



1

"When they demand the abolition of the WTO in order to end globalisation, it is like demanding the abolition of hospitals to defeat illness"

Former WTO Director-General, Mike Moore



¹ The Innovative Science & Technology Group 2009 < www.istg-africatomorrow.com/projects.html >

Trade Facilitation under the WTO Multilateral System: the key to ensuring sustainable development in Southern Africa through intra-regional trade.

Submitted in partial fulfilment of the requirements of the degree LLM
(International Trade and Investment Law) Faculty of Law, Centre for Human
Rights,
University of Pretoria

By

Ruan Jordaan

Student Number:

Prepared under the supervision of Ms Rafia de Gama

**At the Faculty of Law, Centre for Human Rights,
University of Pretoria**

31 May 2010

DECLARATION

I, RUAN JORDAAN, do hereby declare that this research is my original work and that to the best of my knowledge and belief; it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: *Ruan*

Date: 31 May 2010

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:

Prof, Bradlow

University of Pretoria

Date:



Dedication

My Father, Francois Jordaan, your unconditional love and support is the reason I have a future today. God bless you!

ACKNOWLEDGEMENTS

Thank you Lord for your guidance and strength, my purpose remains in your will.

The Centre for Human Rights, I express my gratitude and appreciation for such a wonderful and well organised programme. Special thanks must go out to Mrs Emily Laubscher and Prof. Daniel Bradlow for not only believing in my capabilities but also putting confidence in that belief by providing me with a valuable and much appreciated bursary. Thanks must also go to each and every lecturer who took time out of their busy schedules to impart to us their wealth of knowledge and expertise.

To Berita Kopolo, Stephanie van der Walt, many thanks for your valid comments and insights on my work and career choice decisions throughout the semester in Pretoria. Thanks must also be extended to Rafia de Gama for her insightful comments on the drafts of this dissertation.

To the staff at BUSA, thank you for your daily support and guidance, especially Catherine Grant my supervisor who provided me with ample opportunity and time to work on this paper.

Lastly, I will never forget Maple Avenue, the “Ugali house”. Thanks to all my housemates for the memories and allowing me to learn from your cultures and practices, I will cherish the memories in my heart forever.

List of abbreviations

ACP African Caribbean and Pacific Group of States
AGOA Africa Growth and Opportunity Act
APEC Asia-Pacific Economic Cooperation
BC Before Christ
BLNS Botswana Lesotho Namibia and Swaziland
CCC Customs Co-operation Council
CET Common External Tariff
COMESA Common Market for Eastern and Southern Africa
DDA Doha Development Agenda
EPA Economic Partnership Agreement
EU European Union
FDI Foreign Direct Investment
FTA Free Trade Area
FTAs Free trade agreements
GATT General Agreement on Tariffs and Trade
GDP Gross Domestic Product
ITO International Trade Organisation
ICC The International Chamber of Commerce
ILEAP International Lawyers and Economists Against Poverty
IMF International Monetary Fund
ISI Import Substitution Industrialisation
ITC International Trade Centre
LDC Least Developed Country
LLDC Land-locked developing country
MFN Most Favoured Nation
MRA Mutual Regulation Agreements
MTS Multilateral Trading System
NAMA Non-Agricultural Market Access
NEDLAC National Economic Development and Labour Council
NTB Non Tariff Barriers
NY New York

OECD Organisation for Economic Cooperation and Development

RISDP Regional Indicative Strategic Development Plan

RoO Rules of Origin

PTAs Preferential Trade Agreements

RTA Regional Trade Agreements

SACU Southern African Customs Union

SADC Southern African Development Community

S&DT Special and Differential Treatment

SMEs Small and Medium Enterprises

TRADE Trade for African Development and Enterprise

TRIPs Trade-Related Aspects of Intellectual Property Rights

UN United Nations

UN/CEFACT the United Nations Centre for Trade Facilitation and Electronic Business

UNECE United Nations Economic Commission for Europe

UNCITRAL the United Nations Commission on International Trade Law

UNCTAD United Nations Conference on Trade and Development

UNIDO the United Nations Industrial Development Organisation

UN-UNOHRLLS UN Office of the High Representative for the Least Developed Countries,
Landlocked Developing Countries and Small Island Developing States

UK United Kingdom

US United States

VAT Value Added Tax

WCO World Customs Organisation

WTO World Trade Organisation

TABLE OF CONTENTS

Preliminaries

Declaration.....	3
Dedication.....	4
Acknowledgements.....	5
List of Abbreviations.....	6-7

CHAPTER I

Trade Facilitation under the WTO Multilateral System: The Key to Ensuring Sustainable Development in Southern Africa through Intra-Regional Trade.

1. Introduction.....	10
1.1 Background to the Research.....	10-12
1.2 Problem statement.....	12
1.3 Research Question and Objectives.....	12-13
1.4 Significance and Limitations of the Research.....	13
1.6 Methodology	13-14
1.8 Chapter Breakdown.....	14

CHAPTER II

Defining Trade Facilitation

2. Introduction.....	15-16
2.1 Trade facilitation Bodies	16-20
2.2 Theoretical Approaches	20-21
2.3 The Importance and Benefits of Trade Facilitation	21-23

CHAPTER III

The History and Development of Trade Facilitation

3. Introduction	24-26
3.1 Predecessors and Formation of the WTO	26-28
3.2 Negotiations/Proposals on Trade Facilitation.....	28-33
3.3 Conclusion.....	33



CHAPTER IV

Barriers Facing Southern African Trade

4. Introduction	34-35
4.1 Tariff Barriers Facing Southern Africa.....	36-42
4.2 Non-Tariff Barriers Facing Southern Africa.....	42-60
4.3 Conclusion.....	60-62

CHAPTER V

Solutions Offered by the GATT and Via Current WTO negotiations

5. Introduction.....	63
5.1 Increasing Transparency of Trade regulations (Article X).....	64-72
5.2 Customs Efficiency (Article VIII).....	73-80
5.3 Freedom of Transit (Article V).....	81-86
5.4 Conclusion.....	86-93

CHAPTER IV

Conclusion and Recommendations

6.1 Conclusion and Recommendations.....	94-98
6.2 Bibliography	99-109
6.3 Appendix A	110-111

Chapter I: Trade Facilitation under the WTO Multilateral System: the key to ensuring sustainable development in Southern Africa through intra-regional trade.

1. Introduction

The massive growth in international trade and the explosion of international technology, as a result of globalisation, are steering they way towards a world trading market and economic interdependence of most nations. As a result of inadequate procedures and laws as well as the lack of sustainable economical resources, countries in Southern Africa seem to be lagging behind in tapping in to the benefits provided by this current trend. If these countries do not act fast in implementing measures to improve their own supply chain and accessibility requirements for their regional partners, the chances of obtaining future global access in trade seem minuscule.

1.1 Background to the research

The economic devastation of 1929 and the end of Second World War in 1945 had a significant impact on political change of the world economy as we see it today. As a result, international trade increased dramatically due to the affirmation of United States of America (US) as a new leader in world trade.² In 1948, the Havana Treaty, signed by 25 governments, established the International Trade Organisation (ITO) to reorganise the world economy.³ Unfortunately, this organisation did not come into operation for political reasons explained below, and as a result the General Agreement on Trade Tariffs (GATT) and later on the World Trade Organisation (WTO) was formed.

² Malawer “The U.S. and the WTO: Lessons Learned for Trade Litigation and Global Governance” 2003 14 <<http://www.worldtradelaw.net/articles/malaweruslessons.pdf>>(accessed 10 January 2010)

³ *ibid*

As this paper will attempt to show, the WTO system offers the only practicable solution to unlock substantial new resource flows and to improve the growth prospects of developing countries and Least Developing Countries (LDCs).⁴ Vast amounts of aid and debt forgiveness will not solve the recurring problems in the low-growth development economies.⁵ Trade growth is key for economic growth and poverty reduction and thus essential in order to meet the “Millennium Development Goals” and other vitally important international development initiatives.⁶

Power relationships in trade diplomacy have transformed in recent years.⁷ Almost three out of four of the 153 members⁸ of the WTO are from the developing world, and they want to be sure that they get a square deal in the ongoing negotiations on trade facilitation - something most are convinced that the previous Uruguay Round did not give them.⁹

Many developing countries have made great progress in recent years in achieving faster growth and managing their economies better.¹⁰ But growth alone will not be enough to halve poverty by 2015.¹¹ Developing countries need to ensure that all people, and especially poor people, have access to education, health care, and put in place the right investment climate to create opportunities, spur productivity and make real improvements in people's lives.¹² At the moment all hope is placed in rich countries to follow through on their aid commitments and to take action on trade barriers, particularly in agriculture.”¹³

The cost of moving goods across borders is a critical determinant of a country's competitiveness.¹⁴ According to a recent study by the Organisation for Economic

⁴ Oxley “Official Statement by former Australian Ambassador to the GATT” Australian Financial Review 29 June 2001 <http://www.wto.org/trade_resources/quotes/development/development.htm>(accessed 5 January 2010) ; Panitchpakdi “Statement made by former Director-General of the WTO” The General Council meeting on Coherence at the WTO 13 May 2003

<http://www.wto.org/trade_resources/quotes/development/development.htm>(accessed 5 January 2010)

⁵ Oxley *supra* 4

⁶ Panitchpakdi *supra* 4

⁷ *ibid*

⁸ As of 23 July 2008(according to the WTO Website)

<http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>(accessed 24 May 2010)

⁹ Panitchpakdi *supra* 4

¹⁰ World Bank “World Bank Press Release no 2003/287/S” 13 April 2003

<http://www.wto.org/trade_resources/quotes/development/development.htm>(accessed 5 January 2010)

¹¹ *ibid*

¹² *ibid*

¹³ *ibid*

¹⁴ *ibid*

Cooperation and Development (OECD), the cost of poor border procedures could vary between 2 per cent and 15 per cent of the total transaction value.¹⁵

The two fundamental elements of competitiveness are price and time.¹⁶ The comparative efficiency of a country's trade logistics chain is thus of vital importance in enhancing competitiveness of its industry and commerce.¹⁷ Currently the Inefficient and unreliable transport logistics limits the prospects of regional trade and leads to exports being less competitive. Also, the greater the scope for interpreting regulations the more chance for corruption exists.¹⁸ An efficient trade facilitation system together with good governance is therefore essential in ensuring smooth, predictable and liberated trade flows in Southern Africa.

1.2 Problem Statement

Although regionalism and bilateralism has been a source of numerous benefits for Southern Africa, there still exists a general lack of harmonisation and transparency among countries trading in this region. The former being demonstrated by the existence of conflicting laws, procedures and systems and the latter due to these laws, procedures and systems not being publicised in an appropriate and accessible way so as to sufficiently inform traders wishing to engage in commerce with the region. Many believe this is mostly due to the lack of political will while other's favour the view that Southern Africa merely lacks the financial resources to establish the necessary infrastructure and implement systems needed for the supply chain to move quicker, smoother, faster and cheaper within the region.

1.3 Research question and Objectives

It seems that the African is holding its breath waiting in anticipation on the outcome of the ongoing negotiations on trade facilitation. The GATT, current proposals on it as well as rules under international conventions, provide a rich supply of guidelines and systems countries can implement in the meantime in order to tackle current deficiencies facing regional trade cooperation in Southern Africa.

¹⁵ *ibid*

¹⁶ *ibid*

¹⁷ *ibid*

¹⁸ *ibid*

The key research question is: How can trade facilitation measures, under the multilateral system (with specific reference to GATT) provide countries with the necessary tools and resources not only to promote regional sustainable growth and development, but also specifically the growth of least developed countries (LDCs) in Southern Africa who are solely dependent on larger economies for their continued subsistence.

1.4 Significance and limitations of the research

This research aims to provide an in-depth analysis of the conceptual non tariff barriers (NTBs) facing intra regional trade in Southern Africa focusing on the possible benefits provided by the GATT (specifically Articles X, VIII and V) as well as the recommendation provided in the context of ongoing negotiations on trade facilitation related to these Articles.

This research is limited in the following ways: Firstly due to the international element of this topic, information is limited and thus restricted to official publications of Organisations such as the WTO and United Nations Conference on Trade and Development (UNCITAD).

Secondly, this research is limited to the trade facilitation interests of Southern Africa within the context of its overall goal of globalisation. References will therefore be restricted to the Southern Africa Development Community (SADC) and the Southern African Customs Union (SACU) communities, but will draw inspiration from international instruments informing the arguments.

The Author has furthermore chosen to narrow this research by mainly focusing on barriers impacting countries geographically placed in the southernmost tip of Africa, including: Botswana, Lesotho, Malawi, Mozambique, Namibia, South Africa and Swaziland.

Regrettably due to its current situation and the lack of sufficient sources no reference will be made to Zimbabwe.

1.5 Methodology

This research is conducted mostly through secondary sources, such as articles, working papers, statements, reports, books and journals. The research will further draw from relevant international instruments related to the topic of trade facilitation provide mostly by

International Organisations such as the WTO, United Nations(UN), World Bank, International Monetary Fund (IMF) etc.

For the sake of clarity, all monetary references have been converted to South African Rands.

1.6 Chapter breakdown

This research comprises six chapters:

1. *Chapter one* highlights the foundation and basic structure of the research.
2. *Chapter two* defines trade facilitation from a multilateral perspective and gives insight on the various activities it relates to. It also recognises the various multilateral originations and parties having a direct or indirect interest in trade facilitation. Chapter two lastly deals with the methodology of trade facilitation and unpacks the two approaches available in adopting trade facilitation measures as well as dealing with the benefits offered by trade facilitation
3. *Chapter three* explores the history of trade facilitation from the beginning of western civilisation right through to the formation of the International Trade Organisation (ITO), the GATT, the WTO and the current Doha negotiations.
4. *Chapter four* identifies the major barriers facing trade in Southern Africa by first defining what tariff barriers are and briefly alluding to its significance and impact on trade in the region. The second branch of chapter 4 then explores the various and most predominant NTBs facing Southern Africa, SACU, SADC and specific countries mentioned above.
5. *Chapter five* is broken in to three distinct sections. Each one dealing with the provisions and recommendations/proposals relating to Article X, V and VIII respectively, ending with a summary of a way forward in dealing with each of these Articles.
6. *Chapter six* provides concluding remarks and recommendations.

Chapter II: Defining Trade Facilitation

2. Introduction

Inside the complex international trade environment we find ourselves today, trade facilitation can be described as being at once a legal, political, economic, business, administrative, technical and technological issue.¹⁹ Trade facilitation essentially relates to a variety of import and export activities such as administrative procedures including land transportation, shipping, border controls, insurance, payment mechanisms etc. In simple terms trade facilitation deals with measures that make it easier, faster and less costly to trade.²⁰

There currently exists no standard definition of trade facilitation, however through the literature and positions of WTO Members, it appears that there are two kinds of approaches on this issue.²¹ First, for some Members, organisations, individuals, trade facilitation is being understood as measures and policies intended to simplify, harmonise and standardise customs and other border procedures with a view of minimising cost and time and enhancing predictability of international trade of goods.²²

For others particularly Southern Africa, trade facilitation is a broader concept going beyond procedures and formalities related to cross-border trade of goods, by also covering other domestic trade-related constraints.²³ In this context, trade facilitation is understood to be covering trade procedures and formalities as well as infrastructure development of ports, railways and roads for example.

¹⁹ Grainger “Trade Facilitation Research Paper” 2009 1

<<http://www.tradefacilitation.co.uk/content/view/37/1/>>(accessed 8 February 2010)

²⁰ Hammar “Trade facilitation in Vietnam” (LLM Thesis 2009 University of Lund) 8

<<http://www.nek.lu.se/Publ/mfs/190.pdf>>(accessed 8 February 2010)

²¹ Bizumuremyi “ Enhancing The Africa’s Participation in the WTO

Negotiations” (UNECA Report: Expert Meeting Nairobi) 2009 2

<<http://www.uneca.org/atpc/egm0909/TradeFacilitation.pdf>>(accessed 10 April 2010)

;Grainger *supra* 19 at 1

²² Bizumuremyi *supra* 21 at 2; World Trade Organization “Doha Development Agenda Database”

<http://tcdbd.wto.org/trta_subcategory.aspx?Cat=33121>(accessed 8February 2010)

²³ Bizumuremyi *supra* 21 at 2

The scope of the on-going WTO negotiations on trade facilitation is limited to the review of the GATT 1994 Article V, VIII and X.²⁴ This means that trade facilitation in the WTO context is closer to the narrow definition of trade facilitation and is understood as the simplification of **procedure**, **formalities**, and **documents** related to importation and exportation of goods in transit.²⁵ However current negotiations seem to be favouring a wider stance in providing more assistance in this field of infrastructure development.

2.1 Trade Facilitation Bodies

Because trade facilitation is such a broad model, many parties are involved in one or more of its components as well as feeling the daily implications of these measures.²⁶ Whether it is a private, public, regional and multilateral interest all are concerned with its implementation as well as the current discussions relating to it.²⁷ International and national bodies in various countries and sectors have provided many improvements and inputs through the trade-related flows of information, including international conventions, standards, recommendations, and guidelines all under the auspices of the WTO multilateral trading system.²⁸

The following sections will introduce and briefly describe the most important players involved in dealing with various aspects of trade facilitation, thus creating a setting for chapters to follow.

a) International Trading Parties

The WTO does not provide any definitions regarding LDC, “developing” and “developed” countries. Members are thus required to announce for themselves whether they are “developed” or “developing” countries.²⁹ Provision is however made for other members to

²⁴ *ibid*

²⁵ *ibid*

²⁶ Sohn *et al* “Trade Facilitation in The WTO and Implications for Developing Countries” 2008 146
< http://www.unescap.org/tid/publication/chap8_2278.pdf >(accessed 10 February 2010)

²⁷ *ibid*

²⁸ UNECE “National Trade Facilitation Bodies Recommendation” 2001 3
< http://www.unece.org/cefact/recommendations/rec04/rec04_ecetrd242e.pdf >(accessed 26 February 2010)

²⁹ “Who are the developing countries in the WTO?”

< http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm >(accessed 23 February 2010)

challenge the decision of a certain member wanting to make use of provisions exclusively available to developing countries.³⁰

In deciding the status of a country the WTO uses international established standards in deciding whether a country should be classified as a developed or a developing country.³¹

The WTO recognises LDCs on the other hand as those designated as such by the United Nations (UN).³² This category of States is deemed highly disadvantaged in their developmental process, facing issues such as low income, weak human assets and economic vulnerability.³³ Out of the current 49 LDCs on the current UN list,³⁴ 32 of them have to date joined as WTO members and 10 more are in the process of negotiating to join in the near future.³⁵

Another category namely land-locked developing country (LLDC), exist under even harsher conditions with poor physical infrastructure, weak productive capacities, small domestic markets, and limited access to world markets.³⁶ The location of LLDCs in the interior of continents requires their export and import goods to travel hundreds, if not thousands of kilometres to and from the closest maritime ports.³⁷ In Southern Africa these countries include for example Lesotho, Malawi and Swaziland, who might stand a great chance in benefiting from the advantages offered by trade facilitation.

b) Private International Organisations

Private international organisations include worldwide and regional institutions involved in humanitarian mission.³⁸ These organisations operate around the world independently of any government, and also enjoy special status as legal entities under international law.³⁹

³⁰ *ibid*

³¹ See List for developing countries: http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm

³² See List of least developing countries: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm

³³ *ibid*

³⁴ UN-UNOHRLLS “Country Profiles” <<http://www.unohrlls.org/en/ldc/related/62/>> (accessed 23 February 2010)

³⁵ World Trade Organization” Least-Developed Countries” <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm> (accessed 13 February 2010)

³⁶ Sheikhan “Trade Facilitation in the Multilateral Trading System” (LL.M Thesis 2008 University of Gothenburg) 9

<http://gupea.ub.gu.se/bitstream/2077/19714/1/gupea_2077_19714_1.pdf> (accessed 8 February 2010)

³⁷ UNCTAD “Landlocked Developing Countries: Facts And Figures” 2006 <<http://www.unctad.org/Templates/webflyer.asp?docid=7273&intItemID=3632&lang=1>> (accessed 10 February 2010)

³⁸ Witzig *et al* “Humanitarian and Peace Operations: NGOs and the Military in the Interagency Process” 2006 7 <http://www.dodccrp.org/files/Davidson_Humanitarian.pdf> (accessed 23 February 2010)

Some of the private international organisations that deal with trade facilitation include the International Chamber of Commerce (ICC), which acts as the voice for international business and **defender** of the **multilateral trading system**,⁴⁰ as well as various transport industry associations around the world, which frequently set formal and informal international shipping standards.⁴¹

c) Public Organisations

Public organisations in this context include all government agencies and its members that deal directly or indirectly with trade. Some countries maintain public or semi-public agencies and regional organisations that seek to facilitate trade.

i) Semi-Public Agencies

An example of such agencies can be found in Southern African Global Competitiveness Hub situated in Botswana and funded by USAID. Primarily the Hub was created to enhance Southern Africa's trade competitiveness and take greater advantage of opportunities provided through the Africa Growth and Opportunity Act (AGOA) and other global trade initiatives.⁴²

There are also agencies that focus on trade facilitation through electronic means such as the Trade Law Centre for Southern Africa (Tralac). Tralac's main objective is to develop trade law intellectual capital through the process of monitoring trade negotiations, interpret agreements, contribute to debates and stimulate discussion on international law matters and provide research developments in international trade law, providing access to such information free of charge for traders through the internet.⁴³

ii) Regional Organisations

The key Regional Organisations responsible for the promotion and facilitation trade in Southern Africa is that of the Southern African Customs Union (SACU) which came into

³⁹ *ibid*

⁴⁰ International Chamber of Commerce(ICC) "What is ICC" <<http://www.iccwbo.org/id93/index.html>> (accessed 23 February 2010)

⁴¹ *ibid*

⁴² Southern African Competitiveness Hub "About Us" <http://www.satradehub.org/index.php?option=com_content&task=view&id=21&Itemid=131> (accessed 26 February 2010)

⁴³ Trade Law Centre for Southern Africa "About us" <http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_vision_mission&cause_id=1694>(accessed 26 February 2010)

existence on 11 December 1969⁴⁴ with the signature of the Customs Union Agreement between South Africa, Botswana, Lesotho, Namibia and Swaziland (BLNS), thereby replacing the Customs Union Agreement of 1910.⁴⁵

Another important regional organisation that exist in Southern Africa is SADC which has been in existence since 1980 and has made numerous contributions to the development of trade facilitation in the Southern African region, aiming to ensure economic well-being, improvement of the standards of living and quality of life, freedom and social justice as well as peace and security for the people of Southern Africa.⁴⁶ Founding members include Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia, and Zimbabwe subsequent members comprise of Namibia, South Africa, Mauritius, Democratic Republic of Congo, Seychelles and recently suspended Madagascar.⁴⁷ The cooperation and pooling of resources from such regional organisations will play a vital role in assisting Southern African countries in adopting a multilateral trade system.

d) Multilateral Public Organisation

One of the most important multilateral public organisations that deal with trade facilitation may be that of the World Customs Organisation (WCO)⁴⁸. The WCO was founded in 1953 as the Customs Co-operation Council (CCC).⁴⁹ Established originally by 13 European countries, its membership has expanded to 151 members.⁵⁰ All aspects of the WCO's work relates closely to questions of trade facilitation with its mission being to enhance the efficiency of customs administrations in the areas of compliance with trade regulations, protection of society and revenue collection.⁵¹

Another vital multilateral public organisation is the WTO. The WTO is regarded as one of the cornerstones of international economic regulation providing a forum for negotiating agreements aimed at reducing obstacles to international trade and ensuring a level playing

⁴⁴ (Entering into force on the 1st of March 1970)

⁴⁵ Department: International Relations and Cooperation "SACU History and present status" 2004 <<http://www.dfa.gov.za/foreign/Multilateral/africa/sacu.htm>>(accessed 7 March 2010)

⁴⁶ SADC "Profile" <<http://www.sadc.int/index/browse/page/99>>(accessed 11 February 2010)

⁴⁷ *ibid*

⁴⁸ Sohn *supra* 26 at 146

⁴⁹ WTO "Trade facilitation work undertaken by intergovernmental organisations" <http://www.wto.org/english/tratop_E/tradfa_e/intergov_e.htm>(accessed 25 February 2010)

⁵⁰ *ibid*

⁵¹ *ibid*

field for all.⁵² The WTO furthermore provides a legal and institutional framework for the implementation and monitoring of these agreements, as well as for settling disputes arising from their interpretation and application.⁵³

e) Other Multilateral Public Organisations

Other multilateral public organisations that oversee aspects of trade facilitation include:

- the International Monetary Fund (IMF),
- The World Bank,
- The United Nations Industrial Development Organisation (UNIDO),
- Organisation for Economic Co-operation and Development (OECD),
- United Nations Conference on Trade and Development (UNCTAD), and
- The United Nations Commission on International Trade Law (UNCITRAL).⁵⁴

2.2 Theoretical Approaches

When dealing with International Trade Law it is necessary to bear in mind there are primarily two discourses one can follow concerning the adoption of a multilateral trading system (MTS).

