

# Multi-membership in African regional trade agreements: A focus on SADC and COMESA

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"How shall I make a return to the Lord  
for all the good he has done for me?"

**Psalm 116:12**

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## **Abstract**

There are many Regional Trade agreements in Africa. These include Customs Union, Preferential Trade Agreements, Free Trade Area and the Common Market. African RTAs offer many different benefits to countries. They are also flexible in the sense that they offer open-door membership to any country willing to join them. Countries end up joining many of these RTAs at the same time, leading to a problem of multi-membership or overlapping membership, a phenomenon described by authors as a "spaghetti bowl".

This mini-dissertation focuses on the issue of multi-membership in African RTAs, especially the two prominent RTAs namely South African Development Community (SADC) and the Common Market for Eastern and Southern Africa (COMESA) to determine the problem brought about by overlapping membership. The attention is drawn on the Laws/Rules of these RTAs to see if a country having multi-membership is able to use its domestic laws to regulate its imports and exports. There is also a case study of Lesotho and South Africa.

## Opsomming

Daar is baie plaaslike en regionale handelsooreenkomste (RHO's) in Afrika. Dit sluit Doeane-unies, Voorkeurhandelsooreenkomste, Vry-handelzones en gemeenskaplike markte in. RHO's in Afrika bied baie verskillende voordele vir lande. Hulle is ook buigsaam in die sin dat hulle oop-deur lidmaatskap bied aan enige land wat bereid is om by hulle aan te sluit. Lande sluit gelyktydig by meerdere van hierdie RHO's aan, wat lei tot 'n probleem van multi-lidmaatskap of oorvleuelende lidmaatskap, 'n verskynsel wat beskryf word deur skrywers as 'n "spaghetti bak".

Hierdie mini-verhandeling fokus op die kwessie van multi-lidmaatskap in Afrika RHO's, veral op twee prominente RHO's, naamlik die Suid-Afrikaanse Ontwikkelingsgemeenskap (SAOG) en die Gemeenskapsmark vir Oos- en Suider-Afrika (COMESA) om vas te stel of oorvleuelende lidmaatskap problematies is. Die navorsing fokus op die wette / reëls van hierdie RHO's om te bepaal of 'n land met multi-lidmaatskap van RHO's in staat is om sy binnelandse wette te gebruik om sy invoere en uitvoere te reguleer. Daar is ook 'n gevallestudie van Lesotho en Suid-Afrika.

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## List of Abbreviations

AGOA	Africa Growth and Opportunities Act 2000
ACP	African, Caribbean and Pacific
AUSFTA	Australian Free Trade Agreement
BRICS	Brazil, Russia, India, China and South Africa
BLNS	Botswana Lesotho Namibia and Swaziland
CET	Common External Tariffs
CMA	Common Monetary Area
COMESA	Common Market for Eastern and Southern Africa
CU	Customs Union
EAC	East African Community
EBA	"Everything but arms"
ECOWAS	Economic Community of West African States
EU	European Union
FTA	Free Trade Area
FDI	Foreign Direct Investment
GATT	General Agreement on Tariffs and Trade
GSP	Generalised System of Preferences
MFN	Most-Favoured-Nation
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organisation
Para	Paragraph
PTA	Preferential Trade Area
REC	Regional Economic Community
RoO	Rules of Origin
SADC	Southern African Development Community
TFTA	Tripartite Free Trade Agreement
WTO	World Trade Organisation
IOC	Indian Ocean Commission

## Chapter 1

### 1.1 Introduction

Regional Trade Agreements<sup>1</sup> in the World Trade Organisation<sup>2</sup> are defined as reciprocal trade agreements between two or more partners.<sup>3</sup> RTAs are formed by countries situated in the same region and they are not similar to Bilateral Trade Agreements that are formed by countries not necessarily within the same region.

RTAs are of different types that include a Customs Union<sup>4</sup>, Preferential Trade Area<sup>5</sup>, Free Trade Area<sup>6</sup> and the Common Market. Where a set of countries agrees to reduce but not to eliminate the trade restrictions amongst themselves, that arrangement is referred to as a PTA. An agreement on the part of a set of countries to eliminate trade restrictions among themselves is called an FTA. Where a set of countries agrees to eliminate trade restrictions among themselves and decides to adopt a common external tariff, this is called a CU and a Common Market is an agreement on the part of a set of countries to eliminate trade restrictions among themselves, to adopt a common external tariff, and to allow the free movement of labour and physical capital among member countries.<sup>7</sup>

Most African countries have membership in more than one of the above-mentioned trade agreements.<sup>8</sup> This is referred to as multi-membership or overlapping membership. Overlapping membership is a common phenomenon in Africa where countries concurrently are party to several regional trade agreements.<sup>9</sup>

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1 Hereinafter referred to as RTAs.

2 Hereinafter referred to as WTO.

3 Anon 2014 [http://www.wto.org/english/tratop\\_e/region\\_e/rta\\_pta\\_e.htm](http://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm).

4 Hereinafter referred to as CU.

5 Hereinafter referred as the PTA.

6 Hereinafter referred to as the FTA.

7 Anon 2005 [www.swlearning.com/economics/reinert/reinert1e/ppt/ch08.ppt](http://www.swlearning.com/economics/reinert/reinert1e/ppt/ch08.ppt). See also article XXIV8 (a) (i) of the GATT as quoted by Gathii on page 79. He says, "a customs union is the substitution of a single customs territory for two or more territories, so that duties and other restrictive regulations of commerce...are eliminated with respect to substantially all the trade between the constituent territories of the union, or at least with respect to substantially all the trade in product originating in such territories."

8 An example is Swaziland, which is a member of the SACU as a Customs Union. It is also a member of the SADC and the COMESA, which are both Free Trade Areas. The COMESA is also a common market.

9 Ngenyeh *Regional Integration in Southern Africa* 22.

## 1.2 Problem statement

The number of RTAs has increased significantly on the African continent. Examples of these RTAs include the Southern African Development Community,<sup>10</sup> the Southern African Customs Union<sup>11</sup>, the East African Community<sup>12</sup>, the Common Market of Eastern and Southern Africa<sup>13</sup>, and the Economic Community of West Africa States<sup>14</sup>, amongst others. Many African countries are members of several different RTAs. Of the fifty one countries in Africa, only six belong to a single RTA. The other forty-five belong to at least two or more RTAs. This multi-membership in RTAs seems to be a reflection of the large number of RTAs on the African continent.<sup>15</sup>

These multi-memberships of countries in RTAs have attracted a lot of criticism. It has been stated that the overlapping memberships between the various regional arrangements generate unnecessary costs. There are administrative costs related to the complex rules of the origin. It is very expensive to pay multi-membership fees.<sup>16</sup>

Additionally, the jurisdictional uncertainty that arises because of the overlapping legal regimes and conflicting objectives among rival arrangements has contributed to a lack of progress in many areas. To resolve conflicts of membership in these arrangements may prove politically difficult.<sup>17</sup>

Furthermore it has also been stated that a country cannot change its policies without the consent of the other countries in the RTA. This becomes even more problematical when a country is a member of multiple RTAs, since it can be argued that a country ends up losing part of its sovereignty every time that it joins an RTA.<sup>18</sup>

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10 Hereinafter referred to as SADC.

11 Hereinafter referred to as SACU.

12 Hereinafter referred to as the EAC.

13 Hereinafter referred to as COMESA.

14 Hereinafter referred to as ECOWAS.

15 Gathii J.T. *African Trade Agreements as Legal Regimes* 65; See also Yang and Gupta *Regional Trade Arrangements in Africa* 8; Also see Chiumya *Regional Trade Agreements* 86.

16 Khandelwal *COMESA and SADC: Prospects and Challenges for Regional Trade Integration* 14.

17 Khandelwal *COMESA and SADC: Prospects and Challenges for Regional Trade Integration* 14.

18 Gathii J.T. *African Trade Agreements as Legal Regimes* 79.

Moreover, some writers have stated that one of the things that hinder African trade are the multiple and conflicting objectives of overlapping regional arrangements and limited administrative resources.<sup>19</sup>

Because countries have legal obligations in respect of their membership of these arrangements, legal uncertainty arises in situations where multiple trade arrangements apply between two countries.<sup>20</sup> Such uncertainties undermine the implementation of the agreements that aim to establish rules-based dispensations and also add considerably to transaction costs and duplication in both regional trade and trade with outside partners. This increases the burden on member states, some of which are already lacking the necessary capacity and resources. Any uncertainty and unpredictability caused also impact negatively on the investment climate in these countries and their organisations.<sup>21</sup>

The issue of multi-membership further violates the Vienna Convention on the Law of Treaties.<sup>22</sup> The convention obliges a State to refrain from acts which would defeat the object and purpose of any treaty it has signed.<sup>23</sup> This responsibility of states imposed by this Convention is compromised when countries acquire membership in different RTAs at the same time. Having to comply with various rules of origins from different RTAs means a state will definitely compromise their responsibilities in certain treaties.

Various reasons have been advanced as to why countries have multiple memberships in RTAs. It has been stated by some writers that multi-memberships reflect the desire of countries to make use of forum shopping, i.e. to pick and choose various options offered by competing RTAs.<sup>24</sup> Different RTAs offer benefits to members beyond the reduction or removal of tariff barriers and the harmonisation of trade policies, such as customs policies.

Notable trade agreements in east and southern Africa are SADC and COMESA. Most SADC member states have membership in different southern and eastern RTAs. Trade relations in SADC are characterised by overlapping bilateral and regional arrangements.<sup>25</sup>

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19 Khandelwal *COMESA and SADC: Prospects and Challenges for Regional Trade Integration* 14.

20 Braude W *SADC, COMESA and THE EAC: Conflicting regional and trade agendas* 8.

21 Braude W *SADC, COMESA and THE EAC: Conflicting regional and trade agendas* 8.

22 Vienna Convention on the Law of Treaties 1969.

23 See article 18 of the Treaty. See also article 26 thereof which provides that: "Every treaty in force is binding upon the parties to it and must be performed in good faith."

24 Gathii J.T. *African Trade Agreements as Legal Regimes* 67.

25 Ngenyeh *Regional Integration in Southern Africa* 3.

An example given by Ngenyeh<sup>26</sup> is that within the milieu of the Indian Ocean Commission (IOC), Mauritius has a trade arrangement with Madagascar and Comoros while Namibia, Lesotho, Swaziland, Botswana and South Africa are members of SACU.<sup>27</sup> The other SADC member-states are members of COMESA. This means that Lesotho and South Africa have to comply with the rules of SADC as well as those of SACU.

Both SADC and COMESA have provisions that allow member states to maintain preferential trade and other trade related arrangements they had prior to joining them. They also allow members to join new arrangements provided they don't violate the provisions of their treaties.<sup>28</sup>

The fact that each RTA is governed by its own rules means that countries that are members of both SADC and COMESA will experience difficulties in abiding by the rules of the two.<sup>29</sup> For example COMESA's rules of origin are based on the content of minimum value added and it requires that local material should comprise at least 35% for the product to be considered as locally produced thereby qualifying for preferential tariffs.<sup>30</sup> SADC, on the other hand, has its rules of origin based on the different sectors of production and includes specific requirements for different sectors and products.<sup>31</sup>

Against this background, it is therefore necessary to investigate this matter in order to determine to what extent the multi-membership of countries in many different RTAs can affect such countries. The problems, challenges as well as benefits of multi-membership in RTAs generally will be investigated. The two prominent RTAs namely SADC and COMESA will be given specific attention. These two RTAs will be discussed to see their features that may lead to multi-membership. Lesotho and South Africa will also be discussed to see the extent of their involvement in RTAs as well as how they benefit from the RTAs they are signatories to.

### **1.3 Research question**

What legal effect does having multi-memberships in SADC and COMESA have on African countries, particularly Lesotho and South Africa?

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26 Ngenyeh *Regional Integration in Southern Africa* 3.

27 See Ngenyeh *Regional Integration in Southern Africa* 3.

28 See Article 28 of the SADC trade protocol and article 56 of the COMESA treaty.

29 See Ngenyeh *Regional Integration in Southern Africa* 36.

30 Ngenyeh *Regional Integration in Southern Africa* 36.

31 See Ngenyeh *Regional Integration in Southern Africa* 36.

## **1.4 Research methodology**

The study will be based on a literature study of relevant textbooks, law journals, legislation, case law and internet sources relating to the overlapping and multi-memberships of African countries in RTAs, particularly the SADC and COMESA. There will also be a brief analysis of African RTAs in relation to the RTAs from other parts of the world, and a specific focus on the RTAs membership status of South Africa and Lesotho.

## **1.5 Framework of the dissertation**

This dissertation is divided into the following chapters

1. Introduction and problem statement.
2. Reasons for multi-memberships in RTAs.
3. Criticisms/Problems of multi-memberships in RTAs.
4. Position of South Africa and Lesotho in RTAs.
5. Analysis of selected African RTAs and RTAs from other parts of the world.
6. Conclusions and Recommendations.

## **1.6 Relevance for the research unit**

The proposed study falls within the broad focus of the Research Unit namely *Development in the South African Constitutional State*. The study falls under the sub-project: Trade and Development. It is an International Trade Law topic and has a bearing on the law of import and export of goods. The study relates directly to the membership of countries in multiple RTAs and contributes to the literature by offering a comparative analysis of the two major African RTAs, namely the COMESA and the SADC. It may accordingly contribute to South African law of import and export by specifically looking at how the rules and/or laws of RTAs can affect a country that has multiple memberships in RTAs.



## Chapter 2 The Rationale behind multi-membership in African RTAs

### 2.1 Introduction

The previous chapter mentioned some of the controversial issues surrounding the RTAs in Africa. Among the aspects highlighted were the fact that RTAs offer a number of different advantages to countries and that countries benefit from those RTAs when they have multi-membership. The aim of this chapter is to investigate the general benefits countries derive from different RTAs. The chapter will also determine whether countries are not influenced to join different RTAs at the same time because they are attracted by different benefits offered by competing RTAs. The objectives and aims of RTAs, in particular the SADC and COMESA, will also be discussed.

RTAs are meant to help countries eliminate trade barriers and they offer different benefits to countries that have membership. Multi-memberships in RTAs shows that countries want to choose various opportunities and benefits offered by rival RTAs.<sup>32</sup> RTAs are also meant to increase the volume of trade and to enhance the economic welfare among member countries. They further offer trade benefits for all countries in a region, which increase their international competitiveness.<sup>33</sup>

African RTAs are flexible in that they give membership to any country that is willing to join them.<sup>34</sup> A country can join a RTA despite the fact that it already has membership in a different RTA. This is referred to as multi-membership or overlapping membership. According to Gathii<sup>35</sup>, multiple RTA membership shows the flexibility or open-door membership offered by African RTAs.

Gathii<sup>36</sup> is of the opinion that African RTAs are regimes and he argues that countries that are members of more than one RTA may regard treaties creating such RTAs as providing a basis for teamwork not necessarily as treaties making compulsory responsibilities. He further argues that multi-membership of RTAs gives countries flexibility and adaptability

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32 See Gathii J.T. *African Trade Agreements as Legal Regimes* 67.

33 See Haddoud Y. *The Impact of Regional Trade Agreements on North African Countries' Foreign Trade Economic Welfare*.

34 See Gathii J.T. *African Trade Agreements as Legal Regimes* 65; See also Chiumya 2009 [http://www.worldcustomsjournal.org/media/wcj/2009/2/WCJ\\_V3N2\\_Chiumya\\_%28web%29.pdf](http://www.worldcustomsjournal.org/media/wcj/2009/2/WCJ_V3N2_Chiumya_%28web%29.pdf) who says that there has been a dramatic increase in regional trade agreements in the last past two decades. He says from 1948 to 1994 there were about 124 RTA notifications but between 1995 and 2008 there was an additional of about 300 notifications.

35 Gathii J.T. *African Trade Agreements as Legal Regimes* 2.

36 Gathii J.T. *African Trade Agreements as Legal Regimes* 72.

because they can retain their sovereignty and accrue benefits from these many regimes, which would otherwise not available through sole membership.<sup>37</sup>

## **2.2 Reasons for multi-membership in African RTAs**

Apart from the reasons stated above, some of the benefits believed to be attracting countries to RTAs include: Traditional Trade Gains, Guarantee of Access, Strategic Linkage, Strengthening domestic policy reform, Increased Multilateral Bargaining Power, Multilateral and Regional Interplay and Avoidance of Trade Wars, among others. These reasons are explained in detail in the paragraphs that follow.

