2 Competition Policy in Eastern and Southern Africa

2.1 Introduction

Although the ESA jurisdictions did not have a comprehensive competition regulatory regime most had in place statutes and policies from as early as the 60s aimed at addressing specific market practices that were of pervasive concern on a sectoral level. However, the adoption of comprehensive competition policies for most of the ESA countries was tied to a transitional period in their social, political and economic development where for instance trade liberalization and privatisation, either 'homegrown' or at the behest of external forces, required the adoption of a corresponding policy framework.

At the regional level, competition policy is in many cases, as is the case with the ESA region, usually tied into a greater regional integration objective.[33] Therefore, an analysis of the policy objectives behind a regional competition regime is better understood against the backdrop of the regional integration objectives.

This section gives an overview of the national and regional socio-economic and political context of the ESA region in order to contextualise the discussion of competition policy considerations.

2.2 The National Context

2.2.1 Kenya

Kenya's pre-independence economy has been described as having been fairly basic in the context of industrial development and level of monetization. It was essentially import-based, geared mainly towards the needs of the settler community. The exploitation of natural resources from an economic perspective was also aimed at fulfilling the needs of the settlers. One of the immediate concerns was to regulate the price of commodities. It was deemed necessary to put in place a price control mechanism to ensure that the consumer-base was protected from any drastic changes in

33 Josef Drexl, *op. cit.*, (note 20) 231.

the price of goods and services. This need was met by the enactment of a Price Control Act in 1956.[34]

In its Sessional Paper No. 10 of 1965 on African Socialism and its application to planning in Kenya, the post-independence government espoused its plan to ensure rapid economic development and social progress for all citizens.[35] The desire for 'Africanisation' of the economy and public service was expressed. The government indicated the desire to reorganize and mobilize Kenya's African social heritage and the colonial economic legacy to address poverty, disease and lack of education in order to achieve social justice, human dignity and economic welfare for all.[36]

There was a concern that the concentration of economic power in 'domestic hands' could easily lead to undue influence in political affairs. The government equally recognised the conflicting challenges of ensuring wide distribution of wealth and at the same time not prohibiting methods of large-scale production where they are necessary for efficiency.[37] The proposed methods to enable the diffusion of ownership of large-scale enterprises included state ownership, joint ventures between the state and private investors, cooperatives, companies and partnerships.[38]

In order to protect consumers, the government noted that it would not permit producers to make monopoly profits through monopolistic and unfair marketing practices. The government deemed it necessary to keep the prices of basic commodities down in order to ensure increase in per capita income.[39]

The post-independence government also sought to restructure the economy to make it more export-based. The restructuring also involved increased industrialisation as well as indigenisation to ensure that the native population was integrated into the economic system. In order to control

34 CUTS International, 'Competition Regimes of the World: A Civil Society Report: Kenya' (2006) CUTS Civil Society Report, 245 <https://competitionregimes.com/pdf/Africa/46-Kenya.pdf> accessed 15 July 2019.

35 Government of Kenya, Sessional Paper No. 10 of 1965: African Socialism and its application to planning in Kenya (Sessional Paper 1965) <https://www.knls.ac.ke/images/AFRICAN-SOCIALISM-AND-ITS-APPLICATION-TO-PLANNING-IN-KENYA.pdf> accessed 15 July 2019.

36 Government of Kenya Sessional Paper 1965 paras 1-4.

37 Government of Kenya Sessional Paper 1965 para 41.

38 Government of Kenya Sessional Paper 1965 para 45.

39 Government of Kenya Sessional Paper 1965 para 130.

the high inflow of foreign goods, the government placed high tariffs on imports.[40]

To further reduce reliance on imports, the government put in place an import substitution strategy. This involved in the main the formation of state corporations in the major areas of the economy. Reasons proffered for the establishment of state corporations include accelerated socio-economic development and increasing participation of the indigenous population in the economy.[41]

Kenya, having been one of the first countries to sign a structural adjustment plan in 1980 with the World Bank, was required to adopt liberal as well as increasingly outward-oriented trade and industrial policies as a condition to accessing development funding and technical assistance. This was within the context of the three main structural adjustment conditions; deregulation, liberalisation and privatisation.[42] Persisting concerns regarding poor performance, wasteful expenditure as well as highly concentrated and near monopoly markets occasioned by the state corporations necessitated a comprehensive review of the state-owned enterprises which was carried out in 1982 by a Working Party on Government Expenditures. It was recommended that the government reduce its direct involvement in the economy so that there can be more private sector investment. It was considered that such a liberalised economic environment would only work where there is an institution in place to ensure that there is effective competition in the market.[43]

The working party proposals together with related recommendations in Session Papers that called for progressive removal of price controls and reduced government control in the economy led to the passing into law in 1988 of the Restrictive Trade Practices, Monopolies and Price Control (RTPM) Act.[44] The RTPM Act established the Monopolies and Prices Commission which was a department of the Ministry of Finance. The competition authority was therefore not an independent institution. The

40 CUTS Civil Society Report Kenya 2006 245.

41 Government of Kenya Sessional Paper 1965 para 17.

42 Geoffrey Gertz, 'Kenya's Trade Liberalization of the 1980s and 1990s: Policies, Impacts, and Implications' (2008) Background paper commissioned by the Carnegie Endowment, 3 <http://carnegieendowment.org/files/kenya_background.pdf> accessed 15 July 2019.

43 CUTS Civil Society Report Kenya 2006 pp. 245-246; See also Gertz (2008), 3-4.

44 The Restrictive Trade Practices, Monopolies and Price Control Act, Laws of Kenya Chapter 504. (RTPM Act).

RTPM Act addressed restrictive trade practices, control of monopolies and concentrations of economic power as well as retaining some price control functions.[45]

The increasing liberalisation of the market meant that the residual price control functions in the RTPM Act needed to be lifted to spur more effective competition. It was also considered that the competition authority needed to be independent and autonomous in order to effectively carry out its functions. The RTPM Act underwent a series of amendments to bring it more in line with the increasingly liberal and diverse economy. This culminated with the enactment of the current statute in 2011, the Competition Act of Kenya. The Act in section 3 sets out its objective as the enhancement of the '…welfare of the people of Kenya by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct throughout Kenya..' in order to, inter alia, increase economic efficiency, promote innovation, protect consumers and create an investment friendly environment.

It established an independent and autonomous competition authority. The new Act did away with the price control functions and introduced consumer welfare provisions. The Act also addresses three other major areas: restrictive trade practices, mergers and control of unwarranted concentration of economic power.[46]

2.2.2 Zambia

Zambia's pre and post-independence socio-economic and political status was largely shaped by copper, which remained the country's economic mainstay for the ensuing decades. The discovery of copper deposits in the 1920s is considered as the most significant economic development in Zambia. However, Zambia's copperbelt has been described as 'an island of comparative plenty in a vast sea of rural poverty'. [47]

At the time of independence in 1964, it is estimated that mining accounted for around 50 percent of the GDP, with 90 percent of foreign exports as well as national income arising from copper. Other sectors,

45 RTPM Act.
46 Competition Act of Kenya, No. 12 of 2010.
47 Howard Simpson, *Zambia: A Country Study* (Scandinavian Institute of African Studies 1985) 11-13. <http://www.diva-portal.org/smash/get/diva2:277702/FULLTEXT01.pdf> accessed 15 July 2019.

mainly agriculture and manufacturing, accounted for less than 20 percent of the GDP. The economy was highly imbalanced with an inordinate reliance on copper. This imbalance extended to the distribution of the benefits, with African social development lagging behind.[48]

The impact of the colonial era socio-economic and political policy has been summarised thus:[49]

> The whole economy was made to hinge on the mining and export of copper. Capitalist agriculture grew in step with the demands for maize by the large urban working class. Manufacturing industry languished thoroughly, due to unchecked and rampant competition from imports from South Africa, Southern Rhodesia and Britain. All industrial activity and commercial agriculture was concentrated along the line of rail which ran through the Southern, Central and Copperbelt provinces. Peasant production of food and other simple commodities was irreparably damaged, and peasant society totally debilitated, by the phenomenal migration of labour from rural to urban areas, induced by the colonial regime. Great regional imbalances arose between the towns and the countryside proper. Monetization of the peasant economy and the growth of wage labour brought the benefits of some "modern" basic consumer goods and some aspects of the social infrastructure to a big proportion of the population. Society became stratified along colour and class lines, leading to tremendous social inequalities between sections of the population.

Naturally, the post-independence regime sought to rectify this. National development plans were put in place between 1966 and 1979 which sought to diversify the economy to reduce reliance on copper, narrow the rural-urban income disparity by improving agricultural productivity, raising education and social welfare levels. The diversification of the economy to reduce reliance on copper proved to be more challenging. [50]

The government restructured the economy to have more direct control over economic activity, which had so far been private and foreign-owned. This process, which was part of what was termed 'Zambianisation', was in line with the then socialist policy, with the government seizing majori-

48 Simpson (1985) 11-13.

49 M R Bhagavan, 'Zambia: Impact of Industrial Strategy on Regional Imbalance and Social Inequality' (1978) Scandinavian Institute of African Studies p 14 <https://www.files.ethz.ch/isn/97149/44.pdf> accessed 15 July 2019.

50 Simpson (1985) 27-28.

ty control over the largest mining, industrial, transport and commercial enterprises. The state-controlled economy, which was still heavily reliant on copper whose prices were falling, proved to be highly inefficient and in need of reform.[51]

In late 1991, Zambia adopted its structural adjustment program, which was part of the wider International Monetary Fund (IMF) requirements for financial support to developing countries. It was estimated that by this time about 80 percent of Zambia's main industries were under state control.[52] Naturally, one of the main conditions of the structural adjustment program was privatisation and increased trade liberalisation.[53] Competition policy was seen as a necessary tool to regulate a liberalised economy.[54]

Zambia's Competition and Fair-Trading Act was enacted in 1994 and came into force on 15 February 1995 and was operationalised in April of 1997. The Act sought inter alia to prohibit anticompetitive trade practices, regulate mergers, regulate monopolies and concentration of economic power and protect consumers. It also put in place the Zambia Competition Commission as the appropriate regulatory authority. The 1994 Act was repealed and replaced by the Competition and Consumer Protection Act of 2010 which enhanced the merger and consumer protection provisions and established a Competition and Consumer Protection Tribunal.[55] The Act sets out in its preamble the objective of safeguarding and promoting competition as well as protecting consumers from unfair trade practices.

51 Simpson (1985) 28.

52 UNCTAD, 'Competition Policy, Trade and Development in the Common Market for Eastern
and Southern Africa' (1999) UNCTAD Series on Issues in Competition Law and Policy, Geneva <https://unctad.org/en/Docs/poitcdclpm18.en.pdf> accessed 15 July 2019.

53 Zambia and IMF, 'Enhanced Structural Adjustment Facility: Policy Framework Paper, 1999-2001' (1999) <https://www.imf.org/external/np/pfp/1999/zambia/> accessed 15 July 2019.

54 CUTS International, 'Competition Regimes of the World: A Civil Society Report: Zambia' (2006) CUTS Civil Society Report, 303. <https://competitionregimes.com/pdf/Africa/59-Zambia.pdf> accessed 15 July 2019.

55 CUTS Civil Society Report Zambia 2006 303-304.

2.2.3 Zimbabwe

Pre-independence, the focus of the settler community in Zimbabwe was on the development of commercial agriculture, with the prospecting for minerals not having yielded the expected commercially viable amounts.[56] The choice of commercial agriculture as an appropriate base for industrial development led to the passing of laws between 1930 and 1956 which would see indigenous communities dispossessed of their land to make way for commercial level agriculture by the settlers. This meant that at independence, agriculture was the most highly developed economic sector, with the most arable land in the hands of the settlers. Industrial input was focused on meeting the needs of the agricultural sector.[57]

Around the time when Britain was ceding control of its colonies in Sub-Saharan Africa, Zimbabwe, then known as Rhodesia and still under the control of the settlers, made a Unilateral Declaration of Independence (UDI) in 1965.[58] Following the UDI, the government in power sought to strengthen self-reliance following a string of international sanctions. The government adopted policies that saw increased intervention and state control of the major economic sectors, import-substitution to promote domestic production, price controls and other measures aimed at ensuring economic stability considering the increased international isolation. However, the indigenous majority were still excluded from the mainstream economy.[59]

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56 Frank Barry, Patrick Honohan and Tara McIndoe-Calder, 'Postcolonial Ireland and Zimbabwe: Stagnation before Convergence' (2009) IIIS Discussion Paper No. 291, Institute for International Integration Studies <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1610301> accessed 15 July 2019.

57 Benson Zwizwai, Admore Kambudzi and Bonface Mauwa, 'Zimbabwe: Economic Policy-Making and Implementation: A Study of Strategic Trade and Selective Industrial Policies' 225-252 in Charles C. Soludo et. al. (eds), *The Politics of Trade and Industrial Policy in Africa: Forced Consensus?* (The International Development Research Centre 2004) <https://www.idrc.ca/sites/default/files/openebooks/125-6/index.html> accessed 15 July 2019.

58 For information on the UDI see <https://www.nationsencyclopedia.com/knowledge/Unilateral_Declaration_of_Independence.html> accessed 15 July 2019. The Unilateral Declaration of Independence (UDI) of Rhodesia from the United Kingdom was signed on November 11, 1965, by the administration of Ian Smith, whose Rhodesian Front party opposed an immediate transfer to black majority rule in the self-governing British colony.

59 Daniel Makina, 'Historical Perspective on Zimbabwe's Economic Performance: A Tale of Five Lost Decades. Journal of Developing Societies' (2010) 26 Journal

Therefore, although the few years following the UDI saw relative stability and economic growth, this progress was from the perspective of the settlers and there was increased agitation from the indigenous African majority for independence. Zimbabwe finally achieved internationally recognised independence in 1980 with Robert Mugabe becoming the first prime minister.[60]

It is noted that the focus of the independence government was more on ownership rather than economic expansion. State corporations were put in place to take control of the strategic economic sectors. National policies centred on expanding social services and redistribution of land to the disenfranchised indigenous majority. However, the lack of proper economic policies began to be felt with budget deficits, spiralling inflation, high unemployment, declining foreign exchange reserves and an overall under-performing economy becoming the norm. The independence government determined the way out to be via external financial aid. However, the financial aid came with its conditions. IMF and other main donors required the adoption by Zimbabwe of a structural adjustment program. Zimbabwe adopted an enhanced structural adjustment program (ESAP) in 1991.[61]

The main goal of the ESAP was to transform Zimbabwe into a more open and market-driven economy. Some of the more concrete measures included the adoption of trade liberalizing policies, including privatization of parastatals, as well as increased deregulation of certain core sectors. Competition policy was considered a necessary measure to realise the benefits of the economic reforms.[62]

A study conducted in 1991 revealed that there are indeed existing restrictive business practices such as market power-enhancing barriers to trade and collusive agreements. The need for promoting market efficiency and protecting competition led to the passing in 1996 of the Competition Act, which came into force in 1998. It sets out the main objective as the promotion and maintenance of competition in the economy of Zimbabwe. The act adopts the *per se* and rule of reason approach to prohibiting restrictive business practices. It also sets out provisions for the regulation of mergers.

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of Developing Societies 1 99–123 <https://doi.org/10.1177/0169796X1002600105> accessed 15 July 2019.

60 Benson Zwizwai et al. (2004) 4-6.

61 Benson Zwizwai et al. (2004) 7.

62 World Bank Group, 'Structural Adjustment and Zimbabwe's Poor' (2012) <http://lnweb90.worldbank.org/oed/oeddoclib.nsf/DocUNIDViewForJavaSearch/15A937F6B215A053852567F5005D8B06> accessed 15 July 2019.

The Competition Act established the Competition and Tariff Commission which is responsible for the administration of competition law and policy in Zimbabwe.[63]

2.2.4 Tanzania

When Tanzania gained independence from Britain in 1961, the independence government took over a largely agriculture-dependent market economy, with agriculture contributing more than 50 percent to the GDP. The structure of the economy, as is the case for most SSA countries today, was mainly geared towards production and export of raw materials and importation of processed goods. The post-independence market economy and the main means of production were still largely under the control of the British and Asians. It is noted that the period between 1961 and 1967, the independence government opted to retain this imbalanced capitalist structure, with the majority of the indigenous Tanzanian population not benefiting socially and economically from independence.[64]

This however changed in 1967, when Tanzania adopted a socialist policy. This included the state taking control of the previously market-oriented economy and nationalizing all the main means of production in the country. State corporations were established to take control of the previously privately held enterprises. The socialist policy is later regarded as the main reason for Tanzania's economic under-performance. As noted by Ngowi, the state corporations were,

> typically characterized by inadequate managerial and technical skills; embezzlement; capacity under-utilization; reliance on government subsidies; non-payment of taxes; over-employing; protected from im-

63 CUTS International, 'Competition Regimes of the World: A Civil Society Report: Zimbabwe' (2006) CUTS Civil Society Report, 306-310 <https://competitionregimes.com/pdf/Africa/60-Zimbabwe.pdf> accessed 15 July 2019.

64 Honest Prosper Ngowi, 'Economic development and change in Tanzania since independence: The political leadership factor' (2009) 3 African Journal of Political Science and International Relations 4 pp. 259-267 <http://www.academicjournals.org/app/webroot/article/article1379789169_Ngowi.pdf> accessed 15 July 2019; see also Martin Mandalu, DR Thakhathi, and Hofisi Costa, 'Investigation on Tanzania's Economic History since Independence: The Search for a Development Model' (2018) 4 World Journal of Social Sciences and Humanities 1 pp. 61-68 <http://pubs.sciepub.com/wjssh/4/1/4> accessed 15 July 2019.

> ports; and monopolistic in nature. As a result they became loss-making entities that depended on government subsidies for their survival. Inefficiencies drove down producer prices and there was high effective protection of the import-substituting industrial sector. Trade controls, instead of exchange rate adjustment, were used as a means of adjusting to external shocks. Suppression of private business limited opportunities for entrepreneurship. Control of prices, exchange rate, interest rate, imports and exports added to the already hostile business and investment climate.[65]

The socialist policies however greatly benefitted the indigenous majority, with a lot of investment going to social services such as education and health. Moving into the eighties, there was an acknowledgement by the government of the failure of the socialist policies to yield the anticipated economic gains. The mid-eighties saw a change in political leadership in Tanzania and with it major reforms which included a shift from the socialist policies to a market-based economy.[66]

Like in many SSA countries, the Tanzania government sought external aid, principally from the IMF, to support the economic recovery. In 1986, Tanzania adopted a structural adjustment program which was part of the conditions attached to the IMF funding. Reforms included privatisation of the state corporations, easing of entry restrictions in the majority of economic sectors, removal of price controls and deregulation in a number of industries.[67]

As part of the ongoing structural adjustments, a government task force was established in 1990 to look into policies and institutional frameworks that can be put in place to regulate Tanzania's market economy. One of the regulatory frameworks that was put in place was the Fair Trade Practices Act which was enacted in 1994 to regulate competition law. The Act inter alia regulated restrictive business practices, misuse of market power, control of monopolies and concentration of economic power via mergers and acquisitions. Various shortcomings in the Act were identified including absence of a competition test, excessive ministerial power

65 Ngowi (2009) 263.
66 Ngowi (2009) 265; Mandlu et al (2018) 66.
67 Ngowi (2009) 265.

and inadequate safeguards for the independence, accountability and transparency of the competition law.[68]

The Act was reviewed in 1994 and 2001 with the current version being the Fair Competition Act of 2003. The Fair Competition Act establishes the Fair Competition Commission which is independent of the relevant ministry. Its object is to inter alia, 'enhance the welfare of the people of Tanzania as a whole by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct throughout Tanzania'.[69]

2.2.5 Mauritius

Prior to gaining independence in 1968, Mauritius had been under the colonial rule of three European powers: the Netherlands, France and in the latter years Britain. Economically, Mauritius depended primarily on its sugar-cane fields, which are argued to have been introduced by the Dutch and later nurtured and exploited by the French and the British. At independence, the country's economy was dependent on sugar for over 90 percent of its export earnings.[70]

From the social perspective, Mauritius has a very high cultural diversity; Mauritians of Indian descent making up most of the population followed by the Creoles (Mauritians of African descent). It has been argued that prior to the Dutch colonising the island around 1658, it was largely uninhabited. Large scale migration into the island is noted to have been intended to meet the labour needs of the European settlers.[71]

Post-independence, there were several socio-economic concerns that needed to be addressed. Racial inequality for instance led to the social

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68 CUTS International, 'Competition Regimes of the World: A Civil Society Report: Tanzania' (2006) CUTS Civil Society Report pp. 288-292 <https://competitionregimes.com/pdf/Africa/56-Tanzania.pdf> accessed 15 July 2019.

