participating countries there would be no other way to discriminate since the customs union or free trade area would be ‘considerably less distortive and disruptive than an [RTA] consisting of selective partial preferences that can expand or deepen every year.’ The adoption of the Enabling Clause exempting developing

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427 Hudec pointed out that whereas at the end of the 1950s, developed countries held a 21–16 edge in GATT membership, this had changed to a 25–52 balance in favour of developing countries by May 1970. Hudec, Developing Countries, above n 20, 24.
429 Jackson, World Trade, above n 46, 95.
430 Ibid 17.
431 Robert Hudec, ‘Discussion: GATT’s Influence on Regional Arrangements’ in Jaime de Melo and Arvind Panagariya (eds), New Dimensions in Regional Integration (1993) 151, 155.
countries from that obligation can therefore be considered to have been counterproductive in that developing countries could no longer be constrained to adopt optimal trade policies.

4.3 The Substantive Rules for the Establishment of RTAs

This next section engages in a close examination of the substantive rules contained in Article XXIV and the Enabling Clause. The provisions of Article XXIV have been criticised on the grounds that though they were aimed at tying down ‘in the most precise legal language possible, the conditions that such regional groupings would have to fulfil’, the effort was ‘a failure, if not a fiasco.’ The aim of the analysis is to determine whether such criticism is justified by establishing the nature of the requirements that Article XXIV places on parties establishing RTAs. In doing so, it is hoped to assess the extent to which Article XXIV is more onerous than the Enabling Clause.

4.3.1 The Substantive Legal Requirements

In order for a WTO member to be exempted from Article I under Article XXIV, the RTA that it forms must meet the following substantive requirements:

For a customs union, duties and other restrictive regulations of commerce (except those permitted by Articles XI – XV and XX) must be eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to all the trade in products originating in such territories. The members of the CU are also obliged to apply ‘substantially the same duties and other regulations of commerce’ on trade with territories not part of the union. They should also ensure that such duties and other regulations of commerce are on the whole no ‘higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of’ the union. If the adoption of the common external tariff leads to an increase in a

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432 Dam, *The GATT*, above n 12, 275.
434 Ibid art XXIV: 8(a)(ii).
435 Ibid art XXIV: 5(a).
bound rate by a member in a manner inconsistent with Article II, then the procedure set forth in Article XXVIII is to apply.\footnote{Ibid art XXIV: 6. Note that in the event of a failure to follow this procedure, there is no indication that a CU will automatically be prevented from qualifying for the GATT exception. See Jackson, \textit{World Trade}, above n 46, 583.}

For a free trade area, the duties and other restrictive regulations of commerce (except those permitted under Articles XI – XV and XX) are to be eliminated on substantially all the trade between the constituent territories in products originating in such territories.\footnote{\textit{GATT 1994}, 15 April, 1994, 1867 UNTS 190, art XXIV: 8(b) (entered into force 1 January 1995).} In addition, the duties and other restrictive regulations maintained and applicable in each of the territories at the formation of the FTA to their trade with non-parties are to be no higher or more restrictive than the corresponding duties existing in the same constituent territories prior to the formation of the FTA.\footnote{Ibid art XXIV: 5(b).} Moreover, where an interim agreement leading to the formation of a free trade area or customs union is adopted, the parties are obliged to ensure that the interim agreement includes a plan and schedule for the formation of such union or area within a reasonable length of time.\footnote{Ibid art XXIV: 5(c).}

The Enabling Clause, on the other hand, does not specifically refer to either customs unions or free trade areas. It simply provides that the discretion to accord differential and more favourable treatment applies to, inter alia,

(c) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of nontariff measures, on products imported from one another.\footnote{Enabling Clause, above n 41, [2(c)].}

This provision therefore gives developing countries a choice as to whether to reduce or to eliminate tariffs on imports from one another unlike Article XXIV, which obliges members to commit to the elimination of duties and other restrictive regulations.\footnote{Note that since parties are not required to eliminate tariffs, no provision regarding interim agreements is set out.} With regard to non-tariff measures, on the other hand, developing
countries are allowed to act only ‘in accordance with criteria or conditions which’ the Contracting Parties may prescribe. No such criteria have in fact been set out.442

A strict reading of this provision would imply that until such criteria are prescribed and the provision is made operative, developing countries are not entitled to rely on it for the preferential reduction of non-tariff measures. This is because such reduction would not be ‘in accordance’ with any criteria. A more realistic interpretation, however, is that in the event that a developing country did engage in such reduction, no measures could be taken against it as the clause would be no more than a pactum de contrahendo.

It is also significant that the Enabling Clause is silent on the external dimensions of a customs union. This failure to provide directions regarding the setting up of a common external tariff suggests that developing country customs unions are not eligible to be notified under the Enabling Clause. Prior to the adoption of the Enabling Clause, developing countries had been notifying customs unions under Article XXIV. This was the case, for example, with the African Common Market,443 the Arab Common Market,444 and the Caribbean Community and Common Market.445 This supports the contention made above that the Enabling Clause was not intended to cater for such arrangements.

In the Economic Commission for Africa’s Report entitled Assessing Regional Integration in Africa, it is asserted that ‘[u]nder the Enabling Clause, compensation is due if a WTO Member can demonstrate that expected benefits from a tariff binding have been compromised.’446 This assertion portrays a fundamental misunderstanding of the rationale underlying the RTA exception. The rationale underlying the RTA exception, be it under Article XXIV or the Enabling Clause, is to the effect that state A is not obliged to extend MFN treatment to state C if the preferential treatment that it is extending to state B is covered by an Enabling Clause or Article XXIV RTA

442 Legal Note on Regional Trade Arrangements under the Enabling Clause, WTO Doc WT/COMTD/W/114 (2003) [53(b)] (Note by the Secretariat).
445 Treaty Establishing the Caribbean Community, GATT Doc L/4083 (1974) (Notification pursuant to Article XXIV:7(a)).
between A and B. In such circumstances C has to accept that the preferential access to A’s market that B has is legal. Thus, although ECA’s viewpoint is erroneous, it does highlight the main drawback of regionalism for third parties.

In sum, the Enabling Clause confers a wide degree of discretion on developing countries that wish to extend preferences to one another as to the scope of the preferences. Nonetheless, issues of interpretation mean that the Article XXIV provisions are relatively ‘soft’. Thus, requiring developing countries to comply with it may not impose as onerous a burden on them as they would appear to think, even as the ambiguities detract from the effectiveness of the regime’s regulatory function. The following sub-section discusses a few of these ambiguities. This analysis is illustrative not exhaustive. Detailed analyses of the provisions have been conducted by many distinguished scholars and no purpose would be served by going over the same ground again in this thesis.447

4.3.2 The Interpretation and Clarification of the Substantive Rules

In the previous sub-section, it was seen that, technically, Article XXIV imposes stricter obligations on a party establishing an RTA than does the Enabling Clause. However, the provisions of Article XXIV exhibit a fairly high degree of ambiguity. A few of the terms that have been most controversial will now be discussed to determine their impact on the scope of liberalisation that is required of the parties to an RTA. In Chapter Two it was noted that ambiguity can be used deliberately to enable compromise and to cater for uncertainty as well as to safeguard sovereignty. Where parties would still wish to achieve a high degree of compliance, broad terms can be combined with the delegation of the duty of interpreting the terms to an independent entity. This has not, however, been the case with either Article XXIV or the Enabling Clause. Any clarifications of the terms have come from the parties themselves.

It may be useful to start by recalling the principles that guide the legal interpretation of GATT provisions. In the *Turkey – Restrictions on the Imports of Textile and Clothing Products* dispute, the Panel stated that it would be guided by the principles of interpretation of public international law including the provisions of the Vienna Convention on the Law of Treaties. Accordingly, the Articles are to be interpreted ‘using first the ordinary meaning of the terms of that provision, as elaborated upon by the 1994 Understanding on Article XXIV, in their context and in light of the object and purpose of the relevant WTO agreements.’[^448] If necessary, it is possible to resort to the negotiating history, including the historical circumstances that led to the drafting of Article XXIV of GATT. As WTO obligations are cumulative, members have to comply with all of them unless there is a formal conflict between them,[^449] but that, as a principle of public international law, there was a presumption against conflict and certain conditions had to be satisfied before a conflict would be found. The Panel was also of the opinion that the principle of effective interpretation of treaties ‘whereby all provisions of a treaty must be, to the extent possible, given their full meaning so that parties to such a treaty can enforce their rights and obligations effectively’ should be a guiding factor.[^450]

‘Substantially all the trade’ (SAT)

The term ‘substantially all the trade’ appears in paragraph 8 of Article XXIV. This clause deals with the internal dimensions of trade within customs unions and free trade areas. It will be recalled that under the market integration model, both free trade areas and customs unions are defined in terms of the elimination of all barriers to movement of goods between the parties.[^451] Article XXIV does not go this far; it merely requires the removal of barriers on *substantially all the trade*. The ambiguity in this term arises from the fact that Article XXIV gives no indication as to whether the condition is to be satisfied by the use of a quantitative test involving the volume of trade, a qualitative test that takes sectors of the economy into account, or a combination of the two. This omission has been a source of intense debate.

[^449]: Ibid [9.92].
[^450]: Ibid [9.96].
[^451]: See section 1.3.
The first time that the phrase arose for interpretation was during the examination of the Treaty of Rome. The quantitative issue was raised in the context of the relationship between the EEC and the Overseas Territories in Part IV of the Rome Treaty, while the qualitative aspect was raised in the context of the exclusion of agriculture from the Treaty. With regard to the former, third-party countries were concerned about the nature of the relationship between the EEC and the Overseas Territories. The EEC claimed that the agreements between it and the associated countries were interim agreements leading to the formation of FTAs, as their ultimate objective was the removal of barriers from substantially all trade. However, the non-members of the EEC were concerned that the amount of trade being liberalised between the EEC and its Associated Overseas Territories did not comply with the ‘substantially all trade’ requirement.

The EEC representative suggested that since Article XXIV gave no concrete guidelines, a figure of 80% would fit the criteria. Figures were produced, based on the total cross-border trade in the proposed free-trade area, inclusive of intra-EEC trade, that showed a liberalisation of over 80% in each case. The critics of the EEC Agreement remained sceptical but failed to make any recommendations. Haight argues that they were embarrassed by their paradoxical posture that objected to a discrimination against some of their trade, but would approve of an agreement that assured them that some day a discriminatory regime would be applied to all of their trade. However, as was noted above, the failure to arrive at any recommendations can equally be attributed to the ambiguity of the provisions themselves and the consensual nature of the GATT.

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452 Treaty Establishing the European Economic Community, above n 53.
454 Haight, above n 36, 398.
455 See nn 53–57 and accompanying text.
At the examinations of the European Free Trade Association (EFTA) and the Latin American Free Trade Association (LAFTA) the interpretation of ‘substantially all trade’ issue was also raised in the context of the exclusion of agricultural goods from the agreements. Again there was a failure to agree on the meaning to be given to the term.

When the members had an opportunity to clarify the meaning during the Uruguay Round, they were unable to do so. The preamble to the 1994 Understanding simply states that the members recognise that the contribution of customs unions and free trade areas to the expansion of world trade is increased if the elimination between the constituent territories of duties and other restrictive regulations of commerce extends to all trade, and diminished if any major sector of trade is excluded.

Resort to the dispute settlement mechanism has also failed to provide a definitive answer to this issue. In the Turkey - Restrictions dispute, the Panel noted that neither the GATT CONTRACTING PARTIES nor the WTO members had ever reached an agreement on the interpretation of substantially all. However, they observed that its ordinary meaning appeared to provide ‘for both qualitative and quantitative components’ with the quantitative aspect being more emphasised in relation to duties. The Appellate Body for its part agreed with the Panel’s finding that there had been never been any agreement on the interpretation of the term ‘substantially’. The Judges did say that “substantially all the trade” is not the same as all the trade, and also that “substantially all the trade” was something considerably more than merely some of the trade.

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457 LAFTA was notified to GATT as an interim agreement leading to the formation of a free-trade area. Both the Working Party Report and the Conclusions were adopted on 18 November, 1960. See GATT BISD 9th Supp, 87 and 9th Supp, 21 respectively.


460 Ibid.

This failure to agree on the definition of ‘substantially all the trade’ can be attributed to the desire of members to give themselves some latitude to exclude sensitive sectors from trade liberalisation. Using this ‘soft’ formulation carries the requisite normative element while safeguarding policy options. Developing countries that are currently relying on the Enabling Clause for this discretionary space should be assured by this ambiguity that notification under Article XXIV would not excessively constrain their options.

...general incidence of the duties and regulations of commerce applicable ...

The term ‘general incidence’ is used in the context of the formation of a customs union.\textsuperscript{462} It refers to the external policy that the customs union adopts. It will be recalled that the establishment of a customs union requires the adoption of a common external trade policy.\textsuperscript{463} The object of the rule is to ensure that countries do not take advantage of the formation of a customs union to put into place more restrictive barriers. The problem with the provision is that the drafters failed to specify the method for calculating the level of the ‘general incidence’.

It has been argued that the term ‘general incidence’ was intended to show that a mathematical average was not required but greater flexibility was to be allowed to enable the volume of trade to be taken into account.\textsuperscript{464} Jackson pointed out that this could result in the absurdity of a tariff that is so high as to choke off all trade in a particular commodity being given less weight than that which permits a substantial amount of trade.\textsuperscript{465} Moreover, the volume of trade tends to be a function of, rather than independent of, the restrictiveness of each duty.\textsuperscript{466} Another ambiguity concerning the term relates to its interpretation with regard to quantitative restrictions and how these should be weighed against tariffs. Such a calculation would require an

\begin{itemize}
  \item \textsuperscript{462} \textit{GATT} 1994, 15 April 1994, 1867 UNTS 190, art XXIV.5(a) (entered into force 1 January 1995).
  \item \textsuperscript{463} See section 1.3.
  \item \textsuperscript{464} Jackson, \textit{World Trade}, above n 46, 611-12.
  \item \textsuperscript{465} Ibid 612. Moreover as Dam noted, it is not clear whether the words refer to each item in the common external tariff schedule or to the common external tariff schedule as a whole. If the latter is to be used, one would have to decide whether to get national averages then get an average of that or get the average of each item, then strike a common average index. Dam, ‘Regional Economic Arrangements and the GATT’, above n 12, 619–620.
  \item \textsuperscript{466} Dam, ‘Regional Economic Arrangements and the GATT’, above n 12, 620. Thus one must distinguish between protective tariffs, ie, those that are sufficient, in view of domestic production, to exclude all imports, and revenue tariffs that have little or not effect on the volume of imports.
\end{itemize}
unverifiable estimate of what tariff level would restrict imports to the levels permitted by particular quotas.

In the examination of the Treaty of Rome, EEC members favoured the use of a mathematical average to determine the common external tariff. The other members of the Working Party conducting the examination felt that a weighted average would give a better picture of the overall incidence of a tariff. However, it was the controversy over the interpretation of the word ‘applicable’ that dominated discussions. Was one to use the legally bound tariffs of Article II, or those duties actually being applied by the territories involved? The text does not provide an answer. An EEC calculation based on legally permitted tariffs showed that the incidence post-formation would be lower. Data provided by non-members using figures actually encountered in trade indicated that the Common Tariff would be higher than the prior general incidence. The Working Party sought the views of the Executive Secretary of GATT but, though he indicated a leaning toward a calculation based on the existing tariff, he gave no definitive answer.