On one hand, there is the multilateral discourse that promotes collaboration between states under the WTO and on the other hand, there is the bilateral discourse that promotes various forms of bilateral agreements as an alternative.⁵⁵

With regards to trade facilitation, the multilateralists usually argue that the WTO is the best-positioned organisation to administer, implement and enforce trade facilitation.⁵⁶ And since the nature of trade facilitation is to harmonise juridical and administrative procedures, the framework ought to be of an international magnitude and of binding nature.⁵⁷

⁵² Lamy “About the WTO: A statement by the Director-General”
<http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm> (accessed 25 February 2010)

⁵³ *ibid*

⁵⁴ *ibid*

⁵⁵ Sheikhan *supra* 36 at 9

⁵⁶ *ibid*

⁵⁷ *ibid*

The bilateralists, on the other hand, argue that Regional Trade Agreements (RTAs) or Preferential Trade Agreements (PTAs) are more suitable to handle the specific needs of every country or region, and that the scope of the free trade agreement can not only be much broader but also more efficient since governments usually express extra political will when they have a more active role.⁵⁸ Bilateralists further argue that RTAs collaborate instead of collide with the WTO and that RTAs are a sign of the MTS's shortcomings.⁵⁹ It is true that RTAs are not in conflict with WTO law; however their judicial status is becoming more and more complex and has become the subject for different academic discussions.⁶⁰

Although this paper is predominantly in favour of a multilateral approach in adopting a trade facilitation framework, it doesn't intend on examining the discourses any further while it settles to state that the new movement seems to be of a somewhat anarchical nature and the cause of the proverbial "spaghetti bowl effect".⁶¹

It is not argued that the WTO is perfect; however the fundamental question is whether multilateralism can efficiently irritate the negative effects of power politics better than bilateral agreements can.⁶²

2.3 The importance and benefits of trade facilitation

Trade facilitation measures can help countries lower the cost of trade and reduce the margin between domestic and international prices to benefit consumers and producers alike.⁶³ Such measures includes the simplification of customs procedures, synchronisation of rules and laws as well the automation and use of internationally standardised documents to name but a few.⁶⁴ There is furthermore a common understanding that simplifying trade procedures can result in significant savings in time, money and human resources that would benefit any economy regardless of its level of development or size.⁶⁵

⁵⁸ *ibid*

⁵⁹ *ibid*

⁶⁰ *ibid*

⁶¹ *ibid*

⁶² *ibid*

⁶³ Hammer *supra* 20 at 8

⁶⁴ *ibid*

⁶⁵ UN Secretariat Report-Tenth session "The Importance of Trade Facilitation" 2004 3
<www.unece.org/cefact/cf_plenary/plenary04/docs/04cf30.doc>(accessed 2 March 2010)

The importance of trade facilitation as an instrument for sustainable development is therefore particularly important for the economic growth of LDCs and developing countries in Southern Africa. The main reasons for this is the current increase in international trade, the explosive IT-development, which has lead to faster, cheaper and more efficient transport systems, and the development in the nature of internationally trade goods departing from complete goods towards sub-assembled products in different countries.⁶⁶

In order not to be left behind, countries in Southern Africa should collectively consider investing and further adopting their trade facilitation measures as a tool to reduce transaction costs and complexities relating to regional trade thereby also improving the trading environment for foreign traders and investors.

Trade facilitation under the multilateral system is seen has having direct benefits for both governments and the business community. The benefits government can expect in pursuing trade facilitation measures include:”

- Increased effectiveness of control methods and transparency
- More predictable revenue yields
- More effective deployment of resources
- Improved trader compliance
- Accelerated economic development
- Encouragement of foreign investment”⁶⁷

The benefits for business relate to:”

- Reducing trade transaction costs and delays for traders
- Faster customs clearance and more transparent release
- A simpler framework for domestic and international trade
- Enhanced competitiveness locally and internationally.”⁶⁸

Further benefits that accrue from increased trade include higher incomes due to specialisation and greater economies of scale.⁶⁹ In addition, trade brings greater choice for consumers,

⁶⁶ *ibid*

⁶⁷ *ibid*

⁶⁸ *ibid*

⁶⁹ Woolfrey “The Importance of trade Facilitation in Sub-Saharan Africa” 2010 1
<http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=81474&cat_id=1059>(accessed 2 March 2 2010)

promotes innovation and is usually associated with better governance and economic policies.⁷⁰

Trade facilitation can also be especially helpful to Small Medium Enterprises (SMEs) for whom the cost of compliance with procedures are proportionally higher.⁷¹ And this is all the more important even for government seeing as SMEs, as a whole, account in many economies for up to 60% of GDP creation.⁷²

In order to exploit these benefits however, there is an explicit need for political will from all governments in Southern Arica so as to facilitate rather than impede trade in the region.

⁷⁰ *ibid*

⁷¹ *ibid*

⁷² UN Secretariat Report *supra* 65 at 4

Chapter III: The History and Development of Trade Facilitation

Historically, trade has been a source of the economic and cultural development of quite a number of civilisations. Today, efficiently functioning trade is an important prerequisite for a more stable and prosperous world. But such trade is not based on the rules of power. It is trade based on an agreed order that takes into account the weakest and systematically promotes their fuller integration. It facilitates access of least developed countries to foreign markets and thus to financial resources needed for development.

Former President of the Czech Republic: Vaclav Havel 24 October 2001, International Herald Tribune.

3. Introduction

As established earlier in this paper, trade facilitation looks at the operational aspects of international trade and aims to improve the interface between business and government. As such, any history relating to trade facilitation is inevitably linked to the history of trade liberalisation.⁷³

Earlier histories of trade liberalisation and attempts to improve cross-border operations can be found in numerous texts around the world.⁷⁴ Trade agreements have taken place since the beginning of western civilisation. There even exists evidence that Carthage, an ancient city state in North African, had a trade treaty with Rome in 509BC and further trade agreements relating to the movement of boats around the Mediterranean Sea can also be dated back to around 7000BC.⁷⁵

If we look at trade facilitation under the WTO today, it becomes apparent that trade facilitation is a subject driven by the developed countries especially by the U.S. and the

⁷³ Grainger “Trade Facilitation: A Review” (Working Paper Trade Facilitation Consulting Ltd UK) 13 <<http://www.tradefacilitation.co.uk/content/view/17/42/>>(accessed 28 February 2010)

⁷⁴ *ibid*

⁷⁵ *ibid*

European Union (EU).⁷⁶ With developing countries and LDCs showing only a reserved interest on the subject, arguing that they lack the economical or technological means to facilitate the improvements required under GATT.⁷⁷ Some of their initial unwillingness also related to other “Singapore Issues”⁷⁸, and since it was more or less a “package offer”, trade facilitation became even less important.⁷⁹

However due to the current developments of world trade, more pressure has been placed on developing countries to focus on implementing trade facilitation measure in order to reap the benefits offered by globalisation. At the Ministerial Conference held in Geneva 1998(discussed below) developing countries stated that although they were prepared to discuss on trade facilitation issues, they first needed **guarantees of assistance** in the form of special and differential treatment (S&DT) and technical assistance.⁸⁰ Although initially reluctant, WTO Members did eventually agree on such benefits, while the implementation issues were still to be discussed.⁸¹

After the collapse of the Cancun Ministerial Conference in 2003, it became evident that trade facilitation needed to become an independent issue on the Doha Development Agenda (DDA) and in 2004, under the “July Package”; trade facilitation was finally launched as an independent trade topic.⁸²

When the history of trade facilitation is studied today , it becomes clear that the collapses and shortcomings of the Ministerial Conferences revolved around other issues, illustrating the fact that trade facilitation, as an independent issue, is not one of the subjects that hampers negotiations.⁸³ On the contrary, the benefits of trade facilitation seem to be one of the questions that the WTO Members can all agree on although there are certain implementation issues that still needs to be resolved.⁸⁴

⁷⁶ Sheikhan *supra* 36 at 22

⁷⁷ *ibid* at 23

⁷⁸ (These were called Singapore Issues because disciplines on these issues were first mooted during the Singapore Ministerial Conference of the WTO in 1996)

⁷⁹ Sheikhan *supra* 36 at 22

⁸⁰ *ibid*

⁸¹ *ibid*

⁸² *ibid*

⁸³ *ibid*

⁸⁴ *ibid*

What will follow is the step-by-step development of trade facilitation within the context of GATT and later the WTO as well as the position we find ourselves today concerning this receptive issue.

3.1 Predecessors and Formation of the WTO

a) The International Trade Organisation (ITO)

The ITO had collapsed under the weight of its own ambitions.

Narlikar, A

Following the end of the Second World War, international leaders were anxious to erect institutions into the international system capable of protecting the world from a possible repetition of such disastrous events.⁸⁵ The US took the lead in advancing the view that **free trade** would represent an important mechanism for consolidating world peace.⁸⁶ The Allies, particularly the US and United Kingdom (UK) thus began discussions on reconstructing the world economic order and in 1944, at the Breton Woods conference, those countries signed an agreement that set out the outline for a post-war economy.⁸⁷

Three pillars were foreseen for establishing and maintaining this international economic cooperation: The IMF, the World Bank and the ITO.⁸⁸ Following the bilateral trade negotiations between the US and Britain, successive multilateral conferences were held between 1946 and 1948.⁸⁹ The outcome of this process was the Havana Charter, the draft agreement for the creation of the ITO, which was signed by 53 of the 56 countries participating in the conference.⁹⁰ However, despite this promising multilateral commitment, the ITO never came into existence.⁹¹

⁸⁵ Távora “The World Trade Organisation and its critics” (LLM Thesis 2007 University of London) 3;4 <<http://www.ciari.org/english/WTO.pdf>>(accessed 15 February 2010)

⁸⁶ *ibid* 4

⁸⁷ *ibid*

⁸⁸ *ibid*

⁸⁹ *ibid*

⁹⁰ *ibid*

⁹¹ *ibid*

b) The GATT

The failures of the ITO experiment did however help negotiators identify the political feasibility of adopting an agreement instead of creating an organisation.⁹²

In 1945, during discussions on the ITO, the United States proposed a multilateral commercial treaty on tariff reductions to be negotiated by the participating countries.⁹³ Behind this proposal was the recognition by US representatives that though a multilateral organisation such as ITO would need ratification from the Congress, a trade agreement could be negotiated and implemented much more easily.⁹⁴ This fact represented the openness of the conditions for the establishment of the GATT, which was to serve as an interim agreement until the ITO came into force.⁹⁵ It was later signed by 23 countries in 1948 and provided a provisional framework for multilateral cooperation until the ITO was formed.⁹⁶

Notwithstanding the dissatisfaction and relative marginalisation of the developing countries, this temporary agreement continued to exist for over four decades.⁹⁷

c) The WTO

The formation of the World Trade Organisation, in 1995, was intended to replace the GATT and was somehow seen as a framework to rebuild the aborted ITO, though without the constraints that had driven it to its later collapse.⁹⁸ Some contracting parties of the GATT proposed the formation of a more permanent body, as dissatisfaction with the GATT had been evident throughout its reigning years.⁹⁹

The official establishment of the WTO, marking the completion of the Uruguay Round, was thus signed in Marrakesh on April 1994, and was indeed a response to problems to which the old GATT structure could no longer cope with.¹⁰⁰

⁹² *ibid*

⁹³ *ibid*

⁹⁴ *ibid*

⁹⁵ *ibid*

⁹⁶ *ibid*

⁹⁷ *ibid*

⁹⁸ *ibid* 4;5

⁹⁹ *ibid* 5

¹⁰⁰ *ibid*

The Uruguay Round of negotiations resulted in a tripod of rules under the auspices of the World Trade Organisation.¹⁰¹ The tripod consists of the GATT 1994, the General Agreement on Trade in Services (GATS), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).¹⁰²

A further consequence for countries joining the WTO is that members are inevitably bound to have their national legislation aligned with these commitments taken by the WTO.¹⁰³

On Trade Facilitation, the 1996 Singapore Ministerial Declaration directed the Council for Trade in Goods “to undertake exploratory and analytical work, drawing on the work of other relevant international organisations such as WCO, UNCTAD and UNECE as well as from private enterprises and industry groups, on the simplification of trade procedures in order to assess the scope for WTO rules in this area.”¹⁰⁴

3.2 Negotiations/Proposals on Trade Facilitation

a) Pre-Doha (1997-November 2001)

The preliminary work done on the Doha Ministerial Conference included a focused study on the need for clarification on the Singapore Issues mentioned above.¹⁰⁵ On Trade Facilitation, between 1997 and 1999, a large number of proposals were presented to the Council for Trade in Goods by developed as well as developing countries.¹⁰⁶

Numerous countries presented country papers to illustrate how modernisation and automation of customs procedures had led to gains for traders as well as their Governments through the reduction in transaction cost, better deployment of officers and better targeting of scarce resources to more risk-prone goods.¹⁰⁷ These, *inter alia*, sought to have clarity as to what

¹⁰¹ Acharya *et al* “Selected Issues Concerning the World Trade Organisation and the Multilateral Trading System” 2004 1 <http://www.wto.org/english/res_e/booksp_e/discussion_papers7_e.pdf>(accessed 28 February 2010)

¹⁰² *ibid*

¹⁰³ Shashank (Professor, Centre for WTO Studies) “Trade Facilitation: A Brief Negotiating History” 2007 1 <<http://www.eSocialSciences.com/data/articles/Document1273200700.8037683.pdf>>(accessed 13 February 2010)

¹⁰⁴ *ibid*

¹⁰⁵ *ibid*

¹⁰⁶ *ibid* at 2; Sheikhan *supra* 36 at 25

¹⁰⁷ Shashank *supra* 103 at 1

subjects should be covered under trade facilitation.¹⁰⁸ The main issues of concern was excessive documentation requirements, lack of transparency, inadequate procedures and a lack of modernisation of customs and other government agencies.¹⁰⁹

i) The WTO Ministerial Conference in Seattle 1999

During the preparations for the 1999 WTO Ministerial Conference in Seattle, several WTO Members from the developed world lead by the EU, Japan and US, made official submissions to the WTO.¹¹⁰ They advocated the launch of negotiations on trade facilitation as part of the new WTO Round, despite the persistence by some members that more research was needed.¹¹¹ However, the meeting was unable to agree on the new agenda for the Doha Round and the negotiations were not started.¹¹²

There was, however, one notable development for trade facilitation in the Seattle Ministerial Conference.¹¹³ The range of discussions on trade facilitation was reduced and concentrated to Articles X, V and VIII.¹¹⁴

b) Post-Doha

As history shows us, trade facilitation is not a new phenomenon and a number of trade facilitation initiatives have become firmly established within the international trade regime.¹¹⁵ The attention received over the last few years, stemming from WTO's Doha Trade Round discussions, has been quite unsuspected to say the least.¹¹⁶

i) The Doha Ministerial Declaration

The Doha Ministerial Declaration held on the 14th of November 2001, signalled that the work on trade facilitation was in the process of moving to the next phase.¹¹⁷ The Declaration sketched out a broad outline of areas where rule making on trade facilitation could be

¹⁰⁸ *ibid* 2

¹⁰⁹ Sheikhan *supra* 36 at 25; WTO "Trade Facilitation an overview" 1998 1
<http://www.wto.org/english/tratop_e/tradfa_e/tradfa_overview1998_e.htm>(accessed 15 February 2010)

¹¹⁰ Sheikhan *supra* 36 at 25

¹¹¹ *ibid*

¹¹² *ibid*

¹¹³ *ibid*

¹¹⁴ *ibid*

¹¹⁵ Shashank *supra* 103 at 2

¹¹⁶ *ibid*

¹¹⁷ *ibid*

undertaken.¹¹⁸ It was agreed that the work programme on trade facilitation would involve clarification and improvement of three existing GATT articles, namely Articles V, VIII, and X dealing with freedom of transit related issues, fees and formalities connected to importation and exportation and publication and administration of trade regulations respectively.¹¹⁹ The Declaration also placed a special emphasis on extending technical assistance and capacity building for developing countries.¹²⁰

During the period between the Doha Declaration and the 5th Ministerial Conference held in Cancun, numerous written proposals were filed with the WTO, mostly by developed countries and some by developing countries suggesting various improvements to GATT Articles X, V and VIII.¹²¹

A group of developing countries who did not agree with the launching of negotiations on trade facilitation consequently formed an alliance called the Core Group.¹²² On the other hand a grouping of developed and developing countries supporting negotiation on Trade Facilitation was also formed referred as the Colorado Group.¹²³ The Core Group became an important voice in presenting a common developing country position on Singapore Issues.¹²⁴

ii) First Draft Text (Rev.1)

The strong position of the developing countries of not starting negotiation on Singapore Issues was reflected in the first draft text¹²⁵ presented for the Cancun Ministerial Conference. “Paragraph 16 of this draft offered two options for the Ministers:

- To commence negotiations on the basis of modalities set out as Annex G to the document, or
- To continue the clarification of issues in the council for Trade in Goods.”¹²⁶

¹¹⁸ *ibid*

¹¹⁹ *ibid*

¹²⁰ *ibid*

¹²¹ *ibid* 3

¹²² *ibid*

¹²³ *ibid*

¹²⁴ *ibid*

¹²⁵ “1st Revision Draft Cancun Ministerial Text” 2003

<<http://www.mincomes.it/OMC/cancun/150R1.pdf>>(accessed 10 February 2010)

¹²⁶ Shashank *supra* 103 at 3

The Annex G stated that “negotiations shall aim, by clarifying and improving relevant aspects of GATT Articles V, VII, and X of the GATT 1994, at the establishment of an agreement to further expedite the movement, release and clearance of goods, including goods in transit”.¹²⁷

It also stated that for developing and LDCs, their implementation capacities shall be an important factor to take into account in the negotiations, also making general reference to S&DT, adequate technical assistance and capacity building support for developing countries.

The Core Group took the lead in this regard in opposing the draft texts presented on all four Singapore Issues, having specific regard to the lack of capacity to implement these new commitments.¹²⁸

iii) Second Revision of the Draft Ministerial Text

The second revision of the draft Ministerial text¹²⁹ further unbundled the four Singapore issues by suggesting different treatment for the various Singapore Issues.¹³⁰ On Trade Facilitation, it dropped the option of continuing with the clarification process and directed to commence negotiations on the basis of modalities set out in “Annex E”.¹³¹

A large number of developing countries viewed this revision as highly unbalanced and tailored to suit the position of most major developed countries.¹³² This led to strong statements against the revised text during the informal meeting of the Heads of Delegation.¹³³ The Cancun Ministerial Conference therefore failed to arrive at a consensus on the treatment of Singapore Issues which inevitably led to its collapse.¹³⁴

The Green Room deliberations during the Cancun Ministerial did however set the groundwork for a future compromise solution on this contentious topic.¹³⁵ During the Green Room talks, the main applicants on the Singapore issues offered to drop three out of the four subjects from the negotiating agenda namely: Trade & Investment, Trade & Competition

¹²⁷ *ibid*

¹²⁸ *ibid* 4

¹²⁹ “2nd Revision Draft Cancun Ministerial Text” 2003

<http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_drafttext2_e.pdf>(accessed 10 February 2010)

¹³⁰ Shashank *supra* 103at 4

¹³¹ *ibid*

¹³² *ibid* 5

¹³³ *ibid*

¹³⁴ *ibid*

¹³⁵ *ibid*

Policy and Transparency in Government Procurement, leaving trade facilitation as the only subject left on the table.¹³⁶

iv) The Annex-D Modality (see Appendix A)

The modality for negotiation, contained in Annex-D of the framework agreement, reflected the issues of concern from developing country members raised prior to and after the Cancun Ministerial Conference.¹³⁷

Intensive negotiations took place within the parameters of submissions relating to this framework agreement and one of the most controversial issues that came up during the discussions was the subject of technical assistance and capacity building.¹³⁸

The developed countries argued that WTO was not an aid-giving agency, and hence financial support could not come within its sphere.¹³⁹ Some argued that they provided technical assistance on a bilateral basis and it would be very difficult for them to arrive at a connection between bilateral technical assistance and multilateral commitments.¹⁴⁰

On the whole Annex–D turned out to be a moderately balanced document aiming to clarify and improve GATT Articles V, VIII, and X to enhance technical assistance and capacity building for developing countries.¹⁴¹ This modality was thus clearly not authored by a group of developed countries and it took into account the sensitive needs and concerns of developing countries.¹⁴²

v) Negotiating Process Post Annex – D

In order to give effect to the July framework Agreement on Trade Facilitation, a devoted “negotiating group” on trade facilitation was formed on 12 October 2004 in the WTO.¹⁴³ Most of proposals addressed the primary aim of the negotiation, namely to clarify and

¹³⁶ *ibid*

¹³⁷ *ibid*

¹³⁸ *ibid*

¹³⁹ *ibid*

¹⁴⁰ *ibid*

¹⁴¹ *ibid*

¹⁴² *ibid*

¹⁴³ *ibid*

improve GATT Articles V, VIII, and X.¹⁴⁴ A revised document relating to these proposals is brought out as and when new proposals are tabled.¹⁴⁵ During the period of compiling this paper there have been nineteen revisions of this document, the last being dated on the 30th of June 2009.¹⁴⁶ All these proposals have been compiled by the WTO Secretariat in a document labelled: TN/TF/W/43.¹⁴⁷

3.3 Conclusion

In conclusion it can be said that negotiation on trade facilitation has navigated a long way from where it is today. Throughout negotiations the heart of the agenda seems to have its focal emphasis on the simplifying of trade procedures for traders and government agencies alike. While the matrix of proposals on the table promises an ambitious outcome, it would also need to address the problematic issues of technical assistance, capacity building and special and differential treatment.¹⁴⁸

Delays in the completion of the Doha Round however, ultimately mean that the benefits of a trade facilitation package are not likely to be felt anytime soon.¹⁴⁹ Nevertheless, there are much countries can do at a domestic level through the guidance of current multilateral provisions and proposals relating to trade facilitation, even in the absence of a concrete WTO agreement.

