



TRAINING MODULE ON DRAFTING TRADE AGREEMENTS



NOTE

This Training Module is published under the auspices of TradeMark Southern Africa and addresses the drafting of trade agreements in the context of the negotiating process leading to the establishment of the Tripartite Free Trade Area (TFTA) between the Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC) and the Southern African Development Community (SADC).

This Module is designed for educational and divulgation purposes only. As such, no claim can be made to the publisher in relation to its legal contents, which in no instance replaces or is a substitute for the reviewed official texts.

The training exercise is intended to contribute to the negotiating capacity of the TFTA role players, including government officials as well as private sector and civil society representatives.

PREFACE

This Module concerns the drafting agreements for preferential trade in goods in the context of the negotiations of the TFTA.

The Module will review the following aspects relating to the drafting of agreements for preferential trade in goods:

- Law of treaties and the international trading system;
- Basic articles of a Free Trade Area (FTA) Agreement;
- Most Favoured Nation (MFN) clauses, standstill and rollback provision;
- Options for dealing with sensitive items;
- Options for the creation of Committees in the FTA; and
- Options for amending an FTA Agreement and its annexes.

Throughout this Module, selected content is drawn from the World Trade Organization (WTO), the Draft TFTA Text, and other FTAs.

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What you will learn

As a result of the training exercise, you will be knowledgeable on the following subjects:

- > Law of treaties and international trading;
- > Basic articles of an FTA Agreement with regard to trading in goods;
- > MFN clauses, standstill and rollback provision;
- > Options for dealing with sensitive items;
- > Options for the creation of Committees in the FTA; and
- > Options for amending an FTA Agreement and its annexes.

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1. Introduction to Free Trade Agreements

The Tripartite Free Trade Agreement (TFTA) represents an attempt to consolidate and build upon the trade liberalisation gains already realised in its constituent units, the Member States of the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern Africa Development Community (SADC), also known as Regional Economic Communities (RECs). Currently the Member States have varying levels of trade liberalisation commitments with regard to each other, within and outside the RECs. The objectives are summarised in the Draft:¹

Article 3, Draft TFTA Agreement

“The general objectives of the Tripartite Free Trade Area shall be:

- 1. To promote the rapid social and economic development of the region through job and wealth creation and the elimination of poverty, hunger and disease through building skills, innovativeness and hard and soft infrastructure; and through improving the location of factors for sustainable generation of national, regional and foreign investment and of trade opportunities;*
- 2. To create a large single market with free movement of goods and services and business persons, and eventually to establish a customs union;*
- 3. To resolve the challenges of multiple membership and expedite the regional and continental integration processes;*
- 4. To build a strong people-based Tripartite Free Trade Area; and*
- 5. To promote close co-operation in all sectors of economic and social activity among the Tripartite Member States.”*

This Module will cover the basic aspects of negotiating a free trade agreement for trade in goods, including the definition of parties, negotiating paradigm, basis of tariff reduction and reciprocity.

The Module then covers the basic foundations of a trade agreement:

- Standstill and rollback;
- Phase-out period modalities;
- MFN;
- Relationship with other FTAs;
- Variable geometry;
- Sensitive products;
- Organisation;
- Annexes and sides letters;
- Amendment and review; and
- Accession.

Other aspects of an FTA, such as dispute resolution, will be covered in other Modules. Section II of the Module will review these topics in the context of the existing COMESA, EAC, SADC and the Draft TFTA Agreement. Section III of the Module will discuss the General Agreement on Tariffs and Trade (GATT)/World Trade Organization (WTO) aspects of these topics. Section IV of the Module will provide comparative examples from other regional economic integration projects such as the North American Free Trade Agreement (NAFTA) and the Association of Southeast Asian Nations (ASEAN) Free Trade Agreement. Section V of the Module will provide some recommendations for the TFTA Agreement drafting process.

¹ The Draft TFTA Agreement notably does not explicitly adopt the standards of the General Agreement on Tariffs and Trade (GATT), WTO or other obligations of the TFTA Parties to the international trading system. This is emphasised by mention in the text of a ‘large single market’ rather than a customs union or FTA that would directly link with GATT Article XXIV. The potential implications of this drafting are discussed later in this module.

2. The COMESA, EAC, SADC and TFTA Approach

The TFTA Parties have previous experience with FTA agreements, both in the RECs in which they are already Members – COMESA, EAC and SADC – and in the Draft TFTA Agreement itself. In this section, the basic clauses of an FTA are reviewed and it is explained how the REC and TFTA texts have adapted them for their agreements.

2.1 Standstill and Rollback

In trade parlance, the commitment not to impose any new duties is known as ‘standstill’ and the commitment not to increase existing duties (those already reduced) is known as ‘rollback,’ i.e. not to roll back the duties to previous levels. This is discussed in more detail in Sections 3.4 and 4.5 of the Module.

The COMESA Treaty has what is intended to serve as a robust standstill and rollback clause:

Article 46.3, COMESA Treaty

“Within the period specified in paragraph 1 of this Article, the Member States shall not impose any new duties and taxes or increase existing ones in respect of products traded within the Common Market and shall transmit to the Secretariat all information on import duties for study by the relevant institutions of the Common Market.”

