THE COMESA-SADC-EAC FREE TRADE AREA: RULES OF ORIGIN – AN IMPEDIMENT TO REGIONAL TRADE AND ECONOMIC INTEGRATION?

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DECLARATION

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ABSTRACT

The Tripartite Free Trade Area is a regional economic integration initiative that brings together 26 African countries belonging to the Common Market of Eastern and Southern Africa (COMESA), the Southern African Development Community, (SADC) and the East African Community (EAC) regional economic communities (REC's). Among the main objectives of the TFTA is the creation of a large single market with free movement of goods and services and the promotion of intra-regional trade. To this end, the tripartite member states undertake to progressively eliminate all tariffs and non-tariff barriers to trade. Despite concerted efforts to remove barriers to trade among African countries, non-tariff barriers (NTBs) remain an obstacle to regional economic integration and thus reduce investment in the region. Among these NTBs are rules of origin (RoO). RoO constitute an essential element of preferential trade agreements (PTAs) to ensure that only eligible products receive preferential treatment. Overlapping membership to the COMESA, SADC and the EAC has led to the proliferation of RoO regimes among the tripartite member states that are often restrictive, highly protectionist and different in detail and application. Negotiations on RoO in the TFTA have shown that it is difficult to agree on a common RoO standard.

Against this background this dissertation discusses the role played by RoO in the multilateral trade system. It examines the RoO applicable in the COMESA, SADC and EAC REC's and assesses the impact of these RoO on intra-regional trade and economic integration. Furthermore, the dissertation examines the legal framework of the TFTA Annexure on RoO (Annex 4 on RoO) and conducts a comparison of the RoO criteria employed in the TFTA, the Association of Southeast Asian Nations (ASEAN) FTA and the Southern Common Market (Mercusor). The dissertation shows that while COMESA and EAC RoO are similar and relatively simple, SADC RoO are complicated and restrictive. The study further shows that Annex 4 on RoO has been designed in a manner that it is trade facilitating and thus has the potential to increase regional trade and economic integration. The dissertation offers policy makers modest suggestions that can be adopted to address the problems of divergent RoO regimes in the tripartite territory and improve public-private sector participation in the design an appropriate RoO regime.

KEYWORDS: rules of origin, regional integration, TFTA, trade facilitation, COMESA, SADC, EAC

LIST OF ABREVIATIONS AND ACRONYMS

ARoO	Agreement on Rules of Origin
ASEAN	Association of East Asian Nations
CEPT	Agreement on Common Effective Preferential Tariff Scheme for AFTA
CET	Common external tariff
CFTA	Continental Free Trade Area
COMESA	Common Market of East and Southern Africa
CU	Customs Union
CTC	Change in Tariff Classification
CTH	Change in Tariff Heading
EAC	East African Community
FTA	Free Trade Agreement
FTTA	Free Trade Area of the Americas
GATT	General Agreement on Trade and Tariffs
GATS	General Agreement on Trade and Services
GDP	Gross Domestic Product
GVC	Global Value Chain
HS	Harmonized System of Nomenclature
HWP	Harmonised Work Programme
ICC	International Chamber of Commerce
IMF	International Monetary Fund
ITO	International Trade Organisation
LAFTA	Latin America Free Trade Area
MERCOSUR	Southern Common Market
MFN	Most Favoured Nation
NTB	Non-tariff barrier
PTA	Preferential Trade Agreement

REC	Regional Economic Community
RISDP	Regional Indicative Strategic Development Plan
RoO	Rules of Origin
RTA	Regional Trade Agreement
RVC	Regional Value Content
SADC	South Africa Development Community
SADCC	Southern African Development Coordination Conference
SP	Specific processes
STR	Simplified Trade Regime
TFA	Trade Facilitation Agreement
TFTA	Tripartite Free Trade Area
TTNF	Tripartite Negotiating Forum
VA	Value Added
VC	Value Content
WTO	World Trade Organisation

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CHAPTER 1

Introduction

1.1 Tentative Title

The COMESA-EAC-SADC Tripartite Free Trade Area: Rules of Origin - An impediment to regional trade and economic integration in the tripartite territory?

1.2 Background and statement of purpose

For much of the past decade, Africa's three major regional economic communities (REC)'s, the Southern African Development Community (SADC), the Common Market for Eastern and Southern Africa (COMESA) and the East African Community (EAC) have been locked in negotiations aimed at creating the continent's largest free trade zone. At the 1st COMESA-SADC-EAC Tripartite Summit of Heads of State and Government held on 22 October in Kampala, Uganda, an agreement was reached for the establishment of a Tripartite Free Trade Area (TFTA).[1] A declaration launching the negotiations of the TFTA was signed in Johannesburg South Africa on 12 June 2011, at the 2nd Tripartite Summit.[2]

On 10 June 2015, at the 3rd Tripartite summit held in Sharm El Sheik, Egypt, the Agreement Establishing a Tripartite Free Trade Area among the COMESA-SADC-EAC Community was signed by the Heads of State and Government of the three regional blocs.[3] The TFTA was officially launched on 10 June 2015, with the signing of the Sharm El Sheikh Declaration Launching the COMESA-EAC-SADC Tripartite TFTA. Interestingly, 24 out of the 26-member states of the TFTA have signed the Declaration,[4] while the TFTA Agreement has been

[1] 'Final Communique of the COMESA-EAC-SADC Tripartite Summit of Heads of State and Government' available at https://www.tralac.org/wpcontent/blogs.dir/12/files/2011/uploads/FinalCommuniqueKampala_20081022.pdf accessed on 25 July 2017.

[2] 'Tripartite cooperation' available at http://www.sadc.int/about-sadc/continental-interregional-integration/tripartite-cooperation/ accessed on 25 July 2017.

[3] 'Agreement Establishing a Tripartite Free Trade Area among COMESA, the EAC and SADC' available at https://www.tralac.org/documents/resources/tfta/1083-tfta-agreement-june-2015-english/file.html accessed on 26 July 2017.

[4] Only Eritrea and Libya have not signed the Declaration.

signed by 21 of the 26-member countries.[5] South Africa [6] and Madagascar [7] became the latest signatories to the TFTA Agreement following the finalisation and adoption of the three remaining Annexes on rules of origin, trade remedies and dispute settlement[8],[9]. The TFTA Agreement comes into force after the deposit of the fourteenth instrument of ratification.[10]

The TFTA represents a single free trade area consisting of 26 countries with a population of 632[11] million people and a combined GDP of an estimated US$1, 3 Trillion as of 2015, which contributes 57 per cent of Africa's GDP.[12] The TFTA Agreement identifies its objectives as:

> to promote economic and social development of the Region; to create a large single market with free movement of goods and services and to promote intra-regional trade; enhance the regional and continental integration processes; and build a strong Tripartite Free Trade Area for the benefit of the people of the Region.[13]

In order to fulfil and realise these objectives, the tripartite member states undertake, among numerous other things, to progressively eliminate all tariffs and non-tariff barriers to trade in goods.[14] Although multilateral trade negotiations such as the TFTA have lowered the use of tariffs as barriers to trade, 'the reduction in tariffs has been substituted by the utilisation of non-tariff barriers (NTBs)'.[15] NTBs are defined as 'restrictions which are the result of prohibitions,

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[5] The countries that have signed the declaration so far are: Angola, Burundi, Comoros, Democratic Republic of Congo (DRC), Djibouti, Egypt, Kenya, State of Libya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Tanzania, Uganda, South Africa, Swaziland, Zambia, and Zimbabwe. See https://www.tralac.org/resources/by-region/comesa-eac-sadc-tripartite-fta.html accessed on 26 July 2017.

[6] South Africa signed the TFTA Agreement on the 7th of July 2017 at the 6th meeting of the Tripartite Sectoral Ministerial Committee on Trade, Customs, Finance, Economic Matters and Home/Internal Affairs (TSMC) held in Kampala, Uganda. *See* Mangeni (note 39 below).

[7] Madagascar signed the TFTA Agreement on the 13th of July 2017. See 'Madagascar signs Tripartite Free Trade Agreement' (note 12 below)

[8] 'Tripartite signatures rise to 20' available at http://www.comesa.int/wp-content/uploads/2017/07/e-comesa-newsletter_525.pdf accessed on 26 July 2017.

[9] In terms of Article 44 of the TFTA Agreement, member states undertook 'to conclude negotiations on outstanding issues under Phase I as set out in Annex I on Elimination of Customs Duties, Annex II on Trade Remedies and Annex 4 on Rules of Origin after the launch of the Tripartite Free Trade Area.'

[10] TFTA Agreement, Article 39(3).

[11] Z Mabuza & D Luke 'The Tripartite Free Trade Area Agreement: A milestone for Africa's regional integration process' (23 June 2015) available at https://www.ictsd.org/bridges-news/bridges-africa/news/the-tripartite-free-trade-area-agreement-a-milestone-for-africa%e2%80%99s accessed on 9 August 2017.

[12] See 'Madagascar signs Tripartite Free Trade Agreement'- 19 July 2017 available at https://www.tralac.org/news/article/11904-madagascar-signs-tripartite-free-trade-agreement.html accessed on the 9 August 2017.

[13] TFTA Agreement, Article 4.

[14] Ibid Article 5(1).

[15] W Viljoen 'Non-tariff barriers affecting trade in the COMESA-EAC-SADC Tripartite Free Trade Agreement' 2011, 1 available at https://www.tralac.org/images/docs/4240/n11wp072011ntbsintripartitefta20110330fin.pdf accessed on 26 July 2017.

conditions or specific market requirements which make the import or export of products difficult and or costly.'[16] Such restrictions can arise from a number of measures put in place by governments including import bans, general or product specific quotas, unjustified sanitary and phyto-sanitary conditions, quality conditions imposed by the importing country on the exporting countries and complex or discriminatory rules of origin (RoO). The focus of this dissertation is on RoO. The World Trade Organisation (WTO) Agreement on RoO [17] defines RoO as 'those laws, regulations and administrative determinations of general application applied by any Member to determine the country of origin of goods…'.[18] More importantly, and of particular relevance to this thesis, Annex 4 to the TFTA[19] , which deals with RoO, defines RoO as:

> those laws, regulations and administrative determination of general application applied by any member state under the Agreement to determine the country of origin of goods. [20]

As such, RoO 'specify how much processing must take place locally before goods are considered to be the product of the exporting country. The objective is to facilitate preferential trade between trade partners.'[21]

Although the TFTA is made up of three different RECs, there is however, an overlap of membership in the RECs with some member states belonging to more than one REC.[22] Most of the member states of the EAC are also member states of COMESA whilst at least seven countries have dual membership in COMESA and SADC. Because of this overlap in membership, there has been a proliferation of RoO regimes in the RECs. Consequently, each REC has its own RoO and certification processes which has the effect of limiting trade among the RECs.[23] Member countries of the different RECs who also belong to another REC end up

[16] 'Non-Tariff Barriers to Trade' Available at http://www.tradebarriers.org/ntb/non_tariff_barriers accessed on 26 July 2017.
[17] Agreement on Rules of Origin, December 15, 1993, in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, April 15, 1994, 33 I.L.M. 1143. [Hereinafter ARoO]
[18] Ibid Article 1.
[19] Annex 4 on Rules of Origin (under Article 12 to the TFTA Agreement) available at https://www.tralac.org/images/Resources/Tripartite_FTA/TFTA%20Annex%2004%20Rules%20of%20Origin%20Revised%20Dec%202010.pdf accessed on 26 July 2017. [Hereinafter Annex 4 on RoO]
[20] Ibid Article 1(1).
[21] 'Good progress on Tripartite FTA; Rules of Origin remain a challenge' *Bridges Africa* 23 August 2014 available at https://www.ictsd.org/bridges-news/bridges-africa/news/good-progress-on-tripartite-fta-rules-of-origin-remain-a-challenge accessed 26 July 2017.
[22] This is known as the spaghetti bowl phenomenon.
[23] 'Assessing Regional Integration in Africa II: Rationalizing Regional

utilising only those RoO 'which are beneficial and simplest to use' and also employ 'two different sets of rules of origin when trading with different countries which are members of different RECs.'[24] It is thus unsurprising that negotiations on the RoO that will apply to the whole of the TFTA have been long and drawn out, giving testimony to the fact that it has been difficult to agree on a common RoO standard that can apply in the whole of the TFTA.[25]

It should be noted that the TFTA must comply with Article XXIV of the General Agreement on Tariffs and Trade (GATT),[26] which permits member states of the WTO to form preferential trade agreements (PTAs) wherein they extend tariff concessions to each other that they do not extend to other members outside the PTA. This is an exception to the Most Favoured Nation (MFN) principle embodied in Article 1 of GATT. The MFN principle, widely regarded as one of the most important principles under WTO law, requires member states to accord the same preferential treatment that they afford any member of the WTO to all members of the WTO. In relation to trade in goods, 'a Member must provide any benefit it accords to the products of one country (whether or not that country is a WTO Member) to the products of all WTO Members.'[27] A further requirement is that the TFTA, as a FTA should be reported to GATT/WTO to ensure compatibility with GATT/WTO principles.[28]

Furthermore, the TFTA RoO has to be in line with the ARoO. The ARoO aims at harmonizing non-preferential RoO used by signatory countries into a single set of international rules 'in a way that prevents such rules from becoming obstacles to trade.'[29] Work at harmonizing RoO is ongoing spearheaded by the Harmonization Work Programme (HWP). The HWP was supposed to have been completed three years after the entry into force of the WTO agreement[30],

Economic Communities' 2006 Economic Commission for Africa, 55 available at https://www.uneca.org/sites/default/files/PublicationFiles/aria2_eng.pdf accessed 9 August 2017.

[24] Viljoen (note 15 above) 9.

[25] E Naumann 'The Tripartite FTA: Background and overview of progress made in developing new and harmonised rules of origin' 2014 tralac Trade Brief No. T14TB01/2014 available at https://www.tralac.org/publications/article/5808-the-tripartite-fta-background-and-overview-of-progress-made-in-developing-new-harmonized-rules-of-origin.html accessed on 9 August 2017.

[26] General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994] available at https://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm accessed 9 August 2017. The relevance of Article XXIV and its relationship to RoO is discussed in sections 2.2.6 and 2.2.7 below.

[27] T Voon 'Eliminating Trade Remedies form the WTO: Lessons from regional trade agreements' 2010 (59) *International Comparative Law Quarterly* 625–666, 628.

[28] See Marceau & Reiman (note 165 below) 310, discussing the notification of RTAs and their examination by the WTO membership. See also Komuro (note 355 below) 710, for a brief discussion of the requirements that must be satisfied for a regional trade agreement to constitute a FTA in the context of GATT Article XXIV.

[29] H Mabrouk 'Rules of origin as international trade hindrances' (2010) 5 (1) *Entrepreneurial Business Law Journal* 97-176, 104.

[30] ARoO, Article 9(2).

but the complexity of the issues being discussed and the inability of member states to reach a consensus on these issues has hampered any progress to achieve the complete harmonisation of non-preferential RoO.[31] Pending the completion of the HWP, member states are required to, among other things, ensure that RoO 'shall not themselves create restrictive, distorting, or disruptive effects on international trade'[32] and 'are administered in a consistent, uniform, impartial and reasonable manner.'[33]

1.3 Rationale for the thesis

The TFTA Agreement seeks to establish a larger market, with a single economic space. Such economic space will be more attractive to investment and large-scale production.[34] This is in turn expected to increase trade flows and regional economic integration. Despite concerted efforts to remove barriers to trade among African countries, non-tariff barriers (NTBs) remain an obstacle to regional economic integration and thus reduce investment in the region. Among these NTBs are RoO. RoO constitute an essential element of PTAs to ensure that only eligible products receive tariff preferences. The idea of PTAs is the facilitation of greater trade flows between member countries. In this context therefore, 'the objective of preferential RoO is the facilitation of preferential trade between preferential partners without opening up such a trade regime to goods simply transhipped from third countries.'[35]

The member countries in each of the three RECs forming the TFTA have in existence regional trade agreements (RTAs) that are applicable between the trading partners of each REC. As already noted above, the lack of a harmonised RoO standard has led to a proliferation of RoO regimes in the RTAs. Apart from being restrictive and highly protectionist, these RoO regimes are 'often substantially different in detail and application.'[36] The three RECs have been trying to find common ground in the TFTA negotiations. Although negotiations on most of the Annexes to the TFTA Agreement had already been completed when the TFTA Agreement was launched on 10 June 2015, negotiations on Annex 4 on RoO proved to be difficult and complicated and were only completed in July 2017.

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[31] 'Technical Information on Rules of Origin' available at https://www.wto.org/english/tratop_e/roi_e/roi_info_e.htm Accessed on the 9th of August 2017
[32] ARoO, Article 2(c).
[33] ARoO, Article 2(e).
[34] 'Tripartite Free Trade Progress Report' available at http://www.tralac.org/wpcontent/blogs.dir/12/files/2011/uploads/draft_TaskForce_Progress_Rep_Impl_Decisions_1st_Summit.pdf accessed on 26 July 2017.
[35] Naumann (note 25 above) 2.
[36] Ibid 3

It therefore remains to be seen whether the recent completion on the legal scrubbing of Annex 4on RoO will lead to ratification of the TFTA Agreement. As only those countries that will ratify the Agreement will be bound by it, 'it remains a possibility that some participating states (doubting the benefits or considering the CFTA to be a better option) will not become TFTA parties.'[37] It is worth repeating that a total of 14 ratifications are required for the agreement to enter into force.[38] As of 10 July 2017, only Egypt has ratified the Agreement.[39]

As mentioned earlier, one of the main objectives of the TFTA is the progressive elimination of tariffs and non-tariff barriers to trade in goods and the liberalization of trade in services, with the aim of increasing trade and contributing to the deepening of integration of Tripartite member states. With the recent completion of negotiations on Annex 4 on RoO, and bearing in mind the objectives of the TFTA, it becomes of necessity to examine the RoO that will apply in the TFTA with the aim of establishing whether they impose an impediment to regional trade and economic integration. This thesis is thus of great significance in so far as it relates to a FTA that will pave way for the envisaged massive economic integration in the tripartite territory with particular focus on RoO. It will, in its own small way assist policy makers in decision making and contribute to the ever-increasing literature on rules of origin in FTAs.

1.4 Aim of thesis

Rules of origin are an important aspect of RTAs. They have played a central role in the negotiations for the Free Trade Area of the Americas (FTTA) and the European Union-Southern Common Market (Mercosur).[40] The Committee of Trade Agreements of the World Trade Organisation has elevated them to the status of a systemic negotiation issue.[41]

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[37] G Erasmus 'The TFTA as a legal construct: What is it and how will it be implemented?' 2017 tralac Trade Brief No. US17TB04/2017 available at https://www.tralac.org/publications/article/11497-the-tfta-as-a-legal-construct-what-is-it-and-how-will-it-be-implemented.html accessed on 26 July 2017.
[38] Article 39(3) of the TFTA Agreement.
[39] F Mangeni 'The Tripartite Free Trade Area – a breakthrough in July 2017 as South Africa signs the Tripartite Agreement' (10 July 2017) available at https://www.tralac.org/news/article/11860-the-tripartite-free-trade-area-a-breakthrough-in-july-2017-as-south-africa-signs-the-tripartite-agreement.html accessed on 26 July 2017.
[40] A Estevadeordal & K Suominen 'Rules of Origin in FTAs in Europe and in the Americas: Issues and Implications for the EU Mercosur Inter-regional agreement' 2004 Intal ITD Working Paper 15 available at https://publications.iadb.org/bitstream/handle/11319/2568/Rules%20of%20Origin%20in%20FTAs%20in%20Europe%20and%20in%20the%20Americas%3a%20Issues%20and%20Implications%20for%20the%20EU-Mercosur%20Inter-Regional%20Association%20Agreement.pdf?sequence=1&isAllowed=y accessed on 12 August 2017.
[41] 'The Doha Declaration Explained' available at https://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm accessed on 12 August 2017.

Negotiations and the legal scrubbing on Annex 4 on RoO in the TFTA Agreement have just recently been completed. More signatures and ratifications of the Agreement are expected to follow given that most of the outstanding issues in Phase 1 of the negotiations appear to have been dealt with.

Against this background, the thesis aims to achieve the following. Firstly, the thesis seeks to identify the RoO regimes applicable in the three RECs forming the TFTA. This will be achieved by analysing the RoO that are employed by the different RECs in the TFTA. Secondly, the thesis will discuss the RoO applicable in the TFTA and the impact these RoO have on intra-regional trade and economic integration. Thirdly, the thesis examines the extent to which Annex 4 on RoO addresses the problem of restrictive or discriminatory RoO in the TFTA. In this regard, Annex 4 to the TFTA Agreement will be analysed and compared with the RoO regimes applicable in other multilateral FTAs, specifically the MERCOSUR and ASEAN FTA. The thesis will also evaluate whether the RoO that will apply in the TFTA hinder or promote regional integration efforts within the tripartite territory.

1.5 Research questions

The main research question this thesis seeks to answer is: To what extent do rules of origin in the TFTA hinder or promote regional economic integration?

In addressing the above question, the following questions will also be answered;

(i) How did Rules of Origin become part of the Multilateral Trade System and what role do they play?
(ii) What rules of origin apply in the Southern Africa Development Community, The East African Community and Common Market for Eastern and Southern Africa?
(iii) How do rules of origin in the TFTA compare to rules of origin of particular multilateral FTAs? To what extent will the rules of origin in the TFTA impact intra-regional trade and will they promote or hinder regional integration?

1.6 Relevance of thesis

The discussion of these questions could be of assistance to the role players involved in formulating RoO to apply in the TFTA. The research questions this thesis seeks to answer raise

topical issues that are relevant to Africa's efforts at increasing intra-regional trade and economic integration. RoO in the tripartite territory have for a long time been a subject where divergent views have been expressed by the different countries within the region. As such, this thesis tackles this controversial and highly technical issue with the aim of offering solutions and recommendations to policy makers. The thesis also contributes to the ever-increasing literature on international trade in general and on RoO in particular.

1.7 Research methodology

This thesis will mainly be based on desktop and library research. The key primary sources to be explored are the Agreement Establishing the COMESA, EAC and SADC Tripartite Free Trade Area and its annexures, the SADC Trade Protocol, The COMESA Treaty, the EAC Treaty, the General Agreement on Trade Tariffs (GATT) and the Agreement on Rules of Origin (ARoO). Journal articles, textbooks and papers by prominent trade law and economic integration authors will form the secondary sources component of the research. Internet sources will also be utilised, as they constitute significant literature on issues pertaining to RoO in FTAs.

