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RESEARCH SERIES No. 87

# PROSPECTS AND CHALLENGES IN THE FORMATION OF THE COMESA-EAC AND SADC TRIPARTITE FREE TRADE AREA



By:

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NOVEMBER 2011

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## ABSTRACT

The stalemate of the multilateral trade system in addressing key trade and trade related issues over the years have mounted pressure on World Trade Organisation (WTO) member states to search for alternative solutions. This pressure has directed countries' attention and efforts towards bilateral and regional trade arrangements as an immediate intervention to resolve some of the stagnated issues at the multilateral level. Despite the pressure and the hurry for regional trade liberalization, concluding a comprehensive agreement both at bilateral, regional and multilateral negotiations remains complex to achieve given the existence of varying economic divergences among countries. With regard to the proposed tripartite Free Trade Area (T-FTA) among COMESA-EAC and SADC member states, it is one among the many regional economic communities (RECs) that have emerged over the years. This paper tries to examine some of the complexities and inter-linkages in reaching a tripartite free trade agreement in services and goods, as well as infrastructure development.

The proposed tripartite FTA in both goods and services will carefully have to deal with the task posed by, inter alia, the heterogeneity in the rules of origin, non-tariff barriers, trade facilitation, technical regulations, infrastructural shortfalls, financing, standards and conformity assessment procedures. In the services sector, the task involves dealing with the heterogeneity of services, ubiquity of market failures associated with service transactions and regulatory intensity in order to reach a comprehensive agreement and host of national policy objectives of member states such as regulations, universal access and preservation of cultural diversity. These are coupled with the challenges of slow progress of integration in some RECs, financing and member states defence interests. Likewise, there is a need to ensure that the agreement meets the requirement contained in the GATT Art XXIV and GATS V and also in harmony with other individual bloc FTAs.

The emerging policy issues and way forward would require, inter alia, the pursuance of a deeper integration framework taking into consideration the economic development needs of other members (especially LDCs requiring greater flexibilities for policy interventions). Establish a resource pool under which the tripartite members can mobilize sustainable financing to cover negotiations, finance infrastructure and industrial development, implementation of the agreement and compensation for members with resource and capacity constraints. The goods and services negotiations committee would need to examine specific barriers in the respective sectors, including domestic regulations in individual member states on services and goods trade, to cultivate deeper understanding of the sectors and possible measures that would be applied. Selecting appropriate services subsectors to be coherently negotiated with goods agreement is necessary given that technological advancement is faster than political decisions. The T-FTA should be built on a rule based system, as well as ensure harmonization of technical regulations, standards and conformity assessment procedures, the rules of origin should be objective, simple and predictable to ensure the promotion and facilitation of regional integration.

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## 1.0 BACKGROUND AND MOTIVATION

In pursuit of the broader objective of the African Union, and the earlier vision of the 1980 Lagos Plan of Action, and the 1994 Abuja Treaty which aimed at establishing an African Economic Community by 2028.<sup>1</sup> There is now growing consensus among policy makers and practitioners that rationalising regional economic communities could complement the course towards achieving the underlying objectives. Trade is now seen as a powerful engine for economic growth and development for both developed and developing economies, thus the call for a great effort to deal with restrictive trade measures among trading partners both at multilateral and regional level. The rationalisation of regional trade agreements (RTAs) in Africa is seen as the framework that would unlock the intra and inter-regional trade barriers such as tariffs, quotas, and non-tariff measures associated with both international and regional trade. Likewise, there is a growing recognition that regional integration provides a platform to address the challenges posed by smaller markets, limited economies of scales, and marginalisation at multilateral trade level.

The underlying theoretical expectation behind the formation of a free trade area is in the potential dynamic gains arising from its pro-competitive effect resulting in increased efficiency in resource allocation (Kalenga, 2011). However, the gains accrue to industries with relatively high value addition, since these industries command the largest share of the consumer's pocket book (Kapstein, 2010). Preferential trade agreements have also shown an increased degree of sophistication in the range of issues they address. In pursuance to harness mutual gains in trade liberalisation, many of the newer agreements cover trade in services and include provisions dealing with investment, competition policy, government procurement and intellectual property rights (Fiorentino et al. 2007).

Trade liberalisation reforms both at multilateral and regional levels have contributed to positive growth in goods and services trade globally. The growth in merchandise and services exports by about 648.2 percent globally, from US\$2.0 trillion in 1980 to about US\$15.2 trillion in 2010 (the value of services alone have grown by about 930 percent from US\$380 million in 1980 to US\$3.9 trillion in 2008) has generated pressure for countries to seek for new markets. In Africa, trade in services has grown from US\$ 12.3 million in 1980 to US\$ 87.5 million in 2008 (UNCTADstat 2010). This trend of events in the trade segment has created pressure for openness among countries, as well as regional trade blocs to negotiate trade agreements. However, trade agreements on both goods and services are complex activities to achieve. They require sufficient financial resource, and skilled and committed manpower. They are an uphill task even at the bilateral level and more especially for services.

The pressure for openness and the search for markets for commodities, and the fear of diplomatic isolation, has resulted to a high proliferation of RTAs world over. The surge in RTAs has continued unabated since the early 1990s. As of 15th May 2011, some 489 RTAs, counting goods and services notifications separately, have been notified to the GATT/WTO. Of these, 358 RTAs were notified under Article XXIV of the GATT 1947 or GATT 1994; 36 under the Enabling Clause; and 95 under Article V of the GATS. At that same date, 297 agreements were in force.<sup>2</sup> This has resulted in many

<sup>1</sup>This aims to rationalise the splintered regional groupings, address overlapping institutions, duplicated efforts, and dispersed resources to achieve economic growth and reduce poverty.

countries, especially in Africa, signing up to a multiple agreements (some of which have conflicting requirements) which has left them caught in a “spaghetti bowl” problem. The “spaghetti bowl” problem is characterised by conflicting implementation schedules and commitments of the different trade regimes which undermined their effectiveness.

It is was due to the growing awareness of the problems arising from the trade agreement “spaghetti bowl” in Southern and Eastern Africa that the proposed Tripartite –Free Trade Area (T-FTA) was agreed among the heads of states of the COMESA, EAC and SADC countries on 22nd October, 2008 at their meeting in Kampala. At this meeting, they agreed on a number of issues including:

- a) expeditious establishment of an T-FTA encompassing the member states of the 3 RECs with the ultimate goal of establishing a single customs union;
- b) development of a roadmap for the establishment of the FTA which would take into account the principle of variable geometry;
- c) the legal and institutional framework to underpin the FTA; and
- d) measures to facilitate the movement of business persons across the RECs.

This initiative is seen as a more realistic approach to harness the gains from regional integration. The summit’s vision is “towards a large single market” with a theme of deepening COMESA-EAC and SADC regional integration.<sup>3</sup> In the same meeting, the summit decided on the need for a study on customs, trade and regional integration.<sup>4</sup>

The rationale for the T-FTA initiative is to:

- a) Promote the rapid social and economic development of the region through employment and wealth creation and the elimination of poverty, hunger and diseases. It expands to skill building, innovations, factor locations towards national, regional and foreign investments to create trade opportunities;
- b) Overcome dependence on the export of primary commodities;
- c) Dismantle bottlenecks attributed to regulations of commerce particularly non-tariff measures currently undermining the trade flows within respective RECs and amongst the RECs;
- d) Jointly address poor infrastructure and institutional bottlenecks, “including bureaucratic and physical hindrances such as road charges, transit fees, administrative delays at borders and ports”<sup>5</sup>, barriers to free movements of business persons, as well as overcome the challenges linked to non-implementation of agreed commitments; and
- e) Address challenges associated with overlapping memberships in the RECs, as well as ignite the stunted gains within the intra-regional tariff reforms;

<sup>2</sup> See WTO, Regional Trade Agreements [http://www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm](http://www.wto.org/english/tratop_e/region_e/region_e.htm)

<sup>3</sup> See Historic First EAC-SADC-COMESA Tripartite Summit <http://www.africanexecutive.com/modules/magazine/articles.php?article=3725> visited on 11th July, 2011

<sup>4</sup> See Historic First EAC-SADC-COMESA Tripartite Summit <http://www.africanexecutive.com/modules/magazine/articles.php?article=3725> visited on 11th July, 2011

<sup>5</sup> See Africa: Deeper regional integration needed in response to crisis Published in SUNS #6728 dated 26th June 2009. <http://www.twinside.org.sg/title2/wto.info/2009/twninfo20090702.htm> visited on 30th June, 2011

Although some technical work has been undertaken in various working teams and a draft agreement with fourteen annexes prepared including:

- a) Non-Tariff Barriers (NTBs);
- b) Customs cooperation;
- c) Simplification and harmonisation of trade documents and procedures;
- d) Rules of Origin;
- e) Transit trade and transit facilities;
- f) Trade remedies;
- g) Competition policy and consumer protection;
- h) Standardisation, metrology accreditation and conformity assessment;
- i) Sanitary and Phytosanitary measures (SPS);
- j) Intellectual Property Rights (IPR);
- k) Movement of business persons;
- l) Guidelines for negotiations of trade in services;
- m) Trade development and competitiveness;
- n) Dispute settlement mechanism;

There is still a long way to achieve the dreams of the summit. It was also not until June, 2011 that a summit held in Johannesburg, South Africa officially launched the commencement of the negotiations on phase one of the proposed framework. The challenge remains ahead to achieve this reverie, given the complex operations and varying trade regimes including the rules and regulations, structures, resources, and financing requirements, national development objectives, reaching a rule based approach lacking currently in all the RECs, progress of individual RECs, and dealing with partner countries' defensive trade interests. However, it would be right to argue that successful harmonisation of the existing legal frameworks could bring benefits in terms of wider market for industrialists and other producers. This would promote competition and capitalise economies of scale for the market players within the bloc.

