Trade Defence Instruments in Africa: Possible Scenarios for Implementation under the TFTA

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ABSTRACT

Africa is moving towards more economic integration, leading to the conclusion of the Tripartite Free Trade Agreement (TFTA). The trade remedies annex, essential to ensure economic survival of industries in member states, must still be developed. This article proposes a gradual approach to achieve integration and a regional trade defence system.

Keywords: anti-dumping, public interest, RECs (or regional economic communities), TFTA, trade defence instruments

I. INTRODUCTION

The signing of the Tripartite Free Trade Area (TFTA) Agreement in Sharm ElSheikh, Egypt, in 2015 represented a milestone towards achieving the African Economic Community (AEC). When fully implemented, the TFTA will create a market of 626 million customers and an aggregate GDP of USD1.2 trillion. In 2014, the total merchandise exports by TFTA members reached USD145 billion (1 per cent of global exports) and merchandise imports of USD211 billion (1.5 per cent of global imports).

The TFTA adopted an innovative and improved approach to African integration that sought to learn from previous African experiences. The Preamble of the Agreement indicates that it was built on three pillars: market access, industrial development, and trade facilitation. The strong focus on non-market access issues can potentially expedite African integration implementation. Nevertheless, the outcome of phase I of the negotiations was less than the planned objectives. The negotiations started with a very ambitious text that included progressive provisions but ended up with a consensus-based text. These negotiations could have brought many important added values to African TDI systems, one of which is the harmonization of the different rules on trade defence instruments (TDIs), include anti-dumping, countervailing and safeguard action, in the three blocks that constitute the TFTA – the Common Market for

Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC). Of the 26 potential TFTA Members,[1] only 16 signed the TFTA Agreement on 10 June 2015[2] and there were many unresolved issues at the time of signing that are prerequisite for the implementation of the Free Trade Area (FTA), including TDIs.

At present only three Tripartite Members have national legislations in the three TDIs: Egypt, South Africa and Zambia, while some other countries, including Kenya, Mauritius and Namibia, have some TDI legislation. Only Egypt and South Africa – on behalf of the Southern African Customs Union (SACU) – have fully fledged investigating institutions,[3] while some countries, including Mauritius, have an *ad hoc* authority that consists of a chairperson, assisted by staff from various Ministries.[4] One of the major challenges of this scenario is that the two customs unions within the TFTA (the EAC and SACU) do not apply TDIs against their Members but continue to apply them against other Members of the TFTA. This differentiates between Members of the TFTA and could complicate further the integration prospects. This situation needs to be addressed to provide the TFTA members with an effective TDI system. If there are efficient TDIs measures between Members of African integration, countries may be more inclined to implement their trade obligations and not to resort to other trade protectionist measures, which can jeopardise the essence of African integration.

The initial TDI proposal presented in December 2010 included a number of very ambitious objectives, which faced strong challenges, practical realities and diverse points of views from Members, eventually leading to a deadlock on the issue. This article focuses on the unresolved issue of the TFTA TDI legal framework, with the objective of identifying possible scenarios for African policy makers in phase II of the negotiations.

The short-term objective of the tripartite area is to reach FTA level which implies a high level of trade liberalization. Article XXIV of GATT requires that Members of an FTA remove the duties and other restrictive measures on substantially all intra-trade. The determination of what constitute "substantially all trade" is challenging and the WTO Dispute Settlement Un-

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[1] This is based on the total membership of the three RECs.

[2] Angola, Burundi, Comoros, DRC, Djibouti, Egypt, Kenya, Malawi, Namibia, Rwanda, Seychelles, Sudan, Tanzania, Uganda, Swaziland, and Zimbabwe.

[3] O Illy *Trade remedies in Africa: Experiences, challenges and prospects* ICTSD (2015)

[4] S 72 of the Trade (Anti-Dumping and Countervailing Measures) Act 2010.

derstanding (DSU) has addressed this vagueness several times, however this issue is usually subject to debate in the WTO committee on Regional Trade Agreements (CRTA). Nevertheless, it could be assumed that the WTO law is in favour of a high degree of sector coverage as implied in paragraph (8) (a) (i) of GATT which was further confirmed in the *Turkey-Textiles* where the WTO Appellate Body (AB) defined the term "substantially" as requiring a higher degree of sameness. [5]

Following this introduction, this article is divided into three main sections. Section II compares the initial draft of the TFTA with the agreed outcome in June 2015, with the objective of contrasting the initial ambitious objective with the realistic consensus among Member States. Section III discusses the application of TDIs in other regional groups while Section IV proposes possible solutions for the TFTA.

II. AMBITION VERSUS REALITY

A. Introduction

The TFTA proposes to establish a free trade area (FTA) between the 26 countries that form part of the three regional economic communities (RECs). This would include removing customs duties between member states.[6] In the transformation towards a single FTA, while normal customs duties will be (gradually) removed, TDIs may still be applied.

One of the major questions is whether TFTA members should have the right to use TDIs against other member states or whether TDIs should only be applied to non-Members, especially as the TFTA progresses over time to become a customs union. Another important question, regardless the answer to the first question, is how to achieve this.

TDIs could be maintained in the T-FTA. TDIs do not fall under "other restrictive measures" in Article XXIV of GATT. The current practice of major FTAs confirms that Members could maintain the application of TDIs as they are not categorised as prohibited measures by Article XXIV. If TDIs are to be removed, this could put limitation on FTA Members in applying legitimate trade tools that may be required at the early stages of trade liberalization. Up to now, there was no decision from the WTO DSU that rendered the application of TDIs on intra-FTA trade as non-legitimate.

[5] Appellate Body Report, *Turkey-Textiles* para.50.
[6] Art. XXIV of GATT 1994.

TDI negotiations were one of the contentious issues in the negotiations process. It proved that there were many different approaches and conceptions toward TDIs, often related to differences in the level of development, the application of TDIs at national level and the understanding of the importance of TDIs to regional integration.

Several of the smaller Members were in favour of simple and favourable TDI rules since they have neither national laws on TDIs nor technical capacities or investigating authorities. On the other hand, the more advanced economies such as Egypt and South Africa were supportive of an advanced TDI system.[7]

As a compromise, at the end of stage I Members adopted a simplified set of TDI rules on a transitional basis and decided to postpone negotiations on whether to develop detailed rules to the second stage of negotiations.[8]

Comparing the original proposal against the final outcome provides the a number of stark contrasts, ranging from the establishment of a regional authority versus maintaining national authorities; detailing investigation procedures versus only including generalities; removing or maintaining the use of TDIs between TFTA members; the use of trade restrictive practices other than TDIs, especially to protect infant industries; and what role public interest should play in investigations. We now consider each of these issues.