69 CUTS Civil Society Report Tanzania 289.

70 Louis YeungLamKo, 'The Economic Development of Mauritius Since Independence' (1998) School of Economics, University of New South Wales, 4 <http://wwwdocs.fce.unsw.edu.au/economics/Research/WorkingPapers/1998_6.pdf> accessed 15 July 2019; see also Milo Vandemoortele with Kate Bird, 'Progress in economic conditions: Sustained success against the odds in Mauritius' (2011) Overseas Development Institute, 4-7 <https://www.odi.org/sites/odi.org.uk/files/resource-documents/11579.pdf> accessed 15 July 2019.

71 Vandemoortele and Bird (2011) 4.

and economic exclusion of the Creoles. There was also overdependence on sugarcane, with the control of the plantations being in the hands of a few. There were also high unemployment rates coupled with high population growth. Other concerns included a decline in export earnings, poor balance of payments, reduced output and a ballooning external debt.[72]

Mauritius adopted a structural adjustment program in the 1980s as a condition precedent to a loan from the IMF and is credited as having, to a large extent, succeeded in implementing structural adjustment in SSA.[73] Various factors including a sound macroeconomic management policy, a flexible exchange rate policy which favoured competitive prices, structured (and improved) policies for export processing zones, streamlining of the near-capacity sugar industry, and investment in education and inclusive social welfare policies to reduce the social imbalance.[74] Efforts to further diversify the economy to include service industries such as tourism and financial services as well as streamlining the manufacturing sector also contributed to the economy's success. Overall, Mauritius GDP grew by 4.6% annually for the period between 1977 and 2008.[75] The service sector, primarily financial services and tourism, has grown to become the main contributor to the GDP, standing at approximately 74 percent.[76]

In 1980, Mauritius enacted the Fair Trading Act which was largely meant to protect consumers from misleading trade practices as well as preventing the charging of prices beyond those fixed by statute. One of the justifications given for price control was that lack of competition in most sectors hence the need to cushion consumers from excessive prices. The intention was for the price controls to be removed gradually as the markets become more competitive.[77]

As a consequence of various changes in the economy especially privatisation, increased trade liberalisation and the gradual removal of price controls, it was felt that a robust competition policy was needed to pre-

72 Vandemoortele and Bird (2011) 5.

73 Philip English, 'Mauritius: Reigniting the Engines of Growth A Teaching Case Study' (2002) Teaching Notes, 3-4 <http://documents.worldbank.org/curated/en/936011468757482849/Teaching-notes> accessed 15 July 2019.

74 English (2012) 3-4.

75 Vandemoortele and Bird (2011) 6.

76 For statistics see Mauritius: Economic Outline <http://www.mauritiustrade.mu/en/trading-with-mauritius/mauritius-economics-outline> accessed 15 July 2019.

77 CUTS International, 'Competition Regimes of the World: A Civil Society Report: Mauritius' (2006) CUTS Civil Society Report, 254-259 <https://competitionregimes.com/pdf/Africa/48-Mauritius.pdf> accessed 15 July 2019.

vent cartelist behaviour form capturing the market.[78] The Competition Act, which was passed in 2003, was considered a necessary policy tool to enhance competition in Mauritius. It however never entered into force. One of the reasons proffered for the 2003 Act not entering into force was that there was a change of government which resulted in proposals for a new Act. It was also argued that a lot of interference from private sector interests had undermined the 2003 Act.[79]

The Act currently in force is the Competition Act of 2007 (entered into force in 2009). It established the Mauritius Competition Commission and regulates various restrictive business practices (such as collusive agreements and non-collusive horizontal agreements). It also provides for merger control.[80]

2.2.6 Malawi

Malawi's economy at the time of independence shares many similarities with several SSA countries. There were high poverty levels affecting the largely rural based African population. There was also a lack of skilled human resource, exacerbated by a burgeoning uneducated population. The lack of mineral resources led to an over reliance on agriculture and pressure for land. Therefore, at the time of independence in 1964, the economy was predominantly dependent on agricultural export earnings. However, although facing similar socio-economic challenges as most other SSA countries at the time of independence, Malawi is noted to have experienced a period of accelerated economic growth in the first decade under the independence government. In addition to the rapid economic growth, there was increased employment, an improved investment climate and an increase in agricultural output.[81]

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78 Reshma Peerun-Fatehmamode, Sunil Bundoo and Kheswam Jankee, 'Competition Scenario in Mauritius' (2006) CUTS International <http://www.cuts-ccier.org/7up3/pdf/CRR-Mauritius.pdf> accessed 15 July 2019.

79 Siven Pillay Rungien, 'Competition in Paradise: A look at the competition law and enforcement activities of Mauritius' (2011) Queen Mary University Global Antitrust Review 4, 165-166 <http://www.icc.qmul.ac.uk/media/icc/gar/gar2011/GAR-journal-2011_10_rungien.pdf> accessed 15 July 2019.

80 Mauritius Competition Act 25/2007.

81 Happy M. Kayuni, 'Malawi's Economic and Development Policy Choices from 1964 to 1980: An Epitome of 'Pragmatic Unilateral Capitalism' (2011) 20 Nordic Journal of African Studies 2, 112–131 <http://www.njas.helsinki.fi/pdf-files/vol20

The period of growth however hit its peak towards the end of the 1970s. Malawi remained very fragile to shocks to its agricultural sector. The two decades from the beginning of the 1980s were marked with various challenges including falling per capita income and a decline in agricultural output. Malawi adopted its structural adjustment programme in the early 1980s under the advise of the World Bank.[82]

Although facing adverse economic challenges, the 1980s and 1990s were marked with increased trade liberalisation. The government also began to commit more resources to social development such as education. However, the structural adjustment programs to a large extent failed to meet their objectives. It is argued that the structural adjustment program did not address the underlying structural problems such as the rapidly increasing population coupled with poor land distribution and a decrease in the soil's productive capacity.[83]

In spite of the failure of the policy initiatives to reverse the negative trend in socio-economic development, the government continued to pursue trade liberalisation and privatisation of state enterprises in various sectors.[84] It is in the 1990s that Malawi adopted its competition policy. The Malawi Competition and Fair Trading Act was enacted in 1998 and came into force in 2000. The Act inter alia seeks to:

> encourage competition in the economy by prohibiting anti-competitive trade practices; to establish the Competition and Fair Trading Commission; to regulate and monitor monopolies and concentrations of economic power; to protect consumer welfare; to strengthen the efficiency of production and distribution of goods and services; to secure

num2/kayuni.pdf> accessed 15 July 2019; see also David Booth, Diana Cammack, Jane Harrigan, Edge Kanyongolo, Mike Mataure and Naomi Ngwira, 'Drivers of Change and Development in Malawi' (2006) Overseas Development Institute Working Paper 261 <https://www.odi.org/publications/1318-drivers-change-and-development-malawi> accessed 15 July 2019 .

82 Booth et al (2006) 5-6; IMF, 'Malawi: Economic Development Document' (2017) IMF Country Report No. 17/184 <https://www.imf.org/en/Publications/CR/Issues/2017/07/05/Malawi-Economic-Development-Document-45037> accessed 15 July 2019.

83 Booth et al (2006) 4-7; IMF Malawi Country Report (2017) 4-6.

84 CUTS International, 'Competition Regimes of the World: A Civil Society Report: Malawi' (2006) CUTS Civil Society Report, 249-253 <https://competitionregimes.com/pdf/Africa/47-Malawi.pdf> accessed 15 July 2019.

> the best possible conditions for the freedom of trade; to facilitate the expansion of the base of entrepreneurship.[85]

Malawi also enacted a Consumer Protection Act which came into force in 2003 with the aim of protecting consumers from unfair trade practices.[86]

2.2.7 Botswana

From an economic perspective, Botswana can be analysed from two broad perspectives; the period before and the period after the discovery of diamonds. Pre-independence, Botswana was used by the British and later South Africa mainly for geo-political reasons as a means of safeguarding access to the interior of Africa. There was no real interest in the exploitation of its natural resources. There were further disincentives to invest in the territory as a result of various uncertainties regarding its status as a colonial protectorate. As a result, no extensive administrative structures were set up within Botswana. A number of the pre-colonial indigenous socio-political structures therefore remained prominent even at independence, with tribal chiefs having a level of influence on leadership at the national level. There was therefore a mix of colonial administrative structures as well as the indigenous structures.[87]

Botswana gained independence in 1966. At independence, Botswana's economy was largely dependent on a poorly performing agricultural sector (in particular beef production) which accounted for roughly 40 percent of the GDP. Botswana also faced most of the socio-economic hardship experienced by many of the newly independent African states such as a

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85 Competition and Fair Trading Act of Malawi, Act No. 43 of 2008.

86 Consumer Protection Act of Malawi, Act No. 14 of 2003.

87 Daron Acemoglu, Simon Johnson and James A. Robinson, 'Botswana: An African Success Story' in Dani Rodrik (Ed.), *In Search of Prosperity: Analytical Narrative on Economic Growth* (Princeton University Press 2003); Valentin Seidler, 'Why did Botswana end up with Good Institutions: The Role of Culture and Colonial Rule' (2010) Vienna University for Economics and Business: Institute for Economic and Social History, 3-7 <https://ssrn.com/abstract=3051011> accessed 15 July 2019; Lewis H. Gann and Peter Duignan, *Burden of Empire: An Appraisal of Western Colonialism in Africa South of the Sahara* (Hoover Institution Press 1967); John Alan Robinson, and Neil Parsons, 'State Formation and Governance in Botswana' (2006) 15 Journal of African Economies 1, 100-140 <https://scholar.harvard.edu/jrobinson/publications/state-formation-and-governance-botswana> accessed 15 July 2019.

poorly educated population largely dependent on subsistence agriculture. Botswana was for the most part dependent on international development assistance.[88]

However, unlike other SSA countries, Botswana did not adopt policies that seek to promote import substitution. Botswana also avoided the wave of nationalisation of private enterprises. The government did not create state corporations to take over key sectors in the economy. For this reason, Botswana is noted to have avoided many of the economic inefficiencies suffered by states that adopted these policies. Indeed, Botswana is one of the very few developing countries that have not been part of the IMF structural adjustment programs.[89]

The discovery of diamonds in 1967 was a big turning point and ushered in a period of rapid economic growth associated with the exploitation of this resource. It shifted Botswana from an agricultural-based to a predominantly mineral-based economy. Currently, mining averages about 40 percent of Botswana's GDP with manufacturing and agriculture now contributing substantially less to the GDP in comparison. The challenge however is how to diversify the economy and reduce reliance on mineral exports, whose earnings are projected to drop.[90]

Due to good economic and governance policies as well as political stability, Botswana is one of the few countries that have not fallen victim to the 'resource curse' which has seen many developing countries fail to benefit from their natural resources as a result of bad governance and corruption.[91]

In 2005 Botswana adopted a National Competition Policy. It was acknowledged in the policy that Botswana has, since independence, maintained a very open economy and has sought to strengthen the functioning of markets. However, there were concerns regarding the emergence of certain private sector anti-competitive practices. Other considerations included 'the increasing dominance of foreign companies in the Botswana

88 Michael Lewin, 'Botswana's Success: Good Governance, Good Policies, and Good Luck' (2019), 1 <https://www.researchgate.net/publication/265285982> accessed 15 July 2019.

89 *See generally* Lewin (2019); *See also* Patrick Imam, 'Effect of IMF Structural Adjustment Programs on Expectations: The Case of Transition Economies' (2007) IMF Working Paper <https://www.imf.org/en/Publications/WP/Issues/2016/12/31/Effect-of-IMF-Structural-Adjustment-Programs-on-Expectations-The-Case-of-Transition-Economies-21449> accessed 15 July 2019.

90 Lewin (2019) 87.

91 Lewin (2019) 83-84.

economy; the need to safeguard and promote the growth and development of citizen-owned small and medium enterprises; and other Government policy initiatives such as the diversification of the economy.'[92] It was further noted that the competition policy is a strategic tool to:

> promote free entry in the market place by investors and all firms, irrespective of their size; the attraction of both domestic and foreign investment flows; innovation and transfer of technology from intellectual property rights-holders; unfettered competition; acceptable business behaviour and conduct; fair business practice; efficiency; competitiveness; and consumer welfare.[93]

Botswana first adopted a Competition Act in 2009. The 2009 Act was repealed and replaced by the Competition Act of 2018. The 2009 Act established the Competition Authority which was responsible for the day to day implementation and enforcement of the Competition Act. The Act also established in parallel a Competition Commission which served as the governing body of the Competition Authority as well as the adjudicative body. The Act regulated restrictive business practices as well as control of mergers.[94] The 2018 Act changed the name of the Competition Authority to the Competition and Consumer Authority. A Competition and Consumer Board was established and replaced the Competition Commission as the governing body of the Competition and Consumer Authority. The 2018 Act also established the Competition and Consumer Tribunal which is the dedicated adjudicative body. The 2018 Act also introduced criminal liability for cartel conduct, specified particular types of conduct regarded as abusive of dominance and introduced financial penalties for failure to notify mergers falling within the notification thresholds.[95]

2.2.8 Seychelles

Seychelles is a small island (archipelago) economy whose first settlers were the French (1770). It was thereafter colonized by the British in 1811 un-

92 Botswana Ministry of Trade and Industry, National Competition Policy of Botswana (2005) <https://www.competitionauthority.co.bw/sites/default/files/National%20Competition%20Policy%20Botswana%202005.pdf> accessed 15 July 2019.
93 National Competition Policy of Botswana (2005) para 2.6.
94 *See generally* Botswana Competition Act, No. 17 of 2009.
95 *See generally* Botswana Competition Act, No. 4 of 2018.

til gaining independence in 1976. It was during the colonization period that most of the physical and administrative structures were put in place. Economically, there was a clear divide between the settlers who owned most of the land and assets, and the migrants from mainland Africa who constituted most of the low-income working class.[96]

Subsequent socio-economic and political developments in the ensuing years led to the formation of two main political parties: The Seychelles People's United Party (SPUP) which was backed by the proletariat and the Seychelles Democratic Party (SDP) which was backed by the elite. The SPUP agitated for wealth distribution as well as independence while the SDP pushed for a maintenance of the status quo. Seychelles gained independence in 1976 with the head of the SDP ascending into power before being ousted a year later and the SPUP seizing power.[97]

The SPUP government embarked on a process of wealth redistribution, with the government acquiring large tracts of land to facilitate this effort. The government subsequently set up state corporations covering most of the economic sectors such as transport, hospitality, manufacturing, tourism, education and financial services. These state corporations essentially became monopolies. The state also relied heavily on borrowing from banks to meet its commitments. The effect was a decline of the private sector which was unable to effectively compete against the state corporations. Therefore, although the economy grew in the 1980s and 1990s this was against the backdrop of overdependence on debt finance, with debt averaging above 40 percent of the GDP.[98]

Seychelles to date is largely dependent on its tourism industry. In order to expand the sector, the government embarked in the 1990s on a mix of policies such as increased privatization and tax incentives in order to attract more foreign investors. There were some gains made in this sector as well as other sectors such as fisheries where the government had adopted similar policies to attract foreign investors. However, the overreliance on debt finance proved unsustainable. By the late 1990s, the government was increasingly unable to service its debt. It is noted that by the end of the year 2001, external debt had risen to over 50 percent of the GDP.[99]

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96 Sawkut Rojid, Ahmed Afif, and Emilio Sacerdoti, 'Seychelles: How Classic Policies Restored Sustainability' (2013) World Bank, 1 <https://www.worldbank.org/content/dam/Worldbank/document/Africa/Seychelles/sc-how-classic-policies-restored-sustainability.pdf> accessed 15 July 2019.

97 Rojid et al. (2013) 1-2.

98 Rojid et al. (2013) 2.

99 Rojid et al. (2013) 2-21.

Between 2006-2008 a series of events including rising food and energy prices and the economic crisis which negatively impacted the tourism industry led to the government being unable to honour its external debt payments. It is around this time that the government-initiated discussions with the IMF, World Bank and other institutions in order to develop a structural adjustment program. Some of the immediate priorities included:[100]

Elimination of currency and price controls as well as liberating trade in the market in order that market forces drive trade; and

Reversing budget deficits and reducing external indebtedness.

As part of its program to transform the economy into a more liberal, market-oriented one the government began adopting various policies to safeguard the market. This included the Fair Trading Commission Act and the Fair Competition Act which were both enacted in 2009 with the Fair Competition Act coming into operation in 2010. The purpose of the Fair Trading Commission as noted in its preamble includes, 'to safeguard the interests of consumers, to monitor and investigate the conduct of business enterprises, to promote and maintain effective competition in the economy.'[101] The Fair Competition Act addresses the three main types of competition law concerns: restrictive (horizontal and vertical) agreements, abuse of dominance and anti-competitive mergers.[102]

2.2.9 Namibia

Namibia's pre-independence political economy can be divided into two main time periods; the period between 1884 and 1915 when the country was under German rule and the period between 1919 and 1990 when the country was under the control of South Africa. The period under German occupation was mainly marked with largescale land dispossession and introduction of private ownership to what was a predominantly pastoral indigenous population with a communal land ownership system. It is noted that by 1902, only 38 percent of the total land area remained in the hands of the indigenous population. Most of the previously pastoral communities were forced to take up poorly paying labour jobs. By 1913, around 90 percent of the livestock in established police zones were owned

100 Rojid et al. (2013) 21-27.
101 *See generally* Mauritius Fair Trading Commission Act, No 17 of 2009.
102 *See generally* Mauritius Fair Competition Act, No 18 of 2009.

by the settlers. The settlers had established an export economy focused mainly on agriculture and mining.[103]

South Africa's control of the Namibian territory from 1919 was intended to be a transition period in which Namibia would gradually obtain its independence. South Africa however established itself as a 'colonial power' with the indigenous population largely facing the pre-existing problem of poor human development and land dispossession. South Africa instituted a system of apartheid similar to the one existing in the home country. The native population were confined to native reserves and their movement out of these reserves was restricted. Thus, a system by which the indigenous population were reduced to serfs and practically forced to work on farms, mines and industries set up by the settlers was put in place.[104]

During the period between 1960 and 1979 there was a significant increase in GDP driven largely by investments in the mining sector, which was the most active economic sector and the biggest contributor to the economy. The period from 1980 to just before independence in 1990 saw a decline in GDP caused mainly by a poorly performing mining sector as well as poor weather conditions that affected the agricultural sector. There was also substantial investor uncertainty in the years leading to independence which caused a decline in investment. After Namibia gained independence from South Africa in 1990, the ensuing political stability resulted in a return of investor confidence and a resurgence of investment activity.[105]

Namibia is classified as a small middle-income country and is noted to be one of the few SSA countries that have seen their GDP increase by more than 5 times on average in the last 30 years. This is attributed to policies that effectively address development challenges such as infrastructure, health and education. However, lack of economic diversification and overreliance on the mining sector leaves Namibia vulnerable to external developments.[106]

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103 Wolfgang Werner, 'A Brief History of Land Disposession in Namibia' (1993) 19 Journal of Southern African Studies 1 <https://www.tandfonline.com/doi/abs/10.1080/03057079308708351> accessed 15 July 2019.