The meaning of ‘general incidence’ was clarified by the 1994 Understanding. It provides, inter alia, that an overall assessment of weighted average tariff rates and of customs duties collected based on a tariff-line basis, in values and quantities broken down by WTO country of origin shall be used. The duties and charges to be taken into consideration are the applied rates of duty and the responsibility for computing the rates and duties is placed on the Secretariat. This delegation of the duty to the Secretariat suggests that this is an area where WTO members are happy to relinquish some of their ‘sovereign’ rights.

However, the economic rationale for adopting a test based on the level of tariffs has been challenged by some economists. McMillan, for example, criticises the requirement on the grounds that it focuses on the wrong variable (tariff levels) and

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467 Treaty Establishing the EEC, above n 85, 5[7].
468 Jackson, World Trade, above n 46, 613.
469 Understanding on Interpretation of Article XXIV, above n 90, [2].
that it is vague.\textsuperscript{470} He argues that a test based on the effects of integration on trade volume is a more direct way of measuring the effects of regional integration which has the additional benefit of having a deep justification in economic theory.\textsuperscript{471} Applying this test would mean that a proposed RTA would only be approved if it promised ‘not to introduce policies that result in external trade volumes being lowered.’ Moreover, if after some years its policies had reduced imports from the rest of the world it ‘would be required to adjust its trade restrictions’.\textsuperscript{472} However, as even he acknowledges, trade volumes can only be measured after an RTA has been in existence for a few years as opposed to tariff levels which can be determined in advance.\textsuperscript{473} Thus, as Roessler asserts, transforming such a test ‘into a rule of conduct capable of influencing the behaviour of governments negotiating a regional agreement’ would be difficult.\textsuperscript{474} In addition, it underestimates the political difficulties of negotiating a common external tariff.

\textit{Interim Agreements and the Meaning of ‘Reasonable Length of Time’}

Prior to its clarification by the 1994 Understanding, the meaning to be ascribed to the term ‘reasonable length of time’ in paragraph 5(c) had proved to be controversial. It first arose for consideration during the examination of the \textit{South Africa – Southern Rhodesia Customs Union} agreement.\textsuperscript{475} Though the agreement had been notified to GATT as an interim agreement under Article XXIV, it did not contain a plan or a schedule for the formation of the customs union. The partner states informed the Working Party that due to problems related to the establishment of secondary industries in Southern Rhodesia during the Second World War, it was difficult to formulate a definite schedule or time-table for the removal of customs barriers between the two.\textsuperscript{476} They did, however, undertake to re-establish the customs union within a period of ten years, submit a definite plan within five years and submit

\begin{itemize}
  \item \textsuperscript{471} Ibid 292. He acknowledges that applying such a test would not be simple but notes that there are well-developed econometric techniques for testing whether any observed change in trade volumes is caused by policy or by extraneous influences’: at 302.
  \item \textsuperscript{472} Ibid 300.
  \item \textsuperscript{473} Ibid 307, his endnote 9.
  \item \textsuperscript{474} Roessler, ‘The Relationship between Regional Integration Agreements and the Multilateral Trade Order’ above n 17, 313.
  \item \textsuperscript{476} Ibid 6.
\end{itemize}
annual reports to GATT.\textsuperscript{477} Although several members thought that the ten-year time-line ‘was longer than should generally be fixed for the completion of a customs union,’ this criticism was not pressed in view of the characteristics of the economies concerned.\textsuperscript{478}

The examination of this RTA illustrates how the ‘legalist’ approach to the administration of the GATT operated in its early years. At this early stage of the Agreement’s life, GATT parties were keen to see that the provisions of the General Agreement were observed and were not timid about pointing out defects in notified agreements. However, in the light of how the Treaty of Rome was later handled, a Realist interpretation would suggest that this aggressive approach may have had more to do with the status of the parties involved than a true desire to see the Agreement strictly enforced.

It should be noted that though the 1994 Understanding finally defined ‘reasonable length of time’ as meaning 10 years, the adoption of a longer time-span is not ruled out. Members that ‘believe that 10 years would be insufficient’ and that have an ‘exceptional case’ are permitted to exceed the 10 years on condition that they ‘provide a full explanation to the Council for Trade in Goods of the need for a longer period.’\textsuperscript{479} No mention is made of the Council’s approval for the extension being needed. However, it can be imagined that some sort of reporting requirement would be imposed in such instances. Developing countries wishing to adopt a transition period longer than 10 years could therefore utilise this provision.

\textbf{4.3.3 The Approval of Non-Conforming Agreements}

The GATT has been likened to a contract between states.\textsuperscript{480} Like in any other contract, therefore, the parties have the power to forego the enforcement of their

\textsuperscript{477} Ibid.

\textsuperscript{478} Ibid 7. Following the tabling of the Working Party Report, the CONTRACTING PARTIES issued a declaration stating that the governments of the Union of South Africa and Southern Rhodesia were ‘entitled to claim the benefits of the provisions of Article XXIV of the General Agreement on Tariffs and Trade relating to the formation of customs unions’: at 9. The question of a timetable for the elimination of trade barriers was also at issue in the examinations of the Australia/NZ FTA and the \textit{Arab Common Market}, both in 1965.

\textsuperscript{479} \textit{Understanding on the Interpretation of Article XXIV}, above n 90 [3].

\textsuperscript{480} J Michael Finger, ‘GATT’s Influence on Regional Arrangements’ in Jaime de Melo and Arvind Panagariya (eds), \textit{New Dimensions in Regional Integration} (1993) 128, 129.
rights under the Agreement. With regard to the extension of preferences, the GATT had two such ‘waiver’ provisions: The first was that governed by Article XXIV:10 while the second was the waiver in Article XXV:5. It is therefore worth noting that where a proposed agreement did not conform to the provisions in paragraphs 5 and 8, a contracting party could still apply for it to be approved. In the first instance, Article XXIV:10 provides:

The CONTRACTING PARTIES may by a two-thirds majority approve proposals which do not fully comply with the requirements of paragraphs 5 to 9 inclusive, provided that such proposals lead to the formation of a customs union or a free-trade area in the sense of this Article. 481

The drafting history indicates that that this paragraph was intended to cover the set of circumstances where a non-party to GATT was a member of the regional arrangement in question. 482 Such agreements were approved by GATT parties in two instances, the free trade area between Nicaragua and El Salvador and the participation of Nicaragua in the Central American Free Trade Area. 483 Legally, this is the provision under which an RTA such as COMESA should be notified.

In the second situation, Article XXV:5 permitted CONTRACTING PARTIES to waive obligations imposed on a contracting party by a two-thirds majority vote. 484 This provision was used several times to authorise preferential trading agreements. Examples of its use include the waiver granted to France in 1948 for its proposed customs union with Italy which, at the time was not a GATT signatory, 485 and the waivers granted in respect of the GSP and PTN. 486 Following the establishment of the WTO, the procedure for obtaining a waiver has been tightened and an application that

482 WTO, Guide to GATT Law and Practice (1995) vol 2, 829. In such instances, the paragraph was intended to give GATT a degree of control over the arrangement.
483 Ibid.
484 For a detailed analysis of the waiver provision in relation to the waiver granted to the Lomé Convention, see Daniel Marinberg, ‘GATT/WTO Waivers: “Exceptional Circumstances” as applied to the Lomé Waiver’ (2001) 19 Boston University International Law Journal 129. Marinberg argues that the waiver granted for implementation of the Lomé Convention should not have been granted firstly, because it involved too many countries for it to be truly exceptional, secondly, because the request for the waiver was made on policy objectives and, thirdly, the EC and ACP countries could have used alternative mechanisms to retain the trade arrangements between themselves.
485 Decision Concerning the Formation of a Customs Union Between France and Italy, GATT Doc GATT/1/49 (1948).
486 GSP, above n 33; PTN, above n 39.
would previously have been considered under Article XXV:5 will now be considered under Article IX of the WTO Agreement. 487

4.3.4 **Summary**

This discussion of the substantive rules found in Article XXIV confirms that if developing countries chose to notify under it, there is sufficient flexibility in the rules for their circumstances to be taken into consideration. Moreover, it is clear that GATT parties have always been prepared to take into consideration the individual economic characteristics of the parties involved in deciding how strictly to apply the rules. The prolonged debates regarding the legality of the Treaty of Rome show how the examination process provides a forum for the airing of grievances and allows third parties an insight into the operation of the RTA. The examination of the *South Africa – Southern Rhodesia Customs Union* and the concessions made by South Africa and Rhodesia regarding the formulation of a plan and schedule demonstrate how the use of dialogue and persuasion can bring parties closer to compliance with their obligations.

From an economic perspective, the provisions of Article XXIV are also preferable to those in the Enabling Clause. This is because, as was pointed out in Chapter Three, designing a preferential agreement in such a way that it entirely avoids trade diversion while enabling trade creation is extremely difficult. It is also preferable because by requiring the creation of a unified market, all the efficiencies associated with such a market can be attained by the participating countries. The primary benefit in terms of effectiveness would be that the normative principle that barriers to trade be eliminated would be restored. The following section takes a closer look at the formal procedural requirements and the actual practice that developed regarding their application.

4.4 **Norm Implementation: The Procedural Rules**

The process of norm implementation can be analysed in terms of three distinct phases: data collection and initial reporting, examination of the data, and the monitoring and supervision of subsequent operation of the regime. This section examines the WTO

legal regime’s procedural requirements from this managerial perspective. In discussing these three phases, the features of the institutions in which they take place will also be evaluated. Both Article XXIV and the Enabling Clause oblige WTO members entering into preferential agreements to avail information regarding the agreements to the other members. Article XXIV provides that:

7. (a) Any contracting party deciding to enter into a customs union or free trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.

(b) …

(c) Any substantial change in the plan or schedule referred to in paragraph 5(c) shall be communicated to the CONTRACTING PARTIES, which may request the contracting parties concerned to consult with them if the change seems likely to jeopardize or delay unduly the formation of the customs union or of the free trade area.\(^\text{488}\)

The equivalent provision of the Enabling Clause provides that

4. Any contracting party taking action to introduce an arrangement pursuant to paragraphs 1, 2 and 3 above or subsequently taking action to introduce modification or withdrawal of the differential and more favourable treatment so provided shall:

(a) notify the CONTRACTING PARTIES and furnish them with all the information they may deem appropriate relating to such action.\(^\text{489}\)

4.4.1 Data Collection and Reporting: The Notification Requirement

In Chapter Two it was noted that the objective of data collection is ‘to generate information about the policies and activities of parties’ to a treaty.\(^\text{490}\) This is the purpose that the notification requirements in both Article XXIV and the Enabling Clause serve. In both instances, the requirements are obligatory in nature.

One shortcoming of the provisions in Article XXIV is that the only indication of how timely the notification is to be is provided by the use of the word ‘promptly’. The definition of ‘prompt’ is ‘done, performed, delivered, etc., at once or without delay.’\(^\text{491}\) Though this should be sufficient direction to parties acting in good faith, it has proved difficult to interpret authoritatively and instances of parties failing to


\(^{489}\) The Enabling Clause, above n 41 [4].

\(^{490}\) See section 2.3.1.

\(^{491}\) Macquarie Dictionary (Federation ed, 2001) 1519.
notify agreements are common. An examination of the surrounding provisions provides some guidance. Thus with regard to paragraph 7(c), an analysis of the context provided by the other provisions of Article XXIV shows that it was contemplated that notification of a customs union would occur at least before the common external tariff was put into place. This would allow the parties adequate time to participate in the process provided for in paragraph 6. Likewise, in the case of an interim agreement, the requirement that the GATT parties examine the plan and schedule and determine whether it is ‘not likely to result in the formation of’ the RTA in the period contemplated implies that notification needs to occur prior to the implementation of the agreement.

This issue was clarified in 1972, when the GATT Council decided that:

Without prejudice to the legal obligations to notify in pursuance of Article XXIV, the Council decides to invite contracting parties that sign an agreement falling within the terms of Article XXIV, paragraphs 5 to 8, to inscribe the item on the agenda for the first meeting of the Council following such signature, to the extent that the advance notice of ten days prescribed for inclusion of items in the agenda can be observed. Inclusion of the item should allow the Council to determine the procedures for examination of the agreement.492

With regard to the Enabling Clause, the use of the phrase ‘taking action’ implies that notification of an arrangement under it should occur either prior to or simultaneously with the action that is contemplated. At the end of the Tokyo Round, the obligation to notify ‘trade measures affecting the operation of the General Agreement’ was reiterated. Parties were encouraged to notify in advance of the implementation of the measures and, if not possible, to do so ‘promptly ex post facto. (emphasis original)’493 This was a general obligation regarding all measures covered by GATT and thus could be construed as applying to both Article XXIV and the Enabling Clause.

Though this issue was not resolved by the 1994 Understanding, some indication can be gathered as to the timeliness of notification from the provisions of paragraph 4. With regard to the formation of customs unions, this states, in relevant part, that ‘the procedure set forth in Article XXVIII … must be commenced before tariff

492 Minutes of Meeting, GATT BISD, 19th Supp 13, GATT Doc C/M/81 (1972) [12] (Council Meeting held on 25 October 1972). The parties in practice would also supply the other countries with a copy of the agreement.
493 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, GATT BISD, 26th Supp 210, GATT Doc L/4907 (1979) [3].
concessions are modified or withdrawn.\(^{494}\) This confirms that notification should take place before the customs union is put into operation.

**Nature of Data to be Provided and Identity of Provider**

In Chapter Two it was noted that an effective institution should provide for data to be collected by an independent entity.\(^{495}\) This was never the case with the original GATT which relied on the parties themselves to provide the data that they considered relevant.

The more serious shortcoming proved to be the failure to specify the nature of the information to be provided upon notification. The 1994 Understanding did not directly address this issue. Paragraph 2, concerning the evaluation of the general incidence of duties and other regulations, however, specifies some of the data to be used. These include import statistics on a tariff line basis by country of origin, the tariff rates as well as other measures, regulations, products covered and trade flows.\(^{496}\)

In order to standardise ‘the provision of initial information by parties to regional trade agreements’, a ‘Standard Format for Information on Regional Trade Agreements’ containing what are referred to as ‘Chairman’s Guidelines’ has now been developed by the CRTA.\(^{497}\) This document sets out four categories of data to be provided. These are: background information on the agreement, trade provisions, general provisions of the agreement, and other relevant information related to the agreement. However, this document is not a binding interpretation of the rules and clarification by WTO members would be desirable and more authoritative.

**4.4.2 The Examination of Notified Agreements: Forum and Procedure**

The examination process is consistent with the managerial model in that it is generally aimed at exerting pressure on parties to comply with their obligations and, where

\(^{494}\) *Understanding on the Interpretation of Article XXIV*, above n 90 [4].

\(^{495}\) See Chapter Two, nn 72–74 and accompanying text.

\(^{496}\) *Understanding on the Interpretation of Article XXIV*, above n 90 [2].