The following approaches will be employed in this thesis. A descriptive approach will be utilised to give a general overview of the RoO applied in the COMESA, EAC and SADC blocs. An analytical approach will be employed to assess the impact of these RoO on intra-regional trade and the extent to which they promote or hinder regional integration. A comparative analysis will be employed to draw similarities and differences between RoO in the TFTA and RoO in other multilateral FTAs.

1.8 Literature Review

International trade law by its very nature is a multidisciplinary subject in respect of which there is an ever-increasing literature. Of late, perhaps due to a lack of meaningful progress in WTO negotiations, there has been a proliferation of free trade agreements. Consequently, more authors have devoted their writing to the subject of regional and bilateral trade agreements. As Africa intensifies efforts at regional and economic integration, RoO have remained a topical

issue in the TFTA, a phenomenon that is also present in FTAs across the world. A review of some of the existing literature on FTAs and RoO is undertaken below.

The liberalization of trade has been one of the foremost objectives of the WTO. Instruments such as the GATT have been directed towards the unification of multilateral trade by providing international rules on harmonisation of trade practice and the maximization of global cooperation. To this end, Article XXIV of the GATT allows the formation of customs unions and FTAs. According to Leon Trakman, the reasoning behind GATT's endorsement of RTAs was that, 'by reducing trade barriers between two or more members, the presupposed net result was the enhancement of global trade.'[42] Trakman goes on to point that although 'bilateral agreements are by their nature reciprocal, consensual and inclusive of the parties while being exclusionary of non-parties', they are in practice 'also internally different from one another.'[43] These internal differences in bilateral agreements are also evident in African RTAs, particularly in the context of RoO regimes in the TFTA. In this regard, Naumann observes that 'while the majority [of RTAs in Africa] employ a broadly generic approach to determining the preferential origin status of traded goods, they are often substantially different in detail and application.'[44] He points out that different RoO regimes are applied in different RTAs often resulting in unnecessary RoO related trade barriers. This sentiment is also shared by Willem Viljoen, who argues that if non-uniform RoO apply in the three RECs forming the TFTA and 'some countries apply different RoO to different countries, uncertainty, confusion and barriers to trade will increase rather than decrease.'[45]

RoO themselves are an important component of international trade. According to Joseph LaNasa[46], '[they] were designed as an uncontroversial, neutral device essential to implementing discriminatory trade policies, compiling economic statistics, and marking a good.' The author argues that RoO become more important and more controversial as the extent to which similar goods from different countries or trading groups are accorded differential

[42] E Trakman 'The Proliferation of free Trade Agreements: Beauty or Bane?' (2008) 42 (2) Journal of World Trade 367, 370.
[43] Ibid 373.
[44] Nauman (note 25 above).
[45] Viljoen (note 15 above) 9.
[46] LaNasa III, Joseph A 'An Evaluation of the Uses and Importance of Rules of Origin and the Effectiveness of the Uruguay Round's Agreement on Rules of Origin in Harmonizing and Regulating Them' 3 (Harvard Law School, The Jean Monnet Working Papers Series No.9601, 1996) available at http://www.jeanmonnetprogram.org/archive/papers/96/9601ind.html accessed on the 10th of August 2017.

treatment increases.[47] He submits that as a result of a lack of global regulation of RoO and their effectiveness in protecting domestic industries from foreign competition, 'governments [have] increasingly turned to rules of origin as a mechanism for protectionism.'[48] Many authors also share this view point. Vermulst[49] attributes the increasing importance of RoO in international trade to 'the surge in selective contingency protectionist measures'. Hatem Mabrouk[50] argues that despite their role and importance in international trade, 'RoO are considered to be obstacles to international trade when they are used as protectionist apparatuses and when their stringency leads to trade diversion.'[51] Brenton et al.[52] argue that highly protectionist domestic industries heavily influence SADC RoO. They are of the view that 'unnecessary use of a detailed product-by-product approach to rules of origin is likely to lead to complex and restrictive rules of origin and to constrain integration.'[53] To prevent the use of RoO as protectionist tools and consequently obstacles to trade, Article 2 (b) of the ARoO calls upon member states to 'ensure that . . . rules of origin are not used as instruments to pursue trade objectives directly or indirectly.'

In the TFTA Annex 4 on RoO, one of the principles governing the application of RoO is that RoO 'shall facilitate intra-regional trade and shall not create distortive or disruptive effects on regional trade.'[54] According to Naumann[55], the facilitation of preferential trade between preferential partners to the exclusion of goods simply transhipped from third countries is the main objective of a PTA such as the TFTA. In this regard, the design of an underlying RoO is critical to achieving this objective. According to him, the design, application, and implementation of preferential RoO is often the biggest challenge. He argues that 'there is no common binding standard that would facilitate the design of "appropriate" RoO conforming

[47] Ibid.
[48] Ibid.
[49] E Vermulst 'Rules of Origin as commercial policy instruments -Revisited' (1996) 26 (6) *Journal of World Trade* 61-102, 62.
[50] Mabrouk (note 29 above) 103.
[51] Trade diversion occurs when new RTA members seek products from existing RTA members, redirecting previous trade flows away from efficient external producers in non-member states to less efficient producers within the RTA, in accordance with the RTA conditions of membership. The use of RoO as protectionist devices used to protect industries in an RTA thus has the potential to lead to trade diversion. *See* Marceau & Reiman (note 165 below) 304.
[52] P Brenton et al 'Rules of Origin and SADC: The Case for Change in the Midterm Review of the Trade Protocol' (2005) 83 *African Region Working Paper Series* available at http://documents.worldbank.org/curated/en/267121468340272289/pdf/336090PAPER0wp83.pdf. Accessed on the 8th of August 2017.
[53] Ibid 13.
[54] Annex 4 on RoO, Article 2(b).
[55] Nauman (note 25 above) 2.

perhaps to some best practice standard.'[56] He further notes that 'given the inherent nature and far reaching implications of RoO and the range of different methodologies available to determine origin, there is arguably no obvious methodology that would satisfy all RoO objectives in an optimal manner.'[57]

1.9 Limitations of the thesis

A conclusive analysis of the impact of the RoO in the TFTA can hardly be achieved in this thesis owing to a number of reasons. Firstly, the TFTA is a work in progress, still very much in its infancy. The TFTA Agreement is yet to attain the requisite fourteen ratifications that will bring it into force, with Egypt being the only member state of the TFTA to have ratified the Agreement as of 4 August 2017. It therefore remains to be seen whether the recent conclusion of negotiations on the Annexes on rules of origin, trade remedies and dispute settlement will move member states to deposit their instruments of ratification. Even if that were to occur within the period in which this research is being conducted and the RoO in Annex 4 of the TFTA Agreement were to become applicable between member states of the TFTA, the challenge still remains to accurately and exhaustively assess the impact of these RoO on regional trade and economic integration in the tripartite territory as it may take years to collect the data required for such an assessment.

Secondly, the RoO contained in Annex 4of the TFTA Agreement are, at the time of writing this thesis, yet to be finalised. Of particular importance is Appendix 1 to Annex 4 on RoO, which contains a schedule of products whose originating status is determined in accordance with Article 5(2) of Annex 4 on RoO. This product list is yet to be completed and is not included in the current Annex 4 on RoO. As such, a product-by-product analysis of the RoO applicable in the TFTA is not possible. Likewise, the comparison of RoO in the TFTA vis-à-vis RoO in Mercosur and the ASEAN FTA is confined to origin determining provisions and does not include RoO that apply to specific products.

Lastly, the time and space available to the researcher does not permit for a detailed article-by-article analysis of the RoO as they are presented in Annex 4 on RoO in the TFTA.

[56] Ibid.
[57] Ibid 3.

Consequently, only the provisions in Annex 4 on RoO that deal with origin determination will be identified and will receive the utmost consideration.

Chapter Breakdown

Chapter 1

Chapter one of the dissertation will deal with the following

- Background of the research
- Statement of purpose
- Rationale for the thesis
- Research questions
- Literature review
- Research methodology
- Limitations of research

Chapter 2

The second chapter focuses solely on RoO in the Multilateral Trade System.

Chapter 3

Chapter three discusses RoO that apply in the Southern Africa Development Community, The East African Community and Common Market for Eastern and Southern Africa?

Chapter 4

Chapter four deals with a comparison of RoO in the TFTA vis-à-vis RoO in the Mercosur and ASEAN FTAs particular and an assessment of the extent to which RoO in the TFTA impact intra-regional trade and whether they will promote or hinder regional integration?

Chapter 5

This is the last chapter and it discusses the findings of the thesis, proffers recommendations to policy makers and discusses the conclusions drawn from the research conducted.

CHAPTER 2

Rules of Origin in the Multilateral Trade System

2.1 Introduction

The multilateral trading system today is an intricate web of preferential trade agreements (PTAs). Crucial to the operation and success of these PTAs are the rules that determine the origin of goods that are traded between the parties to these agreements, commonly referred to as rules of origin (RoO). RoO are an indispensable component of international trade agreements.[58] They are used to determine the economic origin of goods in international trade. According to Kruger, RoO specify the criteria under which goods 'imported by one CU [customs union] or FTA partner will be deemed to have originated from within the CU or FTA and thus be eligible for duty free treatment.'[59] Their function

> is to prevent trade deflection wherein non-originating goods are shipped to a party to a free trade agreement with the lowest external tariffs and then re-exported to the party with higher tariffs in order to avoid paying these higher tariffs or products originating from non-beneficiaries of unilateral preferential schemes are trans-shipped through beneficiary countries.[60]

Against this background, this chapter seeks to determine how RoO became part of the multilateral trading system and exactly what role they play in international trade. In this regard therefore, the chapter will provide a background on RoO, discuss the legislative texts governing RoO in international trade and conclude with a brief discussion on the current problems facing RoO in the multilateral trading system.

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[58] J Coyle 'Rules of Origin as Instruments of Foreign Economic Policy: An Analysis of the Integrated Sourcing Initiative in the U.S.-Singapore Free Trade Agreement' 2004 (29) 2 *Yale Journal of International Law* 545-580, 547.

[59] A Kruger 'Free trade agreements as protectionist devices: Rules of Origin' April 1993 *NBER Working Paper Series* Working Paper No. 4352, 5 available at http://www.nber.org/papers/w4352. See also Gretton and Jali (note 406 below) 1.

[60] 'RoO applicable to exports from LDCs' UNCTAD, United Nations 2011, 2 available at http://unctad.org/en/Docs/ditctncd20094_en.pdf accessed on 6 September 2017. *See also* Lombaerde & Garay (note 260 below) 954, for the view that RoO are meant to prevent the proliferation of the phenomenon known as trade deflection.

2.1.1 Background on RoO

RoO have for a very long time been part of the world trading system. They can basically be defined as 'those laws, regulations, and practices that govern the determination of the country of origin of an imported product.[61] Two types of RoO exist in the multilateral trading system (these are non-preferential RoO and preferential RoO).[62] Non-preferential RoO 'are used to distinguish foreign from domestic products in establishing anti-dumping and countervailing duties, safeguard measures, origin marking requirements and in the context of government procurement'.[63] Preferential RoO on the other hand 'define the conditions under which the importing country will regard a product as originating in an exporting country that receives preferential treatment from the importing country.'[64] As such, non-preferential RoO are mainly concerned with administrative issues such as the recording of trade statistics whereas preferential RoO determine whether a particular product will enjoy certain tariff preferences based on the fulfilment of a certain criteria classifying its origin.

According to LaNasa, RoO were initially designed 'as an uncontroversial, neutral device essential to implementing discriminatory trade policies,[65] compiling economic statistics, and marking a good.'[66] In this context therefore, RoO remained uncontroversial and neutral devices 'for as long as the parts of a product were manufactured and assembled primarily in one country, and as long as other mechanisms for implementing protectionism[67] existed.'[68] With the growth of industrialization and the surge in multinational corporations, goods began to be produced in multiple stages using components manufactured in different places across the world. This in turn undoubtedly created difficulties in establishing what constitutes an

[61] D Palmeter 'Rules of Origin or Rules of Restriction? A commentary on the new form of protectionism' (1987) 11 (1) *Fordham International Law Journal* 1-50, 2.
[62] A Estevadeordal & K Suominen 'Mapping and measuring Rules of Origin around the world' in Cadot et al (eds) *The origin of goods: Rules of origin in Regional Trade Agreements* New York: Oxford University Press (2006), 72.
[63] Ibid 73.
[64] Ibid
[65] Discriminatory trade policies include policies such as anti-dumping measures and safeguard laws. Anti-dumping measures involve the charging of extra import duties on particular goods from particular exporting countries so as to remove any injury to the domestic industry in the importing country. Safeguard laws are meant to protect domestic industries from a surge of imports from a particular country.
[66] LaNasa (note 46 above) 3.
[67] Protectionism refers to the theory or practice of protecting domestic industries and local jobs from foreign competition through government actions or policies that restrict or restrain international trade. Such actions and policies involve the imposition of tariffs on imported goods, restrictive quotas, product standards, and government subsidies. *See* 'What is protectionism' available at https://www.investopedia.com/terms/p/protectionism.asp accessed on 12 August 2017.
[68] LaNasa (note 46 above) 3.

originating product.[69] Governments seemingly did not like the idea of a product manufactured entirely in one country then shipped to another country where it underwent little transformation to be accorded origin status of the latter country. An extract of a speech made by the Australian Minister for Trade and Customs in the Australian House of Representatives whilst introducing the Customs Bill of 1925 best illustrates this point:

> An almost ludicrous state of affairs has arisen. Textile goods manufactured entirely on the Continent of Europe have been sent to England, and there dyed, measured, and wrapped, and have then come to this country under the terms of British preference. Machines in parts have been made on the Continent, and assembled and packed in England, and have come here under the terms of British. I am sorry to say that there is in England a type of Anglo-continental manufacturer, and he should be prevented from doing this sort of thing.[70]

Against this background, origin as a concept had to be defined. Defining origin as a concept became even more important 'as the major trading nations entered into special arrangements resulting in different tariffs with certain countries.'[71]

The earliest effort directed at standardizing origin was in the 1923 International Convention Relating to Simplification of Customs Formalities.[72] The provisions of this convention allowed the contracting states 'to delegate or out-source the process of origin certification to third party organizations of their choice.'[73] When GATT came into force in 1947, it did not deal with RoO, but rather gave the contracting states the freedom to determine their own RoO.[74]

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[69] A Zampetti & P Sauve 'Rules of Origin for services: economic and legal considerations' in Cadot et al (eds) *The origin of goods: Rules of origin in Regional Trade Agreements* New York: Oxford University Press (2006), 73.

[70] An extract from the Speech delivered by the Honourable Mr. M. Pratten, Australian Minister for Trade and Customs, in the Australian House of Representatives at the introduction of the Customs Bill 1925. Available at https://historichansard.net/hofreps/1925/19250821_reps_9_111/#debate-18. Accessed on the 28th of August 2016.

[71] J Bourgeois 'Rules of Origin: An Introduction' in Vermulst et al (eds) *Rules of Origin in International Trade: A Comparative Study*. Michigan: University of Michigan Press (1994).

[72] International Convention Relating to Simplification of Customs Formalities, 1923. Available at https://treaties.un.org/doc/Publication/UNTS/LON/Volume%2030/v30.pdf 371. Accessed on the 28th of August 2017.

[73] 'RoO applicable to exports from LDCs' (note 60 above). Article 11 of the 1923 International Convention Relating to the Simplification of Customs Formalities provided that origin certificates could be issued not only by official authorities of the contracting states but also by any other organisation with the necessary authority and previously approved for this purpose by the states concerned.

[74] J Jackson '*World trade and the Law of GATT: A legal analysis of the General Agreement on Tariffs and Trade*' Indianapolis: Bobbs-Merrill, (1969) 468.

In 1953, however, the International Chamber of Commerce (ICC) submitted a proposal to GATT contracting parties for the adoption of a uniform definition for determining the nationality of manufactured goods.[75] GATT did not adopt the proposal due to '[differing] views between those countries that view[ed] rules of origins as instruments of commercial policy and those which view[ed] them as technical, objective, and neutral instruments.'[76] Although GATT did undertake several rounds of multilateral trade negotiations aimed at eliminating tariff and non-tariff barriers to trade, RoO never featured prominently in these negotiations until the Uruguay Round of negotiations in 1986. The following section provides a brief history of GATT and the multilateral trade negotiations that led up to the Uruguay Round.

2.2 General Agreement on Trade and Tariffs 1947 (GATT)

The General Agreement on Trade and Tariffs 1947, which entered into force in 1948 'sets the rules for international trade and provides a forum for multilateral trade negotiations.'[77] Commonly referred to as GATT, 'it is often described as the major international treaty discipline for world trade'[78] and 'one of the principal international organizations concerned with the substantive issues of international trade policy.'[79] GATT was created in the aftermath of World War II. Its emergence can be traced back to 1944 in Bretton Woods, New Hampshire, when delegates from twenty-three countries, led by the US and the UK, met to devise a post-war economic and financial recovery plan.[80] There existed a strong desire among the main Western economic powerhouses such as the US and the UK, for multilateral co-operation in international trade policy.[81] There was a general conviction that the economic troubles of the 1930s, characterised by widespread protectionism, and the devastating war that ensued were

[75] LaNasa (note 46 above) 3.
[76] Ibid.
[77] 'Gist: GATT and the International Trading System' (1992) 3 (5) *Department of State Dispatch* 22-23, 22.
[78] J Jackson 'GATT and the Future of International Trade Institutions' (1992) 18 (1) *Brooklyn Journal of International Law* 11-30, 15.
[79] D McRae & J Thomas 'The GATT and Multilateral Treaty Making: The Tokyo Round' 1983 (77) *American Journal of International Law* 51 – 83, 52.
[80] Jackson (note 74 above) 15; See also Jackson (note 151 below) 5.
[81] J McKinney 'The World Trade Regime: Past Successes and Future Challenges' (1994) 49 *International Journa*l 445-471, 445.

connected. To avoid a repetition of the economic decline and political turmoil, it was thought necessary to establish a stable international political and economic structure.[82]

The vision was to put in place three international economic institutions, the World Bank, the International Monetary Fund (IMF) and the International Trade Organisation (ITO). The task of establishing the World Bank and the IMF was done quicker than that of establishing the ITO. With the intention to expedite negotiations on tariff reductions and their implementation, the GATT was slotted in "to serve as an interim agreement until the ITO and its founding document, the Havana Charter, could be approved by national legislatures."[83] In this regard therefore the drafters of GATT never intended it to operate on a permanent basis. Instead, it was the Havana Charter, which was a more detailed and complete document than GATT and 'contained provisions relating to employment, economic development, restrictive business practices, and dispute resolution,'[84] that was intended to operate as the founding document to the ITO.[85] However, when it became clear that the Havana Charter would never enter into force when the US Congress failed to ratify it, GATT was used to fill the vacuum created by the demise of the Havana Charter.[86]

The main objectives pursued by the countries in GATT were the raising of standards of living, developing full use of world resources, and expanding the production and exchange of goods.[87] To fulfil these objectives, they entered into 'reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.'[88]

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[82] G Bunting 'GATT and the Evolution of the Global Trade System: A Historical Perspective' (1996) 11 *St. John's Journal of Legal Commentary* 505-522, 522. For more detailed background information on the GATT, *see* Jackson (note 74 above) 35-57.

[83] K Kennedy 'The GATT-WTO System at Fifty' (1997)16 *Wisconsin International Law Journal* 421-528, 422.

[84] Ibid.

[85] See Article XXIX of GATT which provides:

> 1. The contracting parties undertake to observe to the fullest extent of their executive authority the general principles of Chapters I to VI inclusive and of Chapter IX of the Havana Charter pending their acceptance of it in accordance with their constitutional procedures.
> 2. Part II of this Agreement shall be suspended on the day on which the Havana Charter enters into force.
> 3. If by September 30, 1949, the Havana Charter has not entered into force, the contracting parties shall meet before December 31, 1949, to agree whether this Agreement shall be amended, supplemented, or maintained.

[86] Jackson (note 74 above) 17.

[87] GATT Preamble.

[88] Ibid.