¹⁴⁴ *ibid*

¹⁴⁵ *ibid*

¹⁴⁶ Odashima “Challenges of Supply Chain Security and Risk Management”
<http://www.unescap.org/tid/projects/tforum_bs3_odashima.pdf>(accessed 19 February 2010)

¹⁴⁷ *ibid*

¹⁴⁸ *ibid*

¹⁴⁹ *ibid*

Chapter IV: Barriers Facing Southern African Trade

“The lowering of tariffs has, in effect, been like draining a swamp. The lower water level has revealed all the snags and stumps of non-tariff barriers that still have to be cleared away...”

B.A. Jones, New York Times, 10 July 1968;

4. Introduction

From 1948, with the introduction of the GATT leading to the formation of the WTO, reducing tariff barriers have been the major focus of all participating countries.¹⁵⁰ Thus the initiation of the process of trade liberalisation by the GATT became almost synonymous with the lowering of tariffs, while the critical issue of NTBs remained on the margins until its supersession by the formation of WTO in 1995.¹⁵¹

Notwithstanding ongoing problems with rules of origin (RoO) pertaining to tariff concessions, liberalising trade through tariff reductions has enjoyed meaningful successes in Southern Africa in recent years thanks to the WTO, the Uruguay Round agreements, unilateral liberalisation under structural adjustment programmes, and through the SADC free trade agreement (FTA).¹⁵²

The overall record of regional trade in Southern African is however one of dismal failure and remains miniscule, accounting for around 12% of cross-border trade and on average 5.3% of gross domestic product (GDP) for Southern Africa.¹⁵³ Some believe that the reason for this poor trade cooperation among countries relates to the high tariffs, however stronger evidence

¹⁵⁰ Ponter *et al* “Development of Sector Strategies for South African Exporters to overcome Non Tariff Barriers in selected sectors and regions” NEDLAC Report 2006 4
<<http://www.nedlac.org.za/media/14428/export%20ntb%20-%20draft%20%20final%20report.pdf>>(accessed 17 March 2010)

¹⁵¹ *ibid*

¹⁵² Pierides “Non-Tariff Barriers to Trade in Southern Africa: Towards a Measurement Approach” 2008 7
<http://uscdn.creamermedia.co.za/assets/articles/attachments/15828_sadc_trade.pdf>(accessed 23 February 2010)

¹⁵³ Daya *et al* “Intra-Africa Agricultural Trade: A Southern African Perspective” 2006 8
<http://www.nda.agric.za/docs/Intra_Africa.pdf>(accessed 7 March 2010)

suggests that the major reason is related to NTBs that stifle the movement of goods crossing its borders.¹⁵⁴

According to a statement made by Carlos Fortin, an officer in Charge of the United Nations Conference on Trade and Development, the average customs transaction in Africa involves 20–30 different parties, 40 documents, 200 data elements (30 of which are repeated at least 30 times) and the re-keying of 60–70% of all data at least once.¹⁵⁵

Even though tariffs have progressively fallen across the world, the cost of complying with customs formalities, for example, has in some cases surpassed that of tariff duties.¹⁵⁶ Such costs and inefficiencies provide a compelling case for implementing multilateral trade facilitation measures in order to make participation in regional and even international trade easier, faster and cheaper¹⁵⁷ for traders.¹⁵⁸

However as this paper will explain in the proceeding chapters, change in local or even regional policies alone are not sufficient to brake the current barriers facing Southern African trade. What is required, according to Ambassador Lin of Taiwan, is the harmonisation of Southern African policies and procedures through compliance with WTO rules and other international standards.¹⁵⁹ Thus calling for the formation of a multilateral framework in order to create certainty and transparency not only for trader's operating within the region but also those trading with other members of the WTO, who have similarly adopted such standards.¹⁶⁰

Before looking trade facilitation measures and guidelines provided by the WTO, one needs to first establish what these barriers are and to what extent they impede the flow of goods in and out of Southern Africa. The following sections will thus briefly introduce and explain what tariff barriers are and the impact they have on trade(in the context SACU) and then focus on and attempt to identify the major NTBs faced by Southern Africa, its regional blocks and its specific member countries.

¹⁵⁴ *ibid*

¹⁵⁵ *ibid*

¹⁵⁶ Soko “Why trade facilitation is key to boosting intra-African trade” 2006 20
<http://www.mthente.co.za/resources/reports-and-articles/academic-articles-written-by-mthente-and-associates/AfricaGrowthAgenda_Soko_SepNov.pdf>(accessed 12 February 2010)

¹⁵⁷ The potential medium-term income gains from trade facilitation are estimated by UNCTAD to be around 2-3 per cent of the total value of traded goods

¹⁵⁸ Soko *supra* 156 at 20

¹⁵⁹ “Taiwan encourages SACU members to harmonise trade policies and ensure WTO compliance” (Press release 11 November 2009) <<http://www.roc-taiwan.org/WTO/ct.asp?xItem=116606&ctNode=5998&mp=502>>(accessed on 31 March 2010)

¹⁶⁰ *ibid*

4.1 Tariff Barriers in Southern Africa

a) Defining Tariff Barriers

Tariffs, which are taxes on imports of commodities into a country or region, are among the oldest forms of government intervention in economic activity today.¹⁶¹ SADC defines a tariff as duty placed on imported goods going from one customs territory to another.¹⁶²

Tariffs add to the overall cost of imported goods and are one of several trade policies that countries use in order to maintain that delicate balance between the pursuit of efficiencies and the government's need to ensure low unemployment.¹⁶³

Customs tariffs, presented in various forms, are an integral part of trade and economic policy for states and are implemented in order to pursue various objectives.¹⁶⁴ Tariffs are levied in various forms including: *Ad valorem*, specific, revenue, prohibitive and protective as discussed below.¹⁶⁵

- i) With an *ad valorem* duty the importer is required to pay a fee which is calculated as a percentage of the value of the goods being imported.¹⁶⁶ An example of an *ad valorem* tariff would be a 15% tariff levied by Japan on South African automobiles.¹⁶⁷ The 15% is a price increase on the value of the automobile, so a R100, 000 vehicle would now cost R110, 500 to Japanese consumers. This price increase protects domestic producers from being undercut, but also keeps prices artificially high for Japanese car shoppers.¹⁶⁸

¹⁶¹ Sumner *et al* "Tariff and Non-Tariff Barriers to Trade" 2002 1

<<http://www.farmfoundation.org/news/articlefiles/816-sumner.pdf>>(accessed 6 March 2010)

¹⁶² SADC "Glossary of FTA Terms" <<http://www.sadc.int/fta/index/browse/page/46>>(accessed 6 March 2010)

¹⁶³ Radcliffe "The Basics of Tariffs and Trade Barriers" 2009 1

<<http://www.investopedia.com/articles/economics/08/tariff-trade-barrier-basics.asp>>(accessed 6 March 2010)

¹⁶⁴ WTO Brochure "Trade And Market Access Data for Policy Makers" 2009 10

<http://www.wto.org/english/res_e/statis_e/broch_dataday_feb10_e.pdf>(accessed 30 March 2010)

¹⁶⁵ *ibid*

¹⁶⁶ South Africa.info "Tariffs, Taxes and Exchange Control" 2009 1

<<http://www.southafrica.info/business/trade/import/925317.htm>>(accessed 6 March 2010)

¹⁶⁸ Radcliffe *supra* 163 at 1

- ii) **Specific tariffs** are set amounts which are levied on products which are imported, regardless of values.¹⁶⁹ A country could for example be levied a R150 tariff on each pair of shoes imported, but levied a R2000 tariff on each computer imported.¹⁷⁰
- iii) A **revenue tariff or a specific excise duty**, can be used to increase government funds, for example, a country that does not grow bananas may create a tariff on the importation of bananas thereby making money from businesses that import these bananas.¹⁷¹ Similarly specific excise duties can be levied for revenue purposes on luxury goods such as spirits, beer, cigarettes/tobacco and new cars with the effect that local and imported items are treated equally.¹⁷²
- iv) **Protectionism** is when nations put in place tariffs in order to promote the interests of domestic producers by restricting importers.¹⁷³ This is common in many developing nations, but it is also frowned upon, primarily by nations who want to export their goods in other countries.¹⁷⁴
- v) A **prohibitive tariff** is one so high that it discourages the importation of any specific item.¹⁷⁵ For instance in 1995 the average tariffs in OECD countries stood at 214% for wheat and 154% for barley.¹⁷⁶ Similarly, up until the early 1990's prohibitive tariff levels were used to protect the automotive industry, resulting in low levels of imported vehicles into South Africa during that time.¹⁷⁷

b) Why are Tariffs Used?

Tariffs are implemented for two clear economic purposes.¹⁷⁸ Firstly, they provide revenue for the government and secondly, they improve economic returns to firms and suppliers of resources to domestic industry that face competition from foreign imports.¹⁷⁹

¹⁶⁹ SA.info *supra* 166 at 1

¹⁷⁰ Radcliffe *supra* 163 at 1

¹⁷¹ *ibid*

¹⁷² Mbendi "Guide to importing into South Africa" 2000 1

<http://www.mbendi.com/import/sa/customs_tariffs.htm>(accessed 7 March 2010)

¹⁷³ *ibid*

¹⁷⁴ *ibid*

¹⁷⁵ *ibid*

¹⁷⁶ OECD-FAO "Agricultural Outlook 2007-2016" 2007 22

<<http://www.agrioutlook.org/dataoecd/6/10/38893266.pdf>> (accessed 10 March 2010)

¹⁷⁷ Black "The Impact Of Trade Liberalisation On The South African Automotive Industry" 1998 33

<<http://www.tips.org.za/files/177.pdf>>(accessed 10 March 2010)

¹⁷⁸ Beghin "NTBs Working Paper -06-WP 438" (Iowa State University 2006) 1;2

<http://www.econ.iastate.edu/research/webpapers/paper_12703.pdf>(accessed 12 March 2010)

¹⁷⁹ *ibid*

Free trade benefits consumers through increased choice and reduced prices, but because the global economy brings with it uncertainty, many governments impose tariffs and other trade barriers to protect their infant industry and developing economies, but are also often used by advanced economies with more developed industries.¹⁸⁰ Here are the five of the top reasons, according to Brent Radcliffe (a well known International Economist), tariffs are used today:

Protecting Domestic Employment - The levying of tariffs is often highly politicised as the possibility of increased competition from imported goods can threaten the domestic industries of countries.¹⁸¹ These domestic companies may have to fire workers or shift production abroad to cut costs, which means higher unemployment and a less happy electorate.¹⁸²

Protecting Consumers - A government may also levy a tariff on products that it feels could endanger its population.¹⁸³ For example, Botswana may place a tariff on imported pork from China if it thinks that the goods could be tainted with disease.

Infant Industries - The use of tariffs to protect infant industries can be observed by the Import Substitution Industrialisation (ISI) strategy employed by many developing nations.¹⁸⁴ The government of a developing economy will thus levy tariffs on imported goods in industries in which it wants to promote growth.¹⁸⁵ This increases the prices of imported goods and creates a domestic market for domestically produced goods, while protecting those industries from being forced out by more competitive pricing.¹⁸⁶ Thereby also decreasing unemployment and allowing developing countries to shift from agricultural products to finished goods.¹⁸⁷

Criticisms of this sort of protectionist strategy revolve around the cost of subsidising the development of infant industries.¹⁸⁸ If an industry develops without competition, it could wind up producing lower quality goods, and the subsidies required to keep the state-backed industry afloat could drain the economic growth of a country.¹⁸⁹

¹⁸⁰ Radcliffe *supra* 163 at 1

¹⁸¹ *ibid*

¹⁸² *ibid*

¹⁸³ *ibid*

¹⁸⁴ *ibid*

¹⁸⁵ *ibid*

¹⁸⁶ *ibid*

¹⁸⁷ *ibid*

¹⁸⁸ *ibid*

¹⁸⁹ *ibid*

National Security Barriers - are also employed, mostly by developed countries, in order to protect specific industries deemed strategically important (such as those supporting national security).¹⁹⁰ Defence industries are often viewed as fundamental to state interests, and often enjoy significant levels of protection.¹⁹¹

Retaliation- Countries also sometimes set tariffs as a retaliation technique if they think that a trading partner has not played by the rules.¹⁹² For example, if South Africa believes that the United States has allowed its tea producers to brand its domestically produced tea “Rooibos” (a name given to a specific tea only grown a small area of the Western Cape region in South Africa), it may levy a tariff on imported meat from the United States.

c) Significance of Tariffs

Although difficulties in accessing **tariff information** is strictly speaking a NTB issue, the author felt it would be fitting to briefly introduce the importance of easy access to tariff information and later on divulge in the specific issues and proposals relating to modernisation and simplification of systems pertaining to accessing such information.

The significance of tariff information goes beyond multilateral tariff negotiations and is relevant for a diverse group of stakeholders.¹⁹³ Exporters need to know what the applied tariffs are should they wish to compare the market access conditions of their products with the ones originating from other countries.¹⁹⁴ Trade promotion agencies are interested in estimating the actual prospects for market access for a given product and destination.¹⁹⁵ Based on tariff information, trade analysts and policy makers can evaluate trade policy impact, such as gains associated with various trade liberalisation scenarios.¹⁹⁶

¹⁹⁰ *ibid*

¹⁹¹ *ibid*

¹⁹² *ibid*

¹⁹³ ITC "Business briefing on Trade Policy" 2009; "WTO Trade Policy Review: Botswana, Lesotho, Namibia, South Africa and Swaziland" 2009 10<www.wto.org/english/tratop_e/tpr_e/tp322_e.htm>(accessed 31 March 2010)

¹⁹⁴ *ibid*

¹⁹⁵ *ibid*

¹⁹⁶ *ibid*

d) Southern African Customs Union (SACU)

SACU is a customs union agreement that is in force between South Africa, Botswana, Lesotho, Namibia and Swaziland (BLNS) with all member states sharing similar Customs and Excise Legislation.¹⁹⁷ In terms of the agreement, goods are traded free of duty between members and provides for a common external tariff to non member countries.¹⁹⁸ Import tariffs are levied at the first point of entry in SACU and the dutiable value of imported goods is calculated “Free on Board” (FOB) in the country of export.¹⁹⁹

Countries are required to set the applied Most Favoured Nation (MFN) Common External Tariff (CET) in consultation with its SACU partners.²⁰⁰ However in some cases, it appears that the structure of the CET does not adequately reflect the needs of the individual economies of the other SACU members.²⁰¹

The simple average rate of SACU's applied MFN CET decreased from 11.4% in 2002 to 8.1% in 2009.²⁰² The pattern of protection has shifted in favour of agricultural products, with an average rate for agricultural products²⁰³ of 10.1% in 2009, up from 9.6% in 2002, against an average rate for non-agricultural products²⁰⁴ of 7.8% in 2009, down from 11.6% in 2002.²⁰⁵

The tariff structure has been simplified dramatically in recent years and in 2009, 96.8% of all tariff lines carry ad valorem rates, up from 75% in 2002.²⁰⁶ The number of tariff lines with mixed duties has been reduced from 1,774 in 2002 to 98 in 2009 and those with specific duties have been reduced from 195 to 109.²⁰⁷

Mixed duties apply to agricultural products, textiles, coal, and footwear.²⁰⁸ Specific duties apply mainly to agricultural products, coal, and some textiles with their *ad valorem*

¹⁹⁷Mbendi supra 232 at 1; SACU Tariffs ”Trade Facilitation” 2010
<<http://www.sacu.int/tradef.php?include=about/tradef/tariffs.html>>(accessed 7 March 2010)

¹⁹⁸SACU Tariffs supra

¹⁹⁹ *ibid*

²⁰⁰ *ibid*

²⁰¹ ITC supra 193 at 1

²⁰² *ibid*

²⁰³ WTO definition

²⁰⁴ *ibid*

²⁰⁵ ITC supra 193at 1

²⁰⁶ *ibid*

²⁰⁷ *ibid*

²⁰⁸ *ibid*

equivalents ranging from zero to 60%.²⁰⁹ Compound duties are no longer applied by SACU however there remains five tariff lines with formula duties.²¹⁰

Tariff bindings by all SACU members are at *ad valorem* rates seeing as the imposition of non *ad valorem* rates on some tariff lines creates the risk of non-compliance by SACU Members. This is due to the fact that their individual tariff bindings and duty formula's (based on reference prices) does not ensure conformity WTO obligations under the Agreement on Customs Valuation.²¹¹

e) Tariffs and Modern Trade today

The function tariffs play in international trade has declined in modern times.²¹² One of the primary reasons for the decline is the introduction of international organisations such as the WTO designed to improve free trade in the world.²¹³ Such organisations make it more difficult for a country to levy tariffs and taxes on imported goods, and can reduce the likelihood of retaliatory taxes being enforced as well as reduce the production and consumption distortions created by tariffs.²¹⁴ These distortions are usually the result of domestic producers making goods due to inflated prices, and consumers purchasing fewer goods because prices have increased.²¹⁵

Tariffs on manufacturing goods have been reduced to low levels through eight successive rounds of the WTO and its predecessor, the GATT.²¹⁶ As of 2005, the average tariff stood at roughly 3% in high-income countries, and 11% in developing countries, figures that according to the World Bank were at least three times higher in 1980.²¹⁷ This has resulted in the promotion of goods crossing borders, therefore improving regional as well as intercontinental trade.²¹⁸

Under the market access offer by the Uruguay Round, South Africa has taken the lead in the process of reducing its number of tariff lines and binding levels to figures below of what is expected by the WTO standards. It has also rationalised 10 000 tariff lines down to between 5

²⁰⁹ *ibid*

²¹⁰ *ibid*

²¹¹ *ibid*

²¹² Mbendi *supra* 197 at 1

²¹³ *ibid*

²¹⁴ Radcliffe *supra* 163 at 1

²¹⁵ *ibid*

²¹⁶ Beghin *supra* 178 at 2

²¹⁷ *ibid*

²¹⁸ Radcliffe *supra* 163 at 1

000 and 6 000 by the end of the five-year adjustment period following 1995.²¹⁹

It has furthermore cut back tariff lines from the 80 different levels of the past to six levels at present: 0 per cent, 5 per cent, 10 per cent, 15 per cent, 20 per cent and 30 per cent, with only a few exceptions, notably in clothing and textiles and motor industry manufacturer.²²⁰

For importers, tariff barriers can make it difficult to bring goods into a country. The importer may be forced to import less because the tariff barriers cannot be afforded otherwise, and it may need to charge more for the goods to make importing worthwhile.²²¹ Tariffs are designed to force importers to do this to level the field between domestic producers and importers, allowing costly domestic producers to compete with importers who may be able to bring in goods at lower cost.²²²

Because of this, countries have opted rather to use NTBs, such as quotas and export restraints to levy goods crossing its borders. Hence the primary focus of this paper surrounds identifying critical NTBs that further stifle the movement of goods in Southern Africa and then later deal with solutions offered to address such barriers.

4.2 Non-Tariff Barriers Facing Southern Africa

a) Introduction

Problems and deficits facing trade in Southern Africa are well known and include multiple NTBs undermining cross border trade with specific reference to those NTBs that hamper cheap, fast and smooth movement of goods crossing its borders.

The attention of policy makers and international organisations has therefore shifted to NTBs as the primary sources of hindrance for the furtherance trade liberalisation and as a key access concern for developing countries.

²¹⁹ Mbendi *supra* 197 at 1

²²⁰ *ibid*

²²¹ *ibid*

²²² *ibid*

The legal definition of NTBs according to the OECD is that NTBs constitute *any instrument that is in violation of WTO law*.²²³ Non-tariff measures (NTMs) on the other hand are *policy measures that have the effect of limiting trade, with no implied judgement on the legitimacy or otherwise of these measures*.²²⁴

The WTO has no general definition of what a NTB is, however NTBs have been commonly defined by authors as: *any regulation of trade other than a tariff or other discretionary policy that restrict[s] international trade. These include export prohibitions; export quotas; export licensing; export duties and levies; and minimum export prices*.²²⁵

In contrast to legitimate non-tariff measures (NTMs) that are based on legitimate policy objectives such as public safety, health, security, environmental or consumer protection, NTBs may be dictated by protectionist designs, which are incompatible with GATT and WTO principles and thereby impose unjustified burdens on traders.²²⁶

Some NTBs do exist for legitimate reasons such as consumer protection or as a component of business methods necessary for doing trade and are referred to as legitimate trade measures (LTMs).²²⁷ These measures only become genuine NTBs when they are implemented in such a way that they add unnecessarily costs or inhibit trade, or are applied in an illegitimate manner.²²⁸ This chapter will however only attempt to identify the major NTBs facing intra-regional trade within in Southern Africa with only a brief mention of NTMs.

Ultimately NTBs refer to the wide and heterogeneous range of policy interventions other than border tariffs that affect and distort international trade.²²⁹ NTBs are commonly divided into three broad categories, namely:

- **Health, Safety and Environmental NTBs** including export bans, sanitary and phytosanitary requirements (SPS), standards and conformance requirements; Essentially, technical standards and SPS measures are put in place to protect health, safety and animal and plant life, however when these measures are applied

²²³ Dhar *et al* "Taming Non-Tariff Barriers: Can WTO find a solution?" 2006 3
<http://www.unescap.org/tid/projects/postdoha_s5dhar.pdf>(accessed 21 March 2010)

²²⁴ *ibid*

²²⁵ Mashindano *et al* "Elimination Of NTBs Towards SADC Investment Promotion" 2008 10
<<http://www.foprisa.net/publications/documents/NTBsinSADC.pdf>>(accessed 12 March 2010)

²²⁶ Imani Development "Inventory Of Regional Non Tariff Barriers: Synthesis Report" 2007 6
<http://ntb.africonnect.com/media/ntb_synthesis_2007_final.pdf>(accessed 14 March 2010)

²²⁷ Mashindano *supra* 294 at 10

²²⁸ *ibid*

²²⁹ Beghin *supra* 178 at 2

inconsistently with international standards they can provide serious barriers to trade and impact heavily on the competitiveness of private businesses.²³⁰

- **Trade policy NTBs include:** much broader policy measures such as export assistance, export taxes, import licenses, public import quotas, state trading and import monopolies, production subsidies, tax concessions and trade remedy practices (such as anti-dumping, safeguard and countervailing measures);

These barriers either directly hinders trade through quantitative measures or through cost/price reduction on fair competition, monopolistic or restricted import trade in countries.²³¹

- **Administrative NTBs** simply relates to administrative disincentives for exporters and includes: customs clearance delays, a lack of transparency and consistency in customs procedures, poor transport service, overly bureaucratic and arbitrary processing methods and documentation requirements for consignments, corruption, high freight and transport charges and services that are not user-friendly.²³²

NTBs are usually applied fairly arbitrarily, difficult to quantify and appear to be more prevalent in trade between developing countries.²³³ They are also often linked to historic bureaucratic and trade cultures of particular countries and usually occur at various levels of administrative systems.²³⁴

Most importantly, in the context of this paper, NTBs hamper intra-regional trade because they diminish the potential benefits which could be derived from the **trade preferences** offered through not only the WTO but also those benefits under SADC and SACU, since these regional economic communities are seen as developing mechanisms for dealing with NTBs.²³⁵ Moreover overlapping membership²³⁶ in itself creates a major NTB for Southern Africa trade. Financial costs associated with dual memberships, lack of harmonisation of policies(especially in the area of customs procedures), large information gap at policy making

²³⁰ Ponter *supra* 150 at 6

²³¹ Imani Development *supra* 226 at 7

²³² *ibid*

²³³ *ibid*

²³⁴ *ibid*

²³⁵ Luximon “Has Regional Economic Integration Promoted Trade In Southern Africa? The Spaghetti Trap” 2003 8

<[http://r0.unctad.org/p166/reduit2004/module1/Regional%20integration%20and%20Mauritian%20trade%20\(per\).doc](http://r0.unctad.org/p166/reduit2004/module1/Regional%20integration%20and%20Mauritian%20trade%20(per).doc)>(accessed 24 March 2010)

²³⁶(*For example:* Five members of the SADC belong to the SACU, and all, except Botswana and South Africa, also belong to Community of Eastern and Southern African countries (COMESA).