\(^{497}\) *Standard Format for Information on Regional Trade Agreements*, WTO Doc WT/REG/W/6 (1996). A similar format was developed for agreements in the area of services. *Standard Format for Information on Economic Integration Agreements on Services*, WTO Doc WT/REG/W/14 (1997).
relevant, to develop a programme to improve compliance. One of the early
difficulties faced by GATT parties was deciding how to go about the process. This is
because the terms of Article XXIV do not go into any detail regarding what is to
transpire, in terms of process, once an agreement is notified. The realisation that there
was no actual procedure in place for the GATT parties to meet and examine the
information provided came when *The South Africa – Southern Rhodesia Customs
Union* agreement was notified to GATT.498 The GATT session that received the
notification had to decide how to respond. What it decided to do was to establish a
Working Party to examine the agreement and to suggest to the Working Party that it
examine the procedure to be established for the implementation of Article XXIV.499
The Working Party declined the latter invitation.

Its Report stated that:

> The Working Party discussed this question and reached the conclusion that
consideration by the CONTRACTING PARTIES of proposals for Customs Unions
would have to be based on the circumstances and conditions of each proposal and,
therefore, that no general procedures can be established beyond those provided in the
Article itself.500

Subsequent GATT practice therefore continued the practice of establishing a Working
Party to carry out the task of examining notified agreements. One possible
explanation for this conclusion is that the Working Party did not foresee that there
would be an explosion of RTAs that would require a streamlined procedure to be
employed. The 1979 *Understanding Regarding Notification* clarified the situation. It
provided, inter alia, that where a Working Party was set up, its standard terms of
reference would be ‘to examine in the light of the relevant GATT provisions, [name
of the agreement], and to report to the Council.’501 With regard to notifications under
the Enabling Clause, the practice that arose within GATT was to consider such
agreements in the Committee on Trade and Development502 together with other
notifications regarding other special treatment for developing countries such as
GSP.503

498 *South Africa – Southern Rhodesia Customs Union Agreement*, above n 107.
501 *Understanding Regarding Notification*, above n 125, annex [6].
502 The Committee was created in 1964; see GATT BISD, 13th Supp 75.
503 *Legal Note on Regional Trade Arrangements under the Enabling Clause*, above n 74, [24, 45–46];
At this point, it is worth noting that the practice adopted to examine RTAs reflects the cooperative approach advocated by the managerial model. The actual examination process was generally commenced by an exchange of written questions and answers with the members of the proposed RTA.\textsuperscript{504} As would be expected in an anarchic system, participation in Working Parties was open and countries that were members of the agreement in question participated and had the same status as other parties.\textsuperscript{505} Not surprisingly, this often led to deadlock within the working parties regarding the compliance or lack thereof, with Article XXIV requirements of an agreement.\textsuperscript{506} The positive aspect of participation by all parties was that it provided all the parties with an opportunity to seek the information they required regarding the operation and likely effects of the agreement. The negative aspect was that it proved next to impossible to arrive at a consensus regarding the conformity of the notified RTAs to the rules due to the danger of ‘self-serving auto-interpretation’ referred to in Chapter Two.

The 1994 Understanding formalised some aspects of this procedure with respect to Article XXIV. It provided, inter alia, that all notifications were to be examined by a Working Party that would then submit a report to the Council for Trade in Goods on its findings.\textsuperscript{507} Following the establishment of the WTO, the procedure has been further formalised with the creation of the Committee on Regional Trade Agreements (CRTA). These changes have resulted in the process being more ‘institutionalised’ in the sense that a specific body, the CRTA, is now responsible for handling the routine examination process. The CRTA’s terms of reference are:

(a) to carry out the examination of agreements in accordance with the procedures and terms of reference adopted by the Council for Trade in Goods, the Council for Trade in Services or the Committee on Trade and Development, as the case may be, and thereafter present its report to the relevant body for appropriate action;

(b) to consider how the required reporting on the operation of such agreements should be carried out and make appropriate recommendations to the relevant body;

(c) to develop, as appropriate, procedures to facilitate and improve the examination process;

\textsuperscript{504} WTO, Guide to GATT, above n 114, 814.

\textsuperscript{505} WTO, Regionalism and the World Trading System, above n 79, 10.

\textsuperscript{506} Moreover, once a Working Party report had made its way to the Council, the tradition was that any decision requiring any positive action had to be taken by consensus. WTO, Regionalism and the World Trading System, above n 79, 10.

\textsuperscript{507} Understanding on the Interpretation of Article XXIV, above n 90 [7].
(d) to consider the systemic implications of such agreements and regional initiatives for the multilateral trading system and the relationship between them, and make appropriate recommendations to the General Council; and
(e) to carry out any additional functions assigned to it by the General Council.\textsuperscript{508}

The centralisation of the examination process has not resolved all the issues that bedevilled the work of the Working Parties under GATT. Thus, the CRTA was faced by the same issues regarding the information to be provided by members upon notification of RTAs and the procedures to be followed. With regard to the former, the WTO has created ‘Technical Cooperation Handbooks’ that summarise the various notification obligations for acceding countries.\textsuperscript{509} Though these documents are not authoritative interpretations of the legal obligations, they provide an example of the kind of technical assistance that the WTO can provide to assist members comply with their obligations.

The CRTA has also ‘taken note’ of ‘Guidelines on Procedures to Improve and Facilitate the Examination Process’.\textsuperscript{510} This document confirmed the self-reporting nature of the procedural requirements. It outlined a process whereby members in the process of establishing a RTA were invited to share information even ‘prior to making the formal notification’.\textsuperscript{511} It also provided for notification to be made by supplying the text of the relevant treaty and text of the notification. The relevant body would then adopt the terms of reference for the examination of the RTA and refer examination to the CRTA. Once the Committee received the reference, parties were to provide basic information using either the ‘Standard Format’ or ‘in the form of written replies to written questions submitted by interested Members’.\textsuperscript{512}

Once the agreement has been notified to the CRTA, the Chairperson of the CRTA establishes a work programme for the examination of the individual RTA. The Guidelines do not specify a period within which the examination process is to be

\textsuperscript{508} Committee on Regional Trade Agreements, WTO Doc WT/L/127, 1 (Decision of 6 February 1996).
\textsuperscript{509} For RTAs, the relevant handbook consists of five parts: an overview of notification requirements, a listing of the notification obligations, a document concerning guidelines and formats, ‘mock’ examples of notifications, and texts of the legal provisions. See Technical Cooperation Handbook on Notification Requirements, WTO Doc WT/TC/NOTIF/REG/1 (Regional Trade Agreements, 9 September 1996).
\textsuperscript{510} Guidelines on Procedures to Improve and Facilitate the Examination Process, WTO Doc WT/REG/W/15 (1997) (Note by the Chairman).
\textsuperscript{511} Ibid [1].
\textsuperscript{512} Ibid [6].
completed, noting only that ‘flexibility should be allowed,’ but that ‘expedient examinations could take place on an ad hoc basis.’\textsuperscript{513} Lastly, the guidelines provide that the final report upon conclusion of the examination is to take the form of a three-part report consisting of the background, the ‘factual record’ and the ‘conclusions’ reached by the Committee.\textsuperscript{514} One feature worth highlighting is that these Guidelines do not make any distinction between RTAs notified under the Enabling Clause and those notified under Article XXIV with regard to the examination process. Thus, Enabling Clause RTAs are technically subject to examination in the CRTA in the same manner as Article XXIV RTAs. The only difference would be in the final report which, in the case of Enabling Clause RTAs, would not contain a conclusion as to conformity.

However, the practice has been that Enabling Clause RTAs have not been examined by Working Parties, with the sole exception of the \textit{Mercado Comun del Sur} (‘Mercosur’).\textsuperscript{515} When Mercosur was formed in 1991, there was a debate as to whether to notify it under the Enabling Clause or Article XXIV. The Mercosur countries eventually opted to notify it to the Committee on Trade and Development under the Enabling Clause. However, upon further debate in the GATT Council and following the insistence of the United States,\textsuperscript{516} the decision was made to examine it under Article XXIV.\textsuperscript{517} Thus, the terms of reference of the Working Party that was set up to examine refer to both the Enabling Clause and Article XXIV.\textsuperscript{518} The recent notification of SADC under Article XXIV may signal a shift in thinking by developing countries regarding Article XXIV. This would support the argument made in this thesis that developing countries need to engage in the WTO process on an equal basis and under the same rules as developed countries.

\textsuperscript{513} Ibid [11].
\textsuperscript{514} Ibid [14-15]. This procedure has recently been slightly amended with regard to the provision of information so that an option has been added whereby the Secretariat can undertake the task of providing the factual presentation. This development is discussed in more detail in the context of possible improvements to the system in Chapter Seven.
\textsuperscript{515} Legal Note on Regional Trade Arrangements under the Enabling Clause, above n 74, [45-47].
\textsuperscript{516} \textit{Southern Common Market (Mercosur)}, GATT Doc L/7029 (1992) (Request by the United States for notification under Article XXIV and for the establishment of a working party).
4.4.3 *Monitoring and Supervision of Compliance*

The original GATT did not provide for RTAs to be monitored once they had been examined. This practice however, was started with the *South Africa – Southern Rhodesia Customs Union* examination and was later followed by the *Treaty of Rome*. In 1971, the practice was formalised by the CONTRACTING PARTIES instructing the GATT Council of Representatives to establish a calendar fixing examination of preferential agreements every two years.\(^{519}\) This biennial reporting practice continued until 1986 when it was discontinued. It was not until 1998 that the practice was revived. This followed the earlier instructions given in the 1994 Understanding to the effect that:

> Customs unions and constituents of free trade area shall report periodically to the Council for Trade in Goods, as envisaged by the CONTRACTING PARTIES to GATT 1947 in their instruction to the GATT 1947 Council concerning reports on regional agreements (BISD 18S/38), on the operation of the relevant agreement. Any significant changes and/or developments in the agreements should be reported as they occur.\(^{520}\)

Establishing the modalities for such reports was one of the terms of reference given to the CRTA, which they duly did in 1998.\(^{521}\) According to the latest report of the CRTA, seven reports were submitted and considered during 2004, while 12 that were supposed to be submitted, were not submitted. This function of the CRTA is consistent with the review element of the managerial strategy.

### 4.5 Dispute Settlement and the Regulation of RTAs

This section discusses the relationship between the dispute settlement provisions of the GATT/WTO and the rules regulating regional trade agreements. It also evaluates the likely impact of dispute settlement rulings on the formation of regional trade agreements and other preferential arrangements. Note that it does not go into a detailed analysis of the dispute resolution provisions themselves as that would be beyond the scope of the thesis.

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\(^{519}\) *Summary Record of the Twelfth Meeting*, GATT Doc SR.27/12 (1971) [4(d)] (27\(^{th}\) Session of the CONTRACTING PARTIES).


\(^{521}\) See *Reporting on Regional Trade Agreements*, WTO Doc WT/REG/4 (1998) (Recommendations by the CRTA to the Council for Trade in Goods) and *Reporting on Regional Trade Agreements*, WTO Doc WT/REG/6 (1998) (Recommendations by the CRTA to the CTD).
4.5.1 **Competence and Jurisdiction to Determine Consistency**

In Chapter Two, it was noted that most treaties contain mechanisms for resolving differences of opinion regarding the interpretation and implementation of treaty obligations and that the most effective regimes entrust this task to an independent body. The previous sections of this Chapter have examined the WTO’s regulatory regime for regional trade agreements from both a substantive and a procedural perspective. It was observed that the substantive rules contain a number of ambiguities that render the issue of compliance ‘contestable’. The ambiguity of the rules and the consensual nature of the examination process are the principal reasons why it has proved to be so hard to reach any definitive conclusions as to the GATT-consistency of notified RTAs.

However, it will also be recalled that the rationale for making GATT a legal instrument was to place constraints on the actions of the contracting parties and to ensure some form of redress would be available in the event that the benefits that the parties expected were lost as a result of another party’s breach of the Agreement. Thus, Articles XXII and XXIII provided procedures for consultations between parties regarding disputes over any matters affecting the operation of the Agreement or the nullification or impairment of any benefits, due to the actions of the other party. With regard to Article XXIV, this raised the question of what was to happen in the event that a free trade area or customs union was examined and no conclusions could be reached regarding its consistency with the rules. Article XXIV itself did not provide any guidance. This therefore proved to be one of the most contentious issues raised by the Article XXIV legal regime. Prior to the establishment of the WTO, this issue had been addressed several times in the context of both Working Parties and the dispute resolution procedures.

The first time the issue was raised was in one of the special committees convened to examine the Treaty of Rome. It is reported that the EC representative opposed the extension of the life of the Committee examining the Treaty and proposed that the provisions of Articles XXII and XXIII were sufficient for the holding of any
consultations the Contracting Parties might desire.\textsuperscript{522} This position was reiterated when the \textit{Agreement between the EEC and Egypt}\textsuperscript{523} was examined in 1978. Both the representatives of the EEC and Egypt stated their readiness to enter into consultations, were the need to arise, with contracting parties regarding the incidence of the Agreement on their trade interests.\textsuperscript{524}

However, it was not until 1985 that a dispute regarding the extension of preferences under Article XXIV went before a panel. In the years since the establishment of GATT, there had only been one request for a panel and that was in 1974.\textsuperscript{525} The request, which was made by Canada in a complaint against the EEC, resulted in the formation of a panel. In the event, the panel was never activated due to the success of conciliation between the parties.\textsuperscript{526} In the 1985 dispute, the EEC’s agreements with certain Mediterranean countries were challenged by the US on the ground that they were inconsistent with the EEC’s obligations under Article I of the GATT.\textsuperscript{527} The EEC argued, inter alia, that the preferential tariff arrangements in dispute were an element of agreements between the Community and certain Mediterranean countries which had been examined under Article XXIV and that since the tariff arrangements were consistent with Article XXIV, the complaint was inadmissible.\textsuperscript{528}

The Panel found that no judgment had been made in any of the Working Parties as to the conformity of the agreements but that:

\begin{quote}
Had it been recognized that an agreement was in conformity with the requirements of Article XXIV, the implementation of this agreement could no longer be considered as nullifying or impairing benefits accruing under the General Agreement.\textsuperscript{529}
\end{quote}

\textsuperscript{522} WTO, \textit{Guide to GATT}, above n 114, 840.
\textsuperscript{523} \textit{Agreement between the European Economic Community and Egypt}, GATT Doc L/4521 (1977).
\textsuperscript{525} It should be noted that in 1963, a panel had been established regarding the Common Customs Tariff of the EEC but it had only been requested to issue an advisory opinion. WTO, \textit{Guide to GATT}, above n 114, 811.
\textsuperscript{526} Ibid. The complaint related to a failure to reach agreement with the EEC over Article XXIV:6 negotiations following the accession of Denmark, Ireland and the UK to the EEC.
\textsuperscript{528} Ibid [1.2].
\textsuperscript{529} Ibid [4.19].
In the result, they concluded that though it was not proper that they pass judgment on the whole of the EEC agreements, they could examine the matter under Article XXIII in keeping with their terms of reference.  

This same issue regarding jurisdiction of Panels to hear disputes regarding Article XXIV arrangements arose in two other cases heard before the establishment of the WTO: Bananas I and Bananas II.  

Again, the EEC submitted that the tariff preferences were justified under Article XXIV:5 read with part IV of the General Agreement and that a GATT Panel established under Article XXIII had no jurisdiction to determine the overall consistency of an FTA with Article XXIV.

In the first Bananas case, the Panel dismissed the argument on the grounds that it would mean that preferences granted under any agreement for which Article XXIV was invoked could not be investigated under Article XXIII. As a result, any contracting party, by invoking Article XXIV, could deprive other parties of their rights under Article XXIII.

