Dealing with Trade Defence Instruments in the context of Economic Integration in Africa

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By: Khaled El Taweel

Student number: 29045119

Prepared under the Supervision of Dr Gustav Brink

Faculty of Law

University of Pretoria

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List of Abbreviations

ACP	African, Caribbean and Pacific Countries
AEC	African Economic Community
AD	Anti-dumping
ADA	Anti-dumping Agreement (Agreement on Implementation of Article VI of GATT 1994)
ADR	AD Regulation
AFAS	ASEAN Framework Agreement on Services
AFTA	Asian Free Trade Area
AGOA	African Growth and Opportunity Act
AIDA	Action Plan for Accelerated Industrial Development of Africa
APEC	Asia-Pacific Economic Cooperation
AMU	Arab Maghreb Union
APTA	Asia-Pacific Trade Agreement
ASCM	Agreement on Subsidies and Countervailing Measures
ASEAN	Association of South East Asian Nations
ASEC	ASEAN Economic Community
ASG	Agreement on Safeguards
ATF	Agreement on Trade Facilitation
ASR	Anti-subsidy Regulation
ATIGA	ASEAN Trade in Goods Agreement

AU	African Union
AUC	African Union Commission
CAMEX	The Brazilian Chamber of Foreign Trade
CARICOM	Caribbean Community and Common Market
CCP	Common Commerce Policy
CEMAC	Economic and Monetary Community of Central African States
CEPT	Common Effective Preferential Tariff
CET	Common External Tariff
CFTA	Continental Free Trade Area
CMC	Council for the Common Market
COMESA	Common Market for Eastern and Southern Africa
CRTA	WTO Committee on Regional Trade Agreements
CTD	Committee on Trade and Development
CTRS	Committee on Trade Remedies and Safeguards
CU	Customs Union
CUSFTA	Canada USA Free Trade Agreement
DDA	Doha Development Agenda
DECOM	The Brazilian Department of Trade Remedies
DFQF	Duty Free Quota Free
DRC	Democratic Republic of Congo
DSB	Dispute Settlement Body

DSU	Dispute Settlement Understanding
EAC	East African Community
EBA	Everything but Arms Initiative
EC	European Commission
ECA	Economic Commission for Africa
ECB	European Central Bank
ECCAS	Economic Community for Central African States
ECJ	European Court of Justice
ECOWAS	Economic Community of West African States
ECSC	The European Coal and Steel Community
EFTA	European Free Trade Area
EMU	Economic and Monetary Union
EPA	Economic Partnership Agreement
EU	European Union
FANs	Friends of AD Negotiations
FDI	Foreign Direct Investment
FTA	Free Trade Area / Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Production
GMC	Common Market Group
GSP	Generalised System of Preferences
GSTP	Global System of Trade Preferences
GVCs	Global Value Chains

HS	Harmonised system
IGAD	The Intergovernmental Authority on Development
IPRs	Intellectual Property Rights
ITO	International Trade Organisation
LAIA	Latin American Integration Association
LDCs	Least Developed Countries
LPA	Lagos Plan of Action
MEDIC	The Brazilian Ministry of Development, Industry and Foreign Trade
Mercosur	Common Market of the South
MES	Market Economy Status
MFN	Most Favoured Nation
MIP	Minimum Integration Program
MOU	Memorandum of Understanding
NAFTA	North American Free Trade Agreement
NAM	Non-Aligned Movement
NEPAD	New Economic Partnership for Africa's Development
NME	Non-market Economy
OAU	Organisation of African Unity
ODA	Official Development Assistance
OECD	Organisation for Economic Cooperation and Development
OHADA	Organisation for the Harmonisation of African Business Law
PAP	Pan African Parliament

PIDA	Program for Infrastructure Development in Africa
PSA	Partial Scope Agreement
PTA	Preferential Trade Arrangement
RECs	Regional Economic Communities
RIA	Regional Investigating Authority
RoOs	Rules of Origin
RTAs	Regional Trade Agreements
SACU	Southern African Customs Union
SADC	Southern African Development Community
SADCC	Southern African Development Coordinating Conference
SAFTA	South Asian Free Trade Area
SECEX	The Brazilian Secretariat of Foreign Trade
SOEs	State-owned enterprises
SPS	Sanitary and phytosanitary measures
TBT	Technical Barriers to Trade
TDIs	Trade Defence Instruments
T-FTA	Tripartite Free Trade Area
ToRs	Terms of Reference
TTIP	Transatlantic Trade and Investment Partnership
TTNF	Tripartite Trade Negotiation Forum
TPP	Trans-Pacific Partnership

TRIPS	Trade-Related Aspects of Intellectual Property Rights
TWGs	Technical Working Groups
UEMOA	West African Economic and Monetary Union
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America
USD	United States Dollar
WTO	World Trade Organisation

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Full names of student: Khaled MSH El Taweel
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3. I have not used work previously produced by another student or any other person to hand in as my own.

4. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.

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Signature of supervisor:…….....……..

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Contents

Executive Summary

The launching of the T-FTA in June 2015 presents an opportunity for accelerating regional integration in Africa towards the establishment of a single market through deepening COMESA-EAC-SADC integration.

This milestone can contribute positively to African development. Nevertheless, it faces different structural and technical challenges, including the risk of aggressive export strategies and unfair trade practices, which may wipe away a substantial part of the integration gains.

This could undermine African integration plans and the largely infant industries in Africa, especially since many African countries lack sufficient technical skills, institutional capacity, and the legal framework to deal efficiently and effectively with unfair trade practices and to respond to situations which may require the application of emergency tools to better adapt to economic challenges.

Apart from Egypt, Morocco, Tunisia, South Africa and Zambia national Trade Defence Instruments (TDIs) are not well developed. This could further constrain the ambitious African plans of economic integration.

The thesis concludes that, although an effective TDI system is crucial for African integration as it can provide the required protection for African infant industries and unlock the potentials of African economic integration, the current African TDI systems are not effective. This is confirmed by the limited resort to TDIs in the African continent and the general perception that an effective TDI system is not a priority on the integration agenda.

The concluded T-FTA TDI legal regime is not supportive for African integration plans in the long run. Africa should envisage how to upgrade its TDI system to make better use of the tools available under the WTO to deal with unfair trade measures, including anti-dumping to face dumped imports, countervailing measures to face subsidized imports, and safeguard measures to temporarily suspend concessions in the face of surge in imports.

Africa can improve its national and regional TDIs system by learning from more developed TDI systems incorporated by other economic blocks such as the EU, NAFTA, Mercosur, and ASEAN.

This thesis submits that the EU TDIs system is the most suitable to the African integration objectives. This submission is made while recognising the different level of development on both sides. The thesis submits that the long-term objective of the T-FTA is to have a regional investigating authority. It draws several recommendations to enhance African TDI system by working on five main categories: (A) The strategic direction; (B) The institutional framework; (C) Enhancing engagements; (D) Application of TDIs; and (E) The supportive factors.

Chapter 1: Introduction

1.1 Background Information

African countries are embarked on ambitious plans for regional economic integration. The three Regional Economic Communities (RECs) in Eastern and Southern Africa, namely the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern Africa Development Community (SADC), have agreed at their Summit in Sharm El-Sheikh on 10 June 2015 to launch a Tripartite Free Trade Area (T-FTA) between the three RECs.[1]

The T-FTA endorsed a vision that seeks to reach a single market through deepening COMESA-EAC-SADC integration.[2]

This important milestone came after a long process of negotiations which started at the first Tripartite Summit in Kampala in 2008, where Members of the three blocks agreed to establish a Free Trade Area (FTA) covering the 26 countries of the three regions with the long-term goal of establishing a Customs Union (CU).[3] The three blocks adopted a holistic approach by agreeing to enhance cooperation and coordination in non-tariff areas including competition, financial and payment systems, capital market and commodity exchange.[4] This would contribute towards the African countries' goals of expanding trade to accelerate economic growth and consequently to alleviate poverty and achieve economic development.

The second Tripartite Summit in Johannesburg in June 2011 formally launched the negotiations for the establishment of this FTA, which lasted four years.[5]

This expanded FTA is in line with the African vision of establishing the African Economic Community (AEC) as per the Lagos Plan of Action (LPA) and the Final Act of Lagos of 1980, the Abuja Treaty of 1991, as well as the Resolution of the African Union (AU) Summit held in Banjul in 2006, which directed the African Union Commission (AUC) and the RECs to harmonise and coordinate policies and

[1] Communiqué of the Third Tripartite Summit (2015) Para. 1 (a).
[2] *Ibid.*
[3] Communiqué of the First Tripartite Summit (2008) Para. 14 (i).
[4] *Ibid*, Para.14 (iv).
[5] Communiqué of the Second Tripartite Summit (2011) Para 4.

programs of the African RECs as important strategies for increasing intra-Africa trade and investment as well as integration in the global economy.[6]

Nevertheless, this important objective faces many structural and technical challenges. The integration plans are at risk of aggressive export strategies and unfair trade practices by other countries, which could undermine the largely infant industries in Africa and weaken African integration.

This could impact negatively on economic development, especially when many African countries lack sufficient technical skills, institutional capacities, and the legal framework to deal effectively and efficiently with unfair trade practices and to respond to situations which may require the application of emergency tools like safeguard measures to better adapt to economic challenges.

Apart from Egypt, Morocco, Tunisia, Zambia and South Africa, national Trade Defence Instruments (TDIs), competition laws and institutions are not well developed in Africa. This can leave Africa's economic integration plans vulnerable to unfair competition threats and consequently further constrain the ambitious African plans of economic integration.

The World Trade Organisation (WTO) has established rules for dealing with unfair trade measures. Countries are allowed under certain conditions to apply anti-dumping (AD) measures against injurious dumping from other WTO Members, while Members can resort to countervailing measures against subsidies that cause injury to the national industries to neutralise the benefit of such a subsidy. Additionally, under certain conditions, Members can temporarily suspend concessions and impose safeguard measures in the face of fair trade.

Several economic blocks like the Association of South East Asian Nations (ASEAN), the European Union (EU), the North American Free Trade Agreement (NAFTA) and the Common Market of the South (Mercosur) have adopted different TDI systems to deal with dumped and subsidised products from third parties in addition to regulating the application of safeguards against Members and non-Members. These laws are declared to be consistent with WTO Agreements, but in many cases these blocks

[6] Communiqué of the Third Tripartite Summit (2015) Para.1 (e).

adopt significant changes to suit their level of development and their policy objectives.

Some of these economic blocks have gone further by establishing regional institutions to manage or supervise the application of TDIs with jurisdiction in Member States, which has significant effects on trade integration as well as on the results of the investigations.

1.2 Challenges Facing the Tripartite Economic Integration

The founding documents of African economic integration suggest that the main objective of African integration, including the T-FTA, is to establish a large market with a single economic space that would be more attractive to investment and economies of scale production, and which would promote intra-African trade, improve African countries' competitiveness, and foster economic development and employment in Member States.[7] The T-FTA seeks to achieve these objectives by building on and deepening integration in the three RECs.

There is empirical evidence that the formation of African RECs has facilitated trade creation among African Member States.[8] A significant part of intra-African trade takes place within the RECs.[9] The increase in the intra-trade in the RECs contributed to the improvement in intra-African trade in general.

However, and despite the growth in nominal intra-African trade in the last decade,[10] further improvement in intra-African trade and in particular in the T-FTA context could face some challenges which include: overlapping membership in the three RECs, limited conducive infrastructure, under-developed private sector, different and complex systems of rules of origin (RoOs), similar production structures, and insufficient institutional and personal capacities at national and regional levels.

[7] See for example the Lagos Plan of Action and the Final Act of Lagos of 1980, the Abuja Treaty of 1991 as well as the Resolution of the African Union (AU) Summit held in Banjul in 2006.
[8] See in general UNCTAD (2013).
[9] *Ibid.*
[10] See the discussion under section 3.2 of this Thesis.

In addition to these structural challenges, the lack of effective trade tools to protect national and regional industries in Africa is another important challenge that can limit the success of this initiative.

1.3 Problem statement

The African TDI systems, and in particular those within the Tripartite framework, is not effective in providing the required level of protection to the national and regional industries in Africa, and may consequently undermine economic regional integration gains. This system needs major upgrades to suit the current state of African development and the long-term economic integration objectives as well as the developments in the multilateral trade system.

1.4 Research objectives

This thesis seeks to analyse the legal framework of TDIs in the context of African economic integration and in particular that within the T-FTA, and to compare it to TDI systems in other economic blocks. The objective of the research is to determine the main shortcomings in the TDI system in Africa and the possible lessons that could be learned from other economic blocks. The achievement of these objectives depends on realising the following targets:

1. To analyse the nature and specificities of African economic integration and its major challenges.
2. To analyse the WTO legal framework dealing with TDIs (AD, Subsidies and Countervailing measures and Safeguards).
3. To analyse the TDI regimes in the context of major Regional Trade Agreements (RTAs).
4. To examine the current legal setting of TDIs at the national, REC and regional levels in Africa as well as the African countries usage of TDIs and their involvement in the Dispute Settlement Body (DSB) in relation to TDIs.
5. To draw possible lessons and improvements that could be learned from the multilateral system as well as from the application of TDIs in other economic blocks, and identify which would best support the African model of integration.

1.5 Thesis statement

An effective TDI system can contribute to the achievement of the African integration objectives.

There is a deficiency in the jurisdictional regimes governing TDIs in the context of economic integration in Africa as well as in the technical and institutional capacities at national and regional levels. The African TDI system needs a significant overhaul about both substance and procedure, in order to create a fair and transparent system that will be more conducive to economic development.

1.6 Limitations of the study

As the T-FTA is the most advanced level of economic integration on the African continent so far in terms of membership, the study will be limited to the T-FTA and will not deal with other economic blocks in Africa. However, it is submitted that the recommendations coming from this research could be applied to other similar endeavours in Africa.

The study deals solely with TDIs in the context of goods, and does not deal with unfair practices in services. Since the study deals with TDIs, which relate to protection against certain types of trade, the study is limited to regional economic integration and does not deal with regional political integration.

As the research methodology depends partially on interviews with African and international trade experts, the availability of interviewees may prove to be a limitation.

The limited resources available about TDIs in Africa might present another limitation.

1.7 Significance of the study

The current plans to achieve greater economic integration in Africa can result in accelerating economic growth, reducing poverty, and creating new jobs. However, those potential gains may be threatened by the lack of trade protection tools available

to African countries when facing foreign competition and exports surges, which could undermine the objectives of economic integration.

It is of particular importance to African countries to identify and overcome these potential threats, to combat possible anti-competitive conducts, and to make use of emergency tools in order to achieve the envisaged objectives of integration.

Most of Africa's trade is done with third parties, and African exports are heavily concentrated on raw commodities and primary manufactured products. These two factors have led to the continent being particularly vulnerable to external macroeconomic shocks and protectionist trade policies.

Africa cannot isolate itself from the outside world. However, the continent can reduce its vulnerability to external shocks, and can improve its trade and economic performance if its market integration is deepened and if its trade tools and mechanisms, including TDIs, are developed.

Economic integration can be threatened by unfair trade measures from non-Member States that can make use of this reduction in tariff and non-tariff trade barriers to increase their market share in the African continent and maximise profits on the expense of local and regional producers. This can subsequently damage the infant industries in developing and least developed countries (LDCS) in Africa, and may wipe away the potential economic gains of regional integration.

Additionally, African emerging manufacturing exports may be subject to excessive use of TDIs in export markets. The inadequate institutional and technical capabilities of African countries may be a stumbling block in the way of increasing exports, and consequently of improving economic conditions.

African Countries would need to develop national and regional legislations, create new institutions or bodies to ensure adherence to, and respect for fair competition and fair trade rules and the achievement of the African integration objectives. These legislations and these new institutions should be in line with African countries' obligations under the WTO and should be based on international best practice.

An effective TDI system could provide the necessary legal protection to the national and regional industries in Africa, especially in light of the absence of international competition laws and the frequent usage of TDIs by trading partners, as well as the nature of African industries, which are largely infant industries.

In terms of previous research, the academic work done on this area focused mainly on the economic effects of economic integration in Africa in terms of trade creation and trade diversion, rather than the linkages between TDIs and economic integration in Africa.

Moreover, despite the extensive literature about regional integration, there was limited analysis of TDI provisions in RTAs in Africa.

1.8 Terminologies

Economic integration is defined as the process of removing progressively discriminations at national borders or within an area.[11] It can take place through bilateral and regional Agreements or in the context of the WTO where it should fulfil certain criteria.

Regional trade agreements (RTAs) are defined as reciprocal trade agreements between two or more Members but fewer than all Members of the WTO, they include free trade areas (FTAs) and customs unions (CUs).[12]

Multilateral Trade liberalisation refers to the elimination of tariff and tariff barriers under the WTO.

Trade defence instruments (TDIs) are multilaterally agreed and permissible trade tools used by governments to restrict specific imports to their markets, protect national industries, and achieve economic and political objectives.[13] They include three tools: anti-dumping measures, countervailing measures and safeguards.

[11] Balassa (1961) 1 and Kahnert *et al* (1969).
[12] "Regional trade agreements and preferential trade arrangements" <http://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm> (accessed 27 October 2014).
[13] Bown (2008) 20 *Economics & Politics* 2.

Trade remedies include anti-dumping measures and countervailing measures and are limited to unfair trade practices while safeguard measures are emergency actions that are not necessarily used against unfair trade measures.

Dumping is the introduction of products of one country into the commerce of another country at less than the normal value of the products.[14] Dumping takes place when the export price of the product is less than the comparable price of the like product when destined for consumption in the exporting country.[15]

A subsidy is a financial contribution made by a government or a public body that is specific and confers a benefit to a national industry.[16]

Safeguard measures are emergency actions used by importing Members with respect to unexpected increase in imports of particular products, where such imports have caused or threaten to cause serious injury to the domestic industry.[17]

1.9 Research Methodology

The thesis will combine analytical and comparative approaches, as well as in-depth interviews to achieve the research objectives. The three research methodologies will work in a way to complement each other in order to achieve the research objectives.

An analytical approach will be used to analyse the current theoretical framework dealing with TDIs in the WTO. This will seek to clarify and explain the technical terms in the three WTO Agreements, the conditions for using these trade tools to achieve policy objectives as well as the current negotiations to clarify trade remedies in general.

The thesis will also analyse the main characteristics of four examples of RTAs (ASEAN, EU, Mercosur, and NAFTA). The four choses RTAs are representative in the sense that they are examples for different types of integration: North-North, North-South and South-South.

[14] Art. VI of GATT 1947which was carried forward into GATT 1994.
[15] Art. 2.1 of the ADA.
[16] Art. 1.1 of the ASCM
[17] *Ibid.*

Additionally, the analytical approach will be used to analyse the legal structure governing TDIs in major T-FTA Members and the three RECs of the T-FTA. This will be done in order to highlight the major potential weaknesses within this structure that could hinder its effectiveness, with the ultimate objective of coming up with suggested recommendations on how to use TDIs to support regional integration. The study will compare the statistics of African usage of TDIs with other blocks and Members of WTO with the objectives of determining the pattern of usage and if this is linked to certain structural factors such as the volume and the composition of trade.

A comparative approach will be used to compare the African legal structure of TDIs with other economic blocks. This will be done to highlight the major differences between these systems of integration, and how Africa can incorporate some of the legal instruments and models applied by these more advanced economic blocks.

In-depth interviews can help in understanding the complex nature of multilateral and regional TDI systems and the possible recommendations that suits Africa's level of development. The interviews will be conducted with both African policy makers and WTO experts working on this complex topic. This can provide valuable insights and recommendations on how African integration models could benefit from a more conducive TDI system. The insights emerging from these interviews may not be available in primary and secondary sources.

1.10 Research Structure

This body of work will be divided into seven chapters.

Following this introduction, Chapter two will discuss the theories of economic regional integration, explore the background of regional economic integration while analysing the different levels of economic integration; objective of regional integration; economic effects of regional integration as well as the relevant provisions dealing with regional integration in the WTO.

Chapter three will deal with the background of African economic integration under both the Organisation of African Unity (OAU) and the African Union (AU); the African model of integration and will analyse the intra-African trade figures and the

challenges facing the African integration. The chapter will also discuss the three economic blocks forming the T-FTA (COMESA, EAC and SADC) and will analyse the T-FTA texts with emphases on its objectives and pillars

Chapter four deals with the multilateral legal system governing TDIs within the WTO (The Anti-Dumping Agreement, the Subsides and Countervailing Measures Agreement and the Safeguards Agreement). The chapter will analyse the objectives of TDIs, while discussing the major proposals submitted to improve and clarify trade remedies in the WTO in the context of the Doha Agenda.

The fifth chapter analyses the characteristics of TDI regimes within RTAs with the objective of proposing some valuable tools to be applied with the African integration model.

Chapter six is devoted to analysing the TDI regimes in Africa both at the national and regional levels. The chapter will analyse and compare the initial proposal of the T-FTA regime in connection with TDIs with the final outcome while exploring possible reasons that forced T-FTA members to opt for this solution at the end of the negotiations. The analysis will benefit from interviews with African and international legal experts working in this field. The Chapter seeks to come up with conclusions about the direction and the effectiveness of the TDI system in the T-FTA.

The last chapter will include major conclusions and recommendations on how TDIs can help unlock the potential of African economic integration, and possible strategies and tools for improving Africa's economic integration process and the application of TDIs.

1.11 Further Research

The increasing pace of new RTAs and the interaction between multilateral integration and regional integration as well as the possible reform of TDIs at the multilateral level suggest the need to anticipate further evolving issues around TDI systems that may require a more updated study and analysis in the future. This need could be emphasised further by the evolving nature of International trade law being shaped by the rulings of the DSB.

Chapter 2: Background and Literature Review

2.1 Theories of Regional Economic Integration

Economic integration is defined as the process of removing progressively discriminations at national borders or within an area.[18]

It is both a process and a state of affairs.[19] Regarded as a process it includes measures designed to abolish discrimination between economic units belonging to different national states; viewed as a state of affairs it can be represented by the absence of various forms of discrimination between national economies.[20]

Economic integration seeks to make boundaries between nation-states less discontinuous thereby leading to the formation of more-comprehensive systems.[21]In essence, economic integration seeks to remove tariff and non-tariff barriers to trade in goods and services between selected countries.

Theories of regional integration retain a good deal of relevance wherever and whenever the setting they were designed to describe and explain continue to exist. [22]

Many theories tried to explain the concept of regional integration. Haas developed the Neo-functionalism theory which is built on the concept of "spill-over". The concept refers to situations when an initial decision by Members of a regional block to place a certain sector under the authority of central institutions creates pressures to extend the authority of the institutions into other policy areas such as currency exchange rates, taxation, and wages triggering dynamics that can sustain and expand interregional cooperation.[23]

[18] Balassa (1961) 1 and Kahnert *et al* (1969).,
[19] Kahnert *et al* (1969).
[20] *Ibid.*
[21] Mennis & Sauvant (eds) (1976) 75.
[22] Haas (1975) *Institute of International Studies* 15.
[23] *Ibid.*

This theory, which was applied mainly to the European model of integration at a particular point of time, was latter declared obsolete by its own developer.[24] Haas criticized the pace of regional integration in Western Europe in the 1970s explaining that it didn't achieve a federation level and that the nation-state behaves as if it were both obstinate and obsolete, and what appeared to be a distinctive "supranational" style looks like a huge bureaucratic appendage to an intergovernmental conference in permeant session.[25]

As a criticism of the Neo-functionalism, Hoffmann developed the theory of Intergovernmentalism which claimed that national governments would always endorse their interests within a regional block and will consequently control the level and speed of regional integration.[26] Hoffman rejected the concept of "spill-over" stating that losses in one sector are not necessarily compensated with equal gains in another sector and that the creation of regional supranational organizations is a decision by governments rejecting the idea that supranational organisations can be on an equal level as national governments.[27] The notion of Intergovernmentalism is of importance when studying African integration and the efforts to build regional institutions.

Hoffman also distinguished between areas where Members could be willing to waive sovereignty such as economic and trade issues and issues where Members may be reluctant to do so such as foreign policy, security and defence issues.[28] This distinction is important when analysing regional integration in Africa where Members are still concerned about sovereignty even in connection with regional trade issues such as the creation of regional bodies.

The interaction between political and economic motives of integration could determine the level of success of regional integration.[29] Swann explained that in

[24] *Ibid.*
[25] *Ibid* 14.
[26] Hoffmann (1966) 95 *Daedalus* 882.
[27] *Ibid.*
[28] *Ibid* 889.
[29] Haas & Schmitter (1964) *International Organization* 713-720.

certain integration models the objective may be to move from economic integration into political integration.[30]

As for economic integration, the main theory for economic integration was developed by Viner which was the first to differentiate between the positive and negative implications of economic integration (trade creation and trade diversion effects).[31] Trade creation is the increase in intra-RTA trade as a result of the elimination of customs tariffs, which could be at the expense of trade flows from more efficient third parties, while trade diversion takes place when the trade flows are diverted from cost-efficient units to less efficient units due to the trade preferences they enjoy as a result of the formation of RTAs. This could result in inefficient global allocation at regional and international levels.[32]

The Vinerian model was criticised by many scholars. It was argued that this model may be valid only when inelastic demand and perfect elastic supply exist and that trade diversion may not be always harmful.[33]

It was submitted that there are four different stages of economic integration: FTA, then a Customs Union (CU), then a Common Market (CM), and finally an Economic Union. [34] If we add the initial stage of Partial Scope Agreements (PSAs) we would have five stages of integration.

2.2 Regional Integration and Regionalism

Although for this thesis the terms "regional integration" and "regionalism" are used interchangeably, the two terms are sometimes used to convey different meanings in certain contexts.

On one hand, economic regional integration takes place mainly between the private sector making use of falling trade barriers and mainly lead to the creation of Global Value Chains (GVCs). On the other hand, regionalism refer to the deliberate creation of bilateral or regional formal arrangements that could range from preferential trade

[30] Swann (1970) 77.
[31] See the discussion of the trade creation and trade diversion effects under Sec. 2.6 of this thesis.
[32] See the discussion under sec. 2.8 of this thesis.
[33] Meade (1955) *Amsterdam: North-Holland*.
[34] Balassa (1961).

agreement to the creation of Economic Union.[35] Regionalism can take place through bilateral Agreements in the context of the WTO where it should fulfil certain criteria as established by the WTO provisions.[36]

2.3 Regional Economic Integration and Sovereignty

The creation of political or economic regional blocks requires Members to surrender part of national sovereignty in certain areas. When regional blocks take a step further by creating regional bodies, this may affect sovereignty by limiting the space of national institutions in certain areas such as customs and TDI investigations

Sovereignty Concerns may act as a deterrent for policy makers entering regional integration agreements especially when deep integration is envisioned.

However, it should be noted that Member states determine the functions and jurisdiction of regional organisation through their sovereign will and by Agreements between Members. Additionally, Members can withdraw from such Agreements by following the established mechanisms.

There are many cases where sovereignty was affected in the context of regional integration. One of the most recent manifestations was the effect of the eurozone crisis on Greece. The crisis shows how bailout could be conditional on tough economic terms. It showed also how a regional body (the European Central Bank) had significant jurisdiction and influence on issues that traditionally falls within the traditional authority of national bodies.[37]

Regional integration is built on international treaties concluded between States. These treaties represent a major source of international Law and states have an obligation to implement them. When it comes to the implementation of these treaties, there are two legal doctrines encompassed in national constitutions or just simple practiced.[38]

Countries which apply the dualist approach separate between national law which is applied nationally and international conventions which are applied between states and

[35] See in general Bhagwati, Krishna & Panagariya (eds,) (1999).
[36] See the discussion under sec. 2.9.1 of this thesis.
[37] Lane (2012) 26 *Journal of Economic Perspectives* 49-68.
[38] For the discussion of the relation between international law and municipal law through the two approaches (dualism and monism) see Starke (1936) 17 *British Yearbook of International Law.*

do not intervene as such in the international legal system. Consequently, to implement an international treaty at the national level, this treaty should be incorporated under the national law.[39]

On the other hand, the monist approach accepts that the national and international legal systems form a unity. In this case, international law refers to treaties signed by countries or obligations accepted as part of international obligation. [40]

In Africa some countries adopt the dualist approach while others adopt the monist approach which is an important factor when studying the regional economic integration Agreements and their implementation.

2.4 A Historical Perspective of Economic Regional Integration

In the World Trade Organisation (WTO) regional trade agreements (RTAs) are defined as reciprocal trade agreements between two or more Members but fewer than all Members of the WTO.[41] RTAs include free trade areas (FTAs) and customs unions (CUs).[42]

Some RTAs include Members of the same geographical region like the Southern African Development Community (SADC) and the European Union (EU), while others are held between countries located in different regions like the EU-Egypt partnership Agreement and the USA-Jordan FTA.

From a historical perspective three main waves of economic regional integration could be identified.[43] The first wave took place before 1990 and was a largely European phenomenon.[44] The European Coal and Steel Community (ECSC), which provided preferential tariffs and quota treatment among France, Germany and the Benelux nations is considered an important step toward the current EU.[45] On the developing countries' side political motivations and solidarity among new

[39] *Ibid.*
[40] *Ibid.*
[41] "Regional trade agreements and preferential trade arrangements" <http://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm> (accessed 27 October 2014).
[42] *Ibid.*
[43] Cottier and Delimatsis (eds) (2011) 139.
[44] *Ibid.*
[45] "Treaty establishing the European Coal and Steel Community, ECSC Treaty" <http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_ecsc_en.htm> (accessed 27 October 2014).

independent countries prompted calls for economic integration especially after the establishment of the Non-Aligned Movement (NAM) in 1961.[46]

The second wave of regionalism began in 1990. A major agreement in this period was the North American Free Trade Agreement (NAFTA), which is asymmetric in nature and includes two developed countries (the USA and Canada), and one developing country (Mexico). NAFTA is a landmark in regionalism as one of the most notable examples of a substantial, reciprocal North-South FTAs.[47] A second feature in the second wave was the establishment of many regional groups of developing countries, as exemplified by the common market of the south (Mercosur), and several RECs in Africa including COMESA, the EAC and SADC. After the disintegration of the Soviet Union both the European Communities and the European Free Trade Area (EFTA) concluded several FTAs with countries in Central and Eastern Europe. Many partnership agreements were also concluded with Mediterranean countries, which involved a high level of obligations for developing partners.[48]

The increased rate of integration at the first and the second waves could be explained by the increase of number of countries as a result of independence from former colonial powers. It could be also explained by the general perception that opening new markets can enhance production specialisation and trade liberalisation, which could consequently support economic growth.

In the last decade the world has witnessed a third wave of regionalism which is characterised by a high level of interdependence and a growth in negotiation and conclusion of RTAs that is unprecedented and was described as 21st century regionalism.[49]

This sharp recent increase in the number of RTAs could be a result of two main reasons: 1) The concern of both developing and developed countries about the unsatisfactory results of the WTO Doha negotiations and the realisation that RTAs can provide a customised – and sometimes a deeper – level of integration to selected Members. 2) The fear of marginalisation especially on the side of developing and

[46] See for instance Stojanovic (1981) 13 *CWRJIL* 450.
[47] Cottier & Delimatsis (eds) (2011) 141.
[48] *Ibid.*
[49] Baldwin (2011) *WTO working Paper ERSD.*

Least Developed Countries (LDCs), which also sought to enhance their negotiating weight *vis-à-vis* developed countries by concluding RTAs with each other.

Currently there are two mega RTAs that could have important repercussions on the multilateral trade negotiations. These are the Transatlantic Trade and Investment Partnership (TTIP), which aims to remove trade barriers in a wide range of economic sectors between the EU and the USA,[50] and the Trans-Pacific Partnership (TPP) which was concluded in October 2015 by agreement on an FTA between twelve major economies throughout the Asia-Pacific region.[51]

The consecutive waves of both deep and shallow regionalism, combined with the multilateral trade liberalisation, have created a state of interdependency between countries in the creation of different goods, and the emergence of GVCs which has become a dominant feature of world trade and investment, with prospects for growth, development, and job creation.[52]

The term *"made in the world"* describes how many goods are produced today through interdependence between different countries in different geographical locations.[53] This usually takes place according to respective comparative advantages.

These changes have brought both opportunities and threats to African countries. African countries can profit from these changes if they manage to participate in the GVCs at the right stage and with the right products that are suitable for African countries' comparative advantages. At the same time African countries may find it difficult to participate in this process if their exports are not at sufficient level of competitiveness. The increasing integration can also put African markets at risk of cheap imports.

While the 20th century regionalism was more about preferential market access, the 21st century regionalism is about deep integration disciplines that support the trade

[50] "European Commission - Press release - Report on the online consultation on investment protection and investor-to-state dispute settlement in the Transatlantic Trade and Investment Partnership Agreement" http://europa.eu/rapid/press-release_MEMO-15-3202_en.htm accessed 19 March 2015).
[51] "Trans-Pacific Partnership (TPP) | United States Trade Representative" <https://ustr.gov/tpp> (accessed 19 November 2015).
[52] OECD, WTO & UNCTAD (2013) 3.
[53] "Made in the World" https://www.wto.org/english/res_e/statis_e/miwi_e/miwi_e.htm (accessed 19 March 2015).

investment-service nexus.[54] It is driven by a different set of political economy forces; that is not limited to opening markets but makes Foreign Direct Investment (FDI) conditional on domestic reforms.[55]

These disciplines directly and indirectly support the GVCs and the division of manufacturing among different countries according to their comparative advantages.

From the TTIP and TPP negotiation agendas it is clear that future integration processes are going beyond tariff reductions to structural liberalisation, and even changes in national economic policies.

2.5 Overview of Regional Trade Agreements landscape

The WTO defines RTAs as reciprocal trade agreement between two or more Members.[56] RTAs and Preferential Trade Arrangements (PTAs) are exceptions to the Most Favoured Nation (MFN) principle, which is one of the core principles of the WTO.

As of 1 February 2016, there were 625 notifications of RTAs to the GATT/WTO, of which 419 RTAs were in force. [57]

Partial Scope Agreements (PSAs) and FTAs account for around 90% of RTAs, while CUs account for less than 10%.[58]

These RTAs are not homogenous. Every RTA has its own objectives and structures. They vary according to membership, level of integration and level of implementation.

PTAs are different from RTAs. Although they have features in common, PTAs are characterised as unilateral trade preferences.[59] Currently there are 28 PTAs in force.[60]

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[54] Baldwin (2011) *WTO working Paper ERSD* 3.
[55] *Ibid.*
[56] "Regional Trade Agreements" <http://www.wto.org/english/tratop_e/region_e/region_e.htm> (accessed 15 March 2016).
[57] *Ibid.* Counting goods, services and accessions separately.
[58] *Ibid.*
[59] *Ibid.* It is noted that Preferential Trade Agreements are different from Partial Trade Agreements which is the first step of trade integration. See section 2.8 of this thesis.
[60] "List of PTAs" <http://ptadb.wto.org/ptaList.aspx> (accessed 15 March 2016)

All WTO Members are now Members of one or more RTA, with some belonging to as many as 30 RTAs.[61]

The continuous increase in the number of RTAs with preferential tariff concessions may result in a situation where an increasing percentage of world trade is conducted on preferential basis.

Nevertheless, around 84% of world merchandise trade still takes place on an MFN basis.[62] This is because half of the world trade is already subject to zero MFN tariff rates and also because RTAs tend to exempt high MFN-tariff items from preferential treatment and continue to trade these products at MFN rates.[63] Additionally, major trading powers such as China, the USA, the EU and Japan do not, at the moment, have any preferential trading arrangements in place between them.[64] This may change in the coming years especially if the TTIP and the TPP come into force.

Countries which are not effectively integrated in the trade preferential system run the risk of being at a disadvantageous position as they have to pay the MFN tariff while their competitors pay a preferential tariff. This led major trading countries to compete to have preferential access in international markets. Developing countries are slowly integrating in the regional trade networks to avoid exclusion and being in a disadvantageous position *vis-à-vis* competitors.

The major clusters of RTAs are North-South and South-South, each accounting for 37% of the total number of notified RTAs in goods.[65]

It is noted that preferential arrangements on services are also proliferating at an accelerated pace which is also affecting international trade. While there were only six notified RTAs in Services before 2000 this number increased to 141 by mid-2015.[66] RTAs with a service liberalisation component represent a small portion of all RTAs notified to the WTO, and are concentrated mainly between developed and emerging countries.

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[61] "The 9th WTO Ministerial Conference, BALI, 2013 Briefing note: Regional Trade Agreements" <http://www.wto.org/english/thewto_e/minist_e/mc9_e/brief_rta_e.htm> (accessed 1 April 2014)
[62] World Trade Report (2011) 7. The reference study was conducted in 2008 which may suggest a decrease in this percentage in recent years.
[63] *Ibid.*
[64] The EU, for example, applies MFN tariffs to only nine trading partners according to the EU data.
[65] Baldwin & Law (eds) (2009) 36.
[66]" RTAs in Services" <http://rtais.wto.org/UI/PublicSearchByCrResult.aspx> (accessed 14 November 2015

In terms of the number of RTAs, African countries were not isolated from this phenomenon. According to the WTO African countries are involved in 55 preferential agreements of which 43 were South-South Agreements.[67]

2.5.1 Unilateral versus Reciprocal Trade Preferences

Unilateral preferences from developed to developing countries were first authorised by the GATT parties in 1971 through a waiver of the MFN principle.[68] The waiver was extended indefinitely through the Enabling Clause, which is now part of GATT 1994.

While the providing countries usually impose some requirements on the recipient countries that could include certain economic criteria, the pursuit of good governance, application of free market rules, protection of intellectual property rights (IPRs) and respect of human rights to qualify for such treatment, the recipient countries do not have to extend reciprocal trade preferences to the developed countries in exchange for improved market access. [69]

One example thereof is the Generalised System of Preferences (GSP), extended by Canada, the EU, Japan, Russia, Turkey and the USA to developing countries and LDCs in Africa, Asia and Latin America.[70] The GSP system is a non-discriminatory system that allows beneficiary countries to have preferential tariff treatment in the markets of developed countries export to developed countries with no obligation to reciprocate which is in accordance with the UNCTAD II Resolution 21 (ii) taken at New Delhi in 1968.

Another example is the African Growth and Opportunity Act (AGOA). According to the provisions of this Act, the USA provides Sub-Saharan African countries duty-free and quota-free (DFQF) access for thousands of tariff lines.[71] This initiative resulted in

[67] De Melo (2014) *Brookings*.
[68] WTO document L/3545 of 28 June 1971.
[69] Mendoza , Low & Kotschwar (eds) (1999) 3.
[70] "About GSP" <http://unctad.org/en/Pages/DITC/GSP/About-GSP.aspx> (accessed 30 October 2014).
[71] African Growth and Opportunity Act <http://trade.gov/agoa/> (accessed 30 October 2014).

improved market access for many African countries in the American market benefiting from this comparative advantage.[72]

Additionally, many LDCs benefit from the "Everything but Arms" initiative (EBA) with the EU in terms of which they can export most products DFQF to the EU.[73]

Since some these arrangements are basically in violation to the MFN principle, it had to be amended to be in line with the multilateral trading system rules. The Economic Partnership Agreements (EPAs) between the EU and several African countries replaced the waiver that was extended by the WTO, which allowed the EU to provide preferential market access exclusively to the African, Caribbean and Pacific (ACP) states until December 2007. The Cotonou Agreement had to declare that the non-reciprocal preferences would be replaced by reciprocal trade commitments in compliance with Article XXIV of the GATT.[74] In July 2014 the EU concluded an EPA with Botswana, Lesotho, Mozambique, Namibia, South Africa, and Swaziland, which was signed on 10 June 2016[75] and came into operation on 10 October 2016.[76]

Reciprocal trade preferences differ from unilateral trade preferences in two aspects. Firstly, unilateral trade preferences are voluntary arrangements by definition in accordance to certain political and economic conditions and criteria while reciprocal arrangements are the result of trade negotiations that seek to balance the overall economic benefits and costs to the parties. Secondly, the WTO has more jurisdiction in reviewing the consistency of reciprocal arrangements with Article XXIV of GATT, while it only considers whether a unilateral preference scheme meets the conditions of the Enabling Clause allowing for a departure from the MFN principle, which is mainly limited to the terms of the preferential scheme itself, which can be reviewed by the WTO Dispute Settlement Body (DSB).[77]

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[72] "USA Trade with sub-Saharan Africa, January - December 2014" <http://trade.gov/agoa/pdf/2014-us-ssa-trade.pdf> (accessed 1 March 2015)
[73] "The "Everything But Arms" initiative" <http://www.unctad.info/en/Infocomm/Agricultural_Products/Banana/Economic-policies/The-Agreement-Everything-But-Arms/> (accessed 30 October 2014).
[74] Art. 37.1 of the Cotonou Partnership Agreement.
[75] http://trade.ec.europa.eu/doclib/press/index.cfm?id=1509 (accessed 12 October 2016).
[76] "Economic Partnership Agreement with southern African countries enters into effect" <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1554> (accessed 12 October 2016).
[77] EC - Tariff Preferences (WT/DS246).

In Africa almost all Sub-Saharan African (SSA) countries are part of one of the unilateral preferential trade systems (mainly EBA, AGOA, etc.). This provides African countries with preferential access in export markets. The utilization of this advantage may be constrained to certain extent by supply side challenges at the African side.

The WTO Hong Kong Ministerial conference in 2005 emphasised the legality of the unilateral market access schemes and requested developed countries and some developing countries to provide DFQF market access on a lasting basis, for all products originating from all LDCs by 2008.[78] It required specifically that the DFQF market access should cover at least 97% of products defined at the tariff line level. The WTO Ministerial conference in Bali in December 2013 required developed Members to improve their DFQF access prior to the next Ministerial Conference. It also called on developing countries, in a position to do so, to provide preferential access to LDCs exports.[79]

According to WTO estimates more than 80 % of LDC's exports currently enjoy DFQF access in developed countries, while some developing countries are also exporting 80% under duty-free treatment. [80] This highlights the risk of the erosion of preferences granted to LDCs compared with developing countries.

2.5.2 Deep and Shallow RTAs

RTAs could be divided into shallow and deep integration models. Shallow integration mainly focuses on tariff liberalisation and is characterised with long exclusion lists. Deep RTAs cover issues that go beyond tariff liberalisation and may include services liberalisation, the adoption of a common competition policy, harmonised investment regulations, common import standards, unified public procurement regulations, IPRs as well as the possible abolition of the application of TDIs.

There are both political and functional forces driving the trend to move toward deep RTAs.[81] Deep integration was initially common among developed countries in Europe

[78] WTO Document WT/MIN(05)/DEC, Annex F.
[79] WT/MIN (13)/44-WT/L/919 “Duty Free and Quota Free (DFQF) Market Access for Least Developed Countries”.
[80] World Trade Report (2014) 200.
[81] Lawrence (1996) 26.

and North America, which is in accordance with their level of economic development and diversification.

In the last two decades deep RTAs spread rapidly to cover North-South trade.[82] The NAFTA Agreement led the way as it covers investment and IPRs.[83] Japan has recently joined the movement by signing deep EPAs with the ASEAN economies.[84] Agreements between developing countries such as Mercosur and EAC have recently gone into some deep integration areas that go beyond mere tariff liberalisation.

In Africa most of the RECs are pursuing an integration agenda with ambitious deep integration objectives yet with modest levels of implementation. There are exceptions to this as exemplified by the significant progress in the EAC.

The spread in RTAs is going parallel with deepening the level of integration in RTAs to cover behind the border non-tariff measures in a way that can substitute or complement the limited coverage and the slow pace of the multilateral trade liberalisation. Recently concluded and negotiated RTAs seek to be more responsive to the national economic priorities, the changes in the world economies and patterns of trade. This is clear among developed countries with sophisticated and diversified economies that are export intensive and which seek to deepen trade liberalisation with major trading partners.

Provisions related to competition policy, investment, harmonisation of standards and IPRs were present in more than 40% of RTAs in force in 2012.[85] The pace of world integration and the rapid incorporation of these principles in mega RTAs could eventually bring them to the multilateral level through the WTO system. This has the risk of marginalising the WTO system as well as the small developing countries, including African countries.

The negotiations to reach the TTIP and the TPP are telling examples of these ambitious integration endeavours with multilateral implications.

[82] Baldwin (2011) *WTO ESRD Working Paper* 10.
[83] *Ibid.*
[84] *Ibid.*
[85] WTO World Trade Report (2014) 8.

The EU and the USA seek to reach a TTIP that aims at substantial trade and sectoral liberalisation in addition to harmonisation of regulatory measures, such as differences in technical regulations, standards and approval procedures as well as services, investment, and public procurement which are the major issues that are constrained at the multilateral level in the WTO negotiations.

Although this negotiation faces significant challenges, nevertheless addressing these regulatory issues is a recognition of the significant effects these measures, including trade facilitation, have on trade that could be more important than tariff liberalisation, as they increase the cost of trade and consequently constrain international flows.

Reducing regulatory barriers to trade is the main target of these negotiations especially since the average applied rate is very low, under 3%.[86] It is estimated that between two thirds and four fifths of the gains from a future agreement would come from cutting red tape and having more coordination between regulators.[87]

An ambitious and comprehensive TTIP could bring significant economic gains for the EU (€119 billion a year) and the USA (€95 billion a year) once the agreement is fully implemented.[88]

The TPP was concluded on October 2015 by agreeing on FTA between twelve major economies throughout the Asia-Pacific region.[89] This RTA is similar to the TTIP as they both seek deep integration objectives; however it is asymmetrical in the sense that it includes developed and developing countries.[90]

The TPP is considered as an upgrading of the existing standards and setting new high standards by adopting high environmental and labour standards, and for including the

[86] "TTIP" <http://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states/> (accessed 1 November 2015).
[87] "TTIP, the regulatory part, presentation by the EU Commission" <http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151605.pdf> (accessed 1 January 2015).
[88] Francois *et al* (2013) *CfEPR* 2.
[89] "Trans-Pacific Partnership (TPP) | United States Trade Representative" <https://ustr.gov/tpp> (accessed 19th November 2015).
[90] Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the USA and Vietnam.

first-ever measures to ensure that state-owned enterprises compete on a commercial basis.[91]

2.5.3 Hub and Spoke RTAs

In the context of RTAs, a hub is defined as a country which is a Member of two or more distinct RTAs, while spokes arise when a hub country forms a bilateral RTA with other countries.[92] The hub and spoke agreements are usually maintained by a single large trading entity (the hub) with a collection of smaller trading partners (the spokes).[93]

The USA, the EU, EFTA, China and Japan are active in concluding agreements with developing and developed countries, which forms the hub and spoke model.

From economic and political perspective, the hub countries can be better off through these arrangements as it unifies applicable trade rules and sustain economies of scale but the spokes are generally less well off than they would be if they were integrated among themselves in a larger arrangement with the erstwhile hub.[94]

In Africa many countries act as spokes with major trading powers like the EU and the USA, which sometimes put them at disadvantageous position with their hubs. This further emphasise the importance of regional integration in Africa.

2.6 Objectives of Regional Trade Agreements

Economic integration is not an objective in itself. RTAs have different economic and political objectives that evolve according to the level of development of Members, and the envisioned depth of integration.

The report of the first Warwick Commission identifies a non-exhaustive list of ten objectives for governments when involved in RTAs.[95]

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[91] "Upgrading the North American Free Trade Agreement" <https://ustr.gov/tpp/#upgrading-nafta> (accessed 19 November 2015).
[92] Murshed, Goulart & Serino (eds) (2011) 108.
[93] *Ibid.*
[94] *Ibid.*
[95] Report of the First Warwick Commission (2007)

The report highlighted the difference in motivation between forming FTAs and CUs, explaining that, when countries unify their common external tariffs (CETs) with respect to third parties in CUs, it is highly probable that the motivations driving such agreements include a strong economic component, underwritten by a willingness to pool sovereignty across a range of policy areas, with limited exceptions.[96]

These objectives, which vary across regions, among agreements, and over time, can be summarised as follows.

2.6.1 Seeking Enhanced Market Access

Enhancing market access is the most obvious and direct traditional objective of RTAs. Countries seek to enhance market access for their companies by giving them a comparative advantage over third parties. For example, the Association Agreement between the EU and Egypt and the Trade and Development Cooperation Agreement (TDCA) between the EU and South Africa give Egypt and South Africa trade preferences into the EU over other countries that do not enjoy such preferential treatment. In addition, COMESA and SADC FTAs are built on trade preferences between Member States.

One of the pillars of the T-FTA is market access. Although Members of the three RECs enjoy preferential access within their RECs, they are treated on a MFN basis when dealing with Members of the other two RECs, which could put them at a disadvantageous position compared to their competitors.

2.6.2 Furthering Foreign Policy Objectives

Countries can be engaged in RTAs for foreign policy and political reasons. This includes promoting peaceful relation with neighbouring countries, solidifying interests with countries that share the same ideological objectives, and encouraging countries to adopt certain political and economic objectives.

For example, economic integration in Europe was widely seen as a successful means of overcoming hostilities between the major European powers through promoting economic interdependency, where the ECSC was a catalyst for this interdependency

[96] *Ibid.*

and promoting peace.[97] With the current state of high interdependence among Members of the EU politically and economically the chances of escalating hostilities are much less than before world war two.

RTAs reduce the probability of war through two channels: by increasing the opportunity cost of war; and by reducing information asymmetries, as partners get to know each other better.[98]

It is acknowledged that agreements between big economies like the USA and the EU and small developing countries in Africa, the Middle East and the Caribbean have important economic implications for at least one party, but are also motivated by political and strategic considerations.[99]

For example, the Cotonou Partnership Agreement between the EU and the ACP countries includes dialogue on human rights under Article 8 of the Agreement, which is one of the EU foreign policy objectives.

In the Association Agreements between the EU and its Mediterranean partners the preamble emphasises the importance of the principles of the United Nations Charter, in particular the observance of human rights, democratic principles and economic freedom.[100]

Agreements between developing countries sometimes refer to political objectives and solidarity in its declarations.

2.6.3 Influencing National Economic Policies of Trading Partners

RTAs could be used to indirectly influence the national economic policies and legislation of other Members by promoting liberalisation. RTAs can offer incentives for policy reform through improved governance and the possible adoption of regulatory and reform practices from others.[101]

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[97] European Integration - Achievements and Challenges <http://www.ecb.europa.eu/press/key/date/2005/html/sp050616_1.en.html> (Accessed October 2014).
[98] Melo (2014) *Brookings Institute*.
[99] Report of the First Warwick Commission (2007) 47.
[100] For instance, the EU-Egypt Association Agreement and the Economic Partnership Agreement between the CARIFORUM States and the European Community.
[101] Chauffour (2012) *ECDPM* 1.

RTA provisions may oblige its Members to take steps to reach a level of liberalisation in certain areas that are not covered under multilateral trade. Members who are sources of outward FDI may encourage recipient partners, through RTAs, to provide the necessary protection for their investment, which could also include providing protection for IPRs, and provisions pertaining to social norms, such as labour standards and human rights.[102]

A stronger and quicker enforcements and dispute settlement mechanisms may present another incentive for countries to engage in RTAs especially when compared with the relatively lengthy procedures under the WTO DSB.

Developing countries and LDCs may accept such obligations in return for enhanced market access and increased official development assistance (ODA).

Examples of the inclusion of these objectives are the TPP and the NAFTA agreement with respect to labour standards and IPRs. The USA uses a template in its RTAs that also seeks to shape domestic regulations in partner countries.[103]

The multilateral trading system is also employed to induce reform, as could be manifested in the protocol of accession of China to the WTO, which is viewed as a tool of accelerating economic and political reform in China by expanding its linkage to the world and its dependence on it.[104]

2.6.4 Achieving Economies of Scale and Increasing Collective Bargaining Power

For small countries to realise economies of scale, they may need to build a bigger market, which can result in better allocation of resources based on comparative advantages, attracting investment, reducing unit cost and increasing competitiveness.

Additionally, regional arrangements can improve African countries' weight *vis-à-vis* larger trading partners.

Individual African Countries' Gross Domestic Production (GDP) and share of international trade is a fraction that of the USA or the EU, and it is doubtful that,

[102] For example The Economic Partnership Agreement between the CARIFORUM States and the EU.
[103] Report of the First Warwick Commission (2007) 8.
[104] "China's accession Protocol to the WTO in 2001" https://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm (accessed 13 March 2015).

dealing individually with major powers, they would have significant advantage or could reach balanced trade deals.

It is submitted that, at the African level, a REC-based or continental-based negotiation with the more major trading powers can yield more positive results in terms of African economic objectives, rather than negotiations on an individual basis. This also applies to the multilateral trade negotiations.

The plan to reach a continental FTA (CFTA) in Africa is a move in the right direction to achieve economies of scale and enhanced bargaining power.

2.6.5 Liberalising Sectors beyond the Current reach of WTO

With the limited progress, diminishing mandate and coverage of the WTO negotiations, countries with ambitious trade agendas seek to engage in RTAs, which go deep into liberalising sectors that are beyond the agenda of the multilateral trade negotiations. This includes both the TPP and TTIP.

Some countries may be using RTAs to set the standards of the multilateral trade negotiations at the multilateral level. For example, the services liberalisation in NAFTA is viewed as a tool of influencing the multilateral negotiation and the formulation of the Friends of Services group in the WTO, which seeks to reach plurilateral agreement on services, which could set the bar for eventual multilateral negotiations. This also applies to labour standards, IPRs and public procurement.

2.6.6 Avoiding Exclusions

With the increase in the pace and coverage of RTAs, small countries need to engage in RTAs to avoid exclusion from these networks of RTAs which result in them being the only ones to pay the MFN tariff.

This has led to a reactive domino effect described as “Bandwagon RTAs”, where countries seek to restore a situation where they have a level playing field to redress trade diversion.[105]

[105]Jaimovich & Baldwin (2010); Bhagwati (1991) 73.

It is submitted that Africa is at high risk of exclusion because of its own specificities, especially as most African countries depend on exports of natural resources and are small economies with a small share in world trade. African countries are also at risk of preference erosions because other countries are securing preferential access through RTAs with major markets for African exports, which traditionally provided African countries with unilateral trade preferences.

2.7 Economic Effects of Trade Integration

There is a correlation between the growth in world trade and the growth in GDP. In the period 1990-2013, the annual growth in world trade was almost one and half times to two times the growth in GDP.[106] In 2014, the growth in world merchandise trade was 2.5%, which was roughly equal to the increase in world GDP.[107]

Since 1980, the developing world's share of global trade has grown from a third to almost half.[108] This happened in parallel with the growth in their GDP. China now ranks as second world power in terms of nominal GDP,[109] and is the world's largest exporter; compared with the 32nd thirty year ago.[110]

Countries trade with each other because certain countries produce a particular good or service at a lower marginal opportunity cost than another.[111] Economic integration may increase welfare by overcoming the inefficiencies of individual Members through specialization according to comparative advantages. The theory of comparative advantage explains why certain countries specialise in certain products and consequently export these products to other countries.

Trade can accelerate economic growth in GDP by improving resource allocation through specialisation according to comparative advantage, or by allowing economies of scale in production to be exploited, which can result in decreasing unit cost. [112]

[106] WTO World Trade Report (2014) 20.
[107] WTO World Trade Report (2015) 14.
[108] WTO World Trade Report (2014) 20.
[109] According to the IMF data.
[110] WTO World Trade Report (2014) 42.
[111] See Ricardo (1817) for the theory of comparative advantage.
[112] WTO World Trade Report (2014) 6.

This is important to developing countries and LDCs, where their small economies and small markets do not permit economies of scale. Regional integration and integration in the international markets can help developing countries attract FDI which can support job creation as well as the transfer of much needed production technologies.

On the other side, inefficient industries that do not have comparative advantages, and which thrive on tariff protection, may not be able to survive and can lose its market share to the favour of more efficient producers.

Imposing tariffs and restrictions on foreign trade was traditionally considered one of the fundamental sovereign rights of the modern state. Countries may decide wilfully to forfeit this right in exchange for a similar acceptance of commitments from the other signatories.[113] This is done in order to allow its economy to gain from trade liberalisation.

In developed trade blocks like the EU, EFTA and NAFTA, economic integration usually leads to mergers between companies to benefit from economies of scale.[114] This has not been the case in less developed blocks like in Africa, where foreign companies' subsidiaries have benefited from the removal of regional and national tariff walls at the expense of less efficient national companies, which undermined the objectives of regional integration and may require consideration of available tools to deal with such challenges including TDIs.

2.8 Trade Creation and Trade Diversion

The removal of tariffs between two or more economic units can result in trade creation and trade diversion.

Trade creation is the increase in intra-RTA trade as a result of the elimination of customs tariffs, which could be at the expense of trade flows from more efficient third parties.

[113] "Seattle: what is at stake" <http://www.wto.org/english/thewto_e/minist_e/min99_e/english/book_e/stak_e_6.htm> (Accessed: 23 March 2014).
[114] Mergers and Acquisitions are regulated by the competition law in the EU, which is designed to ensure that firms do not acquire such a degree of market power on the free market so as to harm the interests of consumers, the economy and society as a whole.

Trade diversion takes place when the trade flows are diverted from cost-efficient units to less efficient units due to the trade preferences they enjoy as a result of the formation of RTAs. This could result in inefficient global allocation at regional and international levels.

The outcomes of the creation of RTAs in the sort of trade creation and trade diversion may determine the effectiveness of regional integration.

Viner explained the ambiguity welfare effect of RTAs, which stems from the trade creation and trade diversion effects.[115] According to the Vinerian model, trade creation would outweigh trade diversion when trade barriers were lifted.[116]

Viner distinguished between the trade-creating and the trade-diverting effects of preferential trade, noting that CUs may be irrational as they may can divert more trade than they create, and, thus, are economically irrational.[117] He claimed further that trade creation increases the welfare of the home country while trade diversion achieve the opposite result. The larger the economic area of the CU, the stronger the liberalization effect.[118]

The magnitude of tariff reductions in the CU may affect the welfare gains or losses. It was claimed that small reduction in tariffs may raise welfare, while a large reduction may raise or lower it. [119]

Salera explained that the main objective of a CU is to shift resources to members of the union and as a result could be a movement toward free trade or increasing protectionism.[120]

In some cases, trade diversion may have positive effects on economic welfare, considering that losses from trade diversion may be compensated by the welfare gains from the increase consumer's welfare resulting from decreasing cost of imports.[121] It was also assumed that Article XXIV of the GATT could be economically irrational.[122]

[115] See in general Viner (1950).
[116] *Ibid.*
[117] *Ibid.*
[118] Ibid.
[119] De Melo & Panagariya (eds) (1993) 171-172.
[120]Salera (1951) 59 *The Journal of Political Economy* 84.
[121] Johnson (1975) *The Canadian Journal of Economics* 117.
[122] Mathis (2002) 104.

This is based on the fact that RTAs can move production from countries with comparative advantages to countries with no comparative advantage but which enjoy preferential market access, which can result in a higher degree of trade diversion and overall welfare reduction.

Because of its limited coverage and preferences, PSAs may not give enough margin to encourage trade flows from members on the expense on non-members and consequently may create less trade diversions.

When it comes the application of the Vinerian model, it is noted that many scholars have concluded that the CU theory does not necessarily apply in the case of developing countries.[123] For some developing countries trade integration is mainly a tool for economic development.[124]

2.9 Multilateralism vs. Regionalism

The MFN principle in Article I of GATT is a founding principle of the multilateral trading system. It provides that any advantage granted to any product originating in or destined for another contracting party will immediately and unconditionally be accorded to the same product originating in or destined for the territories of all other GATT contracting parties.[125]

There are certain exceptions to this principle. These are illustrated in three areas mainly: Article XXIV of GATT, Paragraph 2c of the Enabling Clause and Article V of the General Agreement on Trade in Services (GATS).[126]

Regional and bilateral trade agreements are discriminatory by nature and constitute an exception to the MFN principle. They are established in accordance with Article XXIV of GATT or the Enabling Clause according to their composition.

The main reason for countries to engage in RTAs is to circumvent the MFN rule and consequently to enjoy preferential market access over non-Members.

[123] See for example Balassa (1961), Abdel Jaber (1971) 9 *Journal of Common Market Studies* 256, Andic, Andic & Dosser (1971) 25.
[124] Ibid.
[125] Art. I of GATT.
[126] See the discussion under section 2.9 of this thesis

The continuous increase in the number of RTAs happens in parallel with the ongoing trade liberalisation in the GATT/WTO negotiations.[127]

The pursuance of parallel regional and the multilateral tracks by the majority of world countries today confirm the conviction that trade and economic interests of countries could be served through this dual track.

In RTAs, countries could be inclined to accept the liberalisation of certain sectors and areas on a reciprocal basis and where they wouldn't accept the same liberalisation at the multilateral level. This applies to services liberalisation, investment accords, labour, competition and government procurement, which are found in many agreements between developed countries such as NAFTA, EFTA and the EU.

However, certain issues and disciplines could be only dealt with at the multilateral level. Issues like agricultural domestic support, agricultural export subsidies and IPRs are best negotiated at the multilateral level to ensure a level playing field for all. If negotiated on RTA-level, sector-specific liberalisation may, unintentionally, benefit non-Members in equal measure. Example include the elimination of both agriculture domestic support subsidies and agriculture export subsidies which should be negotiated at the multilateral level.

There is debate about the competition and interaction between regionalism and multilateralism and the effect this has on world trade and liberalisation.[128]

Krugman noted that there are natural trading blocs among neighbouring countries, where low transportation costs contribute to welfare gains when these countries form an RTA.[129] In essence he was of a view that regionalism can support or hinder multilateralism.[130]

Bhagwati analysed the interaction between RTAs and multilateral trade liberalisation and whether trade blocs serve as building blocks rather than stumbling blocks to multilateral trade liberalisation.[131] He concluded that RTAs are *"termites in the*

[127] For more analysis on the parallelism between multilateral and regional trade liberalisation, see Baldwin (2011) *WTO Staff Working Paper*.
[128] *Ibid.*
[129] De Melo & Panagariya (eds) (1993).
[130] *Ibid.*
[131] Bhagwati (1991) 77.

trading system" arguing that the conclusion of RTAs makes countries hold back on global tariff cuts, since freer global trade would erode the narrow gains they have achieved through this limited number of agreements.[132]

On the other side, RTAs can support liberalisation at the multilateral level by setting the norms and levels of liberalisation. The consolidation of existing RTAs, for instance, through accession by non-parties or the formation of one single plurilateral agreement that replaces existing bilateral relationships among the parties, can also reduce the degree of discrimination they cause.[133]

This could be partially true. Nevertheless, the rules incorporated by different RTAs could impose constraints on trade. For example, the multiple RoOs and standards as well as overlapping memberships can pose major challenges for small economies and business entities which might incur increasing costs to deal with multiple requirements.

These complexities could undermine the MFN principle through discrimination between Members and non-Members, which could have a negative effect on the aggregate world economic welfare.[134]

In reality both multilateralism and regionalism co-exist and support each other. The WTO Doha round is still going, while RTAs are flourishing on all the continents. There is continuous interaction between regionalism and multilateralism. However, regionalism is here to stay.[135] The only way to move from fragmentation to coherence is for the WTO to work with regionalism, not against it.[136]

This can happen when clear multilateral rules will make sure WTO and RTAs work in synergy and do not contradict each other.

While half of world trade is between countries that apply preferences, only 16% of world trade is eligible for preferences, and preferential margins are often very

[132] Bhagwati (2008).
[133] Briefing note on RTAs to the 9Tth WTO Ministerial Conference 2013.
[134] *Ibid.*
[135] Bhagwati, Krishna & Panagariya (eds,) (1999).
[136] Cottier & Delimatsis (eds,) (2011) 138.

small.[137] Less than 2% of world imports – excluding intra-EU trade – are eligible for preferences with a margin of 10 percentage points[138]

Assuming static trade flows and full utilisation of preferences, all preferences together reduce the global trade-weighted tariff from 3% to 2% which means that the global trade-weighted preference is only 1%.[139] This should not be underestimated as it equals to one third of the reduction in weighted average tariff rate.

Around 90% of this reduction is due to RTAs and the rest to non-reciprocal regimes such as the GSP.[140] The net effects of trade liberalisation differ from one country to another and from one commodity to another.

Only 40% of USA exports are subject to preferential tariffs, and only 20% of EU exports are subject to preferential treatment, while for Brazil the ratio is 56%, for South Africa 67%, while Canada enjoys the highest coverage of preferences to its exports (80%) because of its networks of RTAs with its major trading partners.[141]

In Africa regionalism runs parallel with multilateralism. Many African countries are joining the WTO while African RECs were supposed to consolidate into a CFTA in 2017 according to the African Summit decision in 2012.

As an indication of the growing importance of this issue, the WTO Nairobi Ministerial conference in 2015 confirmed that RTAs should remain complementary and not substitute for the multilateral trading system. The conference requested the WTO Committee on Regional Trade Agreements (CRTA) to discuss the systemic implications of RTAs for the multilateral trading system and their relationship with WTO rules, with a view to enhance transparency in RTAs.[142]

[137] Carpenter & Lendle (2010) *The Graduate Institute Geneva* 9.
[138] *Ibid.*
[139] *Ibid.*
[140] *Ibid.*
[141] *Ibid.*
[142] Para. 28 of the WTO Ministerial Declaration in Nairobi 2015.

2.10 Levels of Trade Integration

Bilateral or regional trade agreements can take on different forms, depending on the level of integration involved. This can vary from a PSA to a fully-fledged political union.[143]

2.10.1 Partial Scope Agreements (PSAs)

PSAs provide only for the reduction of tariffs on a limited number of tariff lines while keeping the most sensitive sectors protected by tariffs. These are typically concluded between developing countries. They are notified under Paragraph 2(c) of the Enabling Clause, as they wouldn't fulfil the strict criteria of Article XXIV because of their limited coverage that does not ensure liberalisation of substantially all the trade.[144]

In many cases a PSA can be a step toward a FTA. Examples of this include the ASEAN PSA launched in 1976, which was elevated into a FTA in 1992, and the PSA of Eastern and Southern African countries which was elevated into a FTA in 2000.

Examples of PSAs include the China-ASEAN PSA, the India-Chile PSA, which came into effect in September 2007, and the Mercosur-India PSA, which entered in force in June 2009. India is very active in concluding PSAs which is in line with its relatively protectionist trade policy.

Because of their limited coverage, these agreements are not attractive to developed countries and blocks which seek to conclude deep integration agreements.

PSAs do not require the elimination of TDIs nor the establishment of a common investigating authority.

2.10.2 Free Trade Area (FTA)

An FTA implies the removal of duties and other restrictive regulations on substantially all trade among two or more economic units.[145]

[143] Balassa (1961) 3.
[144] Explained in section 2.9.
[145] Art. XXIV (8) (b) of the GATT.

FTAs represent almost 82% of all RTAs notified to the WTO and in force.[146] Examples of FTAs include the TDCA, NAFTA and the Jordan-USA FTA.

FTAs are flexible and selective in terms of application and do not require the application of a common external tariff (CET) or forgoing national sovereignty. This explains its desirability to developed and developing countries alike.

Article XXIV lays out the external requirements for the formation of CUs and FTAs or an interim agreement necessary for the formation of CUs or FTAs.[147] An FTA is consistent with WTO law if the duties and other regulations of commerce are not more restrictive in the constituent territories after the formation of the FTA.[148]

In Africa, currently five of the eight recognised RECs are at the stage of FTA.[149]

With the establishment of FTA, Members may decide to restrict the application of TDIs on intra-trade or to have customised rules for their application.

2.10.2.1 Rules of Origin in FTAs

RoOs are important in the context of FTAs as they determine the eligibility of the products to enjoy the tariff preference. They could be used in parallel with TDIs to protect national industries by ensuring that third parties' exports are not indirectly receiving preferential treatment because of lax RoOs. RoOs are costly in terms of both administration and compliance and could represent 1-7% of the cost of the product.[150]

RoOs imply constraints on firms concerning where they can source their intermediate inputs and can have two consequences. First, they open up the possibility for them to be used for protectionist purposes. Second, because the RoOs are complex and specific to each given FTA, they have an extremely powerful natural impetus towards strengthening the spaghetti bowl effect. [151]

[146] According to WTO statistics.
[147] Art. XXIV-5 of the GATT.
[148] Art.XXIV-56 of the GATT.
[149] Explained in more details in section 3.7.
[150] Baldwin & Low (eds) (2008) 150.
[151] *Ibid* 147. Spaghetti bowl effect refers to the phenomenon of international economic policy that arises from the application of different RoOs across nations.

According to the WTO Agreement on RoOs, Members have agreed in principle to harmonise non-preferential RoOs, but final agreement has not been reached so far.

The RoOs criteria are typically identified at the Harmonised System (HS) four-digit level. Typically, one or more of three criteria are used in determining whether has been substantial transformation or not: [152]

1. The change in tariff classification rule: whether the transformation of the good results in a different tariff classification.
2. The value content rule: whether the value of the imported intermediates exceeds a certain value of domestic value added.
3. The specific production process rule: whether a particular specified production process has been employed or not.

Additionally, almost all preferential trading agreements allow the partner countries to use each other's goods as inputs into the production process, which is called bilateral cumulation.

RoOs can lead to either trade creation or trade diversion. Their design responds to political economy factors represented in local producers or exporters pressures. Some RTAs like NAFTA adopt a strict RoOs that combines change of classification with a value-added rule to ensure that certain imported products have enough local content.[153]

In sensitive products like textiles the EU requires at least two movements in the tariff classification in order to be considered origin and one transformation for LDCs while NAFTA applies a triple transformation rule. [154]

Foreign exporters and investors could use African countries as an assembly base to other African countries making use of the flexibility of African RTAs and the lax RoOs. This requires the adoption of RoOs that are conducive and in harmony with African integration plans which could also be supported by TDIs.

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[152] *Ibid* 149.
[153] In the case of NAFTA, for car imports it should satisfy both a change in classification requirement and a value-content rule where the imported cars must contain a minimum of 62.5% or originating materials.
[154] "NAFTA and the Textile Sector" http://www.ic.gc.ca/eic/site/textiles-textiles.nsf/eng/tx01188.html (accessed 13 April 2015).

2.10.3 Customs Union

Article XXIV of GATT obliges Members of CUs to eliminate all duties and other restrictive regulations of commerce on substantially all trade between them and to impose a CET to the trade with third parties.[155]

To ensure that a CU will not restrict multilateral trade, the duties and other regulations of commerce imposed should not, on the whole, be higher or more restrictive than those applicable in the constituent territories before the CU was formed.[156]

The establishment of a CET implies a higher degree of commitment. Many CUs seek to achieve deep integration objectives that go beyond tariff liberalisation and could include the creation of regional institutions and the harmonisation of trade policies, rules and standards including TDIs.

The CUs' institutions deal with the complex issue of customs revenue sharing in addition to the application of TDIs. The collection and distribution of customs revenue could be challenging especially between developing countries.[157] CUs often take years to negotiate and have long implementation phases. The long-delayed COMESA CU is a telling example in this regard.

CUs are different from FTAs. While the parties to an FTA have flexibility in concluding preferential trade agreements, Members of a CU have less flexibility in this regard as this should usually be with the consent of their CU partners. Any RTA should, in principle, include the CU as a whole.

In principle countries cannot be Members of more than one CU, as every CU has its own CET. Countries like Egypt and Sudan would have to choose between membership of the Arab countries CU and the COMESA CU when both are implemented.

This constraint does not apply if a CU partner has an applied CET that is lower than a MFN binding, provided the negotiated MFN reduction in the bound tariff does not bring the latter to a level lower than the applied CET. Examples of this include the

[155] Art. XXIV (8) (a) of the GATT.
[156] Art. XXIV 5(a) of the GATT.
[157] Check for example Grynberg & Motswapong (2012) *Botswana Institute for Development Analysis*.

FTA signed between Bahrain and the USA, [158] and the TDCA signed between South Africa and the EU. [159] In both instances a single Member of a CU entered into FTA with a non-Member.

Examples of customs unions in Africa include the Southern African Customs Union (SACU) and the COMESA CU, which was launched in 2009 but has not come into force yet.

2.10.4 Common Market

A common market is the second most advanced form of trade and economic integration. It does not only entail free trade in goods, but also covers the removal of barriers to the movement of services, labour and capital. The free movement of labour could be a very delicate step because of its effect on national employment rates, and is usually only allowed between Members at a close level of development.

The EAC, SADC and Mercosur are seeking to reach the level of a common market with different degrees of progress so far.

The free movement of factors of production would necessitate the removal of TDIs.

2.10.5 Monetary Union

In a Monetary Union, monetary and fiscal policies between Members are harmonised. Members also can adopt a common currency with central bank to manage the monetary policy.

One of the most advanced forms of monetary union is the Economic and Monetary Union (EMU) of the EU. It involves the coordination of economic and fiscal policies, a common monetary policy, a common currency for 18 Members (Euro), [160] as well as the establishment of the European Central Bank (ECB), which works to maintain the Euro's purchasing power and thus inflation rate in the Euro area. [161]

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[158] Bahrain is a member of the Customs Union of the Gulf Cooperation Council (GCC).
[159] South Africa is a member of the Southern African Customs Union (SACU).
[160] Lithuania joined the Euro Zone in 1 January 2015.
[161] "Economic and Financial Affairs"< http://ec.europa.eu/economy_finance/euro/emu/index_en.htm> (accessed 3 April 2014).

Another example at the African level is the West African Economic and Monetary Union (UEMOA), where Member states have adopted the CFA Franc as a common currency.[162] UEMOA is working toward deep integration and coordinated fiscal policies and has established a common accounting system, periodic reviews of Member countries' macroeconomic policies, a regional stock exchange, and the regulatory framework for a regional banking system.[163]

Another example is the Economic Community of Central African states (CEMAC) which includes six African countries.[164]

The level of integration of RTAs can encourage a *de facto* adoption of single currency. For example, in SACU, all Members have their own national currencies, although the South African Rand is still legal tender in all but Botswana.

The adoption of a single currency has its positive implications on the ease of trade and the minimisation of currency fluctuation risks and it supports, directly and indirectly, regional integration objectives.

2.10.6 Political Union

Political Union means the creation of one political supreme administration, while giving some autonomy to Members of this union where they can apply different economic systems.

Examples of political integration include China-Macao, China-Hong Kong, the political union between Andorra and France and between Monaco and France.

2.11 Regional Trade Agreements Rules in the WTO

RTA notifications are made under Article XXIV of the GATT 1947 or GATT 1994, the Enabling Clause or Article V of the GATS. This depends on the coverage and membership between developing and developed countries.

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[162] The West Africa CFA franc-Zone includes Benin, Burkina Faso, Guinea-Bissau, Ivory Coast, Mali, Niger, Senegal and Togo.
[163] "UEMOA" < http://www.uemoa.int/Pages/Home.aspx> (accessed 1 November 2015).
[164] CEMAC is made up of six States: Gabon, Cameroon, the Central African Republic, Chad, the Republic of the Congo and Equatorial Guinea.

2.11.1 Article XXIV of GATT 1994

Article XXIV of GATT 1994 is an exception to the MFN principle as it allows, under certain conditions, for preferential tariff treatment between Members of RTA *vis-à-vis* other Members of the WTO.

It lays out the external requirements for the formation of CUs and FTAs or an interim agreement necessary for the formation of CUs or FTAs.[165] As a general rule the establishment of a CU or FTA should not lead to a higher or more restrictive situation compared to the situation before the establishment of them[166]

The Article recognises the positive effects of free trade that can be attained by closer integration between parties of the RTAs, and the promotion of trade liberalisation through the removal of barriers to substantially all the trade between Member States. The Article seeks to promote economic integration without inducing protectionism by raising barriers to trade with third parties.[167]

In the case of developing countries, RTAs could induce domestic reforms and opening up to competitive market pressures at a substantial pace, which could facilitate their integration in the world economy.[168]

Any interim agreement should have a plan and schedule, within a reasonable length of time, to reach a stage of FTA or CU in order to satisfy the requirements of this Article.[169] Consequently, PSAs may not be recognised under Article XXIV if they raise concerns over the protectionism that may result from granting preferences over less than substantial trade that can raise obstacles to international trade.

All agreements concluded in accordance with Article XXIV should be notified to the WTO and then examined by the CRTA.[170]

It is believed that, despite the requirements included in Article XXIX, the system is still characterised by lack of effectiveness in ensuring strict respect of these requirements. There are calls to ensure the supremacy of WTO law over RTAs by

[165] Arts. XXIV-5a and 5b of the GATT.
[166] *Ibid.*
[167] Para 4 of Art. XXIV of the GATT 1947.
[168] Crawford & Fiorentino (2005) *WTO Discussion Paper*.
[169] Para. (5) (c) of Art. XXIV of the GATT.
[170] Para. (7) (a) of Article XXIV of GATT.

adopting a constitutional approach of regulating preferential agreements through the disciplines of WTO law.[171] The essence of this submission is to put more constraints on RTAs and to declare them void if they do not conform to WTO rules or to impose obligations on them to be amended accordingly.[172]

2.11.2 The Enabling Clause

Developing countries and LDCs can notify their RTAs under the more flexible rules of the Enabling Clause. The Enabling Clause is one of the aspects of the special treatment offered to developing and LDCs in WTO. Its main advantage is the removal of the "substantially all trade" requirement for CUs and FTAs which gives more flexibility to developing countries in their integration endeavours.

GATT adopted the Enabling Clause in 1979 under the "Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries".[173]

The Enabling Clause constitutes the legal basis for violating the MFN principle in accordance with the Global System of Trade Preferences (GSTP), under which a number of developing countries exchange trade concessions, including the mutual reduction or elimination of tariffs and non-tariff barriers (NTBs) among themselves.[174]

It also enables developed Members to give differential and more favourable treatment to developing countries under the GSP. This non-reciprocal preferential treatment depends on the choice of the providing countries that unilaterally determine which countries and which products are included in their schemes.[175]

[171] Bartels & Ortino (eds) (2006) 67.
[172] *Ibid.*
[173] WTO Decision of 28 November 1979 (L/4903).
[174] "Generalised System of Trade Preferences" http://unctad.org/en/Pages/DITC/GSP/Generalised-System-of-Preferences.aspx (accessed 1 July 2015).
[175] "The Enabling Clause" http://www.wto.org/english/tratop_e/devel_e/d2legl_e.htm#enabling_clause (accessed 1 July 2015).

By December 2015, developing countries have notified thirty-nine PTAs and RTAs covering trade in goods under the Enabling Clause.[176]

2.11.3 Article V of the General Agreement on Trade in Services (GATS)

Article V of GATS is the services equivalent of Article XXIV of GATT. It states that there is no legal constraint on WTO Members from being a party to RTA Agreement liberalising trade in services as long as it has substantial sectoral coverage that is interpreted in terms of volume of trade, number of sectors, and modes of supply.[177]

The RTA covering services liberalisation should facilitate trade among parties and not raise overall barriers *vis-à-vis* other WTO Members.[178]

2.11.4 The WTO Institutional Framework for RTAs

The institutional framework dealing with RTAs in WTO is composed of the CRTA and the Committee on Trade and Development (CTD).