B. Establishment of Regional Investigating Authority vs. Maintaining the Status Quo

The initial proposal was very progressive in the sense that it sought to overcome the national limitations of Members. One of its most important features was that it provided for the establishment of a sub-committee on Trade Remedies (CTR) that was supposed to act as a quasi-regional investigating authority.[9] It was planned that this regional authority would assume the duties of national authorities in conducting investigations, including the collection of data; the determination of the existence of dumping, subsidisation or increased imports; the determination of injury; and the need to take action to remedy the injury in accordance with the WTO Agreements.[10] This would have gone beyond the current situation in the three RECs where investigations are conducted by national authorities except for the Southern African Customs Union (SACU), which forms part of SADC, where the South African investigating

[7] According to interviews with Egyptian and South African negotiators.
[8] Art. 16 of the TFTA Agreement.
[9] Art. 2 of Annex 6 of the proposed TFTA Agreement (December 2010)
[10] Arts. 8 and 9 of the Proposed TFTA Agreement and Art. 2 of Annex 6.

Authority, the International Trade Administration Commission (ITAC), assumes responsibility for all TDI investigations for SACU members.[11]

The establishment of this authority would have been an unusual positive step in the context of regional integration. It could have been more conducive to African integration objectives in the long run, as it could have provided an effective framework for the protection of the largely infant African industries and consequently support intra-African trade. It is understood that this ambitious objective requires a deep level of integration that does not exist at this stage and may have faced challenges regarding the national sovereignty of Members. It is submitted that this goal had to do with the long-term objective of the Tripartite area which is to establish a customs union. 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.

This step did not materialise and the final text leaves the investigation powers in the hands of national authorities where they exist, thus failing to remedy the present situation where most African countries do not have effective national bodies. The TFTA, however, acknowledges the importance of dealing with TDIs from a regional perspective as it requires Members to cooperate in TDI investigations in connection with imports from other Members or from a third country.[12]

Where Members do not have national authorities, the Sub-Committee could undertake the investigation on the Member's behalf. At the signing of the TFTA, no Sub-Committee was established. The creation of a TDI Sub-Committee could have resulted in discrimination against non-Members and favouritism toward Members as manifested in different regional groups including NAFTA. Although this discrimination could bring negative effects to global trade and welfare, it can positively support regional integration in Africa through increasing intra-trade.

C. Detailed Investigation Procedures vs. Generalities

The initial draft gave very broad room for applicants to lodge applications. The investigation starts after application to the Sub-Committee by either a national or regional industry or a TFTA Member on behalf of a domestic or regional industry.[13] Allowing investigations to start on the basis of a request from a Member could compensate the weakness of the private

[11] G Brink (2012) *Anti-Dumping in South Africa* Tralac Working Paper 07/2012, 52.
[12] Art. 20 of the draft TFTA Agreement (December 2010)
[13] Art. 3 of Annex 6 of the draft TFTA (December 2010).

sector and its institutions in some TFTA Members. As regards definitions, the initial Agreement adopted a broad approach. The Annex defined "injury" and "threat of injury" as "economic circumstances resulting from dumping, subsidies or an unforeseen upsurge in imports that negatively affect the performance of an industry."[14] This definition is broader than the WTO definition and did not differentiate between material injury in the case of dumping or subsidised imports and serious injury in the case of safeguards.

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.[15] It is not clear to what extent the Sub-Committee decisions would be affected by technical as opposed to political factors.

The initial text combined both basic text and detailed Provisions. The text was drafted in a way to be in line with the relevant WTO Agreements,[16] while the proposed Annex 6 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 final Agreement, however, only restated the rights and obligations of Members under WTO and RECs.

D. Maintaining the Application of TDIs among Member States

Both the initial proposal and the final outcome provided for the maintenance of the application of TDIs on intra-trade. This has to do with the short-term objective of the TFTA, which is the establishment of an FTA.

The initial proposal included some extra tools that could substitute anti-dumping and countervailing duties with price undertakings pending the approval of the Sub-Committee on Trade Remedies.[17] A price undertaking is a commitment by an exporter to raise the export price of the product to a satisfactory level to either remove the margin of dumping or subsidization or the injury caused by the dumping or subsidized exports.[18] If such undertaking is accepted, the rationale for a protective measure falls away

[14] Art. 1 of Annex 6 of the draft TFTA Agreement.
[15] *Ibid*.
[16] Art. 1 of Annex 6 of the draft TFTA proposal.
[17] *Ibid*, Art 4.
[18] Art. 8.1 of the Anti-dumping Agreement; Art 18.1 of the Agreement on Subsidies and Countervailing Measures.

The flexibility in accepting price undertakings could serve as favourable treatment to Members compared with third parties as it could suspend investigations against Members of RTAs without the adoption of duties, whereas duties would be applied to dumped or subsidised imports from non-Members.

One of the major features of the original proposal was that it envisaged the emergence and consolidation of regional industries. The Agreement provided for the protection of regional industries which could be a long-term objective that is more relevant in deep integration models.[19] Annex 6 defined regional industry as an industry covering the region of the three blocks and any other regional organisations that join the Tripartite Agreement.

Apart from notification and consultation requirements, the concluded TFTA text does not give any tangible preferential treatment to its Members. 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.[20] It is understood that Members will apply their regional rules on intra-REC trade. Realizing the difficulties in the negotiation process, the final Agreement stressed that TDIs are only applicable during a transitional period. [21] The length of this transitional period is not fixed and it may lengthy if we consider the history of African integration and implementation of trade provisions.

The concluded Agreement places anti-dumping and countervailing measures in one category and safeguard measures in another category, which has to do with their different objectives. In connection with global safeguards, the TFTA restates the requirements of the WTO in this regard.[22] Members can also impose bilateral safeguards to the extent necessary to prevent or remedy serious injury and specifically in cases where a Member of the TFTA suffers from serious injury as a result of the trade liberalization obligations undertaken in accordance with Annex II of the Agreement.[23]

E. TDIs and other protection Tools

Both the initial proposal and the final outcome included trade tools that can act in a similar way to TDIs.