From this language, it appears that the COMESA parties can neither impose any new duties, nor can they increase existing ones. However, the clause contains a major drafting flaw in that the standstill and rollback commitments are limited in application to the period defined by paragraph 1 of Article 46 of the COMESA Treaty. That paragraph specifically applies to the transition period for the elimination of import tariffs for trade within COMESA. Hence after the COMESA FTA tariff elimination period had been completed, the standstill and rollback commitments would no longer apply. This is an example of inaccurate drafting, as these commitments should have continued to apply throughout the life of the Agreement.

The SADC Agreement has more limited commitments:

Article 4.4, SADC Agreement

“Pursuant to paragraph 1, Member States shall not raise import duties beyond those in existence at the time of entry into force of this Protocol.”

The SADC Agreement thus commits the parties only to refrain from raising import duties to the levels beyond those applicable on the initial date of the Agreement. The clause does not prevent the parties from lowering the duties, then raising them back to those levels prevailing at the time of the initial date of the Agreement, i.e. the clause does not provide for a prohibition of rollback. Nor does the clause arguably provide a standstill obligation because it does not explicitly prevent the parties from introducing new import duties.

The EAC Agreement contains a limited rollback clause. The parties can increase duties on goods traded among themselves but only up to the level of the common external tariff administered by the EAC Members on goods from outside the EAC:

Article 11.6, EAC Agreement

“Internal tariffs specified under the provisions of this Article shall not exceed the Common External Tariff with regard to any of the specified products.”

The Draft TFTA Agreement contains a standstill clause:

Article 8.2, Draft TFTA Agreement

“Tripartite Member States shall not impose new import duties or charges of equivalent effect except as provided for under this Agreement.”

Under this clause, TFTA Parties would be obliged not to impose new import duties. From this language also, the TFTA Parties could not increase duties beyond the levels contained in the tariff liberalisation schedules, which could serve as a rollback obligation. However, if the tariff liberalisation schedules of the Agreement have narrow coverage, the rollback obligation could be similarly narrow in application as well. Arguably, some language stating that the TFTA Parties could not increase duties in general (e.g., that the duties could not be increased after a tariff reduction) would help clarify that the clause is also intended to cover rollback. A suggested new version of the Article will be discussed in Section 5.1 of the Module.

2.2 Phase-out Period

COMESA implemented its tariff reductions over an eight year period, 1992–2000. SADC also used an eight year period, 2000–2008. The EAC used a five year phase-out period. The current Draft TFTA Agreement does not specify a phase-out period.

The COMESA Treaty allows for the acceleration of the phase-out period by the grouping:

Article 10.2, EAC Agreement

“The Council may, at any time, decide that any tariff rate shall be reduced more rapidly or eliminated earlier than is provided for in accordance with paragraph 1 of this Article.”

Article 10.2 of the EAC Customs Union Protocol also allows for acceleration:

Article 46.4, COMESA Treaty

“The Authority may at any time, on the recommendation of the Council, decide that any import duties shall be reduced more rapidly or eliminated earlier than is scheduled in paragraph 1 of this Article.”

The SADC Agreement does not appear to have such acceleration provisions, nor does the Draft TFTA Agreement.

If a subset of TFTA Members elects to reduce tariffs among themselves on an accelerated basis, this will raise issues of non-discrimination with regard to other TFTA Members. The most favoured nation (MFN) non-discrimination clause in the TFTA Agreement obligates the TFTA Parties to apply trade commitments equally and consistently to all other TFTA Parties, although there are conditions and exceptions, as will be seen later. The balancing of the MFN non-discrimination clause with the application of trade commitments to a subset of the TFTA Parties will be discussed in the next section of the Module.

2.3 MFN

The MFN obligation in international trade refers to the commitment by a trading party not to discriminate against other trading parties. In the context of the GATT/WTO, Members have the general obligation not to discriminate against other GATT/WTO Members unless otherwise allowed, such as through customs unions and FTAs (GATT, Article XXIV), antidumping duties (GATT, Article VI), countervailing duties (the WTO Subsidies and Countervailing Measures Agreement) and other exceptions specifically provided in the GATT/WTO Agreements. Thus, FTAs themselves are a deviation from the GATT/WTO concept of the MFN obligation through GATT Article XXIV or the ‘Enabling Clause’. The conditions for such deviation are discussed in this Module under Section 3.5.

The MFN principle also entails that WTO Members grant each other MFN import duty rates, i.e., that tariff rates are applied consistently and equally to all other WTO Members, unless otherwise permitted by the GATT/WTO Agreements. This principle may not be explicitly referred to in articles of an FTA where all Partners are WTO Members, since parties to an FTA are seeking to negotiate a reduction or the total elimination of the MFN rate of duties. However, in the case of the TFTA where some Member States are not yet WTO Members the insertion of an article by which the TFTA Member States grant each other the MFN rate of duty will, in itself, be a concession granted by TFTA WTO Members to TFTA non-WTO Member States.²

² Botswana, Burundi, Djibouti, Democratic Republic of the Congo (DRC), Egypt, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe are WTO Members. Comoros, Eritrea, Ethiopia, Libya, Seychelles, and Sudan are not WTO Members.