It is imperative to note that, over the past seven years, the three RECs have separately made attempts towards the coordination and harmonization of their members' trade rules including: simplification of customs procedures and documentation; rationalisation of the COMESA and SADC customs bond guarantee schemes; development of customs training and capacity building schemes; preparation of an inventory of harmonised product standards; co-ordination of competition policies and institutional frameworks; identification, removal and monitoring of non-tariff barriers; and establishment of One-Stop Border Posts. However, the vice of non-implementation of the agreements and non-tariff barriers remain a big problem, as well as the pursuance towards trade facilitation remains wanting despite the effort and resources injected by various donors in all the member countries of the three RECs to promote trade facilitation efforts. .

The proposed T-FTA is an ambitious scheme to be negotiated in two phases. The first phase of the negotiation process will deal with trade in goods covering tariff liberalisation, harmonization of rules and regulations on goods, rules of origin, dispute resolution, customs procedures and simplification of customs documentation, transit procedures, non-tariff barriers, trade remedies and technical standards, and sanitary and phytosanitary measures, and movement of business persons.

The second phase would deal with trade in services, intellectual property rights, competition policy and consumer protection and trade development. The broader focus of the T-FTA is to achieve market integration, industrial and infrastructural development.

Albeit the initiative could be seen as a realistic ‘grand’ strategy, there are multifaceted issues arising from the ambitiousness of the initiative. The intention is to deal with heterogeneity in the rules of origin, national policy objectives, standards and conformity assessment procedures, trade facilitation, non-tariff barriers, regional bloc progress and conformity to the multilateral rules amongst others. Therefore, any failure to make substantive progress towards achieving the aims of phase one could jeopardise the transition to negotiate an agreement covering the phase two issues.

The challenge to policy makers and practitioners therefore remains how to direct and drive the initiative to success on key policy issues and priorities especially the sequencing of the initiative and what outcome would be acceptable by members. This paper tries to examine some of the complexities and inter-linkages in reaching a tripartite free trade agreement in both services and goods, as well as achieving a “grand plan” covering deeper market integration, industrial and infrastructure development. Likewise, this paper examines critical areas which may delay or block the progress and success of the negotiations, and as well underscoring the prospects of achieving a comprehensive T-FTA. It also highlights some options to addressing the possible challenges. The suggestions herein may guide policy makers and negotiators involved in the process.

The first part of this paper focuses on the background and motivation of the study. Part two examines the status quo of the respective regional economic communities. In the third part, the paper covers the composition of the tripartite trade. Part four covers the discussion on the implication of the T-FTA initiative for the liberalisation of the region’s trade in goods, and the fifth part discusses the implications for the liberalisation. The sixth part discusses the structural challenges, and this is followed with the conclusions and emerging policy issues.

## 2.0 STATUS OF THE THREE REGIONAL TRADE BLOCS

### 2.1 East African Community

In January 2005 Kenya, Tanzania and Uganda launched the EAC Customs Union (CU). Burundi and Rwanda joined in mid-2007, and the CU was transformed to a Common Market (CM) on 1st July 2010. The goods sectors were fully liberalised through the elimination of internal tariffs under the EAC customs union, except for Kenya that underwent asymmetry tariff liberalisation for a period of five years from 2005 to 2010 for products listed in category B with a three band common external tariff of 0, 10 and 25 percent. However, the commodities in the sensitive list have varying tariff rates between 35 - 100 percent. The category B products included 443 and 880 product lines for Uganda and Tanzania respectively.

Under the CM protocol, some services sectors underwent liberalisation reforms. However, there are still prevailing barriers within the protocol on issues of work and residence permits, stay of students, right of establishment and the unbound commitments on market access and national treatment by all partner states on other key services sectors:<sup>6</sup>

Burundi, for example, did not make commitments on some services sectors including legal services, accounting, auditing and booking services, data processing services, data base services, research and development services in natural sciences, social sciences, humanities, interdisciplinary research and development services, life, accident and health insurance and telecommunication services;

Tanzania remains closed to financial leasing, credit reference bureau (CPC 8133), midwives and nurses (CPC 93191), medical and dental services (CPC 9312) are restricted to specialised hospitals and diagnostic centres, courier services (CPC 7512) are subject to shareholding of 35 percent by locals, telecommunication services are subject to shareholding of 35 percent by locals, and also 51 percent shareholding by locals is required in radio and television transmission services (CPC 9613);

Kenya remained unbound in the sub-sectors of postal services, telecommunication and maintenance and repair of vessels (CPC 8868);

Rwanda maintains restriction on commission agents (CPC 621), franchising (CPC 8929) and wholesale service and retail;

Uganda remains closed to wholesale, retail and travel agencies, tour operators and guides, as well as hotels and restaurants including catering (CPC 641-643 which is subject to economic needs test);

This suggests that introducing a new phase of services negotiations with the other two blocs of COMESA<sup>7</sup> and SADC that may have interests in these sectors could minimise the negotiations if requests are made by interested parties.

<sup>6</sup> EAC Common Market, Schedules of Trade in Services Commitment

<sup>7</sup> COMESA include Burundi, Comoros, DRC, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Libya, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

## 2.2 Common Market for Eastern and Southern Africa (COMESA)

COMESA<sup>7</sup> launched its Customs Union at its 13th Summit of Heads of State and governments in Victoria Falls, Zimbabwe on 8th June, 2009 - five years after the originally agreed date. The member states agreed to submit their lists of products with rates that are the same as those under the Common External Tariffs (CET) (that is, the rates of 0, 10 and 25 percent), as well as their lists of sensitive products where current national rates would be aligned to the CET rates during the transition period. The Summit agreed that the transition period for the implementation of the COMESA CET would be three years, but could as well be extended to a period not exceeding five years. There would be a mid-term review after one and a half years to take stock of the progress made by member states in implementing the Customs Union. The three tariff bands cover raw materials and capital goods at 0 percent duty, with about 2,709 tariff lines which is about 39 percent of the total 6,903 CET lines. The second band which covers intermediate goods is at 10 percent, with a total of 2,196 tariff lines (that is, 32 percent of the total lines). The last band being finished products at 25 percent, with a range of 1,998 tariff lines or 29 percent of the total lines.

The COMESA member states with substantial number of tariff lines of more than 30 percent below corresponding CET duty include Libya, Madagascar, Mauritius and Seychelles. The process of restructuring the tariff schedules of these member states upwards would require more consultation in light of the existing WTO tariff bindings of the members with the WTO secretariat and respective council members - especially for those who are WTO members.

For Madagascar and Mauritius, the adoption of the COMESA CET tariff bands would result in a marginal 0.2 percent and 7.6 percent point increase in the average incidence of duties respectively.<sup>8</sup> Madagascar and Mauritius would require an upward revision on 2,028 (32 percent of total tariff line) and 3,257 (52 percent of total tariff lines) respectively. Libya's alignment to the COMESA CET would imply an upward revision of its tariff schedules by 50 percent (or 2,639 of its tariff lines from 0 percent duties to 10 percent and 25 percent respectively). In the case of Seychelles, an upward adjustment would cover 1,895 tariff lines amounting to 37 percent of total tariff lines to achieve an alignment to the CET. These upward adjustments would imply a contradiction to the WTO commitments for member states and also undermine the integration initiative for non-WTO members. The member states which are vying for WTO integration include Libya, Seychelles, Comoros, Sudan and Ethiopia into the global trade economy. Thus, if tariff adjustments could be addressed harmoniously, then reaching a comprehensive T-FTA would be much easier.

The CET of COMESA is harmonised with the CET of the East African Community. This means that the member states in both customs unions do not have to choose which one to remain in given that both RECs have the same CET. Thus, COMESA and EAC in effect have moved closer towards becoming a single customs union. This implies that the member countries who are both COMESA and SADC members would be better placed by negotiating along the COMESA arrangement.

<sup>8</sup> COMESA, Meeting of Committee on the Customs Union: Report of the Third Meeting of Committee on the Customs Union. 3-5 August, 2011

<sup>9</sup> A roadmap was adopted according to which the Committee would convene in May 2010 to commence services negotiations after countries have prepared their requests and offers. I am not sure of the status quo of this progress.

COMESA held its first committee meeting on trade in services on 1st to 4th September, 2009. The committee adopted the guidelines for the negotiation of trade in services, focusing especially on the preparation of schedules of specific commitments and operationalizing the regulations on services. Accordingly, they also agreed on an indicative list of priority services sectors in which each member state is expected to make commitments. The list was to be based on economic contributions covering; financial, communication, business, transport, tourism, energy and construction and related engineering services.<sup>9</sup> They also agreed on flexibilities for LDCs; inter alia, a transition period for liberalisation and opening of fewer sectors or types of transactions. However, after the adoption of the guideline in 2009, only 11 of the 19 member states had submitted confirmed priority sectors by end of 2010. Of the 11 members, all included communications and tourism, 10 included financial services, 9 transport services, and 7 included both construction and energy. DR Congo and Djibouti indicated 10 differing services sectors; Kenya, Mauritius and Uganda likewise indicated different 7 sectors; Swaziland, Zambia and Zimbabwe indicated 6 sectors.<sup>10</sup>

The COMESA committee on trade in services held its third meeting on 4th-6th May, 2011 in Swaziland with the objective of deliberating on services liberalisation based on a draft schedule of specific commitments, as well as additional priority services sectors. The deliberation focused on four priority services sectors of communication, transport, tourism and financial services. For the various sectors, the committee considered a review of the defunct COMESA Banker's Association with a focus on assessing the merits of the association, the existing articles and possible amendments and possibility of incorporating other financial institutions. Likewise, on all professional services, the committee agreed to operationalize the existing professional associations within the region to provide the frameworks for the professions to coordinate pertinent initiatives in advancing the integration, as well as encouraging new associations to emerge where necessary. Emphasis was also put towards ensuring regular stakeholder consultations and information sharing to guide the regulatory agenda. The committee also agreed to the regulations on trade in services which aims at the establishment of enquiry points to address services suppliers and categories of natural persons under Mode 4 clearly defined. In addition, the committee recommended a realistic roadmap with clear milestones in the negotiation of professional services including accounting, legal and engineering services.

The committee agreed on the mechanism of fast-tracking the four priority services sectors (communication, transport, financial and tourism services). In addition, member states agreed to carry out national consultations and submit their revised schedules of commitments by 6th August, 2011. The secretariat was supposed to translate the revised and improved submissions and circulate to members by 6th September, 2011. And subsequently convene a meeting to negotiate on the basis of the improved schedules of specific commitments under the COMESA services program.<sup>11</sup> However, the progress made with these initiatives was not known at the time of writing this paper.