The CRTA is designated to streamline the examination process of the RTAs notified under Article XXIV of the GATT and Article V of the GATS and to consider their implications for the multilateral trading system. [179]

The General Council decision requires WTO Members to inform the WTO Secretariat in the event of any subsequent changes to a notified agreement and to provide a report once an agreement is fully implemented. In the interests of transparency, WTO Members are also encouraged to inform the Secretariat of any agreements being negotiated or those that have been signed but are not yet in force in accordance with the early announcements notifications.[180]

[176] "WTO RTA database" http://www.wto.org/english/tratop_e/region_e/region_e.htm (accessed 13 December 2015).
[177] Art. V (1) A and B of GATS.
[178] *Ibid* Art. V (4).
[179] "Work of the CRTA" https://www.wto.org/english/tratop_e/region_e/regcom_e.htm (accessed 1 November 2014).
[180] Para. A of the Transparency Mechanism for RTAs Document, WTO Document WT/L/671.

The examination process seeks to promote the transparency of the RTAs and to allow other Members to evaluate the RTA's text consistency with WTO rules, especially Article XXIV of GATT.[181]

The CRTA's reports are usually adopted by consensus. Nevertheless, it has had, in certain cases, difficulty in verifying such compliance due in part to controversies over the interpretation between Members over the interpretation of the Article and in determining how much intra-trade satisfies the "substantially all trade" requirement.[182]

The CRTA adopted a standard format for submissions on the formation of RTAs which includes information on membership, date of signature and date of entry into force, the type of the Agreement (FTA, CU) and its scope, the trade provisions, RoOs, safeguards and TDIs.[183]

Since the end of 2006, all RTAs, regardless of whether they are notified under Article XXIV of the GATT 1994, the Enabling Clause, or Article V of the GATS, are subject to the provisions of the transparency Mechanism. This mechanism provides specific guidelines on when a new RTA should be notified and the related information and data to be provided. It also requires the Secretariat to prepare a factual presentation on each RTA to be reviewed by Members.

Agreements notified under the Enabling Clause are considered by the CTD. It is concluded that both mechanisms have led to some improvement in information sharing and the reporting mechanisms on RTAs but their rules need to be strengthened further and improved in terms of clarity, thresholds and enforcement mechanisms to avoid confusion and disagreements as well as violation of the rules.

2.12 Conclusions

RTAs are increasingly shaping the world in terms of trade and economic development. Countries are engaging in a dual track of trade liberalisation. While

[181] "Work of the CRTA" <https://www.wto.org/english/tratop_e/region_e/regcom_e.htm> (accessed 1 November 2014).
[182] Interview with Mr. Santana. The author has attended several sessions of the CRTA in Geneva where this factor was prominent in the discussions.
[183] WTO Standard Format for Information on Regional Trade Agreements.

they are engaging in multiple RTAs negotiations they are also pursuing multilateral trade liberalisation at the WTO.

This dual approach seeks to achieve different economic and political objectives and it confirms the conviction of the importance of these agreements and its linkage to economic development and job creation.

The formation of RTAs can result in trade creation and trade diversion with different welfare effects. Mega RTAs can lead to the exclusion of small developing countries, particularly African countries as well as undermining the multilateral trading system. African countries should pursue their integration agenda both with each other and with third parties in a way that could achieve their developmental objectives.

The negotiations and the conclusion of the grand RTAs, particularly the TTIP and the TPP, may divert attention from multilateral negotiations where African countries have "theoretically" equal footing versus their trading partners, and can diminish their bargaining power. Additionally, it could raise the level of liberalisation of future RTAs and also at the multilateral level, which would affect African countries directly and indirectly.

LDCs in Africa are at particular risk of the erosion of preferences granted to them by developed countries on a non-reciprocal basis.

According to WTO estimates, currently more than 80 % of LDCs exports enjoy DFQF access in developed countries, while some developing countries are also exporting 80 % under duty-free treatment.

In developed trade blocks like the EU, EFTA and NAFTA, economic integration leads to mergers between companies to benefit from economies of scale, while in Africa–in many cases–foreign companies may benefit from the removal of tariffs to expand their markets, which came at the expense of less efficient national companies, thus undermining the objectives of regional integration.

African countries have to interact more proactively with the developments in the world trade architecture. GVCs offer important opportunities to African economies and industries and can contribute positively to African integration if African countries

manage to participate in a way that suits their comparative advantages. This can assist African countries to add value to their economies instead of mainly participating as providers of raw materials and minimally industrialised goods with little added value.

The momentum of this integration process can also harm the fragile industries in Africa and emphasises the importance of trade tools including TDIs.

There is a correlation between the level of integration in respective RTAs and the incorporated rules on TDIs. At the level of CU, Members may be more inclined to limit the application of TDIs against Member States and to harmonise the rules governing its application against third parties.

Chapter 3: African Economic Integration: Objectives and Challenges

3.1 Background on African Economic Integration

The calls for regional integration in Africa started in the early sixties, almost at the same time as integration initiatives of other developing countries in Asia and Latin America.

The newly independent African countries have called for regional integration to facilitate structural transformation in Africa.[184] African countries have embraced regional integration as an important component of their development strategies primarily driven by the economic rational of overcoming the constraint of small and fractioned economies working in isolation. It was argued that the African Union integration model is leaning towards a functionalist approach paving the way for transfer of sovereign powers to the African institutions.[185]

Tracking the progress in regional integration over the last two decades, it is noted that the strong political commitment from African countries was not paralleled with an equivalent level of implementation. The newly created African regional institutions such as the Pan-African Parliament (PAP) and the African Court of Justice still have limited enforcement mechanisms especially when compared with their counterparts in more developed regional models such as the EU. For example, the PAP can only make recommendations to Member States and not enact legislations.

African countries have taken several steps along the integration path including the Lagos Plan of Action (LPA),[186] the Abuja Treaty of 1991,[187] and the Resolution of the African Union (AU) Summit in Banjul in 2006, in addition to the creation of several Regional Economic Communities (RECs) on the continent.

[184] History of Africa's Regional Integration efforts http://www.uneca.org/oria/pages/history-africa%E2%80%99s-regional-integration-efforts (accessed 25 January 2017)
[185] Olivier 22 (2015) *South African Journal of International Affairs.*
[186] Lagos Plan of Action for the economic development of Africa 1980-2000.
[187] Abuja Treaty Establishing the African Economic Community.

Regional integration in Africa seeks to achieve political and economic objectives that are similar to other economic blocks but also have its own specificities. These objectives include supporting economic growth and expanding markets to reap the benefits of economies of scale for production and trade, and thereby maximise the welfare of their nations.[188]

The first wave of regional integration in Africa failed as it applied the neo-classical model of integration based solely on the comparative advantage model.[189] This did not take cognisance of the economic or political requirements or consequences for the different countries, nor of the often-physical difficulties in moving products within the region. The assumption that the mere removal of tariff barriers between Member States would increase intra-trade and support national economic development was proved to be far from achievable.

The second wave took a wider treaty-based approach. These treaties extended beyond trade to include investment, capital, and infrastructure issues and security, as well as labour movements, and the management of common resources such as river basins.[190] This emphasised the interlinkages between these supporting sectors and trade liberalisation. The main challenge to this approach is the lack of enforcement mechanisms to ensure the implementation of trade treaties.

African endeavours are based on economic and political integration among geographically contiguous countries.[191] It follows and incremental approach, and in many cases is characterised by gap between commitments and implementation, however, it follows, yet slowly, the objective in the respective African initiatives and plans. This is based mainly on the LPA which linked self-sufficiency to Africa's economic integration.[192]

According to the AU roadmap of 2011 a continental FTA (CFTA) would be launched in 2017, followed by a Customs Union (CU) in 2019. The projected CFTA would increase trade within the region by at least 25-30% in the next decade.[193] This

[188] UNECA (2011) Report on Progress on Regional Integration in Africa 1.
[189] Gathii (2013) *ALS* 5.
[190] *Ibid.*
[191] Baldwin & Low (eds) (2008) 53.
[192] Lagos plan of Action for the economic development of Africa 1980-2000.
[193] Resolutions of the AU Summit in 2012.

ambitious objective may not be very realistic; however, it serves as a strong motivation for economic integration in Africa as current intra-African trade stands at around 12% compared to 60% for Europe, 40% for North America, and 25 % for ASEAN. [194]

3.1.1 The Organisation of African Unity (OAU)

The independent African nations established the Organization of African Unity (OAU) in 1963.

The OAU aimed at achieving political and economic conditions such as: promoting unity and solidarity of the African States; coordinating and intensifying cooperation and efforts to achieve a better life for the peoples of Africa; defending African sovereignty and territorial integrity; eradicating all forms of colonialism; and promoting international cooperation.[195]

Recognizing the importance of economic integration, African countries agreed to establish the African Development Bank (AfDB) in 1963 which was created to support regional integration by enhancing cooperation between African [196]business entities and to foster regional investment.[197]

3.1.2 The Lagos Plan of Action

The (LPA) of 1980-2000 was motivated by both economic and political motivations. The provisions of the LPA refer to concepts that are influenced by self-sufficiently; the creation of a self-reliant continental economy as well as the fight against neo-colonialism. It was influenced by the objectives of the OAU charter.

The LPA was a very comprehensive document that addressed regional integration in several fields: agriculture; industry; natural resources; trade and finance; environment and energy.[198]

The LPA adopted an ambitious programme for expanding intra-African trade through the reduction or elimination of trade barriers; negotiations to establish preferential

[194] According to WTO Trade Statistics for 2014.
[195] Art. 2 of the OAU Charter.
[196] *Ibid.*
[197] "African Development Bank" https://www.afdb.org/en/ (accessed 17 January 2017)
[198] The Lagos plan of action for the economic development of Africa.

trade areas or similar institutions. The Plan determined a time frame of attaining these objectives by 1984 which was not attained.

The lack of effective monitoring and follow-up mechanism was a key reason for the failure of LPA in meeting its objectives.

3.1.3 The Abuja Treaty Establishing the African Economic Community

The Abuja Treaty, signed in 1991, represents the guide map for regional integration in Africa. It deals with economic, social and political collaboration. It adopts a linear model of integration with specific time frames that aim at the establishment of the African Economic Community (AEC). In accordance with this incremental approach the Treaty proposed the division of the continent into areas that would eventually constitute a united economy.[199] The establishment of the AEC aims to promote economic, social and cultural development and the integration of African economies in order to increase economic self-reliance and to coordinate and harmonise policies among African RECs.[200]

The Assembly of Heads of State and Government directed the Committee on the Review of the Charter to re-examine the OAU Charter with a view to aligning it with the Abuja Treaty but Members could not agree on amendments to the 1963 Charter.[201]

This linear ambitious integration model establishes six stages for the establishment of the AEC over a period of thirty-four years from 1994 to 2028:[202]

1. Strengthening existing RECs within five years and establishing RECs in regions where they do not exist.
2. Within eight years, stabilising tariff barriers and non-tariff barriers within RECs with a view to removing them. Additionally, taking steps to harmonise customs duties in relation to third states.
3. Establishing FTA at the level of every REC within a time frame of ten years.

[199] Art. 28 of the Treaty for the Establishment of the AEC.
[200] Arts. 2 and 4 of the Treaty for the Establishment of the AEC.
[201] "History of Africa's regional integration efforts" http://www.uneca.org/oria/pages/history-africa%E2%80%99s-regional-integration-efforts.
[202] Art. 6 of the Treaty for the Establishment of the AEC.

4. Co-ordination and harmonisation of tariff and non-tariff systems among RECs with a view to establishing a continental CU with a common external tariff (CET) within a period of two years.
5. Within a period not exceeding four years, establishment of a Common Market through the adoption of a common policy in agriculture, transport and communications, industry, energy and scientific research, the harmonisation of monetary, financial and fiscal policies and the free movement of persons.
6. Within five years, strengthening of the structure of the African Common Market, through the free movement of people, goods, capital and services.

The current level of African integration indicates clearly that there is a huge gap between stated objectives and implementation. Currently many African RECs are at a level of FTA but the achievement of CFTA or a CU is far from achievement.

Continental integration in crucial areas like competition, trade policies and financial and fiscal policies has not started on a continental basis yet.

The attainment of CU or Common Market may entail the limitation or removal of TDIs at the continental level as well as the establishment of regional bodies to manage their application.

3.1.4 The African Union and African Economic Integration

The establishment of the AU in 1999 presented a new vision for dealing with African economic integration.

The main objectives of the OAU were, inter alia, to rid the continent of the remaining vestiges of colonization and apartheid; to promote unity and solidarity among African States; to coordinate and intensify cooperation for development; to safeguard the sovereignty and territorial integrity of Member States and to promote international cooperation within the framework of the United Nations.[203]

The new paradigm sought to support integration through the establishment of regional bodies. Those bodies deal directly and indirectly with African economic integration

[203] Art. 3 of the Constitutive Act of the African Union.

plans. This included the AU Commission, the Pan-African Parliament (PAP), and the Economic, Social and Cultural Council, the court of justice

Furthermore, the AU has established specialized technical committees to address the sectoral issues of integration. This included: the Committee on Rural Economy and Agricultural Matters; the Committee on Monetary and Financial Affairs; the Committee on Trade, Customs and Immigration Matters; the Committee on Industry, Science and Technology, Energy, Natural Resources and Environment; the Committee on Transport, Communications and Tourism; the Committee on Health, Labour and Social Affairs.

Despite the agreement to establish important financial institutions such as the African Central bank; the African Monetary Fund and the African Investment Bank. These institutions didn't come into effect yet.

One of the main changes in the integration approach is that became more dependent on the African regional blocks as manifested in the RECs in accordance with the Abuja Treaty.

3.1.5 The Accra Declaration

Despite the insufficient progress and structured obstacles in achieving the AEC, the Accra Declaration of the AU Meeting in 2007 resolved to review and shorten the time frame towards the establishment of an AEC and to use the RECs to achieve these objectives.[204]

It is noted that the declaration stated in its preamble that the ultimate objective of the AU is the United States of Africa with a Union Government.[205] The declaration confirmed the importance of rationalising and strengthening the RECs.[206]

3.1.6 The Accra Action Plan

The importance of the African action plan of 2011 comes from identifying obstacles to increasing intra-African trade and deepening market integration in addition to

[204] Para. 1 of the Accra Declaration of the AU Summit in 2007.
[205] Preamble of the Accra Declaration. This was mainly with support from the former Libyan President Qadafi.
[206] Para 2 of the Accra Declaration of the African Union Summit Meeting in 2007.

outlining the program of activities required to address these constraints.[207] The Action Plan includes specific actions in seven interconnected clusters: trade policy, trade facilitation, productive capacity, trade related infrastructure, trade finance, trade information and factor market integration.[208]

It includes proposals to expedite the attainment of the CFTA and a mechanism to monitor and evaluate the progress of Africa in market integration.[209]

The Action Plan highlighted the importance of infrastructure and industrial development in supporting African integration; consequently, it made reference to key AU initiatives such as the Action Plan for Accelerated Industrial Development of Africa (AIDA), the Program for Infrastructure Development in Africa (PIDA) and the Minimum Integration Program (MIP).[210]

3.1.7 The African Union Summit in 2012

At the AU Summit in January 2012, which was held under the theme *'boosting intra-African trade'*, Members endorsed the plan to set up the CFTA by 2017, building on the Accra action plan.

A roadmap for the establishment of the CFTA has been put in place and required that all eight RECs complete FTA processes by 2014. This left 2015 and 2016 for consolidation of the REC FTAs into the CFTA and then the establishment of the CFTA in 2017.[211]

The time frame was not realistic, keeping in mind the track records of African integration and the realities and challenges on the ground. Despite leaders' endorsement of the declaration several African representatives reiterated that it was premature to think of establishing a CFTA by 2017,[212] given the current challenges.[213]

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[207] "Action Plan for boosting intra-African Trade" <http://www.au.int/en/sites/default/files/Action%20Plan%20for%20boosting%20intra-African%20trade%20F-English.pdf> (accessed 15 July 2013).
[208] *Ibid.*
[209] *Ibid.*
[210] *Ibid.*
[211] Report of the AU Summit in 2012.
[212] "African Union Aims for Continental Free Trade Area by 2017" <http://www.ictsd.org/bridges-news/bridges/news/african-union-aims-for-continental-free-trade-area-by-2017>

3.2 Analysis of Africa Trade Figures

3.2.1 African Trade figures

In 2014 the economic growth of Africa was 3.9%, which made it the second fastest growth region, only after Asia.[214] This economic growth was slower than had been forecast which is attributed to the sharp decline in commodity prices, which is a major component of African exports.[215]

African Imports increased from USD 202 billion in 2004 to USD 642 billion in 2014, and African exports increased from USD 223.49 billion to USD 555 billion in the same period.[216] The trade deficit in 2014 was USD 87 billion.

Africa's share of world merchandise trade remains very limited. Africa accounts for only 3% of world exports and 3.5% of world imports in 2014.[217]

Despite the fact that global merchandise trade has tripled in the last two decades, the region's share of world trade declined. [218] While Africa contributed 8% to total world exports in 1948, this decreased to 6% in 1980 and almost 3% in 2014. This compares to the developing economies in general which have witnessed a growing trend over time; developing economies contributed 29.5% to global exports in 1980, which increased to around 40% in 2014.[219]

When compared with other developing blocks, it is shown that the African exports figure is less than that of South and Central America's countries (USD 695 billion), and less than half the exports of ASEAN (USD 1,295 billion).[220] Africa's trade in total is around 24 % of that of China and 37 % of that of Germany.[221]

Africa's trade is dependent on the performance of the international economy and is vulnerable to external economic shocks. Exports figures were affected negatively by

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[213] "Egypt-to-South Africa Free Trade Zone on the Move" < http://www.ictsd.org/bridges-news/bridges/news/egypt-to-south-africa-free-trade-zone-on-the-move> (accessed 1 April 2014)
[214] World Trade Report (2014).
[215] UNECA (2015) 2.
[216] *Ibid.*
[217] Data from WTO World Trade Reports.
[218] *Ibid.*
[219] Data from UNCTADstat and WTO World Trade Reports.
[220] *Ibid.*
[221] *Ibid.*

the world financial crisis and registered a negative growth of 7.3 % in 2011, then registered a positive growth of 6.6 % in 2012 and again a decline of 2% and 3.3% in 2013 and 2014 respectively, because of the decline in commodity prices.[222]

Intermediate products accounted for the bulk of Africa's merchandise trade, (60% of Africa's total merchandise imports and over 80% of its exports). According to a UNECA report, intermediates represent the most dynamic component of Africa's merchandise trade, increasing fourfold over the last decade; yet Africa only accounts for 2-3% of the global figures.[223]

Africa's intermediate exports are mostly mining products and resource-based manufactures such as basic metals or chemicals and fuels. The challenge is that these sectors bring limited added values to African economies.

The limited share of Africa's trade in world trade and its composition is a determining factor in the frequency of using TDIs.

3.2.2 Intra-African Trade

Despite the strong growth in nominal intra-African total trade which averaged 2.7% in the last decade, intra-African trade remains a very low percentage of trade with the world.[224]

As a share of the value of African world trade, intra-African trade rose steadily from 19.3% in 1995, to a peak of 22.4% in 1997 but thereafter fell to 11.3 % in 2011.[225] This decrease could be attributed to the increase in Africa's trade with the world and its integration in world economy, which is partially a result of the network of preferential agreements with the world. In fact, from 1996 to 2011, intra-African trade rose at a robust rate of 8.2% on average per year but African trade with the rest of the world grew faster at 12% on average.[226]

[222] *Ibid.*
[223] UNECA (2015) xxii.
[224] UNCTADstat database.
[225] According to WTO and ITC data.
[226] UNCTAD Economic Development in Africa Report (2013).

The share of intra-African imports to total imports was 13.6% in 2004 and decreased to 12.8% in 2012, while the share of intra-African exports to total exports increased from 10.5% to 13%.[227]

More than 88% of Africa's exports are still destined for outside markets, with the EU and USA accounting for more than 50% of this. Asia, and China in particular, are important export markets for African countries.

In terms of the composition of intra-African trade, surprisingly, African countries appear to have diversified pattern of trade. They are trading more in manufactures than in other sectors, reflecting a certain amount of sophistication in intra-African trade.[228] The weight of manufacturing intermediates is far greater than in the continent's exports to the rest of the world, suggesting a considerable scope for regional supply chains to support Africa's industrialisation.[229]

3.2.3 Africa Intra-REC Trade

Although intra-African trade has been low compared with other continents, intra-REC figures have been growing in most of the eight RECs in Africa.

In the 2000-2009 period intra-REC exports accounted for an average of 19.8% in the EAC, 9.7% in SADC, 8.8% in ECOWAS, 5.3% in COMESA and 0.8% in ECCAS.[230] The EAC registered the highest ratio in this regard, which could be explained by its deep integration model, its small geographical area and the homogeneity between its Members.

The highest percentage of exports is dominated by major economic powers in every REC. In SADC, 62% of exports came from South Africa; in COMESA, 67% of exports came from four countries: Kenya (27%), Egypt (18%), Uganda (10%), and Zambia (10%); in the EAC, 73% of exports came from Kenya; in ECOWAS, 77% of

[227] *Ibid.*
[228] Economic Development in Africa Report (2013) 5.
[229] ECA Economic Report on Africa (2015) 26.
[230] Hartzenberg (2011) *WTO* 11.

exports came from two countries: Nigeria (45%) and Côte d'Ivoire (32%); and in ECCAS, 64% of exports came from Cameroon.[231]

Intra-REC imports have also shown a growing trend in recent years. In the same period, intra-REC imports averaged 9.6% in ECOWAS, 9.5% in SADC, 8% in the EAC, 5.4% in COMESA and 1.8% in ECCAS.[232]

As in the case of exports, a significant portion of imports were destined for few countries: in SADC, 66 % of imports were destined for four countries – South Africa, Zambia, Zimbabwe, and Mozambique; in COMESA 47% of imports were destined for four countries – Sudan, Democratic Republic of Congo (DRC), Uganda, and Egypt; in the EAC 67% of imports were imported by two countries, Uganda and Tanzania; in ECOWAS 58% of imports were destined for three countries – Côte d'Ivoire, Ghana, and Nigeria; and in ECCAS 52% of imports were destined for two countries – Gabon and Chad.[233]

The growth rate of intra-REC trade comes parallel with steps taken to remove trade barriers in African trade blocks. This could suggest a need for a robust TDIs system to ensure the effectiveness of this integration model.

It is noted that in the three RECs of the T-FTA, Egypt, South Africa and Kenya are the major trading powers in terms of share of intra-REC trade.

3.3 Linear Model of Integration in Africa

One of the important characteristics of African integration is that it follows a linear model based on a step-by-step approach to integration, where tariffs and non-tariff barriers are progressively eliminated. This incremental approach may be slow but it suits the nature of the African economies and level of development. It is submitted that a non-linear model of integration, where countries move directly to a deep integration model can not be supportive of African development and integration plans. The incremental approach takes into consideration the special nature of African economies and the fundamental challenges facing African countries which requires a

[231] Data from IMF Direction of Trade Statistics (DOTS) and WTO World Trade Reports.
[232] *Ibid.*
[233] *Ibid.*

step by step approach that consolidates integration across sectors before moving to a higher level of integration. The eight RECs in Africa go through gradual steps, starting by FTA, and then CUs followed by Common Market and eventually the integration of monetary and fiscal policies to establish an economic union. Similarly, the AU resolutions provides for the same model toward the achievement of the CFTA. Regional integration blocks usually start by liberalisation of trade in goods, and mainly the tariff barriers, which is in line with the level of development of most of the African countries and its economies where the service sector is not the most prominent in the majority of African countries.

Harmonisation of labour, protection of IPR and mergers of capital markets, liberalization of the service sector are sometimes stated among the objectives of integration but are deferred to later stages. Integration in these sectors depends on the envisaged depth of integration and the level of development of Members. The major three countries in Africa with substantial services exports, national IPR laws and developed capital markets are South Africa, Egypt and Nigeria.[234]

It is submitted that, despite the challenges associated with it, the linear model of integration is more suitable to the current level of development of African countries and its comparative advantages, and the level of the sophistication of its economies.

The linear model of integration is in contrast to other models seeking to achieve political and economic union without going through these necessary gradual steps. In many developing countries, economic integration is often derived by political motivations and is then forced to work on economically insufficiently prepared environment.[235] This explains why some integration endeavours did not achieve success. In the Arab world, there were many examples of political union based on political and ideological motivations and with limited success. This include the political union between Egypt and Syria (1958-1961) and the Federation of Arab States among Egypt, Libya and Syria in 1971. An accelerated, deeper level of integration that reaches to fundamental policy areas may not be realistic now, especially when many African countries lack efficient institutions and diversification of economy. Harmonisation of rules between African countries and dealing with trade

[234] According to data from the World Trade Report (2015).
[235] Inotai (1991) 9-10.

facilitation issues may need to be addressed first before deepening the level of integration and moving to a more progressive model.

3.4 Variable Geometry in the African context

The linear model of integration and variable geometry are closely interconnected. Variable geometry refers to to progress in cooperation among Members in a variety of areas at different speeds in order to accommodate the different levels of development of Members. It is a central principle in Agreements between asymmetric countries where flexible laws and norms may be chosen by organisations to seek consensus among its Members.[236]

In the African context, variable geometry is defined as *"the rules, principles, and policies adopted in trade integration treaties that give Members, particularly the poorest Members, policy flexibility in pursuing trade commitments and harmonisation objectives at slower paces; mechanisms to minimise distributional losses by creating opportunities such as compensation for losses arising from implementation of region-wide liberalisation commitments and policies aimed at the equitable distribution of the institutions organisations of regional integration to avoid concentration in any one member; and preferences in industrial allocation among Members in an RTA and preferences in the allocation of credit and investments from regional banks*".[237]

In practice, this principle focuses on two main pillars: slower rate of implementation for the LDCs as well as compensation mechanism for the potential losses of trade liberalisation on the short-run.

Because of the centrality of this principle in Africa's integration it could have implications on the speed of achieving regional integration objectives.

African RTAs are designed as flexible regime and should be understood on their own terms, rather than as Treaty-based regimes on a path toward becoming much like the EU or NAFTA.[238]

[236] Abbott & Snidal (2000) *The IO Foundation and the Massachusetts Institute of Technology* 434.
[237] Gathii (2010) *Loyola University Chicago* 609.
[238] *Ibid.*

African integration model adopts a broad array of social, economic and political objectives including the equitable distribution of the gains of trade liberalisation and the establishment of regional projects of benefit to all Members.[239]

Although it is highly doubtful that, without the application of this principle, small African countries would have participated actively in regional integration, the principle is not in conformity with other successful economic models of integration like the EU which contains rules requiring strict compliance and implementation of commitments to trade liberalisation.

Examples of the application of this model include the Southern Africa Customs Union (SACU) development account that provides for a customs revenue sharing formula among Members.[240] Additionally, SACU rules allow for the protection of infant industries in certain countries from competing goods from South Africa and non-SACU countries.[241] In the EAC the principle of variable geometry allows Members' commitments to be implemented at different speeds.[242] Similarly, large numbers of tariff lines in African RTAs are designated as sensitive products that fall outside the liberalisation commitments. This happens because of their important role to the government revenues or because of being labour intensive among other reasons.

More recently, in the T-FTA Agreement, variable geometry was adopted as one of the principles of the T-FTA.[243] Moreover, the T-FTA focuses on common objectives that benefit small economies, which include trade facilitation and infrastructure development which are designed to bring across the board benefits to Member States.

3.5 Objectives of African Economic Integration

Although African economic blocks differ in terms of their level of integration, composition and objectives, there are common objectives across the eight RECs. These objectives are similar to the objectives of other developing country economic integration models in Asia and Latin America, but have their specific goals.

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[239] *Ibid* 573.
[240] See for example Art. 34 of the SACU Agreement of 2002.
[241] Article 26 of the SACU Agreement. This privilege is granted to only Botswana, Lesotho, Namibia or Swaziland.
[242] Protocol on the Establishment of the EAC.
[243] Art. 1 of the T-FTA Agreement.

Regional integration makes sense for Africa; a continent characterised by small countries, small economies and small markets.[244]

It was argued that there was a general and growing consensus not only about the desirability of regional economic integration, but also about its centrality in facilitating industrialisation, developing intra-African trade, reducing Africa's vulnerability *vis-à-vis* the fluctuating commodity prices, enhancing Africa's participation in the global economy, mobilising and maximising skills and capital, and promoting African unity in both the political and economic realms.[245]

Economic integration can be of high importance, especially to small and LDCs in Africa. According to UNCTAD, twelve African countries had populations of less than two million persons, which is a very small market for national industries to achieve a low cost of production. Nineteen Sub-Saharan African countries have a GDP of less than USD five billion; six of them have a GDP less than USD 1 billion.[246] There are fifteen landlocked countries in Africa; out of them twelve are LDCs, which usually results in high transaction costs and high cost of doing business.[247]

In practical terms, consensus on the benefits of regional integration has underpinned the formation of RECs by African states.[248] The different AU declarations as well as the legal instruments of different RECs in Africa highlight the main objectives of regional integration mainly: increase market size, trade expansion, increase productivity as a result of the economies of scale, greater utilisation of factors of production, and the creation of incentives for political cooperation and unity.

Regional integration can increase the continent's bargaining power and its ability to negotiate more effectively with other regional and international economic blocks. It can enhance the attractiveness of FDI to make use of preferential market access to a larger market. The effect of FDI on national economies could be positive or negative depending on its nature (greenfield, merger or acquisitions) and implications on employment, technology transfer, competitiveness and exports, among other factors.

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[244] Hartzenberg (2011) *WTO Staff Working Paper* 3.
[245] Asante (1995) 22 *Review of African Political Economy* 574 and interview with Dr. Fahmy.
[246] UNCTAD (2007) The Least Developed Countries report.
[247] *Ibid.*
[248] Art. 88 of the Abuja Treaty.

The increasing multilateral trade liberalisation could result in erosion of preferences granted to African countries under unilateral trade preference schemes with developed countries; this should act as an extra reason for integration in Africa to address increasing competition and the threats of marginalisation.

Opening up to foreign competition in accordance with the WTO liberalisation process may also encourage giving more attention to regional integration to promote economic synergy in the continent. It also emphasises the importance of trade tools including TDIs.

3.6 Challenges to Economic Integration in Africa

African integration has been facing many structural and non-structural challenges.

The challenges facing Africa's integration may be similar to those facing developing countries' endeavours but could also have their own specificities, which are linked to the particular characteristics of African countries and their economies.

African RECs show progress in some areas, but there is a big gap between political ambitions and what is achieved in reality. This is confirmed by the low intra-regional trade which is less than 12%.[249] It is submitted that Africa has a potential to increase and diversify its intra-trade figures depending on many favourable factors including geographic proximity, its emerging industries and the solidification of network of regional integration agreements between African countries.

African integration is hampered by constraints such as overlapping memberships, differences in trade regimes, restrictive customs procedures, administrative and technical barriers, limitations of productive capacity, weak policy coordination, non-harmonised and complicated RoOs, inadequacies of trade-related infrastructure, fragile political commitment, lack of factor market integration, lack of sufficient institutional and personal capacities. [250] Inefficient TDIs systems and inadequate focus on internal market issues are also some of the constraints facing African integration that should be taken into consideration while designing African plans.

[249] See Discussion in section 3.2.2 of this Thesis.
[250] Uzodike (2009) 39 *Africa Insights* 2.

These constraints need to be addressed for this integration to have positive outcomes on the economic performance in the continent.

3.6.1 Focus on Trade in Goods

All African countries are developing countries and LDCs. When integration is envisaged, the focus is mainly on removing tariff barriers to trade in goods, which follows the linear model of integration.

The services sector is only developed in few Africa countries, and consequently liberalisation of this sector does not take the priority in African RECs. Similarly, there is little attention to fundamental issues like competition policy, investment and government procurement. These issues are usually pivotal for successful economic integration.[251]

Some exceptions exist in the African continent where the level of integration is deeper. The Organisation for the harmonization of African Business Law (OHADA) is an example of an African Agreement that seeks specifically to deal with this challenge by creating a better investment climate so as to attract investment in order to foster more growth. [252]

The focus on trade liberalisation in goods may be expected considering the level of development of the African economies and its exports composition. Nevertheless, excluding these other important sectors from integration may constrain the level of integration African countries can achieve. These fundamental issues should be addressed in the medium and long terms to support African integration objectives.

In the three RECs that constitute the T-FTA, COMESA and SADC are notified to WTO as covering trade in goods only, while the EAC covers goods and services.

[251] Interview with Dr. Fahmy.
[252] Doris (2014) LLD Thesis, *University of Pretoria*.

3.6.2 Lax Implementation combined with Lack of Enforcement Mechanisms

Lax implementation is defined as *"pervasive and long lasting across issue areas and time periods, unpunished by co-signatories and generally accepted even when its existence hampered the procedures or organisations that states sought to create*".[253]

Within the African RECs, not all Members are Members of their respective FTAs. Regional FTAs are sometimes characterised by long negative lists and excessive resort to non-tariff barriers. The Achievement track of African RTAs shows that countries are delayed in terms of implementation of commitments.

The removal of tariff barriers is a sensitive issue in the African context. In some cases, African governments rely on customs tariffs as one of the main sources of government revenue.[254] This fear has its implications both on the negotiation process and on the implementation stage.

For example, Zimbabwe, which suffered from economic challenges in the last decade, has one of the highest Most Favoured Nation (MFN) applied rates in its region. Almost 20% of its tariff lines have applied MFN rates of 30% or more.[255] This can indicate the correlation between dependence on tariff revenues and the willingness to liberalise trade.

In SADC there were many requests not to implement the obligations of the FTA.[256] SADC suffers from the lack of efficient enforcement mechanisms. The SADC Tribunal was disbanded after its ruling against Zimbabwe's imposition of new duties on South African goods. This had serious implications for the implementation of the SADC FTA.[257] In the absence of the SADC Tribunal these disputes could not be ruled upon.[258]

WTO rules allow Members to raise their applied rates not beyond the bound WTO rate. This could be one of the easiest and less costly options for Members facing economic difficulties or when seeking to protect national industries.

[253] Acharya & Johnson (eds) (2007) 94-95.
[254] Fundira (2015) *Tralac* 1.
[255] *Ibid* 5.
[256] Interview with Mrs. Van Renen.
[257] Erasmus (2013) *Tralac.*
[258] *Ibid.*

The lack of commitment is sometimes in contrast with the strong interest of many African countries to join RTAs, which sometimes results in multiple memberships.

There is a view that this lack of implementation may be a result of preference by African countries to have informal institutions over the bureaucratic structures and international rule-making or legislative processes of formal international institutions.[259] The excessive flexibility in the African trade regimes have made them more like soft law where non-compliance could be permitted without strict accountability measures or strong enforcement mechanisms.

The application of the variable geometry principle can lead to multiple results. Although it is essential to accommodate the different needs of African countries and their different levels of development, excessive flexibility can lead to hindering trade liberalisation in Africa.

Lack of enforcement mechanisms can encourage Members to use protective measures in excessive ways which can have implications on the usage of TDIs. The existence of functioning TDI system may encourage African countries to implement their trade commitments within the agreed time frames knowing that they can revert to these tools when the conditions exist.

3.6.3 Underdeveloped Private Sector

The private sector is the main implementer and the intended user of the provisions of trade liberalisation agreements. In Africa the private sector is underdeveloped, constrained by structural inefficiencies and sometimes unaware of trade preferences available in African RTAs and to what extent the market preferences are implemented.[260]Evidence from the implementation of both the COMESA and SADC FTAs suggests that numerous economic actors within the region are either unaware of trade preferences available under the FTA or feel that the conditions attached to such preferences make them unattractive for actual use.[261]

[259] Maluwa (2006) *ASIL*.
[260] Interview with Dr. Fahmy.
[261] Woolfrey (2012) *Tralac*.

For some exporters, both inside and outside the region, doing business in Africa is risky and burdensome.[262]

The underdevelopment of the private sector affects the pattern and frequency of using TDIs. This could be attributed to the lack of knowledge of the existence of these defensive measures or the inability to use them.

A positive development in recent years is that the private sector has brought cases before national and regional courts claiming their rights emanating out of regional agreements.[263] These developments could be built upon to strengthen the key role of the private sector in Africa.

3.6.4 Trade Facilitation Challenges

Trade Facilitation deals with expediting the movement, release and clearance of goods, including goods in transit.[264]

Trade facilitation is crucial for economic integration and economic growth. The Director General of the WTO has stated that any enhancement in trade facilitation issues on the African continent will benefit African economic integration and that African nations stand to benefit from the Agreement on Trade Facilitation (ATF), which would support African efforts at regional integration in a very practical way. [265]

The ATF could reduce worldwide trade costs by between 12.5% and 17.5%, which can assist African countries to decrease the cost of intra-trade cost.[266]

The ATF emphasises the correlation between sound trade facilitation and multilateral trade liberalisation.[267]

In Africa insufficient infrastructure, cumbersome procedures on the borders, and the high cost of trade with landlocked countries are major constraints for African

[262] *Ibid.*
[263] Proceedings of the Annual conference of Tralac (2016).
[264] "Trade Facilitation" https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm (accessed 17 September 2015).
[265] "Statement by the WTO DG to the African Union Conference of Ministers of Trade on 4 December 2014" http://www.wto.org/english/news_e/spra_e/spra43_e.htm
[266] OECD (2015) Policy Brief.http://www.oecd.org/trade/WTO-TF-Implementation-Policy-Brief_EN_2015_06.pdf
[267] "WTO Agreement on Trade Facilitation" https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm (accessed 17 September 2015).

integration. These factors result in high transportation cost, poor communication services and have negative drawbacks on African integration.[268]

It is submitted that regional and continental infrastructure projects can act as a catalyst that can help foster African integration and can also be enhanced further by successful integration projects.

According to the World Bank the cost to export and import a standardised cargo of goods is highest in sub-Sahara Africa and could be double that of comparable trade in Latin America, the Caribbean, East Asia and the Pacific.[269] Each day spent in transit is equivalent to charging an *ad valorem* tariff rate of 0.6-2.3%.[270]

Some estimates conclude that, if customs procedures and port handling become twice as efficient in a CFTA, intra-African trade would increase from around 10% in 2010 to around 22% in 2022.[271] This confirms the link between enhanced infrastructure and regional integration and the need to give priority to addressing this important constraint on African intra-trade.

Recognising the importance of these constraints, the African countries have launched several continental projects to foster integration. Some of these projects are coordinated by the Presidential Infrastructure Champion Initiative (PICI), which includes the North-South Corridor in the SADC region, and a potential linkage through the Nile by the Nile Basin Countries.[272] Additionally, the T-FTA incorporated trade facilitation as one of its pillars.[273]

In addition to regional projects, Africa can learn from several initiatives like the Asia Pacific Economic Cooperation (APEC) business travel card and should work to harmonise documentation, road charges and entry visas.

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[268] Hartzenberg (2011) *WTO Staff Working Paper* 2.
[269] Data from World Bank Doing Business Report (2015)," Cost to export per container" <http://data.worldbank.org/indicator/IC.EXP.COST.CD> (accessed 1 July 2015).
[270] Hummels & Schaur (2010) 82 *Journal of International Economics* 15.
[271] UNECA, AfDB & AU (2012) 48.
[272] "Presidential Infrastructure Champion Initiative" http://www.nepad.org/regionalintegrationandinfrastructure/knowledge/doc/2393/presidential-infrastructure-champion-initiat (accessed 1 July 2015).
[273] Hartzenberg (2011) *Tralac* 16.

If improved substantially, trade facilitation can support African integration and may make African products more competitive compared with third parties which can also affect the need to revert to TDIs.

3.6.5 Non-Tariff Barriers

Countries can make use of legitimate regulatory barriers including Non-Tariff Barriers (NTBs), in order to protect consumers, human, animal and plant health.[274] If used excessively, NTBs could represent disguised protectionist obstacles to trade. According to WTO law countries should ensure that any measures are applied only to the extent necessary to protect human, animal or plant life or health, and is based on scientific principles.[275]

In Africa the non-harmonisation of rules governing NTBs and the bureaucratic processes usually serve as an additional constraint on regional integration.[276]

This is of particular importance to agricultural trade within the region.[277] NTBs are sometimes used as an import- limiting tool in a way similar to the application of TDIs.

3.6.6 Unharmonized Rules and Import Standards

The challenge of the different import requirements in African countries is an issue where the RECs have made little progress so far. In COMESA for example, the sanitary requirements for imports differ significantly from one country to another which undoubtedly affect regional trade.

The excessive resort to NTBs combined with the existence of unharmonized rules can act as a major constraint on the development of economies of scale, significantly increase the cost of doing business and limit inter-regional trade.

It is positive that the T-FTA attached high importance to the phasing out of NTBs. Article 10 of the Agreement provides for the elimination of all existing NTBs and the

[274] "The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)" <http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm >.
[275] Art. 2.2 of the SPS Agreement
[276] Interview with Dr. Fahmy.
[277] *Ibid.*

harmonisation of them into a single mechanism as provided for in Annex 3 on Simplification and Harmonisation of Trade Documentation and Procedures.

The T-FTA Annex includes provisions on how to decrease the cost of trade documentation and how to standardize them in accordance with international standards with attention to trade facilitation issues. Despite this pragmatic and detailed approach, the objective of harmonizing NTBs remain very challenging especially that interlinks with the capacities of the African institutions and may be perceived as an encroachment on the sovereignty of Members. However, if achieved, this would allow the private sector in the three blocks to decrease cost of production by adhering to one set of harmonized rules and standards.

3.6.7 Regional Politics and lack of Political Will

There is a gap between the stated objectives of RTAs in Africa and the level of implementation. Looking at the time frame for the implementation of the CFTA, it could be concluded that this objective was set with a high level of optimism that does not fit with the reality.

Despite strong political commitments, many instances countries place individual interests as a priority compared to regional integration.[278]

Regional politics can be manifested in the determination of some countries to join economic blocks for political and ideological reasons. It can also affect the success of integration when political conflicts between countries can have negative effects on their trade relations.

Political conflicts have had a decisive impact on regional integration efforts in Africa, particularly given that those regions with the most conflict have witnessed the slowest growth in regional integration.[279]

3.6.8 Overlapping Membership

The overlapping membership is one of the main constraints on African economic integration. The eight RECs that constitute the building blocks for the African

[278] Interview with Mr. Acosta.
[279] UNECA (2004) 17.

integration have multiple memberships. Of the 53 countries in the AU, 47 countries belong to more than one trade block.

Bhagwati has referred to overlapping membership as "the spaghetti bowl" which is a stumbling – rather than a building block for the multilateral trade regime. [280]

Looking at the three building blocks of the T-FTA, it is noted that four out of the five Members of EAC, which has a CU status, are Members in COMESA (Burundi, Uganda, Kenya, and Rwanda) and one a Member State of SADC (Tanzania).

Five of the SADC Member States (Botswana, Lesotho, Namibia, South Africa and Swaziland) are Members of the SACU.

There are eight common Members between COMESA and SADC which are: DRC, Madagascar; Malawi; Mauritius; Seychelles; Swaziland; Zambia; Zimbabwe.

There are nine countries in the region that are already Members of CUs. All nine countries are also involved in negotiations aiming at establishing additional CUs to the ones they currently belong to.[281]

Out of the 26 countries that constitute the T-FTA 16 are either in a CU, negotiating another CU to the one they belong to or are in the process of negotiating two separate CUs. Membership in multiple CUs could create consistency-related problems and may pose challenges to WTO rules.

Overlapping membership in Africa is, in many cases, a result of political motives for integration; it can also be attributed to the open regionalism policy of membership.[282] African RTAs are trade-plus regimes that reflect a broad set of political goals and are not simply trade treaties. [283] The overlapping membership is also correlated with the nature of the African integration model where enforcement mechanisms are weak.

This has its implications on the level of commitment of the Members. Additionally, it could lead to high transaction costs and administrative difficulties associated with the

[280] Bhagwati (1995) *Discussion* Paper 4.
[281] UNECA (2012).
[282] Hartzenberg (2011) *Tralac.*
[283] Gathii (2011) 72.

need to comply with multiple RoOs in different FTAs, which makes it harder for firms to cope effectively in the international supply chains.

It could also lead to jurisdictional uncertainty, where the private sector is not certain about the preferences it is entitled to and the jurisdiction it is falling under.

When it comes to the effect on TDIs, the overlapping membership could lead to different applicability of the systems of TDIs belonging to more than one trade regime, for example under the COMESA and EAC systems.

The overlapping of membership is a major constraint on the speed and depth of African integration. Merging the current eight RECs into one African FTA as called by the Abuja Treaty can remedy this problem. The harmonization of rules between the African RECs, can also address this challenge by ensuring that African countries are subject to unified rules in their trade relations.

3.6.9 Similar Production Structures

In Africa many countries enjoy similar factors of production and production systems due to the abundance of land, natural resources and raw materials and the shortage of technology-intensive industries. This resulted in industries concentrated on agriculture, raw materials and primarily industrialised production and has its effect on the success of its integration plans.

Regional integration is constrained by the fact that African countries don’t necessarily have comparative advantages between them sufficient to overcome this similarity which led to African countries being unable to supply each other with their imports.

Africa has a large population, but with low average per capita income, which makes the actual African market small in terms of purchasing power and may challenge the efforts to achieve economies of scale.

African trade figures can be increased through economic diversification away from row materials and towards more industrialisation. Increasing intra-African trade in

manufactures may lead to diversity on which further profitable commodity exchange among African countries could be based.[284]

The industrialisation process would emphasize the need for an effective TDIs system to protect African industries especially at the infant industries stage.

3.7 Regional Economic Communities in Africa

The Abuja Treaty of 1991 recognises only eight of the existing 14 RECs in Africa as pillars of the AEC. These are: The Arab Maghreb Union (AMU), the Community of Sahel-Saharan States (CEN-SAD), COMESA, the Economic Community of West African States (ECOWAS), the Economic Community of Central African States (ECCAS), EAC, the Inter-Governmental Authority on Development (IGAD) and SADC.[285]

Currently five RECs, namely ECOWAS, ECCAS, COMESA, SADC and EAC, have established their FTAs while CEN-SAD, IGAD and AMU have not reached this stage yet. [286]

Furthermore, EAC has been a full CU with CET since 2005, while COMESA launched its CU in 2009 but has not implemented its CET yet. ECOWAS launched the CU in 2015 after some delay.

Three of the recognised RECs (COMESA, EAC and SADC) are the blocks of the T-FTA, which is in accordance with the plans to establish the AEC.

3.7.1 The Common Market for Eastern and Southern Africa (COMESA)

3.7.1.1 Background Information

The agreement for the establishment of COMESA was signed in November 1993, and came into force in December 1994. It was notified to the WTO under the Enabling

[284] UNECA (2012) 5.
[285] "African Union (AU) & Regional Economic Communities (RECs) on Africa" <http://www.au.int/en/organs/recs> (accessed 3 April 2015).
[286] According to the official information from African RECs.

Clause on 4 May 1995. It is at a level of CU, and covers trade in goods only, with the ultimate objective of achieving an economic community.[287]

COMESA is an example of progressive integration in the African continent. It replaced the Preferential Trade Area (PTA) that had been in existence since 1981.

COMESA has nineteen Members: Burundi, the Comoros, the DRC, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe.

It has a population of 390 million, annual imports of USD 138 billion and exports of USD 114 billion.[288] COMESA's main exports are crude and refined oil, base metals, agriculture products, sugar, clothing, fertilisers and rolled iron.[289] Some of these products, especially the semi-industrialised items, are potential targets of TDIs.

For the period from 2000 to 2010 intra-COMESA trade has increased fivefold from USD 3 billion to USD 15.2 billion, which proves a successful economic integration model.[290]

3.7.1.2 COMESA Objectives

The central objective of COMESA is to form a unified large economic and trading unit within which goods; services, capital and labour can move freely across national frontiers.[291] The block seeks to fully integrate the economies of its Members and to enhance its competitiveness.[292]

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[287] "Preamble of the COMESA Treaty" http://www.comesa.int/attachments/article/28/COMESA_Treaty.pdf (accessed 13 February 2012).
[288] According to data from the International Trade Centre Trade Map (accessed 14 February 2015).
[289] *Ibid.*
[290] "COMESA Customs Union" <http://programmes.comesa.int/index.php?option=com_content&view=article&id=90&Itemid=142 > (accessed 13 February 2012).
[291] "COMESA, Overview of COMESA" <http://about.comesa.int/index.php?option¼com_content&view¼article&id¼475:overview-of-comesa-&catid¼42:general&Itemid¼106> (accessed 13 February 2012).
[292] "COMESA" <http://programes.comesa.int/> (accessed 13 February 2012).

The founding documents of COMESA include very ambitious and broad integration objectives including strengthening market mechanisms as well as convertibility of currencies, integration of financial markets and the creation of a monetary union.[293]

COMESA follows a linear model of integration through the following incremental steps:[294]

1. A Preferential Trade Area (PTA) with lower tariffs applied to certain tariff lines of intra-regional trade. This step was achieved in 1981.
2. FTA in which no tariffs are levied on goods from other member States.[295]
3. CU with CET. This step is meant to enhance the regional competitiveness of Members through a possible process of restructuring, mergers, acquisition and privatisation.[296] The proposed time was ten years from the effective date of the Treaty but this has not yet been fully achieved. [297]
4. A Common Market with free movement of capital and labour, considerable harmonisation of trade, exchange rate, fiscal and monetary policies, internal exchange rate stability and full internal convertibility.
5. An Economic Community with a common currency and unified macroeconomic policy by 2025. [298]

3.7.1.3 COMESA Customs Union

The formation of the COMESA CU comes in accordance with Article 45 of the COMESA Treaty which provides for the gradual establishment of a CET in respect of all goods imported into the Member States from third countries within a period of ten years from the entry into force of the Treaty and in accordance with a schedule to be adopted by the Council.

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[293] "Trade, Customs and Monetary Union" http://programmes.comesa.int/index.php?option=com_content&view=article&id=83&Itemid=106 (accessed 13 February 2012).
[294] *Ibid.*
[295] Arts. 45 and 49 of the COMESA Treaty.
[296] "COMESA, COMESA Strategy" <(http://about.comesa.int/index.php?option=com_content&view=article&id=78:comesa-strategy-&catid=42:general&Itemid=11853> (accessed 13 February 2012).
[297] Art. 45 of the COMESA Treaty.
[298] Ibid Art. 4.4a.

As with other RECs in Africa, the COMESA objectives were not achieved within the determined time frames. Thus, although the COMESA Council of Ministers decided in 2001 to establish the CU by December 2004, the CU was officially declared five years later during the COMESA Summit in 2009 which endorsed two legal relevant instruments: the council regulations governing the COMESA CU, and the Common Market Customs Management Regulations.[299]

The Council Regulations Governing the COMESA CU provide for establishment of the CU, the internal free trade area, relations with third countries including the application of the CET, trade remedies, export promotion, and dispute settlement. The Common Market Customs Management Regulations provide for the imposition and collection of duties and taxes; the control, management and administration of Customs; the conclusion of Customs and Trade Agreements and other matters.[300]

The CU was launched with a three-year transition period during which each member state must enact the common market legislation, the common tariff nomenclature, the CET and the common market customs management regulations.[301] To date no member state has ratified the common market legislation for the CU which led to the non-operationalisation of the CU.[302] This raises doubts about the classification of the current level of economic integration of COMESA.

The CU is based on a three-band tariff structure that imposes a 10% tariff on intermediate products, a 25% tariff on finished goods and a 0% tariff on capital goods and raw materials imported from non-COMESA nations.[303] The CET is designed in a way that would be supportive of economic development in Members. The zero tariffs on capital goods and raw materials are meant to promote industrialisation and create jobs.

[299] Final Communiqué of the thirteenth Summit of the COMESA authority of heads of state and government in 2009.
[300] COMESA Customs Union http://programmes.comesa.int/index.php?option=com_content&view=article&id=90&Itemid=142 (accessed 15 March 2013).
[301] Arts. 10, 11 and 12 of the COMESA Treaty,
[302] Findura (2015) *Tralac* 6.
[303] Official Gazette of the COMESA Volume 15 No. 1 09 June 2009.

The sensitivity of some tariff lines to trade liberalisation is a concern for some Members as the proposed CET effect can have negative effect on custom revenues.[304]

The COMESA CU incorporates flexibility provisions to cater for the special needs and demands of some of its Members at a lower level of development. This is in line with the variable geometry principle.

The proposed flexibility allows some Members with sensitive national industries to delay the liberalisation of these sectors during the transition period, with the possibility of applying a higher CET or even excluding them from the CET.[305] Additionally, Members could propose the establishment of a Common List of Sensitive Products to cater for their specific needs.[306]

The establishment of the CU is subject to periodical review that could lead to adjustments in the CET according to results, and the needs of Members.[307]

Moreover, a COMESA fund would be established to compensate Members who may incur losses due to possible decrease in customs revenues as a result of the establishment of the CET.[308] This fund would also finance infrastructure projects in the region, which is pivotal for regional integration and assisting landlocked countries.

When the CU is fully implemented its CET will be harmonised with that of the ECA, which is in line with the decision of the first Tripartite Summit in October 2008.[309]

The attainment of the COMESA CU may mean putting limitations on the application of TDIs within COMESA and may require the unification of TDIs rules against third parties.

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[304] Findura *(2015) Tralac* 7 *and* interview with Dr Fahmy.
[305] COMESA Customs Union" http://programmes.comesa.int/index.php?option=com_content&view=article&id=90&Itemid=142 (accessed 1 December 2014).
[306] *Ibid.*
[307] *Ibid.*
[308] Interview with Dr. Fahmy.
[309] Communiqué of the First COMESA-EAC-SADC Tripartite Summit (2008).

3.7.1.4 COMESA Rules of Origin

The COMESA RoOs Protocol sets forth a five-part test, requiring that goods meet at least one of the enumerated criteria in order to obtain status as originating from a Member State.

These are: wholly produced goods, [310] a local content of not less than 40%, [311] a value added of at least 35%, [312] substantial change of tariff classification [313] and goods produced in Members that have been designated to be goods of particular importance to the economic development of Member and with a minimum value added of 25%.[314]

The relatively flexible RoOs of COMESA, which includes a low local content requirement, may allow for transhipments from third parties and emphasises further the importance of TDIs.

Some COMESA Members, who are relatively more developed, advocate for a higher local content linking this to industrialisation programmes in the continent while small countries advocate for lower local content.[315]

3.7.1.5 The COMESA Court of Justice

COMESA has a functioning dispute settlement mechanism. The COMESA court of Justice is relatively advanced. It addresses many issues related to the implementation of tariff concessions, and may take action based on requests from the private sector. An important ruling was by made by the court in the matter between Polytol paints (a company registered in Mauritius) and the Government of Mauritius where it addressed the legality of imposing tariffs of 40% on imports of Polytol which was claimed to be in violation of the COMESA agreement.[316]

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[310] Rule 2(1) (a) of the COMESA Rules of Origin Protocol.
[311] *Ibid*, (Rule 2(1)(b)(i).
[312] *Ibid*, Rule 2(1)(b)(ii).
[313] *Ibid*, Rule 2(1)(b)(iii).
[314] *Ibid*, Rule 2(1)(c).
[315] Interview with Dr. Fahmy.
[316] " The COMESA Court of Justice rules that Mauritius breached the COMESA rules for the Free Trade Area and orders a refund of customs duties to a small company" http://comesacourt.org/the-comesa-court-of-justice-rules-that-mauritius-breached-the-comesa-rules-for-the-free-trade-area-and-orders-a-refund-of-customs-duties-to-a-small-company-2/ (accessed 1 May 2016).

The Court ruled that Mauritius breached the COMESA rules for the FTA and ordered a refund of customs duties to the company.[317] This mechanism can have many positive effects on the enforcement of trade liberalization commitments in the African context.

3.7.1.6 Other Fields of Cooperation

The COMESA integration model recognises the interlinkages between infrastructure, trade facilitation and regional integration.

The region has adopted two protocols, one on the free movement of persons, labour, services, right of establishment and right of residence; and another on the Gradual Relaxation and Eventual Elimination of visas.[318] These protocols are not fully implemented yet but can have positive effects on regional integration in the future.

COMESA has established several programs designed to support trade promotion: trade policy, trade facilitation, multilateral transport, information and communication technology (ICT).[319]

3.7.2 East African Community (EAC)

3.7.2.1 Background Information

The EAC is a model of advanced regional integration in Africa both in terms of depth of integration and level of implementation. The Treaty for the establishment of the EAC was signed on 30 November 1999 and came into force for goods on 7 July 2000 and for services on 20 November 2009.[320]

The EAC Customs Union and Economic Integration Agreement covers goods and services and was notified to WTO under the Enabling Clause and GATS Article V on 9 October 2000 and on 1 August 2012 respectively.[321]

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[317] *Ibid.*
[318] "Progress on Regional integration in Africa report" (2011) 6 <http://www.uneca.org/sites/default/files/uploaded-documents/CTRCI-VII/ctrci-progress-on-regional-integration_may2011.pdf > (accessed 15 March 2013).
[319] *Ibid.*
[320] "WTO, RTA Portal: East African Community" http://rtais.wto.org/UI/PublicShowMemberRTAIDCard.aspx?rtaid=94 (accessed 15 March 2013).
[321] *Ibid.*

The EAC official documents usually refer to Members of the EAC as "Partner States" rather than "Members", which imply a higher level of integration and a differentiation between the two categories.

Despite Kenya being the biggest and most diversified economy in the group, the EAC could be considered as the REC with the least disparity in income and level of development. Unlike COMESA and SADC where there are big disparities between South Africa and Egypt and the Members of the two respective groups, the differences between the five Members of EAC (Burundi, Kenya, Rwanda, Tanzania and Uganda) is much less.

EAC could be considered a sub-group of COMESA, where EAC is at a higher level of integration. The block viewed itself as on a fast track for regional integration in the context of COMESA.[322]

As with other RECs in Africa, the EAC applies the variable geometry principle, which is manifested in the Treaty for the establishment of the EAC that allows the commitments in the Treaty to be undertaken at different speeds.[323] Additionally, a fund was established in 2005 to mobilise resources from domestic sources and partner states to finance productive sectors including energy, transportation and infrastructure. [324] These projects benefit regional integration in general but also support the small countries by enhancing their connectivity.

The percentage of intra-REC trade is the highest among the RECs of the T-FTA. In 2013, total exports from the intra EAC trade amounted to USD 3,508 million while the total imports amounted to USD 2,315 million, thus giving an intra-trade deficit of USD 922 million.[325] Kenya, Tanzania and Uganda recorded a surplus balance with Burundi and Rwanda recording a deficit.[326]

[322] *Ibid.*
[323] "Protocol on the Establishment of the East African Community Common Market" <http://www.eac.int/commonmarket/index.php?option=com_docman&task=cat_view&gid=30&Itemid=6> (accessed 15 March 2013).
[324] Gathii (2011) 36.
[325] East African Community Facts and Figures Report (2014) 64.
[326] *Ibid.*

3.7.2.2 EAC Objectives

The EAC follows a linear integration model with broad objectives that underscore the commitment to reach a deep level of integration i.e. monetary union and political federation.

An important step in this regard is the entry into force of the Monetary Union Protocol, which will deepen integration in the region. The EAC objectives also include developing policies and programmes among Partner States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs.[327]

As another manifestation of the variable geometry principle, the EAC treaty confirm that the final aim of the ECA is to achieve accelerated, harmonious and balanced development that is shared equally between Partner States.[328]

3.7.2.3 The EAC Customs Union

The protocol for the establishment of the EAC customs union was signed by the five Partners and was firstly applied in July 2009.[329]

Members agreed to eliminate the internal tariffs and other similar charges on trade between themselves. To date a three band CET exists with a minimum rate of 0%, a middle rate of 10% and a maximum rate of 25%, which is similar to the COMESA CET and which has the same objectives of promoting industrialisation in the region. Members undertook to review the maximum rate of the CET five years from the coming into force of the CU.

As a CU, TDIs may not be permitted under the CU while it could be theoretically applied in the context of COMESA. This raises questions about the applicability of TDIs in the context of EAC after the T-FTA system is implemented.

[327] Art. 5 of the EAC Treaty.
[328] *Ibid.*
[329] "East African Community Customs" < www.customs.eac.int> (accessed 15 March 2014).

3.7.2.4 The EAC Court

The EAC has a functioning dispute settlement mechanism that addresses issues of compliance with the EAC obligations. Unlike the COMESA court, the EAC court can only address cases between Partner States and institutions of the community and does not deal with cases where the private sector is a party.[330]

The EAC CU protocol provides for a panel process composed of experts that address issues like NTBs and TDIs.

3.7.2.5 Other Fields of Cooperation

The EAC has undertaken a review of the RoOs and the criterion on change in tariff headings was operationalised.[331]

Significant progress has been made in the area of free movement of persons, goods and services, which include major steps to ease the movement of persons among Members.[332]

The block focuses on improving regional infrastructure and trade facilitation. This took place through the convertibility of the currencies of Kenya, Tanzania and Uganda, capital markets development and cross-listing of stocks, joint infrastructure development projects, and harmonisation of some standards and mutual recognition of health certificates. [333]

3.7.3 The Southern African Development Community (SADC)

3.7.3.1 Background Information

In 1992 the leaders of the Southern African Development Coordinating Conference (SADCC) agreed to elevate their level of cooperation from a coordination conference into legally binding arrangements. [334] SADC emphasises economic integration where South Africa is the dominant economic power in the region.

[330] Modern Holding vs. Kenya Ports Authority (KPA).
[331] EAC Trade Report (2012).
[332] UNECA Progress on Regional Integration Report (2011) 6.
[333] Infrastructure Projects include Arusha-Namanga-Athi River Road.
[334] SADC Regional Indicative Strategic Plan 2005-2020.

3.7.3.2 SADC Objectives

The SADC objectives are diversified among political and economic objectives. The SADC Treaty lists the main objectives which are to achieve development and economic growth, evolve common political values, alleviate poverty, enhance the standard and quality of life of the peoples of the region, and support the socially disadvantaged through regional integration and to build democratic principles and equitable and sustainable development.[335] It was claimed that SADC is more about development in the southern region of Africa and not about preferential market access.[336] This may be explained by the gap in development between South Africa and the rest of the Members in the region.

The SADC FTA was launched in August 2008, when 85% of intra-regional trade amongst the partner states attained zero duty.[337] It covers trade in goods only and was notified to the WTO under GATT Article XXIV on 2 August 2004.[338]

The maximum tariff liberalisation was only attained by January 2012, when the tariff phase down process for sensitive products was completed.[339]

The FTA has many challenges. Only twelve of the fifteen SADC Members are Members of the FTA. These are: Botswana, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania Zambia and Zimbabwe. Angola, DRC and Seychelles remain outside the FTA. The case of Angola is of particular importance being SADC's second largest economy. This hinders the progress of economic integration in SADC.

Overlapping of membership is another challenge for the SADC FTA. There are eight common Members between COMESA and SADC, which raises questions on implementation and harmonisation of RoOs. Five of the twelve Members of the FTA are also Members of the more integrated SACU. Those five countries followed a faster pace of trade liberalisation and completed this process in January 2007. [340]

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[335] Art. 5 of the Treaty of SADC.
[336] Shams (2003) *Hamburg Institute of International Economics.* 31.
[337] SADC FTA, <http://www.sadc.int/about-sadc/integration-milestones/free-trade-area/> (accessed 1 April 2015).
[338] "WTO, Southern African Development Community" http://rtais.wto.org/UI/PublicShowMemberRTAIDCard.aspx?rtaid=45 (accessed 1 April 2015)
[339] *Ibid.*
[340] "Southern African Customs Union" <http://www.sacu.int/> (accessed 1 April 2015).

SADC also faces challenges related to non-compliance and delayed implementation from some of its Members. Some Members have delayed or back-loaded their adjustment in order to protect domestic industries, and maintain revenue streams from custom duties.[341]

For example, Malawi had only started in 2010 to align its tariff schedule to the SADC tariff regimes.[342] Zimbabwe experienced problems in implementing its tariff commitments on sensitive products and was allowed, under Article 3(1) (c), to suspend tariff phase downs from 2010 until 2012.[343] Annual reductions were supposed to resume in 2012, for completion in 2014.[344] Mozambique would have completed the process in 2015 in respect of liberalisation of imports from South Africa.[345] Although Tanzania was on schedule with its tariff commitments, the Government applied for derogation to levy a 25% import duty on sugar and paper products until 2015 in order for the industries to take measures to adjust.[346]

As a way of measuring progress in SADC a Trade Monitoring and Compliance Mechanism was set up to monitor the implementation of the FTA, with a specific mechanism for identifying and eliminating NTBs.[347]

The first stage of the Economic Partnership Agreement (EPA) negotiations with the EU exposed the major divisions and fractures in the SADC regional integration project.[348] This was also a result of the fact that South Africa already has FTA agreement with the EU. SADC split into different configurations, each with its own separate liberalisation schedule. This came to an end when the EPA was concluded on July 2014.

TDIs could encourage Members to implement their tariff liberalisation commitments knowing that they can resort to these protective measures to provide temporary and conditional protection to national industries.

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[341] "Proceedings of the Fifth Southern African Forum on Trade held in Pretoria, South Africa (2008) <http://library.fes.de/pdf-files/bueros/angola/06281.pdf > (accessed 1 April 2015).
[342] *Ibid.*
[343] *Ibid.*
[344] *Ibid.*
[345] *Ibid.*
[346] *Ibid.*
[347] *Ibid.*
[348] "Proceedings of the Fifth Southern African Forum on Trade (SAFT) held in Pretoria, South Africa, on 6–7 August 2008" <http://library.fes.de/pdf-files/bueros/angola/06281.pdf> (accessed 1 April 2015).

3.7.3.3 The SADC Customs Union

Although the SADC Summit in 2013 discussed a report from the Ministerial task force on Regional Economic integration towards the formation of the CU, it is highly doubted that the block can take this ambitious step in the short run. This assessment is in line with the challenges of non-implementation in the FTA and the other structural challenges facing SADC including overlapping of membership,

The establishment of the CU would require the establishment of a CET, an agreement on revenue sharing as well as a willingness of Members to relinquish some aspects of national sovereignty, which are not expected to be agreed upon soon. It would also imply the removal of TDIs among Members.

3.7.3.4 SADC Rules of Origin

SADC's RoOs are relatively complex when compared to the RoOs in COMESA.[349] They are more closely aligned to the model employed in EU preferential trade agreements.[350]

The SADC audit in 2012 indicated that one of the key problems with implementing SADC deep integration agenda within the context of overlapping memberships is that countries cannot implement two sets of RoOs as a result of overlapping membership.[351] This applies to COMESA as well, where overlapping membership with other RECs also exists.

3.7.3.5 Other Fields of Cooperation

SADC lags behind in terms of its regional integration with respect to free movement of persons. Not much has been done in the implementation of the Protocol regarding visa exemption agreements for SADC citizens.[352] Efforts are being made to facilitate movement of persons, goods and services.[353] These include: harmonising custom

[349] *Ibid.*
[350] Naumann (2014) *Tralac* 3.
[351] Technical Report: Audit of the Implementation of the SADC Protocol on Trade (2012) 10.
[352] *Ibid.*
[353] UNECA progress on Regional integration (2011) 6.

procedures and instruments, including adoption of a single administrative document; and creation of nomenclature of common tariffs.[354]

3.8 The Tripartite Free Trade Area Negotiations

3.8.1 Background

The Tripartite FTA between COMESA, EAC and SADC, signed in June 2015 in Egypt, is a crucial step towards reaching the AEC as per the Abuja Convention and comes in line with the convention's objective of unifying the sub-regional markets.[355]

The Tripartite FTA is the first step in merging African RECs. The RECs are considered as the building blocks of the CFTA. While efforts are being continued to reach the CFTA, African RECs work to deepen their integration.

The Tripartite region includes 26 countries and represents almost half of the AU Members with a combined population of 632 million people (57% of African population), an area of 17.3 million square kilometres and a total GDP of USD 1.3 trillion, which represented 58% of African GDP in 2014.[356]

The per capita income changes from one member to another: USD 5690 in South Africa, USD 3600 in Egypt and USD 1376 in Kenya.[357] The total merchandise trade of the T-FTA is USD 356 Billion, among which USD 145 billion are exports and USD 211 billion are imports.[358]

Estimates indicate that merchandise exports among the 26 Tripartite countries increased more than 12-fold: from USD 2.3 billion in 1994 to USD 36 billion in 2014.[359] This increase was supported by the trade liberalisation within the three RECs.[360] It can also be attributed to the growth of member economies as well as other regional trade initiatives like the African Growth and Opportunity Act (AGOA), which incentivised intra-region trade.

[354] *Ibid.*
[355] Art. 6 of the Abuja Treaty.
[356] Art. 1 of the Communiqué of the Third Tripartite Summit (2015).
[357] According to the World Bank Data for 2015.
[358] Data from World Bank World Integrated Trade Solution (WITS).
[359] *Ibid.*
[360] Report of the chairperson of the Tripartite Task Force- Ambassador Mwapachu.

Despite this growth, intra-trade is less compared to other economic blocks in the EU, Asia and Latin America.[361]

Economic growth in the three blocks in recent years is due in general to high demand for commodities and sound macroeconomic policies in some of the countries. The economic growth rate in 2013 for COMESA, EAC and SADC was 15%, 6.2% and 3.7% respectively.[362]

3.8.1.1 The First Tripartite Summit

During the first Tripartite Summit in Uganda on October 2008 the leaders of the three RECs agreed to work toward a merger into a single REC with the objective of fast-tracking the attainment of the AEC.[363] The Summit directed the Tripartite Task Force of the three Secretariats to develop a roadmap for the implementation of this merger for consideration at its next meeting.[364]

The Summit approved the expeditious establishment of an FTA encompassing the member and partner states of the three RECs with the ultimate goal of establishing a single Customs Union.[365] Members agreed to build on the already achieved level of liberalisation in the three RECs.

The initial plan was very ambitious with a deep integration agenda that is not limited to tariff liberalization but extends to cooperation in industrial and competition policies, financial and payments systems, development of capital markets and Commodity Exchanges.[366]

As shown by the declaration of Kampala the establishment of the FTA would take into account the principle of variable geometry; the legal and institutional framework to underpin the FTA; and measures to facilitate the movement of business persons across the RECs.[367]

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[361] *Ibid.*
[362] Compiled from the official web sites of the three RECs.
[363]Communiqué of the first Tripartite Summit.
[364] *Ibid.*
[365] *Ibid.*
[366] Para. 14 IV of the Communiqué of the First Tripartite Summit.
[367] *Ibid*, paras. 14 (a), (b) and (c).

3.8.1.2 The Second Tripartite Summit

The Second Tripartite Summit was held in June 2011 in Johannesburg, South Africa. It officially launched the T-FTA negotiations as well as the negotiating principles, structures, and roadmap.[368]

The Summit affirmed that the establishment of the T-FTA would bolster intra-regional trade by creating a wider market, increase investment flows, enhance competitiveness and develop cross-regional infrastructure.[369]

Out of the 26 Members 23 signed the declaration for the FTA, while Madagascar, Eretria and Ethiopia did not sign the declaration at that stage.[370] These three countries are lagging behind in the implementation of the COMESA and SADC FTAs.[371]

The T-FTA was meant to embark on an innovative approach to find solutions to the structural problems that traditionally faced African integration.[372] The launching of the negotiations and the official Summit declaration confirmed the direction for a deep integration agenda. This was manifested through the inclusion of liberalisation of movement of natural persons and services in the negotiation agenda, which are objectives common to African endeavours but may not be feasible, at least in the short run.

3.8.1.3 The Third Tripartite Summit

The Sharm El-Sheikh Summit held in June 2015 officially launched the Tripartite FTA, and directed Member/Partner States to expedite the process towards its implementation.[373]

Many fundamental issues were not finalised because of the challenges that faced the negotiation process. The Summit declaration requested member States to finalise outstanding issues in relation to Annex 1 on Elimination of Import Duties, Annex 4

[368] Para. 2 of the Communiqué of the Second Tripartite Summit.
[369] *Ibid* para. 1(ii).
[370] Madagascar indicated its readiness to sign the Declaration launching negotiations for the T-FTA during the TTNF meeting in June 2012. Eritrea and Ethiopia are yet to sign the Declaration. Ethiopia indicated that the declaration has been submitted to authorities for signature, while Madagascar would sign after the elections.
[371] See discussion under sections 3.7.1 and 3.7.3 of this Thesis.
[372] Erasmus (2013) *Tralac*.
[373] Para. 2(d) of the Third Tripartite Summit Declaration.

on Rules of Origin, and Annex 6 on Trade Remedies which will form part of the T-FTA.[374]

The Summit also declared the commencement of Phase II negotiations covering trade in services, cooperation in trade and development, competition policy, intellectual property rights (IPRs) and cross border investments.

3.8.2 The Tripartite Structure

According to the T-FTA negotiating principles and framework the Tripartite is functioning on four different levels: Heads of states, Council of Ministers, senior officials, and the Tripartite Trade Negotiation Forum (TTNF). [375]

The Tripartite Task Force is composed of the Heads of Secretariats of the three RECs and is responsible for coordinating and providing technical and administrative support to the negotiation process. It is responsible for day-to-day management and is supported by the sub-committee on trade and the sub-committee on infrastructure.[376] The establishment of a sub-committee on infrastructure confirms the importance attached to infrastructure as a catalyst for regional integration.

The Sectorial Ministerial Committee supervises and provides leadership to the negotiation process, including dealing with contentious issues. The Committee is responsible for ensuring that the negotiating committees of senior officials and the TTNF adhere to the negotiation timeframes as provided in the T-FTA Roadmap.[377]

Progress in negotiations is evaluated through quarterly reports by the Chairperson of the TTNF and six-monthly formal reviews by the Tripartite Sectoral Ministerial Committee responsible for trade. The outcome of the monitoring and evaluation is responsible for informing the pace of the negotiations.[378]

The implementation of the T-FTA is designed in a comprehensive way and entrusted to six organs. These are: the Tripartite Summit which shall give general direction and impetus for the Tripartite arrangement; the Tripartite Council of Ministers, the

[374] *Ibid.*
[375] Annex 1 of the Second Tripartite Summit on negotiating principles and institutional framework.
[376] *Ibid.*
[377] *Ibid.*
[378] *Ibid.*

Tripartite Sectoral Ministerial Committee on Trade, Finance, Customs and Economic Matters and Home/Internal Affairs; and the Tripartite Sectoral Ministerial Committee on Legal Affairs.[379] Each body is responsible for policy direction and implementation in their respective sectors; the Tripartite Task Force of the Secretariats of the three RECs, which shall coordinate the implementation of the Tripartite work programme and shall provide secretariat services to the Tripartite arrangement; the Tripartite Committee of Senior Officials, which shall be responsible for overseeing and guiding technical work; and the Tripartite Committee of Experts, which carry out the technical work and report to the Tripartite Committee of Senior Officials.[380]

The involvement of the Tripartite Summit is meant to give the required political support to the advancement of the FTA, but may be challenging in terms of the inflexibility of the meeting of heads of states and governments.

3.8.3 The Negotiation Processes

The negotiation process is built on the substantial progress on trade liberalisation that has been achieved within the three RECs, and seeks to consolidate the RECs *acquis*. [381] It was agreed that the negotiation would be conducted in two main phases.

The first phase was supposed to cover negotiations on tariff liberalisation, RoOs, dispute resolution, customs procedures and simplification of customs documentation, transit procedures, TDIs, technical barriers to trade (TBTs), and sanitary and phyto-sanitary measures. The movement of business persons was supposed to be dealt with as a parallel and separate track. In reality many of these issues were not agreed upon at the first phase. This includes important areas which are fundamental for the FTA, such as TDIs and RoOs.

The second phase is supposed to start 24 months after the entry into force of the T-FTA Agreement, [382] and shall cover negotiations on trade in services, IPRs, competition policy, development and competitiveness.[383]

[379] Art. 29 of the T-FTA Agreement.
[380] *Ibid.*
[381] Annex 1 of the Second Tripartite Summit on negotiating principles and institutional framework.

[382] Art. 45 of the T-FTA Agreement.
[383] Annex 1 of the Second Tripartite Summit on negotiating principles and institutional framework.

The second phase would include most of the controversial issues and issues of deep integration which is understood in terms of the linear model of African integration and their level of development.

3.8.4 Tripartite Pillars and Road map

The T-FTA is a positive step in African integration as it adopts a developmental approach with three main pillars: market integration, infrastructure development, and industrial development.[384] The T-FTA seeks to achieve synergies between these three related aspects with the ultimate goal of improving economic performance and employment in the continent.

This comprehensive approach seeks to overcome with the major constraints on previous African integration initiatives that are mainly related to supply side capacities.

3.8.4.1 Market integration

This pillar is the cornerstone of the T-FTA and is manifested in the conclusion of the T-FTA in June 2015. It is a clear example of the African linear model of economic integration through a step-by-step trade liberalisation process that is focused on trade in goods.

This could be the easiest of the three pillars to implement. It deals mainly with market access and trade constraints, with a focus on removing tariffs and NTBs with the objective of reducing the costs of cross-border trade to improve the competitiveness of the Members compared to third parties. The main added value of this pillar is to remove tariffs across the three RECs, especially between major economies that do not enjoy any preferential treatment at the moment, for example Egypt and South Africa.

The FTA Agreement requires Members not to impose quantitative restrictions on imports or exports in trade with other Members that contradict their obligation in the WTO and under this agreement.[385]

[384] Communiqué of the Third T-FTA Summit on 10 June 2015.
[385] Art.11 of the Agreement establishing the T-FTA.

Member states can still impose restrictions in accordance with Article XI (2) of the GATT. Additionally, Members can impose conditional restrictions on market access by resorting to TDIs as indicated in the WTO Agreements and Article 17 (AD and countervailing measures), Article 18 (safeguards) and Annex 2 on Trade Remedies, which is not approved yet.

As per Article 31 (General exceptions), Members can limit market access of other members in cases where such measures are necessary to protect public morals, human, animal or plant life or health, to secure compliance with laws and measures essential to acquisition or distribution of foodstuffs in general or in local short supply.[386] Moreover, under Article 32 a member state can impose measures to protect its security interests or take measures in time of war.[387] These measures are similar to the exceptions listed under Article XX of the GATT.

Although removing tariff and non-tariff barriers is an important step, it has to be noted that trade policy alone cannot deliver industrial development, and it needs to be complemented with other policies and various institutional structures to optimally foster industrialisation and structural transformation.[388] This is addressed in the other two pillar of the T-FTA.

Rapid tariff liberalisation can incentivise the usage of regional TDIs to protect national industries which may suffer from the effects of falling trade barriers.

3.8.4.2 Infrastructure Development

Unreliable infrastructure could be one of the most important challenges to African integration as it can increase the cost of intra-trade compared to other parts in the world.

This pillar acknowledges the positive synergetic relation between infrastructure development and market integration and seeks to facilitate and enhance the connectivity and movement of goods and persons, and reduce the cost of doing business and consequently increase the competitiveness of Members.

[386] *Ibid*, Art.
[387] *Ibid*, Art. 30.
[388] UNECA (2015) 27.

In the meantime it may be the least controversial pillar considering its wide-spread positive implications and the potential more equitable sharing of the benefits of regional integration in a non-discriminatory way.[389] This is not the case in RTAs built exclusively on the removal of trade barriers which may result in trade diversion to the benefit of less efficient Members on the expense of more efficient third parties without necessarily increasing the overall return of regional integration.

Any investment in regional infrastructure could lead to decreasing cost of intra-region cost of transactions and consequently lead to increase in the intra-trade. It can also help African countries integrate into the global economy, which is crucial for economic development. The availability of the financial resources required to develop this pillar could be the main constraint.