Besides this WTO context, within the context of FTAs, the MFN principle may be articulated in three forms of obligations:

- The obligation to treat all other FTA Parties equally, unless otherwise agreed as per asymmetrical or nonreciprocal treatment;
- The obligation to apply the treatment provided under agreements made by a subset of FTA Members to other Members of the FTA (these subset agreements can result from voluntary agreement among the FTA Partners);
- The obligation to apply the treatment provided to third parties under other FTAs to Members of the FTA (the other FTAs can be pre-existing or come into existence after the FTA has been formed).

These forms of non-discrimination are contained to different extents in the REC and TFTA Agreements. The MFN obligation will be discussed in more detail with regard to international trade norms in Section 3.5 of the Module. Furthermore, the MFN obligation also affects the FTA's interaction with pre-existing and future FTAs. For the TFTA Parties, this is related to the EU's Interim Economic Partnership Agreements (IEPAs), which contain their own form of the MFN obligation in their terms. This will be discussed in the next section of the Module.

The first type of FTA non-discrimination, a general commitment among FTA Members not to discriminate among each other, is contained in the COMESA Treaty.

Article 56.1, COMESA Treaty

"The Member States shall accord to one another the most favoured nation treatment."

A similar clause is contained in the SADC Agreement.

Article 28.1, SADC Agreement

"Member States shall accord Most Favoured Nation Treatment to one another."

However, it should be noted that Article 28.3 of the SADC Agreement further provided that FTA commitments made under pre-existing agreements would not have to be extended to other SADC Members. This will be discussed in the next section of the Module.

The EAC does not contain this type of non-discrimination clause, ostensibly because it creates a customs union among its Members without an internal duty.

The Draft TFTA Agreement, however, does contain a general non-discrimination clause.

Article 6.1, Draft TFTA Agreement

"Tripartite Member States shall accord to one another the most favoured nation treatment."

This clause, taken by itself, would appear to impose an absolute non-discrimination obligation on the TFTA Parties. As discussed earlier, such an absolute non-discrimination clause obliges TFTA Parties who are WTO Members to apply the MFN rates to WTO Members and non-WTO Members who are TFTA Parties. These non-WTO Members thus benefit from the MFN rates which resulted from the WTO negotiations, even though the non-WTO Members have not acceded to the terms of the WTO. However, as indicated by the COMESA example and as the Module discusses, the obligations under this general non-discrimination clause are not absolute and their implications vary. The Draft TFTA Agreement allows for TFTA Parties to enter into other FTAs, but requires that those parties apply the benefits from those other FTAs to TFTA Parties on a reciprocal basis. The Draft TFTA Agreement also 'grandfathers' in pre-existing FTA commitments made by the TFTA Parties, such as within the RECs (i.e., it allows inconsistent trade commitments to be applied if they are contained in pre-existing FTAs).³ Given the complexity of the negotiations, the TFTA Parties might consider whether to provide a clear, predictable and logical sequencing of the MFN obligation in all its forms, such as a total and unconditional MFN obligation or the introduction of additional flexibilities to deviate from the overall non-discrimination obligation, a recurring topic in this module.

³ GATT allows the original contracting parties to exempt from general GATT obligations mandatory domestic legislation which is inconsistent with GATT provisions or terms of accession, but which existed before the GATT was signed.

The second type of non-discrimination, regarding a subset of FTA Partners which agree to proceed with liberalisation beyond the general FTA obligations, is applied in the RECs and Draft TFTA Agreement, but with different obligations imposed on the subset of FTA Members undertaking the additional liberalisation. This will be discussed in the context of variable geometry in Section 2.5.

2.4 Relationship with Other FTAs

The third type of MFN obligation deals with the FTA Members' benefits under FTAs with third parties and whether they are obliged to provide those benefits to the other FTA Members.

The SADC Agreement obliges its Members to avoid adversely affecting other Members' trading rights through FTA Agreements with third parties.

Article 28.2, SADC Agreement

"Nothing in this Protocol shall prevent a Member State from granting or maintaining preferential trade arrangements with third countries, provided such trade arrangements do not impede or frustrate the objectives of this Protocol and that any advantage, concession, privilege or power granted to a third country under such arrangements is extended to other Member States."

The SADC Agreement contains additional language that 'grandfathers' in existing commitments under previous FTAs. 'Grandfathering' means that Members can continue to apply pre-existing tariff treatment under incumbent FTAs without having to apply those commitments to other SADC Members on an MFN basis.

Article 28.3, SADC Agreement

"Notwithstanding the provisions of paragraph 2 of this Article, a Member State shall not be obliged to extend preferences of another trading bloc of which that Member State was a member at the time of entry into force of this Protocol."

This language thus allows the Southern African Customs Union (SACU) Members who are also Members of SADC to apply the duty free treatment of the SACU only amongst themselves, because the SACU existed before the SADC Protocol came into force. This language also allows South Africa to continue applying the terms of its FTA with the EU only to the EU, because the EU – South Africa FTA predated the SADC.