2.2.1 GATT Rounds of Multilateral Trade Negotiations

Apart from liberalizing trade, the GATT also provided a platform for further multilateral trade negotiations.[89] As more countries acceded to the GATT, further trade liberalization negotiations ensued. The first of these negotiations was the Geneva Round of Multilateral Trade negotiations, which started in April 1947. Reportedly, 23 Countries participated in the Geneva round and apparently, it was here that the GATT was brought to life. Further, negotiations at the 1947 Geneva round were mainly centred on trade liberalisation through the elimination of tariffs and 45000 tariff concessions covering more than $10 billion worth of trade were exchanged.[90]

The second and third rounds of trade negotiations were the Annecy and the Torquay rounds which took place between 1949 and 1950-1951 respectively. During these rounds, GATT membership increased but there was little progress in the reduction of tariffs.[91] The fourth round of negotiations returned to Geneva in 1955-1956 and 22 countries participated in the 1955-56 Geneva Round. The USA, the UK, France, and Germany led the countries that participated at the 1955-56 Geneva round.[92] They managed to negotiate tariff reductions worth $2.5 billion in trade value.[93]

The fifth round of trade negotiations was again held in Geneva between 1960-1962 and it was named the Dillon Round, after the then U.S. Treasury Secretary and former Under Secretary of State, Douglas Dillon, who first initially proposed the talks.[94] The Dillon Round focused on harmonizing concessions within the newly established European Economic Community (EEC). Reportedly, 4 400 concessions covering $4.9 billion worth of trade were negotiated.[95]

In 1964, GATT members met in Geneva for the sixth round of multilateral trade negotiations, the Kennedy Round, named after assassinated US President John Kennedy. This round of negotiations was, upon its conclusion, hailed 'as the most important trade and tariff negotiation

[89] Gist (note 77 above).
[90] 'The GATT years: From Havana to Marrakesh' available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm accessed on 8 September 2017.
[91] D Irwin 'The GATT in historical perspective' (1995) 85 *The American Economic Review* 323-328, 325.
[92] *See* 'Geneva round' https://prezi.com/qwun6ccqigip/the-gatt-geneva-round-of-negotiations-1955-1956/. Accessed on 8 September 2017
[93] Ibid.
[94] 'History of GATT rounds' available at https://www.joc.com/history-gatt-rounds_19931214.html accessed on 8 September 2017.
[95] Ibid.

ever held.'[96] Among its main objectives were the establishment of 'acceptable conditions of access to world markets for agricultural, as well as for industrial products', the inclusion of non-tariff barriers in the negotiations and the reduction of barriers to the exports of less developed countries without the expectation of full reciprocity from these countries.[97]

The Kennedy Round saw the involvement of developing countries which had largely been side-lined in the previous rounds of GATT negotiations. It was also generally successful in tariff reduction with $40 billion in tariffs being eliminated.[98] Of concern, the US tariff concessions at the Kennedy round increased in scope and depth compared to other multilateral trade negotiations, totalling $8 billion.[99] In relation to non-tariff barriers, the Kennedy Round had limited success although it led to the adoption of the Anti-Dumping Code, which provided more clarity on the application of Article VI of GATT. [100]

The seventh round of multilateral trade negotiations was the Tokyo Round held in Tokyo from 1973 to 1979. It was the longest round of negotiations since the formation of GATT and 102 countries took part in the negotiations. It permitted even countries that were not signatories to the GATT to participate in the negotiations.[101] The inclusion of countries that were not signatories to the GATT in the negotiations can be attributed to the objectives of the negotiations, which aimed to 'achieve the expansion and ever greater liberalization of world trade', 'secure additional benefits for the international trade of developing countries', and the elimination of non-tariff barriers or the reduction of their trade restricting or distortion effects.[102] There was wide recognition of the fact that non-tariff barriers presented an even greater obstacle to trade liberalization than tariffs. While the previous rounds of GATT negotiations had been successful in reducing tariffs, non-tariff barriers had begun to emerge as substitute instruments of protectionism.[103] The Tokyo Round therefore presented the

[96] B Norwood 'The Kennedy Round: A Try at Linear Trade Negotiations' (1969) 12 *The Journal of Law and Economics* 297-320, 297.
[97] J Greenwald 'The Kennedy Round and beyond' (1967) 2 *International Society of Stanford Law School Proceedings* 1-11, 1,2.
[98] Norwood (note 96 above) 314.
[99] Ibid
[100] WTO-World Trade Report 2012, at 41. Available at https://www.wto.org/english/res_e/booksp_e/anrep_e/wtr12-2a_e.pdf. Accessed on the 8th of September 2017.
[101] G MacPhee 'Tokyo Round Tariff Reductions and The Less Developed Countries' (1987) 1 (4) *The International Trade Journal* 371-396, 373.
[102] Declaration of Ministers Approved at Tokyo on 14 September 1973, GATT Doc. MIN (73) 1, BISD, 20th Supp. 19 (1972-73). 17 BISD, 15th Supp. 67-72). Available at https://docs.wto.org/gattdocs/q/GG/GATT/1134.PDF. Accessed on the 8th of September 2017.
[103] McKinney (note 81 above) 448.

negotiating countries with an opportunity to conclude multilateral trade instruments that would regulate the use of non-tariff measures. [104]

As such, the Tokyo Round employed the same approach that had been used in the Kennedy Round tariff negotiations which 'involved general agreement on a tariff negotiating formula, a matter on which there could be multilateral negotiations, with the possibility of resort to the bilateral request-and-offer procedure for dealing with exceptions to the agreed formula.' Since the focus of the Tokyo Round was non-tariff barriers, the negotiating countries had very little experience in this regard as previous rounds of multilateral trade negotiations had focused on tariff barriers. Resultantly, there was no clear negotiating procedure to follow.[105]

Continuing with the GATT's primary goal of tariff reduction, the industrialised countries agreed to reduce tariffs by almost one-third over a period of eight years. The Tokyo Round also made some progress in dealing with non-tariff barriers. Various codes of conduct were agreed upon 'dealing with subsidies and countervailing duties, custom valuation, government procurement, import licensing and technical barriers to trade.'[106]

2.2.2 Why were RoO never discussed at GATT?

As mentioned earlier, the earlier rounds of GATT multilateral trade negotiations from 1947 to 1979 did not address directly the issue of RoO. Although there was a shift in focus from tariff reduction to the elimination of non-tariff barriers to trade in the Kennedy and the Tokyo rounds, none of these rounds included negotiations on RoO. RoO were among the non-tariff measures that were considered to be 'too complex or controversial to be addressed through general rules or "codes of conduct" alone.'[107] In GATT, it was origin markings (rather than RoO) that received more attention and were dealt with in Article IX of GATT.[108] Concerning RoO, the GATT Preparatory Committee during the second session in 1947, decided that 'it is within the province of each importing member to determine, in accordance with the provisions of its law, for the purpose of applying the most-favored-nation (MFN) principle[109] whether goods do in

[104] D McRae & J Thomas (note 79 above) 54.
[105] Ibid
[106] McKinney (note 81 above) 449.
[107] WTO-World Trade Report 2012, at 41. Available at https://www.wto.org/english/res_e/booksp_e/anrep_e/wtr12-2a_e.pdf. Accessed on the 8th of September 2017.
[108] Origin markings merely identify where a product was manufactured or produced whereas RoO ultimately determine the economic origin of the product.
[109] For a discussion of the MFN principle, *see* Chapter 1, page 4.

fact originate in a particular country.'[110] This position is attributed to the GATT drafter's pre-occupation with establishing the MFN clause in article 1 of GATT.[111]

2.2.3 The Kyoto Convention

The first multilateral attempt at harmonization of RoO was in the Kyoto Convention [112] in 1973, which sought to harmonize both preferential and non-preferential RoO through the adoption of guidelines based on the principles of 'wholly produced' and 'substantial transformation' that countries would use in their RoO.[113] The wholly produced or obtained category, which accordingly applies only to one PTA member, 'asks whether the commodities and related products have been entirely grown, harvested, or extracted from the soil in the territory of that member or manufactured there from any of these products.'[114] The criteria for substantial transformation is more complex involving goods manufactured with inputs from different countries or regions. In this regard, the question is whether the manufacturing or processing which the inputs undergo results in a change so significant such that it can be said that the resultant product was produced in the country where such change took place.[115] However, under the Kyoto Convention, as was the case under the International Chamber of Commerce (ICC) proposal, 'member countries retained a great deal of discretion to fashion the rules of origin as they deemed fit.'[116] The Kyoto Convention did not achieve much success in getting countries to sign the convention[117] although the 'convention's rule of origin for goods wholly obtained in the originating country has been adopted repeatedly by other trade agreements.'[118]

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[110] S Imana '*Rules of Origin in International Trade'* New York: Cambridge University Press 2009, 2.
[111] Ibid.
[112] International Convention on the Simplification and Harmonization of Customs Procedures, *signed* at Kyoto on May 18, 1973 and *entered into force* on September 25, 1974. Available at http://www.wcoomd.org/en/topics/facilitation/instrument-and-tools/conventions/pf_revised_kyoto_conv.aspx.
[113] Imana (note 110 above) 3.
[114] Estevadeordal & Suominen (note 62 above).
[115] M Silveira 'Rules of Origin in International Trade Treaties: Toward the FTAA' (1997) 14 *Arizona Journal of International & Comparative Law* 411- 464, 415.
[116] LaNasa (note 46 above).
[117] The United States for example, did not sign the convention. *See* Leirer (note 122 below) 6.
[118] LaNasa (note 46 above).

2.2.4 The Uruguay Round and the Agreement on Rules of Origin

The Uruguay Round, which lasted from 1986 to 1993, was the eighth round of GATT multilateral negotiations and 'by far the most ambitious round of negotiations.'[119] The agenda at the Uruguay round included, among other things, the extension of the scope of GATT to include trade in services, protection of intellectual property, trade related investment measures and the improvement of existing GATT rules.[120] The round also pushed for further tariff reductions and improvements on the non-tariff codes that had been negotiated in the previous rounds.[121] Following the little success of the several attempts at harmonizing the widely different RoO, the harmonisation of RoO also featured prominently on the agenda of the Uruguay Round.[122]

On 15 April 1994, after eight years of negotiations, the participating countries signed The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations at Marrakesh, Morocco.[123] This document is mainly made up of five separate agreements:

- the Agreement Establishing the WTO (WTO Agreement);
- the Multilateral Trade Agreements in Trade and Goods;
- the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding);
- the Trade Policy Review Mechanism; and
- the Plurilateral Trade Agreements.[124]

It also consists of several ministerial decisions and declarations, which are appended to the Uruguay Round Agreements.[125] Among the Multilateral Trade Agreements in Trade and Goods, contained in Annex 1A, is the Agreement on RoO.[126]

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[119] McKinney (note 81 above) 449.
[120] J Bello & M Footer 'Uruguay Round - GATT/WTO – Preface' (1995) 29 (2) *International Lawyer* 335-344, 336.
[121] McKinney (note 81 above) 449.
[122] W Leirer 'Rules of Origin under the Caribbean Basin Initiative and the ACP-EEC Lome IV Convention and Their Compatibility with the GATT Uruguay Round Agreement on Rules of Origin' (1995) 16 *University of Pennsylvania Journal of International Business Law* 483-526, 485.
[123] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 1867 U.N.T.S. 14, 33 I.L.M. 1143 (1994) available at https://treaties.un.org/doc/Publication/UNTS/Volume%201867/volume-1867-I-31874-English.pdf accessed on 7 September 2017.
[124] W Aceves 'Lost Sovereignty - The Implications of the Uruguay Round Agreements' (1995) *19 Fordham International Law Journal* 427-474, 431.
[125] D Leebron 'An Overview of the Uruguay Round Results' (1996) 34 (11) *Columbia Journal of Transnational Law* 11-36, 12.
[126] ARoO (note 17 above).

The Agreement on RoO was an attempt to regulate and harmonise the RoO used by the signatory states[127] 'to ensure that RoO themselves do not create unnecessary obstacles to trade.'[128] The Agreement on RoO was formed in order to ensure that member states of the WTO comply with a set of harmonised RoO when specifying the origin of a product in the application of the MFN principle:

> under Articles I, II, III, XI and XIII of GATT 1994; anti-dumping and countervailing duties under Article VI of GATT 1994; safeguard measures under Article XIX of GATT 1994; origin marking requirements under Article IX of GATT 1994 and for government procurement and trade statistics.[129]

Further, Article 1.1 of the ARoO defines non-preferential RoO as 'those laws, regulations and administrative determinations of general application applied by any Member to determine the country of origin of goods.'[130]

According to LaNasa, non-preferential RoO 'are used for all other purposes, including enforcement of product and country specific trade restrictions that increase the cost of entry (*i.e.*, antidumping duties) or restrict or prevent market entry (*i.e.*, quotas).'[131] In addition, non – preferential RoO are also used for origin marking or labelling and are otherwise mainly important for the collection of trade statistics.[132]

As such, Article 1(1) expressly excludes RoO 'related to contractual or autonomous trade regimes leading to the granting of tariff preferences going beyond the application of the [MFN clause].' The effect of this provision is that 'when harmonised, non-preferential RoO, would not apply in PTAs.'[133] The Agreement on RoO however does contain in Annex II, a Common Declaration with regard to Preferential Rules of Origin[134], which 'seeks to provide more transparency and foster the development of a rule of law around the application of the

[127] LaNasa (note 46 above).
[128] ARoO (note 17 above) Preamble.
[129] Ibid Article 1(2).
[130] Ibid Article 1(1).
[131] LaNasa (note 46 above)
[132] 'Rules of Origin Handbook' World Customs Organisation, 11 available at http://www.wcoomd.org/en/topics/origin/overview/~/media/D6C8E98EE67B472FA02B06BD2209DC99.ashx accessed on 26 July 2017.
[133] Mabrouk (note 29 above) 154.
[134] Common Declaration with regard to Preferential Rules of Origin, Annex II of the Agreement on Rules of Origin, available at https://www.wto.org/english/docs_e/legal_e/22-roo.pdf (Hereinafter RoO Common Declaration)

preferential rules through the adoption of suggested procedural reforms.'[135] The Common Declaration defines preferential RoO as:

> those laws, regulations and administrative determinations of general application applied by any Member to determine whether goods qualify for preferential treatment under contractual or autonomous trade regimes leading to the granting of tariff preferences going beyond the application of paragraph 1 of Article I of GATT 1994.[136]

The use of preferential RoO is therefore an exception to the MFN principle in Article 1 of GATT in so far as it affords preferential treatment to goods originating from member states of a preferential agreement whilst not extending such preferential treatment to similar goods originating from countries who are not member states of the preferential agreement.

Further, Article 4 (1) of the Agreement on RoO established a Committee on Rules of Origin (CRO) whose main purpose is to facilitate consultation on matters relating to the operation of parts I to IV of the Agreement. In addition, it aims to ensure the furtherance of the objectives set out in these parts and carrying out any other responsibilities assigned to it under the Agreement or by the Council for Trade in Goods. A Technical Committee on RoO (TCRO) was established in Article 4(2), under the auspices of the World Customs Organization (WCO)[137] (formerly Customs Co-operation Council) and tasked with carrying out the Harmonisation Work Programme (HWP)[138] in accordance with part IV and Annex I of the Agreement.[139]

In terms of Article 9(1) (b), the 'wholly obtained' and the 'substantial transformation' criteria are used to define origin under the harmonised rules. Furthermore, the TCRO developed a harmonized list of 'minimal operations or processes that do not by themselves confer origin to a good.'[140] In defining the 'substantial transformation' criteria for goods produced in more than one country, the TCRO uses:

[135] LaNasa (note 46 above).
[136] RoO Common Declaration, paragraph2.
[137] The World Customs Organisation is an independent intergovernmental body whose mission is to enhance the effectiveness and efficiency of Customs administrations.
[138] For a brief discussion of The Harmonisation Work Program see Chapter 1, page 4.
[139] ARoO, Article 9(2)(b).
[140] Ibid, 9(2)(c).

the change in tariff classification method at the heading or sub-heading level, using the Harmonized System as the underlying nomenclature, and, when supplemental tests are necessary…the value added and specified processing methods of determining origin.[141]

In this regard therefore, the HWP seeks to have a uniform application of the criteria that is used to determine the origin of goods.

The HWP was projected to be completed in three years from the date of its commencement.[142] Provision was made for a set of principles to be followed before and after the three years during which the RoO were to be drafted and adopted.[143] Member states were to ensure, among other things, that:

- 'rules of origin are not used as instruments to pursue trade objectives directly or indirectly';
- 'rules of origin shall not themselves create restrictive, distorting, or disruptive effects on international trade'; and
- 'that their rules of origin are administered in a consistent, uniform, impartial and reasonable manner.'[144]

As discussed above,[145] progress in the HWP negotiations have stalled due to a failure on WTO members to reconcile their different positions on the issue of RoO.

2.2.5 From GATT to WTO

One of the most significant developments to emerge from the Uruguay Round was the establishment of the World Trade Organisation (WTO).[146] The emergence of the WTO can be attributed to the institutional weaknesses of GATT as a system. Although the GATT system was a huge success in trade liberalisation and elimination of tariffs, it had its own institutional problems. Among these problems was the fact that as mentioned earlier, the chief drafters of the GATT never intended it to operate on its own.[147] It had been hoped that by the time the

[141] LaNasa (note 46 above).
[142] ARoO, Article 9(2)(a)
[143] Ibid, Article 2.
[144] Ibid, Articles 2(b), (c) and (e).
[145] Chapter 1, page 4
[146] L Blumberg 'GATT Gives Way to WTO' (1995) 3 *Juta's Business Law* 31-33,31.
[147] G Patterson & E Patterson 'The Road from GATT to MTO' (1994) 3 *Minnesota Journal of Global Trade* 35-60, 36.

drafting of the GATT would be completed, an International Trade Organisation (ITO) would be in place which would 'provide the commitments and institutional structure for voting, rules of procedure, a secretariat, and detailed dispute settlement arrangements that are a normal part of an international organization.'[148] The GATT was therefore meant to be an agreement that would operate under the ITO.

Thus, with the expectation that a formal legal arrangement was to be concluded in the future, the contracting parties to the GATT agreed to commit to the obligations of the GATT under a Protocol of Provisional Application.[149] [150] This Protocol put GATT into operation as an international legal instrument.[151] This provisional application of the GATT was yet another of its institutional problems, described as 'confusing to the public and experts alike' and also involving 'the so-called "grandfather rights" of existing legislation, which were the subject of the rankest debate.'[152] Another institutional problem was the amending provisions of GATT, which were regarded as inadequate. The general feeling was that the GATT was difficult to amend, which resulted in the establishment of a series of separate treaty agreements, which added to the complexity of the GATT system and 'rendered the GATT vulnerable to the charge that it was an "a la carte" system, which reduced the predictability and uniformity of obligations among nations.'[153]

The lack of a binding dispute resolution system also contributed to the problems of GATT. The GATT system had operated 'as more or less an organization through which parties resolved their bilateral trade disputes by negotiation' rendering it 'more of a political forum than an adjudicatory one.'[154] The United States had in recent times pushed for 'a more legalistic dispute resolution system that would adjudge trade disputes according to an established, but evolving body of international trade law.'[155]

As a result of these institutional weaknesses there was a proposal for the establishment of an umbrella organization 'to be called either the Multilateral Trade Organization (MTO), or World

[148] Ibid.
[149] The Protocol of Provisional Application of the General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 55 U.N.T.S. 308 available at https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/prov_appl_gen_agree_e.pdf accessed on 23 August 2017.
[150] Patterson & Patterson (note 147 above) 6
[151] J Jackson 'GATT and recent international trade problems' (1987) 11 *Maryland Journal of International Law and Trade* 1-13, 8.
[152] Jackson (note 74 above) 18.
[153] Ibid.
[154] Bunting (note 82 above) 522.
[155] Ibid.

Trade Organization (WTO), devoted entirely to defining an institutional structure; establishing and reaffirming the treaty base of the GATT.'[156] This proposal led to the creation of the WTO. Upon its creation, the WTO acquired an international personality and:

> serves as an umbrella organization for three multilateral agreements that are binding on all WTO members: the General Agreement on Tariffs and Trade (GATT 1994[157]), the General Agreement on Trade in Services (GATS), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[158]

2.2.6 Article XXIV of GATT

Of particular relevance to this thesis is GATT Article XXIV, which is an exception to the principle of non-discrimination (MFN principle) embodied in Article I. Article XXIV:

> recognises the desirability of forming close economic integration in the form of customs unions and free trade areas (RTAs) as a means of increasing the freedom of trade between parties to the RTA and thereby contributing to the expansion of world trade.[159]

According to Jackson, '[t]he basic policy goal of this provision is to permit preferential trading arrangements if they constitute a genuine attempt to develop free trade within the bloc.'[160] As such, Article XXIV is probably the most contentious provision of the GATT.[161] Many authors have been critical of this provision.[162] It has also been viewed 'as inadequate for today's developing economic practices' due to, for example, its failure to deal with the important question of RoO whilst a former GATT Deputy Director General complained that, 'of all the GATT articles, this is one of the most abused, and those abuses are among the least noted.'[163]

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[156] Jackson (note 74 above) 22.
[157] GATT 1994 incorporates the text of GATT 1947 in its entirety.
[158] Leebron (note 125 above) 13.
[159] H Hijazi 'GATT Article XXIV and Asymmetric Rules of Origin: Could it work for EPAs?' 2008, 12 available at https://www.peacepalacelibrary.nl/ebooks/files/Hijazi_gtz_Gatt-article-XXIV-and-asymmetric-rules-of-origin.pdf accessed on 25 August 2017.
[160] J Jackson 'Perspectives on Regionalism in Trade Relations' (1996) 27 *Law & Policy in International Business* 873-878, 875.
[161] M Islam & S Alam 'Preferential Trade Agreements and The Scope of GATT Article XXIV, GATS Article V and The Enabling Clause: An Appraisal of GATT/WTO Jurisprudence.' (2009) 1 *Netherlands International Law Review* 1-34,4.
[162] Article XXIV has been criticised as being 'extremely elastic' (Curzon,1965:64), 'unusually complex' (Dam, 1970:275), and 'full of holes' (Bhagwati, 1993: 44) due to language that is full of 'ambiguities' and 'vague phrases' (Haight, 1972: 397). Haight (1972: 398) impugns Article XXIV as an 'absurdity' and a 'contradiction', while Dam (1970:275) brands it 'a failure, if not a fiasco'. *See* Chase (note 163 below) 1.
[163] K Chase 'Multilateralism Compromised: The Mysterious Origins of GATT Article XXIV.' (2006) 5 (1) *World Trade Review*. 1-30, 2.

To assist in the interpretation of this contentious provision, the negotiators at the Uruguay round of multilateral negotiations came up with the Understanding on the Interpretation of Article XXIV of GATT [164] (the Understanding).[165] The Understanding, among other things, provides that:

> the review process of Article XXIV does not insulate RTAs from the WTO's Dispute Settlement Understanding (DSU); includes specific details of how RTAs must measure trade so as to be in compliance with Article XXIV; provides a timetable during which new emerging RTAs must be phased into operation; and creates a Committee on Regional Trade Agreements (CRTA) whose main role is 'to engage in oversight of RTAs and their relationship with the WTO.' [166]

The Understanding has however been criticised as being 'essentially technical and has not really altered the relationship of RTAs to the multilateral trading system.'[167] Furthermore, the Understanding and the CRTA examination report process have proven to be ineffective in ensuring RTA compliance with the provisions of Article XXIV.[168]

Notwithstanding the criticism directed at it, Article XXIV has led to the proliferation of RTAs. This is made possible by the provisions of paragraph 4 of Article XXIV, which recognises that:

> the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.[169]

The Understanding provides that in order to be consistent with Article XXIV, CU's and FTAs and the agreements leading to their formation must satisfy, inter alia, the provisions of paragraphs 5, 6, 7 and 8 of that Article.[170] The basic premise of the provisions of Article XXIV is that GATT allows the formation of PTAs 'but only as a reward for fully fledged liberalisation

[164] Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A. Available at https://www.wto.org/english/docs_e/legal_e/10-24_e.htm. Accessed on the 26th of September 2017.
[165] G Marceau & C Reiman 'When and How is a Regional Trade Agreement Compatible with the WTO?' (2001) 28 (3) *Legal Issues of Economic Integration* 297-336, 300.
[166] C Picker 'Regional Trade Agreements v. The WTO: A Proposal for Reform of Article XXIV to Counter this Institutional Threat' (2005) 26 *University of Pennsylvania Journal of International Economic Law* 267-320, 283.
[167] Ibid.
[168] Ibid
[169] GATT Article XXIV (4).
[170] Article 1 of the Understanding.

in the form of either a CU or a FTA among the constituent members.'[171] In terms of paragraph 5(c), the PTA must take the form of a CU or an FTA within the interim phase in order to comply with Article XXIV contemplated in Article 5(c).