### **2.2.3 Traditional Trade Gains**

It is believed that the conventional objective that motivates a country's involvement in any trade negotiation is the idea that through mutual exchanges of concessions on trade barriers there will be developments in market access from which all parties to the negotiation will benefit.<sup>38</sup> The reason for participating in a regional negotiation over any other type, including a multilateral agreement is typically that because trading partners are involved, the chances of success are seen as high because there are a small number of countries.<sup>39</sup>

### **2.2.4 Guarantee of Access**

Whalley<sup>40</sup> states that an objective in large-small country trade negotiations is normally to use a regional trade agreement to make access to larger country markets in the region more secure for the smaller country.<sup>41</sup> He argues that countries enter into regional trade agreements because they have a number of objectives, which include conventional access benefits, the use of trade agreements to underpin security arrangements, and tactical interplay between multilateral and regional trade negotiating positions.

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37 Gathii J.T. *African Trade Agreements as Legal Regimes* 72.

38 Whalley J 1996 <http://www.nber.org/chapters/c7820.pdf>.

39 Whalley J 1996 <http://www.nber.org/chapters/c7820.pdf>.

40 Whalley J 1996 <http://www.nber.org/chapters/c7820.pdf>.

41 This is also the case in bilateral trade agreements between a smaller country and a bigger country. An example is an agreement, known as the AGOA between Lesotho and the United States of America. Through this agreement Lesotho has access to the larger markets in the US for its textile industries.

### **2.2.5 Strategic Linkage**

Some of the countries regard trade agreements as providing the foundation of strategic alliances, and therefore forming part of security arrangements.<sup>42</sup> Less-developed countries view trade agreements with developed countries as their way of gaining more security for access to larger country markets.<sup>43</sup> Other countries' use of RTAs reflects strategic considerations and sensible efforts to use regional agreements to influence multilateral negotiation.<sup>44</sup>

### **2.2.6 Strengthening Domestic Policy Reform**

Here it is believed that a country's objective in joining/participating in a RTA branches from the impression that a regional trade treaty can support and make domestic policy reform more secure; that is, by binding the country to the masthead of an international trade treaty, future reversal of domestic policy reform can become challenging to be realised.

### **2.2.7 Increased Multilateral Bargaining Power**

Countries may also want to increase their bargaining power towards other countries, especially the developed countries, by negotiating a regional trade agreement with common external barriers.<sup>45</sup>

### **2.2.8 Multilateral and Regional Interplay**

A further objective of countries in deciding to join RTAs includes the possible usage of regional agreements for strategic determinations by countries looking for the achievement of their multilateral negotiating objectives.<sup>46</sup> This is because of the fact that the continuing multilateral negotiations can possibly be used to influence the outcome of regional negotiations in order to create the regional opportunities as well as the opportunities that may be beneficial to an individual country. This can be referred to as multilateral and regional interplay. The RTAs can also be joined for the guarantee of access.

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42 Whalley J 1996 <http://www.nber.org/chapters/c7820.pdf>.

43 Whalley J 1996 <http://www.nber.org/chapters/c7820.pdf>.

44 Whalley J 1996 <http://www.nber.org/chapters/c7820.pdf>.

45 See Whalley J 1996 <http://www.nber.org/chapters/c7820.pdf>.

46 Whalley J 1996 <http://www.nber.org/chapters/c7820.pdf>

## 2.2.9 Avoidance of Trade Wars

Tanzania has membership in the East African Community (EAC) and the SADC. Tanzania's President is of the view that customs unions that conflict could avoid trading wars by building lasting plans and common cross-border trade approaches seeking to standardise investment and trade policies.<sup>47</sup>

Gathii further argues that multi-memberships of RTAs reflect the reality of diversity among African countries and the complexity of their conflicting, overlapping, and sometimes congruent interests.

He aptly puts his argument as follows:<sup>48</sup>

Regionalism in Africa is often regarded as necessary to aggregate bargaining power to negotiate with powerful trading partners like the European Union. While this argument has much merit and ought not to be downplayed, it presumes that unity in regionalism can overcome the variety of ways in which African countries are divided. Indeed, presuming that African unity through regionalism is easily achievable is based upon "certain sociological, cultural and psychological affinities already identified" and "conceives of Africa's foreign policy as being singular and consensual." Further, such a view presumes that for Africa's voice to be heard in the world trade arena, it must be unified through "'externalisation' for continental integration as well as extra continental effectiveness." Yet while the hope of unity for these purposes would ideally serve Africa well, the search for African unity and regional integration has proven very daunting.

The argument above shows that African countries are willing to join as many RTAs as possible because the multi-membership reflects their diversity even when negotiating with European countries or any of their trading partners in the world and they do so as a group of countries in a trade agreement.

Afesorgbor and Bergeijk<sup>49</sup> are of the view that the benefits that RTAs offer to countries can consist of economic benefits, of economic spill-over from non-economic treaties and of non-economic benefits. These benefits will be discussed in more detail below.

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47 Ngenyeh *Regional Integration in Southern Africa* 21.

48 Gathii *African Regional Trade Agreements as Legal Regimes* 73; His argument is supported by Zartman who says: "The recognition of overlapping systems in interpreting foreign policy alternatives and possibilities for states with dual membership is both a more helpful and more realistic way of looking at foreign policies than is the attempt to force such states exclusively into one area or the other. See Zartman I. W. *Africa as a subordinate state in international relations.*" 581.

49 Afesorgbor and Bergeijk 2011 *Multi-membership and the effectiveness of regional trade agreements in Western and Southern Africa: A comparative study of ECOWAS and SADC.*

## 2.3 Economic benefits derived from RTAs

Afesorgbor and Bergeijk,<sup>50</sup> when referring to the economic benefits countries derive from RTAs, define the overlapping membership as a system of a hub and spokes.<sup>51</sup> In this case they say an single country is the hub and the other countries with which it has multi-membership of RTAs are the spokes. Therefore, through multi-membership of RTAs, the hub country is likely to lessen the likelihood of becoming the victim of trade discrimination from the spoke countries that are non-members of the original RTA of the hub country. It is therefore clear that a country cannot easily be discriminated against by other countries it shares membership of the RTA with. This means that the true products of member countries are treated in a similar manner as opposed to the products of those countries that are not members of the RTA. Customs duties may not be levied on the products of the member states. A country may therefore join as many RTAs as possible in order to enjoy this privilege.

For example, the COMESA gives extensive assistances and advantages for its member States, as well as the business community. It offers new industrial, production, investment, development and trade opportunities. No investor produces any goods without determining where and how to sell them. Therefore, the advantage, which the COMESA offers to governments, investors and producers, is the large market.<sup>52</sup>

The other trade-related benefit countries derive from the RTAs is normally with regard to that between landlocked countries and coastal countries. Some African countries are landlocked and most of the landlocked countries are members of the RTAs with the result that the RTAs tend to be beneficial to those landlocked countries. Yang and Gupta<sup>53</sup> argue that most of the African landlocked countries share membership of the RTAs together with their coastal neighbours and they also share the long-standing trade routes and the port facilities.

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50 Afesorgbor and Bergeijk 2011 *Multi-membership and the effectiveness of regional trade agreements in Western and Southern Africa: A comparative study of ECOWAS and SADC*.

51 See also Cheng X., Y. Wang and Y. Lui 2009 *Analysis on the Development and Influence of Overlapping Free Trade agreement*.

52 See Anon Date unknown <http://www.markedbyteachers.com/university-degree/business-and-administrative-studies/advantages-and-disadvantages-of-comesa.html>.

53 Yang and Gupta 2005 *Regional Trade Arrangements in Africa: Past Performance and the Way Forward*. IMF WP/05/36.

This means that membership of a RTA, which also has a coastal country as member can therefore connect the landlocked country to the ocean. The export or import of goods of these countries tends to be easier because of the relationship established through the RTA. Lesotho is a good example in this instance. Lesotho is surrounded by the Republic of South Africa and both Lesotho and South Africa are members of the SADC and the SACU. Most of the goods exported from or imported into Lesotho go through the ports of South Africa and this is made easier by the customs union they share as a result of the SADC and the SACU. This point is further emphasised by Gathii<sup>54</sup> who says that different RTAs provide benefits to their members over and above the reduction or removal of tariff barriers and the harmonisation of trade policies, such as customs policies. He gives an example of the international transportation of commodities through waterways in Africa that developed because the continent has the largest river basin in the world, and argues that:

Since waterways do not divert or conform to the signing and changing climate of trade arrangements, the use and rights of these waterways that span through multiple free trade areas requires cooperation between RTAs and offers an important reason for multiple trade bloc membership. Multiple trade bloc membership gives member countries access to aquatic trade routes that would otherwise be unavailable to them. This contributes to the diversification of agreements by landlocked countries, since transport costs limit competitiveness. As a result, Africa's landlocked countries and the coastal nations they border are members of the same RTAs, sharing ports and trade routes. Water basin states, in fact, often share membership in more than one RTA, and some RTAs overlap in the basins that they manage. African RTAs, therefore, serve as institutions of basin management demonstrating "the entwined relationships among trade, environment, and security aspects of international river basins". From this perspective RTAs are trade-plus institutions to the extent to which trade is linked to environmental issues as well as to security issues. In short, natural resource management and water cooperation on the one hand are interwoven with trade and security on the other.<sup>55</sup>

It is clear from the point made above that the landlocked countries benefit from the ports of the coastal countries. This is made easier by the relationship established through the membership of the RTA that the landlocked country and the coastal country share. Therefore this can motivate a landlocked country to enter into as many RTAs as possible with other coastal countries in order to enjoy this benefit.

According to Gathii, another chief benefit of multi-membership in RTAs is the capability to move law-making creativities from one international venue to another that offers different

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54 Gathii J.T. *African Trade Agreements as Legal Regimes*.

55 Gathii J.T. *African Trade Agreements as Legal Regimes* 67.

advantages. This is known as regime-shifting.<sup>56</sup> The argument he advances is that the presence of multiple, distinct regimes, any one of which may possibly serve as a site for future policy development, leaves significant possibility for manipulation by different clusters of states (or states and NGOs) seeking to maximise their interests. Countries therefore enter into regimes to reduce the transaction costs and information problems that plague uncoordinated state relations. An example that can be used to illustrate this point more fully in the African RTA context is that of the simultaneous RTA membership that Lesotho has in the SADC and SACU. There are benefits that accrue under the SADC that are not available under the SACU,<sup>57</sup> and there are also benefits available under the SACU that are unavailable under the SADC.<sup>58</sup> In short, there are things that Lesotho can better achieve in one regional arrangement than in another arrangement.<sup>59</sup>

From the above discussion it appears that multi-membership in RTAs offers countries flexibility and adaptability to member states since they can retain their sovereignty and accrue benefits from multiple regimes that are not available in sole membership.

## 2.4 Other benefits derived from RTAs

According to Novinson,<sup>60</sup> RTAs comprise procedures to resolve trade disputes. Countries conflict with one another over agricultural subsidies, dumping products at low prices, and currency manipulation. The trade agreement includes standardised arbitration rules and ensures that trade disputes are resolved according to consistent rules.

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56 Helfer, 'Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking', *Yale Journal of International Law* 29 (2004) 5, n. 17 (explaining that "the term international 'regime' refers to the principles, norms and rules governing a particular issue of international relations and the institutional structures and decision-making procedures through which they are developed...regimes are formed when the interests of states converge around certain shared objectives that can best be achieved through interstate cooperation". (This was quoted in Gathii's book on page 70).

57 Tariffs are relatively low within the SADC market but they are not totally eliminated within the member states as in the SACU.

58 Under the SACU Lesotho has pegged its currency, Loti, to the South African currency, Rand. In the SACU there are no tariffs or quotas on goods originating from within the customs union. Goods move freely from one country to another.

59 Gathii gives a further example to illustrate this point on page 70. He uses Kenya, which has membership in COMESA and the EAC as example. The COMESA allows Kenya to impose anti-dumping duties, as it has done in the case of sugar and wheat export, which Kenya has sought and obtained. It has been said that the EAC does not offer Kenya the same important possibility. The COMESA also offers a broader group of countries from which Kenya can defend itself against unfair trade practices than does the EAC. The EAC also provides a closer regional proximity with Kenya's immediate and near neighbours than does the expansive COMESA region that extends to Egypt in North Africa.

60 Novinson Date Unknown [http://www.ehow.com/list\\_6721244\\_advantages-regional-trade-agreements.html](http://www.ehow.com/list_6721244_advantages-regional-trade-agreements.html).

RTAs provide dispute remedies. A country, using trade practices that are harmful to a trading partner, can be legitimately penalised according to the rules of a trade agreement.<sup>61</sup> Regional economic integration adds to conflict reduction and good governance both at intra- and inter-state level. This can be seen in the SADC, which has established an organ on politics, defence and security.<sup>62</sup> This organ is influential in managing the conflicts within the SADC region. For instance, the SADC played a major part in safeguarding political stability in Lesotho in 1998.<sup>63</sup>

This point is further emphasised by Yang and Gupta who state that African arrangements, like RTAs in other parts of the world, also have several non-economic goals, of which the most important is the avoidance and resolution of conflicts.<sup>64</sup>

These authors rightly state the following:

"It is widely believed that close trade ties would make conflicts between countries economically more costly and hence less likely to happen. If conflicts do arise, the incentives for external intervention are stronger because the stakes are higher."<sup>65</sup>

Multi-membership may be a tool to minimise economic susceptibility to protectionist measures, to maximise economic spill-overs from other regional diplomatic arrangements that differ with respect to the non-economic issues that they cover and to maximise non-economic benefits in particular if geographic coverage is important.<sup>66</sup> In the context of economic spill-over from non-economic treaties, Afesorgbor and Bergeijk<sup>67</sup> state that trade agreements form part of a larger set of political international arrangements that breeds trust between nations. They further indicate that non-economic spill-over benefits may

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61 See Novinson Date Unknown [http://www.ehow.com/list\\_6721244\\_advantages-regional-trade-agreements.html](http://www.ehow.com/list_6721244_advantages-regional-trade-agreements.html).

62 In 1996, the SADC created the Organ on Politics, Defence and Security, an institutional framework for coordinating policies and activities on politics, defence, and security. However, the Organ operated without a legal framework and clear objectives until the SADC passed the Protocol on Politics, Defence and Security Co-operation on 14 August 2001. The protocol is available at <http://www.sadc.int/documents-publications/show/809>.

63 Quite recently on 30 August 2014, there was political unrest in Lesotho that led to the Lesotho Defence Force taking over all police stations in Maseru and the Courts within the capital city suspending their operations. The country's prime minister called the SADC peace-keeping troops to intervene. See <http://enca.com/thabane-calls-sadc-troops-lesotho>.

64 Yang and Gupta 2005 *Regional Trade Arrangements in Africa: Past Performance and the Way Forward*. IMF WP/05/36.

65 Yang and Gupta 2005 *Regional Trade Arrangements in Africa: Past Performance and the Way Forward*. IMF WP/05/36.

66 See Afesorgbor and Bergeijk 2011 *Multi-membership and the effectiveness of regional trade agreements in Western and Southern Africa: A comparative study of ECOWAS and SADC*.

67 Afesorgbor and Bergeijk 2011 *Multi-membership and the effectiveness of regional trade agreements in Western and Southern Africa: A comparative study of ECOWAS and SADC*.

sometimes develop in the area of peace economics and they also highlight that increasing bilateral trade decreases the tendency of escalation of conflicts among states.

Yang and Gupta<sup>68</sup> have stated that another major objective of African RTAs is to increase the regional negotiating power in multilateral and other environments for trade negotiations. They state that joint efforts would increase Africa's bargaining power as long as the African countries formed a common position, in terms of what concessions they seek from their trading partners as well as what they are willing to offer to them. It is stated that in most areas African countries seem not to have a collective position, such as greater market access in industrial countries.<sup>69</sup>

From the point made above, it is clear that it becomes easy for countries to negotiate with other countries or with international organisations when they enter into such negotiations as a group of countries rather than when a single country negotiates. Negotiating as a group formed from the RTA is therefore easier for countries. They can negotiate for donations, trade barriers or anything that may be considered beneficial for the region or continent as a whole.

## **2.5 The features, aims and objectives of the SADC and COMESA**

Having discussed the benefits and objectives of RTAs in general, it is important to look at two of the most prominent RTAs in eastern and southern Africa, namely the SADC and COMESA. This is undertaken in order to evaluate whether they have any characteristic features that may influence countries to acquire membership of both of them at the same time, or to choose between the two.

