The World Trade Organisation and Southern African trade relations

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1 HISTORICAL CONTEXT

Following an uninspiring attempt at regional co-operation in the 1980s, Southern African states began in the 1990s to pursue economic integration with renewed vigour, with particular emphasis on building a trade integration agenda. This was primarily as a consequence of developments in Europe (notably the adoption of the Treaty of Maastricht) and North America (the establishment of NAFTA between the USA, Canada and Mexico). More significantly however, political rapprochement in the Region had an even stronger influence. The emergence of a new and democratic South Africa in April 1994 and the potential resolution of regional conflicts in Angola and Mozambique lent urgency to the search in the Region for a new approach to integration.

In anticipation of the new South Africa, the Region had begun in 1991, to seriously reconsider its strategies for closer economic co-operation, acknowledging the importance of consolidating efforts to integrate their economies.[1] As a consequence, the Southern African Development Community (SADC) was established by Treaty in August 1992, succeeding the former Southern African Development Co-ordination Conference (SADCC).[2] Not surprisingly, in August 1994, South Africa became the eleventh member and one year later, in August 1995; Mauritius joined as the twelfth member. In 1997, two new members were admitted – the Democratic Republic of Congo and Seychelles – thus bringing the membership to fourteen states each notably at different levels of development.

The SADC Treaty[3] as adopted in 1992, is a broad enabling document, and does not create specific obligations of an economic nature for member

1 Thus in anticipation of South African membership, the Heads of State and Government of the former SADCC, meeting in Arusha in August 1991, decided to shift SADCC's focus away from the co-ordination of externally funded projects, towards promoting economic integration amongst the ten members. They expected South Africa to join as the eleventh member. See Waterhouse (1992) and Fauvet (1992). ANC Deputy President Walter Sisulu had pledged that a non-racial South Africa would not seek hegemony over the region, and endorsed the SADCC principles of "equity, interdependence and mutual benefits".

2 The latter was a loose agglomeration of states, held together by a non-binding declaration of intent known as the "Lusaka Declaration", which had been adopted in 1980. Member states of SADC at that stage included Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Tanzania, Zambia and Zimbabwe.

3 Treaty establishing the Southern African Development Community 32 *ILM* 116 (1993).

states. These are to be spelt out in a series of protocols of which several, including those on Transport, Energy, Water Resources and Trade, have thus far been concluded. For present purposes, the most significant of these is the Trade Protocol, adopted by member states at the August 1996 SADC Summit in Maseru. The Protocol anticipates the establishment of a free trade area (FTA) eight years after entry into force, which will occur following ratification, by eight member states. Thus far only four member states have ratified, namely: Botswana, Mauritius, Tanzania and Zimbabwe. It is anticipated that South Africa will ratify early in 1999.

This attempt at regionalism should be examined against developments in the global economy, where multilateralism has seen the adoption in 1994, of a rules-based trading system and witnessed the creation of the World Trade Organisation (WTO), to police trade diplomacy.

2 THE WTO AND REGIONAL ARRANGEMENTS OF DEVELOPING COUNTRIES

The cornerstone of the WTO Regime,[4] is Article I of the GATT, upon which each WTO Member extends most-favoured-nation (MFN) treatment to all other WTO Member States which are party to the Agreement. MFN is synonymous with non-discrimination and equal access to the markets of WTO Members.

The concept of reciprocity is likewise associated with the MFN principle, and is an integral component of the concept of non-discrimination. Although not defined in the GATT Agreement, in Article XXVIII *bis* it is clearly stated that negotiations on tariff reductions should be " . . . on a reciprocal and mutually advantageous basis . . .".

There is however, several exceptions to these basic commitments, including the principles of (i) "non-reciprocity", which applies in respect of developing country WTO Members' trade with developed countries; (ii) differential and more favourable treatment in the case of developing countries, and (iii) regional arrangements generally. Each of these is explained below, including their significance for developing countries as a whole.

2.1 Non-reciprocity

On 26 November 1964 a fundamental reform of the GATT legal framework occurred with the adoption by the Contracting Parties of Part IV of the GATT, entitled "Trade and Development". It became effective on 27 June 1966. Part IV added three articles to the GATT Agreement, namely Articles XXXVI, XXXVII and XXXVIII. The adoption of Part IV had important legal and institutional consequences. It resulted in the first substantive reform of a basic GATT principle that is, reciprocity of concessions, as under Article XXXVI:8, developing countries are relieved of this commitment. (Trebilcock and Howse 1995:35)[5] Thus under this Article, developed