2.2.7 Article XXIV and RoO

The perceived relationship between Article XXIV and RoO stems from the wording of Article XXIV:5(b).[172] This perceived relationship is based on the use of the words 'other regulations of commerce' and various views have been expressed on whether RoO are 'regulations of commerce' within the meaning of the provision. As a starting point one can look to the interpretation afforded the words 'regulations of commerce' by the WTO. In this regard, Islam and Alam note that the Panel in *Turkey – Textiles*[173]:

> determined that "any regulation of commerce having an impact on trade" could be taken to be as other regulation of commerce, and arguably preferential ROOs because of their significant potential impact on actual trade flows should also fall into the category.[174]

In support of this viewpoint, the authors argue that the ARoO links RoO to trade measures and demonstrates a possible connection between RoO in PTA's and 'other regulations of commerce.'[175] According to their argument, the link lies in the preamble of the ARoO, which '[recognises] that clear and predictable rules of origin and their application facilitate the flow of international trade' and which further states the desirability of ensuring 'that rules of origin themselves do not create unnecessary obstacles to trade' and also in paragraph 3(c) of the Common Declaration which requires that laws and regulations relating to preferential ROOs be published 'as if they were subject to, and in accordance with, the provisions of Article X of GATT 1994'.[176] Given that Article XXIV seeks to prohibit the use of restrictive 'regulations

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[171] Islam & Alam (note 161 above) 6.

[172] GATT Article XXIV:5(b) states that:

> duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free trade area or the adoption of such interim agreement to the trade of contracting parties shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free trade area.

[173] '*Turkey – Restrictions on Imports of Textile and Clothing Products*' WTO Doc. WT/DS34/R (1999), Report of the Panel, para. 9.120 available at https://www.wto.org/english/tratop_e/dispu_e/1229d.pdf accessed on 23 September 2017.

[174] Islam & Alam (note 161 above) 12.

[175] Ibid.

[176] Ibid, footnote 72.

of commerce' in FTAs, Rivas[177] argues that there are incidents when RoO can indeed qualify as additional restrictions under Article XXIV:5 as they can have a 'detrimental knock-on effect on external trade.' This view is perhaps premised on the fact that in order to reap benefits from preferential treatment, producers within a PTA would naturally tend to increase local sourcing, thereby negatively impacts suppliers of third parties irrespective of their efficiency.

However, a contrary view point argues that RoO in a PTA are concerned only with intra-PTA trade and determine the eligibility for the preferences granted by it, and in this sense therefore, 'they do not fall within the category of "other regulations of commerce" in terms of external trade of the PTA.'[178] In this regard, Mathis[179] argues that given that RoO in an RTA apply only to internal trade among RTA partners and do not extend to external trade between RTA partners and third parties, RoO therefore do not fall under the purview of Article XXIV:5. Further support for this position can be drawn from Hijazi who states that:

> [RoO in FTAs] while undoubtedly regulations of commerce, by definition cannot affect external trade in a way that Article XXIV:5 aims to proscribe, because they affect only internal trade between RTA partners. Effects of external trade, while potentially important, are indirect and a necessary and logical consequence of the liberalization of trade among RTA partners, and hence sanctioned by Article XXIV.[180]

This thesis agrees with Mathis and Hijazi, and adopts the position that although RoO in RTAs can be regarded as 'regulations of commerce' they are not necessarily forbidden by Article XXIV as they apply only to internal trade among members of the RTA and thus do not fall under 'regulations of commerce' as contemplated under Article XXIV.

[177] J Rivas 'Do Rules or Origin in Free Trade Agreements Comply with Article XXIV GATT? in Bartels and Ortino *Regional Trade Agreements and the WTO Legal System* Oxford University Press, Oxford, 158-170.
[178] This view was expressed by the United States of America, which also noted that the ARoO expressly excludes preferential RoO. *See* Committee on Regional Trade Agreements, Note on the Meetings of 27 November and 4-5 December 1997, WTO Doc. WT/REG/M/15 (13 January 1998), para. 59.
[179] J H Mathis 'Regional Trade Agreements in the GATT/WTO: Article XXIV and the Internal Trade' Asser Press: The Hague (2002), 253.
[180] H Hijazi (note 152 above) 12.

2.3 Current problems with RoO

The changing needs of international trade have led to inevitable complexity in the concept of origin, 'which has made the mere notion of substantial transformation obsolete.'[181] In today's trading system, products are rarely wholly produced in one country as parts, components, and manufacturing processes originate in different countries, with different levels of participation. As such, establishing origin has become an even tougher task.

Different preferential trade arrangements, apply different RoO resulting in a lack of uniformity in RoO applied across the world. For example, although RoO regimes applied in the European Union (EU) FTAs are highly uniform *vis-à-vis* each other, there is much variation across RoO regimes in the Americas.[182]

Although the HWP program has sought to harmonise non-preferential RoO the process has been long and drawn out due to failure to reach consensus on core policy issues that affect tariff headings. Since July 1998, which was the initially scheduled date for completion, of the program, the deadline has been extended several times.[183] Even though the work of the TCRO was completed in 1999, interestingly, there were 500 pending issues that could not be solved at the technical level which were sent to the CRO in Geneva.[184]

As such, RoO that are 'overly detailed' have been criticised as 'obstructing rather than facilitating trade' whilst on the other hand it is feared that "oversimplification may lead to ineffective rules."[185] RoO in some FTAs are complex and have often been used as protectionist devices. Typical examples are SADC and NAFTA RoO which are both known to be complex and are highly protective of their respective automobile industries.[186] The failure of WTO members to conclude the HWP is evidence of their willingness "to use RoO as tools that protect their own national interests and susceptible goods."[187]

[181] Silveira (note 115 above) 414.
[182] Estevadeordal & Suominen (note 62 above) 77-78.
[183] Ibid 80.
[184] Ibid 10.
[185] Silveira (note 115 above) 420.
[186] See 'What are the implications of the SADC Protocol for the Automotive Industry in Southern Africa?' DPRU Policy Brief No. 00/P6 December 2000, University of Cape Town available at http://www.dpru.uct.ac.za/sites/default/files/image_tool/images/36/DPRU%20PB%2000-P6.pdf accessed on 28 September 2017.
[187] Mabrouk (note 29 above) 154.

2.4 Conclusion

RoO play a critical role in the multilateral trade system. They are an important and indispensable component of international trade. In FTAs, preferential RoO are more useful than non-preferential RoO as they determine the preferential treatment accorded to goods originating from member states of the FTA. Primarily used to prevent the phenomenon known as trade deflection, preferential RoO however often fall prey to governments who tend to use them to pursue protectionist policies. In these instances, instead of being simple, predictable transparent and trade facilitating, RoO have been formulated in such a manner that they are complex, lack transparency and are restrictive of intra-regional trade.

The lack of an international concerted effort aimed at harmonising preferential RoO is testimony to the difficulties that policy makers encounter in trying to obtain common ground on preferential RoO among member states of the WTO. This difficulty in reaching consensus on preferential RoO among WTO members can be attributed to the proliferation of RTAs which require different RoO regimes based on the specific needs of the RTA member countries. It is thus unsurprising that the three RECs making up the TFTA employ different RoO regimes that are tailored to meet the specific needs of their member countries. The following chapter focuses on RoO in the COMESA, SADC and EAC RECs, the three constituent RECs making up the TFTA.

CHAPTER 3

RULES OF ORIGIN IN THE COMESA, EAC AND SADC RECs

3.1 Introduction

The TFTA is anchored on three core pillars: market integration, infrastructure development, and industrial development.[188] The inclusion of the infrastructure development pillar and the industrialisation pillar provides an opportunity for the development of an integration agenda that not only focuses on obstacles at national points of entry but, more importantly, on the behind-the-border challenges to industrial development and competitiveness.[189] Market integration, which involves the elimination of tariff and non-tariff barriers and the implementation of measures aimed at trade facilitation, is essential to the well-functioning of the TFTA.[190] The constituent RECs of the TFTA, COMESA, EAC and SADC have achieved relative success in tariff liberalisation and this can be used as an effective launch pad for liberalisation of trade in goods in the TFTA. It is in the context of liberalisation of trade in goods that RoO come to the fore.

In any FTA, an appropriate RoO regime is critical to the liberalisation of trade in goods to avoid restrictive intra-regional trade.[191] According to Naumann, an appropriate RoO regime plays a critical role in the facilitation of trade between member countries to the TFTA.[192] Multiple RTAs exist among African countries and they in turn employ RoO regimes that suit their regional needs. This creates challenges in the implementation of trade policies and the administration of trade flows in the context of preferential RoO. Whilst most of these RTAs in Africa employ a 'broadly generic approach' to determining the preferential origin status of goods traded within the region, they often substantially differ in detail and application.[193] The

[188] Communique of the Third COMESA-EAC-SADC Tripartite Summit, 10 June 2015, Article 1(d) available at https://www.tralac.org/news/article/7528-communique-of-the-third-comesa-eac-sadc-tripartite-summit.html accessed on 30 October 2017.
[189] T Hartzenberg et al 'The Tripartite Free Trade Area: Towards a New African Integration Paradigm Stellenbosch: Tralac 2012, Preface available at https://www.tralac.org/publications/article/4658-the-tripartite-free-trade-area-towards-a-new-african-integration-paradigm.html accessed on 30 October 2017.
[190] M Pearson 'Trade Facilitation in the COMESA-EAC-SADC Tripartite Free Trade Area' 2011 TradeMark Southern Africa, 2 available at http://www.g20dwg.org/documents/pdf/view/40/ accessed on 30 October 2017.
[191] L Othieno and I Shinyekwa 'Prospects and challenges in the formation of the COMESA-EAC and SADC Tripartite Free Trade Area' 2012 Research Series No 87 *Economic Policy Research Centre*, 12 available at https://www.africaportal.org/publications/prospects-and-challenges-in-the-formation-of-the-comesa-eac-and-sadc-tripartite-free-trade-area/ accessed on 30 October 2017.
[192] Naumann (note 25 above) 2.
[193] Ibid 2.

differences in approach to RoO in part stem from the myriad of challenges faced by African countries, including but not limited to overlapping memberships in the different RECs.

Against this background, this chapter focuses on the RoO regimes that are applied in the three RECs forming the TFTA. It begins with a background discussion of the origins and legal framework of the COMESA, EAC and SADC RECs and discusses the challenges to regional integration faced by these RECs.

3.2 Origin and legal framework of the SADC, COMESA, and EAC RECs

3.2.1 Background

In any discussion concerning the regional integration efforts in the TFTA, it is important to have a background understanding of the constituent RECs of the TFTA, their origins, the legal framework in which they exist and the challenges to regional integration faced by the countries in the RECs. This is particularly so when one considers that the TFTA seeks to build on the progress already made in the COMESA, EAC and SADC RECs to ensure the delivery of meaningful development outcomes for the region. What follows below is a discussion of the origins and legal framework of the three RECs making up the TFTA.

3.2.2 SADC

The birth of the Southern African Development Community (SADC) as an inter-governmental organisation can be traced back to the days of the fight against colonialism, in particular the efforts of the Front-Line States, a group of Southern African countries whose aim was to cast off the shackles of white minority rule in the region.[194] It began its existence in April 1980, at a Summit in Lusaka, Zambia where the Front-Line states met and issued a Declaration, which was to become the first constitutive document of the inter-governmental organisation known as the Southern African Development Coordination Conference (SADCC). In this form, it consisted of nine independent Southern African states,[195] organised and coordinated towards the mobilisation of funding for developmental projects of common interest.[196] Other objectives

[194] A Saurombe 'SADC Trade Agenda, a Tool to Facilitate Regional Commercial Law: An Analysis' (2009) 21 *South African Mercantile Law Journal* 695 -709, 697.
[195] The founding member states of SADCC were Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia, and Zimbabwe.
[196] C Ng'ong'ola 'The Legal Framework for Regional Integration in the Southern African Development Community' (2008) 8 *University of Botswana Law Journal* 3-46, 4.

identified in the Declaration were to reduce economic dependency of most, if not all of its members, on apartheid South Africa, mobilize resources which would be directed towards the promotion of the implementation of national, interstate, and regional policies and the establishment of links to create 'genuine and equitable regional integration.'[197]

The SADCC model of regional integration received ample support from the international community but a decade into its existence, weaknesses and flaws of the arrangement began to show. Countries were underperforming in the regional activities assigned in their respective areas and the SADCC Secretariat situated in Gaborone lacked the institutional powers or authority to force compliance with performance expectations.[198] Lacking the capacity to finance its projects from its own resources and overly reliant on international donor funding, SADCC was confronted with its economic realities. With the region also facing severe drought, and the reduction of economic dependency on South Africa proving to be too cumbersome a task, it was time for a reconsideration of the SADCC model. Majority rule in South Africa was on the horizon and powerful trading arrangements across the world had begun to emerge, giving impetus to African leaders to conclude plans for a pan-African Economic Community (AEC) which was to be built around regional communities with specific trade liberalisation and market integration targets.[199] With an independent South Africa's signature available for taking, an opportunity beckoned for the region to emerge as the more attractive block for the AEC in Southern Africa, and in the process avoid being overshadowed by COMESA.

In August 1992, SADCC was reconstituted as SADC by the SADC Treaty[200], in Windhoek Namibia. The SADC Treaty was hurriedly drafted as the relevance of SADCC had begun to be questioned and amid increasing calls for it to be merged with COMESA.[201] Some commentators regard the SADC Treaty as a document with flaws due in part, to its hurried drafting in order to fend off the challenge posed by COMESA.[202] At its inception, the SADC was made up of ten countries, (now including Namibia, which had acquired independence). South Africa joined the organisation in 1994.

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[197] C Ng'ong'ola 'Regional Integration and Trade Liberalization in the Southern African Development Community' (2000) 3 *Journal of International Economic Law* 485-506, 488.
[198] Ibid 490.
[199] Ibid 488.
[200] Treaty Establishing the Southern African Development Community (SADC), Aug. 17, 1992, 32 I.L.M. 116 (1993). Available at www.sadc.int/documents-publications/sadc-treaty/.
[201] I Mandaza 'SADC: An Economic Agenda or a mere political expression' (1992) August *Southern African Politics and Economics Monthly* 18-22.
[202] K Kiplagaat 'Jurisdictional Uncertainties and Integration Processes in Africa: The Need for Harmony' (1995) 4 *Tulane Journal of International & Comparative Law* 43-62, 49.

SADC was established in terms of Article 2(1) of the SADC Treaty, with an overarching objective of promoting 'economic and social development through co-operation and economic integration.'[203] It has its headquarters in Gaborone, Botswana.[204] The SADC Treaty identified the objectives of the organisation as being, among other things, the achievement of development and economic growth, alleviation of poverty, the enhancement of quality of life and provision of social support to the disadvantaged through regional integration.[205] In this regard therefore, regional integration was viewed as essential to the attainment of economic growth, self-sustenance, and the sustainable utilisation of the continent's vast resources. From a political perspective, SADC sought to 'evolve common political values, systems and institutions', and 'promote and defend peace and security.'[206] The strengthening and consolidation of long standing historical, social, and political ties and linkages among the peoples of the region was reiterated.[207] SADC member states also recognised that trade co-operation was crucial to the success of the organisation and to this end, the SADC passed its Protocol on Trade in the SADC region on the 24th of August 1996.[208] By further liberalising intra-regional trade in the SADC region through the creation of mutually beneficial trade arrangements, it was hoped that the SADC Trade Protocol would improve investment and productivity in the region.

Apart from adding the SADC Tribunal, the SADC Treaty retained the institutional structure of the SADCC, with practically the same powers and responsibilities.[209] There was also no attempt to change the approach in pursuit of the clarified and expanded objectives, including in new areas of co-operation. National governments, through Sector Co-ordinating Units located in their establishments, retained the responsibility of implementing a now revised and expanded regional integration agenda.[210] The admission of new members who did not share a common social and political historical background with the region further complicated the organisation's strategy towards regional integration.[211]

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[203] J Mapuva & L Muyengwa-Mapuva 'The SADC Regional Bloc: What Challenges and Prospects for Regional Integration' (2014) 18 *Law, Democracy & Development* 22-36, 24.
[204] SADC Treaty, Article 2.
[205] SADC Treaty, Article 5(a).
[206] SADC Treaty, Article 5(b) and (c).
[207] SADC Treaty, Article 5(h).
[208] SADC Protocol on Trade. Available at http://www.sadc.int/documentspublications/show/Protocol_on_Trade1996.pdf. Accessed on the 1st of November 2017.
[209] Ng'ong'ola (note 196 above) 14.
[210] Ibid 15.
[211] Ng'ong'ola (note 196 above) 15.

A review of the SADC institutions and operations between August 1999 and April 2001 exposed these and other shortcomings of the SADC Treaty.[212] This led to the adoption of the Agreement Amending the SADC Treaty in Blantyre, Malawi, on August 14, 2001. The Agreement introduced wholesome changes to the structure, policies, and processes of SADC.[213] As such, the process of reforming the SADC culminated in the implementation of the Regional Indicative Strategic Development Plan (RISDP), an ambitious programme whose goals included the establishment of a FTA by the year 2008, a customs union (CU) by 2010 and a common market by 2015.[214]

3.2.3 EAC

The East African Community (EAC) is one of the earliest efforts at regional integration in Africa. Although established in 1967, its roots can be traced to as far back as 1902, when Great Britain, as the colonial master, established an administrative organisation to foster its colonial interests in Tanganyika (now Tanzania), the Ugandan Protectorate (now Uganda) and the Colony of Kenya.[215] The Colony of Kenya was the 'the centre of the periphery', with most of the industrial activity in East Africa taking place in the Kenyan capital of Nairobi.[216] Although the economic structures of the three British colonies became intertwined and interdependent, Kenya's dominance in the region led to uneven levels of development in the industrial, services and trade sectors.[217]

As British colonial influence in the region waned, there was a general consensus among the leaders of Kenya, Tanzania and Uganda that losing the economic structures that had been put in place by the colonial master would leave them at a disadvantage. Each nation therefore sought to protect its own interests by entering into an economic, political, and social

[212] Report of the Review of the Operations of SADC Institutions, Gaborone, April 2001 available at www.sadc.int/files/6113/.../REPORT_ON_THE_REVIEW_OF_OPERATIONS.pdf accessed on 13 November 2017.
[213] A Saurombe 'SADC Trade Agenda, a Tool to Facilitate Regional Commercial Law: An Analysis' (2009) 21 *South African Mercantile Law Journal* 695 -709, 697.
[214] Ibid.
[215] A Awori 'Seeking Regional Economic Integration in Africa.' (1992) 46 *Journal of International Affairs* 119, 120.
[216] G Okoth 'The Foreign Policy of Uganda Since Independence Toward Kenya & Tanzania in Oyugi W. (ed) *Politics and Administration in East Africa.* Nairobi: East African Educational Publishers (1994) 359, 361.
[217] K Adar & M Ngunyi 'The Politics of Integration in East Africa Since Independence in Oyugi W. (ed) *Politics and Administration in East Africa.* Nairobi: East African Educational Publishers (1994) 395, 412.

integration.[218] It is against this background that, in 1967, the three former British colonies signed the treaty establishing the EAC.[219]

The main objective of the Treaty was the establishment of the East African Common Market, and to this end, the Treaty provided for a common external customs tariff and curtailed the ability of signatories to conclude trade agreements that extended tariff concessions that were not available to other signatories.[220] As a means of ensuring the success of the East African Common Market, the Treaty attempted to bring the three member states to a similar level of development through a system of 'unequal sharing of benefits in favour of the economically less developed.'[221]

Despite being regarded as one of the most advanced integration processes of its time, with 'a higher level of integration than even that of the EEC', the success story of the EAC was short-lived.[222] By 1971, the three state partnership was nearing its demise due to competition and inequities within the region and the Idi Amin *coup* in Uganda.[223] By 1972, with no solid leadership and embroiled in political turmoil, the EAC, essentially, had ceased to exist.[224] In April 1977, it reached a state of total collapse, losing more than 60 years of co-operation and benefits of economies of scale.[225]

The EAC was revived in 1993 when the leaders of Tanzania, Kenya and Uganda met in Arusha, Tanzania and signed the Agreement for the Establishment of the Permanent Tripartite Commission for East African Co-operation.[226] In 1996, the Secretariat of the Permanent Tripartite Commission was launched at the Headquarters of the EAC in Arusha, Tanzania, officially re-establishing the EAC. In 1997, the Heads of state of the three countries directed

[218] S Fitzke 'The Treaty for East African Co-operation: Can East Africa Successfully Revive One of Africa's Most Infamous Economic Groupings' (1999) 8 *Minnesota Journal of Global Trade* 127-160, 133.
[219] Treaty for East African Co-operation, June 6, 1967, 6 I.L.M. 932. Available at kenyalaw.org/lex/rest//db/kenyalex/Kenya/.../No.%2031%20of%201967.pdf accessed on 27 September 2017 [Hereinafter EAC Treaty].
[220] Ibid Articles 5 and 7.
[221] N Mwase 'Regional Economic Integration and the Unequal Sharing of benefits: Background to the disintegration and collapse of the East African Community' (1978) 8 *African Review* 28-53, 31.
[222] K Kiplagaat 'Legal Status of Integration Treaties and the Enforcement of Treaty Obligations: A Look at the COMESA Process' (1995) 23 *Denver Journal of International Law and Policy* 259-277.
[223] Fitzke (note 218 above) 140, *citing* N Mwase 'The African Preferential Trade Area: Towards a Sub-Regional Economic Community in Eastern and Southern Africa' (1985) 19 *Journal of World Trade* 622, 623.
[224] Awori (note 215 above) 120.
[225] Kiplagaat (note 202 above) 49.
[226] Fitzke (note 218 above) 140. *See also* History of the EAC, available at https://www.eac.int/eac-history. Accessed on the 8th of November 2017.

the Permanent Tripartite Commission to upgrade the Agreement into a Treaty.[227] The Treaty for the Establishment of the EAC was signed in 1999 and entered into force in 2000, upon ratification by all three-member states.[228] In this regard, Kiplagaat observes that certain common traits amongst the three states of the EAC made them natural candidates for integration.[229] Furthermore, their partnership made such political and economic sense that it was inevitable that it would be revived once the politics of the region had stabilised.[230]

The Treaty for the Establishment of the EAC identifies its objectives as the development of policies aimed at widening and deepening political, economic, and social co-operation for mutual benefit.[231] In pursuit of these objectives, the Community undertook to establish a Customs Union, (CU) a Common Market, a Monetary Union, and a Political Federation.[232] The Community has to a large extent been successful in achieving its goals. In March 2004, efforts towards establishing the CU gained momentum through the signing of the Protocol Establishing the East African Customs Union, which then entered into force in 2005.[233] By 2010, these efforts culminated in the establishment of a fully-fledged CU.[234] In July 2010, the EAC became the most advanced RTA in Africa when the EAC Common Market Protocol came into force after ratification by all six members of the Community.[235] The protocol for the Establishment of the EAC Monetary Union was signed on 13 November 2013.