[19] Annex 6 of the draft TFTA (December 2010).
[20] Art. 16.1 of the TFTA Agreement.
[21] *Ibid*, Art. 16.3.
[22] *Ibid*, Art. 18.
[23] *Ibid*, Art. 19.

In the initial proposal, 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.[24] It could also recommend the restriction of the export of products to prevent or relieve critical shortages of foodstuffs or other essential products.[25]

In the same vein, while the final TFTA deals with the elimination of quantitative restrictions, it 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 WTO Agreement on Safeguards and Articles 17 and 18 and Annex II on Trade Remedies of the TFTA.[26] Additionally, 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,[27] but only after that member has taken all reasonable steps to overcome these difficulties and these measures must be reviewed annually.[28] These limitations are meant to decrease the resort to such emergency measures.

The draft included several flexible provisions that were customised to the special needs and situations of African countries which are largely infant and small. An infant industry is defined as "a new industry of national strategic importance that has been in existence for not more than five years".[29] 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. Annex 6 took a broad approach to the definition of TDIs and defined them as: "measures recommended by the Sub-Committee on Trade Remedies to protect domestic industries in accordance with this Annex". [30]

This suggests additional measures to the three TDIs, including that a Member could adopt appropriate measures to protect its infant industries by imposing tariffs on like goods originating from other TFTA Members.[31] The draft Agreement placed two restrictions in this regard including that it shall only come after taking all reasonable steps to overcome the diffi-

[24] Art. 7 of Annex 6 of the draft Agreement (December 2010).
[25] *Ibid*.
[26] Art. 11 of the TFTA Agreement.
[27] *Ibid*, Art. 25.
[28] *Ibid*.
[29] Art. 21 of the Proposed Agreement (December 2010).
[30] *Ibid*, Art. 4.
[31] *Ibid*

culties facing its industries and provided that the measures are applied on a non-discriminatory basis.[32] These measures were also made under the review of both the Tripartite council which would determine the period and the nature of these measures and the Trade and Customs Committee which would review these measures periodically.[33]

The text authorised the sub-committee to order enterprises doing business or directly affecting trade and industries in the TFTA area to ensure and maintain conditions for fair competition and for sustainable human development. This is very broad in nature and can have important implications on Foreign Direct Investment (FDI). Although such FDI will bring positive economic and social impacts to host countries, it may be difficult to interpret these conditions and may be discouraging for investment because of the additional costs associated therewith.

Additionally, the Sub-Committee could recommend any other measures in the public interest, consistent with the appropriate protection of a domestic or regional industry,[34] without specifying what these other measures could entail.

The initial Agreement included some provisions on competition which could have acted as a substitute to TDIs in certain cases, such as predatory pricing, and consequently would have supported integration objectives. [35]. However, these provisions were not included in the final Agreement.

F. Pubic Interest Clause

The Sub-Committee decisions must take into consideration public interest in TDIs and competition policy related decisions, consistent with the appropriate protection of a domestic or regional industry.[36] This provision seemed to be an open door to include any other measures not specified in this 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, consumers and producers importing intermediate components.

The WTO Anti-Dumping[37] and Subsidies[38] Agreements provide that the decision whether or

[32] *Ibid*.
[33] *Ibid*.
[34] *Ibid*.
[35] Art. 23 of the draft TFTA Agreement (December 2010).
[36] *Ibid*, Art. 4(2)(f).
[37] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

not to impose a definitive measure is a decision the authorities of the importing Member must take, and provide that it "is desirable that the imposition be permissive in the territory of all Members".[39] This indicates that it is not compulsory that a definitive measure be imposed even if all the requirements for imposition have been met.[40] The Safeguard Agreement requires in Article 3.2 that the investigating authority provide an opportunity to all parties to submit their views whether or not the application of safeguard measures will be in the public interest.

National or public interest can differ depending on the eye of the beholder and it is therefore important that the concept be properly defined before it can be applied as a concept.[41] *Brink* has indicated that trade remedies "relate to international trade, and as dumping [or subsidised imports] results in a negative impact on the industry producing the like product, yet a positive effect on downstream users and consumers, national interest in such investigations has to be considered with special circumspect. This may mean that the national *economic* interest must be considered" in more detail than *public* interest.[42]

Major jurisdictions differ in the way they oblige the national investigating authorities to consider public interest in their investigations[43] as explained in the coming sections. There is a room for incorporating this clause to achieve the policy objectives of the tripartite Members.

III. MAJOR REGIONAL TDIS SYSTEMS

A. Introduction

The TFTA negotiation process revealed that Members envisaged drawing lessons from and adopting some of the approaches adopted by other regional blocks. Several TFTA meetings discussed how other FTAs have been able to develop and implement user-friendly mechanisms for the three TDIs that are WTO-consistent and suited to regional realities.[44]

Studying the major examples of regional integration such as the Association of South East Asian Nations (ASEAN), the European Union (EU), Mercosur and the North America Free Trade Agreement (NAFTA) can reveal the importance economic blocks attach to TDIs as a major component for effective integration that is conducive to regional economic develop-

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[38] Agreement on Subsidies and Countervailing Measures.

[39] Art. 9.1 of the Anti-Dumping Agreement; Art. 19.2 of the Subsidies Agreement.

[40] A Aggarwal *The WTO Anti-Dumping Agreement: Possible Reform through the inclusion of a Public Interest Clause* (2004) (Working Paper 142, Indian Council for Research on International Economic Relations) 6 (available at http://www.icrier.org/pdf/wp142.pdf) (accessed 14 March 2017). See also P Moen *Public Interest Issues in International and Domestic Anti-Dumping Law: The WTO, European Communities and Canada* (1998) 39.

[41] G Borjas (2001) *Heaven's Door* (Princeton University Press) 180.

[42] G Brink "National Interest in Anti-Dumping Investigations (2009) *South African LJ* 316 at 319.

[43] See in general Moen *Public Interest Issues in International and Domestic Anti-Dumping Law: The WTO, European Communities and Canada* (1998) and Brink "National Interest in Anti-Dumping Investigations (2009) *South African LJ* 316-359.

[44] Report of the third meeting of the technical working group on Trade Remedies and Dispute Settlement in Bujumbura, Burundi from 4 to 7 August 2014.

ment. It can also provide some example of the implementation of TDIs to support economic development and regional integration that could be useful in analysing the possible future scenarios in the TFTA TDI negotiations.

