

**SADC/EAC/COMESA and EPA Negotiations: Trade Policy Options to
Overcome the Problem of Multiple Memberships
Political, Legal and Economic Perspective**

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Executive Summary

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1. Objectives and Main Findings of the Analysis

There is overlap of membership among Regional Economic Communities (RECs) in the Southern and Eastern African region to an extent unparalleled anywhere else in the world. The main objective of the study is to address the question how to deal with this overlap from the point of view of the RECs and their members. The analysis looks into the history of the RECs in the region, addresses the political, legal, and economic consequences of multiplicity and discusses three viable options and their implications for the ongoing processes of economic and political integration in the region.

RECs with overlapping membership considered here are SACU, SADC, COMESA, and the EAC. All four are either already a Customs Union (SACU, EAC) or intend to become one in the near future. But membership in more than one Customs Union (CU) is technically impossible. Moreover, multiplicity has a bearing on the costs and benefits of integration, and more fundamentally, it has implications for the processes of deeper integration which parts of the region have embarked on. The ongoing negotiations with the European Union (EU) on Economic Partnership Agreements (EPA) as successors for the former Lomé Preferences can serve as a catalyst in this critical phase of decision-making. But the EPA negotiations should not determine the future of regional integration. They are currently moving into a critical phase but the key decisions are still open.

The following three options are all viable in view of the need to deal with multiple memberships in the region. But they imply certain trade-offs which are discussed in more detail below and which are analysed at length in the main body of the study:

- **Option 1 – “Status Quo Option” and larger integration project:** SACU and EAC remain fast-tracking groups and only comprise of their current members, while SADC and COMESA remain FTAs for the time being with a view to form a larger Eastern and Southern African trade zone at a later stage.
- **Option 2 – “Variable Geometry Option” or “SACU+ and EAC+ Option”:** Enlarged SACU and EAC become fully functioning (not just partial) CUs by 2008, and countries not participating in the CUs remain members of the SADC and/or COMESA FTAs.

- **Option 3 – “Leap Forward Option:** SADC and COMESA become CUs by 2010/2008 and will merge with the current SACU and EAC respectively. All countries take a decision regarding their membership in either the SADC or the COMESA CU.

The choices are essentially between deeper and faster economic integration on the basis of the existing CUs acting as fast-track RECs on the one hand, and a larger but more shallow integration project for the region as a whole on the other. Fully functioning CUs can act as major facilitators of trade expansion but it is very difficult and time-consuming to establish a common external tariff, to set up a customs pool and agree on a common trade policy, notably for countries with a different level of industrialization and with different additional trade arrangements.

The EPA negotiations should provide an important stimulus to the deepening of integration in all three options. A desirable result would be, for instance, that financial mechanisms are created to support initiatives to build capacity for the joint collection of revenue from tariffs and the distribution of pooled revenue. Moreover, the countries of the region should be able to count on the experience of the EU in addressing structural and regional weaknesses that may arise in the process of deeper integration.

The decision on multiple memberships must be an informed one with a view to CUs and EPA negotiations. Member states will have to strike the balance individually and collectively of the costs and benefits of the respective arrangements. They should be aware, however, that the challenge of coordinated tariff reduction is just one of the many others on the path to deeper integration in the region such as non-tariff barriers to trade, discriminatory taxes, high transport costs and lack of access to financial services, to name just a few. Therefore, solely concentrating on tariffs and revenue foregone would mean to miss out on some of the more fundamental aspects of regional integration.

2. The History of Multiplicity

The creation of the different Regional Integration Initiatives (RIIs) of the region date back to colonial initiatives in some cases, was informed by the first wave of regional integration based on the model of the European Economic Communities or reflected a political and security motive in the struggle against the apartheid regime in South Africa. The political agenda

tended to overrule the trade aspects. A number of countries developed a culture of signing agreements or protocols without fully internalizing the contents and the impact on the economy. This resulted in the present situation of multiplicity and overlapping memberships. As a consequence, most of the RIIs in the region were still fragile coordinating bodies rather than supranational institutions. And membership as well as integration processes accordingly appeared to be reversible. In the past, RIIs were known for solemn declarations and lengthy protocols, but not so much for firm implementation of agreed policies and proven economic impact on the ground.