3.2.4 COMESA

The Common Market for Eastern and Southern Africa (COMESA) is a regional economic community made up of 20-member states.[236] COMESA originates from the 1960's 'eagerness for regional economic co-operation during the "post-independence period" in most of

[227] The revival of the EAC shows that despite the problems that led to the collapse of the EAC in 1977, regional integration in East Africa remained high on the agenda of leaders within the region.
[228] Burundi and Rwanda would later join in 2007, and the Republic of South Sudan in 2016. *See* EAC History Available at https://www.eac.int/eac-history accessed on 8 November 2017.
[229] Kiplagaat (note 202 above) 49,50.
[230] Ibid.
[231] EAC Treaty, Article 5(1).
[232] Ibid Article 5(2).
[233] M Hailu. 'Regional Economic Integration in Africa: Challenges and Prospects' 2014 (8) *Mizan Law Review* 299-332, 317.
[234] Ibid.
[235] Ibid.
[236] 'COMESA Member States'. Available at http://www.comesa.int/comesa-members-states/. Accessed on the 11th of November 2017.

Africa.'[237] In 1965, a few newly independent eastern and southern African states met in Lusaka Zambia for a ministerial meeting organized by the United Nations Economic Commission for Africa to consider proposals for regional or sub-regional integration.[238] This culminated in the creation of an Economic Community of Eastern and Central African states. In 1978, the Ministers of Trade, Finance and Planning recommended the creation of a sub-regional economic community which would begin with a regional preferential trade area, to be gradually updated into a common market over a period of ten years, before a community could be established.[239] Thus, the treaty establishing the Preferential Trade Area for Eastern and Southern States (PTA) was signed on 21 December 1981 and came into force on 30 September 1982 after ratification by seven signatory states.[240]

Modern day COMESA came into existence in 1993, formally succeeding the PTA on 8 December 1984.[241] Its primary objectives were inter-alia:

> the attaining of sustainable growth and development of its member states; promotion of development in all fields of economic activity; and contributing towards the establishment, progress and the realization of the objectives of the African Economic Community.[242]

Pursuant to Article 4 of the COMESA Treaty, 'the member states have [undertook] to establish a CU, eliminate non-tariff barriers to trade, establish a common external tariff and co-operate in customs procedures and activities.'[243] In late October 2000, the COMESA FTA was achieved when, in accordance with the tariff reduction schedule adopted in 1992, nine member states eliminated tariffs on products originating from within COMESA.[244] A customs union (CU) was launched in June 2010, at the 13th Summit of COMESA Heads of State and Government.

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[237] T Foote 'Economic integration in Africa: Effectiveness of Regional Agreements' 2009 University of Notre Dame 7 available at https://al.nd.edu/assets/20235/bernoulli_09_paper.pdf accessed on 11 November 2017.
[238] Ibid.
[239] 'Looking back: Evolution of PTA/COMESA' available at http://www.comesa.int/history-of-comesa/ accessed on 13 November 2015.
[240] Ibid.
[241] Foote (note 237 above) 7.
[242] Article 3 of the COMESA Treaty.
[243] Article 4 of the COMESA Treaty.
[244] Hailu (note 233 above) 317; *see also* 'Overview of COMESA' available at http://www.comesa.int/overview-of-comesa/ accessed on 13 November 2017.

3.3 Challenges to regional integration

African governments have for quite a long time embraced regional integration initiatives as a critical part of their development strategies.[245] According to Hartzenberg, the African model of market integration follows a 'stepwise integration of goods, labour and capital markets, and eventually monetary and fiscal integration.'[246] This model commences with the establishment of a FTA, which is followed by a CU, leading to a common market, which then culminates in the integration of monetary and fiscal matters to establish an economic union.[247] The establishment of a political union is the ultimate objective of many regional integration arrangements. Despite concerted efforts at regional integration through the formation of RECs such as SADC, COMESA and the EAC, the African model of integration has seen very little progress towards the deepening of economic co-operation and increasing intra-regional trade.

Various obstacles exist which impede the full exploitation of Africa's economic potential. Kimenyi and Kuhlm observe that the challenges to regional integration include political factors, social and cultural barriers, poor infrastructure, conflict, free movement of people within the region and overlapping membership in various regional organisations.[248] They cite as an example of the political factors impeding regional integration the collapse of the EAC in 1977, which, they submit, was as a result of the 'diverse governance systems' of the day.[249]

Tafese also argues that in the absence of political co-operation and unity, it is a cumbersome task to build strong regional co-operation and consensus.[250] Flatto, who argues that political instability in Africa, is a threat to economic development, buttresses this view and integration as it has the potential of deterring investment, interrupting production, and encouraging educated individuals to migrate for greener pastures in peaceful regions.[251] A typical example is the case of Zimbabwe which, following periods of political instability saw a mass exodus of

[245] T Hartzenberg 'Regional integration in Africa' (2011) WTO Staff Working Paper, No. ERSD-2011-14, 2 available at https://www.wto.org/english/res_e/reser_e/ersd201114_e.pdf accessed 18 November 2017.
[246] Ibid.
[247] Ibid.
[248] M Kimenyi & K Kulhmann 'African Union: Challenges and Prospects for Regional Integration in Africa' (2012) 13 *Whitehead Journal of Diplomacy and International Relations* 7-28, 16.
[249] Ibid 17.
[250] G Tafese 'Challenges to Regional Development Block in Southern Africa: The Case of Southern African Development Coordination Conference' (2014) 24 *Journal of Law, Policy & Globalization* 61-70, 63.
[251] S Flatto 'Too Much of a Good Thing: Reassessing the Proliferation of African Regional Trade Agreements' (2007) 30 *Suffolk Transnational Law Review* 407-432, 423.

highly educated individuals to neighbouring South Africa, Australia, New Zealand, the United Kingdom and the United States.[252]

Infrastructural problems also remain a major challenge in Africa's regional integration efforts. In this regard, Hailu argues that the inadequacy of roads connecting African countries is an obstacle to boosting cross border trade.[253] Kalenga observes that due to inadequacies in both the physical and regulatory transport infrastructure, a huge number of firms in sub-Saharan Africa have identified transportation as a major obstacle to doing business.[254] Where transportation costs are high, the consumers are the ones who suffer the most as goods reach the market at an extremely high cost to the consumer.

Overlapping membership in various regional integration organisations is perhaps the biggest challenge to regional integration, particularly in the context of the TFTA. Nine-member countries of COMESA also belong to SADC whilst five other countries belong to both COMESA and the EAC RECs. Tanzania has dual membership in SADC and EAC. According to Gathii, such overlapping membership 'is a reflection of the large number of bilateral and regional trade agreements', referred to as the 'spaghetti bowl' phenomenon.[255] Given that one of GATT/WTO goals is the achievement of non-discriminatory international trade, Panagariya argues that the proliferation of bilateral and regional trade arrangements undermines this goal 'through the creation of RoO that discriminate across products and countries.'[256]

The spaghetti bowl phenomenon occurs when bilateral trade agreements criss-cross to create a maze of restrictions and regulations, which ultimately impede free trade rather than promote it.[257] The existence of multiple memberships to preferential trading arrangements has the effect of cluttering up trade with discriminatory focus on origin of goods, which inevitably leads to

[252] D Chimanikire 'Brain Drain: Causes and economic consequences for Africa' Paper submitted at the African Association for Public Administration and Management (AAPAM) 27th Annual Roundtable Conference, Zambezi Sun Hotel, Livingstone, Zambia 5th – 9th December 2005, 17 available at http://unpan1.un.org/intradoc/groups/public/documents/AAPAM/UNPAN025752.pdf accessed on 18 November 2017.
[253] Hailu (note 233 above) 323.
[254] P Kalenga 'Making the Tripartite FTA Work' in T Hartzenberg et al *Cape to Cairo: Making the Tripartite Free Trade Area Work* Stellenbosch: Tralac (2011) 1-23, 21.
[255] J Gathii 'African Regional Trade Agreements as Flexible Legal Regimes' (2010) 35 (3) *North Carolina Journal of International Law & Commercial Regulation* 571-668, 657. For an illustration of the overlapping membership in the COMESA-SADC-EAC Tripartite territory, see Appendix 1A below (page 76).
[256] A Panagariya 'Preferential Trade Liberalization: The Traditional Theory and New Developments' (2000) 38 *Journal of Economic Literature* 287-331, 328.
[257] J Bhagwati 'U.S. Trade Policy: The Infatuation with Free Trade Agreements' in Bhagwati & Krueger (eds) *The Dangerous Drift to Preferential Trade Agreements.* Washington DC: AEI Press, 1995. 1, 2-3.

an increase in the cost of doing trade.[258] It should also be noted that multiple membership to different trade agreements inevitably leads to selective application of RoO regimes. In this regard, Viljoen points out that when countries belong to more than one REC, they end up applying only those RoO that are simple and benefits them whilst employing different sets of RoO when dealing with countries belonging to different RECs.[259] The differences and inconsistencies between RoO regimes at the regional level has the tendency to lead to greater complexity and a lack of transparency.[260] The RoO that apply in the three RECs making up the TFTA are discussed below.

3.4 Overview of the RoO in the COMESA, EAC and SADC RECs

3.4.1 A brief Background

As discussed in the previous chapter,[261] two different criteria are used in determining the origin of goods. On one hand is the 'wholly produced criterion' in which only one country is involved in the manufacturing or production of the goods and on the other hand is the 'substantial transformation' criterion in which more than one country is involved in the production process.[262] The former criterion mainly applies to natural products and goods made from them and excludes those goods made from imported parts or materials as well as goods of undetermined origin. In this regard, the inquiry is whether the commodity or related product is entirely grown, harvested, or extracted from that country or entirely manufactured from such product. In the latter criterion, goods are considered as originating from a country if such goods have been manufactured wholly or partly from imported material, parts, or components and have undergone 'substantial transformation' or 'sufficient working or processing' that results in the manufacture of an entirely new product.[263] In *Anheuser-Busch Assn v. United States of America*, substantial transformation was held to occur 'when an article emerges from the manufacturing process with a name, character, or use which differs from those of the original materials subjected to the process.' [264]

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[258] J Bhagwati 'Preferential Trade Agreements: The Wrong Road' (1996) 27 *Law & Policy in International Business* 865-871, 866.
[259] Viljoen (note 15 above) 9.
[260] P Lombaerde, & L Garay. 'Preferential Rules of Origin EU and NAFTA Regulatory Models and the WTO' (2005) 6 *Journal of World Investment and Trade* 953-994, 953.
[261] *See* Chapter 2 above, page 21.
[262] LaNasa (note 46 above).
[263] See Introduction of the 1973 Kyoto Convention.
[264] *Anheuser-Busch Assn v United States of America*, 207 US 556 (1907)

Interestingly, RoO are divided into two categories, preferential and non-preferential RoO. Preferential RoO, usually employed in FTAs, are used to determine whether a good originates from a country eligible for preferential treatment whereas non-preferential RoO are used mainly for origin marking and trade statistics.[265] According to Estevadeordal and Suominen, these two categories of RoO are further divided into sectoral, product specific RoO and general, regime-wide RoO.[266]

3.4.2 Product specific RoO

Under the product specific RoO, different RoO methodologies are used either singly or in combination with another to measure substantial transformation.[267] These are:

(i) The change in tariff heading (CTH) under the Harmonised System (HS) of Tariff Nomenclature. The HS was designed as a multipurpose nomenclature for commodity classification and statistics compilation. Under this system, goods are classified at a two-digit chapter level, a four-digit heading level, a six-digit subheading level or an eight to ten-digit level and regarded as 'substantially transformed' when classified in a heading or subheading different from the classification of the non-originating inputs used in the production process.[268]

(ii) The specific processes (SP) criterion or the technical requirement (TECH) in terms of which a good is considered as substantially transformed when it undergoes specified manufacturing or processing requirements regardless of a change in classification. It also involves the express inclusion or exclusion of certain inputs from the manufacturing or processing operations.[269]

(iii) The Value Content criterion in terms of which a product must meet a set minimum local value in the exporting country or in the alternative 'remain below a certain ceiling percentage of value originating in the non-member countries.'[270] This

[265] LaNasa (note 46 above).
[266] A Estevadeordal & K Suominen 'Rules of Origin: Emerging Gate Keepers in Global Commerce' in UNCTAD *Multilateralism and Regionalism: The New Interface* Geneva: UNCTAD (2005) 51, 53.
[267] E Naumann 'Tripartite FTA Rules of Origin: Reflections on the Status Quo and Challenges Ahead in *Cape to Cairo: Making the Tripartite Free Trade Area Work* Stellenbosch: Tralac (2011), 256 -287, 259.
[268] Estevadeordal & Suominen (note 62 above) 4.
[269] Ibid 5.
[270] E Estevadeordal & K Suominen 'Rules of Origin in the World Trading System' Paper prepared for the Seminar on Regional Trade Agreements and the WTO, Centre William Rappard, World Trade Organization

criterion is expressed in two ways, 'either as the minimum percentage of the value of the product that must be added in the exporting country (domestic or regional value content RVC) or as 'the difference between the value of the final good and the costs of the imported inputs (import content, MC)'.[271]

3.4.3 Regime-wide RoO

Apart from product-specific RoO, other types of RoO applied in RoO include the *de minimis* rule, the absorption or roll-up principle and the type of cumulation.[272] The *de minimis* rule specifies the maximum amount of non-originating inputs that can be used without affecting the origin of the product. It introduces a lenient approach to the CTH and TECH requirements thereby allowing goods with non-originating materials to qualify.[273] The absorption or role-up principle allows initially non-originating material that attains originating status through satisfying the SP requirements to be regarded as originating when used as raw materials in subsequent transformation.[274] Cumulation is divided into three types: bilateral, diagonal, and full cumulation. Firstly, Estevadeordal & Suominen writes that bilateral cumulation applies between two PTA partners and permits them to use products originating in the other PTA partner as if they were their own when seeking to qualify for the PTA-conferred preferential treatment in that partner.[275] Secondly, diagonal cumulation finds application where countries tied by similar preferential RoO can use products that originate in any part of the common RoO zone as if they originated in the exporting country.[276] Lastly, full cumulation extends the application of diagonal cumulation by providing that countries with similar RoO regimes can use goods produced in any part of the common RoO zone regardless of whether they are originating products: any or all of the processing carried out in the zone is calculated as if it had taken place in the final country of manufacture.[277]

November 14, 2003, 4 available at https://www.wto.org/english/tratop_e/region_e/sem_nov03_e/estevadeordal_paper_e.pdf accessed on 18 November 2017.

[271] Ibid 5.

[272] Estevadeordal & Suominen (note 62 above) 5.

[273] Ibid 5.

[274] E Medalla & J Balboa 'ASEAN Rules of Origin: Lessons and Recommendations for Best Practice' December 2009 *PIDS Discussion Paper Series* No. 2009-36, 7 available at https://dirp4.pids.gov.ph/ris/dps/pidsdps0936.pdf accessed 24 November 2017.

[275] Estevadeordal & Suominen (note 271 above) 6.

[276] Ibid.

[277] Ibid.

As shall be seen below, these RoO methodologies when applied in the various RECs are applied either singly or in combination with one another.

3.5. RoO in COMESA-SADC-EAC RECs

3.5.1 SADC RoO

Although regarded as relatively complex and highly restrictive,[278] SADC RoO form the cornerstone of intra-regional trade within the SADC FTA and serve to prevent trade deflection by preventing non-SADC goods from benefiting from the preferential tariff treatment offered under the trade regime.[279] The RoO governing trade in the SADC region are contained in Annex 1 to the SADC Trade Protocol.[280] Initially, simple and non-restrictive RoO consistent with those applied in developing country PTA's such as COMESA were applied in the SADC region.[281] Under these RoO, goods produced in Member States with non-originating materials were eligible for SADC preferential tariffs if

(i) they contained at least 35 per cent regional value added or;

(ii) the non-SADC originating materials used in their production was not more than 60 per cent of the total value of inputs used or;

(iii) the production process of the goods resulted in a single change in tariff heading.[282]

Following pressure for exceptions to these initial RoO by certain Member States driven by a desire to protect domestic markets, the RoO were amended to reflect 'made-to-measure sector-specific RoO' that are fundamentally different from those initially agreed on.[283] They reflect a product-specific approach to RoO.[284]

[278] P Brenton et al (note 52 above) 20
[279] 'SADC Rules of Origin Exporters Guide Manual' Preamble available at https://www.sadc.int/files/9613/5413/6410/3._Rules_of_Origin__Exporters_Guide_Manual.pdf accessed on the 18 November 2017.
[280] 'SADC Trade Protocol: Annex I Concerning the Rules of Origin for Products to be traded between The Member States of The Southern African Development Community' available at www.tralac.org/files/2011/11/SADC-Trade-protocol-Annex-1.pdf accessed on 18 November 2017. (Hereinafter SADC Trade Protocol Annex 1).
[281] Kalenga (note 254 above) 16.
[282] P Brenton et al (note 52 above) 2
[283] Ibid.
[284] E Naumann 'Tripartite FTA: State of Play on Preferential Rules of Origin' (2011) Tralac Trade Brief No SI 1TB05/2011. 1-12, 7 available at file:///C:/Users/214581501/Downloads/S11TB05%20Naumann%20Tripartite%20RoO%20overview%2020110323%20fin.pdf accessed on 18 November 2017.

The current SADC RoO mirror those in PTAs made up of highly industrialised countries and are similar to RoO in the EU-South Africa and EU-ACP trade agreements. The current SADC RoO regime retains the wholly obtained or produced criteria[285] and regards as wholly obtained or produced in Member States, inter-alia, any mineral products extracted from their ground or seabed; vegetable products harvested there; live animals born and raised within a member state and the products obtained from such live animals.[286]

Under the sufficient processing criteria, goods produced in a Member State with non-SADC originating materials are considered as originating in a Member State if such goods have undergone sufficient working or processing within the meaning of Rule 2(2).[287] Rule 2(2) lists in Appendix 1 the conditions, which must be satisfied in order for goods falling outside the wholly produced criteria to be considered as sufficiently worked or processed and thus originating in a Member State.

Appendix 1 lists the various products covered by the Trade Protocol and indicates the processing or working to be carried out on the non-originating materials used in the manufacturing of the various products that confers originating status.[288] The RVC criteria (discussed earlier) is applied to stipulate the percentage value of non-originating material permissible on a finished product for such product to obtain originating status and the VA criteria is applied to stipulate the minimum value addition in the country of manufacture.[289] Certain products listed in Appendix 1 obtain originating status through the application of the CTH criteria. Under this criterion, origin is obtained when there is sufficient working or processing which results in a change in tariff heading between the non-originating materials used in the production of the product and the finished product itself. [290]

SADC RoO apply the *de minimis* or value tolerance rule to provide relief where a product fails to qualify as originating due to the use of expressly excluded non-originating material of negligible value failing to meet the minimum percentage in terms of value criteria. Rule 3 of Annex 1 provides that the non-originating material in question may nevertheless be used 'provided their total value does not exceed 15 per cent of the ex-works price of the product and

[285] SADC Trade Protocol Annex 1, Rule 2(1)(a).
[286] Ibid Rule 4(a)-(j).
[287] Ibid Rule 2(a)
[288] Ibid Rule 2(b)
[289] 'SADC Rules of Origin Exporters Guide Manual' 7. Available at https://www.sadc.int/files/9613/5413/6410/3._Rules_of_Origin__Exporters_Guide_Manual.pdf. Accessed on the 18th of November 2017.
[290] Ibid

any of the percentages given in the list for the maximum value of non-originating materials are not exceeded through the application of the de minimis rule.'[291] SADC RoO also apply the cumulative principle in determining the origin of goods. Since SADC Member States are considered as one country for the purposes of determining origin, cumulation under SADC RoO occurs when a product is manufactured using raw materials or semi-finished goods originating from any of the Member States. Such raw materials or finished goods are deemed to have originated in the Member State where the final processing or manufacturing takes place.[292]

Certain processes or operations such as packaging, packing, simple assembly or combining operations, dismantling or disassembly, slaughter of animals etc. are considered as insufficient to sustain a claim that goods originate in a Member State.[293]

3.5.2 COMESA RoO

The COMESA RoO are contained in the COMESA Protocol on RoO.[294] The COMESA Protocol to RoO was created pursuant to the provisions of paragraph 2 of Article 48 of the COMESA Treaty, which provides that the RoO for products eligible for Common Market Treatment shall be set out only in a Protocol annexed to the Treaty. COMESA RoO are fundamentally different from those in the SADC FTA. Whilst SADC uses the line by line product specific approach in its RoO, COMESA uses an across the board single rule approach to its RoO.[295] This makes SADC RoO complex and restrictive compared to the COMESA RoO which are simpler and less restrictive.

The COMESA RoO accept as originating in a Member State, goods consigned directly from a Member State to a consignee in another Member State.[296] It also applies the wholly produced criteria in the same way as the SADC RoO.[297] The criteria for goods regarded as wholly

[291] SADC Trade Protocol Annex 1, Rule 2(3).
[292] Ibid Rule 2(4).
[293] SADC Trade Protocol Annex 1, Rule 3.
[294] 'Protocol on The Rules of Origin for Products to Be Traded Between the Member States of The Common Market for Eastern and Southern Africa' available at www.comesa.int/wp-content/uploads/2016/.../Protocol-on-Rules-of-Origin-2015.pdf accessed on 19 November 2017. Hereinafter [COMESA RoO Protocol].
[295] Naumann (note 267 above) 260-261.
[296] COMESA RoO Protocol, Rule 2.
[297] Ibid.

produced and thus originating in a member state is also similar to that applied in the SADC RoO.[298]

In determining the origin of goods produced in a Member State wholly or partially from inputs sourced outside the Member States or of undetermined origin, the COMESA RoO require such goods to have undergone a process of substantial transformation.[299] This process of substantial transformation should be such that 'either the CIF value of non-originating material does not exceed 60 per cent of the total cost of the value of material used in the production of the goods',[300] or the value added resulting from the production process must account for at least 35 per cent of the ex-factory cost of the product. As a third alternative, the value of non-originating material used in the production of the goods must not exceed 25 per cent if the product is listed by the COMESA council as being of importance to the economic development of the Member States.[301] The CTH criteria is also applied to confer originating status on substantially transformed goods if the materials used in producing the goods can be classified under a different heading to that of the final product.[302]

The value-added threshold of 35 per cent is not uniformly applied across all Member states. For example, Egypt applies a 45 per cent threshold, with Member States applying the higher threshold on a reciprocal basis.[303] Malawi, Uganda, and Zambia at some point also applied the 45 per cent threshold but have since complied with the 35 per cent COMESA threshold. The differentiation in the percentage value threshold has been highly controversial with most Member states calling on Egypt to follow the 35 per cent COMESA RoO standard.