In addition to these RTAs, several bilateral trading arrangements exist as of 1999 within the SADC context: three between South Africa and Zimbabwe, Malawi as well as Mozambique. Also, three FTA exist between Zimbabwe and Botswana, Malawi as well as Namibia).

and implementation levels and changing political position of member countries of different RECs are few among many problems created by overlapping membership.²³⁷

By looking at various empirical studies, the following sections break down these three categories mentioned and explore the impact of specific NTBs faced by Southern Africa as a whole, SACU, SADC as well as individual countries within these regions. The purpose being to inform the reader of the fundamental and recurring NTBs prevalent in these countries and regions, before divulging in the solutions and recommendations offered by the multilateral system.

The author is well aware that the core NTBs within the specific regional blocks and countries are somewhat similar and do overlap to a large degree. None the less it is essential to look at various studies and surveys done on Southern Africa as a whole, regional level and national basis in order to develop a priority list of the most prolific NTBs that continually exist and found in Southern African countries.

b) Prevalent NTBs in Southern Africa

There is a consistent view expressed by the business operators in Southern Africa that, as a whole, NTBs prevailing in the region has a serious impact on trade, business costs and market access.²³⁸ Non-Tariff Barriers within the region have become considerably less identifiable as trade liberalisation and tariff reform processes have been implemented over the last decade.²³⁹ In the past state intervention through price controls, foreign currency controls, import licensing and state marketing meant that such barriers to trade were obvious to all concerned.²⁴⁰ Today most of these controls have been lifted in most countries with the result that prevailing NTBs tend to be more arbitrary, qualitative and non-transparent.²⁴¹

A review by *Imani Development Group* on the various reports and input given by Southern African countries attempts to unveil this issue and identifies the most prevalent NTBs in the region as follows:

²³⁷ Luximon *supra* 235 at 8

²³⁸ Imani Development *supra* 226 at 5

²³⁹ *ibid* 18

²⁴⁰ *ibid*

²⁴¹ *ibid*

- i) **Arbitrary NTBs:** There exists a surplus of such NTBs in Southern Africa, most of which tend to be very product specific and sometimes of seasonal or limited duration.²⁴² Included in this category are such actions as follows:

NTB	Primary Reason
Non-acceptance of SADC / Certificates of Origin	Non-notification of change of verifying signatures, suspicion of authenticity of declaration
Changes in road and border tolls	Short-term revenue generation
Temporary bans on selected products	Local industry protection, vested interests, health protection
Non-acceptance of certificates and trade documentation	If the documents are in order then often due to corrupt practices as border posts
Visa requirements	Lack of harmonisation and revenue seeking
Non-acceptance of national Standards	Inability for verification at national level, lack of regional accreditation processes, MRA ²⁴³ not in place
Pre-shipment Inspection	Prevent transfer pricing and under-invoicing
Restrictions on transport mode	Protection of local transporters, revenue collection
Incorrect tariff classification	Corruption, revenue collection, lack of suitable training
Poor collection and dissemination of trade data	Inadequate human resources, lack of computerisation.

Source: Imani Development, 18-19

- ii) **Agricultural NTBs:** Without a doubt and somewhat ironically the most prevalent NTBs faced by traders within Southern Africa is in agricultural commodities, with

²⁴² *ibid*

²⁴³ (Mutual Regulation Agreements)

particular commodities facing restraints such as import and export bans, quota restrictions, variable SPS and TBT restrictions, licensing requirements and seasonal restrictions.²⁴⁴ The irony is that these are the same countries that are clamouring for easier access for their agricultural commodities into the developed world.²⁴⁵

Manufactured goods on the other hand have historically faced fewer restrictions and when they did exist they usual met national standards or RoO requirements.²⁴⁶ None the less, since the Uruguay Round and leading up to the Doha Round of negotiations, this category has come under increased focus. A study by the World Bank estimates that barriers to manufacturing exports make up around 70% of the total export barriers faced by developing countries and that three-quarters of the gains from further manufacturing liberalisation would go to developing countries.²⁴⁷

Currently there exist very little intra-regional trade in **mineral products** and restraints tend to be more focused on exports such as single channel marketing, export permits and the like.²⁴⁸

- iii) **Customs Administration:** This still appears to be a significant NTB in the region as the disparity in the efficiency and effectiveness of Customs administration in different countries tend to be huge.²⁴⁹ This disparity ranges from highly computerised systems linking Customs and traders thereby enabling goods to be cleared in a matter of hours, to a very bureaucratic, corrupt, manual systems that can see goods taking weeks to clear.²⁵⁰
- iv) **Infrastructure:** Technically the quality of infrastructure (including the cost and efficiency of public utilities) is not an NTB, but in the context of regional trade, it

²⁴⁴ Imani Dvelopment *supra* 226 at 19

²⁴⁵ *ibid*

²⁴⁶ Ponter *supra* 150 at 5

²⁴⁷ Chutikul (former Secretary-General of UNCTAD) "Official Statement to Bangkok Post" 25 July 2001 <http://www.wto.org/trade_resources/quotes/new_round/new_round.htm>(accessed 20 March 2010)

²⁴⁸ Imani Development *supra* 226 at 5

²⁴⁹ *ibid* 19

²⁵⁰ *ibid*

can be the most important barrier to trade.²⁵¹ Nearly every country report has raised the issue of poor road, rail, airport and harbour facilities as a major barrier to trade in their region.²⁵² The time and cost of transport is a massive burden to the land-locked countries such as Botswana and Lesotho²⁵³ (internal transport often costing as much or more than the cost of shipping a product from overseas).²⁵⁴ Variable tolls, variable axle-loading regulations, different insurance and bond guarantee systems etc, all add to the burden of moving goods within the region.²⁵⁵

Therefore it is imperative that Southern Africa unites in addressing these NTBs as they not only restrict trade but also challenges regional growth by hindering trade liberalisation and economic integration.²⁵⁶ The removal of these barriers will thus not only increase intra-regional trade, but will also lead to employment creation, lower consumer costs and create more revenue for the fiscus.²⁵⁷

Lastly, it is important to note that Southern Africa should not only be seen as the victim of the growing prevalence of NTBs, countries are also prone to using these NTBs themselves to keep out the exports of other African countries. Notably Multi-Fibre Agreement (MFA) quotas and voluntary export restraint's (VERs) have helped their exporters by shielding them from competition from other developing regions.²⁵⁸ Many NTBs in the region are also linked to legitimate public policy objectives, for example health, safety or environmental protection, and may be in place for valid regulatory reasons.²⁵⁹ It is therefore not feasible simply to reduce or eliminate an arbitrary proportion of such measures.²⁶⁰ But given the WTO Ministerial mandate, neither can negotiators avoid addressing them.²⁶¹

²⁵¹ *ibid*

²⁵² *ibid*

²⁵³ (Such as Botswana and Lesotho)

²⁵⁴ Imani Development *supra* 226 at 19

²⁵⁵ *ibid*

²⁵⁶ Denner "NTBs to Intra-SACU Trade"

http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&news_id=77808&cause_id=1694>(15 March 2010)

²⁵⁶ *ibid*

²⁵⁷ *ibid*

²⁵⁸ Fliess *et al* "Analysis of NTBs: Concern To Developing Countries" 2005 11

<http://www.iadb.org/intal/intalcdi/PE/2007/00582.pdf> >(accessed 9 March 2010)

²⁵⁹ Imani Development *supra* 226 at 7

²⁶⁰ *ibid*

²⁶¹ *ibid*

c) Prevailing NTBs Identified In SADC

Following the Uruguay round for negotiation of Marrakesh 1994, all SADC countries became parties to the WTO.²⁶² Today SADC comprises of 14²⁶³ countries, with a total population of approximately 215 million people.²⁶⁴

This big market provides country's with the opportunity to exchange goods (produced in their countries) with each other so as to promote regional development and alleviate poverty.²⁶⁵

SADC member states have committed themselves to the removal of NTBs and thus embarked on a process which includes the harmonisation of customs rules and procedures; the harmonisation of Sanitary and Phyto-Sanitary measures (SPS) and the implementation of common Rules of Origin.²⁶⁶

SADC, in its endeavours to achieve these goals, has developed a Protocol on Trade to which 13²⁶⁷ Member States have currently acceded to.²⁶⁸ This Protocol identifies and calls for the elimination of various forms of NTBs which prevent trade and investment in the region.²⁶⁹

Article 6 of the SADC Protocol on Trade provides that Member States, in relation to intra SADC trade, are obligated to:

- Adopt policies and implement measures to eliminate all existing forms of NTBs.
- Refrain from imposing any new NTBs.²⁷⁰

The following are NTBs identified and targeted by the SADC protocol and also by the WTO in realising the economic gains and potential from this rather large market.²⁷¹

²⁶² Mashindano *supra* 225 at 10

²⁶³ (Including, Angola, Botswana, Democratic Republic of Congo (DRC), Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe).

²⁶⁴ Mashindano *supra* 225 at 10

²⁶⁵ *ibid* 2

²⁶⁶ *ibid* 9

²⁶⁷ (Including, Angola, Botswana, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. Angola, however, has not presented its schedule of tariff reductions for goods originating from the SADC Member States. And the DRC has not yet acceded to the Protocol on Trade).

²⁶⁸ Mashindano *supra* 225 at 9

²⁶⁹ *ibid* 19

²⁷⁰ Imani Development *supra* 226 at 12

²⁷¹ *ibid*

- Imposition of charges for services or clearances other than those internationally agreed, or above internationally agreed levels. This includes import and export license fees, administrative charges, transit bonds, and special deposits.
- Misuse of legal measures concerning movement of persons (passports, visas, health documents).
- Improper administrative interventions. Customs authorisations and procedures may be used to impede the passage of products and traders for example.
- Lack of capacity to meet SPS and other quality standards imposed by importing countries. (The lack of harmonised SPS and other quality standards within the SADC region may also constitute a NTB)
- Inadequate/lack of trade-support, finance and transport services and information relating to market information, electronic communications systems and standards authorities.”²⁷²

Although not strictly an NTB, deficiencies and inadequacies in infrastructure such as ports, roads, airports, and border posts still pose what many would argue, the most significant constraint to trade in the region.²⁷³ Hence, for the purposes of this paper infrastructure and transport issues are given equal weighting in determining NTBs within the region.

d) Prevailing NTBs within SACU

Article 2(a) of the 2002 SACU Agreement identifies one of its objectives as: “to facilitate the cross-border movement of goods between the territories of the Member States.”²⁷⁴

Although tariff barriers and quantitative restrictions have mostly been eliminated between the SACU members, NTBs have been identified as a major impediment to further integration within the region.²⁷⁵ According to the trade policy review of SACU, published by the WTO Secretariat on 4 November 2009, intra-SACU trade has been on the increase since 2003.²⁷⁶ However, more than 95% of the commercial flows within the customs union involved South

²⁷² Mashindano *supra* 225 at 19

²⁷³ *ibid* 20

²⁷⁴ 2002 SACU Agreement between: The Governments of The Republic of Botswana, The Kingdom of Lesotho, The Republic of Namibia, The Republic of South Africa and The Kingdom of Swaziland
<<http://www.trade.gov.ls/documents/2002%20Southern%20African%20Customs%20Union.pdf>>(accessed 16 March 2010)

²⁷⁵ Denner *supra* 256 at 1

²⁷⁶ *ibid*

Africa as a destination or supplier.²⁷⁷ Although South Africa accounted for half of the total BLNS trade throughout the review period, the intra-SACU component of South Africa's total trade accounted for only 11% and 0.4% of South Africa's total exports and imports respectively.²⁷⁸ During the review period the total trade among the BLNS member states was calculated as negligible.²⁷⁹

In the trade policy review, various NTBs were identified which currently restrict intra-SACU trade." These included:

- seasonal import bans
- price controls
- levies and surcharges
- customs administration procedures and
- border transport charges."²⁸⁰

Furthermore within SACU various key NTMs were also identified as not yet been fully harmonised, these were listed as:

- quantitative restrictions;
- customs procedures;
- standards and technical regulations;
- SPS measures;
- competition policy; and
- internal taxes.²⁸¹

The main barrier facing traders in the SACU region has also been identified as existing in agricultural commodities.²⁸² Import permits are required for most agricultural imports by SACU member states.²⁸³ Furthermore SPS requirements are particularly stringent, especially in South Africa, where agricultural goods are subject to additional quality standards or technical regulations.²⁸⁴ The SACU member countries also apply measures aimed at

²⁷⁷ *ibid*

²⁷⁸ *ibid*

²⁷⁹ *ibid*

²⁸⁰ *ibid*

²⁸¹ *ibid*

²⁸² *ibid*

²⁸³ *ibid*

²⁸⁴ *ibid*

encouraging domestic production of certain agricultural goods, including seasonal import bans on controlled crops, tariff rate quotas, and additional duties on the importation of certain agricultural products, infant industry protection and government incentives for increased agricultural production.²⁸⁵

Customs administration, regulation, procedures and documentation requirements have also been identified as considerable barriers to trade in the region.²⁸⁶ In terms of the ease of trading across borders, customs procedures of the SACU member states do not perform well on a global scale.²⁸⁷ In a recent survey by the International Finance Commission, among 183 countries Lesotho ranked 143rd, South Africa 148th, Botswana 150th, Namibia 151st and Swaziland 158th.²⁸⁸ The customs automation option used by Botswana, Namibia and Swaziland (not yet fully computerised) differs from the system used by South Africa, while Lesotho's customs procedures are sadly not yet automated.²⁸⁹ Goods traded within SACU must also be declared at each border post and comply with the strict requirements of each SACU member state.²⁹⁰

Harmonisation has also been identified as a major obstacle to trade in the region as each SACU member applies its own Value Added Tax (VAT) or sales tax regime.²⁹¹ This creates an economic border on intra-SACU exports and imports.²⁹² Botswana, Lesotho, Namibia and South Africa levy VAT at different rates, while Swaziland still imposes a sales tax.²⁹³ Exporting goods from one SACU country to another also requires the transporter not only to apply for the VAT/sales tax refunds from the exporting country but also to pay the relevant tax to the importing country.²⁹⁴ This means papers have to be filed in two different countries, increasing trading costs and encouraging smuggling and tax evasion.²⁹⁵

²⁸⁵ *ibid*

²⁸⁶ *ibid*

²⁸⁷ *ibid*

²⁸⁸ IFC" Doing Business 2010 Report" <<http://www.doingbusiness.org/economyrankings/>>(accessed 20 May 2010)

²⁸⁹ Denner *supra* 256 at 1

²⁹⁰ *ibid*

²⁹¹ *ibid*

²⁹² *ibid*

²⁹³ *ibid*

²⁹⁴ *ibid*

²⁹⁵ *ibid*

Due to the differences in the internal tax systems border controls are still maintained within SACU.²⁹⁶ The harmonisation of internal taxes can thus greatly facilitate trade and foster further economic integration.²⁹⁷

e) NTBs at a National level

i) South Africa

The majority of issues facing South African traders are indicated to be problems faced outside of South African borders, such as preferences disappearing one day and import bans instituted the other without much forewarning by other countries in the region.²⁹⁸

The most predominant NTBs affecting exports from South Africa include:

- uncertainty regarding appropriate documentation and time required to clear customs;
- visa costs and problems;
- identifying and conforming to standards requirements of importing countries; and
- the need for multiple SPS testing, in both country of origin and destination.²⁹⁹

Although South Africa is well ahead of its SADC partners, it has recently been severely criticised for the shocking state of its infrastructure, specifically to the conditions and effectiveness its roads and railway systems, the lack of cold room facilities at airports, the containerisation and congestion problems facing the port of Durban and the limited nature of air cargo and air passenger links.³⁰⁰

Other constraints relate to:

- Theft of products at SA border posts;
- visa control by the Department of Home Affairs;
- the various insurance issues on exported products into SADC;
- uncertainty due to overlapping multi-and bilateral trade deals and differing requirements;

²⁹⁶ *ibid*

²⁹⁷ *ibid*

²⁹⁸ Imani Development *supra* 226 at 59

²⁹⁹ *ibid*

³⁰⁰ *ibid*

- Black Economic Empowerment (BEE) criteria affecting Government Procurement; and
- some of the existing government monopolies.³⁰¹

The strict and complicated RoO also inhibit the flow of regional imports into South Africa.³⁰² Some traders have also struggled to ascertain the correct South African requirements with regard to SPS measures and testing certification.³⁰³ South Africa furthermore has import bans on specific products, mostly for health, environment and safety grounds, but also on second hand goods which potentially hinder regional trade.³⁰⁴

ii) Botswana

Botswana has not emplaced any explicit NTBs since 2004, however some of what are essentially NTMs have become virtual NTBs when there are not enough experienced staff in place to administer them.³⁰⁵ Various SARS initiated transit procedures have a definite irritating impact on trade in the region.³⁰⁶

The fixation with catching the few in number of intentional cheaters has an impact on the 98+% of legitimate operators and manufacturers.³⁰⁷ GABCON, as a ‘dry port’, is apparently not utilised as much as it could be by exporters since the containers go by rail, which is both slow and expensive compared to road transport.³⁰⁸ The unfortunate trade off is that more cumbersome and complex transit arrangements have to be made for road transit.³⁰⁹

The Drugs and Related Substances Act, 1993 established a Board to manage and review the registration of all drugs utilised in non government facilities and practices.³¹⁰ The procedures under the Act for registration are complex and require a very large database to be assembled for each drug submitted for registration.³¹¹ Due to this workload, up until about 2004 several drugs utilised in Botswana were granted a waiver while the registration process was taking

³⁰¹ *ibid*

³⁰² *ibid* 60

³⁰³ *ibid*

³⁰⁴ *ibid*

³⁰⁵ Mashindano *supra* 225 at 36

³⁰⁶ Imani Development *supra* 226 at 28

³⁰⁷ *ibid*

³⁰⁸ *ibid*

³⁰⁹ *ibid*

³¹⁰ *ibid*

³¹¹ *ibid*

place.³¹² This waiver process was halted around 2004, however the build-up has not been cleared thus resulting in a situation whereby over half the drugs readily available in South Africa are no longer available in Botswana.³¹³ What was planned to be a straightforward and legitimate NTM justified on the grounds of safe guarding public health has now turned into a high impact NTB.³¹⁴

iii) Namibia

Institutional coordination in Namibia towards removal of NTBs is under progress although the private arm Namibia Trade Forum (NTF), established in 2005, is weak in undertaking the appropriate measures necessary.³¹⁵ There are no less than six ministries, the Namibian Police, two marketing boards and a statutory board involved in the management of imports and exports thus creating massive uncertainty and burdensome admin for traders.³¹⁶ The onus is upon the applicant to collect all relevant permits/ certificates from line ministries and other bodies, before a commercial import/ export permit application can be made to Ministry of Trade and Industry.³¹⁷ For certain goods, up to three different points of control could apply.³¹⁸

It was also found that for all non-SACU SADC imports an import license is required, even if a product does not feature on the positive list.³¹⁹ Furthermore no general import licensing applies to SACU trade thereby creating unlevelled playing between SACU and non-SACU SADC trade.³²⁰

Progress is currently slow on the harmonisation of transit traffic procedures between Namibia and its regional partners, not in the least due to the large number of sovereign states involved.³²¹ Namibia (Government and industry) has called for the abolishment of “third country rule” and for the introduction of a Single Administrative Document (SAD) for all SADC trade.³²² Key informants interviewed were in favour of streamlining of customs

³¹² *ibid*

³¹³ *ibid*

³¹⁴ *ibid*

³¹⁵ Imani Development Regional Trade Facilitation Programme “Update Survey of NTBs to Trade: Namibia” 2007 8 <<http://ntb.africonnect.com/media/nambia.pdf>>(accessed 11 May 2010)

³¹⁶ *ibid* 11

³¹⁷ *ibid*

³¹⁸ *ibid*

³¹⁹ *ibid* at 25

³²⁰ *ibid*

³²¹ *ibid* 38

³²² *ibid*

clearance documentation. Although current talks among SADC members favour adopting a commonly recognised SADC customs clearance form, the benefits of adopting international standardised customs clearance form would not only guarantee clarity and familiarisation for foreign traders but will also create a sense of security and certainty amongst local governments (who don't have the money to waste on experimental procedures) as history proves the success of adopting such documents.

Other observations included:"

- Visa requirements for travelling Namibians into Zambia (and *vice versa*) present a real hassle for Namibian (and Zambian) transport companies;
- Import of sugar from the SADC sugar producing countries has been monopolised by South African companies who buy up the entire SACU quota resulting in limited access for Namibian importers to Zimbabwean sugar. The SADC Trade Committee has insufficient muscle to address this unfair trade practice and in Namibia no institution exists that is fit enough to deal with unfair trade practices such as dumping;
- The performance of the Namibia Trade Forum (NTF), a public-private partnership in trade promotion and facilitation, is not up to scratch;
- There are concerns about the long-term negative impact of extended infant industry protection measures. Consumers are also dissatisfied with the 2004 ban on second hand vehicles which are seen as pure protectionism;
- In addition to the various NTBs and unlawful payment practices (such as bribery), transport infrastructure shortcomings, including the absence of handling facilities, hamper trade within the region; and
- The general import and export management (IEM) system administered by the Ministry of Trade and Industry (MTI) is regarded by industry as unnecessary and adding inefficiency to their business. A single focal point for IEM is long overdue."³²³

iv) Mozambique

When dealing with Mozambican imports the same problems mentioned in the previous reports such as customs, inefficiencies in ports, import procedures, licensing and registration requirements and costs of clearance are being faced by traders.³²⁴

³²³ *ibid* 45

There are currently 16 **procedures** in the importation process, which on average takes 38 days with an estimated average cost of R12499.76 per container.³²⁵ The procedures are still the same and aside from the new scanner³²⁶ at the Maputo port no significant change has been noticed in recent years.³²⁷

The number of **documents** required to export is currently 6 and takes 39 days with an average cost of R 11726.26 per container.³²⁸ Road transport is constrained by the absence of both customs clearing capacity and adequate customs warehousing facilities at the main land border entry posts, thus creating the need for compulsory warehousing at the destination venues.³²⁹ For Pre-shipment inspection further certification is needed for products on a restricted list.³³⁰

Trade with the region is also constrained by language barriers.³³¹ The Tete border post in particular appears to be highly problematic, with difficulties existing predominantly at the weighbridge for trucks and extremely cumbersome customs procedures.³³² This post is further characterised by looseness on dealing with migration paperwork as well as customs procedures (even for light cars).³³³

v) Malawi

Malawi maintains few non-tariff import restrictions and as from June 1997, all licensing requirements³³⁴ on imports were removed.³³⁵

Nevertheless, the main categories of NTBs forming the primary obstacles to trade in Malawi are:”

- Registration procedures and administration;

³²⁴ Mashindano *supra* 225 at 42

³²⁵ *ibid*

³²⁶ (The interviewed companies complained about the fee charged per container for this service irrespective of the type of merchandise. It costs R700 per 20 ft container or any size of bulk cargo but only 10% of the containers are checked).