### **2.5.1 SADC**

The SADC member-states are an especially heterogeneous group and as a result the development of trade in the SADC region faces so many challenges and restraints. Unequal levels of economic integration, differences in the region and overlapping membership are some of the biggest constraints.<sup>70</sup>

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68 Yang and Gupta 2005 *Regional Trade Arrangements in Africa: Past Performance and the Way Forward*. IMF WP/05/36.

69 Yang and Gupta 2005 *Regional Trade Arrangements in Africa: Past Performance and the Way Forward*. IMF WP/05/36.

70 Ngenyeh *Regional Integration in Southern Africa* 65.

The SADC has a number of objectives<sup>71</sup> and they are as follows:

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

The SADC works by way of protocols and it is stated that countries shall conclude such protocols as may be necessary in each area of co-operation, which shall state the objectives and scope of, and institutional mechanisms for, co-operation and integration.<sup>72</sup> It has a trade protocol, which aims, among other things, to protect the infant industries of member states and also makes provision for antidumping and safeguards measures. The other objective of the SADC trade protocol is to establish a Free Trade Area in the SADC region.

The trade protocol acknowledges that the Least Developed Countries, such as Lesotho, by virtue of their levels of development, should not be expected to enter into the same degree of tariff elimination commitments as developing and developed countries, which form part of the protocol. The countries, which have signed the trade protocol benefit from it. An example, which illustrates this, is article 4(1) of the trade protocol, which provides for the phased reduction and eventual elimination of import duties. It also prevents member states from applying any export duties on goods for export to other member states.<sup>73</sup>

In terms of article 7 of the same trade protocol member states shall not apply any new quantitative restrictions and shall phase out the prevailing limitations on the import of

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71 See article 5 of the SADC treaty available at [http://www.sadc.int/files/9113/5292/9434/SADC\\_Treaty.pdf](http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf).

72 See article 22 of the SADC treaty.

73 See article 5 (1) of the SADC trade protocol.

goods originating in member states. The protocol also provides that member states shall not apply any quantitative restrictions on exports to any member state.<sup>74</sup> Countries that are members of the SADC Trade Protocol are also obliged to accord, immediately and unconditionally, to goods traded within the SADC community, the same treatment as to goods produced nationally regarding all laws, regulations and requirements affecting their internal sale offering for sale, purchase, transportation, distribution or use.<sup>75</sup>

From the above provisions of the SADC Trade Protocol, as well as the objectives of the protocol and of the SADC agreement, it is seen that the SADC, through its different protocols, such as the trade protocol, tries to ensure that member states enjoy certain benefits, especially with regard to imports and exports of the member states.

It has been stated that the SADC Trade Protocol also provides for the settlement of disputes through diplomatic consultation, failing which the problem could be referred to a panel of trade experts appointed by the council of ministers responsible for trade matters. However, the conflicting and restricting rules of origin may increase administrative costs and thereby making it difficult for exporters to take advantage of the SADC preferences.<sup>76</sup> It has also been stated that the SADC aims to establish an SADC central bank and to prepare for a single SADC currency by 2016.<sup>77</sup>

The SADC Trade Protocol provides for trade simplification and harmonisation and cooperation with regard to customs documents and procedures. A sole customs declaration form has been adopted and an SADC certificate of origin is in place.

## **2.5.2 COMESA**

The COMESA is arguably the largest regional trade agreement in Africa. It comprises twenty member states, which constitutes nearly half of the total number of African countries.<sup>78</sup> The aims and objectives of COMESA are as follows:

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74 See article 8 of the SADC trade protocol.

75 See article 11 of the SADC trade protocol.

76 Khandelwal P. *COMESA and SADC: Prospects and Challenges for Regional Trade Integration*.

77 Khandelwal P. 2004 *COMESA and SADC: Prospects and Challenges for Regional Trade Integration*.

78 These are Angola, Burundi, Comoros, Democratic Republic of Congo (DRC), Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

- (a) to attain sustainable growth and development of the Member States by promoting a more balanced and harmonious development of its production and marketing structures;
- (b) to promote joint development in all fields of economic activity and the joint adoption of macro-economic policies and programmes to raise the standard of living of its peoples and to foster closer relations among its Member States;
- (c) to co-operate in the creation of an enabling environment for foreign, cross-border and domestic investment including the joint promotion of research and adaptation of science and technology for development;
- (d) to co-operate in the promotion of peace, security and stability among the Member States in order to enhance economic development in the region;
- (e) to co-operate in strengthening the relations between the Common Market and the rest of the world and the adoption of common positions in international fora; and
- (f) to contribute towards the establishment, progress and the realisation of the objectives of the African Economic Community.<sup>79</sup>

The COMESA agreement does not exclude products from the Free Trade Agreement (FTA). It does not provide for asymmetry of treatment between the least developed countries and developing country members. Like the SADC agreement, it calls for the liberalisation of services but in a mostly advanced provision. The COMESA treaty contains provision for the establishment of a court of justice to serve as a dispute settlement mechanism. It also allows safeguards in the form of exceptional temporary restrictions for balance of payment reasons.<sup>80</sup>

One of the important aims of COMESA is to support the process of regional economic integration in order to help its members to achieve sustainable economic growth. The COMESA secretariat therefore focuses on encouraging member states expand development of their production and marketing structures in order to increase trade among member states thus promoting local producers.<sup>81</sup>

COMESA has long term objectives including the establishment of a monetary union by 2025, harmonising taxation and business legislation, such as company laws, intellectual property rights and investment and competition policies.<sup>82</sup> Its more instant objectives include the creation of a common market with the associated free movement of goods,

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79 Article 3 of the Agreement establishing COMESA available at <http://biblioteca.clacso.edu.ar/ar/libros/iss/pdfs/comesa/COMESATreaty.pdf>.

80 Khandelwal 2004 *COMESA and SADC: Prospects and Challenges for Regional Trade Integration* 38.

81 Ngenyeh 2009 *Regional Integration in Southern Africa* 41.

82 Khandelwal 2004 *COMESA and SADC: Prospects and Challenges for Regional Trade Integration* 38.

capital and labour, and it is also aiming for the liberalisation of services and harmonisation of standards.<sup>83</sup>

COMESA allows its member states to maintain trade arrangements with other regions that they had prior to signing the COMESA treaty as long as they do not frustrate the objectives of the treaty. Member states also have to extend those preferences to all other COMESA member states according to the Most Favoured Nation (MFN) principle.<sup>84</sup> Article 56 of the COMESA Treaty provides as follows:

The member States shall accord to one another the most favoured nation treatment.

Nothing in this Treaty shall prevent a Member State from maintaining or entering into new preferential agreements with third countries provided such agreements do not impede or frustrate the objectives of this Treaty and that any advantage, concession, privilege and favour granted to a third country under such agreements are extended to the Member States on a reciprocal basis.<sup>85</sup>

## 2.6 Conclusion

This chapter dealt with various possible reasons that encourage different African countries to join multiple RTAs at the same time. From the discussion it emerged that different RTAs offer different benefits to members. The various benefits offered by the RTAs to members may be possible reasons why the countries join multiple RTAs at the same time. This is because it has been stated by some authors<sup>86</sup> that multi-memberships in RTAs reflect the desire of countries to pick and choose various options and benefits that are offered by different competing RTAs. It has been stated that African RTAs are flexible in that they offer open-door membership to any country willing to join them. Because of the flexibility of African RTAs, countries may join as many RTAs as possible simultaneously in order to have access to all the benefits that are offered by different competing RTAs as Ngenyeh<sup>87</sup> said:

Due to the inequality in economic growth and development in most RTAs, some regional groupings do not last for long thus failing to achieve its objectives. As a result, it turns out to affect some economies negatively. This is especially true for economically weak countries and thus a strong incentive to belong to several blocks at the same time so that in cases where one RTA fails, it will be much easier for these

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83 Khandelwal 2004 *COMESA and SADC: Prospects and Challenges for Regional Trade Integration* 39.

84 Ngenyeh 2009 *Regional Integration in Southern Africa* 43.

85 Article 28 of the SADC trade protocol is similar to article 56 of COMESA.

86 See Gathii J.T. *African Trade Agreements as Legal Regimes* 2.

87 Ngenyeh 2009 *Regional Integration in Southern Africa* 22.

economies to shift their membership to the next RTA that is performing relatively well. In cases where a weak economy is partner to just one RTA, if this RTA fails to attain its objectives, it will be difficult in the short run for member states to become member to another RTA to benefit from lower tariffs. Thus, they can take advantage of the gains from each block. Some countries would deliberately seek membership to a number of RTA's with the hope of maximizing the advantages and benefits of integration and minimizing losses by spreading risks. For example, if one RTA fails to achieve its goals and collapse, the country that is involved in more than one RTA will eventually maintain its membership in the other trade blocks thus minimising the risk of export tariffs.

It can therefore be concluded that the benefits offered by RTAs, as well as the flexibility of RTAs in giving countries membership, are the reason for multi-membership of countries in the RTAs. The chapter also discussed some features of the two most prominent RTAs in Africa, namely the SADC and COMESA. The intention of discussing the features of these two RTAs was to determine if they have any features that may possibly attract countries to join them. The discussion of both COMESA and the SADC revealed that they both have provisions in their treaties allowing countries to maintain any agreements they had before joining them as long as they still respect their obligations in them.<sup>88</sup>

Having discussed the possible reasons that may have led to the overlapping or multiple memberships of countries in RTAs, the next step will be to discuss the problems that may be brought about by the overlapping membership. The next chapter will discuss the problems and challenges faced by countries, which have membership in multiple RTAs.

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88 See Article 56 of the COMESA treaty and article 28 of the SADC Trade Protocol.

## Chapter 3 Challenges/Problems of overlapping membership in RTAs

### 3.1 Introduction

The occurrence of overlapping membership in several RTAs is a reflection of the large number of bilateral agreements and RTAs in Africa. This phenomenon has been referred to as the "spaghetti bowl".<sup>89</sup>

There are fifteen members in the SADC and of these eight members are also members of COMESA.<sup>90</sup> Some SADC members have withdrawn<sup>91</sup> from COMESA, namely Lesotho (1997), Tanzania (1999), and Namibia (2004), but before the withdrawal of these countries there was a big overlap between the two RTAs. Likewise Angola withdrew its membership in COMESA citing duplication with its membership of the SADC. Rwanda withdrew its membership from ECOWAS and cancelled joining the SADC, both countries wanted to reinforce membership in COMESA and the EAC.<sup>92</sup> Countries are overlapping their membership because of the tariff rates and the rules of origin. However, the overlaps between the SADC and COMESA, although not unmanageable, create uncertainty regarding which tariff rates and rules of origin should be applied to trade between two countries that belong to both COMESA and the SADC.<sup>93</sup>

Wolfe<sup>94</sup> states that although it has been suggested that COMESA and the SADC would be better off if they were to merge, it has proven politically very sensitive. This, he says, is so because efforts have been made to coordinate the work of the two organisations in order

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89 Bhagwati (J. Bhagwati, 'U.S. Trade Policy: The Infatuation with Free Trade Areas', in J. Bhagwati and A.O. Krueger (eds), *The Dangerous Drift to Preferential Trade Agreements* (Washington, DC: AEI Press, 1995) 2. says "the 'spaghetti bowl' phenomenon results when countries and intergovernmental organizations enter into multiple criss-crossing, instead of participating in multilateral trade"; Afesorbor and Bergeijk have stated that "the 'spaghetti bowl' of African RTAs creates red tape and inconsistencies that actually hamper intra-regional trade." See [www.econstor.eu/bitstream/10419/48295/1/1\\_afesorbor.pdf](http://www.econstor.eu/bitstream/10419/48295/1/1_afesorbor.pdf).

90 The phenomenon of multiple memberships is particularly true of trade blocks in Southern Africa. For example, the DRC, Malawi, Angola, Madagascar, Mauritius, Swaziland, Zambia and Zimbabwe are members of SADC, but also full members of COMESA; See Ngenyeh *Regional Integration in Southern Africa* iv.

91 It has been stated that "since the initial signing of the COMESA Treaty in 1993, there have been several changes to COMESA membership. In 1994 the community gained five new members: Angola, Lesotho, Mozambique, Namibia, and Tanzania. Three years later, in 1997, Lesotho and Mozambique withdrew their membership from COMESA. On January 6, 1999, Egypt joined COMESA. Tanzania quit COMESA on September 2, 2001. Over the next decade, Seychelles (2001) and Libya (2005) joined COMESA; Namibia quit during 2004; and Angola suspended itself from membership during 2007. Today the community has 19 member states" See Anon 2014 <http://globaleedge.msu.edu/trade-blocs/comesa/history>.

92 Braude Wolfe 2008 *SADC, COMESA, and EAC: Conflicting Regional and Trade Agendas*.

93 Braude Wolfe 2008 *SADC, COMESA, and EAC: Conflicting Regional and Trade Agendas*.

94 Braude Wolfe 2008 *SADC, COMESA, and EAC: Conflicting Regional and Trade Agendas*.

to prevent duplication of or conflict between the programmes, projects and activities. The integration of these organisations can be profitable since the two organisations have already been cooperating on a number of fronts since 2001, namely trade analysis, capacity building, negotiations, transport issues, international relations, and preparations for negotiations with the European Union and the WTO.

In the rest of this chapter the focus will be on the possible problems that countries face or are likely to face as a result of joining multiple RTAs at the same time. The focus is on the criticisms that have been levelled by different writers on RTAs in general. The chapter will discuss the legal problems that arise or that are likely to arise when a country has multi-membership in RTAs. The criticisms or problems relating to costs will also be discussed, as well as other possible problems relating to multi-membership. There will also be a discussion on the implications for African RTAs. Finally, there will be a brief conclusion to the chapter that will be based on the discussions made throughout the whole chapter.

### **3.2 Criticisms/Problems of Multi-membership in African RTAs**

According to Gathii, the criticisms of multi-membership in RTAs can be divided into two main categories. The first category relates to the fact that multiplicity of membership in RTAs is a reflection of the proliferation of RTAs in creating the spaghetti bowl<sup>95</sup>.

The second category of criticisms relates to the high transaction costs and administrative difficulties of complying with multiple Rules of Origin.<sup>96</sup> Multi-membership also prevents African governments from focusing on a single regional economic bloc and lessening the little trade capacity and budgets of these countries. It also causes jurisdictional uncertainties as a result of overlapping legal regimes. These criticisms and related issues will be discussed in more detail throughout this chapter.

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95 Gathii J. T. *African Regional Trade Agreements as Legal Regimes* 76.

96 Gathii says that “the Rules of Origin specify when a product will qualify for duty-free movement within the RTA, and what proportion of value must be added if it originates within the trade bloc, or whether it is required that a product undergo a substantial transformation in a country before being allowed to cross the border duty free”; Paul Brenton (<http://siteresources.worldbank.org/INTRANETTRADE/Resources/C8.pdf>) also states that “the preferential rules of origin are applied by countries that offer certain trade partners zero-duty or reduced-duty access for their imports as a means of determining the eligibility of products to receive such preferential access. These rules of origin are required to prevent trade deflection or simple transshipment, whereby products from non-preferred countries are redirected through a free trade partner to avoid the payment of customs duties. They are meant to ensure that only goods originating in participating countries enjoy duty preferences.”

### 3.3 Problems/criticisms relating to costs

Gathii<sup>97</sup> has argued that multi-membership increases the transaction costs, as well as the administration difficulties of complying with multiple rules of origin.<sup>98</sup> He argues that multi-membership saps the little trade capability and budgets of African governments from concentrating on a single regional trade agreement.

Gathii also states that one of the characteristic features of a customs union is that all the countries adopt one Common External Tariff.<sup>99</sup> He argues that this raises a major concern regarding the loss of revenue for countries that enjoy monies through their various trade interests. He points out that the funds that the countries previously collected through their own means and agreements are diminished when countries join a customs union because they will be subject to one Common External Tariff.

Lesotho, for instance, is a member of the SACU and as such it does not pay tariffs to export goods to other SACU members. The South African rand can be used interchangeably with the loti, the Lesotho currency. The loti is pegged to the South African rand. Lesotho is also a member of the SADC Free Trade Agreement (FTA) that became effective in August 2008 eliminating tariff and non-tariff barriers to trade between the SADC member states.<sup>100</sup>

The above paragraph supports what was said earlier concerning the fact that countries derive certain benefits from being members of many different RTAs.