104 *See generally* Tekaligne Godana and John E. Odada, 'Sources of Growth in Africa: A Case Study of Namibia' (2002) <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.590.3047&rep=rep1&type=pdf> accessed 15 July 2019.

105 Godana and Odada (2002) 16.

106 IMF, 'Namibia: Selected Issues' (2014) IMF Country Report No. 14/41, 10-11 https://www.imf.org/external/pubs/ft/scr/2014/cr1441.pdf accessed 16 July 2019.

As a middle-income country, Namibia is not eligible for the Bretton Woods international development association funding. Namibia is therefore one of the few SSA countries that were not part of the structural adjustment programs of the Bretton Woods institutions.[107]

Namibia adopted its competition policy in 2003 with one of the core objectives being to boost competitiveness in the economy. It is noted that the government had recognised the necessity of a competition policy to address certain market practices that were affecting the competitiveness of the Namibian economy. The government with the assistance of the EU Commission prepared a study which resulted in the drafting of a Competition Bill in 1996. A committee was formed to further discuss the bill with all relevant stakeholders included, leading to the enactment of the Competition Act in 2003.[108] The Act establishes the Namibia Competition Commission and sets out a number of objectives including: promoting the efficiency of the economy, providing consumers with competitive prices and product choices, advancement of social and economic welfare. It also includes a public interest objective, that is, increasing the ownership stakes of historically disadvantaged persons.[109]

As noted by a former Chief Executive Officer of the Namibia Competition Commission, 'as the Commission pursues fair competition, it in fact creates an enabling environment for factors of competitiveness to manifest themselves, leading to productivity and sustained national economic development. It is thus envisaged that with the well working competitiveness markets, the economy would see lower prices, better quality goods, new product ranges, and innovation in production and distribution, leading to a socio-economic and consumer welfare as defined in the Competition Act'[110]

Substantially the Act addresses restrictive business practices including restrictive agreements and abuse of dominance. It also provides for the regulation of mergers.

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107 World Bank, 'World Bank Annual Report' (2007), 2 <http://siteresources.worldbank.org/EXTANNREP2K7/Resources/English.pdf> accessed 16 July 2019.

108 CUTS International, 'Competition Regimes of the World: A Civil Society Report: Namibia' (2006) CUTS Civil Society Report, 265-268 <https://competitionregimes.com/pdf/Africa/50-Namibia.pdf> accessed 16 July 2019.

109 Namibia Competition Act ss 2 and 4.

110 Mihe Gaomab, 'Competition Policy and Competitiveness in Namibia', 3 <http://www.nacc.com.na/cms_documents/703_competition_policy_and_competitiveness.pdf> accessed 16 July 2019.

2.2.10 Summary

Outside of the forces that shaped global market dynamics and led to the globalization of markets in the 20th century, the countries in SSA present many similarities in the evolution of their socio-economic and political climate. Three broad time periods are evident:

1. The period before colonial occupation where land ownership was communal and production was basic and largely subsistence, geared more towards consumption than trade.
2. The period of colonisation where settlers divided up the territories, subdued the indigenous populations and introduced a system of private ownership and capitalistic exploitation of resources. The native populations had their socio-economic and political structures disrupted, were excluded from ownership and means of production and were in many cases relegated to a low-income labour force.
3. The period after independence where the newly liberated countries were met with the choice of either maintaining the pre-independence socio-economic structures or developing policies aimed at ensuring a more even distribution of resources, means of production and other human development factors.

The choice for many post-independence governments was the adoption of policies that saw state control and nationalization of many of the previously privately-owned enterprises as a means to enable an equitable distribution of resources. Other measures such as import substitution were aimed at stimulating production in the local market. This is in addition to other policies targeting human development factors such as education and health. This is the case for instance with Kenya, Zambia, Tanzania, Seychelles, Zimbabwe and Malawi.

The outcome of these policies however for most of these jurisdictions was gross inefficiency leading to market failure. Except for Botswana, Mauritius and Namibia, the other ESA jurisdictions introduced structural adjustment programs at the behest of international donor institutions as a condition attached to access to development funds and technical assistance. It was within this matrix of trade liberalization, deregulation and privatisation that a package of policies, which included comprehensive competition policies, were introduced. Although not part of a negotiated structural adjustment program, Mauritius also adopted competition and consumer protection policies as part of a policy framework to support its liberalization and privatisation efforts. In the case of Botswana, which had strived to maintain an open economy since independence, a main concern

was the emergence of private-sector anti-competitive practices, especially by foreign enterprises. Namibia highlighted boosting competitiveness of the economy as one of their main reasons for adopting its competition policy.

In terms of objectives of competition policy, the main themes are promoting market efficiency, enhancing social and consumer welfare and facilitating economic growth and development.

2.3 The Regional Context

2.3.1 Introduction

The need for integration in Africa has been expressed over the years through the crafting of various objectives and the creation of a number of legal instruments and institutions to meet these objectives. Though the ultimate intention has always been to create a socially, politically and economically integrated Africa, the focal objectives have evolved over time in response to various circumstances and changes within Africa and globally.

The quest for integration can be said to have begun in the early 20th century with the espousing of the Pan Africanist ideals that advocated for *inter alia* the civil and political rights for Africans as well as encouraging the venturing by Africans into educational, commercial and industrial enterprise as a means of alleviating the poor condition of Africans globally.[111] The initial objectives were largely political, seeking to ensure that Africans were granted a level playing field in terms of having their own voice and seeking their own ideals.

The efforts of the Pan-African movement are credited with the conclusion in 1963 of the Organization of African Unity (OAU) Charter establishing the OAU, which is the predecessor of the current African Union (AU).[112] At its inception the central objective of the OAU was to ensure that after the liberation of most African States the right to self-determination was protected.[113] With increasing globalisation, economic develop-

111 Marika Sherwood, 'Pan-African Conferences, 1900-1953: What did 'Pan-Africanism' Mean?' (2012) 4 The Journal of Pan African Studies 10, 106-126 <http://www.jpanafrican.com/docs/vol4no10/4.10Pan-African.pdf> accessed 16 July 2019.

112 *See* AU in a Nutshell <https://au.int/en/au-nutshell> accessed 16 July 2019.

113 Charter of the Organization of African Unity (OAU Charter) 479 U.N.T.S. 39 <https://www.sahistory.org.za/archive/charter-organization-african-unity-479-u

ment was acknowledged as a core aspect of self-determination and resulted in the increased focus on economic integration as a catalyst for uniting Africa.[114]

One of the core intentions of the OAU had always been to foster economic cooperation among the Member States.[115] This intention was subsequently expressed over the years that followed through the signing of various declarations and conclusion of treaties that aimed at fostering economic cooperation and development among the Member States.

The most concrete step towards the economic integration of Africa under the ambit of the OAU was the signing of the Treaty Establishing the African Economic Community (AEC Treaty) in 1991.[116] The AEC Treaty provides for a six-stage plan towards the eventual achievement of an African Economic Community (AEC).[117]

One of these stages was set in motion on the 10th of June 2015 when the heads of state of three regional economic communities (RECs), the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC), signed a declaration launching the biggest free trade area in Africa as well as opening a Tripartite Free Trade Area (FTA) Agreement for signature. This was followed a week later by the launching of negotiations within the AU for the establishment of a Continental FTA.[118] The Continental FTA Agreement was adopted and opened for signature on 21 March 2018.

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nts-39-entered-force-sept-13-1963> accessed 16 July 2019. The preamble reflects this intention.

114 See, e.g., Organization of African Unity: Declaration on African Cooperation, Development, and Economic Independence, I.L.M 12(4): 996-1013. The preamble for instance expressed the concern over the widening gap in economic development between Africa and the developed world.

115 OAU Charter art 1 and 2

116 Treaty establishing the African Economic Community (AEC Treaty), 30 I.L.M. 1241 (1991).

117 AEC Treaty art 6(2). In respect of the third stage the AEC Treaty provides that 'At the level of each regional economic community and within a period not exceeding ten (10) years, establishment of a Free Trade Area through the observance of the time-table for the gradual removal of Tariff Barriers and Non-Tariff Barriers to intra-community trade and the establishment of a Customs Union by means of adopting a common external tariff.'

118 Africa Union, 'The African Union Assembly launches the Continental Free Trade Area (CFTA) negotiations' (17 June 2015) <https://au.int/sw/node/29332> accessed 16 July 2019.

While the conclusion of the Tripartite FTA Agreement and the Continental FTA Agreement is certainly a bold step towards the creation of the AEC, questions still remain as to the effectiveness of the RECs in achieving their objectives. The FTA Agreements also present their own challenges. The discussion will mainly focus on COMESA, EAC and SADC as well as the Tripartite FTA Agreement. An overview of the Continental FTA Agreement will be presented.

2.3.2 The Regional Economic Communities

Regional integration has been largely accepted in Africa as a way to achieve economic development and sustainable growth. The AU for instance recognises eight RECs, which together cover more or less the whole of Africa. Many RECs in Africa are however lagging behind in the implementation of their objectives. The price volatility on the global market and its effect on the relatively nascent natural-resource based economies in Africa highlights the need for the RECs to expedite their integration efforts in order to bolster and increase regional economic activity. The conclusion of such Agreements by the Member States of the EAC, COMESA and SADC is in this regard highly laudable. One, however, has to take a step back and consider how effective the three RECs are in meeting their own objectives.

The core objective of the three RECs is naturally to achieve social, political and economic integration but the level of integration sought varies. Whereas on the one hand SADC and COMESA intend to eventually achieve a Monetary Union with a single currency, the EAC has the far more ambitious objective of establishing a Political Federation. The three RECs however have common objectives which if harmonised could facilitate the tapping of the great potential within the Tripartite FTA.

2.3.2.1 COMESA

COMESA is the largest of the three RECs with a membership of 21 Northern, Eastern and Southern African states.[119] The origin of COMESA goes back to the 1982 Treaty Establishing the Preferential Trade Area for

119 COMESA Member States are Burundi, The Comoros, Egypt, The Democratic Republic of Congo, Djibouti, Eritrea, Ethiopia, Kenya, Libya, Madagascar,

Eastern and Southern African States (PTA Treaty), which was concluded under the ambit of the OAU.[120] The PTA Treaty sought the enhancement of co-operation and development among the Member States in the fields of trade, customs, agriculture, industry, natural resources, transport, monetary affairs and communications.[121] Member States were required to inter alia bring down and eventually eliminate customs duties on imports from within the PTA and establish common rules of origin (RoO) for products eligible for preferential treatment. The ultimate objective of the PTA was the establishment of an economic community for the Eastern and Southern African states.[122]

The transition of the PTA into a Common Market was set in motion with the ratification of the COMESA Treaty on 8 December 1994. The main objectives of COMESA as set out in the COMESA Treaty are geared towards sustainable growth and development within the Member States and jointly among the Member States. This objective is to be met through the creation of an economically liberalised environment that promotes domestic, cross-border and foreign investment, adoption of common policies and programs and the adoption of common positions with regards to the international agenda.[123] The ultimate aim is the implementation of specific measures that will result in the realisation of the AEC.

The COMESA Treaty sets out undertakings in various economic fields which the Member States are required to meet, some of which were subject to fixed timelines. As regards cooperation in respect of trade liberalisation and development for instance, the COMESA Treaty set a timeline of 10 years from its entry into force for the creation of a Customs Union. Within this period, customs duties and similar charges on imports from the Member Countries were to be eliminated. It also entailed the removal of Non-Tariff Barriers (NTBs) and the establishment of a Common External Tariff (CET) for goods coming from third countries.[124] This in turn necessitated the adoption within this period of various requirements such

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Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, Zimbabwe, Tunisia and Libya.

120 Treaty Establishing the Preferential Trade Area for Eastern and Southern African States (PTA Treaty), 21 ILM 479 (1981) article 29; See also Treaty Establishing a Common Market for Eastern and Southern Africa (COMESA Treaty), 33 I.L.M. 1067 (1994) preamble.

121 PTA Treaty art 3.

122 PTA Treaty art 3.

123 COMESA Treaty art 3.

124 COMESA Treaty, art 45.

as RoO, rules on dumping, restrictions on subsidies and rules on competition.[125] The COMESA Treaty also requires the Member States to cooperate in monetary and financial matters with the highly ambitious eventual goal of establishing a Monetary Union characterised by a common currency that would facilitate easier cross-border trade.[126]

Another fundamental undertaking was geared towards addressing the persistent problem of poor infrastructure. The Member States undertook to establish coordinated and complementary transport and communications policies as well as to expand and improve the current facilities and create new ones.[127] Industrial development, which is intrinsically linked to functional infrastructure, is also acknowledged as a critical development area. The Member States are required to adopt an industrial strategy that takes into account aspects such as specialisation and complementarity of industries while having regard to various comparative advantages.[128] The support of small and medium enterprises, food and agricultural industries, the promotion of industrial Research and Development (R&D), increased private sector participation and the improvement of the investment climate in the Common Market are among the many factors identified as necessary in enhancing industrial development.[129]

Various other critical development areas targeted for achievement by the Member States are: cooperation in the development of energy; efficient and sustainable use of natural resources; protection and preservation of the environment; promotion of scientific and technological progress; cooperation in agriculture and rural development and the progressive adoption of measures to facilitate the free movement of persons, labour and services.

The disparity in terms of economic development between some of the Member States is recognised as a critical integration challenge. The Member States therefore agreed to take measures to address this disparity through cooperating in capacity building for these regions in areas such as infrastructure, industrial development and agriculture.[130]

The COMESA FTA was launched in 2000. To date however not all the Member States are party to the FTA.[131] The Democratic Republic of

125 COMESA Treaty art 46-62.
126 COMESA Treaty art 4(4).
127 COMESA Treaty art 84-98.
128 COMESA Treaty art 99.
129 COMESA Treaty art 100.
130 COMESA Treaty art 144.
131 COMESA, 'Final Communiqué of the Eighteenth Summit of the COMESA Authority of Heads of State and Government (COMESA 18th Summit)' (31

Congo, Ethiopia, Uganda, and Eritrea have expressed their commitment to join and are at various stages of preparing accession instruments.

The Customs Union was launched in 2009, which was already beyond the agreed-upon 10-year timeline.[132] A three-band CET was set at 0% for imports of raw materials and capital goods, 10% for imports of intermediate products and 25% for imports of finished products. The 0% on raw materials is because they are important for production and the cost therefore affects competitiveness of the end products. The 25% on finished products is explained as a measure to protect domestic products from the stiff competition of foreign products.[133]

COMESA has adopted various instruments and measures meant to give full effect to the Customs Union but timelines remain largely unmet and the implementation is still low. Member States expressed various concerns including: local industries and revenues being affected by the imported goods; loss of decision-making capacity on various policy areas; some countries facing serious economic and industrial problems hence requiring time for their own economies to recover; insufficient capacity, information and coordination. One concern expressed that touches on the issue of overlaps is the fact that the EAC, a number of whose members are also members of COMESA, already has a customs union.[134]

The COMESA Secretariat pointed out that the real reasons for the non-implementation include: National policies that are incompatible with the customs union; some countries having existing free trade agreements with third countries that include duty free provisions hence making it difficult to subsequently introduce a CET; some domestic industry stakeholders feeling threatened by competition from imports, and a general lack of prioritisation of regional integration requirements as well as institutional, technical and financial constraints in some Member States.[135]

The inadequacy of existing infrastructure in the COMESA region has been noted as one of the key hindrances to the region's economic progress. Various infrastructure projects that have been identified as key in meeting the COMESA Treaty objectives have been initiated. They broadly

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March 2015) <http://dhanaanmedia.com/wp-content/uploads/2015/03/150331_Final-communique_March-2015_new.pdf.pdf> accessed 5 March 2017.

132 Sindiso Ngwenya et al, 'Key Issues in Regional Integration' (2013) 2, 131 <https://www.comesa.int/wp-content/uploads/2019/03/key-issues-on-intergration-ii_final_final_cutout_print.pdf> accessed 16 July 2019.

133 Ngwenya et al (2013) 79.

134 Ngwenya et al (2013) 134-135.

135 Ngwenya et al (2013) 135.

cover transport, energy, and Information and Communications Technology (ICT).[136] The approach to the development of roads and railways envisions the construction of inter-regional corridors.[137] A Djibouti Corridor Authority was for instance set-up to oversee the implementation of the Djibouti Corridor which links Djibouti, South Sudan, Sudan and Ethiopia.[138] As regards energy, the regional Association of Energy Regulators for Eastern and Southern Africa (RAERESA) was set up in 2009 to streamline cooperation efforts towards sustainable energy development. The current projects are targeted at hydro-electric, geothermal and wind energy, including various proposed regional interconnection projects.[139] The COMESA Infrastructure Fund was set up to raise capital to aid the funding of these proposed projects and is reported to currently have a capitalisation of around USD 22 million.[140] There are however no concrete timelines for the finalisation of the various projects.

Regarding ICT, an association of ICT regulators in the COMESA region (ARICEA) was formed in 2003. One of its objectives is to coordinate cross-border ICT regulatory issues.[141] To this end an ICT Policy and Model Bill was approved as well as various regulatory guidelines touching on for instance interconnection, satellite and wire services, licensing, cyber security being concluded.[142] The status of the expansion and modernisation

136 See for instance COMESA, 'COMESA Region Key Economic Infrastructure Projects' (2013) <https://europa.eu/capacity4dev/file/16076/download?token=46F3PgO7> accessed 16 July 2019 (COMESA Infrastructure Report).

137 COMESA Infrastructure Report para 4.1.

138 Japan International Cooperation Agency, The Data Collection Survey for Djibouti Corridor: Final Report <http://open_jicareport.jica.go.jp/pdf/12302642_01.pdf> accessed 22 August 2019.

139 COMESA Infrastructure Report paras 3.2 and 4.2; See also Tinashe Mushakavanhu, 'Kenya is building Africa's biggest wind energy farm to generate a fifth of its power, Quartz Africa' (2015) <http://qz.com/444936/kenya-is-building-africas-biggest-wind-energy-farm-to-generate-a-fifth-of-its-power/> accessed 16 July 2019.

140 COMESA Infrastructure Report para 5; See also IPAN, 'COMESA Infrastructure kitty hits $22 million' (2015) <http://www.ipan.co.za/?p=314> accessed 16 July 2019.

141 See ARICEA Constitution <https://ariceaweb.org/index.php?option=com_content&view=article&id=4&Itemid=13> accessed 16 July 2019.

142 COMESA, 'Report of the 8th Annual General Meeting of Regulators of Information and Communication for Eastern and Southern Africa (ARICEA)' (2012), 22

of actual regional ICT infrastructure is however uncertain. Various ICT projects had been conceptualised under the ambit of a regional telecommunications project (COMTEL Project) seeking to for example increase fibre-optic linkages, but the funding remains a major hindrance to their implementation.[143] ARICEA also reports facing challenges in attracting private sector participation in its programs.[144]

All these factors point to a significant NTB concern, not to mention a number of lingering tariff issues. These challenges aside, reports point to a slow but somewhat steady achievement of some integration objectives. The operationalisation of the Regional Payment and Settlement System (REPSS) for instance will go a long way in cutting down financial and transaction costs in the region once all the Member States commit to participate in it.[145] As regards actual trade, reports indicate that intra-COMESA trade increased from USD 19.2 billion in 2013 to USD 22 billion in 2014, with a likelihood of seeing further increases once all Member States participate in the FTA.[146]

2.3.2.2 EAC

The EAC Member States are Kenya, Uganda, Tanzania, Rwanda, Burundi and South Sudan. South Sudan was admitted to the EAC in February 2016. With the exception of Tanzania and South Sudan, all the other Member States are also part of COMESA. The EAC was established with the entering into force of the Treaty for the Establishment of the East African Community (EAC Treaty) in the year 2000.[147] The main objective

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<https://ariceaweb.org/attachments/article/18/8th%20ARICEA%20AGM%20final%20report%20with%20annexes%20(2).pdf> accessed 16 July 2019.