The EAC allows its Members to conclude agreements with non-EAC Members, but the proposal must be consistent with the EAC Agreement and be approved by the other EAC Members:

Article 37.4, EAC Agreement

- "4. (a) A Partner State may separately conclude or amend a trade agreement with a foreign country provided that the terms of such an agreement or amendments are not in conflict with the provisions of this Protocol.*
- (b) Where a Partner State intends to conclude or amend an agreement, as specified in paragraph 4(a) of this Article, with a foreign country the Partner State shall send its proposed agreement or amendment by registered mail to the Secretary General, who shall communicate the proposed agreement by registered mail to the other Partner States within a period of thirty days, for their consideration.*
- (c) Where a Partner State notifies the other Partner States of its intention under paragraph 4(b) of this Article, the other Partner States shall make comments and proposals as they may deem appropriate, within ninety days from the receipt of the Secretary General's notification, before the conclusion or amendment of the agreement.*
- (d) Following the receipt of the comments and proposals as specified in paragraph 4(c) of this Article, the Secretary General shall convene a meeting of the Council within a period of sixty days to consider the comments and proposals.*
- (e) Where the Partner States do not submit comments and proposals within the period specified under paragraph 4(c) of this Article, the concerned Partner State may conclude or amend the said agreement."*

The COMESA Treaty allows Member States to maintain preferential trade arrangements made under previous FTAs, but requires them to apply the benefits of those arrangements to all other COMESA Members on a reciprocal basis:

Article 56.2, COMESA Treaty

"Nothing in this Treaty shall prevent a Member State from maintaining or entering into new preferential agreements with third countries provided such agreements do not impede or frustrate the objectives of this Treaty and that any advantage, concession, privilege and favour granted to a third country under such agreements are extended to the Member States on a reciprocal basis."

By making the commitments reciprocal, the COMESA Agreement allows COMESA Members to enter into FTAs with third parties, and offer terms more favourable than the COMESA Agreement. If other COMESA Members want to have the benefits of the third party FTA, they can do so if they themselves are willing to give those benefits on a reciprocal basis.

The Draft TFTA Agreement follows the COMESA approach almost verbatim, by providing for reciprocal application of benefits from FTAs with third parties:

Article 6.2, Draft TFTA Agreement

"Nothing in this Agreement shall prevent a Tripartite Member State from maintaining or entering into new preferential agreements with third countries provided such agreements do not impede or frustrate the objectives of this Agreement and that any advantage, concession, privilege and favour granted to a third country under such agreements are extended to the Tripartite Member States on a reciprocal basis."

The Draft TFTA Agreement provides that all previous commitments made under the RECs are built into the new TFTA Agreement as part of the 'acquis', or accumulated body of commitments associated with the TFTA.

Article 8.3, Draft TFTA Agreement

- "(a) Tripartite Member States already in the regional FTAs (COMESA, EAC and SADC) shall automatically extend duty free quota free treatment to all other Tripartite Member States implementing regional FTAs, as set out in Schedule 1.*
- (b) Tripartite Member States not yet in the regional FTAs, or which have not completed implementing FTA tariff liberalization process, shall eliminate import duties on goods originating from other Tripartite Member States in accordance with their Schedules 2.*
- (c) Tripartite Member States already in the regional FTAs shall eliminate import duties on goods originating from countries that are not in any of the regional FTA in accordance with Schedules 3."*

However, there is a general commitment to eliminate duties, regardless of the starting point for liberalisation.

For TFTA Parties, a related issue is the relationship between the TFTA and the Interim Economic Partnership Agreements (IEPAs) with the EU. SADC, the EAC and some COMESA States (through the East and Southern Africa (ESA) grouping) have initialled IEPAs with the EU.⁴ The ESA IEPA involves Mauritius, Madagascar, the Seychelles and Zimbabwe.⁵

Article 16, EU – ESA Interim Economic Partnership Agreement

- "1. With respect to the subject matter covered by this Chapter, the EC party shall accord to the Signatory ESA States any more favourable treatment applicable as a result of the EC party becoming party to a free trade agreement with third parties after the signature of this Agreement.*
- 2. With respect to the subject matter covered by this Chapter, the Signatory ESA States shall accord to the EC party any more favourable treatment applicable as a result of the Signatory ESA States becoming party to a free trade agreement with any major trading economy after the signature of this Agreement.*
- 3. The provisions of this Chapter shall not be so construed as to oblige the parties to extend reciprocally any preferential treatment applicable as a result of one of them being party to a free trade agreement with third parties on the date of signature of this Agreement.*
- 4. The provisions of paragraph 2 shall not apply in respect of trade agreements between Signatory ESA States with other African countries and regions.*

⁴ The only IEPA signed and in the process of ratification is the IEPA with Mauritius, Madagascar, the Seychelles and Zimbabwe. Botswana, Lesotho and Swaziland signed an IEPA, but did not provisionally implement the IEPA. Burundi, Rwanda, Tanzania, Kenya and Uganda initialled an IEPA only. See http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/agreements/#_other-countries.

⁵ Interim agreement establishing a framework for an Economic Partnership Agreement between the Eastern and Southern Africa States, on the one part, and the European Community and its Member States, on the other part, OJ L 111/2 (2012)

5. For the purposes of this Article, 'free trade agreement' means an agreement substantially liberalising trade and providing for the absence or elimination of substantially all discrimination between or among parties thereto through the elimination of existing discriminatory measures and/or the prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable timeframe.
6. For the purposes of this Article, 'major trading economy' means any developed country, or any country accounting for a share of world merchandise exports above 1 percent in the year before the entry into force of the free trade agreement referred to in paragraph 2, or any group of countries acting individually, collectively or through a free trade agreement accounting collectively for a share of world merchandise exports above 1,5 percent in the year before the entry into force of the free trade agreement referred to in paragraph 2."