As stated previously, one of the reasons attracting countries to join RTAs is the fact the trade is simplified amongst members of the RTAs due to the fact that goods of countries belonging to one RTA are normally transferred to other member states free of any customs duties.<sup>101</sup> This benefit that member states offer to one another has been subject to many

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97 Gathii J. T. *African Regional Trade Agreements as Legal Regimes* 79.

98 Here Gathii has quoted W.M. Choi 'Defragmenting Fragmented Rules of Origin of RTAs: A Building Block to Global Free Trade', *Journal of International Economic Law* 13 (2010) 111, 115 (who argues that "the Rules of Origin tend to discriminate, especially against small poor developing countries, and that they act like tariffs on intermediate products levied by the country importing the final good."); See also Padamja Khandelwal who states that "negotiating resources and capacity have been stretched thin across the region."

99 Gathii J. T. *African Regional Trade Agreements as Legal Regimes* 79.

100 Anon 2012 <http://www.photos.state.gov/libraries/lesotho/740351/tsiamest/Lesotho%20Country%20Commercial%20Guide%20docx.pdf>.

101 The simple example of this point is the fact that both Lesotho and South Africa are members of SADC. The aim of the SADC Trade Protocol is to reduce trade barriers to regional trade and liberalise the conditions of regional competition, one of the ways in which to avoid levying customs

criticisms. Gathii has stated that eliminating tariffs between member countries in a regional grouping leaves each country worse off. This will therefore result in the welfare gain being less than the revenue lost by the elimination of tariffs.

Afesorgbor and Bergeik made the following point regarding the overlapping memberships in RTAs:

Overlapping memberships undermine the effectiveness of African RTAs...the overlap among regional economic communities also adds to the burdens of member states. A country belonging to two or more regional economic communities not only faces multiple financial obligations, but must cope with different meetings, policy decisions, instruments, procedures, and schedules. Customs officials have to deal with different tariff reduction rates, rules of origin, trade documentation, and statistical nomenclatures. The range of requirements multiplies customs procedures and paperwork, counter to trade liberalisation's goals of facilitating and simplifying trade.<sup>102</sup>

They also pointed out that multi-membership may be hindering the full potential of these regional blocs in inspiring intra-regional trade. They further state that differences in the rules of origin may undermine the effectiveness of the RTAs by creating considerable red tape and inconsistencies.<sup>103</sup> In addition, overlapping and multi-memberships may undercut the member states' consistent commitment, which is a necessary condition for the success of any RTA.

RTAs in Africa have also been criticised for being ineffective in stimulating trade as well as the foreign direct investment (FDI). Yang and Gupta<sup>104</sup> have argued that somewhat high external trade barriers and low resource complementarity between member countries hinder both intra- and extra-regional trade. Their argument is that small market size, poor transport facilities and high trading costs make it tough for African countries to acquire the potential benefits of RTAs.

Finally, Gathii, in line with Bhagwati and Panagariya's argument, refutes certain arguments that are usually advocated in favour of the RTAs, namely that the reduced transportation costs are a basis for the formation of RTAs, and that a high volume of trade resulting from

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duties on the goods of member states. It is, however, stated that the trade protocol allows SADC member states to adopt measures that restrict trade if the purpose of the restriction is to protect the infant industries within a country. In such circumstances a country is allowed to levy duties, such as the anti-dumping duties, in terms of article 18 of the Trade Protocol and the countervailing duties to offset the effects of subsidies in terms of article 19 of the SADC Trade Protocol.

102 Afesorgbor and Bergeik also discuss the definition of trade diversion and how it occurs, as well as its side effects. See [http://econstor.eu/bitstream/10419/48295/1/1\\_afesorgbor.pdf](http://econstor.eu/bitstream/10419/48295/1/1_afesorgbor.pdf).

103 Afesorgbor SK and Bergeijk AG *Multi-membership and the effectiveness of regional trade agreements in Western and Southern Africa* 21.

104 Yang and Gupta 2005 [www.iadb.org/intal/intalcdi/PE/2010/06079.pdf](http://www.iadb.org/intal/intalcdi/PE/2010/06079.pdf).

a RTA is good for both trading partners.<sup>105</sup> Their argument is that it is unlikely that a high initial volume of trade will offset any form of trade diversion caused by two states that enter into a RTA. They argue that this is quite unlikely because elasticity of production is the main determination of the amount of trade diversion, and not the volume of trade. They point out that in countries with defective substitutes, a gradual reduction in tariffs leads to an eventual loss of welfare by each of the countries even though each state is specialised in the production for a particular product.<sup>106</sup>

### 3.4 Problems relating to the Rules of Origin

Gathii argues that multiple Rules of Origin have to be applied at the same time when a country has multi-membership in RTAs.<sup>107</sup> According to his argument, the Rules of Origin stipulate when a product will qualify for tax-free movement within the RTA, and what value has to be added if it originates within the trade agreement, or whether it is required that a product undergo a substantial transformation in a country before being allowed to cross the border without any duties imposed. He further argues that knowing which Rule of Origin to abide by depends on where merchandises originate, and for countries involved in multiple RTAs, this certainly delays customs clearance process and transactions making them more complex.

According to Ngenyeh,<sup>108</sup> the rules of origin are an important part of any RTA. They are the criteria used to determine the nationality of a product, and they are a main factor decisive whether RTAs are able to achieve their objectives.<sup>109</sup>

Ngenyeh describes the nature of the rules of origin as conflicting and overlapping, thereby making multiple membership in the trade agreements conflicting.<sup>110</sup> As an example he refers to COMESA whose rules of origin are based on the content of the value added to it, and requiring that domestic materials comprise no less than 35% of the final goods for the product to be considered as local and therefore qualified for the preferential tariffs.<sup>111</sup> On the other hand, he says that SADC rules of origin are based on the different sectors of production and include specific requirements for different sectors and products.<sup>112</sup>

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105 Gathii J. T. *African Regional Trade Agreements as Legal Regimes* 78; see also Bhagwati *World Trading System* 1130 (As cited by Gathii).

106 See Gathii J. T. *African Regional Trade Agreements as Legal Regimes* 78.

107 Gathii J. T. *African Regional Trade Agreements as Legal Regimes* 80.

108 Ngenyeh *Regional Integration in Southern Africa* 39.

109 Ngenyeh *Regional Integration in Southern Africa* 39.

110 Ngenyeh *Regional Integration in Southern Africa* 39.

111 Ngenyeh *Regional Integration in Southern Africa* 39.

112 Ngenyeh *Regional Integration in Southern Africa* 39.

Ngenyeh further states that the complex and restrictive rules of origin can hinder trade depending on how stringently the rules are applied.<sup>113</sup> He says that in the SADC the rules are applied mostly to products that are facing steep competition in the world market for commodities, such as garments, textiles and flour and those traders in the region need to comply with the different rules of origin and will have to incur costs of complying with the certification requirements.<sup>114</sup>

### 3.5 Other problems/criticisms

Regarding South Africa, it is not easy administratively to separate goods originating in South Africa from those originating in the rest of the SACU.<sup>115</sup>

Brown<sup>116</sup> has outlined some of the general problems that are faced by different RTAs. From the problems he outlined, it is obvious that a country that has multi-membership of the RTAs will face even more problems. He argues that RTAs face the risk of escalating tensions and hampering development. His argument is based on the fact that RTAs can be divisive and exclusive, and their terms can embed regional tensions and power imbalances. He says trade agreements can exert powerful leverage on the political stability of the economically weaker partner, and this is especially the case when negotiated between countries of different economic muscle.

When a country is involved in more RTAs, there is a higher possibility that the cost of shipping goods would increase to offset the need for increases in administrative supervision necessary to keep track of proper origin documentation and procedures. This may in turn have the effect of producers turning to other countries not involved in multiple RTAs, or to those requiring less complex procedures.<sup>117</sup>

It was stated earlier that one of the reasons attracting countries to join different RTAs at the same time is the fact that the countries derive different benefits from membership of multiple RTAs. One of the benefits that was mentioned was the fact that products of member states are given preference over the products of the non-member states. This has, however, been regarded as a stumbling block rather than a building block for the

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113 Ngenyeh *Regional Integration in Southern Africa* 40.

114 Ngenyeh *Regional Integration in Southern Africa* 40.

115 Padamja Khandelwal 2004 *IMF Working Paper, Policy Development and Review Department COMESA and SADC. Prospects and Challenges for Regional Trade Integration.*

116 Brown O. et al October 2005 [www.iisd.org/pdf/2005/security\\_rta\\_conflict.pdf](http://www.iisd.org/pdf/2005/security_rta_conflict.pdf).

117 See Gathii J. T. *African Regional Trade Agreements as Legal Regimes* 80.

multilateral trade regime. For instance, Bhagwati<sup>118</sup> has argued that these arrangements have biased consequences for trade creation. As an example he mentions that one product is treated differently depending on its country of origin. This, he said, is caused by the fact that members of a preferential trade agreement treat their members better than they would non-members, even if the same product from the non-members was produced at a lower cost.<sup>119</sup>

The argument that he poses together with Gathii<sup>120</sup> is that in multiple bilateral agreements and RTAs weaken the goal of non-discriminatory international trade under the umbrella of the GATT/WTO framework. The argument they put forward is that this happens because they create the Rules of Origin that discriminate across products and countries.

The point that that these writers make is as follows:

The ten-year assessment of the WTO, referred to as the Sutherland Report, regretted the lack of harmonization produced by the complex web of inconsistent RoOs in multiple RTAs which in turn increased transactions costs for business and hampered trade flows. These complex webs of RoOs also counteract trade creation, as the ability of a partner country to undermine an inefficient domestic industry is reduced, since they have the effect of requiring a country bound by them to purchase inputs from less efficient sources. In effect, the trade preferences, which are extended under bilaterals and RTAs undermine the GATT/WTO rule that requires members to unconditionally extend any trade concessions made to one WTO member to all WTO member countries.

It was pointed out earlier that a country joins multiple RTAs at the same time because it reaps benefits from other member countries. It seems that it is not always the case that a country that enjoys benefits from being a member of many different RTAs is able to reciprocate and extend benefits to other countries as well. According to Gathii,<sup>121</sup> multi-membership in RTAs opens up the possibility that a country is at once a CU, as well as a member of an FTA. His argument is that such a country would be able to enjoy preferential tariffs from the Free Trade Area, but the problem is that it would not be able to reciprocate the preferential favour to the FTA. Gathii says the reason for this is that such a country has to uphold its CET in the CU and if the commodities are valuable enough, those in the FTA may deem the transactions to supersede the benefits of special tariffs that they are not able to enjoy.<sup>122</sup>

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118 Bhagwati, *The World Trading System at Risk*; see also Bhagwati, *et al.* Trading Preferentially: Theory and Policy, *The Economic Journal* 1138.

119 See Gathii J. T. *African Regional Trade Agreements as Legal Regimes* 76.

120 Gathii J. T. *African Regional Trade Agreements as Legal Regimes* 76.

121 Gathii J. T. *African Regional Trade Agreements as Legal Regimes* 80.

122 Gathii J. T. *African Regional Trade Agreements as Legal Regimes* 81.

Gathii uses the example of Swaziland, which is a member of the SACU, COMESA (both CUs), as well as the SADC, which is an FTA. He says Swaziland is a member of two CUs and an FTA. As a COMESA member, Swaziland gets free market access within COMESA, which has a fully developed FTA, but its duty-free importing beyond COMESA and the SACU is limited due to their CETs. Membership in the SACU and COMESA CET confines Swaziland's ability to extend more generous unilateral concessions to non-SACU and non-COMESA members, since this would undermine Swaziland's CET commitments. If Swaziland were to extend such autonomous concessions, say to SADC member countries who are neither SACU nor COMESA members, it would weaken these CUs and effectively downgrade them into FTAs. In such a situation the respective RoOs would apply, thereby effectively making Swaziland a transit country.<sup>123</sup>

In the previous chapter, it was argued that when countries join multiple RTAs good relations are established among members because the members of one RTA extend the trade benefits to one another, thereby promoting peace. This was said to be the advantage of RTAs for countries. Yang and Gupta<sup>124</sup> have a different opinion in this regard. The argument they make is that the close trade ties do not always reduce the risk of conflicts. According to them close trade ties can in fact worsen tensions between countries if they lead to uneven distribution of benefits and losses arising from RTAs.

### **3.6 Legal problems that arise**

It has been stated that most African countries have multiple commitments arising from different agreements, and the commitments are not always consistent.<sup>125</sup> It is stated that as long as the CETs are different, these countries would face the impossible task of implementing multiple tariff obligations. The point made is that in the case of FTAs, the implementation is also complex because of the different RoOs that these countries have to administer, and along with the administrative costs, these rules give customs officials more discretion and are consequently vulnerable to rent seeking by domestic interest groups.<sup>126</sup>

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123 Gathii J. T. *African Regional Trade Agreements as Legal Regimes* 82.

124 Yang and Gupta 2005 [www.iadb.org/intal/intalcdi/PE/2010/06079.pdf](http://www.iadb.org/intal/intalcdi/PE/2010/06079.pdf).

125 See Yang and Gupta 2005 [www.iadb.org/intal/intalcdi/PE/2010/06079.pdf](http://www.iadb.org/intal/intalcdi/PE/2010/06079.pdf).

126 See Yang and Gupta 2005 [www.iadb.org/intal/intalcdi/PE/2010/06079.pdf](http://www.iadb.org/intal/intalcdi/PE/2010/06079.pdf).

It is not easy for a country to apply two different common external tariffs and therefore cannot be a member of more than one CU from a legal perspective.<sup>127</sup> When a country becomes a member of more than one RTA it brings out, as can be seen currently, overlapping membership, which becomes impossible to maintain, for instance when COMESA and the SADC also become CUs in addition to the SADC and the EAC. The principal possibilities, which could arise are that the current and future CUs can emerge into one, thereby adopting a common external tariff resulting in members withdrawing their membership from overlapping groups<sup>128</sup>.

When a member of a CU or FTA negotiates individual trade agreements all the members have to bear the costs of administering several trade regimes with the same REC. This suggests maintaining border controls and applying rules of origin to prevent preferred trade from entering the countries that are not party to the legal bodies and mechanisms that will need to be set-up in each grouping and for each trade agreement such as dispute settlement mechanisms or a court. The legal basis and mandate of such institution has to be clearly defined if the overlap amongst the REC continues.

The legal analysis discloses that the treaties in respect of the SADC, the EAC and COMESA do not prevent members from maintaining prior trade arrangements or from entering into new ones. Instead the legal analysis shows that any preferences granted to a member state have to be stretched to all other member states according to the common custom territory principle. Therefore membership in different RTAs tends to absorb much needed human resources, institutional capacity and limited financial resources.<sup>129</sup>

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127 See Yang and Gupta 2005 [www.iadb.org/intal/intalcdi/PE/2010/06079.pdf](http://www.iadb.org/intal/intalcdi/PE/2010/06079.pdf).

128 Jakobeit C, Hartzenberg T, Charalambides N *et al* 2005 *Overlapping Membership in COMESA, EAC, SACU, SADC. Trade Options for the Region and EPA Negotiations* (Summary Findings) 4; See also Chiumya 2009 [http://www.worldcustomsjournal.org/media/wcj/2009/2/WCJ\\_V3N2\\_Chiumya\\_%28web%29.pdf](http://www.worldcustomsjournal.org/media/wcj/2009/2/WCJ_V3N2_Chiumya_%28web%29.pdf) who says: "One major consequence of the statistics relating to multiplicity (as cited in the UNECA and AUC report) has been the duplication of programmes amongst RECs. This has been most pronounced in programmes relating to trade and market integration, as well as trade facilitation, which are of direct relevance to customs administrations. In this situation, it is not unusual to find a given customs administration in Africa implementing more than one programme in the same area but under two or more RECs. A good example can be found in the area of rules of origin, where customs officers have to cope with and be conversant with more than two sets of rules of origin, each of which has its own tariff schedule and implementation period. This situation not only drains already scarce resources but may also affect the efficiency of trade administration."

129 Cord Jakobeit Trudi Nartzenberg 2005 Nick Charalambides *et al* 2005 *Overlapping Membership in COMESA, EAC, SACU, SADC. Trade Options for the Region and EPA Negotiations* (Summary Findings) 4.

The SACU, amongst all the RECs has not yet accepted common policies and trade regimes.<sup>130</sup> This creates tension and stretches the coordination and negotiation capacities of the RECs that are not yet equipped with the respective mandates or with the appropriate institution capacities of a fully-fledged custom union.