B. ASEAN

The legal framework for TDIs is found in Articles 86 and 87 of the ASEAN Trade in Goods Agreement (ATIGA), and retains the rights and obligations of the WTO TDI agreements.

ASEAN permits the application of TDIs on intra-trade, in line with the current level of integration which stands at FTA level. ASEAN incorporates coordination and notification mechanisms before imposing TDIs on intra-trade, as highlighted in the Protocol on Notification.[45] Members are requested to provide sufficient information regarding the proposed action or measure to be taken, including a description of the action or measure to be taken; the reasons for undertaking the action or measure; and the intended date of implementation and the duration of the action or measure.[46]

The provisions of the Protocol exclude actions taken under emergency or safeguard measures of the ASEAN economic agreements.[47] Where a Member imposes global safeguard measures it does not exclude other Members from these measures.[48] In practice, ASEAN members have been active in implementing TDIs against each other. For example, the top target of Malaysia's anti-dumping measures is Indonesia, followed by the Republic of Korea and China.

The ASEAN system permits the imposition of bilateral safeguards, i.e. against other Members, in cases where the implementation of the Agreement results in an increase in imports of a particular product from other Members such as to cause serious injury to like or directly competitive products.[49] In such cases 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.[50] Members are required to notify the ASEAN Council as well as engage in a consultation process as per the guidelines in Article 8 of the Agreement.[51]

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[45] Art. 4 of the ASEAN Protocol on Notification Procedures.
[46] *Ibid.*
[47] *Ibid*, Art. 1.4
[48] See for example the Philippines safeguard measures on ceramic wall and floor tiles in 2002.
[49] Art. 6.1 of the ASEAN FTA.
[50] *Ibid*.
[51] *Ibid*, Art. 6.3.

There is no regional investigating authority in ASEAN. National investigating authorities conduct the investigations.

C. The European Union

The EU is one of the most integrated economic blocks in the world. The EU is based on Treaty-based commitments with supranational organisations that sets its objectives and manage the integration process among its Members.[52]

Since the EU is at a level of a customs union with a common external tariff, TDIs are prohibited on intra-trade.[53] What differentiates the EU from other customs unions is the creation of a single market with free movement of factors of production, including labour and capital. Although the EU has prohibited the application of TDIs on intra-trade, it is still one of the major users of TDIs against external trade.[54]

The EU TDI regulations are part of the Common Commerce Policy. They are governed by the *"acquis communautaire"* which is the entire body of European laws including all the treaties, regulations and directives, as well as judgments by the European Court of Justice (ECJ).

The EU system differentiates between anti-dumping and countervailing measures on one hand and safeguard measures on the other hand. The legal basis for the EU's anti-dumping and countervailing measures is the Anti-Dumping Regulation[55] and the Anti-Subsidy Regulation,[56] jointly referred to as the two basic Regulations. These regulations have evolved through a series of revisions, the most recent of which took place in 2009. 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.[57]

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[52] According to Article 9 of the Lisbon Treaty, the Union's institutions are: The European Parliament; the European Council; the Council; the European Commission; the European Court of Justice; the European Central Bank; and the Court of Auditors.

[53] According to Arts. 91 and 113 of the Treaty of Rome.

[54] According to WTO TDI statistics available at https://www.wto.org/english/tratop_e/adp_e/adp_e.htm, between 1995 and 2014 the EU initiated 547 TDIs investigations and applied 336 TDIs measures.

[55] 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.

[56] Council Regulation (EC) No 597/2009 of 11 June 2009 on protection against subsidized imports from countries not Members of the European Community.

[57] 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

The EU manages trade and investment relations with non-EU countries through the EU's trade and investment policy.[58] Trade policy is the exclusive power of the EU as opposed to individual member states and only EU institutions can legislate on trade matters and conclude international trade agreements.[59] 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.[60] The European Parliament influences the negotiation process by issuing trade related legislation and by approving concluded trade agreements.[61]

The EU common competition policy addresses some of the unfair trade measures among Members, including predatory pricing and some types of state subsidies.[62] The laws of competition demand more requirements than anti-dumping, and there is a question about its effectiveness against possible dumping from new EU Members as was manifested in the EU duties on ceramic tiles.[63] The elimination of TDIs and the creation of a single market necessitate the establishment of a level playing field where Members cannot favour their national companies through financial assistance. This requires the prohibition of state aid granted by a member state or through state resources in any form whatsoever where it would give the recipient entity an advantage on a selective basis. This excludes non-specific aid with positive developmental and social implications.[64] To ensure that state aid does not harm competition, a permanent review mechanism under the auspices of the European Commission (EC) reviews different kinds of state aid and may decide to abolish or alter any state aid that does not conform to the common market rules within a specific period of time.[65]

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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.

[58] 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).

[59] In accordance with the Treaty of Lisbon signed on 13 December 2007 amending the Treaty on EU and the Treaty establishing the European Community.

[60] 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).

[61] Arts. 9 (b) and 188 (c) of the Lisbon Treaty.

[62] Articles 101 to 109 of the Treaty on the Functions of the EU and Protocol No 27 on the internal market and competition, where it is made clear that fair competition is included in the objective of the internal market in Article 3(3) TFEU.

[63] J Kasteng *Dumping or Competition: The EU anti-dumping Duties on Ceramic Tiles* National Board of Trade Sweden (2012).

[64] Art. 93 of the Treaty on the Functioning of the European Union (TFEU).

[65] *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.

A major feature of the EU TDI system is the establishment of a regional investigating authority, the European Commission (EC). The EC coordinates with Members in the investigation and imposition stages, especially in collecting data related to injury determinations.[66] The EC monitors the application of TDIs, follows up the enforcement of measures and negotiates future rules with third parties.[67]

The EU law and applications go beyond the provisions of the WTO. This is manifested mainly in certain aspects related to invocation criteria, investigation procedures, the application of the "Union interest test"[68] and the "lesser duty rule".[69] The EU responds to WTO Dispute Settlement Body (DSB) rulings against through regular updates of its regulations.[70] This confirms the robust nature of regional TDI systems and the need for continuous improvements.

The application of the Union interest test rule is one of the features of the EU TDI system and is usually considered in every single investigation, although it seldom affects the outcome.[71] The EU seeks to ensure that the implementation of TDIs 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. The investigations analyse all the economic interests involved, including the positive / negative effects on domestic industry, users, consumers and traders of the product concerned.[72]

The right of defence is one of the EU fundamental rights. The EC introduced in 2007 the position of "independent hearing officer".[73] The hearing officer's 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.[74] The hearing officer ensures that every person has the right to be heard before the imposition of measures that could affect him.