3.8.4.3 Industrial Development

The T-FTA recognises the challenges associated with weak industrialisation in Africa by including industrial development as one of the three pillars. Enhancing competitiveness and addressing supply-side and productive capacity constraints could lead to more value added, increase economic growth and job creation.

Regional industrial development projects can overcome the limited markets of individual African countries and consequently leading to economies of scale.

The state of industrial and manufacturing development in Africa is weak and has not been improving with time.[390] For example, the share of African manufacturing in GDP rose from a low of 6.3% in 1970 to a peak of 15.3% in 1990, and thereafter fell to 12.8% in 2000 and 10.5% in 2008.[391] The share of the region in global manufacturing value added fell from 1.2% in 2000 to 1.1% in 2008. In developing Asia, it rose from 13% to 25%.[392]

The three pillars can work in synergy to promote specialisation in accordance to regional comparative advantage, which could promote industrialisation and better integration in the Global Value Chains (GVCs).

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[389] Woolfrey (2012) *Tralac.*
[390] UNCTAD (2013) *Policy brief number 27.*
[391] *Ibid.*
[392] *Ibid.*

Industrial development in Africa can support regional integration while integrating African economies in the global economy. The current pace of multilateral trade liberalization may not be supportive of the import-substitution industrialisation programmes that were applied in many African countries in the sixties and seventies.

The traditional regional economic integration approach runs the risk of promoting uneven development within the FTA as relatively more industrialised countries or sub-regions within the FTA gain disproportionate benefits through industrial agglomeration effects and the greater capacity of that country or sub-region's firms to take advantage of an expanded market. [393]

Despite the importance attached to industrialisation it is submitted that this pillar will need a long term approach and a lot of resources and technology transfer that makes it challenging to enhance this pillar in the short term. African countries may need to focus on industries where they have comparative advantages with the potential of growth.

The three pillars are interrelated. Trade could be conducive for industrialisation. For trade to effectively promote industrialisation, African countries need to move away from tariff liberalisation only and develop the capacity to fully engage in modern trade policy.[394] Additionally, intra-trade promotion can benefit from infrastructure and industrialisation.

3.8.5 Main T-FTA Negotiation Rounds

Phase I of the negotiations included several rounds of negotiations. The preparatory phase was intended to enhance transparency among all countries through the exchange of trade and tariff data, trade regulations and other trade measures and instruments as well as to enhance the understanding of the trade regimes prevailing in each of the RECs.

The preparatory meetings covered important issues and faced many challenges; however some limited progress was achieved by the TTNF in areas such as tariff

[393] Hartzenberg *et al* (eds) (2012) 293.
[394] UNECA African Economic Report on Africa (2015) 27.

liberalisation, NTBs, TDIs, and rules of origin. The main points that could be concluded from the negotiations rounds are the following:[395]

1. Because of the different rules applied in the three RECs, RoOs, TDIs and dispute settlement were among the most controversial issues at the negotiation. For the RoOs negotiations the TWG had finalised eleven out of 97 chapters. Twenty-five headings were determined as common between the three RECs, these headings cover approximately 9% of intra-Tripartite trade. COMESA Members indicated that they want the RoOs to be flexible and development oriented to support regional value chains. It was agreed that products manufactured in special economic zones will be subject to annex 4 on RoOs, which was not approved in the first stage.
2. The two CUs (SACU and EAC) negotiated as single blocks, which is in line with their level of development.[396] This was applied to the exchange of tariff offers with other countries. For example, in 2014 a bilateral meeting was held between Egypt and the EAC to exchange tariff offers.
3. The TTNF identified thresholds for substantial liberalisation, time frames for tariff liberalisation and treatment of sensitive and exclusion lists as critical issues that should be addressed. The negotiation process was telling about the specific positions of Members regarding regional trade liberalisations. Some Members with strong industries called for raising the level of ambition of negotiation to reach trade liberalisation of 90-95%, and the only exception would be for a few sensitive products according to the demands of Members. Those Members emphasised the importance of having a distinction between tariff liberalisation in the T-FTA and tariff liberalisation within the respective three RECs. Other less developed countries had a more protectionist approach.
4. There were also different views about the extent of exclusions in the sensitive lists that will not be subject to trade liberalisation, at least in the first stage.[397]
5. Certain countries had a special position in the negotiations because they are not yet Members of the two FTAs of COMESA and SADC. These are: Angola, DRC, Eritrea and Ethiopia. Additionally, Mauritius indicated that it wanted to maintain the *acquis* with COMESA and SADC FTA Members. These kinds of positions

[395] Interviews with Dr. Fahmy and Mrs. Van Renen.
[396] Interview with Mrs Van Renen.
[397] Interview with Dr. Fahmy.

presented another challenge for the negotiations to reach the T-FTA.[398] For these countries it was suggested to have an initial minimum threshold of 85% of tariff lines.

6. The discussion on TDIs reflected on the possibility of learning from other economic blocks. Members agreed on the need to implement user-friendly mechanism for TDIs. A study was conducted that highlighted the need for a three tier approach which would include general provisions on trade remedies, supported by an Annex setting out principles, and further clarified by guidelines that could be formulated at a later stage. [399]
7. Some Members indicated that they do not have adequate experience in TDIs, and they would require capacity building in order to implement the trade remedy provisions. [400] Out of the 26 Member/Partner states only few have laws and institutions implementing TDIs, and seek to adhere to the WTO Agreements.[401]
8. Botswana highlighted the importance of fast tracking negotiations on services, which reflect the importance of the service sector in some African countries.
9. Some Members pointed out the need to adopt a roadmap for implementation, and for private sector capacity building given that they are the primary beneficiaries of the T-FTA.

3.8.6 Analysis of the T-FTA Agreement

This analysis is based on the final text of the Agreement establishing the T-FTA among COMESA, EAC and SADC as was signed on 10 June 2015. It considers the scope and objectives of the T-FTA, market access and tariff modalities, RoOs, trade facilitation, and implementation. The analysis of the TDIs related provisions are addressed under chapter six of this thesis.

The Agreement is general in nature and comprises seven parts and 45 Articles. The technical issues were put in the proposed attached annexes, which were not agreed upon at the first stage.

[398] DRC declared in October 2014 that it will join the COMESA FTA after the accession instrument is ratified by the Parliament. Angola has not to joined the SADC FTA at the time of writing
[399] Bujumbura TTNF meeting report in October 2011.
[400] Interview with Dr Fahmy.
[401] Interview with Mrs Mrs. Van Renen.

3.8.6.1 Scope and Objectives

The Agreement establishes FTA among the Member/Partner States of the three RECs, which is declared to cover trade in goods, services and other trade-related matters. [402] Service liberalisation will take place in the second phase of the negotiations.

Members confirm the vision that the achievement of the T-FTA is part of the continental plans to reach regional integration. The main objectives of the Agreement are general and go beyond trade areas. They include: to promote economic and social development, to create a large single market with free movement of goods and services, to promote intra-regional trade, to enhance the regional and continental integration processes; and to build a strong T-FTA for the benefit of the people of the region. [403]

The agreement lists five targets that are considered prerequisites for the realisation of these broad objectives. These are the progressive elimination of tariffs and non-tariff barriers to trade in goods, to liberalise trade in services, and to cooperate in customs matters and trade facilitation measures.[404] These objectives are important and far-reaching, and require long-term approach.

3.8.6.2 Governing Principles

The Agreement lists twelve governing principles which are similar to the negotiation principles which governed the negotiation process. In many cases these principles are mere confirmations of the multilateral trade rules. [405] The principles reflect some of the needs of the small Members and are in harmony with the principles governing African integration in general.

3.8.6.2.1 The negotiations shall be REC and/or Member/Partner driven

This principle is to accommodate the different needs, specificities and levels of integration of the 26 Members and the three RECs. Members of COMESA and SADC

[402] Art. 3 of the T-FTA Agreement.
[403] *Ibid*, Art. 4.
[404] *Ibid*, Art. 5.
[405] *Ibid*, Art. 6.

are in a position to negotiate and implement the Agreement on individual basis as they are at a level of FTA, while the EAC and SACU would apply the Agreement on a REC level.

3.8.6.2.2 Variable geometry

The variable geometry principle allows for progression in cooperation among Member States in a variety of areas at different speeds. [406]

The T-FTA would allow the co-existence of different trading arrangements which have been applied within the three blocks and any trading arrangements that may be reached during the negotiations. The principles of variable geometry, reciprocity and *acquis* are complementary by nature.

3.8.6.2.3 Flexibility and Special and Differential Treatment

This principle has the same spirit as the variable geometry principle. The T-FTA Members are at different levels of development. In fact, 15 Members of the T-FTA are LDCs. [407] This requires the incorporation of this principle to allow for the execution of trade liberalisation at different speeds and to allow a longer period for adjustment for LDCs.

The incorporation of this principle can affect the implementation of commitments and the usage of TDIs provisions.

3.8.6.2.4 Transparency

Sharing information on tariffs, trade statistics, trade policy instruments and other trade related measures is an important prerequisite for any preferential trade Agreement. Transparency entails an open and predictable trading system, especially for the private sector, which is crucial for the success of RTAs in Africa.

The Tripartite Members agreed to share information on tariffs at the 8-digit Harmonised System (HS) level as well as information on trade values, also on the 8-digit HS level for both extra and intra-regional trade.

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[406] See discussion under section 3.4 of this Thesis.
[407] "List of UN LDCs"
<http://www.un.org/en/development/desa/policy/cdp/ldc/ldc_list.pdf> (accessed 11 March 2014).

The lack of efficient statistics institutions may represent a constraint on the coming stage of negotiations as well as in the implementation of the T-FTA.

3.8.6.2.5 Building on the *acquis*

The Agreement builds on the existing trade liberalisation already achieved in the three RECs, and aims at consolidating tariff liberalisation between them. It focuses on achieving trade liberalisation between Members that have no preferential arrangements at the current moment. It is noted that some countries are not yet Members of the FTAs of their own RECs.

3.8.6.2.6 A single undertaking

This principle was meant to ensure that nothing is agreed until all components are agreed between Members. This applies to the different phases of the negotiation. It is the same principle that is applied in the WTO Doha round of negotiations to ensure that concessions at one sector may be compensated with gains in other sector to reach a balanced deal at the end of negotiations.

7.3.6.2.7 Most-Favoured Nation Treatment

The (MFN) principle is one of the key principles of the international trading system of the WTO and is explained in details under Article 7. In the T-FTA context, it means that the advantages, concessions or favours that any Tripartite country offers to third parties, outside the T-FTA, or to other Members, would be offered to other Tripartite countries on a reciprocal basis.[408]

The objective is very relevant for regional integration is it ensures that T-FTA partners trade amongst each other on terms as good or better than that offered to non-FTA partners. These advantages would be extended on a reciprocity basis and can apply to any individual agreement that Members of the T-FTA reach with other countries or economic blocks. The precise effect of this principle on Agreements currently in place between Members of the T-FTA and other developing countries needs further analysis.

[408] Art. 7 of the T-FTA Agreement.

7.3.6.2.8 National Treatment

This principle is another pivotal principle of the multilateral trading system. The principle, which is highlighted in Article 8, is in conformity with Article III of GATT 1994.

National treatment means that the products of the territory of any Tripartite member imported into the territory of other Members must be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their sale, offering for sale, purchase, transportation, distribution or use.[409] This ensures that after paying the tariff imported products will be on an equal footing compared to national products and that importing Members may not be able to neutralise the effects of regional trade liberalisation through internal taxes.

7.3.6.2.9 Reciprocity

Reciprocity means that Members or RECs grant to each other mutually agreed trade concessions. However, in the T-FTA context, it would take into consideration the special case of LDCs within the T-FTA in accordance with principle 3 on Flexibility and Special and Differential Treatment.

7.3.6.2.10 Substantial liberalisation

The T-FTA covers substantially all trade within the T-FTA. This is in conformity with the Article XXIV of GATT, which requires that duties and other regulations of commerce must be eliminated with respect to substantially all trade. Although this requirement has always been the determining factor in assessing RTAs in the Committee on Regional Trade Agreements (CRTA), it could be advisable to consider notifying the T-FTA under the Enabling Clause, keeping in mind its membership of developing countries and LDCs. This can avoid the strict examination under the CRTA.

[409] *Ibid*, Art. 8.

7.3.6.2.11 Consensus Decision Making

Decisions shall be taken on the basis of consensus. This would imply that the FTA would be launched only between those who have agreed to its terms and conditions.

7.3.6.2.12 Applying Best Practices

The T-FTA will apply best practices in the regional economic communities, the Tripartite Member/Partner States and international conventions binding Tripartite Member/Partner States.[410] This principle allows for learning from other experiences both at regional and international levels with the ultimate objective of fostering regional integration. This applies to the TDIs system as was shown during the negotiation process and could be of important added value to African countries.

7.3.6.3 RoOs negotiations in the T-FTA

Highlighting the Members positions toward RoOs can be indicative of the envisaged level of liberalisation. It is also closely related to the negotiations on TDIs as both could be used as protectionist measures.

Some authors believe that the T-FTA negotiation represent an opportunity to enhance regional integration given that the previous respective RoOs regimes are often considered as not necessarily conducive to regional trade integration.[411]

The focus of the RoOs TWG's work has been on finalising the various provisions of the RoOs Protocol, which deals with the basis for determining origin.

RoOs was dealt with under Article 12 and the proposed Annex 4 on RoOs. Annex 4 was not finalised when the agreement was signed in June 2015, which is a perquisite for the implementation of the FTA.

Article 12 of the Agreement merely states that goods shall be eligible for preferential treatment if they are originating goods in any of the Tripartite member/ partner states in accordance with the criteria and conditions set out in Annex 4.

[410] Art. 6 of the T-FTA Agreement.
[411] Naumann, (2014) *Tralac* 7.

The negotiations around the RoOs were very complex which is always the case in FTA negotiations, especially because this issue is always influenced by the pressures from national industries that call for protection.[412]

The disagreement in the T-FTA negotiations was promoted by the different RoOs systems applied in the three RECs and the fact that EAC and COMESA regimes are significantly different from the one used by SADC. SADC applies the local content rule while COMESA applies the added value rule.

At least 56% of the RoOs are dissimilar across the three RECs and the matrix of dissimilar rules extends to over 100 pages and concerns a majority of the product-specific provisions.[413]

The T-FTA secretariat came up with three lists of RoOs: A common list for tariff lines that was identical between the three RECs, A similar list where two sets of RoOs, mainly ECA and COMESA are similar and A different list where all the three RECs are different.

COMESA and EAC proposed to go ahead with the common list and the similar list, and requested that SADC adopt its RoOs to conform to the two other RECs in the different list. This proposal was not accepted by SADC.

This means that the RoOs for these tariff lines have to be negotiated on a line-by-line basis. Egypt proposed to start by applying the COMESA RoOs in the similar tariff lines of T-FTA and to incorporate a 35% value added rule on the different tariff lines between the three blocks.[414] This proposal was not accepted by SACU as it would need changes in the administrative structures which was not possible at the time.[415]

One of the ideas for solving this problem is for a provisional application of rules where they are the same, while noting that further work will continue in all situations where product-specific rules are dissimilar.

[412] Interview with Mrs Van Renen.
[413] Draper, Chikura & Krogman (2016) *German Development Institute Discussion Paper* 13.
[414] Interview with Dr. Fahmy.
[415] Interview with Mrs Van Renen.

As of January 2016 the negotiation was still going on. It is expected to take time in light of the huge dissimilarities and the importance of this issue to Members. The agreement is crucial for the T-FTA to come into force.

7.3.6.4 Trade facilitation in the T-FTA

Members were required to design and standardise their trade and customs documentation and information in accordance with international standards.[416] It was agreed to undertake trade facilitation programmes in accordance with Annex VI of the Agreement and with the objective of reducing the cost and time of processing documents with the objective of promoting economic development and intra-trade.[417]

It also requires Members to adopt common standards of trade procedures and to ensure adequate coordination between trade and transport facilitation within the T-FTA.[418]

In light of the fact that many Members are landlocked, the Agreement requires Members to facilitate the free movement of goods and means of transport in transit in accordance with Annex VII on Transit Trade and Transit Facilitation.[419]

The success in addressing challenges related to trade facilitation can determine, to a large extent, the level of success of the T-FTA in promoting regional integration. Trade facilitation can increase intra-trade and decrease the need to resort to TDIs against third party's trade which could be less competitive compared to Member's trade.

7.3.6.5 Dispute Settlement

Dispute Settlement proved to be another controversial issue during the negotiations. The dispute settlement mechanisms will affect the enforceability of the Agreement and the application of TDIs.

After long negotiations, Members decided to establish a Dispute Settlement Body which takes the model of the WTO DSU. This body is mandated to have the authority

[416] Art. 14 of the T-FTA Agreement.
[417] *Ibid.*
[418] *Ibid.*
[419] *Ibid*, Art.15.

to establish panels and an Appellate Body and maintain surveillance of implementation of rulings and recommendations; and in certain cases, authorise suspension of concessions under the Agreement.[420]

Article 30 requires Members who may impose measures not in line with the agreement, and which causes nullification or impairment of a benefit under the agreement, to remove these measures.

The Agreement also requires Members to engage in consultations before referring the matter to the dispute Settlement Body. Under Article 38, a member state could be subject to sanctions if it did not implement its obligations under the Agreement. The Agreement didn't define what the sanctions would be, and made it subject to decision by the Tripartite Summit, which may make it subject to wider political considerations.

The Agreement recognises the superiority of the T-FTA over the Agreements constituting the three RECs. In case of conflict, the T-FTA rules shall prevail.[421]

3.8.7 The Way Ahead for the T-FTA

The signing of the T-FTA Agreement in June 2015 was a major step on the path of African regional integration.

Nevertheless, the coverage and depth of the T-FTA was less than the ambitious objectives set out at the beginning of the negotiations in 2008. There was also significant delay in the achievement of this objective, which was mainly due to the slow progress in the negotiations and the differences between Members, which led to the postponement of the Summit to June 2015.[422]

No tangible progress has been achieved since the signing of the Agreement, as technical level negotiations are still ongoing.[423] At present a lot of significant issues are still under negotiations. It is believed that it will take many years to reach an Agreement.[424]

[420] *Ibid*, Art.30.
[421] Art. 28.3 of the T-FTA Agreement.
[422] Interview with Dr. Fahmy.
[423] Fahmy (2016) *Ahram.*
[424] Interview with Mrs. Van Renen.

The most controversial remaining issues are: Annex 1 on Elimination of Import Duties, RoOs negotiations and TDIs provisions and Annex 2. [425]

Additionally, the Agreement has to be ratified by the Parliaments of each member before it comes into force. [426] Those countries which did not join the T-FTA will continue to trade under previous existing arrangements.

In Phase II Members will endeavour to conclude two protocols in a period of 24 months from the time of entry into force of this Agreement. These protocols are: a protocol on services, a protocol on trade related matters including competition policy, cross-border investment, trade and development, and IPRs. [427] The two-year time frame is not obligatory, and it would be difficult, with the pace of negotiations, to reach an agreement on these deep negotiation agenda items among all Members within this time limit.

In addition to these substantial issues, there are more challenges regarding the direction of the negotiations. It was claimed rightly that the T-FTA did not deal, so far, with issues very crucial to African integration, and that the work of the T-FTA has diverted from the original objectives as the work is not dealing anymore with the problem of overlapping membership.[428]

The Tripartite Sectoral Ministerial Committee on Trade, Finance, Customs, Economic Matters and Home Internal Affairs has directed the TTF to prepare a draft post-Signature implementation roadmap.

This roadmap will cover issues necessary for the implementation of the T-FTA and includes notification of the WTO, as well as finalisation of pending issues, public awareness, capacity building and preparation of a T-FTA Resource Mobilisation Strategy.[429] As per Article 34 of the Agreement, Members shall institute appropriate modalities to fund their implementation commitments.

[425] Art. 3 of the T-FTA Agreement.
[426] *Ibid.*
[427] *Ibid*, Art. 43.
[428]Erasmus (2013) *Tralac* 4.
[429] Fahmy (2016) *Ahram.*

Under any scenario, the three RECs will continue to exist. There is no obligation to disband them. Overlapping membership may continue to be another challenge as a result of the fact that tariff offers were only extended between those Member who are not presently part of FTAs in the different RECs.[430]

Theoretically the T-FTA should be finalized by 2017, which is the date of the launch of the CFTA. It is highly doubted if this deadline will be attained.

[430] Tralac (2015) The Architecture of the Continental Free Trade Area annual conference.

3.9 Conclusions

African economic integration is necessary for boosting economic growth in a continent composed of small economies with many structural national challenges. In a world where MFN became the exception rather than the rule, economic integration should be a priority on the African agenda so African countries are not in a disadvantageous position compared with other countries and blocks.

The African continent has achieved significant progress in the area of regional integration, but intra-regional trade remains less than the average achieved in other developing blocks. African integration model reflects a strong focus on the liberalisation of trade in goods through a linear model of integration, while trade in services, and substantial issues received little attention.

The African integration model may find it necessary, at a later stage, to deepen its integration agenda to include creating effective regional organisations, services liberalisation, effective TDI systems, investment, competition policy and other fundamental issues that can address the national-level supply-side constraints.

Despite the challenges facing the continent the conclusion of the T-FTA is an important step. This step is not void of challenges and shortcomings. The T-FTA fell short of initial ambitious. It was supposed to deal with the major constraints on African integration, especially the overlapping membership, the different and complex RoOs, the small market size, the harmonisation of standards, trade facilitation issues as well as the lack of an efficient TDI system. The outcome of the first stage of negotiations was limited and built on reaching compromises among Members rather than dealing with the fundamental challenges facing Africa.

Nevertheless, the negotiations to finalise outstanding issues as well as the negotiation of Phase II present an opportunity for designing a new African trading system that is more conducive to regional trade with substantial improvements over previous endeavours. This should include – among other things – TDI issues as well as harmonization of rules and NTBs between the three blocks

The linear model of integration and the variable geometry approaches adopted by the T-FTA can bring consensus and support among African countries but in the meantime, it may result in a shallow integration model.

In certain areas, African countries are more open to trade with third parties than with other African countries. This highlights the importance of addressing the constraints on African integration and mainly the NTBs and trade facilitation related challenges. The focus should be on harmonizing the rules and standard between African countries to provide a sustainable and predicable business environment that is conducive for the development of economies of scale.

A lot of work needs to be done to ensure the success of this initiative. The T-FTA can draw lessons from previous endeavours for African integration as well as from other more advanced regional blocks, especially among developing countries.

Some initiatives in the African continent can improve supply-side capabilities, and consequently may have a very positive effect on the pace and success of regional integration. This includes the New Partnership for Africa's Development (NEPAD) and the Program of Infrastructure Development in Africa (PIDA).

African integration can also benefit from trade facilitation initiatives both at the regional level and in the context of the WTO ATF. Trade integration can benefit from simplifying customs procedures, increasing transparency and improving regulatory frameworks.

Chapter 4: The Legal Framework of Trade Defence Instruments

4.1 Introduction

Trade defence instruments (TDIs) are multilaterally agreed and permissible trade tools used by governments to restrict specific imports to their markets, protect national industries, and achieve economic and political objectives. They are categorised as mechanisms that put boundaries on certain imported products.[431]

TDIs are contingent and temporary by nature, and allow countries – under certain conditions – to temporarily increase the level of protection to a specific industry. TDI regimes require high national administrative costs and sophisticated institutional structures for applying and managing them.[432]

There are three major TDI tools: Anti-Dumping (AD), countervailing measures and safeguards.

AD and countervailing measures (jointly referred to as trade remedies) are designed to protect national industries against perceived "unfair" trade practices that cause material injury to domestic producers.[433] On one hand dumping takes the form of selling products below their “normal” price (“normal value”), usually determined as the selling price for the “like product” when sold for consumption in the exporting country,[434] while subsidised exports benefit from government-provided financial assistance. On the other hand, safeguard measures are employed to protect the local industries against a surge in imports caused by unforeseen developments. Safeguard measures can be taken even if there is no unfair trade practice, as long as imports have increased to an extent that causes serious injury to the domestic producers. [435]

[431] Bown (2008) 20 *Economics & Politics* 2.
[432] Meeting with Dr. Mueller.
[433] Art.3 of the ADA and Art.15 the ASCM.
[434] Art VI.1 of GATT 1994; Art 1 of the AD Agreement.
[435] Art.4 of the ASG.

The three instruments are governed by different rules, regulations and Agreements under both the WTO and RTAs.

4.2 The World Trade Organisation

TDIs are governed by the respective WTO Agreements and provisions jointly negotiated and agreed upon between Member states. Although the trade transactions are usually conducted in-between the private sector, the WTO directs its obligations to the governments and not the private sector in connection with TDIs investigations and practices.

The WTO is the only global organisation dealing with the rules of trade between nations.[436] The current WTO legal system consists of 16 different multilateral agreements that were negotiated and signed by the majority of the world's trading nations in consecutive round of negotiations,[437] and two different plurilateral agreements (to which only some Members are parties).[438] Decisions in the WTO are generally taken by consensus.[439]

The WTO comprises 164 Members,[440] of which the majority is developing and least developed countries (LDCs).[441] It governs more than 95% of world trade in goods and services.[442] It incorporates an enforcement mechanism through the Dispute Settlement Body (DSB). As of July 2016, there were forty-three African countries as members of the WTO which emphasises the importance of studying the WTO rules on TDIs.

The central objective of the WTO is to liberalise international trade, thus contributing to economic growth and development.[443] This takes place through reducing and eliminating obstacles to trade, administering and monitoring the application of the WTO's agreed rules for trade in goods, trade in services and trade-related intellectual

[436] "What is the WTO" <https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm> (accessed 10 December 2015).
[437] Art. II.2 of the Agreement establishing the WTO.
[438] *Ibid.* Article II.3. This include the Agreement in Trade in Civil Aircraft and the Agreement on Government Procurement.
[439] Art. IX of the Agreement establishing the WTO.
[440] According to WTO database (Accessed on 19 December 2016).
[441] *Ibid.* LDCs are classified by the UN. http://www.un.org/en/development/desa/policy/cdp/ldc/ldc_list.pdf
[442] "The WTO in Brief" https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr02_e.htm (Accessed on 19 December 2015)
[443] "About the WTO" <http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm> (accessed 26 January 2014).

property rights (TRIPRs), monitoring and reviewing the trade policies of WTO Members, as well as ensuring transparency of regional and bilateral trade agreements, and settling disputes among Members regarding the interpretation and application of the agreements.[444]

Eight rounds of trade negotiations under GATT and WTO have brought the average tariffs of developed countries on industrial products from 20-30% to less than 4%.[445] This was parallel with the introduction of multilateral rules that regulates the protection of national markets through non-tariff means including TDIs and certain standards.

The WTO's guiding principles are the pursuit of open borders, the guarantee of the Most Favoured Nation (MFN) principle, non-discriminatory treatment by and among Members, and a commitment to transparency in the conduct of its activities.[446]

4.2.1 The Most Favoured Nation

The MFN principle, set in the first Article of GATT, is the cornerstone of the WTO legal system. It obliges Members not to discriminate between trading partners by granting other Members preferential tariff unless they apply it to all other Members of the WTO.

The MFN principle is constitutional in that it impacts both the sovereignty of states and the relationship between states and their nationals.[447] The extension of the MFN principle to new subject matters during the Uruguay round and the manner of mandatory adoption marked its prominence in the universalisation of WTO law and the Constitutionalisation of the GATT.[448]

RTAs created under Article XXIV of GATT and the Enabling Clause are two main exceptions to the MFN. Certain trade measures, including the TDIs, are considered to be an important exception to the MFN principle as they allow Members to raise barriers against products that are considered to be traded unfairly from specific

[444] *Ibid.*
[445] Low & Santana (2009) 3 *Journal of International Trade and Diplomacy* 3 65.
[446] *Ibid.*
[447] Gathii (2011) 96.
[448] *Ibid.*

countries. African countries have preferential market access in some export markets which is an exception to the MFN principle.

CUs were traditionally treated as receiving an exemption from the MFN principle in bilateral arrangements, and this practice was preserved through the Havana conference and in the final International Trade Organisation (ITO) Charter.[449] A similar exemption was created for FTAs, which were an unknown concept before the GATT.[450]

4.2.2 The National Treatment

The national treatment Principle is highlighted in Article III of GATT and states that imported and locally produced goods should be treated equally after clearing tariffs customs.

This principle aims at providing a competitive environment and level playing field between local products and imported products. It operates as a restraint on national legislative power in terms of flexibility to impose additional national discriminatory measures against imported goods and services.

4.2.3 Special Treatment to Developing Countries in WTO

One of the important features of the WTO system is that it provides a wide range of flexibilities and special treatment to developing countries. The real effect of these provisions on recipient countries is debatable.

This special treatment was designed as a way to get all developing countries to commit to trade liberalisation and to encourage them to engage with more advanced economies. Special treatment provisions exist in different degrees in most of the WTO Agreements including the TDIs Agreements.

Some of these provisions aim at addressing the resource constraints of developing countries. This happens through longer transition periods of implementation and the provision of technical assistance. Other types of special treatment allow developing countries and LDCs to take special measures that are not allowed to other Members,

[449] Mathis & Bhagwati (2002) 38.
[450] *Ibid.*

like providing certain levels of subsidies and taking measures to restrict imports under certain conditions.

African countries strongly call for enforcing and strengthening these provisions as part of the current Doha negotiations.

4.3 Economic Effects of TDIs

TDIs target practices such as forms of price discrimination, subsidies and certain increases in imports. Price discrimination is usually practiced by companies while subsidies are provided by governments or government-affiliated bodies.

Subsidies and dumping usually affect negatively domestic producers, however they bring indirect positive results in certain cases. Dumping can result in welfare gains in the destination country from the lower prices offered to consumers and intermediate industries. Similarly, subsidies can result in welfare gains as a result of the transfer of foreign government financial resources to consumers and intermediate producers in the destination country.

The application of AD or countervailing measures can neutralise these welfare effects by increasing the price of the imported product to the level that would have prevailed under normal circumstances. However, in practice, the imposition of these measures could lead to redirecting trade flows to other markets, especially when these markets do not have functioning TDI system.

One view is that the application of TDIs represents a temporary breach of obligations, which could be efficient if the costs for the member affected exceed the benefits foregone by its trading partners.[451] The degree of effectiveness of TDIs is directly correlated to the net economic effect they have on the importing countries.

It has to be considered that the excessive and unjustified usage of TDIs may promote anti-competitive collusive practices by domestic firms making use of this protection.[452]

[451] Sykes (2006).
[452] *Ibid.*

The effect of the application of TDIs varies according to the analysed sector of the national economy. National producers are usually better off as these measures limit the volume of imported like goods through raising the level of protection. Consumers and downstream industries can be negatively affected through price appreciation, which can increase costs of consumed goods and industrial inputs and consequently decrease their competitiveness.

In practice, it is noted that policy makers may have a tendency to favour producer's interests rather than consumer welfare.[453] Under WTO rules the initiation of an investigation comes after a request from national producers.[454]

Some scholars have analysed the reasons behind favouring producer's welfare, and giving less attention to the interests of millions of voting consumers who may benefit from dumping and subsidisation in the form of lower prices.[455] This could be explained by three factors:

1. The gains to consumers are diffuse while the losses to domestic producers and their workers are concentrated and potentially significant.[456]
2. Consumers lack the incentive or capacity to engage in collective lobbying action, whereas domestic producers clearly possess both.[457]
3. TDIs serve as a safety valve for protectionist pressures from foreign competition.[458] In such cases TDIs in RTAs could act as an incentive to national producers to accept trade liberalisation in RTAs.

Some legal regimes, like the EU and Canada, consider the potential effects of the application of TDIs on consumers before imposing them.[459] This can partially balance the pressures from national producers to make use of TDIs.

It has been claimed that TDIs lack sound economic rationale as international price discrimination is neither unfair nor a problem unless it harms competition.[460] The

[453] Bowman *et al* (2010) 471.
[454] Art. 5 of the ADA and Art. 11 of the ASCM.
[455] Bowman *et al* (20 10) 471.
[456] *Ibid.*
[457] *Ibid.*
[458] Zheng (2012) *34 Michigan Journal of International Law* 158.
[459]Brink (2009) 316 and Art. 21 (Community Interest) of Council Regulation (EC) No 1225/2009.
[460] See for example Irwin (2009), Barceló (2007) 57 *Cornell L. Rev* 491; Bolton R (2011) 29 *Berkeley Journal of International Law 66.*

costs to consumers or downstream industries may be higher than the benefits to domestic producers, the economic rationale for TDI depends crucially on whether the practices addressed by TDIs are anti-competitive or market-distorting, or entail excessive adjustment costs by the industry.[461]

4.4 Policy Objectives of TDIs

The precise economic effects of TDIs may not be very clear, but decision makers usually have certain objectives in mind when they decide to make resort to them. TDIs provisions are a central part of RTA negotiation. They are of different degrees of sophistication and deviation from the WTO rules.

The motives for the incorporation of TDIs in national and regional legislations and their subsequent application could be explained by the prevailing economic conditions. The application can depend on economic situation of importing country, the category of product as well as the competition with locally made products. In other cases, it can be in response to new economic challenges, for example fiscal challenges, or emerging competition in recent years from low cost producers like China and others.

The expanded use of TDIs recently by emerging markets has posed risks to many countries as a result of increasing risks of trade deflection, which leads to countries redirecting their exports to easier-to-penetrate markets. This could have effects on developing countries with weak defensive mechanisms, which could make them the victim of this trade diversion.

TDIs are applied by developed and developing countries, either under WTO rules or under RTAs disciplines, and for different reasons that can be summarised as follows:

4.4.1 To Protect National Industries from Foreign Competition

The overarching objective of the application of TDIs is to protect national industries from foreign competition.

[461] Report of the Evaluation of the EU Trade Defence Instruments (2012).

This can happen by raising barriers to foreign competition in the form of low pricing or subsidised products. Both manifestations are on the rise as a result of increasing competition on market shares. TDIs can level the playing fields and ensure that foreign exporters do not benefit from subsidies not available to producers in the importing country or apply price discrimination between markets.

One point of view claims that there is little in history to suggest that AD ever had a scope more particular than protecting national producers from competition, and there is much to suggest that such protection was its intended scope.[462] It is submitted that this assumption could apply to countervailing measures and safeguards with some variations.

In the last three decades, the world witnessed a sharp decrease in the tariff protection of national markets as a result of the successive multilateral trade negotiation rounds, combined with bilateral liberalisation in RTAs, which have brought down the average tariffs on both industrial and agriculture items.

The WTO Uruguay Round achieved "across-the-board tariff cuts for industrial countries averaging 40%.[463] Additionally, in some countries tariffs were eliminated entirely in several sectors, including steel, medical equipment, construction equipment, pharmaceuticals, and paper.[464] Other kinds of barriers like agriculture subsidies and export restraints were reduced.[465] This liberalisation process could potentially be expanded further pending the successful conclusion of the Doha round and through the unilateral elimination of tariff barriers on selected sectors.

The emergence of global value chains offers new prospects for growth, development and jobs.[466] Developing countries are increasingly involved in international production networks and South-South global value chains (GVCs) are becoming more important.[467] This has also emphasised the need for protecting national industries.

[462] Finger (1991) *World Bank Working Paper* No. 783 at 1.
[463] Carbaugh (2011) 194.
[464] *Ibid.*
[465] WTO Agreement on Agriculture put a framework for Liberalising agriculture trade through three main pillars: Domestic Support, market access and export subsidies.
[466] Joint Report by the OECD, the WTO and UNCTAD (2013).
[467] WTO World Trade Report (2014) 7.

In particular, there is an increasing usage of TDIs by developing countries, which could be explained by the rising need for protection as a result of engagement in multilateral and bilateral tariff liberalisation schemes. Over the last few decades the reduction in MFN tariffs of developing countries was greater than the average world reduction in MFN tariffs.[468] TDIs are viewed by some analysts as a key component of the protectionist trade measures that are threatening to derail world economic recovery.[469]

Providing the necessary legal protection to national industries through the correct application of TDIs could be of importance to African countries seeking regional integration and integration into the international trading system

4.4.2 As an Incentive for Deep Cuts in RTAs

Despite being theoretically inconsistent with WTO's fundamental principle of MFN, the existence of TDIs is regarded with great urgency when it comes to facilitating trade liberalisation.[470]

The WTO TDI Agreements as well as the TDI provisions in RTAs could serve as an incentive for governments and pressure groups to accept deep tariff cuts while assuring national industries that government can reverse the effect of tariff cuts by the application of these emergency measures when needed.[471]

This is particularly important especially with the uncertainty over possible changes in trade relations, possible future economic shocks or changing political constraints that could follow after an agreement comes into force. In this regard, the TDIs could serve as an "escape clause" if changes in trade relations render the original deal inefficient.[472] This can help to readjust, even if this implies reversing liberalisation and the temporary non-implementation of commitments. This can provide governments with more policy space for adjustment to trade liberalisation.[473]

[468] Tharakan (1995) *The Economic Journal* 105.
[469] Zheng (2012) *34 Michigan Journal of International Law* 159.
[470] Voon (2010).
[471] Interview with Dr. Fahmy.
[472] Bagwell & Staiger (2005) *Journal of Legal Studies, Working Paper 10987*.
[473] Jackson (1997).

In most of the systems, TDIs are managed by Ministries, however the final decision to implement or not to implement these measures is largely affected by political consideration. An example of this is the introduction of safeguard measures in the NAFTA Agreement. The American Administration assured the Congress that NAFTA would not result in injurious increases in imports from either Mexico or Canada, and that safeguards provisions would address potential import surges where needed. [474]

Incorporating an effective regional TDI system could encourage African countries to implement their trade commitments in the context of the African regional integration plans and consequently may expedite the integration process.

4.4.3 During Transitional Periods

RTAs could incorporate TDIs provisions to be used exclusively during the transitional period. This serves as a tool for adjustments for national industries to prepare themselves for increasing competition as a result of the phasing out of trade barriers. In such circumstances TDIs are limited to an agreed period and are usually suspended after the end of the transitional period unless it is agreed to extend them. This could be applicable to the three TDIs or just to one or two of them.

For example, in the EU-Singapore FTA bilateral safeguard measures were limited to the transitional period.[475]

It may be advisable that TDIs on intra-African trade be used exclusively during the transitional period and in preparation for the stage of deep integration where TDIs could be removed between African countries.

4.4.4 As a Macroeconomic Tool

Although the *de jure* function of TDIs is to protect national industry, some countries may resort to them to boost public revenues. This trend could increase in times of economic pressures where the need to protect national industries combines with falling public revenues.

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[474] "The North American Free Trade Agreement: Implementation Act Statement of Administrative Action" <http://womenontheborder.org/wp/wp-content/uploads/2011/06/NAFTA-PROVISIONS.pdf>.
[475] Art. 3.10 of the EU-Singapore FTA.

In the last decade the global economy witnessed several economic crises in terms of massive global imbalances and real exchange rate fluctuations.[476] These had profound effects on the production sector and consequently on welfare and unemployment and could have triggered resorts to extraordinary protectionist policy measures which directly or indirectly would have had significant implications for global trade flows.[477]

The use of TDIs increased during the 2008-2009 financial crises, with the number of new product-level investigations in the first quarter of 2009 registering a 22.3% increase over the same period in 2008.[478] The number of new product-level TDIs investigations in 2008 was 34% higher than in 2007.[479]

Although countries resort to protectionist measures including TDIs in times of crisis and economic pressures, the WTO legal system and the strong enforcement mechanisms under the DSB make it costlier for countries to resort to across the board measures as was the case in the great depression in 1930s.

Surprisingly there is no much evidence to suggest that these tools were used excessively in Africa during the financial crisis either to protect national industries or to boost public revenues.

4.4.5 As a Tool of Industrial Development

Developing countries and LDCs at early stages of industrial development may resort to TDIs to protect their infant industries from foreign competition, and as part of national plans to boost industrialisation.

Some economists have stressed the need for the protection of infant industry to allow it to grow.[480]

Because of the particular situation of African industries, the T-FTA agreement refers specifically to the protection of infant industries through "appropriate measures" provided that the measures are applied on a non-discriminatory basis.[481]

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[476] The financial crisis 2007-2008 is considered the worst financial crisis since the great depression in 1930 and had its effects on both developed and developing countries.
[477] For more analysis of the using of protectionist policies in times crisis see Bown (2011) *CEPR and World Bank*.
[478] According to WTO TDIs statistics.
[479] *Ibid.*
[480] See in general Huang (2003) 17 and Mill (1885) 283-284.

4.4.6 As a Deterrence Mechanism

TDIs may be used in a politicised way to either retaliate against the application of TDIs by other countries, or as a mean of deterring other countries from using TDIs.[482]

Analysis that used data from some of the most active users of AD over the period 1980-2000 indicated a positive relationship between the number of AD investigations against a developing country and the number of AD investigations that a country initiates itself.[483] This proved the political nature of TDIs and that they could be used as counter mechanism against usage by other countries.

AD investigations initiated by Mexico within twelve months after a particular country had started an AD investigation against Mexico are three times as likely to result in a positive outcome.[484] This analysis of the Mexican AD investigations could apply to other countries and other tools of TDIs.

Incorporating an effective TDI system may act as a deterrent to the trading partners of African States and may limit the probability of using TDIs against African exports.

4.4.7 Protection for Vulnerable Communities

TDIs could be used in a customised way to render protection for certain sectors of the economy. In certain jurisdictions where there are communities that are heavily dependent on particular products for local employment, TDIs can be used to provide specific targeted protection for those vulnerable groups from possible disruptive change stemming from trade.[485]

In such markets the demand is not to any substantial degree supplied by producers of the product in question located elsewhere in the community. In such circumstances injury determination is different from normal circumstances, as it could be established even if a major portion of the total community industry is not injured, provided there

[481] Art. 24 of the T-FTA Agreement.
[482] Interview with Mr. El Sherbiny.
[483] Aggarwal (2004) 32 *World Development* 1043.
[484] Francois & Niels (2004) *Tinbergen Institute Discussion* 23.
[485] Report on the Evaluation of the EU's TDIs (2012) Volume I at XV.

is a concentration of dumped imports into such an isolated market. This could be of particular importance in the African case.

4.5 The Flexibility Nature of TDIs

Countries have substantial discretion in the investigation and application of TDIs measures notably in both margins and injury determinations.[486] This is a result of the flexible nature of TDIs rules in WTO and RTAs. The application process of TDIs could be riddled with subtle tricks and arbitrary biases that invariably favour the domestic producers.[487]

This flexibility can be manifested in the choice between different jurisdictions, the calculation of margins, injury determination and the preference to apply one of the three TDIs.[488] In a survey of ten major user countries of TDIs[489] it was found that the increasing use of constructed normal values gave too much discretion to investigating authorities in determining the existence of dumping. [490]

Additionally, the average dumping margin calculated by the USA Department of Commerce (DOC) had risen from an average of 15.5% in the early 1980s to an average of 63% by 2000, also the proportion of cases in which the USA International Trade Commission (ITC) found material injury rose from 45% to 60% in the same period. This could be an indication of increasing usage of dumping and subsidies to get access to the USA market nevertheless it can also indicate the discretion the investigating authorities in the USA have in determining injury and the dumping margin.[491]

Investigating Authorities differ in the procedural parts of the investigations. The main differences depend on the flexibility in accepting price undertakings either from members of RTAs or from third parties, the point at which they start to collect provisional duties as well as the flexibility in applying the lesser duty rule.

[486] Blongien & Prusa (2003)
[487] Irwin (2009) 160.
[488] Blonigen and Prusa (2003).
[489] Australia, Brazil, China, the EU, India, Indonesia, Mexico, South Africa, Thailand and the USA.
[490] Horlick & Vermulst (2005).
[491] Blonigen (2003).

Additionally, the preference of one of the three TDIs is usually based on the intended objective and the economic circumstances. In many cases it is a result of pressures from national industries and interest groups.[492]

In the coming sections the legal framework of the three TDIs will be analysed in more details.

4.6 Anti-Dumping

4.6.1 Anti-dumping Definition, Basic Concepts and Legal Framework

The legal framework of the AD regime consists of Article VI of GATT 1994 and the Anti-Dumping Agreement (ADA) which is essentially the implementation of Article VI.

The ADA provides detailed rules to determination of dumping, the criteria to determine material injury, the link between dumping and injury, the process by which the national authorities can conduct investigations and the implementation of AD measures.

The ADA applies only to dumped goods. It has been accepted that neither Article VI nor the ADA covers exchange rate dumping, social dumping, environmental dumping or dumping of services. [493]

The following definitions are important in the context of the ADA:

4.6.1.1 Dumping

Dumping is the introduction of products of one country into the commerce of another country at less than the normal value of the products.[494] Dumping takes place when the export price of the product is less than the comparable price of the like product when destined for consumption in the exporting country.[495]

[492] Interview with Mr. EL Sherbiny.
[493] UNCTAD (2003) 3.
[494] Art. VI of GATT 1947which was carried forward into GATT 1994.
[495] Art. 2.1 of the ADA.

Dumping is not prohibited as such, but it is condemned and GATT/WTO rules authorise the importing Member to take measures to offset the dumping if it causes or threatens material injury to their established industries or materially retards the establishment of a domestic industry.[496] Using AD measures in cases of potential negative effects on the establishing an industry is of particular importance to developing countries pursuing industrialisation programs.

The ADA does not discuss dumping in enough details. Dumping can be resorted to for many reasons depending on the objective of the exporting company. It could be for predatory reasons in which case it would fall under the competition law. It may also be a cyclical dumping which takes place as a result of low demand in the exporting country. It could also be a market expansion dumping, state-trading dumping or strategic dumping. Dumping can also take place inadvertently, as a result of exporters trying to meet the price requirements of importers.[497]

4.6.1.2 AD measures

AD measures are unilateral remedies which may be applied by a WTO member after an investigation and determination, that the dumped product is causing material injury to a domestic industry producing the like product.[498] The ADA regulates the requirements for imposing AD measures.

Although that there is strong support for the idea that dumping is an unfair trade practice as well as a problem for international trade,[499] the economic effects on producers and consumer's welfare are not clear.

4.6.1.3 Like Product

Injury determination is correlated with injury to the domestic industry producing the like product, consequently the determination of the like product is very relevant to the investigations and for both the dumping and injury determinations and is one of the most contested concepts in DSB litigation.

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[496] *Ibid.*
[497] Interview with Dr. Brink.
[498] Art. 1 of the ADA.
[499] See in General Viner (1923) *University of Chicago Press*.

A like product is a product which is identical to the product under consideration, or in the absence of such a product, another product which has characteristics closely resembling those of the investigated product.[500]

The definition of like product in both the ADA and the ASCM is narrow, especially when compared to the definition in the ASG, which is broader and includes like or directly competitive products.[501]

4.6.1.4 Domestic Industry

For purposes of initiation of investigations and injury determination, domestic industry is defined as the domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production.[502] Domestic producers who import a dumped or subsidised product could be excluded from the domestic industry since they benefit from the dumped or subsidised imported goods.[503]

The ADA does not define the term "major proportion" which was discussed in many cases in the DSB. In *Argentina-Poultry*, the panel rejected a claim that Argentina violated Article 4.1 of the ADA by defining "a major proportion" of the domestic industry in terms of domestic producers representing only 46% of total domestic production.[504] The panel specifically indicated that the domestic industry does not necessarily have to include more than half of the domestic production.

A territory could be divided into sub-markets in exceptional circumstances, where the producers within each market may be regarded as a separate industry.[505]

This will require certain conditions, mainly that the producers sell all their productions within their respective markets, and that the demand in that market is not

[500] Art. 2.6 of the ADA.
[501] *Ibid*, Art 15.1, footnote 46; Art. 2.1 of the ASG.
[502] Art. 4.1 of the ADA.
[503] *Ibid.* Footnote 11 of the ADA explains that producers shall be deemed to be related to exporters or importers only if (a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers.
[504] Panel Report, *Argentina-Poultry*, para. 7.344.
[505] Art. 4 (1) ii of the ADA.

substantially supplied by producers elsewhere in the territory.[506] This provision is of particular importance in the context of regional integration in Africa.

4.6.1.5 Export Price

The export price is a key factor in determining if dumping is taking place by comparing it to the normal value of the product.

The ADA does not define the export price; however, the reference is usually made to the ex-factory price which is normally indicated in the commercial invoice, the bill of lading and the letter of credit.

In some cases, the export price provided by the exporters is not reliable where the exporter and importer are related. In such cases the investigating authority may construct the export price on the basis of the price at which the imported products are first resold to an independent buyer.[507] This usually takes place by making allowances for costs, duties and taxes incurred between importation and resale in addition to profit.[508] Such allowances could reduce the export price and increase the likelihood of a dumping finding. It could also lead to higher dumping duties.

4.6.1.6 Normal Value

The normal value is the price of the like product, in the ordinary course of trade, in the home market of the exporting Member.[509] Its calculation is important to determine the existence of dumping.

Normal value calculation should depend on reliable market costs and prices that are the result of market forces. Additionally, sales in such market shall be sufficient in quantity, i.e. more than 5% of the sales of the product under consideration to the importing Member. A lower ratio should be acceptable where the evidence demonstrates that domestic sales are of sufficient magnitude to provide for a proper comparison.[510]

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[506] *Ibid.*
[507] Art. 2.3 of the ADA.
[508] *Ibid*, Article 2.4.
[509] Art. 2.2.1 of the ADA.
[510] Footnote 2 of the ADA.

Where there are no or insufficient domestic sales in the ordinary course of trade, the normal value may be determined with reference to either the export price to an appropriate third country or to the constructed value to produce and sell the product in the exporting country.[511] This can both raise the probability of dumping and the dumping margin.

In *Korea-Paper*, Indonesia argued that Korea violated Article 2.2 of the ADA by failing to make an affirmative determination that there were no or insufficient domestic sales in the ordinary course of trade before resorting to constructed normal value. The panel found that it was not necessary since Korea had concluded that there was no verifiable sales data and therefore, implicitly, there were no sales in the ordinary course of trade on the domestic market.[512]

In the case of non-market economies (NMEs) a strict comparison with domestic prices may not always be appropriate and the investigating authority may revert to constructed price.[513] This is because the state may have a complete or substantially complete monopoly of its trade or where the prices are directly or directly affected by factors other than the mere market forces.

4.6.2 Determination of Dumping

The ADA places certain obligations on the investigating authority in order to determine the existence of dumping and to calculate the dumping margin.[514]

The comparison between the export price and the normal value should be as precise as possible and should be made on a weighted average basis at the same level of trade, and in respect of sales made as nearly as possible at the same time, normally at the ex-factory level.[515] Costs incurred after that must be deducted to the extent that they are included in the price.[516] This comparison should take into consideration the

[511] Art. 2.2 of the ADA.
[512] Panel Report, *Korea-Paper*, para.7.94.
[513] Note 2 to Article VI.1 of GATT.
[514] *Ibid*, Art. 2; Panel Report, *Thailand - H-Beams* para. 7.35.
[515] Art. 2.4 of the ADA.
[516] *Ibid.*

differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, etc.[517]

4.6.3 Determination of Injury or threat of Injury

Although dumping is defined both in Article VI of GATT and in the ADA, material injury is not defined in either document.[518]

Injury determination shall involve an objective examination – based on positive evidence – of both the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products and the consequent impact of these imports on the domestic producers of such products. [519]

The ADA requires that the examination of the impact of the dumped imports on the domestic industry include an evaluation of all relevant economic issues affecting the national industry producing the like product.[520] It lists a non-exhaustive list of 15 factors which includes: actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilisation of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.[521]

In determining if dumping has caused material injury or not, the investigating authority depends on data provided by the initiating company / industry as well as by the companies under investigation.

In *Thailand-H-Beams* the AB stated that Article 3.4 of the ADA requires the investigating authority to base its determination of injury on all relevant reasoning and facts before it.[522]

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[517] *Ibid.*
[518] *Ibid*, Art. 2.1.
[519] *Ibid*, Art. 3.1.
[520]Art 3.4 of the ADA, as interpreted by Panel Report, *EC-Bed Linen*, para. 6.167; Panel Report, *Guatemala-Cement II*, para. 8.283; Panel Report, *Mexico-HFCS*, para. 7.128; Panel Report, *Thailand-H-Beams*, para. 7.231; Panel Report, *Egypt-Rebar*, para. 7.37; Panel Report, *Mexico-HFCS.* Para. 8.2.
[521] Art. 3.4 of the ADA.
[522] Appellate Body Report, *Thailand-H-Beams*, paras. 106-111.

In *Mexico-Corn Syrup (HFCS)* the panel concluded that a threat analysis must also include evaluation of all the Article 3.4 factors and that the definitive AD measure imposed on imports of HFCS from the USA was inconsistent with the requirements of the ADA because of its determination of threat of material injury on the basis of only a part of the domestic industry's production.[523]

In *Egypt-Steel Rebar* the panel confirmed this decision by stating that, in a threat of injury investigation, the central question is whether there will be a "change in circumstances" that would cause the dumping to begin to injure the domestic industry.[524]

In *EC-Bed Linen* the panel ruled that the EU acted consistently with its obligations by considering all imports from India (and Egypt and Pakistan) as dumped in the analysis of injury caused by dumped imports.[525]

It is recommended that an injury determination be made over a period of three years.[526] In reality the investigation period differs from one country to another according to national legislation and capacities of the investigating authorities. Such a relatively long period may be necessary for the determination of injury and causation.

In *Argentina-Poultry* the panel stated that the ADA does not require that the periods of review for dumping and injury must necessarily end at the same point in time.[527] It further explained that, since there may be a time-lag between the entry of dumped imports and the injury caused by them, it may not be appropriate to use identical periods of review for the dumping and injury analyses in all cases.[528]

In certain cases, the domestic industry of the importing state can suffer dumping from multiple sources. In such case, the investigating authority may apply the cumulation principle, where the injury establishment could be based on the cumulative effects of multiple dumping.

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[523] Panel Report, *Mexico-HFCS*, paras. 7.12, 7.131 and 8.2.
[524] Panel Report, *Egypt-Steel Rebar*, para.7.91.
[525] *Panel Report, EC-Bed Linen, para. 7.1.*
[526] WTO Committee on AD Practices - Recommendation Concerning the Periods of Data Collection for AD Investigations - Adopted by the Committee on 5 May 2000, G/ADP/6 (16 May 2000).
[527] Panel Report, *Argentina-Poultry*, para. 7.287.
[528] *Ibid.*

This is done on condition that the margin of dumping for each investigated country is not *de minimis, i.e.* less than 2%, and the volume of dumped imports is not negligible, *i.e.* less than 3% of the total volume of imports.[529] It is noted that under the ADA, the same thresholds for *de minimis* dumping margin and negligible volume of imports are used for both developing countries and developed countries, which is not the case under the ASCM and ASG.

In addition, a cumulative assessment must be appropriate in light of the conditions of competition among the imports and between imports and the like domestic product.[530] Many WTO Members apply cumulation in all cases as long as the thresholds are met.[531]

An investigation may be initiated and AD measures imposed even in the event that no material injury has yet manifested. Measures could be imposed on the basis of a threat of material injury to the domestic industry. In these instances the investigating Authority must also consider four additional factors, namely: a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation; sufficient freely disposable, or an imminent substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports; the prices of imports which could have a suppressing effect on domestic prices, and would likely increase demand for additional imports; and inventories of the product being investigated. [532]

The investigation shall consider the totality of the factors to reach a conclusion if further dumped exports are imminent and that, unless AD measures are imposed, material injury would occur.

4.6.4 Determination of the Casual Link

In addition to proving the existence of dumping and material injury to the domestic industry, the investigating Authority must demonstrate the causal link between dumping and injury. This demonstration must be based on an examination of all relevant evidence before the authorities, which must include any known factors other

[529] Art. 3.3 of the ADA.
[530] Art. 3.3 (b) of the ADA.
[531] UNCTAD (2003) 25.
[532] Art. 3.7 of the ADA.

than the dumped imports that are also injuring the domestic industry and the injury as a result of such other known factors must not be attributed to the dumped imports. The ADA provides a non-exhaustive list of other factors which may be relevant depending on the facts of the case.[533]

In *HP-SSST* China the panel upheld the claims by Japan that China's imposition of AD duties was inconsistent with the ADA based on China's failure to evaluate the magnitude of the margin of dumping in considering the impact of subject imports on the domestic industry; and for improperly relying on the market share of subject imports, and its flawed price effects and impact analyses, in determining a causal link between subject imports and material injury to the domestic industry; and failing to ensure that injury caused by the decrease in apparent consumption and the increase in production capacity was not attributed to subject imports.[534]

The margin of dumping is not an injury factor, but can be an indication of the cause of injury. In *China-X-Raying*, the panel emphasised that an investigating authority is required to evaluate the magnitude of the margin of dumping and to assess its relevance and the weight to be attributed to it in the injury assessment.[535]

4.6.5 Anti-dumping Investigations

Members are not in a position to impose AD measures until an investigation has been initiated and conducted in accordance with the provisions of the ADA. An investigation normally takes place over a period of one year and may not exceed 18 months.[536]

One of the main challenges of the imposition of AD measures at the WTO DSB is to claim that the investigation conducted by the national authorities violates the requirements of the ADA.

The procedures of the initiation of an investigation usually begin with an application made by the domestic industry claiming the existence of dumping, material injury and

[533] *Ibid*, Art. 3.5.
[534] Panel Report, *China-HP-SSST*.
[535] Panel Report, *China — X-Ray Equipment.*
[536] Arts. 1, 5.1 and 5.10 of the ADA.

causal link.[537] Although the investigating authority of the importing country must examine the accuracy and adequacy of the evidence contained in the application, the ADA does not give clear detail on how this examination should be conducted, and consequently leaves the matter to the judgement of the DSB. This is an indication of the flexibility the investigating authorities have in the conduct of investigations.

To ensure transparency in the investigation process the investigating authority has an obligation to inform the government of the exporting Member before initiating the investigation.[538] Additionally, parties to an investigation shall be allowed to present their views in defence of their interests.[539] Before the final determination is made, authorities shall disclose information to all interested parties on the essential facts that form the basis for the decision.[540] This is also valid for the ASCM.[541]

In a similar manner to Article 6, Article 12 establishes a framework of procedural and due process obligations concerning, notably, the contents of a final determination.[542] Any information submitted to the investigating authorities on a confidential basis must be treated as confidential.[543] However, any party submitting information in confidence must provide reasons for claiming confidentiality and must provide a non-confidential summary in sufficient detail to provide other interested parties with a reasonable understanding of the information submitted in confidence.[544]

The investigating authority must publish detailed explanations of their determinations.[545]

After the initiation of the investigation, the investigating authority could terminate the investigation in three scenarios: If the investigating authority did not establish the

[537] Art. 5.1 of the ADA. Note that Art 5.6 provides for self-initiation of investigations under certain conditions.
[538] Art. 5.5 of the ADA.
[539] *Ibid*, Article 6.2.
[540] *Ibid*, Art. 6.9; AB Report, *China-GOES*, para. 286(c); Panel Report, *China-X-ray equipment*, para. 8.1(g).
[541] Art. 12.8 of the ASCM.
[542] Art. 5.3 of the ADA; Panel Report, *Mexico-HFCS*, para. 7.102-7.110; Panel Report, *USA Stainless Steel*, para. 5.20.
[543] Art. 6.5 of the ADA.
[544] *Ibid*, Art. 6.1.3.
[545] Art 12.2.2 of the ADA; Panel Report, *Mexico-HFCS*, para. 7.197.

existence of either dumping or injury; in cases where the dumping margin is *de minimis*, and where the volume of dumped imports is negligible. [546]

4.6.6 Imposition of AD measures

Investigations typically consist of preliminary and final investigation phases, and preliminary measures may be imposed after an affirmative preliminary determination. In certain jurisdictions, like Australia and New Zealand, authorities often move straight to a final determination.[547]

4.6.6.1 Provisional Measures

The rationale of imposing provisional measures is to save the national industry from possible injury in case of delay. They could be imposed not before 60 days from the date of initiation of investigations.[548] This time constraint is meant to prevent potential abusive usage of these measures.

Similarly, and in order to limit any possible abuse of these measures, the maximum duration of imposition is four months with a possible extension to six months, after a request from the exporters and under certain conditions.[549]

The investigating authority has a duty to issue a public notice, and to give interested parties adequate opportunities to submit relevant information, before imposing these measures.[550]

In cases where authorities examine the lesser duty rule such as the EU and South Africa, they normally impose provisional duties for a period of six months.[551]

4.6.6.2 Definitive Anti-Dumping Duties

When the investigation determines the existence of dumping, injury and the causal link, the importing member can impose definitive AD duties at a level not exceeding

[546] Art. 5.8 of the ADA. Unless countries which individually account for less than 3% collectively account for more than 7% of the imports. See the discussion under section 4.4.3 of this Thesis.
[547] See generally Bienen, Brink & Ciuriak (eds) (2013).
[548] Art. 7.3 of the ADA.
[549] *Ibid*, Art. 7.4.
[550] Art. 7.1 of the ADA. Note that Art. 7 of the ADA uses the term ‘measures’ and not ‘duties.
[551] See for example, South African provisional AD measures on frozen potato chips originating in or imported from Belgium and the Netherlands in 2013 and EU provisional AD tariffs on Chinese solar panels in 2013.

the margin of dumping.[552] It can also decide to retroactively levy provisional AD duties, where the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury.[553]

Definitive AD duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures, in cases of history of dumping or in the cases of fear of undermining the remedial effect of the definitive AD duty to be applied.[554]

Definitive measures should be imposed and collected on a non-discriminatory basis on all imports that are found to be dumped and causing material injury.[555]

In some cases, and even when there is injurious dumping, some countries may prefer not to impose AD duties. This could happen as a result of economic analysis that indicates that the consumer welfare could outweigh the negative effect on national industries. [556]

4.6.6.3 Price Undertakings

The importing country may wilfully decide not to impose AD measures and accept undertakings from importers to revise prices or cease exports to the area in question at dumped prices so that the injury effect will be eliminated.[557]

Price undertakings can achieve the same objective of AD measures without the negative correlation that may be connected with their imposition.

The acceptance of price undertakings may qualify as a constructive remedy in cases involving developing countries as shown in *EC-Bed linen*.[558]

[552] Art. 9.1 of the ADA
[553] But not in cases of a threat thereof or of a material retardation of the establishment of an industry.
[554] Art. 10.6 of the ADA. This is provided that that the importers concerned have been given an opportunity to comment.
[555] Art. 9.2 of the ADA.
[556] UNCTAD (2003) 34, and see in general Bienen, Brink & Ciuriak (eds) (2013). See also Brink (2009) National interest; Moen (1998).
[557] Art. 8.1 of the ADA.
[558] Panel Report, *EC-Bed Linen*, para. 7.2. See also the discussion under section 4.6.8 of this Thesis.

4.6.7 Anti-dumping Reviews

Anti-dumping reviews have the objective of ensuring the non-abusive usage of the AD measures and that these measures are imposed only to the extent necessary to achieve its objectives.

According to the ADA there are three types of AD reviews. These reviews are different from the parallel channels through the judicial reviews and reviews under the Dispute Settlement Understanding (DSU).

4.6.7.1 New Shipper Reviews

These reviews are meant to safeguard the rights of new shippers who are usually producers who did not export during the original investigation period and may be subject to the residual duty that was imposed in the original investigation. This happens by giving new exporters the right to request the importing country to carry out reviews on AD measures in a prompt and accelerated manner.[559]

During the review process the importing country is required not to impose AD duties on the newcomers; however, it can request guarantees to ensure the possibility of imposing retroactive AD duties in case of determination of dumping.[560] If dumping is established, the residual duty will simply be re-imposed on the new exporter. However, in the event of no dumping, the duties will be removed in respect to imports from that exporter.

4.6.7.2 Sunset Reviews

Definitive AD duties shall normally expire five years after their imposition. In certain cases, the domestic industry may request a review, within a reasonable period of time preceding the expiry, claiming that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.[561]

In the sunset reviews investigations require prospective and counter-factual analysis. The absence of dumping during the review does not necessarily lead to termination of

[559] Art. 9.5 of the ADA.
[560] *Ibid.*
[561] Art. 11.3 of the ADA.

an AD duty pursuant to Article 11.2 ADA, because it might indicate that the measures are having the desired effect.[562]

4.6.7.3 Interim Reviews

Interim reviews are conducted to ensure that AD measures are not implemented for longer period than necessary.

They could be conducted during the implementation period upon request from interested parties (usually importers or foreign exporters) to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both.

In all cases the measures may stay in force pending the outcome of the review.[563]

4.6.7.4 Judicial Reviews

All decisions by the investigating authority are subject to national judicial review.[564] This ensures that the investigating procedures are consistent with national laws and international obligations according to the duality of law.

The ADA requires that judicial reviews can promptly review administrative actions relating to final determinations and that it shall be independent of the authorities responsible for the determination or review in question.[565]

In certain jurisdictions administrative decisions could be subject to regional review mechanism such as in the Bi-national Panel in NAFTA.

4.6.7.5 The Dispute Settlement Body

Another form of review is through the DSU.[566] While judicial reviews make reference mainly to national legislation, the DSU mandate is to verify if decisions taken by

[562] Panel Report, *USA – DRAMS*, para. 6.32.
[563] *Ibid.*
[564] Art. 13 of the ADA. Yilmaz (ed) (2013); Brink (2012) Anti-Dumping and Judicial Review 274-281 *Global Trade and Customs Journal*.
[565] *Ibid.*
[566] Art. 17.4 of the ADA.

administrative authorities of Members do not violate the ADA, Article VI of GATT 1994 and WTO law in general.

This takes place in two steps: a panel review and an Appellate body (AB) review. It is noted that the resort to the DSB has its own limitations due to financial and capacity constraints, especially in the case of developing countries.[567]

The request to establish a panel in the DSB should challenge the legality of the definitive AD duties, the acceptance of price undertakings, or provisional measures that has a significant impact. [568]

A country cannot request the establishment of a DSB for a mere initiation of dumping investigation. It is noted that this provision does not have a similar clause in the ASCM and ASG.

The ADA was a source of a large number of disputes under the DSU, however the number of AD measures challenged under the DSU is limited compared to the measures imposed. This could be explained in light of the difficulties facing many developing countries in making use of the DSU, including the political factors, lack of sufficient technical capacities and high cost of litigation.[569]

As of the 15 March 2016, there were 113 cases under the review of the DSB which cited the ADA in the request for consultations.[570]

4.6.8 Special Treatment to Developing Countries

The three TDIs Agreements include some provisions on special treatment to developing countries and LDCs in the usage and application of TDIs. Nevertheless, most of these provisions are weak and do not result in *de facto* tangible advantages to recipient countries.

Since the Members of the T-FTA are all developing countries, this issue is of particular importance.

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[567] El Taweel LLM Thesis (2010).
[568] Appellate Body Report, *Guatemala-Cement I*, paras. 62-72.
[569] El Taweel, LLM Thesis (2010).
[570] "Disputes by Agreement" <https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A6> (accessed 20 March 2016).

The ADA deals with this issue under Article 15 which requires developed countries to give "special regard" to the special situation of developing countries when considering the application of AD measures and to explore possibilities of "constructive remedies" provided for by this Agreement before applying AD duties where they would affect the essential interests of developing countries. [571] The Article is vague especially when it comes to defining what is meant by "special regard" and what could be the "constructive remedies".

In *EC-Bed Linen*, the panel stated that the developing countries abide by the same rules of the ADA, and more importantly a decision not to impose an AD duty on a developing country was not required as constructive remedy.[572] Nevertheless, the panel stated that the "exploration" of other possibilities must be actively undertaken by the developed country authorities with a willingness to reach a positive outcome, which could be in the form of acceptance of price undertakings or application of a lesser duty rule especially in cases where the measures would affect the essential interests of a developing country.[573]

In *EC-Pipe Fittings*, the panel indicated that, in the reading of Article 15 of the ADA, a constructive remedy cannot be in a form not foreseen in the ADA, such as price quotas, quantitative undertakings, and tariff quotas.[574]

The reading of Article 15 of the ADA and the decisions of the DSB indicate that there is no tangible preferential treatment to developing countries under the ADA, as there is no enforceable obligation on developed countries not to impose AD measures on developing countries, nor to accept any constructive remedy.

4.6.9 Anti-dumping Statistics[575]

This overview relies mainly on notifications to the WTO from 1 January 1995 till 31 December 2014.[576] It is noted that this covers only investigations and actions that

[571] Art. 15 of the ADA, which is unchanged from the Tokyo Round Code.
[572] Panel Report, *EC-Bed Linen*, para.6.233.
[573] *Ibid*, para 6.229.
[574] Panel Report, *EC-Pipe Fittings*, paras. 7.72, 7.78.
[575] Author's own calculation based on WTO AD statistics 01/01/1995 - 31/12/2014 https://www.wto.org/english/tratop_e/adp_e/adp_e.htm (accessed 28 March 2016).
[576] Note that by October 2016 WTO statistics have not been updated for 2015.

were notified to the GATT / WTO. Section 6.3 of this thesis addresses in more details the statistics of African countries both as user and subject of TDIs.

It is noted that there is a positive correlation between the country's share of international trade and its usage of TDIs. The more the country is involved in international trade, the more it can be both a user and a subject of TDIs. This is proved by the increasing usage of TDIs by major traders like the USA, EU, China, Canada and Australia.

These statistics shows clearly that countries have a general preference for using AD measures compared to countervailing duties and safeguard measures. The increased usage of TDIs is primarily driven by AD, which has become known as the "most important non-tariff trade barrier. [577]

AD measures account for 89.9% of all TDIs measures reported to the WTO. There were 3402 TDIs measures reported in the comparison period; out of them 3058 were AD measures, 202 countervailing measures and 142 safeguards measures.

4.6.9.1 Anti-Dumping Initiations

Until the 1990s Australia, Canada, the EU and the USA initiated the bulk of all AD investigations.[578]

The total number of initiations according to exporter country was 4757 initiations. China was the number one target of these initiations with 1052 initiations,[579] which represent around 22% of total initiations. The Republic of Korea was the second with 349 initiations followed by USA (266), Chinese Taipei (265), Thailand (197), and India (192). It is noted that, apart from the USA, the other five target countries are developing or emerging economies.

As for initiators of AD investigations, India came first with 740 AD initiations followed by the USA (527), the EU (468), Brazil (369), Argentina (316), Australia (289) and South Africa (229).

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[577] Zanardi (2004) 27 *The World Economy* 403 at 403.
[578] However, note that Brink (2002) 2-3 and Brink (2004) 4, 54-58 indicate that South Africa was also a major user of AD, but that it did not notify its investigations to the GATT as it was not a signatory to the Anti-Dumping Code.
[579] Although China joined the WTO in 2011.

For this 20-year period the average initiations per year is 238, with increasing trend in initiations from 1995 till 2001 where it reached the peak of 372 initiations in 2001 which coincided with China's accession to the WTO and the general perception of the need for more protection of national industries. After a period of substantial decline, the number of initiations rose again to 208 initiations in 2008 compared with 163 in 2007. Subsequently, according to a report by the WTO, some 208 AD procedures were initiated in 2014, compared to around 160 launched in 2009.

4.6.9.2 Anti-Dumping measures

Not all AD initiations are developed into AD measures, as some investigations reach a conclusion that the conditions for imposing AD measures are not met.

Traditionally, developed countries and especially the USA, the EU, Canada, Australia, and New Zealand accounted for about 95% of all AD actions notified to the GATT.[580] It is noted that South Africa was one of the most frequent users of AD measures in the first three quarters of the 20th century, and the first user in the first ten years of GATT despite the fact that most of its AD investigations were un-notified.[581]

Since the establishment of the WTO, many other countries have adopted AD legislation and applied AD measures. Developing countries such as India, South Africa, Argentina, Brazil, Mexico, Indonesia, Pakistan and China now account for the majority of AD actions among developing countries. This has changed the landscape of the users of these measures in favour of developing countries with strong industrialisation programs.

According to the WTO data for the period under analysis the total numbers of AD measure were 3058, which represent around 64% of total initiations. China was the number one target of these measures by 759 measures, followed by Republic of Korea (213), Chinese Taipei (173), the USA (162), Japan (134), and Thailand (129).

As for countries imposing AD measures for the same period, India comes first with 534 AD measures, followed by the USA (345), the EU (298), Argentina (228) and Brazil (197 measures).

[580] Teh, Prusa & Budetta (2007) 7 *WTO Economic Research and Statistics Division*.
[581] See Brink (2012) Anti-Dumping in South Africa.

The conversion rate is calculated by dividing the number of measures over the number of initiations. It varies from one country to another. Among the top users of AD measures India has the highest conversion rate (72.2%) while the Brazil has the lowest rate (53.4%)

It is noted that AD measures by developing countries are increasingly directed to other developing countries, with China as the main target. In the comparison period India, which is the biggest user of AD measures, imposed 132 AD measures against China, and 42 measures against Chinese Taipei, while it imposed 41 measures against the EU and 27 measures against USA. Argentina's major targets of AD measures are China (70), Brazil (38) and Republic of Korea (12).

(Table 1)
Anti-Dumping Statistics (By Initiating member)
(1/1/1995- 31/12/2014)

	India	USA	EU	Brazil	Argentina	Total
AD initiations	740	527	468	369	316	2420
AD Measures	534	345	298	197	228	1602
AD measures as percentage of world measures	17.4%	11.3%	9.7%	6.4%	7.5%	52.3%
Conversion Rate	72.2%	65.5%	63.7%	53.4%	72.1%	66.2%

(Table 2)
Anti-Dumping Statistics (By Target member)
(1/1/1995- 31/12/2014)

	China	Republic of Korea	USA	Chinese Taipei	Total
AD initiations	1052	349	266	265	1932
AD Measures	759	213	162	173	1307
AD measures as percentage of world measures	24.8%	7%	5.3%	5.6%	42.7%
Conversion Rate	72.1 %	61%	61 %	65 %	67.7 %

4.6.10 Conclusions on AD

AD is the most frequently used of TDIs. The landscape of users of this protective tool is changing as many developing countries are increasingly making use of this tool to defend their trade interests, protect their industries and promote industrial development. Despite the fact that the ADA is not perfect, and does not provide tangible preferential treatment to developing countries, African countries need to enhance their capacities to be able to engage in the multilateral trading system with sufficient technical capacities and institutional frameworks. These efforts can draw lessons from emerging economies that are becoming major users of the AD measures.

There is a need to make use of available methodologies to measure normal values and to account for the cases of NMEs.

The negotiations to clarify and improve the ADA present an important opportunity for African countries to improve the text in favour of them especially by focusing on ensuring preferential treatment to developing countries.

African countries should make sure their national and regional legislations are strictly in line with WTO. They should also endeavour to make use of some of the Articles that could be supportive to African integration for example Art. 4 (1) ii of the ADA on the division of market.

4.7 Subsidies and Countervailing Measures

4.7.1 Subsidies and Countervailing Measures, Definition, Basic Concepts, Legal Framework and Conditions

In dealing with this section the focus will be on areas of particular importance under the WTO Agreement on Subsidies and Countervailing Measures (ASCM), while not repeating the concepts that are dealt with similarly under the ADA.

A substantial difference between AD and countervailing measures concerns the nature of the parties involved in the practice of dumping and subsidisation. Dumping relates to business activities between private companies, whereas subsidisation is a financial contribution made by a government or public body. This has its implications on the investigation process.

4.7.1.1 The Legal Framework

The legal framework in dealing with subsidies and countervailing measures is the ASCM and Articles IV and XVI of the GATT.

The ASCM serves the objective of clarifying the GATT 1947 provisions on subsidies, which were limited and with unclear procedures on investigations, in addition to being short of defining the term "subsidy".[582]

The ASCM deals with the two interconnected issues, which are the multilateral disciplines of providing subsidies at the national levels (the multilateral track), and the use of countervailing measures to offset injury caused by subsidised imports (the unilateral track).

It should be noted that the Agriculture Agreement contains its own disciplines with respect to subsidisation of agricultural products. However, Article 13 provides that, under certain circumstances agricultural subsidies may be countervailed under the ASCM.

4.7.1.2 Definition of Subsidy

The ASCM defines for the first time "subsidy" indicating that it should satisfy the four conditions as follows: [583]

4.7.1.2.1 A Financial Contribution.

A subsidy should be in the form of a financial contribution. Actions which could constitute financial contributions are the following:[584]

- Direct transfers of funds from the government or public entity to recipient industry, this can be in the form of grants, loans, equity infusions and government guarantees.
- Exempting industries or business from government taxes.
- Government's provision of goods or services that support business and that goes beyond infrastructure.

[582] Horlick & Clarke (1994) 17 *World Competition* 41.
[583] Art. 1.1 of the ASCM.
[584] *Ibid.*

- Government making payments to a funding mechanism or entrusting or directing a private body to carry out one or more of the type of functions above.

In *USA-Export Restraints*, where Canada challenged the USA on the ground that it mandated treatment of export restraints as financial contributions within the meaning of Article 1 of the ASCM, the AB found that the statute does not mandate the treatment of export restraints as financial contributions, and accordingly does not violate the ASCM. [585]

Providing subsidies depends on the financial capacities of Members, which constrains the possibility of developing countries and LDCs to provide subsidies on a large scale.

4.7.1.2.2 A subsidy is made by a government or any public body

The financial contribution should be provided by government at any level or by a public body, or by a territory controlled by other public bodies within the territory of a WTO Member. This excludes contributions from private bodies.

In *Korea-Commercial Vessels*, the panel considered that an entity would constitute a public body if it is controlled by the government or other public bodies.[586]

This means that the ASCM applies not only to measures of national governments, but also to measures of sub-national governments and stated-owned enterprises which may be important in central planning economies. It is noted that not all SOEs are considered as public bodies capable of providing financial contribution.[587]

4.7.1.2.3 A subsidy confers a benefit

Subsidies are dealt with under WTO because they change the balance of the playing field by conferring benefits to certain companies over others. A benefit implies a comparison as it should make the recipient better off than it would otherwise have been without that contribution.[588]

[585] Panel Report, *USA-Export Restraints*, para. 8. 131.
[586] Panel Report, *Korea-Commercial Vessels*, para. 7.50.
[587] Panel Report, *USA- Countervailing measures on China*.
[588] *Ibid*, Appellate Body report *Canada-Aircraft*, para. 153.

In the context of countervailing duties, the ASCM provides some guidance with respect to determining whether certain types of measures confer a benefit. [589] The AB has explained that the focus should be on the recipient and not the government, providing that financial contribution, and accordingly a "benefit" does not exist in the abstract, but must be received and enjoyed by a recipient.[590]

4.7.1.2.4 A subsidy is Specific

Even if the subsidy satisfies the three previous conditions it cannot be subject to the ASCM provisions unless it is specific, which means that it relates to an enterprise or industry or group of enterprises or industries, and consequently distorts the allocation of resources within an economy and with respect to other competitors.

There are four types of "specificity": enterprise specificity, industry-specificity, regional specificity and prohibited subsidies.[591]

4.7.1.3 Categories of subsidies

There are the three basic categories of subsidies:

4.7.1.3.1 Prohibited Subsidies

These subsidies, which are also called red-light subsidies, are prohibited because they directly affect trade and thus are most likely to have adverse effects on competition as well as the interests of other Members.