Gathii<sup>131</sup> has stated that there is a fear that once a country joins a customs union, its trading policy cannot be changed without the approval of the other union members.

In line with this argument made by Gathii on the fact that a country cannot change its trading policies without the consent of other countries with which it shares membership of the RTA, the argument that can be made is that there is a strong possibility that such a country will end up losing part of its sovereignty because every time it changes its trading policies, it has to seek the consent of other countries.<sup>132</sup> This may, however, cause problems because a country can be compelled to change its policies because of many factors and circumstances that are only occurring in such a country and that may make it really necessary for changes to be effected. Therefore if other members of the RTA do not give their approval, it means there will be problems for such a country.

Gathii further states that legal uncertainties may also arise in cases where more than one trade arrangement applies to trade between two countries.<sup>133</sup> He argues that there may be disagreements regarding which RTA has appropriate jurisdiction in cases where there is more than one dispute settler, which may hinder trade by increasing transaction costs, as well as causing doubt among the member countries.<sup>134</sup>

The point he makes is that difficulties may arise from countries participating in various RTAs, including the human and financial cost associated with membership, lack of harmonisation of policies regarding Rules of Origins, customs procedures and the changing political climate of RTAs or the countries themselves.

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130 Cord Jakobeit Trudi Nartzenberg 2005 Nick Charalambides *et al* 2005 *Overlapping Membership in COMESA, EAC, SACU, SADC. Trade Options for the Region and EPA Negotiations* (Summary Findings) 4.

131 Gathii J. T. *African Regional Trade Agreements as Legal Regimes* 79.

132 Gathii J.T. *African Trade Agreements as Legal Regimes* 79.

133 Gathii J.T. *African Trade Agreements as Legal Regimes* 79. See also Braude W. 2008. *SADC, COMESA AND THE EAC*.

134 Gathii quotes W. J. Davey and A. Separ, 'The Soft Drinks Case: The WTO and Regional Agreements', *World Trade Review* 8 (2009) 5, 15 when arguing that; "it would obviously be desirable from the perspective of avoiding duplication of proceedings and conservation of resources if there were agreements negotiated as to how to allocate jurisdiction over disputes in respect of international agreements covering subjects in a way that multiple dispute-settlement procedures might be expected to be invocable."

### 3.7 Implications for African Regional Trade Agreements

There is a further argument submitted by Gathii where he says that if the goal of trade liberalisation is to increase efficient production and therefore to lower the costs, then according to him, African RTAs seem to have stayed very far from this objective.<sup>135</sup> He argues that decreasing costs on each unit of trade created by entering into the next RTA does not appear to be the main inspiration for African countries that have multi-membership in RTAs. Instead he says that multi-memberships in RTAs have been motivated by historical circumstances, political and ideological thoughts, as well as strategic considerations, such as access to riparian waterways.<sup>136</sup> In this sense, he argues that trade diversion may very well have increased the magnitude of costs of production, further worsening the problems of trade liberalisation within the African continent.

Gathii goes on to say that African RTAs are not viewed by their member states as completely trade regimes.<sup>137</sup> He says they rather serve numerous objectives, such as frameworks for coordination of development projects as referred to more fully in Chapter 2. To the extent to which African RTAs are regarded as trade regimes, African countries have been most concerned with balancing gains and losses and guaranteeing that the poorest members are compensated for any losses they suffer as a result of liberalisation obligations.

Another point which Gathii makes is that external tariffs are still applied in a variety of African countries, while other countries have lower tariffs on the same merchandise.<sup>138</sup> He says that this results in product diversion between countries and effectively decreases the efficiency of RTAs as liberalising trade regimes in Africa. According to him, much of the current available data supports the notion that RTAs are either ineffective at inspiring inter-regional trade, or are at best, non-factors.<sup>139</sup>

He says that if RTAs are to work optimally in helping liberalising trade, more regional trade should be occurring and external trade should be increasing due to specialisation. He says that in 2004 and 2006 many African countries did not become involved in a great deal of

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135 Gathii J.T. *African Trade Agreements as Legal Regimes* 82.

136 Gathii J.T. *African Trade Agreements as Legal Regimes* 82.

137 On this point Gathii refers to a number of writers, such as Pravin Krishna and Jagdish Bhagwati who he says have argued that: "it is possible to pursue non-economic benefits within CUs and for the members to come out better off." See P. Krishna and J. Bhagwati, 'Necessarily Welfare Enhancing Customs Unions With Industrialisation Constraints: The Coopers-Massell-Johnson-Bhagwati Conjecture', *Japan and the World Economy* 9 (1997) 441.

138 Gathii J.T. *African Trade Agreements as Legal Regimes* 83.

139 Gathii J. T. *African Regional Trade Agreements as Legal Regimes* 83.

inter-regional trade. Gathii uses Swaziland, Togo and Zimbabwe as examples and says in that period those countries exported more than half of all exports to countries inside their regional groupings in the SADC, and that only five countries exported more than half of their exports to Africa generally.<sup>140</sup>

### **3.8 Conclusion**

This chapter dealt with the problems that arise due to multi-membership in regional trade agreements. The chapter focused on the problems that RTAs are faced with, such as the fact that the costs of maintaining membership in those RTAs are high, especially for the least developing countries, such as Lesotho. Members of RTAs also eliminate the tariffs amongst themselves and that affects the economies and income of some of the countries, such as Lesotho that relies heavily on the customs duties. The chapter dealt with those criticisms that are levelled against RTAs and the conclusion drawn is that, having regard to the criticisms and problems faced by different RTAs, the country that has acquired membership of many different RTAs faces even more problems because it has to abide by the rules of the different treaties of each and every agreement that it is a member to. As discussed earlier, legal uncertainties arise when there are conflicting rules.

Having discussed the problems, the criticisms, as well as the challenges faced by countries with multiple memberships in RTAs, the next step will be to look at the extent of the involvement of certain countries with overlapping membership of RTAs. Chapter 4 will be a case study of Lesotho and South Africa to determine the extent of their involvement in the regional trade agreements.

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140 Gathii J.T. *African Trade Agreements as Legal Regimes* 83.

## Chapter 4 The Position of Lesotho and South Africa in the RTAs

### 4.1 Introduction

The previous chapters dealt with the benefits normally derived by countries as a result of being members of RTAs, especially when they are members of multiple RTAs. Problems, as well as criticisms levelled against countries having multiple memberships were also discussed. This chapter, on the other hand, serves as a case study of South Africa and Lesotho. It aims to determine the extent of involvement of South Africa, as well as Lesotho in the RTAs. The main intention is to discuss the RTAs that Lesotho and South Africa are signatories to in order to find out whether they benefit from that overlapping membership. The focus will be on how trade, especially the import and export of goods of each of these two countries, is affected as a result of being members of the RTAs.

### 4.2 Lesotho's trade agreements

Lesotho has a number of trade agreements with different countries. Some of these agreements originate from the African continent while others are those it has entered into with countries from various parts of the world. For instance, it is a member of the SADC, which is a trade agreement based in Africa, it is also a member of the WTO<sup>141</sup> and party to the AGOA<sup>142</sup> which is an agreement that it entered into with the United States of America. These agreements will be discussed in detail in this chapter.

Lesotho became a member of the WTO on 31 May 1995. Through its small and very active, Mission in Geneva it participates fully in the Doha Development Agenda<sup>143</sup> and other aspects of the WTO negotiations.<sup>144</sup> Lesotho is considered as a least-developed country by the WTO and it is also a member of the Informal Group of Least-developed Countries, and of the African and Commonwealth groups in the WTO.<sup>145</sup>

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141 It has been stated that: "the World Trade Organization (WTO) is the only global international organisation dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations and ratified in their parliaments. The goal is to help producers of goods and services, exporters, and importers conduct their business." See [http://www.wto.org/english/thewto\\_e/whatis\\_e/whatis\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm).

142 *African Growth and Opportunities Act* 19 of 2000. This Act gives countries access to US markets for designated goods, especially textiles.

143 It has been stated that the aim of Doha Development Agenda is "to achieve major reform of the international trading system through the introduction of lower trade barriers and revised trade rules." See [http://www.wto.org/english/tratop\\_e/dda\\_e/dda\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/dda_e.htm).

144 Roos 2011 [http://www.paulroos.co.za/wp-content/blogs.dir/12/files/2011/uploads/Kingdom\\_of\\_Lesotho.pdf](http://www.paulroos.co.za/wp-content/blogs.dir/12/files/2011/uploads/Kingdom_of_Lesotho.pdf).

145 Roos 2011 [http://www.paulroos.co.za/wp-content/blogs.dir/12/files/2011/uploads/Kingdom\\_of\\_Lesotho.pdf](http://www.paulroos.co.za/wp-content/blogs.dir/12/files/2011/uploads/Kingdom_of_Lesotho.pdf).

Other than the WTO, Lesotho is a member of the SACU, the SADC, and the African Union, and also a party to the Cotonou Agreement governing relationships between the ACP (African, Caribbean and Pacific)<sup>146</sup> group and the European Union.<sup>147</sup> Within the SACU, Lesotho, Namibia, South Africa, and Swaziland (except Botswana) form the Common Monetary Area (CMA) under which the loti<sup>148</sup> is pegged and maintained at the same level as the South African rand,<sup>149</sup> which is allowed to circulate freely in Lesotho. The fact that Lesotho is a member of the SACU means that it is similarly affected directly by the free-trade agreement between South Africa and the European Union. Lesotho also benefits from preferential access to the markets of most developed countries under the Generalised System of Preferences (GSP).<sup>150</sup>

Lesotho is an active member of the SADC and is committed to the SADC regional integration process with access to a large market critical to the development of the economy and remains committed to the continuing regional integration processes, such as the SADC Trade Protocol.<sup>151</sup> It is stated that Lesotho also views the SADC as critical to the development of its economy. Lesotho does not have member in COMESA.<sup>152</sup>

Lesotho became the first of the BLNS<sup>153</sup> countries, the second SACU country (after South Africa) and the fifth of the 35 originally qualifying sub-Saharan African countries to qualify for the AGOA benefits.<sup>154</sup>

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146 The African, Caribbean and Pacific Group of States (ACP) has been defined as “an organisation created by the Georgetown Agreement in 1975. It is composed of 79 African, Caribbean and Pacific states, with all of them, save Cuba, signatories to the Cotonou Agreement, also known as the ‘ACP-EC Partnership Agreement’, which binds them to the European Union.” See <http://www.acp.int/content/secretariat-acp>.

147 SACU members participate in these trade blocs.

148 Loti is the Lesotho currency.

149 Rand is the South African currency.

150 Roos 2011 [http://www.paulroos.co.za/wp-content/blogs.dir/12/files/2011/uploads/Kingdom\\_of\\_Lesotho.pdf](http://www.paulroos.co.za/wp-content/blogs.dir/12/files/2011/uploads/Kingdom_of_Lesotho.pdf)

151 SADC Trade Protocol was signed on 1 August 1996 and came into force on 25 January 2001 in Maseru, Lesotho. The Protocol is available at <http://www.sadc.int/documents-publications/show/Protocol%20on%20Trade%20%281996%29>.

152 Roos 2011 [http://www.paulroos.co.za/wp-content/blogs.dir/12/files/2011/uploads/Kingdom\\_of\\_Lesotho.pdf](http://www.paulroos.co.za/wp-content/blogs.dir/12/files/2011/uploads/Kingdom_of_Lesotho.pdf).

153 BLNS comprises Botswana Lesotho Namibia and Swaziland.

154 Roos 2011 [http://www.paulroos.co.za/wp-content/blogs.dir/12/files/2011/uploads/Kingdom\\_of\\_Lesotho.pdf](http://www.paulroos.co.za/wp-content/blogs.dir/12/files/2011/uploads/Kingdom_of_Lesotho.pdf). ; See also Lesotho National Development Corporation online information. Available at: [www.lndc.org.ls/AGOAbenefits/agoabenefits.htm](http://www.lndc.org.ls/AGOAbenefits/agoabenefits.htm):

### 4.3 The benefits that Lesotho derives from the RTAs, as well as the benefits it extends to other countries in the RTAs

Lesotho's membership of the SADC, CMA<sup>155</sup> and the SACU, as well as related trade agreements, provides opportunities for addressing the constraints imposed by a small domestic market and for diversifying the country's export market.<sup>156</sup>

It has been stated that Lesotho will gain significantly from regional cooperation.<sup>157</sup> Despite the fact that Lesotho is a party to the SADC Free Trade Area and the SACU, there is little or no trade between Lesotho and the rest of the SADC or SACU countries other than South Africa, which is the main source of its imports.<sup>158</sup>

Lesotho's trade is dominated by the export of textiles and clothing to the USA, as well as the imports from the Republic of South Africa and therefore regional integration will play a critical role in Lesotho's long-term development.<sup>159</sup> It has been stated that the SADC region is important in that it offers an opportunity to create new markets and as a result it is suggested that Lesotho must take initiatives to foster regional economic integration to make the most of the advantages of its location.<sup>160</sup>

Over and above its preferential access to the EU market under the Cotonou Agreement, Lesotho, as a least developed country, also benefits from unilateral duty-free access to the EU market for "everything but arms" (EBA) under special commitments made by the EU in the WTO.<sup>161</sup> In view of its LDC<sup>162</sup> rank, Lesotho is considering the balance of its interests in the future Cotonou negotiations between allying itself to the South Africa-EU free-trade

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155 CMA is a Common Monetary Area within the SACU, which is formed by Lesotho, Namibia, South Africa, and Swaziland, whereby they have pegged their currency to the South African Rand. The South African rand circulates freely and is used interchangeably with the currencies of these countries.

156 African Development Bank Group Kingdom of Lesotho Country Strategy Paper 2013-2017 [www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf).

157 African Development Bank Group Kingdom of Lesotho Country Strategy Paper 2013-2017 [www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf).

158 African Development Bank Group Kingdom of Lesotho Country Strategy Paper 2013-2017 [www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf).

159 African Development Bank Group Kingdom of Lesotho Country Strategy Paper 2013-2017 [www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf).

160 See African Development Bank Group Kingdom of Lesotho Country Strategy Paper 2013-2017 [www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf).

161 *WTO document WT/COMTD/N/4/Add.2*, and WTO (2002).

162 Lesotho is considered an LDC (Least Developed Country) under the WTO.

agreement, simply relying on EBA conditions for the future, and concluding some other arrangement, possibly within the SADC.

The main benefits Lesotho gets from the AGOA are said to be in access to the US market for textiles and clothing.<sup>163</sup>

It has been said that some components of Lesotho's trade policies have changed since the last review of SACU in 1998.<sup>164</sup> However, Lesotho still maintains the SACU Common External Tariff, presently efficiently determined by South Africa.<sup>165</sup> In line with the revised provisions of the 2002 SACU Agreement, the joint SACU Tariff Board will, in future, regulate duty rates, including anti-dumping and countervailing duties. Lesotho does not yet set its own standards and uses South African standards in most cases, while health and sanitary regulations are based mainly on international practices.<sup>166</sup>

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- 163 It is stated that: “the textile and clothing industry has played a crucial role in Lesotho’s economic development. Its growth was stimulated in the 1990s by investment mainly from Taiwanese companies, which moved to Lesotho to take advantage of duty-free access of clothing originating in Africa, Caribbean and Pacific (ACP) countries to the EU under the ACP-EU agreement. It was substantially boosted following the designation of Lesotho by the USA as one of the AGOA eligible countries. Taking advantage of this opportunity, Lesotho’s textile and clothing industry achieved very rapid growth and the country became the largest single exporter of textiles and clothing to the USA in sub-Saharan Africa. However, following the elimination of the quotas with the phasing out of the Multi-Fiber Agreement (MFA), Lesotho began to face fierce competition from low cost and more efficient producers from China and the Far East. Even though the MFA expired in 2005, the impact started to be felt in 2008. The drop in Lesotho’s textile and clothing exports to the USA was exacerbated by the onset of the global economic crisis and investor concern regarding Lesotho’s duty free access to the USA under the AGOA beyond 2012, before it was extended to 2015. Exports reached a seven-year low in 2009. Following the relocation of a number of South African clothing firms to Lesotho, which has been driven mainly by labour market conditions in South Africa and duty-free market access to supply retailers in the South African market, exports to South Africa have been gradually increasing since 2006. According to the Lesotho National Development Corporation, more firms from South African would like to open plants in Lesotho but they are constrained by lack of factory shells and serviced manufacturing sites.” See African Development Bank Group Kingdom of Lesotho Country Strategy Paper 2013-2017 [www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf).
- 164 See African Development Bank Group Kingdom of Lesotho Country Strategy Paper 2013-2017 [www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf).
- 165 African Development Bank Group Kingdom of Lesotho Country Strategy Paper 2013-2017 [www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf).
- 166 See African Development Bank Group Kingdom of Lesotho Country Strategy Paper 2013-2017 [www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf).