³²⁷ Mashindano *supra* 225 at 42

³²⁸ *ibid*

³²⁹ *ibid*

³³⁰ *ibid*

³³¹ *ibid*

³³² *ibid* 43

³³³ *ibid*

³³⁴ (Except those maintained, according to authorities, for health, environment, safety and national security reasons.)

³³⁵ Mashindano *supra* 225 at 38

- Customs related issues and procedures;
- Transport costs and regulations;
- Infrastructure problems;
- Lack of capacity and training within key institution; and
- Technical measures (including packaging and labelling regulations).³³⁶

The exporting community faces increased costs owing mostly to inefficient implementation of administrative procedures, delays in receiving approvals, receiving trading licenses and delays in the issuance of RoO certificates.³³⁷ The transport infrastructure within Malawi also creates a major barrier to ensuring comprehensive product availability.³³⁸

Currently all of Malawi's products are transported by road throughout the country, which is expensive (due to high haulage costs and transportation surtaxes), labour intensive, insecure and especially unreliable.³³⁹

vi) Lesotho

Due to its geographical position and industrial base, the majority of Lesotho's intra-SADC trade is with South Africa.³⁴⁰ It is therefore difficult to differentiate goods as really originating from South Africa as opposed to being routed through South Africa when determining trade direction.³⁴¹ Problems have also arisen due to previous bilateral trade agreement between South Africa and the EU, which brings goods into the customs union at preferential rates.³⁴²

Lesotho continues to confront the challenge of improving competitiveness and promoting broad-based economic growth in order to reduce poverty.³⁴³ The Ministry of Trade, Industry, Marketing and Cooperatives, has through various studies identified regulatory and administrative bottlenecks as critical barriers to setting up business in Lesotho.³⁴⁴

³³⁶ *ibid* at 39

³³⁷ *ibid*

³³⁸ *ibid*

³³⁹ *ibid*

³⁴⁰ Imani Development *supra* 226 at 44

³⁴¹ *ibid*

³⁴² *ibid*

³⁴³ 2010 Index of Economic Freedom "Lesotho"

<<http://www.heritage.org/index/Country/Lesotho>>(accessed 13 March 2010)

³⁴⁴ Imani Development *supra* 226 at 44

The poor quality of much basic infrastructure and the government's inefficiency in delivering public goods have been serious impediments to fostering more vibrant economic development and growth.³⁴⁵ The overall entrepreneurial environment has also been hurt by weak property rights, limited access to finance, and bureaucratic red tape.³⁴⁶

Import bans, controls and restrictions, import licensing, domestic preference in government procurement, some subsidies, and corruption are further NTBs facing Malawi.³⁴⁷

Transportation of goods is also restricted to road freight as negotiations to upgrade the railway facilities are still in progress.³⁴⁸ Freighters mostly complained about the amount of time it takes to declare goods at the border posts and have expressed their wishes for more effective harmonised customs clearing procedures in order to speed up transportation.³⁴⁹

vii) Swaziland

Swaziland has also limited access to intra-SADC trade because of its unique geographical position and size (being landlocked and almost completely surrounded by South Africa).³⁵⁰ Besides its geographical position, Swaziland's dependence on South Africa has also largely been influenced by its membership to SACU and the Common External Tariff (CEF).³⁵¹

Delay in return of export documents for the purpose of acquittals have been recognised as causing major problems for exporters.³⁵² Furthermore, failure to acquit at the stipulated 1 month results in fines of R10 000 per set of documents and failure to submit documents for acquittals on time may also result in paying 14% VAT of the total value of goods every time the goods are to exit through South Africa.³⁵³ These delays obviously translate into higher costs and unnecessary burdens for traders.³⁵⁴

³⁴⁵ *ibid*

³⁴⁶ 2010 Index of Economic Freedom *supra* 343

³⁴⁷ *ibid*

³⁴⁸ Imani Development *supra* 226 at 44

³⁴⁹ *ibid*

³⁵⁰ *ibid* 63

³⁵¹ *ibid*

³⁵² *ibid*

³⁵³ *ibid*

³⁵⁴ *ibid*

Customs and Administration NTBs are however the most prevalent in Swaziland as they are reported to be burdensome and causing delays further increasing the cost of doing business.³⁵⁵

Transport throughout the region is also complicated by the different border procedures because the border requirements in the SADC, COMESA and EAC countries are not harmonised thus causing congestion and delays which ultimately raise the cost of trading with Swaziland.³⁵⁶ This lack of harmonisation furthermore, encourages corruption as traders take it upon themselves to move the process faster.³⁵⁷

Swaziland ranks 72nd out of 179 countries in Transparency International's Corruption Perceptions Index for 2008.³⁵⁸ Corruption is seen as significant in the executive and legislative branches of government, and efforts to combat it are viewed as insufficient.³⁵⁹ Credible reports indicate that unqualified businesses have won contracts because of their owners' relationships with government officials.³⁶⁰ The problem of bribery is especially prevalent in the corridor between the Beit Bridge border and Zambia, as well as some other borders in Zimbabwe and the DRC.³⁶¹

4.3 Conclusion

Through analysing these various studies and country reports one can comfortably conclude that the biggest NTB facing intra regional-trade in Southern Africa can be attributed to the importation and exportation of agricultural commodities. But more specifically to the barriers relating to quotas, permits, duties, import restrictions, infant industry protection as well as SPS and TBT measures imposed on the importation and exportation on such agricultural products.

Equally important, is the deteriorating condition of Southern Africa's infrastructure and the effect it has on sustainable development in the region. Such deficiencies and inadequacies

³⁵⁵ 2010 Index of Economic Freedom "Swaziland"
<<http://www.heritage.org/index/Country/Swaziland>>(accessed 13 March 2010)

³⁵⁶ Imani Development *supra* 226 at 63

³⁵⁷ *ibid*; 2010 index *supra* 355

³⁵⁸ *ibid*

³⁵⁹ *ibid*

³⁶⁰ *ibid*

³⁶¹ Imani Development *supra* 226 at 63

relating mostly to inadequate port, airports, and border post operations as well as the appalling conditions and sometimes non-existence of the roads and railways systems have arguably the most damaging effect in allowing goods to travel smoothly throughout the region

There currently exists a common belief among regional traders that many goods such as coal, steel, wood and other heavy commodities need to shift from road to rail as the road system cannot handle such heavy loads and the congestion it creates. Furthermore, truckers carrying these loads are most often the culprits of overloading owing to the sad state of the roads in the region. The undeniable argument raised however, is that rail cannot handle the current load expected of it. Rail is furthermore much less reliable than road transport not only because traders have more control over their loads but more importantly due to poor internal operations of the rail companies relating to derailments, strikes and theft.

Traders can therefore not afford to take the chance of switching back to rail even though rail is calculated to be cheaper on longer distances and even if at the expense of further deterioration the roads possibly penalties facing truck drivers due to overloading.

Although this author supports the opinion that rail transport needs to be restored to adequate working condition, it also supports the opinion that countries in the region must first harmonise their laws, and put in place further and more stringent enforcement mechanisms in order to monitor breaches related to overloading and further misconduct so as to prevent the continuation of such practice. There is no point in one country alone putting in place such mechanisms while its trading partner on the other side of the border neglects to do so.

Although this matter can sufficiently be dealt with at a regional level it is further believed by this author that by harmonising laws in terms of WTO standards would create a sense of certainty and transparency not only in the region, but also for traders abroad wishing to do business with Southern Africa.

The other notable NTB facing trade in South Africa is the lack of transparency in its customs systems and processes due to, for the most part of it, lack of modernisation, outdated trade information and lack of competent officials. This undoubtedly leads to uncertainty among not only traders but also such officials, which ultimately caters for corrupt practices and bribery being predominant in the region.

The solutions offered to address these problems are few but effective and with a little help from the developed world, can successfully address these barriers impeding trade in the region. What will follow is a chapter dedicated to the solutions offered under the multilateral system having specific reference to Articles X, VIII and V of the GATT and the various proposals relating to the improvement of these Articles.

Chapter V: Solutions offered by the GATT and via current WTO negotiations

"Connecting efficiently to local regional markets is particularly critical for developing countries, whose firms and farmers typically do not enjoy a high enough margin of competitiveness internationally to be able to absorb high transaction costs. Their ability to move their produce across borders quickly, reliably and cheaply can mean the difference between their success or failure to integrate into the world economy."

Richard Eglin

July 8, 2008

4. Introduction

Negotiations and proposals on providing a suitable multilateral framework for developing and least developed countries have mostly been characterised by the modalities surrounding trade facilitation. Annex D of the “July Package” (See Appendix A) sets out the modalities for these negotiations and proposals. Given the importance of trade facilitation the question remaining is: “what position Southern African countries should take vis-à-vis these negotiations, bearing in mind the current NTBs facing the region and particular infrastructural needs and concerns of countries in the region, especially those of LDCs and landlocked countries.

Whatever the outcome of these negotiations may be in terms of additional provisions and disciplines, the purpose of this chapter is to analyse the relevant WTO Articles and proposals relating to current negotiations on trade facilitation, identify their shortcomings and faults and establish the necessary guidelines for Southern Africa in adopting a suitable framework in order to achieve its goals of modernising trade transportation and Customs operations.

The suggestion relating to these measures are structured around GATT Articles X, VIII and V which at present constitute the core of multilateral rules on trade facilitation. It’s important to note that while it is possible to consider Articles X, VIII and V independently, they are in fact very closely interlinked.

4.1 Increasing the transparency of trade regulations (Article X GATT)

Article X is regarded as the chief Article in GATT dealing with **transparency** in domestic trading systems by calling for regulations, rulings and laws to be publicised in a prompt and accessible manner and calls for abstinence from enforcing measures of general application prior to its publication.³⁶² Article X has furthermore been classified as **just administrative action** provision that seeks to ensure basic rule of law and administrative justice procedures through the regulation of trade and incorporates provisions on administrative review mechanisms and the right to appeal against such administrative actions.³⁶³ These procedures guarantee transparency, legal certainty and most importantly faith in the legal and administrative systems of countries.³⁶⁴

The critical information required by importers and exporters however go beyond the current scope and application of Article X.³⁶⁵ “Not only is the **scope** of published information limited”.³⁶⁶ In many countries **accessibility** to this information is limited as publication of this information relies on paper prints and government gazettes which are usually printed with delay and in an insufficient number thereby making local distribution an impossible task, not to mention cross-border distribution.³⁶⁷

Legislative texts are important for litigation, appeal and dispute settlements, but for the actual operation of trade transactions: Practical descriptive trade information or excerpts have far greater value.³⁶⁸ Operational implications and aspects of legislation, such as outlines of border crossing formalities, opening hours of border crossing and other agencies offices, updated release and clearance times at selective border crossings etc. are all crucial information needed by trader wishing to engage in regional trade and multilateral trade, as is information relating to applicable fees/charges and tariff schedules.³⁶⁹

Article X is the area where members are most likely to reach a swift agreement, seeing as **transparency** is not a particularly controversial issue, and many WTO agreements already

³⁶² Par. 1; Par 2 Art X GATT

³⁶³ Sohn *supra* 26 at 149; Sheikhan *supra* 36 at 15; Par.3 Art X GATT

³⁶⁴ Njinkeu *et al* “A Positive Agenda For Africa in Trade Facilitation Negotiations” 2005 13
<http://www.ileap-jeicp.org/publications/negotiation_advisory_briefs/nab8.html>(accessed 12 March 2010)

³⁶⁵ UNCTAD “Publication of Trade Related Information” 2006 1
<http://www.unctad.org/en/docs/TN01_PublicationTradeRegulationsUnifAdmin.pdf>(accessed 28 April 2010)

³⁶⁶ *ibid*

³⁶⁷ *ibid*

³⁶⁸ *ibid*

³⁶⁹ *ibid*

have well-established provisions on transparency.³⁷⁰ Transparency, especially the availability of information, allows market participants to fully appreciate the conditions, constraints, benefits and costs of entering and operating in a market.³⁷¹ Transparency is furthermore vital in enhancing the openness of markets and allowing market participants to take full advantage of the opportunities created by WTO rules and commitments.³⁷²

Specific areas proposed by negotiators to be covered by the publication obligation are divided for the purpose of this paper into the following categories:

- a) Publication and Administration of Trade Regulations
- b) Streamlining & Harmonising Trade-related Publications through Digitisation
- c) National Enquiry Points
- d) Integrity and Ethical Conduct of Officials
- e) Release of Goods in Event of Appeal.³⁷³

The proposal intends to reaffirm GATT Article X and are the most advanced in terms of attracting a growing consensus among negotiators.³⁷⁴ The reason being that publication of trade regulations is already implemented by almost countries.³⁷⁵ Although difficulties may arise through internet publication or the establishment of inquiry points this shouldn't create a threat if adequate technical assistance is provided.³⁷⁶

a) Publication and Administration of Trade Regulations

*Publication is the act of making information available to a third person or the general public by distribution and circulation.*³⁷⁷ Information can be published using different means and formats: on paper by printing in a journal or in electronic format by placing it on a website.³⁷⁸

Timely, accurate and easily accessible information on trade laws, applicable fees and charges, customs regulations, and related judiciary mechanisms are vital for lending transparency,

³⁷⁰ Sohn *supra* 26 at 150

³⁷¹ *ibid*

³⁷² *ibid*

³⁷³ United Nation New York (UN NY) and Geneva Trade Facilitation Handbook Part II “Technical Notes on Essential Trade Facilitation Measures” (2006) 11-36

³⁷⁴ Bizumuremyi “Enhancing The Africa’s Participation in the WTO Negotiations” (UNECA: Expert Meeting Nairobi, September 2009) <<http://www.uneca.org/atpc/egm0909/TradeFacilitation.pdf>>(accessed 10 April 2010)

³⁷⁵ *ibid*

³⁷⁶ *ibid*

³⁷⁷ UNCTAD Publication of trade related information *supra* 365at 1

³⁷⁸ *ibid*

efficiency and predictability to private traders.³⁷⁹ However, publication provisions and practices differ amongst countries.³⁸⁰ The current vibrant growth experienced in world trade and technological innovation therefore calls upon governments in Southern Africa to seriously consider adapting their trade laws and Customs regulations/operations to meet these discrepancies in order for them to derive maximum benefits from this existing movement.³⁸¹

While Article X imposes an explicit obligation on Members to *publish trade regulations promptly for governments and traders to become familiar with them*, regrettably the existing provisions according to authors lack the kind of **specificity** and **disciplines** needed to operate efficiently in today's trading environment.³⁸²

For many businesses the difficulty of obtaining this basic trading information, often dampen their entrepreneurial enthusiasm to engage in trade with their regional partners.³⁸³ It has thus been suggested that easy access to trade regulations, Customs requirements, and administrative processes that apply before and during importing/exporting goods are essential in order to provide a time and cost savings environment for traders in the region.³⁸⁴

Instances where trade regulations are not managed in a uniform, impartial or reasonable manner inevitably provide Customs officials with wide discretionary powers that may result in decisions detrimental to the trader, especially in the absence of an appeal mechanism.³⁸⁵

The problem facing Southern Africa however is that most developing and LDCs lack the **financial resources, technology** and in some cases the **political will** to make such information easily available.³⁸⁶ Establishing the right channels to broadcast trade-related information through modern, transparent and simple mechanisms and procedures would not only amount to an incentive for more businesses and individuals to engage in trade but will also undoubtedly save time and money for traders.³⁸⁷

The majority of Developed countries publish extremely detailed trade and customs information, and often that of their major trading partners, on official government

³⁷⁹ UN NY and Geneva *supra* 373 at 11

³⁸⁰ UNCTAD-Publication of trade related information *supra* 365 at 1

³⁸¹ *ibid*

³⁸² *ibid*; Art. X GATT

³⁸³ UN NY and Geneva *supra* 373 11

³⁸⁴ *ibid*

³⁸⁵ *ibid*

³⁸⁶ *ibid*

³⁸⁷ *ibid*

websites.³⁸⁸ Many developing and even LDCs in the region are following suit with the rapid spread of internet into remote corners of the world.³⁸⁹ But while websites in these countries are up and running, many tend to be skeletal with inactive links regarding vital trade information needed by traders.³⁹⁰ Targeted capacity building in computer technology, replete with staff training, and technical assistance in operating software and website programming for publishing relevant trade information, should be an a high priority concern for countries, especially LDCs such as Lesotho and Swaziland who lack the basic framework of such a system.³⁹¹

In the context of the negotiations on trade facilitation, Members proposed strengthening and clarifying the publication requirements of the GATT 1994 by defining **exactly what information** should be published and by enhancing accessibility through placing the content on websites and through the establishment of national enquiry points.³⁹² The information according to these submissions should be available non-discriminately and any fees charged should be proportionate to the costs of providing such information.³⁹³

b) Streamlining & Harmonising Trade-related Publications through Digitisation

Article X also requires that WTO Members publish all laws, trade regulations, judicial decisions and administrative rulings of general application *in such a manner as to enable governments and traders to become acquainted with them.*³⁹⁴

At the preparation stage of any international trade project, to assess the feasibility of the operation, the exporter would need to know the rules of the game, potential costs, average time for different formalities and various risks involved.³⁹⁵ They would therefore need **reliable, specific and easily accessible information** before initiating operations and, later on, a transparent flow of products, during the transport process, consistent with the published

³⁸⁸ *ibid*

³⁸⁹ *ibid*

³⁹⁰ *ibid*

³⁹¹ *ibid*

³⁹² UNCTAD-Publication of trade related information *supra* 365 at 1

³⁹³ UN NY and Geneva *supra* 373 at 11

³⁹⁴ *ibid* 23

³⁹⁵ *ibid*

information.³⁹⁶ Proposals relating to this matter thus call for countries to ensure better **access to advance information** on the formalities involved at different stages of trade operations.

However, publishing these formalities in a useful way implies more than having access to a rough and bulky set of local documents.³⁹⁷ Such formalities need to first be streamlined and harmonised in line with Articles V, VIII and X, GATT, as well as having them digitised in such a format that would make browsing and searching easy i.e.— by entering a specific subject or keyword.³⁹⁸ This will guarantee certainty and a stronger sense of familiarisation among not only regional trading partners but also on a global scale.

Such information usually includes:”

- Customs regulations
- Maritime transport and port regulations
- SPS procedures
- Immigration requirements
- Bank, insurance and currency exchange requirements
- Facilitation instruments in operation
- Statistical information on charges, average waiting time, usual queues, winter closures of border passes, availability of services, references on fuel costs, all multilateral, regional and bilateral agreements affecting international trade policy.”³⁹⁹

Evidently, the amount and size of the texts to be published could amount to thousands of pages and, unless further measures are taken, this information may be poorly organised and may be frequently incomplete and sometimes unreliable.⁴⁰⁰

As a result of poor practices in generating laws and regulations, many developing and LDCs presently do not have their trade regulations prepared for direct publication on the internet.⁴⁰¹ Although a few countries have begun to simplify and harmonise their legislation, the information often found is still ample, incomplete, dispersed over several web pages and the

³⁹⁶ *ibid*

³⁹⁷ *ibid*

³⁹⁸ *ibid*

³⁹⁹ UN NY and Geneva *supra* 373 at 23-24

⁴⁰⁰ *ibid* 24

⁴⁰¹ *ibid* 26

download mechanisms are not always user friendly.⁴⁰² Some countries even have a significant part of their regulations still in paper format, or in old digital formats.⁴⁰³

Unfortunately the great majority of countries especially LDCs in Southern Africa do not have the financial capacity and required level of governance to implement this measure in the short term.⁴⁰⁴ Unless assistance is secured through ongoing negotiations on trade facilitation, these countries will certainly lose out on the benefits offered under a multilateral system.

c) National Enquiry Points

Article X further obliges WTO Members to *publish promptly all trade regulations and administrative rulings of general application for each others' benefit and that of their national trading communities.*⁴⁰⁵

With the aim of further improving the disciplines relating to Article X, Members have submitted proposals on the creation of National Enquiry Points.⁴⁰⁶ These are to serve as central repositories for a country's trade regulations and trade-related information thus creating easy access for interested public and private parties.⁴⁰⁷

Provisions for Enquiry Points already exist in WTO agreements on technical barriers to trade (TBT), SPS, and GATS.⁴⁰⁸ Its function is to respond to information requests from Members and interested parties and to make accessible all documents relating to technical regulations, standards and conformity assessment procedures available at a centralised access point.⁴⁰⁹ However, the scope of these enquiry points is restricted to the subject areas covered by the above-cited agreements and falls well short of the intention of the current proposal.⁴¹⁰

Such enquiry points would constitute the officially designated medium in which WTO Members are entrusted with the task of providing trade-related information, such as:"

⁴⁰² *ibid* 30

⁴⁰³ *ibid*

⁴⁰⁴ *ibid*

⁴⁰⁵ *ibid* 18

⁴⁰⁶ UNCTAD "National Enquiry Points" 2006 1

<http://r0.unctad.org/ttl/technicalnotes/TN06_EnquiryPoints_fin.pdf>(accessed 28 April 2010)

⁴⁰⁷ *ibid*

⁴⁰⁸ *ibid*

⁴⁰⁹ UN NY and Geneva *supra* 373 at 18

⁴¹⁰ *ibid*

- relevant laws, regulations, administrative guidelines, decisions and rulings;
- customs and other border-related agency processes (including port, airport and other entry-point procedures and relevant forms/documents);
- appeal procedures (including standard times and conditions for appeal);
- fees and charges applicable to import, export and transit procedures and requirements;
- agreements with any other country or countries relating to the above issues;
- management plans of Customs and other government agencies relating to implementation of WTO commitments, possibly including standard processing times or relevant reform and modernisation programmes; and
- all significant amendments to the above.⁴¹¹

An Enquiry Point should be equipped with competent staff, and the information be made available, insofar as local capacities allow, in at least one of the official languages⁴¹² of the WTO.⁴¹³

d) Integrity and Ethical Conduct of Officials

Article X: 3(a) specifically requires each WTO member to *administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of Article X.*⁴¹⁴ Most countries in Southern Africa lack comprehensive codes of conduct which sets out clearly and consistently the functions and duties for all categories of their public officials. Such codes or similar provisions, usually incorporated in the domestic laws or administrative policies, furthermore seem to lack the necessary enforcement mechanisms in order to effective.

