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ACKNOWLEDGEMENTS

This serves to give glory to the mighty God for the opportunity to undertake my research until it became a success. *'If you ask anything in My name, I will do it'* (John 14:14 in NKJV).

Without your tolerance, intelligence and honesty Professor C.S. Blignaut in your capacity as my supervisor, this study was not going to materialise. In the same context, I would like to salute Dr J.H.E Basson of the Faculty of Law at the University of Pretoria in your capacity as my co-supervisor. You really helped to instill legal understanding in my research work. Thanks to both of you. Without financial support, this research was not going to be undertaken. I feel indebted unless I express my gratitude to Canon Collins Educational Trust (Southern Africa) for the support and funding of my course work and accommodation. In a special way, it is through funding from Deutscher Akademischer Austausch Dienst (DAAD/TUCSIN), that I managed to undertake my research work. Thanks to you my sponsors, as well as to the Ministry of Higher Education in Namibia.

Furthermore I would like to express my appreciation to Professors B.J. Bester (University of Fort Hare) and G.K Coetzee (University of Pretoria), Dr R. Mabugu & Dr M. Geyser (University of Pretoria) for your encouragements and support and also Ms M. Prozesky for editing my thesis. Thanks to friends (Dr L.R. Brown, Yemane, Mesfin & colleagues at the Centre for Microfinance). A family is very important in matters of this nature. My wife Cebisile Nyambe for your unfettered support and encouragements, my mother Mrs Alice Nyambe, I cannot thank you enough for your support and I also give thanks to my brothers and sisters for being at my side at all times. Darrel, you are also not forgotten.

Jacob M. Nyambe

Pretoria, South Africa

2005

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EVALUATING TWO INTERNATIONAL AGREEMENTS FOR CONSISTENCY WITH GATT/WTO RULES: A METHODOLOGICAL STUDY WITH REGARD TO EU/RSA TRADE, DEVELOPMENT AND COOPERATION AGREEMENT AND SOUTHERN AFRICAN DEVELOPMENT COMMUNITY AGREEMENTS

by

JACOB MULELE NYAMBE

DEGREE: **MSc in Agricultural Economics**

Department: **Agricultural Economics, Extension and Rural Development**

Promoter: **Professor C.S. Blignaut**

Co-promoter: **Dr J.H.E. Basson**

ABSTRACT

Whether the type of integration pursued is *deep or shallow*, international cohesion through international trade is accepted as a key to unlock economic welfare of participating states. Trade liberalisation is with no doubt, the key and major driver of globalisation. Amongst other drivers of globalisation foreign direct investment is

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important. Through foreign direct investment, the backlog of unemployment, underdevelopment and backwardness receive reasonable attention. States less endowed with resources can benefit from those well endowed. It is on this understanding that the world has experienced an unprecedented mushrooming of regional trade agreements with the majority of them geared towards acceleration of economic benefits. Improvement in the efficiency of trade agreements, including maximising economic benefits that flow from foreign direct investment is an essential component of any economic growth and development strategy. In Sub-Saharan Africa where protective policies have not led to broad-based economic growth, gain in the efficiency of attracting foreign direct investment is viewed as necessary for economic growth and the alleviation of rural poverty.

As regarding whether all existing trade agreements satisfy the requirements of the Multilateral Trade World Body, GATT/WTO is not what this study seeks to address. Focus in this context is specifically on the SADC Trade Protocol and the Free Trade Area between the European Union and the Republic of South Africa known as EU/RSA Trade, Development and Cooperation Agreement. The EU/RSA Free Trade Area has been in operation since 2001 while the SADC region is expected to become a free trade area in 2008.

This study provides a methodological investigation using available literature in order to gather necessary legal and economic content of international agreements that should be adhered to with regard to the GATT/WTO rules. It attempts to develop a format to evaluate legal components, checks and balances of intra regional and inter continental trade agreements. It also evaluates the SADC Trade Protocol and the EU/RSA Trade Development and Cooperation Agreement according to the format.

This study firstly, finds that there is sufficient literature on both legal and economic aspects of international trade agreements and commitments. Secondly, the SADC Trade Protocol is not compliant on three aspects, namely the doctrines of Home

Country Measures, Fair and Equitable Treatment and Employment. Thirdly, the EU/RSA Trade, Development and Cooperation Agreement comply with GATT/WTO rules but it must clearly spell out its Sanitary and Phytosanitary Standards and consolidate itself on the Fair and Equitable Treatment doctrine. Fourthly, SADC is relevant in the overlapping of membership with other multi - and bi-lateral agreements for as long as such memberships do not disturb the responsibilities and obligations of individual member states to the GATT/WTO.

Finally, on economic matters that were evaluated for the betterment of the residents of SADC and EU/RSA Trade, Development Cooperation Agreements' member states, the study argues that both the SADC Trade Protocol and the EU/RSA Trade, Development and Cooperation Agreement have sufficient provisions to ensure that land utilised for mining purposes is rehabilitated so it could be allocated to other economic activities for use; there are some operational restrictions hampering foreign direct investments in the SADC and EU/RSA TDCA's member states such as lacking customs and Excise services, impediments on land ownership for investments and pressure from domestic interest groups on their governments in fear of FDI competition; there is no effective legislation in the SADC Trade Protocol that provides a requirement for a foreign investor to impart skills to national (domestic) workers so that these workers can confidently hunt for other jobs or enter into business ventures when the investor has left the State (the EU/RSA TDCA has such a provision).

The study recognise the SADC Trade Protocol and the EU/RSA Trade, Development and Cooperation Agreement as credible and advanced pieces of legislation. Taking into consideration the advanced level of the two Agreements, the study recommends embarking on a fast tracking policy harmonisation process for especially newly joined EU member states and South Africa to ensure uniformity and cohesion; all that has been pointed out as lacking in the two agreements must be rectified in order for the residents of member states to enjoy envisaged economic benefits of being signatories

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to these Agreements; SADC has to refocus its resources on integrating economies of member states, a move that is likely to reduce wars in the region. Other stricter mechanisms that can enforce compliance with the SADC Trade Protocol (and also with other SADC Agreements) must be explored before SADC can achieve the status of a free trade area. It has to ensure, by way of an example, that outstanding issues are harmonised and all member states move in the same direction to allow for reliable policy reforms and to ensure that institutional arrangements are enhanced to allow for the smooth transition of economies that are not on the same level of development. Whether some of these issues can be achieved remains another challenge that suggests further research.

SADC seems to be attempting to emulate the example of the European Union. The European Union came a long way from individual states passing through different stages to become a union. The development of the European Union into a trading block has endowed it with vast negotiating experience. Over time increasingly more resources were devoted ensuring that it becomes a success. Engaging in trade negotiations is costly and wrong policy advice could have high opportunity costs to the EU's economy. In conclusion, it will be useful to point that this study's flexibility and its approach to handling a multi-disciplinary investigation with the help of a checklist is recognised as its main strength.

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LIST OF ABREVIATIONS

ACP	Africa, Caribbean and Pacific
ASEAN	Association of South East Asian Nations
ASOSH	Association of Societies for Occupational Safety and Healthy
BITs	Bilateral Investment Treaties
BLNS	Botswana, Lesotho, Namibia and Swaziland
BoP	Balance of Payment
BYOI	Bring Your Own Infrastructure
CMA	Common Monetary Area
CMT	Committee of Ministers Responsible for Trade Matters
CIO	Commission of the Indian Ocean
COMESA	Common Market for Eastern and Southern Africa
DTTs	Double Taxation Treaties
DSU	Dispute Settlement Unit
EAC	East African Community
EC	European Community
EPAs	Economic Partnership Agreements
EPA	Environmental Protection Agency
EPZ	Export Processing Zone
EU	European Union
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FTA	Free Trade Area
FTAs	Free Trade Agreements
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GSP	Generalised System of Preferences
HCMs	Home Country Measures

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IIAs	International Investment Agreements
IMF	International Monetary Fund
ITC	International Trade Centre
IT	Information Technology
ITO	International Trade Organisation
LDCs	Least-developed Countries
MAI	Multilateral Agreement on Investment
MERCOSUR	Common Market of the South
MFN	Most-Favoured-Nation
MNCs	Multinational Corporations
MoU	Memorandum of Understanding
NGO	Non-Governmental Organisations
NAFTA	North American Free Trade Agreement
NASSP	National Agricultural Support Services Programme
NT	National Treatment
OECD	Organisation for Economic Cooperation and Development
RoO	Rules of Origin
RSA	Republic of South Africa
RTAs	Regional Trade Agreements
SACU	Southern African Customs Union
SADC	Southern African Development Community
SARDC	Southern African Research and Documentation Centre
SMEs	Small and Medium-sized Enterprises
SPS	Sanitary and Phytosanitary Standards
SWOT	Strength, Weaknesses, Opportunities and Threats
TNCs	Trans-national Corporations
TBT	Technical Barriers to Trade
TDCA	Trade, Development and Cooperation Agreement
TPRM	Trade Policy Review Mechanism
TRIMs	Trade-Related Investment Measures

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UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America
WTO	World Trade Organisation

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CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND

1.1.1 The General Agreement on Trade and Tariffs (GATT) and the World Trade Organisation (WTO)

1.1.1.1 Situating the GATT and international trade

International trade has played a vital role in economic growth of many different states. A realisation of this historical fact led to the widespread recognition of a need for an internationally recognised body able to oversee matters pertaining to international trade. The GATT was instituted in 1947 to perform this task. Griffin (1978: 98) records that the GATT was, as its first objective, charged with promoting freer trade by generally prescribing import quotas and encouraging the reduction of tariffs. This process began with a series of negotiating rounds, the first of which was held in Geneva in 1947. The second objective of the GATT was to facilitate the post-war reconstruction of Europe and help finance the development of underdeveloped states all over the world, many of them newly independent ex-colonial states. A third objective was to create harmonious economic relations through negotiations rather than violence. The ideology of this post-war system is capitalist in nature, characterised by free enterprise, freer trade and relatively free movement of currencies across exchange rates (Griffin, 1978: 98).

1.1.1.2 The law in international trade

International trade law regulates the international agreements that govern international trade between member states of the WTO. Van Houtte (2002: 1) asserts that the law of international trade draws from both international law, as well as from the domestic law of the states concerned. Perhaps the most important function of the general principles of public international law is to govern the relationship between states and international organisations. Therefore, the primary source of international trade law is

the treaties (bilateral or multilateral) concluded between states in the course of international trade deliberations[1]. The purpose of some of these treaties [e.g. those establishing the Free Trade Agreement of the Americas and North American Free Trade Agreement (NAFTA)] is to liberalise trade between contracting states (Van Houtte, 2002: 1). Other treaties aim to promote economic integration by way of establishing customs unions, free trade zones or economic unions. Such treaties in general also establish an international organisation to implement the treaty program.

So it is practical that law forms an important part of international trade. In international trade two forms of law are important, namely *international trade law* and *lex mercatoria*[2]. By international law, a state can enter into a contract with an investor (a merchant). In such a scenario the law requires an arrangement that provides for both parties to operate on an equal footing called a *stabilisation clause* (Booysen, 2003: 493)[3].

According to Jackson (2000: 11,12) international trade law (sometimes referred to as international economic law) has, among others, the following characteristics:

- Is a law that cannot be separated from the general principles of public international law, because the general principles of treaty law are the same principles that govern international trade practices and trade disputes.
- International trade law has a multidisciplinary character because in addition to a study of the applicable legal rules, it also involves macro-economic principles, political science etc.
- The investigation of international trade law often requires more empirical study than some other fields of international law. This is because, like many areas of international relations, information on international trade law is often very difficult to obtain. This is due to many factors, including diplomatic habits or the legitimate confidentiality needs of governments and it can as a result impose special burdens on scholars.

[1] A treaty is bilateral when it is in force between only two subjects of international law (states or international organisations). A treaty is multilateral when it is in force between more than two parties (Van Houtte, 2002: 1, 2).

[2] International trade law is law that includes public international law that applies to states only. Lex mercatoria is law that applies to an international merchant or individual and has no rule that applies to public international law (Booysen, 2003: 13).

[3] A stabilisation clause is a clause in the contract between a state and an individual/merchant whereby the state agrees not to use its sovereign or legislative power to alter provisions that are made in the contract (Booysen, 2003: 493).

- International economics have become more central to government policy decisions and studies. International trade law and related subjects have become more prominent in the news media and more deeply interconnected with political groups and agendas.

International trade law is part of international law, and remains an important component in international trade. Historic literature reveals the importance of international law in matters pertaining to international trade. Examples of such historical records concern commodities such as sugar, which was regulated by international agreements as early as 1864, and rubber a first agreement concerning which was adopted in 1934. Furthermore, Chapter 6 of the Havana Charter for the proposed International Trade Organisation (ITO) addresses international agreements on primary products. In 1947 the United Nations Economic and Social Council created an interim Co-ordinating Committee on International Commodity Agreements, as well as a Commission of International Commodity Trade, which were replaced in 1965 by the Committee on Commodities (Sands and Klein, 2001: 129).

1.1.1.3 The GATT rounds of negotiations

Due to the significance of international trade and the value generally attached to it, the GATT had to follow several rounds of important negotiations that were held in various places to resolve some nagging issues. According to Du Plessis (1996: 151) a series of tariff-bargaining negotiations, for example, were necessary to clarify practical implementation of GATT principles. In addition to the main founding conference in 1947, seven further conferences have taken place. These were held in 1949 (Annecy, France), 1951 (Torquay, England), 1956 (Geneva, Switzerland), 1960-61 (Geneva, the Dillon Round), 1964-67 (Geneva, the Kennedy Round) and 1973-79 (Geneva, the Tokyo Round). The seventh round of trade negotiations was initiated in September 1986 in Punta del Este, Uruguay, and came to be known as the Uruguay Round of Trade Negotiations. This Round was scheduled to be concluded in 1990 but kept going until December 1993. South Africa was one of the founder members of GATT in 1947 and has participated in all the major tariff-negotiating rounds.

On January 1, 1995 the GATT was incorporated into the WTO by Article XIV of GATT 1994 (The GATT Secretariat, 1994: 2).

1.1.1.4 The GATT principles

The GATT is based on four legal principles (International Trade Centre UNCTAD/WTO and Commonwealth Secretariat, 1999: 55) that can be summarised briefly:

1. While considering the significance of member states following open and liberal trade policies, the GATT permits member states to protect domestic production from foreign competition, for as long as such protection is extended only through tariffs and is kept at low levels. To this end the GATT prohibits member states from using quantitative restrictions, except in specified cases (GATT 1994, Article XI).

2. The GATT provides for the reduction, through multilateral negotiations, of tariffs and other barriers to trade that member states may maintain to protect their domestic trade. The reduced tariffs should be bound against further increases. Member states are under an obligation not to increase tariffs above the bound rates shown in their schedules (GATT 1994, Preamble; Article XXVIII bis)[4].

3. The GATT/WTO requires member states to conduct their trade without discriminating between other members by whom like products are exported. This rule is embodied in the most-favoured-nation (MFN) treatment. An important exception to this rule is permitted in the case of regional preferential trade agreements (GATT 1994, Article I).

4. The national treatment (NT) rule requires member states to refrain from imposing on an imported product, after it has entered their domestic markets and paid custom duties at the port of entry, internal taxes such as sales or value-added tax at rates higher than those levied on a similar domestic product (GATT 1994, Article III).

[4] GATT 1994, Article XXVIII bis (The GATT Secretariat, 1994: 529, 530).

These fundamental (GATT) principles are binding on all member states of the WTO. A dispute settlement body (DSB) within the WTO Secretariat handles violations of GATT/WTO rules and disputes that arise among member states (GATT 1994 Agreement, Articles XXII and XXIII; Understanding on Rules and Procedures Governing the Settlement of Disputes Article 19).

According to Van Houtte (2002: 5,6) the possibility of preferential trade agreements form an exception to the MFN standard. Such an agreement implies that preferences are given to one contracting state (or its subjects) over a third state (or its subjects). Preferential treatment usually applies to states that are closely linked, politically or economically. The standard of preferential treatment is applied to trade agreements with developing states and within customs unions or free trade areas. As stated above, the GATT allows for the possibility of granting such preferential treatment (GATT 1994, Article XXIV) (The GATT Secretariat, 1994: 522; Van Houtte, 2002: 5,6,).

A number of developing states have in addition to high tariffs, applied quantitative restrictions on imports in both their agricultural and industrial sectors. This is due to the fact that GATT rules permit states in balance of payment (BoP) difficulties to impose quantitative restrictions on imports (GATT 1994, Article XII) (The GATT Secretariat, 1994: 501). A state is said to have BoP difficulties when its external earnings from trade in goods and services, and the inflow of investment and loans are inadequate to cover its external payment liabilities, and also when monetary reserves for meeting immediate liabilities are declining (International Trade Centre UNCTAD/WTO and Commonwealth Secretariat, 1999: 56).

1.1.1.5 Relevance of the GATT/WTO trading system

Looking at the significance of the WTO international trade agreements, Blignaut (1986: 7) cites examples to illustrate how such agreements decrease and increase risk. The GATT Agreement on Agriculture, which is the legal instrument applicable to agricultural trade, has decreased risk in international trade in agricultural products. An example of a reduction in risk is that of trade risk i.e. a state can now appeal to the WTO for unfair discrimination applied on its agricultural commodity exports if such exports were found to be unfairly discriminated against by some other trading

partners. Together with the Dispute Settlement Procedure creates legal certainty and prevents such unfounded accusations of trade discrimination between member states. An example is the case between the European Union (EU) and the United States of America (USA) on the EU ban of USA cattle products produced using growth hormones. The EU banned USA beef citing that it was dangerous to consume beef treated with hormones (such as oestradiol-17, progesterone, testosterone, trenbolone acetate, zeranol and malengestrol acetate) fearing that it was going to cause health problems. Another reason for the ban was the EU's position that its members preferred beef free from hormones regardless of its safety.

The Appellate Body had to investigate three issues: firstly, the uncertainty or certainty surrounding the scientific verification. Secondly, the legitimacy of the EU's public demand and thirdly, whether or not the EU's ban was discriminatory. Findings of the Appellate Body were: that the EU acted inconsistently with the requirements contained in Article 5.1 of the Agreement on the Application of Sanitary and Phytosanitary Standards (SPS); unfairly discriminated against beef from the USA and also that by maintaining SPS measures not based on the existing international standards without justification under Article 3.3 of the Agreement on the Application of SPS, the EU acted inconsistently with the requirements contained in Article 3.1 of that Agreement. Though the recommendations of the Appellate Body were slightly modifies by the DSU, the fact of the matter remains that the EU applied unfair discrimination against beef from the USA (WorldTradeLaw.net a, 1998: 14-101, 163, 228-232; Friends of the Earth International, 2001: 1 – 6). Lastly, rules of origin prevent a state from unfairly importing subsidised products and after accumulating stockpiles reselling these as products of domestic origin (Blignaut, 1986: 7).

Gaisford and Kerr (2001: 178) argue that the purpose of the rules of the WTO is to reduce the risk for firms engaging in international commerce. These rules of trade limit the scope of governmental interference in free international trade. Booysen (1999: 1) cautions that the international community is composed of states. Each state is in law equal and independent. The domestic affairs of a state are regarded as the private domain of every state. Therefore, a state is the sole regulator of domestic affairs within its borders. However, there are exceptions to this, for example in the case of human right abuses, or when humanitarian interference is necessary. These

qualities of a state and its power to regulate its own affairs can be described as state sovereignty. Governments tend to guard their sovereignty closely. The political strategy for rule-making bodies like the WTO is to adopt rules of trade that provide business entities in international trade with a secure legal framework within which to trade, but which simultaneously ensure that infringement on state sovereignty is kept to a politically acceptable degree.

It is vested law that every state assumes responsibility for its citizens, including among other things, to protect them from food insecurity. However, often in the past governments have engaged in policies, which, though were thought to be for the benefit of citizens have produced the opposite results. Many policies, especially agricultural policies, have proved detrimental in the fight to eradicate food insecurity. As a result, agricultural policies have developed to become more against foreign competition resulting in higher social costs. In both absolute and relative terms, farm policies in OECD states became distortive in relation to non-farm trade policies in the 1980s (The WTO Secretariat, 2000: 12; Houck, 1992: 23).

Over the years, many governments have been using trade policies to restrict free international trade citing a variety of arguments. Some of these arguments include: *Infant industry protection* refers to a situation whereby a government would argue for the need to protect its fragile industry, which may not survive international competition in its infancy stage. *National health protection,* which in modern terms is closely associated with SPS measures. *Protection against unfair foreign trade policies* that are in modern terms closely associated with antidumping measures. *Protecting domestic programmes* where a government would support the market price of a commodity above international level to prevent such a commodity's chance in the market from being destroyed by overseas imports (Houck, 1992: 21, 22, 23).

BoP argument, where a government would seek to prevent a continuous rise in the BoP deficit by reducing payments to international competitors with a resultant reduction to entry of imports. *Seeking revenue* in a way of introducing tariffs and export taxes. Though in modern times, developed states would not primarily levy tariffs for revenue but to protect their domestic industries. *Protection to avoid a painful economic adjustment,* with interest groups such as industry leaders and an

inflated clout of farmers organisations canvassing for government protection. This move is associated with stricter import controls especially if imports are to blame for the pressure on domestic prices (Houck, 1992: 23, 24; Booysen, 1999: 98).

To be more specific on the agricultural sector and policies that influence this sector, Houck (1992: 26) isolates three key reasons to why governments have been so protective over their agricultural sectors. The reasons are:

- Stability problems. It is believed that markets of agricultural products are unstable than necessary for efficiency of resource allocation and utilisation, and for efficient cost effectiveness at the side of buyers. Biological nature of the agricultural sector, its susceptibility to natural disasters and pest infestations, the sector's notorious nature of inelasticities of demand and supply and uncertainties in foreign markets, together influence sizable price, output and income fluctuations in the agricultural sector.
- Income problems. Many states have experienced an unequal growth in their farm incomes compared to income growth in non-farm businesses. In developed states, some of the interventions carried to redress the problem include influencing the market where commodities are offered for sale and markets for inputs, and direct payment of income to farmers.
- Foreign trade problems. In net food importing states, policy makers have a tendency to avoid the use of foreign currency earned for buying food and agricultural raw materials citing it as a wasteful use of resources. They then resort to protective programmes to promote the growth of import substituting agricultural enterprises. Most of the time, these government led programmes relies heavily on political sustenance.

Against this background, it can be seen that agricultural policies, more than most sector policies, need to be disciplined under GATT/WTO regulations. Without such discipline, the empirical evidence across states and over time strongly suggests that domestic political pressures are such that many states will eventually adopt policies that increasingly assist and insulate their farmers from foreign competition. While farm policies had proven to be too contentious to be included in previous GATT rounds, their inclusion in the Uruguay Round was considered unavoidable.

Booysen (1999: 98) agrees that agriculture is a highly protected and state-supported segment of most national economies. The preamble of the WTO Agreement on Agriculture spells out its very modest goals for agriculture. Protect as the sector may, the long-term objective of the WTO Agreement on Agriculture is to provide for substantial progressive reductions in state agricultural support and protection. The agreement aims to secure specific binding commitments from states in the following areas: *market access, domestic support and export competition* (The GATT Secretariat, 1994: 42-47).

Croome (1999: 87) seems to agree also that agriculture has been barely touched on by the successive rounds of GATT negotiations to reduce trade barriers. Trade in agricultural products has been governed by special exceptions to the GATT rules, of which some are general while others are granted to particular member states. International trade in agricultural products has been increasingly hampered by complex systems of import restrictions and export subsidies put in place in the majority of industrialised states. Typically, these systems secured higher living standards for the protected farmers and led to some extent to the inexorable shift of the workforce out of agriculture. The gains were bought at heavy national costs in government subsidies, high consumer prices, unwanted surplus production and distortion of national economies.

As it turned out, the Uruguay Round produced little in the three key areas of farm export subsidies, import market access, and domestic producer subsidies. The fact that farm export subsidies are still tolerated continues to distinguish agriculture from industrial goods in GATT 1994. A first distinctive feature with regard to developments in the GATT on agriculture stems from the 1950s when the USA insisted on a waiver of the prohibition of export subsidies for agriculture. A second feature that distinguishes agricultural agreements is that these require all non-tariff import barriers to be converted to tariffs, and these tariffs are then to be reduced and bound. The third feature, which is the main component of the Agricultural Agreement, is that the aggregate level of domestic support for farmers was to be reduced to four-fifths of its 1986-1988 levels by the turn of the century. This too requires only modest reform in most industrialised states because much of the decline in support had

already occurred by the time the Uruguay Round was completed (The WTO Secretariat, 2000: 12).

Global duties and other restrictions are sometimes linked to the price of the imported products. Price is perhaps one of the most important competitive factors in international trade. After all, Ricardo's theory of comparative (price) advantage underlines all efforts towards a liberalised trading system. Indeed, one might say that the GATT itself was intended to safeguard a fair chance for a better and more competitive price in international trade (Bronckers, 1985: 22)[5].

Developments in the WTO have led to a clear way of handling various multilateral agreements. According to Booysen (1999: 65) international trade in goods is regulated by the multilateral agreement on trade in goods, which are annexed to the WTO Agreement. This multilateral trade agreement consists of the General Agreement on Tariffs and Trade 1994 (which is basically all the substantive provisions of the GATT 1947), certain understandings on the interpretation of the GATT provisions, the Agreement on Agriculture, the Agreement on Application of Sanitary and Phytosanitary Measures, the Agreement on Textile and Clothing, the Agreement on Technical Barriers to Trade, the Agreement on Trade Related Investment Measures, the Agreement on Pre-shipment Inspection, the Agreement on Implementation of GATT 1994 Article VII, the Agreement on Rules of Origin, the Agreement on Import Licensing Procedures and also the Agreement on Safeguards.