<sup>10</sup> see Trade in service COMESA Perspectives by Mangeni  
<http://www.thecommonwealth.org/files/223343/FileName/TheCOMESAexperience.pdf>

<sup>11</sup> see COMESA: Third Meeting of the Committee on Trade in Services in Manzini, Swaziland 4-6 May 2011.  
[http://programmes.comesa.int/attachments/article/35/comesa\\_committee\\_services\\_report\\_06%2005%202011.pdf](http://programmes.comesa.int/attachments/article/35/comesa_committee_services_report_06%2005%202011.pdf) visited on 15th November, 2011.

<sup>12</sup> SADC composition includes fifteen members including: Angola, DRC, Lesotho, Madagascar, Malawi, Mozambique, Tanzania, Zambia, South Africa, Namibia, Swaziland, Seychelles, Zimbabwe, Botswana and Mauritius

## 2.3 Southern African Development Community (SADC)

SADC<sup>12</sup> FTA was launched in August 2008 with about 85 percent tariff liberalization at zero rates of the merchandise trade flows. SADC remains a FTA after the launch of the Customs Union planned for 2010 was deferred indefinitely. Swaziland being both a signatory of SACU and COMESA is not able to implement the different external trade regimes given the variation in the common external tariff bands, as well as rules of origin— therefore it has negotiated a dispensation with the other COMESA members which allows its exports to enter COMESA members' markets duty free, without reciprocating. SADC members Angola, Seychelles and DRC have not acceded to the SADC FTA and are currently trading with SADC members on a Most Favoured Nation (MFN) basis. With regard to tariff liberalisation, Southern Africa Customs Union (SACU) completed its tariff phase down, Malawi by end of 2011 had only liberalised about 46 percent of its tariff offer. Zimbabwe was granted derogation and its annual reductions are to resume in 2012. Tanzania initially was on schedule but in 2010, it unilaterally reintroduced a 25 percent duty on sugar and paper products to be phased out in 2015 given its EAC treatment of sugar in the sensitive list. These derogations could be attributed to the weak legal framework enshrined in Article 3.1 (c) of the protocol giving member states a leeway to derogate, provided that “member states which consider they may be or have been adversely affected, by removal of tariffs and non-tariff barriers (NTBs) to trade, may upon application to Council of Ministers of Trade (CMT), be granted a grace period to afford them additional time for the elimination of tariffs and NTBs”. This provision undermines the progress towards achieving market integration. Unlike the EAC and COMESA, SADC's integration is progressing at a much slower pace, for example, it has just started the process of negotiating an agreement on services liberalisation that is expected to take at least 3 years. This perhaps could be the centre stage of complications for the T-FTA to achieve progress in both in goods and services negotiations, as well as reaching a comprehensive agreement.

## 2.4 Composition of Trade between the Countries negotiating the Tripartite Agreement

The T-FTA negotiations are being undertaken by 26 countries with a combined population of about 581 million people, Gross Domestic Product (GDP) of US\$ 624 billion. The average GDP per capita is US\$ 2,312 and this makes up half of the African Union (AU) in terms of membership (UNCTAD Statistics Handbook, 2011).

**Table 1**, indicates that largely, the market share in terms of exports among the tripartite FTA member states remains dominated by South Africa accounting for about 32.7 percent subsequently followed by two oil exporters Angola at 17.7 percent and Libya 17.5 percent and Egypt 10.1 percent in 2010. This also suggests that the larger more diversified economies within the three RECs are likely to be more competitive within the regional market compared to other small member economies in the region. Similarly, South Africa, Egypt and Angola are the largest market destination for the other regional member states' exports – accounting for nearly 60 percent of the total in 2010.

**Table 1: Market Share of Tripartite member's Merchandise and Services Trade flow (%)**

|              | Exports |       |       | Imports |       |       |
|--------------|---------|-------|-------|---------|-------|-------|
|              | 2008    | 2009  | 2010  | 2008    | 2009  | 2010  |
| Angola       | 24.08   | 19.27 | 17.67 | 8.06    | 9.82  | 6.74  |
| Botswana     | 1.65    | 1.62  | 1.79  | 2.00    | 2.05  | 2.30  |
| Burundi      | 0.02    | 0.03  | 0.04  | 0.15    | 0.17  | 0.21  |
| Comoros      | 0.00    | 0.01  | 0.00  | 0.07    | 0.07  | 0.08  |
| DRC          | 1.32    | 1.50  | 1.88  | 1.57    | 1.43  | 1.59  |
| Djibouti     | 0.02    | 0.04  | 0.03  | 0.22    | 0.20  | 0.17  |
| Egypt        | 8.75    | 10.84 | 10.06 | 18.73   | 19.47 | 21.52 |
| Eritrea      | 0.00    | 0.01  | 0.00  | 0.23    | 0.25  | 0.28  |
| Ethiopia     | 0.53    | 0.76  | 0.98  | 3.33    | 3.45  | 3.94  |
| Kenya        | 1.66    | 2.10  | 1.96  | 4.25    | 4.42  | 4.65  |
| Lesotho      | 0.29    | 0.34  | 0.32  | 0.78    | 0.82  | 0.89  |
| Libya        | 20.66   | 17.42 | 17.52 | 3.50    | 4.40  | 4.27  |
| Madagascar   | 0.56    | 0.52  | 0.49  | 1.48    | 1.37  | 1.12  |
| Malawi       | 0.29    | 0.56  | 0.41  | 0.85    | 0.88  | 0.88  |
| Mauritius    | 0.80    | 0.91  | 0.85  | 1.79    | 1.61  | 1.79  |
| Mozambique   | 0.89    | 1.01  | 0.85  | 1.54    | 1.63  | 1.45  |
| Namibia      | 1.06    | 1.46  | 1.54  | 1.74    | 2.14  | 2.27  |
| Rwanda       | 0.09    | 0.09  | 0.09  | 0.45    | 0.52  | 0.57  |
| Seychelles   | 0.16    | 0.20  | 0.15  | 0.42    | 0.35  | 0.40  |
| South Africa | 28.73   | 31.28 | 32.65 | 36.92   | 32.38 | 31.21 |
| Sudan        | 3.89    | 3.68  | 3.99  | 3.59    | 4.20  | 4.05  |
| Swaziland    | 0.52    | 0.78  | 0.67  | 0.84    | 0.90  | 0.89  |
| Uganda       | 0.74    | 1.09  | 0.82  | 1.74    | 1.84  | 1.94  |
| Tanzania     | 1.01    | 1.40  | 1.54  | 2.72    | 2.73  | 3.13  |
| Zambia       | 1.70    | 2.03  | 2.74  | 1.94    | 1.64  | 2.16  |
| Zimbabwe     | 0.57    | 1.07  | 0.95  | 1.09    | 1.26  | 1.50  |

Source: UNCTAD *Statistic Handbook, 2011*

The competitiveness of the small economies within the tripartite countries' markets will be dependent on their resource endowments, their comparative advantage in a limited range of niche products, as well as production cost variation. Otherwise, the current pattern of market distribution could lead to demands by especially the LDC economies for asymmetrical tariff liberalisation, as well as long lists of sensitive products between SADC and COMESA/EAC members. Likewise, in **Table 2**, the significance of export share of their GDP may influence the extent of tariff liberalisation by some of the economies within the group. Member states with insignificant export share of GDP may resist liberalising much of the goods sector where they may see prospects of building dynamic comparative advantage in the near future. However, more significant will be in fact the more diversified economies wishing to protect particular segments of their domestic economy from imports from the rest of the region – for example, South Africa and its vehicle and clothing industries, possibly Egypt and Kenya worried about competition in specific areas from South Africa.

Whereas Mauritius will be reluctant to raise tariffs as it sees its comparative advantage in being a duty free island. Angola has refused to open its market to SADC, and so is unlikely to do this for the rest of the T-FTA countries as it (naively?) believes that it can rebuild the industries it had prior to its civil-war. A major fight will be between South Africa (probably supported by most of its SACU partners) wishing to protect its sensitive (that is, uncompetitive) domestic sectors from competition from Egypt and Kenya. Thus, this thinking by some member states may frustrate the efforts towards extensive liberalisation or rather drag the negotiations on for a longer period than anticipated.

**Table 2: Exports of goods and services by tripartite members states (% GDP)**

|              | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 |
|--------------|------|------|------|------|------|------|
| Angola       | 79   | 74   | 75   | 76   | 52   | 58   |
| Botswana     | 51   | 47   | 47   | 42   | 34   | 29   |
| Burundi      | 11   | 11   | 9    | 13   | 9    | ..   |
| Comoros      | 14   | 14   | 15   | 14   | 15   | ..   |
| DRC          | 34   | 31   | 27   | 23   | 10   | 15   |
| Djibouti     | 41   | 40   | 57   | ..   | ..   | ..   |
| Egypt        | 30   | 30   | 30   | 33   | 25   | 21   |
| Eritrea      | 6    | 7    | 6    | 4    | 4    | ..   |
| Ethiopia     | 15   | 14   | 13   | 11   | 11   | 11   |
| Kenya        | 29   | 26   | 26   | 28   | 25   | 26   |
| Lesotho      | 53   | 54   | 56   | 59   | 51   | 49   |
| Libya        | 66   | 71   | 68   | 67   | ..   | ..   |
| Madagascar   | 28   | 30   | 30   | 27   | 28   | ..   |
| Malawi       | 24   | 23   | 27   | 30   | 30   | 26   |
| Mauritius    | 60   | 62   | 59   | 53   | 48   | 45   |
| Mozambique   | 32   | 38   | 35   | 32   | 25   | 25   |
| Namibia      | 40   | 40   | 51   | 53   | 47   | 39   |
| Rwanda       | 11   | 11   | 11   | 14   | 12   | ..   |
| Seychelles   | 81   | 89   | 97   | 118  | 119  | ..   |
| South Africa | 27   | 30   | 31   | 35   | 27   | 26   |
| Sudan        | 18   | 17   | 20   | 22   | 15   | 20   |
| Swaziland    | 89   | 85   | 78   | 63   | 60   | 58   |
| Tanzania     | 21   | 23   | 24   | 23   | 23   | 24   |
| Uganda       | 14   | 15   | 17   | 24   | 23   | 24   |
| Zambia       | 35   | 39   | 42   | 37   | 36   | 44   |
| Zimbabwe     | 35   | 38   | 40   | 42   | 36   | 37   |

Source: African Development Indicators, 2011 [www.databank.worldbank.org](http://www.databank.worldbank.org)

T-FTA member states with more than 50 percent exports contribution of GDP in the period 2005 to 2009 include, inter alia; Swaziland, South Africa, Libya, Lesotho and Angola.