In Bananas II case, with regard to the examination of the Lomé Convention, the Panel found that paragraph Article XXIV:7 empowered ‘the CONTRACTING PARTIES to make recommendations only on agreements establishing’ CUs, FTAs, or interim agreements leading to such a union or area. Thus, the provisions did not apply to ‘any agreement notified to the CONTRACTING PARTIES’ (emphasis original).

A Panel faced with the invocation of Article XXIV therefore had to examine whether the provision applied to the agreement in question. It should be noted that none of these three Panel reports were adopted meaning that they do not have any authoritative legal status. However, the reasoning of the Panels is still persuasive.

In light of these disagreements, the contracting parties took the opportunity provided by the Uruguay Round to make it clear through the 1994 Understanding that:

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530 Ibid [5.1(e)].
533 Bananas I, above n 163 [219]; Bananas II, above n 164 [18-19].
534 Bananas I, above n 163 [367].
535 Bananas II, above n 164 [158].
The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free-trade areas or interim agreements leading to the formation of a customs union or free-trade area.\textsuperscript{536}

\textit{The ‘Lex Specialis’ Argument in ‘Turkey – Restrictions’}

The 1994 Understanding did not determine the debate over the relationship between Article XXIV and the dispute settlement provisions of GATT. In the \textit{Turkey – Restrictions} case,\textsuperscript{537} the matter was raised once again by Turkey. As the complainant, India had argued that Article XXIV did not permit members forming a customs union to impose quantitative restrictions on imports from third-country members. Turkey responded that the measures forming the object of the complaint were a requirement of the Turkey – EC customs union and that a Panel could not rule on their legality absent a finding by the CRTA on the consistency of the customs union with GATT requirements.

Turkey contended that the disputed measures had been implemented in connection with the formation of its Article XXIV-compatible customs union with the EC. Thus, Article XXIV being \textit{lex specialis}\textsuperscript{538} for the rights and obligations of WTO Members at the time of the formation of a regional trade agreement, the measures challenged depended on the WTO consistency of the customs union. This could only be determined by reference to the provisions of Article XXIV:5 - 9 and no other GATT provisions. Turkey’s argument, in effect, was that any sort of ruling on the status of the restrictions would, ipso facto, be a ruling on the legality of the customs union, something that they claimed was ultra vires the Panel’s powers. Turkey also put forward a defence based on the absence of any challenge to the customs union or making of a recommendation based on paragraph 7 by the CONTRACTING

\textsuperscript{536} \textit{Understanding on the Interpretation of Article XXIV}, above n 90 [12].

\textsuperscript{537} \textit{Turkey – Restrictions}, Report of the Panel, above n 80.

\textsuperscript{538} From the Latin maxim \textit{lex specialis derogat generali} - ‘a specific statute overrules a general one.’ See Jowitt’s Dictionary of English Law, Vol. 2 (2\textsuperscript{nd} ed) 1090.
PARTIES over the years.\(^{539}\) For Turkey’s ‘defence’ to succeed, therefore, the Panel had to be convinced that any measure taken in pursuance of a customs union agreement could be implemented by parties thereto pending a ruling on its status by the CRTA and that no panel could make a ruling thereon in the absence of that CRTA finding.

Regarding the issue of why no recommendations had been made, the Panel ventured:

> We note also that with regard to the interpretation of Article XXIV, the difficulty in securing a definitive interpretation from WTO Members because of the wide range of issues involved, and because Members are often parties to one or more regional trade agreements, and the rather unclear wording of Article XXIV, may explain the absence of challenges under GATT.\(^{540}\)

On Turkey’s defence that Article XXIV was an instance of *lex specialis*, the Panel found that a reading of the Article did not lend itself to such an interpretation. The WTO agreement being a single undertaking, no provision could be applied separately from the rest of the WTO Agreement unless it would result in a conflict some other provision. In this instance, there was no conflict between Articles XI, GATT and 2.4, ATC, on the one hand and Article XXIV, GATT on the other.\(^{541}\) In its conclusion, the Panel stated although they ‘had jurisdiction to examine any specific measure adopted by a WTO Member in the context of a customs union’ in this case they ‘did not need, and indeed were asked by the parties not to assess the overall WTO compatibility of the Turkey-EC customs union.’\(^{542}\) The Panel also found that the provisions of paragraphs 5 and 8 of Article XXIV did not provide ‘any indication as to the type of measure to be used in the formation of a customs union but rather [provided] guidelines for the overall assessment of regional trade agreements.’\(^{543}\)

Turkey appealed the Panel’s decision. Though the issue of the jurisdiction of panels to assess the overall compatibility of a customs union with Article XXIV had been passed over by the Panel as being ‘arguable’, the Appellate Body took care to draw the attention of the parties to its report in the *India – Quantitative Restrictions on*

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\(^{539}\) *Turkey – Restrictions*, Report of the Panel, above n 80 [6.121].

\(^{540}\) Ibid [9.174].

\(^{541}\) Ibid [9.186–9.188].

\(^{542}\) Ibid [9.208].

\(^{543}\) Ibid.
Imports of Agricultural, Textile and Industrial Products dispute.\textsuperscript{544} In that dispute India had challenged the Panel’s jurisdiction to review balance-of-payments restrictions imposed allegedly pursuant to Article XVIII:B, GATT 1994. India there argued that the Balance of Payments Committee and the General Council had the necessary competence to review balance-of-payments restrictions.\textsuperscript{545} The Appellate Body had rejected this argument and stated that the proper context for determining its powers were the provisions of the Dispute Settlement Understanding and Article XXIII, GATT 1994, and in the circumstances, there was no conflict between the competences of the Committee and of the Panel.\textsuperscript{546}

No appeal was made in \textit{Turkey – Restrictions} against the assumption that the customs union was GATT-consistent. However, the reference to the \textit{India – Quantitative Restrictions} dispute would seem to indicate that, in the right circumstances, the Appellate Body would have been willing to listen to argument along the lines pursued in it, that is, they could be willing to examine the consistency of a regional trade agreement with Article XXIV.

Concluding its examination of Article XXIV, the Appellate Body stated that it could be used to justify a measure inconsistent with certain other GATT provisions on two conditions:

First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue.\textsuperscript{547}

Finally, on the question of the quantitative restrictions imposed by Turkey, the Appellate Body was in agreement with the Panel that they were not necessary for the formation of the customs union as rules of origin could have been used to achieve the same purpose without breaching GATT obligations.\textsuperscript{548}


\textsuperscript{545} Ibid [80].

\textsuperscript{546} Ibid [103–109].

\textsuperscript{547} \textit{Turkey – Restrictions}, Report of the Appellate Body, above n 93 [58].

\textsuperscript{548} Ibid [63].
This case is important because it indicates that the WTO as an institution has taken steps in the direction of becoming a more ‘effective’ institution by providing an independent, credible dispute resolution mechanism. This will enhance the probability of members complying with their RTA obligations.

4.5.2 The EEC’s Preferential Arrangements and the Dangers Inherent in Preferences

4.5.2.1 Background

One of the arguments made in this thesis is that the unchecked discretion to extend preferences is contrary to the ethos of the multilateral trading system and harmful to its effectiveness. The most-favoured-nation principle is aimed at providing the necessary check to this danger but, as was seen in section 4.2, its effectiveness has been severely curtailed by the many exceptions to it, none more harmful than the Enabling Clause. This section further explores this argument in the context of the preferential arrangements established by the EEC.

It will be recalled that during the examination of the Treaty of Rome, one of the most contentious issues was the relationship between the EEC and its Overseas Territories. This relationship had the effect of creating a split among developing countries as well as among developed countries. While some less-developed countries were unhappy with the preferential access the Overseas Territories were receiving to the EEC, non-EEC developed countries led by the US were unhappy with the ‘reverse preferences’ given by the Territories to EEC products.

Though no recommendations were made regarding the consistency of the Treaty of Rome with Article XXIV, the criticisms led the EEC to transform the nature of its relationship with its former colonies through the conclusion of first, the two Yaoundé Agreements, followed by the four Lomé Agreements and now, the Cotonou Agreement. What all these Agreements have in common is that they extend preferential, non-reciprocal access into the EEC (now EU) to the ACP group of developing countries. At the same time, the EEC was extending preferences to the

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549 See above nn 56, 57 and accompanying text.
550 Dam, ‘Regional Economic Arrangements and the GATT’, above n 12, 649.
Mediterranean developing countries through a network of purported free trade area agreements. As a result, other developing countries were placed at a disadvantage. It has already been noted above that the US unsuccessfully sought to challenge these preferences in the Citrus dispute.

In the two *Bananas* cases referred to above, these preferences were also challenged but this time by developing countries. The circumstances of the two cases are similar. In *Bananas I*, the import measures maintained on fresh bananas by individual member states of the EEC as at the end of December 1982, were challenged by five Central and South American countries. *Bananas II* concerned the banana import regime introduced by the EEC on 1 July, 1993. In both cases, the complainants’ primary grievance was with the tariff preferences extended to ACP countries by the EEC.

In its defence, the EEC argued, inter alia, ‘that the tariff preferences accorded to the ACP countries were justified by Article XXIV taken in conjunction with Part IV of the General Agreement.’ The EC argued that a free trade area between developed and developing countries was not subject to the Article XXIV requirement that it cover substantially all the trade between the constituent territories and that, by virtue of Part IV, duties and other restrictive regulations of commerce in such free trade areas only had to be eliminated for imports into the customs territory of the developed country party.

In *Bananas II*, Colombia, Costa Rica, Guatemala and Nicaragua argued that ‘the parameters laid down by Article XXIV were precisely what prevented the trade treatment granted by the EEC to the beneficiaries of the Lomé IV Convention from

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551 *Bananas I*, above n 163. The essential facts as found by the Panel were that imports of bananas into the EEC were subject to quantitative restrictions in certain members and a tariff preference in favour of certain African, Caribbean and Pacific (ACP) countries; at [312].
552 Costa Rica, Guatemala, Nicaragua and Venezuela claimed that the banana import regimes were inconsistent with Articles I, II, XI and XIII, as well as part IV of the General Agreement and were not justified by any of the exceptions to the General Agreement; Ibid [40]. Colombia argued that the EEC’s actions were inconsistent with Articles I, III, VIII, XI, XIII, XXXVI and XXXVII; at [41].
553 *Bananas II*, above n 164.
554 *Bananas I*, above n 163 [42].
555 Ibid [364].
falling within the scope of that Article.’\textsuperscript{556} Further, in their opinion, the regime established under Lomé IV was neither a free trade area nor a customs union but ‘a unilateral and non-reciprocal relationship not provided for in Article XXIV.’\textsuperscript{557} With regard to the argument that Part IV justified the EEC’s rationale for the non-reciprocal nature of the agreement, they argued that ‘the very concept of non-reciprocity was fundamentally irreconcilable with the notion of a free trade area or customs union.’\textsuperscript{558}

It is beyond the scope of this thesis to go into the details of the Panel findings on these issues but the arguments made by the parties and the very need to go before a Panel to resolve the disputes support the arguments made in this thesis regarding the dangers of eroding the MFN obligation. The gist of these arguments is that, by extending a wide discretion to countries regarding the extension of preferences in an environment where there was no independent arbiter to resolve disputes regarding the interpretation and application of the rules, GATT parties were inviting the abuse of the rules for other purposes. This is what resulted, with the EEC entering into preferential agreements to strengthen political ties with countries close to Europe and to maintain close links with its former colonies.

Though these links were keenly sought after by the beneficiaries themselves, it has been argued that the benefits they received were minimal due to the many exclusions as well as the phenomenon of tariff escalation which restricted many of the recipients to exporting raw materials. The failure of the preferential agreements to improve the economic situation of many of the ACP countries over a period of almost 30 years is further proof of the limited benefits of these agreements.\textsuperscript{559} Though there are other factors that have contributed to the poor trade performance of many developing countries, from a legal perspective, extending preferences to one set of countries invites calls for equal or greater preferences from other countries thus complicating the situation further. If any preferences are to be extended it is best that it is done on a non-discriminatory basis, as the rules themselves provide. In the following sub-
section, it will be seen that a move towards restoring this legal discipline is now under way.

4.5.2.2 The EC – Conditions for Granting Tariff Preferences Dispute

This dispute, brought with regard to preferences extended under the Enabling Clause by the EU, provides an illustration of the difficulties that exist with regard to creating a fair preferential regime. It also illustrates the difficulties of distinguishing between the needs of particular developing countries.

The facts are as follows.\(^{560}\) In March 2002, India requested consultations with the EC regarding the conditions under which the latter accorded tariff preferences to developing countries under its scheme of generalised tariff preferences. The scheme applied by the EC provided for five different tariff preference arrangements: a General Arrangements scheme; a Special Incentive Arrangement for protecting labour rights; a Special Incentive Arrangement for protecting the environment; Special Arrangements for least-developed countries; and Special Arrangements to combat drug production and trafficking (the Drug Arrangements). The arrangements differed in terms of countries covered, products covered and depth of preferences accorded.

India claimed that the Drug Arrangements scheme was inconsistent with Article I:1 of GATT and was not justified by the Enabling Clause. She therefore requested the Panel to suggest the EC bring it into conformity with WTO rules by either extending the Drug Arrangements to all developing countries or seeking a waiver from its obligations under Article I:1. In reply, the EC argued, inter alia, that the Enabling Clause was an autonomous right that excluded the application of Article I:1, not an affirmative defence.\(^{561}\) In order to succeed with her claim, the EC contended that India would either have to prove that the Drug Arrangements were not covered by paragraph 2(a) of the Enabling Clause, but by Article I:1, or that the Drug

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\(^{561}\) This is essentially the same argument made by Turkey regarding Article XXIV in *Turkey-Restrictions*. 
Arrangements were covered by paragraph 2(a) but were inconsistent with paragraph 3(c) of the Enabling Clause.

4.5.2.3 The Panel Report

The Panel held that the resolution of the dispute hinged on the issue of ‘the relationship between Article I:1 of GATT 1994 and the Enabling Clause, which in turn [depended] on the correct characterization of the nature of the Enabling Clause, namely, whether it [was] in the nature of a positive rule establishing obligations or of an exception to Article I:1 of GATT 1994.’ Applying the test laid down by the Appellate Body in US – Wool Shirts and Blouses, the Panel found that the Enabling Clause was an exception to Article I:1, that where there was an inconsistency between Article I:1 and the Enabling Clause, the Enabling Clause would prevail and that the onus lay on the European Communities to invoke the Enabling Clause once India had demonstrated the inconsistency of the Drug Arrangements with Article I:1.

In the words of the Panel,

There is no legal obligation in the Enabling Clause itself requiring the developed country Members to provide GSP to developing countries. The word “may” in paragraph 1 of the Enabling Clause makes the granting of GSP clearly an option rather than an obligation.

With regard to the issue of whether the Drug Arrangements were justified by the Enabling Clause, the Panel found that there was nothing in the Enabling Clause to support the EC’s argument that paragraph 3(c) permitted a GSP scheme to be accorded to less than all developing countries. In any case, the Panel held that there was no reasonable basis for distinguishing between different types of development needs in order to come up with ‘objective criteria’ that could be applied to justify treating different developing countries differently under GSP.