In this context and as part of the ongoing negotiations on trade facilitation, WTO Members have dealt with this matter by submitting numerous proposals addressing the need for **improved ethical guidance** on the required conduct of border agency officials and **legal remedies** in cases of infringements.⁴¹⁵

⁴¹¹ *ibid*

⁴¹² English, French or Spanish

⁴¹³ UN NY and Geneva *supra* 373 at 18

⁴¹⁴ UNCTAD “Maintenance and reinforcement of integrity and ethical conduct among officials” 2008 1 <http://r0.unctad.org/ttl/technical-notes/TN07_IntegrityofOfficials.pdf>(accessed 27 April 2010)

⁴¹⁵ UN NY and Geneva *supra* 373 at 31

One such proposal suggested developing specific **codes of conduct** for staff of border agencies as well as appointing officials in charge of providing such staff with the necessary training and education needed to comply with these codes.⁴¹⁶

The administration of trade regulations and Customs procedures requires of government agency staff and Customs officials a high level of integrity and professionalism in their dealings with members of the public, traders as well as their fellow government employees.⁴¹⁷ However, complicated and unclear procedures often lure such Customs officials and operators to take discretionary actions, exercise favouritism or even engage in corrupt transactions such as accepting bribes.⁴¹⁸

For the sake of such integrity it has been proposed that Customs officials be held personally liable for their actions and in cases of gross misconduct amounting to unlawful behaviour, criminal sanctions to be envisaged under domestic law.⁴¹⁹

Codes of conduct for Customs officials, like other codes of conduct, normally include provisions that deal with general issues, such as loyalty, efficiency and effectiveness, however more emphasis should be placed on the importance of **integrity, fairness, impartiality** and **non-discrimination** in order to insure the ethical conduct of officials.⁴²⁰

Any code of conduct should also clearly state which types of behaviour are unacceptable, such as undue preferential treatment for any group of individuals, abuse of authority, and acceptance of gifts or benefits and further spell out the disciplinary measures in cases of non-compliance.⁴²¹

e) Release of Goods in Event of Appeal

Customs authorities do not normally release goods until all issues are resolved and all duties and taxes are paid.⁴²² Delays in receiving goods due to customs clearance is a matter of great

⁴¹⁶ UNCTAD-Maintenance of ethical conduct among officials *supra* 414 at 1

⁴¹⁷ UN NY and Geneva *supra* 373 at 31

⁴¹⁸ *ibid*

⁴¹⁹ *ibid*

⁴²⁰ UNCTAD-Maintenance of ethical conduct among officials *supra* 414 at 1

⁴²¹ *ibid*

⁴²² UN NY and Geneva *supra* 373 at 36

concern for any company (especially SMEs) under the extreme demands of today's competitive market.⁴²³

Such delays can arise for numerous reasons, including valuation problems and others not currently regulated by WTO provisions, such as classification problems and e.g. tariff heading determination, missing documents, lack of certificates of origin or health certificates, payment procedures, and in the event of an appeal of a customs decision.⁴²⁴

Further submissions by WTO members to clarify and improve Article X include proposals relating to the **release of goods in the event of appeal**.⁴²⁵ Their aim is to boost the Customs clearance system by securing the payment of Customs fees by traders through the introduction of a financial guarantee/deposit and by allowing traders to take possession of the goods while the appeal is still pending.⁴²⁶ The introduction of such a measure will certainly improve predictability, and speed up the administration of Customs procedures in Southern Africa.⁴²⁷

While neither Articles VIII nor Article X specifically address the issue of providing for a financial guarantee to permit the release of goods, Article 13 of the WTO Agreement on Customs Valuation (CVA) does seem to provide guidance on the matter. Submissions made relating to the release of goods on appeal can thus be seen as extending the scope of the requirement contained in Article 13 of the CVA.⁴²⁸ The proposals made therefore seek to ensure that in the event of an appeal goods are released against the provision of financial security.⁴²⁹ Countries' are thus invited to review their commitments on this matter and if adopted, members would need to include this requirement in their national legislations.⁴³⁰

⁴²³ *ibid*

⁴²⁴ *ibid*

⁴²⁵ UNCTAD "Release of goods in the event of appeal" 2008 1

<http://r0.unctad.org/ttl/technical-notes/TN04_Releaseofgoodsineventofappeal_fin.pdf>(accessed 27 April 2010)

⁴²⁶ *ibid*

⁴²⁷ *ibid*

⁴²⁸ *ibid*

⁴²⁹ *ibid* 2

⁴³⁰ *ibid*

4.2 Customs Efficiency (Article VIII GATT)

Article VIII is the most technical, wide-ranging and difficult of the three articles and basically requires contracting parties to impose fees and charges, relating to import and export, in a manner that it is **reasonable to the cost of services provided** and does not represent indirect protection of domestic products or taxation of imports or exports for fiscal purposes.⁴³¹

In Article VIII, members also recognise, but undertake no explicit obligations to meet:

- *The need to reduce the number and diversity of the fees and charges addressed by Article VIII: 1(b);*
- *The need to minimise the incidence and complexity of import and export formalities, and decrease and simplify import and export documentation requirements Article VIII: 1(c).*⁴³²

In addition, members are required to **review** the operations of their laws and regulations, upon request by others,⁴³³ and not to impose **substantial penalties** for minor breaches of customs regulations/procedural requirements, in particular when such breaches are the result of mistakes that are easily rectifiable and do not emanate from fraud or gross negligence.⁴³⁴

For the purpose of this paper Article VIII and its proposals are divided into five key categories. These include:

- The levying of fees and charges,
- the Use of Customs Automated Systems,
- Simplified Formalities and Documentation and the Use of International Standards,
- Document Requirements in Maritime Transport; and
- Risk management in Customs audit procedures

⁴³¹ International Trade Centre(ITC): UNCTAD/WTO “Business And The WTO Negotiations On Trade Facilitation” 2005 37
<http://www.intracen.org/btp/issues/trade_facilitation/publications/trade_facilitation.pdf>(accessed 12 April 2010); Par 1 Article VIII GATT

⁴³² Par.1 (b);(c) VIII GATT

⁴³³ Par 2 Article VIII GATT

⁴³⁴ ITC *supra* 431 at 37; Par 3 Article VIII GATT

The aims of these proposals relate to the avoidance of unnecessary barriers to trade in the design, application and effect of import and export procedures and to minimise the number and complexity of documents and formalities, thus ensuring simplicity, consistency, predictability and ensures that procedures do not unnecessarily slow down the movement or release of goods.⁴³⁵

a) The Levying of Fees and Charges

As mentioned above, the primary objective of Article VIII seeks to reduce the costs and complexity of cross-border trade by imposing a binding obligation on WTO Members requiring that the amount of fees and charges are approximate to the cost of services rendered and not to act as hidden protectionist or fiscal motive.⁴³⁶ Such fees usually include: import/export license, consular, stamp, inspection, computer and transaction fees.⁴³⁷

Substantial differences currently exist between the **type** and **amount** of fees levied in Southern Africa as well as lacking objective criteria, parameters and disciplines regarding such levying of fees.⁴³⁸

Proposals therefore call up the calculation of fees and charges to:

- mirror the estimated cost of services rendered, and
- undergo periodic review as to their appropriateness in light of new business practices and technological improvements.⁴³⁹

Countries considering a review of their fee structure should be guided by the following criteria in determining whether their fees/charges are in compliance with GATT Article VIII:”

- The fee must represent a cost recuperation mechanism rather than an additional taxation;
- The fee cannot include any element of protection of domestic production or services

⁴³⁵ CITPRO “The WTO Trade Facilitation Negotiations” 2006 4
<<http://www.sitpro.org.uk/policy/wto/wtguidev2.pdf>>(accessed 15 April 2010)

⁴³⁶ UNCTAD “Levy of Fees and Charges” 2006 1
<http://r0.unctad.org/ttl/technical-notes/TN02_FeesandCharges.pdf>(accessed 10 April 2010)

⁴³⁷ UN NY and Geneva supra at 373 39-40

⁴³⁸ *ibid* 40

⁴³⁹ *ibid*

- The fee figure should be calculated as the lowest possible amount reflecting the approximate actual cost of the service rendered;
- The fee should be collected as a fixed amount irrespective of the value of the goods or the number of tariff headings declared; and
- The objective of the fee/charge should be well defined, and fees and charges collected should be accumulated in a special treasury account assigned for this purpose.⁴⁴⁰

b) The Use of Customs Automation Systems

Article VIII: 1(c) further recognises *the need for minimising the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements*.⁴⁴¹ Proposals related to clarifying and improving Article VIII considered the introducing measures requiring countries to automate their Customs and other border agency procedures in order to **minimise such incidence and complexities**.

Automated systems in Customs provide one of the most significant tools in facilitating international trade procedures.⁴⁴² Customs automation primarily results in increased transparency in the assessment of duties and taxes, substantial reduction in Customs clearance times, and predictability, all leading to direct and indirect savings for both government and traders.⁴⁴³

Furthermore, as a complement to Customs reform, automation becomes a catalyst for modernisation of Customs and acts as an incentive for increased use of information and communications technology by other government agencies and private sector stakeholders, whose activities evolve around Customs operations.⁴⁴⁴ Proposals therefore encourage regional parties, including government agencies, importers, exporters, freight forwarders, carriers, customs brokers, terminal operators, banks, shipping and insurance agents to actively partake in further improving or establishing an effective automation system for the benefit of promoting further trade in the region.⁴⁴⁵

⁴⁴⁰ *ibid* 40-41

⁴⁴¹ UNCTAD “Use of Customs Automation Systems” 2008 1

< http://r0.unctad.org/ttl/technical-notes/TN03_CustomsAutomationSystems.pdf>(accessed 12 April 2010)

⁴⁴² UN NY and Geneva *supra* 373 at 42

⁴⁴³ *ibid*

⁴⁴⁴ *ibid*

⁴⁴⁵ *ibid*

c) Simplified Formalities and Documentation Through the Use of International Standards

The need for simple and transparent documents, procedures and formalities to facilitate cross border transactions has long been recognised by the revised Kyoto Convention of the WCO.⁴⁴⁶

Article VIII also makes reference to this in paragraph 1(c) calling for: *decreasing and simplifying import and export documentation requirements*.⁴⁴⁷ Proposals to clarify and improve of Article VIII, inter alia, consider reducing documentation and data requirements to a minimum, using **international standards**.⁴⁴⁸

National and international businesses, traders and transport operators are currently faced with numerous documents and forms (up to 40 originals), often containing redundant and repetitive data and information (200 data elements on average).⁴⁴⁹ These documents, often not standardised, are complex and cumbersome for traders to complete and for authorities to verify.⁴⁵⁰ Moreover, they frequently exist only in one language, making such documents and forms difficult to understand.⁴⁵¹ Excessive paperwork also takes more time for import /export and transit procedures and formalities and therefore calls for the employment of more human resources in government and the private sector.⁴⁵² This invites errors in submissions and misadministration raises trade transactions costs as well as slowing down trade flows (SMEs being effected most in this regard).⁴⁵³

Simplified trade procedures and documents, aligned to international standards, are thus a vital solutions offered to address these difficulties as they provide a commonly agreed basis of similar measures to different regions and countries engaging in regional or multilateral trade.⁴⁵⁴

⁴⁴⁶ UN NY and Geneva *supra* 373 at 47

⁴⁴⁷ Art. VIII 1 (c) GATT

⁴⁴⁸ UN NY and Geneva *supra* 373 at 47

⁴⁴⁹ UNCTAD “Simplification of Trade Documentation using International Standards” 2006 1
<http://r0.unctad.org/ttl/technical-notes/TN13_Document%20Simplification.pdf>(accessed 12 April 2010)

⁴⁵⁰ *ibid*

⁴⁵¹ *ibid*

⁴⁵² *ibid*

⁴⁵³ *ibid*

⁴⁵⁴ UN NY and Geneva *supra* 373 at 47

d) Document Requirements in Maritime Transport

Very little intra-regional trade occurs through maritime transport in Southern Africa with the possible exception of goods travelling between the Maputo and Durban Ports. The reason being is that most countries in Southern Africa are landlocked and largely depend on South Africa and Mozambique for the access of their harbours. Intra-regional trade is thus normally restricted to road and rail transport. However facilitating international trade through for example minimising document requirements in maritime transport will definitely play a huge role in minimising the eventual cost of intra-regional trade especially through the trade of manufactured goods produced outside the continent.

The majority of goods traded worldwide are transported by sea at costs that tend to be on average **two to three times higher** than customs duties of the importing country.⁴⁵⁵ Since the beginning of shipping, local and central authorities have regrettably developed a complex set of regulations related to customs, immigration, health, quarantine, environment and security protection.⁴⁵⁶ A ship on its way to several countries could therefore be requested to fill out numerous forms that vary from port to port and often require the same information.⁴⁵⁷ In the process, ships and cargoes are delayed and hundreds of costly man-hours are wasted on a daily basis.⁴⁵⁸

To prevent unnecessary delays in maritime traffic, the member countries of the International Maritime Organisation (IMO) adopted in 1965 the Convention on Facilitation of International Maritime Traffic (IMO-FAL).⁴⁵⁹ IMO is the UN specialised agency responsible for promoting the adoption of the highest realistic standards to ensure safe and efficient shipping.⁴⁶⁰ Its Facilitation Committee seeks to prevent unnecessary delays in maritime traffic and to promote uniformity in port formalities and other procedures.⁴⁶¹ The Convention, together with its amendments, limited the number of required declarations to nine, these include:

- IMO General Declaration;

⁴⁵⁵ *ibid* 51

⁴⁵⁶ *ibid*

⁴⁵⁷ *ibid*

⁴⁵⁸ *ibid*

⁴⁵⁹ UNCTAD “Documentation Requirements in Maritime Transport “2008 1
<http://r0.unctad.org/ttl/technicalnotes/TN09_MaritimeTranspDocuments_fin.pdf>(accessed 12 April 2010)

⁴⁶⁰ *ibid*

⁴⁶¹ *ibid*

- Cargo Declaration;
- Ship's Stores Declaration;
- Crew's Effects Declaration;
- Crew List;
- Passenger List;
- Dangerous Goods Manifest;
- Declaration required under the Universal Postal Convention; and
- Declaration required by international health regulations.⁴⁶²

Apart from documentation requirements, the duration of the total maritime voyage can also be prolonged by cumulative delays in the clearance of ships in the intermediate ports of call for a variety of reasons related to security, substandard conditions of the ship or its crew, discharge of ship's residues in ports and weather and sea conditions etc.⁴⁶³

Having regard to Article VIII, maritime facilitation efforts today also aim at total electronic clearance of ships and cargo, mainly through pre-arrival electronic messaging.⁴⁶⁴ Thus, the IMO Compendium on Facilitation and Electronic Business (FAL) is currently being amended to ensure alignment with UN/CEFACT, ISO, WTO, UNCITAD and the WCO standards in order to further secure and facilitate unified global trade.⁴⁶⁵ These are the types of international standards on maritime facilitation that should be adopted and implemented by countries, such as Mozambique and South Africa, in order to serve the trade facilitation needs and goals of the region.

e) Risk Assessment and Management

In traditional Customs proceedings, goods are subject to customs control upon arrival at the border or in the port of entry and then stored in a warehouse or on a wharf pending the presentation of a declaration and supporting documents for clearance.⁴⁶⁶ Goods remain in Customs custody until all checks have been performed and requirements fulfilled, including

⁴⁶² UN NY and Geneva *supra* 373 at 51

⁴⁶³ *ibid*

⁴⁶⁴ *ibid* 52

⁴⁶⁵ *ibid*

⁴⁶⁶ *ibid* 60

the payment of duty and taxes.⁴⁶⁷ This process may take numerous days, sometimes weeks, if disputes or irregularities occur.⁴⁶⁸

Proposals related to clarifying and improving Article VIII require Members to conduct documentary and physical examination based on risk management systems for the purpose of concentrating on examining high risk goods and facilitating the movement of lower risk goods, based on appropriate selectivity criteria.⁴⁶⁹

In applying these risk management techniques Customs is able to release the majority of shipments and retain only consignments matching the risk profiles.⁴⁷⁰ Risk indicators usually relate to a particular commodity code, country of origin or value, risk assessment factors on the other hand relate to import patterns, duty and tax rates, types of goods, previous examination results and routes/modes of transport.⁴⁷¹

The risk assessment process is then given effect by a procedure involving the building of profiles, which are simply a group of characteristics displayed by unlawful consignments at a specific location and which are matched against the day-to-day Customs transactions.⁴⁷²

While the principle is widely accepted due to the fact that many developing countries including Southern African countries are currently applying risk assessment and management in clearance of imported goods, **differences remain** on the specific standards used.⁴⁷³

Adopting such international standards raises concerns particularly for countries which are not parties to various international conventions or who face difficulties in participating in the standard setting process.⁴⁷⁴ Also, the list of criteria to be used in categorising low and high risks/categories is disputed.⁴⁷⁵ Some Members want the list to be open for their legitimate policy space in determining the categories of risks particularly in countries where the practice of the undervaluation of goods by traders and other tactics of frauds are widely prevalent.⁴⁷⁶

⁴⁶⁷ *ibid* 55

⁴⁶⁸ UNCTAD “Risk management in Customs procedures” 2008 1
<http://r0.unctad.org/ttl/technical-notes/TN12_RiskManagement.pdf>(accessed 14 April 2010)

⁴⁶⁹ Bizumuremyi *supra* 21 at 11

⁴⁷⁰ UN NY and Geneva *supra* 373 at 60

⁴⁷¹ *ibid* 55

⁴⁷² *ibid*

⁴⁷³ Bizumuremyi *supra* 21 at 11

⁴⁷⁴ *ibid*

⁴⁷⁵ *ibid*

⁴⁷⁶ *ibid*

Whichever approach is taken, countries in Southern Africa and Africa should stand together in adopting similar international standards for the purpose of creating unity and certainty amongst traders and therefore furthering the speedy movement amongst its member countries.

i) Post-clearance audit:

As a follow-up to the risk assessment and management and authorised trader scheme, Members are requested to conduct post-clearance audit to check the information provided in customs declaration forms on, among others, the value of imported goods, their origin and tariff classification (rather than pre-check such information prior to the release of goods), hence identify the risk and further assess the compliance of traders.⁴⁷⁷ In the current negotiations, Members don't oppose this principle but want this to be optional rather than being mandatory as it is currently drafted ("*Members shall...*").⁴⁷⁸

ii) Establishment of the Single Window/one-time submission

The current proposal requests Members to establish a single window where documentation and data requirements for importation and exportation and transit are submitted.⁴⁷⁹ The single window then distributes the submitted documentations to relevant authorities who will examine them and notify the results to the applicants through the single window.⁴⁸⁰ The proposal which is of now being applied in very few countries is still raising oppositions particularly with regard to its implementation.⁴⁸¹

Advance clearance on the basis of documentation approved prior to the arrival of goods and other post-arrival procedures would allow traders to pick up goods upon arrival and amount to immense time and money savings.⁴⁸²

⁴⁷⁷ UNCTAD Risk management in Customs procedures *supra* 468 at 1

⁴⁷⁸ *ibid*

⁴⁷⁹ Bizumuremyi *supra* 21 at 11

⁴⁸⁰ *ibid*

⁴⁸¹ *ibid*

⁴⁸² *ibid*

4.3 Freedom of Transit Trade (Article V GATT)

Freedom of transit is a major trade facilitation tool designed to allow goods to be transported with the least amount of control within and through the Customs territories of a particular region.⁴⁸³ The arrangement permits Customs duties and taxes payable on goods originating from or destined to countries outside the region to be suspended whilst the goods are being transported until the goods depart from the region concerned, or enter another Customs regime.⁴⁸⁴

Article V expressly provides for such freedom of transit of goods, vessels and other means of transport across the territory of another WTO via the routes most convenient for international transit.⁴⁸⁵ Whilst Customs transit arrangements theoretically cover goods transported by all modes of transport, in reality however it is road-based systems that have developed successfully over the years.⁴⁸⁶

In the WTO context, goods are defined to be in transit when the crossing of the territory of another WTO Member and constitutes only **part of the journey** between departure and final destination country, whether or not transshipment, warehousing, breaking of bulk or change in transport mode are involved.⁴⁸⁷ GATT Article V therefore only refers to so-called through-transit, i.e. transit in the GATT context, normally involves at least three states.⁴⁸⁸

Article V stipulates the following principles of freedom of transit:

- a) equal treatment independent of flag of vessel, origin, departure, entry, exit, destination or ownership of the goods, vessels;
- b) prohibition to make traffic in transit subject to unnecessary delays or restrictions;
- c) prohibition to levy customs duties, transit duties and other transit related charges (except for charges for transportation or those commensurate with administrative expenses entailed by transit, or with the cost of services rendered);
- d) level charges levied should be reasonable to the conditions of traffic; and
- e) Most favoured nation treatment with regards to charges, regulations and formalities.

⁴⁸³ UN NY and Geneva *supra* 373 at 73

⁴⁸⁴ *ibid*

⁴⁸⁵ UNCTAD “Freedom of transit” 2009 1 http://r0.unctad.org/ttl/technical-notes/TN08_FreedomofTransit.pdf (accessed 12 April 2010)

⁴⁸⁶ UN NY and Geneva *supra* 373 at 73

⁴⁸⁷ *ibid*

⁴⁸⁸ *ibid*

Traffic in transit is exempt from customs duties; a member can only impose charges proportionate to the expenses incurred.⁴⁸⁹ This means that Traffic in transit is exempt from customs duties and a member may legitimately impose only charges related to transportation and administrative expenses caused by transit or services rendered.⁴⁹⁰

However, even such charges must be *reasonable* and *non-discriminatory* according to paragraphs 4 and 5 of Article V.⁴⁹¹ In other words transit traffic should not be a source of fiscal revenue for governments.

a) Negotiations on Freedom of Transit and Regional Transit Arrangements

Whereas the notion is a simple one, a number of broader and interrelated issues often militate against the full implementation of the spirit of this Article.⁴⁹² These include the standardisation and simplification of Customs procedures, documents and data, the adoption of risk management techniques and the maximum use of information and communication technology, similar to those issues described in Article VIII above.⁴⁹³

The issues raised in proposals on this Article can be divided into three distinct categories namely:”

- i) The simplification and standardisation of transit procedures and related documentary requirements;
- ii) Non-discrimination between modes of transport, types of consignment or individual carriers; and
- iii) Strengthening Cooperation between Regions, Border Controls and information sharing between the Agencies, Authorities and the Private Sector in Relation to Transit.”⁴⁹⁴

⁴⁸⁹ UNCTAD Freedom of transit *supra* 585 at 2

⁴⁹⁰ *ibid*

⁴⁹¹ Par 4; 5 Art.V GATT

⁴⁹² UN NY and Geneva *supra* 373 at 73

⁴⁹³ *ibid*

⁴⁹⁴ Sohn *supra* 26 at 150

i) **Simplification and standardisation of transit procedures and documentary requirements**

The reduction, simplification and harmonisation of documentary and data requirements relating to transit procedures, essentially necessitates using the same risk management procedures mentioned in Article VIII, so that traders with good records can have their goods promptly released through risk assessment systems and limit physical inspection of goods.⁴⁹⁵ This is essential as slow acquittals result in traders having to take out larger guarantees than necessary, at extra cost, in order to maintain the movements of their trucks.⁴⁹⁶

Not only do proposals call for simplification and harmonisation of transit procedures, they also call for the adoption and alignment of various international standardised documents such as provided by the Harmonisation Conventions (HS) and the Revised Kyoto Convention of the WCO.⁴⁹⁷

Furthermore, having great prospects for landlocked countries lies in the adoption of the *Transport Internationaux Routiers* (TIR) multimodal procedures.⁴⁹⁸ This system, adopted through the TIR Convention, will have the impact of allowing approved and sealed road vehicles to be free from Customs examination (unless irregularities are expected).⁴⁹⁹ The effect of adopting such a system will reduce the regular requirements of national transit procedures and physical inspection of transit countries, through the use of a single standardised document.⁵⁰⁰ These instruments will however only have the desired effects if recognised and adopted by once again all countries in the region.