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[66] Van Bael & Bellis *EU Anti-Dumping and Other Trade Defence Instruments* Alphen aan den Rijn, Netherlands: Kluwer Law International (2011) 5th ed. 19.
[67] *Ibid*.
[68] Art. 4.3 of (EC) regulation No 1225/2009.
[69] Art. 18 of (EC) regulation No 1225/2009.
[70] The EU regulations 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.
[71] Art. 21of Council Regulation (EC) No 1225/2009 of 30 November 2009, Van Bael & Bellis (2011) *EU Anti-Dumping and Other Trade Defence Instruments* (5th ed.) 379-397.
[72] *Ibid*.
[73] "Hearing Officer" http://ec.europa.eu/trade/trade-policy-and-you/contacts/hearing-officer/index_en.htm (accessed 15 November 2015).
[74] 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).

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.[75] Access to the hearing officer may decrease the tendency to revert to the judicial system and the DSB in cases involving the EC.

The results of all TDIs investigation are published in the EU's Official Journal.[76] The EC has an obligation to report its TDI activities to the EU Parliament.[77] It maintains a public website on background information, information on investigations, and measures statistics[78] and has recently developed a system whereby all information in an investigation is available to interested parties on a password-protected website.[79]

A Helpdesk was set up to respond to requests for information by SMEs.[80] The TDI website also specifically highlights an SME's role in TDI proceedings and provides simplified technical advice.[81]

Having a regional judicial system is one of the most important features of the EU system. It is an important requirement when TDI 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 and the Court of Justice.[82] This includes the procedural rights of the parties, hearings and access to non-confidential files.

D. The Southern Common Market (Mercosur)

The Southern Common Market (Mercosur) covers trade in goods and services, and was notified to GATT under the Enabling Clause and GATS Article V.[83] Even though Mercosur is at the level of a customs union, there are a high number of exceptions in the application of the common external tariff in addition to the implementation of trade remedies on intra-trade.

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[75] *Ibid*.
[76] European Commission (2013) 32nd Annual Report.
[77] Resolution of 16 December 1981.
[78] "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).
[79] See e.g. the EU web-based syste at https://webgate.ec.europa.eu/tron/TDI (accessed 15 February 2017).
[80] European Commission (2013) 32nd Annual Report.
[81] *Ibid*.
[82] M Yilmaz *Domestic Judicial Review of Trade Remedies: Experiences of the Most Active WTO Members* (ed) Cambridge, UK: Cambridge University Press (2013); Annual Reports of the EC to European Parliament.
[83] "Southern Common Market" <http://rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=130> (accessed 1 December 2015).

WTO TDI statistics show that Members use trade remedies extensively against each other.[84] Mercosur established a common regulatory framework against dumped imports from countries not Members of the block[85] and includes disciplines, procedures and rules on anti-dumping and countervailing investigations related to imports from a Mercosur Member.[86]

For the period from 1995 to 2014 the six Mercosur Members and Associates acting independently have initiated 756 TDIs investigations and have applied 472 TDIs measures, with anti-dumping cases comprising the overwhelming majority thereof. Argentina and Brazil are major international users of TDIs.[87]

Although Mercosur is at the level of a customs union, there is neither a regional investigating authority. TDI investigations are conducted by the national authorities according to national laws and regulations which differ from one member to another. There are different deadlines, different tariff classifications, and different investigation methodologies.[88] The main preferential treatment between Members is that price undertakings are more likely to be accepted from Members than from non-Members[89] and that Members are required to notify each other and the Mercosur trade commission before conducting investigations.[90]

Trade remedies are permitted among Mercosur Members. The Mercosur vision, provided in the Protocol on defence of competition,[91] was to permit Members to use 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 was drawn up during the transition period.[92] However, this has not materialised. Because of the failure to reach agreement on the elimination of TDIs between Members, Mercosur in-

[84] According to the WTO TDIs statistics, available at https://www.wto.org/english/tratop_e/adp_e/adp_e.htm (accessed 10 December 2016), Argentina has initiated 53 AD investigations against Brazil while Brazil has initiated 12 AD investigations against Argentina. Both countries have initiated AD investigations against other Mercosur partners.

[85] Mercosur regulation CMC/DEC N. 11/97

[86] Mercosur CMC/DEC N. 64/00

[87] Based on WTO TDIs statistics available at https://www.wto.org/english/tratop_e/adp_e/adp_e.htm (accessed 10 December 2016)

[88] "Southern Common Market" <http://rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=130> (accessed 1 December 2015). See also De Artaza & Cwiertz "Argentina" and Saldanha-Ures "Brazil" in Bienen, Brink & Ciuriack (2013) *Guide to International Anti-Dumping Practices*.

[89] "Southern Common Market" <http://rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=130> (accessed 1 December 2015).

[90] Mercosur CMC decision 22/02.

[91] Protocol for the Defence of Competition.

[92] Mercosur Market Council Decision 18/96.

corporated the WTO TDI Agreements in its legal system as a temporary mechanism to deal with unfair trade measures.[93]

Intra-regional safeguard measures were permitted in Mercosur during the transition period provided it was applied only once, and up to a one-year period.[94] Despite the expiry of bilateral safeguard measures at the end of 1994, Argentina requested the continuation of these measures in the context of Mercosur.[95] These pressures resulted in the establishment of the Mechanism of Competitive Adaption (MAC) in 2006, which permits Members to adopt bilateral safeguard measures in cases of injury to the domestic industry caused by a substantial increase in imports from the other Member.[96] This mechanism allows the limitation of importation for a maximum of three years when there is substantial growth in imports in a short period of time on condition 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.[97] 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.[98]

The Mercosur Council adopted common legislation on global safeguards in 1996 which retains the rights and obligations of Article XIX of GATT and the Agreement on Safeguards and establishes procedures for the application of global safeguard measures by Mercosur.[99] These rules regulate the application of safeguards both at the level of Mercosur and individually, which could be in the form of the suspension or elimination of preferences.[100] 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

[93] Mercosur CMC decisions 13/02 and 14/02.

[94] Annex IV to the Treaty of Asuncion.