The text of the EAC IEPA is identical to the above,⁶ but the SACU IEPA is not:⁷

Article 28, SACU-EU IEPA

- "1. With respect to the subject matter covered by this Chapter, the [European Communities (EC)] party shall accord to SADC [Economic Partnership agreement (EPA)] States any more favourable treatment applicable as a result of the EC party becoming party to a free trade agreement with third parties after the signature of this Agreement.
2. With respect to the subject matter covered by this Chapter, the SADC EPA States shall accord to the EC party any more favourable treatment applicable as a result of the SADC EPA States or any Signatory SADC EPA State becoming party to a free trade agreement with any major trading economy after the signature of this Agreement.
3. Where an SADC EPA State can demonstrate that it has been given by a third party substantially more favourable treatment than that offered by the EC party, the parties will consult and jointly decide how best to implement the provisions of paragraph 2.
4. The provisions of this Chapter shall not be so construed as to oblige the EC party or any SADC EPA State to extend reciprocally any preferential treatment applicable as a result of the EC party or any SADC EPA State being party to a free trade agreement with third parties on the date of signature of this Agreement.
5. For the purposes of this Article, 'major trading economy' means any developed country, or any country accounting for a share of world merchandise exports above 1 percent in the year before the entry into force of the economic integration agreement referred to in paragraph 2, or any group of countries acting individually, collectively or through an economic integration agreement accounting collectively for a share of world merchandise exports above 1.5 percent in the year before the entry into force of the economic integration agreement referred to in paragraph 2."

Under the terms of the IEPA Agreements, the MFN obligation is not symmetrical. The European Union (EU) agrees to provide MFN treatment for trade preferences arising from any later FTAs that it signs, whereas the ESA and EAC States agree to provide MFN treatment only for trade preferences arising out of later FTAs with any 'major trading economy'. This definition of 'major trading economy' as contained in paragraph 5 excludes all TFTA Countries since no one of the TFTA Countries or grouping reaches the benchmarks contained therein (i.e., none reach the 1% of total world merchandise exports.⁸

Furthermore, the MFN obligation contained in the EAC and ESA IEPAs does not apply to trade agreements with other African countries and regions, hence commitments made in the TFTA should not fall within this MFN obligation. The SADC IEPA's text does not have a paragraph 2 excluding African countries from the MFN clause. However, the 'major trading economy' clause should be sufficient to exclude the TFTA Parties from its MFN obligation.

Both the ESA and EAC IEPAs make this MFN obligation to the EU automatic, whereas the SADC IEPA only allows SADC to request a consultation if it can demonstrate that a third party is offering better terms than provided under the SADC IEPA. Also, the EAC and ESA IEPAs define 'Free Trade Agreement' as an "agreement substantially liberalising trade" either when that agreement enters into force, or on the basis of a reasonable timeframe, whereas the SADC IEPA contains no definition of a 'Free Trade Agreement'.

Arguably the EU has already given duty and quota free treatment to the African countries, but it should be noted that the IEPA MFN commitments only apply to trade in goods, and then only to certain aspects of trade in goods such as rules of origin, safeguards and standstill. Hence the IEPA MFN commitment is relatively limited.

⁶ See <http://trade.ec.europa.eu/doclib/html/145792.htm>.

⁷ See <http://trade.ec.europa.eu/doclib/html/143981.htm>.

⁸ See http://www.wto.org/english/res_e/statis_e/its2012_e/section1_e/i08.xls.

2.5 Variable Geometry

Variable geometry is the second type of non-discrimination regarding FTAs described earlier in the MFN section, regarding a subset of FTA Partners which agree to proceed with liberalisation beyond the general FTA obligations, but with different obligations imposed on the subset of FTA Members undertaking the additional liberalisation.

The COMESA Treaty allows for a subset of COMESA Members to proceed with liberalisation beyond that agreed by the entire grouping, but that subset must apply such liberalisation on an MFN basis to the entire grouping on a reciprocal and non-discriminatory basis.

Article 56.3, COMESA Treaty

"Nothing in this Treaty shall prevent two or more Member States from entering into new preferential agreements among themselves which aim at achieving the objectives of the Common Market, provided that any preferential treatment accorded under such agreements is extended to the other Member States on a reciprocal and non-discriminatory basis."

The Draft TFTA Agreement contains similar language.

Article 6.3, Draft TFTA Agreement

"Nothing in this Agreement shall prevent two or more Tripartite Member States from entering into new preferential agreements among themselves which aim at achieving the objectives of this Agreement, provided that any preferential treatment accorded under such agreements is extended to the other Tripartite Member States on a reciprocal and non-discriminatory basis."

The reciprocal aspect of this clause in the COMESA and TFTA Agreements means that a subset of Members can proceed with liberalisation beyond that agreed upon by the entire group, but if those outside the subset wish to partake of the subset's benefits, they must also agree to apply the terms of the subset's liberalisation. This approach allows the subsets to go beyond the commitments of the larger grouping, but others can adopt the subsets' commitments if they themselves are willing to accept the commitments.