The end of the apartheid regime in South Africa coincided with the second, more trade-oriented wave of regional integration in Eastern and Southern Africa. The various RIIs have moved on to become Free Trade Areas (FTAs). They all embrace trade integration as the necessary intermediate step towards the ultimate objective to become an African political and economic union. Meanwhile, the RIIs have all turned into Regional Economic Communities (RECs), while non-trade matters stayed prominently on the agenda in some cases as well. As from the year 2000, declarations and later political commitments were made to turn into Customs Unions (CUs) before long. This, however, marked a new era of regional integration as the establishment of a CU is no longer compatible with multiple memberships.

3. Multiple Memberships from a Legal Point of View

From a legal as well as from a technical point of view a country cannot apply two different common external tariffs and therefore cannot be a member of more than one CU. Hence, the pattern of overlapping membership becomes impossible to maintain, unless the current (SACU and EAC) and future (COMESA and SADC) Customs Unions of the region adopt identical common external tariffs – or their members decide to go for membership in only one of them. The African Economic Community (AEC) which is envisaged to be created by 2028, has five RECs as designated regional pillars, with SADC and COMESA being among them.

With regard to taking the next step towards establishing a CU, the decision on where to deepen trade integration needs to be taken urgently by those countries which are currently a member of more than one REC. Member states will have to decide which RECs will serve their interests best. As soon as COMESA and SADC become CUs, countries with multiple memberships will ultimately have to pull out of any other CU. What can be maintained is a

relationship of a FTA between the various CUs under conditions spelled out in more detail below. In this respect, the negotiations of EPAs with the EU can serve as a catalyst. The ongoing EPA negotiations are moving into a critical phase but the key decisions are still open, including the option to join a different EPA configuration.

As the legal analysis in the study points out, the current treaties and protocols of SADC, EAC and COMESA do not preclude members from maintaining prior trade arrangements or from entering into new ones. They do state, however, that any preferences granted by a member state to a third party or by two or more member states have to be extended to all other member states according to the most favoured nation principle. This suggests that countries with multiple memberships should not seek individual exemptions but rather cooperate in efforts to negotiate new arrangements between the RECs concerned. Free trade agreements between two regional blocs are a viable means to substitute for foregone trade preferences when a country leaves one arrangement in order to concentrate on another. But when it comes to the adoption of a common external tariff and common trade policies within a CU, countries with multiple memberships must make a decision. Besides, membership in different trade blocs tends to absorb much-needed manpower, institutional capacity and limited financial resources.

The current situation forces existing RECs in the region to some extent to adopt common positions vis-à-vis their negotiation partners, thus pushing them to behave as members of a CU without effectively being one. This creates tensions as it stretches the coordination and negotiation capacities of the RECs which are not yet equipped with the respective mandates nor the appropriate institutional capacities.

Whenever individual trade agreements are negotiated by any one member of a CU or a FTA, the whole group has to bear the costs of administering several trade regimes within the same REC. Generally this implies to maintain border controls and to enforce rules of origin to prevent preferential trade from entering the countries which are not party of the agreement. Other important questions that arise are related to the legal bodies and mechanisms that will need to be set up in each grouping and for each trade agreement such as a dispute settlement mechanism or a court. The legal basis and mandate of each such institution has to be clearly defined if there continues to be overlap.

4. Perspectives from the Private Sector

The economic part of the study looks at product market integration and investment. The analysis sets out to provide insights from the perspective of the private sector. For it is companies, not countries, that react to altering trade incentives and pick up the new opportunities for growth and development – or ignore them.

The economic analysis based on the different proposed tariff structures of the envisaged Customs Unions does not offer a definitive indication of the “best” strategy for any one country. Rather, the balance of the costs and benefits of any decision is likely to hinge on which REC is able to move beyond trade integration and address some of the other pressing issues related to creating a conducive environment for doing business in the region.

Consultations and surveys revealed that people in the business community largely view the current trade agreements as existing on paper only. Priorities named relate more to overcoming customs procedures, red tape and corruption, policy uncertainty, discriminatory taxes, bans and non-tariff barriers to trade, divergence in standards and requirements, non or late payments, lack of financial services, and high transport costs, especially in landlocked countries. It should be noted that most of these constraints and impediments can be addressed by measures that do not technically require the establishment of a CU but are currently on the agendas of the FTAs as well. However, if lack of political will and commitment are at the root of the problem, then a clear decision to move on to a CU and to deepen regional integration in only one REC may be the necessary step forward.

5. Drawing on Experience with Multiple Memberships Elsewhere

Experience from elsewhere in the world can be drawn upon to highlight the fact that – given the current predicament – a number of choices are left. Norway and Chile may serve as examples for “managed” or associate membership with RECs, and the “variable geometry” or the “different speeds of integration” in the EU and in the rest of the EU’s relations with the wider Europe provide further examples. A country’s national sovereignty in deciding about these key issues of regional integration and/or trade arrangements and partnerships is a genuine right. But it should be clear that this comes along with certain obligations and commitments that need to be defined.