Specifically in the services exports of GDP composition of the member states in the three RECs, there is a significant contribution for small economies including Seychelles, Djibouti, Uganda, Rwanda, Comoros and Mozambique (**Figure 3**, Annex) for the last five years before 2011. The large economies in the region like South Africa, Kenya, and Egypt have not registered significant growth of service exports to GDP, except for Mauritius. Although, it is notable that South African companies have made major investments in the region in retail (major supermarkets and chain stores), tourism, mobile phones, banking, transport, insurance, engineering and design. Similarly, it registers a large number of regional student enrolments at South African educational establishments. Within the EAC, Kenya dominates in the share of services exports. **Table 3** indicates that within the proposed T-FTA framework, Egypt, South Africa, Kenya, Mauritius, Ethiopia and Tanzania are the major services exporters in the region. This is an indication that trade liberalisation among the member states, if statistically weighted, could reflect the importance of services liberalisation in form of employment creation, technological transfer for the small economies as well within the bloc

**Table 3: Partner State Service Exports (US\$ Millions)**

|              | 1980    | 1985    | 1990    | 1995    | 2000    | 2005     | 2009     | 2010     |
|--------------|---------|---------|---------|---------|---------|----------|----------|----------|
| Egypt        | 2,392.7 | 3,023.6 | 5,971.0 | 8,590.0 | 9,803.0 | 14,642.6 | 21,519.8 | 24,456.9 |
| South Africa | 2,462.6 | 1,737.5 | 3,407.1 | 4,618.7 | 5,045.6 | 11,300.1 | 12,020.4 | 14,003.5 |
| Kenya        | 576.7   | 577.3   | 1,138.3 | 1,613.5 | 993.4   | 1,880.1  | 2,911.4  | 3,401.0  |
| Mauritius    | 139.9   | 121.2   | 483.9   | 777.7   | 1,070.2 | 1,618.1  | 2,238.9  | 2,689.0  |
| Ethiopia     | 125.4   | 288.8   | 304.6   | 344.5   | 506.2   | 1,012.1  | 1,894.9  | 2,353.0  |
| Tanzania     | 165.1   | 105.6   | 130.6   | 582.6   | 627.4   | 1,269.2  | 1,854.6  | 2,354.0  |
| Uganda       | 9.9     | 23.1    | -       | 104.0   | 213.2   | 525.1    | 966.9    | 1,310.1  |
| Botswana     | 100.9   | 76.3    | 209.5   | 260.4   | 324.8   | 856.0    | 841.7    | 806.7    |
| D.R.Congo    | -       | -       | -       | -       | 71.3    | 343.1    | 651.0    | 628.5    |
| Angola       | -       | 129.0   | 108.5   | 113.1   | 267.3   | 176.8    | 623.1    | 786.9    |
| Mozamb       | 117.9   | 66.3    | 103.0   | 242.4   | 325.4   | 341.9    | 611.7    | 696.7    |
| Madagascar   | 79.5    | 58.6    | 152.9   | 242.4   | 364.1   | 497.9    | 576.0    | 640.2    |
| Namibia      | -       | -       | 131.8   | 315.3   | 173.8   | 412.6    | 521.5    | 583.0    |
| Seychelles   | 91.2    | 112.0   | 171.8   | 278.7   | 286.9   | 368.8    | 404.1    | 563.0    |
| Sudan        | 292.4   | 374.2   | 172.5   | 125.3   | 27.4    | 113.9    | 392.0    | 514.3    |
| Rwanda       | 34.3    | 34.9    | 41.7    | 17.9    | 59.3    | 129.4    | 341.0    | 374.0    |
| Djibouti     | -       | -       | -       | 162.8   | 161.6   | 248.4    | 322.0    | -        |
| Zimbabwe     | 169.1   | 295.5   | 264.2   | 502.6   | 331.0   | 298.0    | 300.0    | 237.9    |
| Zambia       | 151.4   | 68.1    | 106.8   | 121.0   | 115.0   | 273.3    | 240.9    | 334.0    |
| Swaziland    | 36.1    | 27.8    | 107.6   | 151.8   | 273.2   | 282.5    | 200.0    | 213.0    |
| Malawi       | 31.8    | 25.9    | 36.6    | 24.2    | 34.3    | 54.4     | 78.0     | 84.1     |
| Comoros      | 2.2     | 4.2     | 16.9    | 34.5    | 38.4    | 44.6     | 68.1     | 68.7     |
| Burundi      | -       | 13.2    | 16.7    | 16.4    | 4.0     | 34.8     | 49.9     | 55.4     |
| Eritrea      | -       | -       | -       | 48.6    | 60.9    | -        | -        | -        |

Source: UNCTAD Handbook Statistics, 2010

## 3.0 IMPLICATIONS FOR GOODS AND SERVICES LIBERALISATION

### 3.1 Rules of Origin

The advancement of negotiations in goods among the member states of the three RECS could be expeditious if coherence is reached among the member states on the list of sensitive products and a simple Rules of Origin (RoO). In simple terms, according to the WTO Common Declaration regarding preferential RoO, it refers to 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 Art I of GATT 1994". The Rules of Origin (RoO) are among the most important instruments in the negotiation and functioning of Regional Trade Agreements (RTAs). They are designed to determine the eligibility of goods for preferential treatment among RTA members. Ostensibly meant to prevent transshipment of imported products across RTA borders after only superficial assembly, they may act in practice as complex and opaque trade barriers.. In other words, the purpose of RoO in trade agreements is to help customs determine whether a particular good is originating or non- originating from countries qualifying for the preferential treatment in order to avoid trade deflection.

Negotiating the appropriate RoO will be a critical area for liberalisation in the goods sector to avoid intra-regional trade restrictiveness. RoO determines to a considerable extent, how liberal or restrictive a free-trade agreement would be. For example, the more conditions a good has to satisfy to qualify for preferential market access, the less likely it is that it will indeed qualify for preferential treatment (Goode, 2005). RoO are sometimes used by countries as a protectionist measure aimed at sheltering domestic industries especially those that could be perceived as 'sensitive' against competition (Kalenga, 2011). Likewise, some policy makers view RoO as a mechanism that would promote domestic industrial development, particularly the development of upstream-downstream production networks through local or regional content requirement as a condition for preferential treatment.

The challenge ahead for the tripartite states is reaching an agreement on the methodological application of what RoO would be appropriate? Is it a product based RoO or local content requirement/ value added approach, or change in tariff heading, or a mixture of all the three? Otherwise, for the T-FTA to be of a meaningful effort for the RECs and individual member states in deriving the gains from the inter-regional trade, the RoO should be flexible, simple/robust, economical to administer, with integrated simple accounting requirements (business friendlier), fair and consistent (once qualify, always qualify) but able to prevent transshipment. The tripartite FTA members should negotiate a RoO that reflects the trading environment given that different countries have different trade needs. For example, Mauritius requires an easy access to regional markets for all goods unlike South Africa that would application of RoO to protect parts of its domestic industries. This is because application of the RoO as a mechanism to promote domestic industrial development would be a myth given that empirical works have proved to the contrary (Erasmus et al. 2006).

In the current framework of the three regional trade blocs as illustrated in **Table 4**, COMESA and EAC's RoO are to a great extent similar.

They are all based on value-added rule of 35 percent local content requirement with some exception for COMESA on cost insurance and freight (c.i.f) value rule of 60 percent of ex-works price of imported materials. Likewise, COMESA has an exception for goods of particular importance, requiring only a minimum of 25 percent of ex-works price of imported materials. Contrarily, Egypt a member of COMESA, applies a 45 percent value-added rule on local materials while others apply 35 percent. However, the question is whether the value-added rule would address the emerging global production network where most components of production parts are fragmented among different countries? This perhaps would require member countries to negotiate a hybrid RoO that would take care of technological advancement globally.

On the other hand, tripartite member countries would also have to deal with the contrary application of the RoO by some member countries. For example, the COMESA RoO has been implemented arbitrarily especially Egypt till recent applying a 45 percent value-added rate contrary to the 35 percent in the COMESA RoO. This arbitrary/inconsistent application should encourage the T-FTA members to develop a rule-based mechanism to ensure enforcement and penalties towards arbitrary behaviour by a member state.

**Table 4: Comparative analysis of the Rules of Origin in the three RECs**

|        | Value Addition   | Maximum Import-Content                | Cumulation 3        | de minimis  |
|--------|--|---------------------------------------|---------------------|---|
| COMESA | VA in production $\geq 35\%$ & VA $\geq 25\%$ for goods of economic importance | C.i.f. value of materials $\leq 60\%$ | Regional cumulation | No de minimis                                       |
| EAC    | VA in production $\geq 35\%$   | C.i.f. value of materials $\leq 60\%$ | Regional cumulation | No de minimis                                       |
| SADC   | Product specific   | Product specific                      | Regional cumulation | -10% de minimis; but does not apply to Chap. 50-63, |

*Source: EAC, COMESA and SADC Rules of Origin, 2011*

SADC RoO is a product-specific rule with a range of methodologies determining eligibility. The SADC RoO provides for a combination of rules the valued-added threshold, process or change in tariff heading. This implies that a particular good would have undergone a specified manufacturing or processing path to qualify for preferential treatment. It is therefore notable, that SADC's goods agreement is engulfed with complex, restrictive and supportive of protection for specific products, and this undermines the gains from tariff liberalisation. For example, the section covering textile and clothing requires double transformation and wheat flour which is still not traded under the SADC FTA because of the inability to agree on origin rules is a case in point. In addition, SADC RoO provides for the de minimis criteria which allow goods to qualify as originating even without meeting the minimum requirements for origination. The de minimis criteria only apply where the imported content is below 10 percent. Over 10 percent the rules apply. This is however not applied in COMESA and EAC. In the SADC, a 10 percent de minimis is allowed, but this does not apply to products of Chap. 50-63, 87 and 98 in the product classification. In reality, any effort by South Africa to advance a defensive interest of domestic industrial protection in promoting the SADC RoO is likely to pose a great challenge to reaching a comprehensive trade liberalisation in a tripartite goods agreement,

which subsequently would affect progress in services negotiations and yet services liberalisation would be of much more interest to it given its that their services sectors are super competitive with regional services suppliers.