Prohibited subsides can be either export subsidies or local content subsidies.[592]

The ASCM extended the prohibition on export subsidies and local content subsidies to developing countries after it was limited to developed countries under the Tokyo Round.[593]

1. **Export Subsidies**

[589] Art. 14 of the ASCM.
[590] Appellate Body report, *Canada-Aircraft*, para. 156.
[591] Art. 2.1 of the ASCM.
[592] Art. 3 of the ASCM and Appellate Body Report, *USA-Carbon Steel*, para. 73.
[593] *Ibid*, Art.27.4. The Article requested developing countries to phase their export subsidies in eight years period.

Export subsidies are subsidies contingent, in law or in fact, whether wholly or as one of several conditions, on export performance.[594] A non-exhaustive detailed list of export subsidies is annexed to the ASCM.[595]

The mere provision of a subsidy to enterprises which export shall not be directly considered to be an export subsidy.[596]

While the concept of *de jure* export subsidies is relatively clear as it is stated by national legislation, the existence of *de facto* export subsidies depends on analysis that shows that the subsidy is dependent on exporting.[597]

In *Canada-Autos* the panel held that in addition to the prohibited export subsidies identified in the Illustrative List, there may be additional practices that are also subsidies contingent upon export performance.[598] In the same case the AB stated that *de jure* export contingency is demonstrated on the basis of the provisions of the national legislation, regulation or other legal instruments.[599]

The existence of this relationship of contingency, between the subsidy and export performance, must be concluded from the fact related to the provision of the subsidy, none of which on its own is likely to be decisive in any given case. [600]

In *Canada-Aircraft*, the panel stated that export credits granted for supporting, directly or indirectly, Canada's export trade are expressly contingent in law on export performance, and therefore falls within the meaning of Article 3.1(a) of the ASCM Agreement and is therefore a prohibited subsidy.[601]

In the same line the AB stated that a subsidy is contingent "in law" upon export performance when the existence of that condition exists in the relevant legislation or other legal instruments.[602]

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[594] Art. 3.1(a) of the ASCM and Appellate Body Report, *Canada-Aircraft*, para. 167.
[595] Annex I of the ASCM: Illustrative List of Export Subsidies.
[596] Footnote 4 to Article 3.1 (a) of the ASCM.
[597] Footnote 4 of the ASCM.
[598] Panel Report, *Canada-Autos*, para.10.196.
[599] Appellate Body Report, *Canada-Aircraft*, para.16.
[600] *Ibid.*
[601] Panel Report, *Canada-Aircraft*, para. 9.230.
[602] Appellate Body Report, *Canada-Autos*, para. 100.

The legality of export subsidies by developing countries was analysed by the DSB. In *Brazil-Aircraft*, the AB upholds the finding of the panel that, in a dispute involving a claim of violation of Article 3.1(a) of the SCM Agreement by a developing country Member, the complaining party has the burden to proof that the developing member violated Article 27.4 of the ASCM on export subsidies.[603]

Nevertheless, the AB rejected the claim by Brazil that, to the extent that export subsidies are provided by developing countries only to offset certain disadvantages that developing country exporters face, such subsidies ought not to be subject to countervailing measures.[604]

2. Local Content Subsidies

Local content subsidies are subsidies that depend on the use of domestic over imported goods, which often take the form of local content requirements.[605]

They are prohibited for the same reason as export subsidies *i.e.* because they distort competition by favouring local products over imported ones.

Article 3.1(b) covers ‘goods’ and other costs factors as local content.

4.7.1.3.2 Actionable Subsidies

Actionable subsidies, which are sometimes called yellow-light subsidies, are not prohibited; however, they are subject to litigation in the WTO DSB.[606] It could be also subject to countervailing duties, in case they cause adverse effects to the interests of another Member. These adverse effects could be in the form of material injury to a domestic industry or serious prejudice as a result of adverse effects in the market of the subsidising Member or in a third country market.[607]

Thus, unlike material injury, it can serve as the basis for a complaint related to harm to a Member's export interests. Serious prejudice is a different concept from injury, as

[603] Appellate Body Report, *Brazil-Aircraft*, para. 196(b).
[604] Appellate Body Report, *Brazil-Aircraft*, para. 196.
[605] Art. 3.1(b) of the ASCM.
[606] *Ibid*, Art. 4.4.
[607] *Ibid*, Art. 5(c) and 5(a).

it has to do with negative effects on a Member's trade interests in respect of a product caused by another Member's subsidisation.[608]

Additionally, the adverse effects can take the form of causing nullification or impairment of benefits accruing under the GATT 1994, which could take place where the market access is negatively affected by subsidisation. [609]

4.7.1.3.3 Non-Actionable Subsidies

Non-actionable subsidies are usually in the form of general infrastructure subsidies. These subsidies are neither prohibited nor subject to countervailing measures mainly for not specification. They are usually called green-light subsidies provided they are notified to the WTO.

4.7.2 Imposition of Countervailing Measures

The investigating authority has to establish, according to the ASCM, that the subsidised imports are causing material injury to a domestic industry producing the like product.[610] The like product and the national industry are defined similar to the ADA. [611] These definitions are relevant not only to the injury determination for countervailing duty purposes, but also to other aspects of the ASCM such as serious prejudice analysis under Article 6.

Like in AD investigations the ASCM permits the application of the principle of cumulation of effects of subsidised imports from more than one Member where specified criteria are fulfilled.[612]

Serious prejudice shall be deemed to exist in the case of total *ad valorem* subsidisation of products that exceeds 5%.[613] Countries may prefer to use the lesser duty rule if such a duty is sufficient to offset the damage or injury caused by the subsidised imports.[614]

[608] Panel Report, *Korea-Commercial Vessels*, para. 7.578.
[609] Art. 5b of the ASCM.
[610] Art. 2.6 of the ASCM.
[611] Art. 16, 16.1 and Footnote 46 of the ASCM.
[612] Art 15.3 ASCM.
[613] *Ibid*, Art. 6.
[614] *Ibid*, Art. 19.

4.7.3 National Procedures and Notifications

The ASCM has detailed rules that apply to the national procedures of countervailing investigations, the imposition of preliminary and final measures, the use of undertakings, and the duration of measures.[615] These rules are designed to ensure that investigations adhere to the principle of transparency and allow opportunity for interested parties to defend their interests, and that investigating authorities adequately explain the justification for their determinations.

The investigation procedures are generally similar to those in the ADA. One important distinct feature is that Members are required to consult with the exporting government before an investigation can be initiated.[616] This is in line with the fact that subsidies are provided by government bodies. Unlike the ADA, the government of the exporting country participates actively in the investigations and is requested to provide information and data that is usually tabled in a questionnaire form, and which may subsequently be verified by the importing Member.[617]

Members are required to notify their countervailing investigations, countervailing duty laws and regulations, all countervailing actions as well as any specific subsidies provided to the Committee on Subsidies and Countervailing Measures.[618]

Once notified, the subsidies and the rationale behind it may be subject to comments and review by Members, which is another layer of indirect scrutiny.

The investigation may be suspended or terminated without the imposition of provisional measures or countervailing duties upon receipt of voluntary undertakings in two circumstances: the exporting country government may agree to eliminate or limit the subsidy or to take other measures concerning its effects, or an exporter may agree to revise its prices to eliminate the injurious effect of the subsidy.[619]

[615] Part V of the ASCM.
[616] Annex VI of the ASCM.
[617] *Ibid.*
[618] Arts. 25 and 32.6 of the ASCM.
[619] *Ibid*, Art. 18.1.

These undertakings are limited in order to avoid voluntary restraint agreements or similar measures masquerading as undertakings.[620]

4.7.4 Countervailing Measures Reviews

Reviews under the ASCM are conducted similarly to those under the ADA, and typically include sunset reviews, new shipper reviews and interim reviews.[621]

The decisions of investigating authorities are subject to judicial review through an independent tribunal, which shall determine the consistency of determinations of the investigating authority with national laws.[622] National decisions could be also subject to reviews by the DSB.

As of 4 April 2016 there were 111 cases under the review of the DSB which cited the ASCM in the request of consultation.[623]

4.7.5 Special Treatment to Developing Countries

Unlike the ADA, the ASCM provides tangible preferential treatment to developing countries including with respect to claims of serious prejudice arising from subsidies provided by developing country Members.[624] The lower a Member's level of development, the more favourable the treatment it receives with respect to subsidies disciplines.

Although this could be important to developing countries in Africa that may have infant industries that need financial support, the lack of financial resources could provide a strong constraint on the ability of African countries to subsidise its industries in a meaningful way. This could also limit the need for countervailing measures in the African context, however it could not be entirely excluded.

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[620] "Agreement on Subsidies and Countervailing Measures" <https://www.wto.org/english/tratop_e/scm_e/subs_e.htm > (accessed 17 March 2014).
[621] Art. 21.3 of the ASCM.
[622] Art. 23 of the ASCM.
[623] "Disputes by Agreement" <https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A20> (accessed 15 April 2016).
[624] Art. 27 of the ASCM as interpreted by Panel Report, *Indonesia-Autos*, para.14.156.

Developing countries are categorised into three categories: LDCs as designated by the United Nations,[625] Members with a Gross National Product (GNP) per capita of less than USD 1,000 per year,[626] and other developing countries.

Two categories of countries are exempted from export subsidy disciplines: (i) LDCs; and (ii) other developing countries listed in Annex VII (b) so long as their gross national product (GNP) per capita does not exceed USD 1,000 per year.[627] However, this does not extend to local content subsidies, which are prohibited for all countries.

There is also more favourable treatment with respect to actionable subsidies. For example, certain subsidies related to developing country Members' privatisation programs are not actionable multilaterally.[628] With respect to countervailing measures, developing country Members' exporters are entitled to more favourable treatment with respect to the termination of investigations where the level of subsidisation or volume of imports is small.

In this regard, the *de minimis* level of subsidisation is 1% for developed countries,[629] 2% for developing countries,[630] and 3% for LDCs, while no measures can be imposed against a developing country if its exports represent less than 4% of the imports into the importing Member[631] so long as all such developing country imports do not exceed 9% of total imports. There is no negligibility standard for developed countries.

The favourable treatment to developing countries has limitations. Any export subsidy exemption must no longer apply for products that reach export competitiveness (when exports of a product by a developing country have reached a share of at least 3.25% of world trade in that product over a two-year period).[632] This is mainly relevant to emerging developing countries like China and Brazil with strong export performance in products where they have comparative advantages; it could also apply to certain exports of African countries in the mining sector.

[625] See Annex VII(a) to the ASCM.
[626] See the list in Annex VII(b) of the ASCM.
[627] Art. 27.2(a) of the ASCM.
[628] Art. 27.13 of the ASCM.
[629] Art. 11.9 of the ASCM.
[630] *Ibid*, Art. 27.10.
[631] *Ibid*, Art. 27.10 b.
[632] *Ibid*, Arts. 27.5 and 27.6.

Moreover, the burden of proof is on the claiming country, which must prove that Article 27.4 does not apply to that developing Member.[633]

The Doha Ministerial Conference reaffirmed that LDCs Members are exempt from the prohibition on export subsidies and have flexibility to finance their exporters, consistent with their development needs.[634] Additionally, the Ministers directed the Subsidies and Countervailing Measures Committee to extend the transition period for certain export subsidies of developing countries and they had to be phased out by the end of 2015 in accordance with Article 27.4 of the ASCM.[635]

4.7.6 Countervailing Duties Statistics [636]

This overview relies on notifications to the WTO from 1 January 1995 till 31 December 2014.

4.7.6.1 Countervailing Duties Initiations

Developed countries are more active than developing countries in the area of countervailing measures. According to WTO statistics for the comparison period, there were 380 initiations in the comparison period. The USA tops the list of the world in initiating investigations in possible countervailing measures with a total of 156 initiations followed by the EU (74), Canada (49), Australia (18) and South Africa (13).

The USA alone accounted for 41% of total initiations. If combined with the EU and Canada, the three countries' share would account for 73.4% of total initiations in the comparison period.

Developing countries are the main targets of these initiations. As in AD investigations, China is the number one target with a total of 90 initiations against it, followed by India (65) and the Republic of Korea (24). It is noted that China and India combined account for 40.7% of total countervailing investigations.

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[633] Panel Report, *Brazil-Aircraft*, para.7.56.
[634] Art. 10.5 of the WTO Ministerial Conference Decision on Implementation-related issues and concerns.
[635] *Ibid*, Art.10.6.
[636] Author's calculations using WTO data < http://www.wto.org/english/tratop_e/scm_e/scm_e.htm> (accessed 1 April 2016)

The average number of countervailing investigation initiations is 18 per year with a peak of 44 initiations in 1999.

The usage of countervailing measures is less than the usage of AD measures in general. This is explained by the nature of subsidies, which is granted by governments that could have certain limitations on providing financial support and which may trigger retaliation, while dumping practice is conducted mostly by the private sector.

4.7.6.2 Countervailing Duties Measures

Until the 1990s the USA, followed by Australia and Canada, were the main users of countervailing duty actions. However, since then the EU and some developing countries have also started to increasingly apply countervailing measures.

For the comparison period there were 202 reported countervailing measures. The USA comes first with a total of 86 measures, followed by the EU (35), Canada (24) and Mexico (11). There is a noticeable decrease in the number of countervailing measures in recent years, from 19 measures in 2012 to 12 measures in 2014.

China is the top target of countervailing measures with 56 measures, followed by India (36), the EU (12), Republic of Korea (9) and Indonesia and the USA (8 each).

The Conversion rate is lower compared to the AD measures implying that the probability of turning investigations into measures is higher for AD. The highest conversion rate among top users is the USA (55%) and the lowest is the EU (47%).

(Table 3)
Countervailing Measures Statistics (By Initiating Country)
(1/1/1995- 31/12/2014)

	USA	EU	Canada	Australia	Total
Countervailing initiations	156	74	49	18	297
Countervailing Measures	86	35	24	9	154
Countervailing measures as percentage of world measures	42.5%	17.3%	11.9%	4.5%	52.3%
Conversion Rate	55%	47%	49%	50%	52%

(Table 4)
Countervailing Measures Statistics (By Target Country)
(1/1/1995- 31/12/2014)

	China	India	Republic of Korea	Total
Countervailing Measures initiations	90	65	24	179
Countervailing Measures	56	36	9	101
Countervailing measures as percentage of world measures	27.7%	17.8%	4.4%	50%
Conversion Rate	62.2%	55.4%	37.5%	56%

4.8 Conclusions on Subsidies and Countervailing Measures

The ASCM provides preferential treatment to developing countries and LDCs which could be better utilised by African countries to promote their industrialisation efforts and exports.

Developed countries are more active in using countervailing measures while developing countries are the main target of these measures, especially those with a certain degree of government control over the economy.

African countries may not be in a position to provide substantial subsidies to their national industries across the board, but they could be at risk of increasing imports from countries that heavily subsidise their industries, especially making use of the falling barriers to trade between African countries.

Nevertheless, green light subsidisation to infrastructure projects may be necessary to boost African integration and export performance. This is an area that needs more exploration by African policy makers.

In the context of the T-FTA there might not be strong need to have provisions for countervailing measures on intra-trade because of the constraints on providing subsidies from the governments of Members, but this could not be entirely excluded as some African countries can increase their subsidisation programmes in a way that

can undermine competition. Additionally, there should be provisions to account for possible penetration of third party subsidised exports through investment in the tripartite countries.

4.9 Safeguards

4.9.1 Safeguards Basic Concepts, Definition and Legal Framework

In WTO safeguard regulations are governed by the WTO Agreement on Safeguards (ASG) together with Article XIX of the GATT 1994.

The ASG aims to clarify and reinforce GATT disciplines, particularly those of Article XIX,[637] re-establish multilateral control over safeguards and eliminate measures that escape such control. It also allows structural adjustment on the part of industries adversely affected by increased imports.

4.9.1.1 Definition of Safeguards

Safeguard measures are emergency actions used by Members with respect to unexpected increase in imports of particular products, where such imports have caused or threaten to cause serious injury to the domestic industry.[638]

Safeguard measures are applied on an "*erga omnes"* basis, take the form of suspension of concessions and can consist of quantitative import restrictions or of duty increases to higher than bound rates.[639]

Safeguard measures are temporary by nature and seek to permit the national industry to adjust while facing fair trade measures, which is a distinctive feature of safeguards compared to AD and countervailing measures.

4.9.1.2 Increase in Imports

In order to apply safeguard measures, the investigating authority should determine that there was an increase in imports. This increase could be absolute or relative to the

[637] Art. XIX remained unchanged from GATT 1947.
[638] *Ibid.*
[639] Art. 5 of the ASG.

domestic production.[640] The increase should be in such increased quantities as to cause or threaten to cause serious injury to the domestic industry and must have been "recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause "serious injury.[641]

4.9.1.3 Definition of Unforeseen Developments

The investigating authority should show, in consistency with Article XIX of GATT, that the increase in imports was sudden and due to unforeseen developments that should be demonstrated as a matter of fact.[642]

Unforeseen development is not an increase in imports as a result of tariff liberalisation or economic growth, because in such cases the increase could be considered a natural result of executing obligations which results in falling barriers to trade, or the increasing demand of the importing country.[643]

In *USA-Hatters Fur* the Working Party report stated that the term "unforeseen development" should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect at the time of negotiating the concession.[644] For most WTO Members the time when the concessions were negotiated means the end of the Uruguay round in 1994.

In *USA-Steel Safeguards* panel confirmed that the term "unforeseen development" was one of the important terms that needed to be demonstrated, irrespective of the fact that it was omitted from the ASG. In this regard the panel stated that the USA had acted inconsistently with its obligations under Article XIX of the GATT 1994 by failing to demonstrate the existence of unforeseen developments before applying the measures.[645]

4.9.1.4 Obligations under GATT

Article XIX of GATT provides that a safeguard measure may only be taken in effect

[640] *Ibid*, Art. 2.
[641] Appellate Body Report, *Argentina-Footwear (EC*), paras. 130–131; Appellate Body Report, *Korea-Dairy*, para. 84; Appellate Body Report, *Argentina-Footwear (EC)*, para. 91.
[642] Appellate Body Report, *Korea-Dairy*, para. 85; Appellate Body Report, *Argentina-Footwear (EC)*, para. 92.
[643] Appellate Body Report, *USA-Steel Safeguards*, para.479.
[644] Working Party Report, *USA-Hatters' Fur,* p. 10, para. 9.
[645] Panel Report, *USA-Line Pipe*, para. 8.1 (6).

of the obligations incurred under this Agreement, including tariff concessions.[646] Accordingly, an authority must also show what the obligations are that it has incurred and how those obligations contributed to the increase in imports.[647]

In *Ukraine Passenger Cars* the panel indicated that the investigating authority should clarify which of the applicable obligations have resulted in increased imports quantities.[648] It is noted that this requirement has not been incorporated yet into the T-FTA text, which may give more space to the investigating authority.

4.9.1.5 Definition of Serious Injury

Serious injury is a higher threshold compared with material injury as in the ADA and the ASCM Agreements.[649]

It usually refers to overall impairment of the industry while the material injury, which is not defined in the ADA, usually means an injury that is not insignificant.[650] This higher standard confirms the exceptional nature of safeguard measures which does not necessarily deal with unfair trade measures.

The definition of "serious injury" is broad, while "threat of serious injury" refers to threat that is clearly imminent as shown by facts, and not based on mere allegation, conjecture or remote possibility.[651]

In determining serious injury, the authority shall evaluate all relevant factors that affect industry, which includes the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilisation, profits and losses, and employment.[652]

[646] Art. XIX(1)(a) of GATT 1994.
[647] Panel Report, *Ukraine-Passenger Cars*, paras. 7.92-7.99.
[648] *Ibid*, para. 7.96.
[649] Appellate Body Report, *USA-Lamb*, para.124. Interview with Mr. Graafsma.
[650] Rai (2011) 69.
[651] Art. 4 (a) and 4 (b) of the ASG.
[652] *Ibid*, Art. 4.2 (a), Appellate Body Report, *Argentina-Footwear* (EC), para.136.

The investigating authority should not attribute to imports injury caused by other factors (the non-attribution requirement).[653]

In practice, in both AD and safeguard cases, the determination is largely left at the discretion of the domestic authority.[654] The DSB mandate is to examine whether all relevant factors were considered objectively and whether the relevant factors showed serious injury to the domestic industry.[655]

4.9.1.6 Like or Directly Competitive Products

When assessing the effect of the increase in imports the ASG refers to the effect on like or directly competitive products. This is a broader category than "like products" under both the ADA and ASCM.

A like product is defined as in the ADA and ASCM,[656] while directly competitive product could cover a wider range of products. This gives more discretion to the investigating authorities in determining the existence of injury.

4.9.1.7 Definition of Domestic Industry

The definition of domestic industry is correlated with the wide definition of like or directly competitive products under the ASG, and consequently is broader compared to the ADA and ASCM. Domestic industry includes producers as a whole of the like products in addition to producers as a whole of the directly competitive products who collectively account for a major proportion of the total domestic production of those products.[657]

4.9.2 National Procedures and Notifications

Safeguard measures may be applied only following an investigation conducted by competent authorities pursuant to previously published procedures.[658] They are usually faster than AD and SCM investigations and require less proof as they are not as comprehensive as those contained in the ADA or the ASCM.

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[653] *Ibid.*
[654] Rai (2011) 69.
[655] *Ibid*, 72.
[656] Art 2.6 of the ADA; footnote 46 to the ASCM.
[657] Art. 4 (1) C of the ASG.
[658] *Ibid* Art. 3.1.

There is no need to analyse economic factors related to pricing in the exporting country and there are fewer injury indicators that have to be considered.

Safeguard measures could achieve broad objectives including effectively removing injurious imports and all imports regardless the price.

The investigating Authorities must demonstrate that there is a causal link between the increase in imports of the product concerned and serious injury, or threat thereof. [659]

Although the ASG does not contain detailed procedural requirements, it does require reasonable public notice of the investigation, and that interested parties are given the opportunity to present their views and to respond to the views of others. Among the topics on which views are to be sought is whether or not a safeguard measure would be in the public interest.[660] The relevant authorities are obligated to publish a report presenting and explaining their findings on all pertinent issues, including a demonstration of the relevance of the factors examined.

Provisional measures must be notified before being applied, and consultations must be initiated immediately after such measures are applied.[661]

Members are required, before applying or extending a safeguard measure, to provide an adequate opportunity for consultations with Members who have substantial interests as exporters of the product.[662]

The results of consultations, mid-term reviews of measures taken, compensation, and/or suspension of concessions, must be notified immediately to the Council for Trade in Goods through the Safeguards Committee.[663]

To ensure transparency Members are obligated to notify their own laws, regulations and administrative procedures to the Committee, as well as their own pre-existing

[659] Appellate Body Report, *USA-Line Pipe*, para. 208
[660] Art. 3.1 of the ASG.
[661] Art. 6 of the ASG, read with Art 12.4 of the ASG.
[662] Appellate Body Report, *USA-Wheat Gluten*, para.136.
[663] Art. 12.5 of the ASG.

Article XIX and grey area measures.[664] This does not cover confidential information.[665]

4.9.3 Imposition of Safeguard Measures

4.9.3.1 Provisional Measures

Provisional measures take the form of a tariff increase and should only take place when delay could result in damage that is difficult to repair, and after a preliminary determination that there is serious injury or threat thereof.[666]

The maximum period of application of these measures is 200 days and such period must be included in the total period of application of safeguard measures.[667]

The tariffs imposed shall be promptly refunded if the subsequent investigation does not determine that increased imports have caused or threatened to cause serious injury to a domestic industry.[668]

4.9.3.2 Definitive Safeguard Measures

Safeguard measures are applied on MFN basis without differentiation according to source, in accordance with the principle of parallelism. Some exceptions exist in the context of RTAs including Mercosur and NAFTA.

Definitive safeguard measures are different from AD or countervailing measures in many aspects as they can take many forms, which include suspension of obligations, withdrawing or modifying tariff concessions.[669]

Safeguard measures may only be applied to the extent necessary to remedy or prevent serious injury and to facilitate adjustment within certain limits, or to offset other injury.[670] This provision is meant to ensure that safeguards are not used in an excessive way as a protection mechanism.

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[664] *Ibid*, Art. 12.6.
[665] *Ibid*, Art. 12.8.
[666] Art. 6 of the ASG.
[667] *Ibid.*
[668] *Ibid.*
[669] Art. XIX:1 of GATT.
[670] Art. 5.1 of the ASG, AB Body Report, *USA-Line Pipe*, para.260.

If safeguard measures take the form of a quantitative restriction, the level must not be below the actual import level of the most recent three representative years, unless there is clear justification for doing otherwise. [671]

Quota shares among exporting Members are to be allocated among supplier countries according to the respective shares of the supplying Members over a previous period.[672]

To limit further the usage of safeguards, safeguards may not be applied again to a product until a period equal to the duration of the original safeguard has elapsed, as long as the period of non-application is at least two years.[673]

Nonetheless, if a new safeguard measure has a duration of 180 days or less, it may be applied again as long as one year has elapsed since the date the original safeguard measure was introduced, and as long as a safeguard has not been applied more than twice on the product during the five years immediately preceding the date of introduction of the new safeguard measure.[674]

The safeguard measures can be extended if such a measure continues to be necessary to prevent or remedy serious injury and there is evidence that the domestic industry is adjusting.[675] This serves as a proof of the effectiveness of the safeguard measure in achieving its designated objective. The extended measure shall not be more restrictive than it was at the end of the initial period, and should continue to be liberalised if exceeding one year in total.[676]

The maximum initial duration of any safeguard measure, including the duration of provisional measures, is four years.[677] However, they may be extended to eight years in the case of developed countries, [678] and 10 years in the case of developing countries.[679].

[671] Art 5 of the ASG; Appellate Body Report, *Korea-Dairy*, para. 99.
[672] Art 5.2(a) of the ASG.
[673] *Ibid*, Art. 7.5.
[674] Art 7.3 of the ASG.
[675] Art. 7.2 of the ASG.
[676] Art. 7.4 of the ASG.
[677] *Ibid*, Arts. 6 and 7.1.
[678] *Ibid*, Art. 7.3.
[679] *Ibid*, Art. 9.2.

4.9.4 Reviews

In order to facilitate adjustment in a situation where the expected duration of a safeguard measure is over one year, the Member applying the measure shall progressively liberalise it at regular intervals during the period of application.[680]

Any measure of more than three years must be reviewed at mid-term. Based on the results of the review the member applying the measure must withdraw it or increase the pace of its liberalisation.[681]

4.9.5 Compensations and Concessions

Safeguards are different from the other two TDIs as they require providing compensation to negatively affected exporting countries.[682] This usually takes place through negotiations, which result in agreed trade compensation.[683] If the imposing Member and the affected Members do not reach agreement, the affected Members may retaliate by suspending equivalent concessions and other obligations.[684]

This is in line with the nature of safeguard measures, which are used against fair trade and designed to prevent serious injury to a specific sector on a temporary basis and not to reverse the liberalisation process by increasing the overall level of protection. Members applying these measures must maintain a substantially equivalent level of concessions and other obligations with respect to affected exporting Members.

This has its limitation as it cannot be used during the first three years of application of a safeguard measure if the measure is taken based on an absolute increase in imports.

4.9.6 Special Treatment to Developing Countries

The ASG provides preferential treatment to developing countries in different ways. Developing Members may extend the application of a safeguard measure for an extra two years beyond that normally permitted, i.e. a maximum of ten years.[685] They have the right to apply a safeguard measure again to the import of a product which has been

[680] *Ibid*, Art. 7.4.
[681] *Ibid.*
[682] *Ibid*, Art 8.1.
[683] *Ibid.*
[684] *Ibid*, Art. 8.2.
[685] *Ibid*, Art. 9.2.

subject to such a measure, after a period of time equal to half that during which such a measure has been previously applied, provided that the period of non-application is at least two years.[686]

Importantly, a safeguard measure shall not be applied to developing country Members, where a single developing country Member's products account for no more than 3% of the total subject imports and as long as products originating in those low-import-share developing country Members collectively do not exceed 9% of imports.[687] This can exclude the imports of some developing countries from these measures and put them, at least theoretically, at a better position compared to developed countries products.

4.9.7 Safeguards Statistics[688]

This overview relies mainly on notifications to the WTO from 1 January 1995 till the end of 2014.[689]

4.9.7.1 Safeguard Measures Initiations

Safeguards are the least resorted to of the TDIs, with a total of 295 Safeguards initiations in the above-mentioned period and an average of less than 15 per year.

The limited number of safeguard initiations compared to AD and countervailing measures should be considered with the nature of safeguards which are applied indifferently to all exporters as well as by the preference of many countries to use the AD and countervailing measures, as they are not correlated with the obligation to grant compensation.

Developing and emerging countries feature as major users of the system accounting for almost 70% of total initiations, principally India (39 initiations), Indonesia (26), Turkey (20), Jordan (17) and Chile (15).

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[686] *Ibid.*
[687] *Ibid*, Art. 9.1, Appellate Body Report, *USA-Line Pipe*, para.129.
[688] Author's own calculation based on data from Safeguard statistics <https://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm> (accessed 20 July 2015).
[689] Although the WTO statistics for safeguards is extended till 30 April 2015, for comparison reasons the data reported in this basis will be till the end of 2014 to match with data on AD and countervailing measures.

Developed countries, which are active in using the other two TDIs, use safeguards in a relatively limited manner. The USA, EU and Australia initiated only ten, five and four investigations respectively. This is in line with the requirements of imposing these exceptional measures.

Chapter XV of the Harmonised System (HS) (base metals and articles of base metal) has been the main target of safeguard initiations with a total of 57 out of 297 initiations (19%). It was followed by chapter VI (products of the chemical or allied industries) with 48 initiations, and chapter XIII (articles of stone, plaster, cement, asbestos, mica or similar materials; ceramic products; glass and glassware) with 26 initiations.

4.9.7.2 Safeguard Measures

Out of the 295 investigations 142 reach the imposition stage (48% of total initiations). India has imposed 19 measures, followed by Indonesia and Turkey (14 each), Jordan (9) and Chile (8).

Among the top users of safeguard measures, Turkey has the highest conversion rate (70%), while India has the lowest rate (48.7%).

(Table 5)
Safeguards Statistics (By Initiating Country)
(1/1/1995- 31/12/2014)

	India	Indonesia	Turkey	Jordan	Chile	Total
Safeguard initiations	39	26	20	17	15	117
Safeguard Measures	19	14	14	9	8	64
Safeguard measures as percentage of world measures	13.4%	9.8%	9.8%	6.3%	5.6%	54 %
Conversion Rate	48.7%	53.8%	70 %	53 %	53.3%	54.7 %

4.9.8 Safeguards Conclusions

Safeguard measures are of particular importance to developing countries especially those at early stages of industrialization. They are imposed across the board and can

provide a chance to national industries to avert serious injury and allow for adjustments. The technical invocation requirements are relatively easier than the requirements of the AD and countervailing measures.

The preference of many countries to use the AD and countervailing measures is because they are not correlated with the obligation to grant safeguards relief in the form of compensation payment to adversely affected exporting countries as in the case of Safeguards.

The ASG favours developing countries and LDCs compared to developed countries in a meaningful way especially in terms of the period of application, which presents another reason for African countries to consider making better use of this underutilised trade tool. Developing countries can also escape safeguard measures under certain conditions.

Although developing countries are more active than developed countries in making use of Safeguard measures, African countries are lagging behind.

The Safeguard legal system within RTAs should be considered attentively by African countries in order to decide on important issues including excluding Members of RTAs from the global safeguards and designing clear disciplines for the application of bilateral safeguards. African countries should formulate safeguard provisions in their agreements with third parties in a way that suits African developmental goals.

4.10 Dealing with Non-Market Economies (NMEs)

The WTO rules distinguish between treatment to market economies and Non-Market Economies (NMEs). NMEs economic policies can introduce price distortions which can render price comparability between the ‘normal value’, determined as the domestic price of a certain good in the exporting country, and the export price of that same good applied by the exporters of that same country, impossible, which suggests adopting a different methodology to calculate ‘normal value’ in the case of countries having a complete or substantially complete monopoly of trade and where prices are

fixed by the State.[690] This distinction has been developed in national legal frameworks.[691]

China was admitted to the WTO in 2011, which was a major development for the multilateral trading system. China's accession protocol included specific provisions related to TDIs. The protocol provides a relatively flexible mechanism for using TDIs against Chinese imports even with weak evidentiary requirements. This protocol, which is designed to address the NME nature of China, is discriminatory by nature as it put China in a disadvantageous position compared to other Members.

Member states were allowed to apply safeguard measures against Chinese imports if they caused or threatened to cause market disturbance.[692] This is a lower threshold compared to the serious injury standard in the ASG. However, this provision lapsed after 12 years. The Protocol also contained special rules related to the determination of the normal value for China in anti-dumping investigations, but this provision will lapse after 15 years, that is, at the end of 2016.[693]

In NMEs, domestic prices could be unreliable in determining the normal value of the good in the country, as prices are distorted by government and the possible control of factors of the economy. In such cases, and exporting firms can prove that they operate under market economy conditions, investigating authorities can use alternative methodologies for the determination of 'normal value' other than the domestic prices.[694] Eliminating NME Methodology would give importing countries less room to initiate TDIs on Chinese exports mainly be making it obligatory to refer to domestic prices and costs in China and not with an 'analogue' country. Even if initiated, this can lower TDIs margin for some companies. [695]

The interpretation of Section 15(d) of the Chinese WTO Accession Protocol has come under debate, as well as whether the latter section stipulates the automatic granting of

[690] The second paragraph to the addendum to Art. VI of GATT.
[691] Van Bael & Bellis (2011).
[692] Sec. 16 of the Accession Protocol of the People's Republic of China.
[693] Sec. 15 of the Accession Protocol of the People's Republic of China.
[694] *Ibid*, Sec. 15.
[695] USA GAO study (2006).

Market Economy Status to China after December 2016, which is 15 years after the date of accession.[696]

China argues that the Section 15 (a) (ii) provision allowing for NME methodology expires after 11 December 2016, resulting in a legal obligation to grant MES to China after that date.[697] This interpretation of the section remains highly controversial as many parties, including the EU and the USA, claim that this is not automatic and shall be subject to importing countries' national legislations.[698]

This phenomenon influenced the way TDIs are designed in RTAs. Some RTAs incorporated strong TDIs and RoOs provisions to make sure that trade liberalisations among Members will not result in a surge in imports from NMEs.

Additionally, in RTAs to which China is a party, China endeavoured to be granted market economy status in order to circumvent the accession clauses, and avoid the excessive usage of TDIs against its exports. In the China-Macao RTA, AD measures were prohibited for this reason.

Additionally, China has obtained Market Economy Status through the conclusion of Memoranda of Understanding (MOUs) with many countries including Australia, Brazil, Argentina, China, South Africa and ASEAN.[699]

China has doubled its grants and interest-free loans, and has pledged to disburse USD 10 billion in preferential loans for infrastructure building to African countries.[700] This could discourage some African countries from using TDIs against Chinese imports.

Other major trading partners, including the USA, Canada, Japan, Mexico, the EU and India, still consider China as NME.

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[696] See e.g. DG for External Policies *New Trade Rules for China?: Opportunities and Threats for the EU*, http://www.europarl.europa.eu/RegData/etudes/STUD/2016/535021/EXPO_STU(2016)535021_EN.pdf (accessed 12 October 2016).
[697] China continues to maintain this position in WTO meetings, the last of which was the 14th of July Council on Trade in Goods.
[698] This was the position expressed in the 14th of July Council on Trade in Goods; Interview with Professor Bellis.
[699] Puccio (2015) *EPRS* 8.
[700] WTO Trade Policy Report on China (2010).

Additionally, and as a way of defending itself against what it perceives as excessive and unjustified usage of TDIs against its imports, China frequently resorted to the WTO DSB to challenge other countries' TDIs regulations and measures.

In July 2011 China, for the first time, challenged EU regulation on AD in connection with measures on *Chinese imports of certain iron or steel fasteners*. The AB report indicated that Article 9 (5) of the Basic Regulation was inconsistent with the EU obligations.[701] In September 2011 the EU informed the WTO DSB that it intended to implement the recommendations and rulings of the DSB in this dispute in a manner that respects its WTO obligations. In February 2012 the EC proposed to the European Parliament and the Council an amendment to the Basic AD Regulation to take account of the DSB Ruling.

Another example in this regard is *certain leather footwear* where the DSU panel confirmed that Article 9 (5) of the Basic EU Regulation was inconsistent with the ADA and recommended that the EU bring Article 9 (5) into conformity with its obligations. This kind of litigation is a manifestation of China's integration in the multilateral trading system and defending its rights.

China is now the number one target of the combined usage of TDIs with a total of 815 measures in the period from 1 January 1995 to 31 December 2014.[702] This is addition to safeguard measures which are applied *erga omnes*. This represents a quarter of the total world application of AD and countervailing measures.

In the last 20 years, 33 countries have imposed AD measures against Chinese imports and five countries have imposed countervailing measures against Chinese imports.[703] This comes as a consequence of two factors: Chinese aggressive export performance, as well as the flexible rules in China's accession protocol which allows more countries to impose more TDIs against Chinese imports.

[701] Appellate Body Report, *EC – Fasteners*.
[702] According to WTO statistics on TDIs combined.
[703] *Ibid.*

China is now the number one of world merchandise exporters with a volume of exports of USD 2342 billion in 2014, which represent 12,7% of world trade and with a growth rate of 8% in 2013.[704]

The issue of NMEs is of importance to Africa, where African industries could be affected negatively by the aggressive export strategies of NMEs and especially China. This requires consideration of the available tools to African countries within the WTO legal framework including TDIs.

4.11 Negotiations to clarify and improve TDIs Agreement in the WTO

During the period prior to the Doha conference in 2001 many countries have expressed dissatisfaction with the implementation of the AD and ASCM. Most of the general concerns were related to the ambiguity of some of the provisions, while developing countries and LDCs criticised the ineffectiveness of the special and differential (S &D) treatment in these Agreements.

As a response, the Doha Work Program in 2001 included an agreement to conduct negotiations to clarify and improve disciplines under the ADA and the ASCM while taking into account the needs of developing and LDCs.[705] This mandate is limited to these two agreements and not to change their substantial provisions. Moreover, it does not cover the ASG.

In the Hong Kong Ministerial meeting in 2005 Members agreed to accelerate the negotiating process on the basis of detailed textual proposals.[706] It was agreed that the negotiation shall aim to clarify and improve the rules of the ADA specifically with reference to the investigation and the review processes including the determinations of dumping, injury and causation, and the application of measures, procedures governing the initiation, conduct and completion of AD investigations, including with

[704] World Trade Report (2015).
[705] Art. 28 of the Doha Ministerial Declaration in 2001 stated that *"In the light of experience and of the increasing application of these instruments by Members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least developed participants. In the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices that they seek to clarify and improve in the subsequent phase.*
[706] *Ibid*, para. 10.

a view to strengthening due process and enhancing transparency, and the level, scope and duration of measures, including duty assessment, interim and new shipper reviews, sunset, and anti-circumvention proceedings. [707]

The negotiations have been progressing along three phases: an initial phase where Members identified the provisions they wanted to clarify and improve, in-depth examination of these provisions, and the respective proposals for clarification and textual proposals.

The pace of the negotiation has been very slow and it does not seem to be a priority area for major trading powers.[708] The proposals for major changes in the texts are not supported by many Members like Brazil, India, Argentina, Turkey and the USA, who advocate for reaching agreement first on the "core" Doha round issues of agriculture, non-agricultural market access (NAMA) and services, before determining what elements on AD could be part of the work program.[709]

The negotiation showed a divergence in opinions between Members who are benefiting from the existing TDIs system and want to maintain it to protect their domestic industries, and those Members who wish to curtail the growing use of TDIs investigations and measures.[710]

This divergence is clear around the flexibility of the investigating authority. Some Members want to grant national investigating authorities more flexibility in determination of dumping, injury and causal link, while other countries want to limit this flexibility as it results in more TDIs imposition. The negotiation is also a manifestation of the political sensitivity to TDIs in general.

In this negotiation, the provisions of the ADA could be of particular importance to developing countries as the ambiguity of the provisions has led to more usage against them. [711] Additionally, it didn't allow them to enjoy real benefits of the special treatment provisions.

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[707] Para. 4 of Annex D of the Hong Kong Ministerial Declaration in 2005.
[708] Interview with Mr. El Etrby.
[709] "Rules Negotiations" <https://www.wto.org/english/news_e/news15_e/rule_25jun15_e.htm> (accessed 1 July 2015)
[710] Young & Wainio (2004) *American Agricultural Economics Association* 5.
[711] Zanardi (2004) 27 *The World Economy* 403 at 403.

Up to now there have been more than one hundred proposals that were presented by different Members and groups and these are being negotiated in the negotiating Group on Rule, the Committee on AD practices and its working group on Implementation. The major proposals are the following:

4.11.1 Friends of anti-dumping Negotiations Proposals

One of the active groups in the context of the rules negotiations is the Friends of AD Negotiations group (FANs) which include both developed and developing countries and seeks to limit the flexibility granted to the national investigating authorities.

In 2015 the group requested the establishment of new disciplines on transparency and due process in AD proceedings.[712] The group requested agreement on key areas "core deliverables" of the AD part of the post-Bali work program which Members are seeking to finalise.

The group believes that the existing ADA should be improved to counter what they consider to be an abuse of AD measures, and consequently wants to curtail the growing resort to AD investigations and, most importantly, to limit the discretion which national investigating authorities can exercise in the context of such investigations, as well as the abuse arising in that context and tightening the requirements for initiation actions.[713]

The group tabled many proposals for tightening disciplines on the conduct of AD investigations focusing on transparency and due process issues including the following:[714]

1. To request Members to periodically update the list of definitive measures in their semi-annual report to the Committee on Anti-Dumping Practices.
2. To enhance the transparency in the AD proceedings and timely provide complete disclosure of information regarding AD investigations to allow interested parties to present their views on the authority's assessment of evidence. The proposal calls

[712] Members are: Chile, Colombia, Costa Rica, Hong Kong China, Israel, Japan, Korea, Norway, Singapore, Switzerland, Chinese Taipei and Thailand.
[713] "Rules in the Doha Agenda" <https://www.wto.org/english/tratop_e/dda_e/status_e/rules_e.htm>(accessed 1 July 2015)
[714] WTO document TN/RL/W/257 of 15 June 2015.

for clarifying the information that must be disclosed and defining the time period after disclosure during which interested parties may submit their comments.

3. To include provisions that clarify the information that should be discussed in the investigating authority's notices of initiation and preliminary and final determinations.
4. To improve Article 5.5 of the ADA by taking into account cases of innocent dumping (where the exporter does not know that it is dumping) and by providing the exporter with information on methodologies and information used by authorities – including the exchange rates used to compare prices that are in different currencies – to determine the existence of dumping.
5. To clarify all procedures and practices that the authority must publish and to improve the transparency of refund procedures in cases where AD duty is assessed on a retrospective basis in accordance with Article 9.3.1 of the ADA.
6. To state in the ADA that all information on the record (consistent with the protection of confidential information) must be disclosed timely to interested parties in an organised manner.
7. To ensure due process by specifying in detail the information which must be included in the application to enable interested parties to review the accuracy and adequacy of information in the application, and to require authorities to review readily available sources to confirm that the application includes sufficient information that is readily available to identify domestic producers.

These proposals are not supported by some countries that want to focus on core Doha negotiation issues. The USA, Canada, Argentina and Turkey believe these proposals are too ambitious while India believes that these proposals could impose onerous requirements on developing and LDCs.[715]

4.11.2 Major Developed Countries Proposals in Rules Negotiations:

The USA position is to support the importance of using effectively AD measures to deal with unfair trade practices through preserving the basic concepts, principles and effectiveness of the agreement and enhancing the transparency and procedural

[715]" Rules Negotiations" https://www.wto.org/english/news_e/news15_e/rule_25jun15_e.htm (accessed 1 July 2015).

issues.[716]It has indicated that it would not like the WTO's AD rules to be strengthened to the extent that they would effectively narrow its administration's ability to use discretion in carrying out AD duties investigations.[717]

In connection with the ASCM Agreement, the USA appears to favour stricter disciplines on the appropriate tool to address unfair trade.

The EU and Japan suggested developing a standard format for AD rules to reduce costs of AD cases.[718]

The EU proposed to add a public interest clause, and an Article that can provide for an additional balancing of interests, which is in line with the EU regulations.[719]

4.11.3 Major Developing Countries Proposals in Rules Negotiations

The common notion of the developing countries – including African countries – is that there is a need for reform of many areas in the ADA and ASCM, especially in dealing with the flexibility granted to the investigating authorities in conducting investigations, which leads to repeated investigations against exports of developing countries.

Another area of high priority to developing countries is the weak provisions of special treatment in the two Agreements. Developing countries are calling for giving "special regard" to developing countries and their export situation as per Article 15 of the ADA, which recognises that special regard must be given to the special situation of developing country Members when considering the application of AD measures.

They also request the implementation of Article 5.8 of the ADA, which states that, if the volume of dumped imports is negligible, the investigation must be terminated. This Article does not specify the time period to be used in determining the volume of dumped imports. Developing countries requested to make the application of time period more predictable and objective as possible.

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[716] "Rules in the Doha Agenda" https://www.wto.org/english/tratop_e/dda_e/status_e/rules_e.htm (accessed 1 July 2015).
[717] *Ibid.*
[718] Young & Wainio (2004) *American Agricultural Economics Association* 11.
[719] WTO document TN/RL/W/13.

4.11.4 Specific African Countries' Proposals in Rules Negotiations

Analysing the different proposals coming from African countries and especially Egypt and South Africa, it could be concluded that African countries share to a large extent the same concerns expressed by developing countries and especially the need to strengthen the principle of special and differential Treatment.

The African countries coordinate their position toward the rules negotiations through the African Group, which is an informal group of WTO Members through which African countries jointly advocate their negotiation positions and champion several of their interests through the Committee on Trade and Development (CTD).

The African countries' position was reiterated in the declaration of the African group at the WTO ministerial conference in 2013, in which they stressed the importance of the Doha Development Agenda (DDA) according to the principles of Single Undertaking and S&D treatment.[720] They requested further to preserve negotiated flexibilities beneficial to developing countries, all anchored on the principles of inclusiveness, transparency and bottom-up approach.[721]

African countries rejected attempts to add new issues to the DDA, before development issues, which include agriculture, LDC issues and S&D Treatment implementation related concerns, are satisfactorily addressed.[722]

In the Area of TDIs African Members have been expressing their concerns, which focus mainly on the possible abuse of AD law as a disguised means of protection.[723]

The main motivation of the African Group is to seek the materialisation of the principle of S&D in Article 15 of the ADA as they claim that the language of the Article is not enough to grant a *de facto* preferential treatment to developing countries.[724]

[720] Para. 4 of the Addis Ababa Declaration on WTO Issues in 2013.
[721] *Ibid*, Para. 5.
[722] *Ibid*, Para. 7.

[724] Panel Report, *EC-Tube or Pipe Fittings*, para. 7.68.

The African group also wants to operationalise the second part of Article 15 of the ADA, which requires the exploration of constructive remedies before applying AD duties where they would affect the essential interests of developing country Members.

To achieve this objective, the African Group submitted a document to the Negotiating Group on Rules to enhance the enforceability of Article 15. The African Group has sought to revise the interpretation of Article 15 so that the duty to explore constructive measures should now include an obligation to apply the lesser duty rule instead of the margin of dumping if such lesser duty would be adequate to remove the injury to the domestic Industry.[725]

Another constructive remedy proposed by the African Group is the non-application of AD duties if an exporter from a developing country Member agrees to price undertakings or to cease exports at dumped prices. [726]

African countries also seek to enhance the provision of technical assistance by the Members and the WTO Secretariat to enhance their ability to draft AD laws, engage in investigations and the application of anti-dumping measures.[727]

Egypt and South Africa are the most active Members of the T-FTA group who are involved in the rules negotiations under the DDA.

4.11.4.1 Egypt

Egypt's proposals are an indication of the nature of Egypt as both a user and a subject of TDIs. Egypt emphasises the importance of enhancing the preferential treatment to developing countries under the TDIs Agreements. On the substantial part, Egypt was strongly in support of the discretion for investigating authorities in its determination, in addition to the possibility to expand AD measures beyond the expiry dates when needed, while taking into consideration the special needs of small companies in developing countries. The most important proposals are the following:

1. Egypt proposes to define the concept of "material retardation" in terms similar to the concepts of "material injury" and "threat of material injury". The essence of

[725] WTO Doc TN/RL/GEN/154.
[726] Kufuor (2009) 166-176.
[727] Para. 16 of the declaration of the 3rd Ordinary session of the AU Ministers of Trade in 2005.

the proposal is that the concept of material retardation in the ADA should not be limited to newly established industries but should be expanded to cover small-scale industries or those industries that are facing what the proposal calls a "new start".[728] This proposal aims to give more consideration to the special situation of small and medium industries in developing countries. Egypt has argued that a new ADA should include a footnote in Article 5.4 to indicate that, where the existence of material retardation is alleged, determining whether a petition is representative of the domestic industry shall be assessed using production capacity instead of production as a reference.[729]

2. Egypt proposes to clarify Article 6.8 of the ADA regarding the investigating authority discretion in using the available information. The aim of the proposal is to achieve greater clarity to enable greater freedom of action. Egypt's submission is that a revised agreement should not limit the powers of investigating authorities to take decisions on the basis of facts available.
3. Egypt has objected to proposals to amend the ADA's sunset review.[730] Egypt claims that whilst it appreciates the current position that AD measures should lapse at the end of a five-year period, developing country industries in particular are generally not in a position to withstand the injurious effects of dumped imports after the expiry of these measures, and many want to extend it under certain conditions. [731]
4. Egypt proposed to deal with the ambiguity in Article 3.5 of the ADA, which calls for the demonstration of the causal link between the dumped imports and the injury to the domestic industry, which shall be based on an examination of all relevant evidence before the authorities. Egypt believes that the wording of the Article is ambiguous and does not clearly establish the scope of the assessment that must be carried out to determine whether or not injury is the consequence of dumped imports. Furthermore, Egypt is of a view that the investigating authority should be given more discretion in determining the causation between dumping and injury especially in light of the lack of expertise and resources in developing countries.[732] Consequently it has proposed that it should be explicitly stated that

[728] Communication from Egypt, Material Retardation, TN/RL/GEN/122.Rev.1 (6 June 2006).
[729] *Ibid.*
[730] Egypt, Duration of Review Investigations, TN/RL/GEN/118 (21 April 2006) p. 1.
[731] Kufuor (2009) 3.
[732] WTO Document TN/RL/GEN/140 (6 June 2006).

there is no requirement for investigating authorities to assess the detailed impact of different injury factors. Egypt believes that the amendments that are proposed would eliminate any ambiguities about the scope of the determination of injury factors and would clearly be in the interests of developing countries.[733]

4.11.4.2 South Africa

Similar to Egypt, the proposals of South Africa reflect the fact that it is both an active user and target of TDI investigations and measures. Some of its proposals are developed into specific texts and some are in the form of non-text proposals.

South Africa is mindful that in focusing on the effects of injurious dumping on a particular domestic industry, investigating authorities should not lose sight of the potential cost to other industries and segments within the domestic economy.[734]

South Africa advocates enhancing the transparency and predictability of AD proceedings and calls for ensuring that all interested parties are able to participate in a meaningful way in such proceedings.[735] The South African proposals differ from those of Egypt in that it favours limiting the discretionary powers of the investigating authorities, and that sunset reviews should be limited to a single review. South Africa has submitted specific proposals as follows:

1. South Africa was against the application of zeroing in AD investigations or reviews, regardless of the calculation methodology used in these proceedings, as it results in significantly increasing the overall margin of dumping.[736]
2. South Africa proposed to limit the discretionary nature of initiating investigations as per Articles 5.1 and 5.4 of the ADA. These two Articles require authorities to determine whether an application has been made "by or on behalf of the domestic industry" and provide that this standing requirement is met if at least 25% of the total production of the domestic industry and 50% of those domestic producers express an opinion in support of an application. South Africa is of the view that the standing requirement of Article 5.4 should be increased to be more than 50% of the total domestic production of the like product to ensure that the absolute

[733] *Ibid.*
[734] WTO Document TN/RL/GEN/137 (29 May 2006).
[735] *Ibid.*
[736] *Ibid.*

majority of the domestic industry are in favour of initiating anti-dumping proceedings.[737]

3. South Africa supports a proposal from Egypt that requires that applications, lodged by or on behalf of associations of domestic producers, should be assessed by taking into account the production volumes of all of the Members of the association as a whole.[738]
4. On causation, South Africa is of the opinion that, in making a determination on causation as per Article 3.5 of the ADA, the authorities need not isolate or quantify the effects of the dumped imports or any known factors other than the dumped imports, either individually or collectively.[739] An evaluation needs to take place indicating that the effects of the dumped imports are at least as important as the effects of the other known factors, either individually or collectively.[740]
5. On material retardation, South Africa agrees with the proposal by Egypt that, in the analysis of causation, the term "material retardation of the establishment of such an industry" should not be limited to newly established industries, but should also apply to all domestic industries that are characterised by a limited level of commercial development and/or a reorganisation of an industry.[741]
6. On public interest, South Africa is of the view that the investigating authorities, especially of developing countries and LDCs, should not be burdened with extra requirements that may be burdensome for them.[742]
7. In matters related to reviews and specifically sunset reviews South Africa has indicated that is not satisfied with Article 11.3 of the ADA, and believes that the rule of expiry of AD measures in five years is being circumvented with "unsubstantiated" reviews being initiated, thus prolonging the life of measures.[743] It proposes that sunset reviews should be limited to a single review, and that, if authorities determine that expiry of a measure would be likely to result in continuation or recurrence of dumping and injury, the measure should remain in force for an additional period not to exceed three years.[744]

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[737] *Ibid.*
[738] WTO Document TN/RL/GEN/119.
[739] WTO Document TN/RL/GEN/137 on 29 May 2006.
[740] *Ibid.*
[741] WTO Document TN/RL/GEN/122.
[742] WTO Document TN/RL/GEN/137 on 29 May 2006.
[743] *Ibid.*
[744] *Ibid.*

4.11.4.3 African Caribbean and Pacific (ACP)

In 2011 the ACP Group called for the provision of technical assistance to develop the technical capacities of officials working in this area proposed in a coordinated way.

4.12 Conclusions

The WTO Agreements on AD, subsidies and countervailing measures and safeguards are the constitutional laws governing the application of TDIs both at the multilateral and the regional levels.

The specific rules on TDIs in RTAs are generally in conformity with the WTO Agreements where the latter act as flexible templates with many gaps to be filled by national and regional TDIs laws. These rules can be used to achieve the RTAs' specific objectives.

The reduction in the average applied duty in both developed and developing countries is an important reason for the surge in the application of TDIs. TDIs are used in many RTAs as protection measure to compensate for the phasing out of tariffs and NTBs as to serve other important objectives including industrialisation and macroeconomic policy objectives.

Although developed countries were traditionally considered the main users of TDIs, especially AD and countervailing measures, developing countries – with the exception of Africa – are engaging more actively in the usage of TDIs against developed and developing countries alike. India comes first in terms of the number of TDIs measures with a total of 553, followed by the USA (437), the EU (336), Argentina (236) and Brazil (206).

As for the top target of trade remedies measures, China comes first with 815, followed by the Republic of Korea (222), Chinese Taipei (181), India (145) and Japan (134).

Under WTO rules developing and least developed countries are granted certain special treatment for the application of TDIs. This special treatment applies to the criteria of subjectivity to TDIs as well as to the usage of these measures. This

treatment did not have significant effect on developing countries' usage of TDIs nor the usage against developing countries.

The current negotiation to clarify and improve the rules provisions in the WTO is not progressing in a satisfactory pace. This negotiation is of importance to developing countries, especially in enforcing the concept of preferential treatment to developing countries and in ensuring that the TDI systems would not be abused against developing countries and LDCs in addition to the provision of the needed technical assistance. The concrete substantial proposals from the two Members of the T-FTA are of particular importance in this regard, but there is a need for more harmonisation of positions between African countries.

The negotiations should come up with concrete measures to enforce the preferential treatment to developing countries, and enhancing the capacities of developing countries, which could lead to better participation in the multilateral trading system. While TDI rules are complex, these are the only trade protection rules sanctioned by the WTO and thus the only protection African countries may legitimately use to protect their domestic industries from injury caused by international competition. It is therefore important that the necessary expertise be developed, either on an individual country or on a regional basis, to ensure that African countries can provide their industries with the necessary protection. The capacity building programmes in the WTO can support the national efforts to accumulate expertise and technical skills.

The WTO TDIs rules provide significant flexibility that should be utilised by developing countries to support their integration endeavours, especially when it comes to the design of their TDIs chapters. This could include the application of bilateral safeguard measures during the transitional period, and the exemption of Members of RTAs from the application of multilateral safeguards in accordance with WTO and the DSB jurisprudence.

Chapter 5: Dealing with Trade Defence Instruments in Regional Trade Agreements

5.1 Introduction

TDIs are increasingly adopted and implemented by Regional trade agreements (RTAs). It is relevant for this study to refer to what constitutes an RTA under the WTO.

(RTAs) include mainly Customs Union (CU) and Free Trade Areas (FTAs). Both structures represent different levels of regional integration and are defined under Article XXIV.8 of GATT 1994.

A CU is an agreement between two or more customs territories to create one single customs territory where duties and other restrictive regulations of commerce are eliminated with respect to substantially all trade between Members, and substantially the same duties and other regulations of commerce are applied by each of the Members to the trade with third parties. [745]

FTA is a lower level of integration than a CU. It entails the elimination of duties and other restrictive regulations of commerce on substantially all the trade between two or more customs units in products that originate from such territories.[746]

The main distinction between the two structures is that, in the CU, Members have to apply a common external tariff (CET) on trade with third parties, whereas in an FTA Members depend on Rules of Origin (RoOs) to grant preferential market access to each other.

In these two main economic integration models, Article XXIV calls for the removal of duties as well as other restrictive regulations of commerce with respect to substantially all trade between Members. The definition of "substantially all trade" and "other restrictive measures" is of special importance in the context of RTAs.

[745] Art. XXIV:8 (a) of GATT 1994. The eliminated duties and regulations do not cover those permitted under Arts. XI, XII, XIII, XIV, XV and XX of GATT.
[746] Art. XXIV:8 (b) of GATT 1994.

It is difficult to determine exactly what constitute "substantially all trade" as it is not defined as a percentage of total trade. While the Dispute Settlement Understanding (DSB) has addressed this issue several times there is still no clear definition of the term so far and usually the matter is subject to debate in the Committee on Regional Trade Agreements (CRTA) when discussing the consistency with Article XXIV.

An attempt to clarify this vagueness is manifested in the Understanding on the Interpretation of Article XXIV of the GATT, adopted in 1994. The preamble emphasises that if any major sector of trade is excluded from the trade liberalisation and if the duties and other restrictive regulations of commerce have not been eliminated with respect to substantially all the trade between the constituent territories, the RTA may not be WTO consistent and is therefore not eligible for exemption from applying the MFN principle. This however remains subject to the determination of the CRTA, which usually considers this issue as the determining point in assessing the compliance of RTAs with Article XXIV.

This reading is in line with the different rulings of the DSB which confirm that WTO jurisprudence is in favour of a high degree of sector coverage in trade liberalisation among Members of an RTA as implied in paragraph (8) (a) (i) of GATT 1994. For example, in *Turkey-Textiles*, the WTO Appellate Body (AB) defined the term *"substantially"* as requiring a higher degree of sameness.[747]

In all cases the duties and other regulations of commerce imposed at the institution of any RTAs shall not be higher or more restrictive than the duties and regulations of commerce applicable prior to the formation of such RTA.[748] This shall ensure that RTAs shall have a positive effect on global trade liberalisation and not otherwise.

The removal of substantially all barriers to trade in goods across the board serves the objective of avoiding trade diversion by allowing the formation of RTAs that have a neutral impact on non-member countries.[749] If Members of RTAs were allowed to determine the sectors to be liberalised, this may create trade diversion to the benefit of

[747] Appellate Body Report, *Turkey-Textiles* para. 50.
[748] Paras. (5) (a) and (b) of Art. XXIV of GATT 1994.
[749] Gathii (2011) 87.

less competitive producers which enjoy duty-free or preferential sources and with negative effects on more efficient producers.[750]

5.1.1 TDIs and Other Restrictive Regulations

The call to remove other restrictive regulations between Members is not less ambiguous as there is no agreement about the definition of the latter in Article XXIV.8 of GATT. Additionally, there is no agreement on whether Trade Defence Instruments (TDIs) fall under "other restrictive measures".

The phrase "other regulations of commerce" is an evolving concept given the dynamic nature of RTAs.[751] It could include any regulations that have an impact on trade which may theoretically apply to tariff and non-tariff barriers (NTBs) and TDIs.

In an effort to clarify this, the WTO secretariat has produced a list of regulations that may affect trade between third parties and Members of the RTA. This includes quantitative restrictions and other measures of similar effect, RoOs, standards, TDIs, state-aid, sector-specific provisions and measures associated with customs administration, import licensing and customs valuation.[752]

One point of view claims that TDIs fall under the restrictive regulations and consequently should be eliminated in accordance with the interpretation of Article XXIV:8(a)(i).[753] This point of view explains that their claim comes in line with the wording of Article XXIV:8(b) which allows RTA Members to exclude only certain GATT Articles from the general requirement to eliminate other regulations restricting trade.[754]

On the other hand, it is submitted correctly, TDIs could be maintained in RTAs as they are not categorised as prohibited among Members under Article XXIV:8(i).[755]

This point of view submits that the reading of this Article confirms that TDIs are not provided for under GATT/WTO rules as "duties" or "restrictive regulations" *vis-à-vis* trade, unlike regular custom duties, quantitative and other import restrictions provided

[750] For detailed discussion on trade diversion see Viner (1950) 49.
[751] See in general Panel Report, *Turkey-Textiles*.
[752] WTO Secretariat (1996) Standard format for information on regional trade agreements.
[753] Pauwelyn (2004) J Int. Economic Law 7 (1) at 109.
[754] Art XI, XII, XIII, XIV, XV and XX, and then only to the extent necessary.
[755] Borovikov, Evitmov & Danilov (2010) 45.

for in Articles XI-XV GATT 1994 or import bans justified under Article XX GATT 1994, and consequently could be maintained.[756] This opinion submits rightly that, if that had been the intention of the Members, it would have been easy to make clear reference to TDIs in addition to the excluded GATT Articles.[757]

The second point of view is confirmed by the majority of RTAs, especially at the level of FTAs, where TDIs exist as a way of protection against the liberalisation effect of the formation of the RTA in transitional periods and also to be used against unfair trade practices.

It is also confirmed in the wording of the three TDI Agreements. For example, the ADA specifically indicates that AD measures have to be imposed against all sources found to be dumping and no reference is made to excluding FTA partners.

Moreover, there could still be a need to revert to TDIs in the context of regional integration, as they remain needed for the same purposes they are used against trading partners with which a country does not enjoy trade preference.

If TDIs were removed, it would mean that the formation of RTAs would put limitation on Members in applying trade policy tools in their intra-trade, which may not be the objective of Members of all of these agreements.

From the rulings of the recent WTO jurisprudence it is concluded that there was no ruling that delegitimised any RTA for retaining TDIs on intra-trade.

5.2 TDIs and Competition Policy

TDIs and competition policy have similar and distinct objectives. TDIs have been described as the international trade analogue of internal market competition policies. [758] Competition policies represent the main policy area covered by preferential trade agreements among the issues not addressed in the WTO agreements. [759] Some RTAs have common competition policies; others have

[756] *Ibid.*
[757] Teh *et al* (2007).
[758] Bienen (2012) *bkp Development Research & Consulting* 1.
[759] WTO (2011) World Trade Report 132.

provisions on the harmonisation of competition policies while in most RTAs the reference to competition policy has no real effect on intra-trade.

While national competition regulations fall within the mandate of national legislative bodies, international competition laws are discussed at the multilateral level with no binding Agreement so far.

TDIs deal mainly with dumping and subsidised products, while national competition policies deal with certain types of business practices such as monopolies, market-sharing agreements, price fixing, exclusionary practices that deny access to markets to competitors, and abusing a dominant position in one market to gain market share in another through tied selling. [760]

Many of these practices have its implications on international trade. One area where TDIs and competition policy can intersect is the area of pricing. While AD addresses exports sold below the normal value of the product, competition policy deals with predatory pricing which is setting low prices to control markets and drive competitors out. Low prices could be below average variable costs. In normal circumstances the exporter raises prices at a stage when it establishes a dominant position in the market. These practices are usually sanctioned by the competition authorities through financial fines.

In the cases of dumping or subsidisation the imposition of TDIs takes a remedial nature and is dependent on the causal link between dumped or subsidised products and injury to national producers. In both instances these corrective measures can offset the welfare benefits to consumers of temporarily lower prices in order to prevent injury to the national industries.[761]

In Africa, the lack of existence of national competition policy in most of the countries combined with the weak TDIs systems aggravate the challenges facing African infant industries and the plans for regional integration

[760] See for example the EU competition law and the USA antitrust law as major examples of fighting these practices.
[761] Brink & Van Heerden (2016).

5.3 Different Systems of TDIs in RTAs

RTAs have different approaches toward TDIs design and implementation. These approaches depend largely on the level of development of Members as well as the economic objectives of the RTAs, specifically the degree of envisaged economic integration and the progress in trade liberalisation. The formulation of the TDIs chapter in the founding agreements of the RTAs can serve as an important indicator for the degree of envisaged integration and the priority Members give for protectionism. Additionally, TDI policies in RTAs are affected by other factors like the existence of a competition policy and the applicable RoOs.

Major world trading partners seek to incorporate harmonised TDIs systems in their RTAs. In recent years, there is some evidence that major hubs of RTAs like the EU, NAFTA, and EFTA are negotiating RTAs with third parties with specific TDIs models in mind.[762]

There are exceptions to this approach as other countries may adopt different schemes on a case-by-case basis, depending on the common objectives of the RTA and the level of development of the partner states.[763]

Following previous research and analysis that has mapped existing RTAs,[764] it is noted that some RTAs entirely abolish the application of TDIs among Members, others apply precisely the WTO relevant TDIs agreements, and others choose to strengthen the disciplines and requirements for imposition of different TDIs, while others limit the imposition of RTAs to transitional periods only.

Almost a quarter of the RTAs surveyed have either entirely abolished the application of AD rules or tightened disciplines on the application of AD on RTA member, or given authority to regional institutions to conduct investigations or review the findings of national authorities.[765]

These different schemes are explained in the coming sections.

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[762] Estevadeordal, Suominen & Teh (eds) (2009) 207.
[763] One example is the USA concluded RTAs where different models of TDIs are applied according to the level of integration and the level of development of Members.
[764] This analysis depends mainly on the research of Teh, Prusa & Budetta in Estevadeordal, Suominen & Teh (eds) (2009).
[765] *Ibid.*

5.3.1 Abolishing the application of TDIs among Members of RTAs

In practice, many RTAs eliminate the imposition of one or more TDIs among Members. This can have effects on trade with Members and third parties.

The elimination of TDIs on intra-trade may encourage the investigating authorities to direct their efforts to imports from third parties. This can act as a discriminatory tool that could result in trade diversion manifested in increasing less competitive imports from Members of RTA at the expense of more competitive imports from non-Members. The DSB rulings in cases of parallelism indirectly confirm this conclusion.[766]

This trade diversion is elastic by nature, and could encourage more frequent usage of TDIs against non-RTA Members and without necessarily requiring the adoption of special provisions on TDIs.[767] This happens as the national protection approaches become increasingly directed at the imports of non-RTA Members.[768]

The welfare effects of the elimination of TDIs on intra-trade depend on several factors including the net effects on producers, consumers, and importers of intermediate products.

Although TDI could assist governments in administering protection in a manner which appears impartial, automatic and rule-based, procedures may be biased towards a positive dumping or subsidisation determination.[769]

Although only one quarter of RTAs has abolished the use of TDIs among Members, it is noted that these RTAs include Members with high intra-trade figures which makes this approach very important and very relevant to the world international trade, and inevitably affects the trade of third parties including African countries.

The EU is the most obvious example of abolishing the application of all kinds of TDIs among its Members. The creation of a single market and the establishment of a CU

[766] See the discussion under section 5.4.3.1 of this Thesis.
[767] Bhagwati & Panagaruya (1996).
[768] Bhagwati (1993).
[769] Waincymer (2001).

required the elimination of AD measures.[770] This is correlated with a deep level of integration and the existence of equal economic settings in Members. In Africa, TDIs are not permitted on intra-trade within SACU.

In the European Free Trade Area (EFTA), Member states may provide state aid only in accordance with Article XVI of GATT 1994 and the ASCM. Consequently, AD and countervailing measures for intra-trade are not permitted.[771] Countervailing duties are still allowed in EFTA for agriculture and fisheries products,[772] and safeguards are allowed under certain conditions.[773]

Another example of an FTA that abolished one or more of the TDIs is the FTA between EFTA and Singapore, in which the two parties employed competition provisions that recognised that certain business practices, such as anti-competitive agreements or concerted practices and abuse of a dominant position, might restrict trade between the parties.[774] These provisions act as a substitute of AD which was prohibited between the two parties.[775] The two parties maintained their rights and obligations in respect of subsidies, countervailing measures in accordance with Articles VI and XVI of GATT 1994 and the ASCM.[776] Additionally, bilateral safeguards are allowed among Members for a period not exceeding one year, with strict exceptions for three years and within the MFN applied rate.[777] The imposing party has to compensate the affected party in the form of substantially equivalent trade liberalisation; otherwise the affected party may take compensatory action.[778]

In the China-Hong Kong Closer Economic Partnership Arrangement (CEPA), AD and countervailing duties were abolished.[779] Meanwhile bilateral safeguards are allowed in the form of suspension of concessions.[780] This is explained by the special political and economic relation between China and Hong Kong, which is a special

[770] Wooton and Zanardi (2002)
[771] Arts. 16 and 36 of the EFTA Convention.
[772] *Ibid*, Art. 8.
[773] *Ibid*, Art 40.
[774] Art. 50 of the Agreement between the EFTA states and Singapore.
[775] *Ibid* Art. 16.
[776] *Ibid*, Art. 15.
[777] *Ibid*, Art 17.
[778] *Ibid.*
[779] Arts. 7 and 8 of the China-Hong Kong Closer Economic Partnership Arrangement (CEPA).
[780] *Ibid* Art. 9.

Administrative Region. The same TDI system is applied in the China-Macao Closer Economic Partnership Arrangement.

In the Canada-Chile FTA AD measures were prohibited, and the parties agreed to establish a committee on trade remedies to consult with a view of eliminating the need for countervailing duty measures on trade between them.[781]

The main reasons for eliminating TDIs among Members of RTAs could include the following:

5.3.1.1 The higher the level of integration the less the need for TDIs

In cases where Members of RTAs go beyond tariff elimination to unify or harmonise trade and economic policies and adopt common internal regulation, the need for TDIs will be limited. Intra-regional trade is usually significant in countries that abolished AD and countervailing duties.

In RTAs, signs of deeper integration include the application of behind the borders measures such as harmonised standards and sanitary and phytosanitary measures, customs and quarantine, free movement of capital and persons, the creation of supranational institutions, and *"acquis communautaire"*. Some examples of RTAs that have applied those deep integration measures include the EU, EFTA, as well as Agreements between the EU and overseas countries and territories. This is in addition to the Agreements China has with Macao and Hong Kong.

In Africa, the majority of the RTAs have a low level of integration but some exceptions exist as in the case of the EAC. Although this may be a justification for the maintenance of TDIs on intra-trade in the short-run, but it may not be the case in the long-run when African integration is deepen further.

5.3.1.2 Harmonisation of economic policies

When macro and micro-economic policies are harmonised, TDIs may become unnecessary as there will not be any reason for using them in a levelled playing field

[781] Arts. M-1 and M-5 of the Canada-Chile Free Trade Agreement.

where the production of goods and services is subject to almost the same economic conditions and not benefiting from different advantages.

5.3.1.3 When the conditions for TDIs do not exist

In RTAs that include developing and LDC Members the governments may not have the means to provide substantial subsidies to its Members which render one of the TDIs tools (countervailing measures) obsolete.

This could be the case in Africa where few African countries provide industrial subsidies. One notable exception is the South African Automotive Industrial Scheme (AIS), which provides the automotive industry a non-taxable cash grant of 20% of the value of qualifying investment in productive assets and 25% of the value of qualifying investment in productive assets by component manufactures and tooling companies.[782] Neither South Africa nor Egypt grants any export subsidies. However, various incentives are granted to encourage export-oriented activities in the free zones.[783]

Additionally, largely small business entities in developing countries may not have the resources or the incentive to pursue injurious dumping in export markets on developed countries, which could also discourage the need to use AD measures.

5.3.1.4 Existence of Common Competition Policy

It is noted that more than three-quarters of RTAs have a competition policy chapter, yet with different levels of details.[784] Competition policy can address unfair practices, specifically AD and countervailing measures, and consequently could be used as a substitute for them.

The existence of a common competition policy in the RTA can make TDIs redundant in certain aspects. It has to be noted that competition policy is motivated by the need to manage the results of deeper integration[785] and has more scope than AD. This link could also be criticised by the fact that AD measures and competition policy serve

[782] "Trade, Export and Investment" https://www.thedti.gov.za/trade_investment/export_incentive.jsp?id=37&subthemeid=26 (accessed 17 December 2015)
[783] Egyptian Investment Guarantees and Incentives Law (Law 8/1997) as amended in March 2015.
[784] Kasteng and Prawitz (2013).
[785] Hoekman (1998).

different policy objectives. AD is mainly about producer's interest while competition policy is more about protecting consumers.[786]

RTAs which have abolished TDIs in accordance with the establishment of a CU, could have greater intra-trade ratio and are more likely to have competition policy and to pursue deeper integration agenda.[787]

Examples of this include the agreement between Australia and New Zealand which replaced AD policy with competition policy. [788]

5.3.1.5 Political Considerations

When integration is based on political objectives, countries could be more inclined not to revert to TDIs even if justified economically, as they could be perceived as hostile measures by their trading partners.

Fear of retaliation could also play a role in discouraging small countries from using TDIs against their major donors and trading partners.[789] This could be the case for many African countries depending on international markets as well as official development assistance from their developed partners.

5.3.2 Maintaining the application of TDIs on intra-RTA Trade

In the majority of RTAs Members decide to keep policy space for the application of TDIs. This takes place for several political and economic reasons where request for protectionism from local producers is the pivotal force behind this. [790] In such RTAs the level of integration is usually less than deep. The maintenance of TDIs among Members of RTAs requires, in most cases, the adoption of a legal and technical framework to govern their application.

RTAs differ in the way they manage the application of TDIs. Some RTA may choose to apply exactly the same rules and regulations as provided in the relevant WTO

[786] Bienen *et al* (2012) *bkp Development Research & Consulting*.
[787] Estevadeordal, Suominen & Teh (eds) (2009).
[788] Interview with Professor. Bellis.
[789] Interview with Mr. El Sherbiny.
[790]Tharakan (1995) *The Economic Journal* 105.

Agreements without differentiating between Members and non-Members.[791] Members could decide to apply the same WTO-stipulated procedures in all technical steps for investigations *i.e.* determination of injury, definition of domestic industry, evidence, provisional measures, price undertakings, retroactivity and notification and consultations.

Other RTAs may adopt slightly different rules and procedures that, although not identical to the WTO relevant Agreements, are closely similar to them. These RTAs adopt what is called TDI-plus provisions.[792]

The most recent example of the retention of TDIs is the Trans Pacific Partnership Agreement (TPP), which states that all parties retain the rights and obligations under Article VI of GATT 1994, the ADA Agreement and the ASCM.[793] Annex 6-A of the Agreement does not alter the substantial rights and obligations under WTO law but includes detailed procedures in connection with the investigation process.

Another example is the FTA between EFTA and the Central American States (CAS), where the two parties confirm the rights and obligations of the TDIs Agreements in the WTO. [794] AD measures are allowed among Members, however the investigating member shall notify, in writing, the other member whose goods are allegedly being dumped, and allow a 20-day period for consultation.[795] The FTA provides for the application of the lesser duty rule if it is adequate to remove the injury.[796] Subsidies and countervailing measures are allowed in accordance with Articles VI and XVI of the GATT 1994 and the ASCM. Parties are required to engage in a 45-day period of consultations with a view to finding a mutually acceptable solution. [797] Members are required to exclude other Members from global safeguards if imports from such Members do not cause or threaten to cause serious injury.[798] Bilateral safeguards are allowed and could be applied in cases where there is clear evidence that increased

[791] See e.g. the EPA between the EU and SADC Members.
[792] See the discussion in 5.3.2.1 below.
[793] Art. 6.8 of Section B of the TPP Agreement.
[794] Central American States (CAS) are Costa Rica and Panama.
[795] Art. 2.15 of the FTA Agreement between EFTA and CAS states.
[796] *Ibid.*
[797] *Ibid,* Art. 2.14.
[798] *Ibid,* Art. 2.16.

imports have caused or are threatening to cause serious injury as a result of liberalisation in accordance with the agreement.[799]

In the FTA between the EU and Mexico, which came into effect in 2000, there is no reference to state aid but both parties merely confirmed their rights and obligations under the ADA and the ASCM.[800] Parties can apply bilateral safeguard measures in cases where an increase in imports of a product of one party leads to serious injury in the domestic industry of the other party, where it should be combined with adequate compensation.[801] Safeguard measures could be applied without compensation in case of balance of payment difficulties.[802] Moreover, the Agreement acknowledges the linkage between competition policy and TDIs, and establishes a cooperation mechanism where both parties are required to present an annual report on the implementation of the mechanism to the Joint Committee.[803]

In the EPA between the EU and six SADC members,[804] all WTO TDIs have been retained in addition to specific FTA safeguards.[805]

When Members of different RTAs decide to apply rules different from the WTO rules, these main substantial differences could include the following aspects:

5.3.2.1 Application of higher de minimis Dumping Margin or higher Negligible Volume

Members of RTAs could decide to increase the *de minimis* margin and the negligible volume for the respective TDIs in order to provide favourable conditions for RTA Members. In such cases, investigations against Members may terminate yet continue against non-Members even if they have the same dumping (or subsidies) margin or volumes.

In certain FTAs the *de minimis* margin for AD investigations is raised from 2% to 5% and the negligible volume of dumped imports is increased from 3% to 5%.[806] Other RTAs raise both the *de minimis* margin and the negligible level to 6%.[807]

[799] *Ibid*, Art. 2.17.
[800] Art. 14 of the EU-Mexico FTA.
[801] *Ibid*, Art. 15.
[802] *Ibid*, Art. 21.
[803] *Ibid*, Art. 39.
[804] Botswana, Lesotho, Mozambique, Namibia, South Africa and Swaziland.
[805] See chapter II of the EU-SADC EPA.

5.3.2.2 The Application of the lesser duty rule

When the RTA provisions require the application of the lesser duty rule against Members but not necessarily against third parties, it could provide favourable treatment to Members by imposing a duty less than the dumping/countervailing duty margin but sufficient to remove the injury to the domestic industry.[808]

5.3.2.3 The provision of shorter period of application of TDIs

When RTAs provisions impose a shorter time of application of TDIs against Members compared to non-Members, this can clearly provide another source of favourable treatment to intra-trade.

In certain RTAs the application of AD and CVD measures is for a maximum of four years which is less than the standard period in the context of the ADA and ASCM which is usually five years.[809] This can result in less harm to the exports of Member States compared with non-Members.