The withdrawal from a particular REC that moves towards a CU must not translate into complete alienation. To maintain membership in the form of an FTA is one possibility. Associate membership comprising all but the trade integration agenda is another which could make the decision to leave one REC more easily acceptable. Associate members would for instance be freed of tariff reduction/liberalisation obligations, could attend meetings, but would not have voting rights on trade issues. And cooperation in a number of areas not related to trade – e.g. security matters, migration, management of shared resources etc. – could be maintained or even intensified. Economic criteria alone do not set the regional integration agenda although they are invariably an important element. Members willing to push for deeper integration in some issue areas should be free to do so, while others are free to abstain.

6. Three Viable Options and their Implications

With respect to trade policies, the tough decision ahead for countries with multiple memberships will ultimately be a political one. In any case, these decisions should be informed ones where all feasible options are clearly spelled out with their respective costs and benefits. Taking into account the ongoing EPA negotiations, the study highlights the following three options:

- **Option 1 – “Status Quo Option” and larger integration project:** SACU and EAC remain fast-tracking groups and only comprise of their current members, while SADC and COMESA remain FTAs for the time being with a view to form a larger Eastern and Southern African trade zone at a later stage.

Implications: COMESA and SADC remain FTAs, hence continue to enforce border controls including Rules of Origin (RoOs) among their members. At the same time they undertake to converge to common trade policies with the whole of Eastern and Southern Africa instead of further pursuing their trade agendas with the objective of becoming fully functioning CUs. This would be a new integration agenda which deals with a larger number of countries and consequently with a less ambitious but potentially still quite effective trade liberalization and facilitation policy, thus embracing the vision of Pan African integration. The current CUs (SACU and EAC) can serve as fast-tracking groups which set standards in various areas of economic integration but do not define later common policies. More effective integration

mechanisms would need to be formed, probably at the level of the African Union (AU). These mechanisms could embrace larger groupings and coordinate between the currently established RECs.

In terms of EPA negotiations, this option could be combined with an EPA configuration that negotiates as two groups. One would consist of the current SACU and basically concentrate on the revision of the Trade and Development Cooperation Agreement (TDCA) in favour of Botswana, Lesotho, Namibia and Swaziland (BLNS); and the other one would comprise all other countries irrespective of their current membership in COMESA, EAC and/or SADC, i.e. as had been suggested by the Eastern and Southern Africa (ESA) EPA configuration earlier in the process. The general framework of the agreements on RoOs and SPS/TBT measures etc. would be the same for all countries, but tariff phase-down schedules would be negotiated individually with the EU by countries and/or by those CUs that are in place by 2008, namely the EAC.

Trade-offs: This solution would come at the cost of deeper economic integration in SADC and within COMESA, whereby the latter would essentially slow down the more advanced and variable trade integration already achieved. The aim is a larger integration project for the region as a whole. The economic and political signals given to potential investors will be ambiguous if the trade agenda is not pursued firmly by SADC and COMESA as a whole any longer. In SADC, the move towards full implementation of the FTA may lose momentum if the objective to achieve the CU by 2010 is removed. Likewise, by pursuing this option, COMESA would also postpone its CU plans beyond 2008 in the interest of the larger integration project, thereby keeping the FTA open for a larger number of countries. As tariffs will continue to differ from country to country, RoOs will have to be enforced for some time to come. Each country not part of the EAC CU by 2008 will need to come up with its own tariff phase-down schedule and negotiate it individually with the EC which may not even be feasible within the timeframe left for the negotiations. Moreover, the EC may be reluctant to accept such an approach as it will seriously stretch its own negotiating capacities.

Recommendations for further assessments: While this option seems to be the easiest and potentially most realistic one, it is certainly neither consistent with SADC's envisaged integration process spelled out by the Regional Indicative Strategic Development Programme (RISDP) nor with COMESA's stated more ambitious objective to establish a CU by or before

2008. The economic and political consequences have to be clearly anticipated by both RECs and their member states. Trade liberalization would still be part but no longer the centrepiece of SADC integration, while COMESA would basically postpone the coordinated and ambitious move towards the CU for the sake of larger internal cohesiveness and of the larger regional integration project. The appeal of this option seems to lie in the fact that it reflects current realities with the caveat that the respective clear political decisions have not been taken as yet. If pursued deliberately, this could be the option which is most realistic in terms of how ready the larger region currently is for deeper trade integration. All countries should moreover consider the potential loss of bargaining power in EPA negotiations and the cost of administering various trade regimes in the region.