Choosing a RoO regime for a trade agreement can make or break the agreement (for example, it is what has prevented any real growth in intra-SADC trade apart from South Africa exports). Therefore, it must be agreed on the basis of balancing real national interests, not simply ‘borrowing’ from other agreements (which have their own circumstances and dynamics). It would be appropriate to draw some lessons from the ASEAN-Australia-New Zealand FTA (AANZFTA) RoO which provides for greater flexibilities in the rules application. The AANZFTA RoO is based on “co-equal” access to rules based on either the ‘change in tariff classification’ (CTC) model or a regional value content (RVC) test of 40 per cent. For most goods under AANZFTA, exporters have the choice of testing (CTC) their products under a CTC-based rule or an equivalent RVC-based rule. Therefore exporters wishing to access the tariff arrangements agreed, would need to support their claim with a certificate of origin issued by a relevant industry body. For example, in calculating the RVC for “goods not wholly produced or obtained”, the formula in application is either:<sup>13</sup>

|                                |   |                |   |   |   |        |         |                |        |
|--------------------------------|---|----------------|---|---|---|--------|---------|----------------|--------|
| 1. Direct Formula              |   |                |   |   |   |        |         |                |        |
| AANZFTA<br>Material Cost       | + | Labour<br>Cost | + | Overhead<br>Cost                          | + | Profit | +       | Other<br>Costs | x 100% |
| FOB                            |   |                |   |   |   |        |         |                |        |
| Or                             |   |                |   |   |   |        |         |                |        |
| 2. Indirect/Build-Down Formula |   |                |   |   |   |        |         |                |        |
|                                |   | FOB            | - | Value of Non-<br>Originating<br>Materials |   |        | x 100 % |                |        |

**FOB**

**Where:**

AANZFTA Material Cost is the value of originating materials, parts or produce that are acquired or self-produced by the producer in the production of the good;

Labour Cost includes wages, remuneration and other employee benefits;

Overhead Cost is the total overhead expense;

Other Costs are the costs incurred in placing the good in the ship or other means of transport for export including, but not limited to, domestic transport costs, storage and warehousing, port handling, brokerage fees and service charges;

FOB is the free-on-board value of the goods as defined in Article 1 (Definitions); and

Value of Non-Originating Materials is the CIF value at the time of importation or the earliest ascertained price paid for all non-originating materials, parts or produce that are acquired by the producer in the production of the good. Non-originating materials include materials of undetermined origin but do not include a material that is self-produced.

<sup>13</sup> See ASEAN-Australia-New Zealand FTA Rules of Origin <http://www.dfat.gov.au/fta/aanzfta/chapters/chapter03.html> visited on 12th Feb, 2012

The AANZFTA RoO clearly outlines the criteria for determining whether a good imported from another party qualifies for preferential market access or not. It sets out methods for calculating for regional value content, rules for calculating value of material, accumulation/cumulation, the de minimis rule for deeming a good an “originating good”, and the method for determining whether fungible goods or materials are originating good. It further sets out the methodological framework for determining whether accessories, spare parts and tools are originating goods. It also underlines how packaging materials for retail sale and shipment are to be considered. The AAZFTA RoO further provides for how indirect materials are to be treated and the criteria for the treatment of material that is self-produced. Likewise, it sets out the rules for transit and trans-shipment of goods, the framework for consultation between the parties and the criteria for importers to make claims for preferential tariff treatment. In addition, the rule outlines areas of exceptions to certification requirements, provides the framework for verification and sets out obligations relating to importations.

It is therefore important to note that for a successful T-FTA to be achieved, the member states ought to establish coordinating secretariat/s or institutions to ensure effective implementation of the T-FTA RoO. It would also require member states’ line ministries to prepare information materials to inform and guide traders on the application of the RoO. But also undertake an extensive training program to customs staff. Likewise, there would be a need to build a mechanism under which the monitoring, verifying and reporting are implemented.

### 3.2 Trade facilitation<sup>14</sup>

Although there has been high proliferation of regional economic communities world over, those among African countries are characterised by a range of trade barriers, especially the non-tariff measures on merchandise trade. These include roadblocks, including Weigh Bridge, standards and quarantine measures, customs procedures and documentations, corruption which is one of the impervious drawbacks towards intra and inter regional trade development. Trade facilitation encompasses the systematic simplification and rationalisation of transparent, predictable, non-discriminatory and simplified procedures and documentations for cross border trade. Dramatic increase in the volume and complexity of global trade implies the necessity to keep procedures simple, predictable and transparent to permit smooth flow of commerce as freely as possible. This requires institutional and regulatory reforms to customs procedures, behind border measures and port and transport efficiency. Although Article 13-15 of the T-FTA Annex on trade facilitation provides for simplification of customs procedures and facilitation and would set the ball rolling, however, the language therein does not display a strong commitment to tackle these issues. The provision could be remedied with more strict compliance mechanisms that monitor the implementation of commitments and attract penalties for member states found to be deviating from the agreement. This would require supra-national institutions to enforce such a mechanism.

The chapter in the goods agreement should give coverage to recognition, harmonisation, transparency, consistency and equivalence treatment of goods within the tripartite bloc.

This would include the harmonisation of standards<sup>15</sup>, transparency and consistency in application and recognition of conformity assessment procedures including sanitary and phytosanitary measures<sup>16</sup>, and procedures treated as equivalent to others. This should take into account customs procedures such as methods of customs valuation, goods classification, and fixed time border clearance, application of uniform automated systems, uniform system of risk management, commitment to transparency, establishment of inquiry points, and commitment to co-operate in the development of customs procedures.

Another important issue that would need to be discussed with regards to trade facilitation is to do with “secure trade”. Security measures especially to combat terrorism may be an expensive venture on the one hand but on the other hand, it has a higher potential to drive up the costs of doing business, as well as reduce trade flows among partner states. However, heightened security environment should be conducted in a balanced manner which does not unduly obstruct commerce but rather facilitates trade. Thus, with appropriate joint security measures in place among partner states within the bloc, there would be certainty of a secure and facilitated trade. Other measures to facilitate trade should accentuate:

1. Adoption of a standardized electronic and simplified common data elements and formats with internet compatibility application systems for the transmission of trade-related data elements.
2. Refrainment of custom authorities from posting minimum import prices in such a way that is not compatible with the obligations of the Valuation Agreement adopted by member states.

In conclusion, appropriate trade facilitation principles should therefore underscore a need for:

- a) Transparency, communication, consultation and cooperation through streamlined procedures and rules;
- b) Simplification, practicability and efficiency in the implementation of agreed rules and regulations;
- c) Non-discrimination, consistency, predictability and due process in the application of agreed mechanisms;
- d) Harmonisation, standardization and recognition of established measures; and
- e) Modernization and the use of new technology to ensure fast smooth flow of commerce.

<sup>14</sup> Trade facilitation requires cutting the red tape at border to ensure that goods get delivered in the most efficient and cost effective manner (see APEC’s 2nd Trade Facilitation Action Plan).

<sup>15</sup> The WTO agreement on Technical Barriers to Trade (TBT) Annex 1 defines a standard as: document approved by a recognised body that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, making or labelling requirements as they apply to a product, process or production method.

<sup>16</sup> Sanitary and phytosanitary measure according to the WTO agreement on SPS measure Annex A is defined as any measure applied to protect human, animal or plant life or health from diseases, disease-carrying or disease-causing organisms in foods, beverages or feedstuffs. SPS measures include all relevant laws, decrees, regulations, requirements and procedures including, inter alia, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labeling requirements directly related to food safety.

### 3.3 Non-Tariff Barriers (NTBs)

Albeit the legal instruments of the three RECs provide for the elimination of non-tariff barriers and prohibit the introduction of new ones, NTBs remain a major impediment to trade throughout the region. As a result of trade liberalization undertaken over the last two decades, the use of tariffs for protection has declined and NTBs have become major barriers to trade. NTBs such as cumbersome customs documentation and clearance procedures, border controls, transport and transit traffic regulations, visa requirements, and corruption remain major impediments.

The Tripartite cooperation framework will have to undertake additional resource mobilization as prerequisite to support NTB reporting and elimination mechanisms, monitor the work of the mechanisms and create an inter-regional forum for Member states to engage and develop modalities for eliminating reported NTBs. The Tripartite FTA will need to provide an enhanced legal framework that underpins the elimination of NTBs, as well as capacity building in the RECs and institutions that effectively generate and address disputes related to NTBs. Thus, dealing with NTBs would have to be coherently taken with trade facilitation efforts.

### 3.4 Technical standards, regulations and conformity procedures

Although multilateral trade regimes provide that member countries of the WTO<sup>17</sup> should implement technical regulations and product standards<sup>18</sup> in conformity to existing international standards, technical standards may vary from country to country. Thus, differing product standards and regulations in various markets makes trade costlier for producers and exporters. If regulations and standards are effected arbitrarily, then such a trade regime would be seen as protectionist in nature. Therefore, dealing with varying product standards and regulations at regional economic level requires member states to commit efforts towards standards harmonisation and regulation through recognition of conformity assessments.<sup>19</sup> The T-FTA regional blocs would need to develop a framework to deal with Technical Barrier to Trade (TBT) and Sanitary and Phytosanitary (SPS) measures, as well as capacity building initiatives.