5.3.2.4 Pre-imposition Requirements

In certain cases, RTAs provide for the requirement of prior notification or certain steps to be taken by RTA Members to try to reach a mutually satisfactory outcome before the application of TDIs. This requirement is called "best endeavour clause" and could also decrease the possibility of imposing AD measures by reaching agreement through negotiations. An example of this is the EFTA-South Korea FTA.[810]

5.3.3 Regional vs. National Investigating Authorities

One of the major decisions of any RTAs is whether to have a regional investigating authority (RIA) to conduct TDIs related investigations or conduct the investigations through national bodies.

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[806] Art. 9 of the Singapore-New Zealand FTA and Art 2.8 of Singapore-Jordan FTA.
[807] Art. 7.2 of the Taiwan-Panama FTA.
[808] Art. 2.10 of EFTA-South Korea FTA.
[809] Art. 7.5 of Taiwan-Nicaragua FTA.
[810] Arts. 16, 17 and 18 of the EFTA-SACU FTA Agreement signed in 2006 dealing with the three TDIs

5.3.3.1 Regional Investigating Authority

The creation of a regional investigating authority (RIA) is a significant step in the path of economic integration. It entails a delegation of national powers to the established entity. This could be perceived as undermining the national sovereignty which is an important controversial issue in regional integration.

The creation of a regional institution which has powers beyond the territorial jurisdiction of Members may be difficult to accept for Member States. This challenge is magnified further when these institutions act in a way that limit the policy space of Members in economic and political spheres.[811]

It can also put limitations on national governments in achieving their TDIs related objectives as it decreases the policy space in trade related matters.

The creation of a RIA requires the dedication of financial and human resources as well as drafting regional legal instruments that determine the mandate and jurisdiction of this authority. This will also require the establishment of a regional judicial power to review the determinations of this body.

A RIA that has the authority to conduct TDI investigations, or review the determinations of national authorities, may affect the frequency of using TDIs against RTA Members and non-Members and results in a *de facto* favourable treatment to Members.[812] This can happen through the tendency of regional bodies to apply TDIs against third parties and not against Members which are bound by agreements and stronger networks of economic interests.[813] The creation of RIAs is always correlated with a high level of integration.

The EU Members have delegated their investigating powers to the European Commission (EC), which conducts investigations on behalf of Members. [814]

In Africa the creation of regional investigating authorities could face several constraints due to structural challenges and sovereignty concerns. SACU has a special

[811] See the discussion under sec. 2.3 of this thesis.
[812] See in general Teh, Prusa & Budetta (2007).
[813] *Ibid.*
[814] See discussion under section 5.5.1 of this Thesis.

position, as the investigating authority of South Africa (ITAC) is responsible for TDIs through its Trade Remedies Unit (TRU) which administers the TDIs through investigation of alleged dumping, subsidised imports and a surge of imports into the SACU, in accordance with domestic legislation.[815]

In cases where the final determinations are subject to review, not only by the courts or tribunals of the country whose authorities imposed the measure, but also by a regional body, it may provide an additional layer of objectivity.[816] This consequently has its implications on how the RTAs handle TDIs against Members and non-Members.

5.3.3.2 National Investigating Authority

In the majority of RTAs national investigating authorities are responsible for the conduct of investigations. This is the case especially where countries want to maintain sovereignty and control over trade issues believed to be within national jurisdiction like TDIs investigations. In Africa the limited number of countries with TDI legislations conduct investigations through their national investigating authorities. This is the case in COMESA and SADC. The same situation is found in other blocks like the Latin America Integration Association (ALADI), where the investigations are carried out by national authorities.

In certain cases, national investigating authorities have a responsibility to report to RTA bodies. These regional bodies may have authority of validating the judgments of national authorities. This can act as a second layer of scrutiny as in the case of the Bi-National Panel of NAFTA.[817] The NAFTA Bi-National Panel may change the incentives for filing unfair trade petitions by reducing the likelihood of an affirmative finding of injury by unfair trade.[818] There was a reduction of USA investigations against Canada after the creation of NAFTA, which may be attributed to the potential effects of the rulings of the bi-national panels in NAFTA. This view was supported by the TDIs statistics in NAFTA, which confirmed that the creation of regional

[815] "Trade Remedies" <http://www.itac.org.za/pages/services/trade-remedies> (accessed 1 May 2014). Note that the SACU Council of Ministers has requested ITAC to conduct all TDI investigations on behalf of all SACU Members – interview with Dr. Brink.
[816] *Gagné (2000) The World Economy 23(1), 77-91.*
[817] See the discussion under section 5.5.2 of this Thesis.
[818] Jones (2000) 18.

Investigating Authority has the effect of decreasing actions against Members of RTAs.[819]

National investigating authorities could be an independent body, or a body that is annexed to the Ministries of Trade, Finance or Foreign Affairs. In Egypt the investigating authority is part of the Ministry of Trade and Industry while in South Africa ITAC takes this role.

The results of the investigations may be submitted to other national authorities which have the mandate to take the final decision considering broader factors as well as other technical and political considerations.

Any decisions by the national investigating authorities could be challenged for compliance in the national courts or under the WTO DSB.

In India, the Directorate General of Anti-dumping and Allied Duties (under the Ministry of Commerce and Industry) is the national authority responsible for investigations, but the ultimate decision is taken by the Government while the Department of Revenues is responsible for implementation. [820] In Brazil the Department of Trade Defence conducts the investigations, but the decision is taken by the Secretary of Foreign Trade.[821]

In the USA safeguard decisions should be approved by the President of the USA.[822]

Not all countries have national investigating authorities, as it requires a lot of financial and technical resources, and many countries may find that the perceived potential economic benefits of establishing this authority is less than the required cost.

5.4 Analysis of different TDIs systems in RTAs

The coming section will allude to the different schemes dealing with AD, countervailing and safeguard measures in RTAs. The design of these tools and its

[819] See in general Kasteng & Prawitz (2013).
[820] See in general Bienen, Brink and Ciuriack (2013).
[821] *Ibid.*
[822] Sec. 201 of the USA Trade Act.

application on intra-trade and trade with third parties reflect the integration objectives of Members as well as their concerns.

5.4.1 Analysis of AD provisions in RTAs

The majority of RTAs permit the application of AD measures under certain conditions. This has to do with the fear of increasing usage of dumping by the private sector in low-cost exporting countries. RTAs which have eliminated the application of AD on intra-regional trade include two categories: CUs and FTAs.

In the case of CUs, where there is a common external tariff (CET), it could be impractical to apply AD measures against Members. This includes the cases of the EU, the EU-Andorra and the EU-San Marino CUs.

On the other hand, RTAs at the level of FTA which have eliminated the usage of AD include: Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA), the European Economic Area (EEA), Canada-Chile FTA, EFTA, EFTA-Singapore FTA, EFTA-Chile FTA, China-Hong Kong FTA and China-Macau FTA. [823]

The majority of these FTAs are between territories that have special economic and political relations among themselves and/or are at a relatively close level of development.

In certain cases, the elimination of AD is substituted by the application of common provisions on competition, for example in (ANZCERTA), EFTA-Chile FTA and EFTA-Singapore FTA.

Similarly, in the EU, EFTA, the EEA and Canada-Chile FTA, the elimination of AD measures has been replaced by the use of competition rules and deep harmonisation of rules in accordance with deep integration objectives. This can happen while acknowledging the difference between the objectives of AD and competition policy.

Safeguard measures may be used to achieve some of the objectives of AD measures *i.e.* protecting national industries.

[823] See for example Art. 36 of EFTA, Art. 26 of the EEA, Art. 4 of ANZCERTA, Art. 16 of EFTA-Singapore FTA.

A study indicated that out of 69 RTAs that maintained the application of AD measures, 53 RTAs include a notification and consultation obligation before the imposition of AD measures.[824] This process could act as a constraint that could prevent / delay excessive usage of TDIs.

The RTA's notification to the CRTA should include a description of the AD measures applicable on intra-trade, in cases where they differ from those applied on an MFN basis.[825] In the cases of CUs, or interim agreements leading to a CU, the notification shall provide information on whether the parties intend to apply a common regime on AD measures to imports from third parties.[826]

AD provisions could differ in terms of the *de minimis* margin, the negligibility level, the lesser duty rule, the period of implementation and the prior notification clause.

5.4.2 Analysis of countervailing provisions in RTAs

Subsidies are very important in the context of RTAs. When one member provides financial assistance to its companies, this could completely distort competition and consequently affect negatively the national industries of other Members which could offset the potential benefits of regional liberalisation and may cause substantial damage to other Members.

In dealing with subsidies and countervailing measures, RTAs can adopt different approaches. Generally, subsidies are allowed as long as they are not distorting competition and abide by WTO rules. Most RTAs state clearly that subsidies that distorts competition are prohibited and authorise Members to countervail these distortive subsidies.

Among 69 RTAs surveyed by WTO, 64 allow member countries to impose countervailing measures against subsidies.[827]

On the other hand, RTAs with deep integration and harmonised rules could opt for abolishing countervailing measures for intra-trade. This includes the EU, the EEA and

[824] Estevadeordal , Suominen & Teh (eds) (2009)
[825] WTO (2006) Standard format for Information on Regional Trade Agreements.
[826] *Ibid.*
[827] Report of "Inventory of Non-Tariff Provisions in Regional Trade Agreements 1998" (WTO:WT/REG/W26).

the EFTA. It also includes some of the FTAs concluded between the EU and the Eastern European countries before the EU enlargement process.[828]

Note that for some countries that are currently candidates to the EU membership like Bosnia and Herzegovina, TDIs are still allowed between the two sides.[829]

Similar to the AD cases in RTAs, countervailing measures could be replaced by competition policy, harmonised policies and state aid agreements.

RTAs which maintain the application of countervailing measures could have notification procedure obligations to endeavour reaching mutually acceptable agreement before the investigation process can be initiated and prior to the imposition of countervailing measures.[830] This process is meant to act as a constraint on the excessive usage of TDIs.

Other RTAs include provisions on subsidies policies, and exchange of information on its provisions as well as a monitoring mechanism to make sure that subsidies do not harm competition.[831]

RTAs provisions distinguish between subsidies to industrial goods and subsidies to agriculture products. The latter are dealt with separately which reflects the sensitivity of the agriculture sector in many countries and its connection with employment and food security. Agriculture export subsidies are prohibited in most RTAs as per the Hong Kong ministerial conference declaration, which decided that all export agricultural subsidies should end by 2013.[832]

RTAs should notify the CRTA with information regarding countervailing measures and especially where they differ from those applied on a MFN basis. [833]

[828] Estevadeordal, Suominen & Teh (eds) (2009).
[829] Arts. 38 and 39 of the Stabilisation and Association Agreement between the EU and Bosnia and Herzegovina.
[830] *Ibid.*
[831] *Ibid.*
[832] Para. 6 of the WTO Ministerial Declaration in 2005.
[833] WTO (2006) Standard format for Information on Regional Trade Agreements.

5.4.3 Analysis of Safeguard provisions in RTAs

Safeguard provisions are affected by their nature as trade-corrective measures designed to deal with surges in imports that are not necessarily due to unfair trade measures and consequently allow national industries to adjust.

In some RTAs safeguard measures are only allowed to the extent necessary to remedy serious injury in accordance with Article 5 of the ASG.[834] Other RTAs allow for the suspension of concessions and to revert to MFN rates.

RTAs differ also in terms of the provisions governing the conditions of application of safeguards, including investigations procedures, the provision of a mutually accepted solution, the duration and conditions of provisional measures, the duration of application, the review process, compensation, retaliation, treatment to developing countries and LDCs, existence of regional investigating authority, notification, consultation and dispute settlement.

In the standard format submitted to the CRTA, RTA Members must include a description of the emergency measures and other safeguard mechanism applicable to intra-trade (e.g. balance of payments difficulties, developmental matters, special safeguards for agriculture), in cases where they differ from those applied on an MFN basis. In the case of CUs, or interim agreements leading to a CU, this must include information on whether the parties intend to apply a common safeguard regime to imports from third parties and on whether the Agreement provides for the exclusion of parties to the Agreement from global safeguard measures.[835]

In the EU-SADC EPA, both sides can impose safeguard measures in accordance with the ASG and the procedures laid out in the Agreement.[836] The TDCA also provides for bilateral safeguard separately for industrial and agricultural products.[837]

RTAs can include provisions on both bilateral safeguards and global safeguards. Examining the different approaches toward safeguard measures in RTAs, there could be four different approaches:

[834] See, e.g., Arts 34(2) and 34(6) of the EU-SADC EPA.
[835] WTO (2006) Standard format for Information on Regional Trade Agreements.
[836] Art. 33 of the EPA.
[837] Arts. 34 and 35 of the EPA.

1. No provisions on safeguards. One example is the Agreement setting up the FTA between the Arab Mediterranean countries (Egypt, Jordan, Morocco and Tunisia) which, although containing some provisions on AD and countervailing measures,[838] is silent on the regulation of safeguard measures. This would imply implementing the ASG rules.
2. To refer to the ASG provisions as the governing legal system or to copy or have similar provisions of the ASG with no specific provisions for bilateral or multilateral safeguards. For example, the SADC Trade Protocol refers to the investigation procedures under Art. 4 of the ASG.[839]
3. To have detailed customised provisions on both multilateral and bilateral safeguards, where bilateral safeguards are applied to intraregional imports and the multilateral safeguard on imports from third parties.
4. To prohibit the application of safeguard measures on intra-trade. Some RTAs, including the EU and ANZCERTA,[840] have prohibited the use of safeguards on intraregional trade.

5.4.3.1 Global Safeguards

Global safeguard is the application of safeguard measures in a universal way in accordance with GATT Article XIX and the ASG and in response to increased imports that cause serious injury to a domestic industry. In such cases safeguards are applied on a non-discriminatory basis *vis-à-vis* all imports from all countries, except as per Article 9.1 of the ASG. [841]

Some RTAs agree to exclude Members from safeguard measures without being subject to any condition.[842]

On the other hand and according to one study a quarter of RTAs provide for the possible exclusion of the RTA partner, subject to certain criteria, thus discriminating

[838] Art. 17 of the Agreement setting up FTA between the Arab Mediterranean countries.
[839] Art. 20 of the SADC Protocol.
[840] Safeguard measures were only allowed in the transitional period.
[841] Art. XIX of GATT and Art. 2.2 of the ASG. A safeguard measure shall not be applied to developing country Members, where a single developing country Member's products account for no more than 3% of the total subject imports and as long as products originating in those low-import-share developing country Members collectively do not exceed 9% of imports.
[842] See for example Art. 9 of the Singapore-Australia FTA.

against non-parties.[843] This takes place in accordance with parallelism, which basically means that in order for a WTO member to exclude imports from RTA partners from the application of safeguard measures, the investigations should exclude imports from Members of the RTA.[844] The investigating authority must prove in its causality analysis that the effect of the excluded RTA imports is not attributed to imports included in the safeguard measures.[845] This will require the fulfilment of two conditions:[846]

1. That the imports from Members do not represent a substantial share of the total imports. The definition of "substantial share" differs from one RTA to another. In the *Canada-Bicycles Safeguard*, Canada exempted the USA imports from the application of global safeguards as it was considered to be a small supplier based on volume measurement, since the USA exports represented only 13% of the Canadian market and came third among major suppliers by value.[847] Other RTAs define "substantial share" as not in the top three suppliers in the most recent period.[848]
2. That the imports from Members do not contribute to serious injury, which means that that the growth rate of imports of Members during the period of serious injury is appreciably lower than the growth rate of total imports from all sources.

In Australia-Thailand FTA the party imposing safeguard measures may exclude imports from the other party if such imports are not causing serious injury or threat thereof.[849]

The issue of parallelism was challenged several times in the DSB on the basis that the ASG requires that safeguard measures be applied irrespective of source, which made it among the issues most disputed.[850] The complexity of this unresolved issue comes

[843] See Crawford, McKeagg, and Tolstova (2013) *WTO ERSD.*
[844] Appellate Body Report, *USA-Steel, para. 44.*
[845] *Ibid*, para. 453.
[846] Examples of RTAs applying this principle include: NAFTA, Canada-Chile FTA; Canada-Israel FTA; Chile with Costa Rica, El Salvador, Guatemala, Honduras,
[847] Canadian safeguard inquiries into imports of Bicycles and Finished Painted Bicycle Frames (GS-2004-001 and GS-2004-002). Note that imports from Israel and Chile (with which Canada has FTA) were also exempted from the measures.
[848] Guatemala-Chinese Taipei FTA; Honduras-Chinese Taipei FTA.
[849] Art. 508 of the Australia-Thailand FTA.
[850] *USA-Line Pipe, USA-Wheat Gluten, Argentina-Footwear, and USA-Steel.*

from the fact that it deals with the interaction between several WTO rules and Agreements, mainly the ASG, the MFN principle and Article XXIV.[851]

It is noted that the ASG does not mention the term parallelism. The AB reports however indicate that the requirement of Parallelism could be concluded from the language used in the first and second paragraphs of Article 2 of the ASG. [852]

RTAs differ in the way they apply parallelism. NAFTA for example tend to generally exclude Members from the application of safeguards.[853] Some RTAs apply the parallism principle where RTA Members are excluded from global safeguards as long as their imports do not cause serious injury.

Because of the special nature of CUs, Members can only exclude other Members from the application of global safeguards if the domestic industries of all Members act collectively as a single domestic industry *vis-à-vis* all other import sources.[854]

RTAs may decide to include explicit language on the application of safeguard measures to avoid possible DSB rulings on parallelism.[855] This will ensure that injury caused by any other factors, including intraregional imports, may not be attributed to the surge in imports from third-party countries. Additionally, safeguard measures will only be applied to the imports from third-party countries to the extent necessary to remedy injury caused in accordance with the ASG.

In *USA-Line Pipe*, the USA claimed that Article XXIV permits the exclusion of RTA Members from safeguard measures as this can be considered one of the forms of the required elimination of "restrictive regulations of commerce" on "substantially all the trade" among the free trade area Members. The panel agreed with this claim as it stated that GATT Article XXIV could, in certain circumstances, prevail over Article XIX and that Article 2.2 of the ASG and Article XXIV of GATT could provide a defence against claims of discrimination if imports from RTA Members were excluded from the application of a global safeguard measure. However, the AB declared the panel's finding on the use of Article XXIV as a defence to be moot and of

[851] Du Pisani *et al* (2014) (eds) 220.
[852] Appellate Body Report, *USA-Steel*, para. 439.
[853] See for example *USA-Line Pipe.*
[854] Appellate Body Report, *Turkey-Textiles*, para 58.
[855] Estevadeordal, Suominen & Teh (eds) (2009).

no legal effect, pointing out that it was not ruling on the question whether GATT Article XXIV permits exempting imports originating in a member of an FTA from a safeguard measure [856]

In *Argentina-Footwear* the AB endorsed the panel's reasoning between the scope of a safeguard investigation and the scope of the application of safeguard measures, and concluded that the facts of the case did not justify the imposition of safeguard measures only on non-Mercosur exporters as the investigation found serious injury caused by imports from all sources, including imports from Mercosur Members.[857] In line with the decision in *USA-Line Pipe* the AB indicated that it is not ruling on whether, as a general principle, a member of a CU can exclude other Members from the application of a safeguard measure.[858]

The AB was very clear in *USA-Wheat Gluten* as it confirmed further the requirements of parallelism principles indicating that, to include imports from all sources in the determination that increased imports are causing serious injury, and then to exclude imports from one source from the application of the measure, would violate the ASG.[859] It also ruled that if there was any gap between imports covered under the investigation and imports falling within the scope of the measure, this could be justified only if the competent authorities establish explicitly that imports from sources covered by the measure satisfy the conditions for the application of the safeguard measure.[860]

In conclusion, these cases support the possibility of excluding Members of RTAs from global safeguards if they are also excluded from the injury determination.

The issue of parallelism could be of importance to developing countries including the T-FTA Members in their regional integration endeavours. The imposition of safeguard measures by African countries should not result in hurting the economies of other Members at an early stage of development as this can have dire consequences on their economies and their integration objectives. This will encourage the application of the parallelism principle in accordance with WTO law.

[856] Appellate Body Report, *USA-Line Pipe*, para. 199.
[857] Appellate Body Report, *Argentina-Footwear*, para. 114.
[858] *Ibid.*
[859] *USA – Wheat Gluten paras.* 96 and 98.
[860] *Ibid.*

Safeguard measures are underutilised in Africa and can provide an important less burdensome tool to protect national infant industries from potential surge in imports from developed trading partners, provided they are used judiciously.

However, it is noted that if countries continue to follow the wide interpretation of the parallelism requirement by excluding intraregional imports from multilateral safeguards, they run the risk of being challenged at the multilateral level. This can pose challenges for those countries which lack financial and institutional capacities to defend their case on the WTO platform. [861]

5.4.3.2 Bilateral Safeguards

Regional or bilateral safeguards are safeguards imposed against Members of RTAs to address potential distortions resulting from trade liberalisation in the context of RTAs. In certain cases, they may act as a safety valve and guarantee against risks deriving from a complete abolition of the other two types of TDIs on intra-RTA trade. They are usually included in RTAs as a result of political pressures fearing the unforeseen increase in imports that can cause serious injury to the domestic industry.[862]

In such a case RTA Members can suspend the further reduction of customs duties provided for under the Agreement, increase the rate of customs duty to a level not to exceed the MFN rate, and they can also impose quantitative ceilings.[863] For example, the EFTA-SACU FTA permits the suspension of further reduction in duties as well as the increase in duties.[864]

RTAs differ in how they design their bilateral safeguard measures. Some RTAs use flexible language on the trigger mechanism which broadens the scope for these measures while other RTAs tighten the conditions for application of a bilateral safeguard through limiting the duration of the safeguard measure, allowing the use of tariff-based measures only, and binding the use of the measure to the transition period.[865]

[861] Du Pisani *et al* (2014) 220.
[862] Interview with Mr. El Sherbini; Kruger, Denner & Cronjé (2009) 7.
[863] EPAs provide for TRQs.
[864] See also Art. 34(3) of the EU-SADC EPA.
[865] See Crawford, McKeagg, and Tolstova (2003) *WTO ERSD.*

In line with their nature and purpose, safeguard measures are the most maintained type of TDIs against Members in RTAs. Sixty-eight RTAs out of sixty-nine reviewed in one study allow member countries to apply the emergency import restriction measures of Article XIX of GATT.[866]

If over-utilised, bilateral safeguards could undermine the liberalisation gains of RTAs.

Bilateral safeguards are flexible and are imposed after fulfilling the required conditions of every RTAs that could require prior consultation, periodic reviews and dispute settlement rules.[867]

The EU-SADC EPA has limitations on imposing safeguard measures. The party planning to impose these measures shall inform the other party and, if requested, enter into consultations. Additionally, before taking the measure, it shall supply the Trade and Development Council with all relevant information, with a view to seeking a solution acceptable to both parties. [868] Moreover, the measures to be taken should be least disturb the functioning of the Agreement and should be limited to the extent necessary to prevent or remedy serious injury and facilitate adjustment.[869]

Similarly, in the EU-Egypt Association Agreement both parties are allowed to apply safeguard measures and are required to supply the Association Committee with all relevant information with a view to seeking a solution acceptable to the parties before imposing these measures.[870]

In the USA-Bahrain FTA the two parties are allowed to impose safeguard measures in response to serious injury that comes as a result of the liberalization of custom duties under the Agreement.[871]

The SACU-EFTA agreement requires the party imposing the safeguard to supply the Joint Committee with all relevant information, with the view to seeking an acceptable solution.

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[866] *Ibid.*
[867] See for example Arts. 24 and 25 of the TDCA Agreement between South Africa-EU, Japan-Mexico and Israel-Mexico FTAs, Art, 24 of the EC-Egypt Association Agreement, Art. 18 of the EFTA-Egypt FTA, Art. 5 of the Israel-Mexico FTA.
[868] Art 34(7) of the EU-SADC EPA.
[869] *Ibid*, Arts 34(2) and 34(6).
[870] The EU-Egypt Association Agreement.
[871] Art. 8.1 of the USA-Bahrain FTA Agreement.

The duration period varies from one RTA to another. In the EFTA-Chile FTA the limit for a safeguard measure is only one year with the possibility of two additional years of extension.

In some cases, the application of safeguard measures is only during the transitional period of trade liberalisation to allow national industries to adjust to increased competition. The duration could be between three and ten years.[872]

Some RTAs limit the imposition of safeguard measures to cases of balance-of-payment difficulties, structural adjustment for domestic industries and protection for infant industries and only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.[873]

RTA Members may permit the application of safeguard measures on permanent basis and – with relaxed imposition requirements – to protect sensitive sectors including agriculture, fishery and certain labour-intensive industrial products.[874]

As in the ASG, many RTAs provide for trade compensation equivalent to the value of the imposed safeguard measures that should be mutually agreed, otherwise parties may resort to retaliatory action.

RTAs could provide special treatment to developing and LDCs in the form of not applying safeguard measures as long as their share of imports is less than a specific threshold. The South Asian Free Trade Area (SAFTA) agreement does not permit the application of safeguard measures against products originating from LDCs as long as the share of imports of the product concerned does not exceed 5%, or provided that LDCs which individually share less than 5% of the imports do not account for more than 15% of the total of a certain product. [875]

The issue of bilateral safeguard is of importance in RTAs formed between developing countries and LDCs, as they may be in high need for them to face particular challenges as a result of opening their markets in accordance with RTA provisions,

[872] See Art. 25 of the EU-South Africa TDCA where safeguard measures were permitted to protect the economies of Member States during the transitional period.
[873] Art. 24 of the EC-Egypt Association Agreement.
[874] This also applies to special safeguards. See for example EU RTAs with Balkan countries and the EPA with Papua New Guinea and Fiji.
[875] Art. 16.8 of SAFTA.

however they should not be used excessively in a way that can threaten the gains of regional integration.

In practice countries revert to these emergency measures in a limited way, which could be explained in light of the political sensitivity associated with these measures, fear of retaliation, and because it can jeopardise the liberalisation process [876]

Countries have a choice between bilateral safeguards and the ASG provisions. In COMESA and NAFTA member countries have preferred to use the bilateral safeguard mechanism, while in ASEAN Members have preferred to resort to the ASG.[877]

5.4.3.3 Special Safeguards

Most RTAs contain provisions for special safeguard measures which could be triggered by a price or volume threshold and without necessarily going through the demanding process of injury determination to the domestic industry. Special safeguards usually act as a last resort of protection for certain sensitive sectors. The same sectors that are facing problems in liberalisation in WTO like agriculture are usually the sectors protected by this emergency measures. [878]

Because of its sensitivity to the USA economy, a special safeguard mechanism for textiles is present in almost all USA FTAs.[879] This includes the USA-Morocco FTA,[880] USA-Chile FTAs [881] and NAFTA.[882] Additionally, agricultural safeguard provisions are present in the EU-SADC EPA and the EFTA-SACU FTA.

RTAs differ in terms of the detailed provisions related to the invocation of special safeguard measures mainly in terms of trigger volumes or prices, the duration of measures, specific measures that can be implemented and procedures that need to be followed.

[876] See in general Kruger, Denner & Cronjé (2009).
[877] See for example Kenya sugar and flour cases in the context of COMESA.
[878] Brown & McCulloch (2004).
[879] Kruger, Denner & Cronjé (2009) 25.
[880] See for example Art. 4.2 of the USA-Morocco FTA.
[881] USA-Chile FTA Section G, Art. 3.19.
[882] See for example NAFTA Annex 300-B.

5.5 Dealing with TDIs in Major RTAs

Out of all notified RTAs to the WTO, the EU, NAFTA, ASEAN and Mercosur are among the most prominent examples of trade integration in terms of economic weight, volume of trade and depth of integration. They are also indicative agreements of different regional groups. The EU is a model of economic integration among developed countries, while Mercosur and ASEAN encompass LDCs, developing and emerging countries and NAFTA is an asymmetric agreement between developed and developing countries.

The four RTAs differ in the way they govern the application of TDIs against Members and against third parties. Their legal texts include specific and detailed provisions for the application of TDIs.

5.5.1 The European Union (EU)

5.5.1.1 Introduction

The origin of the EU (formally the European Communities) has its background in the aftermath of the Second World War, with the idea that fostering economic cooperation and interdependence could lead to avoiding conflict. In 1951 six countries founded the ECSC Community,[883] and later, in 1957, the European Economic Community (EEC) and the European Atomic Energy Community.[884]

The EU has gone through consecutive stages of enlargement in the last 15 years. The most significant took place in 2004 with the admission of 10 Eastern European countries.[885] Bulgaria and Romania joined in 2007,[886] while Croatia joined in July 2013.[887]

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[883] "The ECSC Treaty" <http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_ecsc_en.htm.
[884] For detailed account of the background of the European Common Market See Swann (1970)
"Treaty establishing the EEC"
http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_eec_en.htm.
[885] "EU Enlargement 2004-2007"
http://europa.eu/legislation_summaries/enlargement/2004_and_2007_enlargement/e50017_en.htm (accessed 1 March 2013).
[886] *Ibid.*
[887] "EU Enlargement 2013"
http://ec.europa.eu/enlargement/countries/detailed-country-information/croatia/index_en.htm (accessed 1 February 2014).

The EEC (now the EU) was notified to the GATT/ WTO under GATT Article XXIV and GATS Article V on the 24th of April 1957 and 10 November 1995 respectively. It is classified in the WTO as a CU and Economic Integration Agreement.[888] The EU is based on Treaty-based commitments with supranational organisations that sets its objectives and manage the integration process among its Members.

The EU institutions act as forum for developing and harmonising common policies in all fields. These supranational institutions are mainly: The European Parliament, the European Council, the Council of the European Union, the European Commission (EC), the European Court of Justice (ECJ), the European Central Bank and the Court of Auditors.

The Economic and Monetary Union (EMU) represents a major step in the integration of EU economies as it adopts a common currency and a central bank to manage the common monetary policy within the euro area. [889]

The EU has adopted many common policies and laws for many trade-related areas.[890] Integration includes foreign investment policy which, as provided for in the Treaty on the Functioning of the European Union (TFEU), is now the exclusive competence of the EU.

The EU's trade with non-Members accounted for 14.8% of the world trade in 2014.[891] It is the second largest exporter after China with total exports of 1702 billion Euros and the second largest importer after the USA with a total of 1680 billion Euros.[892]

If including trade of Members, the EU would be considered the largest trading block in terms of value of trade. The biggest trader in the EU is Germany with a volume of trade of USD 1508 billion, followed by the Netherlands, France, Italy and the UK.[893]

The Treaty of Rome provided for the harmonisation of rules and the development of a common commercial policy based on uniform principles, particularly with regard to

[888] "RTA portal" http://rtais.wto.org/UI/PublicShowMemberRTAIDCard.aspx?rtaid=120 (accessed October 2013).
[889] "Economic and Monetary Union" http://ec.europa.eu/economy_finance/euro/emu/index_en.htm (accessed 1 February 2014).
[890] EU Trade Policy Review WTO document WT/TPR/S/284 (2013) (accessed 2 July 2014).
[891] According to Eurostat data.
[892] *Ibid.*
[893] According to World Trade Statistics in 2014. https://www.wto.org/english/res_e/statis_e/its2015_e/its2015_e.pdf

changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as TDIs.[894]

The application of TDIs against third parties is declared to be in line with the objective of re-establishing a competitive environment for the EU industry when harmed by dumped or subsided imports.[895]

5.5.1.2 TDIs Governing Legislations in the EU

EU laws and regulations govern the EU trade policy. The EU TDIs regulations are part of the Common Commerce Policy (CCP). They are governed by the so called *"acquis communautaire"* which is the entire body of European laws including all the treaties, regulations and directives passed by the European institutions, as well as judgments laid down by the ECJ.

The EU system differentiates between AD and countervailing measures on one hand and safeguard measures on the other hand.

The legal basis for the EU's AD and countervailing measures is illustrated in the AD Regulation (ADR) and the Anti-Subsidy Regulation (ASR),[896] jointly referred to as the two basic Regulations.[897]

The EU TDI regulations are sophisticated. They have evolved through a series of revisions, the most recent of which took place in 2009 and mainly constituted a consolidation of various amendments made to the previous two basic Regulations.[898]

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[894] Art. 113 of the Treaty of Rome (1957).
[895] "The EC" <http://ec.europa.eu/trade/policy/accessing-markets/trade-defence/actions-against-imports-into-the-eu/> (accessed 1 August 2015).
[896] Council Regulation (EC) No 597/2009 of 11 June 2009 on protection against subsidized imports from countries not Members of the European Community.
[897] The two regulations are Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not Members of the European EU the European Community and Council Regulation (EC) No 597/2009 of 11 June 2009 on protection against subsidized imports from countries not Members of the European EU.
[898] Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not Members of the European Community and Council Regulation (EC) No 2026/97 of 6 October 1997 on protection against subsidized imports from countries not Members of the European Community.

On the other hand, the EU Safeguards policy is governed by three different regulations to account for the different purposes and targets of this policy between Members and non-Members of WTO as well as the special case for China.[899]

The EU Regulations establish rules for both the substantive and the procedural aspects of the three TDIs.

5.5.1.3 EU Institutions dealing with TDIs

The EU institutions dealing with trade policy are well developed with clear mandate and function for every institution. There institutions deal directly and indirectly with the EU trade Policy including TDIs.

The EU manages trade and investment relations with non-EU countries through the EU's trade and investment policy.[900] Trade policy is the exclusive power of the EU and only EU institutions can legislate on trade matters and conclude international trade agreements.[901] This is a clear example of power delegation to a regional authority which diminishes the sovereignty of Members.

The European Council influences the trade policy through its directives for negotiations, the following-up of the negotiation process and by approving the results of the negotiation, usually by qualified majority.[902]

The European Parliament influences the negotiation process by issuing trade related legislation and by approving concluded trade agreements.[903]

TDI investigations are within the exclusive competence of the EC, which acts as the regional investigating authority.

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[899] These are Council Regulation (EC) No 260/2009 of 26 February 2009 on the common rules for imports, which is applied on imports from WTO Members, Council Regulation (EC) No 625/2009 of 7 July 2009 on the common rules for imports from certain third countries, which is applied to imports from non-WTO Members, Council Regulation (EC) No 427/2003 of 3 March 2003 on a transitional product-specific safeguard mechanism for imports originating in the People's Republic of China, and amending Regulation (EC) No 519/94 on common rules for imports from certain third countries.

[900] The overall direction for the EU trade policy is set out in the Communication "Trade, Growth & World Affairs" <http://trade.ec.europa.eu/doclib/docs/2010/november/tradoc_146955.pdf> (accessed 1 August 2015).

[901] In accordance with the Treaty of Lisbon signed on 13 December 2007 amending the Treaty on EU and the Treaty establishing the European Community.

[902] Art. 188c of the Lisbon Treaty. For more information see “International Trade and Customs” http://www.consilium.europa.eu/en/topics/international-trade-customs/ (accessed 1 August 2015).

[903] Arts. 9 (b) and 188 (c) of the Lisbon Treaty.

5.5.1.4 Main Features of the EU TDI System

The EU TDIs system is generally in line with its WTO obligations and it has its own distinct features in accordance with the EU level of integration and the CCP. Analysing these features can indicate the particularity of the system and its objectives, which could be summarised in the following points.

5.5.1.4.1 Prohibition of TDIs on Intra-Trade and adoption of Common Competition Policy

Since the EU is at a level of CU with common CET, the three TDIs are prohibited on intra-trade in the single market. AD measures on intra-EU trade were only allowed during the transitional period and upon authorisation from the EC.[904] These measures were prohibited on intra-EU trade when the Treaty of Rome entered into force.[905] The prohibition was applied in all successive EU enlargements in 1973, 1981, 1986, 1995, 2004, 2007 and 2013 when the EU expanded to 28 Members.

The Treaty of Rome permitted the imposition of countervailing measures on intra-EU trade unless that State applies a countervailing charge on export, and authorised the EC to fix the amount of these charges.[906] Any decision in this regard was required to be approved by the EU council with a qualified majority.[907] The Treaty requested the EC to take steps to harmonise measures applicable to trade between Member States in the interest of the common market.[908]

What differentiates the EU from other CUs is the creation of a single market with free movement of factors of production including labour and capital. This renders the TDIs obsolete and impossible to manage.

The EU common competition policy addresses some of the potentially unfair trade measures among Members, including predatory pricing and some types of state subsidies. The laws of competition demand more requirements than AD, and there is a

[904] Art. 91.1 of the Treaty of Rome.
[905] *Ibid*, Art. 91.2.
[906] *Ibid*, Article 46.
[907] *Ibid*, Article 98.
[908] *Ibid*, Art. 99.

question about its effectiveness against possible dumping from new EU Members as manifested in the EU duties on ceramic tiles.[909]

To apply EU competition rules in cases of dumping would require strict conditions, *i.e.*, the EC will only consider possible dominance by a company if its market share is 40% or more.[910]

National Competition Authorities are empowered to apply Articles 101 and 102 of the Treaty fully, to ensure that competition is not distorted or restricted

The exemption of EU Members from TDIs and the application on third parties present an important way of favouring Members *vis-à-vis* third parties. This can put the exports of developing countries at increasing risk of competition from EU members.

5.5.1.4.2 Agreed Rules on State Aid and a Review Mechanism

The creation of a single market necessitates the establishment of a level playing field where Members cannot favour their national companies through financial assistance.

The prohibition of state aid requires the same conditions under the ASCM, which means that the subsidies should be granted by a member state or through state resources in any form whatsoever, and gives the recipient entity an advantage on a selective basis.

This could include subsidies granted to specific companies or industry sectors, or to companies located in specific regions, or subsidies which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, and the aid is likely to affect trade between Member States. [911]

Not all types of state aid are prohibited. State aid is allowed if it is in line with the EU common market rules, *i.e.*, does not distort competition. This includes non-specific aid with positive developmental and social implications, aid provided in response to

[909] Kasteng (2012) *National Board of Trade Sweden*.
[910] "Antitrust procedures in abuse of dominance" http://ec.europa.eu/competition/antitrust/procedures_102_en.html (accessed 1 August 2015). Abuse of dominance could be in the form of unfair purchasing and selling price.
[911] Art. 87 of the Treaty of Rome. Note the interaction between competition policy and TDIs and their distinct objectives.

natural disasters and reimbursement for the discharge of certain obligations inherent in the concept of a public service. [912]

Other kinds of financial support could be classified as compatible with the common market or not according to their nature. This includes aid to promote economic development; aid to projects of common European interest or to remedy a serious disturbance in the economy of a Member State; aid to facilitate the development of certain economic activities on a condition that it does not adversely affect trading conditions to an extent contrary to the common interest; aid to promote culture and heritage conservation and other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the EC.[913]

To ensure that state aid does not harm competition, a permanent review mechanism under the auspices of the EC reviews different kinds of state aid and may decide to abolish/alter any state aid that does not conform to the common market rules within a specific period of time.[914] The review process is managed through three departments. The Fisheries department reviews state aid in the fisheries sector, the Agriculture department reviews state aid in the agriculture sector while the Competition department reviews all other sectors.

State aid sector enquiries can be launched in situations where state aid measures may distort competition in several Member States, or where existing aid measures are no longer compatible with the regulatory framework.[915]

In cases of non-compliance the EC can refer the matter to the ECJ.[916] Moreover, the EC has the right to recover incompatible state aid.[917] EU Members should notify the EC of any intended state aid before providing it; otherwise it would be breaching EU rules, mainly Article 108 of the TFEU.[918]

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[912] Art. 93 of the Treaty on the Functioning of the European Union (TFEU).
[913] *Ibid.*
[914] *Ibid*, Arts. 88 and 108 of the TFEU, using the 2013 revision of the State Aid Procedural Regulation contained in Council Regulation (EU) No 734/2013 of 22 July 2013.
[915] According to the EC revision of the State Aid Procedural Regulation of 2013.
[916] Art. 108 of the TFEU.
[917] *Ibid*, Interview with Mr. Toft.
[918] *Ibid*, see also EC case, State Aid SA.34403 (2015/NN) (ex 2012/CP) - UK - Alleged unlawful State aid granted by Nottinghamshire and Derbyshire County Councils to community transport organisations in 2015.

The regulation of state aid in the EU could present some useful lessons that could be applied in the context of African integration while acknowledging the different levels of developments between the two models and the space available to governmental bodies at the two sides to provide financial assistance.

5.5.1.4.3 Regional Investigating Authority

One of the most important features of the EU system is the adoption of a single investigating authority to deal with TDIs against third parties. TDIs are the exclusive competence of the EC, which acts as a supranational organ. Nevertheless, the EC coordinates with Members in the investigation and imposition stages especially in collecting data related to injury determinations.[919]

The EC monitors the application of TDIs, follows up the enforcement of measures and negotiates future rules with third parties.[920]

This model is based on Treaty obligations and supranational bodies to which the states transfer some of their authority. It ensures a higher level of compliance and an accountability system which is a distinct feature compared to other endeavours with low level of compliance.

The EC conducts its TDIs investigations on the basis of the basic Council Regulations, which are the governing rules.

One distinct feature in the EU model is the abolition of TDIs on intra-trade, which limits the mandate of the regional authority to trade with third parties.

It is understood that there is a strong correlation between the high level of integration in the EU and the adoption of this progressive model of investigations.

5.5.1.4.4 TDIs law goes beyond WTO Provisions

The EC states that it applies TDIs against third parties in accordance with EU and WTO law.[921] However in certain cases EU law and applications go beyond the

[919] Interview with Mr. Mueller.
[920] *Ibid.*
[921] "EC Trade Defence" http://ec.europa.eu/trade/policy/accessing-markets/trade-defence/index_en.htm (accessed 11 April 2014).

provisions of the WTO. This is manifested mainly in certain aspects related to invocation criteria, investigation procedures, the application of the "EU interest test" and the "lesser duty rule".[922]

The frequent challenges to the EU law and application in the DSB and the subsequent rulings indicate that the European authorities sometimes deviate from the right application of some of the WTO TDIs rules. This could be understood in light of the evolving nature of international trade law. The EU responds to the DSB rulings by regular updates of its regulations. This confirms the robust nature of regional TDI systems and the need for continuous improvements.

5.5.1.4.5 The EU Public Interest Test

The application of the interest test rule is one of the fundamental features of the EU system and is usually considered in every single investigation.[923] The EU defines the public interest test as "an appreciation of all the various interests in the Union taken as a whole by analysing the likely economic impact of the imposition or non-imposition of measures on economic operators in the Union".[924]

The definition confirms that TDI measures will not undermine the aggregate interests in the Union. Consequently, TDIs measures should be imposed only in cases that would benefit the national producers and not significantly negatively affect the EU consumers.

In ensuring that the application of TDIs will not diminish the aggregate interest of the EU, the investigations analyse all the economic interests involved, including the positive / negative effects on domestic industry, users, consumers and traders of the product concerned. It is noted that these analyses are economic in nature and does not include political, foreign or development policy considerations.

In *Zeolite A powder originating in Bosnia and Herzegovina* in 2011 the EC concluded that it was in the interest of the EU to impose AD measures as it was estimated that

[922] Arts. 4.3 and 18 of (EC) regulation No 1225/2009.
[923] Art. 21of Council Regulation (EC) No 1225/2009 of 30 November 2009.
[924] Replies of the European Communities to the List of Questions Posed by Members on the Application of the Lesser Duty Rule and Consideration of Public Interest, G/ADP/AHG/W/114 dated 11 April 2001, p. 1.

the Union industry would benefit from these measures in terms of increased economies of scale and it would not affect the Union users significantly.[925]

In *Coated fine paper originating from China* in 2011 the EC concluded that the imposition of provisional AD duties would restore fair trade conditions, which would enable the Union industry to regain part of the market share lost. It explained that imports from China represented only a limited share of the importers' total business and any negative impact of AD measures on the users and importer was thus likely to be limited.[926]

5.5.1.4.6 The Lesser Duty Rule and Price Undertakings

As recommended by the ADA and ASCM,[927] the EU considers applying a duty less than the dumping or subsidy margin, if such lower duty rate is sufficient to remove the injury suffered by the Union industry, thereby not affecting trade flows in a substantial way.[928] This also applies to provisional duties. [929]

The lesser duty rate is determined using the cost of production and sales of the EU industry and a reasonable profit margin. This methodology reduces AD measures in almost half of the cases.[930]

Additionally, any AD or countervailing duties may be replaced by undertakings if the government or exporters give appropriate and verifiable guarantees that the injurious effects of the subsidies will be removed. Acceptance of undertakings could decrease the number of trade remedies measures. In practice, however, few price undertakings are accepted.

5.5.1.4.7 Transparency

Although some critics point to a lack of transparency in EU TDI system,[931] it is submitted that compared to other TDIs systems the EU maintains a high degree of transparency in the conduct and application of TDIs investigations.

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[925] EC (2011) 30th Annual Report.
[926] *Coated fine paper originating in the People's Republic of China* in 2011.
[927] Art. 9 of the ADA and Article 19.2 of the ASCM.
[928] Art. 7 of the EU AD Basic Regulation.
[929] *Ibid.*
[930] Para. 1.1.2 of EC staff working paper accompanying the 31st report of the EC to the European Parliament (2012).

The EC has an obligation to report its activities in connection with TDIs to the EU Parliament.[932] It maintains a public website on background information, information on investigations, and measures statistics.[933]

The results of all TDIs investigation are published in the Official Journal, and the EC is obliged to justify its decisions in this publication. Moreover, the EC declares that it takes measures to explain its legislation both to trading partners and to key European stakeholders including business associations.[934]

5.5.1.4.8 The Hearing Officer

The right of defence is one of the EU fundamental rights. To safeguard this right, the EC introduced in 2007 the position of "independent hearing officer".[935] The Hearing Officer is affiliated to the Commissioner for Trade. His principal task is to safeguard the effective exercise of rights in trade proceedings before the EC and to ensure that trade proceedings are handled impartially, fairly and timely.[936]

The officer ensures that every person has the right to be heard, before taking measures that could affect him, and to have access to relevant files, while respecting the legitimate interests of confidentiality and as described in the EU Charter of Fundamental Rights.

The Hearing Officer advises the EC regarding the follow-up of his recommendations and, when necessary, on possible remedies and recommendations on issues relating to the rights of interested parties.[937]

This position has a substantial level of intervention in TDIs proceedings. In 2013 it received 159 requests for intervention which concerned 30 TDI proceedings. In all, 42

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[931] Interview with Mr. Graafsma. See also Vermulst (2005); Bienen in Bienen, Brink & Ciuriack (2013).
[932] Resolution of 16 December 1981.
[933] "European Commission online information, "Trade Defence: Investigation". http://trade.ec.europa.eu/tdi/index.cfm. 79 European Commission online information, (accessed on 17 February 2015).
[934] European Commission (2013) 32nd Annual Report.
[935] "Hearing Officer" http://ec.europa.eu/trade/trade-policy-and-you/contacts/hearing-officer/index_en.htm (accessed 15 November 2015)
[936] Decision of the President of the EC on the function and terms of reference of the hearing officer in certain trade proceedings in 29 February 2012 (2012/199/EU).
[937] *Ibid.*

hearings with 188 interested parties were held, which included parties with conflicting interests.[938]

The requests for intervention are presented by different stakeholders including exporters from third countries, Union industry, users and importers. The requests cover all stages of the investigation and mainly included the right to be informed, the right to access the files and disagreement with determinations, findings and conclusions.[939]

Permitting access to the hearing officer by exporters from third countries may decrease the tendency to revert to the judicial system and the DSB in cases involving the EC.

5.5.1.4.9 Prioritisation of SMEs

Although the EU TDI regulations do not explain in detail the importance of protecting the SMEs, the EC data and reports to the European Parliament indicates the importance the EU institutions gives to the specific conditions and needs of SMEs which may be more vulnerable to unfair trade measures and might not be in a position to make good use of the complex TDIs system to protect themselves. This could be of particular importance to developing countries in Africa.

The EC has identified a number of concrete actions which could assist SMEs in TDIs investigations, especially in connection to submitting complaints, or participating in investigations as an importer, as a user or as exporters in investigations initiated by third countries.[940]

In the same line of supporting SMEs engagement in TDI investigations, a Helpdesk was set up to respond to requests for information by SMEs.[941] These questions usually address both the procedural and substantive elements of proceedings. The TDI website also specifically highlights an SME's role in TDI proceedings and provides

[938] "Annual Report of the Hearing Officer for DG TRADE (2013).
[939] *Ibid.*
[940] EC paper Actions to Address the Difficulties Encountered by SMEs (2013).
[941] European Commission (2013) 32nd Annual Report.

technical advice.[942] It is noted that the information on the EC websites are simplified to suit the needs and capacities of SMEs.

5.5.1.4.10 Judicial Review

Having a regional judicial system is one of the important features of the EU system. It is an important requirement when the TDIs investigations are conducted at the regional level.

All EC decisions in the area of TDIs are subject to regional judicial review represented by the General Court (GC) and the Court of Justice (COJ) in Luxembourg.[943] This includes the procedural rights of the parties, hearings and access to non-confidential files. This may decrease the need to revert to the DSB in the WTO.

In 2013 there were 33 new cases lodged in 2013, 23 before the GC and 10 before the COJ, that are related to TDIs.[944] Four of the judgments of the COJ concerned appeals against judgments of the GC.[945]

5.5.1.4.11 Differentiation between Market and non-Market Economies

The EU differentiates between market economy and non-market economy (NME) countries in its TDIs investigations.

According to the EU regulations a market economy is a market characterised by a low degree of government influence, absence of distortion in the operation of the privatised economy, effective implementation of company law, an effective legal framework for the proper functioning of a free-market economy and the existence of a genuine financial sector. [946]

In NME countries, applying the WTO rules and the basic EU regulations may not lead to accurate results in connection to normal value, injury and causal links, as the

[942] *Ibid.*
[943] Yilmaz (ed) (2013); Vermulst (2012) Judicial Review (in GTCJ) and different reports of the EC to European Parliamant.
[944] European Commission (2013) 32nd Annual Report.
[945] *Ibid.*
[946] Art. 2(7) of Council Regulation (EC) No 1225/2009.

business sector in these countries could benefit from hidden types of economic conditions or government support.

The EU put six countries in the category of NMEs.[947] This allows the EU to use alternative methodologies for the determination of normal values, which could lead to a higher dumping margin and consequently higher duties. On average anti-dumping duties against those companies granted market economy treatment could be around 28 percentage points less than for those companies categorised as NMEs.[948]

The six NME countries have submitted requests for ME status and are in regular dialogue with the EC over this issue.[949]

China is the most important EU trading partner among the six NMEs. Under Section 15 of the Chinese WTO Accession Protocol China can be treated as a NME in AD proceedings, which allows importing countries to use flexible methodologies in the determination of normal value. The interpretation of Section 15(d) of the Chinese WTO Accession Protocol has come under debate, as well as whether the latter section stipulates the automatic granting of Market Economy Status (MES) to China after December 2016.[950]

The EU does not agree with China's claim that NME-provisions could only be used until the end of 2016.[951] It advocates against automatically granting MES to China in 2016, as it make it conditional on the national laws of importing states.[952]

5.5.1.4.12 Asymmetric provisions with Developing Countries and LDCs

In many RTAs with developing and LDCs countries, the EU provides favourable treatment to these countries in terms of TDIs.

For example, in some Economic Partnership Agreements (EPAs) the EU can exclude imports from the ACP partner from global safeguard action for a period of five years, which may be extended. In EU-Papua New Guinea, Fiji, imports from the ACP partner "may be excluded"

[947] China, Vietnam, Armenia, Kazakhstan, Mongolia and Belarus.
[948] Detlof & Fridh (2006) *The Swedish National Board of Trade* 2.
[949] European Commission (2013) 32nd Annual Report, COM(2015) 43 final, 4 February 2015
[950] Puccio (2015) *European Parliamentary Research Service.*
[951] See the discussion under section 4.9 of this Thesis.
[952] Interview with Professor Bellis.

from a global safeguard imposed by the EU, while in the other EPAs imports from the ACP partner shall be excluded.[953] The same applies to the EU-SADC EPA.[954]

This can provide favourable treatment to African countries engaged in EPAs with the EU which should be utilised.

5.5.1.5 The Application of AD and countervailing measures against non-Members

5.5.1.5.1 General Rules

The EC abides by the two basic regulations in its conduct and investigations against possible dumping or actionable subsidies from non-Members. These regulations are mostly in harmony with WTO and usually respond to DSB ruling rulings: in 2012 the basic AD regulation was amended twice to reflect rulings of the WTO DSB.[955]

The basic regulations abide by the same requirements of imposing both definitive and provisional measures AD and countervailing measures as in the WTO Agreements.

The EC establishes the rules and procedures for carrying out investigations in carrying out investigations in accordance with WTO rules.

The EU AD and state aid investigations take place at the Union level.[956] Dumping and injury are investigated simultaneously over a period not less than six months.[957]

The EC refers to Union industry, which means producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion.[958] This excludes producers who are related to the exporters.[959]

The investigations usually involve EU Members. This happens by requesting them to supply information on issues covered by the investigation and may request them to

[953] Art. 19.2 of the Interim Partnership Agreement between the European Community and the Pacific States.
[954] Art. 33(2) of the EU-SADC EPA.
[955] WTO document G/ADP/N/1/EU/1, 16 Oct 2012. See also Regulation (EU) No. 765/2012 of the European Parliament and of the Council, 13 June 2012 (OJ L 237, 3 September 2012).
[956] Art. 6 of the EU AD Basic Regulation.
[957] *Ibid.*
[958] *Ibid,* Art. 4.
[959] *Ibid,* Art. 6.

carry out checks and inspections, particularly amongst importers, traders and Union producers.[960]

AD and countervailing measures are imposed by the EC if the investigation determines there is dumping or actionable subsidies, causality between the imports and injury of the EU's industries, and that the imposition of contingency measures is not against the EU's interests.[961] The EC may propose contingency measures to the Council. The adoption of contingency measures is subject to the comitology rules, and requires a positive opinion voted by qualified majority of a committee composed of member state representatives.[962]

The EU applies five types of reviews to both AD and countervailing measures. Expiry[963] and interim[964] reviews are normally concluded within 12 months of the date of initiation of the review, but in all cases must be concluded within 15 months.[965] Newcomers and absorption reviews are provided for in the EU regulations.[966] Additionally, investigations could be re-opened in circumstances where evidence is brought to show that measures are being circumvented.[967]

According to the EC statistics the average duration of AD measures is seven years; approximately 17% of AD measures remain in place for more than ten years. According to the EC for Trade the Commission is to consider "ways to make sure that the levels of the duties are still appropriate after such a long time".[968] Provisional duties should be secured by a guarantee,[969] and for a maximum of nine months.[970]

When receiving a complaint by representatives of the national industry, the EC considers the merits of the request and accordingly could decide to conduct investigations, and impose provisional measures.[971]

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[960] *Ibid.*
[961] *Ibid,* Art. 9 (4). The definitive AD duty shall be imposed by the Council, acting on a proposal submitted by the EC after consultation of the Advisory Committee.
[962] Section 2.1 that entered into force in March 2011.
[963] Arts. 11(2) and 18 of the basic Regulations.
[964] *Ibid,* Arts. 11(3) and 19.
[965] *Ibid,* Arts. 11(2) and 18.
[966] Arts. 11(4), 12, 19 (3) and 20 of EU Basic Regulations.
[967] Arts. 13 and 23 of the EU Basic Regulations.
[968] De Gucht (2012) 5.
[969] *Ibid.*
[970] *Ibid.*
[971] Art. 5 of the EU AD Basic Regulation.

TDIs investigations are based on verified information provided by questionnaires from all interested parties including exporting producers, Union producers and importers.[972]

In cases where there are parallel AD and countervailing proceedings concerning the same imports, the EC declares that it takes all necessary steps to ensure that there is no "double remedy", explaining that in most cases the simultaneous imposition of AD and countervailing duties does not result in a double remedy, as each type of duty removes a different type of unfair trade practice.[973]

Importers could request the reimbursement of the relevant collected duties where it is shown that the dumping/subsidy margin has been eliminated or reduced to a level below that of the duty in force.[974]

5.5.1.5.2 Specific AD and countervailing measures Provisions in RTAs between the EU and Third Parties

The EU is very active in establishing preferential trade arrangements with third parties both for economic and political reasons. These RTAs extend to neighbouring countries in the Mediterranean and Eastern Europe and also with countries which represent historical, political and economic importance to the EU. Examples of these RTAs include the EPAs with African and Caribbean countries, as well as Mediterranean Partnership Agreements.

It is noted that, as a hub of RTAs, the EU adopts different TDIs approaches with trading partners. This depends on several factors including the depth of envisaged market integration.

The adoption of specific TDI provisions in such agreement seek to limit any potential excessive usage of TDIs in a way that could has negative implications on European exports. In most of these Agreements the TDIs provisions are very close to the WTO Agreements, with some specific changes. The EU has eliminated AD and countervailing measures in the EEA between the EU and EFTA except for agriculture

[972] Information is usually verified by visit from EC officials to the premises of cooperating parties.
[973] The exception is export subsidies which reduce export prices and consequently could create dumping.
[974] Arts. 11(8) and 21(1) of the basic Regulations.

and fish products.[975] This was done provided that the coverage of non-application is limited to where Community *aquis* was fully integrated into the Agreement.[976] In this regard both parties could make use of these measures in certain cases, like circumvention. However, the EEA retained the right to impose safeguard measures in situations of serious economic, social or environmental difficulties that are liable to persist.

The inclusion of TDI provisions is not limited to FTAs with third parties but extend to the CUs, for example with Turkey and Andorra. The TDIs have their own characteristics to suit the level of integration. For example, the EU has prohibited AD measures in its CUs with Andorra (except for agriculture) and San Marino.[977]

In general, the EU applies a consultation mechanism before applying TDIs in addition to prior notifications, and periodic reviews every three months.[978]

5.5.1.6 The Application of Safeguard Measures against Non-Members of the EU

5.5.1.6.1 General Rules

The application of safeguard measures in the EU is governed by three different regulations to account for the different economic policies applied by the WTO with regard to Members and non-Members of the WTO as well as NMEs.

Under the EU legislation, safeguard measures are applied in accordance with the same requirements as stipulated in the ASG and on "*erga omnes* basis.

It is noted that the EU has applied safeguard measures only three times and in exceptional cases which is in line with the EU level of development and the limited need to these measures.

The EC conducts investigations in cooperation with Members. The adoption of definitive safeguard measures is not subject to the standard regime under the comitology rules; it requires a positive opinion voted by qualified majority of a committee composed of Members, as opposed to general "comitology" rules which

[975] Art. 26 of the EEA.
[976] Protocol 13 on the Non-Application of AD and Countervailing Measures.
[977] Art. 7. The EU, Andorra and San Marino apply a common AD regime against third countries.
[978] Arts.112, 113 and114 of the EEA Agreement, and interview with Prof. de Bellis.

require a qualified majority to reverse an EC proposal to adopt AD/ countervailing measures. The EC may decide to impose surveillance if the trend in imports of a product originating in a third country threatens to cause injury to EU producers.[979]

Safeguard investigations start by a notification from one or more Members to the EC in the same way as stipulated by the ASG. Where there is a threat of serious injury the EC must examine whether it is clearly foreseeable that a particular situation is likely to develop into actual injury. The requirements of the imposition of provisional safeguard measures are similar to those stipulated in the ASG and are limited to six months.

To promote transparency, the EC shares this information with Members. When the EC decides that the notification contains sufficient information it could decide to go ahead with investigations, publish a notice of initiation in the Official Journal within one month of receipt of the information and commence the investigation.[980]

Definitive safeguard measures may be imposed no later than nine months from the initiation of the investigation and can be in the form of quotas, tariff quotas or duties.[981]

Following the ASG rules the EC follows a minimalist approach in the application of safeguard measures. The duration of safeguard measures must be limited to the period of time necessary to prevent or remedy serious injury and to facilitate adjustments, but should not exceed eight years.[982]

If the duration exceeds three years the EC should seek consultations with the Advisory Safeguard Committee (which is made up of representatives of each Member State with a representative of the Commission as chairman) in order to examine the effects of the measures, to determine the appropriateness of further liberalisation and to ascertain that the application of the measures is still necessary.[983] Depending on the consultations the measures may be revoked or amended.

[979] Art. 7.3 of Council Regulation (EC) No 260/2009 on the common rules for imports.
[980] *Ibid*, Art. 6.
[981] *Ibid*, Art. 7.2.
[982] *Ibid*, Art. 20.
[983] *Ibid*, Art. 4.

5.5.1.5.2 Specific Bilateral Safeguard Provisions in RTAs between the EU and Third Parties

The EU incorporates bilateral safeguard provisions in its trade agreements with third parties with the objective of limiting the potential excessive usage of bilateral safeguards from trading partners as the bilateral safeguard measures are rarely applied by the EU.

These bilateral safeguard provisions usually go beyond the ASG, in particular in relation to the consultation and notification procedures.[984]

The bilateral safeguards could be in the form of suspending further reduction of the rate of customs duties or increasing the rate of customs duties to a level which does not exceed the MFN applied rate or the base rate specified in the Schedules.[985]

The Agreements usually include compensation mechanisms and requirements for imposing the measures only to the extent necessary as in the ASG.[986]

In the EU-Republic of Korea FTA bilateral safeguard measures are permitted if imports from the other party cause or threaten to cause serious injury to a domestic industry producing like or directly competitive goods and under the same conditions of the ASG.[987] The Party intending to take safeguard measures should provide written notification of the initiation of a safeguard investigation, the provisional findings and the final findings of the investigation where the other party has a substantial interest.

In the Agreements between the EU and ACP countries, the EU cannot impose any bilateral safeguard measures on ACP exports, except when limited to the EU's outermost regions, which are seven regions with specific economic difficulties.[988] This is in line with the composition of the ACP countries, which are mainly LDCs and developing countries.

[984] Art. 3.2 of the FTA Agreement between the EU and the Republic of Korea.
[985] As included in Annex 2-A (Elimination of Customs Duties) pursuant to Article 2.5.2 (Elimination of Customs Duties.
[986] *Ibid.* and Art. 3.4 of the FTA Agreement between the EU and the Republic of Korea.
[987] Arts. 3.1, 3.7 of the FTA Agreement between the EU and the Republic of Korea.
[988] These regions are: Guadeloupe, French Guiana, Réunion, Martinique, the Azores, Madeira, and the Canary Islands.

In the EU-SADC EPA, the six SADC members can impose safeguard measures in cases of "serious injury" or “disturbance”, while the EU can impose these measures if its outermost regions are affected by a surge in imports.[989] The maximum duration of application is four years, but it can be extended by the designated authority in exceptional circumstances. It is noted that the Agreement does not provide definition to explain what is meant by “disturbance” which can give more room for imposing safeguard measures.

5.5.1.6 EU TDIs Statistics [990]

Although the EU has prohibited the application of TDIs on intra-trade, it is still one of the major users of TDIs. The pattern and percentage of EU usage of TDIs could be affected by the increasing usage by new users, and trade deflection resulting from redirecting exports to the EU market.

Nevertheless, TDIs cover only a small percentage of EU imports. In 2013 only 0.29% of total imports were affected by AD or countervailing measures.[991]

5.5.1.6.1 The EU as user of TDIs [992]

During the period from 1 January 1995 till 31 December 2014 the EU has initiated 547 TDIs investigations and applied 336 TDIs measures.

The EU's average annual initiation activity has decreased from 67 to 51 cases per year in the period 2009-2013 compared to the period 1996-2008.

The number of AD and countervailing measures in force is at a historical low and the overall number of measures in force in the EU is much lower than in other major WTO Members.[993]

[989] Art. 33 of the EU-SADC EPA.
[990] Covers only measures taken by the EU and not by individual states. Keeping in mind the enlargement process.
[991] European Commission (2013) 32nd Annual Report.
[992] Accumulated by author based on WTO TDIs statistics available at https://www.wto.org/english/tratop_e/adp_e/adp_e.htm (accessed 1 March 2016)
[993] “Actions against imports into the EU” http://ec.europa.eu/trade/policy/accessing-markets/trade-defence/actions-against-imports-into-the-eu/ (accessed 15 September 2015)

5.5.1.6.1.1 Anti-Dumping Initiations

In consistency with other countries AD is the most used of the three TDIs, with total initiations of 468 investigations, which represent 85.6% of all investigations.

This reflects the concern of the EC about low pricing especially from companies belonging to countries with "allegedly" aggressive export strategies. It is noted that a quarter of these initiations were against China, which is classified as NME (119 initiations) followed by India (36) and the Republic of Korea (29). The three economies are major exporters with relatively cheap cost of production and in some cases with some degree of government-controlled economies.

The main HS sectors covered by these investigations are chapter XV: Base Metals (171 investigations), chapter VI: Products of the chemical or allied industries (87 investigations) and chapter XVI: Machinery and mechanical appliances (58 investigations).

Some of these sectors are major export categories of developing countries including African countries, where base metals and chemical products represent an important portion of the exports of newly industrialised countries in Africa.

5.5.1.6.1.2 Anti-Dumping measures

The EU has applied 298 AD measures for this period (around 89% of all applied measures). China tops the list of target countries with 85 measures, which corresponds to 29% of total measures and reflects strong conviction at the EC of the existence of dumping in investigated cases.

It is noted that the EU has applied 15 AD measures against Turkey, which has a CU with the EU, which may be related to its competitive export performance.[994]

5.5.1.6.1.3 Countervailing Measures Initiations

The EU initiated 74 CVD investigations in the period of analysis. The list of countries subject to investigations is similar to that of AD and includes India (20 initiations),

[994] Interview with Professor Bellis.

China (9), and the Republic of Korea (7). The only African country featuring on the list is South Africa (one investigation).

The main sectors that were subject to investigations are chapter XV (20 initiations), chapter VII (16 initiations) and chapter XVI (7 initiations).

5.5.1.6.1.4 Countervailing Measures

The EU has applied 35 countervailing measures by the end of 2014. The countervailing measures covered 13 countries, with India coming as first target with 13 measures followed by China (five). No African country features in the list, which is correlated with the limited space available to African countries to subsidise their exports. The large majority of these measures were in the form of duties; however, in a number of cases, undertakings were accepted.

When compared with other major economies like the USA it is clear that the EU is less likely to use countervailing measures.

On October 2014 The EU had 11 countervailing measures in force against third countries. The EU has so far initiated nine countervailing proceedings against China and currently has measures in force against 4 products (coated fine paper, organic coated steel products, solar glass and solar panels). In comparison, the USA has imposed more than 25 countervailing measures against China.[995]

5.5.1.6.1.5 Safeguard Initiations

For the period from 1 January 1995 till 31 December 2014 there were five safeguard investigations by the EU.

These investigations, covered chapters I (animal products), Chapter II (Vegetables), Chapter IV (Prepared foodstuffs), Chapter XV (Base Metals), and Chapter XVI (Mechanical Appliances) with one investigation per sector.

5.5.1.6.6 Safeguard Measures

[995] "How the EC investigates subsidized imports" http://trade.ec.europa.eu/doclib/docs/2012/october/tradoc_149951.pdf (accessed 1 March 2015).

Out of these five cases only three reached a stage where safeguard measures were imposed. The limited usage of safeguard measures reflects the nature of the economies of the EU and the nature of safeguard measures which is mainly designed to protect specific domestic industry from fair trade.

The EU reluctance to use Safeguard measures may come from a perception of the need to compete against fair competition.[996]

5.5.1.6.2 The EU as subject to TDIs [997]

5.5.1.6.2.1 TDIs Initiations against the EU

The EU was subject to 122 trade remedies investigations in the period from 1/1/1995 till 31/12/2014. This does not cover global safeguards. Almost 89% of these investigations were for alleged dumping (108 investigations) in addition to 14 countervailing measures investigations.

5.5.1.6.2.2 TDIs Measures against the EU

During this period there were 74 AD measures and 12 countervailing measures imposed against the EU.

The combined number of trade remedies represents only one quarter of the number of measures applied by the EU.

The major users of AD measures against the EU are India (41 measures) and China (20 measures). It is noted that Egypt has imposed three AD measures against the EU with which it has a partnership Agreement.

The major users of countervailing measures are Argentina (three measures), China (two) and Peru (two). No African country has imposed countervailing measures against the EU.

The link between being subject to EU TDIs and initiating investigations against the EU is not clear from these statistics.

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[996] Interview with Mr. Mueller.
[997] Accumulated by author based on WTO TDIs statistics available at https://www.wto.org/english/tratop_e/adp_e/adp_e.htm (accessed 1 March 2016)

5.5.1.7 Modernisation of the EU TDIs

The EU TDIs system is subject to periodical modernisation and upgrading supervised by the Trade Commissioner.[998] This practice aims to ensure that the system is updated and equipped to achieve its objective, in addition to being responsive to the evolving international trade law being shaped by the DSB rulings.

The review process also considers complaints from stakeholders, many of which come from importers who could be affected negatively with the application of TDIs against cheap imports.[999]

The EC announced in its modernisation review of the TDIs in 2011 that it makes use of the AD instrument to ensure "fair competition and a level playing-field for all businesses".[1000]

The modernisation process referred to the change in the economic environment which requires response in the TDIs system after the last legislative changes to the Basic Regulations in 2009.

The process included a public consultation and evaluation study which was published in March 2014 and concluded that most of the trade methodologies, procedures and practices applied by the EC were sound, the amount of litigation related to the EU's implementation of TDIs was low and there was a high degree of compliance with EU law and WTO obligations.[1001]

The study pointed out that EU practice stands out in a number of ways in comparison to other WTO Members, and the regular application of the public interest test and the frequent reduction of duties through application of the lesser duty rule have the effect of moderation of TDIs, distinguishing EU practice from most other countries that do not apply such tests.[1002]

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[998] European Commission (2011) 30th Annual Report.
[999] Interview with Dr. Mueller.
[1000] Statement by Karel De Gucht European Commissioner for Trade, in a press release launching the modernization review of the EU TDIs.
[1001] Bienen *et al* (2012) *bkp Development Research & Consulting.*
[1002] "The Commission publishes independent evaluation of trade defense instruments" http://trade.ec.europa.eu/doclib/press/index.cfm?id=786.

Making national and regional TDI systems subject to periodical review could help in making the system more effective and more in harmony with the international trade law.

5.5.2 The NAFTA TDIs System

5.5.2.1 Introduction

NAFTA is an FTA between Canada, Mexico and the USA, creating a trilateral trade bloc in North America. It entered into force in January 1994 and was notified to the WTO under GATT Article XXIV and GATS Article V.[1003]

NAFTA is an expanded version of the Canada-USA FTA (CUSFTA) that built on the market-oriented reforms unilaterally adopted by Mexico beginning in 1985.[1004] It superseded CUSFTA when Mexican entry into NAFTA was ratified by all three countries.[1005]

The NAFTA model of integration differs from the EU model. While the EU model is based on obligations determined by treaties and the transfer of national powers to a supranational organisation, the NAFTA model is treaty-based with more autonomy of Members in the conduct of trade matters.

The implementation of NAFTA brought the immediate elimination of tariffs on more than half of Mexico's exports to the USA and more than one-third of USA exports to Mexico.[1006]

Within 10 years of implementation of the agreement all USA-Mexico tariffs have been eliminated except for some USA agricultural exports to Mexico that were to be phased out within 15 years.[1007] Most USA-Canada trade was already duty free under the CUSFTA.[1008] All remaining duties and quantitative restrictions were eliminated,

[1003] "WTO RTAs' information System" http://rtais.wto.org/UI/PublicShowMemberRTAIDCard.aspx?rtaid=122 (accessed 1 November 2014).
[1004] Kennedy (2011) 3.
[1005] "North American Free Trade Agreement" http://www.naftanow.org/facts/default_en.asp (accessed 1 November 2014).
[1006] Art. 302 of the NAFTA and Annex 302.2.
[1007] North American Free Trade Agreement" http://www.naftanow.org/facts/default_en.asp (accessed 1 November 2014).
[1008] "The Canada-United States FTA" http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/cusfta-e.pdf (accessed 1 November 2014).

as scheduled by 1 January 2008 when tariffs on highly sensitive agricultural products were abolished.[1009]

NAFTA created the world's largest FTA, which links 468 million people with a GDP of more than USD 20 trillion.[1010] It is considered an asymmetrical agreement; it encompasses three partners who differ in terms of their degree of economic development. Mexico's GDP is USD 1.17 trillion while the USA GDP is USD 15.7 trillion and Canada's GDP is USD 1.2 trillion.[1011] The USA and Canada are Members of the G7 group, while Mexico is still considered a developing country although it joined the Organisation of Economic Cooperation and Development (OECD) in 1994.[1012]

NAFTA is an example of deep integration. Its integration agenda is not limited to tariff liberalisation but covers services liberalisation, government procurement and coordination of standards and competition policy and the protection of IPRs.[1013] NAFTA chapter 11 contains investment provisions that regulate FDI protection and promotion.

The total merchandise trade of NAFTA was estimated at USD 2493 billion in 2014, which represents 13.5% of the world merchandise trade.[1014] The USA trade was USD 1621 billion, which accounts for 65% of NAFTA's trade. Canada and Mexico's volumes of trade are USD 475 billion and USD 398 billion respectively.[1015]

From 1993 to 2009 trade among the NAFTA countries increased by more than 250%, from USD 288 billion to USD 701 billion.[1016] The benefits of expanding trade have trickled down to businesses, farmers, workers, and consumers.[1017]

[1009] North American Free Trade agreement, https://ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta?ht (accessed 1 November 2014).
[1010] http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta)
[1011] According to World Bank data of 2014.
[1012] "List of OECD Member countries - Ratification of the Convention on the OECD" http://www.oecd.org/about/membersandpartners/list-oecd-member-countries.htm (accessed 3 November 2014).
[1013] "The North American Free Trade Agreement" < https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement> (accessed 15 February 2012), Section c of Chapter 3 of NAFTA and chapter 17 of NAFTA.
[1014] Data from WTO World Trade Report 2015.
[1015] *Ibid.*
[1016] "Joint Statement of the 2011 NAFTA Free Trade commission on 10 January 2011." http://www.sice.oas.org/tpd/nafta/Commission/2011meeting_e.pdf (accessed 13 November 2014).
[1017] *Ibid*

5.5.2.2 TDIs Governing Agreements in NAFTA

Unlike the EU where treaties and the supranational intuitions manage and regulate the application of TDIs, there are no supranational institutions in NAFTA as such.

The legal system governing trade in general and TDIs in particular is an interaction between the national laws of the three States and the legal texts of the NAFTA Agreement, and comprise of the following:

1. The national legislations of the three Members on TDIs. These legislations are declared by the three countries to be consistent with WTO law. The USA and Canada were among the first in the world to enact unfair trade remedy legislation around 100 years ago while Mexico has a comparatively new law.[1018]
2. Chapter Nineteen of the NAFTA Agreement which deals with appeals on AD and countervailing duty administrative agency determinations.
3. Chapter eight of the NAFTA Agreement which deals with safeguards and includes the procedures and remedies available to domestic industries that have sustained, or are threatened by, serious economic injury due to increased imports.

5.5.2.3 Main Features of the NAFTA TDIs System

The NAFTA TDI system takes into consideration the asymmetry between the USA and Canada (two developed Members) at one hand and Mexico (A developing Member) at the other hand. This is obvious in the establishment of the Bi-National review mechanism which is considered as a way to overcome the challenges that may arise from the different legal system in the three Members. In addition to some common features with the EU TDI system, the main features of the NAFTA system are the following:

[1018] The USA first Anti-dumping Act was issued in 1916, with the first AD statutory provisions in Canada coming into force in June 1904.

5.5.2.3.1 Bi-National Review Mechanism

NAFTA has adopted an innovative hybrid approach in dealing with TDIs investigations and reviews. While the investigation functions are conducted by national authorities, its decisions are subject to reviews by bi-national Panel within the NAFTA structure.[1019] This approach replaced the similar mechanism that existed under CUSFTA. Review panels apply the standard of review set out in Annex 1911.

This review presents a new layer of scrutiny and accountability, which subjects national authorities to an important constraint.

In the period prior to the entry into force of the CUSFTA and NAFTA, AD, countervailing duty, and injury final determinations of the investigating authorities could only be appealed in the national courts or the administrative tribunals of the member state, which is usually the case between countries which do not have any preferential arrangements in force or through the WTO.

This distinctive feature of NAFTA has to be taken into context, as the jurisdiction of the bi-national panel is limited to examining whether the final determinations of investigating authorities were in accordance with its national laws.[1020] It bases its decisions on whether the party has followed the standards of judicial review of administrative agency determinations.[1021] Although it takes the judicial review role of national laws, it is procedural by nature and doesn't create new laws as it only applies the general legal principles of the court of the importing Party.[1022]

It could be implied that the main objective of this mechanism is to bypass the national judicial system which may have certain shortcomings. An aggrieved party has a choice of forum for review between national courts or a Chapter Nineteen panel. It has to be noted that the decisions of this panel do not seek to harmonise the national laws of the three Members.

[1019] Arts/ 1904(2)-(3) and Annex 1911 of NAFTA.
[1020] *Ibid.*
[1021] *Ibid.* Bowman *et al* (2010).
[1022] Art. 1904 (3) of the NAFTA Agreement

The decisions of the panel are binding for its parties.[1023] Parties may not appeal the panel decisions to the national courts, nor may national legislatures enact legislation to overturn those decisions.[1024] This improves the certainty in the trade relations between the three countries.

This mechanism is an example of Members of RTAs partially forgoing their sovereignty to ensure enforceability of trade agreements. Each of the three countries has its objectives for the adoption of this mechanism. It is believed that American exporters wanted a neutral mechanism as they were snagged in the Mexican AD and countervailing administrative agency net.[1025]

On the Canadian side there was concern over possible excessive usage of AD and CVDs actions by the USA.[1026] Additionally, there was a perception that USA courts were too deferential to AD and CVD determinations by the USA Commerce Department and to injury determinations by the USA International Trade Commission.[1027]

It could be also claimed that the creation of the bi-national panel was in the interest of the less developed Mexico, which sought to be integrated in the system and which may be at more risk of potentially arbitrary usage of TDIs by its two partners.

The creation of this panel resulted in preferential treatment for Members of NAFTA compared with third parties. In a study conducted on CUSFTA for the period 1989-1994 it was proved that two thirds of Canadian appeals to USA trade remedy actions before bi-national panels were remanded compared with one-third for non-NAFTA countries before USA tribunals (the Court of International Trade).[1028] Although the study is relatively old it can indicate, in general, the favourable treatment Members of RTAs receive as a result of the creation of a review mechanism for national authorities' determinations.

[1023] *Ibid*, Art. 1904.9.
[1024] *Ibid*, Art. 1904.11.
[1025] Bowman, *et al* (2010) 700.
[1026] Gagné (2000) *The World Economy* 23(1), 77-91.
[1027] Bowman, *et al* (2010) 700.
[1028] Rugman & Anderson (1997) *The World Economy* 935-50.

This can serve as a proof of the deterrence effect of the RTA's review mechanism on the frequency of using TDIs.[1029]

In addition to the review of national administrative body determinations the Bi-national panel may review amendments to the national laws of Members on TDIs that are challenged for inconsistency with NAFTA and the WTO.[1030] It could also conduct reviews in the case that one of NAFTA parties prevents the operation of the bi-national panel.[1031] This can limit reference to the national legal system to challenge the legality of the review process itself. These two provisions have never been invoked.