4 Also of the old GATT.

5 See also McGovern 1995 : 9.21-2 *et seq* and Hudec 1987: 56-70.

countries do not expect reciprocity for the commitments they make in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries. An explanatory note to paragraph 8 states that developing countries should not have to make contributions which are inconsistent with their individual development, financial and trade needs, taking into consideration past trade developments. This principle of non-reciprocity applies not only to trade negotiations, but also to negotiations under, for example, Article XVIII dealing with safeguard action for development purposes; Article XXVIII, dealing with modification and withdrawal of concessions in a schedule; or any other procedure under GATT. Because Part IV makes no reference at all to Article XXIV, it is argued that negotiations for a FTA are not included in this list. The two GATT Panels of 1993 and 1994 on the EU's banana regime supported this contention, maintaining that the requirements of Article XXIV were not modified by Part IV.[6]

2.2 Differentiation

In November 1979, GATT Contracting Parties adopted four Tokyo Round agreements of which the Agreement on "Differential and more-favourable treatment, reciprocity and fuller participation of developing countries", contained the provisions which make up the "Enabling Clause".[7] Through the "Enabling Clause" a permanent legal basis was created for preferences in favour of developing countries or among them, making them an integral part of the GATT system. Thus paragraph 1 provides:

> "Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties."

Paragraph 2 sets out the following areas of application:

(a) "Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the GSP";

(b) "Differential and more-favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT";

(c) "Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the contracting parties, for the mutual reduction or elimination or non-tariff measures on products imported from one another";

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6 GATT Panel Report 1993: par 369 and GATT Panel Report 1994: par 159. This issue will be revisited below in sections 3 and 4.

7 An important series of events helped to create the favourable conditions for this coming together of minds. The period 1971 to 1979 had brought with it economic disturbances and shifts in the relationship between developed and developing countries, oil crises, economic decline, political tension in the UN and greater recognition of interdependencies. All of these events highlighted the urgency for faster economic development and expansion in developing country exports.

(d) "Special treatment of the least developed among the developing countries in the context of any general or specific measures in favour of developing countries".

Paragraph 2 is not exhaustive, thus a note to the paragraph explains that Contracting Parties may examine any proposal for differential and more favourable treatment.[8] In terms of paragraph 3, differential treatment is designed to promote the trade of developing countries without raising barriers to the trade of other member countries, and must not prevent the reduction and elimination of customs duties or other trade restrictions on an MFN basis. In addition, preferential treatment should be designed, and if necessary, modified to meet the needs of developing countries. [Long 1987:102]

Even though the "Enabling Clause" provides a permanent legal basis for the granting of preferences for developing countries, it does not define "developing" country status, nor does it say what countries qualify for such preferences. Under GATT practice, the system of self-selection applies. Thus, which countries fall within the category of eligible states, is an open question.[9]

The principal justification for granting preferences under the "Enabling Clause" is the contention that treating equally those states that are unequal would be unfair. Implicit in the heading "Differential and more favourable treatment, reciprocity and fuller participation of developing countries", is the notion that developing countries would, with the continued and successful development of their economies, graduate to a more developed status. They would then be able to "participate more fully in the framework of rights and obligations under the General Agreement".[10]

The notion of "fuller participation" by developing countries is the complement of "differential and more favourable treatment". [Long 1987:102] It provides the basis for a potential reversal of the entitlement to differential and more favourable treatment, at least in respect of the more advanced countries. Thus as their situation improves "equality" of treatment should progressively become the rule, particularly in those sectors where they have become more competitive. Thus differential treatment should not be looked upon as being immutable.

Because GATT embraces the tradition of self-selection in respect of "developing" country status (a practice continued by the WTO), this has given rise to enormous controversy over the issue of "graduation". Advanced developing countries such as Israel, Hong Kong, Korea and Singapore, enjoy *per capita* GNPs, and yet are still categorised as "developing countries". Similar questions are also being raised about countries like for example Brazil, Chile and Malaysia. Unfortunately, the Uruguay Round Agreements (UR) failed to deal with this issue in a satisfactory manner.

8 Olivier Long, former Director-General of GATT, contends that the list does not cover 'special' preferences such as those resulting from the Lomé Conventions.

9 Long 1987:102 and see also Carl 1989.

10 See paragraph 7 of the Decision.

Instead, the UR Agreements have divided developing countries into two groups: the least-developed countries (LLDCs) and developing countries (LDCs). In some instances, a further distinction is created. Thus for example, in relation to export subsidies, GATT 1994 creates a division between: (i) least-developed countries;[11] (ii) 20 developing countries whose *per capita* income is below US$1,000; and (iii) the rest of the developing countries. Zimbabwe is included in this group.

The WTO Agreements draw this distinction between LLDCs and LDCs so as to limit in respect of the second group, the application of the principle "differential and more favourable treatment", making it time-bound and confined in its scope. For LLDCs, the rule has indefinite application.[12]

This attempt to divide developing countries in this artificial and arbitrary manner is unconvincing and creates an unfair discrimination against developing countries which while not classified as "least-developed" nevertheless are so poor as to require treatment which favours them over the advanced developing countries.