⁴⁹⁵ Misovicova “Some Issues raised on Article V” (UNECE-UNESCAP Capacity Building Workshop on Trade Facilitation, Kuala Lumpur) 2005 10

<www.unece.org/.../Session%20I_Maria_WTO%20GATT%20Articles_v.1.ppt>(accessed 4 April 2010)

⁴⁹⁶ *ibid*

⁴⁹⁷ Shashank *supra* 103 at 9; The Revised Kyoto Convention, Contracting parties to the Revised Kyoto Convention and their Instruments (as of 26 January 2010)

<http://www.wcoomd.org/home_wco_topics_pfoverviewboxes_tools_and_instruments_pfconventions_instruments.htm>(accessed 4 April 2010)

⁴⁹⁸ Misovicova *supra* 495 at 11

⁴⁹⁹ *ibid*

⁵⁰⁰ *ibid*

ii) **Non-discrimination between modes of transport, types of consignment or individual carriers**

In the context of Article V, one submission made specific reference to issues surrounding discrimination between different modes of transit, types of consignment or individual carriers.⁵⁰¹ The geographical and physical circumstances of a country might mean that one form of transport would be easier than the other methods.⁵⁰² However, some members implicitly or explicitly try to encourage or discourage the use of certain methods of transport for various reasons such as the protection of the environment; however there may be scope for individual countries to examine whether such discrimination is desirable.

In addition, some countries also refuse to allow transit via non-national transport operators.⁵⁰³ For example, freight drivers, carrying goods from one country are not authorised to drive into another country.⁵⁰⁴ Usually, in such cases, only government-designated carriers are permitted to transport goods through the country.⁵⁰⁵ In other cases, the limitation is due to reasons of security and safety guarantees or even to protect domestic operators.⁵⁰⁶

In order to fulfil the facilitation objectives of Customs transit, all countries of transit and destination must acknowledge the means of transport by which goods in transit are being transported.⁵⁰⁷ It makes no sense, for example, for goods in transit to be off-loaded at national frontiers under the excuse that the truck does not conform to national technical specifications, or to national transport policy.⁵⁰⁸ This will effectively act as a NTB and should be avoided by all costs through the development of clear, universal and transparent rules on the specification of the means of transport in order to ensure the free movement of trucks and other modes of transport in and out of Southern African countries.⁵⁰⁹

⁵⁰¹ Sohn *supra* 26 at 159

⁵⁰² *ibid*

⁵⁰³ *ibid*

⁵⁰⁴ *ibid*

⁵⁰⁵ *ibid*

⁵⁰⁶ *ibid*

⁵⁰⁷ UN NY and Geneva *supra* 373 at 77

⁵⁰⁸ *ibid*

⁵⁰⁹ *ibid*

iii) **Strengthening Cooperation between Regions, Border Controls and information sharing between the Agencies, Authorities and the Private Sector in Relation to Transit**

Whereas the concept is a simple one, in practice, the smooth movement of goods in transit is often impeded by the uncoordinated activities and requirements of border agencies that impose slow, cumbersome procedures, some of which duplicate each other.⁵¹⁰

Although WTO negotiations on trade facilitation are currently addressing these issues, transit of goods is often a regional issue, especially for inland countries such as Botswana and Lesotho. It is therefore essential that the regional aspect to be recognised as it is believed that harmonisation of transit policies among Southern African Countries further increase the speed of goods in transit.⁵¹¹ However harmonising such policies might be best served through adopting internationally recognised systems, such as the TIR which will inevitably lead to a sense of familiarisation for non Southern African countries wishing to trade in the region.

A major principle of the TIR system is the mutual recognition of Customs controls.⁵¹² The controls carried out at departure, such as documentary checks, possible physical examinations of goods, sealing of load compartment etc, are accepted by Customs authorities in the countries of transit and destination.⁵¹³ This allows the vast majority of consignments to be released at subsequent exit and entry offices with the minimum checks of the documents, seals and load compartments.⁵¹⁴ Customs should furthermore also cooperate with neighbouring services on **administrative issues**, for example, opening times of border offices.⁵¹⁵

For a transit system to function effectively, this mutual recognition of controls is critical and should be extended to include the sharing of relevant information of all operational and administrative matters, and where required, to individual traders, especially where smuggling is detected or suspected.⁵¹⁶

⁵¹⁰ UN NY and Geneva *supra* 373 at 80

⁵¹¹ Sohn *supra* 26 at 160

⁵¹² UN NY and Geneva *supra* 373 at 78

⁵¹³ *ibid*

⁵¹⁴ *ibid*

⁵¹⁵ *ibid*

⁵¹⁶ *ibid*

The lack of effective cooperation between landlocked countries and their neighbours is however the major obstacles facing the introduction of such a streamlined transit procedure.⁵¹⁷

4.4 Conclusion

a) Concluding Remarks on Article X

Accelerating the movement of goods in order to save time and costs and promote trade through Customs reform and simplified procedures will only bring the expected benefits if the appropriate information on trading is **readily available**, especially for small companies engaged in regional trade.⁵¹⁸

In most countries transparency through the publication of laws is part of the constitutionally mandated legislative procedure and a prerequisite necessary for it to become law and deemed authentic and admissible by national courts.⁵¹⁹ The extended publication and simplifying requirements proposed by WTO Members as part of the clarification and improvement of Article X would largely lead to improvements in domestic transparency of countries' trading conditions and practices, an area that so far has been left to the discretion of governments.⁵²⁰

The expected benefits for Southern African countries also lie in the improvements of conditions under which SMEs (who generally lack the means to search out trade laws and Customs procedures), traders and operators can effectively engage in regional trade; speeding up the movement of goods across borders and thereby increasing trade and revenue collection for the region.⁵²¹ The availability of accurate and timely information on existing regulations and proposed changes or innovations that reduce and clarify Customs formalities should furthermore cut transaction costs for traders as well as administrative costs for governments allowing them to reallocate their resources in a more profitable way.⁵²²

⁵¹⁷ UN NY and Geneva *supra* 373 at 80

⁵¹⁸ UNCTAD "Border Cooperation and Coordination amongst Agencies, Authorities and the Private Sector in Relation to Transit" 2006 1 <http://r0.unctad.org/ttl/technicalnotes/TN18_TransitCooperation_fin.pdf> (accessed 9 April 2010)

⁵¹⁹ UNCTAD-Publication of trade related information *supra* 365 at 2

⁵²⁰ UN NY and Geneva *supra* 373 at 16

⁵²¹ *ibid*

⁵²² *ibid*

Furthermore countries are strongly urged to implement (or adequately update) their National Enquiry points to serve as central repositories for a country's trade regulations and trade-related information and thus creating ease of access to all interested public and private parties. The costs, improvement and set-up procedures may not be too burdensome as many governments already have the seeds of an Enquiry Point either within the official organs of state or in the public or private field.⁵²³

Furthermore countries in Southern Africa are encouraged to incorporate (or further improve on) a comprehensive code of conduct which sets out clearly and consistently the functions and duties for all categories of public officials. In addition, these codes of conduct should be complimented by the necessary enforcement mechanisms in order to guarantee compliance. Implementing measures that increase awareness of integrity and provide greater accountability of Customs officials would greatly benefit Customs administration and provide officials with the necessary tools and education necessary to administer customs rules in a more efficient, transparent, and impartial way.⁵²⁴

Lastly, for the sake of reducing delays at the borders, countries are further urged to implement procedures allowing for goods to be released on appeal at the instance of a financial guarantee being provided. This will go a long way in restoring trust and profitable relationship between traders and Customs authorities, thereby creating a more conducive trading environment for all.

In the longer term the proposed measures of Article X could yield overall economic benefits in terms of:

For traders, it would guarantee:"

- quicker release of goods from Customs
- avoidance of delays in delivery (important for just-in-time operations)
- greater predictability in Customs procedures and trade transactions in general
- greater certainty regarding shipping times and costs
- as well as cost savings (e.g. no storage and handling fees)."⁵²⁵

For governments, it would ensure:"

⁵²³ *ibid* 19

⁵²⁴ *ibid* 32

⁵²⁵ *ibid* 37

- financial guarantee pending the appeal process
- more trust between Customs authorities and traders, hence a better working relationship
- improved compliance by traders with customs laws and regulations of the country.”⁵²⁶

b) Concluding Remarks on Article VIII

Customs authorities in Southern Africa are encouraged to ensure that there is a proper balance between necessity and reasonableness, border security and expeditious clearance of goods, minimisation of customs intervention and a more cooperative relationship between customs authorities and other interested agencies/departments for the sake of expediting goods faster and cheaper between regional borders.⁵²⁷ Countries should also bear in mind that Article VIII at present does not impose any legal obligation to reduce the **number** and **diversity of fees/charges** or to **simplify import and export formalities**; however they may consider this desirable in order to facilitate their private sector import and export activities.⁵²⁸

Article VIII **does however** place in effect a legal obligation on contracting parties to **reduce their charges** so that they are **not excessive in relation to their administrative services rendered**, thereby calling for reasonableness.⁵²⁹ The question of what constitutes reasonableness was raised in *United States – Customs User Fees case*⁵³⁰ in which a two-step approach was put forward: The Panel not only determined whether charges were approximate to services rendered (reasonable), but also whether the services themselves came under the scope of Article VIII.⁵³¹ Thus when devising administrative charges countries should make sure that these charges fall under the scope of services as set out in *Paragraph 4* and that they are relative to the services rendered.⁵³²

Although not always subject to government control, in the context of Southern Africa, fees seem however not only to be unreasonable but also differ from country to country and are for the most part also quite high; this is mostly due to the multiplicity of documents used to

⁵²⁶ *ibid*

⁵²⁷ UNCTAD-Publication of trade related information *supra* 365 at 2

⁵²⁸ Njinkeu *supra* 364 at 24

⁵²⁹ *ibid* 10

⁵³⁰ GATT Panel Report, United States – Customs User Fee, L/6264, adopted 2 February 1988

⁵³¹ *ibid*

⁵³² Njinkeu *supra* at 24

complete different transactions including the use of *ad valorem* values to calculate customs duties.⁵³³

Countries are also encouraged to actively pursue **automating** their Customs systems for the sake of not only transparency and reduction of clearance times between regional partners, but also in the context of countries abroad wishing to engage in trade with Southern Africa.

The implementation of maritime facilitation measures will be an important step in the entire effort of streamlining and harmonisation of trade related regulations in Southern Africa.⁵³⁴ By reducing the number and size of such texts will also facilitate the publication of trade regulations required by Article X.⁵³⁵

Although the concept of risk management in Customs procedures has been considered under Article VIII, issues such as pre-arrival clearance and post audit systems, are already dealt with in the 1999 Revised Kyoto Convention of the WCO.⁵³⁶ Countries in Southern Africa that have ratified this Convention only include South Africa, Botswana, Lesotho and Namibia.⁵³⁷ Countries thus wishing to adopt such standard must do so in a regional context, requiring all regional partners to adopt similar systems of risk management in order to create transparency and familiarisation among all parties involved.

The expected benefits of adopting this risk management procedures in customs audits relates to increased productivity and efficiency as these techniques do away with unnecessary burdens on traders by downscaling physical inspection and reducing bottlenecks existing at border crossings.⁵³⁸ They also significantly enhance the predictability and consistency of border requirements by allowing the harmonisation of practices between different border points and the facilitation of information sharing.⁵³⁹ Thereby increasing duty collection, improving compliance with laws and regulations, reducing release times, lowering transaction cost as well as reducing storage and warehouse fees to name but a few.⁵⁴⁰

⁵³³ *ibid*

⁵³⁴ UNCTAD-Use of Customs Automation Systems *supra* 441at 3; UN NY and Geneva *supra* 373at 42;43

⁵³⁵ *ibid*

⁵³⁶ UNCTAD “Risk management in Customs procedures” 2008 1

http://r0.unctad.org/ttl/technical-notes/TN12_RiskManagement.pdf (accessed 14 April 2010)

⁵³⁷ *ibid*; The Revised Kyoto Convention *supra* 497

⁵³⁸ UN NY and Geneva *supra* 373at 56; UNCTAD-Risk management in Customs procedures *supra* 536 at 2

⁵³⁹ *ibid*

⁵⁴⁰ *ibid*

The expected costs of implementing such measures would involve hiring experts and training staff in the production of the national sets of aligned trade documents and operating computer software.⁵⁴¹ African countries and regions may therefore want to request technical assistance before taking on such commitments.⁵⁴²

c) Concluding Remarks V

The requirement in Article V that traffic in transit not be subjected to *unnecessary delays* indicates that **delays must be reasonable**.⁵⁴³ Given the poor state of roads, ports and railways current delays go beyond what is deemed reasonable, even if reasonable is measured within the context of what can be expected from developing or even least developed countries.⁵⁴⁴

Compliance with Article V thus generates specific trade facilitation needs, which not only includes infrastructure development but also improvement of services, the creation of training centres and the training of personnel.⁵⁴⁵ A number of countries are addressing the problems related to road and railway transport however further support in the form of S&DT and further financial and technical assistance may need to come from a variety of actors and may require the coordination of regional groupings, financial institutions, developed countries and private investors.⁵⁴⁶ Within this context, countries should be mindful of the fact that Annex D (see Appendix A) stipulates that, *developed-country Members will make every effort to ensure support and assistance directly related to the nature and scope of the commitments in order to allow implementation*.⁵⁴⁷

A further priority for African countries includes adopting a system of better coordination and cooperation amongst border agencies. The benefits relating to improvement of coordination and cooperation amongst border agencies are almost impossible to quantify and will go a long way in promoting sustainable development for countries in Southern Africa.

Not only should this transit system ensure unnecessary delays through improvement of infrastructure and border cooperation systems, but should also focus on automating the entire transit system, bearing in mind that the time and costs will all depend on each country's

⁵⁴¹ UNCTAD-Simplification of Trade Documentation using International Standards *supra* 449 at 2;3

⁵⁴² Njinkeu *supra* 364 at 12

⁵⁴³ Njinkeu *supra* 364 at 7

⁵⁴⁴ *ibid*

⁵⁴⁵ *ibid*

⁵⁴⁶ *ibid*

⁵⁴⁷ *ibid* 27

starting point, implementation capacity, infrastructure and financial resources.⁵⁴⁸ A one-size-fits-all approach can thus **not** be applied here, and each country has to consider its own tailor-made model, based on international standards.⁵⁴⁹

The costs of implementation will be soon recovered; however, as an **efficient transit system** will produce fruitful benefits and enhance the effectiveness of Customs controls and significantly reduce transit transport costs.⁵⁵⁰

The question that however remains is whether countries should adopt such a transit system under a regional or a multilateral standpoint?

One view favouring a regional framework, states that infrastructure needs might best be assessed within a regional context as problems related to roads, railways and harbours tend to affect entire regions and not just specific countries.⁵⁵¹ And that these should be further coupled with existing donor-funded efforts to build transport, border and trade-related infrastructure.⁵⁵² This view further supports the notion that countries should have the flexibility to pursue their own priorities even in a regional context. For instance if the volume of intra-regional trade is low, Members should have the flexibility to pursue other high value commitments in the WTO and not transit.⁵⁵³

Other views favouring the multilateral approach tend to lean more towards the belief that a common framework such as the Kyoto Convention or the TIR Convention or the Common Transit Convention should be adopted as they have all proven to be successful examples that can be used by countries and would provide participating members and its trading community with the essential uniformity in the application of rules and procedures and for approval of the means of transport.⁵⁵⁴

Whichever approach is taken, this author supports the view that an effective partnership between government agencies is first needed if the trade facilitation objectives for transit

⁵⁴⁸ UN NY and Geneva *supra* 373 75

⁵⁴⁹ *ibid*

⁵⁵⁰ *ibid*

⁵⁵¹ Njinkeu *supra* 364 at 24

⁵⁵² *ibid*

⁵⁵³ *ibid*

⁵⁵⁴ UN NY and Geneva *supra* 373 at 75

systems are to be achieved.⁵⁵⁵ Equally, effective partnerships between government and business will play a key role in facilitating transit trade.⁵⁵⁶

Customs, as the service with direct responsibility, needs to take the initiative to build joint relationships with all stakeholders, including both within government (specifically Ministries of Trade, Transport, Finance/ Treasury, Immigration, Agriculture, veterinary and phytosanitary agencies) as well as with the business community (importers, exporters, transit principals, freight forwarders, carriers, customs brokers, terminal operators, banks and insurance agents).⁵⁵⁷ To assist the business community in a useful way, Customs should for example arrange for all official regulations and guidance related to transit, to be published and made freely available, preferably on the internet.⁵⁵⁸ This information should include the addresses and opening times of Customs offices of transit, approved transit routes, and any national requirements and fees.⁵⁵⁹

The overall benefits of adopting such a system include:

- Less congestion at borders;
- Improved security of revenue;
- Enhanced use of risk assessment, leading to more efficient controls, and reduced rate of physical examination, as well as more effective deployment of staff;
- Reduced transit times;
- Simplified documents and procedures;
- Lower rate of physical examination;
- Improved predictability;
- Increased international competitiveness; and
- Improved transparency.”⁵⁶⁰

Border cooperation and agency coordination can also help:”

- prevent fraud and smuggling;
- enhance security;

⁵⁵⁵ *ibid* 77

⁵⁵⁶ *ibid*

⁵⁵⁷ *ibid*

⁵⁵⁸ *ibid*

⁵⁵⁹ *ibid*

⁵⁶⁰ *ibid* 73;74

- reduce delays and congestion at border crossings and control points due to harmonisation of activities and requirements between border agencies;
- integrate and simplify data collection;
- detect revenue evasion;
- protect national interests and population; and
- reduce cost through better deployment of resources.”⁵⁶¹

Lastly, when designing and implementing such systems, whether it is, internally, regionally or multilaterally, care should be taken to ensure that SMEs are also able to benefit from the arrangements.⁵⁶² Larger companies with greater financial and staffing resources are much better equipped to take advantage of such schemes, and smaller companies should not be excluded from them by cost or complexity.⁵⁶³

⁵⁶¹ *ibid*

⁵⁶² *ibid* 76

⁵⁶³ *ibid*

Chapter IV: Conclusion and Recommendations

“Organisations are of two kinds, those which aim at getting something done, and those which aim at preventing something from being done”.

Famous philosopher: Bertrand Russell

The question that however still remains is whether countries should adopt these systems and procedure from a regional or a multilateral position?

The view of those favouring a regional framework emphasise that infrastructural and customs control needs might be best served within a regional context as problems related to roads, railways, harbours and customs cooperation tend to affect entire regions and not just specific countries.⁵⁶⁴ And that these should be coupled with existing donor-funded efforts to build transport, border and trade-related infrastructure.⁵⁶⁵ These views also support the notion that countries should have the flexibility to pursue their own priorities even in a regional context, for instance if the volume of intra-regional trade is low, Members should have the flexibility to pursue other high value commitments, not always provided for under the multilateral trade system.⁵⁶⁶

The other view, supported by this author, favouring the multilateral approach tend to lean more towards the belief that a common framework provided by the WTO and other international standards such as the Kyoto Convention and the TIR Convention should be adopted as they have proven themselves to be successful examples that can be used by countries in order to provide participating members and its trading community with the essential uniformity in application for rules and procedures.⁵⁶⁷

Whichever approach is taken, this author supports the view that an effective partnership between government agencies is first needed if the trade facilitation objectives are to be

⁵⁶⁴ Njinkeu *supra* 364 at 24

⁵⁶⁵ *ibid*

⁵⁶⁶ *ibid*

⁵⁶⁷ UN NY and Geneva *supra* 373 at 75

achieved.⁵⁶⁸ Equally, effective partnerships between government and business will play a key role in facilitating transit trade.⁵⁶⁹

Customs, as the service with direct responsibility, needs to take the initiative to build joint relationships with all stakeholders, including both within government (specifically Ministries of Trade, Transport, Finance/ Treasury, Immigration, Agriculture, veterinary and phytosanitary agencies) as well as with the business community (importers, exporters, transit principals, freight forwarders, carriers, customs brokers, terminal operators, banks and insurance agents).⁵⁷⁰ To assist the business community in a useful way, Customs should also for example arrange for official regulations and guidance related to trade facilitation measures to be published and made freely available, preferably on the internet.⁵⁷¹

Only time will tell what the future holds for the WTO but hopefully it will continue to strive in changing unequal trade balances; promoting sustainable economic growth and further develop the world community especially that of developing and least developed countries.

Although there is no guarantee that the Doha Round will be finalised by 2011 as foreseen, there are several factors pointing to new and successful negotiations.⁵⁷² We can afford to give negotiators a bit more time, but we cannot wait forever.⁵⁷³ Failure to reach agreement on the Doha negotiations by the 2011 deadline would raise further fears that governments are incapable of taking the decisions needed to address the current global economic crisis and further help alleviate poverty in the developing world.⁵⁷⁴ All of this would otherwise send a very bad signal to an extremely nervous world.⁵⁷⁵

A successful conclusion to the Doha Development Agenda would also represent a substantial boost to the multilateral trading system at a time of growing economic uncertainty.⁵⁷⁶ It would reinforce the supremacy of the global system at a time when many governments and corporations find regional and bilateral trading arrangements an attractive alternative to

⁵⁶⁸ *ibid* 77

⁵⁶⁹ *ibid*

⁵⁷⁰ *ibid*

⁵⁷¹ *ibid*

⁵⁷² Soko *supra* 156 at 24

⁵⁷³ *ibid*

⁵⁷⁴ *ibid*

⁵⁷⁵ *ibid*

⁵⁷⁶ Official Statement: Director-General Supachai Panitchpakdi (The General Council meeting on Coherence at the WTO) 13 May 2003 <http://www.wto.org/trade_resources/quotes/new_round/new_round.htm>(accessed 5 January 2010)

multilateralism.⁵⁷⁷ Such deals can often be beneficial to the parties involved and can complement the international trading system.⁵⁷⁸ But they cannot replace it.⁵⁷⁹

Globalisation has further placed huge demands on SMEs to become internationally competitive. In order to participate meaningfully in international and regional trade, governments and firms must individually reduce their complexity and costs of transactions, including the elimination of all unnecessary administration and using modern technology to encourage cost-effective processing.⁵⁸⁰ Southern Africa is no exception and SMEs therefore need to develop their human and infrastructure capacities in order to exploit the potential benefits available from intra-regional trade.