The WTO Secretariat (2000: 8) indicates four key objectives of the WTO**:** to set and enforce rules for international trade, to provide a forum to negotiate and monitor trade liberalisation, to improve policy transparency and to resolve trade disputes. The purposes of the WTO rules are firstly, to protect the welfare of small and weak nations against discriminatory trade policy actions by large and powerful nations. GATT Articles I on the MFN and III on the NT promise that all WTO members will be given the same conditions of access to a particular state's market as the most favoured members, and all foreign suppliers will be treated the same as domestic suppliers. These fairness rules are fundamental to creating confidence in the world

[5] Ricardo's theory of comparative advantage suggests the relative efficiency of producing one good as compared with producing another good using the same set of inputs.

trading system. Secondly, the WTO rules aim to prevent large economies that have the potential to exploit monopoly power from taxing their trade. This is because if several large economies were to impose trade taxes simultaneously, most if not all of these large economies would be worse off also many smaller economies would suffer greater welfare losses. Thirdly, multilateral rules can help governments ward off domestic interest groups seeking special favours. This comes partly via GATT 1994, Article II which outlaws the raising of bound tariffs, and tries to ensure that non-tariff measures are not used as substitutes for tariffs (The WTO Secretariat, 2000: 9).

Kasto (1996: 10) provides examples of Non Tariff Barriers as follows: import quotas (either voluntary export restraint or orderly marketing agreements); import licensing; import deposit schemes; import surcharges; anti-dumping measures; special labelling and packaging regulations; health and safety regulations; custom procedures and documentation requirements; subsidies to domestic producers of import-competing goods; countervailing duties on subsidised imports; local content requirements; government contracts awarded only to domestic producers and also exchange rate manipulation.

Regarding determination of dumping – GATT 1994 Article 2 of the Agreement on Implementation of Article VI indicates that a product is perceived as dumped if such a product is sold at a cheaper price in a foreign market compared to its price in the domestic market. It further suggests that when there are low volumes of sale in the domestic market of the exporting state, the determination of dumping will then be by comparing the price of the like product when exported to a foreign market provided such a price is representative of all relevant costs incurred and profits before the product is sold in the domestic market (The GATT Secretariat, 1994: 168).

With respect to stimulation and restraint of exports, Kasto (1996: 11) states that member states may adopt policies that enhance, stimulate or restrict exports. The state or government may use commercial and financial measures to improve its commercial situation. These measures can be classified in terms of:

- Financial and fiscal incentives to export producers,
- Export credits and guarantees,

- Setting of export targets,
- Operation of overseas export promotion agencies,
- Establishment of export processing zones and / or free trade zones,
- Voluntary export restraint,
- Embargo on strategic exports and
- Exchange rate manipulation.

Several functions of the WTO are stressed in the GATT 1994, Article III (The GATT Secretariat, 1994: 7). These are firstly, to facilitate the implementation, administration and operation, and further the objectives of this Agreement and the multilateral trade agreements, and also to provide the framework for the implementation, administration and operation of the plurilateral trade agreements. Secondly, the WTO serves to provide the forum for negotiations amongst its members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to the GATT 1994; in addition the WTO may also provide a forum for further negotiations among its members concerning their multilateral trade relations, as may be decided by the Ministerial Conference. Thirdly, the WTO administers the understanding on rules and procedures governing the settlement of disputes via the Dispute Settlement Unit (DSU). Fourthly, the WTO administers the Trade Policy Review Mechanism (TPRM). Lastly, with a view to achieving greater coherence in global economic policy-making, the WTO cooperates, as appropriate, with the IMF and with the International Bank for Reconstruction and Development and its affiliated agencies.

1.1.2 South Africa

According to Tekere (2000: 22) South Africa's annual growth rate in agriculture over the period 1990-1995 was about –0.3%. The agricultural contribution in GDP terms has in the past undergone some variations due to natural conditions, political changes and government policies. Before 1994, the imposing of trade sanctions on South Africa also influenced the state of the agricultural sector and the economy as a whole. Agriculture in South Africa traditionally shows a dualistic nature, with small-scale agriculture on the one end dominated by black farmers and large-scale agricultural units on the other end dominated by white farmers. The gap between these extremes

has been widening in the past years (Department of Land Affairs, 2005: 8; IRIN, 2005: 1).

In recent years, reflecting the goals of GATT 1994 discussed above, international trade has taken on a new character. International trade under the auspices of the WTO has become more rules-based and transparent, new trade blocks have been formed and emphasis has been placed on the developmental aspects of international trade[6].

With its dualistic nature, South African agriculture faces challenges in competing on the global field. The rule of the game is competitiveness. As Kirsten (1999: 487) indicates the survival of the South African agricultural sector will largely depend on its ability to compete on the world market. In an endeavour to improve South Africa's international competitiveness, the current government has implemented agricultural policies that remove non-tariff trade barriers.

However, South Africa has to remember its international obligations in the numerous trade agreements into which it has entered. Membership of the Southern African Customs Union (SACU) and the Southern African Development Community (SADC) are arguably even more important, because of the market they present for exports and as sources of imports and also because of their strategic importance to South Africa (Vink, 2000: 449). Otto (1990: 11) agrees that foreign markets will continue to be of vital importance to South Africa agricultural commodity trade. Therefore, international agricultural trade patterns will have to be carefully followed and marketing and development strategies constructed accordingly.

1.1.3 The European Union and Republic of South Africa Trade, Development and Cooperation Agreement (EU/RSA TDCA) (FTA)

The EU and the Republic of South Africa (RSA) agreed to establish a Free Trade Area in 1999 (Commission of the European Communities, 1999: L311/6). Penzhorn and Kirsten (1999: 788) assert that critics within South Africa have been speculating

[6] Examples of an intensity of international trade engagements include the formation of MERCOSUR, the USA and SACU trade negotiations, China and India negotiations on free trade arrangement etc.

on the threat that subsidised EU agricultural exports will pose to the SACU economies, competing with unsubsidised domestic products.

1.1.3.1 Members of the European Union (See map 1.1)

The European Union is an economic union comprised of several independent member states.

Source: Europa (2004)

Map 1. 1: The current member states of the European Union

Map 1.1 shows the member states of the EU which are: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Slovakia,

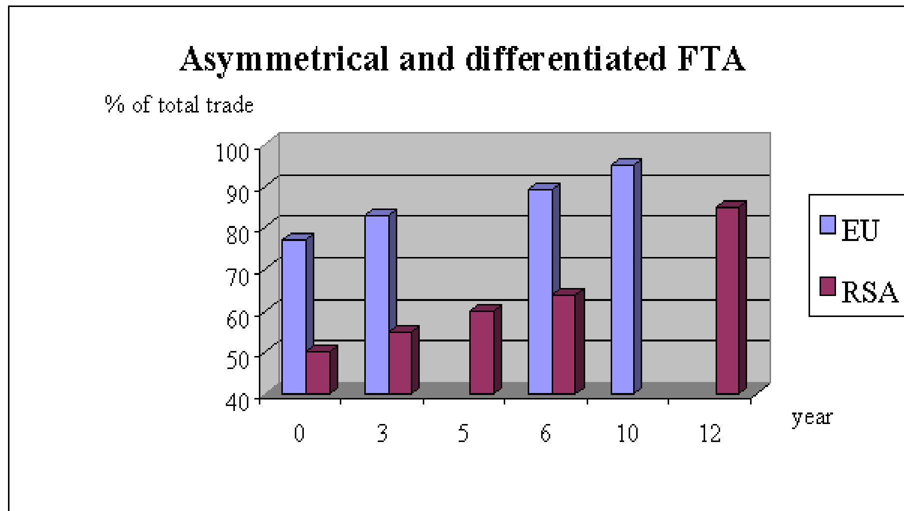
Slovenia, Spain, Sweden, the Netherlands and United Kingdom. . The islands and provinces that appear in yellow in the top right corner of Map 1.1 are the different territories of France located throughout the world. They are considered to be a part of France as are the small states of Monaco and Andorra. The State of Liechtenstein (between Austria and Switzerland) remains a neutral state.

The EU is characterised by its unique Common Agricultural Policy (CAP). Folson et al (2000: 315) affirm that the agricultural objectives of the CAP stated in the European Community (EC) Treaty include the increase of productivity, the maintenance of a fair standard of living for the agricultural community, the stabilisation of markets and the provision of consumer goods at reasonable prices. In practice, the CAP has heavily subsidised production and exports of agricultural commodities and it consumes about two-thirds of the regional budget (which is largely financed by the common customs tariff, agricultural levies and value-added tax revenues). Like the USA, the EU seems unable to effectively control the level of its agricultural subsidies, resulting in overproduction and frequent agricultural commodity trade wars.

Though the CAP is in place, the EU entered into a TDCA with the RSA, which does not subsidise its farmers[7]. The EU/RSA TDCA (commonly known as the EU/RSA FTA) is after Marrakech the first negotiated agreement under the rules of WTO, and the first concluded by the EU with a distant partner that is in itself a member of a custom union and in many ways to be considered a developing state. In response to these realities, the EU/RSA TDCA includes the agriculture sector, as well as all other sectors within tariff liberalisation schedules based on the concept of negative lists.

The agreement states that the EU will implement a full liberalisation of 95% of imports from South Africa by the end of a transitional period of 10 years and South Africa will implement a full liberalisation of 86% of imports from the EU by the end of a transitional period of 12 years.

[7] A free trade area is a group of two or more customs territories in which duties and other restrictive regulations of trade, with an exception of situations where permission has been granted under GATT 1994 Articles XI, XII, XIII, XIV, XV and XX are eliminated on substantially all trade between the constituent territories in products originating in such territories (GATT 1994, Article XXIV) (The GATT Secretariat, 1994: 524).



Source: European Commission (1999)

Figure 1.1: Asymmetrical and differentiated Free Trade Agreement between the EU and RSA

In Figure 1.1 trade between the EU and RSA under the EU/RSA TDCA is expected to improve over a period of twelve years. It is estimated that by the tenth year, South Africa's trade with the EU will be in the area of above 90% compared to the first year when RSA trade with the EU hovers below 50%. The EU is also expected to be more involved such that by the twelfth year from when the agreement came into being, EU trade with RSA is expected to be above 80%.

Literature shows that the EU is South Africa's main trading and investment partner, accounting for over 40% of its imports, nearly 40% of its exports and over 70% of foreign direct investment. The reciprocal nature of the agreement means that products originating in the EU will also have access to the South African markets on improved terms (European Commission, 1999: 6)

According to the European Commission (1999: 7) the FTA between the EU and RSA is characterised by the following five key elements:

1) Asymmetry and differentiation: In recognition of South Africa's economic restructuring efforts, the EU will open its markets faster and more extensively

for South African products than it will ask South Africa to do for EU products.

2) Support for regional integration: The EU and South Africa have committed themselves to designing the free trade agreement in a way, which will support the process of regional economic integration underway in the Southern African region.

3) WTO compatibility: It is believed that the free trade agreement is in full compliance with the rules of the WTO and will cover substantially all trade between the two parties, without excluding any significant sector.

4) Protection for sensitive sectors: Both partners have excluded certain products from the free trade agreement in order to protect vulnerable sectors. On the South African side products that are of specific interest to Botswana, Namibia, Lesotho and Swaziland have also been excluded.

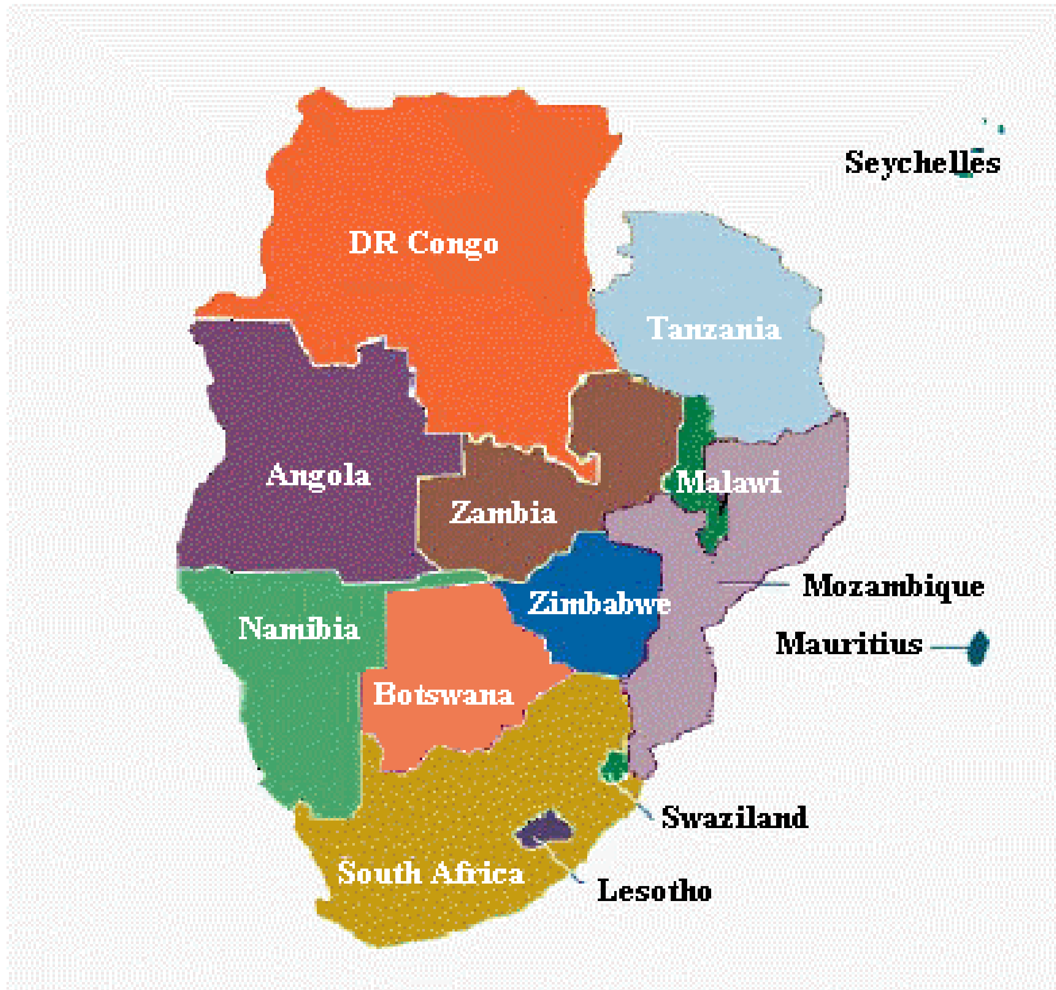
5) Integration of South Africa into the global economy: Due to historical economic isolation of South Africa from both its neighbours in the SADC and the world at large, the EU will assist South Africa in its integration into the world economy by helping to promote increased growth and competitiveness, liberalising trade and encouraging investments (European Commission, 1999: 8).

1.1.4 SADC

These member states are: Angola, Botswana, Democratic Republic of Congo (DRC), Lesotho, Malawi, Mauritius, Namibia, Tanzania, South Africa, Swaziland, Zambia and Zimbabwe.

1.1.4.1 Members of the SADC

SADC comprises of 13 states (Map 1.2) that differ in economic and infrastructure development.



Source: ASOSAH (2004)

Map 1.2: Geographical distribution of the SADC member states[8].

[8] On Map 1.2, Seychelles is no longer a member of SADC.

Table 1.1: The basic economic structures of SADC member states in 2002/2003

Country	Population size in millions	GDP in billion US$	GDP per capita in US$	Currency	Value of imports in billion US$	Value of exports in billion US$	Export products
Angola	14	9.757	696.9	Kwanza	3.07	5.96	diamonds, oil Products, fish, gas, wildlife, agricultural products, sea and marine resources.
Botswana	1.73	6.5	2796	Pula	2.27	2.89	diamonds, copper, nickel, cattle and wildlife.
DRC	54.9	5.278 5.44	96.1	Congo Franc	0.786	1.158	Gold, diamonds, base metals, coal, oil and gas, wildlife, water, uranium, coffee, sugar, rubber, cotton and fish.
Lesotho	2.2	0.81	366	Maloti	0.97	0.04	diamonds, wildlife, mohair, wool and water.
Malawi	11.5	2.277	198	Malawi Kwacha	0.596	0.371	tobacco, sugar, tea, cotton, groundnuts, coffee, fish and wildlife.
Mauritius	1.22	4.831	3953	Mauritian Rupee	3.064	3.165	Sugar cane, beaches, sea, flora, fauna, fish and other marine resources.
Mozambique	18.1	3.492	193	Metical	1.374	0.845	prawns, fish, coconut, coal, gems, wildlife, sea and marine resources.
Namibia	1.83	2.82	1.667	Namibian Dollar	1.32	1.28	natural resources, diamonds, uranium, cattle, fish, wildlife, sea and marine resources.
South Africa	46.4	159.9	3452	Rand	42.2	45.1	gold, coal, platinum, iron ore, copper, timber, sugar, fish, sea, marine resources and wildlife.
Swaziland	1.1	1.22	1.109	Lilangeni	0.93	0.82	sugar, food products, wood pulp and wildlife.
Tanzania	33.6	9.74	266	Tanzania Shilling	1.93	1.680	cotton, coffee, cloves, sisal, cashew nuts, tea, tobacco, minerals and wildlife.
Zambia	10.7	4.34	392.0	Zambian Kwacha	1.6	1.0	minerals, wild life, timber and natural vegetation and Water.
Zimbabwe	11.63	22.0	1891	Zimbabwe Dollar	2.32	2.0	asbestos, gold, copper, nickel, tobacco, agricultural products and wildlife.

Source: SADC Secretariat (2004a)

Table 1.1 depict the basic economic data of SADC member states in terms of population size, gross domestic product, natural resource endowments, currency, value of imports and value of exports. South Africa has the highest GDP of 159.9 compared to all other SADC member states with Lesotho having the lowest GDP of 0.81. SADC member states have some of the world's most wanted natural resources such as platinum, oil, diamond, gold, nickel, zinc, uranium and fisheries. These are the resources wanted by foreign investors.

Regarding regional trade and investment arrangements, SADC has the SADC Trade Protocol that was signed in 1996 in Maseru, Lesotho and came into force on 25 January 2000. Since then there have been negotiations on the implementation of the Protocol. However, the actual Free Trade Area is only expected to be operating in 2008 when 85% of all trade in the region will operate at zero tariff/duty (Nyirenda, 2000: 28). The objectives of the SADC, according to the SADC Secretariat (2004b) are 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;
- Evolve common political values, systems and institutions;
- Promote and defend peace and security;
- Promote self-sustaining development on the basis of collective self-reliance, and the interdependence of member states;
- Achieve complementarity between national and regional strategies and programmes;
- Promote and maximise productive employment and utilisation of resources in the region;
- Achieve sustainable utilisation of natural resources and effective protection of the environment; and
- Strengthen and consolidate the long-standing historical, social and cultural affinities and links between the peoples of the region.

Sigwele (2000: 86) outlines the advantages and disadvantages of economic groupings as follows:

Advantages: larger regional market; uniformity in product standard; common policy on rules of origin; possible economies of scale; lower transaction costs; and easier, freer movement of capital, skills and technology within regional groupings (SACU, SADC and ACP etc)[9].

Disadvantages: possibility of de-industrialisation of small and resource-poor neighbours; tendency to be inward-looking, hence promoting less efficient regional firms because of sisterhood or neighbourliness; and tendency to form an economic/trade fortress and thus failing to benefit from technological advancement.

There are four distinct levels of economic integration:

- Free Trade Area. This is an area in which member states have no tariff arrangements among themselves but each member state maintains its own set of regulations with respect to the rest of the world. An example is NAFTA.

- Customs Union. Require that member states eliminate trade barriers with each other and take economic integration a step further by establishing identical barriers to trade against non-members, most often in the form of a common external tariff.

- Common Market is a customs union in which mobile factors of production are allowed to move freely among member states.

- Economic Union is a single economy with one currency denomination and enjoys unified fiscal and monetary policies. An example is the EU (The GATT Secretariat, 1994: 331, 522; Penson Jr. et al, 1999: 561; Kefalas, 1990: 157; Penson Jr. et al, 1999: 561).

[9] Kohls and Uhl (1990: 524) defines economies of scale or size as the situation where efficiency gains by increased size of operation, for example large food processors may have lower average unit costs than smaller processors.

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Within the SADC, a common customs union known as SACU operates. The SACU comprises Botswana, Lesotho, Namibia, South Africa and Swaziland. According to the SACU agreement, a common tariff rate is applied on imports from non-SACU states. Other arrangements such as import permits are applied on selected intra-SACU imports to nurture the development of infant industries (Seleka and Dambuza, 2000: 49). SACU exports to the rest of Africa over a period 1994-1998 are presented in Table 1.2.

In Table 1.2 SACU exports amounted to (14,3%) with South African exports being the majority of the SACU exports. The Middle East (13,1%) also recorded a high growth rate in current US$ prices for the period 1994-1998. Although exports to Europe (-2,5%), Latin America (2,9%) and Asia (-5,8%) suffered from the financial crises during 1994-1998, global exports to these regions were nevertheless improved.

Table 1.2: Average annual SACU exports for the period 1994-1998 (in percentage)

	Tableau A: SACU Exports	Total	Manufactured	Food & Agric	Minerals & Fuels
1	SADC (excl. SACU)	5.80%	6.50%	13.10%	-16.90%
2	The rest of Africa	14.30%	19.30%	6.10%	5.90%
3	The Middle East	13.10%	3.30%	12.10%	99.80%
4	North America	7.10%	3.80%	12.30%	24.70%
5	Latin America and the Caribbean	2.90%	3.30%	-12.00%	10.00%
6	Asia	-5.80%	-8.30%	-6.80%	-1.50%
7	Europe	-2.50%	-4.90%	3.60%	0.40%
8	Oceania	8.40%	8.60%	17.50%	-4.40%
	Tableau B: World Exports				
1	SADC (excl. SACU)	3.20%	3.30%	4.60%	3.30%
2	The rest of Africa	3.20%	3.70%	1.60%	2.10%
3	The Middle East	3.90%	5.00%	-1.20%	-3.60%
4	North America	7.60%	7.80%	7.20%	5.80%
5	Latin America and the Caribbean	10.20%	11.00%	7.40%	6.40%
6	Asia	2.20%	2.20%	0.10%	3.40%
7	Europe	6.40%	7.00%	2.30%	6.00%
8	Oceania	3.60%	3.40%	3.10%	6.40%

Source: Trade and Industrial Policy Secretariat (2001)

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The SACU is dominated by South Africa in that South Africa has the biggest economy and accounts for most of the SACU exports. Despite such promising trade statistics, producers in developing states still face problems related to technology, infrastructure required to monitor adherence with sanitary requirements, lack of trained manpower, lack of information on SPS regulations, limited reaction time to alter production processes in response to SPS notifications and, fragmented standards. Attempts to solve these problems seem unable to keep pace with the rapid growth of exports, and inspection procedures are often ineffective since facilities are also limited (Narayanan and Gulati, 2002: 59).

1.2 POSTULATIONS FROM ECONOMIC THEORY

Economic theory provides a guideline on how key players in economies are expected to behave so as to explain how and why markets behave as they do. Economic theory has different schools of thought, and two of the most contentious of which are pertinent to this thesis are: firstly, *government intervention in markets /economies and* secondly, *autonomy of markets.* In most literature, market failure is cited as the major point justifying government intervention. Stiglitz (1998: 109) argues that the kinds of market failures discussed in this context differ from those that were the focus of attention some two decades ago and disputes the notion that markets provide investment signals. In the 1980s economic planning tended to be prescriptive which Stiglitz (1998: 109) argues is wrong on three accounts:
Firstly, it underestimates the extent of planning firms undertake. When firms make investment decisions, they forecast future prices of inputs and outputs. Secondly, it overestimates the importance of the general equilibrium problem, particularly for small open economies for which material balance equations (for particular products) do not have to hold. Thirdly, it underestimates the importance of micromanagement.

In this context, Stiglitz (1998: 110) contends that market failures concerned with provides a rationale for a variety of government interventions in scenarios such as those governments face with regard to information and incentive problems, but which the private sector also experience. A question that requires attention in terms of government intervention is, “Are there government policies that can ameliorate some of the adverse effects of market imperfections”? For instance, commodity price stabilisation schemes may, if properly

designed, reduce the risks facing producers, leading to higher levels of production and investment. Tax policies that exacerbate the risks firms face can be eliminated. In other cases, there is a potential positive role for government in taxes, subsidies and in institutional development (Stiglitz, 1998: 110).

In the context of internationalisation of commerce, the key factors in the whole spectrum are: international finance, foreign direct investment, the state, GATT/WTO and Regional Trade Agreements (RTAs). All key factors are interconnected by the theme of globalisation. International finance includes institutions such as the World Bank and the IMF, whereas the state consists of, among others, institutions such as the domestic market, government institutions and private institutions. GATT/WTO is the multilateral body that enforces trade liberalisation and foreign direct investments involve investors in the form of multinational corporations. Regional Trade Agreements could be those of the SADC, the SACU and the EU etc. All of these can be presented schematically, revealing the links between the key factors (see Fig. 1.2).

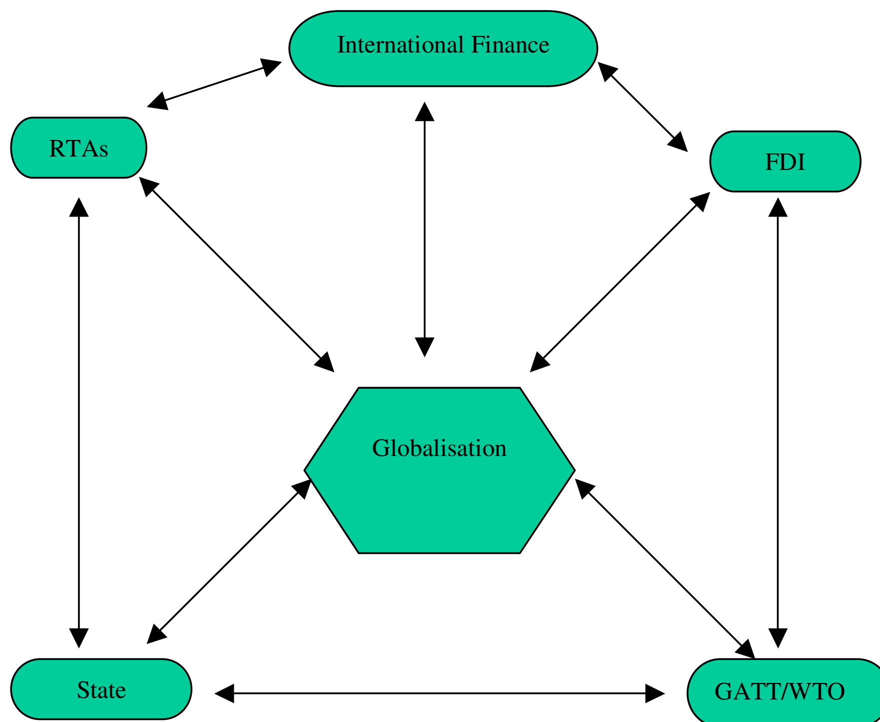

Figure 1.2: Key-player blocks interconnected by globalisation

The role of government in a market economy has been pretty well analysed by economists over the years. Disregarding the responsibility for establishing a stable monetary order, the main role for government has been seen as providing a stable civil order (policing and justice) and maintaining competitive markets. (Schuh, 1983: 279, 285). The main function of the state in the latter case is to break monopolies and maintain an antitrust or competition based economic culture. An exception to the competitive market rule occurs when economic conditions determine natural monopoly[10]. In such cases, desirable social policy involves allowing the monopoly, forcing it to act as a competitive firm by a bounty, tax, or auctioning off the right to the monopoly so as to tax away the scarcity rent. Another function of government is that of providing information that helps to make the market more competitive (Schuh, 1983: 279, 285).