On the procedural part the panel is established after a request from an interested party asking to review an investigating authority's decision involving imports from a NAFTA country.

NAFTA Annex 1901.2 deals with the appointment of individuals to the Chapter Nineteen roster of panellists with legal background and their appointment as panellists once a request for panel review has been filed with the NAFTA Secretariat.[1032]

5.5.2.3.2 The Extraordinary Challenge Committee

The decisions of the Bi-national panels are intended to be final and non-appealable. However, in very limited circumstances these decisions could be subject to review by an *ad hoc* Extraordinary Challenge Committee (ECC) comprised of three judges from the three Members.[1033]

The very limited jurisdiction of this mechanism cannot categorise it as an appeal body as is the case in the WTO AB. Additionally, the scope of this mechanism is different from the review of the AB as it is limited to possible gross misconduct by a panel, fundamental departure from the rule of procedure, where the panel acts beyond its jurisdiction or acting in a way that threatens the integrity of the panel process. [1034]

[1029] Jones (2000).
[1030] Art. 1903 of NAFTA.
[1031] *Ibid* Art. 1905.
[1032] Annex 1901.2 of NAFTA.
[1033] Art. 1904.13 of NAFTA.
[1034] *Ibid.*

So far here have been three ECC requests, all by the USA against Canada and Mexico and in each instance the challenge was unsuccessful.[1035]

5.5.2.3.3 National Investigating Authorities

There is no regional investigating Authority in NAFTA and TDI investigations are conducted by the national authorities.

In the USA and Canada there are two bodies which deal with the two main steps of AD or countervailing measures investigations and injury establishment.

The Canada Border Services Agency makes dumping and subsidy determinations, while the Canadian International Trade Tribunal conducts injury determinations.[1036]

In the USA the International Trade Administration of the Department of Commerce makes dumping and subsidy determinations, while the International Trade Commission (ITC) conducts injury inquiries.[1037]

In the area of safeguards the decision could be affected by political considerations. The ITC conducts the investigation upon request from the national industry, and sends its recommendations to the President of the USA, who can accept or reject the recommendations of the ITC or decide to adopt an alternative decision.[1038] In all cases the president cannot impose safeguard measures unless recommended by the ITC.

In Canada, the Tribunal may recommend to the Government safeguard measures in the form of import surtax or a restriction, such as an import quota or a tariff-rate quota. [1039] The Tribunal has a pivotal role both in the review of the measures and the issue of whether they should be extended once they are applied by the Government.[1040] This long and costly process in the USA and Canada may prolong the process and may affect the frequency of using safeguard measures, but it also accounts for political considerations that could be taken into consideration before imposing these measures.

[1035] "NAFTA Chapter 19 Extra challenging Committee Decisions" http://www.worldtradelaw.net/databases/naftaecc.php (accessed 5 May 2016).
[1036] As per the Special Imports Measures Act.
[1037] Part VII of the Tariff Act of 1930.
[1038] Sec. 201 of the USA Trade Act.
[1039] Sec. 42 of Canada Special Import Measures Act.
[1040] *Ibid.*

In contrast to its two partners Mexico has a single investigating authority. The Ministry of Economy makes the dumping, subsidy, and injury determinations. [1041] It has also the authority to impose safeguards relief.

5.5.2.3.4 National Judicial Review

All Investigating authorities' decisions in the three countries may be appealed to a national judicial review.

In Canada judicial reviews are conducted by the Federal court of Appeal.[1042] In the USA the administrative authorities' decisions are appealed to the Court of International Trade and then to the Court of Appeals for the Federal Circuit. [1043]

As a civil law jurisdiction Mexico's reviewing court, the Federal Tax Court, as well as the "*Secretaria de Economia"*, refers directly to the ADA and ASCM in their decisions.[1044]

Mexican law and practice must be interpreted in conjunction with the WTO Agreements, whereas in the USA and Canada national law is understood to being superior to the WTO Agreements in the event of differences.[1045]

5.5.2.3.5 Applying Trade Remedies to intra-Trade

As shown by the WTO statistics, the three Members (mainly the USA) are active in initiating and imposing trade remedies against each other. This comes also in response to the increase in trade flows between the three countries.

The NAFTA rules adopt the same *de minimis* level and duration as in the ADA and ASCM. The Agreement requires Members to endeavour reaching a mutually accepted solution before imposing trade remedies.[1046]

NAFTA rules do not prohibit the provision of subsidies unless they cause injury. Unlike the EU, there are no detailed provisions on state aid.

[1041] As per Chapter V of the Mexican Foreign Trade Act.
[1042] Art. 76 of Canada Special Import Measures Act.
[1043]Sec. 28 of the USA Trade Act.
[1044] Art. 96. of the Mexican Foreign Trade Act.
[1045] Bowman, *et al* (2010).
[1046] Art. 1903 of NAFTA

5.5.2.3.6 Bilateral Safeguards in the Transitional Period

Bilateral safeguards were permitted in NAFTA in the transitional period of ten years which expired in 2008.[1047]

This safeguard mechanism is exclusive to bilateral trade between Mexico on one hand and the USA and Canada on the other as the bilateral safeguard measures between the USA and Canada were subject to the provisions of Article 1101 of the CUSFTA, which is incorporated into NAFTA.

To limit the application of safeguards the Agreement required that the duration of bilateral safeguard measures be to a maximum of three years and that they could only be applied once against a specific product. Certain sensitive products could be subject to an extension of one year on the condition that the duty applied during the initial period of relief is substantially reduced at the beginning of the extended period.[1048]

Similar to the ASG the party taking a bilateral action should provide the exporting party with a mutually agreed upon compensation which can include the maintenance of an equivalent level of concessions, otherwise the other party could take retaliatory measures.[1049] Safeguard measures should be reviewed in not more than four years.

Any safeguard measures shall be notified and consultation is envisaged between Members to reach a mutually agreed solution before applying bilateral safeguards.

In NAFTA a member could choose to initiate safeguard investigations both under the ASG and the NAFTA mechanisms. In the *Broom Corn Brooms* case in 1996, a safeguard petition was brought under the two mechanisms. A petition was filed by the USA Corn Task Force under the Trade Act of 1974 and at the same time the Task Force filed a petition with the ITC under NAFTA for a bilateral safeguard action provided for in NAFTA Article 801. The ITC made an affirmative injury determination based on a request from the American industry and consequently safeguard measures were imposed for three years in the form of a quota and an over-quota tariff rate to be levied on all imports that exceeded the quota. Mexico

[1047] Chapter 8, Article 801 and Annex 801.1 of NAFTA.
[1048] Category C+ of Schedule to Annex 302.2 of NAFTA.
[1049] Art. 801 and Annex 801.1 of the NAFTA Agreement.

challenged this decision under Chapter Twenty dispute settlement proceedings,[1050] which found that the dispute could be resolved either under NAFTA Annex 803.3(12) or Art. 3.1 of the ASG, and that the determination of the ITC was not made on a reasoned conclusion on all the issues related to fact and law as set out in NAFTA and GATT Article XIX. The safeguard measures implemented were therefore a violation of the USA obligations under NAFTA and the USA had to comply with NAFTA regulations.[1051]

Unlike AD and countervailing measures there is no bi-national Panel to review the consistency of national authority safeguard determinations.

As in other RTAs NAFTA allows for a special safeguard mechanism once imports exceed either a volume or price threshold without showing serious injury or threat of serious injury; additionally, it can extend beyond the transitional period.

5.5.2.3.7 Excluding intra-Trade from Global Safeguards

NAFTA retains the rights and obligations of the ASG and GATT Article XIX. The chapter contains comprehensive provisions on domestic investigations with rigid detailed and extensive conditions for invocation.

All the three Members exclude, in principle, their partners from the application of global safeguards. This exclusion is based on two conditions: 1) Imports from Member States, considered individually, do not account for a substantial share of total imports which means among the top five importers, and 2) Such imports do not contribute importantly to serious injury,[1052] which mean that imports from such member are an important cause, but not necessarily the most important cause, which takes place when the growth rate of imports of the good originating in such a party are appreciably lower than the growth rate of total imports of this good.[1053]

The USA excludes its NAFTA partners and other partners in RTAs from global safeguards in most of the cases as manifested in the exclusion of Canada in *Wheat*

[1050] Under Art. 2009 of NAFTA. Final Report of the Panel in the Matter of the USA Safeguard Action Taken on Broom Corn Brooms from Mexico.
[1051] *Ibid*, Final Panel Report 1998.
[1052] Art. 802 (2) of NAFTA.
[1053] Art. 802 of NAFTA.

Gluten,[1054] NAFTA in *Line Pipe*, [1055] and NAFTA, Israel and Jordan in *Steel*.[1056] It is noted that the AB has ruled in four cases against the country which excluded its RTA Members from global safeguards, which continues to put this issue under legal uncertainty.[1057]

5.5.2.3.8 No Common Competition policy

Unlike the EU, there is no common competition policy in NAFTA. The NAFTA Agreement generally highlights the importance of cooperation and coordination to further effective competition law enforcement including through mutual legal assistance, notification, consultation and exchange of information, but does not go beyond this.[1058]

A working group on trade and competition was established to report and make recommendations on further work on relevant issues concerning the relationship between competition laws and policies and trade in the FTA.[1059] This highlights the interlinkage between trade and competition policies.

5.5.2.3.9 Prioritising National Industries over Consumers

In NAFTA, especially in the USA, there is less regard to the effect of TDIs on consumer welfare, as the main priority is the protection of domestic industries.[1060] This is in contrast with the EU system which incorporates the interest test to ensure that the TDIs will not have major impact on consumer's welfare.

This statement is submitted while acknowledging that Canada, for example, is increasingly incorporating the interest test principle before imposing TDIs.

[1054] Appellate Body Report, *USA-Wheat Gluten paras.* 96 and 98 .
[1055] Appellate Body Report, *USA-Line Pipe* para.7.158.
[1056] Appellate Body Report, *USA-Steel.*
[1057] Appellate Body Report, *USA-Wheat Gluten;* AB Report, *USA-Line Pipe*; B Report, *USA-Steel*; AB Report, *Argentina-Footwear*.
[1058] Arts. 1501, 1502 and 1503 of NAFTA.
[1059] Art. 1504 of NAFTA.
[1060] Interview with Mr. Graafsma.

5.5.2.3.10 Differentiation between Market and non-Market Economies

The three Members of NAFTA do not grant China MES. They differentiate between MES and NMEs in conducting TDIs investigations. This has its implications on the results of such investigation as shown in the EU case.

China is a major exporter to the three countries which highlights the need to make use of trade policy tools to protect national industries under certain conditions.

5.5.2.4 Statistics of TDIs in NAFTA [1061]

For the period from 1 January 1995 till 31 December 2014 NAFTA Members acted independently, have initiated 1078 TDIs investigations and have applied 690 TDIs measures.

The number of individual TDIs initiations correlates with the trade weight of the three countries where is the USA is the most dominant user.

Of the three types of TDIs actions brought by the NAFTA parties AD cases comprise the overwhelming majority (79% in the United States, 83% in Canada, and 90% in Mexico).

5.5.2.4.1 NAFTA Members as Users of TDIs

5.5.2.4.1.1 Anti-Dumping Initiations

AD is the most used of the TDIs, with total initiations of 852 investigations which represent 79 % of all investigations.

In the comparison period the USA was the most frequent user of AD with a total of 527 initiations, followed by Canada (196) and Mexico (129). The three countries have initiated 1.56 times the investigations conducted by the EU.

For the USA initiations, China was the main target (124 initiations or 23.5% of total initiations), followed by Japan (37) and the Republic of Korea (37). The USA has also initiated high number of investigations against its two partners Mexico (24) and

[1061] Accumulated by author based on WTO TDIs statistics available at https://www.wto.org/english/tratop_e/adp_e/adp_e.htm (accessed 1 March 2016)

Canada (five). There were 16 investigations against South Africa and one against Egypt.

Canada has followed a similar trend. The main target of its AD initiations is China with 36 initiations, followed by the USA (17), the Republic of Korea (14) and Chinese Taipei (11). Canada has initiated three anti-dumping investigations against Mexico. It has also conducted one investigation against South Africa.

Out of 129 initiations Mexico has initiated 46 investigations against China, followed by the USA (30) and Brazil, Russia and Ukraine (six each). Only one investigation was initiated against Canada. There were no reported initiations against African countries.

The above analysis show that China is the first target of the NAFTA investigations on AD with a total of 206 initiations, which represent more than 24.1% of all initiations and reflects – as in the case of the EU – fear of low pricing and aggressive export strategy.

Except for South Africa, African countries are not a major target of these initiations. South Africa was subject to 17 initiations (16 initiations from the USA and one from Canada).

5.5.2.4.1.2 AD measures

The NAFTA countries have applied 563 AD measures for the analysis period, which is about 1.9 times the number of measures applied by the EU.

The USA has applied 345 measures out of which 99 AD measures against China, 23 against Japan and 20 against Chinese Taipei. It applied only six measures against Canada. The two T-FTA Members featuring in this list are South Africa and Egypt with nine and one measures respectively.

Out of 119 measures China came on top of the list of AD measures from Canada with 25 measures, followed by the USA (11) and the Republic of Korea (9). South Africa is the only T-FTA member that was subject to Canadian AD measures.

For Mexico, the USA is the second most important target of AD measures with 21 measures, directly after China (28), while Brazil comes third (10).

Chapter XV of the HS (base metals) is the main target of NAFTA member's AD measures with 187 measures applied by the USA, Canada (90) and Mexico (51). This chapter is a main export component of African countries.

5.5.2.4.1.3 Countervailing Measures Initiations

The NAFTA Members initiated 211 CVD investigations in the period of comparison, with the USA as the major user (156) followed by Canada (49) and Mexico (six).

The main target of the USA and Canada in countervailing investigations is China with 46 and 20 investigations respectively. India is the main target of Mexico with total of three investigations.

The only T-FTA featuring in this list is South Africa, which was subject to two investigations from the USA.

5.5.2.4.1.4 Countervailing Measures

NAFTA Members have applied 121 countervailing measures. The USA is the largest world user of countervailing measures (86), with Canada third (24) after the EU. South Africa was the only T-FTA country to be subjected to countervailing measures, with two measures imposed by the USA which reflects convention of strong government sponsored subsidies. It is noted that this was not the case with the EU where it has FTA Agreement.

The first target of American CVD measures is China (29) followed by India (nine), while Canada was subject to three measures and Mexico to one.

The same pattern was followed by Canada which applied 15 measures against China and five measures against India.

Mexico followed a different approach, focusing on neighbouring countries Brazil and Venezuela with four and three applied measures respectively.

Neither Canada nor Mexico targeted its two NAFTA partners with CVD measures.

Chapter XV of the HS (base metals) is the main target of NAFTA Members' countervailing measures.

5.5.2.4.1.5 Safeguard Initiations

For the period of analysis, there were 15 safeguard investigations by the three Members, where the USA has initiated ten investigations, Canada (three) and Mexico (two).

5.5.2.4.1.6 Safeguard Measures

Out of the 15 cases the only country which applied safeguard measures is the USA with six measures. In *USA-Steel* the USA treated South Africa as a developing country, which resulted in several of its products being excluded from the application of the safeguard measure.

The limited usage of safeguard measures reflects the nature of the economies of Members, which include two developed countries and one developing country, and the specific and limited exceptional purpose of safeguard measures as well as the compensatory obligation associated with their application.

Chapter XV of the HS (base metals and articles of base metal) attracted 50% of all measures applied by the USA.

5.5.2.4.2 NAFTA Members as target of TDIs

5.5.2.4.2.1 TDIs Initiations against the NAFTA States

The three NAFTA countries were subject to 397 AD and countervailing measures investigations in the period from 1/1/1995 till 31/12/2014. This does not cover global safeguards. The USA was subject to 281 investigations (almost 70% of total investigations).

Almost 94% of these investigations were for alleged dumping (373 investigations), as compared to 24 countervailing investigations.

5.5.2.4.2.2 TDIs Measures against NAFTA Members

During the comparison period there were 226 AD measures and 12 countervailing measures imposed against the three NAFTA Members where the USA was the major target of these measures with 162 measures in total.

The major users of AD measures against the USA are China (33), India (27) and Mexico (21). South Africa has imposed six AD measures against the USA. No other T-FTA member has imposed any TDIs against a NAFTA member.

The major users of AD measures against Canada are the USA (six) and India (three).

The USA is the major user of AD measures against Mexican exports (17 measures), followed by Brazil and Peru (five measures each).

As for countervailing measures, the USA was subject to eight measures, half of them were imposed by China which could be of retaliatory nature. Canada was subject to three measures exclusively from the USA. Mexico was subject to one measure from the USA.

The analysis shows that the three Members of NAFTA apply TDIs measures actively against each other, with the USA leading the way in this domain.

The analysis could also suggest some retaliatory practice in the application of TDIs, as the countries that were mostly target by TDIs from specific countries tend to use the same measures against them

5.5.3 The Southern Common Market (Mercosur)

5.5.3.1 Introduction

The Southern Common Market (Mercosur) is a customs union and economic integration agreement between Argentina, Bolivia, Brazil, Paraguay, Uruguay and Venezuela.[1062] Chile, Colombia, Ecuador and Peru have associate member status.

It was originally set up by the Treaty of Asuncion in 1991 between Argentina, Brazil, Paraguay and Uruguay.[1063] It covers trade in goods and services,[1064] and was notified

[1062] In accordance with Mercosur document CMC/27-12, Venezuela was ratified as a full member in 2012.

to GATT under the Enabling Clause and GATS Article V. It entered into force for goods on 29 November 1991 and for services on 7 December 2005.[1065]

Mercosur is incorporated in the Latin American Integration Association (LAIA) legal regime as Economic Complementarity Agreement No. 18.[1066] LAIA is an extensive regional agreement, geographically covering Mercosur and other agreements in Latin America and the Caribbean.

The Common Market Group (GMC) and the Council for the Common Market (CMC) are the main executive and decision-making bodies of Mercosur.[1067] The GMC oversees the application of the Treaty of Asuncion, and its protocols and agreements, and it may make recommendations to the Council. Consequently, it is entitled to issue mandatory Resolutions that apply to all member countries.[1068] It is also in charge of negotiations with third countries and economic blocks.[1069] The Trade Commission is responsible for the application of common trade policy instruments.[1070]

Although the level of integration objectives is high, the group is constrained by slow implementation and weak integration mechanisms.[1071]

To reflect a tendency for protectionism and as a response to the global economic crisis in 2008, Mercosur Members were authorised by Decision CMC 25/12 to increase their tariffs for up to 200 tariff lines until the end of 2014.[1072] Additionally, the sugar and automotive sectors are the main exclusions to free circulation within Mercosur.[1073]

Despite the fact that Mercosur is at the level of a CU, there are a high number of exceptions in the application of the CET which makes the CU ineffective.[1074] These

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[1063] « Mercosur" http://www.bilaterals.org/?-Mercosur – (accessed 1 December 2015).
[1064] "Southern Common Market" <http://rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=130> (accessed 1 December 2015)
[1065] *Ibid.*
[1066] WTO Brazil Trade Policy Review (2013) 40.
[1067] *Ibid.*
[1068] WTO Brazil Trade Policy Review (2013) 40.
[1069] *Ibid.*
[1070] *Ibid.*
[1071] Franko (2007) 263.
[1072] *Ibid.*
[1073] *Ibid.*
[1074] Interview with Ms. Saldanha-Ures.

exceptions were allowed by the CMC, and different provisions are applicable for each country. [1075] In addition, trade remedies may still be applied between Members.

One of the challenges facing the group is related to the composition of the group and the asymmetries between Members. Brazil and Argentina are relatively big economies compared to other Members.

There was also the possibility of Uruguay and Paraguay breaking away from the group. Bolivia, Chile, Colombia, Ecuador and Peru can join the FTA but remain outside the bloc's CU.[1076]

The challenges facing this RTA may encourage the adoption of protectionist measures as well as a unilateral approach in achieving trade policy objectives.

Additionally, there is a divergence regarding commercial and industrial policies. While Brazil and Argentina are perceived as protectionist countries, Uruguay and Paraguay have ostensibly liberal policies.[1077]

Although the Mercosur Agreement covers trade in services, the liberalisation process if very slow. The Protocol of Montevideo on Trade in Services establishes a schedule for services liberalisation that was supposed to be completed by December 2015.

The Protocol on Government Procurement, negotiated in 2006, has not entered into force, and Members are currently committed to concluding its revision.[1078]

Despite these important challenges, the group has made many advances especially in harmonising areas such as IPRs, agricultural policy and labour law.

At the Mercosur Summit in June 2011 the block created an Industrial Mercosur strategy through the conception of high added value products and the replacement of external imports by purchase of products inside Mercosur. Furthermore, Mercosur Members also highlighted the importance of reducing the asymmetry within the

[1075] WTO Brazil Trade Policy Review (2013) 40.
[1076] "Profile: Mercosur - Common Market of the South" <http://news.bbc.co.uk/2/hi/americas/5195834.stm> (accessed 15 December 2015)
[1077] Interview with Ms Saldanha-Ures.
[1078]" Mercosur - Joint Communiqué of the Presidents of the Member States, 29 June 2012" http://www.Mercosur.int/innovaportal/file/4488/1/comunicado_conjunto_presidentes_ep.pdf> (accessed on 25 June 2013)

block.[1079] The objective was to integrate small countries such as Paraguay and Uruguay in the regional trade.[1080] The total volume of trade of Mercosur was USD 342 billion in 2013.[1081]

In the last years Mercosur signed FTAs with Israel and Egypt and Palestine. It also signed a PTA with India, and a preferential agreement that has yet to enter into force with SACU.

The bloc is currently negotiating bilateral FTAs with other blocs such as the Caribbean Community and Common Market (CARICOM), the Andean Community, the EU, and the Gulf Cooperation Council as well as the Dominican Republic.[1082]

5.5.3.2 TDIs Governing Legislations in Mercosur

In Mercosur TDIs are managed by two main regulations. Mercosur regulation CMC/DEC N. 11/97 establishes a common regulatory framework of Common Regulation against dumped imports from countries not Members of the block, while Mercosur /CMC/DEC N. 64/00 includes disciplines and procedures and rules on AD and countervailing investigation related to imports from a Mercosur member country.

Neither of these decisions has been ratified by all Members, and consequently, each member has particularities in its TDIs regulation according to its national regulations.[1083]

5.5.3.3 Main Features of the Mercosur TDIs System

5.5.3.3.1 National Investigating Authorities

Although Mercosur is at the level of a CU, there is no regional body to conduct or review investigations (the EU case) or a bi-national Panel (the NAFTA case) to review national authority's decisions.

[1079] "Mercosur Summit ends with signing nine Agreements" <http://g1.globo.com/politica/noticia/2011/06/cupula-do-mercosul-termina-com-assinatura-de-nove-acordos.html > (accessed 1 May 2015)
[1080] Adriana (2013) *ICTSD.*
[1081] According to World Trade report 2014.
[1082] According to official data and information on the EU website and other official declarations.
[1083] Interview with Ms. Saldanha-Ures.

TDI investigations are conducted by the national authorities according to national laws and regulations. The investigation procedures are different from one member to another. There are different deadlines, different tariff classifications, and different investigation methodology.[1084] For example, unlike other Members Brazil uses exchange rate fluctuations to apply TDIs.[1085]

In practice the main preferential treatment between Members is that price undertakings are more likely to be accepted from Members of Mercosur than from non-Members.[1086]

5.5.3.3.2 Dispute Settlement Mechanism

Dispute settlement in Mercosur is regulated under the Protocol of *Olivos*, which created a Permanent Tribunal of Review for disputes arising from member countries.[1087] Because Mercosur incorporate WTO in its regulations, Members have the choice between the Mercosur mechanism and the DSB.[1088]

Members are required to notify each other and the Mercosur trade commission before conducting investigations and to try to reach a mutually acceptable solution.[1089] In practice this is not applied between Members.[1090]

The Agreement provides for solving disputes through mediation where the Common Market Group deals with this issue. Cases could be handled by an Ad Hoc Court of Arbitration (TAHM) and/or by the Permanent Review Court (PRC), composed of five arbitrators.

5.5.3.3.3 Application of Trade Remedies on intra-Trade

Although Mercosur is theoretically at the level of a CU, trade remedies are permitted among Members.

[1084] *Ibid*
[1085] *Ibid.*
[1086] *Ibid.*
[1087] Signed in February 2002 and came in force since January 2004.
[1088] WTO Brazil Trade Policy Review (2013) 41.
[1089] Mercosur CMC decision 22/02.
[1090] Interview with Ms. Saldanha-Ures.

The Mercosur vision, provided in the Protocol on defence of competition,[1091] was to permit Members to use their national trade remedies laws only during the transitional period and to abolish these measures for intra-trade by the end of 2000, provided that common legislation of trade remedies against the non-member countries is drawn up during the transition period.[1092]

In 1997 common legislation of AD measures against non-member countries was established, but the application of trade remedies on intra-trade is still permitted as the Protocol on the defence of competition has been only ratified by Brazil and Paraguay.

Because of failure to reach agreement on the elimination of trade remedies between Members – mainly because of trade tensions between Argentina and Brazil – Mercosur incorporated the WTO Agreements on trade remedies in its legal system as a temporary mechanism to deal with unfair trade measures.[1093]

The WTO TDIs statistics show that Members use trade remedies extensively against each other.[1094] Despite subsequent attempts to adopt common rules on using trade remedies against third parties, so far Members apply their relevant national laws.

An example of disputes around the application of these measures on intra-trade is the Brazilian application of AD measures on certain polyethylene terephthalate resins from Argentina. A DSB panel was established in 2007 but was suspended later following the suspension of the application of AD duties.[1095]

5.5.3.3.4 Permitting Bilateral Safeguards in the Transitional Period

Intra-regional safeguard measures were permitted in Mercosur, during the transition period provided it is applied only once, and up to a one-year period.[1096] Before imposing the measure the party concerned should notify and consult the Common Market Group (CMG), which is the executive body of Mercosur. The CMG has to hold a meeting within ten days after a request and make a decision within another twenty days, taking into account the increase in imports and injury.

[1091] Protocol for the Defence of Competition.
[1092] Mercosur Market Council Decision 18/96.
[1093] Mercosur CMC decisions 13/02 and 14/02.
[1094] See section 5.5.3.3 of this Thesis.
[1095] AD measures on certain polyethylene terephthalate resins, WT/DS355.
[1096] Annex IV to the Treaty of Asuncion.

Safeguard measures may be taken only through a type of import quota, no lower than the average of the past three years. [1097]

5.5.3.2.4.5 Extension of Protection through special Mechanisms

As a reflection of the protectionary tendency in Mercosur and despite the expiry of bilateral safeguard measures at the end of 1994, Argentina requested the continuation of these measures in the context of Mercosur.[1098]

These pressures resulted in the establishment of the Mechanism of Competitive Adaption (MAC) in 2006, which permits both countries to adopt safeguard measures at a bilateral level in cases of injury or threat of material injury to the domestic industry caused by the substantial increase in imports.[1099] The two countries claim that this mechanism is necessary for productive integration and balanced expansion and dynamics of trade relations between the countries.[1100] This mechanism allows the limitation of importation for a maximum of three years of a particular product when there is substantial growth in imports in a certain period of time, able to cause or threaten to cause injury to the domestic industry provided that the protected industry should be subject to modernization within a specific time frame.

Brazil has not ratified the MAC protocol, so it is not yet possible to apply this mechanism.[1101] However, Brazilian exporters agreed to self-regulate their exports to partner countries through voluntary bilateral Agreements in order to guarantee a certain market share for local producers which can satisfy the Argentinian side.[1102] This approach can easily jeopardise the essence of regional integration but could be necessarily to maintain the existence of the regional block.

5.5.3.2.5 Common rules on Global Safeguards and Exclusion of Intra-trade

The Mercosur Council adopted a common legislation on global safeguards in 1996 which retains the rights and obligations of the ASG and Article XIX of GATT and

[1097] Art. 4 of Annex IV to the Mercosur Agreement.
[1098] MAC the New "Safeguard" between Brazil and Argentina" <http://www.migalhas.com.br/dePeso/16,MI23231,81042-O+mecanismo+de+adaptacao+competitiva+mac+A+nova+salvaguarda+entre >
[1099] Ibid.
[1100] "Mechanism of Competitive Adaption" < http://www.baptista.com.br/news/contmar06.htm>
[1101] Franko (2007) 263.
[1102] Mercosur Report Number 14 (2008-2009) *Institute for the Integration of Latin America and the Caribbean* ii.

establishes procedures for the application of global safeguard measures by Mercosur.[1103] These rules regulate the application of safeguards both at the level of Mercosur and individually, which could be in the form of suspension or elimination of preferences. [1104]

The committee on Trade Remedies and Safeguards (CTRS) is responsible for evaluating the requests for protection, and the Mercosur Trade Commission has oversight authority in safeguards determination.

Requests for imposing safeguard measures should be presented by the national industry affected to the secretariat of the CTRS, which may allow the imposition of safeguard measures for four years that can be extended for another four years and for a maximum of ten years in the case of developing countries in accordance with the ASG.[1105]

This regulation is not yet in force since not all Members have incorporated it into their national legislations.

In practice, the imports from member-states are usually excluded from the application of global safeguards. These measures are still applied to Mercosur's associate Members where preferential regulations exist that allows for the temporary suspension or reduction of tariff preferences depending on the product.

In *Argentina-Footwear* Argentina excluded partner states from safeguards. However, this was successfully challenged by the EU in the DSB, where the AB alluded to the concept of parallelism between the scope of a safeguard investigation and the scope of the safeguard measures.[1106]

An example of the ruling of the Mercosur bodies in favour of the exclusion of Members from global safeguards is the Argentinian safeguard measures imposed on textile imports in 1999. Upon request from Brazil the matter was addressed by the

[1103] Except for Agriculture and Textiles, which are regulated in accordance with WTO law.
[1104] 19th Additional Protocol to ACE No, 18 Mercosur (modified by the 49th Additional Protocol). Decision 17/96 "Regulations concerning the Application of Safeguard Measures for Imports originating from non-member countries of Mercosur". The competent authority was established as the Committee on Trade Defence and Safeguards.
[1105] Art. 9 of the ASG.
[1106] AB Report, *Argentina-Footwear (EC)*, para. 111.

Textiles Monitoring Body (TMB) which recommended that Argentina withdraw the safeguard measures. In February 2000 Brazil requested the establishment of a DSB panel but before the panel was established the matter was referred to the Mercosur arbitration tribunal.[1107]

The tribunal ruled that there is a general prohibition on the implementation of safeguard measures on internal trade and that there was no legal basis for the imposition of safeguard measures on textile products within Mercosur. This is an indispensable requirement according to the Articles that deal with the application of safeguard measures by other Members.[1108] This case is also an example of the different judicial reviews available to Mercosur Members.

5.4.3.2.6 Competition Policy in Mercosur

There is no common competition policy in Mercosur. The Treaty of Asuncion did not contain provisions on this issue. However, the CMG made a decision to establish common rules on competition policies and submitted a proposal to the Technical Committee under the Trade Commission. In 1996 the Protocol for the defence of Competition was adopted and harmonisation of the competition policies was accelerated.

5.5.3.3 Statistics of TDIs in MERCOSUR [1109]

For the period from 1 January 1995 till 31 December 2014 the six Mercosur Members/ Associates acting independently have initiated 756 TDIs investigations and have applied 472 TDIs measures.

Of the three types of TDI actions, AD cases comprise the overwhelming majority (95.9% of total initiations).

[1107] *Argentina-Textiles Fabric.*
[1108] Art. 1 and 5 of Annex IV of the Mercosur Treaty.
[1109] Accumulated by author based on WTO TDIs statistics available at https://www.wto.org/english/tratop_e/adp_e/adp_e.htm (accessed 10 March 2016)

5.5.3.3.1 Mercosur Members as Users of TDIs [1110]

5.5.3.3.1.1 AD Initiations

Argentina and Brazil are major international users of TDIs. They are by far the most frequent users of TDIs, with 316 and 369 investigations respectively, which represent 94.4% of all investigations. Venezuela comes third with 31, followed by Uruguay (seven) and Paraguay (two), while Bolivia did not report any investigations. This is correlated with the economic and trade weight of Brazil and Argentina. Brazil is the 22nd world exporter while Argentina comes in the 32nd place according to the WTO statistics.[1111]

It is noted that the five countries have initiated more TDIs investigations than the EU as a whole but it is still much less than the number of investigations reported by the three NAFTA Members.

For the Argentinian initiations, China came as the first target (91 initiations), which represent 28.7% of total initiations, followed by Brazil (53) and the USA (16).

In addition to its relatively high number of initiations against Brazil, which is a Mercosur member, Argentina has also initiated AD investigations against Paraguay, Uruguay and Venezuela in addition to ten investigations against South Africa.

The first target of Brazilian investigations was China with 83 initiations, followed by the USA (42) and the Republic of Korea (21). Brazil has initiated 12 AD investigations against Argentina, three against Venezuela and one investigation against Uruguay. It has conducted eight investigations against South Africa and two against Egypt.

The above analysis shows that China is the first target of the Mercosur investigations on AD, which is the same case in the EU and NAFTA. It shows also that Argentina and Brazil are using this tool actively against each other and against other Members of Mercosur.

[1110] *Ibid.*
[1111] "World Trade Developments (2012).
https://www.wto.org/english/res_e/statis_e/its2013_e/its13_world_trade_dev_e.pdf

African countries are not a major target of these initiations except for South Africa, which was subject to 18 investigations.

5.5.3.3.1.2 Anti-Dumping measures

The five countries applied 454 measures in the comparison period. Argentina is the fourth world user of AD measures. With 228 measures, it comes after India (534), the USA (345), and the EU (298).

Brazil is a significant user of AD measures and it is the second most active user in Mercosur after Argentina with a total of 197 AD measures. It is noted that, despite the fact that the number of initiations varies from one year to another, there is a general upward trend during the review period. This is not the case for other RECs where the trend is decreasing

It is noted that Uruguay applied AD duties for three years on imports of pure refined vegetable oil from Argentina, which reflects the protectionist tendency for this sector.

5.5.3.3.1.3 Countervailing Duties Initiations and Measures.

Mercosur Members initiated, in total, 15 CVD investigations in the comparison period and applied twelve measures. Brazil conducted 66% of these investigations followed by Argentina (three initiations) and Venezuela (two). The main target of the Brazilian investigations is India (six investigations).

The only T-FTA member featuring in this list is South Africa, which was subject to one investigation from Brazil.

It is noted that Members of Mercosur did not implement countervailing measures against each other.

5.5.3.3.1.4 Safeguard Initiations and Measures

There were more safeguards investigations than countervailing measures in the comparison period, which could be linked to the developing nature of the economies of the Members and possible excessive usage of these exceptional measures.

For this period, there were 16 safeguard investigations where Argentina has initiated six investigations and Brazil four. Only Argentina and Brazil applied safeguard measures, with four and two measures respectively.

5.5.3.3.2 Mercosur Members as target of TDIs

5.5.3.3.2.1 TDIs Initiations against the Mercosur Members

All Members of Mercosur except Bolivia were subject to TDIs. Mercosur Members have used trade remedies more than they have been subject to them.

Excluding safeguard measures, the five Members were subject to 196 AD and 18 countervailing investigations in the comparison period.

In accordance with its economic weight Brazil was the most targeted member with 122 AD investigations and seven countervailing investigations. Argentina was subject to 44 AD and nine countervailing investigations. Venezuela was subject to 22 AD investigations, Uruguay (six) and Paraguay (two).

Brazil is a major user of AD initiations against Argentina (12 investigations) followed by Chile (ten).

The major users of AD investigations against Brazil are Argentina (53 investigations), followed by South Africa and the USA (ten each). Egypt has initiated one AD investigation against Brazil. The high number of South African initiations may indicate competition with the domestic production.

As for countervailing measures investigations, the USA has conducted eight investigations divided equally between Argentina and Brazil.

5.5.3.3.2.2 TDIs Measures against the Mercosur Members

During the comparison period there were 126 AD measures and 15 countervailing measures imposed against the five Members, with Brazil as the major target (89 AD measures), followed by Argentina (21 AD and four countervailing measures).

5.5.3.4 Mercosur Members' TDI Regulations

Since the investigation processes are still conducted by national authorities, it is relevant to revert to the legal systems of main Members of Mercosur.[1112]

5.5.3.4.1 Main Features of Brazil's TDIs System

Brazil has increasingly made use of TDIs tools in the last years, which happens partially because of greater participation of the private sector and its understanding of the applicable rules and calculation methodologies.[1113]

Brazil has incorporated the WTO Agreement in its national law. [1114] AD is regulated by decree number 8.058/2013 which regulates administrative procedures relating to the investigation and application of duties. The administrative procedures for safeguard measures are established in National law.[1115]

In 2011 Brazil introduced a new policy to support national industries, which included measures to strengthen the TDIs as part of a plan to support industrialisation and provide protection for national industries.[1116] The policy improved the efficiency of investigations by shortening the time frame, and resulted in speedier relief to the affected domestic producers and full dumping margin instead of the lesser duty rule being applied.[1117]

Brazil adopted similar definitions to the ADA when it comes to national industry, like product, reviews etc.

Brazil applied safeguard measure on desiccated coconut in 2002, and was finally terminated on 31 August 2012. On 15 March 2012 Brazil initiated a new safeguard investigation on fine or table wine, but it was terminated without adoption of definitive measures.

As a sign of attention to TDI issues, Brazil participates actively in the WTO Friends of AD Negotiations.

[1112] There were not many resources available on Bolivia's TDIs system, which could be less developed than the other Members.
[1113] Bienen, Brink & Ciuriak (eds) (2013) 172.
[1114] Decree No. 1,355 of 30 December 1994.
[1115] Decree No. 1,488 of 11 May 1995, as amended.
[1116] *Brazil Maior* or Bigger Brazil policy.
[1117] Bienen, Brink & Ciuriak (eds) (2013) 130.

5.5.3.4.1.1 High Tendency for Protectionism

Brazil is a very active user of TDIs in general, ranking fifth in terms of AD measures and seventh in terms of countervailing measures. Brazil was the most frequent user of AD measures in 2013 and 2014. It imposed 20% of the world AD measures in 2014. In many cases TDIs were used against other Members of Mercosur.[1118]

The three most important targeted HS chapters are: base metals, plastics and rubber, and chemical products, which are competing sectors with national industries.[1119]

Brazil took some recent steps to strengthen its regulatory framework, including providing for anti-circumvention and for the more stringent application of provisional measures.[1120]

5.5.3.4.1.2 National Investigating Authority

Brazil has a sophisticated administrative system dealing with TDIs through different bodies and Ministries.

The general administration of TDIs is entrusted to the Secretariat of Foreign Trade (SECEX), which is under the auspices of the Ministry of Development, Industry and Foreign Trade (MDIC).

SECEX makes the evaluation of whether to initiate an investigation based on available evidence, and in certain cases can decide to terminate an investigation when the conditions are fulfilled, but the investigation is conducted by the Department of Trade Remedies (DECOM), which falls within SECEX.

DECOM is the body dealing with dumping/ subsidies, injury determinations and the establishment of the causal link, and submits its recommendations to the Chamber of Foreign Trade which includes representatives of seven ministries dealing with trade.

[1118] Based on WTO TDIs statistics available at https://www.wto.org/english/tratop_e/adp_e/adp_e.htm (accessed 10 February 2016)
[1119] *Ibid.*
[1120] WTO (2013) Brazil Trade Policy Review 10.

The Chamber of Foreign Trade decisions are reviewed by the Trade Remedies Technical Group, which makes sure that these decisions are in line with Brazil's obligations under WTO and national legislations.

The Chamber of Foreign Trade takes the ultimate decision of imposing trade remedies, taking into consideration broader national interest grounds including reasons of foreign policy.[1121]

Two national entities deal with safeguards. Safeguard investigations are initiated and conducted by the SECEX while The Chamber of Foreign Trade is responsible for determining safeguard measures.[1122] These measures could come in the form of tariff surcharges or quantitative restrictions and can be applied for a maximum of four years, renewable for a further six years. Measures applied for over three years are subject to a mid-term review by SECEX.

Recommendations by the technical group for waiver or modification of duties on public interest grounds should be approved by the Chamber of Foreign Trade. The Secretariat of Federal Revenue in the Ministry of Finance is responsible for duties collection.

5.5.3.4.1.3 Preferential Treatment to Members of Mercosur

Some of the National provisions grant *de jure* differential treatment to the Mercosur Members. Thus Article 67.13 states that if a Mercosur member offers a price undertaking, it would be taken into special consideration.[1123]

Additionally, when the investigation covers companies from one or more Mercosur Members, the copy of the notifications will be forwarded, electronically, to their investigating authorities.[1124]

It is not clear if these provisions can result in tangible preferential treatment to other Members.

[1121] Bienen, Brink & Ciuriak (eds) (2013) 131.
[1122] Decree No. 4,732 of 10 June 2003.
[1123] Decree number 8.058/2013.
[1124] *Ibid* Art 168.

5.5.3.4.1.4 Application of the Public Interest Principle

Brazil applies the public interest rule. A Public Interest Group was established in 2012 in the Ministry of Finance and is mandated with considering requests to waive trade remedy orders on public interest grounds.[1125]

The chamber of foreign trade (CAMEX) has the authority to suspend definitive and provisional duties due to national interest concerns that takes into consideration broader factors supported with the elements of fact and law.

In certain cases, price undertakings were accepted by Brazil in accordance with WTO rules. This included undertakings from China.[1126]

5.5.3.4.1.5 Different Rules for Non-Market Economies

Brazil applies different rules for NMEs with special attention to China. Usually a third country is used for the calculation of normal value.[1127] This may increase the dumping margin in most of the cases.

5.5.3.4.1.6 Judicial Reviews and other kinds of Reviews

In addition to the standard reviews under the ADA and ASCM, the final determinations may be modified based on administrative review by CAMEX.

The Brazilian law ensures the application of judicial reviews, which comes as a result of an appeal by Brazilian importers or the affected exporters and could include issues like terminating an investigation or demanding the recalculation of the dumping margin, or suspending the duty imposition until the next review.

5.5.3.4.1.7 Transparency

DECOM declares that it seeks to enhance transparency.[1128] Confidential information is not disclosed provided that the party submits evidence to support the need to protect this confidentiality.

[1125] Committee on Anti-Dumping Practices, 'Notification of Laws and Regulations under Articles 18.5 and 32.6 of the Agreements', G/ADP/N/1/BRA/2/Suppl. 7, 16 (2012).
[1126] Citric Acid (China), CAMEX Notice No. 52, 24 Jul. 2012.
[1127] See Tyres, of a Kind Used on Buses or Lorries (China), CAMEX Resolution No. 33, 9 Jun. 2009, at Annex para. 4.1. 35. Ball Point Pens (China), CAMEX Resolution No. 24, 28 April 2010, at Annex para. 4.

Public records may be consulted by the interested parties and their legal representatives. Provisional duties are published by CAMEX in the Brazilian Federal Register and may last up to six months.

5.5.3.4.2 Main Features of Argentina TDIs System

Argentina adopted the Uruguay round Agreements in its national law, which governs the substantive matters of AD and Countervailing measures.[1129] The TDI's procedural and institutional aspects are explained in detail in national decrees.[1130]

5.5.3.4.2.1 High Tendency for Protectionism

Argentina is one of the most frequent users of TDIs in general. It comes fourth in terms of the number of AD measures. The other three most frequent users have a high percentage of world imports compared to Argentina, which emphasises the relatively high share of Argentina.

The amendments in the laws governing TDIs in 2008 were mainly motivated by the international economic crisis that affected Argentina, promoted protectionism, and emphasised the importance of TDIs as an economic tool. [1131]

The modifications in the laws indicate a protectionist direction employing TDIs measures. For example, the modifications shortened the AD investigations period from twelve to ten months, while maintaining the possibility of extending the deadline under Article 5.10 of the ADA.[1132]

Most of the AD measures were directed against sectors competing with national industries, for example: base metals and machinery, textiles, rubber and plastics which is in line with the broader foreign trade policy and national industrialisation objectives.[1133]

[1128] Bienen, Brink & Ciuriak (eds) (2013) 172.
[1129] Law No. 244256/1995.
[1130] Decree No. 766/1994 creating the National Commission on Foreign Trade, Decree 139310 and Resolution 293,11, Act 24425,13, Decree 139314 and Resolution 29315.
[1131] Bienen, Brink & Ciuriak (eds) (2013) 44.
[1132] Decree 1393/08, OG, 3 Sep. 2008.
[1133] Based on WTO TDIs statistics available at https://www.wto.org/english/tratop_e/adp_e/adp_e.htm *(accessed 1 February 2016)*

The relative decrease in TDIs measures in the period 2008-2014 could be attributed to retaliation measures taken by Argentina's major commercial partners, mainly China, and because of the application of other type of measures like non-automatic import licenses, which may be more effective for the government's objectives.[1134]

5.5.3.4.2.2 A National Investigating Authority

Similar to Brazil, the investigation process is undertaken by a national authority, which is the secretariat of Foreign Trade. The Secretariat submits its recommendation to the Minister of Economy and Public Finances, which has the authority to impose provisional and definitive measures.

The Under Secretariat of Foreign Trade is responsible for recommending the opening or dismissing of AD investigations, as well as their termination at any stage thereof if the conditions to continue are no longer in place.

The measures may have a maximum term of five years and may be reviewed provided that two years have passed since they were applied. The definitive measures may be made retroactive for up to 90 days from the date of application of the provisional measures, but not beyond the date of initiation of the investigation.[1135] All resolutions closing the investigation, whether or not AD or countervailing measures are adopted, are published in the Official Gazette and communicated to all interested parties.

It is important to note that, although the determinations of the investigation authority are the technical basis for the implementation of a measure, positive findings do not necessarily imply that the Minister will apply duties, since the adoption of the decision may consider other elements, including public interest.

5.5.3.4.2.3 Protection of Small and Medium Enterprises

As an emerging economy where the majority of industries are small and medium enterprises, the TDIs law in both Argentina and Brazil focus on promoting small enterprises and facilitating the litigation procedures.

1134 Bienen, Brink & Ciuriak (eds) (2013) 44.
1135 Decree No. 1393/2008.

In both countries there are dedicated bodies to help national industry access the necessary information to proceed with the initiation of investigation and to assist them in filling out the forms required for a complaint.

5.5.3.4.2.4 Different Rules for Non-Market Economies

Like the EU and the Brazilian systems, the Argentinian Law differentiates between market and NMEs. Investigations of NMEs are governed by Decree 1219.16.

Argentina targeted many NMEs with TDIs, namely Vietnam, Russia, and Kazakhstan, and China, which is the most targeted, as is the case for many other jurisdictions.[1136]

Since the investigating authority enjoys flexibility in constructing the export price, this usually leads to more determinations of dumping instances.[1137]

In practice normal value in the cases involving NMEs is based on prices of a market economy third country to its domestic market.[1138]

In practice, exporters operating in NMEs may request individual market or sectoral economy treatment provided they prove that they are operating under these conditions.

5.5.3.4.2.5 Application of Public Interest Rule

The Argentinian Legislation incorporates a public interest provision, which requires that when applying AD or countervailing measures the general foreign trade policy and the public interest shall be taken into consideration by the Under Secretariat for Foreign Trade.

The national legislation is silent on defining public interest and it is usually determined in a case-by-case basis. For example, in *Glyphosate* Argentina defined public interest by different factors including undermining the effect on employment, making reference to the high percentage of the ingredients of the products that is

[1136] Based on WTO TDIs statistics available at https://www.wto.org/english/tratop_e/adp_e/adp_e.htm (accessed 1 April 2016)
[1137] Decree 1219.
[1138] Bienen, Brink & Ciuriak (eds) (2013) 52.

imported, the potential negative effects of AD measures on the agriculture sector and the effect on national competitiveness.[1139]

In *Steel Pipes* the authorities did not explain the rationale for not imposing AD measures making reference to Article 9.1 of the ADA. [1140]

It is noted that the public interest could be used for political motives. After China imposed restrictions on Argentinian exports of soybean oil in 2010 using Sanitary and Phyto-sanitary measures, the Argentinian Under Secretariat decided to use public interest to close several investigations of imports from China without so much as justifying whose interests were being sheltered.[1141]

Argentina also makes frequent use of the lesser duty rule.

5.5.3.4.2.6 Preferential Treatment to Members of Mercosur

There are provisions for *de jure* preferential treatments in investigations regarding Mercosur's Members which are similar to the Brazilian law. The effects of such provisions are not clear.

5.5.3.4.2.7 Transparency

There is a limited amount of public information on TDIs. However, it is noted that all decisions regarding TDI investigations are published in the Official Gazette and all the interested parties are required to be notified.[1142]

5.5.3.4.3 Other Members of Mercosur

Mercosur Members have incorporated the WTO Agreements in their national laws with similar definitions, and reviews.[1143] Frequent efforts are being exerted to enhance the TDIs system. For example, in 2010 Uruguay introduced measures to prevent

[1139] *Glyphosate and its Formulations* (China), Ministry Resolution 28/04, OG, 3 Feb. 2004.
[1140] *Certain Steel Pipes* (China), Foreign Trade Secretariat Resolution 144/11, OG, 12 May 2011.
[1141] *Ibid*, *Certain Lighters* (China), Ministry of Industry Resolution 9/11, OG, 24 Jan. 2011.
[1142] Decree No. 1393.
[1143] Approved by Law No. 16.671 of 13 December 1994. Decree No. 395/008 of 18 August 2008 regulates the application of countervailing measures, WTO document G/SG/N/URY/1 of 3 April 1995. WTO document G/SG/N/URY/1 of 3 April 1995, Law No. 444/94. Decree No. 15.286/96 of 28 October 1996 and Decree No. 1.837/99 of 29 January 1999 appointed the MIC and the Ministry of Finance as the bodies responsible for implementing the Law, and lay down the relevant administrative procedures for implementing these Agreements available at

circumvention of AD duties, creating a mechanism whereby anti-circumvention measures could be applied after the introduction of an AD measure, based on the results of an investigation conducted at the request of an interested party or by the authorities.[1144]

Some Mercosur Members have national investigating authorities. In Uruguay the investigating authorities for AD and countervailing measures are the National Directorate for Industries (DNI) in the Ministry of Industries, Energy and Mining (MIEM) and the Agricultural Planning and Policy Office of the Ministry of Livestock, Agriculture and Fishing (MGAP).[1145] In Paraguay the Ministry of Industry and Commerce (MIC) is responsible for deciding to initiate and for conducting investigations and, together with the Ministry of Finance, takes any decision on whether or not to apply provisional or definitive measures.[1146]

Countries differ in how they deal with other Members of Mercosur. For example, in Uruguay there is no special provision relating to preferential treatment when a Mercosur member is among the investigated origins.[1147] Similarly, Paraguay applies AD and countervailing against all imports including those of Mercosur as long as the conditions exists. However, in the case of Paraguay, when the investigation involves a product from a Mercosur member, the exporting country must be notified to facilitate mutual knowledge and a satisfactory solution.[1148] Additionally, Paraguay exempts its partners in Mercosur from the application of global safeguards.

Venezuela joined Mercosur only in 2012 and consequently its TDIs laws – which were enacted prior to its admission – do not contain provisions regarding preferential treatment to Mercosur Members.

5.5.4 ASEAN TDIs System

5.5.4.1 Introduction

ASEAN is an example of gradual economic regional integration that was initially established for political reasons. It was namely established to secure the region's

[1144] WTO (2012) Uruguay Trade Policy Review 34.
[1145] WTO document G/ADP/N/14/Add.20 and G/SCM/N/18/Add.20 of 19 April 2005.
[1146] WTO (2011) Paraguay Trade Policy Review 51.
[1147] Decree 142/996: http://www.sice.oas.org/anti-dumping/legislation/uruguay/decreto_s.asp
[1148] Law 444/94), Art.12.5

peace, stability and development.[1149] It was launched in August 1967 with the signing of the Bangkok Declaration by Indonesia, Malaysia, Philippines, Singapore and Thailand. Brunei Darussalam, Vietnam, Lao People's Democratic Republic, Myanmar and Cambodia joined at later stages making up what is today the ten Member States of ASEAN. [1150]

At the Bali Summit in 1976, ASEAN leaders adopted two economic treaties, which emphasised the change in the priorities of ASEAN to be more focused on economic integration. These are the Treaty of Amity and Cooperation in Southeast Asia, 1976 and the Declaration of ASEAN Concord. [1151] The two treaties called for active promotion and cooperation in the economic field, including the adoption of regional strategies for economic development, which included the establishment of ASEAN preferential trading arrangements, and the complementation schemes. [1152]

The ASEAN PTA was launched in 1977 with a limited liberalisation margin of preference, which was only 10%, and was negotiated on a voluntary, product-by-product basis. Local content of 50% was required to enjoy preferential tariff rates.

This limited approach indicated the protectionist nature of Members at this point and was also a result of the existence of largely competing production sectors in Member States.[1153]

The ASEAN PTA was unsuccessful because of the huge exclusion list such that in the late 1980s the PTA covered only 5% of total ASEAN trade.[1154] The gradual modest progress in the growth of PTA items was nullified by the increase of non-tariff trade barriers.[1155]

The limited success of the PTA and the growing RECs in other parts of the world were two main reasons for the ASEAN to elevate their trade relations to FTA status in 1992.[1156]

[1149] Tan (2010) 53 *The International and Comparative Law Quarterly*.
[1150] "About ASEAN" http://www.asean.org/asean/about-asean (accessed 14 November 2014).
[1151] *Ibid*.
[1152] The Declaration of ASEAN Concord, Bali, Indonesia, 24 February 1976.
[1153] Chirathivate (1996)*The Changing International Economy* 23-4.
[1154] Tan & Anil (2002) 3.
[1155] *Ibid.*

The ASEAN FTA (AFTA) was notified to the GATT on 30 October 1992 under the Enabling Clause and covers trade in goods only as Members are mainly developing and emerging economies.

The AFTA could be considered as a semi-deep integration agreement with ambitious integration agenda. It liberalised trade in goods through the ASEAN Trade in Goods Agreement (ATIGA), which entered into force in 2010 and superseded the 1992 Common Effective Preferential Tariff (CEPT) Agreement and 11 economic integration agreements.[1157]

The CEPT scheme is the key framework for the reduction and removal of tariffs among the Members with the objective of creating AFTA and which aims at accelerating the liberalisation of intra-ASEAN trade and investment.[1158]

Compared with AFTA the ATIGA introduces a broader coverage for trade in goods. [1159] It incorporates enhanced measures for NTBs elimination and trade facilitation. ASEAN applies preferential RoOs under ATIGA.[1160]

Trade in services is being liberalised under the ASEAN Framework Agreement on Services (AFAS), which covers all sectors and modes of supply.[1161] To date nine out of ten packages of commitments have been signed. [1162]

The ASEAN Comprehensive Investment Agreement (ACIA), which entered into force in 2012, covers direct and portfolio investment.[1163] Under ACIA, protection is granted to investments made in all sectors and a more comprehensive investor-state dispute mechanism has been introduced.[1164]

[1157] "ASEAN Trade in Goods Agreement" http://www.asean.org/images/2013/economic/afta/atiga%20interactive%20rev4.pdf .
[1158] Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area.
[1159] Brunei Trade Policy Review (2014) < https://www.wto.org/english/tratop_e/tpr_e/s309_e.pdf> (accessed 27 March 2015).
[1160] Rules of Origin for the CEPT Scheme for AFTA< http://www.asean.org/communities/asean-economic-community/item/rules-of-origin-for-the-cept-scheme-for-afta>
[1161] ASEAN Framework Agreement on Services http://www.asean.org/communities/asean-economic-community/item/asean-framework-agreement-on-services (accessed 26 March 2015).
[1162] Brunei Trade Policy Review (2014) < https://www.wto.org/english/tratop_e/tpr_e/s309_e.pdf> (accessed 27 March 2015). 19.
[1163] ASEAN Comprehensive Investment Agreement < http://www.asean.org/resources/publications/asean-publications/item/asean-comprehensive-investment-agreement>

As a way of coordinating policies and tariffs ASEAN Members adopted the ASEAN Harmonised Tariff Nomenclature in 2012.

The intra-ASEAN trade accounts for less than 25% of total trade. The total volume of trade of the ASEAN was USD 2528 billion in 2014. The intra-ASEAN trade was USD 608 billion, and the extra ASEAN trade was USD 1920 billion.[1165] This can indicate the importance of trade tools including TDIs.

ASEAN is very active in terms of integration with other partners. The block has signed RTAs with six dialogue partners, referred to as ASEAN+1. In recent years agreements entered into force with Australia and New Zealand; India; Japan; and the Republic of Korea. It is noted that the ASEAN-Australia-New Zealand agreement is a deep integration agreement. It was negotiated as a single undertaking to cover trade in goods, services, and investment. Trade in services and investment was subsequently negotiated with China, Republic of Korea, India and Japan.

ASEAN seeks further economic integration with its six RTA partners in an effort to broaden and deepen current engagements. To this end, negotiations for a Regional Comprehensive Economic Partnership (RCEP), which cover trade in goods, services, and investment, began in 2012. The RCEP is built upon two initiatives for regional economic integration in which ASEAN member States and RTA partners are also engaged, the ASEAN+3 East Asia Free Trade Agreement (EAFTA) and the ASEAN+6 Comprehensive Economic Partnership for East Asia (CEPEA).[1166]

5.5.4.2 Main Features of the ASEAN TDIs System

The legal framework for TDIs is ASEAN Trade in Goods Agreement (ATIGA), particularly Articles 86 and 87, which retain the rights and obligations of the three WTO TDIs agreements. It is noted that not all Members of ASEAN are Members of WTO. The features of the ASEAN TDI system reflect a low level of integration and competition between similar production structures.

[1165] ASEAN External Trade Statistics http://www.asean.org/news/item/external-trade-statistics-3 (accessed 15 November 2015)
[1166] Building the ASEAN Community http://www.asean.org/storage/images/2015/October/outreach-document/Edited%20RCEP.pdf

5.5.4.2.1 Permission of Application of TDIs on Intra-Trade

ASEAN is at the level of FTA where the three TDIs are permitted on intra-trade.

The ASEAN incorporates coordination and notification mechanisms before imposing TDIs on intra-trade which is highlighted in the Protocol on Notification Procedures that was signed in 1998 so as to strengthen the surveillance mechanism on actions or measures that may nullify or impair any benefit to other Members, directly or indirectly, under any ASEAN economic agreement, or that impede the attainment of any objective of the ASEAN economic agreements.

The provisions of the Protocol exclude actions taken under emergency or safeguard measures of the ASEAN economic agreements.[1167]

In cases where a Member country imposes global safeguard measures it doesn't exclude other Members from these measure.[1168]

5.5.4.1.2.3 No Regional Investigating Authority

There is no regional investigating Authority. Investigations are conducted by national authorities, with a moderate level of cooperation between Members authorities where it is subject to dispute settlement mechanism.

In most of the cases the supervision Ministry is the Ministry of Trade. In Indonesia, the Ministry of Trade and Industry deals with TDIs, where the Indonesia Anti-Dumping Committee (KADI) is responsible for AD and countervailing measures investigations and the Indonesian Safeguard Committee (KPPI) deals with safeguard investigations.[1169]

In Malaysia the investigating authority is the trade practices section in the Ministry of Trade and Industry, while in Philippines the Bureau of import services in the Department of Trade deals with all kinds of TDIs investigations.[1170] In Thailand the Bureau of Trade Interest and Remedies under the Ministry of Commerce has this

[1167] Art. 1.4 of the Protocol on Notification Procedures.
[1168] See for example the Philippines safeguard measures on ceramic wall and floor tiles in 2002.
[1169] According to the Semi-Annual Reports of the WTO Committees on Anti-Dumping Practices, and OFFICIAL web sites of the relevant Ministries in ASEAN.
[1170] *Ibid.*

responsibility, in Singapore, the investigations are conducted by the Ministry of Trade, while in Vietnam it is the Competition Authority under the Ministry of Industry and Trade. [1171]

5.5.4.1.2.4 Permission of Bilateral Safeguards

In the ASEAN Members are allowed to impose safeguard measures in accordance with the Safeguards Agreement but with some flexibility. Annex 4 and Art. VII of the protocol on the special arrangement for sensitive and highly sensitive products of September 1999 to the agreement on the common effective preferential tariff scheme for the ASEAN FTA govern the rules of Safeguards in ASEAN. [1172]

Any emergency measures applied to sensitive products shall be subject to the provisions of Article 6 of the CEPT Agreement and flexibility shall be accorded to highly sensitive products.[1173]

Bilateral Safeguards are permitted in cases where the implementation of the Agreement results in increase in imports of a particular product in a way to cause serious injury, to like or directly competitive products. [1174] In such cases the FTA is vague, only indicating that a suspension of preference could be applied for such time as may be necessary to prevent or remedy such injury and without clarifying the requirements for imposing these measures. [1175]

When imposing Safeguard measures Members are required to notify the ASEAN Council as well as to engage in a consultation process as per the guidelines in Article 8 of the Agreement.[1176]

Also, in the case of a serious decline of monetary reserves, a member state shall endeavour to create or intensify quantitative restrictions or other measures limiting imports, with the concessions agreed upon. [1177] When emergency measures are

[1171] *Ibid*.
[1172]Art. 8 of Protocol on the Special Arrangement for Sensitive and Highly Sensitive Products.
[1173] *Ibid*.
[1174] Art. 6.1 of the ASEAN FTA.
[1175] *Ibid*.
[1176] *Ibid*, Art. 6.3.
[1177] *Ibid*, Art. 6.2.

employed, immediate notice of such an action should be given to the ministerial-level council and such action may be the subject of consultation.

5.5.4.1.2.5 Plans to Harmonise Competition Policies

The establishment of the ASEAN Economic Community (ASEC) in November 2015 is a major step in its regional economic integration agenda covering a market of USD 2.6 trillion and over 622 million people. [1178] It converts ASEAN into a single market with free flow of goods, services, investment, capital, and labour.[1179]

Under the ASEC Member States have committed to endeavour to introduce a competition policy to ensure a level playing field and to develop an environment of fair competition. [1180] It is not clear if there is an intention to have a common competition policy that can act as a substitute for TDIs in some cases.

5.5.4.2 Statistics of TDIs in ASEAN [1181]

5.5.4.2.1 ASEAN Countries as users of TDIs

Only six out of the ten ASEAN Members have used TDIs in the comparison period (1995-2014), which are: Indonesia, Malaysia, Thailand, Singapore, Philippines and Vietnam. No member of ASEAN has ever initiated countervailing investigations.

Indonesia is the highest user of TDIs in general. It has initiated 122 AD investigations and implemented 54 AD measures. It has also imposed 16 safeguard measures.

Malaysia is active in AD, with 70 initiations and 38 measures. It has initiated two safeguards investigations but has never implemented any safeguard investigations.

Thailand has implemented 47 AD measures and three safeguard measures, Singapore has implemented 33 AD measures, and Philippines has implemented 11 AD measures and three safeguards. Vietnam is the least active user with four AD measures and one

[1178] "ASEAN Economic Community" http://www.asean.org/asean-economic-community/ (accessed 10 January 2016).
[1179] *Ibid.*
[1180] Handbook on Competition Policy and Law in ASEAN for Business (2013).
[1181] Accumulated by author based on WTO TDIs statistics available at https://www.wto.org/english/tratop_e/adp_e/adp_e.htm (accessed 1 May 2016)

safeguard measure. This may have to do with its competitive low cost national industry which suggests lower need for protection.

ASEAN Members collectively have implemented 187 measures, which is only 6% of total AD measures. They have applied 25 safeguard measures, which is 17.7% of total safeguard measures. This indicates a preference for safeguards keeping in mind the developing nature of Members.

ASEAN Members follow a trend similar to that used by other RTAs, which targets China and India with a large percentage of TDIs. They are also using AD measures against each other.

The top targets of Indonesia's AD measures are China (11), India (8) and the Republic of Korea (6). Indonesia is active in applying AD measures against ASEAN Members. It has implemented four measures against Malaysia, three against Thailand and one measure each on Philippines, Singapore and Vietnam.

The top target of Malaysia's AD measures is Indonesia (8), followed by the Republic of Korea (7) and China (5). It also applied measures against its partners (Philippines, Thailand and Vietnam).

China was the top target of Thailand's AD measures (14) followed by the Republic of Korea and Thailand (5 each). Thailand targets its partners in ASEAN, with AD measures against Indonesia (three), Malaysia (two) and Vietnam (one). Thailand has implemented one AD measure against South Africa.

5.5.4.2.2 ASEAN Countries as targets of TDIs

The same six Members of ASEAN who are using TDIs instruments are the same who were subject to AD and countervailing measures. ASEAN Members were subject to 390 AD measures, which is more than double the number of applied measures, which show a high level of vulnerability as well as a perception of export intensive strategies of Members.

The top targets of AD initiations/measures are: Thailand (179/129), Indonesia (183/114), Malaysia (125/73), Singapore (53/33), Vietnam (46/34) and Philippines

(16/7). It is noted that India is very active in applying AD measures against ASEAN Members.

In the case of Thailand, India is the primary user of AD measures (28), followed by the EU (19) and Turkey (11). South Africa has applied four AD measures against Thailand and Egypt has implemented three measures against it.

The top users of AD measures against Indonesia are India (22), the EU (13) and the USA (12). South Africa has applied five measures and Egypt three.

India has applied 16 AD measures against Malaysia, followed by the EU (11) and Turkey (eight). South Africa has applied three AD measures against Malaysia and Egypt has applied one measure.

ASEAN Members have been subject to 18 countervailing measures, despite the fact that they have never used these measures against their trading partners.

The top targets of countervailing measures initiations/ measures are: Indonesia (19/8), Thailand (14/3), Malaysia (8/3), Vietnam (7/2), Philippines (2/2) and Singapore (1/0).

The USA has applied 50% of the countervailing measures against Indonesia and Canada has applied two measures. In the case of Thailand, the three countervailing measures were applied by the USA, Canada and the EU. The EU has applied two countervailing measures against Malaysia and Brazil has applied one measure.

5.5.4.3 Main features of Indonesia TDIs System

Indonesia could be used as an example for the application of TDIs in ASEAN Members. It is the largest economy in the block, has an advanced TDIs system and is the most active user of TDIs.

The national legislation governing TDIs is Government Regulation No. 34 adopted in 2011 which brought all relevant TDIs regulations in one piece of legislation.

5.5.4.3.1 An Active user of TDIs

Indonesia is a major trading economy and member of the G20. It is an active player in using TDIs with a preference for safeguard measures, where it is the second largest user with 16 measures only after India (19).[1182] Indonesia uses AD measures in a reasonable way; it is the 12th most active user of AD measures with 54 measures and it has never applied countervailing measures.[1183]

5.5.4.3.2 A National Investigating Authority

The Ministry of Trade deals with trade policy issues including TDIs. The Indonesian Anti-Dumping Committee (KADI) is responsible for investigations in relation to AD and countervailing measures, while the Indonesian Safeguard Committee (KPPI) is responsible for investigations in relation to safeguard measures.

Indonesia created an advocacy centre for safeguards, within the Ministry of Trade, which is charged with defending Indonesian exporters facing remedy actions by foreign governments.

KADI may undertake investigations on its own initiative or upon a request from domestic industry constituting at least 25% of total domestic production of the like product to be investigated.[1184]

5.5.4.3.3 Application of National Interest Consideration

One of the main changes introduced by new National Regulation is the introduction of a "national interest consideration" whereby the Ministry of Trade reviews KPPI recommendations to ensure that they are in the national interest.[1185]

5.5.4.3.4 Involvement in the DSB

Indonesia is active in resorting to the DSB to defend its trade interests against what it considers unlawful application of TDIs by its trading partners. This took place against

[1182] Accumulated by author based on WTO TDIs statistics available at https://www.wto.org/english/tratop_e/adp_e/adp_e.htm (accessed 1 May 2016)
[1183] *Ibid.*
[1184] Regulation No. 34.
[1185] *Ibid.*

many major partners including the USA and the EU and against application of AD and countervailing measures. [1186]

It is noted that Indonesia challenged the AD measures applied by *South Africa-Uncoated Woodfree Paper*, which ended with a mutually agreed solution after South Africa terminated the application of these measures.[1187]

Indonesia was subject to challenges in the DSB from the EU, the USA and Japan regarding Certain Measures Affecting the Automobile Industry.[1188]

5.6 Conclusions

TDIs are integral parts of RTAs. In many cases they are a key indicator of both the envisaged level of integration as well as the success in the implementation process.

There are different models of TDI systems in RTAs. Members of RTAs seek to strike a balance between protecting their national industries and realising the benefits of trade liberalisation and regional integration. In some cases, the TDI chapter is an important indicator for deep regional integration.

TDIs laws are complex by nature. WTO Agreements on TDIs act as supranational laws for all Members that they have to abide by. However, these laws are silent or vague on certain issues, which allow Members a degree of flexibility in the application of these rules. This is reflected in the usage of different principles like the "public interest test" and the lesser duty rule as well as different percentages of *de minimis* and negligible volume.

In recent years many RTAs have incorporated provisions and rules concerning TDIs. Such provisions range from entirely abolishing TDIs on intra-trade to strengthening the imposition criteria for Members and in some cases just copying the WTO provisions.

[1186] See for example *USA-Continued Dumping and Subsidy Offset Act of 2000* , *EU-Anti-Dumping Measures on Biodiesel* and *Pakistan Anti-Dumping and Countervailing Duty Investigations on Certain Paper Products.*
[1187] *South Africa-AD Measures on Uncoated Woodfree Paper.*
[1188] See *Indonesia-Certain Measures affecting the Automobile Industry*.

Countries with a deeper level of integration are more inclined to abolish the application of TDIs as a complementary process to the abolition of tariff and non-tariff barriers. This feature is rarely applied in RECs in developing countries and Africa in general. A high level of integration may correlate with the creation of superregional institutions and regional investigating authorities, which is a step that many RTAs find difficult to achieve because of sovereignty concerns.

The maintenance of TDIs among Members of RTAs requires, in most cases, the adoption of a legal and technical framework to govern their application. This framework differs from one system to another. Some RTA may choose to apply exactly the WTO rules and regulations without differentiating between Members and non-Members. Members could decide to apply the same WTO-stipulated procedures in all technical steps for investigations *i.e.* determination of injury, definition of domestic industry, evidence, provisional measures, price undertakings, retroactivity and notification and consultations.

Other RTAs may adopt slightly different rules and procedures that, although not identical to the WTO relevant Agreements, are closely similar to them. These RTAs adopt what is called WTO-plus provisions.

AD is the most used of the three TDIs in all surveyed regional blocks. This is a result of the increasing use of dumping in international trade by the private sector, and because of its specific nature compared to subsidies that are provided by governments and safeguard measures that could require the provision of compensatory measures.

When Members of an RTA decide to abolish the application of some of the TDIs, AD could be the only tool kept. However, in many RTAs like NAFTA, Mercosur and ASEAN, AD is still widely applied on intra-regional trade.

The effect of prohibited subsidies is felt on exports in general, and this can justify the fact that RTAs have provisions on regional countervailing measures to deal with subsidies that could undermine competition,

The provisions of TDIs incorporated by major hubs of RTAs like the EU, the USA and EFTA are steadily shaping the international trade law, and may affect the provisions to be incorporated on TDIs in the T-FTA.

Theoretically TDIs are designed to be applied in an impartial and rules-based way. However, in certain cases the implementation of TDIs measures may be arbitrary, unilateral, lacking in transparency and responsive to internal pressures for protection. Practice and empirical evidence show that they may be biased both towards finding dumping or subsidies and injury. They may also work in favour of Members of the RTA compared to third parties.

It is noted that when consumer and national producer interests are in conflict, national and regional TDI laws may put national industries interests over consumer welfare.

There are many lessons for Africa to learn from other regional blocks. African countries should envisage making use of these underutilised tools. This can help Africa strengthen its integration process, protect its markets from unfair regional or international competition and shield its exports against unlawful usage of TDIs by other trading partners.

There is a need to ensure that T-FTA countries can effectively exercise their right to protect industries while not harming the integration process. To this end they must ensure that the legal and institutional framework and bodies are in place, up to date and are in strict consistency with WTO law.

Several supportive factors should be taken into consideration when designing the African regional system. This includes transparency, protection of SMEs as well as dispute settlement procedures.

Chapter 6: Dealing with Trade Defence Instruments in Africa

6.1 Introduction

Regional integration in Africa has similar motives to integration in other economic integration endeavours; nevertheless, it has its particular objectives.[1189] African integration could be motivated by the challenges facing developing and least developed countries (LDCs) in Africa, which are mainly small economies with infant and fragile industries.

Integration in Africa is widespread across the continent with regional and continental integration initiatives. Several Regional Economic Communities (RECs) have their particular and common challenges, including overlapping membership, underdeveloped private sector and poor infrastructure.[1190]

African integration adopts a linear integration model, following stepwise integration of goods, services labour and capital markets, and eventually monetary and fiscal integration. This is in contrast to other integration models seeking to achieve political and economic union without going through these necessary gradual steps.[1191] The starting point is usually a Free Trade Agreement (FTA), followed by a Customs Union (CU), a common market, and in some cases the harmonisation of monetary and fiscal matters to establish economic union.[1192]

African RECs legal texts recognise the importance of TDIs in regional integration. Individual RECs have specific chapters/ provisions on the application of TDIs on intra-trade and with third parties. TDIs are not advanced nor highly utilised on the continent.

[1189] See secs. 3.3 and 3.4 of this Thesis.
[1190] See sec. 3.5 of this Thesis; Hartzenberg D (2011) *ERSD WTO* 1.
[1191] See the discussion under sec. 3.3 of this Thesis.
[1192] Hartzenberg (2011) *ERSD WTO* 2.

6.2 Reasons for Limited Usage of TDIs in Africa

African countries' engagement with TDIs, both as user and subject to these measures, is very limited in general, especially when compared to other regional blocks including between developing countries.

The limited usage by African countries of TDIs could be due to different reasons and motivations which could be summarised in the following points:

6.2.1 Limited share of World Trade

A country's volume of imports is a major determining factor in the need to resort to TDIs. Similarly, the rate of being subject to TDIs depends on the country's share of world exports and its market share in specific countries. The major users of TDIs like the USA, the EU, Canada, China, India, Argentina and Brazil are major international and regional trading powers.

The share of Africa's trade in 2014 was just 3.2% of global merchandise trade.[1193] This percentage is less than that of other continents.

6.2.2 Pattern of African Trade

Most of African countries' exports are similar and concentrated on primary and intermediate commodities, which are mainly base metals, agriculture, fuel, precious stones and basic industrialised products.[1194] Africa manufacturing value added share in GDP by region has decreased from 12.3% in the period (1970-1974) to 9.6% in the period (2010-2013).[1195] Moreover, Sub Saharan Africa has further reduced the share of manufacturing employment from an already low level. [1196]

It is noted that fuels and natural resource-based products accounted for close to two thirds of exports.[1197] This is consistent with a forward integration into global value chains, but merely as exporter of raw materials and other intermediates with limited

[1193] Based on WTO Trade Statistics.
[1194] UNCTAD (2009); and *Economic Development in Africa Report 2013: intra-African Trade, Unlocking Private Sector Dynamism in Africa*, 2013.
[1195] UNIDO (2016) 33.
[1196] *Ibid.*
[1197] UNECA (2015) 32.

value addition.[1198]These sectors are not the most important target sectors of TDIs, which mainly focus on the manufacturing sector.[1199] Nevertheless, some African countries' exports of semi-manufactured products were subject to TDIs in a number of cases.

When it comes to African imports the limited competing national industries in some African countries could play a role in decreasing the desirability of using TDIs against foreign imports. In some cases, cheap imports could be of benefit to consumers in developing countries especially when there is no competition with national industries.

Intermediate products represent the most dynamic component of Africa's merchandise trade, increasing fourfold over the last decade; yet Africa only accounts for 2-3% of the global figure.[1200] It is noted that intra-African trade in intermediates is significantly more diversified than the corresponding trade with the rest of the world.[1201]

The African plans for increasing industrialisation as well as the attention given to the industrial development in the tripartite context may suggest that in the long term, the industrial sector can grow in proportion and may be subject to more TDIs.

6.2.3 Underdeveloped Private Sector

In the majority of African countries, the private sector is not very developed to be able to make use of the sophisticated TDIs.[1202]

The private sector is the main implementer of regional and bilateral trade agreements. A request for initiating TDI investigations usually starts with a complaint from the private sector. If the private sector is not aware or not able to detect the existence of, for example, dumping or prohibited subsidies, no complaint will be lodged.

The ability to lodge a successful complaint and request for intervention requires a high level of sophistication of a wide range of human resources at the side of the

[1198] *Ibid.*
[1199] Based on WTO TDIs statistics available at https://www.wto.org/english/tratop_e/adp_e/adp_e.htm (accessed 7 May 2016)
[1200] UNECA (2015) and WTO Trade Statistics.
[1201] *Ibid.*
[1202] Interview with Mr. El Sherbiny.

national industry, including legal, economics and financial skills in addition to financial resources.

Additionally, the private sector may not have the financial resources to engage in the lengthy process required to complete a successful complaint process related to TDIs.

6.2.4 Preferential Treatment for African Countries

Some African countries enjoy preferential treatment both under the WTO TDIs Agreements (mainly the ASCM and the ASG), the Enabling Clause and bilateral agreements with trading partners. In such Agreements the TDI provisions provide preferential treatment to African countries that could make their exports escape some of the TDIs because of different *de minimis* and negligibility provisions applicable to LDCs and developing countries.[1203]

This can decrease the subjectivity of African exports to TDIs both in the context of the WTO and on the bilateral level.

6.2.5 Technical and institutional expertise and lack of legislation

Even when there is a clear case for TDIs many African countries are not in a position to effectively conduct TDIs related investigations. This is due to the lack of legislation and the insufficient (or non-existent) technical and institutional capacities that could, for example, establish the existence of dumping or subsidised imports, injury and the causal link and to go along with the prescribed WTO time frames.

Apart from Egypt, Morocco, South Africa, Tunisia and Zambia the majority of African countries do not possess national legislation or well-functioning national bodies dealing with TDIs.[1204]

Establishing an effective TDI system requires more than the promulgation of laws.[1205]These laws should be strictly in line with international obligations otherwise they might use their value as protection trade tools and may bring negative consequences if successfully challenged at the DSB. To convince sceptical domestic

[1203] See e.g. Art. 3.3 of the ADA; Art. 11.9 of the ASCM; Art. 9.1 of the ASG.
[1204] Based on reports of the WTO committees on anti-dumping, subsidies and countervailing measures and safeguards.
[1205] Kucik & Reinhardt (2008) 483.

groups about its viability as an alternative to liberalized tariffs, the system must also meet WTO standards.[1206]

Trade policy instruments like TDIs are difficult to implement and more demanding than tariff measures.[1207] They usually require holistic approaches with inputs and collaboration between different Ministries, technical departments and the private sector.

6.2.6 High Cost of Investigations

TDIs investigations are costly and may require hiring experts in different fields (economists, lawyers, statisticians and finance experts) to handle the complex rules and regulations involved.

In some cases, these investigations require visiting the export countries, which implies additional cost. These costs could be prohibitive for some African countries. In some cases, the perceived economic value of TDIs could be less than the financial cost which may discourage using these tools.