The individual RECs have also made efforts towards addressing conformity assessments. For example, EAC member countries ratified a Standards, Quality, Metrology and Testing (SQMT) Act in 2006. In February 2010, the EAC enacted the Catalogue of East African Standards covering, inter alia; terminologies, standardization, documentation, natural sciences, healthcare technologies, safety and testing, and all other forms of engineering and metrology applications. Likewise, COMESA initiated a certification plan which is on course aimed at recognising national standards. SADC has also developed an annex covering cooperation in the SPS and TBT implementation. It equally established the regional accreditation authority, that is, SADC Accreditation Service (SADCAS) in 2009 to ensure uniform testing, calibration, certification and inspection with accredited laboratories in Seychelles, Tanzania and Botswana.

<sup>17</sup> The Agreement on TBT tries to ensure that regulations, standards, testing and certification procedures do not create unnecessary obstacles, while also providing members with the right to implement measures to achieve legitimate policy objectives, such as the protection of human health and safety, or the environment.

<sup>18</sup> Technical regulations and voluntary standards set out specific characteristics of a product including size, functions and performance, labelling or packaging. These measures usually serve legitimate goals of public policy such as protecting human health and safety, or the environment.

<sup>19</sup> With appropriate regulation put in place, member states should ensure the acceptance of conformity assessment results from technically competent bodies regardless of nationality or their geographical location.

Consequently, the obligation to avoid unnecessary obstacles to trade, T-FTA, should explore and build on the existing structures at regional levels through harmonisation of the existing regional standards, acceptance of the REC's technical regulations as equivalent, and mutual recognition of conformity assessments. Alternatively, establishment of single standards that would be applied throughout the T-FTA would be more appropriate. This would be difficult, but would simplify the task of exporters having to conform to different standards, and make it much easier for implementation agencies. Therefore, this would facilitate trade. A logical start (unlike what SADC has done for instance) would be to standardise the 100 most traded products, then move on to the next 100, and so on. The implementation of such an agreement requires transparency and consistency coupled with strong enforcement and effective dispute settlement mechanism.

### 3.5 Movement of Business Persons

The free movement of persons and right of establishment and residence is an objective often addressed in services trade liberalisation under mode 4<sup>20</sup> mainly attained at deeper stages of trade integration arrangements than FTAs. However, in the context of FTAs and T-FTA; free movement of business persons is an important element of the RTAs as business transactions are of a cross-border nature and restrictive immigration requirements and cumbersome entry procedures can act as a non-tariff barrier.

Although provisions have been made under the draft T-FTA to facilitate the movement of business persons and for member states to harmonize their laws and administrative practices, as well as abolishing visa requirements for bona-fide business persons where visas are currently necessary for example, in the case of non-SADC member's citizens being required to acquire visa to South Africa for US Dollars 61. The benefits of entering arrangement would facilitate movement of goods. However, others would argue that entering an early agreement which is part of the later services chapters to be negotiated in the second phase may affect the intended objectives of deeper integration in the services sector. Albeit the principle of "Early harvest" may be important in harnessing the benefits of an agreement at its early stages, it could on the other hand fail to address certain aspects of the agreement at a later stage of deeper negotiations and concessions. However, all in all; the most important element in this phase of negotiation would be to comprehensively outline the requirements for qualification of a business person.

### 3.6 Implications of Services Liberalization

Trade in services considerably differs from trade in goods given their intangibility and the modes of delivery and supply. Although trade in services in the past years has recorded enormous growth in all economies globally, contributing to more than 40 percent<sup>21</sup> of GDP on average in poorer countries, market access liberalisation of the sector has not been fast tracked as that of goods. Achieving comprehensive services agreements have been difficult controversial, even at the bilateral level. Trade in services are usually affected by non-tariff measures such as limitations on entry of foreign

<sup>20</sup> Mode 4 deals with the movement of natural persons. It involves temporary movement of a service supplier of one member state moving into the territory of any other member to offer his services. For example, physician from partner state B practicing in the territory of partner country A.

<sup>21</sup> It accounts for about two thirds or more of GDP in OECD countries, and an increasing proportion in the poorest countries, now slightly above 40 percent of GDP (Vyllder, 2007).

firms, foreign equity limitations, foreign services workers, market coverage, requirements regarding legal form of establishment, movement of persons and regulatory measures.

An agreement on trade in services determines whether a services provider, or service offered by the provider, shall receive preferential treatment. The services agreement covers four modalities of services trade as underlined in GATS Article I: 2, these modalities include:

1. Provision of services across borders through electronic, postal or other means without requiring the buyer or seller to meet as covered under cross-border supply (Mode 1).
2. The service consumer travels to the economy where the services provider is located to purchase and consume the service. This is referred to as consumption abroad (Mode 2).
3. The supply of services through an establishment of outlet either as a branch or subsidiary through an investment in the economy where the buyer is located, termed as commercial presence (Mode 3).
4. And the movement of natural persons (Mode 4) which relates to temporary movement of a service provider or a representative of a services supplier from one country to another to deliver services.

Trade in services liberalisation takes two approaches i) the elimination of discriminatory practices and ii) liberalisation of a service sector. In regard to T-FTA, the GATS agreement Article V requires that parties to a regional trade agreement shall eliminate all forms of discrimination against foreign services and services suppliers. Thus, the T-FTA's services chapter should cover a broad description of services, market access and national treatment options, procedures for recognition, safeguard application, arrangement of the inscription of commitments in the services schedules, procedures, amongst other issues.

In scheduling services commitments, economies usually adopt one of the two methods, that is, either positive or negative listing or both. It seems customary that many regional trade agreements in services are characterised with positive listing approach<sup>22</sup> which is known to be associated with limited schedule of commitments, as well as reforms. Whereas, negative listing approach implies that all services except those listed in the schedule are subject to preferential treatment. The negative listing method is advantageous in that all services are automatically covered by the liberalising provisions in the agreement (Goode, 2005). It is regarded as an effective and transparent mechanism to deeper services liberalisation. The challenge with the negative listing approach is that some economies may not be in position to deal with complexities in the new services which might be developed at a later date given that services are subjected to regulatory frameworks, and thus economies would need to retain this right.

Developed economies may have the ability to undertake negative listing approach unlike developing countries that do not have the capacity to deal with regulation of some or new services. Whether

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<sup>22</sup> This only covers services included in the schedules of commitments as the ones to enjoy preferential treatment. The disadvantage of this approach is that each time the parties want to liberalise other subsectors, they have to amend the schedules of commitments.

the T-FTA should adopt a positive or negative approach remains a subject for negotiation, however, taking into account varying development needs and status of partner states, adopting positive listing approach would be more appreciated. This approach shall require more time and commitment by all partner states during the drafting stage of their schedules of commitments in preparations for negotiations.

The reasons behind the lags in services liberalisation across all trade reforms whether multilateral or regional are related to amongst other things: The heterogeneity of services and their intangible nature, coupled with the difficulty of measuring and assessing their contribution to production. The economic consequences of alternative policy choices pose daunting challenges such as establishing a regulatory mechanism, that is, both the laws and the regulatory authorities for the would be liberalised services sectors. The challenge of factor mobility (capital and labour) involved in services transactions, and the ubiquity (and diversity) of market failures affecting services transactions and related regulatory intensity could yet pose complex situations for the individual member countries in reaching a comprehensive agreement. For example, Burundi, Tanzania, Rwanda lack developed capital markets.

It is important to note that some regional blocs particularly SADC have not made much progress in the implementation of the agreements on goods. Coupled with conflicting national agendas, the T-FTA will face delays in reaching an agreement Likewise, SADC region have not given a strong agenda to services negotiations and it counts a great deal in effecting gains in goods trade.

The services sector also involves a host of national policy objectives, including regulation, universal access and preservation of cultural diversity, among others. Thus, the need to clearly define and factor these objectives into the overall framework will not be as easy as it might be thought. Similarly, the boundaries between public and private interests may also need to be properly delineated, notably in the context of public-private partnerships that are increasingly becoming common in services sectors such as infrastructure and transportation (World Bank, 2009 p.3). For example, electricity generation, Water and Sewage in some tripartite states remain in control of government and yet other states may request for opening of such sub-sectors.

## 4.0 STRUCTURAL CHALLENGES

### 4.1 Individual Member States' positions

In the proposed T-FTA, many countries are at different levels of development, the majority being least developed countries. A few, including Kenya, Namibia, Botswana, Libya, Mauritius, Seychelles, South Africa and Egypt are developing countries. In most cases, the difference in the levels of development is influenced by the political economy irrespective of how well endowed with natural resources a country is. Some of the factors that contribute to political instability and a lack of commitment have kept some of these economies lagging in the spheres of global trade growth in both goods and services.

It is important to note that although goods and service trade in the last decade contributed a considerable proportion of GDP in most tripartite states, service sectors remain highly restricted and regulated. The schedules of service commitments of most members in the three RECs at the WTO handful are limited, and even within the blocs where some form of regional agreements have been entered as service commitments remains insignificant. Therefore, for the T-FTA to reach a mutually beneficial agreement, member states will have to consider committing some of the regulated sectors for competition, as well as new investments. This implies ceding some of the sovereignty in members with state monopoly in services provision such as Ethiopia in telecommunication. Liberalisation such a sub-sector would attract new entrants to the market which would create competition and hence efficiency, as well as employment creation and revenue to the government in form of domestic taxes.

Economically, some member states like South Africa being the economic power house in the SACU region has in previous trade frameworks shown a defensive interest to protect its goods industries in the region, in contrast to the lesser developed partners (Botswana, Lesotho, Namibia and Swaziland), that would wish to open their markets in order to be able to source more cheaply from inputs from non-South African producers and thus lower their input costs and benefit their consumers as all of them have limited primary industrial production. This action of South Africa may not easily guarantee an easy path to achieving liberalization reforms in the goods sector. And a possible liberalisation reforms on the part of South Africa are likely to come with possible demands for complex agreements with regard to RoO for goods and tighter restriction on various services sectors, as well as in the modes of supply including movement of natural persons. For example, South Africa currently requires transit visas for non-SADC members transiting through its territories. It is probably that South Africa is very worried about the large migration of illegal immigrants from the rest of Africa as this is a very hot domestic issue, especially from their large number of unemployed people. Past experience also shows that South Africa has been very ambivalent about allowing Southern African Customs Union (SACU) interests to over-ride its perceived national interests and this was also reflected in the Economic Partnership Agreement (EPA) negotiations with the European Union. It is therefore predictable to note that possible stagnation in the progress of the tripartite negotiations is likely to stem from South Africa.