143 COMESA Infrastructure Report para 6.3. Very little information exists about the COMTEL Project with some previous reports indicating that most Member States chose to pursue their own ICT development objectives

144 ARICEA Report (2012) 4.

145 See COMESA's Regional Payment and Settlement System (REPSS) Goes Live <https://www.bou.or.ug/bou/media/statements/COMESA_REPSS.html> accessed 16 July 2019.

146 COMESA 18th Summit Communiqué (2015) 8.

147 See History of the EAC <https://www.eac.int/eac-history> accessed 16 July 2019, The EAC had however previously been in place with a customs union between Kenya, Uganda and the then Tanganyika (now Tanzania) in the 1920 as well an earlier EAC which was dissolved in 1977. Subsequent efforts to reintegrate the three states led to the reestablishment of the EAC.

of the EAC is the development of policies and programmes to foster cooperation among the Member States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs.[148]

The EAC has a four-stage integration plan; the establishment of a Customs Union, a Common Market, a Monetary Union and eventually a Political Federation.[149] The first three stages are similar to COMESA and SADC objectives. The objective of a Political Federation however makes the EAC the most ambitious REC in Africa. The EAC Treaty neither defines what the Political Federation entails nor elaborates further on specific steps for its achievement. A committee set up in 2004 to oversee the fast-tracking of the East African Federation specified that it would entail the drafting of a Federal Constitution, creation of the office of a Federal President and the eventual establishment of a Federal Government.[150] It is therefore presumed that the individual Member States would evolve into the constituent states. Two institutions that have been in place since 2001 and that are regarded as building blocks of the political federation are the East African Court of Justice and the East African Legislative Assembly. The committee's recommendation was for an integration approach that allows for the overlapping of the four stages so that parallel activities can take place to enable an expedited establishment of the Political Federation.[151] The proposed timelines for the political federation have however proven to have been too ambitious.

In terms of economic integration however, the EAC is lauded as having made the most significant strides among the eight RECs in Africa.[152] Of the three Tripartite FTA RECs, the EAC Customs Union was the first to be established. It should however be noted that unlike SADC and COMESA that included a FTA as a transition phase to a Customs Union, the first stage for the EAC was the establishment of a Customs Union. Its establishment was therefore pivotal to the setting into motion of the integration objectives. The Customs Union Protocol was concluded in 2004 with the

148 EAC Treaty art 5(1).
149 EAC Treaty art 5(2).
150 EAC Secretariat, 'Report of the Committee on Fast Tracking East African Federation' (2004) <http://repository.eac.int/handle/11671/1966> accessed 16 July 2019 (EAC Secretariat Committee Report).
151 EAC Secretariat Committee Report (2004) para. 5.3.
152 AfDB, 'African Development Report 2014: Regional Integration for Inclusive Growth' (2014), 11 <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/ADR14_ENGLISH_web.pdf> accessed 16 July 2019.

aim of inter alia eliminating tariffs on imports from the Member States, elimination of NTBs and the establishment of a CET for third countries. Rwanda and Burundi joined the customs union in 2008.[153] All internal tariffs are to date reported to have been eliminated.[154]

A three-band CET similar to the COMESA CET was also established, broadly set at 0% for meritorious goods, raw materials and capital goods, 10% for intermediate goods and 25% for consumer goods with a few products classified as sensitive goods going above the 25% rate.[155] The CET rates are already fully operational with the most recent amendments on various qualifying goods having come into effect at the beginning of July 2018.[156] The Member States have in addition established a Single Customs Territory (SCT) which commenced at the beginning of 2014 and is in the process of implementation.[157] The main import of the SCT is to allow the assessment and collection of tax revenues at the first point of entry of imports thus facilitating the faster movement of the goods within the territory.[158]

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153 See EAC, Customs <https://www.eac.int/security/index.php?option=com_content&id=29:eac-portal> accessed 16 July 2019.

154 Ibid, The elimination had however been gradual in respect of various goods from Kenya to Uganda and Tanzania to enable their producers to adjust to the increased competition from the Kenyan imports. See also Evarist Mugisa et al, 'An Evaluation of the Implementation and Impact of the East African Community Customs Union' (2009), 13 <https://www.academia.edu/27637527/An_Evaluation_of_the_Implementation_and_Impact_of_the_East_African_Community_Customs_Union> accessed 16 July 2019.

155 Mugisa et al (2009) 8.

156 EAC Gazette Notice No. 8 of 2018 <https://www.eac.int/documents/category/gazette> accessed 16 July 2019; Ernst and Young, 'The East African Community amends customs duties and common external tariffs' (2018) <https://www.ey.com/Publication/vwLUAssets/The_East_African_Community_amends_customs_duties_and_common_external_tariffs/$FILE/2018G_010349-18Gbl_Indirect_East%20African%20Community%20amends%20customs%20duties%20and%20external%20tariffs.pdf> accessed 16 July 2019.

157 EALA, 'Report of On-Spot Assessment on the EAC Single Customs Territory' (2014) <http://www.eala.org/documents/view/on-spot-assessment-of-the-eac-single-customs-territory-sct> accessed 16 July 2019 (EALA Report).

158 EALA Report (2014) 1; EAC Secretariat, 'Annual Progress Report of the Council to the Summit of EAC Heads of State for the period December 2013 to November 2014' (2015) <http://www.eac.int/index.php?option=com_content&view=article&id=1807:annual-progress-report-of-the-council-to-the-16th-ordinary-heads-of-state-summit-fo

A report published by the EAC Secretariat in December 2014 revealed that a number of NTBs have been resolved.[159] A time-bound program has additionally been put in place for the elimination of various remaining unresolved NTBs. Some of the NTBs identified for elimination include: government sanctioned or tolerated practices such as export subsidies and government monopolies; restrictive customs and administrative entry procedures such as arbitrary customs classifications and surcharges; technical barriers such as non-harmonised standards and charges such as special duties and administrative fees. There are also concerns raised over issues such as arbitrariness, discrimination and costly procedures.[160] The main arguments made to justify these NTBs centre around safeguards on health, security, safety and revenue loss and the protection of local industries and consumers.[161]

The EAC Common Market Protocol entered into force in July 2010 and broadly provides for the freedom of movement of labour, goods, services and capital.[162] The protocol is regarded as being quite ambitious and its implementation wanting.[163] The Member States are reported as all having restrictions that affect inward investments originating from within the EAC, with new restrictions on capital movement being introduced contrary to the requirements under the Protocol.[164] It is also noted that key laws, principally sectoral, within the Member States have several measures that restrict the movement of services. Most of these measures favour the local service providers over service providers from the other Member States

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r-the-period-december-2013-november-2014-&catid=146:press-releases&Itemid=194> accessed 14 September 2015.

159 EAC Secretariat, 'Status of Elimination of Non-Tariff Barriers in the East African Community' (2014) <http://repository.eac.int/bitstream/handle/11671/416/NTBs%20Vol%207%20-%20compressed.pdf?sequence=1&isAllowed=y> accessed 16 July 2019 (NTB Report).

160 NTB Report (2014) 25.

161 NTB Report (2014) 20.

162 EAC Common Market: Overview <https://www.eac.int/common-market> accessed 16 July 2019.

163 World Bank and EAC Secretariat, 'East African Common Market Scorecard 2014: Tracking EAC compliance in the movement of Capital, Services and Goods' (2014) <http://documents.worldbank.org/curated/en/799871468194049251/Main-report> accessed 16 July 2019 (EAC Common Market Scorecard).

164 EAC Common Market Scorecard (2014) 3; Kenya's laws reportedly make it easier to move capital while Tanzania's and Burundi's are the most restrictive.

contrary to the national treatment principle. The other measures favour service providers from outside the EAC. [165]

In respect of the Monetary Union, a Committee consisting of the Central Bank Governors of the Member States reported that some progress had already been made in the harmonisation of banking regulations, payment systems and monetary and exchange rate policy.[166] Other priority areas identified by the Committee include harmonisation of ICT aspects, integration of the payment systems and harmonisation of reporting standards of which work is reported to be in progress.[167] The Monetary Union Protocol was signed in 2013 and has thus far been ratified by all the five Member States.[168] The next steps include the creation of a Monetary Institute and a Statistics Bureau as well as one tasked with surveillance, compliance and enforcement.[169]

The EAC is reported to be the most economically uniform REC, with economic disparities in terms of fiscal policy, inflation, reserves and revenue to expenditure recording significant reductions since 2000.[170] The value of intra-EAC trade has also seen significant improvement with the period between 2008 and 2013 indicating a 84% increase from USD 3,148.7 million in 2008 to USD 5,805.6 million in 2013.[171]

165 EAC Common Market Scorecard (2014) 3-4.

166 UNECA, 'Towards a Common Currency in the East African Community (EAC) Issues, Challenges and Prospects' (2012) <https://www.uneca.org/sites/default/files/PublicationFiles/towards_a_common_currency_in_the_eac-2012.pdf> accessed 16 July 2019 (UNECA Report).

167 UNECA Report (2012) 9-10, 47-48.

168 Christabel Ligami, 'Uganda Ratifies the Monetary Union' (The East African, 7 February 2015) <http://www.theeastafrican.co.ke/news/Uganda-ratifies-the-monetary-union/-/2558/2616360/-/g05itfz/-/index.html> accessed 16 July 2019.

169 EAC Annual Progress Report (2015) 2; Ligami (2015).

170 Mo Ibrahim Foundation, 'Regional Integration: Uniting to Compete' (2014) <http://static.moibrahimfoundation.org/downloads/publications/2014/2014-facts-&-figures-regional-integration-uniting-to-compete.pdf> accessed 16 July 2019 (Mo Ibrahim Foundation Report).

171 EAC Secretariat, 'East African Community Trade Report' (2013), 32 <https://www.eac.int/documents/category/trade-investment-reports> accessed 16 July 2019.

2.3.2.3 SADC

The SADC Treaty[172] was signed in August of 1992 and currently brings together 15 Member States.[173] Eight of the Member States are also part of COMESA and one the EAC. The main Treaty objectives are similar to those of the EAC and COMESA, seeking to achieve economic development, peace and security, and growth, alleviate poverty and enhance the standard and quality of life.[174] A number of Protocols have to date been concluded to give effect to the SADC Treaty objectives including those on trade, trade in services, energy, finance and investment and movement of persons. The SADC integration plan is similar to that of COMESA, involving a transition from a FTA, a Customs Union, a Common Market and finally to a Monetary Union with the eventual adoption of a single currency.

A Regional Indicative Strategic Development Plan was prepared and signed by the Member States to provide a roadmap for the achievement of the various SADC objectives.[175] The timeframes that the Member States set were for the FTA to be formed by 2008, the Customs Union by 2010, the Common Market by 2015, the Monetary Union by 2016 and the Single Currency by 2018.[176]

One of the core aims of the Protocol on Trade which entered into force in 2001 was for the establishment of the FTA.[177] 13 of the 15 Member States are currently party to the FTA with the Democratic Republic of

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172 Treaty of the Southern African Development Community, 32 ILM 116.

173 The Member States are: Angola, Botswana, DR Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

174 SADC Treaty art 5; see also SADC Objectives <http://www.sadc.int/about-sadc/overview/sadc-objectiv/> accessed 12 February 2017.

175 SADC, 'Regional Indicative Strategic Development Plan (RISDP)' (2001) <http://www.sadc.int/files/5713/5292/8372/Regional_Indicative_Strategic_Development_Plan.pdf> accessed 14 October 2018. A revised RISDP was finalised in 2015 to take into account the reallocation of the existing resources towards the achievement of the most important objectives within the 2015-2020 period. It however does not deviate from the scope and purpose of the original RISDP (see 35th SADC Summit Report, p. 18).

176 See SADC Integration Milestones <http://www.sadc.int/about-sadc/integration-milestones/> accessed 22 August 2019.

177 Protocol on Trade in the SADC Region (1996), art 2 <http://www.sadc.int/files/4613/5292/8370/Protocol_on_Trade1996.pdf> accessed 22 August 2019.

Congo and Angola reportedly set to join.[178] The minimum conditions for the establishment of the FTA were achieved in 2008 when 85% of intra-SADC trade was at zero duty following a tariff phase-down initiative that commenced in 2001. Maximum trade liberalisation was reportedly being achieved in 2012 following the phasing-down of tariffs on sensitive products.[179] There are however various derogations subsequent to 2012 that indicate that maximum liberalisation is in reality yet to be achieved. Mozambique, Malawi, Zimbabwe, and Tanzania for instance require more time to achieve various tariff commitments. The SADC Secretariat indeed highlights that the main action points include the outstanding tariff phase-down commitments, NTBs, problems relating to the RoO, customs and trade facilitation issues as well as liberalisation of trade in services as required under the Protocol on Trade in Services.[180]

The transition from the FTA to the Customs Union did not proceed according to the agreed timeframe and is proving to be quite a challenge for the Member States. This in turn means delayed implementation of the Common Market and the Monetary Union.[181] The biggest challenge identified in this regard is the establishment of the CET which requires the convergence of the various Member State tariff policies. It is notable however that five of the Member States (Botswana, Lesotho, Namibia, South Africa and Swaziland) are already part of a Southern African Customs Union (SACU), an institution separate from and predating the SADC[182], thus providing additional harmonisation and integration challenges.

One positive step towards the achievement of monetary integration was the launching of the SADC Integrated Regional Electronic Settlement System (SIRESS) which to date includes 11 Member States. The SIRESS has had a positive impact in ensuring secure and harmonised settlement

178 Seychelles acceded to the FTA in May 2015, See <http://www.seychellestradeportal.gov.sc/trade-agreements> accessed 22 August 2019.

179 See <http://www.sadc.int/about-sadc/integration-milestones/free-trade-area/> accessed 22 August 2019.

180 SADC Secretariat, '35th Summit of SADC Heads of State and Government' (2015) <http://www.sadc.int/news-events/news/35th-sadc-summit-brochure/> accessed 22 August 2019 (35th SADC Summit Report); Services are recognised as generating 57% of the regions GDP. The priority sectors for the liberalisation of trade in services are communication, construction, energy, finance, tourism and transport.

181 See <http://www.sadc.int/about-sadc/integration-milestones/customs-union/> accessed 22 August 2019.

182 See <https://www.tralac.org/images/docs/12054/introduction-to-siress-sabf-presentation-to-sadc-industrialisation-wekk-2017.pdf> accessed 22 August 2019.

of cross-border payments. The milestone for a single currency has however not been achieved.[183]

SADC however indicates some positive figures in terms of intra-regional trade. SADC's intra-regional trade records the most development amongst the RECs in Africa, accounting for 44% of Africa's intra-regional trade as of 2011.[184] Looking at the international picture however, intra-regional trade still has a long way to go. The highest percentage of SADC trade is still with the Asia Pacific Economic Cooperation (APEC) and the European Union (EU).[185]

2.3.2.4 The overlaps challenge

As already noted, one of the core challenges faced by the three RECs is the fact that most of the participating countries belong to more than one REC. This has resulted in instances of functional overlaps and duplication of integration efforts. One particular aspect of the overlaps concern that touches on the Tripartite FTA is the fact that COMESA, EAC and SACU already have Customs Unions in place, with the SADC Customs Union still in the pipeline. Member States belonging to both EAC and COMESA for instance already have the challenge of having to apply two conflicting CETs.

Belonging to more than one FTA may be beneficial in terms of integrating into the Tripartite FTA owing to the fact that measures to remove tariffs and NTBs would already be in place. However, belonging to a Customs Union entails the adoption of a CET which is incompatible with the Tripartite FTA because it would mean putting up a tariff barrier in respect of goods coming from FTA states that are not part of the Customs Union and are thus regarded as third countries.

The concern over various issues arising from the membership overlaps is one of the key issues that led to the formation of the EAC-COMESA-SADC Tripartite (The Tripartite).

183 35th SADC Summit Report 56.
184 Mo Ibrahim Foundation Report (2014) 19.
185 See <http://www.sadc.int/about-sadc/overview/sadc-facts-figures/> accessed 22 August 2019.

2.3.3 The EAC-COMESA-SADC Tripartite

2.3.3.1 Background

The Tripartite was established in 2005 in order to look into ways in which the three RECs could coordinate and harmonise their efforts towards regional integration, especially in the areas of trade, customs, free movement of people and infrastructure development.[186]

The first Tripartite Summit was held in October 2008 bringing together the Heads of State and Government of COMESA, EAC and SADC. The main objective was to chart out how the three RECs can move towards deeper cooperation in their efforts towards trade and economic liberalisation, including joint programmes targeting free movement of persons and infrastructure development.[187] Indeed, as already noted before, the key challenge highlighted at the first Summit was that of overlapping memberships of countries that are already part of a Customs Union and that are negotiating terms for joining an alternative Customs Union or those that are negotiating terms of two separate Customs Unions.[188] The Tripartite was therefore recognised as the best avenue to address this concern.

The need for a road map for establishing the Tripartite FTA was also highlighted progress made towards inter alia harmonising RoO, establishment of one-stop border posts, and the elimination of NTBs on the Tripartite level was also noted.[189] One of the early achievements of the Tripartite has been the successful implementation of a web-based scheme for reporting, tracking and elimination of NTBs that has enabled stakeholders to efficiently report NTBs and monitor the progress in their resolution.[190]

One of the core recommendations in the first Summit was for the establishment of the Tripartite FTA within a five-year period as well as for the adoption of a roadmap for its achievement. It was also recommended that a Memorandum of Understanding between the three RECs be

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186 See COMESA-EAC-SADC Tripartite <https://www.eac.int/tripartite> accessed 16 July 2019.

187 COMESA, EAC and SADC, 'First COMESA-EAC-SADC Tripartite Summit Report' (2008), para 9 <http://repository.eac.int/handle/11671/1633> accessed 16 July 2019 (1st Tripartite Summit Report).

188 1st Tripartite Summit Report (2008) para 4.

189 1st Tripartite Summit Report (2008) para 23.

190 See Non-Tariff Barriers: Reporting, Monitoring and Eliminating Mechanism <http://www.tradebarriers.org/about> accessed 16 July 2019.

concluded, setting out the broad cooperation objectives as well as the legal and institutional framework for the Tripartite process and a coordination mechanism.[191] The Memorandum of Understanding between the three RECs came into force much later in January 2011.

The draft agreement including its annexes was conveyed to the Member States of the three RECs for review and proposals in December 2009.[192] The revised version was made available in 2010 for purposes of deliberation at the second Summit.[193]

The second Summit was held in June 2011. A three-pillar development approach was adopted at this Summit: market integration, infrastructure development, and industrial development. Three key milestones towards the Tripartite FTA were also achieved at this Summit; a declaration launching the negotiations for the establishment of the COMESA-EAC-SADC Tripartite FTA was signed and the roadmap for the establishment of the Tripartite FTA and the Tripartite FTA negotiating principles, processes, and institutional framework were adopted.[194]

The Tripartite FTA promises a market comprising 632 million people (57% of Africa's population) with a total Gross Domestic Product (GDP) of USD 1.3 trillion as at 2014 which was roughly 58% of Africa's GDP.[195] Africa's GDP figures for the past few years have generally displayed a positive trend, with real GDP growth averaging 5% a year since the turn of the century.[196]

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191 1st tripartite Summit Report para 44 and 104.

192 Aileen Mallya, 'COMESA-EAC-SADC Tripartite Framework: State of Play' (2011), 3-5 <https://www.researchgate.net/publication/271524706_COMESA-EAC-SADC_Tripartite_framework_state_of_play> accessed 16 July 2019.

193 Draft agreement establishing the COMESA, EAC and SADC Tripartite Free Trade Area (2010) <http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/Draft_Tripartite_FTA_Agreement_Revised_Dec_2010.pdf> accessed 20 July 2018.

194 COMESA, EAC and SADC, 'Communiqué of the Second COMESA-EAC-SADC Tripartite Summit' (2011), 1 <http://repository.eac.int:8080/handle/11671/550> accessed 16 July 2019.