Many researchers have dealt with the concept of competitiveness. Blignaut (1999: 693) citing Porter (1985) defines competitiveness as a term used to describe an industry's ability to compete locally and internationally. Blignaut (1999: 693) citing Porter further names five competitive forces:

a) The entry of new competitors,
b) Bargaining power of suppliers,
c) Bargaining power of buyers,
d) Threats of substitutes and
e) Rivalry among existing competitors.

Competition in an industry continually drives down the rate of return on invested capital towards the floor rate of return or the return that would be earned by the economist's perfectly competitive industry. The degree to which the inflow of investment occurs, the drive of returns to the free market level, and thus the ability of firms to sustain above-average returns are all determined by the strength of the competitive forces in an industry (Blignaut, 1999: 701).

[10] Natural monopoly relates to cases in which the technical conditions of production are such that economies of size can be realised only with one firm or unit, or when competition could be obtained only with costly duplication.

Closely to the notions uttered by Bliganaut (1999: 701) citing Porter, Ortman (2000: 371) citing Kennedy et al (1997) feels that national competitiveness is related to the economic concept of comparative advantage. Comparative advantage predicts that trade flow occurs as a result of relative cost differentials between states or regions. A state will export the commodities it produces relatively efficiently and import commodities that other states can produce more efficiently; that is, states are competitive in commodities in which they have a relative cost advantage.

To the extent that liberalisation and associated policies support the private sector to promote more efficient marketing, it would be expected that in general, consumers would benefit as a consequence of narrowing marketing margins. Trade liberalisation is often emphasised as a suitable mechanism to enhance economic growth and catalyse the speed of international trade. Scarborough and Kydd (1992: 149,150) however, argue that some groups may be worse off, experiencing higher prices and/ or substantially greater variability in consumer prices. Adversely affected groups could include:

- Urban residents who previously had access to food supplies from parastatals, where these supplies had been subsidised;
- Rural residents in food-deficient areas subjected to high transport costs;
- Food-deficient households in those rural areas with an overall food surplus and traditionally low access to the main centres of demand. Food prices are likely to rise in these areas as private sector marketing activity intensifies as a consequence of the areas' comparative advantage as food suppliers;
- If satisfactory arrangements are not made for the maintenance of food security stocks, and there is marked production variability over seasons, there may be more generally damaging effects on consumers.

Considering the lower economic growth common in small states and also the promptings of common sense, it sounds reasonable for small economies to belong to regional agreements. The smaller the state and the more liberal its economic regime, the faster the accession process to regional agreements, for two reasons: smaller states realise that it is costly to maintain protection policies and also that the small size of their economies poses fewer market access issues for major WTO Members (Michalopoulos, 2002: 68).

Lower economic growth in developing states (Dornbusch, 1998: 212) has caused many developing states to suffer dismal economic performance due to failing macroeconomic policies, which then engender debt crises and hyperinflation. Of course, also important is an adverse external environment. Attention should therefore be shifted to productivity gains as a source of growth. Liberalised trade may contribute to the solution. The channels by which trade liberalisation can produce benefits include the following: improved resource allocation in line with social marginal costs and benefits; access to better technology, inputs and intermediate goods; an economy better able to take advantage of scale and scope; greater domestic competition; availability of favourable growth externalities, such as the transfer of know-how; and a shake-up of industry that may create a *Schumpeterian environment* especially conducive to growth (Dornbusch, 1998: 218)[11].

1.3 PROBLEM STATEMENT

When agreements are entered into, be they regional (e.g. the SADC) or inter-continental (e.g. EU/SA/TDCA), it is generally accepted that those who engage in negotiations are aware of the advantages and disadvantages of becoming signatories to such arrangements. In the international arena negotiations of bi- and multilateral trade agreements are subject to the rules of GATT 1994 and the discipline of the WTO (GATT Article XXIV). As indicated above, any trade agreement that may affect international trade must conform to the GATT /WTO rules.

South Africa together with the 12 other states listed under section 1.1.4 entered into a major multilateral agreement in a regional context, namely the SADC (The SADC Secretariat, 2004a). It also entered into the EU/RSA TDCA (Commission of the European Communities, 1999: L311/6) as discussed above. In nature these agreements differ and yet are directly and indirectly linked by important issues such as historical facts (such as the creation of the

[11] A Shumpeterian environment (sometimes referred to as the Schumpeterian model), is a term inherited from the writings of Schumpeter which proports that discontinuity of events and opportunities is the critical ingredient in promoting a new growth environment; change is the source of increased productivity. Such a discontinuity involves, specifically, the introduction of a new good, introduction of a new method of production, opening of a new market, the conquest of a new source of supply of raw materials, and carrying out of the new organisation of any industry (Dornbusch, 1998: 218).

SACU), liberalisation of trade between developed and developing economies and the need for economic and political development in the region.

Some SADC member states belong to the Commission of the Indian Ocean (CIO)[12], the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC)[13] and the SACU (The CIO, 2004; The EAC, 1999; Seleka and Dambuza, 2000: 49). In the SADC, the Republic of South Africa is the only relatively developed state, as the others are mostly developing states, with a few less developed states.

In the context of negotiating trade agreements, resources in the form of money, knowledge, technological materials and time are employed to ensure that agreements are reached and implemented to the mutual benefit of the states concerned. However, these are scarce resources that could have been utilised in alternative ways to enhance development–opportunity cost[14]. Another important aspect of many logistical activities is legal knowledge directed at concluding successful negotiations. Overall, the higher flow of benefits would be expected to be from the "developed" member to the "less developed" member rather than vice versa. In the spirit of the WTO developed members are expected to practise due restraint in dealings with developing states and to assist them (GATT, Part IV; Agreement on Agriculture, Article 13, 15 and 16; Agreement on the Application of SPS measures, Article 9).

In negotiations there is a saying that "you only get what you negotiate". The problem at hand, which this thesis will investigate, is whether or not trade agreements and their execution are in practice compliant with GATT/WTO rules and intentions. As such, it is not known whether these agreements are constructed in a manner that the more developed member state will reap benefits out of context with the intention of a particular agreement. The reason why this can happen is that states with less developed institutional and other infrastructure might not negotiate an agreement to the effect that the developed member will assist them in improving the lacking infrastructure. In pursuance of answers to these questions, the EU/RSA

[12] Members of the CIO are the Comoros, France (Reúnion), Madagascar, Mauritius and Seychelles.
[13] Members of East African Community are the Republics of Kenya, Uganda and Tanzania.
[14] Opportunity cost is the cost attached to an opportunity forgone as a result of accepting an alternative (Killian, 2004)

and the SADC agreements will be analysed to test both their consistency with GATT/WTO rules as well as the presence of potential benefits to institutional and other infrastructures.

As already mentioned, RSA and some other SADC member states form a customs union called the SACU[15]. Part of the agreement forming the SACU is that no member state will enter into negotiations of new preferential trade agreement with third parties or amend existing agreements without the consent of other SACU member states (NASSP, 2002: 23). From a development point of view the SACU's members vary widely from comparatively developed to less-developed states. Bilateral agreements between the SACU and other states can contribute to the development needs of the SACU member states and can thus be used as prototypes, testing against development needs. Such testing can then be used to construct a format (checklists) that developing countries with less experience in international negotiations can apply in the negotiating process, as well as in evaluating the process and implementation of the agreements. From a scholastic point of view, economic theory clearly suggests the need to allocate resources in a rational manner. This on its own emphasises the need to avoid wasting resources and development opportunities that are becoming increasingly scarce and expensive in terms of time and the opportunity cost of human suffering.

1.4 GOALS OF THE STUDY

This study has the following goals:

1) To undertake a methodological study using available literature in order to survey the necessary legal and economic content of international agreements that should be adhered to with regard to GATT/WTO rules and development intentions.
2) To develop a format (checklist) to evaluate the legal components, checks and balances of intra regional and inter continental trade agreements.
3) To study the SADC Trade Protocol and the EU/RSA TDCA and evaluate them according to the format.

[15] The SACU is one of the oldest customs unions and its official Customs Union Agreement was concluded on 11 December 1969 (NASSP, 2002:1).

1.5 RESEARCH QUESTIONS

In order to properly address these goals, the study is structured according to the following research questions:

1) Can enough relevant literature be found to construct a database which reflects the legal and economic content of GATT/WTO rules, including matters of foreign direct investment and agriculture commodity trade?
2) Is the SADC correct and relevant considering that some of its member states are also member states of the CIO, the COMESA, the EAC, the EU/RSA TDCA and the SACU?
3) Is the proposed checklist that can be used before, during and after negotiations a practical method to assist developing states in the negotiation process?

1.6 RESEARCH METHODOLOGY

Since this study dwells on the legal and economic aspects that underline international commodity trade and foreign direct investments, literature survey (desktop study) of both primary and secondary sources are essential. Relevant primary legal sources and secondary literature must be used to substantiate certain scenarios that require legal analysis. This study therefore constructs and applies an analytical checklist synthesised from the literature study. This checklist serves as a testing tool to challenge the SADC Trade Protocol and the EU/RSA TDCA in their entirety for compliancy with GATT/WTO rules and its development intentions.

The literature studied consists of legal and economic sources. Legal instruments in the form of GATT/WTO Clauses/Agreements are of course necessary in evaluating compliance of the SADC Trade Protocol and the EU/RSA TDCA with GATT/WTO rules. These clauses embody not only the law of public international trade but also some economic information. Additional economic information is also included in the checklists not explicitly incorporated in these clauses. This information does not serve in the assessment for compliancy of the SADC Trade Protocol and the EU/RSA TDCA, but in useful in assessing whether or not the two Agreements address those economic aspects essential for the betterment of the citizens of

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states signatory to the SADC and the EU/RSA TDCA with regard to foreign direct investment operation.

A definition of international commodity trade is international economic transactions excluding those that are transfers of money capital. This definition thus includes agricultural products, which covers normally seen as a product of the farm firm, and retains this description as long as its farm gate value represents a significant proportion of its trade value (Ritson, 1977: 299). In the context of agricultural economics, this study focuses mainly but not exclusively on the effects of the agreements on agriculture from a development point of view.

Though this study thus avoids some other important legal aspects of GATT/WTO, these will be recognised. These issues are not dealt with purely so as to reduce the scope of the work to maintain efficiency and comprehensiveness. Therefore, in the following chapters, the following legal principles and issues will be focused on: the principles of MFN, the NT principle, the doctrine of Home Country Measures (HCMs), Expropriation (Not much on this issue due to its sensitivity), Trade-Related Investment measures (TRIMs), Employment, Natural environment, Fair and Equitable Treatment FET), SPS, as well as Rules of Origin RoO). Furthermore, this study does not critique the GATT/WTO but considers it as it is, despite the shortcomings noted by many scholars.

1.7 JUSTIFICATION OF THE STUDY

A clear statement of the research problem shows why this study has been undertaken. The main reason is capacity building; although there are many sufficiently skilled professional officers in government departments, there is still a shortage of officers with both economic and legal understanding pertaining bi- and multilateral agreements involving foreign direct investment and agricultural commodities. The reason for this lack is that many African states, as developing states, are novices in the field of negotiating international agreements of any kind.

This study dissects the agreements and logically sets out the structure of their different components in the context of international prescriptions. On this basis the level of compliancy of the SADC Trade Protocol and the EU/RSA TDCA can be determined. The study uses GATT/WTO rules to construct a format composed of checklists useful as measurement tools to test for compliance. The study does not compare the two Agreements consistently (SADC Trade Protocol and the EU/RSA TDCA) but in some instances contrasts certain important issues.

1.8 OUTLINE AND DELINEATION OF THE STUDY

This study is organised in such a way that it consists of the following Chapters:
Chapter One – provides a cursory background on international trade in the context of GATT and the WTO. Presents a basic and brief scenario of South Africa and its agricultural sector. Briefly outlines the EU and RSA Trade, development and Cooperation Agreement and its coverage. The SADC Region is also magnified to include the SACU arrangement. The problem statement, goals of the study, research questions, research methodology and outline of the study also come into the picture.

Chapter Two – focuses on theoretical issues that underline international investments. This refers particularly to Multinational Corporations and their investment behaviours or normally called foreign direct investments. There is a classical scenario of Africa with regard to foreign direct investments. Benefits and critical notions on hosting Multinational Corporations aided with relevant experience from other hosts of Multinational Corporations is included. Chapter Three – sets a legal framework that serves as an information base for the legal components of the format laid in the subsequent Chapter. This is in the form of clauses that are in the checklists. Chapter Four – presents two checklists namely, one for the SADC Trade Protocol and another for the EU/RSA TDCA Evaluates two Trade Agreements (SADC Trade Protocol and the EU/RSA TDCA) using checklists and also discusses the results of the checklists. Chapter Five – In this chapter, the entire thesis is summarised, conclusions drawn, recommendations that contribute to governmental understanding of international trade policy especially from a scholarly perspective are made followed by recommendations for further research.

CHAPTER TWO

THEORY ON INTERNATIONAL INVESTMENTS

2.1 Introduction

Realising the existence of an interrelationship between international trade and international investment, especially foreign direct investments (FDI), one is challenged to say something about it. With this chapter the intention is to reflect the knowledge of some researchers writing on investments. Literature on the topic of FDI carries different understandings. Hence some refers to it as a serious debatable issue. Some writers are in support of FDI while others are to some extent sceptical about what many sees to be the imperatives of hosting FDI or multinational corporations (MNCs) especially in developing and less developed states. The term commonly used to accommodate the activities of international trade and FDI is globalisation, a term used in this chapter.

2.2 Foreign Direct Investment

2.2.1 Globalisation's effect on the gap between Free Trade Agreement and FDI.

According to Brink (2001: 458) globalisation refers to increased integration of different national economies whereby trade and financial flows are the dominating factors. The term also implies increased production linkages, with a growing web of treaties and institutions and the mobility of people as well as knowledge. Furthermore, an upsurge in across border financial flows can be considered as the most obvious manifestation of globalisation. Mudambi and Navarra (2002: 635) believe that it is globalisation that led to rising international exchange of goods and services.

It is in the context of globalisation that Schuh (2003: 96) iterates the benefits that international trade offers. Looking at the dynamic effects of trade and trade liberalisation, it appears that international trade is also beneficial to lagging states. These are mostly small

economies that require much involvement in international trade activities after coming out of a legacy of protectionist policies. It is believed that involvement in international trade activities results in economic integration of such states. Through an active participation lagging states embrace benefits from technological breakthrough in the transport, communication and information technology sectors. Technological breakthrough in the above mentioned sectors results in the reduction in transaction costs that also increases benefits from international trade. Such benefits are reflected in lower prices – a benefit to consumers and also private firms.

Lagging states can also benefit from economic integration through the realisation of the benefits of division of labour and specialisation associated with international trade. This is only true provided many factors such as proper governance, good institutions, well-trained manpower etc, are in place. The kind of division of labour referred to is *sectoral* division of labour and specialisation[16]. With the opening to international trade, a state moves away from protectionist policies and consequently competition from abroad is allowed which then translates into efficiency in the economy. Furthermore, economic integration enhances peace. An example is the European states that in the past engaged one another in war activities but from the time the European Economic Community was established, such member states do no longer fight one another (Schuh, 2003: 98).

The issue of international interdependence features here too. International interdependence, according to Yarbrough and Yarbrough (2000: 6), is not limited to trade in goods and services only but also involves interdependence in financial markets. It is there where firms and governments borrow and finance investment projects, and it has grown more remarkably than the markets of products like oil, steel and automobiles. Consequently, all these international financial markets provide opportunities for international investments, which play a role in the world economy. A puzzling fact in the trade literature is that world FDI and trade flows tend to move in the same direction, which seem to be in contrast with standard trade theory that suggests the two to be substitutes of each other (Di Giovanni, 2002: 7). Despite the differences in the two theories, this research follows what trade theory holds.

[16] Sectoral division of labour and specialisation implies the absence of limitations on economic growth for as long as a state is willing to specialise (Schuh, 2003: 89).

UNCTAD Secretariat (2003: 2) indicates a steady increase in bilateral investment treaties between 1959 and the beginning of the nineties. It is in 1959 that the first bilateral investment treaty (BIT) was concluded[17]. From thereon there has been an increase in the number of BITs such that at the end of 2002, about 2 181 BITs were registered. Furthermore, one finds that BITs encompasses 176 states and cover mostly investment relations between developing states and between economies in transition. Along side BITs one finds Double Taxation Treaties (DTTs). By the end of 2002, the number of DTTs had stood at 2 256. DTTs address among other things, the allocation of taxable income – reducing incidents of double taxation.

According to UNCTAD Secretariat (2003: 3) there has been an increase in the number of free trade agreements (FTAs). It *covers* the most early investment issues involving neighbouring states as well as newer ones concluded between distant states in different regions. It is believed that out of 197 FTAs in force, 55% contain specific chapters on investment and about 22% have general provisions on investment. Among the main issues addressed in these chapters are pre and post-establishment National Treatment (NT); Most-Favoured Nations (MFN) treatment; prohibitions of performance requirements often going beyond the Trade-Related Investment Measures (TRIMs) of the World Trade Organisation (WTO); promotion and protection, including basis for expropriation and compensation; dispute settlement, including both state-state and Investor-state situations; and transfer clauses guaranteeing the free transfer of payments, including capital, income, profits and royalties.

It is true that most of the regional free trade agreements today are also free investment agreements. Examples are NAFTA and MERCOSUR Protocols. The general aim being that of creating a more favourable trade and investment framework through the liberalisation of regional trade and also easing restrictions on FDI and through a reduction of operational restrictions in order to increase the flow of trade and investment within the region (UNCTAD Secretariat, 2003: 4). The gap between negotiations on trade and investments as two separate issues has been getting very narrow. UNCTAD Secretariat (2003: 5) records that such a relationship was introduced into the WTO work programme during the Fist Ministerial

[17] Bilateral Investment Treaty (BIT) is a legally binding international agreement between two states whereby, each state promises on a reciprocal basis to respect the standards of treatment laid down in the treaty on how to handle investors from the other contracting state (Muchlinski, 1999: 17).

Conference of the WTO held in Singapore in 1996, as one of the four so-called Singapore issues[18]. In their Declaration at the Fourth Session of the WTO Ministerial Conference in Doha in November 2001, Members of the WTO agreed on a work programme on the relationship between trade and investment. In doing so, they recognised (in paragraph 21) the need for strengthened technical assistance in the pursuance of the mandate, explicitly referring to UNCTAD. In response to this matter, the WTO Working Group on the Relationship between Trade and Investment deliberated on the seven issues listed in paragraph 22 of the Declaration, as well as technology transfer (UNCTAD Secretariat, 2003: 5).

2.2.2 Location as an investment factor

Traditionally, competitive advantage of a given location has been evaluated in terms of macroeconomic conditions. It is economic variables like the size and growth of the market, availability of labour and its remuneration, inflation, foreign debt, and the state of the BoP that were considered to be the major indicators of location profitability for FDI and trade (Mudambi and Navarra, 2002: 635). This understanding leads us to the components of FDI.

Di Giovanni (2002: 4) presents two major components of FDI. These are Greenfield investments and Mergers and Acquisition (M&A). Greenfield investments refer to investments in new assets in a foreign state whereas M&A are investments that involve acquisition of pre-existing foreign assets. The investment environment for labour matters, political stability, property rights, etc that characterise a location, can influence the decisions about the kind of FDI that can adapt in a particular locality. For the benefits of an investing firm, finding a suitable and secure location where the firm can operate is quite vital.

There are many factors determining the choice of a location. Feinberg and Keane (2001: 129) iterates that characteristics of a firm are very important in explaining the variation in

[18] Singapore issues are as follows:
- Trade and investment
- Trade and competition
- Transparency and government procurement and
- Trade facilitation

adjustments/adaptation when choosing the location for production purposes for that particular firm compared to a criterion of determining whether such a firm has access to international technology. From a policy point of view their argument is that such a finding implies that government action designed to protect vulnerable sectors from trade liberalisation might be altering patterns of domestic competition rather than helping the entire industry to adapt to international competition.

2.2.3 Institutional environment

Not only does location counts when handling FDI but some institutional factors too.
From an institutional economics point of view, institutions represent the major immobile factors in a globalised market. In an international environment featured by mobility of firms and production factors, legal, political and administrative systems tend to be the immobile aspects whose costs determine international attractiveness of a particular location. It is in such a competitive environment that one finds competition between institutional systems. On the one end are those that prove successful in achieving growth by promoting competition and openness, and on the other end those that loose out and the domestic consequences of those who are beginning to emulate the institutions of the successful states (Mudambi and Navarra, 2002: 636).

Mudambi and Navarra (2002: 638) define an institutional environment in this regard as including political institutions such as regime type, the national policy-making structures and the judicial system. They also include economic institutions such as the structure of the national factor markets and the terms of access for international factors of production as well as socio-cultural factors such as informal norms, customs, morals and religions.

Experience shows that attempts to emulate international institutions that seem successful raise domestic tension or resistance (Mudambi and Navarra, 2002: 637). This is because openness can be perceived as weakening the power of national groups. National groups often influence governments to interfere with international trade, capital flows, migration and technological exchange. Irrespective of the type of institutions considered, the role they play in society is seen as necessary to accomplish the following tasks: firstly, avoiding overly

costly transactions and allowing the realisation of large scale productivity gains and adapting improved technology.

Secondly, given the world of incomplete and asymmetric information, institutions enable agents bounded by rationality, to economise on processing information required when taking decisions.

It is possible to conceptualise institutions from a game theory point of view where there are three categories, one being the players of the game (i.e. organisations such as governments, courts, industrial organisations etc); secondly the rules of the game guiding and constraining the actions of players; and thirdly to equilibria the game. From an institutional economics perspective, institutions include formal and informal conventions. In this context, formal conventions are the rules while informal conventions are the standards. Organisations comprise of all sorts of organised agents, e.g. firms, political parties, unions, industrial associations and other organised groups that form society (Mudambi and Navarra, 2002: 638).

Still on institutional environment, literature records that cross-national variation in institutional environment is also a source of uncertainty to new foreign operators. In regional situations where markets are similar in political structures, factor market structures or cultural matters pose less uncertainty. In such a situation one finds that investors are likely to penetrate the market where the future policy regime is relatively predictable (Mudambi and Navarra, 2002: 641).

Stability and transparency are thus two eminent institutional traits necessary to attract FDI companies. Some researchers have indicated that the extent to which FDI can assist national development seem to depend on the extent of control the government of a state can exercise over conditions and direction of entry as well as operation of FDI. However, this can also be an institutional deterrent for positive FDI decisions as Mudambi and Navarra (2002: 642) concur with Asante (2001: 484) that one of the sources of uncertainty for international investments is the instability in the policy decision-making process usually found in states with unstable politics. The resultant effect of change in political regimes or power is

uncertainty about both the remnants of policy decisions taken by the outgoing government and about the policies initiated by the incoming government. An example is of a state where the government's commitments to a given structure of taxation and or regulation or even a set of property rights are easily changed. In this connection MNCs face political dangers in two ways (Mudambi and Navarra, 2002: 642): Firstly, the government is more likely to behave in an opportunistic manner for its own benefit; secondly, the host state's partner or a competitor may opportunistically approach the government with a request to implement actions that favour such a competitor on the expense of a MNC.

2.2.4 The African continent: A paradigm of FDI problems.

Africa, according to Owhoso et al (2002: 407) has a market of about 700 million people. With such a big market compared to that of the European Union, Africa is still perceived as a hopeless continent as a result of poverty, government corruption and poor infrastructure (Owhoso et al, 2002: 408).

In 1990, many African governments started recognising the potential of foreign direct investments and as a result begun changing policies to embrace such investments. Literature records that some states such as Botswana, Morocco and South Africa have made much progress in terms of economic viability in global trade. In Africa, one finds that MNCs identify with certain characteristic such as making their organisational structures distinct from all other firm structures, and also organise and coordinate value added activities across national borders as well as internalising trans-national markets for intermediate products that arise from these activities (Owhoso et al, 2002: 409).

Owhoso et al (2002: 410) identify three conditions that can benefit MNCs from the firm's perspective: ownership[19], location[20] and internalisation[21]. However, doing research on Africa, they found restrictions on ownership of enterprises, high level of economic regulation and

[19] Ownership refers to the development by a firm of its intellectual property, management, marketing and organisational know how (Owhoso et al, 2002: 410).

[20] Location implies the existence of barriers to trade such as tariffs, low labour or transportation costs, that makes it more advantageous to produce for a particular state than exporting.

[21] Internalisation refers to the ability of a firm to utilise its superior knowledge to conduct business within the firm at lower costs than having reliance on external markets.

explicit suppression of financial markets in many states on this continent. On Africa as a location for MNCs to contemplate, Owhoso et al (2002: 410) concur with Asante (2001: 484) and Mudambi and Navarra (2002: 642) that on the African continent, the climate for investors has been quite unfavourable for the last two decades as a result of unstable economic policies and political instability. Market imperfections, which slow the MNCs to take advantage of superior knowledge and expertise, could exist. These imperfections may take different forms among others, as oligopolistic markets, lack of scale economies, differential access to technology, etc (Owhoso et al, 2002: 410). It was reported in the *Economist* (2000) that firms seeking to do business in African states must be prepared to comply with the situation of "bring your own infrastructure" (BYOI) indicating the lack of necessary infrastructure for investors in most of the African states (The Economist, 2000).