562 EC – Conditions for the Granting of Tariff Preferences, Report of the Panel, above n 192 [7.23].
563 The test established two criteria for determining whether or not a rule constituted an exception: first, it could not be a rule establishing legal obligations in itself; and second, it had to have the function of authorising a limited derogation from one or more positive rules laying down obligations. See, United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WTO Doc WT/DS33/AB/R and Corr.1 (1997) 15, 16 (Report of the Appellate Body adopted 23 May 1997).
565 Ibid [7.38].
566 Ibid [7.100].
567 Ibid [7.103].
The Panel therefore concluded that the EC’s Drug Arrangements, as a GSP scheme did ‘not provide identical tariff preferences to all developing countries’ and as such were inconsistent with paragraph 2(a) and were not justified by paragraph 3(c).

4.5.2.4 The Appellate Body Report

The EC appealed against the Panel’s Report on the grounds that it had erred in finding the Enabling Clause to be an exception to Article I:1, that it erred in assigning the burden of proving that the Drug Arrangements were justified to the EC, and that it erred in finding that Article I:1 applied to measures covered by the Enabling Clause.

The Appellate Body found that two issues were raised by the appeal: firstly, whether the Panel erred in concluding that the Drug Arrangements were inconsistent with Article I:1 and secondly, whether the Panel erred in concluding that the EC had failed to prove that the Drug Arrangements were justified under paragraph 2(a) of the Enabling Clause. For the purposes of this thesis, the Appellate Body’s findings relating to the first issue are particularly relevant.

Regarding the EC’s claim that the Panel had improperly characterised the relationship between the Enabling Clause and Article I:1, the Appellate Body conducted a close textual scrutiny of the disputed provisions and concluded that paragraph 1 of the Enabling Clause excepted members from complying with the obligation in Article I:1, hence the Enabling Clause was an ‘exception’ to Article I:1. In its opinion, such a characterisation did not, as the EC claimed, undermine the importance of the Enabling Clause within the framework of the WTO nor did it discourage developed countries from adopting measures in favour of developing countries.

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568 Ibid [7.177].
570 Ibid [78].
571 Ibid [89 & 90].
572 Ibid [95].
The Appellate Body also carried out a review of the history of the Enabling Clause and stated that part of the rationale underlying the adoption of the Enabling Clause was a desire to overcome the failure of the MFN clause ‘to secure adequate market access for developing countries so as to stimulate their economic development.’\textsuperscript{573} These findings are significant because they reaffirm the legality of arrangements granting preferential non-reciprocal access into developed countries for developing countries while injecting some much needed discipline and predictability into the rules by requiring that developed countries base the identity of preferences on ‘objective criteria’. More importantly, from a wider systemic perspective, they confirm that the scope of auto-interpretation of GATT obligations by WTO members is being curtailed.

### 4.6 Conclusion

A number of conclusions can be made based on the analysis in this Chapter. First, reversal of GATT policy regarding constraints on preferential treatment that occurred in the 1960s was a fundamental error based on mistaken economic assumptions. Though there may have been a justification for the extension of non-reciprocal market access, there was none for creating a ‘parallel’ GATT system of preferences among developing countries. In the centrally-planned economies of many developing countries of the time, especially in Africa, the inevitable outcome of such a policy was trade diversion and the establishment of inefficient local industries.

Second, although Article XXIV’s conditions for establishing RTAs are more demanding than those of the Enabling Clause in terms of requiring a country to make a commitment to eliminate barriers to trade internally and, in the case of a customs union, to establish a common external tariff, these conditions leave governments with enough leeway to sequence their trade liberalisation programmes to suit their unique economic conditions. It can therefore be argued, on this ground alone, that developing countries establishing free trade areas or customs unions do not require the flexibility available under paragraph 2(c) of the Enabling Clause. It should be remembered that establishing a free trade area or a customs union is an exception to

\textsuperscript{573} Ibid [109].
the rules and, as such, the conditions need to be sufficiently rigorous to deter countries from resorting to it at will.

Third, though the ambiguities surrounding the substantive rules mean that the normative foundation of Article XXIV is weakened, the procedural requirements and in particular, the notification requirements and the examination process, promote transparency. They also provide a forum for applying pressure on countries to comply with their obligations. The discussion of the procedural requirements revealed that though textually the reporting requirements of Article XXIV and the Enabling Clause are similar, the custom has been to treat them differently. For Enabling Clause arrangements, there is no attempt made to scrutinise the agreements whereas for Article XXIV RTAs, an extensive examination process takes place. The failure to finalise reports comes as no surprise given the ambiguity of the language of the relevant provisions and the consensus-based nature of decision-making in the WTO. However, arriving at conclusions should not be the primary concern of WTO members. This focus on adopting reports detracts from what may be considered the main role of the WTO, facilitating a stable and predictable trading environment. Switching the focus to ensuring transparency of all RTAs is a better use of resources. This leads to the last conclusion.

The institutional framework of the WTO and in particular, the CRTA and the Dispute Settlement Body have key managerial roles to play in clarifying the rules, improving the procedures and enabling countries whose interests are harmed by the formation of an RTA containing an illegitimate measure to obtain redress. In this regard, it should be noted that the questions raised regarding the interpretation of the terms and improvement of the procedures are taken up again in Chapter Seven when the law making element of regulation is considered in the context of the proposals for reform that are currently being tabled as part of the Doha Round.

In sum, the adoption of the Enabling Clause and its subsequent lax application dealt a heavy blow to the ability of the WTO to regulate RTAs by removing any substantive constraints on developing countries establishing RTAs. It also gave carte blanche to developing countries to pursue regional integration based on partial preferences rather than the creation of free trade areas or customs unions involving the elimination of
barriers to trade. In the following two chapters, this linkage is developed through an analysis of regional integration in Eastern and Southern Africa. It will be seen that the ‘blueprint’ for regional integration in Africa, the Lagos Plan of Action, was adopted just one year after the Enabling Clause Decision. It can be no coincidence that these two developments took place almost simultaneously.
CHAPTER FIVE:
REGIONAL INTEGRATION AND TRADE LIBERALISATION IN EASTERN AND SOUTHERN AFRICA: Order or Disorder?

It would be no exaggeration to say that Africa’s experience with integration schemes over the last quarter of a century has been the experience of failure, and that the achievements of integration have been slight or non-existent.574

Introduction

It was asserted in Chapter One, that the argument that the WTO has had a detrimental effect on developing countries seeking to engage in effective regional integration would be explored in the context of the regional integration process in COMESA. The integration process within COMESA cannot, however, be evaluated in isolation from the concurrent and interlinked integration initiatives taking place around the continent. The aim of this chapter is to provide some background information and analysis regarding the wider African context within which COMESA integration is taking place through a series of mini-case studies. The organisations chosen for the case studies are those that are most closely related to COMESA, namely, the African Economic Community (AEC), the East African Community (EAC), the Southern African Development Community (SADC) and the Southern African Customs Union (SACU).

In Chapter One, it was noted that regional integration has been recommended to, and embraced by, African countries as the key to improved trade performance and economic development. This enthusiasm for regional integration has manifested itself in the creation of a large number of overlapping regional arrangements of various forms and sizes and with different objectives and histories. Table 5.1 depicts these configurations together with the memberships of the countries in the WTO and the African Economic Community.

# TABLE 5.1: Regional Configurations – Eastern and Southern Africa

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<tr>
<th></th>
<th>AEC (year of ratification/accession)</th>
<th>COMESA</th>
<th>EAC</th>
<th>SACU</th>
<th>SADC</th>
<th>WTO (year of membership)</th>
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Source: Author’s compilation from official sources

The analysis of the organisations is conducted by means of a discussion of the strategies that each have adopted to attain their respective goals. The analysis includes an assessment of the extent to which the factors identified in Chapter Three as determining the economic benefits conferred by regional integration, such as

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choice of partner, choice of form of RTA, number of RTAs entered into and external trade policy stance, have been incorporated into the arrangements.

In order to assess the effectiveness of the regimes, it is necessary to familiarise oneself with the political, economic and other considerations and objectives that have driven the regional integration agenda in Africa. It is for that reason that this chapter includes a discussion of the historical backdrop to, and rationale for, regional integration in Africa, and Eastern and Southern Africa in particular.

The chapter is organised as follows: The next section (5.2) employs International Relations theory to discuss the primary factors that have driven the trend towards regionalism on the continent. The discussion reveals that a shared sense of identity has been instrumental in providing the political impetus for integration while functional objectives have been influential in the trade liberalisation strategies adopted at both the regional and sub-regional levels.

Section 5.3 contains the four mini-case studies. The organisations are analysed in terms of the propositions regarding objectives, institutions, and norms set out in Chapter Two. Thus the histories and nature of legal regime created, the institutional framework and trade liberalisation program are all examined. It will be revealed that each of these arrangements employs a slightly different strategy and the contrast between them is instructive in terms of evaluating the effectiveness of the different frameworks as templates for integration.

Section 5.4 provides an overview and evaluates the impact of two slightly different approaches to cooperation and trade liberalisation. The Regional Integration Facilitation Forum provides an example of effective collaboration based on informal cooperation rather than a formal treaty. The Cotonou Agreement, on the other hand, is a preferential, non-reciprocal agreement between ACP countries and the EU. The successful conclusion of Economic Partnership Agreements pursuant to the

576 This is because as Asante so aptly put it ‘integration is political as well as economic in both its objectives and procedures’ and ‘many economic problems involved in integration can be solved only through political measures.’ Asante, above n 1, 26.
Agreement holds the promise of bestowing ACP countries the benefits associated with a North-South trade agreement.

The Chapter concludes with some preliminary conclusions that can be drawn from this admittedly general overview.

The Nature of, and Rationale for, African Integration

Shared Identity

The Constructivist theory of International Relations posits that the fundamental structures of the international system are social and that these structures shape states’ identities and behaviour even as states’ interaction helps constitute the structures.\(^{577}\)

According to this theory, a common sense of identity plays a central role in the integration process. Africa’s history provides ample evidence to suggest that this proposition is true with regard to the creation of regional institutions in Eastern and Southern Africa. This evidence is derived primarily from the similar colonial histories and the struggles for independence that many countries waged. This had consequences on a number of levels.

On one level, many integration schemes can be traced back to colonial times. Several authors have highlighted the colonial influence on integration. Karangizi, for instance, argued that colonial powers established areas covering their spheres of influence in order to coordinate their economic interests.\(^{578}\)

Bach offered a similar explanation for the creation of SACU and the West African Franc zone, arguing that they both owe their existence to the perpetuation of colonial arrangements rather than to the transfer of sovereignty.\(^{579}\)

Foroutan, for her part, has noted that many of the groupings created in the 1960s to the early 1980s ‘comprised countries which had shared colonial ties to the same foreign power because the colonial ties had created a

\(^{577}\) See section 2.5.4 for a more detailed though brief discussion of the Constructivist theory.

\(^{578}\) Stephen Karangizi, ‘Regional Trade Agreements Influencing Trade in Africa: An Overview’ (1999) 1 (on file with the author). Examples of such arrangements that he gives are the short-lived Central African Federation joining Northern and Southern Rhodesia and Nyasaland (present-day Zambia, Zimbabwe and Malawi respectively), SACU and the East African Common Services Organisation (later to become the East African Community).

host of common institutions, a common official language, and a common currency. 580

However, it should also be noted that the colonial legacy has also contributed to some of the difficulties associated with integration such as the different legal systems and languages that were bestowed on the former colonies. Thus, some of the trade blocs that have brought together countries with different systems have experienced problems implementing their strategies.

At the wider level, the common sense of identity has been shaped by a number of factors, some external to the continent and others internal. The principal external influence has come from the United Nations Economic Commission for Africa (ECA). The United Nations Economic and Social Council established the Commission in 1958 with the mandate of promoting the economic and social development of its member states, fostering intraregional integration and promoting international cooperation for Africa’s development. 581 It has since been at the forefront in promoting regional integration initiatives and played a significant part in the drafting of the Lagos Plan for Africa and Cairo Agenda discussed below.

The internal dimension of the shared sense of identity is ideological in nature. It originated in the repeated calls by leaders of the newly independent countries for continental integration as a means of asserting and consolidating their independence. They believed that unity would realise the pan-African vision that many of them held dear. It is partly because of this link between pan-Africanism and regional integration that the strategies adopted in the early years of independence ‘favoured all-embracing regional or continental organizations. 582 Thus the Charter of the Organization of African Unity (OAU) stated that one of the aims of the parties was to ‘unite so that

582 Asante, above n 1, 33.
the welfare and well-being of their peoples can be assured.’ Over the following years, similar aspirational sentiments were expressed in various declarations and statements issued on a variety of continental and international platforms. The apogee of this campaign saw the leaders of the OAU adopt the Lagos Plan of Action and the Final Act of Lagos in 1980.584

The Lagos Plan of Action was borne out of a belief that Africa’s disastrous economic situation was the result of exploitation by ‘neo-colonialist external forces’ and that there was a need for economic liberation to go with the political liberation that had been gained. It therefore set out a detailed and ambitious strategy aimed at increasing and cultivating self-reliance in almost all fields of economic activity. The Lagos Plan has been described variously as seeking to provide a conceptual framework for economic integration’ on the African continent,585 and as formalising the plan developed by the OAU together with the ECA ‘to bring the African continent closer to an African Economic Community by the year 2000.’ Somewhat more optimistically, it has also been described as giving ‘a new lease of life’ to regionalism.586 To the extent that it directed interested countries to commence negotiations on the creation of preferential areas in the Eastern, Central and Northern parts of Africa, this description is true.587 The aspirational nature of the Plan’s provisions, however, betrays the reluctance of the states to surrender any of their hard-won sovereignty for the common good of the entire continent.

583 Charter of the Organization of African Unity, opened for signature 25 May 1963, 479 UNTS 39 (entered into force 13 September 1963) preamble, 9th recital (‘OAU Charter’). This aim was amplified by Article II which provided, inter alia, that one of the purposes of the organisation was ‘[t]o promote the unity and solidarity of the African States’ and that to those ends the member states would coordinate their policies in various fields including economically.


587 Asante, above n 1, 28. One needs look no further than the eleven years that elapsed before the adoption of the Abuja Treaty to see the low priority that African countries placed on taking measures to transform their dreams into reality. Section 5.3.1 below contains a more detailed discussion of the Abuja Treaty.

588 Lagos Plan of Action, above n 11, [250(i)(a)].
Through the rest of the 1980s, other programmes encouraging African solidarity and integration were launched both regionally and internationally. These included Africa’s Priority Programme for Economic Recovery (‘APPER’) in 1985 and 10 years later, the adoption by the OAU of the ‘Cairo Agenda for Action for Relaunching Africa’s Economic and Social Development’ in 1995. The most recent such initiative to emerge from the OAU is the New Partnership for Africa’s Development (NEPAD) which was launched in October 2001. It too, like the plans before, aims at providing a framework for Africa’s development. It is to be noted that from a legal perspective, the common denominator shared by all these programmes is their unenforceable nature.

It has been argued that the beginning of the nineties saw a global revival of interest in regionalism and a renewal of the existing regional integration arrangements. Seen from a Constructivist perspective, however, the creation of trade blocs in the eighties and nineties was simply the crystallisation of the desires that had been present from the time of independence.

Institutionalist Considerations: Economic Growth and Development

Institutionalist theory posits that states create institutions and engage in integration in response to functional needs such as increasing economic welfare. States calculate that their interests are well served by cooperating with each other and they therefore create institutions in order to overcome the obstacles that prevent them from

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590 Adopted at the 17th Extraordinary Session of the OAU Council of Ministers, 26–28 March 1995, Cairo, Egypt.