The problem with this approach to differential treatment is that it is rooted in the discredited GATT practice of "self-selection".[13] It does not tackle the root of the problem, that is, how to deal with the advanced developing countries, which have graduated out of that status and therefore should by now be expected to adopt full reciprocity in their relations with developed countries.

Because of their inability to persuade these countries to adopt reciprocal MFN, the solution adopted has been to treat *all* developing countries that do not have a *per capita* GNP of under US$1,000 or are least-developed, as though they are "equal". This creates an absurdity since it places a country like Swaziland on an equal footing with a country like Singapore.

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11 Of the approximately 48 least-developed countries in the world, 38 are part of the ACP countries.

12 Of course, the fact that the principle is available *indefinitely* for LLDCs does not mean that it is a rule created in perpetuity. Rather, its indeterminate nature is recognition of the extremely desperate situation of these countries. However, there is an assumption, that, given the admittedly slow and perverse nature of attempts at development in least-developed countries, the latter will *with time*, eventually graduate from their unfortunate status. When that happens, the rule will fall into disuse and become redundant, as these States will then be able to adopt reciprocal MFN in respect of their trade relations with other WTO Member States, and be integrated into the global economy. This view is supported by the fact that the WTO Agreement states in Article XI:2 that LLDCs, recognised as such by the UN, will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities. In addition in the "Decision on Measures in Favour of Least-Developed Countries", adopted in the UR Final Act, the Ministers repeated the principles regarding commitments and concessions, and gave LLDCs until April 1995 to submit their Schedules. The fact that LLDCs, despite their preferential status, are still expected to "undertake commitments and concessions", and were expected to submit schedules by April 1995, indicates that there is an assumption that they will one day be able to reciprocate fully on tariff concessions. McGovern 1995:9.21-1 to 9.21-5

13 Within GATT and now WTO practice, countries decide for themselves whether or not they should be classified as "developed" or "developing".

Clearly this WTO practice on differentiation is in need of reform. A more credible approach would be to adopt criteria similar to that of the OECD DAC,[14] which would indicate more clearly the differences existing between countries purporting to be "developing" countries. Such criteria should be based on more than just developing country *per capita* GNP, although this last indicator is significant. Additional economic indicators, which determine a country's status, should be used such as for example, the relative role of agriculture and industry in the economy as well as that of the production structures. Other indicators that could be useful are levels of health, including life expectancy, literacy and education.

Developing countries are clearly not on par *inter se*, whether economically, politically or otherwise. It is unjust to qualify the application of preferential treatment for the majority of developing countries merely to prevent the more advanced "developing" countries, which still insists on the classification instead of graduating, from benefiting from such treatment.

2.3 Developing country regional arrangements

The WTO Regime provides three approaches for arriving at a regional trade arrangement. These are either: (i) Article XXIV of the GATT; (ii) paragraph 4 (a) of the Enabling Clause and Part IV ("Trade and Development") of the GATT; or (iii) Article V of the General Agreement on Trade in Services (GATS). For present purposes, only the first two procedures will be considered.

Article XXIV provides the approach more suited for developed country WTO Members' trade arrangements (North-North) and those advanced developing countries arrangements (South-South), whose main objective, according to the Article, is to increase "freedom of trade".(Article XXIV:4) Article XXIV can also be used in a North-South arrangement, which must be reciprocal in nature. (GATT Panel Report 1994: par 159) It is probable that any FTA concluded between for example, South Africa and the EU, will be notified under Article XXIV.

But the fact that an arrangement is notified under Article XXIV does not prevent an element of asymmetry from being built into the relationship while it is still an "interim arrangement", provided a "plan and a schedule" are filed with the WTO. Once a fully-fledged Article XXIV customs union (CU) or FTA is established, it can no longer be asymmetrical. Reciprocity must be granted in full. (GATT Panel Report 1994: par 159) Finally, there is nothing to prevent the less-advanced developing countries and least-developed countries from entering into Article XXIV arrangements. This is not however, advised due to the possibility of stricter rule conformity obligations, which may not be in the interest, of especially the LLDCs, given their entitlement to "differential and more favourable treatment".

14 Organisation for Economic Co-operation and Development's Development Assistance Committee. The OECD is a first world organisation situated in Paris France.

The *Enabling Clause* on the other hand, is designed principally to care for the needs of developing countries, as its main objective is to facilitate economic development rather than tariff liberalisation. Thus Lyn Mytelka (1973:236,240) has opined:

> "Among developing countries . . . the motivation for integration and the objective of integration is not more or less integration, but rather the realisation of economic goals. Integration in many developing areas of the world is, in fact, a paradigm for industrialisation".

Article XXIV envisages four types of regional arrangements, namely CUs, FTAs, and "interim arrangements", leading to a CU or a FTA. Paragraph 4 sets out the characteristics of CUs and FTAs as being " . . . to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories".