Improved financial institution infrastructure is essential for attracting FDI. The African continent hosts a negative reputation on infrastructure matters. Literature records that in Nigeria alone between 1997 and 1999, over 20 banks out of 120 were closed due to insolvency caused by inadequate capitalisation, poor asset qualities, excessive risk taking tendencies, the prevalence of fraudulent activities as well as other banking malpractices. Financial infrastructure are required by manufacturing firms for the purposes of hedging foreign currency risk, obtaining loans in local currency for the purpose of financing working capital, maintenance of deposits as well as to transfer funds throughout the global operations of firms (Owhoso et al, 2002: 411).

According to Owhoso et al (2002: 413) a state that seems capable to host FDI on the African continent is South Africa. South Africa has many opportunities in that it has a long history of being open to FDI accompanied with good infrastructure of European origin. FDI in South Africa is boosted because of investment diversity, existence of a substantial amount of competition for investment purposes. South Africa has its own strong firms and with a well developed communication, infrastructure and banking system. One also finds that overseas firms are quite familiar with the prevailing business culture. Yet in the daily press it was noted that they express their concern on aspects of the RSA labour laws and Black Economic Empowerment. Blignaut also alluded to government as being a risk factor (Blignaut, 1986: 7)

Asante (2001: 484) states that the level of private and public investment has been modest even in African states with the most successful reforms. It has been noticed that most of the FDI in Africa is concentrated in a small number of states that are endowed with natural resources, especially oil. One finds that from 1980, FDI in Africa has remained below US$ 1 billion during the same period when Latin America averaged between US$ 3 billion and US$ 5 billion to US$ 14 billion. Africa requires enhancing macro economic stability in order to boost confidence so as to encourage domestic investments as well as inflow of foreign capital.

As aid and loans have proved unsuccessful in Africa, there is the perception that FDI is the answer to all developmental problems. Aid has to some extent created a dependency syndrome while loans have crippled economies and left many with huge debts. It seems that the need is for technology, such as information technology, instead of hard cash. The backwardness of information technology (IT) is assumed to attribute to an inability to increase the stock of IT hardware in Africa and a low capacity to develop appropriate software. Ineffective, unreliable and costly telecommunication systems face FDI companies. Lack of skills in developing and use of appropriate IT is also part of the problem. Only two states, South Africa and Egypt, have the capacity to absorb new IT technology (Asante, 2001: 485).

2.2.5 Hosting Foreign Direct Investment

2.2.5.1 Definition of MNCs as a form of FDI

Yarbrough and Yarbrough (2000: 394) define MNCs simply as enterprises that manage and control facilities in at least two states. In this clear-cut definition, and to avoid confusion between a MNC and any other firm that operates in at least two states, is of major importance their interpretation of "manage and control". They argue from the economic point of view that the primary issue in establishing whether an enterprise qualifies as a MNC is whether decisions made in one state manage and allocate resources located in another, as MNCs do

Yarbrough and Yarbrough (2000: 395) classify MNCs based on the organisational pattern of their production, into three groups:

a) Horizontal integrated MNCs. These produce similar products in several states. Examples include Toyota that produces automobiles in both Japan and the USA.
b) Vertically integrated MNCs. These are enterprises that produce inputs in one state that they then use to produce another product in another state.
c) Conglomerate MNCs. These enterprises produce different or totally unrelated products in various states. Examples include Japanese electronic firms such as Toshiba, Matsushita and Sony, all manufacturing a wide range of products around the world.

Historically, when industrialised economies extracted much of their required raw materials from developing states, MNCs clustered in agricultural and mining sectors. This trend has changed to the extent that the bulk of MNCs is now in manufacturing sectors.

2.2.5.2 Benefits of hosting FDI

An example from the Association of South East Asian Nations (ASEAN) with member states such as Thailand, Malaysia and Indonesia, shows that high growth experienced in the latter half of the 1980s, is partly attributed to the massive outward flow of Japanese FDI as a result of the Plaza accord. In South Korea between 1995 and 1996, growing trade was financed by growing portfolio inflows and gross other investments (Lim, 1999: 433).

Another example of aggregate growth FDI triggered is in the experience of the economies of Greece, Taiwan, Indonesia and Mexico. Though not quantified in this scenario, literature shows that reasonable growth was experienced. In most cases spillover-benefits are not expected to occur across all industries (Goldberg, 2003: 6).

Brink (2001: 471) concedes that FDI has raised the growth rate in many developing states. It is also claimed that inward FDI has contributed to the supply side transformation in the United Kingdom. From an employment point of view, it is claimed that inward investment has also served to raise the income levels of the factors of production in the host economies. Many advanced MNCs in the manufacturing sectors are conducted outside e.g. USA. This is

a reversal of the tradition of foreign subsidiaries sending their semi finished or simpler products to plants in the home states for completion. Executives of MNCs based in USA indicated that during future recessions they would be impartial in terms of deciding as to which plants should close and would not discriminate in favour of USA plants.

MNCs help in redistributing the world's scarce resources. This occurs by the fact that MNCs moves capital, technology and managerial skills from states in which they are relatively abundant to states in which they are relatively scarce (Du Plessis, 1996: 106). Presenting a related notion to that of Du Plessis (1996: 106), Goldberg (2003: 2) writes that MNCs help to fill an idea gap, which implies that MNCs have access to productive knowledge that is not readily available to producers in the host state. Such knowledge could be technological know-how, marketing and export contacts. Furthermore, in the financial services it was realised that foreign banks operating in developing states appear to be more efficient than their domestic counterparts. It is believed that such efficiency is attributed to stronger prudential regulations that foreign banks import to the hosting state. Stability in foreign banks was observed in the cases of Argentina, Chile and Colombia where especially the employment of more aggressive risk management techniques were applied (Goldberg, 2003: 9).

Bhattacharya (2002: 4) concedes increasing positive contributions of FDI in India. In 2001-2005 the flow of FDI to India amounted to almost US$ 4 billion whereas in 1991 it was US$155 million. Not only does India records such an increase in FDI but also the export performance of the manufacturing sector seems to have improved which in fact is a good achievement for the economy, *ceteris paribus.*

In Poland, between 1993-1997, the annual gross domestic product (GDP) growth averaged 5,8% due to the increase of FDI. The annual GDP in monetary terms was recorded at US$ 89 million for the period before 1989 and in 1990 up to 1998 the economy recorded a value of US$7500 million. The contributions by FDI are both direct and indirect (Gagelmann, 2000: 225).

The Poland findings indicate an experience of higher productivity growth in industries with a higher foreign presence (Gagelmann, 2000: 239). The initial technology gap is seen not to be

the determinant of the scope of impact of FDI on productivity growth. Under low competition industries, a stronger foreign presence (of MNCs) is associated with higher productivity. The reason for the positive impact referred to may be due to higher productivity of foreign firms and their higher rates of productivity growth. Unlike in low competition industries, in high competition industries, FDI does not affect productivity growth as the competitiveness is already established.

Gagelmann (2000: 243) argues that though it was found in Poland that the impact of foreign firms is detrimental especially to the locally owned section of the industry, a substantial initial backwardness can still be neutralised by means of spillovers that turn out to be positive. This was particularly found in the computer industry, manufacturing of control equipments, primary metal industry and manufacturing of grain mill products. Due to the technological superiority of foreign firms over the locally owned ones, a strong presence of MNCs is an advantage for the domestic industry as a whole. The indirect impact of MNCs seems to compensate their negative impact on indigenous firms.

Despite the benefits that MNCs brings to a hosting state, there are also aspects that render it difficult for MNCs to perform economically. This being the fact that some hosting states have both strict capital controls in place and also restrictions on profit repatriation. From MNCs perspective, such capital controls are thought to increase the cost of local borrowing due to high interest rate. The effect of having restrictions on profit repatriation is that dividend remittances are insensitive to the changes in desired dividends and as such investors tend to relocate some of the profit elsewhere (Desai et al, 2004: 5-7).

Future prospects in terms of hosting MNCs indicate that each region has candidate states in the lead to host more MNCs as in Table 2.1.

University of Pretoria etd – Nyambe, J M (2005)

Table 2.1: Ranking States for Foreign Direct Investment flows, estimated for the period 2004 to 2007.

	Africa	Asia	Latin America	Developing Economies	Central & Eastern Europe	Developed Economies
1	South Africa	China	Mexico	China	Czech Republic Poland	United States
2	Angola Tanzania	India	Brazil Chile	India		United Kingdom
3		Thailand		Thailand	Romania Russia	Canada France

Source: UNCTAD Secretariat (2004)

In Africa, South Africa, Angola and Tanzania are in the top three positions in terms of attracting MNCs for the period 2004-2007 (Table 2.1). The reasons mentioned earlier in this Chapter, namely having better transportation, banking and communication infrastructure and the capability to absorb new technology especially in information technology can be why South Africa is seen as the most attractive location on the African Continent. Furthermore, in Asia and the Pacific Rim, China occupies the fist followed by India in the second position. China's economic boom among others is associated with its entry into the WTO. Such a move gives China more opportunities to address its economic matters (UNCTAD Secretariat, 2004: 5).

2.2.5.3 Criticism of FDI

Several problems are documented regarding the operations of MNCs in developing states and which prompt much criticism of MNCs. It is familiar that less developed states are short of capital and desperately in need of employment as well as appropriate new technology, all which cultivate economic growth. Such states are therefore very eager to attract FDI. In their efforts they relax certain conditions that MNCs take unfair advantage of. Potential negative effects of such relaxations are aggravated by domestic inadequacies.

Few less developed states have a civil service capable of monitoring the activities of MNCs or to set environmental and safety standards, but the majority don't have skilled civil services to undertake such tasks (Wilson, 1990: 170). Wilson, (1990: 171)

cites an example of Bhopal in India where due to the tolerance of lower safety standards, an escape of a poisonous gas occurred. Bhattacharya (2002: 3) agrees with Wilson (1990: 171) on the highly toxic Methyl IsoCyanate (MIC) gas at a chemical plant in Bhopal (India) in pointing to the fact that gross incapacity of the industrial environmental law and policy of the state are potential safety hazards for the inhabitants. Bhattacharya (2002: 5) found that some MNCs choose a "Pollution Haven". This is defined as a manufacturing location where the cost of pollution abatement is less than in other locations. MNCs attitude about cost of abatement are seen as them discounting the penalty/consequence of getting caught against the coverage of the law as well as the institutional monitoring mechanism.

Based on such a constraining scenario, less-developed states end up suffering due to their inability to collect information on the activities of MNCs except when MNCs chooses to provide it. Efforts to tax MNCs are difficult in that they have a tendency of transferring products at unrealistic prices between branches in different states so as to minimise tax (Wilson, 1990: 171).

A MNC may buy a subsidiary from a parent company and pay an extremely high price for accompanying machinery or processes. The MNC thus reduce the taxable profits of the subsidiary. An alternative is where products from a subsidiary are sold at a deflated price to the parent company so as to minimise its taxable earning. Combining these strategies gives birth to a third strategy where an intermediary – a third branch of the company located in a certain state with low corporate taxation - then buy and sell from other branches of the MNCs at artificial prices. These are activities that retard the development of Third World states (Wilson, 1990: 171).

Brink (2001: 472) presents a contrasting idea to Wilson's (1990: 171) tax evasion paradigm, indicating that FDI can alter the production possibilities of a host state due to the fact that it is primarily undertaken by technologically progressive sectors and comes with new technologies and additional capital. However, Wilson acknowledges the fact that FDI brings capital to a host state but argues that much of the required capital not being sourced from the host state. On technology, Wilson argues and Brink acknowledges that FDI brings inappropriate technology to host states while MNCs establish new technology. Van Pottelsberghe de la Potterie and Lichtenberg (2001:

497) argue that inward FDI flows does not contribute to the improvement of the technological base of host states. Deductions from these statements are that MNCs bring technology into Africa regardless of its appropriateness.

When establishing subsidiaries abroad, MNCs' aim is certainly not to diffuse their own technological advantages with that of domestic firms of hosting states. So often they aim to exploit more fully their own technological innovations and hence the weak potential diffusion of technology in host states. Using their investments abroad, MNCs seem able to source foreign technology bases, thereby increasing the productivity of their parent companies and own home states. (Van Pottelsberghe de la Potterie and Lichtenberg, 2001: 493).

Owhoso et al (2002: 411) identifies four general motives of USA firms (MNCs) attempting to invest in Africa. To a little extent there are advantages but one finds this as an opportunistic enthusiasm. The four motives of USA MNCs are:

- Natural resource seeking. This involves obtaining relative cheap physical or human resources. USA MNCs for instance penetrate the African market to get gas and bauxite.
- Market seeking. Such expansions of USA MNCs, attempt to follow other main suppliers and customers that have expanded overseas. These USA MNCs ensure that their products adapt to local tastes and needs as a way of exerting competition on rivalry firms in states where they have expanded; to capitalise on lower production and transaction costs and as a response to host governments, either to circumvent barriers introduced by host governments or to take advantage of prevailing investment incentives.
- Efficiency seeking. In this regard, expansions are conducted to take advantage of economies of scale and scope or as a way of diversifying product risk or process risk. MNCs in this connection try to gain from economic systems and factor endowments by concentrating production in a few locations with as purpose supplying multiple markets.
- Strategic asset seeking. This is done to obtain resources that will strengthen the competitive advantage of these USA MNCs over rivals or to weaken

rivals. The strategic advantage is what MNCs first perceive before entering the African market.

For a number of years, many researchers believed that MNCs were vehicles for spreading capital from one state to another. This is what is referred to as *capital arbitrage theory of multinationals.* This view of capital arbitrage according to Yarbrough and Yarbrough (2000: 395) is inconsistent with three aspects observed about MNCs behaviour. These aspects are: Firstly, MNCs capital does not flow from capital abundant states to capital scarce states. In reality it has been noticed that a large share of inward FDI goes to developed states with capital rich economies instead of developing states with capital scarce economies. Secondly, in many states, inward and outward flow of FDI occurs simultaneously. Thirdly, although MNCs do not move capital from one state to another, they (MNCs) borrow money locally for their subsidiaries in the hosting states where products can be produced and where they can maintain control over production. The third aspect is also echoed by Desai et al (2004: 6) where they indicate that funding for local MNCs typically comes from local loans of hosting states.

2.3 Summary

Due to the relevance of this chapter in compiling the checklists in Chapter four, the summary of this chapter is presented in the form of a Strength, Weaknesses, Opportunities and Threats (SWOT) analysis[22]. See Table 2.2.

[22] See Hill and Jones (2004: 16, 17) as well as Higgins and Vincze (1993) for the general explanations of the components of SWOT analysis.

Table 2.2: Strengths, Weaknesses, Opportunities and Threats analysis

	Strength	**Weaknesses**	**Opportunities**	**Threats**
Globalisation	Involvement in international trade leads to economic integration. Increases bilateral investment Treaties and free trade agreements that contain among other clauses; Most-Favoured Nations, National Treatment, Trade-Related Investment Measures, expropriation and environment as in accordance with the WTO standards. Developing states can become signatories to double taxation treaties that seek among other things, to reduce incidents of double taxation.	Operational restrictions hamper the flow of FDI.	Realisation of sectoral division of labour and specialisation. Resultant economic integration enhances peace in the region. Lagging states benefits from technological breakthrough in communication, transportation and information technology sectors. As a result of technological breakthrough in certain sectors, it results in the reduction of transaction costs that also leads to lower product prices. Increased cross border financial flows and interdependence in international financial markets. Increase in production linkages between firms. Access to technical assistance by WTO member states seeking to consolidate their trade and investment positions. A good location free from political instability, labour unrests and conflict on property rights can properly host FDI in the form of Greenfield investments and Mergers & Acquisitions. Liberalisation of regional trade and easing operational restrictions on FDI to increase the flow of trade and investments in the region.	Causes discomfort among local firms (pressure groups/national groups) for fear that governments might succumb to the requirements of trade liberalisation which will make the local market more competitive, a move that can be seen to lead to closure of some local firms.
FDI Problems in Africa	Abundant unskilled labour but only required by labour intensive FDI.	Restrictions on the ownership of enterprises, high level of economic regulation and suppression of financial markets.	Many states are rich in natural endowment such as oil, precious minerals and forestry to which FDI gets attracted.	Unstable economic policies and political instability. Macroeconomic instability.

		Poor infrastructure in the communication sector leads to the 'bring your own infrastructure approach'. Lack of necessary skilled manpower to monitor Foreign Direct Investment operations that can be hazardous to the environment and also those that avoids taxation. Backwardness in the areas of information technology.		
Hosting FDI (general)	Having legal, political and administrative institutions that are efficient is conducive for Foreign Direct Investment. Foreign Direct Investment redistributes the World's scarce resources by moving capital, technology and managerial skills from one state to another. Foreign Direct Investments fills the idea gap through access to productive knowledge.	Getting a suitable location where a firm can operate is difficult because of lack of guarantees on enterprise ownership. Foreign Direct Investments establish quickly in states that are rich in natural resources but once such resources extinguish, they leave.	Enhancement of efficiency and stability in banks as a result of Foreign Direct Investment's capability to employ prudential regulation. Economic growth through Foreign Direct Investments. Foreign Direct Investments raise returns to the factors of production. Creation of export based manufacturing sector. Spillover effect of technological know-how from Foreign Direct Investment to locally owned firms.	In some developing states, attempts to emulate institutions that seem successful elsewhere raise domestic tension (by pressure groups) especially if transparency is not pursued in this regard. Change of governments brings uncertainty to Foreign Direct Investment on future policy decision-making. Cross-national variation in institutional environment causes uncertainty to foreign investors.

CHAPTER THREE

CLAUSES OF SPECIAL INTEREST

3.1 Introduction

This chapter is composed of clauses that are very pertinent to this research as it will be useful in developing checklists for evaluating the two agreements with reference to FDI/MNCs. The United Nations Conference on Trade and Development (UNCTAD) is referred to in this chapter as an institution tasked with the responsibility of attending to world trade matters without excluding the work of the WTO. Clauses referred to in this chapter are obtained from GATT 1994 and the records of the WTO's UNCTAD Secretariat.

Furthermore, a brief background of UNCTAD is highlighted to indicate why such an institution is pertinent in international trade arrangements and in this study. Many clauses are known but of special interest in this regard are: MFN, NT, HCMs, TRIMs, Employment, Expropriation, Natural environment, FET, SPS and RoO. These ten clauses are introduced after having reflected the challenging business environment that suggests their enactment to arrest prejudices that might arise in the processes of setting and operating business enterprises. Furthermore, these clauses are set to briefly reflect how they contribute to improve trade by creating an enabling environment. This chapter forms a base on which in a later chapter, SADC Agreements and EU/RSA TDCA will be examined in terms of their compatibility with these clauses.

3.2 The evolution of UNCTAD

There has been an increase in the problems of developing states particularly in the UN after the 1955 Bundung Conference. Such an unprecedented increase in developing states' problems led to the UN General Assembly convention of UNCTAD in Geneva. UNCTAD has the following aims:

- Promoting economic growth in developing states through international trade,

- Formulating principles and policy options for international trade and economic development and making proposals to this effect.

UNCTAD convenes a general meeting every four years and literature records the following meetings: UNCTAD I - Geneva in 1964, UNCTAD II – New Delhi in 1968, UNCTAD III – Santiago in 1972, UNCTAD IV – Nairobi in 1976, UNCTAD V – Manila in 1979, UNCTAD VI – Belgrade in 1983, UNCTAD VII – Geneva in 1987, UNCTAD VIII – Cartagena in 1992, UNCTAD IX – Midrand (South Africa) in 1996 and UNCTAD X Bangkok in 2000 (Van Houtte, 2002: 54).

According to Van Houtte (2002: 55) up to 190 states are members of UNCTAD whose purpose is assisting developing states in promoting their exports. Starting in 1968, the International Trade Centre (ITC) became jointly operated by the UN acting through UNCTAD and the GATT (now WTO) and has become a joint subsidiary organ of the WTO and the UN.

3.3 Predisposing matters

The host state's law is an important point of departure in trade and investment negotiations that involves MNCs. This serves to provide certainty or can create uncertainty in the business environment. Domestic laws serve as a regulatory framework that can lead to an enhancement or a deterrent to investments. Each of the parties in the business environment has an interest of maximising returns on the investment. However, many of the conceived goals of profit maximisation via MNCs can also negatively effect weaker partners in the outcome of negotiations or allowing the investment to be disadvantaged in one way or another.

Accompanied by unequal conditions of trade and investment in the world market and also the unwillingness of local ruling political parties to submit to the interest of MNCs, 'dependency theory' predicts that less developed host states are likely to remain in weaker bargaining positions. Contrary to the notion of dependency theory the 'bargaining analysis' theory arises which posits that there can be situations in which even a developing host state has a strong bargaining capability (Muchlinski, 1999: 104,105).

One finds that in manufacturing industries, the host state is in a weaker situation compared to a MNC, unless the host firm is operating in a mature industry that has no or little reliance on new technology. If such a scenario happens, then the MNC can be vulnerable since its contribution to the host economy can be replicated locally. With regard to the service industries, host states seem to be in a relatively better position in that they can exercise prudential regulations in the service sectors. In other states there are even well established monopolies geared to provide such services without help from MNCs (Muchlinski, 1999: 106).

All these matters contribute to the necessity of having an effective regulation mechanism to cultivate and sustain a business environment, the advantages of which can be harnessed and multiplied. This brings us to the different levels of regulation. According to Muchlinski, (1999: 107) there are three levels of regulation namely, *the national level, the regional and the international level.* The national level can be further subdivided into two areas: unilateral governmental regulation and bilateral regulation based on a treaty concluded between the home and the host states. The regional level involves a supranational regulatory authority established by a group of states that share common economic interests in a defined geographic area, whereas the international level involves regulation by a substantial majority of the World's states acting through multilateral intergovernmental organisations (Muchlinski, 1999: 107). The following clauses are all in nature typical of the latter.

3.4 Clauses

3.4.1 Most-Favoured-Nation

The purpose with the MFN clause of GATT 1994, Article I is that any advantage, favour, privilege or immunity that is granted by a contracting party to products originating or destined to some other states has to be applied immediately and unconditionally to any other like products originating or destined elsewhere outside the borders of the state (The GATT Secretariat, 1994: 486; Khalid et al, 1999: 13).

There are several types of MFN clauses. These clauses can either be unilateral, reciprocal, conditional, unconditional, limited (by time or territory) or even unlimited.

The MFN standard may be applied in different scenarios but in this context it is applied in the area of trade and investments. In order for a treatment to fall under the scope of the MFN provision, the treatment has to be a general treatment provided to investors from a given foreign state. If a host state grants special privileges or incentives to an individual investor in an investment contract between it and the host state ('once-off deal') there would be no obligation under the MFN clause to treat other foreign investors equally. Freedom of contract prevails over the MFN standard[23]. The relevance of the MFN principle in this particular instance is that all foreign investors must be treated equally for purposes of being potential candidates for the special incentives, which in practice (or without the MFN principle) could only be granted to one individual investor (UNCTAD Secretariat, 1999d: 6, 7; Jackson, 2002: 160-163).

What complicates the MFN issue (GATT 1994, Article 1) is the fact that there are two types of issues that pose a challenge. Firstly, likeness of the products for tariff purposes and secondly, the grant of favourable tariff treatment to products imported by specific importers is alleged to result in de facto discrimination compared to the like products from some other WTO member states. (Jackson et al, 2002:425).

To explain how the MFN principle works especially with reference to the two issues mentioned above, case law is applied to present this clarification. The cases Spain v Brazil and that of Indonesia v Japan, EC and the USA were extracted from [(Jackson et al, 2002: 427 - 437; Foreign Trade Information System, 1981: 1, 6, 7, 8) and WorldTradeLaw.net b, 1998] respectively.

Spain v Brazil

Spain classified all unroasted, non-decaffeinated coffee under one-tariff heading. It happened that in 1979, Spain subdivided its classification for such coffee into five parts with respect to its new law. Three belonged to a 7% duty and two were duty free. Brazil was the principal supplier of coffee to Spain. Brazil complained that the new Spanish law subjected its Brazilian exports of unroasted, non-decaffeinated

[23] Freedom of contract in this regard implies that all investors – be it foreign or domestic, must be allowed to enter into business contracts.

coffee (unwashed Arabica and Robusta coffee) to a tariff treatment less favourable than that accorded to mild coffee. Prior to this new law there had been no differentiation in the tariff treatment applied by Spain to imports of unroasted coffee. As the main supplier these products to Spain, Brazil viewed the new law as discriminatory to its exports.

The Panel then examined all the arguments and justifications that were advanced. The Panel noted that arguments made were mainly related to organoleptic differences resulting from geographic factors, cultivation methods, the processing of coffee beans and the genetic factor. As a result the Panel did not consider such facts as sufficient for Spain to allow differentials tariff treatment. The Panel also discovered that Brazil was exporting unwashed Arabica and also Robusta coffee, which were charged higher tariffs than mild coffee. It was found that Spain acted not inconformity with the provision of GATT Article I: 1. As such it was indicated that the act by Spain constituted prima facie case of impairment of benefits which Brazil suppose to enjoy as prescribed under Article XXIII. Because these two products were considered to be like products, the Panel concluded that the tariff regime that Spain applied was discriminative vis- à-vis unroasted coffee originating in Brazil.

Indonesia v Japan, EC and the USA

In this case, Japan, EC and the USA challenged exemptions that Indonesia was giving on which were alleged to be only for imports of motor vehicles from South Korea and not like products from other WTO member states[24]. These were exemptions in the form of custom duties and internal taxes. The Indonesian measure benefited PTN, which in this instance is a private Indonesian company for whom Kia, a South Korean company manufactured cars. The Panel rejected Indonesia's argument, which reasoned that this exemption was a private-sector choice and not a government directive. The Panel also rejected Indonesia's arguments with an indication that such a private choice was not within the scope of GATT 1994, Article I (MFN).

[24] i.e. South Korea was not a WTO Member State by that time.