592 Walter Kennes, ‘African Regional Economic Integration and the European Union’ in Daniel Bach (ed), Regionalisation in Africa (1999) 27, 27. Asante puts the renewal much further back. He traces the ‘renewed enthusiasm for pan-Africanism as an integrative force at the regional level’ back to the mid-1970s (Asante, above n 1, 37). He also writes that by the mid-80s ‘a new-found or rediscovered enthusiasm for regional economic integration had been evident in Europe, Africa, and North and South America.’ at 3.
satisfying these needs. The main obstacles that Sub-Saharan African countries have had to overcome have traditionally been their small size, both economically and in terms of population, and their poor endowments in human and physical capital. In such circumstances, as Foroutan correctly observed, common sense dictates that ‘it is economically justifiable to integrate their markets.’

It has been argued that the realisation of the possibilities that integration held for increasing economic welfare in Africa was sparked by the formation of the EEC. The enthusiasm for integration was bolstered by the then prevailing economic orthodoxy, which promoted import-substitution economic policies as the best way to develop economically. However, successful import-substitution relies on not only the creation of a large market but also on protecting domestic industries against competition from more efficient external manufacturers. Thus, the early integration initiatives adopted high tariff policies. The acceptance of this autarkic philosophy was reflected in the economic policies that the newly independent countries adopted and in the rhetoric that accompanied the early calls for integration. The Lagos Plan of Action for example, emphasised the need to cultivate a culture of self-reliance and stressed that African economic integration was a vital factor in creating ‘a continent-wide framework for the much needed economic co-operation for development based on collective self-reliance.’

The late 1980s and early 1990s are commonly associated with a global revival of interest in regionalism. This revival saw a shift from a focus on autarkic policies to more outward-oriented export-driven economic policies. This shift was brought about partly by extrinsic factors such as the implementation of structural adjustment programs (SAPs) and by other more internal factors, such as the failure of the

593 See section 2.5.3.
595 Asante, above n 1, 2. ‘The post-war progress towards integration in Europe made a considerable impression on many countries, as the idea of economic integration became attractive to political and economic leaders of the Third World’: at 2 – 3.
596 See Bach, above n 5, 1-2; Wilfred J Ethier, ‘Regional Regionalism’ in Sajal Lahiri (ed), Regionalism and Globalisation 3, 4.
597 Lagos Plan of Action, above n 11, preamble, recital 14(vi).
previous strategies to bring about development.\textsuperscript{599} As a result of this shift, African countries started to look beyond their own borders for markets and accepted the need to trade goods with each other and beyond.

In this changed international environment, the Economic Commission for Africa has offered a number of reasons why integration should be promoted: to transform Africa’s economies, to unleash industry and business, to assist the region become part of the world economy, to promote the African Union, and to address common political problems.\textsuperscript{600} The new arguments in favour of regional integration are that ‘a single regional market can increase economic efficiency, help countries build on their comparative advantage, sharpen industrial efficiency, facilitate integration into the world economy, strengthen the political commitment to trade liberalisation, help build capacity, educate the public and engage the business community.’\textsuperscript{601}

These views reflect the changing strategies of African countries and their international partners in promoting regional integration. In light of these unsettled policies, it is to be expected that in designing a legal framework for reducing these objectives into binding obligations, the ‘softest’ legal provisions will be employed in order to be as inclusive as possible. The discussion of specific integration initiatives in the following section confirms this proposition.

\section*{An Overview of Selected Regional Trading Arrangements}

\subsection*{4.5.4 The African Economic Community (AEC): Supra-regional Regulation}

\textit{History and Nature of the Treaty}

The origins of the AEC can be traced directly to the Lagos Plan of Action and, indirectly, to the OAU Charter. Its creation can be attributed to the desire of African

\textsuperscript{599} Mulat, above n 21, 116.
countries to demonstrate their solidarity with one another and use it to free themselves from neo-colonialism. The first concrete manifestation of this desire, as mentioned above, was the creation of the Organisation of African Unity. One weakness of the Charter was that although it stated that one of the Organisation’s purposes was the promotion of unity and solidarity, the member states were under no binding obligations to take any firm measures to this end. The Charter simply contained a commitment by the parties that they would coordinate and harmonise their general policies.  

Following the continent’s disastrous economic performance in the two decades after independence, the continent’s leaders felt that reliance on ‘unfulfilled global promises of global development strategies’ was futile and there was a need to ‘adopt a far-reaching regional approach based primarily on collective self reliance.’ They therefore resolved ‘to set up, by the year 2000, on the basis of a treaty to be concluded, an African Economic Community, so as to ensure the economic, social and cultural integration of our continent.’ It was not until the June 1991 adoption of the Abuja Treaty, however, that the AEC was formally launched. The AEC was established as ‘an integral part of the OAU’ with the aims of, inter alia, promoting the integration of the African economies and establishing ‘on a continental scale, a framework for the development, mobilisation and utilisation of the human and material resources of Africa.’ The Treaty itself and its associated Protocols were declared to form ‘an integral part of the OAU Charter.’

Though the terms of the Abuja Treaty state that its Parties ‘hereby establish among themselves an African Economic Community (AEC),’ the title of the organisation is clearly aspirational and the Treaty can more accurately be described, in a technical

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603 Lagos Plan of Action, above n 11, preamble, recital 1.
604 Lagos Plan of Action, above n 11, Annex II: Final Act of Lagos, art II:A.
606 Ibid art 11.
607 Ibid art 4(1).
608 Ibid art 99.
609 Ibid art 2.
sense, as a framework or interim agreement for the formation of an Economic Community. Membership of the Community is open to all Members of the African Union (formerly the OAU). Of the 53 countries that have signed the Constitutive Act of the AU, all but 5 have joined the Community.  

Opinion among commentators regarding the status of the Treaty is mixed. Some see it as ‘a major historic undertaking’ and ‘a step in the right direction along the long and arduous path leading to the economic emancipation of Africa.’ Others, such as Aly, have pointed out that it sets objectives that ‘fall in the realm of aspirations far beyond the capabilities of the continent.’ Ng’ong’ola, on the other hand, notes that some reviews of the Treaty are ‘overly sympathetic, to the point of underplaying or obscuring’ some of its problems. The most accurate evaluation of the Treaty probably lies somewhere in between the two views. Though setting out very ambitious measures leading to the creation of an economic community, the Treaty fails to provide resources for the implementation of those measures.

Instead, it adopts an integration strategy based on the use of Regional Economic Communities (RECs) as ‘building blocks’ for the eventual continental Economic Community. The Abuja Treaty provided for the creation of five RECs corresponding to the 5 regions recognised by the OAU, that is, North, West, Central, East and Southern Africa. This would tend to support a conclusion that none of the economic considerations discussed in Chapter Three were high on the agenda of the Treaty’s drafters and that the aim was simply to ensure that the entire continent was covered. It is worth noting that although by the mid-1990s, RECs existed in all these regions, the AEC has continued to accredit more RECs as ‘building blocs’ even though the members of the new RECs are already participants in other pre-existing RECs. There has been no attempt to rationalise the RECs. Thus, the number of RECs has risen to include the Intergovernmental Authority on Development (IGAD), the

610 Of these five, Djibouti, Gabon, Madagascar and Somalia have signed the Treaty but not ratified it while Eritrea is not currently a signatory. Note that Morocco is not a member of the AU.
611 See, eg, Asante, above n 1, 90.
613 Ng’ong’ola, ‘Regional Integration and Trade Liberalisation in Africa’ above n 32, 145, 146.
615 Agreement Establishing the Inter-Governmental Authority on Development, opened for signature 21 March 1996.
Community of Sahel-Saharan States (CEN-SAD)\textsuperscript{616} and, most recently, the East African Community (EAC).\textsuperscript{617}

*Trade Liberalisation Programme*

The Treaty’s integration strategy reflects the market integration model. It provides for the liberalisation program to take place ‘over a transitional period not exceeding’ 34 years.\textsuperscript{618} Table 5.2 below depicts the actions to be taken during this period.

\begin{table}[h]
\centering
\begin{tabular}{|c|c|p{0.6\textwidth}|}
\hline
\textbf{Years} & \textbf{Stage} & \textbf{Activity} \\
\hline
1994 – 1999 & I & existing RECs were to be strengthened and economic communities established in regions where they did not exist \\
\hline
1999 – 2007 & II & the stabilization of tariff and non-tariff barriers, customs duties and internal taxes existing at the date of entry into force of the Treaty, as well as the preparation of studies for the gradual removal of intra-community barriers and harmonisation of customs duties in relation to third States.\textsuperscript{619}
\hline
2007 – 2017 & III & each REC is supposed to establish an FTA and CU by adopting a common external tariff\textsuperscript{620}
\hline
2017 – 2019 & IV & Co-ordination and harmonisation of tariff and non-tariff systems among the various RECs with a view to establishing a continent wide customs union.\textsuperscript{621}
\hline
2019 – 2023 & V & Establishment of an African Common Market\textsuperscript{622}
\hline
2023 – 2028 & VI & Consolidation of the African Common Market, integration of various sectors, establishment of a single domestic market as well as the implementation of an African Monetary Union.\textsuperscript{623}
\hline
\end{tabular}
\caption{Table 5.2: Modalities for Establishment of the Community}
\end{table}


\textsuperscript{616} Treaty on the Establishment of the Community of Sahel-Saharan States (CEN-SAD), opened for signature 4 February 1998. The original signatories were Burkina-Faso, Chad, Libya, Mali, Niger and Sudan.


\textsuperscript{619} Ibid art 6(2)(b).

\textsuperscript{620} Ibid art 6(2)(c).

\textsuperscript{621} Ibid art 6(2)(d).

\textsuperscript{622} Ibid art 6(2)(e).

\textsuperscript{623} Ibid art 6(2)(f).
The AEC relies on the RECs to provide the foundation for the establishment of the Economic Community. The AEC’s role is to coordinate and harmonise their activities.\textsuperscript{624} This ‘decision-making’ authority over other intergovernmental bodies has led Voitovitch to label the AEC a ‘supra-regional’ organisation.\textsuperscript{625} Regarding relations with third states, the Treaty permits members to conclude economic agreements with third states ‘provided that such agreements are not incompatible with the provisions of [the] Treaty.’\textsuperscript{626} A similar provision in art 37 provides that ‘[n]o agreement between a Member State and a third State, under which tariff concessions are granted, shall be incompatible with the obligations arising out of this Treaty.’\textsuperscript{627}

The Treaty also contains an MFN provision that obliges members to ‘accord one another, in relation to intra-community trade, the most-favoured-nation treatment.’\textsuperscript{628} It is unclear whether intra-community in this context refers to the individual RECs or to the Community as a whole. A literal interpretation of ‘community’ as defined in art 1,\textsuperscript{629} would mean that any moves towards reducing tariff and non-tariff barriers within a REC would have to be extended to all other AEC Member States. However, this would render the whole trade liberalisation program superfluous. In view of the central status accorded to the liberalisation program this could hardly have been the intention of the drafters. The only possible conclusion is that the MFN clause was included as a matter of form rather than with any intent that it would be strictly applied. It can be argued that this cavalier treatment of the MFN principle is a reflection of the low standing in which the principle is held in Africa.

With regard to the relationship between the WTO and the AEC, the only direct reference to the multilateral trading system is found in the Trade Promotion clause which provides that members agree to participate as a group in international trade liberalisation.

\textsuperscript{624} Ibid art 4(1)(d).
\textsuperscript{625} Sergei Voitovitch, \textit{International Economic Organizations in the International Legal Process} (1995) 99. He defines ‘supra-regionality’ as the phenomenon that occurs ‘when an “umbrella” organization may issue decisions binding upon the regional economic institutions which do not formally belong to the “umbrella” organization’s membership’.
\textsuperscript{626} \textit{Abuja Treaty}, 3 June 1991, 30 ILM 1241, art 93(1) (entered into force 12 May 1994).
\textsuperscript{627} Ibid art 37(3).
\textsuperscript{628} Ibid art 37(1).
\textsuperscript{629} Article 1 of the \textit{Abuja Treaty} defines ‘community’ as ‘the organic structure for economic integration established under Article 2’.
negotiations within the framework of GATT and other negotiating forums.\textsuperscript{630} This supports the proposition made in Chapter Three that regional organisations can be used by partner states as forums for increasing their negotiating strength. In the context of a continent as diverse as Africa, however, this is by no means a complete advantage. Though the states are all similar in the sense of being classified as developing, their economic situations differ with some countries for instance being net-food-importers, while others are exporters. Thus with regard to an issue such as agriculture, calls for the removal of subsidies for agricultural products, while benefiting exporters, will be costly to the importers among the African countries.

**Institutional Framework**

The institutional framework established by the Treaty confirms that the AEC is an intrinsic part of the OAU (now African Union). The principal organs of the AEC — the Assembly, the Council of Ministers, the Economic and Social Commission and the Secretariat — are all derived from the OAU.\textsuperscript{631} This arrangement has been criticised for being unrealistic in expecting the institutions of the OAU, which are primarily concerned with matters of a political nature, to take on the additional technical responsibilities required by the AEC.\textsuperscript{632} From a regulatory perspective, the main weakness of such a large organisation is that obtaining consensus on any but the most general norms is likely to be time-consuming and involve high transaction costs.

With regard to dispute settlement, the Treaty provides that disputes regarding the interpretation of the Treaty are to be settled in the first instance, by direct agreement by the parties to the dispute, and in the event that the parties fail to settle the dispute, they can refer the matter to the Court of Justice.\textsuperscript{633} Decisions of the Court of Justice are final and not subject to appeal. There is no mention, however, of any mechanism for enforcement of decisions or indeed of any procedures for settling disputes regarding implementation of the Treaty. The Treaty merely provides that member states which persistently fail to honour their general undertakings under the Treaty or to abide by decisions or regulations of the Community, may be subjected to sanctions.

\textsuperscript{630} Ibid art 42(b). See also art 94 which provides for the formulation and adoption of common positions ‘relating to international negotiations in order to promote and safeguard’ African interests.

\textsuperscript{631} Ibid arts 1(h), 11, 15 and 21.

\textsuperscript{632} Ng’ong’ola, ‘Regional Integration and Trade Liberalisation in Africa,’ above n 32, 150.

by the Assembly. Sanctions may include suspension of rights and privileges of membership. 634

4.5.5 The Southern African Customs Union (SACU): Hegemonic Integration 635

History and Nature of the Union

SACU represents the earliest known example of formal cooperation in Eastern and Southern Africa. Though generally regarded as having come into existence in 1910, some authors trace SACU’s antecedents back to the 1889 Customs Union Convention between the Cape Colony and the Orange Free State. 636 The 1910 Agreement was entered into by the Union of South Africa and the then-British administered High Commission Territories of Bechuanaland, Basutoland and Swaziland. In this regard, the common identity of the SACU members derives from their shared histories as British colonies. The 1910 Agreement endured until 1969 when a new Agreement was negotiated between South Africa and the now independent states of Botswana, Lesotho and Swaziland.