2.6 Sensitive Products

Sensitive products are goods for which immediate adjustment or exchange at rates allowed for most products would cause severe political/economic problems. Sensitive products vary with countries but generally cover certain agricultural products (for food security and to protect farmers) and labour intensive manufactured goods such as textiles and garments (to protect small and medium enterprises (SMEs) and employment).

For the common external tariff in the EAC, sensitive products were accorded additional tariffs in excess of the 25 percent normal tariff rate. As during the phase-out period, the internal duties normally could not exceed the common external tariff rate that this designation allowed for higher internal rates for sensitive goods during the phase-out period. However after the phase-out period all duties are set at zero percent, so there is no existing special provision for sensitive products for internal trade.

COMESA has followed an approach similar to that of the EAC, in that sensitive products are identified and placed temporarily outside the scope of internal trade liberalisation and are subject to a tariff rate higher than that provided by the normal external tariff.

The SADC FTA Trade Protocol came into force in 2001. The Protocol introduced a trade liberalization programme in which 85% of all intra-SADC trade would be duty free by 2008; leaving the remaining 15% of imports that were classified as sensitive products to be fully liberalized by 2012.

For the purpose of the tariff phase down process, products were grouped into four categories: - products whose tariff rates were to be reduced to zero upon the protocol coming into force (category A); products that constituted an important source of revenue and whose tariffs were to be removed within 1-8 years (category B); sensitive products to be removed over a period between 8 - 12 years (2008-2012), except for Mozambique whose sensitive products were to be reduced over 15 years (2008 – 2015); and goods that were not eligible for preferential treatment for health, security and environmental reasons. Trade in sugar is governed by a separate Protocol on Trade in Sugar.

As of January 2009, the five (5) SACU countries – South Africa, Botswana, Lesotho, Namibia and Swaziland are effectively granting other FTA partners duty-free market access (around 99.9% of intra-SADC trade). There rest (with the exception of Malawi), are implementing the last category of tariff reduction on sensitive products, which will be completed by 2012. Malawi has made the least progress. Malawi has liberalized 70% of its trade with SADC and was left with only 15% in order to attain the minimum FTA threshold of 85%.

It is evident that by 1 January 2008, SADC Member States have reduced tariffs by the threshold figure of 85% on imports from the region. What is now left is the phase down on SADC sensitive list that was expected to start in 2008 with total elimination in time for the FTA in 2012. By 2012, Mozambique will still have few less liberalized items with respect to South Africa.

Angola, DRC and Seychelles are not yet participating in the SADC FTA.⁹

2.7 Organisation

The RECs each have a number of regional institutions for their internal governance.

COMESA has the following regional institutions:

1. Authority (e.g., national leaders);
2. Council (ministerial level);
3. Committee of Central Bank Governors;
4. Court of Justice;
5. Secretariat;
6. Inter-governmental Committee;
7. Technical Committee; and
8. Consultative Committee of Business Community and Other Interest Groups.

There are other institutions established to assist with regional integration such as a bank and investment agency. The larger number of institutions reflects COMESA's scope beyond trade in goods. Most notable are the Secretariat (for administration) and the Court of Justice (for dispute resolution), as well the Consultative Committee.

SADC also has a broad remit and a number of institutions:

1. Summit (e.g., national leaders);
2. Council (ministerial level);
3. Organ on Politics, Defence and Security;
4. Tribunal; and
5. Secretariat.

SADC contains a Secretariat (for administration) and a Tribunal (for dispute resolution).

Finally, the EAC has similar institutions:

1. Summit (e.g., national leaders);
2. Council (ministerial level);
3. Co-ordinating Committee (senior officials);
4. Sectoral Committees;

⁹ Excerpted from Paul Kaleneg, Mimeo, Roadmap for the COMESA/EAC/SADC FTA, 2010

5. East African Court of Justice;
6. Legislative Assembly; and
7. Secretariat.

Again, the EAC includes a Secretariat (for administrative functions) and a Court of Justice (for dispute resolution).

The Draft TFTA Agreement would establish a series of inter-governmental committees and subcommittees:

Article 37, Draft TFTA Agreement

"1. Tripartite Committee and Sub-Committees on Trade and Customs, at Ministerial, Senior Official and Technical Expert levels are hereby established to oversee the implementation of the Tripartite Free Trade Area. The functions of the Ministerial Committee on Trade and Customs shall include:

- *to regularly review the status of the Tripartite Free Trade Area and make appropriate recommendations;*
- *to initiate policy analysis on key issues affecting the Tripartite Free Trade Area;*
- *to receive and consider reports on trade, trade related and customs issues under this Agreement;*
- *to resolve through consultation trade, trade related and customs matters referred to it by Tripartite Member States;*
- *to implement and monitor closely measures taken to promote trade within the Tripartite FTA;*
- *to decide on new annexes and to amend existing Annexes and regulations that may be required to facilitate the implementation of this Agreement; and*
- *to discharge any other functions as may be required by the Tripartite Council or Tripartite Summit as established by the Tripartite MoU. (To be finalized by lawyers)*

2. The Tripartite Ministerial Committee on Trade and Customs shall be assisted by a Sub-Committee of Senior Officials, which will oversee and guide the overall technical work required to facilitate the implementation of this Agreement. The Sub-Committee of Technical Experts will be responsible for undertaking all the technical work associated with the implementation of this Agreement and shall report to the Sub-Committee of Senior Officials.