- **Option 2 – “Variable Geometry Option” or “SACU+ and EAC+ Option”:**
Enlarged SACU and EAC become fully functioning (not just partial) CUs by 2008, and countries not participating in the CUs remain members of the SADC and/or COMESA FTAs.

Implications: For Eastern Africa, this option would imply a consolidation of membership with the EAC setting the standards. Tanzania would most probably have to commit herself to a concentration on the region and the CET of the EAC would set the standard for other COMESA members to follow this track. For Southern Africa, if one or two SADC countries (Mozambique being the first candidate) decide to become a member of the current SACU, this would effectively imply to take over the SACU CET. These two groups could more easily negotiate and implement an EPA as the CUs would require them to adopt common policies and develop the respective negotiation machinery that FTAs commonly lack. Given the necessary consolidation of membership and the difficult choices to be made, the date of 2008 could still be reached. The other SADC member states would remain linked to the larger SACU via the SADC FTA due to reach full implementation by 2008, while the COMESA FTA would provide the fallback for those countries that opt not to follow the faster track of the EAC. FTA members could continue to have their individual preferential trade agreements with other countries and regional blocs, including between the two larger settings (COMESA and SADC) although this would continue to complicate the overlap problem.

Trade-offs: The main trade-off is that the costly administration of RoO will still be necessary, thereby diminishing the benefits of integration. In addition, most decision making will be

further postponed. Deeper integration among the remaining members of SADC and COMESA risks to be effectively blocked. In particular, the next stages of economic integration such as a common market are likely to be delayed. In addition, the economic gains of an FTA alone are limited as it may not trigger additional investment or growth. For EPA negotiations, this would further complicate the current EPA configurations and split both SADC and COMESA into two EPAs in terms of market access. For SADC, this would be one for the SACU+ group and one for the non-SACU SADC EPA configuration. The latter would negotiate different phase-outs with the EU but apply all other parts of the agreement as the SACU+ group. Similarly, in Eastern Africa the current ESA would split into two EPAs, one for the EAC+ CU and one for the remaining members of COMESA. It is not clear, however, if the EU were to accept such a proliferation of EPA groupings.

Recommendations for further assessments: For the Southern African region, the costs and benefits to join SACU under the current tariff regime will need to be assessed by each country very thoroughly. Moreover, the possibility to extend the SACU revenue sharing mechanism in its current or revised form to additional members needs to be looked into by the current SACU members and the potential accession countries. Those countries which decide to join both SACU and converge to the TDCA should negotiate for additional technical and financial support by the EU as they will open up much faster than required by either the WTO or the Cotonou Agreement. In Eastern Africa, given the current trade flows and operational EAC CET, Tanzania should assess the costs and benefits of committing herself fully to the integration process within the EAC. The EAC should consider the implications of joining COMESA as a bloc. The remaining COMESA members will have to assess the costs and benefits of joining the fast-track EAC very thoroughly. Again, the EPA negotiations could be used to achieve additional technical and financial support for those willing to pursue a faster and deeper trade integration process.

All countries which remain outside the fast-track groups but with the option to join later need to be clear about one thing: The later they join the more internal regulations and external agreements (the *acquis communautaire*) will already be in place without the latecomers having had a part or say in the negotiations. Therefore, the decision not to join should not postpone a later accession but rather be informed by a clear estimate of the benefits to maintain a purely national trade policy agenda.

- **Option 3 – “Leap Forward Option”:** SADC and COMESA become CUs by 2010/2008 and will merge with the current SACU and EAC respectively. All countries take a decision regarding their membership in either the SADC or COMESA CU.

Implications: Rather than concentrating mainly on the fast-track groups, all SADC and COMESA states who are willing and ready could aim at forming functioning CUs as soon as seems feasible but in 2008 or 2010 at the latest. In Southern Africa, the members of the SADC CU will agree on a CET which will be negotiated between SACU and non-SACU member states and which will reflect everybody’s interests. In Eastern Africa, COMESA and the EAC will also agree on a single CET. Common trade policies vis-à-vis third parties will be adopted by the whole group and a mechanism to pool and to redistribute revenue from tariffs will need to be established. Internal RoO will become unnecessary unless for cases where pre-existing preferential trade agreements by one or more members of the CU appear unacceptable to the rest of the union. In those cases – with the TDCA being a likely one – different tariffs and therefore RoO will need to be enforced with that trading partner. The bargaining power of the two foreseen regional pillars of the AU will be enhanced. Their credibility as RECs will be strengthened. EPA negotiations will be straightforward as the configurations will be clear and a CET established in time for a collective tariff phase-down scenario vis-à-vis the EU. For SADC, an extension of the current WTO waiver may be needed to cater for the two years between the expected implementation date of the EPA and the establishment of the CU.