It was also argued by the Panel that the distinction as to whether one product is subject to zero duties while another to a high duty, depends on whether or not TPN had made a deal with the exporting company to produce national cars and is covered by the authorisation of June 1996 with specifications that correspond to those of the Kia car produced in South Korea. The Panel further argued that in GATT/WTO, the right of Members couldn't be made dependent upon, conditional or affected by any contractual obligations in place. The existence of these conditions is inconsistent with the provisions of GATT 1994, Article I, paragraph 1 which ensures that tax and customs duty benefits that one product enjoys must also be made available to the like product imported from GATT/WTO member states immediately and unconditionally. The violations of GATT 1994, Article I that Indonesia auto importers committed seem to depend not on the de facto discrimination per se, but on the fact that some autos from South Korea received more favourable tariff treatment than like autos from other GATT/WTO member states (Japan, EC and the USA).

Jackson et al (2002:437) iterates that the obligation of GATT 1994, Article I (MFN) applies to internal taxes and sales regulations subject to GATT 1994, Article III (NT) obligation, which therefore, means that the obligation in the MFN principle depends partly on the scope of the NT principle.

UNCTAD Secretariat (1999d: 7) advises that foreign investors have to be treated in accordance with different objective situations. This implies that the MFN standard does not necessarily impede the host state from according different treatments to different sectors of economic activity. It is not a violation of the MFN standard per se should a host state grant subsidies only to investment in say one industry while excluding foreign investment in other areas. However, de facto discrimination can be the result if the only purpose of the differentiation was to exclude investors of a particular nationality from the benefits of the programme.

Usually MFN standards are reciprocal and it is a common rule for agriculture, maritime, air and road transport. In trade, the MFN standard only applies to the treatment of investors after entry. Therefore, the MFN standard prevents competition between investors from being distorted by discrimination based on nationality considerations. Though a non-discrimination clause may already exist in the domestic

legal system of a host state, this would often not be perceived a sufficient condition to give foreign investors the same degree of assurance as an obligation under international law (UNCTAD Secretariat, 1999d: 9).

The MFN standard has not only positive rewards but negative ones also. It for instance limits states' room for manoeuvre in respect of investment agreements they want to conclude in the future. The MFN's basic tenet is that incentives given are applicable to all foreign states involved in similar trade for a like product. Classifying the product as a like product is crucial for the MFN principle. This concept (of a like product) provides a reconciling strategy to averting the problem of discrimination. However, this can result in a 'free rider' issue[25], which varies from case to case. This issue can either take a bilateral form or be present in multilateral treaties. Briefly, the degree of free riding depends on the extent to which it creates asymmetrical situations (UNCTAD Secretariat, 1999d: 9; Jackson et al, 2002:428).

There are exceptions to the MFN rule e.g. a WTO member state may offer more favourable treatment to states with which it is in a customs union, free trade area or an economic integration arrangement (Khalid et al, 1999: 13). UNCTAD Secretariat (1999d: 20) agrees with Khalid et al (1999: 13) on the fact that there is an allowance to offer favourable treatment by a state to other states in the same economic arrangement. The motive for such a proviso is to allow member states of such an arrangement an opportunity to advance with their internal investment liberalisation at a faster pace as opposed to those that non-member states have agreed to.

3.4.2 National Treatment

The National Treatment (NT) clause of GATT 1994, Article III sets the main general standard in international practice that ensures prohibition of unfair taxing or charging extra costs on imported products so that such products are not made more expensive

[25] The Free rider issue means that state A enjoys the advantages of being in a treaty with state B that has granted state C additional rights. In this regard the contractual agreement entered into between state A and B was without additional rights that are given to state C. As such state A can take advantage of the situation to claim such additional rights too because it also has a contractual treaty with state B (UNCTAD Secretariat, 1999d: 9; Bhala, 2001: 49).

than like products that are domestically produced (The GATT Secretariat, 1994: 490; Khalid et al, 1999: 112).

For many states, NT serves to eliminate distortions in competition and is thus seen to enhance the efficient operation of the economies involved. NT is a relative standard whose content depends on the state of treatment for domestic and foreign investors alike (UNCTAD Secretariat, 1999e: 3).

UNCTAD Secretariat (1999e: 7) indicates the principal characteristic of the NT standard as being its relativity. The content of NT depends on the treatment offered by a host state to domestic investors. NT has its origins in trade agreements. In trade matters, NT of imported products with respect to internal measures is one of the basic principles of the multilateral trading system created by the GATT. A fundamental principle in this respect is that as a general rule, border measures designed to give a competitive advantage to domestic products should take the form of custom tariffs imposed at the border. The level of such customs tariffs imposed at the border should be a matter for negotiation and binding in national schedules. This notion is what is embodied in the GATT 1994 Article III (NT on Internal Taxation and Regulation). The role of the NT principle of GATT 1994, Article III must therefore be understood in the light of the distinction between border measures and internal measures (UNCTAD Secretariat, 1999e: 8).

NT in the investment field goes well beyond its use in trade agreements. Particularly, the reference to products in GATT 1994 Article III is inadequate for investment agreements in that it restricts NT to trade in goods. Foreign investors in their host states cover a wide array of activities and as such, wider categories of economic transactions may be subjected to NT disciplines under the investment agreements than under trade agreements (UNCTAD Secretariat, 1999e: 9).

UNCTAD Secretariat (1999e: 9) outlines exceptions to NT:

a) General exceptions. These are exceptions based on reasons of public health, order, moral and national security.

b) Subject-specific exceptions. Exceptions in this regard include intellectual property, taxation provisions in bilateral tax treaties, and prudential measures in financial

services.

c) State-specific exceptions. This is whereby a contracting party reserves the right to differentiate between domestic and foreign investors under its laws and regulations.

Furthermore, UNCTAD Secretariat (1999e: 9) utters that the principal beneficiaries of NT are investors and investments.

3.4.3 Home Country Measures

The requirements that NT poses apply also in this clause. Furthermore, member states must ensure that technical regulations are not applied to hinder international trade. To this effect, technical regulations should not be more trade-restrictive than necessary to fulfil a legitimate purpose while taking into consideration the risks that non-fulfilment will create. The legitimate objectives among others are: national security requirements, prevention of deceptive practices, protection of human health and safety, animal and plant life as well as their health and also that of the environment; GATT 1994 Article 2 (The GATT Secretariat, 1994: 139).

Host states desire to have FDI that is geared toward promoting national economic and social objectives. It is for this reason that many host states including developing states, adopt measures to attract FDI by improving their regulatory framework for FDI, enhancing programmes or offering incentives (UNCTAD Secretariat, 1999b: 1)

UNCTAD Secretariat (1999b: 5) indicates that in the context of international investment instruments, the term 'a home country measure' refers to how such instruments might address a range of national laws, regulations and policies that affect FDI. Many developed states espouse policy positions that support FDI promotion but the reality of follow-on programmatic activities often does not match the rhetoric of their declaratory statements.

Major types of home country measures are, according to UNCTAD Secretariat (1999b: 8), as follows:

a) Policy positions. This refers to policy positions that seek to encourage the flow of FDI to developing states. These policy positions are often typically positive in tone but vague in specific commitments. Many home states are said to be facing

competing policy objectives where support for Trans-national Corporations (TNCs) seem to be in conflict with domestic labour interests. The concept of official neutrality on FDI flows also sometimes contrasts with proclaimed support for increased FDI flows to assist developing states.

b) Information provision and technical assistance. This is believed to assist in overcoming market imperfections that sometimes disadvantage developing states. When promoting FDI to developing states, the starting point has to be the fundamental steps to gather, publish and disseminate basic information regarding the states' legal frameworks, macroeconomic circumstances, sectoral conditions and other factors that form the broad political and socio-economic context within which foreign enterprises will look to invest.

c) Technology transfer. This can be facilitated by HCMs that encourage particular types of FDI or enhance host state conditions conducive to technology related FDI. Technology transfer can also be fostered by technical assistance that strengthens the respective capacity of developing states for FDI, in particular for technology intensive sectors.

d) Financial and fiscal incentives. This comprises a diverse array of HCMs that seek to promote FDI to developing states. Special support might be offered for FDI in designated industries such as infrastructure projects, or for ventures undertaken by small and medium-sized enterprises (SMEs) or with local business partners.

e) Investment insurance. Most national and regional or multilateral programmes offer coverage of political and other non-commercial risks not normally included under conventional, private insurance policies. These financial guarantee programmes promote FDI because the projected risk is generally higher in developing states.

f) Market access regulations. This encompasses trade-related measures dealing with matters such as product certification, state of origin definitions or preferential impact regimes. HCMs that inhibit domestic market access for exports from overseas facilities or conversely grant-favoured treatment to imports from selected states help shape the distribution pattern of global FDI flows.

3.4.4 Expropriation (Taking of property)

As hinted earlier in Chapter One, the issue of expropriation is a sensitive one, and for that matter political. This study will just highlight what is embodied in the clause without deliberating the issue in other chapters.

There are different categories under which property can be taken. Firstly, the distinction between governmental measures that involve interference with the assets of foreign investors, but do not require compensation and those that do. Secondly, the issue of the applicable standard for compensation. Furthermore, there are three principal requirements that must be satisfied before expropriation can be qualified to be lawful. These are: taking should be for a public purpose; must not be discriminatory and compensation must be paid. Bilateral Investment Treaties (BITs) use the formula indicating that compensation must be prompt, adequate and effective (UNCTAD Secretariat, 2000: 1).

In the Council of Europe, it is recorded that no one will be deprived of his possessions except in the public interest. The same language is used in the Constitutions of South Africa and Namibia. Expropriation has to be followed by fair compensation according to international law. In South Africa, compensation for the property taken has to be subjected to agreed compensation. In Namibia, the language used is 'just compensation' (Van der Walt, 1999: 97-355).

Host states taking foreign property is one of the major risks to FDI (UNCTAD Secretariat, 2000b: 3). When a foreign investor is in a host state, such an investor and its property falls within the legislative and administrative control of the host state. Several factors may lead to changes in the way the investor is treated such as coming to power of a new government, shifts in ideology, economic nationalism or monetary crises. When these changes occur, they may lead to the taking of the property of a foreign investor.

Takings can be direct or indirect. Direct taking is associated with measures that have given rise to the classical category of taking as applicable in international law. These

include nationalisation[26] and expropriations[27]. Examples of taking of foreign investor's property are recorded in the twentieth century. This was classified as nationalisations. This began with the Russian and Mexican revolutions. No compensations were made and such behaviours led to conflicts between the host states and the home states of the foreign investor whose property was taken. The USA responded to such conflicting behaviours regarding taking of property by Mexico. The USA did not contest the case for nationalisation in terms of Mexico's rights but argued that such a matter was subject to certain international law standards including the Hull formula[28] (UNCTAD Secretariat, 2000b: 5).

Another example of taking is when newly independent states embarked on across the board nationalisation of foreign affiliates and their assets. This was intended to wrest economic control from the nationals of the colonial states. Closely related to nationalisation are large-scale take-overs of land by government with the motive to redistribute it to the landless. The difference of this move from nationalisation is that the government does not retain the property. Earlier it was indicated as one of the requirements for takings, that taking must be for a public purpose (UNCTAD Secretariat, 2000b: 6).

3.4.5 Trade-Related Investment Measures[29]

This clause reaffirms what the NT attempts to enforce on internal taxation and regulation and the elimination of quantitative restrictions GATT 1994, Article III and XI (The GATT Secretariat, 1994: 163; Jackson, 2002: 317).

There are various trade policy measures that can be identified as TRIMs. According to UNCTAD Secretariat (1999c: 5) the sector policy effect of the NAFTA with its three stage effects exemplifies TRIMs. The first stage is that where NAFTA offered an

[26] Nationalisations are outright takings in all economic sectors or on an industry-specific basis.
[27] Firm specific takings refer to takings where payment of prompt, adequate and effective compensation is done (UNCTAD Secretariat, 2000b: 5).

[28] Hull formula implies that takings by a host state should satisfy an external standard mandated by international law, which would fully protect the investor's interest (UNCTAD Secretariat, 2000b: 5).
[29] A number of investment performance-related measures that have an effect on trade were to be notified and then eliminated by January 2001 and January 2003 for LDCs (Pangestu, 2002: 154, 157; Bora, 2002: 171-177).

opportunity for enterprises to qualify for NAFTA trade benefits if they could meet the rule-of-origin requirements, e.g. that their television tubes are produced in North America. The second stage was production oriented and characterised by the establishment of five North American factories. The third stage became observable when these foreign affiliates began exporting USA television tubes to both Mexico and Asia (UNCTAD Secretariat, 1999c: 6).

UNCTAD Secretariat (1999c: 6) identifies the following broad categories of TRIMs:
Market access restrictions. These include tariffs and quantitative restraints on imports such as variable import levies, minimum import prices, discretionary import licensing, voluntary export restraints and non-tariff measures maintained through state-trading enterprises.

Market access development preferences. Includes Generalised System of Preferences (GSP), Caribbean Basin Initiative (CBI) and Cotonou etc. Export promotion devices. Includes Export Processing Zones (EPZs), export financing and taxation measures. Export restrictions. This implies export controls.

3.4.6 Employment

In GATT 1994, Decision on Trade and Environment, member states are encouraged among other things, to handle trade and economic endeavours in a way that raises the standards of living, ensuring full employment (The GATT Secretariat, 1994: 469).

People are employed directly or indirectly in TNCs.
Direct employment is found in natural resources projects, manufacturing plants and service industries. Indirect employment is through suppliers, subcontractors, or service providers. TNC's largest contributions in terms of employment generation are through indirect employment (UNCTAD Secretariat, 2000a: 5).

According to UNCTAD Secretariat (2000a: 5) there are three areas that the employment clause emphasises:

a) Employment promotion. Economic development and employment promotion are two things that are inseparable. It is estimated that the labour force in the

developing world is growing at about 2%. Since there are new entrants into the work force every year, governments are advised to encourage TNCs to invest so as to stimulate economic growth.

b) Opportunity and security of employment. Emphasis is on ensuring that there is no discrimination based on sex, colour, race, national extraction, religion or political opinion. TNCs should base their employment policies on qualifications and skills.

c) Human resources development. Skill upgrading is quite important in developing states. The move should be that of resorting to value-added activities and better quality FDI.

3.4.7 Natural Environment

3.4.7.1 Trade and Investment

Despite the relationship between the two clauses (SPS and natural environment) emphasis on environment in this context shifts to matters of trade and investment. In other words, focus is on the way business operations are regulated to prevent polluting the environment[30].

Trade and investment enters into the sustainable environmental debate as a result of the negative consequences that certain production processes causes to the environment. It is argued that the root cause of environmental degradation is centred on market failures. In this regard, market forces (demand and supply) fail to deliver an optimal output for society as a whole. This occurs when consumers and producers do not have to bear the cost of their actions such as pollution inflicted on third parties (environmental externalities) (Nordström and Vaughan, 1999: 1; Shaffer, 2002: 359).

Another cause relates to undefined property rights over natural resources. Ultimately, governments in most instances attempt to arbitrate conflicting claims over natural

[30] Natural environment refers to the natural world in its pure state, but more generally regarded as referring to renewable and non-renewable resources such as air, water, soil, plants, animals etc. (Fuggle and Rabie, 2003:84).

resources and also attempt to strike a balance between polluters and victims. To some extent such a move by governments may also worsen the situation especially if the move ignores initiating appropriate tax and effective regulations but instead introduce some distortions such as energy subsidies, subsidies on agriculture and fishing, which aggravates pollution problems (Nordström and Vaughan, 1999: 2).

According to Redgwell (2003: 660) the developments in international environmental law can be divided into three time stages as follows:
The creation of international institutions from 1945, the period before the 1972 Stockholm Conference, and the 1992 Rio Conference on Environment and Development. The period before the 1972 Stockholm Conference, the creation of international institutions from 1945 and the 1992 Rio Conference on environment and development.

GATT 1994 Decision on Trade and Environment suggests an opportunity for the improvement of the environment in many states through the diffusion and use of environmentally sound technology and management practices that are at the disposal of trans-national corporations. It is in this connection that national governments are urged to tackle environmental issues through regulation. Private, as well as non-governmental organisations (NGO) have in the past been seen making efforts to preserve the environment. Building on environmental welfare and sustainability is imperative for every state and it should be done jointly with the private sector (UNCTAD Secretariat, 2001: 7).

As mentioned in Chapter One, it is not the intention of this study to criticise the jurisdiction of the GATT/WTO but it is however, worth indicating that the GATT/WTO is not free from criticism in the way it handles matters of trade as they relate to the natural environment. This stems from the fact that environment measures have economic effect and many trade measures affect the environment. Developing states have their own pressing issues that require the WTO to address while the developed states have also their issues. Such differences constitute the move by some states to relegate concerns over environmental impacts of trade to other international institutions such as the United Nations Environmental Programme (UNEP). The level of representation of member states at the WTO is not equal. More powerful states

such as the USA and EC drives the WTO agendas. It remains a question of power. An example where power manifests its influence in WTO agendas is in the way the USA and the EC made their demand for a high level symposium on trade and environment matters held in March 1999. The strategy of using power to influence WTO agendas frustrates developing states (Shaffer, 2002:359, 371).

The GATT 1994 Decision on Trade and Environment with reference to the Trade Negotiations Committee Decision of 15 December 1993 indicates that states must avoid protectionist trade measures and encourages adherence to effective multilateral disciplines. There must be surveillance of trade measures used for environmental purposes and surveillance of trade-related aspects of environmental measures that have an important trade effect. The essence of ensuring environmentally friendly policies is to promote sustainable development (The GATT Secretariat, 1994: 470).

There is a need [UNCTAD Secretariat (2001: 8)] to preserve some flexibility on regulating for environmental protection to prevent a state's breach of its obligations under International Investment Agreements (IIAs). Concerns relating to environmental measures that can be seen as constituting arbitrary means of discrimination against foreign investors must be accommodated. This is seen as a precautionary measure that provides an enabling environment for the operation of Foreign Direct Investment (FDI), and that also enhances a sustainable environmental resource base.

An indication of how environmental awareness has taken its toll in many agreements that has to do with the betterment of economies is well recorded (UNCTAD Secretariat, 2001: 16). It refers to the Cotonou Agreement that replaced Lomé IV. Lomé IV came to an end in 2000 and the Cotonou Agreement introduces the importance of a link between economic development and environmental protection. Environmental awareness in the Cotonou Agreement may not be easily noticed at first glance but Article 1 of this Agreement, which is entitled "Objectives and Partnership" which includes FDI, emphasises that at every level, the principles of sustainable management must be considered (UNCTAD Secretariat, 2001: 16).

In *Venezuela and Brazil v the USA* (The WTO Secretariat, 2002: 38) there is much to learn especially on the SPS, MFN and NT principles point of view and how discrimination finds its way into environmental law.

Background information shows that in 1990, the USA amended the Clean Air Act and the Environmental Protection Agency (EPA) promulgated the Gasoline Rule on the composition and emissions effects of gasoline. The purpose was to reduce pollution and also to prevent an escalation of pollution from combustion of gasoline not to exceed the 1990 level. From 1995, the rule only permitted reformulated gasoline to be sold to consumers in most populated areas of the USA. In an exception of those populated areas, the remaining parts of the USA were allowed conventional gasoline. The gasoline rule became applicable to all refiners, blenders and importers of gasoline in the USA. On this arrangement, the EPA made provision for two different sets of baseline emission standards, namely

a) Any domestic refiner that operated for at least six months in 1990 was to set an individual baseline that represents the quality of their gasoline produced in 1990.

b) Another set is the statutory baseline that shows the average USA 1990 quality of gasoline. The statutory baseline was meant for the refiners that were not operational for at least six months in 1990 and to importers of gasoline and blenders. To this effect, the statutory baseline was much stricter on importers of gasoline.

Based on the above situation, the states of Venezuela and Brazil claimed that the Gasoline Rule was prejudicial to their exports to the United States and that it favoured domestic producers. They postulated that the Gasoline Rule was inconsistent with GATT 1994 Articles III and XXIII: 1(b), with Article 2.2 of the Agreement on Technical Barriers to Trade (TBT), and was not covered by Article XX. The United States argued that the Gasoline Rule was consistent with Article III (National Treatment) and in any event, was justified under the exceptions contained in Article XX, paragraphs (b), (g) and (d), and that the Rule was also consistent with the TBT. The United States appealed the panel report but limited its appeal to the panel's interpretation of GATT 1994 Article XX.

The findings of the panel were that imported and domestic gasoline were homogenous products and that under the baseline establishment methods, imported gasoline was

effectively prevented from benefiting from favourable sales conditions equal to domestic gasoline, imported gasoline was treated less favourably than domestic gasoline. Despite the fact that the Gasoline Rule was a policy meant to protect human, animal and plant life as in accordance with GATT 1994 Article XX (b), there is much left to desire in that the baseline is not necessary and cannot be an enforcement mechanism. As such it was concluded by the panel that the Gasoline Rule was accordingly inconsistent with GATT 1994 Article III.

Finally the Appellate Body concluded that the application of the US regulation amounted to unjustifiable discrimination and to a disguised restriction on trade because of two omissions on the part of the USA. Firstly, the USA had not explored adequate means, including in particular cooperation with Venezuela and Brazil, of mitigating the administrative problems that led the United States to reject individual baselines for foreign refiners. Secondly, the United States did not count the costs for foreign refiners that would result from the imposition of statutory baselines.

From the case between *Venezuela and Brazil v the USA,* one realises that NT is sometimes accidentally violated in that states tend to perceive matters in their national interest without entertaining the outside world. When that happens, renegotiations have sometimes to be considered which means financial resources are utilised wastefully until a point is reached when a properly and well inclusive accord is agreed to and implemented. If the *Venezuela and Brazil v the USA* case imposed charges on the USA, that could have also been a serious financial loss for the citizens of the USA who were represented by their government.

3.4.7.2 Treaty law

Trans-national corporations are bound by a certain code of conduct drafted by the United Nations in the early 70s regarding the environment. 'Trans-national corporations shall/should carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment of the states in which they operate and with due regard to relevant international standards. Trans-national corporations shall/should, in performing their activities, take steps to protect the environment and where damaged to restore it to the

extent appropriate and feasible, rehabilitate it and should make efforts to develop and apply adequate technologies for this purpose' (UNCTAD Secretariat 2001: 19).

UNCTAD Secretariat (2001: 44) and Fitzmaurice (2003: 174, 175) record some concrete legal agreements regarding the transfer of environmentally sound technology under the 1985 Vienna Convention for the Protection of the Ozone Layer. Parties to the Vienna Convention are required to share scientific, technical, socio-economic, commercial and legal information. Parties to this convention are also required to conform to their national laws and ensure that transfer of hazardous wastes is done according to national laws, regulations and policies.

Often states enter into international environmental legal instruments in the form of treaties. A treaty is a method of creating a binding international legal obligation between states (Mvungi, 1994:104; Fitzmaurice, 2003: 174, 175). As such there must be an intention to create legal relations by the signatories. The Vienna Convention does not require a treaty to compromise particular elements if there is any dispute concerning the status of a document. Using case law, this scenario is illustrated with reference to *Qatar v Bahrain*.

In *Qatar v Bahrain* the International Court of Justice ruled:
"The Court does not find it necessary to consider what might have been the intentions of the Foreign Minister of Bahrain or, for that matter those of the Foreign Minister of Qatar. The two ministers signed a text recording commitment accepted by their governments, some of which were to be given an immediate application. Having signed such a text, the Foreign Minister of Bahrain is not in the position subsequently to say that he intended to subscribe only to a 'statement recording political understanding' and not to an 'international agreement'" (Fitzmaurice, 2003: 174).

The case of *Qatar v Bahrain* reflects how binding treaties are. Therefore, as mentioned earlier many international environmental treaties between states
have binding power under international law. Domestic/national law have a working relationship with international law.

3.4.8 Fair and Equitable Treatment

GATT 1994 Article III (NT) encourages fair treatment. Through GATT 1994 Articles VI (Anti-dumping and Countervailing Duties) and XVI (Subsidies) FET seeks to prevent unfair trade practices (The GATT Secretariat, 1994: 493, 508). However, this does not impede with the allowance of domestic support commitments that GATT 1994 permits. Permission to provide domestic support is allowed to developing states especially with regard to low-income and resource poor producers. This has to be done under Aggregate Measurement of Support and "Annual and Final Bound Commitment Levels" (The GATT Secretariat, 1994: 46). Imposing some restrictions or measures that are likely to restrict international trade or for whatsoever reason that the state finds it relevant to introduce such measures would be prohibited unless justified under GATT 1994, Article XX (Weiler, 2000: 209).

The FET clause dates back to 1948 during the Havana Charter where it was contemplated that foreign investment has to be assured just and equitable treatment[31]. Once a host state provides an assurance of FET, it presumably wishes to indicate to the international community that investments within its jurisdiction will be subject to standard/treatment compatible with some main expectations of foreign investors (UNCTAD Secretariat, 1999a: 3).

Developing states can also benefit from FET. An example in this regard is that of Lomé IV quoted by UNCTAD Secretariat (1999a: 9), as an important treaty that embraces FET. A number of developing states, especially those in Africa had in the past benefited from such a treaty. Lomé IV came into force on the 1st March 1990 and exemplifies a significant cross-section of both capital exporting and capital importing states.

The difficulty existing with the FET is vagueness in its application. This is because there is no clear-cut manner in which to define fairness[32]. This approach is consistent

[31] Fair and equitable treatment is a multilateral text, which serves as a yardstick for assessing relations between foreign direct investors and governments of capital – importing states. This implies that foreign investors must be accorded just and equitable treatment (UNCTAD Secretariat, 1999a: 3).

[32] Fairness can be defined as depending on the circumstances of the specific facts, the case involved and ultimately what is fair i.e. what is reasonable is determined by a value judgement made by the

with accepted rules of interpretation though the law is not clear on the precise legal meaning. Any dispute arising from the technicality of interpreting the precise meaning requires a third party as a Dispute Settlement Body to clarify the matter (UNCTAD Secretariat, 1999a: 11).