Additionally, TDIs are sometimes challenged in the WTO, and this is also correlated with high litigation costs and technical skills, neither of which is available to many African countries.[1208]

6.2.7 Fear of Retaliation and Litigation in DSU and Political Considerations

Some African countries might be hesitant to take TDI measures because of fear of retaliation, especially from major trading partners like the EU, the USA and China. This is especially true for African countries dependent on Official Development Assistance (ODA) from these countries, which might represent a significant part of the budgets of some African countries.[1209]

Additionally, the political relations may deter African countries from using TDIs. For example, South Africa has publicly stated that it will not undertake any countervailing investigations against China, for political reasons related to both countries being

[1206] *Ibid.*
[1207] UNECA (2015) 27.
[1208] El Taweel (2010).
[1209] Interview with Dr. Fahmy.

Members of the BRICS as well as fear of retaliation from China by increasing duties on its imports from South Africa.[1210] In 2010, The South African Trade and Industry Minister cautioned against imposing countervailing actions against China warning of "dire consequences for other sectors of the economy".[1211] It is submitted that there is exaggeration in evaluating the potential retaliatory actions of trading partners as response to the application of TDIs by African countries. Different TDIs instruments are being used by close trading partners and Members of different RTAs around the world as shown in the NAFTA and Mercosur cases. Even in the BRICS context, the other Members (India and Brazil) have brought many TDI cases against China.

6.2.8 Availability of Substitute Instruments

Many developing countries and LDCs have other trade policy options to face foreign competition and adjust their economies. For example, in many instances African countries can increase the WTO applied rate (customs duty) to a level not exceeding the bound rate under WTO without being subject to litigation from other Members.

In this regard, many African countries have a lot of policy space, as almost 75% of their tariff lines are unbound, which permits them to raise tariffs without violating WTO rules and without being requested to provide compensation.[1212]

Additionally, African countries make use of substitute options such as import prohibitions and voluntary export restraint (VERs) arrangements, which could be an additional reason for the low usage of TDIs in Africa.[1213] It is noted that, although some of these measures are prohibited in the WTO, many African countries still make use of them.

Like other WTO Members, African countries can use technical and health standards (TBTs and SPS) to limit their imports from particular goods.

[1210] "SA shouldn't kowtow to China on trade." http://www.rdm.co.za/business/2015/08/18/sa-shouldn-t-kowtow-to-china-on-trade (accessed 15 March 2016)
[1211] *Ibid.*
[1212] WTO (2009).
[1213] Illy (2015) *ICTSD.*

6.3 TDIs Statistics in Africa[1214]

6.3.1 African countries as Users of TDIs

WTO statistics show that SA and Egypt are the only Tripartite Members which have implemented AD and safeguard measures, while SA is the only country which has applied countervailing measures. Zambia has initiated one safeguard investigation.

African countries have limited recourse to apply TDIs against each other. Only South Africa and Egypt have resorted to AD measures against other African countries. The relatively high usage of TDIs by South Africa and Egypt is in line with the size of their economies and their diversified nature.[1215] According to World Bank Data for 2014 South Africa is the 33rd largest country in terms of GDP with USD 350 billion and Egypt is the 38th country with a GDP of USD 301 billion.

These statistics do not cover un-notified investigations and measures by African countries. In the period between 1921 and 1947 South Africa conducted more than 90 AD investigations, while another 818 investigations were undertaken between 1948 and October 2001. [1216]

6.3.1.1 Anti-Dumping

AD is the most frequently used of the TDIs in Africa. For the period from 1 January 1995 to 31 December 2014 African countries have initiated 318 investigations. South Africa has initiated 229 investigations, Egypt (82) and Morocco (seven). AD initiations in Africa represent 6.6% of total initiations, which is significantly higher than Africa's share in international trade. It has to be taken that the major proportion was done by South Africa. In the same period South Africa has applied 132 AD measures, Egypt (54) and Morocco (six).

The main target of South Africa's measures are three developing countries which are China (20 measures), the Republic of Korea (16) and India (12). Egypt follows a similar pattern where its three top targets are China (12 measures), India (five) and the Republic of Korea (four).

[1214] Accumulated by author based on WTO TDIs statistics available at https://www.wto.org/english/tratop_e/adp_e/adp_e.htm (accessed 17 May 2016)
[1215] According to World Bank Data for 2014.
[1216] Brink (2002) 2-3.

Morocco has imposed six measures against China, Denmark, the EU, Portugal, Turkey and the USA.

It is noted that Egypt has imposed two AD measures against South Africa, which has in turn imposed three measures against Egypt. South Africa has imposed one measure against Both Malawi and Zimbabwe, which are SADC Members.

South Africa has focused its measures on three chapters, particularly chapters XV: Base Metals and articles (34 measures), VII: Resins, plastics and articles, rubber and articles (26 measures); and VI: Products of the chemical and allied industries (21 measures).

Egypt has emphasised its measures on chapters VII (16 measures), XVI: Machinery and electrical equipment (15 measures) and XV: Base Metals and articles (nine measures). In both cases this could indicate a focus on sectors competing with national industries.

6.3.1.2 Countervailing Measures

Only South Africa and Egypt have initiated countervailing measures investigations with 13 and ten initiations respectively. Only South Africa has reached the stage of imposing countervailing measures with five measures in the calculation period (four against India and one against Pakistan).

The target sectors for South Africa are chapters XV (two measures), Chapter V: Mineral products; VII: Hides, skins and articles, saddlery and travel goods, XI: Textiles and articles (one measure each).

6.3.1.3 Safeguards

African countries have initiated 25 safeguards investigations in the comparison period. Egypt comes first with 11 initiations followed by Morocco (seven), Tunisia (four) and South Africa (three).[1217]

[1217] Note that Zambia initiated a safeguards investigation in 2015, while South Africa initiated another two in 2015 and 2016, both related to steel products.

Egypt has imposed five safeguard measures, Morocco three, and South Africa two. In total African countries implemented 6.5% of global safeguard measures, which is more than its share in world trade.

The target sectors of Egypt are chapters XI: Textiles and textile articles (two), and chapters I: Live animals; animal products, chapter VI: Products of the chemical or allied industries, and chapters XV and XVI, one measure each. South Africa's target sectors are chapters IV: Prepared foodstuffs and Chapter VI: Chemical and Allied products.

(Table 6)
African TDIs Statistics (As Users)
(1/1/1995- 31/12/2014)

	South Africa	Egypt	Morocco	Tunisia	Total
AD initiations	229	82	7	0	318
AD Measures	132	54	6	0	192
Countervailing Measures Initiations	13	5	0	0	18
Countervailing Measures	10	0	0	0	10
Safeguard Initiations	3	11	7	4	25
Safeguard Measures	2	5	3	0	8
Total initiations	245	98	14	4	361
Total Measures	144	59	9	0	212
Conversion Rate of Total TDI Measures	58.7%	60.2%	64.3%	0%	58.7%

6.3.2 African Countries as subject to TDIs

6.3.2.1 Anti-dumping

Nine African countries were subject to AD initiations in the comparison period compared with three African countries which have initiated AD investigations. This might indicate the vulnerability of African countries to possible arbitrary usage of AD. These countries were: South Africa (68 initiations), Egypt (19), Algeria, Kenya, Libya, Zimbabwe (two each) and Malawi, Mozambique and Nigeria (one each).

For the initiations against South Africa, the USA comes first (16 initiations), followed by India (11) and Argentina (10). For initiations against Egypt the EU with which it has FTA Agreement comes first with seven initiations followed by Turkey and South Africa (three each). Eight African countries were subject to AD measures, which are: South Africa (45 measures), Egypt (six), Algeria (two), Libya, Kenya Malawi, Nigeria and Zimbabwe (one each). The AD measures against Malawi and Zimbabwe were imposed by South Africa.

Chapter XV (Base Metals) is the most targeted chapter of South Africa and Egypt. It represents 50% of the measures imposed against Egypt and 71% of measures imposed against South Africa.

African exports subject to AD measures were mainly steel, copper, paper, flowers, machinery and chemicals.

6.3.2.2 Countervailing Measures

Only two African countries have been subject to countervailing measures, which are Côte d'Ivoire and South Africa. This could be a consequence of the limitations that face African countries in providing financial support to their national industries.

South Africa was subject to four measures imposed by New Zealand and the USA (two measures each), while Côte d'Ivoire was subject to one countervailing measure from Brazil. The countervailing measures targeted chapters XV and IV. South Africa is biggest economy in Africa with some export intensive industries and subsidies programmes that target export sectors.[1218]

(Table 7)
African Trade Remedies Statistics (As Targets)
(1/1/1995- 31/12/2014)

	Anti-dumping Initiations	Anti-dumping Measures	Countervailing Measures Initiations	Countervailing Measures	Total Measures
South Africa	68	45	7	4	49

[1218] See section 6.4.1 of this Thesis.

Egypt	19	6	0	0	6
Algeria	2	2	0	0	2
Kenya	2	1	0	0	1
Libya	2	1	0	0	1
Zimbabwe	2	1	0	0	1
Malawi	1	1	0	0	1
Mozambique	1	0	0	0	1
Nigeria	2	1	0	0	1
Côte d'Ivoire	0	0	1	1	1
Total	99	57	8	5	64

6.4 TDIs laws in Africa

WTO periodical reports show that the only Tripartite Members which have national legislation in the three TDIs are Egypt, South Africa and Zambia.

According to the data of the Committee on AD Practices (ADP) only thirteen African countries have notified national AD regulations: Cameroon, Egypt, Kenya, Malawi, Mauritius, Morocco, Nigeria, Senegal, South Africa, Tunisia, Uganda, Zambia and Zimbabwe.[1219] Eight of these countries are Tripartite Members: Egypt, Kenya, Malawi, Mauritius, South Africa, Uganda, Zambia and Zimbabwe.

In connection with countervailing legislation 26 African countries have notified their national legislation; out of them 13 are Members of the Tripartite area: Benin, Burkina Faso, Burundi, Cameron, Chad, Congo, Côte d'Ivoire, Egypt, Gabon, Gambia, Ghana, Guinea, Kenya, Malawi, Mali, Mauritius, Morocco, Namibia, Niger, Senegal, South Africa, Togo, Tanzania, Uganda, Zambia and Zimbabwe.[1220]

[1219] Compiled data from Reports of the Committees on AD Practices as for 10th January 2016.
[1220] Compiled data from the reports of the Committee on Subsidies and Countervailing Measures as of 10 January 2016.

Only six African countries have notified their safeguard legislation to the committee, out of them three are Members of the Tripartite area which are Egypt, South Africa and Zambia.[1221] The other three are Gabon, Morocco and Tunisia.

When it comes to national institutions only Egypt and South Africa have fully fledged institutions.[1222] Note that some countries, including Mauritius, have an *ad hoc* authority that consists of a chairperson, assisted by staff from various Ministries.

In the coming sections the regulations in three countries (Egypt, Kenya and South Africa) will be discussed. These three countries are the major economies in their respective RECs, which are the building blocks of the T-FTA.

6.4.1 South Africa

Unlike other African countries, South Africa is one of the earliest users of TDIs in the world.[1223] The first references to TDIs are found in section 8 of the Customs Tariff Act of 1914.[1224] TDIs were administered by the then Customs Department, which later became the South African Revenue Service (SARS).[1225]

The South African trade policy was affected by the phasing out of international sanctions after the fall of apartheid in the early 1990s. South Africa started opening its economy to become more competitive and to integrate into the world economy and participated actively in the WTO Uruguay round, becoming a founding member of the WTO.[1226]

South Africa was treated as a developed country in the early stages of WTO, which obliged it to embark on a process of rapid liberalisation by introducing substantial tariff offers aligned with those of developed countries.[1227]

The average MFN rate in South Africa fell from over 14% in 1996 to 8% in 2001; the MFN rates for industrial goods fell by 50% and 55% for textiles and clothing

[1221] Compiled data from the reports of the Committee on Safeguards as of 10 January 2015.
[1222] Illy (2015) *ICTSD*; interview with Dr. Brink.
[1223] Gallaghe, Low & Stoler (eds) (2005), Plant (1931) 63; Brink (2002) 2-7; Brink (2004) 19-91.
[1224] Act 26 of 1914. Brink (2004) 19 note 1 indicates that a countervailing duty had been imposed as early as 1903.
[1225] ITAC (2003).
[1226] *Ibid*; Brink (2002) 4-5.
[1227] Interview with Dr. Brink.

respectively over the same period. The weighted average MFN tariff rate came down from a level of 8.6% in 1996 to 5% in 2001.[1228]

This decrease in tariff barriers led to increasing competition from foreign exporters and emphasised the need to resort to TDIs to protect national industries from fair and unfair foreign competition.

South Africa has several TDI regimes in its RTAs. This includes the SADC FTA, SACU, the EU-SADC EAP and the FTA with EFTA.

6.4.1.1 Main Features of South Africa's TDIs System

6.4.1.1.1 Active User of TDIs

South African is by far the largest user of TDIs in Africa, especially AD. From the inception of AD investigations worldwide, South Africa was a prolific actor in this field.[1229] From 1921 to 2001, it is estimated that South Africa has carried out more than 900 AD actions.[1230]

The high share of South African TDIs in Africa is in line with being relatively developed with industrial base that could be in need for protection, and is also related to historical reasons.

South Africa has imposed 132 AD measures which ranks it 8th in terms of global AD measures.[1231] It comes after India (534), USA (345), the EU (298), Argentina (228), Brazil (197), China (176) and Turkey (163).[1232] When compared with other leading powers, it is noted that South Africa use AD measures in a way that exceeds its weight in international trade.

South Africa has applied 69% of all African AD measures, all African countervailing measures and comes third, after Egypt and Morocco, in number of safeguard

[1228] Barral *et al* (2004) 51.
[1229] Brink (2002) 2-3; Brink (2012) [AD in SA] 1.
[1230] Brink (2002) 2-3; Brink (2012) [AD in SA] 2; Brink (2004) 54-58.
[1231] Accumulated by author based on WTO TDIs statistics available at https://www.wto.org/english/tratop_e/adp_e/adp_e.htm (accessed 18 May 2016).
[1232] *Ibid.*

measures. South Africa has used AD measures against Members of the SADC FTA and T-FTA Members.[1233]

There is a noticeable recent downward direction for South Africa's use of AD measures, which reached its peak of 36 measures in 1999 and recorded only four measures in the last three years. [1234] The recent decline observed from 2007 may be because of the depreciation of the South African Rand, which enhances the competitiveness of the domestic industries, and a Supreme Court ruling in 2007 that tightened in some way the regime of AD, which is the most used remedy in the country.[1235]

6.4.1.1.2 The South African Constitution and the Duality of Law

The South African constitution puts the general framework for the interpretation of international law and international treaties. Moreover, it endorses individual rights that in turn affect indirectly international trade. Section 22 of the Constitution refers to the right of every citizen to choose his trade and that trade may be regulated by law.

South Africa follows the duality of law system. Even though the WTO Agreements were ratified by the Parliament, they do not form part of South African public law, as they were not promulgated.[1236] Likewise, this means that if South Africa were to enter into trade agreements, these would have to be promulgated as part of South Africa's national law before they could be relied upon by its citizens.[1237]

The South African Constitution, however, explicitly states that international agreements should be used as reference in the interpretation of domestic laws.[1238] This does not mean that the relevant WTO Agreements could be applied within South Africa, but that where the South African law is not clear on a particular issue, the relevant Agreement, and its interpretation by the DSB, would provide guidance to the national Court.

[1233] See Section 6.3 of this Thesis.
[1234] For reasons of this fluctuation see Brink (2012).
[1235] Bown (2011).
[1236] Sec. 231 of the South African Constitution; Brink (2012) [AD in SA] 4.
[1237] See the discussion of the dualist and the monist doctrines under sec. 2.3 of this thesis.
[1238] Sec. 231 of the South African Constitution.

In 1996 South Africa amended its legislation on AD to ensure its compliance with the relevant WTO agreements.[1239] This included changing the definition of dumping to correspond with the definition in the ADA, and the introduction of certain concepts such as normal value. [1240]

6.4.1.1.3 A National Investigation Authority with regional mandate

ITAC is the national investigating authority responsible for the administration of TDIs in South Africa with a mandate extending to SACU.[1241] A detailed AD regulation was promulgated in 2003 to determine in detail the substantive and procedural parts of AD investigations and review processes.

The investigation procedures are similar to those specified under the ADA. The investigation starts after a request of a domestic industry submitted to ITAC. Thereafter stakeholders (importers, exporters and foreign producers) may submit information relevant to the investigation.[1242]

The decisions could be affected by some political factors, as the results of the investigations are submitted to the Department of Trade and Industry (DTI) for evaluation before the Department makes the final decision. Once the report is approved by the Minister the decision is transmitted to the Finance Ministry, responsible for tariff collection, for implementation. [1243]

The SACU region adopts an innovative approach in the conduct of TDIs investigations. South Africa's ITAC is the investigating authority for SACU since 2002 and until a regional body is established.[1244] This is in line with the level of economic and institutional development in South Africa compared to other Members.

The SACU industry can apply to ITAC requesting the initiation of AD, countervailing or safeguard investigation. When evaluating the dumping and injury analysis in TDIs investigations the SACU market, *i.e.* the combined market of the five SACU

[1239] WTO SACU Trade Policy Review (2015) 33.
[1240] Brink (2004) 693.
[1241] Brink (2004) 710.
[1242] This can include other SACU Members.
[1243] See An overview of ITAC http://www.itac.org.za/pages/about-itac/an-overview-of (accessed 15 March 2015); Brink (2013) *JS Afr. L* 419; Brink (2012) [AD in SA] 12.
[1244] Under the 1969 SACU Agreement, South Africa's customs tariffs and legislation on trade remedies were directly applicable to all SACU countries.

Members, is considered the domestic market. This has its effect on injury determination and could be of use in the Tripartite context.

One of the recent examples of ITAC acting on behalf of a SACU member is the *Soda Ash* case where, the investigation was finalised in June 2014 and final AD duties were imposed.[1245]

Similarly, ITAC conducts TDIs reviews on behalf of SACU. In 2015 a sunset review of the AD duties on garlic originating from China was initiated after an application from the Garlic Growers Association on behalf of the SACU garlic producers.[1246]

In March 2015, South Africa has imposed AD duties of between 3.86% and 73.33% on frozen bone-in chicken portions imported from a selected number of the EU countries, mainly Germany, the Netherlands and the United Kingdom.[1247] ITAC stated that the dumped goods were a detriment to the SACU industry.

South Africa's authority, with an annual operational budget of around USD 7.8 million, employs more than 20 permanent staff in its trade remedy unit.[1248]

6.4.1.1.4 Specific rules

ITAC in certain cases applies the lesser duty rule when a duty less than dumping margin is enough to remove the injury caused by dumping.

ITAC does not generally consider the public interest considerations in terms of effects on consumers before applying AD duties.[1249] South Africa has not accepted price undertakings in some dumping investigations.

6.4.1.1.5 Transparency

All matters related to the initiation, conclusion, termination or suspension of TDIs related investigations are published in the Government Gazette. In addition, detailed

[1245] ITAC Annual Report (2014-2015).
[1246] *Ibid.*
[1247] "Anti-dumping duties imposed on chicken imports to protect SACU industry" http://www.itac.org.za/news-headlines/itac-in-the-media/anti-dumping-duties-imposed-on-chicken-imports-to-protect-sacu-industry
[1248] Illy (2012) *4th Global Leaders Fellowship Program Annual Colloquium, Princeton* 30; ITAC Annual Report (2013-2014) 45.
[1249] However, note that in the preliminary determination in *Korea-Paper and paperboard*, ITAC refused to impose a provisional safeguard measure on the basis of public interest - see ITAC Report. [152] However, a definitive duty was imposed following the final determination.

investigation reports are made available separately following both the preliminary and final determinations.

6.4.1.1.6 Judicial Review

There is no differentiation between the judicial review of general government decisions and determinations related to TDIs. The High Court has jurisdiction over all legal actions in South Africa including TDIs administrative decisions. Appeals are directed to the Supreme Court of Appeal.[1250]

Although the WTO Agreements are not incorporated into the national law, courts usually make reference to the South African obligations under these agreements.[1251]

Judicial reviews are conducted in accordance with the national law and the South African Constitution, which means that in interpreting national obligations cognisance must be taken of international law.[1252] In cases of conflict between national and international obligations, the South African law prevails. To date, relatively few TDI cases have been heard by the High Court,[1253] with even fewer heard by the Supreme Court of Appeals.[1254] Only one TDI case has been decided by the Constitutional Court, and this related to a party's ability, or lack thereof, to interdict the Minister in an investigation.[1255] In general. Courts have addressed only procedural issues and refused to rule on issues of substance. The sole exception was in *Algorax v ITAC*, where the court found that ITAC's sunset review procedures were not supported by the facts of the matter and it provided guidelines on how ITAC had to take specific factual issues into consideration.[1256]

[1250] Brink (2012) *Journal of World Trade* 274.
[1251] Brink (2013) in Müslüm Yilmaz (ed) Domestic Judicial Review of Trade Remedies: Experiences of the Most Active WTO Members 247-268
[1252] Sec. 233 of the South African Constitution.
[1253] For a discussion of these cases, see Brink (2012) *Journal of World Trade* 274; Brink (2012) "Judicial Review of Trade Remedy Determinations in South Africa" in Yilmaz *Domestic judicial review of trade remedies: experiences of the most active users*.
[1254] *Chairman of the Board on Tariffs and Trade v Brenco* 2001(4) SA 511 (SCA); *Progress Office Machines v SARS* [2007] SCA 118 (RSA); *ITAC v SATMC* [2011] ZASCA 137. See also Brink (2008) *Progress Office Machines v SARS* [2007] SCA 118 (RSA) De Jure 644.
[1255] See *ITAC v SCAW* CCT59/09 [2010] ZACC 6.
[1256] *Algorax v Chief Commissioner, ITAC* (unreported case 25233/2005 T).

The judicial review system in South Africa is considered by some to be complicated, unexpected, expensive and long although it may be more affordable than the WTO DSU.[1257]

6.4.1.1.7 Dealing with NMEs

South Africa does not have a predetermined list of NME countries. In 2007 it granted China market economy status (MES), which decreased the probability of subjecting Chinese imports into South Africa and SACU to TDIs and especially AD.

It could be assumed that this was a political decision and not based on economic factors, as China was considered a major source of dumping and competition to South African national industries. South Africa has also granted Russia and Vietnam MES.[1258]

6.4.1.2 South Africa's Involvement in the DSB [1259]

In the period from 1995-2015 there were five AD cases that were notified to the WTO where South Africa was a party. It is noted that, in all these cases, the complainant party was a developing country challenging South African AD measures.

It is also noted that, in four of these cases, South Africa and the other party reached a mutually agreed solution during the consultation stage without reaching the panel stage.[1260]

In *South Africa-Provisional AD Duties on Portland Cement from Pakistan,* [1261] Pakistan claimed that the South African AD measures are inconsistent with the ADA mainly in respect to the comparison between export price and normal value, determination of the like product and determination of injury. It indicated that these measures violate Articles 1, 2.4, 2.6, 3.1, 3.2, 3.4, 3.5, 3.6, 6.1.3, 6.2, 6.4, 6.5, 6.8, 7.1, 12.1.1(i), 12.2, 18 and paragraph 6 of Annex II of the ADA; as well as Article VI of

[1257] See in general Brink (2013).
[1258] Interview with Dr. Brink.
[1259] See in general Brink (2012) AD in SA 53-55; Brink (2009) "South Africa" in Shaffer & Meléndez-Ortiz (eds) Dispute settlement at the WTO: The developing country experience. Brink (2007) [International Trade Dispute Resolution: Lessons from South Africa, file:///Users/Gustav/Documents/Articles/Published/2007_ICTSD_international-trade-dispute-resolution.pdf, (accessed 11 April 2016).
[1260] The fifth case was ongoing at the time of writing.
[1261] *South Africa-Portland Cement* DS500.

the GATT 1994. The case was still under discussion between the two countries when the provisional duties lapsed and no further action was taken.

In *South Africa-Anti-Dumping Duties on Frozen Meat of Fowls from Brazil*,[1262] Brazil requested consultations with South Africa claiming the preliminary determination and the imposition of provisional AD duties, as well as the initiation and conduct of the investigation, to be inconsistent with South Africa's obligations under the provisions of the GATT 1994 and Articles 2.4, 2.4.2, 3.1, 3.2, 3.4, 3.5, 4.1, 5.2, 5.3, 5.8, 6.1, 6.1.2, 6.2, 6.4, 6.5.1, 6.5.2, 6.7, 6.8, 6.9, 6.10, 7.1 and 12.2.1; paragraphs 7 and 8 of Annex I; and paragraphs 1, 3, 5, 6 and 7 of Annex II of the ADA. As a result of these consultations, South Africa decided not to impose definitive AD measures.

In *South Africa-Anti-Dumping Measures on Uncoated Wood free Paper*,[1263] Indonesia challenged the legality of the imposition of AD measures on imports of uncoated wood free white paper from Indonesia. On 9 May 2008 Indonesia requested consultations with South Africa claiming that the definitive AD measures, which were re-imposed on 2 April 2004 after it was initially imposed on 28 May 1999, were not in line with South Africa's obligation under Article 11.3 of ADA which requires termination of AD measures not later than five years after imposition unless the expiry would lead to the continuation or recurrence of dumping and injury. Indonesia pointed out that the latest semi-annual report of South Africa under Article 16.4 of the ADA listed the sunset review on uncoated wood free white A4 paper from Indonesia as ongoing. Indonesia claimed that the failure of South Africa to conclude this review was inconsistent with the obligations of South Africa under Article 11.4 of the ADA to conclude sunset reviews expeditiously and normally within twelve months. On 20 November 2008 Indonesia informed the DSB that South Africa had promulgated an amendment to the Schedule of the Customs and Excise Act withdrawing the AD measures with retrospective effect from 27 November 2003 and consequently decided to withdraw its request for consultations.

In *South Africa-Definitive Anti-Dumping Measures on Blanketing*, [1264] Turkey requested consultations with South Africa concerning its definitive AD measures on

[1262] *South Africa-Poultry* DS439.
[1263] *South Africa-Uncoated wood free paper* DS374
[1264] *South Africa-blanketing* DS288.

imports of blanketing in roll form from Turkey. These measures were imposed further to an investigation by the South African Board on Tariffs and Trade (BTT) (predecessor to ITAC) into the alleged circumvention of AD duties. Turkey challenged the legality of the notification from BTT, its establishment of facts as well as the BTT's evaluation of these facts particularly in relation to the initiation and the conduct of the investigation as well as the imposition of the AD duty. Turkey claimed that South Africa's measures violated Articles 5.5, 6.1, 6.1.3, 6.2, 6.9, 6.10, 9.2, 9.3 and Article 12.1 of the ADA; and Articles III and X of the GATT 1994. Following consultations, South Africa had to withdraw these measures, which put an end to the dispute.

In *South Africa-Anti-Dumping Duties on Certain Pharmaceutical Products from India,*[1265] India claimed that the decision by South Africa to consider some items of pharmaceutical products as being dumped in the SACU market was not in line with the ADA, particularly the definition and calculation of normal value, because of wrong methodology in determining the normal value and the resulting margin of dumping; the determination of injury and that the South African authorities had not taken into account India's special situation as a developing country. The issue was solved through consultations but no agreement was notified. The Indian exporter subsequently took the matter on judicial review in South Africa's High Court, but the Court rejected the application.[1266] This case is important in the context that it concerned the market of SACU and the differential treatment to developing countries.

These cases manifest the complication of the TDIs system and the need to strictly adhere to the multilateral rules and the additional need of being able to defend its legality in the DSB. In all these cases the South African AD measures were challenged and in most of the cases South Africa had to terminate or amend its measures. This could prove some institutional weakness in the investigation process, although in these cases the other party was always a developing country.

[1265] *South Africa-Certain Pharmaceutical Products* DS168.
[1266] Ranbaxy vs. Chairman of the Board (Unreported case 659/98T).

6.4.2 Egypt

Egypt is the second biggest economy in the Tripartite area in terms of GDP after South Africa. Its economy is well diversified where industry represented almost 40% of GDP in 2014.[1267]

Egypt has established a web of RTAs with its major trading partners, including the EU Association Agreement, the Arab FTA, COMESA, and the EFTA FTA. This resulted in a preferential treatment to most of the Egyptian exports in these markets.

Egypt has liberalized many of its economic sectors. The percentage of the bound tariff lines is 99.3 % of all tariffs with an average bound rate of 27.7%.[1268] This highlights further the importance of TDIs.

Egypt's experience in TDIs is more recent compared to South Africa. However, the country has proven to be relatively active in TDIs.[1269] This comes with investment in technical and institutional capacities designed to protect the growing industrial base in the country.

6.4.2.1 Main Features of Egypt's TDIs System

In addition to some common features with other TDIs systems like transparency and judicial review, the following features could be highlighted.

6.4.2.1.1 Detailed National TDIs Laws

According to the Egyptian Ministry of Trade and Industry (MTI) the three TDIs Agreements are of great importance to the domestic industry, as they provide protection against practices of dumping, subsidy and significant increases in imports because they act as the only way to protect domestic industry under the WTO.[1270] This statement may not be accurate as it excludes other legal protection tools, but it emphasises the importance the government attaches to TDIs.

[1267] According to the World Bank data http://data.worldbank.org/indicator/NV.IND.TOTL.ZS (accessed 1 February 2016)
[1268] According to WTO data.
[1269] Illy (2012) 30.
[1270] "Trade Remedies" http://www.tas.gov.eg/English/Trade+Remedies/About/Intro.htm (accessed 15 May 2016).

The three WTO TDIs Agreements are an integral part of Egyptian Law. Egypt has promulgated Law No. 161 of 1998 on 11 June 1998 concerning the protection of the national economy from injurious effects of unfair practices in international trade. The regulation of that law was issued by on 24/10/1998 and it was issued in the Official Gazette Issue No. 241 on 24 October 1998.[1271]

The Egyptian law covers the three TDIs laws in terms of substantial and procedural issues. The Law gives MTI the authority to take the necessary measures and decisions to protect the economy from injury resulting from subsidies or dumping practices or the unjustifiable increase in imports in accordance with the relevant WTO Agreement.[1272]

6.4.2.1.2 National Investigating Authority

Egypt has established different national institutions dealing with TDIs. The establishment of these institutions took a long time with significant financial investment; however, it was an important step in ensuring the availability of functioning institutions to be able to defend Egypt's economic and trade interests.[1273]

Despite this significant progress, Egypt sometimes makes use of private international law firms to support national efforts and ensure the implementation of measures that are in line with national and WTO regulations.

The Central Department of International Trade Policies (CD/ITP), under the MTI, is the national authority responsible for implementing the law. Since its inception the CD/ITP has handled many TDIs cases.[1274] The department employs 200 employees to respond to the demanding cases of TDIs.

A list of experts specialising in the relevant areas needed for the investigation of reported violations is kept in a special register by the Ministry of Justice, in consultation with the Ministry of Trade and Supply.

[1271] Ministerial Decree No. 549 of 1998.
[1272] Art.1 of Law No 161 of 1998 concerning the protection of National Economy from the effects of Injurious practices in International Trade.
[1273] Interview with Mr. El Sherbiny.
[1274] According to the Egyptian Ministry of Trade Web site.

The gradual accumulation of national expertise in fields related to TDIs could prove of importance on the long term.

6.4.2.1.3 A Support System to National Exporters

The MTI responsibilities include the investigation part as well as providing technical assistance to local producers charged with dumping by other WTO member countries.[1275] This is of particular importance, since small and medium enterprises engaged in export activities may not have the technical capacities to defend their interests if threatened by AD or countervailing measures in the export markets.

The Ministry periodically publishes information on the three TDIs agreements in English and Arabic to help exporters interact effectively with the system.

6.4.2.2 Egypt interaction with the DSU

Egypt was involved in four cases in the DSU in the period from 1995-2014. Two of these cases are related to TDIs (AD). It is noted that Egypt participated in some cases related to TDIs as a third party.

The case *Egypt-Definitive Anti-Dumping Measures on Steel Rebar from Turkey*[1276] is the only one where a panel report was issued. It concerned with a claim by Turkey in 2000 against the legality of Egypt's imposition of AD measures on steel imports from Turkey, which ranged from 22.63% - 61.00 % *ad valorem*.[1277] Turkey claimed that Egypt made determinations of injury and dumping in the investigation without a proper establishment of the facts and based on an evaluation of the facts that was neither unbiased nor objective; during the investigation of material injury or threat thereof and the causal link it was claimed that Egypt acted inconsistently with Articles 3.1, 3.2, 3.4, 3.5, 6.1 and 6.2 of the ADA; and during the investigation of sales at less than normal value Egypt violated Article X:3 of the GATT 1994, as well as Articles 2.2, 2.4, 6.1, 6.2, 6.6, 6.7 and 6.8, and Annex II, Paragraphs 1, 3, 5, 6 and 7 and Annex I, Paragraph 7 of the ADA.[1278]

[1275] *Ibid.*
[1276] *Egypt-Rebar* DS211.
[1277] *Ibid.*
[1278] *Ibid.*

After thorough analysis between major stakeholders from the Egyptian government and its foreign legal consultant Egypt decided that its measures were consistent with its obligations under the ADA, and consequently decided to defend these measures in the DSB.[1279]

After the consultations failed to reach a mutually agreed solution Turkey requested the establishment of a panel on 3 May 2001. The Egyptian government believed that the panel report was generally in favour of Egypt, [1280] as it concluded that Egypt did not act inconsistently with its obligations under Articles 3.4, 3.2, 3.1, 6.1, 6.2, 3.5 and 2.4 of the ADA.[1281] The panel concluded that Article 3.2 did not require that a price-cutting analysis be conducted at any particular level of trade, that the Egyptian authorities had provided the justification for their choice of the level of trade at which prices were compared, and that Turkey had failed to establish that an objective and unbiased investigating authority could not have found price undercutting to exist on the basis of the elements before it.[1282] Nevertheless, it also concluded that Egypt acted inconsistently with its obligations under Article 6.8 of the ADA.[1283] The panel report was adopted on 1 October 2002, and Egypt and Turkey later mutually agreed that the reasonable period of time to implement the panel's conclusions should not be more than nine months.[1284] This case showed that the Egyptian investigating authority was complying to a large extent with the rules set forth in the ADA and adequately protected its national industry.

In *Egypt-Anti-Dumping Measures on Matches from Pakistan*,[1285] Pakistan challenged the legality of Egyptian imposition of AD measures on imports of matches in boxes from Pakistan claiming that these measures appeared to be inconsistent with Egypt's obligations under the GATT 1994 and the ADA.[1286] Following the receipt of the request for consultations the Egyptian government made extensive consultations with the foreign consultant and internally assessed the claims of Pakistan.[1287] This case was important as it involved active participation of the recently established Legal

[1279] *Julien* (2007) Conference on Egypt National Dialogue on WTO dispute settlement 11.
[1280] Interview with Mr. El Nozhy .
[1281] *Egypt-Rebar*. DS211.
[1282] *Ibid*, paragraphs 7.67-76.
[1283] *Ibid*, paragraphs. 7.143-266.
[1284] "Egypt Definitive AD measures on Steel Rebar from Turkey" <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds211_e.htm>.
[1285] *Egypt-Matches* DS327.
[1286] *Ibid*.
[1287] *Julien* (2007) Conference on Egypt National Dialogue on WTO dispute settlement 5.

Department in the analysis of the case.[1288] The consultations were not successful, and Pakistan requested the establishment of a panel on 9 June 2005. The panel was formally established on 20 July 2005.[1289] Egypt and Pakistan continued their consultations on an informal level, as the Pakistani exporters had lodged a request for the initiation of an interim review investigation to review the form of the AD measures maintained on Pakistani imports.[1290] Further to the initiation and conclusion of the interim review requested by the two cooperating exporting producers, on 27 March 2006 Egypt and Pakistan informed the DSB that they had reached a mutually agreed solution. The interim review investigation was not directly influenced by the WTO dispute settlement proceedings. However, since its outcome was acceptable to the exporting producers, Pakistan and Egypt decided not to engage in the DSB further.[1291]

In *EC-Anti-Dumping Measures on Bed Linen from India*,[1292] Egypt participated as a third party and claimed in favour of India that Article 15 of the ADA obligated the EC to explore the possibilities of constructive remedies before applying anti-dumping duties, and that the EC failed to comply with this provision, as it did not suggest to the Egyptian exporters the possibility of price undertakings. Egypt was of the view that Article 15 imposes a legal obligation on developed countries any time they contemplate imposing AD duties against developing countries, and it is therefore up to those developing countries then to suggest to the developed countries involved whether or not they would be interested in offering price undertakings.[1293] Egyptian exporters benefited from the panel's ruling since the AD measures on imports of bed linen from Egypt were later terminated as a result of the DSB ruling.

Egypt, an emerging steel exporter, also participated as third party in *EC-Provisional Safeguard Measures on Imports of Certain Steel Imports*.[1294] The dispute ended with no panel report, after the EU and USA removed their respective measures in December 2003. It is submitted the Egyptian steel exports benefited indirectly from

[1288] *Ibid.*
[1289] "AD measures on matches from Pakistan" <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds327_e.htm>.
[1290] Interview with Mr El Nozhy.
[1291] *Ibid.*
[1292] *EC-Bed linen* DS141.
[1293] *Mosoti* (2006) *JIE*L 427 at 437.
[1294] *EC-Steel* WT/DS260.

the outcome of this case as a result of the removal of these constraints in two major export destinations for Egyptian steel products.

Egypt also participated as third party in *USA-Continued Existence and Application of Zeroing Methodology*.[1295] The main objective was to gain knowledge and expertise about the interpretation of the AD zeroing methodology, especially with the importance of this case, at this time, to national regulations.[1296]

On 4 February 2009 the AB affirmed the panel's finding that the use of zeroing in 29 administrative reviews was inconsistent with the ADA and the GATT 1994. The AB disagreed with the panel that the interpretation of the ADA advanced by the USA was a permissible one. Moreover, the AB affirmed the panel's finding that the eight sunset reviews at issue were WTO-inconsistent. It recommended that the DSB request the USA to bring its measures, found to be inconsistent with the GATT 1994 and the ADA, into conformity with its obligations.[1297]

In connection with the ASCM, Egypt participated as third party in *China-Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments*.[1298] The importance of this case is that it concerns the provision of a subsidy by a NME. On 19 December 2007 China and the USA informed the DSB that they had reached an agreement in the form of a memorandum of understanding.[1299]

These cases have highlighted the complexity of the TDIs system and the positive return a country can achieve from investing in building its national system and adhering to the multilateral rules and national laws.

6.4.3 Kenya

Kenya is the most diversified and biggest economy of the EAC region. It is part of the EAC Customs Union where TDIs are addressed on a regional basis. It is also part of the COMESA FTA.

[1295] *USA-Continued zeroing* DWT/S350.
[1296] Interview with Mr. El Nozhy.
[1297] *Ibid*.
[1298] Egypt also participated as third party in the similar case: *China-Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments*.
[1299] China — Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds358_e.htm (accessed 15 March 2015)

Kenya is active in the negotiations around rules in WTO, which reflects interest from the government to make use of these tools.

6.4.3.1 Main Characteristics of the Kenyan Legal System

6.4.3.1.1 National Regulation on AD and Countervailing Measures

Kenya has notified its national legislations on AD and countervailing measures to the WTO. AD and countervailing measures are regulated nationally under the Customs and Excise Act Sections 125 and 126, which came as a result of the revised Act of 2001.

Section 125 regulates the investigation procedures and the decision-making process. According to it, the Minister in charge can impose provisional measures as may be necessary to protect any industry in Kenya that may be threatened by such dumping or subsidisation provided that such provisional measures shall not be imposed before the expiry of sixty days after the commencement of investigation.

The Minister can accept price undertakings by alleged exporters.[1300] The Act copies the same invocation mechanisms of the ADA and ASCM.

The Ministry of Trade is the body responsible for AD investigations, however, according to the WTO published information, this body has not been active in any TDI investigations.

6.4.3.1.2 No notified TDIs to the WTO

Despite the fact that Kenya has national legislation on AD and countervailing measures and that it was subject to AD investigations it has never applied any of the three TDIs. This raises questions about the effectiveness of its TDI system, especially when considering the nature of its relatively diversified economy.

This could be a result of the financial constraints, inadequate expertise, and unreliable data, in addition to potential effects of political factors.

[1300] Sec. 125 of the Customs and Excise Act.

6.4.3.1.3 Lack of legislation on safeguards

Kenya does not have a legal and institutional framework that governs safeguards *per se*, and as such[1301] Kenya can still refer to the ASG and the regional mechanisms when invoking safeguard measures as per the conditions of the Agreement.

6.4.3.1.4 Application of TDIs on intra-regional trade in COMESA

Despite the fact that Kenya is not active in using TDIs under the multilateral system it made use of the regional TDI system in COMESA.

In 2008 Kenya alleged that Egypt was subsidising its exports of flour to Kenya and applied 200% countervailing measures. Kenya also applied safeguard measures to protect its industry against imports from Egypt and Mauritius. This measure expired at the beginning of 2009.

Kenya also applied a Tariff Rate Quota (TRQ) to protect its sugar industry, a measure that was further extended to 2012 on condition that the government will privatise its national industry by 2012.[1302]

Kenya's safeguard measures have affected African countries including Egypt, which has a growing sugar industry.

6.5 Dealing with Trade Defence Mechanisms in Regional Economic Communities in Africa

The next section will discuss the general characteristics of the TDI systems in the three RECs, which are the constituent blocks of the T-FTA.

6.5.1 The COMESA TDIs system

Although the COMESA CU was launched in 2009, to date no member state has domesticated the legislation for the CU, with the result that the process of

[1301] Institute for Economic Affairs (2013) 5.
[1302] These cases are explained in detail in section 6.5.1.4 of this Thesis.

operationalising the CU has not commenced.[1303] Consequently, the CET is not yet applied.

6.5.1.1 Common Rules on TDIs

TDIs in COMESA are regulated under chapter XI of the COMESA Treaty titled "Cooperation in Trade liberalisation and Development" and the Regulation on Trade Remedy Measures adopted in November 2001 under Article 10 (1) of the COMESA Treaty. The Twelfth Meeting of the Council of Ministers for COMESA adopted Trade Remedy Regulations on 30 November 2001. These regulations are applicable to the invocation of safeguard, AD and countervailing measures.

The COMESA rules on TDIs are relatively complicated with many provisions in the annexes. They draw from the three WTO Agreements on substantial and procedural matters, and sometimes are identical to these Agreements.

The COMESA regulation is a binding instrument that seeks to ensure a uniformity of investigations conducted by Members of COMESA, whether Members of WTO or not.[1304] This regulation provides a forum for consultation and amicable solution between Members in cases of investigations on intra-trade, which could decrease the possibility of reverting to these measures.

It is noted that, even when an investigation is initiated against other COMESA countries, the second paragraph of Regulation 3 provides a limitation stating that Members who are also Members of WTO and who have adopted national legislation have the right to apply it without amendments. Part V of the Regulation regulates the consultation mechanism between Members.

6.5.1.1.1 COMESA Anti-dumping Regulation

COMESA copies Article 2 of the ADA on the definition of dumping,[1305] and incorporates the same conditions for the application of AD measures, through similar investigation procedures.[1306]

[1303] Findura (2015) *Tralac* 6.
[1304] Reg. 2 of the COMESA Regulations on Trade Remedy measures.
[1305] Regs. on Trade Remedy measures, P. III: Anti-Dumping, Reg.16: Determination of Dumping, subs.16.1.
[1306] Art. 51 of the COMESA Treaty and Regs. 16,17 and 18 of the Regulations on Trade Remedy Measures.

In determining the normal value of the product COMESA has adopted detailed regulations, which takes into consideration the records of the exporter or the producer under investigation as well as all evidence on the allocation of costs. [1307]

The COMESA regulations allow for substitute procedures in case there is no sale of a like product in the domestic market of the exporting state, or such a low volume of sales that it does not provide for a fair comparison, or the product is not imported directly from the country of origin.[1308] The rules governing the determination of injury are exactly the same as in the ADA.[1309]

In considering the consequent impact of these imports on domestic producers of such products there is a list of relevant economic factors that may be considered. It includes: actual and potential decline in sales, profits, output market share, productivity, return on investment, or utilisation capacity. [1310] The application of AD measures in the case of threat of material injury to domestic industry should be based on facts rather than mere allegations or remote possibility.[1311]

The investigating authority can follow the lesser duty rule by imposing an AD duty that is less than the dumping margin if such lesser duty will remove the injury.[1312]

6.5.1.1.2 Subsidies and Countervailing Duties Regulations

Subsidies are regulated in Articles 52 and 53 of the COMESA FTA Treaty and the COMESA Regulation on Trade Remedy Measures adopted in November 2001 under Article 10 (1) of the COMESA Treaty.

Subsidies are permissible to goods and agriculture products as long as it doesn't distort competition in the common market by favouring certain undertakings or the production of certain goods[1313] Member states can, in such cases, apply countervailing duties that are equal to the estimated subsidy.[1314]

[1307] *Ibid*, Reg. 16.
[1308] Regs. 16.2 and 16.11.
[1309] *Ibid*, Reg. 17.
[1310] *Ibid*, Reg.17.4.
[1311] *Ibid*, Regs 17.8 and 17.7 e.
[1312] *Ibid*, Reg. 22.
[1313] Art. 52 of the COMESA Treaty.
[1314] *Ibid*.

The COMESA Regulations on subsidies are contained in Part IV of the COMESA Regulation and almost copies the same definitions, methodologies and investigation procedures from the WTO ASCM. This includes the definition of subsidies,[1315] and the different ways of Government provision of goods or services.[1316]

To prove the existence of injury, the investigating authority follows similar procedures to those followed in dumping and with the same conditions.[1317]

The applicable *de minimis* level is 2% of the value of the product when calculated on a per-unit basis.[1318] In order to impose countervailing measures the quantity of imported subsidised products from an individual country should not be less than 4% of total imports of the subject product. However, where individual countries each supplying less than 4% of the volume of imports combined supply more than 9% of the total volume of imports, a countervailing duty may be imposed.[1319]

The investigation may include sending questionnaires to stakeholders to assess the situation.[1320] With the consent of the member state subject to investigation the investigating authority may carry out investigations in its territory; this may include examining the records of the exporting company under investigation.[1321]

The Authorities shall inform all Members of the essential facts that form the basis for their decision, allowing parties time to defend their interests.[1322]

The countervailing duty shall remain in force as long as, and to the extent necessary to counteract subsidisation which is causing injury with a maximum of five years unless the investigation determine that the expiry of the duty would be likely to lead to continuation or recurrence of subsidisation and injury.[1323]

[1315] *Ibid*, Reg. 26
[1316] *Ibid*.
[1317] *Ibid*, Reg. 29.3.
[1318] *Ibid*.
[1319] *Ibid*, Reg. 2.
[1320] *Ibid*, Reg. 30.2.
[1321] *Ibid*, Reg. 30.11
[1322] *Ibid*, Reg. 30.
[1323] *Ibid*, Reg. 39.

6.5.1.2 Complementary Rules to WTO Agreements and National Laws

The COMESA TDIs regulations are complementary to the national laws and WTO regulations and are applied in conjunction with them. Member States have the right to apply their national legislation, without amendment, in conducting all trade remedy investigations.[1324] Not all Members have national law on TDIs.

In cases of TDIs investigations against non-Members of COMESA TDI national laws prevail[1325] while COMESA regulations will apply when an investigation is initiated against another COMESA country.[1326]

In the meantime, resorting to the regional rules may compensate the lack of national laws.

6.5.1.3 Differentiation between Members and Non-Members

COMESA rules are applied against Members while national legislations are applied against non-Members.

Member states are required to undergo bilateral consultation before imposing any TDI measures. This could provide some preferential treatment to Members compared with non-Members.

6.5.1.4 Application of Bilateral Safeguards

The Agreement considers the special condition of African industries that could be in need for special protection for its industries especially during the initial liberalisation process.

All COMESA Members have the right to apply their national legislation without amendment in conducting safeguard investigations provided that these legislations comply with both the ASG and the COMESA Safeguard Regulations.[1327]

[1324] *Ibid*, Reg. 3.
[1325] *Ibid*.
[1326] *Ibid*, Reg.3.
[1327] Action Aid International (2005).

Bilateral Safeguards are permitted in COMESA under Article 61 of the FTA Agreement. A member can impose safeguard measures for a period of one year if the trade liberalisation among Members resulted in serious disturbances in the economy.[1328] Serious disturbances could be a broad concept with more room for national authorities to intervene.

These measures could be extended by a decision of the Council upon submission from the importing state that it has taken the necessary and reasonable steps to overcome or correct imbalances for which safeguard measures are being applied and that the measures applied are on the basis of non-discrimination.[1329] This means that the safeguard measures are applied "*erga omnes"* to all COMESA Members. The term "serious disturbances" is not defined in the Agreement and the only requirement Members have is to inform the Secretary General and other Members before taking the safeguard action.[1330] This give large policy space for Members in applying these measures, as the decision depends more on Members' self-assessment than following the rigid procedures of the ASG and its injury analysis.

Safeguard measures follow an investigation that establishes the existence of the conditions of imposing safeguard measures in the ASG and only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.[1331] Provisional safeguards are permitted for a maximum of 200 days.[1332]

The duration of a safeguard action is limited to four years, provided that the safeguard measure continues to be liberalised. It may be extended if necessary to prevent or remedy serious injury and if there is evidence that the domestic industry is adjusting.[1333]

A member proposing to apply bilateral safeguard measures or seeking to extend this measure must endeavour to maintain a substantially equivalent level of concession and other obligations to those existing between it and the exporting Members affected

[1328] Art. 61 of the COMESA Treaty and Reg.7 of the Trade Remedies Measures.
[1329] *Ibid*.
[1330] *Ibid*.
[1331] *Ibid*, Regs. 7 and 10.
[1332] *Ibid*, Reg. 11.
[1333] *Ibid*, Regs. 121 and 12.2.

by such measure.[1334] This happens through consultations with Members that have a substantial export interest in the product to which the state will apply safeguard measures.[1335]

If Members do not reach an agreement in the consultations within 30 days, then the affected Members may suspend the application of substantially equivalent concessions 90 days after application of the measure in respect of trade of the member state applying the safeguard measure.[1336]

The following two cases can shed some light on the application of bilateral safeguards as escape clauses from regional liberalisation commitments in the context of COMESA. In both cases, the implementation was allowed on condition that Kenya reforms its sugar and wheat industries to make them more competitive in the regional market.

1. The Kenya Sugar case[1337]

The Kenya sugar case is one important example of the application of TDIs in COMESA. Kenya invoked Article 61 to apply safeguard measures against imports of sugar from COMESA Members.

The investigation determined that there was a rise in import volumes from an annual average of 6,500 metric tons over a four-year period to a volume of 120,881 metric ton in 2001, which represented a surge in sugar imports from Members. The COMESA safeguard has a quantitative value trigger. Before 2008 this trigger was 200,000 metric tons with a quota and maximum tariff of 110% on any value imported above the quota.[1338]

The quota covered under the COMESA Safeguard was enlarged in March 2008 with the tariff that is applied on import quantities above the quota declining each successive year until 2012. In 2008 the amount of duty-free sugar imports was

[1334] *Ibid*, Regs. 13 and Reg. 15.
[1335] *Ibid*, Reg 13.
[1336] *Ibid*.
[1337] See the Report on the Kenya Sugar Sector Safeguard Assessment Mission of the COMESA Secretariat (2007).
[1338] ICTSD (2009) 35.

increased to 220,000 tons with any consignment above the quota charged with a 100% duty.

The safeguard measure was extended several times, the last of which was in March 2015 where the COMESA Council of Ministers approved a one-year extension on the condition that the Sugar industry will be reformed through several measures.[1339] This included the privatisation of the national industry to increase its competitiveness.

This case could be an example of the application of the variable geometry principles in the context of African integration. The COMESA Council justified its decision to extend these measures stating that, if the new entrants were given sufficient protection for a period of time, they would stabilise and significantly improve the competitiveness of the sugar industry in Kenya. In the meantime, the Council recognised the importance of having a system that benefits all sugar exporting Member States especially in terms of promoting intra-COMESA trade. In this regard it supported the idea of allowing Member States to assist in meeting the sugar deficit in Kenya through country-specific quotas under a formula to be developed.

It is noted that countries with interest in the Kenyan sugar market, like Egypt and Swaziland, did not impose reciprocal measures although these measures resulted in these two countries losing market shares in the Kenyan market.[1340] This may have to do with broader political and economic considerations.

It is also noted that these measures resulted in trade diversion and sugar import surges from non-COMESA countries, especially Brazil and Thailand.[1341]

No COMESA country requested any trade compensation for the application and extension of these measures.

2. The Wheat Flour Case

In 2001, and in response to increasing competition from Egyptian wheat flour, Kenya invoked special safeguard measures in the form of a TRQ of 60% on COMESA wheat flour imports plus additional taxes on imports above the set quota per country.[1342]

[1339] Directive No.1 of 2007.
[1340] Interview with Dr. Fahmy.
[1341] Action Aid International (2005).

The safeguards have been extended in 2003, 2004, 2005, 2006 and 2007, and provided temporary protection to the Kenyan wheat industry against imports from countries with relative advanced industries like Sudan, Egypt and Mauritius.[1343]

In 2007 the limit on the amount of duty-free imports from Egypt was set at 32400 tons and for Mauritius at 2366 tons. In 2008 the duty-free imports decreased by almost 50% to 16300 tons from Egypt and 1183 tons from Mauritius.

The Meeting of the Ministers of Trade, Industry and Finance of COMESA took the decision in April 2008 not to extend these measures.

These two cases provide an important example of using TDIs to protect temporarily an industry that is important to the national economy using legal tools which allow for investment in such industry. However, in the Kenyan sugar case, it cannot be concluded that it achieved its objectives as the extension was requested several times.

6.5.1.5 Consultation Mechanism before imposing TDIs

The COMESA regulations require Members to conduct consultations after the submission of the application and before the initiation of TDIs investigations.[1344]

This mechanism provides an opportunity for reaching a mutually accepted solution and could decrease the possibility of imposing TDI measures against Members.

Members whose products are subject to investigation will continue to be afforded reasonable opportunities to continue consultations throughout the investigation.

6.5.1.6 No Regional Investigating Authority

Although the COMESA is theoretically at CU level, TDIs investigations are still carried out by national investigating authorities with no oversight by a regional body, except for final determinations and extensions of safeguard measures.

[1342] Kenya: COMESA grants Country Safeguards on Wheat and Sugar Imports. 3 December 2007. <www.AllAfrica.com> (accessed 15 April 2015).
[1343] *Ibid.*
[1344] COMESA Reg. 31.1 of Trade Remedies.

This comes with certain implications and may favour Members at the expense of third parties.

6.5.1.7 A Trade Remedies Committee and Notification Procedures

In COMESA the administrative regional framework dealing with TDIs is the Trade Remedies Committee (TRC) and the Group of Experts, which was established in 2001 to be responsible for overseeing the application of COMESA trade remedies. These two bodies do not act as regional investigating authority.

The TRC is composed of representatives of each of the Members, and reports annually to the Trade and Customs Committee.[1345] The Group of Experts is responsible for investigating the COMESA-consistency of the TDI procedures and if they followed the relevant regulations. It reports on those findings to the TRC.[1346]

The Committee also reviews requests for safeguard measures, examining existing measures and monitoring the phasing-out of measures in accordance with the COMESA regulations.[1347]

It is also responsible to examine notifications submitted at special session to be held every three years, as well as examining reports submitted at each meeting of the committee, and to review annually the implementation and operation of the regulations.[1348]

As for the general rules governing the application of TDIs against Members, the COMESA program states that, when a member receives notification from another member that it is initiating an investigation, the competent authority should examine the facts regarding serious injury as alleged in the notice. It may contest the matter before the competent authority of the investigating country, mainly on grounds of non-existence of serious injury, its threat or lack of linkage between increased imports and injury.[1349]

[1345] *Ibid*, Reg. 49.
[1346] *Ibid*.
[1347] *Ibid*, Reg. 49.2.
[1348] *Ibid*, Regs. 49.4 and 49.6.
[1349] COMESA Programmes, "what a Government Must do to defend itself against a Trade Remedy Measure"

6.5.1.8 Dispute Settlement

The COMESA Agreement puts an extra layer of scrutiny in place; if a member state is dissatisfied with the actions of the investigating authority of the other member state, the former may refer the matter to a dispute settlement panel established by COMESA. This is supposed to act as a way of ensuring the consistency of the TDI action with national laws as well as the COMESA agreements.[1350] It can also discourage to a certain extent the possibility of imposing TDIs measures.

The COMESA Treaty established a Court of Justice to ensure adherence to the application of the Treaty which include TDIs.

6.5.1.9 Overlapping Rules on TDIs

The overlapping membership between COMESA, EAC and SADC results in certain countries becoming subject to more than one TDI system.

Kenya, for example, is a member of both the EAC and COMESA, which can theoretically allow it to make use of the different tools available under the two systems, depending on the origin of the imports. The establishment of the T-FTA provides an important opportunity to deal with this challenge by unifying the TDI systems.

6.5.2 Main Features of the SADC TDIs

6.5.2.1 Limited Provisions on TDIs

TDIs instruments are dealt with under Articles 18, 19 and 20 of the SADC Trade Protocol.

These provisions are very limited and mainly refer to the WTO Agreements on TDIs. They are less detailed compared to the TDIs rules in COMESA and the EAC.

[1350] *Ibid.*

6.5.2.2 Permission of TDIs against Member States

At the level of FTA, SADC rules permit the application of TDIs against Members. Additionally, the rules allow the application of temporary protection in order to safeguard an infant industry.

6.5.2.2.1 Safeguards

Safeguards are permitted as per Article 20 of the SADC Trade Protocol. The Article copies Article 4 of the ASG when doing an investigation and puts the same requirements provided in the ASG.[1351] However, the SADC Trade Protocol does not provide for compensation when imposing safeguard measures nor does it exclude Members from global safeguards.[1352]

Safeguard measures should be only applied to the extent necessary to prevent or remedy serious injury and facilitate adjustment, and it cannot exceed four years in accordance with Article 7 of the ASG, unless the importing member determines that the safeguard measure continues to be necessary to prevent or remedy serious injury and there is evidence that the affected industry is adjusting. The period of imposition can not exceed eight years in total except for developing countries.[1353]

6.5.2.2.2 Anti-dumping and Countervailing Measures

Both AD and countervailing measures are permitted among Members.[1354] In fact, AD measures have been applied by South Africa against both Malawi [1355] and Zimbabwe.[1356]

SADC regulations are very similar to the ADA and ASCM. The SADC Protocol refers to the ADA definition of dumping as in Article 2.[1357]

[1351] Art. 20 of the SADC Protocol.
[1352] *Ibid*, Arts. 20.3 and 20.4.
[1353] Art. 20.5.
[1354] Art. 18.
[1355] ITAC Report 13 (Bed linen).
[1356] Board Report 3722 (Aluminium hollowware). There was also an investigation against nuts and bolts imported from Zimbabwe, which did not result in the imposition of duties – Board Report 3983.
[1357] Art. 1 of the SADC Protocol.

SADC rules allow the provision of export subsidies to agricultural products as well as state aid as long as they don't distort or threaten to distort competition in the region and agree with WTO provisions.[1358]

Countervailing measures are allowed under the protocol as a way of offsetting the effect of subsidies. Countervailing investigations shall be in accordance with WTO rules.[1359]

6.5.2.3 Flexible Rules and Protection of Infant Industries

The SADC Protocol gives Members who suffer from the consequences of trade liberalisation a grace period for the elimination of tariff and non-tariff barriers.[1360]

It is an example of the application of variable geometry through the protection of infant industries. The Protocol creates a Committee of Ministers responsible for trade matters (CMT) to deal with this issue.

According to Article 21 of the SADC Protocol an infant industry in a member state could be protected after authorisation from the CMT to suspend certain obligations of the protocol in respect of like products imported from other Members.[1361]

This should be in accordance with WTO rules. The CMT can impose certain conditions to prevent or minimise excessive disadvantage as this may result in trade imbalances. [1362] The CMT must make regular reviews of these exceptional measures.[1363]

The national bodies must also ensure that reports, as well as the evaluations and recommendations, conform to the standards and requirements agreed on between the member and the Tariff Board from time to time.[1364]

[1358] *Ibid*, Art 19.
[1359] *Ibid*, Art 19.3.
[1360] *Ibid*, Art. 3.
[1361] *Ibid*, Art 21.
[1362] *Ibid*.
[1363] *Ibid*.
[1364] *Ibid*, Art 8.2(b).

6.5.3 SACU

SACU may be considered as a sub-group of SADC although at a higher level of integration, *i.e.* customs union, where TDIs measures are not permitted between Members. Although SACU is not recognised as one of the eight RECs of the AU, it is important to shed some light on the application of TDIs in SACU because of its importance in the T-FTA context.

Under Article 14 the SACU Agreement South Africa's ITAC acts as the entity responsible for dealing with TDIs in the SACU region, including the investigation phase as well as the imposition of duties phase. This was a result of the nature, size and sophistication of the economy of SA compared with its Partners.

It could be claimed that SA benefited from this situation as these measures would provide protection to the national industries in SACU, which are largely South African.

The newer signed SACU Agreement in 2002 would imply a more participatory process. When fully implemented, it would affect the methodology of conducting investigations and imposing TDIs measures as it required all Members of SACU to develop national legislation on regional TDIs and to establish national bodies to handle TDI-related investigations.[1365] This can have implications on the frequency, methodology, time and results of TDIs in this region.

It is noted that the SACU Council of Ministers agreed in July 2004 that all AD investigations should be undertaken in consultation with the other SACU Members.[1366] Thus, in 2013 ITAC conducted an investigation on behalf of Botswana, where the only producer of the like product in SACU was situated.[1367]

According to the 2002 Agreement SACU would establish a Council of Ministers, a Secretariat, a Tariff Board, a Tribunal, a Customs Union Commission and a number of technical committees.[1368] These institutions, when fully functional and effective, would change the way the Members deal with TDIs and could democratise the

[1365] Art. 14 of the SACU Agreement in 2002.
[1366] Brink (2012) AD in *SA 52*.
[1367] ITAC Report 476 (Soda ash).
[1368] Art. 7 of the SACU Agreement in 2002.

decision-making process. It is important for the BLNS Members (Botswana, Lesotho, Namibia and Swaziland) to establish their national bodies since recommendations can only be made through to the Tariff Board. The Board is unable to be operational until national bodies are in place.

The Secretariat is currently in the process of being established. The Tariff Board, the Tribunal and the Customs Union Commission still need to be established.

The establishment of national investigating authorities in SACU could change the situation and affect some of the stakeholders in South Africa since this would affect ITAC's processes with potential changes in decision-making procedures which may has its implications on the adherence to the WTO procedures.

6.5.4 Main Features of the EAC TDIs system

The EAC is at the most advanced integration level within the Tripartite structure, standing at the level of a CU. The legal documents usually refer to Members as Partner States to indicate a deeper level of integration.

6.5.4.1 Regional rules on TDIs

EAC TDIs are regulated in the EAC Treaty Articles 75 (I), (F) and (G), the Protocol on the Establishment of the EAC Customs Union Articles 16, 17, 18, 19, 20 and 24 and annexes IV, V and VI. The annexes lay down the provisions on the implementation of TDIs measures.

The protocol states that all partner states must cooperate in the detection and investigation of dumping, subsidies and sudden surges in imports and the imposition of agreed measures to curb such practices.[1369] For example, where there is evidence of a sudden surge of imports, dumping or where subsidised imports from a partner state are threatening or distorting competition within the Community, the affected partner state may request the other partner state in whose territory the surge, dumping or subsidisation is occurring to impose the relevant TDI measures on such goods.[1370]

[1369] Art. 20 of the Protocol on the establishment of the EAC.
[1370] *Ibid*, Art. 20.2.

In case the partner state to which the request is made does not act within 30 days of the request, the requesting party can then report to the CU authorities, which shall take the necessary actions.[1371]

The EAC regulation seeks to ensure the application of uniform TDIs among the EAC Partner States and provide detailed substantive and procedural requirements for the implementation of these measures. However, the regulations are very similar to the WTO Agreements.

6.5.4.1.1 Anti-Dumping

AD is regulated under Article 16 of the Protocol and annex IV of the Protocol. The EAC regulations differentiate between Members of the EAC, referred to as Partners, and foreign countries referred to as governments.

According to Regulation 4 of the EAC Regulations on AD Measures, in the case of AD actions against a third county WTO provisions will apply. In the case of investigation against an EAC Partner State the Regulations will apply in conjunctions with national legislation. In this regard, it is not clear what would be the added value of referring to the regional regulations.

The main area of difference is that the Protocol takes a wider approach toward the definition of dumping. It prohibits dumping if it "frustrates the benefits expected from the removal or absence of duties and quantitative restrictions of trade between the Partner States".[1372]

Annex IV of the protocol and the EAC customs regulations govern the procedural part of the investigations.[1373] Notifications are conducted by the EAC secretariat on behalf of the Partner states.

The EAC regulations adopt the same *de minimis* and negligibility margins of the ADA.[1374] The investigating authority must review the need for the continuation of the AD duty either on its own initiative, or at the request of any interested party who

[1371] *Ibid*, Art. 20.3.
[1372] *Ibid*, Reg. 6 of the Anti-dumping Measures regulations.
[1373] Art. 16 of the EAC protocol.
[1374] Reg. 10.4 of the Anti-dumping Measures Regulations.

submits information substantiating the need for a review.[1375] Measures should remain in force only to the extent necessary.[1376]

6.5.4.1.2 Subsidies and Countervailing Measures

Subsidies and countervailing measures are regulated under Articles 17 and 18 of the Protocol of the EAC and Annex V, which provide the detailed regulations for Subsidies and Countervailing measures.

Article 17 does not prohibit the provision of subsidies but obliges Partner states to notify any provided subsidies including any form of income or price support which could directly or indirectly distort competition by favouring certain undertakings or the production of certain goods.

The notifications should include information about the form of the subsidy, its policy objective, its duration, and any statistical data permitting an assessment of the trade effects of the subsidy in a way that must be sufficient to enable partner states to understand and evaluate the effects of the subsidy.[1377]

Another obligation put on a partner state granting or maintain subsidies is to respond to requests from other Members, within 30 days, about the nature and the extent of the granted subsidy.[1378]

Article 18 explicitly provides that subsidised imports of foreign countries may be countervailed under certain conditions specified in Annex V to this Protocol. This shall be only to the extent that the countervailing duty is equal to the estimated amount of the subsidy.

The EAC applies flexible rules on the provisions of subsidies by partner state. Chapter V of the EAC Competition Act establishes that a partner may grant a subsidy to any sector, if it is in the public interest to do so, provided that the partner notifies the EAC Competition Authority. The Authority considers whether the subsidy is within the list of exemptions, and communicates its decision to the member. Aggrieved Members

[1375] *Ibid*, Reg.16.
[1376] *Ibid*, Reg. 16.1.
[1377] Art. 17 of the EAC Protocol.
[1378] Reg. 29 of the EAC Subsidies and Countervailing Measures Regulations.

may challenge the Authority's decisions in the East African Court of Justice. If the Court determines that the subsidy is illegal, the member state must recover the subsidy from its recipient

The purpose of the regulations is to ensure uniformity among the EAC Partner states in the application of subsidies and countervailing measures, and to ensure, to the extent possible, the transparency, accountability, fairness, predictability and consistency of the provisions of the Protocol.[1379]

Non-actionable subsidies are developmental by nature and could include assistance for research activities, assistance to disadvantaged regions when given in the framework of regional development and assistance to promote adaptation of existing facilities to new environmental requirements[1380] These types of subsidies could be of importance to many African countries.

The regulations place obligations on both Partner and foreign States to enter into consultations as quickly as possible and to clarify the fact of the situation to arrive at a mutually agreed solution.[1381]

If no accepted solution is reached within 60 days any partner state party to the consultation can refer the matter to the Committee, and the Committee will review the evidence and submit a final report within a further 120 days.[1382]

The EAC incorporates the special and differentiated treatment to developing and LDCs as governed by Article 27 of the WTO agreement.[1383]

6.5.4.2 A Regional Committee on TDIs and Dispute Settlement

The EAC has provided for the establishment of the East African Community Committee on Trade remedies.[1384] The Committee deals with TDIs among other

[1379] *Ibid*, Reg.2.
[1380] *Ibid*, Reg. 14.
[1381] *Ibid*, Reg. 15.
[1382] *Ibid*, Reg 15.
[1383] *Ibid*, Reg. 31.
[1384] Art. 24.1 of the EAC Protocol.

things including RoOs, dispute settlement and other matters referred by the EAC council of Ministers.[1385]

The Committee is composed of experts from each partner state who are qualified in matters of trade, customs and law and reports to the EAC Council of Ministers. [1386]

It is noted that the committee does not act as an investigating authority and that investigations are still carried out by the national authorities of Partner States who still have a duty to notify the committee of the investigating authority.[1387]

The Committee handles disputes arising from the application of TDIs and may recommend provisional measures to prevent injury to the domestic industry when the national authority has reported an affirmative preliminary determination. [1388]

The Committee can recommend the withdrawal of any prohibited subsidy in any partner state. The decision is adopted by the Council of Ministers, unless one of the parties rejects the Committee's report within 30 days or if the Council of Ministers unanimously decides not to adopt the report.[1389] This can put a limitation on the possibility of approving these measures.

The report can be appealed by a party. The Council of Ministers can then examine the matter and issue a directive. If a party is still not satisfied, the aggrieved party may refer the matter to the EAC Court of Justice.[1390]

In case the Council of Ministers directive is not implemented within the specified time, the Council shall grant authorisation to the complaining party to take the appropriate counter measures.[1391]

One of the main distinctions of the EAC system is that, in case of disputes, the matter shall be examined by the EAC Committee on Trade Remedies instead of the WTO DSB which provides a substitute mechanism to the multilateral system.

[1385] *Ibid*.
[1386] *Ibid*, Art. 24.2
[1387] *Ibid*, Art. 24.3.
[1388] Art. 24.b.
[1389] Reg. 10.8 of the EAC Subsidies and Countervailing Measures Regulations.
[1390] Established under Chapter 8 of the Treaty for the Establishment of the EAC and Reg. 13 of the Subsidies and Countervailing Measures Regulations.
[1391] Reg. 13 of the Subsidies and Countervailing Measures Regulations.

6.5.4.3 Bilateral Safeguard Measures in the Transitional Period

Although bilateral safeguards were allowed for a transitional period of five years in cases of serious injury, there were no reported cases of imposing bilateral safeguard measures.

If a partner state considered implementing a safeguard measure during these five years, the country had to inform the Council of Ministers of any measure it is considering and demonstrate that their economy will suffer serious injury from the application of the common external tariff. The council would then consider the merits of the proposal and decide the appropriate action. [1392]

6.5.4.4 Detailed Rules on Safeguards

Article 1 of the Protocol on the Establishment of the EAC CU defines safeguard measures as a protective measure taken by a partner state to prevent serious injury to her economy. There were no reported cases of the application of safeguard measures.

The Agreement puts down the requirements for the imposition of safeguards to respond to a sudden surge of imports into a partner state, which causes or threatens to cause serious injury to domestic producers of like or directly competing products in the importing territory. [1393]

Annex VI explains the procedures in more details. Regulation 6 of the Annex defines serious injury as "significant overall impairment in the position of the domestic industry of a partner state, determined basing on facts".

The application of safeguards should be universal in nature and for such a period as necessary to prevent or remedy serious injury and facilitate adjustment. The measures remain in force for one year but can be renewed annually for a maximum of three years by decision of the EAC council of Ministers, if the member state can prove that the measure continues to be necessary to prevent or remedy serious injury and there is evidence that the domestic industry is adjusting.[1394]

[1392] Art. 19.2(a) and (b) of the Protocol on the Establishment of the EAC.
[1393] *Ibid*, Art. 19.
[1394] Reg. 9 of the EAC Safeguard Measures Regulations.

These measures should be notified to the EAC committee on Trade Remedies upon initiation of an investigation, and again upon the finding of a serious injury or threat thereof. The notification should include a precise description of the product involved, information on the evidence of serious injury or threat thereof, the proposed safeguard measure, proposed date of introduction, and the time table for the progressive liberalisation. In case of extension of a safeguard measure there must be evidence that the national industry is adjusting.

A public notice should be given to all interested parties to allow them to present relevant views and information as well as to respond to evidence and views presented by other parties as to whether safeguard measures would be in the interest of public.[1395]

Members should consult with Partner States that have substantial interest as exporters of the product concerned. In case of provisional safeguards, the consultations must be initiated immediately after the measures have been applied. Consultation results should be reported to the committee.

Provisional safeguards are only applied for a maximum of 80 days and after preliminary determination that there is clear evidence that increased imports are threatening to cause serious injury to the domestic industry of a member state, in situations in which delay would cause damage which would be difficult to remedy.[1396]

They can take the form of a tariff increase to be promptly refunded in the case that the investigation determines that the increased imports have not caused serious injury or threat thereof to the domestic market.[1397]

6.5.4.5 Dispute Settlement

The EAC has established an effective system for dispute settlement. On top of the system is the Court of Justice (COJ) which has jurisdiction over the interpretation and

[1395] *Ibid*, Reg. 5.
[1396] *Ibid*, Reg. 8.1
[1397] *Ibid*, Reg. 8.4.

application of the EAC Treaty. Its judgements are subject to a right of appeal to the Appellate Division.[1398]

Article 41 of the Protocol on the establishment of the EAC CU establishes that the settlement of disputes will be implemented in accordance with the regulations specified in Annex XI of the Protocol and that the COJ shall handle matters related to the three TDIs in addition to RoOs. So far no cases related to TDIs have been presented to the COJ.[1399]

In general, in the application of TDIs, Member states shall revert to consultations through the use of good offices, conciliation and mediation. If this is not successful, the Committee on Trade Remedies can then be requested to establish a panel. After consideration of the matter, the panel presents a report with recommendations to the Committee, which makes final determinations on the matter that are final and binding on the parties. It is also provided that, if deemed to be more expeditious than this panel process, parties may have recourse to arbitration.

The EAC Council adopts the report unless it is formally disputed. If the report is appealed, the Council issues a decision on the matter in the form of directives.[1400]

6.6 Trade Defence instruments in the Tripartite Free Trade Agreement

The legal framework dealing with TDIs in the T-FTA is highlighted in Part V titled "Trade Remedies".[1401]

Analysing the initial proposal of December 2010 and the final outcome reached in June 2015, it could be concluded that Members of the T-FTA started with ambitious objectives, but because of certain challenges and shortcomings they ended up with a consensus-based average text. This came as a result of the several difficulties in the negotiations and the diverse points of views at that stage.[1402]

[1398] Articles 27 and 35 of the EAC Treaty.
[1399] According to information on http://eacj.org/ (accessed 11 August 2015).
[1400] Art. 14 (d) of the Treaty on the Establishment of the EAC.
[1401] Arts. 16-20 of the T-FTA Agreement.
[1402] Interview with Dr. Fahmy.

In the coming sections both the first draft proposal and the final outcome reached at the end of phase I of negotiations will be analysed.

The negotiation process identified the major concerns among African governments about the application of TDIs, but it didn't lead to effective TDI provisions.[1403]

6.6.1 The Initial draft of TDIs in the T-FTA

In analysing the initial provisions on TDIs and the negotiation process, the following conclusions can be stated:

6.6.1.1 The First draft of the TDIs Text was Ambitious

The first draft set very ambitious plans that included the establishment of a sub-committee on Trade Remedies (CTR) that was supposed to act as a quasi-regional investigating authority.

It is submitted that the initial provisions would have been more conducive to African integration objectives on the long run, as it could have provided an effective framework for the protection to African infant industries. Additionally, these provisions could have also unified the different rules on TDIs in the three blocks which would have been another desired objective. Nevertheless, it is understood that this ambitious objective would have required a higher level of commitment from Member states and a very high level of integration that was not realistic at this stage.

The negotiation process revealed that Members envisaged drawing some lessons from other international TDI systems, which is submitted to be the right approach. Several T-FTA meetings discussed how other FTAs have been able to develop and implement user-friendly mechanisms for the three TDIs that are consistent with WTO and suited to regional realities.[1404] A draft paper was prepared in this regard which suggested a three-tier approach that would include general provisions on trade remedies,

[1403] The Architecture of the Continental Free Trade Area, Tralac annual conference 2015 <http://www.tralac.org/events/article/7098-tralac-annual-conference-2015.html>.
[1404] Report of the third meeting of the technical working group on Trade Remedies and Dispute Settlement in Bujumbura, Burundi from the 4th-7th of August 2014.

supported by an Annex and further clarified by Guidelines to be formulated at a later stage.[1405]

A technical study was conducted that pointed out the possibility of using a common competition policy to address some potential unfair measures.[1406] The study did not cover some important issues, which can be some of the weak points in the legal framework. These are: the issue of circumvention and how to deal with it; the implications of varying *de minimis* thresholds when it comes to investigations against several countries including Members; and the concept of parallelism.[1407]

6.1.1.1 The initial text combined both basic text and detailed Provisions in Annex 6

TDIs were regulated in the initial text under Part V Articles 18-22 and Annex 6. The proposal confirmed the application of the three TDIs to both Members and non-Members and confirmed the rights and obligations under the relevant WTO Agreements. The proposed Annex 6 of the Agreement contained the procedures and rules governing the application of these measures which were supposed to act as an integral part to the regional TDI system.

The proposal was in accordance with the WTO Agreements including the definition of dumping and subsidies.[1408]

It was envisaged to maintain the application of TDIs. Article 18 stated that the agreement shall not prevent Members from implementing AD measures and countervailing duties in accordance with WTO agreements and following the procedures and conditions provided in Annex 6 of the agreement.

Additionally, Members could accept price undertakings if accepted by the Sub-Committee on Trade Remedies.[1409]

The Sub-Committee on Trade Remedies can adopt provisional measures after initiating the investigations and pending the conclusion of the investigations which

[1405] *Ibid.*
[1406] Interview with Dr. Fahmy.
[1407] *Ibid.*
[1408] Art. 1 of Annex 6 of the initial T-FTA proposal.
[1409] *Ibid*, Art 4.

can take the form of higher than the otherwise applicable customs duties, and which shall be promptly refunded if the application fails.

The Annex authorises the Sub-Committee to periodically undertake studies and inquiries into domestic and regional industries and whenever it may seem appropriate.

6.1.1.2 The Agreement envisaged the protection of Regional Industries

The Agreement recognised the importance of regional industries in the context of regional integration and provided for the protection of regional industries.

The annex defines regional industry as an industry covering the region of the three blocks and any other regional organisations that join the Tripartite Agreement. This definition is broad and anticipates the possible advancement of the T-FTA to include other RECs in Africa in the context of reaching the AEC. The development of regional based industries could be the result of deeper level of integration at the long term.

6.1.1.3 The Agreement sought to Provide Protection for Infant Industries

The Agreement recognised the status of African industries and the prevalence of infant industries in many African countries. It defined an infant industry as "a new industry of national strategic importance that has been in existence for not more than five years".[1410]

A T-FTA member can adopt appropriate measures on similar goods originating from other Tripartite Member States.[1411] The Agreement put two restrictions on the imposition of these measures including that it shall only come after taking all reasonable steps to overcome the difficulties facing its industries and provided that the measures are applied on a non-discriminatory basis.[1412] These measures were also made under the review of both the Tripartite council which would determine the

[1410] Art. 21 of the Proposed Agreement 2010.
[1411] *Ibid*
[1412] *Ibid.*

period and the nature of these measures and the Trade and Customs Committee which would review these measures periodically.[1413]

It is noted here that the definition of infant industry could be confusing as it refers to industries of strategic importance, which might not necessarily be infant industry.