Trade-offs: It will not be an easy task – but not an impossible one either – for SACU and non-SACU member states as well as for EAC and COMESA members to agree on a CET given the divergence of current tariff regimes. Although apparently easier in Eastern Africa, the task is still enormous given the different levels of development and trade preferences. In view of the EPA negotiations in Southern Africa, the TDCA will still prevail, de facto requiring the rest of the SADC CU to either accept the same terms (as the BLNS) and to converge to South Africa’s tariff phase-out agreed on with the EU, or to administer differential offers vis-à-vis the EU. Again, the latter would collide with the EU’s reluctance to stretch its own negotiation capacities. Given that the EU is the most important trading partner of the region and taking into account the different timelines of the agreements it is obvious that the different speed in integration would undermine any future SADC CU. The TDCA is expected to reach full implementation of the FTA in 2012, while the transition period for the

EPAs could expand to up to 20 years from the date of implementation, i.e. until 2028. This “variable geometry” would need to benefit from targeted support by the EU acting on the following principle: “Whoever integrates faster and opens up more quickly should be supported.”

Recommendations for further assessments: All countries with double membership in COMESA and SADC need to assess the costs and benefits of which road towards a CU to follow, and all countries have to define their positions vis-à-vis any suggested CET. The problems of merging the existing fast-track groups with the larger REC are by and large comparable. Costs and benefits of establishing a CU should, however, always be seen in the light of medium term gains of deeper integration and not only against short-term considerations of potential revenue implications. In Southern Africa, in the interest of regional integration, an early convergence date for the CET and common policies including vis-à-vis the EU would need to be considered for the SADC CU. If this were decided on in principle, a mechanism to compensate those countries ready to reciprocate the EU much faster than required in other EPAs (and by WTO standards) would need to be put in place. For the BLNS, this was planned but never operationalised. Moreover, a mechanism to compensate SADC for the need to enforce RoO in order to administer different tariffs in its territory due to the TDCA could be discussed and negotiated for. Technical and financial assistance should be offered to those countries ready to join the SADC CU at an early stage (i.e. between 2008 and 2010) in order to ensure that revenue collection and the enforcement of common trade policies are administered properly. In Eastern Africa, the situation is not complicated by an existing TDCA - provided that Tanzania pulls out of the SADC EPA configuration.

7. Conclusions and Way Forward

The successful move towards a fully functioning CU by as many countries as possible is in and by itself a challenging task for the region and includes negotiation and management of coordinated tariff phase-outs, establishment of a CET as well as the creation and implementation of revenue collection mechanisms. All this depends on the necessary institutional and technical capacities as well as upon mutual trust in order to work effectively and not exist on paper only. Important decisions at the highest political levels to this effect have been taken in the recent past in all four RECs. However, the move towards deeper integration is threatened and contradicted by the persistence of multiple memberships in the

region. Many of the very practical impediments to economic integration have not even been tackled yet, chief among them the proliferation of new non-tariff barriers to trade. Choosing the “right” REC should not obscure where some of the more important constraints really are.

Discussions among stakeholders and policy makers in the region should now urgently lead to some clear decision making. The principle options have been spelled out above. Even if some countries choose to remain a member of more than one REC, they need to take a decision regarding their participation in only one Customs Union. Moreover, it will be far easier to move on to deeper integration, including going beyond product market integration and to the creation of viable financial mechanisms to support the potential losers of an integration process.

In consequence, for the integration process to succeed, two more far-reaching aspects should be kept in mind, while focusing on deeper integration: First, the introduction of a development financing mechanism. And second, the free movement of capital and labour which are the next steps for the region in order to reap the full economic and social benefits of the integration processes.

The EU has gained valuable experience in how to raise and administer common funds that are spent to address the structural and regional weaknesses in all member states - notably in those at the periphery - in order to overcome the supply-side constraints and infrastructural bottlenecks in the process of integration. As indicated in the discussion of the options, this experience should be brought to bear in the framework of the non-trade aspects of the EPAs.