Most of Lesotho's export policies are determined by external conditions, including market access to South Africa, the SADC, the United States, and the European Union.<sup>167</sup> As a way of complying with the provisions of the AGOA, Lesotho has offered new licensing and visa mechanisms for textiles and clothing.<sup>168</sup> The trade and cooperation agreement between South Africa and the European Union has also affected, and will continue to affect, Lesotho's import structure, by effectively granting preferences in the SACU to goods of EU origin, as well as reducing the tariff revenue available from the SACU revenue pool.<sup>169</sup>

Lesotho's imports and exports are regulated by the Export and Import Control Act of 1984, the Customs and Excise Act, 1982, and the Customs and Excise Regulations of 1984. The Export and Import Control Act of 1984 was revised in 1996 to transfer its administration from the Department of Customs of the Ministry of Finance to the Department of Trade of the Ministry of Trade, Industry and Marketing. These legal provisions are presently under review with a opinion to modernizing them in view of the 2002 SACU Agreement.<sup>170</sup> The 1984 Import and Export Control Act contains provisions, *inter alia*, regarding importation, exportation, and transit of goods; clearance and origin; anti-dumping and countervailing duties; rebates, refunds, and drawbacks of duty; and penal provisions.<sup>171</sup>

BLNS countries, including Lesotho, apply import duties and related measures set by South Africa under the 1969 SACU Agreement. In practice, applied customs tariffs, excise duties, valuation methods, origin rules, and contingency trade remedies are, thus far, the only trade policy measures harmonised all over the SACU.<sup>172</sup>

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167 African Development Bank Group Kingdom of Lesotho Country Strategy Paper 2013-2017 [www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf).

168 African Development Bank Group Kingdom of Lesotho Country Strategy Paper 2013-2017 [www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf).

169 African Development Bank Group Kingdom of Lesotho Country Strategy Paper 2013-2017 [www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf).

170 African Development Bank Group Kingdom of Lesotho Country Strategy Paper 2013-2017 [www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf).

171 See African Development Bank Group Kingdom of Lesotho Country Strategy Paper 2013-2017 [www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf).

172 African Development Bank Group Kingdom of Lesotho Country Strategy Paper 2013-2017 [www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf).

The anti-dumping and countervailing provisions contained in Lesotho's Customs and Excise Act<sup>173</sup> are similar to those of South Africa.<sup>174</sup> Lesotho has never independently applied anti-dumping or countervailing duties.<sup>175</sup>

Imports provided in the context of foreign aid to the Lesotho Government, or as part of technical assistance programmes, are excused from taxes.<sup>176</sup> There are provisions for duty reductions on goods imported for use by the Government. There are no other duty or tax concessions provided on imports beyond those granted by all SACU member states.<sup>177</sup>

It is further stated that under the AGOA conditions, Lesotho is regarded as a "lesser developed beneficiary country".<sup>178</sup> As a result, over and above the other preferential terms available under the AGOA, Lesotho receives tax-free access for clothing wholly assembled in Lesotho, irrespective of the country of origin of the fabric used.<sup>179</sup> This has been said to be a substantial advantage to Lesotho, which because of existing investment from South African and Asian sources, is well poised to take advantage of these provisions.<sup>180</sup>

It was argued in Chapter 2 that a country derives benefits from other countries with which it shares membership of the RTA. The position regarding Lesotho, however, seems to be that South Africa is the one country within the SADC region that Lesotho benefits mostly from as far as imports are concerned. This point is aptly summarised as follows below:

The commodity composition of Lesotho's imports does not exhibit a clear-cut pattern...Lesotho imports most of its food items from SA, while the share of imports from the SADC is small... Textiles, used as an input to the country's clothing industry,

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173 See Chapter VI of the Customs and Excise Act 10 of 1982 of Lesotho and Chapter VI of the South African Customs and Excise Act 91 of 1964.

174 See sections 54-57 of the 1982 Act.

175 African Development Bank Group Kingdom of Lesotho Country Strategy Paper 2013-2017 [www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf).

176 African Development Bank Group Kingdom of Lesotho Country Strategy Paper 2013-2017 [www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf).

177 African Development Bank Group Kingdom of Lesotho Country Strategy Paper 2013-2017 [www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf).

178 African Development Bank Group Kingdom of Lesotho Country Strategy Paper 2013-2017 [www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf).

179 African Development Bank Group Kingdom of Lesotho Country Strategy Paper 2013-2017 [www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf).

180 African Development Bank Group Kingdom of Lesotho Country Strategy Paper 2013-2017 [www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf).

form a significant portion of imports. Lesotho's imports of textiles from SADC include semi-finished products and cotton from Mozambique, Madagascar and Malawi, amongst others. Technological equipment is imported predominately from SA; no other SADC countries feature in this category. In general, there is very little trade between Lesotho and SADC; more significant trade occurs between Lesotho and SA...<sup>181</sup>

It was stated in previous chapters that having overlapping membership in RTAs can affect such a country in controlling its imports, as well as its exports. However, the Central Bank of Lesotho's annual report of 2003 shows that Lesotho's exports to the world increased expressively from 1999 to 2002. It is stated that this increase in exports is mostly due to the introduction of the AGOA, which provides Lesotho preferential market access to the US.<sup>182</sup> Imports have also been increasing, signifying increased production levels boosted by preferential market access accorded to Lesotho by the AGOA and other arrangements. The increase in imports is probably due to better imports of textiles, used as inputs into the production of clothing for the US market.<sup>183</sup>

#### 4.4 South African trade agreements

According to Khumalo, Mishi and Dlodlo, South Africa has a number of trade agreements in place and these include an FTA, which falls under the umbrellas of the Southern African Development Community (SADC) and a CU, which is the Southern African Customs Union (SACU).<sup>184</sup>

South Africa has entered into two free trade agreements, one with the SADC and the other with the EU.<sup>185</sup> South Africa acquires most of its imports from the developed world, and therefore has less choice in substituting sources of supply that are closer.<sup>186</sup>

South Africa also has international relationships with some developed countries. It has been stated that joining the BRICS<sup>187</sup> alliance is an important development in the recent

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181 Central Bank of Lesotho annual report 2003 [www.sadctrade.org/files/TPRLesotho.pdf](http://www.sadctrade.org/files/TPRLesotho.pdf).

182 African Development Bank Group Kingdom of Lesotho Country Strategy Paper 2013-2017 [www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017-Lesotho-Country-Strategy-Paper.pdf).

183 Central Bank of Lesotho annual report 2003 [www.sadctrade.org/files/TPRLesotho.pdf](http://www.sadctrade.org/files/TPRLesotho.pdf).

184 Khumalo Mishi and Dlodlo D 2013 [www.essa2013.org.za/fullpaper/essa2013\\_2678.pdf](http://www.essa2013.org.za/fullpaper/essa2013_2678.pdf).

185 Merle Holden and Landon McMillan Date Unknown available on line at [http://www.econrsa.org/system/files/publications/working\\_papers/wp19.pdf](http://www.econrsa.org/system/files/publications/working_papers/wp19.pdf).

186 Merle Holden and Landon McMillan Date Unknown available on line at [http://www.econrsa.org/system/files/publications/working\\_papers/wp19.pdf](http://www.econrsa.org/system/files/publications/working_papers/wp19.pdf).

187 BRICS is an international association of emerging economies comprising Brazil, Russia, India, China and South Africa. See National Development Planning Commission 2013 [www.npconline.co.za/MediaLib/Downloads/Home/Tab/NDP2013-CH7- Positioning South Africa in the world.pdf](http://www.npconline.co.za/MediaLib/Downloads/Home/Tab/NDP2013-CH7- Positioning South Africa in the world.pdf).

history of South Africa's international relations.<sup>188</sup> South Africa has been admitted as a full member of BRICS, which is an important opportunity for and acknowledgment of its role in the economically emerging African continent.

It is, however, said that South Africa's economy is smaller than that of the BRICS economies and that this has led to some sceptical of the country's membership.<sup>189</sup> However, it can play a important role in BRICS by helping to enable deeper integration of relations between African states and other BRICS member countries and by focusing on other advantages. The country has numerous powers that can be used when negotiating within BRICS as well as in broader global negotiations between BRICS and the world.<sup>190</sup>

#### 4.5 How South Africa benefits from RTAs

As it was stated earlier in this chapter, within the SADC region Lesotho relies heavily on South Africa for its imports. Lesotho also sells water to South Africa every month.<sup>191</sup>

Khumalo, Mishi and Dlodlo maintain that these RTAs have allowed South Africa to negotiate preferential agreements outside the scope of the MFN rule.<sup>192</sup> The argument that these writers make is that such agreements should therefore be more helpful to South Africa when compared to the benefits that arise out of the multilateral system. The main benefits, according to their argument, are an improvement in the welfare effects, arising mainly from reduced trade diversion and an increase in trade creation and the issues relating to simplicity of negotiations. In line with Gupta, they note that these benefits arise from first mover advantages and also from creating permanent markets.<sup>193</sup>

On the other hand, Holden and McMillan state that South African exporters have just benefited from preferential access into the United States under the African Growth and Opportunity Act (AGOA).<sup>194</sup> These writers say these agreements are fairly new events, for

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188 National Development Planning Commission 2013 [www.npconline.co.za/MediaLib/Downloads/Home/Tabs/NDP2013-CH7-PositioningSouthAfricaintheworld.pdf](http://www.npconline.co.za/MediaLib/Downloads/Home/Tabs/NDP2013-CH7-PositioningSouthAfricaintheworld.pdf).

189 National Development Planning Commission 2013 [www.npconline.co.za/MediaLib/Downloads/Home/Tabs/NDP2013-CH7-PositioningSouthAfricaintheworld.pdf](http://www.npconline.co.za/MediaLib/Downloads/Home/Tabs/NDP2013-CH7-PositioningSouthAfricaintheworld.pdf).

190 National Development Planning Commission 2013 [www.npconline.co.za/MediaLib/Downloads/Home/Tabs/NDP2013-CH7-PositioningSouthAfricaintheworld.pdf](http://www.npconline.co.za/MediaLib/Downloads/Home/Tabs/NDP2013-CH7-PositioningSouthAfricaintheworld.pdf).

191 Vusi Mashinini *The Lesotho Highlands Water Project and Sustainable Livelihoods* 1.

192 Khumalo M and Dlodlo D 2013 [www.essa2013.org.za/fullpaper/essa2013\\_2678.pdf](http://www.essa2013.org.za/fullpaper/essa2013_2678.pdf).

193 Khumalo M and Dlodlo D 2013 [www.essa2013.org.za/fullpaper/essa2013\\_2678.pdf](http://www.essa2013.org.za/fullpaper/essa2013_2678.pdf).

194 Merle Holden and Landon McMillan Date Unknown available on line at [http://www.econrsa.org/system/files/publications/working\\_papers/wp19.pdf](http://www.econrsa.org/system/files/publications/working_papers/wp19.pdf).

South Africa is also a member of the longest standing customs union in the world, viz. the SACU, consisting of South Africa, Botswana, Lesotho, Swaziland and Namibia.<sup>195</sup>

According to Edwards and Lawrence, South Africa's regional trade arrangements are extremely significant, mostly regarding its diversification strategy, since these are major export markets for its non-commodity manufactured goods and its services.<sup>196</sup> The SACU and the SADC Free Trade Area and the proposed new Tripartite FTA (TFTA) between the EAC, the Common Market for the SADC, all reflect this vital strategic interest. Edwards and Lawrence argue that South Africa has a strong interest in these groups for numerous reasons.<sup>197</sup> Firstly, to allow local firms to export goods and services; secondly, to support in South Africa's role as a hub for foreign firms seeking to enter African markets; and thirdly, deeper African integration can help Africans compete more efficiently in worldwide markets in ways that could provide opportunities for South Africans.<sup>198</sup>

Toward the goal of determining the importance of regional trade agreements, Khumalo, Mishi and Dlodlo assessed a gravity model of trade for South Africa.<sup>199</sup> From their analysis, they conclude that trade in South Africa increases with the size of the economy and that the dummy variables representing regional agreements, as well as WTO membership show that South Africa trades more with trading partners that are members of the WTO and with those that share a RTA with South Africa.<sup>200</sup>

On the other hand, Holden and McMillan claim that trade policy in South Africa has been determined in a multilateral setting under the umbrellas of the Uruguay Round and the WTO, and that the preferential trading agreements have also been followed as shown by the SADC Free Trade Agreement and the EU SA FTA.<sup>201</sup> Holden and McMillan argue that notwithstanding multilateral commitments, policy makers in South Africa continue to negotiate preferential agreements with countries as diverse as the United States, India,

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195 Merle Holden and Landon McMillan Date Unknown available on line at [http://www.econrsa.org/system/files/publications/working\\_papers/wp19.pdf](http://www.econrsa.org/system/files/publications/working_papers/wp19.pdf).

196 Lawrence Edwards & Robert Lawrence 2012 [http://www.saiia.org.za/doc\\_download/20-south-african-trade-policy-and-the-future-global-trading-environment.pdf](http://www.saiia.org.za/doc_download/20-south-african-trade-policy-and-the-future-global-trading-environment.pdf).

197 Lawrence Edwards & Robert Lawrence 2012 [http://www.saiia.org.za/doc\\_download/20-south-african-trade-policy-and-the-future-global-trading-environment.pdf](http://www.saiia.org.za/doc_download/20-south-african-trade-policy-and-the-future-global-trading-environment.pdf).

198 Lawrence Edwards & Robert Lawrence 2012 [http://www.saiia.org.za/doc\\_download/20-south-african-trade-policy-and-the-future-global-trading-environment.pdf](http://www.saiia.org.za/doc_download/20-south-african-trade-policy-and-the-future-global-trading-environment.pdf).

199 Khumalo M and Dlodlo D 2013 [www.essa2013.org.za/fullpaper/essa2013\\_2678.pdf](http://www.essa2013.org.za/fullpaper/essa2013_2678.pdf).

200 Khumalo Mishi and Dlodlo D 2013 [www.essa2013.org.za/fullpaper/essa2013\\_2678.pdf](http://www.essa2013.org.za/fullpaper/essa2013_2678.pdf).

201 Merle Holden and Landon McMillan Date Unknown available on line at [http://www.econrsa.org/system/files/publications/working\\_papers/wp19.pdf](http://www.econrsa.org/system/files/publications/working_papers/wp19.pdf).

Brazil and more recently China.<sup>202</sup> Their view is that whether these agreements will act as a substitute for the MFN trade policy remains to be seen but many economists view these developments with a degree of uncertainty given their potential for trade diversion, as well as trade creation.<sup>203</sup>

#### **4.6 Conclusion**

This chapter focused on the position of Lesotho and South Africa in the RTAs. It was a case study of the two countries, Lesotho and South Africa, on how they feature in what was discussed in previous chapters regarding the overlapping membership of the countries in the RTAs. The focus was not only on the African RTAs because these two countries, Lesotho and South Africa, over and above their membership in African RTAs, have also entered into other RTAs or trade relations with other countries from different parts of the world. It was seen from the discussion that Lesotho and South Africa have overlapping membership in the RTAs. Despite the criticisms generally levelled against multi-membership or overlapping membership in the RTAs, it was seen from the discussion that there are many benefits that these two countries derive from the RTAs and as different authors suggested and argued, there are many possible benefits that these countries are yet to gain from these trade agreements. The research also revealed that Lesotho and South Africa are not members of COMESA.

The previous chapters discussed the issues surrounding overlapping memberships in African regional trade agreements. The next chapter will analyse certain African RTAs and RTAs from other parts or regions of the world to determine whether their operations have similar features to those of Africa.

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202 Merle Holden and Landon McMillan Date Unknown available on line at [http://www.econrsa.org/system/files/publications/working\\_papers/wp19.pdf](http://www.econrsa.org/system/files/publications/working_papers/wp19.pdf).