However, it is important to note that championing defensive interests more especially in a regional trade agreement is spurious because such attitudes defeat the objectives and spirit of mutual benefit in a regional integration. Thus, in the spirit of deeper integration, member countries have to forfeit some of the tight controls in various sectors in their economies if intra-regional trade agreement is to be beneficial to all. However, experience shows that national leaders are never willing to sacrifice what they think are the interests of their supporters for some wider greater good of the region. Off course, trade negotiations are all about promoting national interests that would need to be stated, balanced and traded off for other national interests other than political solidarity.

## 4.2 Multiple trade rules and Multilateral Implications

It is notable that the three RECs in the proposed T-FTA are at different levels of regional integration and each of the blocs have made notifications to the World Trade Organization as required under Art XXIV of the GATT, GATS Art V and the Enabling Clause (EC). SADC FTA was notified in 2006 under GATT Art. XXIV, while COMESA and EAC notified under the EC in 2001 and 2005 respectively. Member states will in the course of their negotiations for the Tripartite FTA make a decision on how they would want to notify the tripartite arrangement under the WTO. This is because of the differing levels of economic development and categorisation as provided for in the Enabling Clause. The EC seems to close out the provisions for notification of a regional trade arrangement entered into with non-less developed countries including South Africa, Egypt, and Mauritius amongst others. This therefore leaves the members with option under GATT Article XXIV and GATS Article V, as well as the “Substantially All Trade (SAT)” requirement.

The complexity that the T-FTA will be faced with in this regard is making the adjustment necessary to reach an agreement that will be WTO-compatible without jeopardizing the Most Favoured Nation (MFN) principle, but also FTA that covers “SAT”. It is important to note that the member states under this framework are also engaged in other trade negotiations such as Economic Partnership Agreement with the European Community. Thus, there is a need to ensure that all such agreements are not burdensome to implement coherently, and without conflicts of interest. Otherwise, failure to take cognizance of these prevailing complexities and thoroughly addressing them, may in one way affect the efforts toward reaching a T-FTA in the face of WTO agreements, as well as other trade regimes.

## 4.3 Financing

The tripartite task force has taken initiatives to source funds to finance its activities. These include, inter alia; advanced discussions with African Development Bank, the World Bank, the European Union and the United Kingdom’s Department for International Development (DFID). With respect to discussions with DFID, a consultative meeting with the Tripartite Task Force held in London on 3rd March, 2010 proved for indicative allocations for the 2010 work plan from DFID<sup>23</sup> Trade Mark programmes worth £400,000 covering administrative and logistical support for tripartite meetings, including the Summit and the Tripartite Trust Fund and its sub-committees. A total of £600,000 was indicated for the preparation and negotiations of a tripartite FTA.

While at least “£2.9 million for the development of corridors and infrastructure and border posts and approximately £1.5 million for developing the tripartite agenda on trade facilitation and addressing broader trade policy issues in the region such as competition and standards. These figures are largely for technical support for project implementation and co-ordination”<sup>24</sup>.

However, it is important to note that these are unsustainable sources which could be determined by the prevailing political atmosphere in the partner states. Notable in recent times, donors have not fully honoured their commitments of aid disbursements. The question remains how will the member states sustain the negotiations and implementation, as well as compensation where needed, especially for member countries with resource constraints? Therefore, it would be appropriate for the T-FTA member states to forge a mechanism to mobilise resources (call it fiscal pool of annual contribution of 1 percent of each member’s GDP) for continuous sustainability of the initiative. This initiative would need to take into account the current burden on member states, some of which already lack the necessary capacity and resources to finance the domestic programs such as poverty reduction, as well as the secretariats in their current regional trade blocs.

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23 See COMESA-EAC-SADC TRIPARTITE FRAMEWORK: STATE OF PLAY

[http://www.eac.int/index.php?option=com\\_content&view=article&id=474&Itemid=68](http://www.eac.int/index.php?option=com_content&view=article&id=474&Itemid=68) visited on 10th July, 2011

24 See also COMESA-EAC-SADC tripartite framework: state of play

<http://www.trademarksa.org/news/comesa-eac-sadc-tripartite-framework-state-play> visited on 10th July, 2011

## 5.0 CONCLUSION, EMERGING ISSUES FOR POLICY AND WAY FORWARD

The T-FTA would be an important framework to help lockout some of the prevailing challenges among the three regional blocs such as non-tariff measures (NTMs) on goods, infrastructural problems and trade facilitation, multiple membership and rules, rules of origin, defensive interests of some members states and eliminate member states restriction on the movement of natural persons and service consumers. This would require pursuance of a deeper integration framework taking into consideration the economic development needs of other members, more especially the LDCs (with greater flexibilities for policy interventions).

Within the T-FTA framework, there is a need to provide a mechanism to finance infrastructure development among member countries, compensate members who incur costs in terms of tariff revenue losses especially the most under developed economies as a result of the establishment of the T-FTA by establishing a sustainable tripartite trust fund managed by an established supra-national institution established by the RECs, (where members would contribute say 1 percent of their GDP or revenue) as well as for the operationalization of the agreement.

Secondly, with regard to both the services and goods negotiations, the respective committees would need to examine specific barriers in the respective sub-sectors especially in services, including domestic regulations in individual member states on goods and services, cultivate deeper understanding of the sectors and possible measures. This is important because it will give a direction in dealing with the interests of members who are already in multiple agreements.

There is also a need to adopt a rule based system of agreement where the structures of the agreement are legally executable by a supra-national institution charged with monitoring and ensuring enforcement of the agreement. This implies that the tripartite member states would have to negotiate an agreement that makes the trading system within the bloc more secure and predictable. That is, a system which is equitable, fast, and effective and mutually acceptable, based on clearly-defined rules.

Harmonisation of technical regulations, standards and conformity assessments procedures are necessary in the tripartite negotiations. Member states need to devote more attention to building a mechanism under which there would be mutual recognition of standards and conformity assessments. This would require establishment of a standard development centre to support uniformity of standards, testing and certification requirements.

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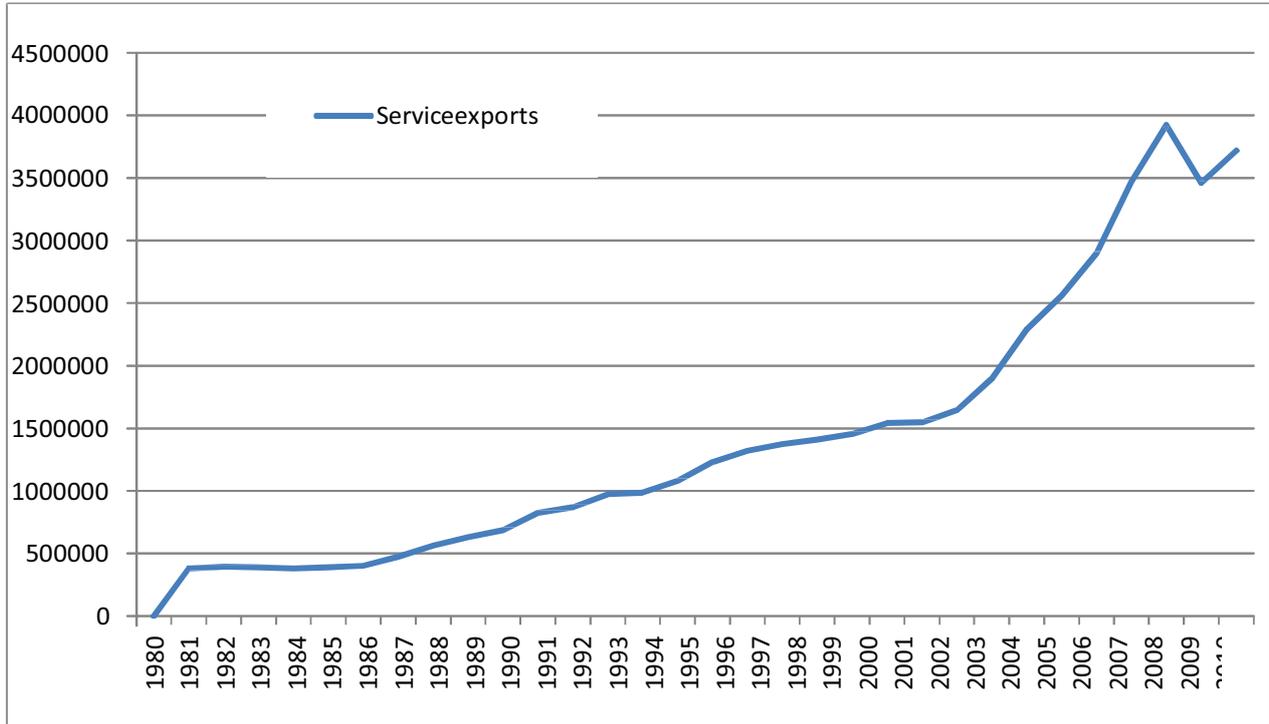
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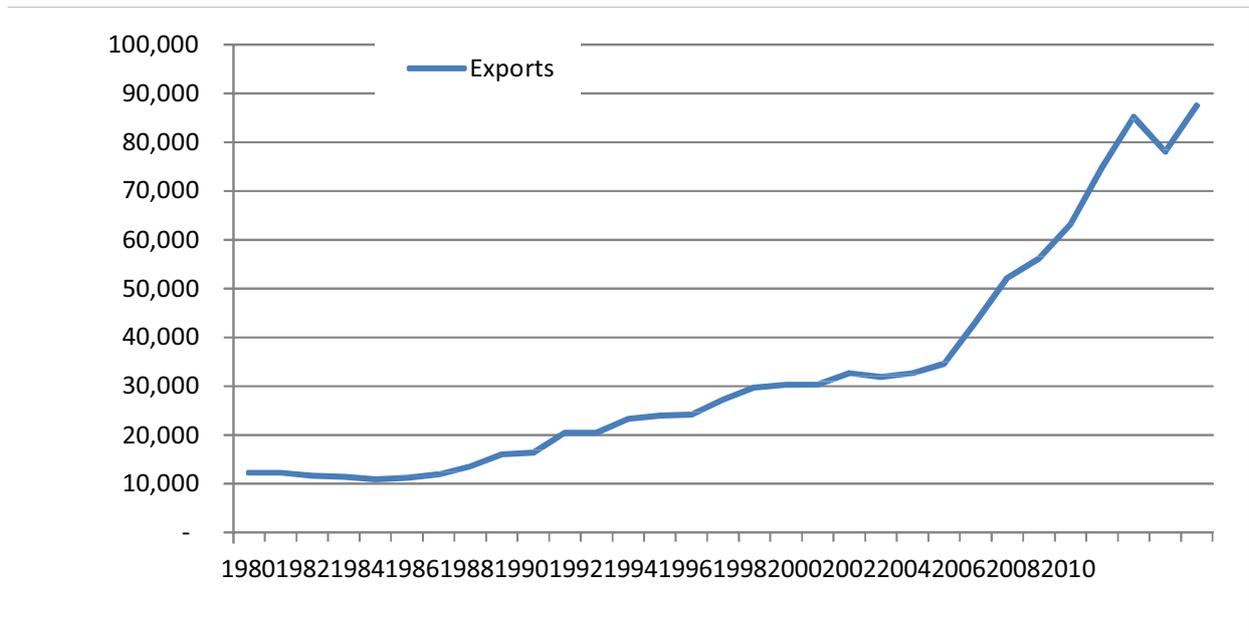
## Annex I