195 COMESA, EAC and SADC, 'Communiqué of the Third COMESA-EAC-SADC Tripartite Summit' (2015) <http://www.sadc.int/files/5914/3401/0196/Communiqu_of_the_3rd_COMESA_EAC_SADC_Tripartite_Summit.pdf> accessed 23 April 2018.

196 AFDB, 'Tracking Africa's Progress in Figures' (2014), 20 <http://www.afdb.org/en/knowledge/publications/tracking-africa%E2%80%99s-progress-in-figures/> accessed 16 July 2019; see also AfDB et al, 'Africa Economic Outlook 2015: Regional Development and Spatial Inclusion' (2015), 9

Trade figures likewise reflect progressive improvement. The value of exports outside of Africa has experienced encouraging growth; from a figure of USD 148 billion in 2000 to USD 657 billion in 2012, with the 2014 figure of USD 552 billion indicating some decline from the 2012 figures.[197]

The negotiations as set out in the negotiating principles are to be conducted in two phases. Phase one negotiations being in respect of trade in goods aspects i.e. tariff liberalisation, RoO, dispute resolution, customs procedures and simplification of customs documentation, transit procedures, NTBs, trade remedies, technical barriers to trade and sanitary and phytosanitary measures. It was also agreed that negotiations on movement of business persons were also to be part of the phase one negotiations but as a parallel and separate track. Phase two negotiations are in respect of trade in services, cooperation in trade and development, competition policy, intellectual property (IP) rights and cross border investment. The Agreement was to be finalised once the phase one negotiations were concluded.[198] According to the roadmap, the phase two negotiations would be part of a built-in agenda once the Agreement was finalised.

The Tripartite FTA was finally launched on the 10th of June 2015 at the third Tripartite Summit in Cairo.[199] The Agreement was opened for signing and a post-signature implementation plan was adopted. It was also directed that the outstanding issues from the phase one negotiations be completed and that negotiations on the phase two be commenced.

2.3.3.2 The Tripartite FTA Agreement

The Agreement formalises the commitment to establish the FTA and gives a legal basis and framework for the participating countries to implement

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<http://www.africaneconomicoutlook.org/fileadmin/uploads/aeo/2015/PDF_Chapters/Overview_AEO2015_EN-web.pdf> accessed 16 July 2019.

197 AfDB Tracking Africa's Progress (2014) 42; see also AfDB et al Africa Economic Outlook (2015) 6; The trade data can also be found on the International Trade Centre (ITC) website <http://www.trademap.org/Country_SelProduct_TS.aspx> accessed 16 July 2019.

198 See Guidelines for Negotiating the Tripartite Free Trade Area among the Member/Partner States of COMESA, EAC and SADC (2011), para 2 <http://www.tralac.org/images/docs/5284/tfta-negotiating-principles-12062011.pdf> accessed 16 July 2019; see also Roadmap for Establishing the Tripartite FTA. <http://www.trademarksa.org/sites/default/files/publications/Roadmap%20for%20TFTA%20Negotiation%20-%2012.06.2011.pdf> accessed 16 July 2019.

199 Third Tripartite Summit Communiqué 1.

the objectives of the Tripartite. The intention as reflected in the preamble to the Agreement is for the Tripartite FTA to evolve into a single Customs Union.[200]

The specific objectives are stated to be the progressive elimination of tariff and non-tariff barriers, the liberation of trade in services, cooperation on customs and trade-related areas, implementation of trade facilitation measures as well as putting in place the institutional framework for implementing and administering the Tripartite FTA.[201]

The principles governing the Agreement include variable geometry, flexibility and special and differential treatment, transparency, building on the *acquis*, single undertaking with regard to the various phases of the Agreement, Most Favoured Nation Treatment (MFN), National Treatment, reciprocity, substantial liberalisation, and consensus-based decision making.[202]

Participating countries may conclude preferential trade agreements with third countries provided that reciprocity is accorded to other participating countries. One aspect however that could affect the unity of the Tripartite FTA is the fact that the Agreement allows participating countries to enter into preferential agreements among themselves. Although such agreements are required to be on MFN basis and in accordance with the objectives of the Agreement, sanctioning such multiplicity within the FTA may ultimately complicate the integration into a single FTA which is an overarching objective of the Agreement.[203] It is not clear from the Agreement what nature of preferential agreements among the participating countries is contemplated. Unless some exceptional circumstances are provided for, it ultimately makes no sense from the perspective of the Tripartite FTA territory for participating countries to conclude among themselves preferential agreements consisting only of aspects that are within the scope of the Agreement. Such agreements would not be 'preferential' in respect of the excluded participating countries because of reciprocity and non-discrimination. One can however picture a situation where derogations are

200 Agreement Establishing a Tripartite Free Trade Area among The Common Market For Eastern And Southern Africa, The East African Community And The Southern African Development Community, preamble, <https://www.tralac.org/news/article/7646-signed-agreement-establishing-a-tripartite-free-trade-area-among-comesa-the-eac-and-sadc.html> accessed 16 July 2019 (The Tripartite Agreement).

201 The Tripartite Agreement art 5.

202 The Tripartite Agreement art 6.

203 The Tripartite Agreement part II.

made in the Agreement in accordance with the special and differential treatment principle. This could be for instance to facilitate preferential agreements aimed at assisting the weaker countries to integrate better into the Tripartite FTA.

The principles of Variable Geometry and flexibility, special and differential treatment are specifically geared towards addressing the different levels of development among the participating countries.[204] The Agreement defines variable geometry as 'the principle of flexibility which allows for progression in cooperation amongst members in a larger integration scheme in a variety of areas and at different speeds'.[205] This is however having due regard to the principle of building on the *acquis*, by which the progress already achieved among the three RECs is meant to be built upon and consolidated.[206]

Some commentators have expressed the concern that the principle of *acquis* would result in an effort for additional and separate trade arrangements.[207] The reasoning is that if the Agreement allows the RECs to maintain preferential terms between their Member States, then participating countries that are not party to such arrangements would have to negotiate their own terms on the basis of the Agreement.[208] This would therefore be contrary to the idea of an all-inclusive system as envisioned in the creation of the Tripartite, in addition to exacerbating rather than resolving the overlaps challenge.

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204 The Tripartite Agreement art 6; The differences in economic development among the participating countries is also highlighted in the preamble to the Agreement.

205 The Tripartite Agreement art 1.

206 The Agreement does not define the term *acquis*. The term had however been explained in context earlier on in the negotiating principles for the Tripartite FTA. Building on the acquis of the existing REC FTAs in terms of consolidating tariff liberalisation in each REC FTA was one of the overarching principles guiding the negotiations. See Guidelines for Negotiating the Tripartite Free Trade Area among the Member/Partner States of COMESA, EAC and SADC (2011).

207 Gerhard Erasmus, 'The Agreement preceding the Agreement: how the negotiating principles decided the Tripartite FTA game plan', cap 2 in Hartzenberg T et al (eds) *Cape to Cairo: Exploring the Tripartite FTA agenda* (tralac 2013) <http://www.tralac.org/publications/article/5548-cape-to-cairo-exploring-the-tripartite-fta-agenda.html> accessed 16 July 2019.

208 Ionel Zamfir, 'The Tripartite Free Trade Area project Integration in southern and eastern Africa' (2015), 6-7 <http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/551308/EPRS_BRI(2015)551308_EN.pdf> accessed 16 July 2019.

From a different perspective however, it was expressed in the Tripartite Trade Negotiations Forum that Member States that belong to an already existing FTA would not need to renegotiate tariff terms between them. They would simply have to consolidate their liberalisation levels to the agreed-upon Tripartite FTA standard, with the eventual result being that all participating countries will be harmonised to the Tripartite FTA standard.[209] Such an application of the principle of building on the *acquis* suggests that the intention is to make it easier to converge towards the Tripartite FTA. Additionally, article 30(7) of the Agreement provides, 'In the event of inconsistency or a conflict between this Agreement and the treaties and instruments of COMESA, EAC and SADC, this Agreement shall prevail to the extent of the inconsistency or conflict.' It may therefore be argued that the overriding objectives of the Agreement, inter alia the creation of a single FTA, take precedence and the principle of *acquis* would be applicable to the extent that it does not interfere with this objective. One may additionally question the validity of any preferential agreements in light of the reciprocity and non-discrimination principles.

The scope of the Agreement covers trade in goods and services as well as other trade-related matters i.e. competition policy, cross-border investment, trade and development, and IP rights.[210] The core areas of harmonisation and cooperation are set out in a more or less general manner with the intention being that the member countries will conclude protocols and annexes to the Agreement to give full effect to its provisions.

Liberalisation of trade in goods is addressed in Part Three of the Agreement. Finalisation of the trade in goods aspects as noted in the roadmap was the main undertaking on which the conclusion of the Agreement was to be based. Trade in goods is in fact the backbone of the Agreement. It is however noted in the Agreement that there are outstanding aspects of the phase one negotiation in respect of elimination of customs duties, trade remedies and RoO that the participating countries undertake to conclude as part of a built-in agenda.[211] The failure to come to an agreement on the core trade in goods aspects of the FTA especially on elimination of

209 Bridges Africa, 'Launch of African Tripartite FTA now set for June' (2015) <http://www.ictsd.org/bridges-news/bridges-africa/news/launch-of-african-tripartite-fta-now-set-for-june> accessed 16 July 2019.

210 The Tripartite Agreement art 3.

211 The Tripartite Agreement art 44.

customs duties and RoO prior to the adoption of the Agreement has led to its workability as a comprehensive instrument being questioned.[212]

Participating countries are required to desist from imposing new import duties or charges having equivalent effect except as stipulated in the Agreement.[213] This however only applies to goods that are subject to trade liberalisation. The criteria and conditions for goods that shall be eligible for preferential treatment have however not been finalised owing to outstanding issues on RoO. Based on the report of the Technical Working Group (TWG) on RoO, some of the outstanding aspects are rather fundamental to comprehensive RoO.[214] The RoO have indeed been one of the significant harmonisation challenges, especially since SADC RoO markedly differ from those of COMESA and EAC.[215]

The report indicates that there was lack of agreement between SACU Member States and the other Member States as to what criteria of origin should be adopted, specifically in the case of materials that do not originate from within the Tripartite FTA. The SACU Member States had expressed preference for the use of agreed common rules for the launch of a Partial Tripartite FTA, opting to leave out any determination based on value addition on non-originating materials. The other Member States preferred the use of agreed common rules as well as 35% value-added on the ex-factory cost as interim RoO of the Tripartite FTA.[216]

The Agreement further provides that duties are to be eliminated progressively in accordance with schedules on elimination of import duties, the negotiation of which is not complete.[217] The goal that has been set is

212 Gerhard Erasmus, 'The Tripartite Free Trade Agreement: Results of Phase One of the Negotiations' (2015), 8-9 <http://www.tralac.org/publications/article/7803-the-tripartite-free-trade-agreement-results-of-phase-one-of-the-negotiations.html> accessed 16 July 2019.

213 The Tripartite Agreement art 9(1) and (2).

214 COMESA, 'Report of the 9th Meeting of the Technical Working Group on Rules of Origin' (2015), 16-19 <http://www.comesa.int/index.php?option=com_content&view=article&id=1440> accessed 16 July 2019 (COMESA RoO Report).

215 Erasmus G (2015), p. 19.

216 COMESA RoO Report (2015) paras 12-17. The value addition criterion is in respect of (raw) materials that do not originate from within the FTA. The proposal therefore advocates for an added value that is not less than 35% of the ex-factory cost of the finished product in the case of non-originating materials. Common rules here refers to rules that are the same across the three RICs and for which it was agreed no further negotiations would need to be undertaken.

217 The Tripartite Agreement art 9(3).

for 100% tariff liberalisation under the Tripartite FTA. The benchmark for countries that are yet to fully liberalise their tariffs within their RECs or those in existing REC FTAs is at 60-85% upon entry into force of the Agreement. The Tripartite FTA negotiations are however built on consensus-based decision making. Various countries have submitted their tariff offers but not all tariff offers are ready, meaning negotiations are set to continue.[218] This essentially means that the Agreement as it currently is provides no definitive guidance as to how the participating countries should go about liberalising trade in goods. The section dealing with the liberalisation of trade in goods, which is a core aspect of the Agreement, is in effect not operable.

The participating countries should also eliminate and refrain from imposing NTBs as well as quantitative restrictions on trade on other participating countries. The Agreement however details exceptional circumstances in which quantitative restrictions can be applied.[219]

Participating countries undertake to cooperate in terms of customs and mutual administrative assistance in the implementation of the Agreement. They should also put in place measures to facilitate trade through standardisation of trade and customs documentation and information is also prioritised.[220]

Trade remedies are also subject to ongoing negotiations.[221] Interim measures were however adopted to facilitate the conclusion of the Agreement. Anti-dumping, countervailing and safeguard measures may be applied on the basis of the existing provisions of the RECs for Member States belonging to the same REC or on the basis of World Trade Organization (WTO) rules in respect of inter-REC issues.[222] The Agreement incorporates a built-in agenda by which guidelines on the implementation of the trade remedies are expected to be concluded. The core provisions on anti-dumping, countervailing and safeguard measures as well as preferential standards

218 Bridges Africa (2015); See also Erasmus (2015) 17.

219 The Tripartite Agreement art 11. The exceptions are those contained in Article XI.2 of GATT 1994, the WTO Agreement on Safeguards, Articles 17 and 18 of the Agreement which deal with anti-dumping, countervailing and safeguard measures and annex II of the Agreement which deals with trade remedies. The annex on trade remedies is however one of the areas in which outstanding issues still exist.

220 The Tripartite Agreement part IV.

221 The Tripartite Agreement art 44.

222 The Tripartite Agreement art 16 (1).

are however suspended pending the finalisation of the annex on trade remedies.[223]

The Agreement points to a heavy reliance on WTO rules on trade remedies which are regarded as difficult to implement, more so for many African countries. The inclusion of WTO rules rather than a *sui generis* trade remedies regime was at the insistence of Egypt and South Africa, which already have active domestic trade remedies regimes.[224] This is also reflected in their proposals in the course of the trade remedies negotiations. South Africa, Egypt, and Malawi for instance proposed the retention of a part incorporating the global safeguard measures under Article XIX of the General Agreement on Tariffs and Trade (GATT) 1994 as well as the WTO Agreement on Safeguards.[225] The EAC however proposed that this part be deleted. Egypt in addition expressed the desire for a system that would allow an affected country to proceed with an appropriate countervailing measure without prejudice to the fact that consultations with the allegedly subsidising country may be proceeding.[226]

The rights and obligations under the WTO agreements on technical barriers to trade (TBT) and sanitary and phytosanitary measures (SPS) are reaffirmed in Part Six of the Agreement. The provisions do not point to any outstanding aspects in this regard. The participating countries are also permitted to establish special economic zones to speed up development. Where the circumstances require, participating countries are allowed to adopt measures geared towards the protection of infant industries. An infant industry is defined as 'a new industry of national strategic importance that has not been in existence for more than five years, and that is experiencing high start-up costs and difficulties competing with like imports.'[227] The only outstanding aspect in this part of the Agreement is in respect of guidelines which are to be developed in respect of measures to alleviate severe balance of payment and external financial difficulties.

The Agreement also provides generally for cooperation in financial areas, trade policies and negotiations, research and statistics. The institutions charged with the implementation of the Tripartite FTA, including a dis-

223 The Tripartite Agreement art 16 (2) and (3).

224 Erasmus G (2015) 20; See also Ousseni Illy, 'Trade remedies in Africa: experiences, challenges and prospects' (2015) <http://www.ictsd.org/bridges-news/bridges-africa/news/trade-remedies-in-africa-experiences-challenges-and-prospects> accessed 16 July 2019.

225 The Tripartite Agreement Annex on Trade Remedies 2.

226 The Tripartite Agreement Annex on Trade Remedies 1-2.

227 The Tripartite Agreement art 24.

pute settlement body responsible for the administration of the dispute settlement are set out in Part Eight and Nine of the Agreement.

Defaulting countries may be subjected to sanctions as determined by the Tripartite Summit on recommendation of the Tripartite Council of Ministers. A participating country may withdraw from the Agreement subject to it discharging its existing obligations under the Agreement.

A two-year timeline from the entry into force of the Agreement has been put in place for the conclusion of a protocol on trade in services as well as on competition policy, cross-border investment, trade and development, and IP rights, which constitute phase two of the negotiation agenda.[228] Going by the negotiations during the drafting of the Agreement, it is expected that the protocol on IP rights will draw upon some of the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) flexibilities. The annex on IP rights in the draft Agreement for instance had a provision encouraging participating countries to fully exploit the flexibilities contained in the Doha Declaration on TRIPs and public health to facilitate access to medicines.[229]

Another exclusion from the Agreement is in respect of the movement of business persons in spite of the fact that it was originally included as part of the phase one negotiation. As indicated before the plan was for negotiations on the movement of business persons to be part of phase one but as a parallel and separate track. It was eventually agreed that movement of business persons should not be included in the Agreement.[230] A separate agreement is now being negotiated under the aegis of the Tripartite Technical Committee on the movement of business persons.[231] Some of the provisions being considered include short-term and long-term temporary movement, identification of a business person, entry, stay, exit as well as a multi-entry multi-visa concept.[232]

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228 The Tripartite Agreement art 45.

229 The Tripartite Agreement Annex on Intellectual Property Rights para 7, <http://www.tralac.org/images/Resources/Tripartite_FTA/TFTA%20Annex%2009%20IPR%20Revised%20Dec%202010.pdf> accessed 18 November 2018.

230 See generally COMESA, EAC and SADC, 'Report of 3rd TTC-MBP, Tripartite Agreement on Movement of Business Persons' (2014) <https://tis.sadc.int/files/8614/1640/5306/Draft_Tripartite_Agreement_on_Business_Persons.pdf> accessed 18 November 2018 (MBP Report).

231 MBP Report (2014); See also COMESA, 'E-COMESA Newsletter' (12 November 2014) <http://www.comesa.int/attachments/article/1379/e-comesa_newsletter_435.pdf> accessed 12 October 2018.

232 MBP Report (2014).

The concept of a built-in agenda from the WTO perspective is in respect of continuing review or further negotiation of specific aspects in already binding agreements.[233] Its use in the Agreement is however different from this. The built-in agenda was initially targeted for phase two negotiations. It was envisioned that they would commence after the trade in goods negotiations had been concluded and the Agreement finalised. The current built-in agenda is now in respect of outstanding phase one aspects as well as the phase two negotiations. As already noted, the outstanding phase one aspects include core trade in goods issues which bring to question whether the Agreement in its current state is binding.[234]

One questions how this concept of a built-in agenda can be reconciled with the principle of a single undertaking as used in Article 6 of the Agreement. The principle of single undertaking is not defined in the Agreement. According to the WTO, a single undertaking would mean that virtually every item of the negotiation is part of a whole and indivisible package and cannot be agreed separately. "Nothing is agreed until everything is agreed".[235] There is however a derogation from this principle under the Doha Ministerial Declaration. Article 47 of the Ministerial Declaration provides that "agreements that are reached at an early stage may be implemented on a provisional or a definitive basis". There is no such derogation under the Tripartite Agreement. The principle of single undertaking as it was used in the negotiating framework had been specifically focused on trade in goods. The Agreement however provides that it is with regard to the various phases of the Agreement. If we go by the WTO definition of a single undertaking, one may very well argue that there is no agreement. Even if we assume that the derogation applies there is no conclusive trade in goods agreement that can be said to have been reached at an early stage.

The overall feeling one gets is that the Agreement was rushed in order to have it ready within an already extended timeline. The entry into force of the Agreement requires 14 ratifications. Participation by accession is also provided for.[236] So far 22 countries have signed the Agreement[237]. Egypt,

233 See WTO: Built-in Agenda: Work set out in existing agreements, <https://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/04agen_e.htm> accessed 16 July 2019.
234 See also Erasmus (2015) 14.
235 See WTO: How the negotiations are organised, <https://www.wto.org/english/tratop_e/dda_e/work_organi_e.htm> accessed 16 July 2019.
236 The Tripartite Agreement art 40 & 41.
237 Erasmus (2015) 8.