3.5.3 EAC RoO

The EAC established its CU in 2005 pursuant to Article 75 of the EAC Treaty. [304] The EAC CU imposes zero duties on goods and services traded amongst EAC Partner States. The EAC Partner States 'agreed on a common external tariff (CET), whereby imports from countries outside the EAC zone are subjected to the same tariff when sold to any EAC Partner State.'[305]

[298] Ibid Rule 3
[299] Ibid Rule 2(1)(b)(i).
[300] Ibid. An inverse application of this rule means the value of local material used must exceed 40 per cent of the total material cost. *See* Naumann (note 267 above) 262.
[301] Ibid
[302] Naumann (note 267 above) 261.
[303] Ibid 262.
[304] 'EAC Customs Union' available at https://www.eac.int/customs-union accessed 20 November 2017.
[305] Ibid.

Goods traded within the EAC are subject to certain provisions of the Protocol for the Establishment of the East African Community Customs Union [306] and must comply with the EAC RoO. The EAC RoO are set out in Annex III of the EAC CU Protocol.[307]

The EAC RoO are in most respects similar to the COMESA RoO. As such, goods are regarded as originating in a Partner State in accordance with the wholly obtained or produced criteria[308] and where goods have been produced wholly or partly with imported material, such material must undergo sufficient working or processing in a Partner state according to an across the board 35 per cent value added rule. The CTH rule is applied to goods that are eligible and such goods are listed in Part 1 of the First Schedule to the RoO.[309] However, the main difference between the EAC RoO and the COMESA RoO is that the former does not have a lower 25 per cent value added rule for products regarded as 'economically important.'[310]

3.6 Conclusion

African countries have for much of the past decades and through various RECs been engaged in efforts to boost intra-African regional trade and deepening of economic co-operation. An analysis of the origins, goals and objectives of the various RECs reveals concerted efforts but albeit slow progress towards deepening economic co-operation and increasing intra-regional trade. This slow progress can be blamed on the myriad of problems faced by the various regional integration organisations in the region. Poor infrastructure, lack of resources, reliance on donor aid, a lack of political will, political instability and overlapping membership to the various RECs are just some of the problems that impede progress towards the full exploitation of Africa's economic potential.

The problem of overlapping membership is magnified by the application of divergent RoO in the three RECs making up the TFTA. Whilst COMESA and EAC RoO are markedly similar (except for the 25 per cent value added threshold applied to "economically important" products in COMESA), and apply an across the broad approach, SADC RoO are fundamentally different, applying a product specific approach that has been criticised as leading to complex

[306] 'EAC Customs Union Protocol' available at https://www.eac.int/documents/category/key-documents. Accessed on the 20th of November 2017.
[307] Ibid Article 14.
[308] EAC Customs Union RoO Rule 4(1)(a).
[309] EAC Customs Union RoO, Rules 4(1)(b) and 6.
[310] Naumann (note 267 above) 263.

and restrictive RoO that constrain integration. The lack of uniformity across the RoO regimes applicable in the SADC and COMESA RECs raises the question as to which RoO are applied by countries belonging to both RECs? The solution perhaps lies in the RoO in Annex 4of the TFTA, which establishes a RoO regime that will be uniformly applied by all member states of the TFTA. The following chapter examines RoO provisions in Annex 4 of the said Agreement and how these RoO compare to RoO applied in particular multilateral FTAs.

CHAPTER 4

COMPARISON BETWEEN THE TFTA RoO AND RoO IN THE ASEAN AND THE MERCUSOR FTAS

4.1 Introduction.

Although the TFTA Agreement was signed and came into force on 10 January 2015, there remained some outstanding work to be completed on certain annexures to the TFTA agreement. As such, negotiations on trade remedies, dispute settlement and RoO were only completed at a ministerial meeting held on 7 July 2017 in Kampala, Uganda.[311] As discussed in the previous chapter, the three RECs making up the TFTA, (COMESA, SADC and the EAC) all utilise different RoO regimes. COMESA and EAC RoO are in most aspects similar, both applying an across the board approach to determining origin. SADC RoO on the other hand apply a product and sector specific approach to determination of origin. The proposed TFTA RoO seek to harmonise the COMESA, EAC, and SADC RoO by designing a new RoO framework 'that will apply to a much larger preferential trade area, with potentially major benefits to producers, exporters, and consumers in the region.'

Significant progress has been made in the design of a new RoO framework for the TFTA. In 2009, a draft protocol on TFTA RoO was published. After substantial revision to the 2009 draft protocol, a revised Annex 4 on RoO was published in December 2010. Against this background, this chapter analyses the TFTA RoO, and how these RoO compare with other FTAs, specifically the ASEAN and Mercosur FTAs.[312] It also seeks to establish the extent to which the TFTA RoO hinder or promote intra-regional trade and economic integration in the tripartite territory.

[311] 'The Tripartite Free Trade Area – a breakthrough in July 2017 as South Africa signs the Tripartite Agreement' available at https://www.tralac.org/news/article/11860-the-tripartite-free-trade-area-a-breakthrough-in-july-2017-as-south-africa-signs-the-tripartite-agreement.html accessed 22 December 2017.

[312] The ASEAN FTA has been chosen because it is regarded as 'one of the most economically dynamic economic groups in the world' and 'an active player in the global FTA movement.'

4.2 TFTA RoO

Noting the different RoO regimes, as discussed in the previous chapter, The TFTA seeks to harmonise these RoO into a set of uniform rules that will govern the entire TFTA. According to Naumann, the development of a new RoO framework is necessary for distinguishing trade flows and the realisation of the many benefits offered by a larger and more integrated market.[313] In this regard, an effort has been made to come up with a new RoO framework that incorporates the RoO regimes of the three RECs but is less restrictive so as to facilitate rather than hinder intra-regional trade. To this end, although the new RoO framework significantly overlaps the COMESA-EAC RoO, it is an entirely new regulation especially with regards to the proposed test for substantial transformation.[314]

The RoO that apply in the TFTA are set out in Annex 4 on RoO, under Article 12 of the TFTA Agreement.[315] Article 2 Annex 4 on RoO sets out the principles that govern the application of the RoO.[316] Interestingly, these principles are consistent with the views expressed by the private sector in the TFTA territory, led by the COMESA Business Council, which, since 2010, has come up with various positions on the TFTA RoO.[317] According to Estevadeordal *et al*, private sector participation is of great importance during the negotiation of international trade agreements.[318] This is particularly true in light of the fact that, being the exporters and importers in RTAs, the private sector possesses valuable information about the day-to-day trade

[313] Naumann (note 267 above) 257.
[314] Naumann (note 284 above) 7.
[315] Annex 4 on RoO (note 19 above). Annex 4 on RoO however does not contain Appendix 1 which is a schedule of products whose originating status is determined in accordance with Article 5 (2) of the Annex 4 on RoO. When the TFTA was launched in June 2015, only 25% of the product list had been negotiated and agreed, rendering TFTA Agreement incomplete. Various commitments were made to expedite the completion of Appendix 1 but whilst the constituent RECs of the TFTA reached a common position on the proportion of tariff lines to be liberalised, no consensus could be reached on tariffs applicable to products such as textiles, cement, wheat, sugar, and maize, products whose trade is considered critical to the growth of domestic industries. See Ayanzwa (note 436 below). An excerpt of Articles 2 – 8 of Annex 4 on RoO is annexed at the end of this dissertation. See Appendix 2A below (pages 77- 81).
[316] The principles governing the application of the RoO are that;
(a) The rules of origin shall be objective, simple, and predictable;
(b) The rules of origin shall facilitate intra-regional trade and shall not create distortive or disruptive effects on regional trade; and
(c) The rules of origin shall be administered in a consistent, uniform, impartial, transparent, and reasonable manner.
[317] 'Fair trade hinges on Rules of Origin' available at https://www.trademarkea.com/news/fair-trade-hinges-on-rules-of-origin/ accessed on the 20th of January 2018.
[318] E Estevadeordal et al 'Multilateralizing Preferential Rules of Origin Around the World' (2007) Paper prepared for WTO/HEI/NCCR Trade/CEPR Conference. 1-74, 48 available at https://www.wto.org/english/tratop_e/region_e/con_sep07_e/estevadeordal_harris_suominen_e.pdf accessed on 19 January 2018.

operations in RTAs and the hypothetical problems they pose and as such, the private sector should participate in such negotiations. During the inaugural Tripartite Regional Dialogue held on 26 January 2016 in Kigali, Rwanda, the private sector submitted recommendations to the Tripartite Negotiating Forum (TTNF) calling for flexibility, simplicity, and uniformity in the administration of RoO and the adoption and harmonization of a Simplified Trade Regime (STR) to support small-scale border traders.[319]

The Annex 4 on RoO concept of originating products applies the wholly obtained and the substantial transformation criteria.[320] This is the same criteria applied in the COMESA, SADC and EAC RECs, with the only difference being that the wholly obtained criteria in Annex 4 on RoO has been slightly expanded to cover products of Mari culture[321] , products made aboard factory ships[322], and products extracted from marine soil or subsoil outside the territorial waters of Tripartite Member States.[323]

When determining the origin of products manufactured with non-originating materials Annex 4 on RoO employs a percentage test (value of materials used) or, as an alternative, the change in tariff heading or the specific processes method for products listed in Appendix 1.[324] In terms of Article 5 of Annex 4 on RoO, 'sufficient working or processing' occurs either when the value of non-originating material used in the manufacture of a good does not exceed 70 per cent of the ex-works price of a product or when the value of originating material is equal to at least 30 per cent of the ex-works price of the good.[325] Operations to ensure preservation of products during transportation and storage, removing of dust, screening, repackaging, simple assembly of parts and the slaughter of animals amongst others are all regarded as insufficient working or processing for the purposes of conferring originating status on products.[326]

As is the case in the COMESA, SADC, and EAC RoO, cumulation is also applied in the TFTA RoO. In this regard, products originating from a Tripartite Member State and subsequently used in the manufacture of another product in another Tripartite Member State are treated as if

[319] 'EABC Update On the 1st Private Sector Dialogue on The Tripartite Free Trade Area Rules of Origin- 5th February 2016' available at http://eabc-online.com/index.php?/resources/view/eabc-update-on-1st-private-sector-dialogue-on-the-tripartite-free-trade-area accessed on 20 January 2018.
[320] Annex 4 on RoO, Article 3.
[321] Ibid Article 4(1)(e).
[322] Ibid Article 4(1)(g).
[323] Ibid Article 4(1)(j).
[324] Appendix 1 contains a schedule of products whose originating status is determined in accordance with Article 5(2) of Annex 4 on RoO. However, no such Appendix has been drawn up at the time of writing.
[325] Annex 4 on RoO, Article 5(1)(a) and (b).
[326] Ibid Article 7.

they originate in the Tripartite State of further manufacture.[327] This allows producers in a TFTA member state to use raw materials from another (or other, as the case may be) TFTA member(s), without disqualifying the final product from preferential treatment.[328]

Annex 4 on RoO also introduces the principle of territoriality, which was not present in the COMESA, SADC, EAC RoO.[329] The principle of territoriality allows Tripartite Member States to export materials, which have acquired originating status for processing or working outside the member state. Tripartite member states can then re-import the exported material without this affecting its originating status provided the value acquired outside the Member State does not exceed 10 per cent of the end product for which originating status is being claimed.[330] This principle is also applied in the European Community origin rules.[331]

Annex 4 on RoO also adopts the STR in terms of which goods imported by small cross border traders valued at less than US$2000 are exempt from proof of origin requirements provided the cross-border trader is "endorsed by adjacent Customs authorities" and the goods imported are regarded as commonly traded goods.[332] The STR programme, which is consistent with Article VIII of GATT and certain provisions of the Revised Kyoto Convention for the Simplification and Harmonization of Customs Procedures is also employed in COMESA where it aims at simplifying customs clearance procedures as well as reducing the costs of trading for small scale cross border traders.[333] In May 2017, SADC ministers responsible for trade mandated the SADC Secretariat to develop a STR for intra-SADC trade in accordance with the WTO Agreement and the Revised Kyoto Convention.[334]

Annex 4 on RoO seeks to bring uniformity to RoO in the COMESA, SADC, and EAC tripartite territory. In so doing, it introduces simple, easy to administer and comply with RoO framework that, to some extent, addresses the problem of divergent RoO regimes in the tripartite territory. Against this background, it is important to consider how the proposed TFTA RoO compare to

[327] Ibid Article 8.
[328] 'RoO applicable to exports form LDCs' (note 60 above) 6.
[329] Annex 4 on RoO, Article 12.
[330] Ibid.
[331] Principle of Territoriality in the European Origin Models – World Customs Organization available at http://www.wcoomd.org/en/Topics/Origin/Instrument%20and%20Tools/Comparative%20Study%20on%20Preferential%20Rules%20of%20Origin/Specific%20Agreements/Agreement%20Topics/TER%20EUR accessed on 20 January 2018.
[332] Annex 4 on RoO, Article 23. *See also* Naumann (note 267 above) 270.
[333] COMESA Simplified Trade Regime available at http://www.comesa.int/wpcontent/uploads/2017/09/COMESA-Simplified-Trade-Regime-STR_email.pdf accessed on January 2018.
[334] 'SADC moves towards a Simplified Trade Regime' available at https://www.tralac.org/news/article/11594-sadc-moves-towards-a-simplified-trade-regime.html accessed on 20 January 2018.

other RoO frameworks in various RTAs across the globe. What follows is an attempt to compare the TFTA RoO with the RoO applicable in the ASEAN and Mercosur RTAs. It should be noted at the outset that Annex 4 on RoO does not as yet contain Appendix 1 (which contains a list of products whose originating status is determined in accordance with the provisions of Article 5(2) of Annex 4 on RoO) and it is therefore not possible to conduct a product by product comparison of the RoO applicable in the three RTAs. As such, the comparison is confined to origin determining provisions in the three RTAs. To put the comparison into context, a brief background discussion of the ASEAN and Mercosur RTAs precedes the comparison of the three RTAs.

4.3 The Southern Common Market (MERCOSUR)

The Southern Common Market (MERCOSUR) emerged from earlier efforts directed at integrating Latin American economies through the 1960 Montevideo Convention, which gave birth to the Latin American Free Trade Association (LAFTA)[335] and the 1980 Treaty of Montevideo that created the Latin American Integration Association (LAIA). In the mid-1980s Brazil and Argentina, the two major economic players in Latin America, began efforts directed at refocusing their relationship with one another and with the rest of the industrialised world through the signing of the 1985 Declaration of Iguaçu.[336] More Brazilian-Argentine agreements would follow as the two countries viewed and pursued integration as a strategy to increase and enhance domestic production, with the aim of satisfying both domestic and international markets. The ultimate goal these countries sought to achieve was the development of faltering entrepreneurial networks.[337]

As such, this pursuit of integration as a strategy for the enhancement of domestic production culminated in the signing of the Argentine-Brazilian Economic Cooperation and Integration Act, which came into force in 1986.[338] Its aim was the setting up of a "Common Economic

[335] J Vervaele 'Mercosur and Regional Integration in South America.' (2005) 54 *International and Comparative Law Quarterly*. 387-410, 389.
[336] M Haines-Ferrari 'MERCOSUR: A New Model of Latin American Economic Integration' (1993) 25 *Case Western Reserve Journal of International Law* 413-448, 418.
[337] J Behar 'Economic Integration and Intra-Industry Trade: The Case of the Argentine-Brazilian Free Trade Agreement' (1991) 29 *Journal of Common Market Studies*. 527, 538.
[338] Agreement on Argentine-Brazilian Economic Integration, July 29, 1986, 27 I.L.M. 901 available at https://www.jstor.org/stable/pdf/20693239.pdf?refreqid=excelsior%3Ae4a9d575be0a1b3d5971f2df5f104be9 accessed on 21 January 2018. [hereinafter the 1986 Act]

Space".[339] Sectoral integration covering diverse productive aspects and not just commerce was the central implementing technique of the 1986 Act. It was conceived that integration would develop through the progression of trade within "self-contained sectors" and the elimination of tariff and non-tariff barriers would give rise to intersectoral specialisation that would result in interconnected economic networks.[340] These sectors were separately and individually regulated by Protocols, each Protocol setting out the different objectives, time-frames, and levels of integration.

Despite reaping some benefits through this imaginative approach at integration, problems would soon arise. Brazil and Argentina had different economic policies, which meant that harmonisation was going to be difficult. Furthermore, the elimination of tariff and non-tariff barriers failed to produce intra-sectorial specialisation as expected and did not do much to curtail the re-emergence of protectionist measures. Noting these concerns on 29 November 1988, Brazil and Argentina concluded the Agreement on Argentine-Brazilian Integration[341] whose general economic goal was the establishment of a global Common Market.[342] Although the 1988 Treaty sought to reformulate the 1986 Act, it retained both its conceptual and methodological approach.[343] The 1988 Treaty prescribed, inter-alia, a gradual reduction of customs duties and non-tariff barriers on goods and services over an initial ten-year phase,[344] the coordination of policies required to establish a common market and the adoption of an inter-governmental system without envisaging any organic structure.[345]

On July 6, 1990, Brazil and Argentina signed the Buenos Aires Act, which brought further dramatic changes to Brazil-Argentina economic relations.[346] This Act introduced an automatic tariff elimination system, placed more emphasis on macro-economic policies and institutionalised integration. It thus reformulated the undefined characteristics of the 1988 Treaty into a precise Common Market System. Soon thereafter, Brazil and Argentina concluded the 1991 Treaty of Asuncion[347] by which MERCOSUR was established. Paraguay and Uruguay, two countries economically dependent on Brazil and Argentina, requested to be

[339] Haines-Ferrari (note 336 above) 419.
[340] Ibid.
[341] Agreement on Argentine-Brazilian Integration, Nov. 29, 1988, 27 I.L.M. 901 (Hereinafter the 1988 Treaty).
[342] Haines-Ferrari (note 336 above) 420.
[343] Ibid.
[344] Article 4 1988 Treaty.
[345] Article 5 1988 Treaty.
[346] Haines-Ferrari (note 336 above) 420.
[347] Treaty of Asuncion Establishing a Common Market among Argentina, Brazil, Paraguay, & Uruguay, March 26 1991, 30 I.L.M. 1041 [hereinafter Treaty of Asuncion] available at https://treaties.un.org/doc/Publication/UNTS/Volume%202140/v2140.pdf accessed on 29 October 2017.

included in Mercosur out of fear that they may be excluded out of a Common Market between two of their largest trading partners.[348] Further, Bolivia and Chile would later join Mercosur as associated members.[349]

Noting the scaffolding of Mercosur, it is clear that it was designed to work on the principle of reciprocity, seeking to achieve integration through the lowering of customs tariffs, elimination of non-tariff barriers and the creation of a common external tariff.[350]

RoO in Mercosur are discussed in the comparison between the TFTA RoO, ASEAN-CEPT RoO and Mercosur RoO.[351]

4.4 The Association of South East Asian Nations (ASEAN)

4.4.1 Background

The Association of South East Asian Nations (ASEAN) was established on 8 August 1967 through the signing of the Bangkok Declaration.[352] It is regarded as "one of the most economically dynamic economic groups in the world, an active player in the global FTA movement and the centre of regional integration and co-operation efforts in East Asia."[353] At its inception, its member states were Malaysia, Thailand, Indonesia, the Philippines, and Singapore. Although formed primarily as a response to the accelerating political situation in the region, the Bangkok Declaration establishing ASEAN mentioned "accelerating economic growth, social progress and cultural development in the region" as one of the main aims and objectives of the association.[354] According to Komuro, armed conflict between the US and Vietnam and the Red Guards Cultural Revolution in China, combined with internal political turmoil provided the impetus for the creation of Asian institutions.[355] Koolaee and Sazmand,

[348] T O'Keefe 'An Analysis of the Mercosur Economic Integration Project from a Legal Perspective' 1994 (28) *International Lawyer* 439-448, 439.
[349] Vervaele (note 335 above) 390.
[350] J Tate 'Sweeping Protectionism under the Rug: Neo-protectionist Measures among Mercosur Countries in a Time of Trade-Liberalization' (1999) 27 *Georgia Journal of International & Comparative Law* 389-424, 394.
[351] See below at 4.5.
[352] 'The ASEAN Declaration (Bangkok Declaration) Bangkok, 8 August 1967' available at http://asean.org/the-asean-declaration-bangkok-declaration-bangkok-8-august-1967/ accessed on 29 October 2017.
[353] Medalla & Balboa (note 274 above) 1.
[354] The ASEAN Declaration (note 342 above) Article 1.
[355] N Komuro 'ASEAN and Preferential Rules of Origin' (2004) 5 *Journal of World Investment & Trade* 709, 710.

who are of the view that ASEAN was formed to create a single front against the spread of communism, express similar views.[356]

Since ASEAN's establishment was primarily meant to, deal with political issues there was very little activity on the economic front until the mid-1970's. It is not surprising that the first ASEAN Summit held in Bali in 1976 led to the adoption of the Treaty of Amity and Co-operation and the ASEAN Co-operation Declaration. The Treaty called for the observance of non-interference principles as well as the promotion of economic development and the strengthening of economic co-operation whilst under the Declaration, Member States were to adopt action programmes covering political collaboration and economic, social, and cultural co-operation.[357] To this end, various initiatives such as the 1977 Preferential Trading Arrangement (PTA), the 1981 Industrial Complementation Scheme and the 1983 Industrial Joint Venture Project were set up with a long-term view at economic co-operation.