The legal requirements and attributes of each arrangement are contained in paragraph 8. For example CUs must meet three legal requirements:

1) Duties and other restrictive trade regulations must be eliminated on "substantially all the trade" in the territories of the members;[15]
2) There must be a common external tariff (CET), with no internal differentials within CU members, and a common trade policy;
3) Duties and restrictions on the trade of non-union WTO members must "not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce . . . prior to the formation of such union".

FTAs are simpler and more commonly in use. The FTA must eliminate duties "on substantially all the trade" between its members. Member states can maintain their external tariffs very much as they were before the FTA was formed. All that is required (Article XXIV: 5(b)) is that members' duties and regulations of commerce should not " . . . be higher or more restrictive than the corresponding" ones existing prior to the formation of the FTA.[16]

All FTAs provide for rules of origin. This ensures that goods do not slip in from outside through members with lower external barriers.[17] However, Article XXIV *per se*, does not deal with rules of origin.[18]

Since CUs and FTAs take a long time to establish, *interim arrangements* are necessary to avoid the economic disturbance caused by a rapid move to free trade among members. To prevent these agreements from being used as a pretext for introducing discriminatory preferences, they are required to include a "plan and a schedule" for the formation of the CU or FTA within a reasonable length of time. The UR Understanding on

15 This rule is not absolute, there are exceptions. Thus members are free where necessary, to exercise their right to maintain trade restrictions under GATT Articles XI (quantitative restrictions), XII (restrictions to safeguard balance of payments), XIII (non-discriminatory quantitative restrictions), XIV (exceptions to the rule of non-discrimination), XV (exchange arrangements) and XX (general exceptions to GATT obligations).

16 See discussion in Kumar 1995: 3.

17 Yeboah (1993).

18 The UR, on the other hand, does deal with rules of origin.

Article XXIV sets the period for establishment at 10 years, which can be extended given sufficient justification.

Because paragraph 4 expressly refers to "constituent territories", a strict interpretation of the term, Article XXIV permits reference only to countries, or at least to contiguous customs regions.[19] Certainly, the drafters of the provision had in mind at the time, "territories" such as the Benelux countries. They did not envisage customs unions or FTAs being established between two non-contiguous zones (eg EU and SADC) or between two continents (Europe and Africa).

Within the WTO Regime, the Enabling Clause provides a more flexible regime for developing country trade blocks, which is more indulgent of developing country arrangements than Article XXIV would permit. In this context, the scope for developing countries to create an arrangement *sui generis* of an Article XXIV trade block, exists, provided of course that it does not prevent the reduction and elimination of customs duties or other trade restrictions on an MFN basis.[20]

Article XXIV sets out inadequate criteria for both CUs and FTAs, and for this reason has come up for a great deal of criticism. Certainly, in view of the history of abuse regarding associations claiming to be Article XXIV arrangements, the Article has not achieved its purpose in providing control. At the top of the list of offenders has been the EU.[21] There have been many calls for its reform to provide for more coherence and stricter guidelines.

However, the criteria under the Enabling Clause are even less tangible, and certainly also in need of sharper definition. Indeed, in respect of CUs and FTAs, it has been said that,

> " . . . [i]n the international system there is no standard model for a trade block. There are no standard models for customs unions, or free trade agreements. . . . Analysis must borrow and synthesise from the practice of existing trade blocks. "(Qureshi 1996: 151–2)

The Enabling Clause permits the actualisation of the principle, "differential and more favourable treatment" for developing countries. In support of this position, Sir Leon Brittan has, as recently as 10 January 1997, stated:

> "It is . . . worth recalling that the EU encourages developing countries to use regional integration as part of their economic development process. Many of the agreements which result are notified under the "enabling clause", agreed as part of the Tokyo Round in 1979 to enable special and differential treatment (and more lenient application of GATT rules) to be applied to developing countries. This objective remains important for the EU. Ideally it should be possible to provide for clearer, stronger rules in respect of FTA's and other regional integration agreements affecting developed and more advanced "developing" countries (many of whom have *per capita* GDP equivalent to EU Member States), while at the same time providing for a genuine more relaxed regime applicable to developing countries." (Brittan 1997)

19 See on this point Long (1987).

20 *WTO Focus* Newsletter No 8 January–February 1996.

21 *Cf* Winters 1993: 122.

The call for clearer, stronger yet more flexible rules is appreciated. Certainly, both Article XXIV and the Enabling Clause need strengthening. Their context also needs to be expanded to deal with the realities of globalised trade between non-contiguous and unequal regions, which, irrespective of what Article XXIV defines as permissible, will in all probability still be established between developed and developing countries.