The FET principle is in terms of application in most cases included in other clauses. UNCTAD Secretariat (1999a: 9) records that the standard of the FET Principle is incorporated in other treaties such as Multilateral Agreement on Investment (MAI) and NAFTA. UNCTAD Secretariat (1999a: 9) found that of approximately 335 Bilateral Investment Treaties (BITs) in force in the early 1990s, at least 183 combined the FET principle with the MFN and NT standards. In the same study it was also found that another 92 BITs combined the FET principle with the MFN standard while 8 contained a combination of the FET principle and NT. If a host state enters into a treaty with a capital exporting state, and this treaty lacks containment of a reference to the FET principle, then it shouldn't be assumed that such a standard is applicable to the investment covered by the treaty (UNCTAD Secretariat, 1999a: 9).

3.4.9 Sanitary and Phytosanitary Standards

The Agreement on the Application of SPS under GATT (The GATT Secretariat, 1994: 70) indicates that no member state must be prevented from adopting measures essential to protect human, animal or plant life. For as long as such measures are not meant to discriminate unjustifiably between member states where the same conditions apply it is not used as a disguised restriction on international trade[33]. The GATT Secretariat (1994: 69) and the United Nations [1995: (992:22/12)] recognise the fact that though prevention of all disease related matters that can affect human, animals and plants are paramount, the difficulties that developing states (member states) will

appellate tribunal of the conflicting legal interests in the specific scenario (Greenberg and Millbrook, 2000: 906, 907).

[33] 'Sanitary and Phytosanitary Standard refer to those measures that include all relevant laws, decrees, regulations, requirements and procedures that includes, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with transportation of animals or plants or with any material necessary for the survival of plants and animals during transportation; provisions of relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety' (The GATT Secretariat, 1994: 78).

encounter in complying with SPS cannot be ignored. As such there is preparedness in providing assistance to such developing states regarding these difficulties.

In light of SPS, protection of human, animal and plant life or health, must be based on scientific principles and will not be maintained without sufficient scientific evidence. GATT 1994, Article XX cautions that SPS measures must not be applied in a manner that will constitute a means of arbitrary discrimination between states where the same conditions prevail (The GATT Secretariat, 1994: 73, 519; Sanson, 2002: 18). SPS measures must not be more trade restrictive than required to achieve the appropriate level of SPS protection taking into account technical and economic feasibility. In instances where the required scientific information is insufficient, a member state may provisionally adopt SPS measures based on available pertinent information, including that from relevant international organisations as well as from other member states (SPS Agreement, Art 5(7)) (The GATT Secretariat, 1994: 73).

Regional conditions prevailing in member states that export animal or plant materials/products must be recognised (SPS Agreement, Article 6). In this regard reasonable access should be granted to the importing state if such an access is required for inspection or testing purposes. Member states also agree to provide technical assistance especially to developing member states either in bilateral or international agreements. Technical assistance may be in the areas of processing technologies, research, infrastructure including establishment of national regulatory bodies. Such assistance may take the form of advise, credits, donations, grants, including for the seeking of technical expertise, training and equipment to enable these member states to reach appropriate level of SPS protection in their export markets (The GATT Secretariat, 1994: 74, 1994: 74).

The GATT Secretariat (1994: 79) recognises scientific verification on the application of SPS based on various international standards, guidelines and recommendations. These are Codex Alimentarius, International Office of Epizootics and Secretariat of the International Plant Protection Convention. The Committee on SPS identifies relevant international organisations to cater for other matters not covered by the above organisations. Any WTO member state that intends to accede to these international organisations is free to do that.

Turning to SADC and EU/RSA TDCA, it is by assumption that the treaties that establish these arrangements, have in them SPS clauses. As to whether such treaties have sufficient information in their SPS clauses to incorporate investment interests remains an issue that will be explored in Chapter Four.

3.4.10 Rules of Origin

The GATT Secretariat (1994: 248) identifies the following principles with regard to the RoO:
RoO must be applied equally for all purposes as indicated in the definition (or Part I, Article 1 of Agreement on RoO[34]). It is expected that RoO must be clear so that it may be possible to determine the origin of a particular commodity to be either the state where the commodity has been wholly obtained, when there is more than one state concerned in the production of the commodity or the state where the last substantial transformation has been done. RoO must be objective, understandable and predictable.

Not disregarding the measure or instrument to which they may be linked, RoO must not be used as instruments to pursue trade objectives. However, the application of trade preferences, whether be they unilateral such as GSP or granted as a result of FTAs, requires some guidelines to ensure that the origin is defined so that preferences benefit only those commodities originating in the beneficiary states (Garay and Cornejo, 2002: 114). RoO must not create restrictive, distorting or disruptive effects on international trade. RoO should not pose unduly strict requirements or require the fulfilment of a certain condition not relating to manufacturing or processing as a prerequisite for the determination of the state of origin. Costs not directly related to manufacturing or processing may be included for purposes of the application of an ad valorem percentage criterion. RoO must be administered in a consistent, uniform, impartial and reasonable manner. RoO must be coherent and must also be based on a positive standard (The GATT Secretariat, 1994: 242, 243).

[34] Rules of Origin refer to those laws, regulations and administrative determinations of general application applied by any of the member states to determine the state of origin of commodities for as long as such RoO have no relationship with contractual or autonomous trade regimes leading to the granting of tariff preferences going beyond the application of GATT 1994 Article I.

Criteria for origin qualification are: a change in tariff classification, a minimum value added threshold and use of a specific technical process or of a certain or some components in the manufacturing of a product (Garay and Cornejo, 2002: 116, 117). RoO is a secondary trade policy instrument whose impact can only be grasped when they are considered with primary policy instruments that they support. The primary policy instruments referred to are tariffs, contingency protection measures, trade preferences, and enforcement of health and safety standards. A principal objective of the Agreement on RoO is to harmonise non-preferential RoO and ensure that such RoO are applied equally for all purposes (Inama, 2002: 122,123).

With regard to preferential RoO, the contracting parties must ensure that the agreement is referred to correctly and also that such an agreement capitalise on the preferential treatment embedded in the SPS Agreement (The GATT Secretariat 1994: 252, 253).

Jackson (2002: 167) GATT 1994 does not seem not to provide a definite answer regarding how much processing is necessary to justify ownership of origin of a product. The example is where X is not a member state but produces plastic pellets, which are then shipped to B. Signatories to the GATT in this regard, are the states of B and C. The state of B then melts these pellets and extrudes them into combs. The question that arises is whether B can ship the combs to C and claim GATT benefits? Furthermore, are the combs the products of B? By merely trans-shipping or repackaging X products would not probably grant B the GATT treatment for the combs. Only when substantial processing has been done can B then claim ownership of origin of the products. Substantial processing remains challenging in terms of up to what extent should a state process to be conferred the status of ownership in terms of origin of a product (Jackson, 2002: 167).

3.5 Summary

This Chapter has established the normative conceptual formulation to evaluate the SADC Trade Protocol particularly the SADC Trade Protocol and the EU/RSA TDCA. A step-by-step approach shows that the MFN principle is important in international

trade as a mechanism that seeks to prevent discrimination practices when treating investors. The MFN principle does not in certain circumstances prohibit a state from entering into an agreement with another partner that will discriminate against other states but this has to be done in accordance with prescribed regulations. The problem encountered with the MFN principle is that it limits states from manoeuvring investment agreements they intend to conclude in future. Another way of preventing discrimination comes through the NT principle. Unlike the MFN principle, the NT principle also prevents discriminatory practices but in a way that suggests an equal footing for all like products (domestic and foreign imported ones) in the domestic market.

Domestic or home measures are important in international trade. Every state is encouraged to formulate policies that promote investments. An effective legal system is important to address matters of security of investments, fair competition, disputes on ownership, expropriation of property, repatriation of profits and certainty on the rule of law as well as, stability of the state. The need for information provision is also of prime importance in that both investors and consumers require that important information be disseminated to keep both the consumers and investors well informed about market issues.

States have to introduce restrictions, among others, on matters that affect their security and strategic industries but this must be done in accordance with established standards and procedures. It is imperative that every state attracts investors to address the living standards of its citizens both in monetary and employment terms. Investors are expected to utilise available labour to the benefit of both the investor and the hosting state. There should be ways of human resource development so that after the investor has left, the disbanded labour can use the acquired skills to find other jobs or establish SMEs based on newly acquired skills.

Investors should be sensitive to environmental degradation so that mechanisms can be put in place to prevent investors from causing environmental damage. States are also required to have a working relationship to team together in addressing environmental matters. All investors despite their various nationalities deserve fair and equal treatment by the hosting state. It is important for every state to formulate policies and

develop facilities that help to prevent the transmission of diseases, pests and infected materials. Every state is allowed to restrict imports of products that are deemed harmful to both human, plant and animal life. Such a move has to be done with convincing scientific evidence so that states that seek to apply discriminatory measures cannot resort to such measures unless they produce convincing scientific evidence. A system of identifying and recording the origin of products must be devised by every state.

Unlike Chapter Three that focussed on developing positions for the ten clauses, the next chapter (Chapter Four) will employ the above clauses and relevant information gathered in an exception of expropriation, in building of the checklists for evaluating the SADC Trade Protocol and the EU/RSA TDCA.

CHAPTER FOUR

CONSISTENCY MEASUREMENT

4.1 Introduction

The point of departure for this section is that GATT 1994 Article XXIV provides for the establishment of customs unions and free trade areas (The GATT Secretariat, 1994: 522; Jackson, 2002: 165). In this context, states enter into regional agreements for various reasons such as economic and political. Entering into these agreements entails some kind of commitment, as there are normally obligations that parties to the agreement have to fulfil. The SADC Trade Protocol and the EU/RSA TDCA demand high levels of commitment.

As mentioned in Chapter One, the SADC consists of one relatively developed state and a number of less developed states. Though all the states in the SADC Trade Protocol share common objectives, the level of economic growth of member states varies. Some of the legal and economic aspects of the SADC Trade Protocol and the EU/RSA TDCA are therefore highlighted. Another issue is multiple membership by SADC member states, which poses a challenge for future negotiations but it is not dealt with in detail in this section. Of paramount importance is the fact that different agreements may be entered into but the fact that all exist may not necessarily imply compliance with the multilateral rules governing member states that are signatory to the WTO. As mentioned in Chapter One, WTO legal instruments are referred to in this chapter, but only those pertinent to regional trade agreements/arrangements, particularly with reference to the clauses explained in Chapter Three.

With this in mind, this Chapter attempts to answer the question of compliance of the SADC Trade Protocol and the EU/RSA TDCA with the relevant rules of GATT/WTO as discussed in Chapter Three. In this chapter a format is developed to use in evaluating the two above-mentioned agreements. Such a format is made up of two checklists, one for the SADC Trade Protocol and another for the EU/RSA TDCA. These two checklists are developed using information gathered in Chapters Two and Three. Thus the legal underpinnings of the SADC Trade Protocol and the EU/RSA

TDCA are tested against the WTO rules. In other words, the checklists use GATT/WTO legal instruments as the basis for assessing compliance. Furthermore, in the application of these legal instruments to the FDI agreements, various spin-offs such as strengths, weaknesses, opportunities and threats are identified. These issues are included in the checklists. The results of the checklists are discussed and a summary of the whole chapter provided.

4.2 SADC

4.2.1 Purpose of the SADC Trade Protocol

The SADC Trade Protocol was enacted under the umbrella Article 22 of the treaty that established the SADC. This article provides for the protocols necessary in each area of the SADC (The SADC Secretariat, 1997: 18).

The SADC Trade Protocol has the following objectives:

- Furthering the liberalisation of intra-trade in goods and services in a fair and mutually beneficial manner to all member states and complemented by other protocols in other areas;
- Ensuring that there is efficient production within the SADC reflecting current and dynamic comparative advantages of member states;
- Contributing towards improving the investment climate for domestic, cross border and foreign investments;
- Enhancing economic development, diversification and industrialisation of the SADC Region; and
- Establishing a free trade area in the SADC Region (The SADC Secretariat, 2004a).

Several articles prescribe the functioning of the SADC Trade Protocol, the most important for this research being the MFN Article 28, NT Article 11, TRIMs Article 22, Cross Border Investment Article 22, Preferential Trade Arrangements Article 27, SPS Article 16 and RoO Article 12.

4.2.1.1 Article 28: MFN

This provides for member states to accord MFN treatment to one another. This article does not prevent a member state from entering into a preferential trade arrangement with a third state as long as such a trade arrangement does not impede or frustrate the objectives of the SADC Trade Protocol, and also that any advantages given to the third state are also given to member states. A member state is not obliged to extend to other member states preferences of another trading block of which that state is a member at the time of entry into force of the SADC Trade Protocol (SADC Secretariat, 1997: 21).

4.2.1.2 Article 11: NT

This article makes provision for member states to immediately and unconditionally accord the same treatment to commodities traded in SADC member states as to those produced outside the SADC, in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation and distribution (The SADC Secretariat, 1997: 20).

4.2.1.3 Article 22: Cross Border investment

According to the SADC Secretariat (1997: 21) member states have to adopt and implement policies that promote an open cross-border investment regime so as to enhance economic development, diversification and industrialisation.

4.2.1.4 Article 27: Preferential Trade arrangements

Relevant member states can maintain all preferential trade and other trade arrangements existing at the time of entry into force of the SADC Trade Protocol. This article makes provision for member states to enter into new preferential trade arrangements between themselves as long as these arrangements do not infringe on the SADC Trade Protocol. Of course, proposals for new trade agreements have to be carefully reviewed to ensure that they do not go against the objectives of the SADC Trade Protocol (SADC Secretariat, 1997: 21).

4.2.1.5 Article 16: SPS

Member states are required to base their SPS on international standards, guidelines and recommendations in order to harmonise SPS for agricultural production. Upon request, member states will have to enter into consultation, with the aim of achieving agreement on equivalence as specified in the WTO Agreement on the application of SPS (SADC Secretariat, 1997: 20).

4.2.1.6 Article 12: RoO

Origin criteria require that goods citing a member state as their origin be consigned directly from that member state to a consignee in another member state (The SADC Secretariat, 2001: 33). Additionally, products must be wholly produced in a member state should they incorporate materials, not wholly produced there, and such materials must have undergone sufficient working or processing. Regarding clothing and textiles, their imported raw materials have to undergo a minimum of two-stage production or transformation in the member state claiming origin. Non-originating materials may be used in the manufacturing of a final product, when its total value is at most 10% of the ex-works price of the final product and when any of the percentages listed for the maximum value of non-originating materials are not exceeded.

There are several operations that are considered insufficient to qualify a product as originating one (The SADC Secretariat, 1997: 20 and 2001: 33). These include:

- packing, packaging, preparations and other processes meant for shipping and for sale;
- mere dilution, blending and other types of mixing;
- simple assembly or combining operations;
- miscellaneous and other operations such as ornamental operations that are relative to textile production designed to enhance interest for marketing purposes;
- slaughter of animals; and
- any process or working which can be demonstrated, on the basis of a preponderance of evidence, to have been aimed at circumventing these rules.

A combination of two or more insufficient working or processing operations does not confer origin, regardless of whether or not the product-specific RoO have been satisfied or not. All operations carried out in the member states on a given product will be considered together when determining whether they are to be regarded as insufficient within the meaning of the rule.

The following are the goods that can be considered as wholly produced in member states:

- Mineral products extracted from the ground or sea,
- Vegetable products that are harvested locally,
- Live animals born and raised locally,
- Products obtained locally from live animals,
- Products obtained by hunting or fishing conducted locally,
- Products of sea fishing and other products taken from the sea by their vessels, and
- Products made on board factory ships exclusively from products of sea fishing and all other products taken from the sea by their vessels.

It is possible that derogation on RoO may be granted by the Committee of Ministers responsible for trade matters (CMT), where the development of existing industries or the creation of new industries is justified. An example is the two-stage transformation over five years of the clothing in Malawi, Mozambique, Tanzania and Zambia.

4.3 EU/RSA TDCA

4.3.1 A summary of legal and economic content of the EU/RSA TDCA

On the 1st of January 2000 an agreement between the EU and South Africa came into power, which was called the Trade, Development and Cooperation Agreement for the twenty-first century. For the purpose of this research, the following aspects of the TDCA will be focused on:

a) RoO:
    - Cumulation of origin

- Value tolerance rule
- Fishery products and
- Derogations;

b) Political aspects:

- Essential element;

c) Trade related aspects:

- Competition policy,
- Safeguard measures and
- Other trade related aspects; and

d) Economic aspects and cooperation:

- Industry,
- Investment promotion,
- Information,
- Cooperation on transport and
- Cooperation on rural development.

4.3.2 RoO

The RoO embodied in the EU/RSA TDCA are only applicable to products of the European Union and South African products (European Commission 1999: 11). The definitions of products to be referred to as South African or European are as follows:

- Products must be wholly obtained in either South Africa or the European Union; examples of such products include agricultural products grown in either of the two regions; and
- Products not wholly obtained but which have been sufficiently worked or processed in either of the two regions; the materials used in processing must undergo a change of tariff heading, or sufficient value must be added to the product, after which the products can be considered as having their origin in the EU or South Africa.

These RoO applied in the EU/RSA TDCA are similar to other RoO applied by the EU to its preferential trading partners and developing states under the GSP. However, the

EU and the RSA agreed upon several unique features. This brings us to the concept cumulation of origin[35]. To make RoO simpler and more flexible the EU/RSA TDCA allows for cumulation of origin of products from several states. This accord allows for bilateral, diagonal as well as full cumulation. Under bilateral cumulation, applying the value-added rule to RSA products, the value of any EU material or product is counted to determine whether it complies with the specification criteria of origin (European Commission, 1999: 11).

Diagonal cumulation implies that products using materials from other African, Caribbean and Pacific (ACP) states can be qualified as of South African origin if the value added on such products exceeds the value of the ACP materials used. Full cumulation means the materials come from member states of the SACU, and the products made from them are qualified as being of South African origin if the final processing of such products is undertaken in South Africa regardless of the value added. Any processing in the BLNS states (Botswana, Lesotho, Namibia and Swaziland) does not provide qualification of origin for South Africa. However, clothing manufacturers can use fabrics from BLNS states and label the product with a South African label. This South African label on such a product automatically confers qualification of origin in South Africa (European Commission, 1999: 11).

4.3.3 Value tolerance

According to the value tolerance rule, products made using particular specified materials are allowed to be of South African origin even if the RoO are not respected in their manufacture. 15% leeway is applicable for South Africa. In other words, returning 15% of the value of the final product will qualify the product. Exceptions are on fishery products, tobacco products, alcohols, spirits and textile products for which the maximum is 10% (European Commission, 1999: 12)

[35] Cumulation refers to the rule that a transaction affecting interstate trade in a trivial way may be taken together with other similar transactions to ensure that the combined effect on interstate trade is not trivial and can therefore, be regulated under the trade agreement (Garner, 1999: 386).

4.3.4 Derogations

South Africa can ask for derogations from RoO requirements with which it has difficulty complying. Limitation for such derogations is in terms of time and quantities. This is a special case because many of the EU's other preferential agreements make no provision for such derogations (European Commission, 1999: 12).

4.3.5 Politics

An essential political element of the agreement is respect for democratic principle and fundamental human rights as laid down in the Universal Declaration on Human Rights. This suggests that the rule of law be upheld and good governance also be embraced as part of the agreement (European Commission, 1999: 18).

4.3.6 Trade-related issues

A policy of competition is quite essential to the EU/RSA TDCA. The agreement makes provision for the prevention of abuse by companies that enjoy dominant market positions in EU or the RSA. Such provision is intended to ensure free and fair competition between companies in the EU and the RSA (European Commission, 1999: 18). Regarding agricultural products, EU/RSA TDCA Article 14 indicates that upon entry into force of the TDCA, all customs duties applicable on import of products originating in RSA shall be abolished (with the exception of duties on certain products referred to in Annex IV of the TDCA) (Commission of the European Communities, 1999: 9, 10).

Though the EU subsidises its agricultural sector, in the agreement both the EU and South Africa reaffirmed their commitment to ensuring that government aid to various firms, intended for production of certain products that affect trade between the two sides be done in a fair, transparent and equitable manner. Provision is made for the two sides to ensure a favourable climate for investments and transfer of capital and also the freedom of repatriation of foreign direct investment and profits. The EU/RSA

TDCA includes support for the development of satellite technology in the Southern African region (European Commission, 1999: 20, 21).

4.3.7 Transport

The agreement prescribes cooperation in creating access to safe modes of transport and in facilitating the flow of goods in both regions through the development of intermodal infrastructure networks and transport systems (European Commission, 1999: 22). Cooperation on rural development entails the promotion of harmonious rural development and sustainable management and use of fishery resources. Further cooperation aims to establish systems of mutual information on dangerous and domestically prohibited products or materials, and also to help increase consumer awareness through information and education.

4.4 The problem of multiple-membership

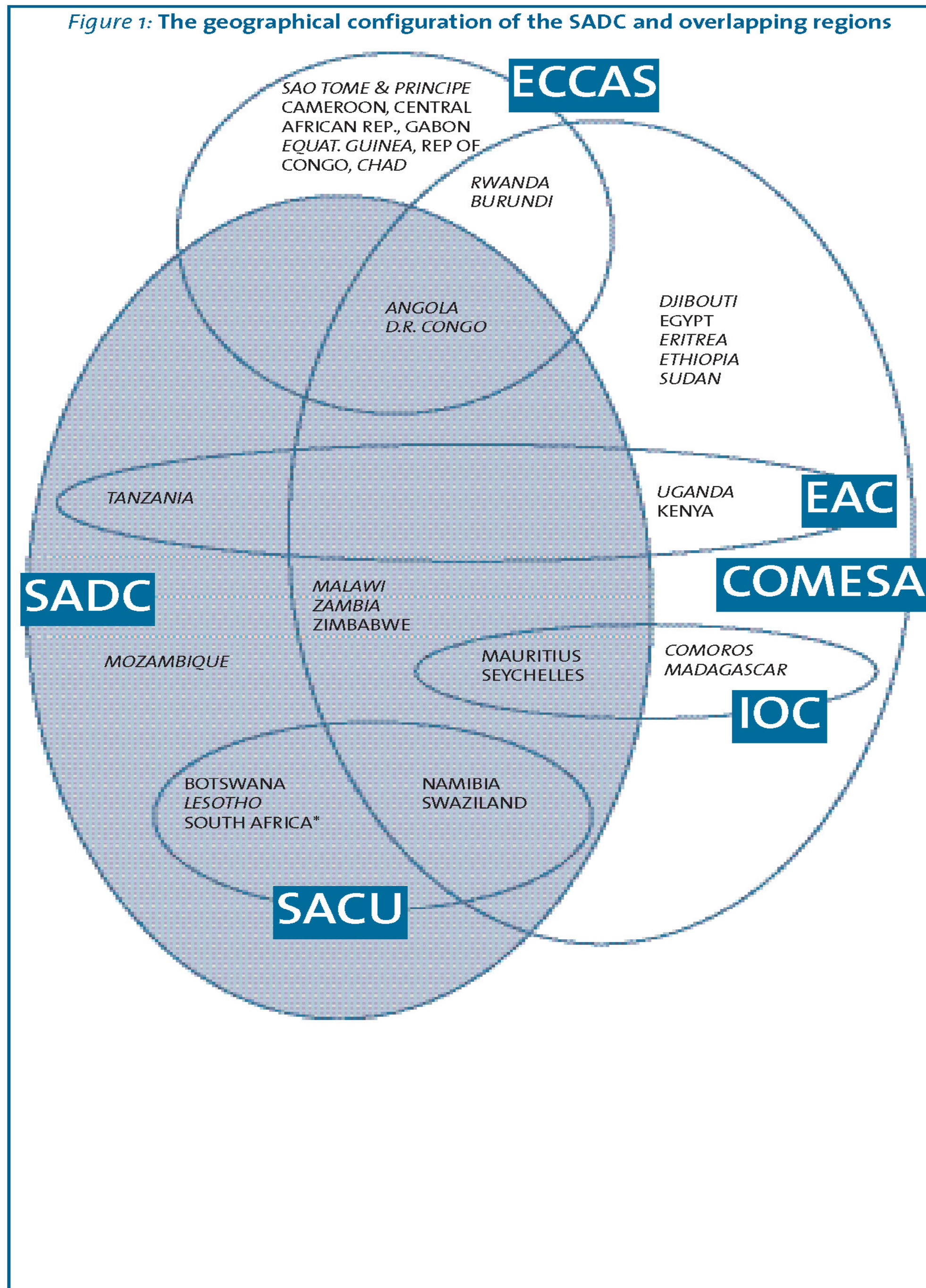
In Chapter One, it was pointed out that some SADC member states are also members of the CIO, the COMESA, the EAC and the SACU, and (The CIO, 2004; The EAC, 1999; Seleka and Dambuza, 2000: 49), which creates the phenomenon of multiple-membership (overlapping). The Literature also cites examples few regional agreements. This poses a challenge for both future negotiations and also for the analysis that follows in this chapter as to the compliance of SADC with WTO rules. Geographic configuration remains a factor that enables African states to belong to multiple RTAs. However, it is not only African states that retain multiple-membership but developed states too.

Szepesi and Bilal (2003: 4) acknowledge that the SADC has no mandate, lacks capacity and has no pre-requisite policy coordination and coherence to collectively negotiate Economic Partnership Agreements (EPAs) as illustrated by the multiple-membership problem.

Mathis (2002: 2) seems to agree about multiple-membership and remarks that the occurrence of overlapping in regional trade has increased. This phenomenon is a complexity produced by globalisation, and poses the challenge of how to qualify these

groupings in the WTO legal framework. Ngqangweni et al (2004: 5) agree that overlapping leads to complications, but argues such overlaps are not necessarily bad for the world economy.

Figure 4.1 represents the multiple-membership of African states, focussing on the SADC. From Figure 4.1 it can be seen that SADC member states Malawi, Mauritius, Zambia and Zimbabwe are also members of the COMESA while Swaziland is a member of the COMESA and the SACU.



Source: Szepesi and Bilal (2003)

Figure 4.1: Overlapping membership of SADC member states[36]

In figure 4.1 states whose names are italicised are least-developed states, commonly known as LDCs.

[36] In Figure 4.1, Namibia is no longer a member of COMESA (Hansohm et al, 2005: 12).