The main objective of the ASEAN PTA was trade liberalization within the ASEAN group.[358] The PTA placed an obligation upon all ASEAN Member states to gradually increase the products covered by preferences and to voluntarily lower internal tariffs. In the beginning, the PTA applied a 10 per cent margin of preference, which was negotiated on a voluntary product-by-product basis.[359] Agricultural, fishing and mining products wholly obtained within the ASEAN acquired a 100 per cent ASEAN origin and were thus eligible for preferential treatment in an importing member state.[360] Industrial products manufactured in a member state with materials sourced not only from the ASEAN but also from third countries had to satisfy the 50 per cent value added criterion.[361] Such products were entitled to preferences only if the value of the ASEAN content reached 50 per cent of the final good's CIF price in the importing Member State.[362]

Despite the reduction of the value-added criterion to 35 per cent and the increasing of the margin of preference to 40 per cent, the PTA remained impotent.[363] ASEAN Member States lacked the enthusiasm that would push ASEAN into a free trade area mainly because their

[356] E Koolaee & B Sazmand 'Regional Integration in Asia: Comparative Analysis of ECO and ASEAN' (2013) 10 (2) *International Studies Journal*. 183-206, 184.
[357] Komuro (note 355 above) 710.
[358] L Tan 'Will ASEAN Economic Integration Progress beyond a Free Trade Area' (2004) 53 *International & Comparative Law Quarterly* 935, 937.
[359] Ibid.
[360] Ibid.
[361] Komuro (note 355 above) 712.
[362]Ibid.
[363] Tan (note 358 above) 937.

economies were more competitive than complimentary and thus focused more on the protection of domestic markets.[364] Furthermore, the PTA did not benefit manufacturers based in the ASEAN countries who depended on third country sourced parts and materials. Most of their products did not enjoy any tariff preferences in ASEAN Member States as they failed to meet the 50 per cent valued added origin criterion.[365]

As multinational companies globalized production and regional economic co-operation in most regions accelerated, it was only a matter of time before ASEAN made the transition from the impotent PTA to a new FTA. Thailand's Prime Minister Anand Panyarachun proposed the establishment of an ASEAN Free Trade Area (AFTA), which would pursue the elimination of tariff and non-tariff barriers to trade between the six countries over a ten-year period.[366] In January 1992, the Fourth Singapore ASEAN summit established AFTA. AFTA's primary objective was the attainment of economy-of-scale benefits within the ASEAN region. It also sought the liberalization of intra-regional trade through reducing the AFTA preferential duty rate to zero and the elimination of non-tariff barriers.[367]

4.4.2 ASEAN RoO

RoO in AFTA are guided by the Agreement on Common Effective Preferential Tariff Scheme for AFTA (CEPT).[368] CEPT is AFTA's pillar for intra-regional preferential purposes. One of the scheme's main objectives is to achieve co-operation among ASEAN Member States to reduce intra-regional preferential tariffs on most products.[369] To this end, the scheme adopted a tariff reduction schedule for the ASEAN original six Member States and a slightly different tariff reduction schedule for the four new ASEAN Member States.[370]

The schedule for the original six required a reduction in AFTA preferential duties from a high of about 20-30 per cent to a low of 0-5 per cent over a period of 15 years.[371] The reduction of

[364] S Chirathivate 'ASEAN Economic Integration with the World through AFTA' in JLH Tan (ed) *AFTA in The Changing International Economy* Singapore: Institute of South East Asian Studies (1996) 23-24.
[365] Komuro (note 355 above) 710.
[366] M Haas 'ASEAN's Pivotal Role in Asian-Pacific Regional Cooperation' (1997) 3 (3) *Global Governance* 329, 332.
[367] Komuro (note 355 above) 713.
[368] Medalla & Balboa (note 274 above) 1. The text of the CEPT Agreement is available at http://www.asean.org/storage/images/2012/Economic/AFTA/Common_Effective_Preferential_Tariff/Agreement%20on%20the%20Common%20Effective%20Preferential%20Tariff%20Scheme%20for%20the%20ASEAN%20Free%20Trade%20Area.pdf.
[369] Komuro (note 355 above) 713.
[370] Ibid.
[371] Ibid

AFTA preferential duties was twice accelerated by the ASEAN Economic Ministers (AEM) Conference, first in 1994 when the period over which reduction would take place was reduced to 10 years and then again in 2001 when the period was reduced to 9 years.[372] A degree of flexibility was incorporated in the accelerated schedule which permitted Member States to derogate from the reduction schedule. The accelerated duty reduction was not strictly complied with as some of the original six opted for the flexible policy to delay the implementation of the tariff reduction schedule.[373] To enforce compliance with the accelerated schedule, the first ASEAN Senior Economic Officials Meeting (SEOM)[374] requested a reduction of preferential duties to less than 5 percent by the end of 2003 and that 60 percent of CEPT-covered products be subjected to zero preferential duty by the end of 2003.[375]

A tolerant tariff reduction schedule was introduced for the four new ASEAN Member States Cambodia, Myanmar, Vietnam, and Laos.[376] These countries were expected to reduce preferential tariffs to less than 5 percent by 2006 to 2010 depending on the country. Reduction of preferential tariffs on sensitive products was postponed to 2018.[377]

4.5 Comparison of TFTA, ASEAN and Mercosur RoO

4.5.1 Wholly obtained criteria

The wholly obtained criteria for determining the origin of goods is applied in both Annex 4 on RoO and the ASEAN-CEPT RoO. In terms of Article 3(1)(a) of Annex 4 on RoO, products produced in Tripartite Member States as contemplated in Article 4 of Annex 4 are regarded as originating in the Tripartite Member States. Article 4 provides a list of products that are considered as wholly obtained in the Tripartite Member States.[378] The wholly obtained criteria applied in the AFTA-CEPT RoO is the same as that applied in Annex 4 on RoO. In terms of Rule 1(a) of the AFTA-CEPT RoO, products under the CEPT Scheme that are imported into the territory of a Member State from another Member State qualify for preferential concessions

[372] Ibid 714.
[373] Ibid.
[374] The first ASEAN Senior Economic Officials Meeting (SEOM) was held in Hanoi in January 2003.
[375] Komuro (note 355 above) 714.
[376] Ibid.
[377] Ibid.
[378] These products include minerals extracted from the soil or seabed of a Member State, vegetable products harvested therein, live animals born and raised therein and products from such live animals, products obtained from hunting and fishing in a Member State, and waste and scrap material that emerges from manufacturing processes conducted in a Member State.

if they are wholly produced as defined in Rule 2 of the AFTA-CEPT RoO. Further, Rule 2 contains a list that is identical in all respects to the list in Article 4 of Annex 4 on RoO.

Similarly, the Mercosur Origin System also applies the wholly obtained criteria but instead of using the phrase 'wholly obtained', it uses the word 'native'. Thus, in terms of Article 3(a) of the Mercosur RoO, products are considered 'native' if they are manufactured in a Mercosur State Party only with materials originating from any of the Mercosur State Parties.[379] Article 3(b) then list products also considered "native" which are no different to the products regarded as wholly obtained in Article 4 of Annex 4 on RoO and Rule 2 of the AFTA RoO respectively. To this extent, despite a difference in the terminology used there is some similarity in the application and content of the wholly obtained criteria for determining origin in the Draft TFTA, the AFTA and Mercosur RoO.

4.5.2 Sufficient working or processing criteria

In determining the origin of goods that have not been wholly obtained or produced, Annex 4 on RoO employs the sufficiently worked or processed criterion.[380] According to this criterion, products manufactured in a Tripartite State incorporating materials not wholly obtained from the Tripartite territory are considered as originating products if they have undergone sufficient working or processing.[381] For a product to qualify as sufficiently worked or processed, either the value of non-originating material used in the manufacture of the product must not exceed 70 per cent of the ex-works price of the good or the value of the originating materials used in the production of the good is at least equal to 30 per cent of the ex-works price of the good.[382] Appendix 1 to Annex 4 on RoO contains a list of products and the conditions which must be fulfilled for these products to be considered sufficiently worked or processed. The conditions indicate the change in tariff classification or the working or processing which non-originating materials used in the manufacture of a product must undergo before the product can be conferred originating status.

Under the AFTA RoO, a regional value content (RVC) of 40 per cent applies as a general rule to non-wholly produced products.[383] The test to be applied is that at least 40 per cent of a

[379] Tate (note 350 above) 400.
[380] Annex 4 on RoO, Art 5.
[381] Annex 4 on RoO, Art 3(1)(b).
[382] Ibid.
[383] Medalla & Balboa (note 274 above) 1.

product's content must originate from an ASEAN Member State.[384] The AFTA RoO incorporates the sufficiently worked or processed criteria. In this regard, the AFTA RoO require that the total value of raw materials or inputs originating from non-ASEAN countries or of undetermined origin used in the manufacture of a good does not exceed 60 per cent of the FOB value of a product and that the final process of manufacture occurs within the territory of the exporting Member State.[385]

On the other hand, the Mercosur RoO apply the CTC criteria for determining the origin of products manufactured in the Mercosur territory with materials not 'native' to Mercosur State Parties.[386] In some cases, the CTC criteria is used in combination with the RVC rule, requiring a 60 per cent value addition to confer originating status.[387]

It is thus evident that, of the three FTAs under comparison, the TFTA applies a relaxed rule in determining the origin of products manufactured with non-originating material. A comparison of RoO regimes in RTAs across the world revealed that no RTAs in the world permits up to a maximum of 70 per cent non-originating material, with the average percentage of imported material allowed ranging between 40-60 per cent.[388]

4.5.3 Processes not conferring originating status

Processes or operations carried out in the territory of a State Party which result in a product acquiring the final form in which it will be marketed do not confer originating status when such processes or operations consists only of assembling, packaging, marking and or mere dilution that does not enable the product to be considered 'native'.[389] Similarly, under Annex 4 on RoO, processes or operations such as mere packaging, simple mixing of products where one or more of the products do not meet the criteria for originating status, affixing labels, assembly of parts etc. are all insufficient to confer originating status on non-originating products.[390] Under the AFTA RoO, where Member States treat products separately from their packaging

[384] Komuro (note 355 above) 718.
[385] AFTA-CEPT RoO, Rule 3(a)(iii).
[386] Mercosur RoO, Article 3(c).
[387] Ibid. *See also* S Laird 'Mercosur: Objectives and Achievements.' June 1997 Paper prepared for the World Bank's Latin America and the Caribbean Region Country Department 1 MERCOSUR project available at http://documents.worldbank.org/curated/en/747401468774610014/pdf/multi0page.pdf accessed on the 19th of January 2018.
[388] Estevadeordal et al (note 309 above) 12-13.
[389] Mercosur RoO, Article 3(c).
[390] Annex 4 on RoO, Article 7

for the purposes of calculating customs duty, they may also determine the origin of such packaging.[391]

4.5.4 Cumulation

Annex 4 on RoO permits cumulation between member states.[392] In this regard, products originating in any Tripartite Member State and used in further manufacture in another Tripartite state are considered as originating from the state of further manufacture. The AFTA RoO also has the cumulative RoO but it is subject to the proviso that the aggregate ASEAN content of the final product is not less than 40 per cent.[393] Mercosur RoO contains no provision that deals with cumulation.

The above comparison of the TFTA, AFTA and Mercosur RoO reveals that RoO in the TFTA are more or less similar to the AFTA RoO. However, the TFTA RoO go even further than the ASEAN RoO by permitting the use of up to 70 per cent non-originating materials in the production of goods eligible for preferential tariffs.[394] This is a welcome development as it affords producers a wide range of options in choosing where to source the cheapest raw materials.

4.6 To what extent does Annex 4 on RoO hinder or promote regional trade?

Although RoO are primarily meant to prevent trade deflection, they could in themselves end up impeding intra-regional trade.[395] It is therefore important that, in order to maximize the benefits of RTAs, the formulation of RoO should not only focus on preventing trade deflection but also aim to facilitate trade.[396] Trade facilitation basically entails simplification, modernisation and harmonisation of import and export processes so as to reduce the cost and time needed to import and export goods.[397] It is of vital importance for developing countries, seeing that in most cases, trade costs are critically dependent on the efficiency and cost of entry and exit of goods in the trading country, as well as on the cost of transit of goods via neighbouring countries.[398] Developing countries have committed to the immediate

[391] AFTA-CEPT RoO, Rule 6.
[392] Annex 4 on RoO, Article 8.
[393] AFTA-CEPT RoO, Rule 4.
[394] Annex 4 on RoO, Article 5.
[395] Medalla & Balboa (note 274 above) 1.
[396] Ibid 2.
[397] 'Trade facilitation — Cutting "red tape" at the border' available at https://www.wto.org/english/tratop_e/tradfa_e/tradfa_introduction_e.htm accessed on 21 January 2018.
[398] 'Trade as a driver of prosperity' 2010 European Union Commission Staff Working Paper (SWP) available at http://trade.ec.europa.eu/doclib/docs/2010/november/tradoc_146940.pdf accessed on 22 January 2018.

implementation of the Trade Facilitation Agreement (TFA), which came into force on 22 February 2017.[399] The TFA introduces measures for the expeditious movement of goods across borders inspired by the best practises from around the world.[400] Simple, flexible, and easy to administer and comply with RoO are thus more likely to aid trade facilitation whilst complex and restrictive RoO can have the opposite effect.

Suominen and Estevadeordal examined RoO applied in more than 100 RTAs and found that restrictive and selective RoO have the effect of discouraging trade flows.[401] A report by Bjuggren and Lundström[402], reveals that restrictive RoO have the potential to greatly reduce the ability of firms to integrate in global value chains (GVC).[403] Flatters and Kirk argue that restrictive RoO deprive producers of access to inputs or intermediate products from low cost international sources and as such, can potentially increase the cost of producing products to be sold in the PTA.[404] In this respect, Naumann is of the view that the stricter RoO become, the more onerous compliance becomes, especially for developing countries due to poor infrastructure or a less developed domestic production capability.[405] Gretton and Jali argue that the economic impact of RoO is dependent on the restrictiveness of the rules and 'on the extent to which the external tariff regimes of the member countries differ.'[406] They argue that when RoO are highly restrictive, they erode the gains attained from reduced tariffs and therefore 'the

[399] Trade Facilitation Agreement available at https://www.wto.org/english/docs_e/legal_e/tfa-nov14_e.htm accessed on 26 January 2018.
[400] 'Easing the flow of goods across borders: Trade Facilitation Agreement' available at https://www.wto.org/english/thewto_e/20y_e/wto_tradefacilitation_e.pdf accessed on 26 January 2018.
[401] K Suominen & E Estevadeordal 'Rules of Origin: A World Map and Trade Effects' 2004 Paper prepared for the Seventh Annual Conference on Global Economic Analysis: Trade, Poverty, and the Environment World Bank available at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.458.5781&rep=rep1&type=pdf.
[402] C Bjuggren & E Lundström 'The Impact of Rules of Origin on Trade – a Comparison of the EU's and the US's Rules for the Textile and Clothing Sector' 2012 https://www.kommers.se/Documents/dokumentarkiv/publikationer/2012/skriftserien/report-the-impact-of-rules-of-orgin-on-trade.pdf.
[403] The concept of a global value chain comprises 'the full range of activities that are required to bring a product from its conception, through its design, its sourced raw materials and intermediate inputs, its marketing, its distribution and its support to the final consumer.' For a detailed discussion on global value chains, see 'The Global Value Chain Initiative', available at https://globalvaluechains.org/concept-tools accessed on 25 January 2018.
[404] F Flatters & R Kirk 'Rules of Origin as tools of development? Some lessons from SADC.' May 2003. available at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.513.8240&rep=rep1&type=pdf accessed on 21 January 2018.
[405] E Naumann 'Rules of Origin under EPAs: Key Issues and New Directions' (2005) Tralac Working Paper no. 9, 1-28, 2 available at https://www.tralac.org/documents/publications/working-papers/wp-archive/754-wp092005-naumann-roo-under-epas-20060202/file.html accessed on 25 January 2018.
[406] P Gretton & J Gali 'The restrictiveness of rules of origin in preferential trade agreements' *Productivity Commission Canberra, Australia* Paper presented at the 34th Conference of Economists 2005 University of Melbourne 26 – 28 September, 3 available at http://www.pc.gov.au/research/supporting/restrictive-rules-of-origin/restrictive-rules-of-origin.pdf accessed on 28 August 2017.

less trade restricting RoO in a PTA are, the better the chances of realising significant welfare benefits.[407] It is therefore evident that complex and restrictive RoO have the potential to impede trade. Thus, it is important that, in order to promote intra-regional trade and economic integration, the TFTA RoO should be formulated in such a manner that they facilitate rather than become an obstacle to intra-regional trade.

Notably, the text of Annex 4 on RoO indicates that the RoO have been formulated in such a manner that they promote rather than hinder intra-regional trade. Some reasons could be proffered to substantiate the argument. Firstly, Annex 4 on RoO applies the across-the-board percentage value basis for determining origin which is applied in the COMESA and EAC RECs rather than the product specific approach employed in SADC. Experience has shown that the product specific approach to RoO the leads to complex and restrictive RoO which in turn impede regional trade.[408] The across the board approach has been successful in the COMESA and EAC RECs and was recommended by the private sector during a Tripartite private sector consultative meeting on RoO, held in Kampala, Uganda in July 2010.

Secondly, Annex 4 on RoO applies a 30 per cent domestic content rule and a 70 per cent non-originating content rule based on the ex-works price.[409] Most RTAs apply a domestic content rule of usually between 40-60 per cent whilst the average percentage value of non-originating materials that can be used is a maximum of 60 per cent. By applying a low domestic content rule of 30 per cent and allowing the use of up to 70 per cent non-originating material in the production of goods eligible for tariff preferences, Annex 4 on RoO affords producers a wide range of options from which to source cheap raw materials. Allowing producers to access raw materials or intermediate products from low cost international sources through relaxed RoO is vital for the generation of economic activity and facilitating development.[410] This is particularly true for developing countries, where, given the abundance of cheap labour, simple manufacturing operations that provide little value addition can create important job opportunities.[411]

[407] Ibid.
[408] A typical example is the NAFTA RoO which apply product-by-product rules in accordance with General Note 12(t) of the Harmonized Tariff Schedule of the United States. Caroline Freund of the Peterson Institute for International Economics bemoaned the complexity of NAFTA RoO, arguing that they impose substantial compliance costs on small businesses. See Dean Pinkert 'The NAFTA Rules of Origin Revisited' available at http://www.industryweek.com/economy/nafta-rules-origin-revisited accessed on 6 February 2018.
[409] Annex 4 on RoO, Article 5(1).
[410] 'Trade as a driver of prosperity' (note 398 above)
[411] Ibid.

Lastly, Annex 4 on RoO implements the STR, which is as a result of private sector participation during negotiations of the TFTA RoO. As already discussed above, the STR is consistent with Article VIII of GATT as well as certain provisions of the Revised Kyoto Convention, which suggest the development, and implementation of simplified trade procedures for eligible small-scale traders.[412]

4.7 Conclusion

Notably, compared to the Mercosur and ASEAN, Annex 4 on RoO reveals a successful attempt at harmonisation of the COMESA, SADC and EAC RoO. The RoO have been formulated in such a way that they are as trade facilitating as possible. In this regard, the RoO in Annex 4 on RoO are simple, easy to administer and comply with. By including private sector participation in the negotiations of the TFTA RoO, the drafters of the RoO have been able to cater for the needs of small scale cross-border traders through the STR programme.

The RoO in Annex 4 are similar in most respects to the AFTA RoO, although the TFTA RoO have opened up trade further by permitting the use of up to 70 per cent non-originating material in the manufacture of products eligible for tariff preferences. Annex 4 on RoO has therefore been formulated to promote rather than hinder intra-regional trade and economic integration.

[412] COMESA Simplified Trade Regime. Available at http://www.comesa.int/wpcontent/uploads/2017/09/COMESA-Simplified-Trade-Regime-STR_email.pdf. Accessed on the 20th of January 2018.

CHAPTER 5

FINDINGS, RECOMMENDATIONS AND CONCLUSION

5.1 Introduction

African countries, along with the rest of the world, have for quite some time been pursuing regional economic integration at various stages of integration. The TFTA, together with the Continental Free Trade Area (CFTA) are Africa's latest regional integration pursuits, with negotiations for the CFTA being launched within a few days of the launch of the TFTA.[413]Amidst the political and economic negotiations, a topical area that sought clarification was the operation of RoO. The preceding chapters alluded that the TFTA aims to boost intra-African regional trade and economic integration through the harmonisation of the RoO that apply in the RECs making up the TFTA. In this regard, an appropriate RoO regime is critical to the liberalisation of trade in goods to avoid restrictive intra-regional trade and it plays a critical role in the facilitation of trade between the countries in the TFTA.[414]

At the outset, the main research question this thesis sought to answer concerned the extent to which the RoO the TFTA hinder or promote regional trade and economic integration. This final chapter discusses the findings of this thesis, particularly the extent to which RoO in the TFTA hinder or promote intra-regional trade and economic integration and proffers recommendations to policy makers involved in the design of the RoO regime that will apply in the tripartite territory.

5.2 Findings

The chapters identified the various challenges to regional integration that exist in Africa. More pertinent to the focus area of this thesis is overlapping membership to the various RECs in Africa and the multiplicity of RoO regimes. As this thesis revealed, many authors have highlighted the negative effect of overlapping membership to various RECs. Aptly termed the "spaghetti bowl" phenomenon by Bhagwati, overlapping membership to different RECs has

[413] 'African Integration: Facing up to Emerging Challenges' International Centre for Trade and Sustainable Development (ICTSD) 2016 available at https://www.tralac.org/images/docs/11045/african-integration-facing-up-to-emerging-challenges-ictsd-december-2016.pdf accessed on 24 February 2017
[414] Naumann, (note 25 above) 2.

been blamed on the proliferation of bilateral and regional trade agreements.[415] It has also been argued that multiple bilateral and regional trade agreements have the effect of undermining the GATT/WTO goal of non-discriminatory international trade through the formulation of RoO that discriminate across products and countries.[416]

An important finding of this thesis is that overlapping membership to different RTAs leads to high transaction costs and poses serious difficulties in the country's ability to comply with the multiple RoO regimes.[417] This contention is borne out of the fact that when a country belongs to more than one RTA, it is expected to apply the RoO regimes applicable in the respective RTAs. Where there is a divergence in the RoO regimes applicable in the respective RTAs, this increases the complexity of the customs clearance procedure and the administrative oversight required to keep track of origin documentation and procedures.[418] Thus by employing a uniform RoO regime in the COMESA-SADC-EAC tripartite territory, the TFTA to some extent addresses this problematic consequence of overlapping membership in different RTAs. Member states will apply a similar RoO regime across the TFTA territory thus improving transparency, eliminating inconsistencies, and reducing complexity of customs procedures.

A further finding of this thesis is that the COMESA and EAC RoO are in most respects similar, whilst the SADC RoO are different and largely mirror those of the EU trade agreements.[419] The COMESA and EAC RoO apply the across-the-board approach to determining origin. This approach has been largely successful in these RECs and drawing from that success, the private sector has recommended the application of the across-the-board approach in the TFTA RoO.[420] The across-the-board approach to determining origin contrasts sharply with the product and sector specific approach applied in SADC. The product and sector specific approach applied in SADC has been criticised as complex and highly restrictive.[421] It is accepted in this thesis that indeed, SADC RoO are complex and restrictive. Complex RoO impose administrative burdens on customs authorities by requiring a more careful identification of which rule applies and what is the correct tariff classification. Restrictive RoO limit the input pool by placing

[415] Gathii (note 255 above) 657.
[416] Panagariya (note 256 above) 328.
[417] Chapter 2, page 41.
[418] A Krueger 'Problems with Overlapping Free Trade Areas' in Takatoshi & Krueger (eds) *Regionalism versus Multilateral Trade Arrangements* Chicago: Univ. of Chicago Press, (1997) 9, 18. For a more detailed discussion on RoO divergence, *see* Estevadeordal et al (note 309 above) 33-39.
[419] Chapter 2, pages 46-47.
[420] Naumann (note 284 above) 7.
[421] P Brenton et al (note 52 above) 20. See also Gretton and Jali (note 406 above) 7, for the view that sector-specific RoO are 'commonly more stringent that rules of general application' particularly for 'so called "sensitive" sectors' as their primary purpose is to protect these sectors from competition.

restrictions on the use of non-originating materials, creating distortive effects on regional trade. Bearing in mind the principles governing the application of RoO in the TFTA[422], it is thus hardly surprising that there has been a reluctance to adopt a product and sector specific approach in the formulation of the TFTA RoO.