The 1969 Agreement re-emphasised South Africa’s dominant position and provided, inter alia, that customs revenues were to be paid into South Africa’s National Fund and that South Africa would be responsible for setting tariff levels. Though initially considered as acceptable, the 1969 Agreement came to be seen as seriously flawed. Its primary shortcoming was its lack of a democratic structure for external policy making; South Africa’s Minister of Trade was responsible for determining what tariffs, anti-dumping and countervailing duties were applied. 637 In later years, revenue distribution also proved problematic. The formula agreed on by the parties, by which revenues from the Common Revenue Pool were paid to the BLS (later BLNS) countries, with South Africa retaining the balance, had started to tilt sharply in

634 Ibid art 5(3).
637 Kirk and Stern, above n 62, 5–6.
By 2001/2002, South Africa’s share of the total revenue pool had diminished from an average of 80% in the 1980s to just under 55%.

In spite of the aforementioned flaws, it was not until Namibia’s independence in 1990 (and subsequent accession to the SACU Treaty, which had been applied on a de facto basis under South African rule) and the end of the apartheid era in South Africa that the necessary political will to renegotiate the Treaty was generated. In spite of the fact that only five countries were participating in the negotiations, it took eight years before a new Treaty was concluded in October 2002. This casts some doubt on the commonly heard arguments that international agreements are easier to negotiate among small groups of countries than among larger groups.

The new Agreement contains a new revenue sharing formula according to which the total payments received by the parties will consist of three components: customs, excise and development. Though the new Agreement is more comprehensive than the 1969 Treaty, it does not address the issues of services, intellectual property rights and the ‘Singapore Issues’, an omission criticised by Kirk and Stern. The omission, however, does show that there are areas where the multilateral trade system offers superior trade-related benefits to countries. Entering into a regional trade agreement does not always entail deeper integration than within the WTO.

It will be recalled that in classic customs union theory, a customs union is characterised by the elimination of trade barriers internally and the adoption of a common external trade policy by member states. One of the anomalous features of SACU is that this has not been the case. This is primarily due to historical reasons associated with South Africa’s apartheid past. Thus, the structure of relations with third parties has been shaped more by political factors than by any desire to conform to a theoretical model. As a result, in the apartheid years, Botswana joined SADCC while Lesotho and Swaziland joined both SADCC and COMESA. Upon its

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641 Kirk and Stern, above n 62, 17.
independence, Namibia joined both SADCC and COMESA. When South Africa gained majority rule, she entered into a Trade, Development and Cooperation Agreement (TDCA) with the EU that did not include its SACU partners. This Agreement has been notified to the WTO under Article XXIV and is currently awaiting examination. All five SACU states are members of the WTO and SACU members have been examined twice as part of the TPRM, once individually and the second time as a customs union. It is noteworthy however, that SACU has not been notified to the WTO under either Article XXIV or the Enabling Clause, nor has SACU sought to become a party to the WTO as a customs territory.

Following the signing of the new Agreement, indications are mixed regarding the course of action that SACU members will take regarding trade relations with non-members. The Agreement provides that the members shall establish a common negotiating mechanism and that no member shall negotiate and enter into a new preferential trade agreement without the consent of the others. While the parties have jointly entered into negotiations in some instances, for instance, the ongoing negotiations for a SACU – US free trade area, the BLNS countries have agreed to enter into negotiations with the EU for the establishment of an EPA as a part of the SADC group. It remains to be seen how this EPA will be reconciled with the SACU Treaty and South Africa’s TDCA.

**Institutional Framework**

The SACU Agreement provides for the creation of six institutions. The Council of Ministers established by Article 7 and defined in Article 8 is the supreme decision making body. It is made up of all members and is responsible for setting external trade policy and approving recommendations for changes in tariffs by the Tariff

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642 Note that Lesotho withdrew from COMESA in 1997 while Namibia ceased being a member in 2004.
644 *Trade, Development and Co-operation Agreement Between the European Community and South Africa*, WTO Doc WT/REG113/113/N/1 (Notification from the parties to the Agreement dated 2 November 2000). The notification states that the Agreement provides for the gradual establishment of a free trade area in the sense of Article XXIV over a maximum period of 12 years.
Board. Article 9 provides for the creation of a Customs Union Commission. Both the Council and the Commission are required to meet at least four times a year. The Treaty also provides for the establishment of a SACU Tariff Board to consider levels of, and changes in, tariffs.\textsuperscript{647} Decisions of these three institutions are made by consensus.\textsuperscript{648} A new independent Secretariat, based in Namibia, is responsible for the day-to-day running of SACU.\textsuperscript{649}

With regard to dispute settlement, the Agreement creates a Tribunal that is responsible for settling disputes regarding the interpretation or implementation of the Agreement or any dispute arising under it.\textsuperscript{650} Unlike the other institutions, the Tribunal is an \textit{ad hoc} body that is constituted by three members chosen by the parties to a dispute out of a pool of names kept by the Secretariat. Also unlike the other institutions, the decisions of the Tribunal can be taken by a majority vote.

These provisions indicate that SACU is very much an institution that prefers to ‘manage’ compliance with its obligations rather than resort to coercive measures. The frequency of meetings together with the requirement for consensus in the taking of decisions all support this conclusion. The lack of any provisions providing for the imposition of sanctions or other punitive measures on any recalcitrant party also indicates the co-operative nature of SACU.

\textit{Trade Liberalisation Programme}

The Agreement provides for the free movement of goods grown, produced or manufactured within the Customs Area.\textsuperscript{651} Member states have the right to impose restrictions on imports or exports in accordance with national laws and regulations for the protection of, inter alia, health of humans, animals, or plants, the environment, intellectual property rights and national security.\textsuperscript{652} It also provides for the Council of Ministers to approve customs duties to be applied on goods imported from outside the Area\textsuperscript{653} and for the member states to apply similar legislation with regard to customs

\begin{footnotes}
\item\textsuperscript{647} Ibid art 11.
\item\textsuperscript{648} Ibid art 17.
\item\textsuperscript{649} Ibid art 10.
\item\textsuperscript{650} Ibid art 13.
\item\textsuperscript{651} Ibid art 18(1).
\item\textsuperscript{652} Ibid art 18(2).
\item\textsuperscript{653} Ibid art 20(1).
\end{footnotes}
and excise duties. It is therefore clear that SACU satisfies the classic economic theory definition of a customs union and conforms to the Article XXIV conditions.

4.5.6 The Southern African Development Community (SADC): Development Integration

History and Nature of the Organisation

SADC owes its origin to the efforts made by the then newly independent front-line states to combat the Unilateral Declaration of Independence (UDI) by the former Rhodesia. SADC did not formally emerge as a bloc, however, until April 1980 when its predecessor, the Southern African Development Coordination Conference (SADCC), was established by the adoption of the Lusaka Declaration. Its original membership was therefore initially determined by the unified stance taken by the ‘Frontline States’ against apartheid South Africa.

The primary aim of the organisation was not the creation of an integration arrangement. The signatories of the Declaration had the more modest shared goal of reducing dependence on apartheid South Africa. Their main objective was to reduce transport and communications dependence on South Africa, which, at the time, provided the principal outlet for exports from the region. It has been argued that in forming SADCC, Southern African countries rejected market integration and the neoliberal theory on regional integration centring on free trade. Instead they opted for a model that would deal with problems of equitable industrial development through economic cooperation. Rather than focussing on trade, SADCC founders concentrated on promoting production and adopting a ‘development integration’

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654 Ibid art 22.
656 The countries that signed the Declaration were Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe.
659 Foroutan, above n 7, 9.
approach to cooperation. It will be recalled that this approach stresses close political cooperation in the early stages of the process rather than at the end.660

In August 1992 a Declaration and Treaty of SADC were adopted at Windhoek establishing a new organisation.661 It has been argued that the transformation of SADCC into SADC was triggered by a number of factors including bureaucratic inertia associated with the end of the apartheid era in South Africa;662 Namibia’s independence; and the signing of the Abuja Treaty. Ng’ong’ola argues, in relation to this latter factor, that ‘SADCC required transformation in order to emerge as the more logical building-block for the AEC in Southern Africa, rather than the far-flung COMESA, or the apartheid inspired and politically incorrect SACU.’663 With regard to membership, the original 10 members of SADCC were later joined by South Africa, Mauritius, the Democratic Republic of the Congo and the Seychelles.664 The admission of South Africa to SADC in 1994 in particular was considered a coup.665

The Treaty provides a framework within which further more detailed provisions can be made regarding greater integration. The objectives of SADC, as set out in the Treaty are, inter alia, the promotion of ‘sustainable and equitable economic growth and socio-economic development’ and ‘self-sustaining development on the basis of collective self-reliance, and the inter-dependence of Member States.’666 One of the means by which these objectives are to be achieved is the development of policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the people of the Region generally, among Member States.’667 Should the movement of capital and labour be made free within the organisation, SADC would have some of the features of a common market. However, without a common external trade policy, it would not be possible to say that a

660 See section 3.4.1.2.
662 Fine and Yeo talk about ‘the tendency of all organizations to redefine new roles for themselves’. Fine and Yeo, Regional Integration in SubSaharan Africa: Dead End or a Fresh Start?” in Ademola Oyejide, Ibrahim Elbadawi and Paul Collier (eds), Regional Integration and Trade Liberalization in SubSaharan Africa: Framework, Issues and Methodological Perspectives (1997) 428, 434.
664 Ibid.
665 Ibid.
667 Ibid art 5(2).
common market in the sense of the definition in Chapter One would have been created.

**Institutional Framework**

In its first year of existence, SADCC functioned as a de facto organisation. It was not until the conclusion of a ‘Memorandum of Understanding on the Institutions of the Southern African Development Coordination Conference’ in July 1981 that a slightly more formal framework was created. The creation of a Secretariat was avoided with the members opting instead to have a flexible structure in which member states were responsible for coordinating activities in the different sectors of cooperation. The weak institutional structures adopted by SADCC, however, worked against its success and when the organisation was transformed, the opportunity was taken to establish a more conventional framework.

Chapter Five of the SADC Treaty sets out the current institutional framework of the organisation. At the apex is the Summit of the Heads of State or Government. The other institutions that are established include the Organ on Politics Defence and Security Co-operation, the Council of Ministers, the Integrated Committee of Ministers, the Standing Committee of Officials, the Secretariat, and SADC National Committees.

With regard to dispute settlement, the Treaty provides for the creation of a Tribunal. The Tribunal is authorised to determine, inter alia, any disputes regarding the interpretation and application of the Treaty and its Protocols which cannot be settled amicably. It is worth noting that persistent failure to fulfil obligations under the Treaty can result in the imposition of sanctions on the defaulting

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668 Ng’ong’ola, ‘Regional Integration and Trade Liberalization in the SADC’, above n 90, 489.
670 Ibid art 10A.
671 Ibid art 11.
672 Ibid art 12.
673 Ibid art 13.
674 Ibid art 14.
675 Ibid art 16A.
676 Ibid art 16.
677 Ibid art 32. Detailed provisions regarding the composition, powers, functions and procedures of the Tribunal are contained in a Protocol that was concluded pursuant to art 16(2).
Such sanctions can only be imposed by the Summit, however. In view of its consensus based character, this suggests that resort to such drastic measures is not contemplated.

**Trade Liberalisation Programme**

It has been argued that the SADC Treaty adopts a more outward-oriented, free-market based approach to integration than did SADCC.\(^{679}\) The specific trade agenda set out in the Protocol on Trade concluded in August 1996 supports this argument.\(^{680}\) The objectives of the Protocol include the liberalisation of ‘intra-regional trade in goods and services on the basis of fair, mutually equitable and beneficial trade arrangements’ and the creation of an FTA covering the member states.\(^{681}\) The reduction of tariffs and elimination of barriers to intra-SADC trade, which is to be done on the basis of the principle of asymmetry, is to be achieved within a time frame of eight years from the Protocol’s entry into force.\(^{682}\)

The actual programme adopted by the members provides for the five SACU countries to remove their tariffs at a faster rate than the other countries. As well as providing for countries to liberalise at different times, the Protocol provides for the categorisation of the goods that will be traded on a tariff-free basis. Category A goods are those to be liberalised immediately, category B are those identified for gradual liberalisation and C consists of sensitive products to be liberalised last.\(^{683}\)

With regard to trade relations with third parties, SADC states commit themselves to accord MFN treatment to one another.\(^{684}\) However, this provision is curtailed by the ‘grandfather’ clause in article 28(3). This paragraph provides that members are not ‘obliged to extend preferences of another trading bloc of which that Member State was a member at the time of entry into force of [the] Protocol.’ Though this provision

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\(^{678}\) Ibid art 33.


\(^{681}\) Ibid art 2.

\(^{682}\) Ibid art 3(1).

\(^{683}\) Ng’ong’ola, ‘Regional Integration and Trade Liberalisation in the SADC’ above n 90, 485.

\(^{684}\) *SADC Trade Protocol*, art 28:1. See also Ng’ong’ola, ‘Regional Integration and Trade Liberalisation in the SADC’, above n 90, 501–502.
indicates an awareness of the legal problems caused by overlapping membership and a tolerance of existing arrangements, the solution adopted does not facilitate trade within the bloc. The relevant authorities in each member state are obliged to determine whether products being traded are eligible for preferential treatment and, if so, under which regime. This negates one of the benefits of forming a trade bloc.

All SADC members are developing countries and are therefore entitled to rely on the provisions of the Enabling Clause in the WTO. However, as was noted in Chapter Four, the SADC Trade Protocol has recently been notified to the WTO under Article XXIV of GATT. On 1 October 2004, the Council for Trade in Goods adopted Terms of Reference for the examination of the Trade Protocol, directing the CRTA:

To examine, in light of the relevant provisions of the GATT 1994, the Protocol on Trade in the Southern African Development Community and to submit a report to the Council for Trade in Goods.

This development is a radical shift in the previous positions taken by developing countries regarding the applicability of Article XXIV. It suggests that there might be a new realisation of the benefits conferred by Article XXIV as well as a realisation that it does not pose a threat to their sovereignty. Whether or not it proves to be an indicator of a future willingness to submit to multilateral rules awaits to be seen.

4.5.7 The East African Community (EAC): Aspirations of Federation

History and Nature of the Organisation

Regional cooperation in the East African sub-region is almost as old as in Southern Africa and goes as far back as 1917 when the British colonies of Kenya and Uganda were joined together in a customs union. Soon thereafter, in 1919, the region had a

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688 Akintan, above n 63, 124; Kipyego Cheluget, Brief on the East African Community, Speech to the Experts Meeting to Develop the East African Common Negotiating Positions, Arusha, 23 October 2002
common currency. In 1927, the then British-administered League of Nations mandate of Tanganyika joined the customs union. In 1948 the British authorities created the East African High Commission to regulate trade, transport and communications within the territories. This in turn evolved into the East African Common Services Organisation upon the independence of Tanganyika in 1961. Following the later independence of Kenya and Uganda, the EAC was established in 1967 as the successor to the East African Common Services Organisation.

The 1967 Treaty was aimed at establishing a common market among its three members. Though the arrangement operated fairly effectively for a few years, the organisation eventually collapsed among disputes over the distribution of benefits from integration as well as fundamental political differences. It has been asserted that the 1967 Treaty contained several weaknesses that partly contributed to its failure. These included a failure to guarantee the free movement of labour among the member states; the transfer tax as an internal levy represented a selective deviation from internal free trade and therefore violated the common market ideal of absence of internal trade restrictions; a failure to provide for any central means of industrial allocation or a common scheme of fiscal incentives; and the entrusting of the coordination of some vital matters of the Community to the Councils, often without specific guidelines.

[2] (on file with the author). Some writers date the EAC’s antecedents to 1902. See, eg, Awori, above n 79, 120.