203 Merle Holden and Landon McMillan Date Unknown available on line at [http://www.econrsa.org/system/files/publications/working\\_papers/wp19.pdf](http://www.econrsa.org/system/files/publications/working_papers/wp19.pdf).

## Chapter 5 Analysis of selected African RTAs and non-African RTAs

### 5.1 Introduction

It was argued in previous chapters that there are many RTAs in Africa and as a result African countries join most of these RTAs at the same time. The reason for this was said to be the flexibility of African RTAs, which offer an open-door membership to countries. The open-door membership offered gives rise to overlapping memberships that lead to a problem that was referred to as the 'spaghetti bowl'.<sup>204</sup> This chapter seeks to compare some African RTAs with some non-African RTAs, such as those of the North American Free Trade Area<sup>205</sup> and the Australian Free Trade Area.<sup>206</sup> The aim is to find out whether the characteristics that were mentioned in respect of African RTAs are also present in other RTAs that are not on the African continent, and the legal effect, if any, of those characteristics on the countries.

According to Gathii,<sup>207</sup> trade integration in Africa is seen with reference to the European Union<sup>208</sup> and other regional integration arrangements, such as NAFTA. He says that trade integration in Europe has been the result of of treaty obligations that also formed a supranational organisation to which states transferred certain types of authority. He says further that African RTAs contrast sharply with their European counterparts where there is higher commitment to obedience with legal obligations contained in the treaties that establish them. Gathii says that African RTAs have not solved the problems of coordination, collaboration or domestic politics that treaty regimes are argued to remedy. Against this background, the chapter will analyse the trade agreements in Africa, as well as those in other parts of the world.

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204 It has been stated that: "The 'spaghetti bowl' phenomenon results when countries and intergovernmental organisations enter into multiple criss-crossing, instead of participating in multilateral trade; Afesorgbor and Bergeijk have stated that the 'spaghetti bowl' of African RTAs creates red tape and inconsistencies that actually hamper intra-regional trade." see [www.econstor.eu/bitstream/10419/48295/1/1\\_afesorgbor.pdf](http://www.econstor.eu/bitstream/10419/48295/1/1_afesorgbor.pdf).

205 Hereinafter referred to as NAFTA.

206 Hereinafter referred to as AUSFTA.

207 Gathii *African Regional Trade Agreements as Legal Regimes* 1.

208 Herein after referred to as the EU.

## 5.2 Some prominent features of African RTAs

African RTAs have certain features that distinguish them from other trade agreements in the world. These features are explained in more detail below, together with various reasons why it is desirable for the RTA to have those features.

### 5.2.1 Flexible Legal Regimes

African RTAs have been described as flexible legal regimes.<sup>209</sup> Flexibility, according to Gathii,<sup>210</sup> refers to the following defining features of African RTAs: African RTAs are regarded as establishing flexible regimes of cooperation as opposed to comprising rules requiring scrupulous and rigorous adherence; as a central feature they incorporate the principle of variable geometry, accepting steps for meeting timetabled and other commitments; they adopt a broad array of social, economic and political objectives without giving salience to any set of objectives; they show a particular preference for functionally specific objectives to undertake separate projects and to help as environments for the integrated development of common resources, such as river basins that cut across national boundaries; they demonstrate a outstanding commitment to the equitable distribution of gains from trade and a corresponding weakness in the adoption of non-discrimination trade principles and the related objectives of trade liberalisation. Finally, African RTAs are characterised by many and overlapping membership.<sup>211</sup>

Seeing African RTAs as flexible regimes, according to Gathii, has the advantage of letting those RTAs to be understood on their own terms, rather than as treaty regimes on a path toward becoming much like European or North American counterparts, and in doing so it becomes possible to improved and more precisely understand the challenges that these RTAs have been intended to address and that have in turn shaped them.<sup>212</sup>

A few examples of African RTAs will be cited to illustrate some of the above-mentioned characteristics of African RTAs. The SADC is one of the African RTAs that achieves this flexibility through its laws that allow its member states to protect the infant industries from competition of goods that come either from SADC member states or SADC non-member

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209 See Gathii *African Regional Trade Agreements as Legal Regimes* 1, 2 & 3.

210 See Gathii *African Regional Trade Agreements as Legal Regimes* 2. On the feature of multiple membership of African RTAs see also Chiumya 2009 [http://www.worldcustomsjournal.org/media/wcj/2009/2/WCJ\\_V3N2\\_Chiumya\\_%28web%29.pdf](http://www.worldcustomsjournal.org/media/wcj/2009/2/WCJ_V3N2_Chiumya_%28web%29.pdf) who also states that “the Regional Economic Communities in Africa are characterised by a multiplicity of membership and as a result, there is a cross-membership of RTAs in Africa.”

211 See Gathii *African Regional Trade Agreements as Legal Regimes* 2.

212 See Gathii *African Regional Trade Agreements as Legal Regimes* 3.

states.<sup>213</sup> The SADC Trade Protocol<sup>214</sup> allows countries to effectively impose anti-dumping duties to protect their locally produced goods by levying duties on certain imported goods which in their opinion have been dumped<sup>215</sup> and also protect the infant industries<sup>216</sup> within the country.

Another area of flexibility regarding the SADC Trade Protocol is that it does not forbid its member states from continuing with any preferential trade agreements that existed before the trade protocol was signed. Member states are therefore at liberty to maintain other trade arrangements as long as this does not frustrate the main objective of the trade protocol.<sup>217</sup>

In this way, countries are free to control the imports by using their national laws to decide whether or not to levy import duties on certain goods which they believe may affect the newly established industries within their territories.

### 5.2.2 Less rigid rules

One other aspect of African RTAs, according to Gathii, is that they have focused less on building rigorously formal obligations backed up by sanctions, and more on building

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213 See *SADC Trade Protocol*.

214 SADC Trade Protocol was signed on 1 August 1996 and came into force on 25 January 2001, Maseru Lesotho. Available at [http://www.sadc.int/documents-publications/show/Protocol\\_on\\_Trade\\_1996.pdf](http://www.sadc.int/documents-publications/show/Protocol_on_Trade_1996.pdf).

215 *Article 18 of the 1996 SADC Trade Protocol*. Article 18 defines dumping as the sale of exported goods at a price that is lower than the price charged for those goods in the country of origin. Article 19 and article 21 also allow countries to impose countervailing duties to offset the effects of subsidised goods that are imported into their territory and also to protect newly established industries in their own territory; See also Section 26 of the 2002 SACU Agreement, which states that “the Governments of Botswana, Lesotho, Namibia or Swaziland may as a temporary measure levy additional duties on goods imported into their area to enable infant industries in their area to meet competition from other producers or manufacturers in the Common Customs Area, provided that such duties are levied equally on goods grown, produced or manufactured in other parts of the Common Customs Area and like products imported from outside that area, irrespective of whether the latter goods are imported directly or from the area of another Member State and subject to payment of the customs duties applicable to such goods on importation into the Common Customs Area.” See also article 51 and article 52 of the COMESA treaty, which also similarly afford member states options whether they levy anti-dumping duties or countervailing duties or not.

216 Infant industries are defined by the same section 26 of the SACU agreement as “an industry, which has been established in the area of a Member State for not more than eight (8) years, and the protection afforded to an infant industry shall be for a period of eight (8) years unless otherwise determined by Council.” The Council may in terms of the same section 26(4) “impose such further terms and conditions as it may deem necessary.”

217 Article 28 requires that “a country willing to maintain other agreements to apply the Most Favoured Nation (MFN) treatment to the other members of the trade protocol. If any SADC member gives trade preference to another country, whether that other country is a SADC member or not, that are more favourable than the preferences as negotiated in the liberalisation schedules of the trade protocol, such a country will have to extend those preferences to all other SADC member states.”

flexible frameworks of development, coordination and cooperation that gives countries their choice of activities that interest them most.<sup>218</sup> He says that African RTAs often adopt functionally specific objectives that do not fight away autonomy from national governments, given that it is not always clear if intra-regional trade would reward for the unavoidable erosion of their autonomy in policy-making.

This feature has much in common with that of flexibility that was discussed above. An example of this point is the Treaty for the establishment of COMESA,<sup>219</sup> which provides for a broad range of undertakings within the areas of trade liberalisation and customs cooperation, transport and communications, industry and energy, monetary affairs and finance, agriculture and economic and social development.<sup>220</sup>

Gathii<sup>221</sup> and Ravenhill<sup>222</sup> argue that the flexibility of institutions and instruments of cooperation is necessary in that it recognises that actors' interests do not remain constant and that it expects that there will be a ongoing quick turnover of governments in many countries, which may be accompanied by dramatic shifts in policy. Ravenhill says that since such transformations have often precipitated the collapse of regional institutions in the past, it is necessary that the framework of cooperation be insulated as much as possible from the sudden consequences of sudden withdrawal of a member state.<sup>223</sup> Ravenhill further argues that flexible arrangements increase the prospects for projects to be continued with a least amount of damage.<sup>224</sup>

If there was inflexibility in the way African RTAs operate it would make cooperation not simple along any axis as steps are taken towards increasing legality for broader forms of cooperation within the heterogeneous nature of African societies.<sup>225</sup> Rigidity can only contribute to entrenching resistance to the legitimacy of cooperative frameworks along any

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218 Gathii *African Regional Trade Agreements as Legal Regimes* 2.

219 Adopted on November 5, 1993 at Kampala and entered into force on December 8, 1994. Available at [http://www.comesa.int/attachments/article/28/COMESA\\_Treaty.pdf](http://www.comesa.int/attachments/article/28/COMESA_Treaty.pdf).

220 See article 4 of the COMESA Treaty; See also the Treaty for the establishment of the East African Community, Chapters 11-27, which provide for a broad range of undertakings in the areas of co-operation in trade liberalisation and development, co-operation in investment and industrial development, etc. The Treaty for the Establishment of the East African Community was signed on 30 November 1999 and entered into force on 7 July 2000. Available at <http://www.eac.int/treaty/>.

221 Gathii *African Regional Trade Agreements as Legal Regimes* 15.

222 Ravenhill "Future of Regionalism" 212 (as cited by Gathii); See also Gathii *African Regional Trade Agreements as Legal Regimes* 18 who argues that "flexibility of institutions is important given the diversity not only of the economies of individual members of the RTAs, but of differences based on their culture, geography, ethnicity, religion and political allegiances as well."

223 Ravenhill "Future of Regionalism" 212 (as cited by Gathii 17).

224 Ravenhill "Future of Regionalism" 212 (as cited by Gathii 17).

225 Gathii *African Regional Trade Agreements as Legal Regimes* 18.

of the lines of difference and asymmetry. Flexibility enmeshes well within the context of heterogeneity and diversity.<sup>226</sup>

### 5.3 Regional and Bilateral Trade Agreements outside Africa

No two RTAs are same in respect of all their characteristic features.<sup>227</sup> There is a great difference among them in terms of their features. These differences can be described in terms of the scope of the agreements with regard to the policies or measures that are included.<sup>228</sup> RTAs also differ in terms of the modalities that have been chosen to implement their policies.<sup>229</sup> With the above text in mind, and having looked at the features of African RTAs, this section will investigate the differences and/or similarities in operations and characteristics of different RTAs from different parts of the world.

Regional Trade Agreements in other parts of the world do not differ much from those on the African continent. There are some features available in African RTAs, which are also available in other RTAs outside those in Africa. As was mentioned earlier,<sup>230</sup> Gathii asserts that African RTAs contrast sharply with their counterparts in Europe, North America and some other parts of the world where there is a much higher commitment to compliance with legal obligations contained in the treaties establishing them.<sup>231</sup> This section will take a brief look at some of the RTAs from other continents to ascertain whether the features that were mentioned in connection with African RTAs can also be observed in the non-African RTAs. Some Regional Trade Agreements in Asia and America will be looked into.

#### 5.3.1 Open-door membership

It was mentioned earlier that African RTAs are characterised by multiple and overlapping membership, and that the multi-membership illustrates the flexibility or open-door membership that African RTAs offer. It would appear that this feature is not only inherent in African RTAs, but is also present in RTAs from other parts of the world. Tran Van Hoa aptly notes as follows regarding this point:

From an international commerce perspective these RTAs are exceptions, or flexibilities...it is interesting to note that, due perhaps to the need for inclusiveness and mutual gains, the vast majority of WTO members are also party to, or central players

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226 See Gathii *African Regional Trade Agreements as Legal Regimes* 18.

227 Lloyd P "Deep Integration in Regional Trading Agreements" 19.

228 Lloyd P "Deep Integration in Regional Trading Agreements" 19.

229 Lloyd P "Deep Integration in Regional Trading Agreements" 19.

230 See para 5.1.

231 Gathii *African Regional Trade Agreements as Legal Regimes* 1.

in, one or more RTAs giving rise to the so-called Bhagwati 'spaghetti' and 'spokes' concepts in the current RTA literature. In addition, it should be noted that as the evolution of RTAs progresses their growth has accelerated in the past decade...<sup>232</sup>

From the above paragraph, it is obvious that it is not only African countries that join different RTAs at the same time in order to have access to different benefits that different RTAs normally offer to member states. It is also obvious that as with African RTAs, which were reported to be growing at a fast rate, increase in the number of RTAs on the continent is also experienced in some other parts of the world.

### 5.3.2 Flexibility

Another feature that was mentioned about African RTAs is the fact that they are flexible in the sense that they allow their member states to sometimes use their domestic legislations to control their imports in an effort to protect newly established industries in their countries.<sup>233</sup> The NAFTA<sup>234</sup> is one of the RTAs that shows this element of flexibility by allowing its member states to use their domestic legislation to control their imports in order to afford protection to the new industries that are within their member states.<sup>235</sup>

### 5.3.3 Other agreements between individual members of the RTA

It is common in some RTAs for members to have certain agreements that are not part of or an amendment to the agreement establishing the RTA.<sup>236</sup> This practice is true of African RTAs, as well as RTAs in some other parts of the world. Member states reach a separate agreement on particular aspects, either before or after the agreement establishing the RTA was reached. Lloyd<sup>237</sup> states that many pairs of countries, which are members of RTAs have double taxation agreements outside the RTA. For example, there is an agreement between the government of the Republic of South Africa and the government of the Kingdom of Lesotho, who are both members of the SADC and the SACU, for the avoidance of double taxation and the prevention of fiscal evasion with regard to taxes on

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232 Tran Van Hoa "The WTO, Regional Trade Agreements and an Enlarged ASEAN" 9.

233 See for example *article 21 of the SADC Trade Protocol*.

234 On January 1, 1994, the NAFTA between the United States, Canada, and Mexico entered into force. Available at <http://www.sice.oas.org/trade/nafta/naftatce.asp>.

235 Example is Chapter 1902 of NAFTA, which provides that "each Party reserve the right to apply its antidumping law and countervailing duty law to goods imported from the territory of any other Party."

236 Lloyd P "Deep Integration in Regional Trading Agreements" 23.

237 Lloyd P "Deep Integration in Regional Trading Agreements" 24.

income.<sup>238</sup> The Agreement applies to persons who are residents of one or both of the contracting states, being Lesotho and South Africa.

Similarly, according to Professor Lloyd,<sup>239</sup> Australia and New Zealand have an arrangement that allows free movement of persons in the CER area but it precedes the CER Agreement and is not part of it. In May 2005 Australia and the USA reached an agreement under which the US will grant an additional Australia-specific category of visas for the temporary movement of business and professional persons to enable Australians to take full advantage of trade and investment links under AUSFTA.<sup>240</sup>

### 5.3.4 Rules of RTAs affecting the sovereignty of Member States/Economic Integration Rules

An aspect, which is common to all the RTAs, be they African or non-African RTAs, is the fact that the rules of these RTAs somehow affect the sovereignty of the member states. These are the rules that are intended to make trade free or simple for members of the same RTA. By virtue of being a member of a particular RTA, a country is subjected to certain restrictions when it comes to controlling its imports, as well as its exports. For instance, members of a particular RTA may be compelled by a treaty establishing that RTA to remove the barriers to trade, such as the tariffs for goods of the member states. This is the case with the SADC Trade Protocol, which acknowledges that Least Developed Countries, by virtue of their levels of development, should not be expected to enter into the same degree of tariff elimination commitments as developing and developed countries, which form part of the protocol.<sup>241</sup>

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238 Available at [http://www.lra.org.ls/Downloadable\\_Docs/Legislation/international\\_tax/Lesotho%20-%20Republic%20of%20South%20Africa%20DTA.pdf](http://www.lra.org.ls/Downloadable_Docs/Legislation/international_tax/Lesotho%20-%20Republic%20of%20South%20Africa%20DTA.pdf); See also Treaty on the Lesotho Highlands Water Project between the Government of the Kingdom of Lesotho and the Government of the Republic of South Africa signed at Maseru, 24 October 1986 available at <http://www.ecolex.org/ecolex/ledge/view/RecordDetails.jsessionid=A246497027947308922DD4A4BC97904B?id=TRE-152232&index=treaties>; and also Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Lesotho “relating to the Establishment of an Office for a Lesotho government Labour Representative in the Republic of South Africa, Lesotho Citizens in the Republic of South Africa and the Movement of such Persons across the International border”, available at <http://www.queensu.ca/samp/Treaties/Lesotho.htm>.