[95] 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 >

[96] "Mechanism of Competitive Adaption" < http://www.baptista.com.br/news/contmar06.htm>

[97] P Franko *The Puzzle of Latin American Economic Development*, 3rd ed. Lanham, USA: Rowman & Littlefield Publishers (2007) 263.

[98] Mercosur Report Number 14 (2008-2009) *Institute for the Integration of Latin America and the Caribbean* ii.

[99] Except for Agriculture and Textiles, which are regulated in accordance with WTO law.

[100] 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.

industry affected to the secretariat of the CTRS, which may allow the imposition of safeguard measures for four years that can be extended by another six years.[101] This regulation is not yet in force since not all Members have incorporated it into their national legislation. In practice, the imports from members are usually excluded from the application of global safeguards in accordance with the parallelism principle.[102]

Dispute settlement in Mercosur is regulated under the Protocol of *Olivos,* which created a Permanent Tribunal of Review for disputes arising from member countries.[103] Because Mercosur incorporates WTO Agreements in its regulations, Members have the choice between the Mercosur mechanism and the DSB.[104]

E. The North American Free Trade Agreement (NAFTA)

NAFTA is treaty-based with significant autonomy of Members in the conduct of trade matters. 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 TDIs is an interaction between the national laws of the three Members and the legal texts of the NAFTA Agreement, comprising the national legislations of the three Members on TDIs; Chapter Nineteen of the NAFTA Agreement, which deals with appeals against anti-dumping and countervailing duty determinations; and 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.

The NAFTA TDI system takes into consideration the asymmetry between the US and Canada (two developed Members) and Mexico (a developing Member). This is manifested in the establishment of the Bi-National review mechanism which is considered a way to overcome the challenges that may arise from the different legal system in the three Members.

NAFTA has adopted an innovative hybrid approach in dealing with TDI investigations and reviews. While the investigation functions are conducted by national authorities, its decisions are subject to reviews by bi-national committees within the NAFTA structure.[105] The review presents a new layer of scrutiny and accountability, which subjects national authorities to an

[101] Art. 9 of the ASG.
[102] See for example Panel Report, *Argentina-Footwear*, WT/DS/121/R.
[103] Signed in February 2002 and came in force since January 2004.
[104] WTO Brazil Trade Policy Review (2013) 41.
[105] Arts 1904(2)-(3) and Annex 1911 of NAFTA.

important constraint. This distinctive feature of NAFTA has to be considered in 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.[106] It bases its decisions on whether the party has followed the standards of judicial review of administrative agency determinations.[107] 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.[108] The decisions of this panel do not seek to harmonise the national laws of the three Members.

The decisions of the panel are binding for its parties.[109] Parties may not appeal decisions to the national courts, nor may national legislatures enact legislation to overturn those decisions.[110] 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.[111] So far here have been three ECC requests, all by the US, and in each instance the challenge was unsuccessful.[112] Th bi-national panel system improves certainty in the trade relations between the three countries.

The creation of the bi-national review mechanism 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 shown that two thirds of Canadian appeals against US TDI actions before bi-national panels were remanded compared with one-third for non-NAFTA countries before the US Court of International Trade.[113] 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.[114]

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[106] *Ibid*.

[107] *Ibid*. Bowman *et al Trade Remedies in North America* Alphen aan den Rijn, Netherlands: Kluwer Law International (2010).

[108] Art. 1904 (3) of the NAFTA Agreement; Mcinerney & Lynch in Yilmaz M (ed) (2013) *Domestic Judicial Review of Trade Remedies: Experiences of the Most Active WTO Members* Cambridge, UK: Cambridge University Press.

[109] *Ibid*, Art. 1904.9.

[110] *Ibid*, Art. 1904.11.

[111] Art. 1904.13 of NAFTA.

[112] "NAFTA Chapter 19 Extra challenging Committee Decisions" http://www.worldtradelaw.net/databases/naftaecc.php (accessed 5 May 2016).

[113] Rugman & Anderson *NAFTA and the Dispute Settlement Mechanisms: A Transaction Costs Approach* The World Economy (1997) 935-50.

[114] K Jones *Does NAFTA Chapter 19 make a difference? Dispute Settlement and the Incentive Structure of US/Canada Unfair Trade Petitions* 18 Contemporary Economic Policy (2000) 145.

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,[115] although this provision has never been invoked.

TDI investigations are still conducted by the national authorities. In the US and Canada there are separate bodies that deal with the anti-dumping or countervailing investigations and injury determinations.[116] In safeguards, the decision could be affected by political considerations. The ITC conducts safeguard investigations upon request from the national industry, and sends its recommendations to the President of the US, who can accept or reject the recommendations of the ITC or decide to adopt an alternative decision.[117] In Canada, the Tribunal may recommend to the Government safeguard measures, which may be accepted or rejected.[118] This lengthy and political process in Canada and the US may affect the frequency of using safeguard measures, but it also accounts for political considerations that could be taken into consideration before imposing such measures. In contrast to its two partners Mexico has a single investigating authority responsible for all aspects of all three TDIs.[119]

All investigating authorities' decisions in the three countries may also be appealed to a national judicial review.[120] Mexican law and practice must be interpreted in conjunction with the WTO Agreements, whereas in the US and Canada national law is understood to being superior to the WTO Agreements in the event of differences.[121]

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[115] Art. 1903 of NAFTA.

[116] The Canada Border Services Agency makes dumping and subsidy determinations, while the Canadian International Trade Tribunal conducts injury determinations. In the US the International Trade Administration of the Department of Commerce makes dumping and subsidy determinations, while the International Trade Commission conducts injury inquiries.
As per the Special Imports Measures Act.

[117] Sec. 201 of the USA Trade Act.

[118] Sec. 42 of Canada Special Import Measures Act.

[119] As per Chapter V of the Mexican Foreign Trade Act, the Ministry of Economy makes the dumping, subsidy, and injury determinations.

[120] Art. 76 of Canada Special Import Measures Act; s. 28 of the US Trade Act; Art. 96 of the Mexican Foreign Trade Act; Miranda & Partida in Yilmaz M (ed) *Domestic Judicial Review of Trade Remedies: Experiences of the Most Active WTO Members* Cambridge, UK: Cambridge University Press (2013); Lanouette & Kent in M Yilmaz (ed.) *Domestic Judicial Review of Trade Remedies: Experiences of the Most Active WTO Members* Cambridge, UK: Cambridge University Press (2013).