3 SOUTHERN AFRICAN TRADE RELATIONS AND THE WTO

The SADC region comprises fourteen countries at varying levels of development. These range from South Africa, which in GATT/WTO parlance is a "developed" economy,[22] to Angola, Democratic Republic of the Congo, Lesotho, Malawi, Mozambique, Tanzania and Zambia, as least-developed economies.[23] The rest are developing countries. These disparities in levels of development will impact on attempts at a regional level to create a GATT consistent – regional trading block. They give rise to conflicting interests so that often the weakest amongst a group of states comes off second or even third best. This may happen irrespective of particular rights that may exist for the latter within international economic law and regardless of specific agreements that may be entered into to counter such events.

McCarthy has argued that regional trade amongst a group of unequal states is unlikely to bring spectacular results. The trade patterns characteristic of developing countries, consist mainly of the export of primary goods and the import of intermediate goods and final manufactured products. Intra-regional trade therefore tends to be limited. Without the presence of South Africa, this is certainly true for SADC, where, prior to the entry of that country, only 4 to 7 percent of total trade was conducted with member states.[24] Orthodox theorists, says McCarthy, would hold that regional integration among developing countries is immaterial. Mytelka supports this view:[25]

"The real obstacle to intra-regional trade [is] not the presence of tariff barriers . . . but the structural conditions of third world economic systems. . . . When integration is conceived, as it most often has been, as the liberalisation of trade by the creation of customs unions or common markets, gains from integration under existing conditions will take time, though sacrifices must often be made immediately."

22 A classification which is not without its problems and indeed is, if anything, a misnomer.

23 It is noted that while Zimbabwe is not considered a least-developed country, it is certainly considered a 'low income' economy with a *per capita* GNP of US$520. With the exception of Angola, this puts Zimbabwe in the same league as the other least-developed economies (Lesotho, Botswana, Malawi, Mozambique, Tanzania and Zambia). While Angola is relatively under-developed and through decades of war, has become a country in sore need of reconstruction, because it has oil revenue and diamond wealth, it is considered a middle-income country with a *per capita* GNP of between US$696–$8,625. (*World Development Report 1995*).

24 Ostergaard 1993: 27, 33. See also McCarthy 1994.

25 Mytelka 1973.

Thus in the SADC region, member state interests would be better served within a framework of co-operation allowing for more efficient and dynamic[26] exploitation of regional comparative advantage. Economic co-operation would enhance productivity by increasing competition within an enlarged market. The Southern African countries could thus benefit from an arrangement that allows them to improve efficiency over a range of goods and services in preparation to accessing international markets.

The larger market is seen as an opportunity to stimulate industrial growth in an environment that is neither autarchic[27] or free trade, but definitely protectionist, although the scope for industrialisation is extended beyond the limits set by the domestic market.

Because the primary aim of integration among developing country members is regional industrialisation, the location of industry becomes crucial. McCarthy shows that regional integration effectively exposes the region to a problem usually experienced within domestic economies: the unequal distribution of economic activity and people in "economic space",[28] resulting in polarised development.

Governments participate in a regional integration scheme because they believe that their countries have something positive to gain. There is also a belief that integration should lead to balanced economic growth and development within the region. If countries were not able to share equally in the industrial wealth of the region, then they would expect to receive adequate financial compensation. The issue here would be who compensates whom? And if compensation were the preferred mechanism for dealing with unequal development, how would such a compensatory arrangement be sustained?

A member state's subjective assessment of the costs and benefits derived from integration cannot be determined with any degree of certainty.[29] Such perceptions are further complicated by the tendency of

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26 Mistry PS comments that: "Not so long ago, *comparative advantage* was used to explain patterns of international trade and the success of some countries over others in the world markets. More often than not, such advantage was seen to accrue mainly to countries which had natural resources, particular qualities of human capital, a surplus of financial capital, and an advanced economic infrastructure by way of functioning markets and institutions. The notion of *static comparative advantage* based on these endowments . . . has given way to a different notion of more rapidly shifting *dynamic competitive* advantage which is based less on factors of production as such, and more on the possession of: market share, global brands, sophisticated process and information technology capabilities, . . . the ability to access and interpret knowledge . . . , and the systemic dexterity which requires considerable flexibility in labour and factor markets."

27 That is economically self-sufficient.

28 In this context, the SADC region comprises an "economic space".

29 Indeed, Mistry contends that "there is an imbalance between the sophisticated quantitative analysis which can be undertaken to assess the trade implications of RIAs (regional integration arrangements) and the less rigorous, almost elusive *qualitative* basis on which the case for assessing the non-trade effects of RIAs must rely. . . . Developing a holistic methodology for assessing all the advantages of regionalism in general, or even of specific RIAs in particular is, of course, easier mooted than achieved. There is no obvious precedent which suggests the viability of a single all-embracing approach to evaluating the costs and benefits of a phenomenon with multiple effects of a quite different nature (ie economic, political, military, social)."

politicians and bureaucrats not to pay attention to economic considerations but to let political expediency with narrow national interests, defined by pressure-groups within their territories, affect their decisions.[30]

> " . . . Given the importance of the distribution of costs and benefits, the force of perceptions in this respect, and the role of political expediency . . . it is not surprising that it has been claimed that the unequal distribution of costs and benefits is the most important reason for the major conflicts experienced by developing countries participating in integration schemes and for the limited success of integration efforts in the developing world."[31]

How then should trade relations in the SADC Region be addressed, given that seven of the members, namely Angola, Democratic Republic of the Congo, Lesotho, Malawi, Mozambique, Tanzania and Zambia are LLDCs?[32] The positions of the other developing countries, whilst also germane, will not be expressly highlighted. Their situation is implicit in the discussion.