239 Lloyd P “*Deep Integration in Regional Trading Agreements*” 23.

240 This information was taken from: Lloyd P “*Deep Integration in Regional Trading Agreements*” 23.

241 There is more or less similar provision in the Treaty establishing COMESA. Article 46 thereof states “that The Member States shall reduce and ultimately eliminate...customs duties and other charges of equivalent effect imposed on or in connection with the importation of goods, which are eligible for Common Market tariff treatment”; See also article 18 of the SACU, which states that “goods grown, produced or manufactured in the Common Customs Area, on importation from the area of one Member State to the area of another Member State shall be free of customs duties and quantitative restrictions, except as provided elsewhere in the Agreement.” Article 19 further states that “a Member State shall not impose any duties on goods, which were imported from outside the Common Customs Area on importation of such goods from the area of any other Member State. Member States are also compelled to apply identical rebates, refunds or drawbacks of customs duty on

Another example of the RTA, which may effectively illustrate this point, is the SACU. SACU Member States have to apply the same tariffs for goods exported from outside the Common Customs Area. This is in terms of article 20 of the SACU, which provides in a nutshell that "the Council shall, on recommendation of the Tariff Board, approve customs duties to be applied to goods imported into the Common Customs Area from outside that Area". It can be seen from this article that a country is compelled to charge the same tariffs with other member states for the goods that it is importing. It does not have discretion to charge the amount it feels will be necessary in a particular case.

This seems to be the case even in other RTAs as Fergusson notes regarding the NAFTA:

The market opening provisions of the agreement gradually eliminated all tariffs and most non-tariff barriers on goods produced and traded within North America over a period of fifteen years after it entered into force. Some tariffs were eliminated immediately, while others were phased out in various schedules of five to fifteen years. US import-sensitive sectors, such as glassware, footwear, and ceramic tiles, received longer phase-out schedules. NAFTA provided the option of accelerating tariff reductions if the countries involved agreed. The agreement included safeguard provisions in which the importing country could increase tariffs, or impose quotas in some cases, on imports during a transition period if domestic producers faced serious injury as a result of increased imports from another NAFTA country.<sup>242</sup>

This can be defined as economic integration, which is defined by Lloyd<sup>243</sup> as:

The process of removing government measures, which discriminate against foreign suppliers of goods and providers of services and suppliers of factors. In the regional context the relevant foreign suppliers are those located in the other countries, which are members of some regional agreement. He says that two or more national economies in a region will be completely integrated if all measures that discriminate against regional suppliers are removed.

By lowering or eliminating tariffs among themselves, the RTA member countries can enjoy trade amongst them and thus increase their overall trade. But there are two possibilities in respect of this situation. There can either be trade creation or trade diversion. According to Kwentua,<sup>244</sup> "trade creation refers to a situation where two countries within the customs

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imported goods in terms of article 20 (2)." See Chiumya 2009 [http://www.worldcustomsjournal.org/media/wcj/2009/2/WCJ\\_V3N2\\_Chiumya\\_%28web%29.pdf](http://www.worldcustomsjournal.org/media/wcj/2009/2/WCJ_V3N2_Chiumya_%28web%29.pdf) who also states that "one effect of a regional trade agreement is the reduction of revenue due to lower rates or even a complete removal of customs duty. This is especially true in least developing countries (thirty-three of which are found in Africa), which lack adequate administrative capacity and an efficient domestic tax system that can compensate for lost revenue."

242 Fergusson I. F. 2014 <http://fas.org/sgp/crs/row/R42965.pdf>.

243 Lloyd P "Deep Integration in Regional Trading Agreements" 16.

244 Kwentua E. G. *Trade creation and trade diversion effects* 1; See also Chiumya 2009 [http://www.worldcustomsjournal.org/media/wcj/2009/2/WCJ\\_V3N2\\_Chiumya\\_%28web%29.pdf](http://www.worldcustomsjournal.org/media/wcj/2009/2/WCJ_V3N2_Chiumya_%28web%29.pdf) who says "a given RTA will be trade-creating if some domestic production in an RTA member is replaced by lower cost imports from another member. On the other hand, an RTA will be trade-diverting where

union begin to trade with each other, whereas formerly they produced the goods in question for themselves.” He says that in international trade terms trade creation means the countries go from autarchy (in these goods) to trading with zero tariffs, and they both gain.<sup>245</sup> Trade diversion, on the other hand, “occurs when two countries begin to trade within the union, but one of these countries had formerly imported the goods from outside the union.” The importing country formerly had the same tariffs on all other countries, but purchased from outside the union because the price was the lowest. After the union, the country switches its purchases from the lowest price to a higher priced country; in this case there is negative efficiency effect.

From the above paragraph it can be seen that due to the trade diversion resulting from the relative low price, some member countries can increase their imports on goods previously supplied by countries outside the RTA. In this way a country is somehow forced to change the trading relationships it had with other countries prior to joining the RTA. By being forced to increase prices because of trade diversion, it means the way in which a country controls its imports, as well as its exports is somehow affected. This may be more of a problem for a country that has entered into many of those commitments.

## 5.4 Conclusion

This chapter discussed some features of African RTAs compared to RTAs from other parts of the world. The discussion revealed that African RTAs are flexible legal regimes in the sense that they contain rules that do not require scrupulous and rigorous adherence. It was seen from the examples that because of the nature of African RTAs, member states within those RTAs are still able to engage in other activities that do not form part of the agreement establishing a treaty to a particular RTA while they still obey their responsibilities within the RTA. It was also seen that because of the nature of the African RTAs, which are flexible, countries are still able to apply their own national legislations to control the entry of imports if in their own opinion such regulation is necessary. It was also seen from the discussion that some writers are of the opinion that this flexibility is desirable because in their opinion, if the rules of these RTAs were rigid and inflexible, it would be difficult for the countries to adhere completely to those rules.

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lower cost imports from outside the RTA are replaced by higher cost imports from an RTA member as a result of preferential trade treatment.”

245 Kwentua E. G. *Trade creation and trade diversion effects* 1.

The chapter also looked at RTAs from other parts of the world and it was seen from the discussion that as with African RTAs the rules of which are flexible, some of the non-African RTAs have flexible rules as well, and that there are some common features in both African RTAs, as well as non-African RTAs. It was further noted that the spaghetti bowl concept that was discussed with reference to African RTAs is not only present in African RTAs, as some authors mentioned that some members of the WTO have membership in many RTAs. In short, it can be concluded that there is not much difference between those RTAs. A further conclusion that can be drawn from the discussion of the features of these RTAs in this chapter is that given the nature of the rules of these RTAs, a country may still be able to control its imports and exports even though it has multi-membership in many RTAs. This point will be argued in greater detail in Chapter 6.

## Chapter 6 Summary, Conclusions and Recommendations

### 6.1 Summary

This research has analysed regional trade agreements in Africa and a few other RTAs from other parts of the world based on the issue of multi-membership. In the context of Africa, the focus was on the two prominent RTAs, namely the SADC and COMESA. The research also included a case study of the two countries, namely Lesotho and South Africa to establish the extent of their involvement in the regional, as well as bilateral agreements.

The aim of the research was to determine the legal effect of having multi-membership in African regional trade agreements on a country's imports and exports. In essence the research strived to look into the treaties/laws of the RTAs to ascertain if those treaties/rules of the RTAs impose any restrictions on member states in terms of how they trade or relate to other countries that they share membership of a particular RTA with, as well as those that are not part of the RTA.

Chapter 2 of the research focused on the reasons that may possibly compel a country to join multiple RTAs. It emerged that RTAs can play a very important role in facilitating trade between different countries. There are various reasons compelling countries to join RTAs, as Ngenyeh<sup>246</sup> also noted that owing to the inequality in economic growth and development in the RTAs, some regional groupings do not last for long consequently failing to achieve their objectives and thereby, affect some economies negatively. Ngenyeh states that the situation is especially true for poor countries and is thus a strong incentive to have overlapping membership in RTAs so that in circumstances where one RTA fails, it will be easier for these economies to shift their membership to another RTA that is performing well. In circumstances where a poor country is a member to one RTA, if this RTA fails to attain its objectives, it will be difficult in the short term for member states to become members to another RTA to benefit from lower tariffs. Thus, they can take advantage of the gains from each block.<sup>247</sup> He further states that some countries would deliberately seek membership of a number of RTA's in the hope of maximising the advantages and benefits of integration and minimising losses by spreading risks.<sup>248</sup> For example, if one RTA fails to achieve its goals and collapses, the country that is involved in

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246 Ngenyeh *Regional Integration in Southern Africa* 22.

247 Ngenyeh *Regional Integration in Southern Africa* 22.

248 Ngenyeh *Regional Integration in Southern Africa* 22.

more than one RTA will eventually maintain its membership in the other trade blocks thus minimising the risk of export tariffs.

A conclusion that can therefore be drawn is that countries join different RTAs at the same time because they want to have access to the benefits offered by different competing RTAs. A further reason that may be promoting overlapping membership is the nature of African RTAs. African RTAs are said to be flexible and offer open-door membership to any country that is willing to join.<sup>249</sup>

Chapter 3 dealt with the problems and challenges faced by countries with overlapping membership of RTAs. From that discussion it became apparent that countries face quite a number of challenges due to their overlapping membership in RTAs. It has been stated that each of the RTAs has its own unique objectives and strategies for attaining its main goal.<sup>250</sup> It may therefore become difficult for countries with multi-membership to apply the rules, which may sometimes be conflicting due to the fact that the multi-membership also adds to the burdens of member states. A country with multiple membership not only faces multiple financial obligations, but must cope with different meetings, policy decisions, instruments, procedures, and schedules. Customs officials have to deal with different tariff reduction rates, rules of origin, trade documentation, and statistical nomenclatures.<sup>251</sup>

Chapter 4 was a case study of Lesotho and South Africa in the RTAs. The discussion revealed that the two countries have commitments in regional and bilateral trade agreements. They have overlapping membership. The discussion also revealed that the two countries do benefit from various trade agreements they have entered into.

Chapter 5 analysed the features of African RTAs and the RTAs from different parts of the world. It was mentioned that African RTAs are characterised by overlapping memberships. The discussion revealed that this is not only the case with African RTAs.<sup>252</sup>

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249 See Gathii J.T. *African Trade Agreements as Legal Regimes* 67.

250 Ngenyeh *Regional Integration in Southern Africa* 78.

251 Afesorgbor SK and Bergeijk A.G. *Measuring multi-membership in economic integration and its trade impact* 8.

252 See Tran Van Hoa “*The WTO, Regional Trade Agreements and an Enlarged ASEAN*” 9 who states that: “From an international commerce perspective these RTAs are exceptions, or flexibilities...it is interesting to note that, due perhaps to the need for inclusiveness and mutual gains, the vast majority of WTO members are also party to, or central players in, one or more RTAs giving rise to the so-called Bhagwati ‘spaghetti’ and ‘spokes’ concepts in the current RTA literature. In addition, it should be noted that as the evolution of RTAs progresses their growth has accelerated in the past decade...”

## 6.2 General conclusion

This conclusion is based on the findings and it seeks to answer the legal question that was posed at the outset. As already stated, the aim of undertaking the research was to determine the legal effect of having multi-memberships in African regional trade agreements, particularly on SADC and COMESA's member states. In order to arrive at a determination on that effect, the treaties, and rules, as well as the objectives of the RTAs had to be analysed.

Before embarking on the study, because of many controversial issues surrounding African regional trade agreements, it was believed that countries with multi-membership in regional trade agreements find it difficult to apply their domestic laws to regulate their imports and exports, and thereby lose part of their sovereignty. This is because of different rules of origin that are applied in different RTAs that member states have to abide by.

A general conclusion drawn is that the sovereignty of a country with overlapping membership of RTAs is not totally lost and as a result such a country can still be able to effectively control its imports and exports using its domestic laws without necessarily being forced to adhere to the rules/laws of different RTAs it has entered into. This conclusion is based on the submissions and arguments in the paragraphs that follow.

The rules of these RTAs are not too strict in the sense that once a country is a member of a particular RTA, such a country is compelled to focus only on one RTA. A country is still at liberty to join other RTAs if it deems this necessary. This is because of the flexibility that was seen in those RTAs in which their treaties allow countries to use their own national laws whenever a need to do so arises.<sup>253</sup> Looking at the SADC Trade Protocol, for example, whose provisions obligate member states to apply free trade, there are many exceptions<sup>254</sup> where a country can still use its domestic laws where it deems necessary.

Over and above the open-door membership that African RTAs offer to countries, they also allow countries to maintain any special agreements they had prior to joining a particular

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253 The SADC Trade Protocol allows countries to effectively impose anti-dumping duties to protect their locally produced goods by levying duties on certain imported goods, which in their opinion have been dumped and also protect the infant industries within the country. See *article 18 of SADC Trade Protocol; Article 51 and 52 of COMESA Treaty and Article 26 of the SACU Agreement*.

254 Those exceptions are found in articles 9, 10, 18, 19, 20 and 21 of the SADC Trade Protocol.

RTA.<sup>255</sup> These RTAs also allow member states to have special individual agreements amongst themselves without necessarily including all members of the RTA.<sup>256</sup>

Gathii<sup>257</sup> has also submitted that African RTAs are flexible legal regimes in the sense that they are not designed to commit their members to scrupulous and rigorous adherence.

Looking at the rules and treaties of these RTAs, there is no specific provision in any of those RTAs prohibiting multi-memberships of RTAs, and from the extensive research undertaken there were no reports found prohibiting a country with overlapping membership from controlling its imports and exports.

That notwithstanding, multi-membership of countries in regional trade agreements brings about many problems. Maintaining membership in the many RTAs may be very expensive for ailing economies of some developing countries. Even though it is submitted in conclusion that the rules, laws and treaties of the RTAs do not wrestle away the sovereignty of countries with multi-membership, there are those few occasions when such sovereignty may be affected. As a result, the following suggestions or recommendations are made.

### **6.3 Recommendations**

Having looked at the African RTAs, it is believed that certain measures have to be implemented in order to have African RTAs operating in a better way, and if possible to eliminate the problems caused by multi-memberships. The following is therefore suggested.

#### **6.3.1 Few members states in RTAs**

The researcher recommends that the RTAs should revisit their treaties, which seem to be giving open-door memberships to any country that is willing join. RTAs should limit the

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255 See Article 28 of the SADC trade protocol and article 56 of the COMESA treaty.

256 There is an agreement between the government of the Republic of South Africa and the government of the Kingdom of Lesotho, who are both members of SADC and SACU, for the avoidance of double taxation and the prevention of fiscal evasion with regard to taxes on income. The Agreement applies to persons who are residents of one or both of the contracting states, being Lesotho and South Africa. It is a special agreement between the two countries and it does not involve other member states of the SADC or SACU.

257 Gathii *African Regional Trade Agreements as Legal Regimes* 84.

number of countries that join them. This will help avoid the problems caused by overlapping memberships.

### 6.3.2 Cooperation of the RTAs

It is recommended that the RTAs in Africa should avoid competition and try to work together to achieve the common goals. Ngenyeh<sup>258</sup> has argued that the elimination of multiple memberships might seem difficult in Eastern and Southern Africa due to the fact that the different RTAs do not have the same degree of integration. He then suggested that a way of solving the problem of multi-memberships could be for the four regional blocks to strive to work toward common goals for the establishment of long-term supranational trade blocks in Southern and Eastern Africa.<sup>259</sup> He uses the SADC as an example and says that a critical area where the SADC member states can work together is in the energy sector.<sup>260</sup>

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258 Ngenyeh *Regional Integration in Southern Africa* 78.

259 Ngenyeh *Regional Integration in Southern Africa* 78.

260 See Ngenyeh *Regional Integration in Southern Africa* 78.

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