This thesis also found that the TFTA RoO affords producers a wide range of options in choosing where to source raw materials in the manufacture of goods. This is achieved by permitting the use of up to 70 per cent non-originating material in the manufacture of products eligible for tariff preferences.[423] In this regard, the TFTA RoO go a step further than most FTAs whose average range of permissible non-originating material is between 40-60 per cent.[424] It is important to note that the application of such a relaxed rule in determining the origin of non-wholly obtained or produced goods will be highly beneficial to producers in the tripartite territory. It will allow producers to benefit from the varying costs of raw materials in different locations across the world and thus be able to source the cheapest raw materials possible. This will in turn generate economic activity in the beneficiary countries leading to the facilitation of development.[425]

Yet another finding of this thesis is that the TFTA RoO has been formulated in such a way that it is as trade facilitating as possible. This is evidenced by the utilization of the across-the-board approach to determining origin, the utilization of a 70 per cent non-originating content rule and the simplification of customs clearance procedures and reduction of trading the costs for small scale cross border traders through the STR programme. The first two have already been discussed above.[426] The third, the STR programme, aims at simplifying customs clearance procedures and reducing the costs of trading for small scale cross border traders. This is in line with Article VIII of GATT and certain provisions of the Revised Kyoto Convention for the Simplification and Harmonization of Customs Procedures.[427]

[422] Annex 4 on RoO, Article 2.
[423] Annex 4 on RoO, Article 5.
[424] For example, the AFTA and MERCOSUR RoO permit up to a maximum of 60% non-originating material.
[425] 'Trade as a driver of prosperity'. (note 398 above)
[426] Page 69, para 3; page 70, para 2.
[427] Revised Kyoto Convention (note 105 above).

5.3 Recommendations

5.3.1 Encourage effective private and public-sector participation

The process of negotiating a free trade area requires the effective participation of the various players whose actions (or lack thereof) has the potential to influence the success or failure of the FTA. In Africa, negotiating trade agreements has largely been the domain of political actors who are state-centric and thus seek to protect sovereign interests rather than pursue genuine economically beneficial policies.[428] In this regard, it is important to note that it is not only the political actors whose views and contributions are critical in shaping the direction in which the negotiations should progress. Private and public-sector participation is no doubt critical to the success of any international trade agreement.

In the TFTA, there is no doubt that the private sector, through multinational companies and businesses, are the implementers and drivers of regional trade. It is these businesses, which bear the high costs of border delays and cumbersome customs clearance procedures. As such the thesis emphasises that the public sector are the final consumers of the products whose trade the tripartite agreement seeks to boost. It is therefore critical that both these sectors be afforded a central role in the trade negotiations that provides them a platform to voice their concerns and effectively participate in the regional integration agenda. The TFTA can draw some valuable lessons from the ASEAN, which acknowledges "the participation and collaboration of the private sector are crucial to the creation of a strong foundation for the establishment of the ASEAN Economic Community (AEC)."[429] In this regard, ASEAN appointed a Business Advisory Council (ASEAN-BAC) whose role is to lead the coordination of inputs from various business councils and entities in their engagements with different ASEAN sectoral groups. Rules of Procedure for Private Sector engagement were also devised and adopted to ensure more effective Public Private Sector engagement.[430]

5.3.2 Encourage SADC RoO amendment

Many trade experts have bemoaned the complexity and restrictiveness of SADC RoO. The negative effects of complex and restrictive RoO have been highlighted in this thesis. Given that those tasked with designing an appropriate RoO regime in the tripartite territory have sought

[428] Hailu (note 233 above) 325.
[429] 'Public Private Sector Engagement (PPE)' available at http://asean.org/asean-economic-community/sectoral-bodies-under-the-purview-of-aem/public-private-sector-engagement-ppe accessed on 14 February 2018.
[430] Ibid.

to harmonise the RoO in the constituent RECs of the TFTA, perhaps it is time to revisit and explore the possibility of amending SADC RoO with a view to adopting the COMESA and EAC model of RoO. It is hypothesized that once the SADC RoO are similar to the COMESA and EAC RoO, the process of implementation and application of the TFTA RoO to the tripartite territory will be easier and less complex given that Annex 4 on RoO is modelled around the COMESA and EAC RoO. Although this might not bode well with some SADC countries such as South Africa,[431] it is no doubt the only way to achieve uniformity of RoO in the TFTA.[432]

5.3.3 Expedite the completion of Appendix 1 to Annex 4 on RoO

Appendix 1 to Annex 4 on RoO is meant to contain a schedule of products whose originating status is determined in accordance with Article 5(2) of Annex 4 on RoO. However, Annex 4 on RoO does not contain this product list.[433] When the TFTA was launched in June 2015, only 25 per cent of the product list had been negotiated and agreed, rendering TFTA Agreement incomplete.[434] An undertaking was made at the Third Meeting of Tripartite Council of Ministers to finalise the product list within 12 months.[435] At the expiry of the 12 months the constituent RECs of the TFTA had reached a common position on the proportion of tariff lines to be liberalised. However, no consensus could be reached on a common tariff to be applied to sensitive products such as textiles, cement, wheat, sugar, and maize, products whose trade is considered critical to the growth of domestic industries.[436] At the time of writing this thesis, the product list is yet to be published despite the finalisation and adoption of the annexure on RoO at the ministerial meeting of 7 July 2017 in Kampala.[437] Against this background

[431] South Africa has been resolute in the use of tariffs to protect domestic industries. Given that SADC RoO are arguably protectionist, it is unlikely that South Africa would support an across-the-board approach to RoO which may offer little protection to its domestic industries. *See* 'South Africa to be 'resolute' in using tariffs to protect domestic industry' available at http://www.engineeringnews.co.za/article/south-africa-to-be-resolute-in-using-tariffs-to-protect-domestic-industry-2017-02-15 accessed on the 15th of February 2018.

[432] South Africa, as the largest economy in the TFTA has been strongly opposed to the across-the-board approach to RoO favoured by COMESA and EAC member states, preferring instead SADC's more tailored approach to RoO. *See* Naumann (note 267 above) 276.

[433] See note 315 above.

[434] Mabuza & Luke (note 11 above).

[435] Ibid.

[436] J Ayanzwa 'African Blocs Fail to Agree on Free Trade Area' (16 July 2016) available at http://allafrica.com/stories/201607160044.html accessed 7 February 2018; See also J Ayanzwa 'Discussions on rules of origin, tariffs hold up free trade pact' 25 December 2017 available at http://www.theeastafrican.co.ke/business/Discussions-on-rules-of-origin-tariffs-hold-up-free-trade-pact/2560-4241102-format-xhtml-5vx4n/index.html accessed on the 3 January 2018.

[437] The Tripartite Free Trade Area – a breakthrough in July 2017 as South Africa signs the Tripartite Agreement. Available at https://www.tralac.org/news/article/11860-the-tripartite-free-trade-area-a-breakthrough-in-july-2017-as-south-africa-signs-the-tripartite-agreement.html. Accessed on the 7th of January 2018.

therefore, it is highly recommended that the completion of work on the product list be expedited. This would assist the private sector and business stakeholders in knowing which products are eligible for which tariff preferences in the TFTA territory.

5.3.4 Provide guidelines on the application of conflicting RoO regimes in the COMESA, SADC and EAC RECs pending the coming into force of TFTA RoO.

Although the TFTA RoO harmonise the RoO regimes in the TFTA constituent RECs, the application and compliance with the TFTA RoO will undoubtedly not occur over a short period of time given that trade within the region has been and will continue to be conducted on the basis of the existing RoO regimes in the three RECs. In this regard, a transitional period will no doubt be beneficial to all involved as businesses position themselves to start implementing the TFTA RoO. Annex 4 on RoO contains no provision that addresses this scenario. As such, conflicting RoO regimes in the TFTA RECs have the potential to impede regional trade through the imposition of cumbersome administrative procedures and high compliance costs. It is therefore important that guidelines be issued that addresses how member states will deal with conflicting RoO regimes during this transitional period pending the coming into force of the TFTA RoO.

5.4 Conclusion

Regional integration remains the key strategy for the attainment of economic development in Africa. It remains one of the ways in which the continent can fulfil its economic potential and assume its rightful place in the world. However, the story of African integration efforts thus far does not make for a good reading. Various challenges and obstacles stand in the way of Africa's integration efforts. Political strife, a lack of adequate infrastructure, diseases and poverty, a lack of political will and multiple membership to various REC are among the main challenges faced by the continent. Furthermore, governments have tended to pursue political policies that do not translate to significant economic gains for the African population. It is therefore important that the policy makers driving integration initiatives such as the TFTA adopt an approach that confronts these challenges and implement policies that offers solutions to these problems.

FTAs no doubt remain the dominant form of regional integration initiatives in Africa. It is unsurprising therefore that the TFTA, together with the CFTA are Africa's latest integration

efforts. Against this background, the role played by preferential RoO in FTAs should not be undermined. RoO play a critical role in determining preferential market access. Whilst their main role is the prevention of trade deflection, RoO "can become the fine print that circumscribes the potential market integration of the [TFTA]."[438] This thesis emphasizes that the RoO in the TFTA must be designed in such a way that the TFTA members benefit from preferential market access and the RoO themselves are as trade facilitating as possible. Key to trade facilitation is a flexible input sourcing regime that promotes efficiency and competitiveness.

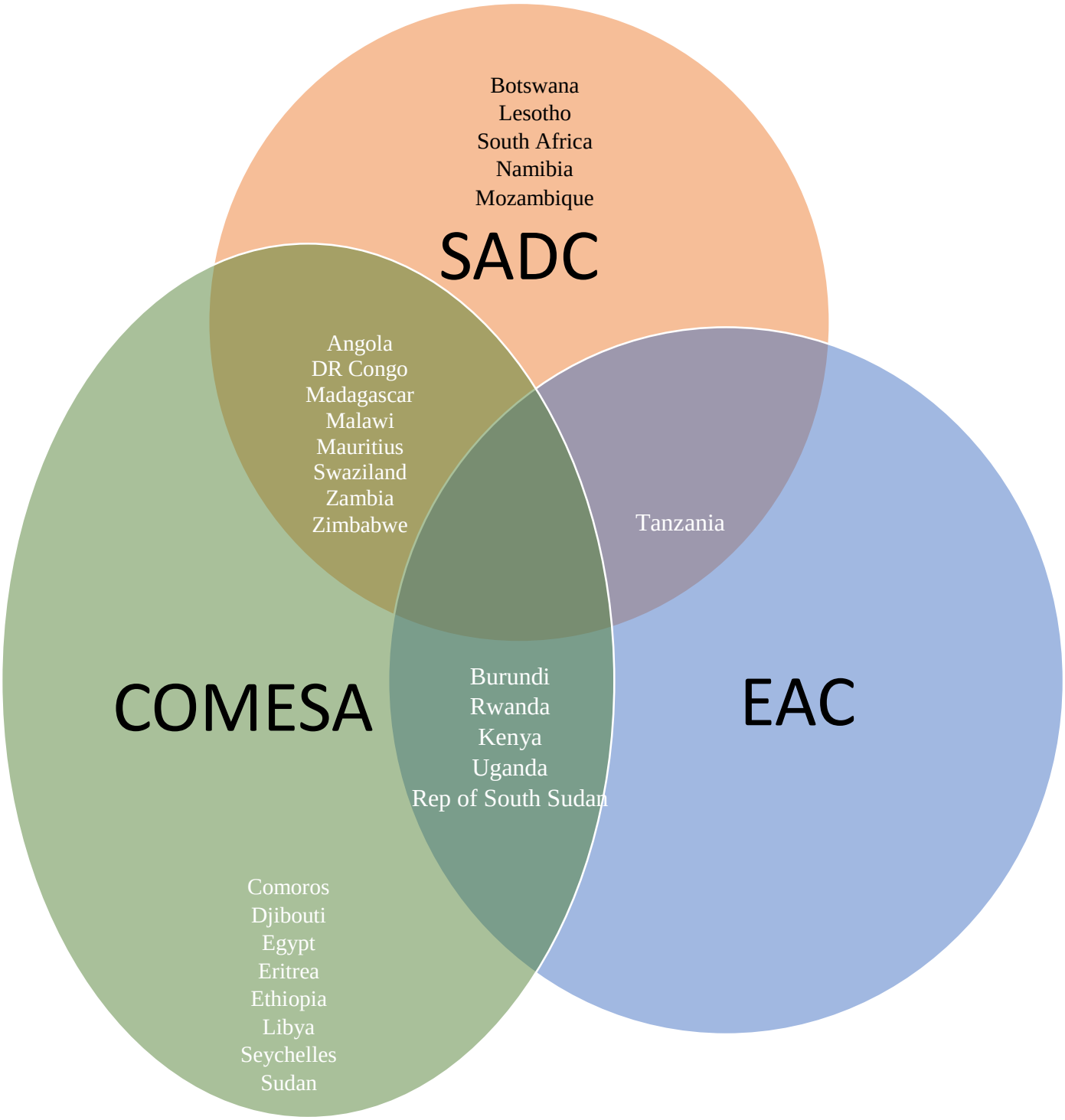
That RoO have been a controversial and contentious issue in the negotiations of the TFTA is evidenced by the long and drawn out nature of negotiations in the TFTA RoO. The application of divergent RoO regimes across the three RECs making up the TFTA is further testimony to the fact that it is difficult to agree on a uniform RoO regime given that each REC has different needs suited for its member countries. Whilst COMESA and the EAC prefer an across-the-board approach to RoO, SADC prefers a product or sector specific approach to RoO. SADC's preference for a product or sector specific approach to RoO allows for the protection of certain products and sectors but leads to restrictive intra-regional trade in the product or specific sectors. This thesis emphasizes that by seeking to apply a uniform RoO regime across all three RECs, the TFTA RoO bring simplicity, transparency, and flexibility to RoO in the Tripartite territory. Simplicity is achieved through the utilization of the across the board approach to RoO whilst flexibility is achieved through a relaxed input sourcing requirement for non-originating materials.

However, a lot more is suggested that would improve regional trade and economic integration in the TFTA. Firstly, the thesis suggests the revisiting of the SADC RoO which have been shown to be complex and restrictive. It is suggested that SADC RoO must be brought in line with the COMESA and EAC RoO to ensure a uniform RoO regime during the transitional period pending the coming into force of the TFTA RoO in the Tripartite territory and guidelines should be issued on how the RoO regimes will be applied. Secondly private and public-sector participation should be further encouraged, and, in this regard, important lessons can be drawn from the ASEAN community through its ASEAN Business Advisory Council. Lastly, it is suggested that there be an expedited completion of Appendix 1 to Annex 4 on RoO, which

[438] Hartzenberg (note 245 above) 7.

contains the schedule of products whose originating status is determined in accordance with Article 5(2) of Annex 4 on RoO. The importance of this appendix cannot be overemphasized as its completion will bring certainty as to what tariffs will apply to what products.

Appendix 1A



Overlapping Membership in the COMESA-SADC-EAC Tripartite Territory.

Source: Author's illustration.

Appendix 2A

TFTA Rules of Origin – Articles 2 – 8.

Article 2
Principles

The following principles shall govern the application of these Rules of Origin:
(a) The rules of origin shall be objective, simple and predictable;

(b) The rules of origin shall facilitate intra-regional trade and shall not create distortive or disruptive effects on regional trade; and

(c) The rules of origin shall be administered in a consistent, uniform, impartial, transparent and reasonable manner.

Article 3
The Concept of "Originating Products"

1. For the purpose of implementing the Agreement, the following products shall be considered as originating in the Tripartite Member States:

(a) products wholly obtained in the Tripartite Member States within the meaning of Article 4 of this Annex;

(b) products obtained in the Tripartite Member States incorporating materials which have not been wholly obtained there, provided that such materials have undergone sufficient working or processing in the member states within the meaning of Article 5 of this Annex.

2. For the purpose of implementing paragraph 1, the territories of the Tripartite Member States shall be considered as being one territory. Originating products made up of materials wholly obtained or sufficiently worked or processed in two or more Tripartite Member States shall be considered as products originating in the Tripartite Member States where the last working or processing took place, provided the working or processing carried out there goes beyond that referred to in Article 7 of this Annex.

Article 4
Wholly Obtained Products

1. The following shall be considered as wholly obtained in the Tripartite Member States

(a) minerals and other naturally occurring products extracted from their soil or from their seabed;

(b) vegetable products harvested therein;

(c) live animals born and raised therein;

(d) products from live animals raised therein;

(e) products obtained by hunting or fishing conducted there; products of aquaculture, including Mari culture, where the fish are born and raised therein

(f) products obtained from the sea, rivers or lakes within the Tripartite Member States by vessels of that Member State;

(g) products made aboard their factory ships exclusively from products referred to in subparagraph (f);

(h) used articles collected there fit only for the recovery of raw materials, including used tyres fit only for re-treading or for use as waste;

(i) waste and scrap resulting from manufacturing operations conducted therein; and

(j) products extracted from marine soil or subsoil outside their territorial waters provided that they have sole rights to work that soil or subsoil; and

(k) goods produced therein exclusively from the products specified in sub-paragraphs (a) to (j).

2. The terms "their vessels" and "their factory ships" in paragraph 1(f) and 1(g) shall apply only to vessels and factory ships which are registered or recorded in the official records of a Tripartite Member State.

Article 5
Origin Criteria -
Sufficiently Worked or Processed Products

1. For the purposes of this Annex, products which are not wholly obtained are considered to be sufficiently worked or processed in the Tripartite Member States when:
(a) the value of non-originating materials used in the production of the good does not exceed 70% of the ex-works price of the good,, or
(b) the value of the originating materials used in the production of the good is at least equal to 30% of the ex-works price of the good.

Notwithstanding paragraphs 1 above, for the purposes of this Annex, products which are not wholly obtained in a member state and contained in the list in Appendix I are considered to be sufficiently worked or processed only when the conditions set out in the list are fulfilled. Those conditions indicate, for all products covered by the list, the change of tariff classification or working or processing which must be carried out on non-originating materials used in manufacturing and apply only in relation to such materials.

3. The Tripartite Member States shall provide that all costs considered for the calculation of regional value content shall be recorded and maintained in conformity with the Generally Accepted Accounting Principles applicable in the territory of the Tripartite State where the good is produced.

4. The conditions referred to above indicate the working or processing which must be carried out on non-originating materials used in manufacturing and apply only in relation to such materials. Accordingly, it follows that if a product, which has acquired originating status by

fulfilling the conditions set out above is used in the manufacture of another product, the conditions applicable to the product in which it is incorporated do not apply to it, and no account shall be taken of the non-originating materials which may have been used in its manufacture.

Article 6
Value of Materials

1. For purposes of Article 5, the value of a material shall be:
(a) for a material imported by the producer of the good, the value, determined in accordance with the GATT Agreement on Customs Valuation adjusted in accordance with the provisions of Articles 8 and 15 of the Agreement on Customs Valuation;

(b) for a material acquired in the territory where the good is produced, the value, determined in accordance with the GATT Agreement on Customs Valuation in the same manner as for imported goods, with such reasonable modifications as may be required due to the absence of an importation; or

(c) for a material that is self-produced,

(i) all the expenses incurred in the production of the material, including general expenses, and

(ii) an amount for profit equivalent to the profit added in the normal course of trade.

2. For originating materials, the following expenses, where not included under paragraph 1, may be added to the value of the material:

(i) the costs of freight, insurance, packing, and all other costs incurred in transporting the material within a Tripartite State territory or between the territories of two or more Tripartite Member States to the location of the producer;

(ii) duties, taxes, and customs brokerage fees on the material paid in the territory of one or more of the member states, other than duties and taxes that are waived, refunded, refundable, or otherwise recoverable, including credit against duty or tax paid or payable; and

(iii) the cost of waste and spoilage resulting from the use of the material in the production of the good, less the value of renewable scrap or by-product.

3. For non-originating materials, the following expenses, where included under Article 5, may be deducted from the value of the material:

(a) the costs of freight, insurance, packing, and all other costs incurred in transporting the material to a Tripartite Member State or between the territories of two or more Tripartite Member States to the location of the producer;

(b) duties, taxes and customs brokerage fees on the material paid in the territory of one or more of the Tripartite Member States, other than duties and taxes that are waived, refunded, refundable, or otherwise recoverable, including credit against duty or tax paid or payable;

(c) the cost of waste and spoilage resulting from the use of the material in the production of the good, less the value of renewable scrap or by-product; and

(d) the cost of originating materials used in the production of the non-originating material in the territory of a Tripartite Member State.

Article 7
Insufficient Working or Processing Operations

1. Without prejudice to paragraph 2 below, the following operations shall be considered as insufficient working or processing to confer the status of originating products, whether or not the requirements of Articles 5 and 6 are satisfied:

(a) operations to ensure the preservation of products in good condition during transport and storage (ventilation, spreading out, drying, chilling, placing in salt, sulphur dioxide or other aqueous solutions, removal of damaged parts, and like operations);

(b) Simple operations consisting of removal of dust, sifting or screening, sorting, classifying, matching (including the making-up of sets of articles), washing, painting, cutting up;

(c) changes of packaging and breaking up and assembly of packages and simple placing in bottles, flasks, bags, cases, boxes, fixing on cards or boards, etc., and all other simple packaging operations;

(d) Affixing marks, labels and other like distinguishing signs on products or their packaging;

(e) simple mixing of products, whether or not of different kinds, where one or more components of the mixtures do not meet the conditions laid down in this Annex to enable them to be considered as originating in a member state;

(f) simple assembly of parts to constitute a complete product;

(g) a combination of two or more operations specified in subparagraphs a) to f); and

(h) slaughter of animals.

2. All the operations carried out in either the member states on a given product shall be considered together when determining whether the working or processing undergone by that product is to be regarded as insufficient within the meaning of paragraph 1.

Article 8
Cumulation of Origin

1. Products originating in any Tripartite Member State and used in further manufacture in another Tripartite Member State shall be treated as if they originated in the Tripartite Member State of further manufacture.

2. Working or processing carried out in any of the Tripartite Member States shall be considered as having been carried out in the Tripartite Member States when the materials undergo further working or processing in a Tripartite Member State

3. Notwithstanding paragraph 1 and 2, products further manufactured in a Tripartite Member State shall be considered as originating in a Tripartite Member State where the last manufacturing process provided that the last working or processing operations exceeds those operations under article 7 of this Annex

* Excerpt of Articles 2 – 8 of Annex 4 on RoO.
Source: TFTA Annex 4 on RoO (note 306 above).

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