Kenya, Uganda, Botswana, Burundi, Namibia, Rwanda, Eswatini, Zambia and South Africa have deposited their instruments of ratification.[238]

One big concern here is that the three RECs will continue to pursue their own individual integration agenda hence further complicating the harmonisation and integration into a single FTA. The need for renegotiation of customs aspects by the countries that are already in Customs Unions is expected to further delay the entry into force of the Agreement.

The anticipation had been that the Agreement would be a game changer in view of some of the challenges faced by the three RECs. However, a lot of work still needs to be done before it can be considered to be a game changer. What is critical is for all the 26 countries to participate in the FTA. Insufficient participation would mean an additional REC hence defeating the whole purpose of the Tripartite FTA. Given the difficulties the three RECs have experienced in liberalising their markets a lot of political goodwill and commitment is needed in order to make the Tripartite FTA a reality in the foreseeable future.

2.3.4 The Continental Free Trade Area

The promise of the Continental Free Trade Area (CTFA) is a market that brings together 1 billion people with a combined GDP of around USD 3.4 trillion. The objectives of the CFTA include: the creation of a single continent-wide market for goods and services, expanding intra-African trade, enhancing competitiveness through scale production, continental market access and better resource allocation. The CFTA also seeks to address the multiple and overlapping REC memberships.[239] It is however not clear how the potential overlaps between the CFTA and the Tripartite FTA will be addressed or whether they will create an additional layer of overlaps. The provisions of both Agreements are very similar as are the challenges to be faced as addressed above. The existence of the two Agreements thus appears to exacerbate and add a layer to rather than resolve the challenge of overlaps.

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238 See COMESA News, 'New Deadline set for Ratification of Tripartite Free Trade Area' (2021) <https://www.comesa.int/new-deadline-set-for-ratification-of-tripartite-free-trade-area/> accessed 4 May 2021.

239 See African Union, CFTA: Continental Free Trade Area <https://au.int/en/ti/cfta/about> accessed 16 July 2019.

So far 54 countries have signed onto the CFTA Agreement, majority of which are also signatories to the Tripartite FTA Agreement. 22 ratifications are required for the agreement to enter into force. On 29 April 2019 the 22-country threshold was reached, triggering the entry into force of the CFTA 30 days later on the 30 May 2019.[240] There is in addition a high probability that the Tripartite FTA Agreement will as well soon enter into force. It is not clear what measures will be put in place to address the largely similar and overlapping objectives and negotiations that are to take place in the context of the two Agreements.

Like the Tripartite FTA Agreement, negotiations in the areas of competition policy and intellectual property constitute phase two of the negotiations.[241] It is however interesting to note that the CFTA Agreement also includes protocols on trade in goods and services as well as a protocol on dispute settlement. This means that the signatories have committed themselves to these protocols irrespective of the fact that negotiations in these areas, particularly on tariffs and rules of origin, is not complete. This would therefore raise the question of whether the CFTA Agreement can be implemented considering it has entered into force before the negotiations are complete.[242]

These discussions should also be put in the context of global trade. Europe remains Africa's largest trading partner. This presents a challenge to regional integration because the EU negotiates for Economic Partnership Agreements (EPAs) on terns that in some cases may conflict with integration objectives. Some critics go as far as to label it a '*divide and conquer*' approach.[243] China has however surpassed the USA as Africa's single largest trading partner, indicating the increased competition for the

240 Agreement Establishing the African Continental Free Trade Area (CFTA Agreement), art 23 <https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area> accessed 16 July 2019;; See also TRALAC, 'AfCFTA Agreement enters into force' (2019) <https://www.tralac.org/resources/by-region/cfta.html.> accessed 16 July 2019.

241 CFTA Agreement art 7.

242 For a brief discussion see Gerhard Erasmus, 'South Africa to ratify Tripartite FTA and Continental Free Trade Area Agreements' (2018) <https://www.tralac.org/blog/article/13467-south-africa-to-ratify-tripartite-fta-and-continental-free-trade-area-agreements.html#_ftnref3> accessed 16 July 2019.

243 Stephen McDonald et al, 'Why Economic Partnership Agreements undermine Africa's Regional Integration' (2013), 4 <https://www.wilsoncenter.org/publication/why-economic-partnership-agreements-undermine-africas-regional-integration> accessed 16 July 2019.

African market.[244] Intra-Africa trade continues to post encouraging figures, with the SADC region responsible for the bulk of intra-African trade.[245]

2.3.5 Summary

Regional integration has largely been embraced in Africa to realise economic development and sustainable growth. The recent entry into force of the CFTA Agreement as well as the formalisation by the Member States of the EAC, COMESA and SADC of the Tripartite FTA Agreement is therefore highly laudable. However, though the CFTA Agreement and the Tripartite FTA present an opportunity to set in motion the eventual establishment of an African Economic Community, the reality is that there are considerable challenges that need to be overcome before the Tripartite FTA can be actualised.

The overall picture shows that a lot more still needs to be done. Africa's share of global trade still remains quite low, with an export value of about 3% as at 2014.[246] There is still a high dependence on commodities and natural resources showing very little improvement in terms of economic diversification.[247] This is in part as a result of a lack of the necessary infrastructure, technological development and technical expertise needed to enable the proper exploitation of the resources.[248]

If the objective of social, political and economic integration and development in Africa is to be achieved a lot more work needs to be done.

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244 AfDB (2014) 42; see also AfDB et al (2015) 6.

245 AfDB (2014) 43; see also Bernard Busuulwa, 'Intra-African trade rises as market access between blocs improves' (The East African, 29 August 2015) <http://www.theeastafrican.co.ke/business/Intra-African-trade-up-as-market-access-between-blocs-improves-/-/2560/2850908/-/14qd2iy/-/index.html> accessed 16 July 2019.

246 Figure courtesy of the International Trade Centre (ITC) data <http://www.trademap.org/Country_SelProduct_TS.aspx> accessed 16 July 2019.

247 AfDB (2014) 42.

248 UNECA, 'Economic Report on Africa 2008: Africa and the Monterrey Consensus: Tracking Performance and Progress' (2008), 133 <http://www.uneca.org/publications/economic-report-africa-2008> accessed 16 July 2019; UNCTAD, 'Economic Development in Africa Report 2009: Strengthening Regional Economic Integration for Africa's Development' (2009), 15 <http://unctad.org/en/Docs/aldcafrica2009_en.pdf> accessed 16 July 2019.

2.4 The Competition Policy Perspective

2.4.1 Introduction

One of the definitions proffered for competition is 'the activity or condition of striving to gain or win something by defeating or establishing superiority over others.'[249] In the business context, it has been described as striving to gain or win 'the custom and business of people in the market place' or as a process of rivalry between firms that are seeking to win customers. This rivalry is widely regarded as a fundamental aspect of an open market society. In its most basic form, this process of rivalry is geared towards private gain. A producer will primarily seek to maximize the profits from his product whereas the consumer seeks to maximize utility of the product.[250]

Yet, as Kenneth Train (1991) observes, through this process of firms on the one hand seeking to maximize their profits (even in disregard of social welfare) and on the other hand consumers seeking to maximize their utility, the welfare of society at large is ultimately maximized. This 'invisible hand' that 'molds privately motivated actions into socially desirable outcome' is considered a rationale for free markets and a guardian of social welfare.[251]

The result of optimal competition in this regard should be an increase in efficiency and ultimately social welfare. However, whereas from the perspective of economic theory the ultimate effects of optimal competition are widely accepted, competition policy is to a great extent a function of its context.[252] Fox (2001) opines that it cannot be expected that different jurisdictions will have identical policy concerns.[253] Whish and Bailey (2012) observe that 'competition policy does not exist in a vacuum: it is an

249 See Oxford Dictionary definition.

250 Richard Whish and David Bailey, *Competition Law* (7th edn, OUP 2012) 3-5.

251 Kenneth Train, *Optimal Regulation: The Economic Theory of Natural Monopoly* (the MIT Press 1991) 1.

252 Eleanor Fox, *The Competition Law of the European Union in Comparative Perspective: Cases and Materials* (West, 2nd edn, 2009) 5.

253 Eleanor Fox, 'The Kaleidoscope of Antitrust and its significance in the World Economy: Respecting Differences' in Barry E. Hawk (ed.), *Annual Proceding of the Fordham Corporate Law Institute Conference on International Antitrust Law & Policy* (Juris 2001), 597-603.

expression of the current values and aims of society and is as susceptible to change as political thinking generally.'[254]

This is certainly the case in the context of the ESA jurisdictions which reflect a number of objectives beyond efficiency and welfare gains. These include economic growth and development and social or public interest goals such as levelling the playing field for historically disadvantaged persons. Competition policy is also regarded as a necessary instrument for the promotion of regional integration. Even the conception of what constitutes welfare gains from a developing economy perspective may be a function of the particular context of the developing economy.[255]

2.4.2 The Birth of Antitrust in the United States

The United States is widely regarded as the birthplace of modern antitrust law. The statutory cornerstone of US Antitrust is the 1890 Sherman Antitrust Act.[256] The Act was conceived towards the end of the 19th century, a period when the United States had experienced an unprecedented expansion of her industries.[257] The 19th century was not only a period of great industrial expansion but also one of socio-economic restructuring, with the Civil War (1861 to 1865) playing a significant part in reshaping industrial organization.

War time contracts heralded large scale expansion in some manufacturing sectors which were integral to the war.[258] At the time, however, this expansion did not result in harmful concentration of industries. The early post war period was still marked by competition in most of the industries, with some sectors experiencing an intensification of competition.[259]

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254 Whish and Bailey (2012) 20.

255 *See* Josef Drexl, 'Consumer Welfare and consumer harm: adjusting competition law and policies to the needs of developing jurisdictions' in Michal Gal et. al (eds), *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Edward Elgar 2015).

256 Section 1 of the Sherman Act prohibits contracts, combinations or conspiracies that are in restraint of trade. Section 2 prohibits monopolization and attempts at monopolization.

257 Hans B. Thorelli, *The Federal Antitrust Policy* (Johns Hopkins Press, Baltimore 1955) 55.

258 Ibid. at 56. Industries such as shoe manufacture, firearms and manufacture of sewing machines gravitated towards bigness.

259 Ibid 55-57.

The post-war period also saw some industries gravitate towards big business because of the conditions created by the war. This 'bigness' was however not the result of competitors coming together. It was attributed to large-scale technical units that were initially designed to cater to the wartime needs.[260] Indeed, one key political and socio-economic change because of the war was the shifting of power from the agrarian South to the industrialist and nationalist North, the South having been left in a post-war political and economic depression.[261]

One industry that benefited from the post-war expansion and which is often cited as one of the key instigators of the birth of US antitrust is the railroads.[262] However, though the railroads experienced expansion to cater for the wartime transportation needs, the railroad expansion and standardization was still a vital aspect of the economic development and had proceeded outside the context of the war.[263]

The tendency in the later part of the 19th century towards mass production is what led in some cases to barriers to entry and created a conducive environment for combinations to thrive. The failure to rein in the railroad and some other industries led to more agitation from not only the farmers but also other interest groups against the monopolistic practices and increasingly against industrial combination.[264]

Thorelli argues that Congress was of the view that the ultimate beneficiary of competition was the consumer; with the immediate beneficiary being the small business proprietors who needed to be shielded from the big business interests. He posits that in this way the Sherman Act embodied what could be referred to as a social purpose.[265] The concern for consumers and small businesses was also at the heart of the 1914 Clayton Act. The Act was *inter alia* intended to prevent small firms from being barred from the market by the bigger firms.[266]

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260 Ibid.
261 Ibid.
262 Ibid.
263 Ibid.
264 Ibid.
265 See Eleanor M. Fox and Robert Pitofsky, 'Goals of US Competition Policy' in J. David Richardson and Edward M. Graham (eds), *Global Competition Policy* (Peterson Institute for International Economics 1997). where farmers, small proprietors, consumers and those who suffered inequality of condition, wealth and opportunity are idenitified as victims for whose benefit the Sherman Act was passed.
266 Thorelli (1955) 236.

It was through the Clayton Act that merger regulation was introduced in the United States.[267] Merger activity had begun earlier with the 1879 Standard Oil trust arguably being the merger that heralded the first wave of US merger activity.[268] The first wave of mergers of the late 19th century and early 20th century resulted in the creation of large monopolistic firms.[269] This wave is arguably attributed to a period of retardation of industrial growth in the United States, with the mergers being an avenue for producers to maintain their profits in light of declining demand and increased competition.[270] The second wave of mergers saw the shift from monopolistic structures to oligopoly, with the smaller firms at the forefront of this merger wave, hence shifting the balance of control in favor of a more open market.[271]

The link between economic power and political power was another point of concern in the development of US policy. The 1950 amendment to section 7 of the Clayton Act[272] was intended to curtail the concentration of economic power, the goal being to keep economic power dispersed hence keeping political power in check.[273]

Another shift in US policy was experienced in the 1970s, with the pendulum swinging from the small business interests in favor of consumer interests. Economically efficient conduct which increased the welfare of the consumer began to be treated as legally sound. Antitrust regulation became non-interventionist, with transactions that were viewed as economically inefficient being highly likely to be prohibited. Economic efficiency is indeed widely regarded as the pervasive antitrust objective in the US.[274]

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267 Section 7 of the Clayton Act, as amended in 1950 and 1980, prohibits mergers and acquisitions that are likely to result in a substantial lessening of competition or tend to create a monopoly.

268 Derek C. Bok, 'Section 7 of the Clayton Act and the Merging of Law and Economics' (1960) 74 Harv. L. Rev 228, 229.

269 Ibid.

270 Ralph L. Nelson, *Merger Movements in American Industry* (Princeton University Press, 1959) 71,72.

271 Bok (1960) 230.

272 Ibid 236, The amendment was effected through the Celler-Kefauver Act which introduced the prohibition of mergers whose effect may be to substantially lessen competition or tend to create a monopoly.

273 Ibid.

274 Ibid 237.

2.4.3 The European Union

Regional integration usually seeks to achieve certain political and socio-economic objectives of the countries at play. The European Union integration for instance, was first and foremost driven by the need to avoid a recurrence of the 20th century Europe wars.[275] This main political objective of peace was to be buttressed by subsequent political and economic integration objectives aimed at bolstering the unity of the Member States and increasing the competitiveness of the Union as a whole.[276]

Competition law played a critical role in the deliberations for an integrated Europe. The Schuman Declaration of 1950[277], in which the then French minister for foreign affairs Robert Schuman proposed the formation of the European Coal and Steel Community (ECSC)[278] contained proposals that reflected the integral role of competition law, and indeed merger regulation, in helping to achieve the objective of maintaining peace in Europe. The proposal was to pool the production of coal and steel in France and Germany under a supranational authority, with the subsequent economic ties being regarded as critical in avoiding a recurrence of war, especially in these two 'industries of war'.[279]

Schuman stated that, 'In contrast to international cartels, which tend to impose restrictive practices on distribution and the exploitation of national markets, and to maintain high profits, the organization will ensure the fusion of markets and the expansion of production'.[280]

Article 65 and 66 of the now expired ECSC Treaty contained provisions of direct bearing to supranational competition regulation. Article 65, which is like the current Article 101 of the TFEU, sought to ensure that cartels did not disrupt competition in the common market through fixing prices, output controls or market allocation. Article 66 contained provisions that submitted prospective concentrations which fell under

275 *See for instance* Drexl (2012) 236.

276 This objective is reflected in the preamble and Article 2 of the Treaty on European Union; *See also* Willem F. Duisenberg, 'The Past and Future of European Integration: A Central Banker's Perspective' (1999) Per Jacobsson Lecture <http://www.imf.org/external/am/1999/lecture.htm.> accessed 23 August 2019.

277 The Schuman Declaration – 9th May 1950 <http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm.> accessed 23 August 2019.

278 Ibid, The ECSC effectively being the first supranational European institution.

279 Ibid, Coal and steel were integral in the manufacture of weapons.

280 Ibid.

the Treaty's regulatory ambit to the authorization of a High Authority established under the Treaty. The intention being to prevent *inter alia* the influencing of prices, the curtailing of production or marketing, the impairment of competition in the market for the relevant products.

The detailed nature of these two articles and the inclusion of similar provisions in subsequent Treaty texts is indicative of the vital role that competition law continues to play in the efforts towards an integrated Europe.

Supranational merger control was first applied in the EU in 1999 following the 1989 EC Merger Regulation, which has subsequently been replaced by the 2004 EC Merger Regulation.

2.4.4 Eastern and Southern Africa

2.4.4.1 National Perspective

Competition policy operates within a matrix of interrelated policy measures which are mainly socio-economic. A good starting point in contextualizing competition policy in the ESA region is to consider trade, industrial and government policy.

From a trade policy standpoint, trade liberalization has played an important role in stimulating increased investment in SSA, by making it possible for investors to exploit the opportunities available in the increasingly open markets. Research indicates that the current reforms in trade liberalization are of a unilateral nature, though there is an increased effort towards reforming to comply with regional and international trade agreements.[281] Trade liberalization has not necessarily resulted in a balance of trade in favour of the SSA countries[282], but it has necessitated the adoption of related policies meant to facilitate the objectives of the trade policy.

Opening the markets and creating new opportunities for investment likewise brings into discussion privatization policy in SSA. Privatization

281 Charles Ackah and Oliver Morrissey, 'Trade Policy and Performance in Sub-Saharan Africa since the 1980s' (2005) Centre for Research in Economic Development and International Trade, University of Nottingham, 1 <https://www.nottingham.ac.uk/credit/documents/papers/05-13.pdf> accessed 23 August 2019. This should however be considered against a backdrop of the structural adjustment programmes that were implemented by a majority of SSA countries and which included trade liberalization as one of the core conditions.

282 Ibid 2-5.

programs in SSA commenced roughly around the same time that the countries started to adopt trade liberalization policies, indicating the need to couple liberalized markets with avenues for investment. Research indicates that the privatization wave began with the small and medium-sized enterprises in the early 1990s and spread to larger companies in the latter part of the 90s.[283] The greatest difficulty has however been experienced in the utilities sector, with data indicating that it has largely been unsuccessful.[284] This lack of success has been attributed *inter alia* to improper regulatory frameworks, insufficient skills and know-how, vested interests in 'strategic companies', lack of political consensus and capacity constraints.[285]

One of the constraints identified as a drawback to liberalization is the lack of adoption or implementation of competition policies.[286] Competition law is however increasingly being adopted as a tool to facilitate trade and other economic policies. COMESA for instance has 21 member states. Of these 14 have competition laws. The number however goes down to 10 when considering those with competition authorities. And out of these 10 countries the authorities are at various stages of implementing or enforcing the competition laws. SADC on its part consists of 15 member states, 8 of which are also members of COMESA. Of the 15, 9 have operational competition regimes. The others are at various stages of adopting and implementing competition laws.[287]

The national competition laws as well reflect objectives geared towards economic development, with a special focus on developing the national markets and making them more competitive. Creating an environment that facilitates local and foreign investment is also seen as a core objective

283 Jean-Claude Berthelemy, Celine Kauffmann, Marie-Anne Valfort and Lucia Wegner, 'Privatisation in Sub-Saharan Africa: Where do we stand?' (OECD 2004) 119-120 <http://www.oecd.org/dev/emea/privatisationinsub-saharanafrica wheredowestand.htm> accessed 23 August 2019.

284 Ibid. See also generally Kate Bayliss and Terry McKinley, 'Privatising Basic Utilities in Sub-Saharan Africa: The MDG Impact' (UNDP 2007) <http://www.ipc-undp.org/pub/IPCPolicyResearchBrief3.pdf> accessed 15 September 2019.