3. The three committees shall adopt their own rules of procedure.

4. Each REC shall within its Secretariat establish a dedicated Coordination Unit for the coordination of the activities under this Agreement."

Hence there would be the following institutions created:

1. Summit or Council (e.g., national leaders);
2. Committee on Trade and Customs (ministerial level);
3. Sub-committee of Senior Officials;
4. Sub-committee of Technical Experts; and
5. Co-ordination Units within each REC.

The Draft TFTA Agreement does not create many new regional institutions, but appears to envisage the TFTA Member States operating collectively to administer the FTA through the ministerial, senior official and technical expert committees. Nor does it discuss granting international legal personality or authority to the TFTA. The RECs would be linked to TFTA administration efforts through their Co-ordination Units. The Draft TFTA Agreement also establishes a dispute settlement mechanism administered by a Tripartite Secretariat, as per Annex 13 of the Draft TFTA Agreement. However, the role of the Tripartite Secretariat appears to be limited to administering dispute resolution.

2.8 Annexes and Side Letters

Article 193 of the COMESA Treaty also stipulates that annexes are an integral part of the Treaty, as do Article 40 of the EAC Agreement and Article 1 of the SADC Agreement.

This concept is contained in the Draft TFTA Agreement, which further provides that annexes can be adopted by the regional institution.

Article 46.2, Draft TFTA Agreement

- “1. Tripartite Member States shall from time to time conclude such Annexes as are necessary for the implementation of this Agreement. Such Annexes shall be adopted by the Tripartite Council.
2. The Annexes shall form an integral part of this Agreement.”

The standard practice for side letters in the RECs is not clear at this stage.

2.9 Amendment and Review

The SADC Agreement calls for amendments through its existing treaty process, and allows for amendments of annexes through consensus of the Members (acting through a regional institution).

Article 34, SADC Agreement

- “1. Amendments to this Protocol shall be in accordance with the procedures established by Article 36 of the Treaty.
2. In the case of a proposal to amend an existing annex or include a new annex to this protocol, the Committee of Ministers of Trade (CMT) shall adopt the proposal by consensus.”

Article 42 of the EAC Agreement contains similar language.

The COMESA Treaty, on the other hand, allows for amendment through a two-thirds majority of the parties.

Article 190, COMESA Treaty

- “Any amendment to this Treaty shall be adopted by the Authority and shall enter into force when ratified by two-thirds of the Member States, provided that in exceptional cases the Authority may provide for an Amendment of the Treaty to come into force upon adoption by the Authority.”

The Draft TFTA Agreement similarly allows for amendment by a two-thirds majority.

Article 47, Draft TFTA Agreement

- “1. This Agreement may be amended at any time by agreement of a two-thirds majority of the Tripartite Member States that are party to this Agreement.
2. Any Tripartite Member State that is a party to this Agreement may submit proposals for amendment of this Agreement. Proposals for amendment shall be submitted to the Chairperson of the Tripartite Council in writing who shall within 30 days submit the proposals to Tripartite Member States.
3. A Tripartite Member State which wishes to comment on the proposals may do so within 90 days from the date of the dispatch of the proposal.
4. After the expiration of the period, the Chairperson of the Tripartite Council shall submit the proposals and any comments to the Tripartite Summit through the Tripartite Council.
5. Any amendment shall enter into force upon ratification by two-thirds majority of the Tripartite Member States that are party to this Agreement.”

2.10 Accession

The SADC Agreement has an accession clause without geographical limitation.

Article 38, SADC Agreement

- “This Protocol shall remain open for accession by any Member State.”

The EAC Agreement does not have an accession clause.

The COMESA Treaty provides for two manners of accession:

Article 194, COMESA Treaty

- “2. Any State referred to in paragraph 2 of Article 1 of this Treaty may accede to this Treaty.*
- 3. Any State referred to in paragraph 3 of Article 1 of this Treaty may accede to this Treaty on such terms and conditions as the Authority may determine.*
- 4. This Treaty shall enter into force in relation to an acceding State on the date its instrument of accession shall be deposited.”*

Thus, COMESA Members may join the COMESA FTA as a matter of right, whereas South Africa and Botswana could join (and did) upon satisfying the terms and conditions set by the COMESA Authority (e.g., the national leaders) after post-apartheid transition. Paragraph 4 of Article 1 further provides that other countries may accede if they are an “immediate neighbour” of a Member State and satisfy the COMESA Authority.

The current Draft TFTA Agreement only allows for Tripartite Member States to accede:

Article 49, Draft TFTA Agreement

- “This Agreement shall remain open for accession by any Tripartite Member State.*
- The Tripartite Council shall adopt accession regulations.”*

3. The GATT/WTO System and FTAs

3.1 The Legal Aspects of Tariff Reduction in the WTO

The GATT/WTO system provides the foundation for trade relations on a multilateral basis. Even though some of the TFTA Parties are not currently WTO Members, the norms and concepts applicable through the WTO system still underpin the TFTA negotiations, given that most of the TFTA Parties are WTO Members and that the TFTA will eventually have to be consistent with the WTO norms as a result. Thus, in this section of the Module, we discuss the basic foundations of the GATT/WTO system and how they relate to FTAs.