As the weakest of the SADC membership, the least-developed states' special position warrants particular acknowledgement. The Protocol on Trade makes no allowances whatsoever, for the special and differential treatment of the least developed of its member states. Every state, no matter what its level of development, is treated exactly the same as the others. The absurdity of this situation becomes clear when one juxtaposes, for example, Mozambique or Malawi against the economies of either South Africa or Mauritius.

The GATT legal system recognises least-developed countries as a special category of states, upon which minimal obligations are imposed. Thus, the various Agreements of the Uruguay Round enshrine the right of the least-developed countries to differential and more favourable treatment. For example, the *Agreement on Agriculture*, in its Article 15 (Special and Differential Treatment) provides *inter alia*:

> "1 In keeping with the recognition that differential and more favourable treatment for developing country members is an integral part of the negotiations, special and differential treatment in respect of commitments shall be provided as set out in the relevant provisions of this Agreement and embodied in the Schedules on concessions and commitments.
>
> 2 Developing country members shall have the flexibility to implement reduction commitments over a period of up to 10 years. *Least-developed country members shall not be required to undertake reduction commitments.*"[33]

Similarly, the *Agreement on the Application of Sanitary and Phytosanitary Measures*, in Article 10 (Special and Differential Treatment), requires that in the preparation of sanitary and phytosanitary measures "Members shall take account of the special needs of developing country members, *and in particular of the least-developed country members*".[34]

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30 See discussion in McCarthy 1994: 10–11 and Hazelwood 1979: 40 53–54.

31 McCarthy 1994: 11.

32 Of the 48 LLDCs worldwide 33 are in Sub-Saharan Africa. UNCTAD *The Least Developed Countries* 1996.

33 Emphasis added.

34 Emphasis added.

The *Agreement on Technical Barriers to Trade* provides in Article 12, for "Special and Differential Treatment of Developing Country Members" and (in 12:1) states that "Members shall provide differential and more favourable treatment to developing country members to this Agreement . . . ". In Article 12:4 it provides that,

> " . . . Members recognise that, although international standards, guides or recommendations may exist, in their particular technological and socio-economic conditions, developing country members adopt certain technical regulations, standards or conformity assessment procedures aimed at preserving indigenous technology and production methods and processes compatible with their development needs. Members therefore recognise that developing country members should not be expected to use international standards as a basis for their technical regulations or standards, including test methods, which are not appropriate to their development, financial and trade needs."

As a last example, the *Agreement on Textiles and Clothing*, which aims to integrate the sector[35] into GATT, provides in Article 6 for transitional safeguard measures. In paragraph 6 of the same, it declares, " . . . *least-developed country members shall be accorded treatment significantly more favourable than that provided to the other groups of members . . . preferably in all its elements, but at least, on overall terms*".[36]

A glance at the Trade Protocol shows however, that none of these "entitlements" have been recognised for the least developed of the SADC states, let alone for the others.

What becomes even more absurd is the obvious treatment of these countries as being on par with an economy the size of South Africa. In global terms, the South African economy is minuscule when compared for example to a tiny country like Belgium. However, in the African context, and indeed, in the SADC region, it is an economic giant.

Within the WTO, South Africa is a developed economy.[37] If development is measured by the level of modernisation in an economy, then, by African standards, South Africa is certainly "developed".[38] It has a GNP of US$130,2 billion,[39] which is clearly four times larger than the GNP of

35 By phasing out the Multi-Fibre Agreement (MFA).

36 Emphasis added.

37 While this classification is considered a misnomer, at least in a relative sense, given the dualistic nature of South Africa's economy, the issue will not be discussed here as it is not entirely relevant to the focus of this paper. According to Mistry, the developed part of South Africa, comprising approximately 6 million people, has a *per capita* GNP of about US$15,000, while the developing part of South Africa – which comprises the majority of approximately 38 million people – have a *per capita* GNP of around US$600.

38 In the Southern African region, it accounted in 1985 (which is the latest date available for such comparison) for 78 percent of all motor vehicles. This amounts to some 40 percent of those in Africa. Sixty-three percent of all tarred roads; 56 percent of all rail lines; 55 percent of maize production; 86 percent of all wheat grown; 75 percent of total exports and 68 percent of total imports. (Mills and Baynham 1994: 10).