Based on the proposals made so far, several elements currently being negotiated are cross-cutting issues across the three articles.⁵⁸¹ These include transparency, consistency, predictability, non-discrimination, simplification, non-restrictiveness and due process.⁵⁸² When negotiating a Trade Facilitation framework in the WTO, African countries should fuse these broad concerns in order to condense the scope of the discussions and address the fundamental issues such as fees, infrastructure development, documentation, customs procedures, publication etc.⁵⁸³

Trade facilitation can also support the democratic process to reach just political and social regimes in the developing countries and LDCs.⁵⁸⁴ The gains should, however, not be exaggerated since corruption and governmental autocracy requires years to dissolve.⁵⁸⁵ Nevertheless, collaboration between domestic authorities and governments, together with harmonisation of the administrative procedures that trade facilitation requires, are vital benefits available for LDCs, other gains also relate to transparency and predictability for the national government, other WTO Members and the business community.⁵⁸⁶

⁵⁷⁷ *ibid*

⁵⁷⁸ *ibid*

⁵⁷⁹ *ibid*

⁵⁸⁰ Soko *supra* 156 at 33

⁵⁸¹ Njinkeu *supra* at 20

⁵⁸² *ibid*

⁵⁸³ *ibid* 23

⁵⁸⁴ Sheikhan *supra* 36 at 56

⁵⁸⁵ *ibid*

⁵⁸⁶ *ibid*

Even though trade facilitation can be perceived to be a potential source of growth promotion for Southern African, experience shows that the cost of integrated and coherent multilateral agreement on trade facilitation will be extremely high and certainly beyond the capability of African countries.⁵⁸⁷ Therefore, seeing as existing commitments already strain their capacities, it is imperative that timely and continued technical assistance and capacity building is secured for Southern African Countries, having regard to the implementation process.⁵⁸⁸ Provisions that provide African countries with the mandate to request technical assistance from developed country members in order to implement new commitments undertaken is therefore essential to pursue. This will be especially necessary when implementing some measures requiring trade related policy changes and IT related customs practices.

The African group should further avoid any new binding commitments on trade facilitation which exceed their implementation capacities, capabilities and institutional needs that would ultimately make them susceptible to dispute settlement.⁵⁸⁹ All trade facilitation efforts should thus ensure that they are in their best interests of countries and should rather extend their negotiating energies on more critical concerns such as risk assessments, smuggling and corruption.⁵⁹⁰ Negotiations should further allow African countries to shift from certain commitments in order to preserve areas of sensitivity such as revenue concerns (for example those countries that therefore rely heavily on the income from customs need to assess what impact fee restructuring will have on them).⁵⁹¹

Where commitments require infrastructure development for example, implementation should be made conditional on the provision of such support and assistance as provided by Annex D (see Appendix A). The Southern African countries should therefore expect that S&DT provisions on trade facilitation to be strengthened from a legal perspective (made precise, effective and operational) and vague language should be avoided as it provides very little legal certainty and is difficult to enforce.⁵⁹²

⁵⁸⁷ *ibid*

⁵⁸⁸ *ibid*

⁵⁸⁹ *ibid*

⁵⁹⁰ Njinkeu *supra* at 25-26

⁵⁹¹ *ibid* 10

⁵⁹² *ibid*

Seeing as institutional needs of LDCs, landlocked countries and those that are not, denotes the non-applicability of a “one size fits all” approach, African countries should also ensure provisions that provide flexible commitments and variable implementation procedures.

The next steps for adequate participation of Africa in these negotiations would be to document the situation in a selected group of countries that have made relatively good progress in these areas and that could provide “best practice” examples.⁵⁹³ These case studies could be used to design a comprehensive programme that a typical African country would have to undertake in order to comply to a multilateral agreement on trade facilitation with elements in proposals being tabled are to become binding.⁵⁹⁴

⁵⁹³ Soko *supra* 156 at 33

⁵⁹⁴ *ibid*

BIBLIOGRAPHY

1. Articles

CITPRO “The WTO Trade Facilitation Negotiations” (2007)

<<http://www.sitpro.org.uk/policy/wto/wtoguidev2.pdf>> (accessed 15 April 2010)

Daya Y *et al* “Intra-Africa Agricultural Trade: A Southern African Perspective” (2006)

<http://www.nda.agric.za/docs/Intra_Africa.pdf> (accessed 7 March 2010)

Fliess B and Lejarraga I “Analysis of Non-Tariff Barriers of Concern to Developing Countries” (2005) <<http://www.iadb.org/intal/intalcdi/PE/2007/00582.pdf>> (accessed 9 March 2010)

Malawer S “The U.S. and the WTO: Lessons Learned for Trade Litigation and Global Governance” (2003) <<http://www.worldtradelaw.net/articles/malaweruslessons.pdf>> (accessed 10 January 2010)

Mashindano O *et al* “Elimination of Non-Tariff Barriers towards SADC Investment Promotion” (2008) <<http://www.foprisa.net/publications/documents/NTBsinSADC.pdf>> (accessed 12 March 2010)

Minara Chamber of commerce “Customs Tariff” (2010)

<http://www.minara.org.za/index.php?option=com_content&view=article&id=65&Itemid=64> (accessed 8 March 2010)

Njinkeu D *et al* “A Positive Agenda for Africa in Trade Facilitation Negotiations” ILEAP (2005) <http://www.ileap-jeicp.org/publications/negotiation_advisory_briefs/nab8.html> (accessed 12 March 2010)

OECD-FAO Agricultural Outlook 2007-2016 (2007) <<http://www.agri-outlook.org/dataoecd/6/10/38893266.pdf>> (accessed 10 March 2010)

Pierides C “Non-Tariff Barriers to Trade in Southern Africa: Towards a Measurement Approach” (2008)

<http://uscdn.creamermedia.co.za/assets/articles/attachments/15828_sadc_trade.pdf>

(accessed 23 February 2010)

Shashank P (Professor, Centre for WTO Studies) “Trade Facilitation: A Brief Negotiating History” ESS Working Paper/International Trade (2007)

<<http://www.esocialsciences.com/data/articles/Document1273200700.8037683.pdf>>

(accessed 13 February 2010)

Radcliffe B “The Basics Of Tariffs and Trade Barriers” (2009)

<<http://www.investopedia.com/articles/economics/08/tariff-trade-barrier-basics.asp>>(accessed 6 March 2010)

Soko M “Why trade facilitation is key to boosting intra-African trade” (2006)

<http://www.mthente.co.za/resources/reports-and-articles/academic-articles-written-by-mthente-and-associates/AfricaGrowthAgenda_Soko_SepNov.pdf>

Sumner D *et al* “Tariff and Non-Tariff Barriers to Trade” (2002)

<<http://www.farmfoundation.org/news/articlefiles/816-sumner.pdf>>(accessed 6 March 2010)

2. Books

United Nation New York and Geneva Technical notes on essential trade facilitation measures Part II: *Trade Facilitation Handbook* 2006 (See: UNCTAD/SDTE/2005/2)

3. Dissertations

Hammar T “Trade facilitation in Vietnam” (LLM Thesis 2009 University of Lund)

<<http://www.nek.lu.se/Publ/mfs/190.pdf>> (accessed 8 February 2010)

Sheikhan P “Trade Facilitation in the Multilateral Trading System” (LL.M Thesis 2008 University of Gothenburg)

<http://gupea.ub.gu.se/bitstream/2077/19714/1/gupea_2077_19714_1.pdf> (accessed 8 February 2010)

Távora F “The World Trade Organisation and its critics” (LLM Thesis 2007 University of London) <<http://www.ciari.org/english/WTO.pdf>> (accessed 15 February 2010)

4. Official International Organisation Documents

a) ICC Documents

International Chamber of Commerce “What is ICC”

<<http://www.iccwbo.org/id93/index.html>>

(accessed 23 February 2010)

b) SACU Document

SACU Tariffs “Trade Facilitation” 2010

<<http://www.sacu.int/tradef.php?include=about/tradef/tariffs.html>>(accessed 7 March 2010)

c) SADC Official Documents

SADC “Glossary of FTA Terms” <<http://www.sadc.int/fta/index/browse/page/46>> (accessed 6 March 2010)

SADC “Profile”<<http://www.sadc.int/index/browse/page/99>> (accessed 11 February 2010)

d) UN Documents

Bizumuremyi E “Enhancing The Africa’s Participation in the WTO Negotiations” UNECA Report: Expert Meeting Nairobi (2009)

<<http://www.uneca.org/atpc/egm0909/TradeFacilitation.pdf>> (accessed 10 April 2010)

Dhar B *et al* “Taming Non-Tariff Barriers: Can WTO find a solution?” Centre for WTO Studies: Indian Institute of Foreign Trade New Delhi (2006)

<http://www.unescap.org/tid/projects/postdoha_s5dhar.pdf>(accessed 21 March 2010)

Luximon D “Has Regional Economic Integration Promoted Trade In Southern Africa? Study done through the University of Mauritius (2003)

<[http://r0.unctad.org/p166/reduit2004/module1/Regional%20integration%20and%20Mauritiana%20trade%20\(paper\).doc](http://r0.unctad.org/p166/reduit2004/module1/Regional%20integration%20and%20Mauritiana%20trade%20(paper).doc)> (accessed 24 March 2010)

Odashima Y “Challenges of Supply Chain Security and Risk Management” Asia Pacific Trade Forum-Breakout Session 3 (2009)

<http://www.unescap.org/tid/projects/tfforum_bs3_odashima.pdf> (accessed 19 February 2010)

UN Secretariat Report-Tenth session “The Importance of Trade Facilitation” (2004)

<www.unece.org/cefact/cf_plenary/plenary04/docs/04cf30.doc> (accessed 2 March 2010)

UNCTAD “Border Cooperation and Coordination amongst Agencies, Authorities and the Private Sector in Relation to Transit” UNCTAD Trust Fund on Trade Facilitation Negotiations Technical Note No. 8 (2006)

<http://r0.unctad.org/ttl/technicalnotes/TN18_TransitCooperation_fin.pdf> (accessed 9 April 2010)

UNCTAD “Documentation Requirements in Maritime Transport” UNCTAD Trust Fund on Trade Facilitation Negotiations Technical Note No. 9 (2008)

<http://r0.unctad.org/ttl/technicalnotes/TN09_MaritimeTranspDocuments_fin.pdf> (accessed 12 April 2010)

UNCTAD “Landlocked Developing Countries: Facts And Figures” (2006)

<<http://www.unctad.org/Templates/webflyer.asp?docid=7273&intItemID=3632&lang=1>>(accessed 10 February 2010)

UNCTAD “Levy of Fees and Charges” UNCTAD Trust Fund on Trade Facilitation Negotiations Technical Note No. 2 (2006)

<http://r0.unctad.org/ttl/technical-notes/TN02_FeesandCharges.pdf> (accessed 10 April 2010)

UNCTAD “Maintenance and reinforcement of integrity and ethical conduct among officials”
Trust Fund on Trade Facilitation Negotiations Technical Note No.7 (2008)
<http://r0.unctad.org/ttl/technical-notes/TN07_IntegrityofOfficials.pdf> (accessed 27 April
2010)

UNCTAD “National Enquiry Points” UNCTAD Trust Fund on Trade Facilitation
Negotiations Technical Note No.6 (2006)
<http://r0.unctad.org/ttl/technicalnotes/TN06_EnquiryPoints_fin.pdf> (accessed 28 April
2010)

UNECE “National Trade Facilitation Bodies Recommendation No.4” Geneva, *second edition*
(2001) <http://www.unece.org/cefact/recommendations/rec04/rec04_ecetrd242e.pdf>
(accessed 26 February 2010)

UNCTAD “Publication of trade related information” UNCTAD Trust Fund on Trade
Facilitation Negotiations Technical Note No.1 (2006)
<http://www.unctad.org/en/docs/TN01_PublicationTradeRegulationsUnifAdmin.pdf>
(accessed 28 April 2010)

UNCTAD “Release of goods in the event of appeal” UNCTAD Trust Fund on Trade
Facilitation Negotiations Technical Note No.4 (2008)
<[http://r0.unctad.org/ttl/technical-
notes/TN04_Releaseofgoodsineventofappeal_fin.pdf](http://r0.unctad.org/ttl/technical-notes/TN04_Releaseofgoodsineventofappeal_fin.pdf)>(accessed 27 April 2010)

UNCTAD “Risk management in Customs procedures” UNCTAD Trust Fund on Trade
Facilitation Negotiations Technical Note No. 12 (2008)
<http://r0.unctad.org/ttl/technical-notes/TN12_RiskManagement.pdf> (accessed 14 April
2010)

UNCTAD “Simplification of Trade Documentation using International Standards” UNCTAD
Trust Fund on Trade Facilitation Negotiations Technical Note No. 13(2006)
<http://r0.unctad.org/ttl/technical-notes/TN13_Document%20Simplification.pdf> (accessed
12 April 2010)

UNCTAD “Use of Customs Automation Systems” UNCTAD Trust Fund on Trade Facilitation Negotiations Technical Note No. 3(2008)

< http://r0.unctad.org/ttl/technical-notes/TN03_CustomsAutomationSystems.pdf> (accessed 12 April 2010)

UN-OHRLLS “Country Profiles”<<http://www.unohrlls.org/en/ldc/related/62/>> (accessed 23 February 2010)

e) WTO Official Documents

Acharya R and Daly M “Selected Issues Concerning the World Trade Organisation and the Multilateral Trading System” Discussion paper No.7 (2004)

<http://www.wto.org/english/res_e/booksp_e/discussion_papers7_e.pdf> (accessed 28 February 2010)

Chutikul K (former Secretary-General of UNCTAD) “Official Statement to Bangkok Post” 25 July 2001 <http://www.wto.org/trade_resources/quotes/new_round/new_round.htm> (accessed 20 March 2010)

First Revision Draft “Cancun Ministerial Text” (2003) JOB (03)/150/Rev.1
<<http://www.mincomes.it/OMC/cancun/150R1.pdf>> (accessed 10 February 2010)

Lamy P “About the WTO: A statement by the Director-General” (2010)
<http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm> (accessed 25 February)

Second Revision Draft” Cancun Ministerial Text” (2003)
JOB (03) 150 Rev.2
<http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_drafttext2_e.pdf>

WTO Brochure “Trade And Market Access Data for Policy Makers” (2010)
< http://www.wto.org/english/res_e/statis_e/broch_dataday_feb10_e.pdf>(accessed 30 March 2010)

WTO “Trade Facilitation an overview” (1998)

<http://www.wto.org/english/tratop_e/tradfa_e/tradfa_overview1998_e.htm> (accessed 15 February 2010)

WTO “Trade facilitation work undertaken by intergovernmental organisations”

< http://www.wto.org/english/tratop_E/tradfa_e/intergov_e.htm > (accessed 25 February 2010)

WTO Trade Policy Review: Botswana, Lesotho, Namibia, South Africa and Swaziland” 2009

<www.wto.org/english/tratop_e/tpr_e/tp322_e.htm> (accessed 31 March 2010)

i) Country Information

List of developing countries: http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm

List of LDCs: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm

Who are the developing countries in the WTO?

http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm

World Trade Organisation LDCs:

http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm

(All accessed 13 February 2010)

f) Other Organisations

i) Tralac Documents

Woolfrey S “ The Importance of Trade Facilitation in Sub-Saharan Africa” 2010

<http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=81474&cat_id=1059> (accessed 2 March 2010)

Denner W “Non-tariff barriers to intra-Southern African Customs Union (SACU) trade” 2009

<http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&news_id=77808&cause_id=1694> (accessed 15 March 2010)

Trade Law Centre for Southern Africa “About us” <http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_vision_mission&cause_id=1694> (accessed 26 February 2010)

ii) **Southern African Trade Hub Document**

Southern African Competitiveness Hub “About Us”

<http://www.satradehub.org/index.php?option=com_content&task=view&id=21&Itemid=131>

5. Other Research Sources

Black A “The Impact of Trade Liberalisation on the South African Automotive Industry”

Paper presented to the TIPS Policy Forum (1998) <<http://www.tips.org.za/files/177.pdf>> (accessed 10 March 2010)

Department: International Relations and Cooperation “SACU History and Present Status” (2004) <<http://www.dfa.gov.za/foreign/Multilateral/africa/sacu.htm>> (accessed 7 March 2010)

Mbendi Information Service “Guide to importing into South Africa” (2000)

<http://www.mbendi.com/import/sa/customs_tariffs.htm> (accessed 7 March 2010)

Misovicova M “Some Issues raised on Article V” UNECE-UNESCAP Capacity Building Workshop on Trade Facilitation, Kuala Lumpur (2005)

<www.unece.org/.../Session%20I_Maria_WTO%20GATT%20Articles_v.1.ppt> (accessed 4 April 2010)

South Africa.info “Tariffs, Taxes and Exchange Control” (2009)

<<http://www.southafrica.info/business/trade/import/925317.htm>> (accessed 6 March 2010)

The Revised Kyoto Convention, Contracting parties to the Revised Kyoto Convention and their Instruments (as of 26 January 2010)

<http://www.wcoomd.org/home_wco_topics_pfoverviewboxes_tools_and_instruments_pfoventions_instruments.htm> (accessed 4 April 2010)

2010 Index of Economic Freedom “Swaziland”

<<http://www.heritage.org/index/Country/Swaziland>> (accessed 13 March 2010)

2010 Index of Economic Freedom “Lesotho”

<<http://www.heritage.org/index/Country/Lesotho>> (accessed 13 March 2010)

2002 SACU Agreement between: The Governments Of The Republic Of Botswana, The Kingdom of Lesotho, The Republic of Namibia, The Republic of South Africa and The Kingdom of Swaziland

<<http://www.trade.gov.ls/documents/2002%20Southern%20African%20Customs%20Union.pdf>> (accessed 16 March 2010)

6. Reports/Speeches/Official Public Statements

Chutikul K (former Secretary-General of UNCTAD) “Official Statement to Bangkok Post” 25 July 2001 <http://www.wto.org/trade_resources/quotes/new_round/new_round.htm> (accessed 20 March 2010)

Dayal R “Trade facilitation: A Paramount Need” Financial Daily from The Hindu Group of Publications (3 May 2005) <<http://www.thehindubusinessline.com/2005/05/03/stories/2005050300210900.htm>> (accessed 9 January 2010)

Ponter K and Rowe-Setz J “Development of Sector Strategies for South African Exporters to overcome Non Tariff Barriers in selected sectors and regions” NEDLAC Report 2006 <<http://www.nedlac.org.za/media/14428/export%20ntb%20-%20draft%20%20final%20report.pdf>> (accessed

“Taiwan encourages SACU members to harmonise trade policies and ensure WTO compliance” (Press release 11 November 2009) <<http://www.roc-taiwan.org/WTO/ct.asp?xItem=116606&ctNode=5998&mp=502>> (accessed on 31 March 2010)

Imani Development “Inventory of Regional Non Tariff Barriers: Synthesis Report”
(2007) <http://ntb.africonnect.com/media/ntb_synthesis_2007_final.pdf> (accessed 14 March 2010)

Imani Development Regional Trade Facilitation Programme “Update Survey of NTBs to Trade: Namibia” (2007) <<http://ntb.africonnect.com/media/nambia.pdf>> (accessed 11 May 2010)

International Trade Centre: UNCTAD/WTO “Business And The WTO Negotiations On Trade Facilitation” Technical Paper No. BAS-05-34.E (2005)
< http://www.intracen.org/btp/issues/trade_facilitation/publications/trade_facilitation.pdf>
(accessed 12 April 2010)

International Finance Cooperation- World Bank Group” Doing Business 2010 Report”
<<http://www.doingbusiness.org/economyrankings/>> (accessed 20 May 2010)

Official statement: Alan Oxley Former Australian Ambassador to the GATT (29 June 2001)
“Australian Financial Review” <http://www.wto.org/trade_resources/quotes/new_round/new_round.htm> (accessed 5 January 2010)

Official Statement: Director-General Supachai Panitchpakdi The General Council meeting on Coherence at the WTO (13 May 2003)
<http://www.wto.org/trade_resources/quotes/new_round/new_round.htm> (accessed 5 January 2010)

World Bank “World Bank Press Release no 2003/287/S” (13 April 2003)
<http://www.wto.org/trade_resources/quotes/development/development.htm> (accessed 5 January 2010)

7. Working Papers

Sohn C and Yang J “Trade Facilitation in the WTO and Implications for Developing Countries” Korea Institute for International Economic Policy and Catholic University of Korea, Seoul (2008) < http://www.unescap.org/tid/publication/chap8_2278.pdf > (accessed 10 February 2010)

Grainger “Trade Facilitation Research Paper” Trade Facilitation Consulting Ltd UK (2009) <<http://www.tradefacilitation.co.uk/content/view/37/1/>> (accessed 8 February 2010)

Grainger “Trade Facilitation: A Review” Working Paper Trade Facilitation Consulting Ltd UK (2007) < <http://www.tradefacilitation.co.uk/content/view/17/42/>> (accessed 28 February 2010)

Witzig *et al* “Humanitarian and Peace Operations: NGOs and the Military in the Interagency Process” 2006 7 <http://www.dodccrp.org/files/Davidson_Humanitarian.pdf>(accessed 23 February 2010)

Beghin JC” Non tariff Barriers Working Paper -06-WP 438” Iowa State University (2006) <http://www.econ.iastate.edu/research/webpapers/paper_12703.pdf > (accessed 12 March 2010)

8. Main Websites

<http://www.un.org/en/> - Official Website of the United Nations

<http://www.wto.org/> - Official Website of the World Trade Organisation

<http://www.sadc.int/> - Official Website of the Southern Africa Development Community

<http://www.sacu.int/> - Official SACU Website

APPENDIX: A

Modalities for negotiations as set by Annex D of the July Package:

1. Negotiations shall aim to clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 with a view to further expediting the movement, release and clearance of goods, including goods in transit. Negotiations shall also aim at enhancing technical assistance and support for capacity building in this area. The negotiations shall further aim at provisions for effective cooperation between customs or any other appropriate authorities on trade facilitation and customs compliance issues.
2. The results of the negotiations shall take fully into account the principle of special and differential treatment for developing and least-developed countries. Members recognize that this principle should extend beyond the granting of traditional transition periods for implementing commitments. In particular, the extent and the timing of entering into commitments shall be related to the implementation capacities of developing and least-developed Members. It is further agreed that those Members would not be obliged to undertake investments in infrastructure projects beyond their means.
3. Least-developed country Members will only be required to undertake commitments to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.
4. As an integral part of the negotiations, Members shall seek to identify their trade facilitation needs and priorities, particularly those of developing and least-developed countries, and shall also address the concerns of developing and least-developed countries related to cost implications of proposed measures.
5. It is recognized that the provision of technical assistance and support for capacity building is vital for developing and least-developed countries to enable them to fully participate in and benefit from the negotiations. Members, in particular developed countries, therefore commit themselves to adequately ensure such support and assistance during the negotiations
6. Support and assistance should also be provided to help developing and least-developed countries implement the commitments resulting from the negotiations, in accordance with their nature and scope. In this context, it is recognized that negotiations could lead to certain

commitments whose implementation would require support for infrastructure development on the part of some Members. In these limited cases, developed-country Members will make every effort to ensure support and assistance directly related to the nature and scope of the commitments in order to allow implementation. It is understood, however, that in cases where required support and assistance for such infrastructure is not forthcoming, and where a developing or least-developed Member continues to lack the necessary capacity, implementation will not be required. While every effort will be made to ensure the necessary support and assistance, it is understood that the commitments by developed countries to provide such support are not open-ended.

7. Members agree to review the effectiveness of the support and assistance provided and its ability to support the implementation of the results of the negotiations.

8. In order to make technical assistance and capacity building more effective and operational and to ensure better coherence, Members shall invite relevant international organizations, including the IMF, OECD, UNCTAD, WCO and the World Bank to undertake a collaborative effort in this regard.

9. Due account shall be taken of the relevant work of the WCO and other relevant international organizations in this area.

10. Paragraphs 45-51 of the Doha Ministerial Declaration shall apply to these negotiations. At its first meeting after the July session of the General Council, the Trade Negotiations Committee shall establish a Negotiating Group on Trade Facilitation and appoint its Chair. The first meeting of the Negotiating Group shall agree on a work plan and schedule of meetings.⁵⁹⁵

⁵⁹⁵ Source:http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm#annexd
(accessed 9 February 2010)