**Figure 1: Global Service Exports (US\$ '000)**



Source: UNCTAD Handbook Statistics, 2010

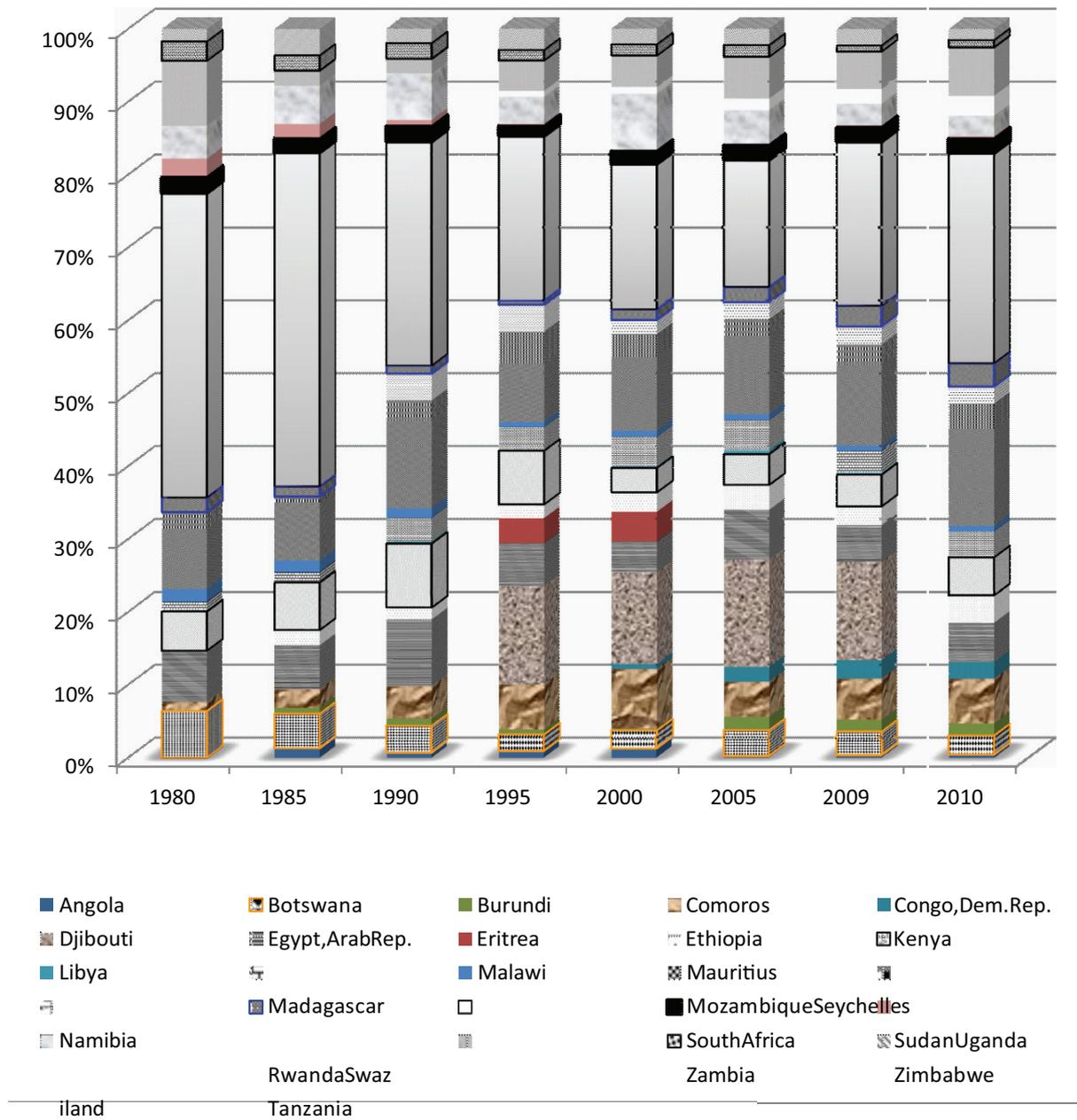
**Figure 2: Services Exports by Africa (US\$ '000)**



Source: UNCTAD Handbook Statistics, 2010

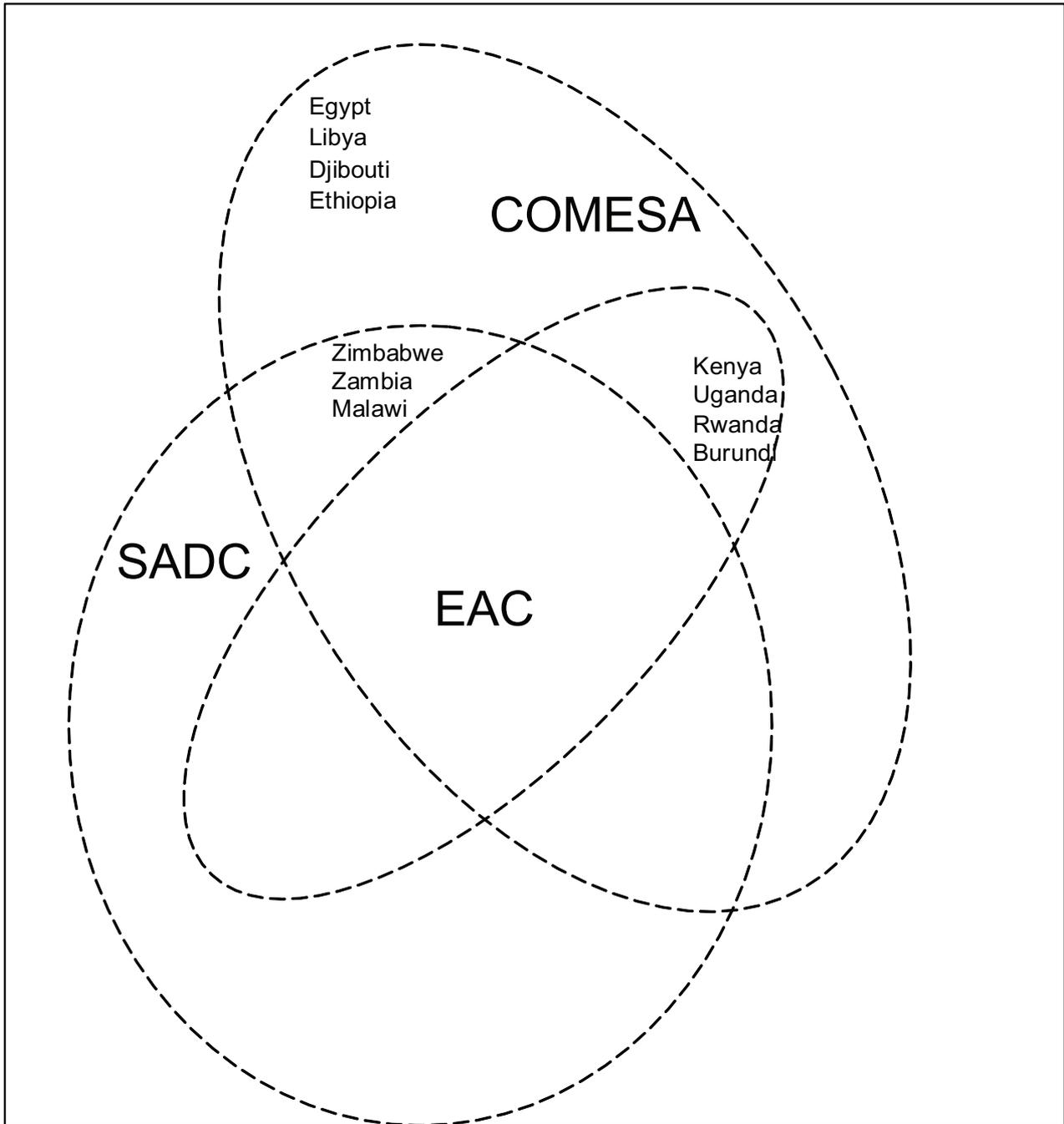


Figure 3: Service Exports to GDP (%)



Source: UNCTAD Handbook Statistics, 2010 and WDI, 2010

Figure 4: Tripartite FTA Composition



Tanzania South Africa Botswana Lesotho Mozambique Namibia Angola DRC Mauritius  
Swaziland Madagascar Seychelles Eritrea Sudan Comoros

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