39 Source, World Bank, 1998/9. However, in order to obtain a proper perspective in global terms, of the relatively small size of some African economies including South Africa's, contrast South African GNP with the GNP of a small country like Belgium, which is in excess of US$ 231 billion.

Nigeria, the second largest Sub-Saharan economy.[40] By contrast, the second largest economy in the sub-region, and South Africa's biggest (non-SACU) trade partner, is Zimbabwe – with a GNP of US$8,6 billion.[41] Compared to the other countries in SADC, South Africa has a large and relatively sophisticated manufacturing sector.

Trade with South Africa, 1989–1993

	1989		1990		1991		1992		1993	
	Export	Import	Export	Import	Export	Import	Export	Import	Export	Import
Angola	3,9	7,3	0,1	19,8	0,2	8,1	0,3	32,6	0,1	58,1
Botswana	73,6	1454,5	82,3	1691,5	74,6	1316,7	81,7	1079,7	115,0	980,8
Lesotho	25,8	433,0	26,1	488,9	21,0	627,2	43,6	705,6	55,9	712,0
Malawi	26,0	190,0	29,0	179,0	42,4	217,0	46,9	244,7	48,8	181,6
Mozambique	5,4	187,6	8,8	118,7	14,1	107,8	23,0	237,8	18,6	280,5
Namibia	197,5	744,7	215,2	794,7	–	–	–	–	–	–
Swaziland	268,8	624,0	288,9	725,7	–	–	319,5	401,9	422,9	714,9
Tanzania	0,6	1,0	2,9	0,7	–	–	3,6	9,7	6,7	17,9
Zambia	2,3	163,4	1,8	152,2	4,6	160,8	4,8	21,4	12,4	293,9
Zimbabwe	129,7	309,0	122,1	342,1	139,4	546,0	267,4	544,7	203,2	535,0

Source: SADC 1996

The region alone accounts for some 70 percent of South Africa's total exports to the continent, and approximately 20 percent of global exports. Indeed, manufactured exports to Southern Africa surpass those to the rest of the world. Currently, South Africa exports eight times more products to SADC countries than it imports from the region.[42] While SADC is considered to be extremely important for South Africa's trade in manufactured products, it is however, widely acknowledged that this type of trade pattern is unsustainable. It results in one-way trade and amounts to trade in a static market. South Africa could end up impoverishing her neighbours if the trade imbalance is not substantially rectified or offset by compensatory investment inducing capital flows in the opposite direction. Such a situation is obviously not in South Africa's nor the region's long-term interests. Most significantly, South Africa could contribute to de-industrialisation in the SADC Region.[43]

40 Nigeria's GNP at 1994 figures is US$30 billion. South Africa's GNP in 1994 was US$125.2 billion *Ibid.*

41 *Ibid.* South Africa's GNP is nearly five times larger than the combined GNP of the other eleven SADC member states.

42 Based upon statistics provided by the South African Department of Trade and Industry.

43 A static analysis carried out by the Industrial Development Corporation of South Africa had indicated that a FTA would have immediate economic benefits for South Africa but would result in de-industrialisation in the rest of the SADC region. By that stage, it was already evident that some countries in the region, notably Malawi, Zambia and Zimbabwe, were experiencing stagnation in industrial output and exports, very little by way of diversification and a significant amount of dislocation and de-industrialisation. Under structural adjustment and within the confines of the Cross-Border Initiative (CBI). "CBI" is an initiative co-sponsored by the World Bank, IMF, European Union and the African

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Recognising this danger, the South African government has always taken the view that a trade regime in Southern Africa that permits asymmetrical access should be established as a first stage in a process, which would eventually lead to a free trade area for SADC. This means that South Africa would need to lower its tariff regime towards its SADC partners at a faster rate than they would *vis-à-vis* South Africa. This position was, however, strongly opposed by the other member states, which preferred to insist on a strict adherence to the sovereignty principle, entailing the equal treatment of member states. The details of the negotiations around this issue will not be covered here, except to say that they are discussed in another paper.(Thomas 1994)

In January 1996, the sector met during the Annual Consultative Conference in South Africa, and since bilateral trade tensions were already at there highest levels,[44] decided to create a Trade Negotiating Forum (TNF) to deal with both regional and bilateral negotiations.

In May 1996, the TNF met for the first time in Dar Es Salaam, both to consider its own terms of reference and the revised draft agreement. Facing a tight schedule and unfinished business,[45] the TNF met again in Pretoria, in June 1996. It was evident at that meeting that considerable differences still existed on the revised Protocol. A further meeting took place in Dar Es Salaam on 8 August 1996. At this meeting, the parties reached agreement on:

(i) the time frame for the FTA, which was set at eight years;

(ii) the domestic content for the Rules of Origin, set at 35 percent *ad valorem*, applying on a cumulative basis;[46]

(iii) a one-year time limit to arrive at proposals on sensitive items, especially textiles and agricultural products.