[121] Bowman, supra note 98.

WTO statistics show that the three Members are active in initiating and imposing trade remedies against each other as well as against third parties, with anti-dumping comprising the overwhelming majority of cases.[122]

In NAFTA, there is less regard to the effect of TDIs on consumer welfare, as the main priority is the protection of domestic industries.[123]

The USA previously expressed "philosophical concerns" with a Canadian proposal to give more weight to consumers' interests wondering how judgments on legitimate domestic concerns would be made, and whether national decisions would be challengeable under the DSU.[124]

On the other hand, Canadian legislation requires that public interest should be considered upon request of any interested parties or through the initiative of the investigating authority, typically through the application of the lesser duty rule.[125]

NAFTA requires Members to endeavour reaching a mutually accepted solution before imposing trade remedies.[126] NAFTA rules do not prohibit the provision of subsidies unless they cause injury. Unlike the EU, there are no detailed provisions on state aid.

Bilateral safeguards were permitted in NAFTA for a transitional period of ten years.[127] This safeguard mechanism was exclusive to bilateral trade between Mexico on one hand and the US and Canada on the other.[128] In NAFTA, a member could choose to initiate safeguard investigations either under the WTO and the NAFTA mechanisms. Unlike anti-dumping and countervailing measures, there is no bi-national commission to review the consistency of national authority safeguard determinations.

All the three Members exclude, in principle, their partners from the application of global safeguards, provided imports from Members, considered individually, do not account for a

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[122] According to the WTO TDIs statistics available at https://www.wto.org/english/tratop_e/adp_e/adp_e.htm (accessed 10 December 2016), NAFTA Members acted independently, have initiated 1078 TDIs investigations and have applied 690 TDIs measures with active application on intra-trade.

[123] G Brink "National Interest in Anti-Dumping Investigations" *South African Law Journal* (2009) 316-359, 328&329.

[124] TN/RL/GEN/85; Bridges Volume 10-Number 4.

[125] S 41 of the Special Import Measures Act. See also G Brink "National Interest in Anti-Dumping Investigations" *South African Law Journal* (2009) 316 at 328.

[126] Art. 1903 of NAFTA

[127] Chapter 8, Article 801 and Annex 801.1 of NAFTA.

[128] Estevadeordal, Suominen & Teh (eds) *Regional Rules in the Global Trading System* Cambridge, UK: Cambridge University Press (2009).

substantial share of total imports which means among the top five importers, and such imports do not contribute importantly to serious injury.[129]

IV. PROPOSALS FOR MOVING FORWARD

The disagreement between Members of the TFTA at the end of stage I of the negotiations came as no surprise. The negotiations were a reflection of the different levels of development of Members. It revealed a growing concern among African Governments about possible TDIs to address unfair trade practices and surges in imports,[130] and parties could not agree on *sui generis* and flexible anti-dumping and countervailing provisions.[131]

The Members decided to give the delicate mission of drafting a regional TDI system to a Tripartite Committee of Experts. This is part of a built-in agenda and shall form an integral part of Annex II.[132] Articles 17, 18 and 19 are suspended until Annex II on Trade Remedies is finalized and operational. This outcome was not an exception to previous African RTAs that did not make significant progress in coordination and collaboration issues. The positive side is that this could be still addressed in the second stage of negotiations.

At present there is a deficiency in the jurisdictional regimes governing TDIs at both national and regional levels in Africa. Although the African TDI systems are different from each other, the systems that do exist are simplistic and generally only restate WTO obligations.

The importance of a sound TDI strategy in Africa is emphasised by the current global re-emergence of protectionism in some developed countries, including the US. The end of the transitional period in 2016 for China's accession protocol, and the bilateral agreements between African countries and China to grant the latter "market economy status" may also contribute to increased low-priced imports into Africa. An effective TDI system could limit the negative effects arising from such imports.

Additionally, the majority of African countries do not have competition policies in place, which leaves national industries vulnerable to foreign competition, further highlighting the importance of TDIs. Furthermore, it has to be noted that in times of economic crisis, coun-

[129] Art. 802 (2) of NAFTA.
[130] Tralac Annual Conference (2015) The Architecture of the Continental Free Trade Area.
[131] *Ibid.*
[132] *Ibid Art. 16.2.*

tries feel more encouraged to make use of protectionist measures including TDIs. This could pose some risks to African exports.

A. The Most Ambitious Scenario

The most ambitious scenario would be to establish a regional investigating authority to which Member States will delegate authority to carry on investigations both in connection to Members and non-Members.

This scenario would follow the EU model of integration where economic and trade policies are gradually harmonised and regional bodies are entrusted with trade relations.

Despite the significant variation in the levels of integration and development between the two blocks, the EU TDI system could be the most conducive for the TFTA in the long run, mainly when the Customs Union stage is reached. This submission is made while recognizing the substantial differences between Members of the EU and Members of the tripartite area. Although characterized by a low pace of integration, the African linear integration model is seeking to imitate the EU model, especially from a historical perspective.

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 and build regional institutions, including a functioning regional TDIs entity.

This scenario, which is practically the actualization of the first draft proposal, will face many challenges mainly due to the fact that only few African countries have TDI legislation and functioning institutions, a lack of sufficient financial and technical resources as well as the perception of the lack of importance of this system. This major step may need to be preceded by many gradual steps to harmonize rules and deepen integration between Members.

It is acknowledged that previous experience in Africa indicates that this ambitious step may face major challenges. Many African countries deal with regional trade liberalization provisions as soft law and they may be inclined not to implement decisions of regional bodies, including trade remedies and dispute settlement bodies. The model of the SADC tribunal and the consequences of its decisions against Zimbabwe[133] may call for caution from African de-

[133] Mike Campbell and Others v. Republic of Zimbabwe, SADC (T) No. 2/2007

cision-makers. Dealing with the sovereignty concerns of African countries through gradual integration and by subjecting the decisions of the regional body to approval by the council of Ministers of the T-FTA may help address this challenge to certain extent.

Reaching a deeper level of economic integration, which permits the free movement of the factors of production, may require the abolition of TDIs, other than the limited use of bilateral safeguards, on intra-trade.

B. The Lowest Common Denominator

In the context of the TFTA negotiations, the lowest common denominator will be to strengthen cooperation between Member States in the area of TDI investigations without having provisions regarding the creation of regional bodies.