4.5 Format

4.5.1 Background information

The WTO as a multilateral body is important in the international economic sphere. It is instrumental in resolving disputes among trading member states and together with other subsidiaries such as UNCTAD, facilitates international trade. The importance of this body (WTO), and the unprecedented increase of RTAs discussed in section 4.4, highlight the importance of the task of determining how compliant the SADC Trade Protocol especially its Trade Protocol, and the EU/RSA TDCA are with GATT/WTO rules.

4.5.2 Checklists

This chapter sets out two checklists, in Table 4.1, which deals with the SADC Trade Protocol and Table 4.2, which deals with the EU/RSA TDCA. Each checklist is divided into an upper and a lower section called Sections A and B, to espouse the discussion that follows later in this chapter. Section A of the checklists consists of information used in evaluating whether the two trade agreements are compliant with GATT/WTO rules. The major part of the information in Section A comes from Chapter Three with one item from Chapter Two. Section A contains information on: the MFN, the NT, HCMs, TRIMs, Employment, Natural environment, FET, SPS, RoO and DTTs.

Section B of the checklist consists of information from Chapter Two (Table 2.2 SWOT analysis), which is referred to as additional economic information. This information is not necessarily important for evaluating the two agreements for compliance with GATT/WTO rules but it is essential in assessing the agreements and their potential users in developing states, ensuring that opportunities will be utilised and threats or shortcomings addressed. This will enhance full utilisation of such agreements for the betterment of the SADC and the EU/RSA TDCA member states. Section B consists of the following information: low or minimum political and labour unrest; effective implementation and control processes; effective control mechanisms of rehabilitation of natural resources before an investor leaves the state; effective

skills transfer programmes; trend of stable economic policies; effective agreements on utilisation of natural resources; effective transfer of advanced communication, transportation and IT administration; presence of negative logistical factors; capitalising on economic integration; and effective programmes addressing variance in cross-national institutional environment.

The two checklists are similar in the types of information they contain. This information is to be employed to evaluate the two agreements for compliance with WTO rules and also for the potential economic betterment of the residents of the SADC and the EU/RSA TDCA member states. If the evaluation is found practical, then such an evaluation will be carried out to the potential application of the checklists in evaluating agreements still under negotiation and those agreed upon but which can be reviewed for improvement.

Discussion of the checklists in this chapter is based on the results of this application of the checklists. The results are the scores **Yes**, **No** or **Ins** (for insufficient) as to existence of a clause or criteria in compliance with GATT/WTO standards based on additional economic information covered in Chapter Two. Accompanying comments in the footnotes support the analysis. As mentioned above, the information in Section B is not GATT/WTO information and as such, does not serve in the evaluation of compliance. In Section B of both checklists (Table 4.1 and Table 4.2), the scores **Yes** or **No** is interpreted differently from those in Section A of the checklists because the purpose is slightly different and the meaning depends on the nature of the question asked.

Table 4.1: A checklist of the SADC Trade Protocol

Clause	GATT 1994 Articles	Yes/No/Ins
Section A. GATT/WTO related		
Most-Favoured-Nations	I	**Yes**[37]
National treatment	III	**Yes**[38]
Trade-Related Investment Measures	1-9[39]	**Yes**[40]
Home Country Measures	2, Part II: VI, IX, XII & Annex on Fin. Services[41]	**No**
Employment	V bis[42]	**No**
Natural environment	XX, XIV, 27 & Annex 2[43]	**Yes**
Fair and Equitable Treatment	III & XX[44]	**No**

[37] SADC Trade Protocol Part Eight, Article 28.
[38] SADC Trade Protocol Part Two, Article 11.
[39] GATT 1994 Articles 1 - 9 of the Agreement on Trade-Related Investment Measures (The GATT Secretariat, 1994: 163-167).
[40] SADC Trade Protocol Part Three, Articles 14 & 15; Part Five, Article 22; Part Six, Article 25;Part Sven, Article 26; Part Eight, Article 27.
[41] GATT 1994 Article 2 of the Agreement on Technical Barriers to Trade and GATS Part II, Articles VI Domestic Regulation, IX Business Practices, XII Restrictions to Safeguard the BoP as well as, Annex on Financial Services – Domestic Regulation. (The GATT Secretariat, 1994:139, 333, 336, 337 & 355).
[42] GATS Part II, Article II about Labour Markets Integration Agreements (The GATT Secretariat, 1994: 333).
[43] GATT 1994 Article XX General exceptions, GATS Article XIV General exceptions and Article 27 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (The GATT Secretariat, 1994: 519, 339 & 379).

Sanitary and Phytosanitary Standards	1-14 & Annexes A, B & C[45]	**Yes**[46]
Rules of Origin	Parts I-IV [47]	**Yes**[48]
Are there laws in the SADC Trade Protocol that exempt member states from double taxation?		No[49]
Section B. Additional economic information		
Is there a mechanism in place to make investment locations in member states free from political instability and labour unrest?		**No**
Does the SADC Trade Protocol prescribe a follow-up action to ensure that what have been declared and done is moving in closer to one another or is being implemented?		**Yes**[50]
Is there a mechanism in the SADC Trade Protocol that ensures that the land utilised by a foreign investor (FDI) is rehabilitated after the mineral/natural resource has been extracted and before the investor leaves the state?		**Yes**[51]
Does the SADC Trade Protocol create mechanisms for a foreign investor to impart skills to workers to make them better equipped to seek related jobs when the investor has left the state or in order for such workers to become self-employed?		**Ins**
Does the SADC Region have member states with unstable economic policies and political instability?		**Yes**[52]
Are there states in the SADC Region that are well endowed with natural resources such as oil, precious minerals and forests to which FDI is attracted?		**Yes**[53]

[44] GATT 1994 Article III (NT) and Article XX General Exceptions (The GATT Secretariat, 1994: 490, 491, 519, 520).
[45] GATT 1994 Articles 1-14 of the Agreement on the application of SPS and Annexes A, B & C (The GATT Secretariat, 1994: 69-84).
[46] SADC Trade Protocol Part Four, Article 16 (SADC Secretariat, 2004: 8).
[47] Parts I, II, III & IV of the Agreement on RoO and Annexes I & II (The GATT Secretariat, 1994: 241-254).
[48] SADC Trade Protocol Part Three, Article 12 (SADC Secretariat, 2004: 7).
[49] SADC MoU on tax co-operation (SADC Secretariat, 2004).
[50] SADC Trade Protocol Part Nine, Articles 31, 32 & 33 (SADC Secretariat, 1996: 13, 14 & 15).
[51] SADC Protocol on Mining, Article 8 (SADC Secretariat, 2004).
[52] Zimbabwe's unstable economic and political policies threaten the purpose of the SADC Trade Protocol. Instability is addressed in Chapter Two (under the sub-heading 2.2.3 Institutional environment).

Do lagging member states in the SADC Region benefit from technological breakthroughs in the communication, transportation and information technology sectors?	**Yes**[54]
Does the region have poor infrastructure to suggest the "bring your own infrastructure" approach?	**Ins**[55]
Are there some operational/institutional restrictions in the SADC Region that hamper the flow of FDI?	**Yes**[56]
Does the resultant economic integration enhance peace in the SADC Region?	**Yes**[57]
Does the region present cross-national variation in institutional environment that causes uncertainty to foreign investors?	**Yes**[58]
Does the banking sector reflect efficiency and stability as a result of prudential regulations due to FDI's influence?	**Ins**[59]
Do member states have the necessary skilled manpower to monitor FDI operations that may be hazardous to the environment?	**Ins**[60]
Do member states have the necessary skilled manpower to ensure that possible tax avoidance practises by FDI are monitored?	**Ins**[61]

[53] All member states have something to offer either in the mining or environmental sectors as appears in Chapter One Table 1.1.
[54] SADC Protocol on Transport, Communications and Meteorology, Chapter 2 Article 2.3; Chapter 7 Article 7.3; Chapter 8 Articles 8.3, 8.4, 8.6; Chapter 9 Article 9.2; Chapter 10 Articles 10.2, 10.3, 10.4 & 10.5; Chapter 11 Articles 11.2 & 11.3; Chapter 12 Articles 12.1, 12.3, 12.5 & 12.7; Chapter 13 Articles 13.3, 13.6, 13.11 & 13.18 ((SADC Secretariat, 2004).
[55] The literature available points to Africa and not specifically to individual states. This is in Chapter Two (under the sub-heading 2.2.4 The African Continent: A paradigm of FDI problems).
[56] Issues such as insecurity and difficulties in terms of ownership of land by foreign investors, lack of investment locations free from political instability and labour unrest as well as, uncertainty of new economic policies when there is anticipated change in government. Literature in Chapter Two (under the sub-heading 2.2.4 The African Continent: A paradigm of FDI problems) points to some of these restrictions.
[57] SADC Protocol on Politics, Defence and Security seeks to address matters of peace in the Region and literature utilised in Chapter Two (as uttered by Schuh, 2003) under the sub-heading 2.2.1 Globalisation's effect on the gap between Free Trade Agreement and FDI cements this notion (SADC Secretariat, 2004).
[58] This was dealt with in Chapter Two. There are many variations including those of an economic nature.
[59] Chapter Two (under the sub-heading 2.2.5.2 Benefits of hosting FDI) shows that due to the presence of MNCs, foreign banks in hosting states are efficient compared to their counterparts that are domestically owned. Chapter Two (under the sub-heading 2.2.4 The African continent: A paradigm of FDI problems) addresses South Africa as the only state in Africa with advanced infrastructure including banking facilities.
[60] Intuitively, if a state lacks good infrastructure in the areas of transportation, communication and information technology, it can be presumed to be unable to effectively monitor the operations of FDI because of lack of infrastructure. In this context, equipments and software useful in this undertaking may not be available.
[61] This issue is somehow addressed in Chapter Two under the sub-heading 2.2.5.3 Criticism of FDI, as it falls under domestic inadequacies. However, no specific

Table 4.2: A checklist of the EU/RSA TDCA

Clause	GATT 1994 Article	Yes/No/Ins
Section A. GATT/WTO related		
Most Favoured Nations	I	**Yes**
National treatment	III	**Yes**[62]
Trade-Related Investment Measures	1-9[63]	**Yes**[64]
Home Country Measures	2, Part II: VI, IX, XII & Annex on Fin. Services[65]	**No**[66]
Employment	V bis[67]	**Yes**[68]
Natural environment	XX, XIV, 27 & Annex 2[69]	**Yes**[70]

example of an SADC member state was found in the literature. The generalisation is made on the basis of the deficiency in less developed states including various African Sates. Another issue is the problem of customs administration, which seems to be weak (Thomas, 1997: 34).

[62] Double taxation is exempted to Community Members and the Republic of South Africa only, in accordance with the EU/RSA TDCA Title VIII, Article 98 (1) Tax carve-out clause (Commission of the European Communities, 1999: L311/29).

[63] GATT 1994 Articles 1-9 of the Agreement on Trade-Related Investment Measures (The GATT Secretariat, 1994:163- 167).

[64] EU/RSA TDCA Title IV, Articles 52 Investment promotion and protection, and 53 Trade development (Commission of the European Communities, 1999: L311/19-20).

[65] GATT 1994 Article 2 of the Agreement on Technical Barriers to Trade, GATS Part II, Articles VI Domestic Regulation, IX Business Practices, XII Restrictions to Safeguard the BoP and Annex on Financial Services – Domestic Regulation. (The GATT Secretariat, 1994:139, 333, 336, 337 & 355).

[66] EU/RSA TDCA Title III, Articles 35, 36, 37, 41& 42; Title IV, Articles 58 & 64 (Commission of the European Communities, 1999: L311/15, 16, 17, 20, & 21).

[67] GATT 1994 Part II, Article II about Labour Markets Integration Agreements of the General Agreement on Trade in Services (The GATT Secretariat, 1994: 333).

[68] EU/RSA TDCA Title IV, Articles 51 (d); 53 (b & d); 54 (b & d) and 60. 2 (c) & 89 Human resources (Commission of the European Communities, 1999: L311/19, 20, 22 & 27).

[69] GATT 1994 Article XX General exceptions, GATS Article XIV General exceptions and Article 27 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (The GATT Secretariat, 1994: 519, 339 & 379).

[70] EU/RSA TDCA Title VI, Article 84 Environment (Commission of the European Communities, 1999: L 311/26).

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Fair and Equitable Treatment	III & XX[71]	**No**[72]
Sanitary and Phytosanitary Standards	1-14 & Annexes A, B & C[73]	**No**[74]
Rules of Origin	Parts I-IV [75]	**Yes**[76]
Are there laws in the EU/RSA TDCA that exempt member states from double taxation?		**Yes**[77]
Section B. Additional economic information		
Is there a mechanism in place to make investment locations in member states free from political instability and labour unrest?		**No**
Does the EU/RSA TDCA prescribes a follow-up action to ensure that what have been declared and done is moving in closer to one another or is being implemented?		**Yes**[78]
Is there a mechanism in the EU/RSA TDCA that ensures that the land utilised by a foreign investor (FDI) is rehabilitated after the mineral/natural resource has been extracted and before the investor leaves the state?		**Yes**[79]
Does the EU/RSA TDCA create mechanisms for foreign investors to impart skills to workers to make them better equipped to seek related jobs when the investor has left the state or in order for such workers to become self-employed?		**Yes**[80]

[71] GATT 1994 Article III (NT) and General Exceptions, and Article XX (The GATT Secretariat, 1994: 490, 491, 519, 520).
[72] EU/RSA TDCA Title III, Articles 41 Public aid, 43 Transparency, 45 Government procurement and Title V, Article 73 Eligibility of contractors and supplies (Commission of the European Communities, 1999: L311/16, 17 & 25).
[73] GATT 1994 Articles 1-14 on the Agreement on the application of SPS and Annexes A, B & C (The GATT Secretariat, 1994: 69-84).
[74] EU/RSA TDCA Title III, Article 24; Title IV, Articles 61: 1(e), 64 (a, f & h) and 92 (3) Health (Commission of the European Communities, 1999: L311/12, 22, 23 & 28).
[75] GATT 1994 Parts I, II, III & IV of the Agreement on RoO and Annexes I & II (The GATT Secretariat, 1994: 241-254).
[76] EU/RSA TDCA Titles [II (Articles 2 -10); III (11, 12 & 13); IV (14 -28) and V (31, 33 & 34)] of Protocol 1 (Commission of the European Communities, 1999: L 311/300-309).
[77] EU/RSA TDCA Title IV, Article 52 (b); Title VIII, Article 98 (Commission of the European Communities, 1999: L 311/19, 29).
[78] EU/RSA TDCA Title VIII, Article103 Review (Commission of the European Communities, 1999: L 311/30).
[79] EU/RSA TDCA Title IV, Article 58 Mining & Minerals (Commission of the European Communities, 1999: L 311/21).
[80] EU/RSA TDCA Title IV, Articles 51 (d); 53 (b & d); 54 (b & d) and 60. 2(c) & 89 Human resources (Commission of the European Communities, 1999: L311/19, 20, 22 & 27).

Does the EU/RSA TDCA have member states with unstable economic policies and political instability?	**No**
Are there states in the EU/RSA TDCA that are well endowed with natural resources such as oil, precious minerals and forests to which FDI is attracted?	**Yes**
Do lagging member states in the EU/RSA TDCA benefit from technological breakthroughs in the communication, transportation and information technology sectors?	**Yes**[81]
Does the trading block have poor infrastructure to suggest the "bring your own infrastructure" approach?	**No**
Are there some operational/institutional restrictions in the EU/RSATDCA that hamper the flow of FDI?	**Ins**[82]
Does the resultant economic integration enhance peace among the EU/RSA TDCA member states?	**Yes**[83]
Does the EU/RSA TDCA have member states that present cross-national variation in institutional environment that causes uncertainty to foreign investors?	**Ins**[84]
Does the banking sector reflect efficiency and stability as a result of prudential regulations due to FDI's influence?	**Yes**[85]
Do member states have the necessary skilled manpower to monitor FDI operations that may be hazardous to the environment?	**Yes**
Do member states have the necessary skilled manpower to ensure that possible tax avoidance practises by FDI are monitored?	**Ins**

[81] Title IV, Articles 55, 56 & 59; Title VI, Articles 83, 87 & 88 (Commission of the European Communities, 1999: L 311/20, 21, 26, 27).

[82] There is insufficient information available on this matter in this study. However, as the new member states that joined the EU in 2004 were expected to harmonise their policies to meet the standard of the EU, it is reasonable to suppose the existence of policies in these member states that may be receiving attention to make it easier for FDI to enter and operate in such member states.

[83] This is what Chapter Two, under the sub-heading Globalisation's effect on the gap between Free Trade Agreement and FDI points to with reference to members of the EU. Furthermore, the SADC Protocol on Politics, Defence and Security Co- operation, Articles 2, 7, 10, 11, 13 & 15 address the issue of peace in the SADC Region (SADC, 2004a).

[84] With new EU member states having joined in 2004, it is obvious that there are cross-national variations in institutional environments that can be problematic to foreign investors (FDI) but this issue can be solved by policy harmonisation.

[85] Chapter Two (under the sub-heading 2.2.5.2 Benefits of hosting FDI) shows that due to the presence of MNCs, foreign banks in hosting states are efficient compared to their counterparts that are domestically owned.

4.5.3 Discussion of the checklists

4.5.3.1 SADC Trade Protocol (Table 4.1) Section A

The results from Section A (Table 4.1) show that the SADC Trade Protocol (inclusive of all related protocols) has sufficient information to score it **Yes** responses in six matters (MFN, NT, TRIMs, Natural environment, RoO and DTTs) and **No** in three (HCMs, Employment and FET) of the listed issues.

Thus the SADC Trade Protocol satisfies GATT/WTO standards in the areas of the MFN, the NT, TRIMs, Natural environment, SPS, RoO and DTTs (though DTTs are not in the SADC Trade Protocol but are part of the SADC Treaty to which the SADC Trade Protocol belong) means that the SADC Trade Protocol has sufficient information in the above-mentioned areas that satisfies the GATT/WTO expectations[86].

Not withstanding the seven affirmative answers, the three negatives will have to be evaluated. Firstly, a *No* in the case of HCMs means the SADC Trade Protocol has no clause on these measures[87]. This does not imply total absence of matters relating to it. In essence, there are related issues such as the SADC Protocol on Politics, Defence and Security. Meanwhile there are also domestic measures that each state has in place but one cannot rule out the existence of trade restrictive measures. Furthermore it seems that the SADC Trade Protocol is silent on repatriation of funds by a foreign investor.

Secondly, the clause on Employment also registered a *No,* yet there is reasonable coverage of the employment clause in other areas of the SADC Trade Protocol, for example in the Protocol on Education and Training under Article 7 and also in the Chapter of Fundamental Social Rights in SADC under Articles 10 and 15, but coverage by these areas is not substantial enough to render it satisfactory with regard to GATT/WTO expectations, particularly in the area of opportunity and security of

[86] For the SADC Trade Protocol, the issue of RoO require much attention and must be clarified and point to the benefits and difficulties signatories are likely to experience.
[87] See section 3.4.3, pp. 60, 61.

employment. In actual fact, the aspect of qualifications and skills as a basis for employment is missing in the SADC employment policy. In other words, the SADC employment policy does not put a strong emphasis on qualifications and skills as a basis for employment. (The SADC employment policy referred to in this context includes the Protocols on Education and Training and the Chapter of Fundamental Social Rights, among other documents).

Finally, FET also scored the answer *No*. The SADC Trade Protocol has no clause on FET. As with the other negative areas though clauses covering related fields supply an indirect expression of FET, this indirect coverage leaves a lot to be desired to comprehensively address matters that GATT/WTO clause on FET intends.

One significant *Yes* result is for DTTs. This score shows that the SADC Trade Protocol has such arrangement in place. SADC member states signed a Memorandum of Understanding (MoU) on Corporation on Taxation and Related Matters that intends, among other things, to avoid double taxation in member states (SADCa, 2004; Trade Law Centre for Southern Africa, 2003). In short, by the introduction of double taxation treaties, foreign products from non-SADC states are subject to internal taxes from relevant SADC states, whereas products from SADC member states are exempted from double taxation. Though the SADC is not yet a free trade area, it can nevertheless justifiably discriminate based on the fact that it is entitled to the advantages provided by GATT/WTO under special preferential/differential treatment (especially the *Enabling* Clause). The provisions of GATT 1994 are to be found in Article XXIV, which covers exceptions to the MFN principle including among others, customs unions and free trade areas[88]. Other exceptions include the import-restraining action permitted under GATT 1994, namely the *Escape* Clause, Article XIX. The Enabling Clause is in place to protect the interests of developing states, preventing developed states from exploiting developing states via reciprocity. Having DTTs is a benefit of which regional groupings can take advantage.

Applying this scenario to the SADC's MoU on Corporation on Taxation and Related Matters and especially the double taxation avoidance aspect, it can be seen that a

[88] The actual SADC FTA will be achieved after eight years (i.e. 2008) (Nyirenda, 2000:28; Thomas, 1997:32).

trading partner that happens to be a non-SADC member state but a developing state will be disadvantage when trading with a SADC member state. In this context a non-SADC member state which is a developing state becomes the loser as it will subject to paying double tax when trading with SADC member states who are free from double taxation when trading amongst themselves. This is also because the SADC MoU on Corporation on Taxation and Related Matters is a non-reciprocal arrangement to the third party.

In addition to the SADC MoU, certain SADC member states have entered into DTTs outside the SADC. Examples are Botswana, Mauritius, Namibia, Tanzania and South Africa[89].

4.5.3.2 SADC Trade Protocol (Table 4.1) Section B

For the question, is the region free from political instability and labour unrest, the SADC Trade Protocol has **No** arrangements on this matter. Furthermore, in the existing TRIMs clause and other related areas of legislation, there is *no* component that handles security of investments in the form of an agreed-upon arrangement ensuring that investors and their investments are protected from strikes and political clashes, especially regarding the location of the investment. This lack is accompanied by the *absence* of a clause on HCMs. Thus though the domestic laws of individual states strive to prevent all forms of destabilisations within their borders, the SADC provides no additional arrangements.

Regarding follow-up action to ensure that what the SADC Forum declares is adhered to and implemented, the results shows a **Yes** score, because a mechanism is in place as in accordance with Article 31 of the SADC Trade Protocol. Effective mechanisms to avert lack of compliance are in place as in accordance with Articles 32 and 33 of

[89] Botswana entered DTTs with the following states: Mauritius South Africa, Sweden and United Kingdom (Webzine Communications LTD, 2004). Mauritius entered DTTs with Belgium, Botswana, China, France, Germany, India, Indonesia, Italy, Kuwait, Luxembourg, Madagascar, Malaysia, Mozambique, Namibia, Nepal, Oman, Pakistan, Singapore, Sri Lanka, South Africa, Swaziland, Sweden, Thailand, United Kingdom and Zimbabwe (National Computer Board of Mauritius, 2004). Namibia entered DTTs with France, Germany, India, Mauritius, Romania, Russia, South Africa, Sweden and United Kingdom (MTI, undated).
South Africa entered DTTs with Indonesia (The Embassy of South Africa in Jakarta, 1997). Tanzania signed DTTs with Denmark, India, Italy, Norway, Sweden and Zambia (UNCTAD, 2001).

the SADC Trade Protocol but their effectiveness leaves much to be desired. Unless mechanisms in place are strictly followed, member states could decide to delay implementation of a protocol, and this delay can rebound adversely on member states by crippling the agreement. Should this happens, the SADC Trade Protocol or any other SADC Agreement would be subject to unnecessary delays and consequently to failure as a result of a lack of enforceability or due to a slow pace at which the process of implementation is moving.

With regard to land, the answer is **Yes**. This means that the SADC Trade Protocol (considering the SADC Protocol on Mining) has legislation that ensures that the land utilised for mining purpose is rehabilitated by a foreign investor when minerals are exhausted or when the life span of the investment has came to an end before the investor leaves the state. Individual states also have domestic legislation on rehabilitation of land utilised for mining purposes. An example is South Africa, which has key legislation on this matter, namely the Conservation of Agricultural Resources Act 43 of 1983 and Minerals Act 50 of 1991 (Kidd, 1997:116). The first mentioned of these, the Conservation of Agricultural Resources Act 43 of 1983, states that its objective is to provide for the conservation of South Africa's natural agricultural resources and by maintaining the production potential of land, combating soil erosion, preventing the destruction of water resources, protecting vegetation and combating weeds and invader plants. The Minerals Act 50 of 1991 provides for the rehabilitation of the surface of land on which mining has taken place. This Act empowers the Regional Director to issue directives and determine conditions for the use of the surface of land in order to limit any damage to the vegetation, environment and water sources to the minimum levels necessary for that particular operation (Kidd, 1997: 118, 119).

There was insufficient information (**Ins**) on the issue of imparting skills to ensure that workers are able to hunt for jobs or be self-sufficient when a foreign investor leaves. The SADC Agreements also do not ensure that employees in the member states are protected from exploitation, leaving them open to being used without the training that would empower them for effective workplace placement and productivity. Thus the SADC Trade Protocol does not emphasise training to prepare workers beyond the current occupation that they hold, but only to train them for the current job. In light of

this, the whole package offered by the SADC Agreement to workers is not comprehensive enough to accommodate their future employment ambitions.

Results show a **Yes** score, that some SADC member states have both unstable economic policies and political instability. Examples include the Democratic Republic of Congo, which has seen many rebellions over a period of time that have led to unpredictable economic activities, and Zimbabwe, which is suffering declining economic activity due to unstable economic and political policies[90]. This unrest leads to the wasting of scarce resources and imbalances in overall development, which scare off potential FDI (Landsberg, 2002: 10).

Regarding natural resource endowment in the Region, the results shows a **Yes** score (Table 4.1, Section B), because all SADC member states are endowed with a variety of minerals to which foreign investors are attracted. Such endowment is clearly presented in Chapter One (Table 1.1).

As to whether lagging member states benefit from technological breakthroughs in communication, transportation and information technology, the results show a **Yes** score. For example, South Africa, a relatively developed state in the SADC, has the advantage due to its linkage with the EU under the EU/RSA TDCA, thus benefit itself and other SADC member states, especially SACU member states via the spillover in technological breakthroughs.

Insufficient information (**Ins)** is available to score the SADC Trade Protocol on the BYOI approach. Chapter Two (under the sub-heading 2.2.4 The African Continent: A paradigm of FDI problems) describes Africa and not individual states[91].