The time limit of five years may be short for some countries with lack of sufficient infrastructure and developed industries.

6.1.1.4 The Agreement included expanded list of Trade Remedy Measures

The text went beyond the existing TDI rules in the three RECs by including additional measures that were suggested to fall under the category of TDIs.[1414] Annex 6 of the draft agreement provided the conditions and procedures applicable to the implementation of trade remedies under part V of the Agreement and that trade remedies are applied between Tripartite Members and with third parties.[1415]

Annex 6 takes a broad approach to the definition of TDIs and defined it as "measures recommended by the Sub-Committee on Trade Remedies to protect domestic industries in accordance with this Annex". [1416]

This could suggest additional measures to AD, countervailing and safeguards measures as long as they are necessary to protect the domestic industry. The Sub-Committee could recommend price undertakings as a trade remedy as an alternative measure to AD or countervailing measures. It could also order enterprises doing business or having a presence, or directly affecting the trade and industries in the T-FTA area, to ensure and maintain conditions for fair competition and for sustainable human development.

Additionally, the Sub-Committee could recommend any other measures in the public interest, consistent with the appropriate protection of a domestic or regional industry.[1417]

[1413] *Ibid.*
[1414] See the discussion in section 6.1.1.6 of this Thesis.
[1415] Art 2 of Annex 6.
[1416] *Ibid,* Art. 4.
[1417] *Ibid.*

Although these two measures could be an indication for the need to ensure that foreign companies would not negatively affect the development in the region, and to ensure the required protection to African industries, the measures were vague and would have been very open for interpretation and potential challenge from trading partners. Additionally, it could raise questions about the evaluation criteria and the authority undertaking this evaluation.

The Annex provided that trade remedies relating to trade with third countries and within the T-FTA could only be adopted after an investigation in accordance with the rules of natural justice and with this Annex.[1418] However, it did not shed much light on the procedures for investigations.

As for safeguard measures, the draft Agreement confirmed the WTO rules by requesting that safeguard measures be imposed after an investigation that proves that domestic or regional industries have suffered injury or are threatened with injury or establishment of a domestic industry has been curtailed within the meaning of this Annex and following the ASG. [1419]

Safeguard measures are subject to the recommendation of the CTR and shall be necessary to deal with the injury.

6.1.1.5 The Agreement went beyond the existing rules in the three RECs

The initial Agreement confirmed the basic provisions pertaining to trade TDIs as in the WTO Agreements and the three RECs. [1420] Additionally, it provided for cooperation on TDIs infant industries and balance of payments.[1421]

Such provisions would have important implications on the African integration process as it envisaged providing the necessary assistance to infant industries and allowing for adjustments in cases of balance of payments challenges.

The Annex defined injury and "threat of injury" as "economic circumstances resulting from dumping, subsidies or an unforeseen upsurge in imports that negatively affect

[1418] *Ibid*.
[1419] Art. 19 of the proposed T-FTA.
[1420] *Ibid*, Arts. 18 and 19.
[1421] *Ibid*, Arts. 20, 21 and 22.

the performance of an industry. This definition is broader than the WTO definition and does not differentiate between material injury in the case of dumping and serious injury in the case of safeguards.[1422]

Additionally, the Agreement included some provisions on competition which could have supported integration objectives. The annex allowed for the application of trade remedies other than in Article 4 and the Sub-Committee had the authority to recommend whether a trade remedy should be applied in accordance with the existing trade arrangement rather than those in Annex 6.[1423]

6.1.1.6 A Regional Investigation Authority

One of the major characteristics of the original T-FTA text would have been the creation of a quasi-regional investigation authority to carry out TDI investigations in the T-FTA Area.

This Sub-Committee was designated as the investigating authority of the proposed T-FTA and would have the authority to initiate and conduct the investigations and to recommend the adoption of TDIs, which shall be applied in accordance with the mechanisms on border measures relating to the imports and the WTO Agreements.[1424] This clearly would have gone beyond the current situation in the three RECs.

The investigation starts after application to the Sub-Committee by either a national or regional industry or business association; a Tripartite member on behalf of a domestic or regional industry; or a consumer organisation registered in a Tripartite member.

The draft gives a very broad room for applicants to bring their claims.[1425] Allowing the investigations to start through a request from governments could compensate the weakness of the private sector and its institutions in certain African countries. Making reference to consumer organisations may have proven to be challenging, keeping in mind the limited level of development of consumer organisations in Africa, however it could also imply the broader considerations of TDIs to deal also with consumer welfare.

[1422] Art. 1 of Annex 6 of the proposed T-FTA Agreement.
[1423] *Ibid*, Art 2(3).
[1424] Arts. 8 and 9 of the Proposed T-FTA Agreement and Art. 2 of Annex 6.
[1425] Art.3 of Annex 6.

The Sub-Committee had the authority to direct the initiation of the investigations and adopt the modalities, including constitution of a panel from among its Members to undertake the designated tasks.[1426] It is not clear to what extent the Sub-Committee decisions will be affected by technical as well as political factors.

Giving this investigative and judgmental authority to the Sub-Committee is more relevant in the case of a CU, rather than an FTA, which is the short-term goal of the T-FTA.

It is submitted that this goal had to do with the long-term objective of the Tripartite area. In the short run this would have raised some confusion regarding the level of integration and the applicability of TDIs to Members and non-Members.

The Sub-Committee was authorised to prohibit or restrict the importation of products to safeguard the external financial position or the balance of payments position of the Members. It could also recommend the restriction of the export of products to prevent or relieve critical shortages of foodstuffs or other essential products.[1427] This last part may have come as a reaction to the fear of a new world food crisis and its effect on many developing countries, especially in Africa.

The Sub-Committee could delegate the investigation power to Members, but most of the Members do not have national investigating authorities. This could result in the Sub-Committee undertaking the investigation in almost all the cases. In the case of the non-establishment of the Sub-Committee and the unavailability of national bodies, this would create an institutional vacuum.

The creation of the Sub-Committee could have resulted in discrimination against non-Members and favouritism toward Members.

6.1.1.7 Reference to Public Interest

The Sub-Committee decisions takes into consideration public interest in TDIs and competition policy related decisions.

[1426] *Ibid.*
[1427] Art. 7 of Annex 6.

Article 4 (2) F states that the Sub-Committee can take any measures in the public interest, consistent with the appropriate protection of a domestic or regional industry. The provision seemed to be a way to include any other measures not specified in the Article, which might also be able to protect the domestic and regional industry. It could also mean that the Sub-Committee may decide not to impose TDIs when the imposition would be against the public interest, in particular consumers and producers importing intermediate components.

Article 6 of Annex 7 (Competition Policy and Consumer Protection) stated that the Tripartite council could only approve a merger or acquisition if it fulfils an overriding public interest. This gives it a mandate to reject mergers between African companies based on public interest justifications which is more under the competition jurisdiction.

Permitting consumer organisation to lodge TDI related claims confirm the approach toward more holistic approach toward this issue, however it could be constrained by the lack of institutional capacities in the African consumer organisations.

6.1.1.8 Provisions for cooperation in Trade Remedies

The Agreement called for cooperation between the Members of the T-FTA in the detection and investigation of dumping and subsidies and imposition of TDIs measures.[1428] This came in recognition of the possibility that these trade practices could have regional effects in the area.

Regional cooperation in TDIs matters could be a more feasible step but it requires a minimum level of expertise in African countries that might not be there yet.

6.1.2 TDIs in the Final T-FTA Agreement

The Agreement establishing the T-FTA was not signed by all 26 Members of the three blocks. Only 16 Members signed the Agreement on 10 June 2015: Angola, Burundi,

[1428] Art. 20 of the proposed T-FTA Agreement.

Comoros, DRC, Djibouti, Egypt, Kenya, Malawi, Namibia, Rwanda, Seychelles, Sudan, Tanzania, Uganda, Swaziland and Zimbabwe.[1429]

The TDIs negotiations were one of the most contentious issues in the Tripartite negotiations.[1430] It proved that there were many different approaches and conceptions toward TDIs, which were related to differences in the level of development, the understanding of the importance of TDIs to regional integration as well as the application of TDIs at the national levels.

Many small countries were in favour of simple and favourable TDI rules as they argued that they did not have national laws on TDIs nor technical capacities and lacked investigating authorities. These countries requested technical assistance as well as simplified and user-friendly TDI rules.[1431] On the other side, Egypt and South Africa requested the incorporation of a more advanced system of TDIs.[1432]

As a compromise Members adopted at the end of stage I a simplified set of rules on TDIs on a transitional basis and decided to postpone negotiations on whether or not to develop detailed rules on TDIs in the second stage of negotiations, which shall also include other challenging issues.

It is noted that the RoOs annex was among the issues that were not approved at the end of the negotiations in June 2015. This is a prerequisite for the application of the FTA and could be complementary to TDIs. This came after nine rounds of negotiations and sharp contradiction in views between Members in light of the different RoOs applied by the three RECs.

Analysing the provisions on TDIs, the following points could be highlighted:

61.2.1 The Agreement opted for the Lowest Common Denominator

The Agreement is reflected in a simple document that merely states the rights and obligations in accordance with WTO Agreements with no revolutionary changes.

[1429] "SADC-EAC-COMESA Tripartite Free Trade Area Legal Texts and Policy Documents. http://www.tralac.org/resources/by-region/comesa-eac-sadc-tripartite-fta.html
[1430] Interview with Dr Fahmy.
[1431] *Ibid.*
[1432] *Ibid.*

TDIs are dealt with under Part V, which includes Articles 11, 16, 17, 18, 19 and 20. The detailed rules governing TDIs were not finalised and it was agreed that it would be illustrated under Annex II of the Agreement. Members agreed to conclude negotiations on outstanding issues at a later stage. This includes Annex I on Elimination of Customs Duties, Annex IV on RoOs and Annex VI on Trade Remedies which mean basically that the FTA is not *de facto* in action.

The Agreement clarified that the TDI arrangements are only applicable during a transitional period. The Members decided to give this delicate mission to a Tripartite Committee of Experts to be responsible for drafting the guidelines as part of the built-in agenda.[1433] Articles 17, 18 and 19 shall be suspended until Annex II on Trade Remedies is finalised and operational.

Article 11 of the Agreement deals with the elimination of quantitative restrictions, but addresses TDIs indirectly as it obliges Members not to impose quantitative restrictions on imports or exports in trade with other Members except under the exceptions provided for in Article XI (2) of GATT 1994, the ASG and Articles 17 and 18 and Annex II on Trade Remedies of this Agreement.[1434]

It could be concluded that the negotiations revealed a growing concern among African Governments about possible TDIs to address unfair trade practices and surge in imports.[1435] The T-FTA could not agree on *sui generis* and flexible AD and countervailing provisions.[1436]

The outcome of the T-FTA negotiation was not an exception to previous African RTAs which did not make a lot of progress in coordination and collaboration issues. This could be still addressed in the coming stage of negotiations.

6.1.2.2 No Regional Investigating Authority

Unlike the first draft the final text leaves the investigation powers in the hands of national authorities, which has implications on the frequency and nature of TDIs.

[1433] *Ibid Art. 16.2.*
[1434] *Art. 11 of the Agreement.*
[1435] Tralac Annual Conference (2015) The Architecture of the Continental Free Trade Area.
[1436] *Ibid.*

This outcome doesn't remedy the present situation where the majority of African countries does not have effective regional bodies.

6.1.2.3 No Preferential Treatment to Members of the T-FTA

Apart from notification and consultation requirements, the Agreement does not give major preferential treatment to its Members with respect to the application of TDIs. It permits, in the transitional period, the imposition of the three types of TDIs between Members provided that they are in accordance with the rules of the three RECs and the WTO rules.[1437]

It is understood that Members will revert to their regional rules in the management of the application of TDIs.

6.1.2.4 Differentiation between Trade Remedies and Safeguards

The T-FTA puts AD and countervailing measures in one category and safeguard measures in another category, which has to do with the different objectives and targets of the two categories. The Agreement allows Members to impose AD and countervailing measures in accordance with the relevant WTO Agreements and Annex II on Trade Remedies.[1438]

In connection to global safeguards, the Agreement restates the rules of the ASG, confirming that Members can apply safeguard measures with the same conditions included in Article XIX of GATT 1994 and the ASG.[1439]

Members can also impose bilateral safeguards but only to the extent necessary to prevent or remedy serious injury and specifically in cases where a member of the T-FTA suffers from serious injury as a result of the obligations undertaken by that member and in accordance with Annex II of the Agreement.[1440]

[1437] Art. 16.1 of the T-FTA Agreement.
[1438] *Ibid*, Art. 17.
[1439] *Ibid*, Art. 18.
[1440] *Ibid*, Article 19.

6.1.2.5 Recognition of the importance Regional Cooperation

The Agreement acknowledges the importance of dealing with TDIs from a regional perspective. It requires Members to cooperate in TDI investigations in connection with imports from Members of the T-FTA or from a third country.[1441]

Although this provision is important, as it can be the basis for future solid cooperation on TDIs between Members, it raises concerns and doubts on the feasibility of this cooperation and the mechanisms to be used to achieve these objectives in light of the limited existence of investigating Authorities and TDIs laws in Members.

6.1.2.6 Dealing with Balance of Payments Challenges

Members who face severe balance of payment and external financial difficulties may adopt appropriate measures in accordance with the guidelines to be determined by the Tripartite Council of Ministers.[1442] This shall come after that member has taken all reasonable steps to overcome these difficulties and that these measures shall be reviewed annually.[1443]

Although not technically one of the TDIs, the relevant provisions could be used for objectives similar to those of the TDIs and may address some of the fiscal and financial concerns of African countries.

6.7 Conclusions

The success of African integration depends on factors related to the integration initiatives as well as to the economic performance of Members. Countries should enhance their legal and institutional framework which can include national and regional trade policies and, in particular, TDIs which can play an important role in providing legal protection for African developing industries and in fostering regional integration that is conducive to African development. TDIs can be regarded as tool to unlock the benefits of economic regional integration and ensuring that low cost and unfair trade measures do not undermine regional integration.

[1441] *Ibid*, Article 20.
[1442] *Ibid*, Art. 25.
[1443] *Ibid*.

TDIs are becoming increasingly important for the survival of the continent's national industries, which remain the main provider of jobs and contributor to GDP. African countries have not played a significant role in this area. Only five countries – Egypt, Morocco, South Africa, Tunisia and Zambia – have functional TDI mechanisms and have ever employed such measures to defend their domestic producers in the WTO arena.

TDIs in African countries and RECs are generally in line with the WTO TDI Agreements. In certain cases, the African TDI systems include detailed provisions on investigation and means of TDI that go beyond those of the WTO.

TDIs are designed to play a role that could support the protection of national industries in African countries and to minimise the negative effects of the liberalisation process on industries and employment. However, in reality the TDIs systems are not working effectively to achieve their designated objectives.

Apart from Egypt and South Africa which have fully fledged functioning investigating authorities and national laws, other Tripartite Members have not been active players when it comes to using or being subject to TDIs.

The EAC and COMESA have detailed provisions dealing with TDIs, even going further than the requirements set out in GATT 1994 and the WTO. The existence of these detailed rules did not lead to effective usage either against Members or third parties as showed by WTO statistics. SADC, on the other hand, has only limited provisions referring to rights and obligations in terms of GATT 1994 and the WTO.

The limited usage of TDIs in the context of African RECs can be attributed to lack of effective institutions, knowledge, know-how and resources, in addition to the African countries' pattern of trade. African countries are not major players in the field of TDIs, yet they are still at risk of being subject to the negative effects of dumping and subsidisation, which can harm their vulnerable national industries and hinder economic integration plans.

On the regional level, it is noted that TDIs were applied in a limited way between Members of the T-FTA. Additionally, there were several accusations of dumping and

subsidisation between some of the Tripartite Members that did not reach the final stage due to lack of documentation.

Developing countries on other continents are using TDIs to a much greater extent and African countries' participation in this area is lacking. Many of the African countries are WTO Members and bound by the WTO Agreements, but there is limited participation in the WTO Rules Committees and the Dispute Settlement Mechanism in this regard.

Some African countries have expressed views that TDI rules in WTO are complicated by nature, difficult to comply with and do not favour developing countries. African countries should engage more actively on the rules negotiations in the WTO to clarify the rules and make them more conducive to developing countries.

The original proposed T-FTA presented an opportunity for coordination and coherence between African countries especially in the area of TDIs. Additionally, it opened an opportunity for pooling resources into an effective TDI continental system which could have brought important positive implications including enhancing the enforcement of TDIs. In this regard, the establishment of a T-FTA sub-committee on trade remedies as a quasi-regional investigating authority would have been an important step toward the achievement of the trade integration goals and the protection of the infant national and regional industries in Africa from unfair competition. It is understood that this was not feasible at this stage, but having this as a long-term objective would be of benefit for African integration. It could be advisable to start the processes of building investigating authorities in Members, until such time as the T-FTA becomes a CU; then it can set up a regional body.

There is a need to build upon phase I of the T-FTA to reach effective regional TDIs policy. This requires taking more steps including the promulgation of national laws to enforce WTO TDIs, enhancing financial capacities, and capacity building in the areas of TDI to ensure application of these laws in a WTO-consistent manner. This can go in parallel with the steps being taken to implement the T- FTA.

Chapter 7: Conclusions and Recommendations

This thesis analysed African economic integration endeavours with a focus on the role that TDIs play or could play in supporting African integration objectives. The thesis statement stated there is a deficiency in the jurisdictional regimes governing TDIs in Africa as well as in the technical and institutional capacities at national and regional levels, and that an effective TDI system can contribute to the achievement of the African integration objectives.

The thesis studied the main motivations for the application of TDIs measures. It analysed the African TDIs system at national, REC and T-FTA levels with the objective of reaching conclusions on the main reasons for the limited resort to these trade tools in Africa and how can TDIs support economic integration in the continent.

The three WTO Agreements on TDIs, namely the Anti-dumping Agreement (ADA), the Agreement on Subsidies and Countervailing Measures (ASCM) and the Agreement on Safeguards (ASG) were studied in detail with reference to the most important and relevant case law.

Additionally, the thesis analysed the main characteristics of the TDI systems in major RTAs with analysis of the characteristics of the ASEAN, the EU, NAFTA and Mercosur systems. The four analysed TDI systems provided examples of how TDI systems function in practice in RTAs.

The four systems provide a good perspective for drawing some lessons for African integration, especially with their different nature and different levels of development.

The EU TDI system is a system applied by developed countries with a deep level of integration, while NAFTA incorporates a system between both developed and developing countries and the other two systems (ASEAN and Mercosur) are between developing countries in general.

The four systems differ in the way they deal with TDIs in many areas including in connection to the creation of a regional investigating authority or depending on

national bodies, the level of the preferential treatment to Members, the level of *de minimis* and negligible margins as well the existence of consultation mechanisms and dispute settlement bodies.

The four systems adopt different approaches toward the application or elimination of all or some of the TDIs against Member States, however All of them seek to ensure adherence to the multilateral trade law as being shaped by the WTO dispute settlement Body (DSB).

It is submitted that Africa can benefit from these endeavours to support its economic regional integration. Although no specific model could be simply copied and implemented in the African context, there is a room for developing a T-FTA framework that builds on some of these tools while adjusting and customizing it to the African integration agenda, priorities, challenges and pace of integration.

It is submitted that the EU TDI system could be the most conducive for the T-FTA model on the long run, mainly when the CU stage is reached at the tripartite level.

Although the EU is at a higher level of development and at a deeper level of integration, the African economic linear integration model is seeking to imitate the EU model, especially from a historical perspective through a gradual approach.

After its consecutive rounds of enlargement, the EU now includes Members at different level of development, which is also the case in Africa where the gap of development between South Africa and Egypt at one side and African LDCs is considerable. The EU has established a single market with free movement of factors of production, which is the ultimate goal of African integration.

The small economies in Africa have strong motivation to integrate their limited economies in a way similar to the EU model in order to reap the benefits of economies of scale. Additionally, African countries might find it necessary to pool their limited financial resources to achieve their integration objectives, build regional institutions and establish a functioning regional TDIs entity.

Many African countries trade and economic interests are connected to the EU because of historical reasons, geographical proximity and the preferential and bilateral trade

agreements between the two sides. Additionally, the EU is still one of the most important trading partners to Africa in addition to being a major donor.

African countries and organisations should work to foster greater coherence between integration policies and trade tools including TDIs.

The abovementioned analyses are the basis for the conclusions and recommendations highlighted in the next sections with focus on the relevance of TDIs to economic integration in Africa.

7.1 General Conclusions on African Economic Integration

7.1.1 African Economic Integration Endeavours in the context of the T-FTA is Pivotal to African Development and Industrialisation

Africa is characterised by small economies, limited markets, weak infrastructure, complicated trade procedures and undeveloped industrial sectors.

For these reasons, regional integration is of utmost importance to overcome these challenges and achieve economic development, job creation and improving competitiveness. Regional integration could play a catalyst role in helping African countries overcome their national and regional-specific shortcomings, achieve economies of scale, accelerate African industrialisation and integrate into the global value-chain systems.

African economic integration is emphasised further by the fact that the proliferation of regional RTAs made the Most Favoured Nation (MFN) rate the exception rather than the rule. This can put African nations at a disadvantageous position compared with other countries when it comes to market access.

Although the average MFN tariff is decreasing globally, RTAs could provide, in the short and medium terms, comparative advantages to its Members, especially with the current stagnation of the WTO Doha round.

The launching of the T-FTA is a very important step towards achieving the objectives of the African Economic Community (AEC). It is also an opportunity for dealing with the constraints facing African integration, in particular the overlapping membership in

the three RECs, the different applied rules of origin, the lack of conducive infrastructures, the unharmonized technical rules and standards applied by different RECs/countries in Africa as well as the different systems of TDIs.

There is a good opportunity for a successful economic integration model in the context of the T-FTA. According to 2014 estimations, the total merchandise exports by T-FTA Members equals USD 145 billion which is almost 1% of global exports, and merchandise imports equal USD 211 billion which is equivalent to 1.5% of global imports. The average economic growth rate in the T-FTA area is high. Between 2010 and 2013 fourteen Members of the T-FTA grew at an average rate of more than 5% per year. Economic integration combined with national industrialisation programmes can further support this economic growth.

It is becoming evident that better market access conditions alone do not necessarily lead to deeper and more successful integration. In this regard, it is commendable that the T-FTA has adopted a three-pillar approach to integration: market access, infrastructure development, and industrialisation. This holistic approach to integration is better positioned to support African countries in dealing with their long-standing constraints, including high cost of transactions, non-tariff barriers and inefficient TDIs.

TDIs should be adopted by African countries in a wider context of a pro-trade development agenda that could support industrialisation in the continent and consequently lead to higher gains of regional integration as well as better terms for integration in the world economy.

7.1.2 Integration in the International Trade System is Crucial for Africa's Development under the Right Conditions

This thesis is not a call for protectionism. In addition to regional integration initiatives, African countries are also opening to other countries and blocks through FTAs and PTAs with major blocks like the EU, the USA, Mercosur and EFTA.

Opening-up Africa's market through these preferential arrangements is inevitable and can deliver positive benefits to many African countries and enhance their participation in the global value chains.

The T-FTA holistic approach could enhance African economic competitiveness, and economic linkages and complementarity among its member countries. The primary objective should be to participate effectively in regional and global value chains while increasing the value-added component of the African industries.

This would require participation in the value chains at the right stage and with the right products that are suitable for African countries' comparative advantages and its industrialisation plans.

In such arrangements, and especially at the initial stages, African countries may need to make use of available trade tools within both the multilateral and the regional systems to provide the required protection for infant and developing industries with strategic importance to African economies. This includes several tools available in the WTO system such as TDIs.

Acting as a block could enhance the integration results. It can also increase the economic weight and bargaining power of African countries vis-à-vis other countries and economic blocks which can improve the return from the integration in the international trade system.

7.1.3 Africa has a Particular Model of Integration

Regional trade initiatives in Africa are not identical to other regional integration models either those between developed countries as well as those between developed and developing countries. The main distinctions are found in its linear gradual economic integration approach, the weak enforcement mechanisms and the low level of implementation of commitments.

African economic integration provisions are dealt with in many cases as soft law, which are based on variable geometry and characterised by a high level of flexibility in the application of commitments, and sometimes non-compliance with trade liberalisation commitments.

Providing preferential treatment to small African countries through longer periods of implementation, development funds and technical assistance should not mean

escaping trade obligations, which are very important for the success of regional integration.

Although this model of variable geometry was necessary at the initial stage of economic integration, it cannot be conducive to the ambitious African economic regional integration objectives in the long run. This model is not in line with other models of economic integration where the trade obligations are enforced through compulsory and binding dispute settlement mechanisms. African countries need to ensure respect for their respective obligations in regional RECs, while giving consideration to the special conditions of small countries to integrate them gradually into the African integration model and with a clear time frame for such preferential treatment.

African countries should work to ensure the enforcement of their obligations both under the multilateral trading system and within the African RECs.

Violating obligations at the regional level could defeat the purpose of regional integration, while violating the obligation at the multilateral level could come with huge economic cost.

In this regard, making appropriate use of TDIs could encourage Members of RTAs to implement their trade liberalisation commitments, as it will allow for the necessary protection of national industries using legitimate tools of protection under clear and understood multilateral and regional rules.

In order to ensure enforceability, dispute settlement institutions should be put in place, with enough resources, clear rules and should be kept independent of political pressures. It has to be noted that this is a very ambitious objective and could be constrained by political and economic factors as was manifested in SADC and other regional groups in Africa.

7.2 Conclusions on African TDIs regimes

7.2.1 Effective TDI systems are crucial to African Integration

TDIs are crucial to African countries, especially at this stage of development where many African countries are undergoing plans for economic diversification away from natural resources with national and industrial development programmes.

Moreover, an efficient regional TDI system can support regional integration objectives, in particular economic growth, job creation and development.

In addition to their general objectives, TDIs could be used in a customised way to protect selective economic sectors with strategic importance and with high intensity of employment. In Africa this could be useful to deal with the potential negative trade effects on the most vulnerable communities.

It has to be noted that with weak TDIs capacities, African countries could be subject to the negative effects of trade diversion. The usage of TDIs by countries against imports could encourage aggressive exporters to divert their exports to African countries where the protectionist mechanisms are not effective. This problem could be exacerbated further with the recent surge in the calls for protectionism even among developed countries.

In particular a TDIs system can achieve synergy in supporting the three pillars of the T-FTA model of integration: market access, industrialisation, and trade facilitation, in addition to foreign direct investment (FDI)

7.2.1.1 TDIs and Market Access

According to World Trade Report 2014, the MFN tariff rates in developing and African countries fell by a pace greater than the average rate in the G-20 countries. This could increase the market access of non-African countries to African markets.

In parallel, traditional protection measures such as import prohibitions, quotas, and tariff hikes are less and less permissible for both developed and developing countries in accordance with WTO rules.

These two factors emphasise the importance of TDIs in protecting African industries.

A well-designed system of TDIs that provides the required protection toward third party imports while ensuring that Members of the FTA are treated favourably can boost African integration and increase intra-African trade, currently standing at only 12%. This system should be in accordance with the WTO Agreements: the ADA, the ASCM and the ASG.

If implemented effectively, TDIs can also encourage tightening binding tariff commitments, implementing tariff liberalisation commitments and decreasing the resort to less permissible protectionist measures.

7.2.1.2 TDIs and Industrialisation

An effective TDI system can provide the required protection to the largely underdeveloped and infant industries in Africa. This temporary protection can ensure that African industries are operating on a level playing field against active export performance from developed and emerging countries with aggressive export strategies and low cost of production. In some cases, and under the right conditions, TDIs can provide the time required for African industries to increase their competitiveness.

More than 88% of African trade is with non-African countries. This goes for both inputs and outputs, and highlight the importance of effective trade policy tools to support industrialisation. TDIs can help African industries survive regional and international trade liberalisation and promote productivity and competitiveness of domestic producers in the domestic and external market. Additionally, this system can also promote value chains across the continent not only to boost intra-African trade, but also to increase its value added and regional industrial development.

In the meantime, export-competitive African industries could eventually face possible arbitrary TDIs measures in the export markets. There is a need to prepare for this stage from an institutional and legal perspective and also through focus on improving the capacities of the private sector in Africa to engage effectively and protect its economic and trade interests.

What supports this assumption is that the top subject sectors to TDIs initiations are: base metals and articles; chemical and allied industries; resins, plastic and articles; machinery and electrical equipment; and textile and articles. These sectors include items high on African exports lists as well as its industrialisation plans, which can highlight the long-term risk that African exports may face.

7.2.1.3 TDIs and Trade facilitation

Africa's integration is constrained in the area of trade facilitation, especially customs procedures, different standards and the particular challenges of land-locked countries.

Trade facilitation is crucial for African integration, and African countries should continue to prioritise this pivotal pillar including by mega regional infrastructure projects, the adoption of harmonised road transport regulations and the entry of business visitors as well as simplified documentation. The current status of trade facilitation in Africa creates a situation where trade preferences among African countries are neutralised by the effects of high transaction costs through complicated trade procedures, documentation, and cost of transit.

This has created a situation where access to African markets might be easier and less costly to third parties than to Members of African regional blocks, which could jeopardise the integration efforts.

This further emphasises the importance of TDIs to slow the penetration of third party exports into the continent at the expense of African countries, while making use of generous subsidisation and unfair measures in the exporting countries.

In the meantime, a well-designed regional infrastructure projects can enhance African connectivity and intra-regional trade.

7.2.1.4 TDIs and Foreign Direct Investment

There is a conviction among policy makers in Africa that Foreign Direct Investment (FDI) is the key to economic development in the continent. This could be partially true and largely depends on the nature (field of investment), the type of FDI (Green field or acquisition) and the added value it brings to African economies.

Many African countries incorporate FDI promotion strategies as part of their economic development plans. The low domestic saving in Africa makes it necessary to depend on foreign investment to accelerate economic growth and create jobs.

However, in many cases FDI in developing countries could lead to negative economic implications and injury to national industries. This takes place when the FDIs makes use of a better access to cheaper labour and raw material, falling tariffs in accordance with regional integration commitments, and greater efficiency to penetrate and dominate African markets. This usually comes at the expense of the growing African industries.

The existence of an effective TDI system and a regional competition policy may limit the negative effects of these processes.

7.2.2 Current TDIs Systems in Africa are not Effective

TDIs are applied at national and regional levels with many different variations. Although these systems are different from each other, the systems which do exist are generally in line with the WTO obligations.

There is a deficiency in the jurisdictional regimes governing TDIs at both national and regional levels in Africa. This also applies to recent trials including the T-FTA negotiations with its limited success so far.

The ineffectiveness of these systems is due to many institutional and technical reasons. Only few African countries have TDIs legislation and functioning institutions. Individual African countries face many challenges in establishing their own systems because of a lack of financial and technical resources as well as the perception of the little importance for this system. This leaves the African industries with limited options to respond to foreign competition and could undermine integration efforts.

It is concluded that these systems are not generally effective as shown by the very limited resort to these tools compared to other economic blocks.

The African TDIs system needs a significant overhaul both in regard to substance and procedure, in order to create a fair and transparent system that will be more supportive and conducive to economic development, regional integration and the protection of the rights of the Members.

This is emphasised further considering the absence of international competition laws and the frequent usage of TDIs by non-African countries, as well as the level of development of African industries.

Dealing with TDIs effectively requires a high level of specialization and expert knowledge. In order to implement TDI rules, African countries need to put in place properly functioning investigating authorities. This would require a lot of financial and technical resources including human resources, especially economists, lawyers and statisticians, to be able to conduct investigations within the strict prescribed deadlines and to abide by the multilateral WTO Agreements.

The lack of efficient dispute settlement mechanisms in African regional integration worsens the problem of TDIs as countries can violate their liberalisation obligations with impunity.

The importance of sound TDIs strategy in Africa is emphasised further with the emergence of export strategies and lower cost of production structures. The end of the transitional period in December 2016 for China's accession protocol, and the bilateral agreements between African countries and China to grant the latter “market economy status” may have dire consequences on Africa in the form of a further influx of cheap imports. TDIs could limit the negative effects of this problem.

Additionally, the majority of African countries do not have competition policies in place, which leave national industries vulnerable to unfair foreign competition, further highlighting the importance of TDIs.

Moreover, it has to be noted that in times of economic crisis, countries feel encouraged to make use of protectionist measures including TDIs. This could pose some risks to African exports.

7.2.3 There is limited usage of TDIs in Africa

As a natural consequence of the previous section and as confirmed in the analysis in section 6.3 of this thesis, apart from South Africa and Egypt, there is no significant resort to TDIs in Africa. This is in contrast with other developing countries and regional blocks in Asia and Latin America. It is acknowledged in this regard that Africa has applied 6% of total world TDIs, which is more than its share of world trade, but most of this usage is by South Africa and Egypt, which are the major industrial economies in the continent.

The distribution of TDIs is not imbalanced among African countries. South Africa applies the majority of all trade remedies in Africa (69% of AD and 100% of countervailing measures), while Egypt applies 28% of AD and 50% of safeguard measures. The remaining 52 African countries have negligible resort to TDIs.

In terms of AD measures, Africa as a continent has applied fewer measures than individual developing countries like Argentina, Brazil or India.

Africa's limited usage of TDIs is due to wide array of reasons. Some of these reasons are natural due to the structure of the African economies and trade patterns. Other reasons are due to the level of development of African legal institutions and lack of technical expertise, preference of some countries to use easier instruments, political factors, an under-developed private sector, the high cost associated with the usage of TDIs in addition to fear of retaliation and pressures from other countries. Moreover, the current rules, provisions and procedures associated with the use of these contingency measures can be complex and administratively demanding for most African countries.

The limited usage of TDIs could have negative effects on the integration plans and the development of African industries both on the short and the long terms.

Most of the reasons behind Africa's limited engagement with TDIs could be addressed through the implementation of the right policies on both the short and the long-terms.

7.2.4 TDIs is not a high priority on the African Integration Agenda

The initial stage of the T-FTA negotiation showed the importance African countries placed on establishing an ambitious TDI system as was highlighted in the initial text that included general provisions and details procedures in the annex.

The divergent views, the financial constraints as well as the different levels of development showed that this is not among the easiest issues of African integration.

The same situation exists at the multilateral level, where African countries attach more priority and importance to issues more relevant to Africa's trade interests like the reform of the agriculture subsidies, non-agriculture market access (NAMA) and the preferential treatment to developing countries. This is natural in light of African economies' composition and level of development. It is also in line with the position of major trading powers that focus on market access and the reform of the Agricultural sector as well as trade facilitation.

However, this situation is also due to different misconceptions including lack of sufficient awareness of these tools and ambiguity around the invocation criteria in addition to perception that the system is very complex and that the application of these measures could be perceived as a hostile step toward trading partners.

There is a need to clear these misconceptions and give the due attention to the issue of the TDIs as fundamental and complementary to economic integration.

The political will and the recognition of the importance of TDI is a prerequisite for establishing an effective system with trade tools options. The Doha negotiations, although facing many challenges at the moment, could eventually increase coverage and decrease bound rates especially for NAMA and consequently increase the importance of TDIs.

In addition to that, African countries should work on enhancing their capacities, expertise and resources to build national legal frameworks and institutions that can deal with the application and implementation of TDIs.

African countries also need to take these measures in the right context. The appropriate application of TDIs on intra-trade should not be perceived as a hostile step, rather than an application of trade tools, considering that they are applied judicially and in accordance with the regional and international laws.

Raising the awareness and the technical expertise of the African trade negotiations in this field can lead to a better negotiation outcome in the African context and with third parties.

7.2.5 The Current T-FTA legal regime is not Supportive for African Integration Plans in the Long Run

Despite the lengthy process of negotiations that led to the conclusion of the T-FTA and the consideration of other existing TDIs models, the Agreement in June 2015 revealed the high degree of divergence in views between Members on how to deal with this issue.

The outcome of the first phase of the T-FTA negotiation resulted in a compromised solution that is not in line with the ambitious African integration objectives in the long-run.

The outcome did not address the challenges facing African TDIs systems and did not add much to the already existing fragmented rules in Africa as it just recognised the existing obligations under WTO law without real added value. This represented a wasted opportunity.

It is understood that the outcome of the negotiation would mean that T-FTA Members will apply the REC-specific provisions in conducting TDIs investigations within each REC while applying the WTO legal framework across the RECs and with third parties. For example, Egypt will apply its national laws and the WTO Agreement in connection to imports from South Africa and vice versa. Regrettably, this was the case before the conclusion of the T-FTA.

The modest result of the negotiation should be a matter of concern for African countries and should be addressed attentively and differently in phase II of the T-FTA negotiations. Additionally, African countries should establish clearly how to deal with

African countries that are not WTO Members and those with no established TDI institutions. This should include the jurisdiction and rules that they will be subject to when it comes to TDIs.

One of the major challenges of this outcome is that CUs within the T-FTA like the EAC and SACU will not apply TDIs against their Members but will continue to apply them against other Members of the T-FTA, which will differentiate between Members of the T-FTA and could complicate further the integration prospects.

The Tripartite area seeks to reach a CU status in the long run. One of the major challenges is how to implement TDIs and if they will be eliminated among Members.

It is suggested to have a vision of eliminating these measures between Members when the CU is implemented which can further strengthen regional integration and the preferential treatment between Members compared with third parties.

This should be done without underestimating the importance of the existence of a regional body to investigate and implement TDIs at the regional level. The first draft of the T-FTA agreement indicated that this was the initial intention; however, the final outcome stopped short of this. This drawback is in contrast with other more developed RECs like the EU and NAFTA, which have different models of regional bodies, and Bi-national Panel to deal with TDIs.

With no efficient TDI system between Members of African integration, countries may be more inclined not to implement their trade obligations and to use protectionist measures, which can jeopardise the essence of African integration.

A well-functioning regional TDIs system in the T-FTA can act both as a shield and as a deterrent against unfair competition, even if not used.

The successful examples of trade integration, particularly the EU and NAFTA, have incorporated strong functioning TDIs systems that supported their integration efforts.

7.3 Recommendations

Based on the analysis and the conclusions in this thesis, it is submitted that the following recommendations could contribute to a better approach toward TDIs and the establishment of an effective TDI system and consequently support African integration objectives, notably economic growth, industrialisation and job creation.

These recommendations are divided into five main categories: (A) Strategic Direction; (B) Institutional Framework; (C) Enhancing Engagements; (D) Application of TDIs; and (E) Supportive factors.

7.3.1 The Strategic Direction

This thesis submits that in the long-term the EU TDIs system is the most suitable to the African integration objectives. This submission is made while recognising the different level of development and integration at both sides and is based on the following points:

1. Africa is pursuing a model of economic integration that would lead in the long-run to a model resembling the EU model. The creation of the AEC will necessitate the free movements of goods, services, capital and labour and would imply the abolition of TDIs on intra-trade while applying unified rules on imports from third parties, which is the case the EU has reached after almost 70 years of incremental integration steps.
2. The EU is the first trading partner of Africa; many African countries already enjoy preferential access to the EU market. The economic and trade relations are diversified to a large extent where the EU is also one of the main donors, which is partially related to historical and strategic considerations. From this perspective, the EU can provide the needed experience and capacity building to African countries in their integration endeavours and which may not be limited only to the establishment of an effective TDIs system but extend also to other integration challenges.
3. Having homogenous rules on TDIs between the EU and Africa can bring indirect advantages mainly increasing predictability between the two sides.

4. The EU reached such a high level of integration through a gradual approach. The TDIs were allowed at the early stages of integration and then were phased out when integration was consolidated between Members. This is the current case of African integration where it is not possible to foresee that TDIs will be removed in the short-term, however, it should be envisaged to remove them at a later stage when integration is deepened and consolidated which could be achieved when the CU is implemented.
5. The EU integration model is flexible. Many smaller eastern European countries joined the EU in the last decade and now abide by the rules and regulations of the EU. The same could be true for Africa where many African countries can decide to deepen their integration at consecutive stages. The T-FTA model is envisaged to be merged with other integration endeavours in the continent to reach the AEC.
6. The EU TDI system attaches much importance to the issue of small and medium enterprises (SMEs), which represent more than 95% of African industries. Africa can incorporate many of the capacity building techniques applied by the EU in equipping its largely small companies to deal with TDIs issues.
7. The EU TDI system gives considerable importance to consumer welfare and intermediate industries through the public interest test and price undertaking provisions. This could be the case in Africa where the application of TDIs should not harm both consumers and intermediate industries. Industrialisation in African may depend on imports of cheap intermediate goods which may require the importation of cheap components.
8. The EU model and system of supranational bodies may give a good example of how to deal with the national sovereignty of Members which is a major concern in regional integration in general.
9. The NAFTA TDI system is effective but may not be the most suitable to African integration plans considering, its limited membership, that it is at a level of an FTA and considering the huge asymmetry between the USA and Canada at one side and Mexico at the other side. The Bi-national Panel in NAFTA can generate positive results to African integration but will require already established and functioning TDI systems in Members. It would not be able address the specific challenges related to lack of sufficient financial

resources and capacities in African countries. It is noted that NAFTA has no established plans to reach a CU level.

10. The two systems applied by Mercosur and ASEAN are facing fundamental challenges and lack of implementation and may not suit the African integration model in the long-run. Nevertheless, they can still provide some example for coordination between national investigating authorities at the initial stages of integration.

In all cases, it is recommended that the T-FTA legal system follows the same initial structure that was suggested at the beginning of the T-FTA negotiations. The legal system could consist of a three-tier approach which would include general provisions on trade remedies, supported by an Annex setting out principles, and further clarified by guidelines which could be formulated at a later stage. This model resembles the EU legal system consisting of regulations and directives while being subject to the scrutiny of the European court of Justice.

7.3.2 The Institutional Framework

7.3.2.1 Conduct a Study on the effects of TDIs on African integration

The starting point should be to conduct a comprehensive technical study on African TDIs system and its implications on economic integration.

This study can come with conclusions about the time and road map of establishing a regional TDI system as well as the desirability of making use of these tools in the African context and the opportunity cost for investing in establishing an efficient TDI system that is founded on human expertise and financial resources. The study could also contribute to enhancing understanding of these trade tools and their relevance to the African economic growth and integration plans. It can also lead to better awareness of the private sector of the importance and the relevance of TDIs.

This study, which could be conducted by the United Nations Economic Commission for Africa (UNECA) or the New Partnership for Africa's Development (NEPAD), could give guidance for the future work and how to design the TDIs system, especially during the first stage of the T-FTA which is at the level of an FTA.

As a second output, it could indicate how to prepare for the long-term objective, which is to achieve a CU that could entail the prohibition of using TDIs among Members.

7.3.2.2 Establish a Regional Investigating Authority

Establishing a regional investigating authority should be the long-term objective for the T-FTA. The question is when to take this step. A regional investigating authority would be entrusted with the mission of conducting TDIs investigations and imposing TDIs measures in the context of the T-FTA following detailed laws and regulations at the regional level.

In order to achieve this long-term objective, it is recommended that African countries follow a gradual approach that takes care of the significant differences between them in terms of level of development and institutional capacities. These steps are suggested in this context:

1. African countries should agree, within the context of the T-FTA, to have a strict time-frame for the promulgation of national laws on TDIs and to establish national investigating authorities to conduct TDIs investigations in accordance with national laws and regulations. The T-FTA secretariat can guide this process with support from the WTO, some African countries with accumulated experiences, as well as donor countries especially the EU. This step can go parallel with the ongoing efforts to put the T-FTA into action through ratification and completion of Stage II of the negotiation, which will take some years to materialise.
2. At the second step, African countries may decide to have an interim arrangement through sub-regional investigating authorities in each of the three RECs. They may benefit from the accumulated expertise of regional economic powers with established rules and practices in TDIs. Egypt, Kenya and South Africa are the most viable candidates for this process. These countries should coordinate closely with the Members of their sub-groups in investigation and injury determination. This recommendation may face some challenges due to sovereignty concerns from Member States as explained in chapter five. It is submitted that the gradual approach and the preparatory process can address this challenge to certain extent.

3. The third step would be to agree on establishing a regional body to deal with TDIs. The mandate of this regional body should be limited to reviewing the determinations of the national investigating authorities according to national and regional laws. This will be done in a manner similar to the Bi-national Panel in NAFTA.
4. The final step is to establish a fully-fledged regional investigating body with full powers to handle investigations on behalf of Members and internal cases, and which can accumulate more experience in a shorter time-frame. This can only take place when the long-term objective of establishing a Tripartite CU is materialised and when TDIs are prohibited on intra-trade.

Establishing a regional body can help African countries achieve many objectives:

1. Overcome the national limitations in many small African countries where the cost of establishing and managing national investigating authorities could be prohibitive. This can take place by pooling financial resources between African countries.
2. Accumulate technical expertise, especially from countries with relative experience in this field like South Africa and Egypt. This can be of benefit to African countries which do not have enough technical expertise at the moment.
3. African countries can also accumulate expertise by engaging in many TDI investigations when the conditions exist. It is understood that it could be a "learning by doing experience" and even African countries with some experience in this field can enhance their expertise through further engagements.
4. Having a solid system with clear agreed regional rules to follow which can encourage African countries to implement trade liberalisation commitments within the agreed time frames.
5. A regional investigating authority representing large number of African countries can act as a deterrent factor to trading partners, which could limit the usage of TDIs against African exports.

Such decision should take into consideration the economic effects of this step as well as the required resources. Establishing this regional authority will require taking

decisions on a wide range of issues including the legal framework, location, structure, sources of finance, number of employees, reporting procedures, etc.

One of the main implications of this ambitious step is the sovereignty concern for African countries, which might see this step as undermining their national sovereignty. Having this authority reporting to the council of Ministers of Members could address these concerns to a certain extent by ensuring that the final decision will be taken by a body with wide and equal representation of all members.

7.3.2.3 Harmonisation of the rules on TDIs in the three RECs

In the second stage of the T-FTA negotiations countries are expected to harmonise the rules of the three RECs to make sure that only one set of rules can apply and that they are in harmony with existing WTO rules. The establishment of new investigating authorities as well as the promulgation of national laws present an opportunity for ensuring the coherence between African rules and regulations. African countries with no TDI laws at the moment may want to follow a standard model that is in harmony with the T-FTA and WTO rules.

The harmonisation step can be conducted by a group of experts from Members. External expertise and the good practices of other countries can be beneficial in this regard.

This process can lead to many positive results. The review process can also modernise these rules and make them more responsive to the jurisprudence of the DSB and the changing in the international trade law and the international trading system.

Members of the T-FTA can build on this step to streamline the information requirements, the procedural rules, methodologies and the technical regulations across the three blocks. It can also ensure more cooperation between relevant bodies in Members.

The effectiveness of TDI investigations usually depends on the cooperation of interested parties, which is an area that requires improvement in the African context. Establishing a TDI committee that has a role to streamline the information requirements, the procedural rules and the investigation schedule could lead to better

cooperation between interested parties without compromising on the overall duration and quality of investigations.

7.3.2.4 Enhance Engagement in the WTO Negotiation to improve the Multilateral TDIs Systems

The WTO Agreements on anti-dumping, subsidies and countervailing measures and safeguards are the constitutional framework for regional and national TDI rules. One of the main constraints on African countries' usage of the TDI system is related to some of the intrinsic problems and complexities in the WTO legal system.

Under WTO rules developing countries and LDCs are granted certain special and preferential treatment for the application of some TDIs. This preferential treatment does not necessarily result in *de facto* benefits to African countries.

For example, Article 15 of the ADA requires that developed countries must consider constructive remedies before imposing AD measures on imports from developing countries. Also, Article 27.10 of the ASCM requires the termination of countervailing investigation against a product originating from a developing country in case the overall level of subsidies granted does not exceed 2% of its value or the volume of subsidised imports represents less than 4% of the total imports of the like product in the importing member, unless imports from developing country Members, whose individual shares are less than 4%, collectively account for more than 9% of the total imports.

More importantly, according to Article 9(1) of the ASG, safeguard measure shall not be implemented against a develop country as long as its market share is not more than 3% or, collectively with other developing countries, is less than 9%. Article 9(2) of the ASG permits developing counties to apply safeguard measure for a total of 10 years, which is two years more than developed countries, while safeguards may also be reapplied within half the duration of the original measure, as compared to the full duration (or double that time compared to developing countries) for developed countries.

Apart from the safeguard provisions, these special treatment provisions have not had significant effects on developing countries' usage of TDIs nor usage against developing countries.

African countries could benefit from more simplified rules that take into consideration their needs and capacities and which ensure the operationalisation of the special and differential treatment through the less-than-full reciprocity principle.

In many cases these provisions are not implemented, and developing countries should seek, through the WTO negotiations, to clarify the rules provisions, to ensure that these provisions can assist in achieving their special developmental objectives. These provisions, which are theoretically designed to address the resource limitations of developing countries in undertaking certain commitments by allowing transition periods for the implementation of commitments or by calling for the provision of technical assistance, can be of help to African countries in the area of rules and TDIs.

The current WTO negotiations, which are only limited to the ADA and the ASCM, are important in ensuring that the TDI systems would not be abused against developing countries and LDCs. The concrete substantial proposals from two Members of the T-FTA (Egypt and South Africa) are of particular importance in this regard as they are mostly in line with the objectives of developing countries in general and African countries in particular.

However, there is a room for more coordination between African countries in this negotiation. It is recommended that African countries seek to negotiate as a single entity, building on the accumulated expertise of some African Members that are active in these negotiations. The AU bodies and the African group in Geneva can be the right forum for harmonizing the African position toward the rules negotiations.

One area that can support African countries' endeavours in this field is the WTO's trade-related technical assistance (TRTA) activities and programs which are designed towards capacity-building in developing countries and are core elements of the development dimension as confirmed by the Doha declaration.

7.3.2.5 Subject the African TDIs system to Periodical Reviews

When established, the African regional TDIs system can benefit from periodical independent reviews and technical evaluations. These reviews can take into account the fast developments in the world and the international trade law in the light of the rulings of the DSB and regional judicial bodies.

The reviews should also determine the adequacy of the investigating authority and if it needs enhancement in terms of financial and human resources.

These reviews should be conducted by an independent body and should involve all stakeholders including producers, importers, exporters, business organisations, consumer organisations as well as government representatives. The objective of this evaluation is to propose adjustments to the TDI system as necessary, which could be incorporated into African law through the prescribed legislative procedures.

A provision should be made for these adjustments in the T-FTA TDIs annex, which shall endeavour to ensure that the TDIs system is working effectively to achieve its objectives and that African law and procedures are in line with international commitments.

It is noted in this regard that the lawfulness of the imposition of TDIs is the major component of cases investigated by the WTO DSB. African RTAs and TDIs should be designed, implemented and adjusted in a way that they are not subject to successful challenges at the DSB where African countries have limited technical and financial capabilities.

This process will require financial resources but it is submitted that the outcome of this review could overweight the financial cost.

7.3.3 Enhancing Engagement

7.3.3.1 Strengthen National Capacities

National capacities are the foundation of African engagement in the field of TDIs. For the time being the majority of African countries do not possess enough technical capacity to deal with TDIs matters.

In the short-run African countries could consider temporary mechanisms such as *ad hoc* investigating teams or drawing on retired or independent trade experts to serve as investigators or adjudicators. Alternatively, Ministries of Trade in African countries could act as investigating authorities until an investigating authority is established.

A well-functioning TDIs system will depend on the availability of economists, trade experts, lawyers and statisticians. African countries can build such expertise by incorporating specialised academic and training programs designed for these kinds of expertise, which can also benefit African trade endeavours in general. The importance of having sufficient statistical capacities cannot be underestimated in the context of TDIs investigations and could bring direct and indirect benefits to the African engagement in international trade negotiations in general

This recommendation, which needs a long-term approach, could be constrained by limited financial resources. The WTO can support the capacity building of African countries through its programs designed to enhance countries' human and institutional capacities to take full advantage of the rules-based multilateral trading system, to deal with the challenges this presents, to enforce their rights and to respect their obligations. Trade capacity-building programs are also an important part of the Aid for Trade work program as well as of projects sponsored by donors such as Australian Aid, the UK Department for International Development (DfID), the EU, UNCTAD and USAID.

It has to be noted that the WTO training programs have seen many beneficiaries of the program leave government jobs to join the private sector or international institutions.[1444] This challenge could be addressed through long-term employment contracts and compensatory financial packages.

African integration endeavours should give attention to the situation of small African countries and LDCs both to improve their capacities and to compensate them for the effects of trade liberalisation in accordance with the variable geometry principle. This should take place without undermining the liberalisation objectives.

[1444] Illy (2015) *ICTSD*.

African judicial bodies are the bodies that act as a layer of control on national and investigating authority's decisions. These bodies should be informed and educated on TDIs and the WTO dispute settlement procedures and should receive attention in terms of improving technical capacities.

7.3.3.2 Encourage more Utilisation of TDIs in accordance with rules and regulations

African countries should not be reluctant to make use of the existing systems in the WTO, including TDIs, to protect their industries and foster regional integration.

The challenges facing African countries in making use of these measures must be addressed, especially those related to unfounded reasons including fear of retaliation.

Simplifying regional TDI rules and procedures, while ensuring they are strictly in harmony with the WTO law, could encourage more frequent resort to them in cases where the invocation conditions exist.

There are fixed costs of maintaining a functioning TDIs system and significant variable costs in conducting investigations that differ from one case to another and depends mainly on the complexity of the issues involved. TDIs should be used judiciously and in a targeted way, otherwise they can have negative effects on Members and regional integration.

The application of TDIs at regional and national level should follow a clear and effective institutional decision-making process that should ensure a rapid response to the threats coming from unfair trade measures or sudden increases in imports.

TDIs are difficult to challenge at the DSB. Despite the high number of cases in the DSB citing the ADA Agreement, only a small percentage of AD measures have been challenged to date.

Enhancing the transparency and predictability of the TDIs system can assist all stakeholders and would facilitate their planning and decision-making processes, and consequently lead to positive effects on national industries.

In parallel, some measures must be taken to encourage African countries to abide by the regional liberalisation commitments. This could include making use of already established development funds or establishing new funds to compensate small African countries at the first stages of trade liberalisation.

African countries can benefit from some models applied by developed and developing countries such as the American model where trade integration challenges are overcome through trade assistance programs which provide relief to workers, farmers, communities and fishermen seriously injured or threatened with serious injury due to surges of imports, and which encourage them to use TDIs in cases where it is needed.

7.3.3.3 Improve the involvement of the Private Sector and other Stakeholders in TDIs Processes

The private sector is the main implementer and beneficiary of trade integration agreements.

The success of integration arrangements depends largely on factors like the competitiveness of the private sector, its export strategies as well as its awareness of the content and technicalities of trade agreements. This includes provisions on TDIs which can provide protection for its products and could in some cases be used as a constraint on its exports in foreign markets.

In Africa, there is a limited knowledge in the private sector regarding the trade opportunities arising from falling trade barriers in the context of regional integration. This lack of sufficient knowledge applies to the existence of protection tools and mechanisms including TDIs. If the private sector continues to be uninformed about the opportunities and the tools available to it, its trade interests and consequently the economic interests of Members will be affected negatively.

It is important to invest resources to enhance the knowledge and capacities of the private sector and business associations regarding TDIs processes, legislation and practices, as these are not sufficiently used, which is often due to lack of knowledge by the domestic producers.

An engaged private sector is a crucial factor in the integration process in general and especially with relevance to the usage of TDIs. According to the three WTO TDI Agreements the private sector is the initiator of the investigation processes in most of the cases.

It is of utmost importance that African governments and regional integration bodies maintain effective communication mechanisms, notably with the private sector, consumer organisations and civil society organisations. It shall also include clarity on the distinct roles of both the private sector and the government in TDIs investigations.

The private sector associations should have clear channels to submit their views and recommendations to the governments and the regional bodies in a transparent and effective way. These views could feed in the national and regional trade policies in Africa and help make the system more effective.

African countries can make use of low cost solutions such as web portals that can include interactive information of TDIs policies, case law and investigation procedures. This can benefit from the templates used by the EU and NAFTA, which are very advanced in this regard.

Some jurisdictions have incorporated capacity-building programmes of the private sector in their TDIs framework, which could also be applied in Africa.

7.3.3.4 Prioritise Small and Medium Enterprises (SMMEs)

SMEs represent 95% of all firms in Africa.[1445] Regional integration endeavours should address the special needs of SMEs in member States in the area of TDIs.

According to the World Bank "Doing Business Report" SMEs can benefit from improving the regulatory framework and business environment especially in terms of the time, cost and procedures it takes to register a business, pay taxes, comply with labour legislation, register property, etc.

[1445] According to the World Bank estimates http://www.ifc.org/wps/wcm/connect/REGION__EXT_Content/Regions/Sub-Saharan+Africa/Advisory+Services/SustainableBusiness/SME_Initiatives/ (accessed 22 October 2016).

Any support to SMEs in the area of TDIs shall deal with their constraints, mainly issues like difficulties of submitting a complaint or participating in TDIs as an importer or as an exporter in investigations initiated by third countries.

Information should be customised to suit the target private sector and mainly SMEs including by using local languages and simplified illustrations that permit easy, user-friendly use of these measures.

Some lessons could be learned from the models applied by other economic integration blocks like the EU that incorporate internet web sites to provide simplified information and assistance to SMEs. The establishment of a help desk that can give answers to the private sector inquiries can present a helpful tool.

7.3.4 Application of TDIs

7.3.4.1 Enhance Transparency

Enhancing transparency and the sharing of information is essential for the functioning of an effective trade system. National laws and TDI decisions should be periodically published in the official journals and made available to the private sector, academic circles and all stakeholders.

African countries can benefit from the model of the EC where a website is made available to the public, with information on investigations, notices and adopted measures. This can also lead to a better understanding and better engagement with the private sector and consumers.

Information should be shared periodically and in a simplified language with different stakeholders to allow them to make timely and informed decisions on their trade issues.

Periodical press briefings on TDIs investigations can enhance transparency and improve the decision-making mechanisms.

7.3.4.2 Specific clauses

The multilateral TDI framework leaves some flexibility to national and regional bodies when designing their TDI systems.

In general, it is recommended that African integration should make use of this discretion to give preferences to its Members compared to third parties as long as this is permissible under WTO law.

African policy makers may consider the application of certain clauses in TDIs investigations. This will depend largely on the perception of the overall benefit and cost-benefit analysis.

7.3.4.2.1 Lesser Duty Rule

In certain cases, the inclusion and imposition of the lesser duty rule can be of benefit to African economies, especially when used on intra-regional trade, as it will be sufficient to remove the injury without unnecessarily hurting imports from Members. Moreover, it could help to focus investigations on third parties.

This is in line with Article 9 of the ADA and Article 19 of the ASCM which establish the desirability of application of a "lesser duty" rule where authorities may impose duties at a level lower than the margin of dumping but adequate to remove injury.

It is also in line with other legal systems including the EU, Argentina, Australia, Brazil, India, New Zealand, South Africa and Turkey.

Limiting it to intra-regional trade can bring obvious benefits for African integration and would give legal preference to Members compared to third parties which can support regional integration.

7.3.4.2.2 Public Interest Test

Despite the fact that neither the ADA nor ASCM obliges or prohibits the public interest test, African countries may consider the application of this test. This would mean that the investigating body shall consider broader public interest concerns, including considering the interests of parties which may be affected by the measure as

well as influence trade and competition in the market concerned which include producers, consumers and others.

This can take place where the imported good could be for the overall interest of African economies, especially when providing competitive intermediate products to African industries or when increasing consumer welfare while not competing with national producers.

In particular, wilfully deciding not to impose TDIs on intermediate goods that are necessary for African industries may be necessary to support the struggling industrialisation efforts at national and regional levels in Africa and comes in harmony with the three pillars of integration in the T-FTA context.

Many legal systems make reference to this principle, including the EU, Argentina, Brazil, China and Canada.

7.3.4.2.3 Best Endeavour Clause

It is recommended that the T-FTA incorporate a “best endeavour clause”, which is incorporated in many RTAs and requires prior notification or certain steps to be taken by Members to try to reach a mutually satisfactory outcome before the application of TDIs on intra-region trade. The imposition of this requirement through clear procedures could decrease the possibility of imposing TDIs measures on intra-trade.

More importantly, it can decrease to a certain extent the ambiguity about the motives for resorting to TDIs in the regional context and consequently lead to possible agreements without necessarily using these tools.

It is acknowledged that TDIs are still considered by some African policy makers as hostile tolls toward Members of the same RTA. This sensitive issue is of utmost importance at this juncture of integration.

7.3.4.2.4 State Aid

As a rule, state aid should be allowed as long as it is supportive to national and regional development, in line with WTO obligations and does not distort competition.

These kinds of permissible subsidies are of importance to African development and industrialisation programmes especially when they are general and targeting infrastructure and research and development efforts which are highly important to African development at this stage.

However, African countries may need to notify existing and new state aid programmes to both the WTO and the regional bodies.

This can help African countries understand the rational for such programmes in the national context and may lead to experience sharing between African countries.

7.3.4.3 Have Flexible Rules that gives Preferential Treatment to Member States

The three WTO TDIs Agreements grant some flexibility in the design of regional TDI systems.

This flexibility provides space to African countries in the design of the T-FTA TDI system which could be designed in a way that takes into consideration the needs and interests of Members. For example, African countries can incorporate provisions on higher *de minimis* and negligibility margins, shorter period of application of TDIs against T-FTA Members, and flexible safeguards provisions.

This would decrease the resort to TDIs against Members while keeping the protection against third parties. This can be helpful to African economies as it gives them a comparative advantage over third parties and consequently support regional economic integration.

7.3.4.4 Defend African exporters' interests

Most African countries are not very prominent in exporting industrialised products. This does not mean that their exports will not be subject to TDIs in export markets.

In reality eight African countries were subject to AD measures which are: South Africa (45 measures), Egypt (six), Algeria (two), Libya, Kenya Malawi, Nigeria and Zimbabwe (one each). Chapter XV (Base Metals) is the most targeted chapter of South Africa and Egypt. It represents 50% of the measures imposed against Egypt and

71% of measures imposed against South Africa. African exports subject to AD measures were steel, copper, paper, flowers, machinery and chemicals.

Additionally, two African countries have been subject to countervailing measures, which are Côte d'Ivoire and South Africa. The countervailing measures targeted chapters XV and IV. South Africa is the biggest economy in Africa with some export intensive industries in addition to subsidies programmes.

Having a regional mechanism in the context of the T-FTA to defend African exports can help ensure viability and predictability in export performance while also overcoming the individual constraints of African industries. This can take examples from different experiences. For example, Indonesia created an advocacy centre for safeguards within the Ministry of Trade, which is charged with defending Indonesian exporters facing remedy actions by foreign governments.

7.3.4.5 Seek Special and Differential Treatment in the Bilateral Trade Agreements

African countries are engaged in a web of RTAs with developed countries including the EU, EFTA, the USA and Mercosur. In many cases these Agreements include provisions on preferential treatment and technical assistance to African countries.

African countries can seek to include in any new agreement with third parties improved provisions that ensure that African countries have preferential treatment with clear procedures and invocation mechanisms and which could widen the condition for invocations by African countries and take into account the status of African countries and the high number of LDCs.

African countries can request to have clauses in Agreements with third parties to ensure the application of the lesser duty rule on African exports instead of the margin of dumping and subsidies in cases. They can also seek to oblige their trading partners not to impose AD or countervailing duties if African exporters agree to price undertakings or to cease exports at subsidised or dumped prices.

It is also important to allow for asymmetry in the application of safeguards in favour of the African parties. LDCs should be exempted automatically when a developed trading partner invokes safeguard actions.

7.3.4.6 Safeguard Measures

7.3.4.6.1 Global Safeguards

Safeguard measures provide temporary protection for national industries even when not facing unfair trade measures.

Safeguards are underutilised in Africa. They can provide tools to protect African national infant industries from potential surge in imports from their developed trading partners.

African countries can, in many cases, resort to safeguard measures on an individual basis, keeping in mind its special nature and the preferential treatment offered to developing countries under the ASG especially Article 9. Safeguard measures could give the national industries a time to adjust and it takes around two years to complete the DSU proceedings. Developing countries can apply these measures for a maximum of ten years compared with eight years in the case of developed countries.

Developing African countries can also escape the application of safeguards in certain conditions because of negligibility.

Because of the special nature of CUs, Members can only exclude other Members from the application of global safeguards if the domestic industries of all Members act collectively as a single domestic industry vis-à-vis all other import sources. This exclusion can take place at FTA level but with less discretion to importing states, which could be of importance to African countries in their integration endeavours.

In cases of application of global safeguards, African countries should actively consider exempting their partners in the T-FTA from the application of these measures in accordance with the parallelism rules and the ASG.

This could be of importance to developing countries and in particular T-FTA Members in their regional integration endeavours. The imposition of safeguard measures by African countries should not result in hurting the economies of other Members at an early stage of development as this can have dire consequences on their economies and their integration objectives.

However, it is noted that if countries continue to follow the wide interpretation of the parallelism requirement by excluding intraregional imports from multilateral safeguards, they could be challenged at the DSB. This can pose challenges for countries which lack financial and institutional capacities and capabilities to defend their case on the WTO platform.

To avoid this, Members of the T-FTA should give attention to the quantification of the "substantially all trade" requirement in Article XXIV of GATT 1994 which is necessary to ensure that any safeguard measures taken will not have implications for the legality of the negotiated RTA in terms of the internal trade requirement and will not subject it to challenges in the DSB. Additionally, they should ensure the strict implementation of the parallelism principle in both the investigation process and the implementation stage including by proving that the imports from Member States are not the cause of injury.

This will ensure that injury caused by any other factors, including intraregional imports, may not be attributed to the surge in imports from third-party countries.

African countries could also make use of special safeguard provisions to protect sectors with strategic importance to African countries in terms of employment and share in GDP. These special safeguard measures are present in many RTAs and could be triggered by a price or volume threshold and without necessarily going through the demanding process of injury determination to the domestic industry, which might be helpful to African countries. Usually they act as a last resort of protection for certain sensitive sectors.

7.3.4.6.2 Bilateral Safeguards

Liberalising trade amongst unequal partners may well result in increases in imports to specific countries, necessitating safeguard action.

The T-FTA Agreement may consider having provisions for regional safeguards, at least in a transitional period. Such measures could encourage Members to apply the trade liberalisation commitments and assure them of the existence of safety valves that could be used if needs arise.

Members will also have to take into consideration the fact that the implementation of a safeguard on intraregional trade will require a case-by-case analysis prior to implementation to ensure compliance with Article XXIV.

When formulating bilateral safeguard provisions in the context of the T-FTA it is important to maintain a balance between allowing countries to apply safeguard measures to prevent serious economic disruptions and ensuring that safeguard measures do not defeat the purpose of trade liberalisation. It is also important to establish a clear safeguard consultation mechanism between Members before resorting to these measures in the regional context to limit abusive usage of these measures.

Agreeing on rules-based preferential safeguards might be the better initial approach; provided national safeguard measures can be justified in terms of binding and objective criteria.

7.3.4.7 Market Definition Factors

If the T-FTA acts as a single market in the long run, this will require that when evaluating the dumping, subsidised imports, increased imports and injury analyses the combined market of Members will be considered the domestic market. This will raise challenges related to the definition of domestic producers and domestic market. One of the major challenges related to this point is that, in order to initiate an application, a country would have to collect information from at least "a major proportion of the T-FTA industry", which could be extremely difficult and very costly.

The T-FTA can make use of Article 4.1 (ii) of the ADA which would allow for dividing a market into two or more geographical areas which could be very useful in terms of the geographically large territory of the T-FTA. It is understood that this clause could only be applied in exceptional circumstances, where the producers within each market may be regarded as a separate industry.

This will require certain conditions, mainly that the producers sell all or almost all of their production within their respective markets, and that the demand in that market is not substantially supplied by producers elsewhere in the territory.

The benefit of this division of markets is that injury could be established even if a major proportion of the domestic (T-FTA industry) is not injured, provided that there is concentration of dumped products within this sub-market and that the dumped, subsidised or increased imports are causing injury to almost all the producers of such sub-market. This would allow the application of AD / countervailing measures against imports to specific Members of the T-FTA.

7.3.4.8 Specific Provisions to deal with Non-market economies

African economies and national industries face aggressive competition from low cost products, especially from countries with a low cost of production; mainly non-market economies (NMEs). African infant industries may not be able to compete in the short run with imports from NMEs with low cost of production and state control of some of the market factors.

There is a need to account for the fundamental differences between the two categories of exporting countries and to deal with them accordingly. It is important for the region to create a specific treatment for NMEs that takes into consideration their market characteristics and cost of production.

Although it is uncertain to what extent the accountability for NMEs will be needed when the T-FTA is fully implemented, as China could have Market Economy Status by then, it is still submitted that there will be a need to address the cases of NMEs and that African countries may consider having special provisions to deal with this case when needed.

One of the challenges that will face African countries in this regard is that many African countries already recognised China as market economy for political and economic considerations. South Africa, a member of BRICS, has cautioned against imposing countervailing actions against China. The exaggeration in evaluating the potential retaliatory actions of trading partners as response to the application of TDIs by African countries should be put into context.

It has to be considered that many TDI systems incorporate specific provisions on this issue and there should be a distinction between political and trade considerations. Different TDIs instruments are being used by close trading partners and Members of

different RTAs around the world as shown in the NAFTA and Mercosur cases. Even in the BRICS context, the other Members (India and Brazil) have brought many TDI cases against China.

7.3.5 Supportive Factors

7.3.5.1 Address the potential conflicting interests of some African Member States

African countries may have conflicting perceptions, interests and demands when it comes to the application of TDIs. This is in light of their level of economic development, trade relations and level of industrialisation. This issue should be addressed in order to ensure a smooth implementation of the system.

The African regional institutions should address in a proactive way the possible conflicting interests and demands of its Members because of their different economic circumstances and levels of industrialisation, as well as their relations with other trading partners.

The use and application of TDIs can bring different points of views that could be contradicting at certain instances. There should be clear criteria for decision-making in such cases that give priority to the collective African interest while taking the effort to exchange information and views between Member states.

It is acknowledged that this is a very challenging issue especially in the African context given that it is affected by political decisions and sensitivities as well as concerns about national sovereignty.

Having an independent panel of experts that will be tasked with examining issues and making recommendations based on technical analyses could help address this complexity partially.

Additionally, subjecting the decisions to endorsement from the council of Ministers (representing Sovereign Members) can provide the political support and address these issues to certain extent, although this may lead to delays in finalising investigations.

7.3.5.2 Consider having a common competition policy

Some RTAs have common competition policies, or are seeking to have a common competition policy in the future. This is more relevant in cases of deep regional integration such as the EU. Having a common competition policy can indirectly support the same objectives of the TDIs without being necessarily subject to WTO scrutiny as manifested in the DSB. It is recognised that this is a long-term objective that should be preceded with many steps to deepen integration.

The establishment of a regional competition authority can help deal with "unfair competition" at the regional level without necessarily resorting to trade remedies. A common competition policy in Africa can support economic integration in general and can work in parallel with TDIs keeping in mind the different objectives of the two systems.

In the short run, African countries should have national competition policies that can deal with unfair trade and other anti-competitive practices. Additionally, the T-FTA can have clear provisions on cooperation on competition issues including sharing of information and capacity building.

7.3.5.3 Harmonisation of Rules of Origin (RoOs)

RoOs are an integral part of RTAs and FTAs in particular. The divergent RoOs applied by the different RECs in Africa is one of the most important challenges to African integration and specifically in the context of the T-FTA.

This was manifested during the final stages of the negotiation leading to the signing of the T-FTA Agreement in June 2015 where the RoOs annex was one of the most controversial areas. Agreeing on RoOs is a prerequisite or the implementation of the T-FTA.

Effective RoOs are vital to African economic integration and boosting intra-African trade; however, the different systems of RoOs applied in the African context might act as a non-tariff barrier to Africa's trade, and hinder the objectives to reach the T-FTA. African countries need to harmonise and simplify their RoOs to be used in harmony with TDIs to defend African interests.

The existence of lax RoOs in many African countries/RECs with low levels of local content could give more chance for the penetration of exports to the African markets from third parties, which can make use of the removal of trade barriers between African countries to enhance its market share at the expense of African exports. This would undermine the economic regional integration efforts in the continent.

While RoOs are important in any FTA to prevent trade deflection, overly complex RoOs can become a trade barrier. RoOs are very important in Africa; there is a need to apply the right balance in RoOs, which may need higher national content RoOs to protect industries but to not stand as an obstacle to economic integration.

7.3.5.4 Enforcement Mechanisms through Regional Dispute Settlement Body

An efficient and strong enforcement mechanism is a prerequisite for the success of African integration. Lack of implementation is one of the main challenges facing African integration plans.

The T-FTA should enhance enforcement mechanisms by the establishment of a regional dispute settlement body that is fully authorised to implement agreed trade liberalisation measures, review the legality of TDIs decisions and enforce its rulings in cases of non-implementation. This could be the first resort for solving African trade disputes instead of the costly and lengthy procedures in the DSB.

More specifically, in cases of TDIs, it can exceptionally review the legality of the review process, in a similar way to the bi-national panel in NAFTA.

Such a body would help to facilitate cooperation and build trust between Members by ensuring transparent and fair investigation measures and could be less time consuming and less costly than other forums. There should be also a vision to shorten the lengthy time frames for court litigation, which could have negative effects on trade and the usage of TDIs.

This regional DSB could operate on a two-step approach like that of the WTO (Panel and Appellate Body) and should include formal and binding procedures. All disputes should be preceded by consultation between relevant Members to improve understanding and help reaching a mutually agreed solution.

The important development and relative accumulated experiences in RECs such as the COMESA court and the EAC court could present a foundation that could be built on.

7.3.5.5 Capacity Building

Periodical capacity building programmes in the area of TDIs should be an integral part of the T-FTA Agreement.

During Stage I of the negotiations, many Members indicated that they do not have adequate experience in TDIs, and they would require capacity building in order to implement the TDIs provisions.

This is a major shortcoming that should be addressed at the regional level and through the WTO capacity building programmes as well as in collaboration with trading partners.

Additionally, national capacity building programmes and academic programmes in the area of TDIs and international trade law in general can support more effective participation in the international trade system.

Building the capacities of judges and technical experts working in the national legal systems is of importance. Increasing efficiency and effectiveness can shorten the investigation periods, in addition to making sure that it is in line with the requirements of both the ADA and the ASCM which require that investigations should be prompt.

7.4 Conclusions

TDIs can be regarded as tool to unlock the benefits of economic regional integration and ensuring that the integration is not undermined by low cost and unfair trade measures by trading partners.

While there will be many challenges in setting up a regional investigating authority that would conduct trade remedy investigations on behalf of the whole of the T-FTA region, and while it may be necessary to split the T-FTA into geographical sub-regions for purposes of some investigations, experience is territories like the EU has indicated that this is a goal that can be achieved, albeit not overnight. It may be

expedient to first establish regional authorities in each of the three main RECs (COMESA, EAC and SADC) that can later be amalgamated into a single authority.

These REC authorities, and later the single T-FTA authority, should be staffed with qualified personnel from all over the region, which in itself will act as capacity building.

Establishing a regional investigating authority can bring many technical and economic benefits to African countries and can overcome their own limitations.

This ambitious step will need preparation from now. African policy makers need to change their perception toward both the nature and the importance of TDIs.

The second phase of the T-FTA negotiations and the delay in the implementation can provide a time frame for African countries to build their national legislations as well as national capacities in the area of TDIs.

In the meantime, African countries are encouraged to work on enhancing the capacities of the private sector and especially SMEs, improving the flow of information between the government and the stakeholders, and designing a strategy to defend the interests of African exporters.

African countries should also enhance their engagement in the WTO negotiations to improve the WTO rules to the benefit of developing countries.

Many indirect factors can enhance the regional TDI system. African endeavours should address the potential conflicting interests of African countries, work on the harmonisation of the RoOs in addition to enhancing the regional dispute settlement mechanisms. A common competition policy can indirectly achieve the same objectives of TDIs.

The envisaged regional TDI system should take care of African priorities and should envisage to be supportive of African integration objectives. The policy space available to RTAs should be utilised by Members. This can take place through many ways, including by exempting Members of the T-FTA from global safeguards, providing for the acceptance of undertakings from Member States, application of the lesser duty

rule as well as the incorporation of a consultation mechanism before imposing any TDIs.

A well-functioning regional TDI system is a long-term objective. It is an incremental and costly process but the overall positive returns on regional integration may overweight the financial costs and could support economic development both at the national and the regional levels in Africa.

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Interviews

Name	Title	Contacts	Date of Interview
Mr. Folkert Graafsma	Partner Holman Fenwick Willan LLP	+32 (0) 26433404 Folkert.Graafsma@hfw.com	4/7/2012
Mr. Wolfgang Mueller	Head of Unit DG TRADE European Commission	+ 32 2 296 30 10 - wolfgang.mueller@ec.europa.eu	7/7/2012
Mr. Carlos BERMEJO ACOSTA	EU DG Trade	Carlos.BERMEJO-ACOSTA@ec.europa.eu	6/7/2012
Dr. Sanoussi Bilal	Senior Executive - Head of the Economic Governance Programme Editor of ECDPM GREAT Insights (http://www.ecdpm.org/great) European Centre for	+32-2-237 43 89 sb@ecdpm.org	7/7/2012

	Development Policy Management (ECDPM)		
Professor Jean-François Bellis	VAN BAEL & BELLIS	32(0)2.647.73.50 jfbellis@vbb.com • **www.vbb.com**	11/7/2012
Mr. Troben Toft	EU State Aid	02-2957789	10/2012
Mrs. Elizabeth Van Renen	Director SADC, DTI, South Africa	+27 12 394 3050 EVRenen@thedti.gov.za	15/1/2015
Mrs. Carolina Saldanha-Ures	Senior Partner at GO Associados, São Paulo Area, Brazil International Trade and Development	mlle.carolina@gmail.com carolina.ures@goassociados.com.br	20/1/2015
Dr. Sherif Fahmy	Head Of Africa Department & Head of the Technical Office Trade Agreements Sector – Ministry Of Trade & Industry – Egypt	s.elsayed@tas.gov.eg Tel: +20223422347 Fax: +20223420496	9/1/12015
Mr. Jean Daniel Ray	WTO Secretariat	jean-daniel.rey@wto.org,	20/9/ 2013
Mr. Roy Santana	WTO Secretariat	Roy.santana@wto.org	03/2013
Mr. Mustaqeem De Gamma	South African Mission to the WTO	mustaqeem.degama@sawtomission.com	27/2/ 2016
Ms.Kedibone M Machiu	Director Trade Negotiations: Trade Rules International Trade and Economic Development Division, Department of Trade and Industry	+ 27 (0) 12 394-3599 www.thedti.gov.za	29/2/2016
Dr Gustav Brink	Supervisor and professor at the University of Pretoria	gustav.brink@gmail.com	1/6/2016
Mr. Sherif El Sherbiny	Trade Remedies expert GCC Bureau of Technical Secretariat	sherif-elsherbiny@hotmail.com 00966545757165	19/6/2016
Mr. Waleed El Nozahy	Former Director of the WTO Department at the Egyptian Ministry of Trade and Industry		12/10/ 2013

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