285 Ibid.

286 Osman Suliman and Ghirmay Ghebreysus, 'Determinants of Privatisation in Selected Sub-Saharan African Countries: Is Privatisation Politically Induced?' (2001) 26(2) Journal of Economic Development 45.

287 Gladmore Mamhare, 'Southern African Development Community (SADC) regional competition policy' in Josef Drexl, Mor Bakhoum, Eleanor M. Fox, Michael S. Gal and David J. Gerber (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar 2012).

of adopting competition laws. They also express the need to meet regional integration goals.[288]

2.4.4.2 The Case of South Africa

Much like most Sub-Saharan Africa countries, South Africa's economy was built on a foundation of reliance on extractive industries and natural resources, primarily diamond and gold. Successive governments sought to reduce this reliance by putting in place economic policies aimed at enhancing farming and manufacturing industries. Other themes such as dominance of state-owned enterprises in vital aspects of the economy, import substitution and putting in place market controls (such as price caps) were also dominant themes in South Africa. However, one predominant theme which ties to the socio-economic and political structure of South Africa (and which traces similarities to many pre-colonial Sub-Saharan African countries) is the legacy of economic inequalities.[289]

The indigenous population was kept out of the formal economy. Vital aspects of economic development such as means of production, arable land ownership, government subsidies for farming were all reserved for the settler communities. This resulted in very highly concentrated ownership of capital. All these factors played a vital role in the development of South Africa's competition law framework.[290]

South Africa's competition policy framework is the most advanced in Sub Saharan Africa. Its modern antitrust framework traces its roots to 1923 when the Board of Trade and Industries was granted an advisory role in relation to competition policy. It was under the auspices of the Board of Trade and Industries that a report recommending the adoption of a general competition legislation led to the enactment of the Regulation of Monopolistic Conditions Act in 1955. As its title suggests, the legislation was aimed at addressing monopolies, adopting a rule of reason approach

288 See for instance Kenya Competition Act s 3; National Competition Policy for Botswana (2005); Namibia Competition Act s 2; Tanzania Competition Act s 3.

289 OECD, 'South Africa: Peer Review of Competition Law and Policy' (2003), 9-11 <http://www.oecd.org/southafrica/34823812.pdf> accessed 16 July 2019.

290 OECD South Africa Peer Review (2003) 9-17.

to addressing such monopolistic conditions based on a public interest standard.[291]

Although the Board of Trade and Industries was responsible for the administrative processes revolving around monopoly cases, ultimate discretion was placed in the hands of the Minister of Trade and Industry to determine which cases would be investigated and what relief would be provided. It is however notable that in the 20 years the statute was in force only 18 investigations were initiated by the Minister. The biggest downside to this statute, apart from its limited applicability to only monopoly situations, was the sweeping discretion it granted the Minister.[292]

This sweeping discretionary power was partly the subject of an inquiry launched in 1975 to assess the effectiveness of the 1955 law. It was noted particularly that the Ministerial discretion made the enforcement of the statute highly susceptible to political influence. The commission of inquiry recommended among other things a new competition body with an independent enforcement function and decision-making tribunal as well as the extension of its scope to cover mergers. The recommendations led to the enactment of the 1979 Maintenance and Promotion of Competition Act which established a Competition Board with an extended mandate to investigate mergers. The Competition Board used its investigative power to come up with 75 formal reports. The appointment of the Board was however still effected through the Minister. The new statute however still did not address residual concerns such as the absence of explicit prohibitions as well as maintaining the undefined public interest as the substantive standard of analysis. Further, the Competition Board was not truly independent as it was composed of individuals serving official functions in other government ministries.[293]

The post-apartheid period saw further changes made to South Africa's competition law framework. Renewed dialogue on the most appropriate competition law framework began and in 1997 the Department of Trade and Industry published Proposed Guidelines for Competition Policy. The guidelines sought to particularly address a number of shortcomings of the 1975 statute as well as pursuing various goals that go beyond econo-

291 Republic of South Africa, 'Board of Trade and Industries Act', No 28 of 1923 and No 19 of 1944; Republic of South Africa, 'Regulation of Monopolistic Conditions Act' No 24 of 1955.

292 Philip Sutherland and Katharine Kemp, *Competition Law of South Africa* (Service Issue 18, LexisNexis 2014) cap 3.

293 Ibid.

mic efficiency. These included the lack of a proper definition of public interest, economic distortions resulting from the unequal distribution of resources in the apartheid era as well as ensuring equal opportunity to participate in the economy. In the main, the guidelines called for more comprehensive merger regulation provisions (including an appropriate pre-notification regime), a more robust and independent administrative authority as well as stronger prohibitions against anti-competitive conduct. Further, in order to address the historical concentration of ownership, stronger divestiture powers were also proposed.[294]

This eventually led to the adoption in 1998 of the Competition Act. The Act established three increasingly independent administrative and judicial bodies (the Competition Commission, the Competition Tribunal and the Competition Appeal Court). Although the primary purpose remains the enhancement of economic efficiency and the promotion and maintenance of competition in South Africa, the Act also seeks to address historical injustices that prevented most of the population from adequately participating in the economy. In this regard, the Act specifically addresses employment and socio-economic welfare, opportunities for SMEs to participate in the economy and the increasing of ownership stakes for historically disadvantaged people.[295]

Given several similarities between the pre- and post-colonial socio-economic and political structures and South Africa's unique situation, the South African competition law framework can serve as a useful guide for a number of Sub-Saharan Africa countries looking to implement their own competition laws.

2.4.4.3 Regional perspective

Both at a national and regional level, the main themes of competition policy are promoting market efficiency, enhancing social and consumer welfare and facilitating economic growth and development. At the regional level, promoting regional integration is one of the key objectives of competition policy. Regional economic integration is also regarded as a catalyst

294 Republic of South Africa, 'Maintenance and Promotion of Competition Amendment Act, No 5 of 1986; See also Ben Fine and Zavareh Rustomjee, *The Political Economy of South Africa – From Minerals-Energy Complex to Industrialisation* (Hurst and Company 1996) cap 3.

295 Sutherland and Kemp (2003) cap.3.

for economic development in Sub Saharan Africa. Looking at COMESA, for instance, the economic objectives are all geared towards sustainable growth and development within the Member States and jointly among the Member States. The integrative objective is to be achieved through creating an environment that promotes domestic, cross-border and foreign investment, adoption of common policies and programs and the adoption of common positions with regards to the international agenda. The aim is the implementation of specific measures that will result in the realization of the economic community.[296]

Similar objectives are observable in the SADC Treaty[297], the main difference being that the SADC chooses cooperation and harmonization of measures rather than the creation of binding supranational provisions. Article 5 of the SADC Treaty lists the objectives which are to be achieved through, *inter alia*, the harmonization of the political and socio-economic policies of the Member States, improvement of economic management and performance through regional cooperation and promoting the coordination and harmonization of the international relations of Member States.

Article 55 of the COMESA Treaty sets out the foundation for the development of the COMESA competition policy and the subsequent COMESA Competition Regulations. Article 55(1) requires Member States to proscribe conduct that has the effect of negating free and liberalized trade within the common market.

Currently, the COMESA Competition regime is the most active and well-established regional competition regime in Africa. Its foundation was set out in Article 55 of the COMESA Treaty, which provided the foundation for the development of the COMESA competition policy and the subsequent COMESA Regulations. Article 55(1) requires Member States to proscribe conduct that has the effect of negating free and liberalized trade within the common market. This is therefore the principal objective of the competition policy.

From an efficiency perspective, Article 55(2) however allows conduct[298] that would in normal circumstances be considered anticompetitive in

296 COMESA Treaty art 3.

297 Treaty of the Southern African Development Community (SADC Treaty) art 5 <http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf.> accessed 23 August 2019.

298 Article 55(2) specifically provides as follows: 'The Council may declare the provisions of paragraph 1 of this Article inapplicable in the case of: any agreement or category thereof between undertakings; any decision by association of undertakings; any concerted practice or category thereof; which improves production

instances where such conduct 'improves production or distribution of goods or promotes technical or economic progress and has the effect of enabling consumers a fair share of the benefits', thus highlighting the goal of economic growth and development through a balancing of the pro and anti-competitive effects of the conduct in question.

Article 55(3) specifically mandates the Council of Ministers to make Regulations to realize this objective. The Council of Ministers set the ball rolling in 2004 when they invoked Article 55(3) and consequently promulgating the COMESA Competition Regulations of 2004. The COMESA Competition Commission, which is established under Article 6 of the COMESA Competition Regulations, became operational on 14 January 2013 and currently plays a very active role in regulating competition in the region including the assessment of mergers. Its mandate is in respect of conduct that has an appreciable effect on trade between Member States and restricts competition in the Common Market. Notifiable mergers are those that fall within the notification thresholds and that have a 'regional dimension', that is, where: (a) both the acquiring firm and target firm or either the acquiring firm or target firm operate in two or more Member States; and (b) the threshold of combined annual turnover or assets provided for is exceeded.[299]

The EAC also has a competition regime in place. The EAC Competition Act was enacted by the East African Legislative Assembly in 2006.[300] The EAC Competition Act became effective on the 1 December 2014 and has been ratified by all the EAC Member States. In February 2016, the EAC Council of Ministers approved the appointment of 5 Commissioners to head the Competition Authority.[301] A secretariat has also been put in place.[302] The EAC Competition Authority has already began operations

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or distribution of goods or promotes technical or economic progress and has the effect of enabling consumers a fair share of the benefits: Provided that the agreement, decision or practice does not impose on the undertaking restrictions inconsistent with the attainment of the objectives of this Treaty or has the effect of eliminating competition.' This provision draws from Article 101(3) of the TFEU.

299 COMESA Competition Regulations art 16,18 and 23.

300 Gazette of the East African Community No. 002 Vol AT 1-003 (September 2007) <https://www.eac.int/documents/category/gazette> accessed 16 July 2019.

301 See EAC, Five Commissioners of the EAC Competition Authority sworn in at the EAC <https://www.eac.int/press-releases/605-1048-346-five-commissioners-of-the-eac-competition-authority-sworn-in-at-the-eac> accessed 16 July 2019.

302 Adam Ihucha, 'EAC Competition Authority to Start Operations in July' (The East African Standard 18 June 2016) <https://www.theeastafrican.co.ke/business/

and is currently conducting market studies to assess the EAC competition climate as well as the prevalence of anti-competitive practices.[303] The Competition Authority is however yet to begin the assessment of mergers.

This inevitably raises the question of jurisdictional overlaps with the COMESA Competition Commission. Article 10(2) of the COMESA Treaty specifies that a regulation shall be binding on all Member States in its entirety. This means that no further step would need to be taken on at the Member State level to give effect to the provisions of the COMESA Regulations. Furthermore, Article 3 of the COMESA Regulations provides, *inter alia*, that the Regulations shall apply to all economic activities having an effect within the Common Market and to conducts covered by parts 3, 4 and 5[304] of the COMESA Regulations which have an appreciable effect on trade between Member States. Additionally, the Article provides that the COMESA Regulations have primary jurisdiction, 'over an industry or a sector of an industry which is subject to the jurisdiction of a separate regulatory entity (whether domestic or regional) if the latter regulates conduct covered by Parts 3 and 4 of these Regulations'.

The EAC Treaty also provides that Regulations made pursuant to the Treaty shall be binding on the Member States.[305] The EAC Competition Act, which is the equivalent of a regulation made pursuant to the EAC Treaty, also applies to economic activities and sectors having a cross-border effect between its Member States.[306] The Act similarly addresses restraints by enterprises, abuse of dominance and mergers and acquisitions in more or less the same way as the COMESA Regulations do.

The Act equally establishes the EAC Competition Authority which has broad investigative powers, power to prohibit or approve the regulated conduct and arrangements and a duty to receive merger notifications and approve or disapprove mergers.[307] In other words, it has the same powers

EAC-competition-authority-to-start-operations-in-July-/2560-3255818-pwwagnz/index.html> accessed 16 July 2019.

303 James Anyanzwa, 'East Africa competition watchdog begins operations, market studies ongoing' (The East African, 28 March 2018) <https://www.theeastafrican.co.ke/business/East-Africa-competition-watchdog-operations-market-studies/2560-4361580-1rqaquz/index.html> accessed 16 July 2019.

304 These parts are in respect of anti-competitive business conduct and practices, mergers and acquisitions and consumer protection.

305 EAC Treaty art 16.

306 Ibid.

307 Article 42 and Parts II, III, IV, VII and VIII of the EAC Act.

and functions within its area of operation as the Competition Commission under the COMESA Regulations.

Even more specifically conflicting is the fact that the EAC Competition Act vests in the EAC Competition Authority exclusive original jurisdiction over violations of the Act with its resolutions and decisions being binding on the authorities of the Member States and their subordinate courts. The right of appeal from the decisions of the Authority lies in the East African Court of Justice[308] whose decisions are also final and binding[309] as are the decisions of the COMESA Court of Justice.

There is no such risk of such a conflict with the SADC given its regional integration model. The SADC approach is one of enhancing co-operation between the Member States through harmonizing various political and socio-economic policies rather than adopting substantive directly applicable rules.[310] The SADC approach to competition policy therefore aims at ensuring the Member States adopt at the national level measures aimed at prohibiting unfair business practices and promoting competition rather than adopting a supranational authority to enforce the regional competition policy.[311]

It is not yet certain how COMESA and EAC will deal with this overlap. It can however be reasonably expected that they will enter into negotiations to conclude a Memorandum of Understanding.

At the supra-regional level, the importance of competition policy is recognized in both the Tripartite FTA Agreement and the CFTA Agreement. Both Agreements place competition policy high on their agenda for their next phase of negotiations.[312] One question in this regard is whether there will be a push for a supra-regional competition regulator and what impact this will have on the existing regional frameworks.

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308 Established under Article 9 of the EAC Treaty.

309 EAC Treaty art 35.

310 See SADC Treaty art 5; Protocol on Trade in the SADC Region art 25; see generally SADC Declaration on Regional Cooperation in Competition and Consumer Policies (2009) <http://www.sadc.int/documents-publications/show/SADC_Declaration_on_Competition_and_Consumer_Policies.pdf.> accessed 16 July 2019.

311 SADC Treaty, Protocol on Trade.

312 The CFTA Agreement's protocol on trade in services already contains provisions by which State Parties to the Agreement should: (1) ensure that suppliers enjoying a monopoly position within their territories do not abuse their monopoly in the supply of services in the relevant market; and (2) cooperate with other State Parties with a view to eliminating anti-competitive practices in the supply of services.

2.4.5 Competition policy objectives

Having the politico-economic objectives of regional integration in mind makes it easier to contextually frame the regional competition policy objectives. The preamble to the COMESA Regulations sets out the specific objectives. These can be condensed to the following main objectives:

1. Promotion of regional integration[313];
2. Economic and market efficiency;
3. Economic growth and development; and
4. Consumer welfare.

Section 3 of the EAC Competition Act sets out the following objectives:

1. Enhancing the welfare of the people in the EAC;
2. Enhancing the competitiveness of Community enterprises in world markets by exposing them to competition within the Community;
3. Creating an environment which is conducive to investment in the Community;
4. Bringing the Community's competition policy and practice in line with international best practices;
5. Strengthening the Partner States' role in relevant international organizations.

One of the main economic objectives of regional integration in the context of trade liberalization is the removal of barriers to trade.[314] Anti-competitive conduct is one of the main non-tariff barriers to trade.[315] The effect of private barriers to market access can be as effective as the government barriers in hindering effective market access. The removal of tariff barriers

313 David J. Gerber, *Global Competition: Law, Markets and Globalization* (Oxford University Press 2010), 182, in the context of promotion of EU integration.

314 This is reflected in Article 4 of the COMESA Treaty which among other things requires the Member States to abolish all non-tariff barriers to trade among themselves, establish a common external tariff and co-operate in customs procedures and activities; See also SADC Protocol on Trade Article 3 and 6 and EAC Treaty Article 75 on the need to eliminate non-tariff barriers to trade. Also reflected in Article 5 and 10 of the Tripartite FTA Agreement and Article 2 of the CFTA Agreement.

315 *See* Drexl (2012) 234; *See also* Diane P. Wood, 'Antitrust: A Remedy for Trade Barriers?' (1995), 2 Asian Law Program, Japan Information Access Project, Washington, D.C., <http://www.justice.gov/atr/public/speeches/0170.pdf> accessed 16 July 2019, which succinctly captures the effect of anti-competitive conduct as a private barrier to trade.

should be accompanied by effective competition policy to prevent anti-competitive barriers from seizing the newly freed market.[316]

Competition policy also promotes economic and market efficiency through incentivizing competition and creating room for innovation and expansion.[317] The removal of the artificial market entry barriers placed by anti-competitive measures means that more market players can access the market. This in turn encourages entrepreneurship and efficient investment of resources for optimal growth and development.[318]

Anti-competitive conduct also has an adverse impact on consumer welfare. The biggest consumer interest on the market is the availability of sufficient substitutes for products on the market at competitive prices. Cartels for instance have the effect of raising prices of the products on the market and restricting optimal output of the products.[319]

Consumers on the market are a largely unorganized group. They have little bargaining power, lack knowledge of their rights and the avenues for enforcing them and the existing information asymmetries make it difficult for them to tackle such anti-competitive conduct.[320] The necessity for effective competition policy complemented by the necessary consumer protection policy can therefore not be wished away.

2.4.5.1 Economic development

One of the main objectives espoused by ESA jurisdictions in favour of the adoption of competition law is that it spurs economic development. It is regarded as an avenue to bolster international, regional and local economic activity by creating a conducive environment for investment in the market. From the perspective of globalised business, it is an avenue

316 Wood (1995) 3.
317 Gerber (2010) 3.
318 Lawrence J. White, 'The Role of Competition Policy in the Promotion of Economic Growth' (2008) Essay presented at the Competition Policy Research Center of the Fair Trade Commission of Japan's International Symposium, 5-7 <http://web-docs.stern.nyu.edu/old_web/emplibrary/competition%20policy%20and%20growth.ljw%20draft%203-30-08.pdf> accessed 16 July 2019.
319 *See* Pradeep S. Mehta, Siddhartha Mitra and Cornelius Dube, *Competition Policy and Consumer Policy: Complementarities and Conflicts in the Promotion of Consumer Welfare* 56, UNCTAD, The Effects of Anti-competitive Business Practices on Developing Countries and their Development Prospects (United Nations Publication 2008).
320 Ibid 67.

to increase FDI.[321] The reduced (and in some instances eliminated)[322] barriers to international trade also serve as a motivating factor for many countries to implement competition laws to prevent the establishment of private frontiers that curtail the efficiency of the global market and which would as well result in their own national markets being less attractive for investment.[323]

However, the increased adoption of competition laws comes at a cost, especially to transnational business enterprises. From their perspective, more regulation means more compliance costs. Therefore, competition law, in serving its function to ensure that market efficiency is maintained, should also ensure that it as much as possible facilitates rather than hinders the ease of doing business.

One of the main questions that arises is whether a link can be made between the adoption of competition law by the ESA jurisdictions and an increase in economic development. This is however keeping in mind that economic development and FDI depend on many other socio-economic factors as well as other policy and regulatory choices.

Economic development does not lend itself easily to specific and concrete competition policy choices. Further, creating a link between economic development and the adoption of competition policies, in terms of specific economic markers of a competition policy's success, is considerably challenging.[324] Some scholars advocate for a human development approach for developing countries, suggesting that competition policy should focus on those sectors that have the greatest impact on human development such as agriculture and health. These sectors would in this regard serve as test cases for the effectiveness of the competition policy on development and eventually instruct the need to expand its application.[325]

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321 Waked (2008) 1.

322 For instance, in the case of Regional Economic Communities where trade tariffs between the member states are eliminated.