On the question whether or not institutional restrictions exist that hampers the inflow of FDI, the results show a **Yes** score (Table 4.1, Section B), implying that some member states have problems in this area. These problems include operational restrictions in the form of the bureaucratic processes associated with customs

[90] Though DRC a member of SADC it is however, not a signatory of the SADC Trade Protocol. As such it is not included in the analysis.

[91] This implies that African states when negotiating an agreement should include help in this context as part of the Agreement.

procedures; withholding of title deeds to land required by foreign investors; and pressure exerted on governments by domestic entrepreneurs in fear of FDI competition. Such institutional restrictions, especially in customs services, highlight the sensitivity of the rule of origin doctrine as conceptualised in SADC trade arrangements, which could raise trade risk to unbearable levels. Other difficulties, which worsen this problem, include the protectionist policies of member states in fear of FDI competition (Blignaut, 1986: 7). In some other states with unstable economic policies and politics, it is very difficult for new investors to enter and also difficult for established investors to operate.

About whether or not economic integration enhances peace in the region, the results show a **Yes** score (Table 4.1, Section B). This to a certain extent means that the SADC Trade Protocol serves as a tool to encourage peace in the Region. In the SADC Protocol on Politics, Defence and Security a regional mechanism to resolve unrest in the region is outlined. Through this combined effort member states can translate the advantages of economic integration into a common agenda for conflict resolution. An exceptional situation is that of Zimbabwe where SADC Trade Protocol did not achieve the expected impact of economic integration and peace.

Regarding cross-national variation in institutional environments that can cause uncertainty to foreign investors, the results show a **Yes** score (Table 4.1, Section B), resulting from the long history of protectionist policies and colonial influences showed by many states in the region. Institutions of government in most of the states resemble those of their colonisers. With the SADC shaping the vision for regional policies into common informed policies, there is optimism that the region will in future reflect similar institutional structures to ease reform and from the adoption of common policies.

The question of whether or not the banking sector reflects efficiency and stability as a result of prudential regulation due to FDI influence cannot be decided because there is insufficient information (**Ins**) available. However, it is documented that South Africa, where more FDI have settled compared to other states in the region, the banking sector indeed boasts efficiency and stability associated with prudential regulation which attracts FDI.

There is also insufficient information (**Ins**) to determine if member states have skilled manpower to monitor FDI activities that may be hazardous to the environment. It is through presumption that member states lack skilled manpower to monitor such activities. Similarly, there is insufficient evidence (**Ins**) on the availability of skilled manpower to monitor FDI tactics of taxation avoidance. Again based on the fact that lack of infrastructure is a common problem in Africa as discussed in Chapter Two. By intuition, SADC member states can be expected to be inadequate in this aspect.

4.5.3.3 EU/RSA TDCA (Table 4.2) Section A

As can be seen from the results in Table 4.2, Section A of the checklist of the EU/RSA TDCA, **Yes** was recorded in six of the nine clauses, namely for the MFN, the NT, TRIMs, Employment, Natural environment, SPS (though SPS clause is absent i.e. **No,** there is convincing information that justify an indirect articulation of this clause), RoO and DTTs. Thus in these areas the EU/RSA TDCA satisfies GATT/WTO expectations.

Since SPS has been explained already focus is now on the two negatives. For HCMs and FET the scores are **No,** indicating their absence from the formal Agreement. Though the HCMs doctrine is mentioned in the EU/RSA TDCA Title III, Articles 35, 36, 37, 41 and 42; and Title IV, Articles 58 and 64, FET receives only sketchy covering, despite presentation of related information. A disturbing aspect (though agreed to by signatories) is found especially in the EU/RSA TDCA Title III (Articles 41 Public aid) and Title V (Article 73 Eligibility of contractors and supplies) which one could argue that it allows the EU to continue with its CAP of providing subsidies to its farmers. This does not provide FET for South African farmers who are not subsidised to the level of their EU counterparts. As a result, South Africa also insisted on an inclusion of a special Agricultural Safeguard Clause Title II, Article 16 of the EU/RSA TDCA and also excluded several sensitive products by putting them on the reserve list, Annex VI, list 4. The issue of subsidies does not arguer well with the future free trade expectations of the WTO.

Concerning taxation matters, the EU/RSA TDCA sets up a free trade area. The EU and South Africa share DTTs prescribed in the EU/RSA TDCA Title VIII, Article 98 (1) Tax carve-out clause (Commission of the European Communities, 1999: L311/29). Thus double taxation is avoided, preventing the exploitation of foreign investors via tax. This is in accordance with the GATT/WTO NT principle.

The obligation in the MFN principle means that any advantage, favour, privilege or immunity that is granted by a contracting party to products originating in or destined for other states has to be applied immediately and unconditionally to any other like products originating or destined elsewhere outside the borders of the state[92]. Now if only those states belonging to the EU/RSA TDCA are entitled to the benefits of the double taxation arrangement, this implies that non-member states are not entitled to the benefits. In this case non-members will pay double tax, which will make their exports to all members of the EU/RSA TDCA very expensive. Thus discrimination does exist but it is considered justifiable discrimination.

4.5.3.4 EU/RSA TDCA (Table 4.2) Section B

Results show that the EU/RSA TDCA has *no* mechanism in place to safeguard member states from the consequences of political instability and labour unrest at investment locations. It does however provide for a review mechanism to evaluate progress every five years. With regard to land, the EU/RSA TDCA has legislation that ensures that before an investor leaves the state or the life span of the investment has came to an end, this investor should rehabilitate the land utilised for mining purposes (Table 4.2, Section B).

The issue of imparting skills to workers is *well* covered in the EU/RSA TDCA (Table 4.2, Section B). It was also found that member states that are signatories to the EU/RSA TDCA *have* stable economic and political environments. On the issue of whether there are states in the EU/RSA endowed with natural resources such as oil, precious minerals and forests to which FDI is attracted, the answer is similarly *positive*.

[92] See 3.4.1, pp. 54-58.

The TDCA provides that South Africa and the newly joined EU member states (Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia) can potentially benefit from activities related to technological breakthroughs in communication, transportation and information technology (Table 4.2, Section B).

Though the EU/RSA TDCA does not explicitly discuss the state of infrastructure in the member states of the EU both old and new, this study makes a surmise that there is *no* problem to suggest a "BYOI approach". By common knowledge, old EU member states are developed states and new ones are also at an advanced stage of development in infrastructure matters. This understanding disqualifies the 'BYOI' approach in the context of the EU. Regarding institutional restrictions among EU/RSA TDCA member states that hamper the flow of FDI, the results show that there is insufficient information **(Ins)** on this aspect. From the agreement, little can be gathered about subsidies under the CAP causing problems for those entrepreneurs who seek free competition to enter and establish themselves in the EU. If equal treatment of foreign investors, especially those in the agricultural industry, does not apply, these investors will be worse off compared to their subsidised EU counterparts.

As to whether or not economic integration enhances peace, Chapter Two (under the sub-heading Globalisation's effect on the gap between Free Trade Agreement and FDI) shows that the EU member states are much more peaceful now compared to before European Unification[93]. Thus this aspect earns a **Yes** score, because economic integration did enhance peace between EU member states. The EU/RSA TDCA prescribes the need for states to embark on strengthening democratic governance, protection of human rights to enjoy peace and the importance of focusing on economic growth.

Though there is insufficient information (**Ins)** on cross-national variation in institutional environments among EU/RSA TDCA member states, such variation can be assumed to exist. This is because of the presence of new EU member states whose

[93] See 2.2.1, pp. 34-37

policies on a broad spectrum require harmonisation with broader EU policies. South Africa's institutional environment also varies from those of EU member states.

The banking sectors in the TDCA member states are efficient and stabile thus scoring a **Yes**. This efficiency and stability in the banking sector in member states is produced by prudential regulations. As South Africa is internationally a leader in the field of banking systems, it can also be argued that it is in this position due to the influence of FDI.

Both South Africa and the EU have advanced technology and skilled manpower to monitor FDI activities that may be hazardous to the environment. From the perspective of both South Africa and new EU member states however, there is insufficient information (**Ins**) to score the issue of monitoring tax-avoidance tricks of FDI. However, taking into consideration the fact that taxation is a challenging aspect to monitor, it seems probable that South Africa would be capable of monitoring tax-avoidance tactics of FDI.

4.6 Summary

The purpose of this chapter was to develop checklists for the SADC Trade Protocol and the EU/RSA TDCA. These checklists are models, which states, both with and without experience can use. The need for such checklists is indicative of the problems and opportunities discussed in previous chapters, which are widespread in developing states, including in Africa. The literature study identified many threats and weaknesses "indigenous" to modern Africa, as well as many strengths and opportunities. Applying this or any similar checklist can enable the negotiator to negotiate clauses in the agreement that will temper weaknesses and threats while strengthening opportunities and strengths. Although the lists are not exhaustive they would still be extremely useful both prior to and during a negotiating process.

In this Chapter the applicability of the checklist was illustrated by analysing two existing agreements, assessing their compliance with a multilateral trading system, the WTO, in focusing on political, economic and security issues which are weighty matters. The SADC Trade Protocol and the EU/RSA TDCA were chosen for analysis.

The issue of multiple-membership was kept in mind, as it has been well documented as problematic for future SADC negotiations. However, it is perhaps not threatening global economic affairs. The SADC region is expected to be a free trade area in 2008.

The SADC Trade Protocol will be summarised first. This agreement satisfies the GATT/WTO in the areas of MFN, NT, TRIMs, Natural environment, SPS, RoO and DTTs[94], but lacks clauses on HCMs, Employment and FET. Information scattered in other SADC Protocols do however partially cover HCMs and FET. The issue of the SADC employment policy is not covered comprehensively enough, particularly its qualification, skills and opportunity aspects.

The agreement provides little scope for minimising political instability and labour unrests at investment locations. It does prescribe a Review Committee but no effective ways of enforcing the implementation of agreements. There is appropriate legislation that provides for continued environmental management. There is not enough information at the regional level to cement on ways of stimulating partnerships between investors and national workers. Some member states are still facing wars and lack of good governance. All member states have something in terms of natural resources to offer foreign investors.

There are potential opportunities for technological advancement through bilateral arrangements and from economic integration. There is sketchy information on infrastructure matters but some member states need to seriously address the status of their roads and communication facilities. Institutional restrictions, such as customs and excise, title deeds to land and pressure by interest groups on their governments, remains a problem for new investors. There are variations in institutional matters among member states as well as in their banking sectors. Infrastructure development and skilled manpower are needed to monitor FDI activities associated with environmental pollution and also for monitoring tax behaviours of FDI.

[94] See section 4.5.3.1, pp. 97-99.

The EU/RSA TDCA will now be summarised. This agreement satisfies GATT/WTO expectations in the MFN, NT, TRIMs, Employment, Natural environment, SPS,[95] RoO and DTTs. The HCMs doctrine is only indirectly presented though fairly thoroughly in various parts of the Agreement. FET is largely neglected in the agreement though related information is scattered through the document.

There is no mechanism in place in the agreement to minimise political and labour disturbances at FDI investment locations. The EU/RSA TDCA has a review structure that every five years revisits what was declared to ensure that its operations are proceeding as agreed. There is legislation that provides for rehabilitation of land after mining activities. The agreement provides for investors to impart skills to workers so that workers can enter into partnership with the investors and also for workers to enter into new business ventures after the investors leave the state. Member states have stable economic and political climates to attract FDI. Many member states are endowed (e.g. South Africa) with natural resources, which FDI requires.

Member states continue to benefit from technological breakthroughs, and have adequate infrastructure in the transportation and communication sectors. Despite little information available on institutional restrictions, some operational restrictions such as the CAP are apparent. The CAP benefits EU farmers as competing farmers, such as those in South Africa, are not subsidised compared to their EU counterparts. Economic integration is a precursor to instilling peace, as was experienced in the EU. With little information available, it is assumed that newly joined EU member states and South Africa all have institutions that are slightly different from those of the old EU member states with regard to economic and political policies.

The banking sectors in the EU/RSA TDCA member states present an efficient and stable banking environment, which is beneficial in attracting FDI. EU/RSA TDCA member states have skilled manpower and technology suitable for monitoring FDI activities that can be environmentally harmful. With available manpower, some of these states can successfully monitor the tax-avoidance activities of FDI.

[95] See section 4.5.3.3, pp. 103, 104.

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CHAPTER FIVE

SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The problem statement, goals and methodology of the study and theoretical underpinnings of international trade in legal and economic terms have been discussed. The goals of this study are:

1) to undertake a methodological study using available literature in order to survey the necessary legal and economic content of international agreements that must be adhered to with regard to GATT/WTO rules and development intentions;
2) to develop a format (checklist) to evaluate the legal components, checks and balances of intra-regional and inter-continental trade agreements; and finally
3) to study the SADC Trade Protocol and the EU/RSA TDCA and evaluate them according to the developed format.

In Chapter One the study also employs research questions to properly address the goals outlined earlier. These research questions are:

Whether or not literature could be found to construct a database (format or checklist), which reflects the legal and economic content of GATT/WTO rules including matters of FDI and agriculture commodity trade,
Whether or not SADC is correct and relevant considering that some of its member states are also member states of the CIO, the COMESA, the EAC, the EU/RSA TDCA and the SACU, and also
Whether or not the proposed checklist that can be used before, during and after negotiations is a practical method to assist developing states in the negotiation process.

These research questions have been answered positively and each will be explained further. Furthermore, this chapter provides a summary and conclusions and makes recommendations for policy purposes.

5.2 Summary

To address the first research question, **"Can literature be found to construct a database (format or checklist) which reflects the legal and economic content of GATT/WTO rules including matters of FDI and agriculture commodity trade",** relevant literature on both the legal and economic content of various international agreements was identified. This literature study was used to create an information database set out in part of Chapter One, the whole of Chapters Two and Three and a small portion of Chapter Four. Chapter Two focuses on economic issues particularly on fostering FDI, which is a powerful catalyst for economic growth and development. Chapter Two shows how globalisation is inescapable, and, despite its shortcomings can benefit states greatly. Issues such as instability in the political sphere of a state, security of the assets or ownership of a firm, as well as labour unrests are shown to be key issues affecting the investment aspirations of foreign investors. Chapter Two also discusses that land utilised for mining, if not rehabilitated, poses a serious challenge to future economic activities. This is because such land cannot easily be utilised for other income-generating activities such as agriculture, because of the presence of hazardous and toxic materials left behind which leads to a loss of soil quality.

Chapter Three discusses how the MFN principle is important in international trade as a mechanism that seeks to prevent discrimination in the treatment of investors. This principle does not prohibit a state from entering into an agreement with another partner that may discriminate against other states, but ensure that this is done in accordance with GATT/WTO rules. A problem with the principle is that it limits the manoeuvring ability of states when planning investment agreements for the future. Another way of preventing discrimination comes through the NT. Unlike the MFN, the NT also prevents discriminatory practices by suggesting an equal footing for all products (domestic and foreign imported ones) in terms of for instance taxes in the domestic market.

Domestic or HCMs doctrine is important in international trade. Every state is encouraged to formulate policies that promote investments. An effective legal system is important in addressing security of investments, fair competition, disputes on ownership of assets, expropriation of property, repatriation of profits and certainty on the rule of law, as well as stability of the state. The need for access to information is also of prime importance in that both investors and consumers need important information to be disseminated to keep both parties well informed about market dynamics.

States have to legislate, for example introducing restrictions to maintain security and strategic industries, but this must be done in accordance with GATT/WTO standards and procedures. It is imperative that every state attracts investors to help improve the living standards of its citizens both in monetary and employment terms. Investors are expected to utilise available labour to their benefit and to the benefit of the hosting state. In a FDI Agreement there must be ways of sensitising the human resource development effort so that after the investor has left, the disbanded labour can use their acquired skills to find other jobs and to start their own business ventures.

Investors have to be sensitive to environmental degradation so that mechanisms can be put in place to prevent compromising the environment. States are urged to partner with foreign investors in sustaining the environmental heritage. All investors no matter their nationality and as the NT principle prescribes, deserve fair and equal treatment by the hosting state. It is important for every state to formulate policies and develop facilities for the prevention and control of diseases, pests and infected materials. Every state is allowed to restrict imports of products that are deemed harmful to either human, plant or animal life but convincing scientific evidence to prevent unjust discrimination according to the SPS and TBT Agreements must back this move. Applying the agreement on the RoO is an imperative for every state that wants to attract FDIs and be involved in regional and other trade agreements.

The second research question asks **"If the SADC is correct and relevant considering that some of its member states are also member states of the CIO, the COMESA, the EAC, the EU/RSA TDCA and the SACU",** and is answered using the information prepared in Chapters Two, Three and Four. It was found that

the issue of multiple membership, sometimes referred to as overlapping of membership, is not necessarily bad and that it does not pose any danger to regional and the world economy. Furthermore, GATT 1994 under Article XXIV was found to reflect no restrictions on overlapping as long as the arrangement or memberships do not handicap the particular state from fulfilling its responsibilities to the multilateral body the WTO and that such a state does not discriminate unjustifiably against other states.

The third research question asks **"If proposed checklist that can be used before, during and after negotiations is a practical method to assist developing states in the negotiation process".** The results of the two checklists, one for the SADC Trade Protocol and another for the EU/RSA TDCA address this question. The evaluation was extended to include some other economic information essential for the betterment of citizens of both SADC and EU/RSA TDCA member states.

The results of the checklists are presented in Chapter Four. It was found that the SADC Trade Protocol has clauses that match well with GATT/WTO rules on matters of the MFN, the NT, TRIMs, Natural environment, SPS (no clause on this aspect but addresses indirectly), RoO and DTTs. The SADC Trade Protocol lacks clauses on the HCMs and FET doctrines. Employment is incomplete in that it fails to strictly base the Regional Employment Policy on qualifications and skills or to explore the issue of opportunity. The EU/RSA TDCA was found to match well with GATT/WTO rules on the principles of MFN, NT, TRIMs, Employment, Natural environment, SPS, RoO and DTTs. The agreement also matches well on the HCMs doctrine though it is not directly included.

The SADC is yet to become a free trade area but before this the SADC is neither a free trade area nor a customs union. This does not apply to the SACU, which is composed of five SADC member states. The exclusion of the CIO, the COMESA and the EAC in this scenario is intended to indicate that the SADC has to account for its own actions without relying on other regional agreements. Though the SADC and the SACU do both aspire to some relative economic fraternities, they are presently in different economic strata.

The SADC Trade Protocol and the EU/RSA TDCA have no legislation providing minimum protection against political and labour riots at investment locations. They do prescribe committees to review progress on decisions agreed to, to ensure that they are implemented. There are sufficient legislative instruments in the SADC Trade Protocol and also in the EU/RSA TDCA for taking care of land utilised for mining purposes. The SADC Trade Protocol has no strict policy providing that foreign investors impart skills to workers so that the workers are prepared to hunt for other jobs or enter into joint business ventures when the investor has left the state. Conversely, the EU/RSA TDCA does make provision for the formation of business ventures between investors and national workers. Unlike the SADC where several states have unstable economic and political policies, EU/RSA TDCA member states have stable governance.

Breakthroughs in technological aspects continue to benefit SADC member states, including spillover benefits from the EU/RSA TDCA. This is because the EU has many states with developed economic sectors (especially old EU member states) supported by advanced technology. Newly joined EU member states stand a good chance of benefiting from advanced EU technology. There are problems with infrastructure in the SADC region, especially in the transport and telecommunication sectors. Some institutional restrictions also require attention; bureaucratic impediments such as customs services, delays in processing (e.g. title deeds to land earmarked by foreign investors) and pressure from domestic firms due to fear of FDI competition. All these issues frustrate foreign investors.

Through economic integration, peace between SADC member states could be promoted, less money spent on war and more financial resources thus devoted to developing their economies. Economic integration has brought much needed peace in the EU and the same is likely to happen if SADC member states can focus on integrating and developing their economies. SADC member states have other avenues of addressing conflict such as those provided by the SADC Protocol on Politics, Defence and Security.

There are cross-national variations in institutional environments among SADC member states, which cause uncertainty to foreign investors. These are often

structures of governance inherited from past colonisers. However, over the past few decades from when some member states earned their independence to date, there is still much backwardness in terms of properly functioning institutions of governance, economic growth and development. Much of this backwardness is a result of corruption prone officials, incompetence and civil wars. As such, it is high time that Africa stop blaming others for its dismal economic performance and take responsibility for its own future.

Variations are common also in the newly joined EU member states. Also some member states have efficient and stable banking sectors, associated with prudential regulation as a result of FDI influence. The EU is advanced in banking matters, as is South Africa. With the exception of South Africa, SADC member states are not very well equipped with the skilled manpower and technology required to monitor activities of FDI that are hazardous to the environment and also to monitor FDI tax-avoidance behaviours. This is unlike the EU/RSA TDCA member states, which have enough skilled manpower and technology for both these purposes.

Based on the above information, the checklist appears to be a practical method. States intending to engage in trade negotiations, those already involved and those that are already signatory to trade agreements can implement them when negotiating or reviewing their agreements in order to include various issues that were earlier not included, so as to foster economic welfare benefits of their citizens.

5.3 Conclusion and Recommendations

5.3.1 Policy matters

A transition from autarky to international trade and from shallow to deep integration accompanied by and the partnering of developed and developing states requires serious political commitment and skilled policy makers. So far remarkable work has been done to bring the SADC Trade Protocol to its current position in both legal and economic terms, yet the agreement is still not completely compliant with GATT/WTO rules in certain areas, especially the absence of HCMs, FET and the Employment clause which is incomplete. The checklists could help in designing intervention instruments to improve the implementation of the SADC Trade Protocol. The current

transitory phase of the SADC consist of a series of negotiations and it is at these forums that member states must press for the inclusion of these three outstanding clauses. Regional policy, such as the SADC Trade Protocol is required for cohesion and for economic growth of the SADC region. For investments to perform well, SADC member states need to ensure that the HCMs doctrine makes provision to reduce political and labour activities at investment locations. This will have a positive impact on the regional economies, as it will increase the confidence in the investment environment.

Since the Employment clause is not adequately covered in the SADC Trade Protocol, it is important that the outstanding issue of job opportunity be included and employment policy be strongly focused on employing people based on their skills and qualifications. This suggestion does not ignore the fact that many people lack necessary skills, especially in member states such as Angola that have been ravaged by war. This is why member states are advised to focus their resources on educating their citizens. This is important if the SADC region is to advance its institutional operations and if its economies are to become free from corruption and nepotism. Furthermore, by placing qualified people in key positions such as research, policy and planning, research institutions and government efforts can become more efficient. Donors will also be encouraged to fund envisaged research and development projects in member states. Issues of origin of products and especially SPS matters require skilled manpower that has undergone rigorous training.

A well-focused development policy is required both regionally and in member states. Such a policy is vital for encouraging residents to advance their education so that skilled manpower is available for monitoring environmental factors, tax activities of FDIs, and information technology. Agriculture and legal skills can become readily available in member states.

Though the SADC Trade Protocol provides for an institutional and a dispute settlement mechanism, it is also important for SADC to explore other strict remedies beyond penalties and sanctions to ensure that member states comply fully with what they agree to do. This approach has the advantage of preventing rebellions and in most cases will foster peace, because residents of the region as a whole will be better

served by their governments. Investment in communication sectors is equally important, as this will provide infrastructure for early warning on natural disasters that affect, human, plant and animal life. The SADC need to enact a sweeping policy that encourages investors to train and also to enter into joint ventures with national workers. Though this is costly, it can nevertheless motivate workers and rapidly lead to the economic emancipation of residents of member states.

Lastly, the SADC member states must continue forging better deals, such as bilateral trade arrangements that can benefit their economies. Multiple-memberships do not have to be a concern, since it does not threaten the global economy or most likely, the regional economy. The only problem with multiple memberships encountered in this study is the complexities that can arise during negotiations as various member states have individual interest in both agreements of which they are members.

The EU/RSA TDCA seems to have largely complied with GATT/WTO rules. Compliance is in the principles of MFN, NT, TRIMs, HCMs, Employment, Natural environment, SPS, RoO and DTTs. The HCMs doctrine is not explicitly addressed but is well presented in other parts of the agreement. The SPS clause has to be well stipulated than its current indirect expression. The FET doctrine is absent but enough sketchy information is available in other parts of the agreement to prohibit a judgement of non-compliance.

The EU/RSA TDCA thus needs to consolidate a clause on the FET so that what is lacking can be included. Together with the MFN and NT principle, the FET doctrine is vital to provide certainty to both foreign investors and domestic investors on predictable policy instruments affecting their investments. With the FET doctrine in place, investors become aware of their limits, and the state remains informed about the treatment that must be accorded to foreign investors.

Lastly, the EU/RSA TDCA requires a rapid process of policy harmonisation so that the policies of newly joined member states are like those of the entire EU. The same must happen to institutions of governance and their *modus operandi* in newly joined EU member states and in South Africa. This is vital for promoting economic growth and development, maintaining banking sectors, and protecting the international

reputations of the EU and South Africa, as well as for coordinating various activities across member states.

5.3.2 Recommendations for further research

- Further research should reveal the opportunities that are likely to be achieved if SADC Agreements can introduce a system that ensures that location factors free from political instability and labour unrests are identified for foreign investors. What will be the likely economic spin-offs?
- It is also possible to focus further research on security of assets of the investors and determine its implication on attracting other foreign investors.
- To cast the research net widely in search for the possibility of rehabilitating land previously utilised for mining to accommodate other economic activities. Can it work?
- The possibility of enforcing SADC declarations, whether that will enable the SADC region to move faster in harmonising all matters that are pertinent to the envisaged free trade area remains unexplored.
- Implications of EU/RSA Trade, Development and Cooperation Agreement on non-SACU but SADC Member States.
- Economic and legal challenges that overlapping of membership poses to future SADC negotiations.
- The implications of the abolishment of EU subsidies on the economics of agriculture in South Africa.

5.3.3 Limitations of the Study

The policy framework proposed in this study is not immune from critique of its focus on FDI and international agricultural commodity trade, which necessitates avoiding issues such as essential services, which are also vital to FDI especially from a GATT/WTO perspective. Another limitation of this study is that it does not deeply examine other policy instruments such as tariffs that are also critical in international trade negotiations.

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