Described as a "framework agreement", the Protocol as amended was adopted by Heads of State at the SADC Summit in Maseru during their meeting in August 1996.

Talks have been underway now for the better part of two years to bring the protocol into implementation. Until there is clarity on the table as to what detailed commitments are to be made, however, South Africa has been unable to ratify the protocol. This has contributed to stalling the process. However, what is notable about the Trade Protocol, is that in

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Development Bank. The European Commission has argued that this initiative results from "the desire to formulate a pragmatic way to promote more effective regional integration" in Eastern and Southern Africa. (Kennes 1994).

44 South Africa was experiencing pressures from both Zambia and Zimbabwe over bilateral trade negotiations.

45 Ministers had indicated in January that they wanted at their next meeting, scheduled for July, to consider final proposals for a SADC Trade Protocol for submission to the August 1996 Summit.

46 Cumulation here would be applied on the same principles as it applied within the Lomé relationship with the EU, in the sense that inputs originating from within the SADC region would be calculated as comprising part of the 35 percent domestic content. The Malawi delegation has, however, reserved its position.

interpreting the detail into binding tariff concessions, the South African position on asymmetry is prevailing.

What is not certain however, is to what extent the negotiators in the TNF are mindful of the needs of the least-developed states amongst them. Of these, two are currently not party to the talks for obvious political reasons. These are Angola and the Democratic Republic of the Congo. However, the question arises whether the negotiators are taking on board the very real concerns over Malawi, Tanzania, Mozambique and Zambia. From the discussions gleaned from newspaper articles on the process,[47] it is clear that the major focus is on tariff reductions. This indicates that SADC states are in the first place, focusing ill-advisedly on trade liberalisation rather than on policies to help build their capacity for dealing with globalisation and the consequent marginalisation of their economies.

The impression emerges that no consideration at all is being given to in particular, LLDC entitlement to "differential and favourable treatment" in their trade relations with other WTO Member States. Certainly, since it is party to the SACU Treaty and therefore ostensibly a South African offer, amounting to a Lesotho offer, Lesotho's interests as an LLDC have been subsumed under those of the rest of SACU. The issue then is, should there not be some consideration of compensation for these countries, since by joining this regional arrangement, they are foregoing whatever entitlements they might have under the Uruguay Round Agreements?

Reverting to the focus on tariffs and sensitive products, the fundamental issue is that the Protocol typically, focuses too much on tariff barriers to trade in SADC when these are not the primary obstacles to more intensive economic interaction in the region. There are two reasons for this. First, the existing schedule of tariffs applies in theory but not in practice. The difference between tariffs that are supposed to be levied and those actually collected is enormous, largely because of the lack of effective administration of customs at border posts.[48] This is, *inter alia*, due to endemic misrepresentation and miss-classification of goods in bills of lading for imports.[49]

Second, tariffs have not been important for all the reasons given in the African Development Bank Report on Southern Africa.[50] The Report points out that NTBs are more problematic than tariffs. What the Protocol should have aimed at in practical terms is the issue of countervailing investment, and particularly trade-related-investment from South Africa into the other economies of the region, in amounts which would approximate the massive trade surpluses in favour of South Africa from intra-regional trade. The reality, which the Protocol should have addressed, is that the size of South Africa's trade surplus vis-à-vis the rest of the region is so large as to be unsustainable and un-financeable when it comes out into the open.

47 See for example Dludlu 1998.

48 This includes South Africa.

49 For example, in Zambia, heavy-duty vehicles attract lower duties than passenger vehicles. An importer will then describe 25 passenger vehicles as 10 trucks.

50 See "the Framework for Trade", Chapter II, African Development Bank *supra* fn 89 at pp 21–22.

With most SADC economies being as dependent as they are on foreign aid, it would be unrealistic to expect donors to keep providing extraordinary levels of balance of payments support simply to finance imports from South Africa. The reason why the Protocol should have focused much more on investment measures, is that in the absence of inductive capital flows from South Africa, it is extremely unlikely that private capital flows from the rest of the world will materialise.

The bottom line is that the Protocol, as it has been developed, and the tariff reductions, as they are being negotiated, are likely to exacerbate inequalities rather than redress the same. This reality has not been carefully thought through and mitigated against.

As a final point, the fact that the Protocol will, when it comes into force, probably be notified by the WTO Committee on Regional Trade Arrangements as an Article XXIV arrangement, as further indication of the failure of the SADC Region to give real meaning to the concept of "differential and more favourable treatment".

Given the nature of the Region, and the profile of the Member States, the fact that little serious discussion is been given to the importance of testing the application of the Enabling Clause to this regional trade arrangement is telling.[51]

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51 For more detailed discussion of this last concern, please refer to Thomas 1997.

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