323 Fox (1997) 19-20.

324 Simon J. Evenett, 'Would Enforcing Competition Law Compromise Industrial Policy Objectives?' in Douglas H. Brooks & Simon J. Evenett (eds), *Competition Policy and Development in Asia* (Palgrave Macmillan, 2005) 47; see also P.A.M. Jacobs & Simon van Norden, 'Why Are Initial Estimates of Productivity Growth So Unreliable?' (2016) 47 J. MACROECONOMICS 200.

325 Aditya Bhattacharjea, 'Who Needs Antitrust? Or, Is Developing-Country Antitrust Different? A Historical-
Comparative Analysis', in Daniel Sokol, Thomas K. Cheng & Ioannis Lianos (eds), *Competition Law and Development* (OUP 2013), 52-53.

Fox (2012) highlights the need for inclusivity and empowerment of people to participate effectively in the economy when making development-focused policy choices. Fox notes specific characteristics of developing countries that need special consideration when making such policy choices including: high levels of concentration, scarcity of human and financial capital, pervasive presence of the state in the economy, high entry barriers, marginalization of the majority from effective participation in the economy and rampant corruption. Therefore, competition policy choices that can measurably impact on these factors would have a positive effect on development. Particularly, Fox highlights the conclusions of the Spence (World Bank) Growth Report which emphasized the importance of inclusivity and the distribution of wealth and opportunity for the growth of developing countries.[326]

In the context of priority setting, Fox and Gal (2015) propose that the focus should be on markets that most affect the welfare of the population, particularly the weakest and poorest. These include agriculture, financial services and infrastructure. Fox and Gal note that the overarching goal should be efficient inclusive development. i.e. 'focusing on market access issues which affect the ability of the weaker parts of the society to take part and participate in the market on a larger scale than their current conditions allow them.'[327]

2.4.5.1.1 Economic Statistics

2.4.5.1.1.1 Foreign Direct Investment

Statistics point to a FDI inflow of USD 46 billion to Africa in 2018, attributed largely to increased demand and better prices for commodities as

326 Eleanor M. Fox, 'Competition, development and regional integration: in search of a competition law fit for developing countries' in Josef Drexl, Mor Bakhoum, Eleanor M. Fox, Michael S. Gal & David J. Gerber (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar 2012) 273-290.

327 *See* Michal S. Gal and Eleanor M. Fox, 'Drafting competition law for developing jurisdictions: learning from experience' in Michal Gal et. al (eds), *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Edward Elgar 2015), 320. See also Mor Bakhoum, 'The informal economy and its interface with competition law and policy' in Michal Gal et. al (eds), *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Edward Elgar 2015) 190.

well as non-resource-based investments in some countries. FDI inflows to the East African region was for the most part unchanged for the 2017-2018 period, standing at USD 9 billion. Despite reduced FDI inflows, Ethiopia remains the largest FDI recipient in East Africa. Improvements in the private enterprise and foreign investment climate as well as an improved Ease of Doing Business ranking saw Kenya's FDI inflows increase by 27 percent. The same period also saw increased FDI inflow across the border in Tanzania and Uganda. Both Tanzania and Kenya have adopted a policy allowing 100 percent foreign ownership of listed companies, in a bid to boost investment. In Southern Africa, FDI inflows saw a significant recovery in 2018. The country-specific statistics however showed stark differences with the largest inflows going to South Africa while Angola experienced decreased investment.[328]

The figure and table below provide some FDI inflow statistics for Sub-Saharan Africa, including some specific statistics for the reviewed ESA jurisdictions.

328 UNCTAD, 'World Investment Report: Special Economic Zones' (2019) 36-38 <http://unctad.org/en/PublicationsLibrary/wir2016_en. https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf> accessed 23 August 2019.

Figure 11: FDI inflows (in USD billion) to SSA (without South Africa) and the world, 1980-2006[329]

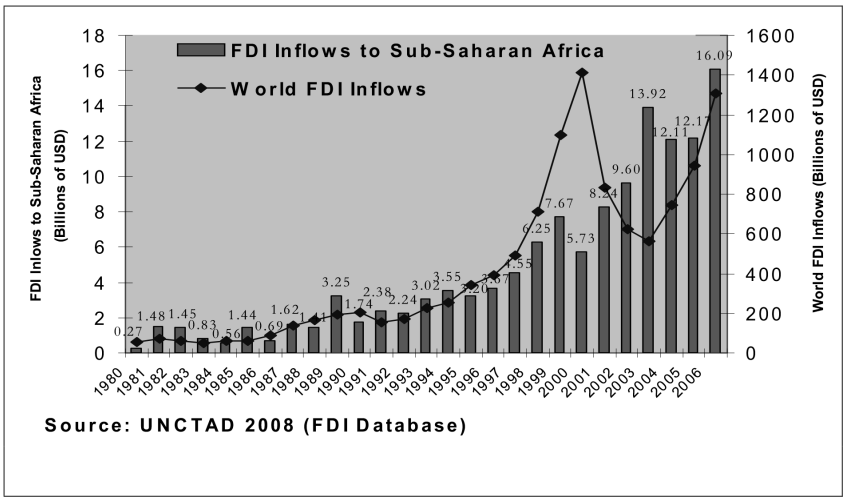

Table 11: FDI inflows (in USD million) for the ESA Region and the reviewed ESA Jurisdictions, 2010-2015

	2010	2011	2012	2013	2014	2015
Eastern Africa[330]	4 520.2	4 779.0	5 474.1	6 789.8	7 927.8	7 808.2
Southern Africa[331]	3 521.2	9 136.5	8 101.0	11 035.9	17 540.4	17 900.1
South Africa	3 635.6	4 242.9	4 558.8	8 300.1	5 770.6	1 772.4
Botswana	218.4	1 371.1	487.2	398.5	515.2	393.6
Kenya	178.1	335.2	258.6	514.4	1 050.7	1 437.0
Zimbabwe	165.9	387.0	399.5	400.0	544.8	421.0
Zambia	633.9	1 110.0	2 433.4	1 809.8	3 194.8	1 653.0

329 United Nations Industrial Development Organization, 'Foreign Direct Investment in Africa: Determinants and Location Decisions' (2009) 6 <https://open.unido.org/api/documents/4818201/download/Foreign%20Direct%20Investment%20in%20Sub-Saharan%20Africa%20-%20Determinants%20and%20Location%20Decisions> accessed 23 August 2019.

330 Includes Comoros, Djibouti, Eritrea, Ethiopia, Kenya, Madagascar, Mauritius, Mayotte, Seychelles, Somalia, Uganda and Tanzania.

331 Includes Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe.

Seychelles	210.8	207.4	261.4	170.3	230.0	194.5
Mauritius	430.0	433.4	589.0	293.3	418.4	208.3
Tanzania	1 813.3	1 229.4	1 799.6	2 087.3	2 049.3	1 531.5
Namibia	793.0	1 119.8	1 133.4	800.5	431.8	1 077.8
Malawi	97.0	128.8	129.5	119.5	130.0	142.5

Courtesy of UNCTAD World Investment Report 2016

Table 3 shows that although the individual country statistics fluctuate substantially over the years, the region-wide statistics indicate a steady increase in FDI inflows into the Eastern and Southern Africa region. Figure 1 as well reveals that FDI into Sub-Saharan Africa has over a long-term period seen a steady increase.

Analysts have pinned the fluctuations to the continued reliance on commodities, with the bulk of investment still focused on natural resource-based industries. However, there has been a notable improvement in private consumption, as well as increased investment in infrastructure with the role of the services sector as well as manufacturing seeing an increase.[332]

The longer-term growth in investment has been linked to increased structural changes, with progress in five main structural areas being identified as key to ensuring long-term progress: governance, diversification, infrastructure, human development and business enablement.[333]

Regulatory hurdles fall within the business enablement criterion. The World Bank for instance regularly undertakes a survey on the ease of doing business, with one of the main measures involving considering global indicators of regulatory governance. The five aspects of good regulatory practices covered include the transparency of rulemaking, public consultation in rulemaking, impact assessments, challenging regulations and accessing the laws and regulations.[334]

332 Ernst and Young, 'Navigating Africa´s Current Uncertainties' (2016) 3 <https://www.tralac.org/images/docs/9673/ey-attractiveness-program-africa-2016.pdf> accessed 18 July 2019.

333 Ernst and Young (2016) 7-8.

334 World Bank Group, 'Global Indicators of Regulatory Governance' <http://rulemaking.worldbank.org/~/media/WBG/CER/Documents/Global-Indicators-of-Regulatory-Governance-Project-Summary.pdf?la=en> accessed 19 September 2019.

Many the reviewed ESA jurisdictions score poorly on these indicators.[335] On the question of transparency of rulemaking for instance, key questions such as making proposed drafts of regulations publicly available or whether an obligation to publish such proposed texts exists. For Botswana, Malawi, Mauritius, Seychelles, Namibia, Zimbabwe, Zambia, Tanzania score negatively or have inconclusive information on this question. The same countries score poorly on the question of whether an impact assessment is conducted of proposed laws. South Africa scores quite well, with Kenya posting decent results on the issue of transparency in rule making and impact assessment.

On the question of access to laws and regulations, a number of the countries surprisingly score well on the question whether the websites and registries where the laws can be accessed is updated regularly. This may be so for the actual statutes but cannot be reconciled with the huge challenge faced in accessing detailed and up to date information on merger regulation, especially when it comes to properly elaborated decisions.

While data revealing a direct link between merger regulation to the FDI inflows may not be easily obtained, these indicators on business enablement through transparency and accountability reveal that the information asymmetry existing within the reviewed ESA jurisdictions as far as merger regulation is involved does pose a challenge to the ease of doing business.

2.4.5.1.1.2 Cross-border M&A

M&A trends in Africa still display a bias for natural resources, with deals in energy, mining and utilities continuing to lead the way. Statistics indicate that in 2014/2015 energy, mining and utilities accounted for 24 percent of the deal value in Africa and 17 percent of the total deal volume. The fall in commodity prices has however led to fewer big deals, which in turn has resulted in smaller deals in the consumer and financial services taking centre stage. The pharma, medical and biotech sector, although constituting only 2 percent of deal value grew by 20 percent between 2013 and 2015. Telecommunications is also expected to remain a resilient deal market given the large number of customers in Africa and the need to ensure infrastructure is maintained. South Africa (which remains the

335 The data is accessible at <http://rulemaking.worldbank.org/> accessed 23 August 2019.

biggest M&A market in Africa), Nigeria and Kenya continue to attract the most M&A activity in Sub Saharan Africa.[336]

The East African region has proven to be particularly attractive to investors owing to very positive GDP figures, as well as providing avenues for investment away from the traditional energy and natural resources. These include deals in the financial sector, construction and pharma, offering a diversity of opportunities which may be smaller in value size but offer growth and expansion opportunities.[337]

Several obstacles to an improved M&A climate have been identified, including political risks, economic uncertainty, currency volatility and security risks. However, the top concern identified by most investors is regulatory uncertainty in as far as compliance and integrity is concerned. Transparency and completeness of information have also been ranked as a significant obstacle to M&A activity.[338] This naturally brings to mind the merger regulation challenges identified in many of the reviewed ESA jurisdictions, particularly the insufficiency of published information which contributes to regulatory uncertainty and raises questions on transparency.

2.4.5.1.2 Summary

The adoption of competition law within a context of economic development is not entirely peculiar to the developing jurisdictions. In the US, antitrust law developed in an economic environment that was undergoing great industrial expansion. In the European Union the aim was to ensure that the common market objective was not hampered by cartelist behaviour.

The difference however is that whereas the US and the European Union adopted competition law to ´regulate´ economic development, the jurisdictions in Sub-Saharan Africa are adopting competition laws with the view to spur economic development, both from the regional economic integration perspective and the individual national perspective. Competition

336 See <http://dealdriversafrica.mergermarket.com/overview-ma-activity-in-africa> accessed 23 August 2019.

337 See <http://dealdriversafrica.mergermarket.com/feature-east-africa> accessed 23 August 2019.

338 See <http://dealdriversafrica.mergermarket.com/survey-findings-continued> accessed 23 August 2019.

laws are regarded as an avenue to attract (foreign) investment into the markets.

Economic development is however dependent on a myriad of policy choices as well as other political and socio-economic factors. The ability to attract foreign investment will also be largely influenced by how these factors are addressed. From the point of view of business enablement, competition law and in particular merger regulation should indeed as far as possible ensure that regulatory uncertainty does not arise. Merger regulation should facilitate as much as possible the ease of doing business. However, the priority for ESA should be on inclusive economic development, where, as Fox and Gal (2015) explain, the focus is on market access where the weaker parts of the effectively enabled to meaningfully participate in the market on a large scale.

2.6 Conclusion

The economic, social and political characteristics of developing countries invariably raise the question whether they should adopt competition policies. There are numerous proponents as well as opponents for the adoption of such policies in developing countries. The immediate argument in support of adoption of a competition policy framework is the expected gains in terms of economic efficiency, consumer welfare as well as economic growth and development.

Yet the unique characteristics of developing countries often raise the question whether competition policy would be an appropriate and effective policy choice for the achievement of these gains. One of the recurring arguments in this regard is in respect of constrained resources. Developing jurisdictions are often cited as lacking the necessary resources in terms of financial capacity as well as antitrust and economic expertise within the enforcement agencies as well as the judiciary. The resource shortfall is therefore seen as considerably hampering the ability of developing jurisdictions to effectively implement a competition policy framework. Insufficient financial resources are considered to interfere with enforcement particularly where certain cases involve intensive investigation of anti-competitive effects.[339] In terms of expertise, developing country agencies that

339 See Gal and Fox (2015) 296, 311–314. See also Michal S. Gal, 'When the Going Gets Tight: Institutional Solutions When Antitrust Enforcement Resources Are Scarce' (2010) 41 Loy. U. Chi. L.J. 417, 423–425.

adopt a more efficiency-based approach arguably find it difficult to carry out the sophisticated economic evaluation of anti-competitive conduct given their constrained human resource capability.[340]

One counter-argument highlighted is the fact that many competition agencies rarely start operations when fully constituted and with sufficient resources.[341] They therefore have to slowly build capacity first through market analysis, followed by advocacy and eventually effective enforcement. It is only after such capacity has been built that the effectiveness of the agency can be assessed.[342]

Another oft-cited argument against the adoption of competition policies by developing countries is the absence of political will, or worse still, a hostile political environment. Weak rule of law and lack of independence of the enforcement agencies and judiciary are regarded as severely hampering the effectiveness of competition policies. These ingredients are highly likely to contribute to a situation of regulatory capture, thereby severely hampering the efficiency and enforcement of competition policy.[343] Where this is combined with a lack of competition culture, it can lead to a serious impediment to competition policy.[344] In this regard, the advocacy role of competition authorities plays an integral part in ensuring the importance of competition policy is appreciated.

The fact that most markets in developing countries are underdeveloped can also prevent even the most effectively implemented competition policy

340 David J. Gerber, 'Adapting the Role of Economics in Competition Law: A Developing Country Dilemma' in Michal S. Gal et al. (eds), *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Edward Elgar 2015).

341 See Tim Büthe and Gabriel T. Swank, 'The Politics of Antitrust and Merger Review in the European Union: Institutional Change and Decisions from Messina to 2004' (2006) Harv. Ctr. for Eur. Stud.,Working Paper No. 142 17-20, highlighting the point that even the EU's Directorate General for Competition commenced operations amidst lots of scepticism and considerably lean staff.

342 See William Kovacic and Marianela Lopez-Galdos, 'Lifecycles of Competition Systems: Explaining Variation in the Implementation of New Regimes' (2016) 79 Law and Contemporary Problems 4, 97.

343 Stephen Weymouth, 'Competition Politics: Interest Groups, Democracy, and Antitrust Reform in Developing Countries' (2016) 61 Antitrust Bull. 296-316.

344 Allan Fels and Wendy Ng, 'Rethinking Competition Advocacy in Developing Countries' in Daniel Sokol, Thomas K. Cheng & Ioannis Lianos (eds), *Competition Law and Development* (OUP 2013), 182-183; see also David Lewis,'Embedding a Competition Culture: Holy Grail or Attainable Objective?' in Daniel Sokol, Thomas K. Cheng & Ioannis Lianos (eds), *Competition Law and Development* (OUP 2013) 228, 230–235.

from achieving its objective. It has been argued that even a development-focused competition policy cannot spur development where the appropriate market structures are absent, more so where there is government interference in economic activity as well as, in some cases, exemptions for state-run enterprises.[345]

Yet, these very same concerns regarding adoption of competition policies by developing countries are regarded by some as a strong imperative for the adoption of such policies. Because of high concentration levels and high barriers to entry, Gal particularly highlights that absent appropriate regulation, market forces in a small economy will in many cases not be enough to sustain competitive discipline among firms in the economy. Accordingly, competition policy is necessary in determining market structure, conduct and the intensity of competition.[346] Gal also points out that given the relative weakness of market forces in small economies, and a much weaker self-correcting tendency, there are higher costs associated with improperly designed and inadequately implemented competition laws. Thus, the natural conditions of many small market economies which have a suppressive effect on competition increase the need for the adoption of appropriate competition policies.[347]

Competition policies are especially important for developing countries that adopted policies for deregulation, privatisation, trade liberalization as well as regional integration as they help with efficient resource distribution. Deregulation and privatisation potentially expose existing and potential competitors as well as consumers to abuse of dominance by the

345 Avner Greif, *Institutions and the Path to the Modern Economy: Lessons from Medieval Trade* (Cambridge University Press 2006); Barak D. Richman, 'Contracts and Cartels: Reconciling Competition and Development Policy' in Daniel Sokol, Thomas K. Cheng & Ioannis Lianos (eds), *Competition Law and Development* (OUP 2013) 155, 164–166; Eleanor M. Fox and Deborah Healey, 'When the State Harms Competition: The Role for Competition Law' (2014) 79 Antitrust L. J. 769, 775–95; Marco Botta, 'Does the EU Competition Law Model Satisfy the Needs of the Emerging Economies? Lessons from the Countries Without a "Carrot"' in Karolina Podstawa and Laura Puccio (eds), 'Framework for Economic Development in EU External Relations' (2012) European University Institute Working Paper, 2251, 2262; William E. Kovacic, 'Getting Started: Creating New Competition Policy Institutions in Transition Economies' (1997) 23 Brook. J. Int'l L. 403, 450; Armando E. Rodriguez & Malcolm B. Coate, 'Competition Policy in Transition Economies: The Role of Competition Advocacy' (1997) 23 Brook. J. Int'l L. 365, 367–69.

346 Gal (2003) 45.

347 Gal (2003) 5.

incumbent. A robust competition policy would be necessary to prevent abuses of the restructured markets. Trade liberalization potentially leads to not only a robust domestic market, it also exposes the economy to international competition. Therefore, trade liberalization as well as regional integration and the consequential elimination or reduction of barriers to trade present a strong case for robust national and regional competition policies to protect the newly liberated national and regional markets from anti-competitive practices that may lead to barriers to trade.

Developing countries also argue that competition policy helps to promote the international competitiveness of their domestic industries. It has been argued that a competitive domestic market forces firms to use resources in the most efficient way, in essence allowing them to become more experienced in conducting business in a competitive climate. This would consequentially prepare the domestic firms to compete in an increasingly globalised market.[348]

Developing countries, particularly in Sub-Saharan Africa, also argue that competition policy provides an avenue to correct historical social injustices by promoting the equal distribution of resources to previously side-lined members of the society, enabling them to effectively participate in the economy.[349]

In sum, the dialogue should not be whether developing countries should adopt competition policies. Rather, what is the most effective competition policy framework to address the unique characteristics of developing countries. In this regard, context should dictate form.

348 Frank Emmert, Franz Kronthaler, Johannes Stephan, 'Analysis of statements made in favour of and against the adoption of competition law in developing and transition economies' (2005) Institut Für Wirtschaftsforschung Halle Report, 23-26 <https://www.iwh-halle.de/fileadmin/user_upload/publications/iwh_sonderhefte/SH_05-1.pdf> accessed 17 July 2019.

349 Ibid.