This scenario could be the easiest to follow as it will not require any major changes to the status quo. Nevertheless, it will not bring any change to the current situation where African industries are vulnerable to unfair trade measures. It is submitted that this scenario would have negative consequences on the pace of regional integration and the economic interests of Members. In order to maximize the economic benefits of such scenario, it is suggested that Members agree on certain provisions that can provide preferential treatment to each other such as the lesser duty rule and the public interest test.

The three WTO TDIs Agreements grant some flexibility in the design of regional TDI systems. Applying this, African countries can incorporate provisions on higher *de minimis* and negligibility margins, shorter period of application of TDIs against TFTA Members, and flexible safeguards provisions. This would decrease the resort to TDIs against Members while retaining the protection against third parties, thus supporting regional economic integration and providing African economies with a comparative advantage over third parties.

C. The Gradual Approach

A gradual approach to both integration and a regional TDI system could be the most suitable in the TFTA context. In such case, the TFTA legal system would follow the same initial structure that was suggested at the beginning of the TFTA negotiations, i.e., it would consist of a three-tier approach which would include general provisions on TDIs, 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 subject to the scrutiny of the European Court of Justice.

This gradual approach may be supported by the fact that Africa is pursuing a linear model of integration that in the long run would lead to a model resembling that of the EU.[134] Considering the European TDI system when designing the African system may be appropriate for several reasons. *First*, the creation of the African Economic Community will necessitate the free movements of goods, services, capital and labour[135] and would, in the long term, imply the abolition of TDIs on intra-trade while applying unified rules on imports from third parties.

Second, the EU reached its high level of integration through almost 70 years of incremental integration steps. Intra-trade TDIs were permitted during the early stages of integration and were phased out as integration between Members increased. It is not foreseen that TDIs will be removed on African intra-trade the short or medium term. However, it should be envisaged to remove intra-trade TDIs at a later stage when integration is deepened and consolidated, culminating in the implementation of the African Customs Union.

Third, the EU integration model is flexible. Many smaller Eastern European countries joined the EU in the past 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 expanded and merged with other integration endeavours in the continent to reach the AEC.

Fourth, the EU TDI system attaches significant importance to small and medium enterprises (SMEs). Such enterprises more than 95% of African industries. Africa can incorporate several of the capacity building techniques applied by the EU in equipping its largely SME industries to deal with TDI issues.

Fifth, the EU TDI system gives considerable importance to consumer welfare and intermediate industries through the application of the lesser duty rule, the public interest test and price undertaking provisions. This could be replicated in Africa where the application of TDIs should bear the minimum impact on consumers and intermediate industries.

In order to achieve the long-term objective of a single, integrated African TDI system, it is proposed that African countries should follow a gradual approach that takes care of the significant differences in terms of the level of development and institutional capacities that exist in African countries. The following steps are suggested in this context:

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[134] According to Art. 6 of the Treaty for the Establishment of the African Economic Community the ultimate goal is to reach the level of African Common Market.
[135] *Ibid.*

1. African countries should agree, within the context of the TFTA, to have a strict time frame for the promulgation of national laws on TDIs and to establish national investigating authorities to conduct TDI investigations. The TFTA secretariat can guide this process with support from the WTO, some African countries with accumulated experiences, as well as donor countries such as the EU and the US. This step can run parallel with ongoing efforts to implement the TFTA.
2. In the second step, African countries could set up regional investigating authorities in each of the three RECs. These regional authorities could 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, although personnel should be drawn from all members of the relevant REC. These countries would have to coordinate closely with the Members of their RECs in investigations. At present, this recommendation may face some challenges due to sovereignty concerns from Member States.
3. The third step would be to agree on establishing a TFTA-wide regional body to deal with TDIs. The mandate of this regional body should be limited to reviewing the determinations of the national or REC investigating authorities according to national and regional laws. This could be done in a manner similar to the bi-national committee in NAFTA.
4. The final step would be to establish a fully-fledged TFTA-wide regional investigating body with full powers to conduct investigations on behalf of all Members and which can accumulate more experience within a shorter time frame. This is a long-term process that can only take place when the long-term objective of establishing a Tripartite customs union has been attained and when TDIs are prohibited on intra-trade.

Because the TFTA is geographically large and its physical infrastructure sometimes lacking, at present there is often little trade between TFTA members. Indeed, WTO statistics show that intra-African trade accounts for only 12% of total trade. This suggests that serious consideration could be given to frequent application of Article 4.1(ii) of the Anti-Dumping Agreement and Article 16.2 of the ASCM, which both provide that the domestic market

> "may be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers within such market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not

to any substantial degree supplied by producers of the product in question located elsewhere in the territory."

Injury can then be determined on the basis of this sub-market and duties may be imposed only in respect of dumped or subsidised imports into that sub-market. This would prevent the destruction of the industry in one part of the TFTA where such regional market only forms a small part of the total TFTA industry and injury cannot be proven to the whole of the TFTA industry. It could also make it easier to gather the necessary injury information as there will be fewer producers in the sub-market.

V. CONCLUSIONS

TDIs can be regarded as tools to safeguard the benefits of economic regional integration and ensuring that the integration is not undermined by low cost imports from 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 TFTA region, experience in territories like the EU has indicated that this goal that can be achieved over time. This submission is made while recognising the important differences between the African and European integration models. It may be expedient to first establish national authorities that would later be absorbed into regional authorities in each of the three main RECs (COMESA, EAC and SADC), and that these regional authorities can later be amalgamated into a single TFTA authority with a regional tribunal to review decisions.

These REC authorities, and later the single TFTA authority, should be staffed with qualified personnel from all over the region. Establishing a regional investigating authority can bring many technical and economic benefits to African countries.

Special attention should be given to invoking the sub-market provisions in the Anti-Dumping Agreement and the ASCM to ensure that TDI measures can be invoked in instances where the industry in a specific geographical area of the TFTA is injured by dumped or subsidised imports, yet where injury cannot be proven to the whole of the TFTA industry.

In the meantime, African countries are encouraged to work on enhancing the capacities of the private sector and especially SMEs, and improving the flow of information between governments and stakeholders. African countries should also increase their engagement in the WTO negotiations and participate in WTO Rules meetings to improve the WTO rules to the benefit of developing countries.

A well-functioning regional TDI system is a long-term objective. It is an incremental and costly process, but it is submitted that the overall positive returns on regional integration will outweigh the financial costs and will support economic development both at the national and the regional levels in Africa.