690 Akintan, above n 63, 124; Cheluget, above n 115.

691 The High Commission was created by the East Africa (High Commission) Orders in Council, 1947.

692 The Common Services Organisation was created by the East African Common Services Agreements 1961 to 1966 following the revocation of the EA (High Commission) Orders in Council. Also see Lyakurwa et alia, ‘Regional Integration in SubSaharan Africa’ above n 116, 190.


695 Aworti argues that constant bickering and political disputes between members led to war between Tanzania and Uganda in 1972 and again in 1979; see Awori, above n 84, 120. Other reasons given for the collapse of the EAC are ‘the variability of the economic policies pursued then by the partner states’, the hostility of the international political climate, ‘the continued perception of disproportionate sharing of benefits’ and the generally polluted political atmosphere.’ Jakaya M Kikwete ‘Regional Alternatives and National Options’ in OECD, Regional Integration in Africa (2002) 151, 153.

696 Ngila Mwase, ‘Regional Economic Integration and the Unequal Sharing of Benefits: Background to the Disintegration and collapse of the East African Community’ (1978) 8 Africa Review 28, 31 cited in
The 15 years following the collapse of the EAC saw the former partners dealing with each other at arm’s length. Relations started to thaw in the 90s and steps were taken to resume cooperation in 1993 when an Agreement for the Establishment of the Permanent Tripartite Commission for East African Cooperation was signed. However, it was a further three years before the East African Cooperation started operating and its Secretariat was launched. Following further negotiations, the three Partners concluded the Treaty for the Establishment of the East African Community on 30 November, 1999.

The joint communiqué issued on the occasion of the signing of the Protocol, in which the Heads of State observed ‘that the customs union epitomised the will of the East African people to unite in strength and realise the faster socio-economic transformation of the region as a single market and investment area’ illustrates the joint political and economic aims of the East African states.

**Institutional Framework**

The framework that the Treaty establishes provides a good balance between the national interests and the common interest. It also indicates a desire to ensure that the decisions of the body are legitimate. The Treaty provides for the establishment of various organs at the apex of which is the Summit. The other main organs are the Council, the Secretariat, the East African Court of Justice and the East African Legislative Assembly. A Co-ordination Committee and Sectoral Committees are also created. This framework demonstrates a desire to strike a balance between

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700 Ibid Chapter Five.

701 Ibid Chapter Ten.

702 Ibid Chapter Eight.

703 Ibid Chapter Nine.

704 Ibid Chapter Six.

705 Ibid Chapter Seven.
national interests and the common interest. It also shows the desire of the parties to ensure that there is no ‘legitimacy deficit’ regarding the participation of the people.

The East Africa Court of Justice and the East African Legislative Assembly were both inaugurated on 30 November 2001. Though the Court of Justice is yet to handle any cases, the Legislative Assembly has already passed several Acts, most notably the East African Community Customs Management Act. The inclusion of a legislative body in the Treaty framework indicates an awareness of the need to have a forum where the common will of the people can be expressed. At present the members of the Assembly are chosen through the national Parliaments rather than by direct plebiscite.

Trade Liberalisation Programme

The EAC trade liberalisation programme does not follow the traditional sequence of economic integration from free trade area to customs union. In the EAC, a common external tariff, the customary hallmark of a CU came into operation on 1 January 2005, some five years before intra-regional trade is scheduled to be liberalised. The strategy adopted in the Treaty envisaged the conclusion of a Protocol on a Customs Union within 4 years. At a later stage, the customs union is to be followed by a common market, monetary union and political federation. No time frame is set for the achievement of the latter stages. Following lengthy negotiations and several delays due to disagreements regarding provisions to be included, the Customs Union Protocol was signed on 2 March, 2004.

The Protocol provides for the elimination of customs duties and other charges of equivalent effect on imports save as provided in the Protocol, the removal of non-tariff barriers to trade among the partners, and the establishment of a common external tariff in respect of all goods imported into partner states from foreign

708 Ibid art 76.
709 Ibid art 5(2).
countries. With regard to intra-Community trade, the Protocol provides for the progressive establishment of a free trade area. Immediate duty free movement of goods will only apply for the movement of goods between Uganda and Tanzania and from Uganda and Tanzania into Kenya. Kenyan exports to Uganda and Tanzania will still be subject to duties for a period of five years.  

In the context of the WTO rules, this asymmetrical approach would not pose any problems to notification under Article XXIV since Article XXIV provides for interim agreements, which the Customs Union Protocol is, to be notified. The lengthy period it took to negotiate the Protocol, like that of SACU, illustrates the difficulties facing COMESA which involves a larger number of countries with correspondingly diverse interests to be catered for. The EAC has been notified to the WTO under the Enabling Clause. The EAC has now also been accredited as a Regional Economic Community of the AEC. It is unclear what the motivation for the application was, nor what possible benefits accreditation will bring to the organisation.

**Alternative Approaches to Integration and Trade Liberalisation**

The Regional Integration Facilitation Forum (RIFF)  

In the four integration arrangements discussed above, the countries involved made a conscious decision to base their interactions on a formal Treaty. The RIFF adopts an informal, non-Treaty based approach to regional cooperation. As its name suggests, its aim is merely to facilitate integration. The Cross-Border Initiative (as the RIFF was originally known) was begun in 1992 as a joint initiative of four sponsors (the World Bank, the IMF, the European Union and the African Development Bank) and a selection of countries from eastern and southern Africa. Its aim was...
to facilitate cross-border economic activity by eliminating barriers to the flow of goods, services, labor, and capital, and to help integrate markets by coordinating reform programs in several key structural areas, supported by appropriate macroeconomic reform policies.  

This was in response to an initial study that had shown that although a lot of countries were supportive of regional integration, governments were often slow in implementing changes domestically due to capacity constraints. A mechanism therefore had to be found to assist them at the national level.

Rather than create a new intergovernmental organisation to perform this task, the sponsors and the participants opted to cooperate informally on an international level and focus their efforts on taking concrete actions nationally. The principal distinguishing characteristic of the CBI was therefore that it did not entail the formation of a distinct formal entity. Instead, it relied on the existing regional bodies from which the participants were drawn to assist in the implementation of reforms. In order to ensure that the measures being taken actually contributed to the facilitation of trade, studies identifying the specific constraints were undertaken by national Technical Working Groups.

The Initiative thus allowed countries to set the pace at which they liberalised their economies. This is not to say that there was no joint agenda. On the contrary, a Concept Paper setting out the core requirements of the CBI was agreed on by all the participants and approved by the sponsors. The section of the Concept Paper relating to trade provided for actions to be taken on the dismantling of import licensing and other non-tariff barriers, the elimination of tariffs on intra-regional trade on a reciprocal basis as well as the elimination of quantitative restrictions on exports to all countries. This Concept Paper was later transformed into a Road Map for Trade Reforms which contained three core features: a commitment to the immediate

717 The RIFF was open to countries in the Eastern and Southern African region and the Indian Ocean. Its members were drawn from existing RTAs: COMESA, SADC, EAC and IOC. The countries that actually joined were Burundi, Comoros, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.
elimination of all non-tariff barriers on intra-regional trade, the removal of tariffs on intra-regional trade by October 1998 and harmonisation of external tariffs by having no more than three non-zero rates. With regard to the actual operation of the Initiative, each country was required to prepare a letter setting out the measures it had taken and that it proposed to take. This letter would then be exchanged with the co-sponsors until agreement was reached and financial assistance could be released to the country.

In 1998, a decision was made to broaden the Initiative to cover the area of investment facilitation. The following year, a Road Map for Investment Facilitation was adopted as a framework to complement existing initiatives. In 2000, it was decided that it was time to start the next phase of the project and the Initiative was re-launched as the Regional Integration Facilitation Forum.

One key aspect of the RIFF was that for the first time the private sector was involved in determining what measures would be taken to facilitate trade. Its input therefore helped to identify barriers to trade and provided a strong lobby against any government temptation to reverse policy reforms. The RIFF therefore supports the Liberal approach to International Relations in that it recognised the benefits to be achieved from seeing states not as monolithic entities but as entities composed of different competing interests. With regard to the arguments made in this thesis, the RIFF supports the managerial model proposition that capacity building and technical assistance is key to enhancing compliance with Treaty obligations.

The current status of the RIFF is rather unclear. At the last meeting of RIFF countries in November 2003, a decision was made to continue with the RIFF even though the funding provided by the EU was coming to an end on 31 December, 2003. Because the organisation relies so heavily on donor funding for the operation of the Technical Working Groups that form its heart, any progress will depend on sourcing additional funding from donors.

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719 Road Map for Investment Facilitation, (Paper for consideration at the Fourth Ministerial Meeting to be held in Mauritius, October 1999, prepared by the Co-Sponsors in consultation with the Technical Working Groups of the CBI Participating Countries, 1999). (On file with the author).

This lack of stability is one of the weaknesses of such informal arrangements. The absence of any binding obligations on the part of any of the participants means that its existence cannot be taken for granted and, in consequence, policy makers cannot be sure of the amount of weight they should put on it in making plans for the future. This will apply not just at the government level but also in the private sector. In terms of the propositions discussed in Chapter Two, the principal distinguishing feature of an informal arrangement such as the RIFF is the absence of any legal obligations vis-à-vis other states. As a result, issues of compliance and determining whether state conduct is in conformity with rules do not arise. Similarly, issues of sovereignty do not arise. Such an arrangement is therefore suitable for states that do not wish to surrender sovereignty over their economic policies.

The Cotonou Agreement and its Implications for Trade Liberalisation

The Cotonou Agreement signed on 23 June 2000, by the African, Caribbean and Pacific Group of Countries and the EC and its members, has a long history. The aim of this section is not to analyse this rich and controversial history but to discuss those features of the current Agreement that are relevant for regional integration in Eastern and Southern Africa. The Cotonou Agreement is based on three interactive pillars: a political dimension, development strategies, and economic and trade cooperation. It provides that ‘[t]he central objective of ACP-EC cooperation is poverty reduction and ultimately its eradication; sustainable development; and progressive integration of the ACP countries into the world economy.’ With regard to economic and trade cooperation, the Parties agree that its ultimate objective is ‘to enable the ACP States to play a full part in international trade.’

One significant change from earlier agreements is a commitment to devise WTO-compatible agreements to replace the Cotonou Arrangement upon its expiry in

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724 Ibid art 34(2).
These agreements are to be known as Economic Partnership Agreements (EPAs). Approval of the arrangements by the WTO will mean that the preferences that the EC has traditionally extended its former colonies through first the Yaoundé Conventions and later the Lomé Conventions will not be open to challenge as they were in the Bananas cases discussed in Chapter Four. However, in order for these proposed Agreements to be consistent with Article XXIV, it will be necessary for the ACP countries to offer reciprocal market access to EC products.

Articles 36 to 38 of the Agreement set out the modalities for the negotiation of the new trading arrangements. These new arrangements, which are currently under negotiation, provide a valuable opportunity for the rationalisation of the Eastern and Southern African RTAs by virtue of the EU’s desire to conclude agreements that support the regional trade blocs.

It is beyond the scope of this paper to engage in a detailed discussion of the modalities for the negotiations but a few points are worth noting. Firstly, the experience of the non-ACP countries under the Lomé regime illustrates the wider dangers of basing trade policy on a discretionary preferential basis. In a multilateral system that prides itself on being rule-based, it is very hard to tailor preferences to cater for one particular group of disadvantaged countries without undermining the preferences granted to an equally though differently disadvantaged group, as was happening with the Lomé Conventions.

The final point that needs to be noted is that a successful conclusion to the negotiations will allow the formation of a North-South RTA with all the attendant benefits promised by economic theory. These include the opportunity to attract foreign direct investment, the possibility of securing internal policy reforms and enhancing the transfer of technology. The financial aid package that accompanies the Agreement in the form of the European Development Funds is also going to be valuable for building capacity and providing technical assistance.

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725 Ibid art 36(1).
Summary
This Chapter has provided a brief history of the regional integration process in Africa and discussed some of the factors that have contributed to the enthusiasm for regionalism. It has also examined very briefly a few of the most significant trade related arrangements in Eastern and Southern Africa. The Table below (Table 5.3) contains a comparison of the main features of the regional arrangements discussed in this Chapter with those of COMESA, which is discussed in the following Chapter.

Table 5.3: Eastern and Southern African Regional Trade Agreements: Objectives and Characteristics

<table>
<thead>
<tr>
<th>Feature</th>
<th>COMESA</th>
<th>EAC</th>
<th>SACU</th>
<th>SADC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Members (as at 30 June 2005)</td>
<td>20</td>
<td>3</td>
<td>5</td>
<td>13</td>
</tr>
<tr>
<td>Format of Arrangement</td>
<td>Common Market</td>
<td>Customs Union</td>
<td>Customs Union</td>
<td>Free Trade Area</td>
</tr>
<tr>
<td>Final Objective</td>
<td>Economic community and eventually into an organic entity of the AEC</td>
<td>Common Market, eventually a Political Federation</td>
<td>Customs Union</td>
<td>Free Trade Area</td>
</tr>
<tr>
<td>Institutional Framework</td>
<td>Authority; Council; Intergovernmental Committee; Committee of Governors; Technical Committees; Secretariat; Consultative Committee.</td>
<td>Summit; Council; Secretariat; East African Legislative Assembly; Coordination Committee; Sectoral Committees.</td>
<td>Council of Ministers; Customs Union; Commission; Secretariat; Tariff Board.</td>
<td>Summit; Organ on Politics, Defence and Security Co-operation; Council of Ministers; Integrated Committee of Ministers; Standing Committee of Officials; Secretariat; SADC National Committees.</td>
</tr>
<tr>
<td>Dispute Resolution Mechanism</td>
<td>COMESA Court of Justice (First instance and)</td>
<td>East African Court of Justice</td>
<td>Tribunal</td>
<td>Tribunal</td>
</tr>
</tbody>
</table>
Looking at this Table, the first thing that emerges is that regional cooperation in the area is not a recent phenomenon. However, it is clear that many of the countries have not settled on the nature and scale of integration that they wish to undertake. Though the ultimate aim, as expressed in the AEC Treaty, is the creation of a continental economic community, only one Treaty, COMESA, makes this an explicit goal.

From an internal regulatory perspective, the necessary mechanisms for securing compliance are present. The institutional frameworks, in terms of norm-formulation and norm-implementation organs, have been created by the Treaties though with varying degrees of authority. In other words, the frameworks that have been established are ideal for the employment of a managerial, cooperative approach to compliance, especially in view of the importance attached to friendly relations.

From an external perspective, the AEC Treaty has failed to constrain the creation of further overlapping RTAs and has indeed exacerbated it by approving the accreditation of three more overlapping RECs, IGAD, CEN-SAD and the EAC. Moreover, the lengthy time period provided for the elimination of trade barriers has meant that, apart from SACU, the other organisations have adopted lengthy trade liberalisation timetables.
As a result of the fact that neither the WTO nor the individual Treaties oblige states to accord each other unconditional MFN treatment, states have engaged in the formation of what appear to be indiscriminate preferential trading arrangements that multiply the complexity of the trade regulations. It is therefore essential that some rationality be restored to the integration process on the continent. In view of the current unenforceability of the MFN principle, more needs to be done within the framework of a ‘managerial’ approach to persuade states of the benefits of cooperating with each other in a coherent manner and eliminating trade barriers on substantially all trade. The following chapter builds on this discussion by engaging in an in-depth case study of COMESA.
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