3.2 Concept of Bound Rates

Bound tariffs or binding tariffs are the negotiated tariff rates listed in the schedules of WTO Members which represent their commitment to not raise their tariffs above the bound rate or agreed level. Once a rate of duty is bound as the result of negotiations, it may not be raised without compensating the affected parties. The key idea is that, as the WTO defines it, "...with stability and predictability, investment is encouraged, jobs are created and consumers can fully enjoy the benefits of competition – choice and lower prices."

Most developing countries have bound the rates somewhat higher than the actual rates charged, so the bound rates serve as ceilings. Countries can break a tariff commitment (i.e. raise a tariff above the bound rate), but only with difficulty. To do so they have to negotiate with the countries most concerned and that could result in compensation for trading partners' loss of trade. Hence Members generally avoid increasing duty rates beyond their bound rate commitments.

3.3 The Applied Rates Concept

It is not necessary that the tariff rate actually applied to trading partners' products is the same as the bound rate. Members have the flexibility to increase or decrease their tariffs provided they are so modified on an MFN basis (in a non-discriminatory manner with regard to all other WTO Members) and do not go beyond the bound rate.

Applied tariffs are the actual tariffs on imported goods applied by WTO Members. These should be below the bound rates. The difference between the bound and applied rates is popularly known as 'water' or 'binding overhang'. A large binding overhang is said to make the trade policies of the country in question less predictable, as it will retain greater flexibility to raise the applied tariff. The binding overhang is seen to be generally lower in industrialised countries, and larger in developing countries.

This difference, or water, as observed from the information provided by the WTO tariffs database, has been seen to be quite high for most countries in SADC, the EAC and COMESA (with the exception of South Africa and Zimbabwe). Hence the choice of bound rates or applied rates as the starting point for trade liberalisation becomes critical, with most FTAs using the applied rates.

3.4 The Standstill Concept

As discussed earlier in this module, the concept of 'standstill' refers to the idea that the negotiating parties refrain from adopting new measures which do not conform to the existing Agreement. This concept is implicit within GATT Article II, which provides for a schedule of negotiated bound tariffs and concessions:

Article II:1(a), GATT 1994

"Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement."

Furthermore, GATT Article II:3 also provides that no contracting party should alter valuation methods for goods, or conversion of currencies, to impair the concessions provided for in its schedule:

Article II.3, GATT

"No contracting party shall alter its method of determining dutiable value or of converting currencies so as to impair the value of any of the concessions provided for in the appropriate Schedule annexed to this Agreement."

Additionally, GATT Article XXIII:1 provides for dispute settlement solutions for situations where one Member sees a nullification or impairment of benefits (including those contained in the schedules described in GATT Article II:1(a)) accruing to it due to the policies of another Member.

Taken together, the GATT articles establish that Members have the legitimate expectation that bound rate commitments made by other Members will be followed, and will not be later withdrawn. This concept of 'standstill' thus underlies all aspects of the GATT/WTO system, for without this set of expectations, Members would neither be willing to make tariff concessions nor accept the outcomes of negotiations.

3.5 MFN in the GATT/WTO Context

The foregoing – binding of rates and standstill – when combined with the most-favoured nation (MFN) clause and the national treatment obligation (that imported goods should be treated the same as domestic goods) form the foundation of the GATT/WTO system. The MFN obligation is in fact articulated in the first Article of the GATT:

Article I:1, GATT

"[A]ny advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

WTO Members thus must apply the bound rates contained in their tariff schedules on a non-discriminatory basis to all other WTO Members. The GATT does allow for deviations from this non-discrimination principle, such as when Members have imposed trade remedies to deal with unfairly dumped or subsidised goods, or when Members grant access to less-developed countries. Importantly for this Module, another acceptable deviation from the MFN principle is provided for customs unions and FTAs. This exception is discussed in the next section.

3.6 FTAs in the GATT/WTO Context

3.6.1 GATT Article XXIV

GATT Article XXIV permits Members to enter into an agreement to form an FTA or a customs union and further provides guidance as to the extent and the speed of tariff liberalisation:

Article XXIV:5, GATT

"Accordingly, the provisions of this Agreement shall not prevent, as between the territories of Members, the formation of a customs union or of a free-trade area."

SADC was notified to the WTO under GATT Article XXIV.¹⁰

GATT Article XXIV:8(b), in particular, defines a Free Trade Area as a group of two or more customs territories in which the duties and other restrictive regulations of commerce are eliminated in "substantially all trade". GATT Article XXIV does not provide any details as to what is meant by 'substantially all' trade.¹¹ This was summarised by the WTO Appellate Body when it stated "neither the GATT contracting parties nor the WTO Members have ever reached an agreement on the interpretation of the term 'substantially' in this provision.

¹⁰ WTO Doc. WT/REG176/N/1/Rev.1. 2 August 2004.

¹¹ New Zealand has even suggested, in view of the many difficulties surrounding the word 'substantially', that the word should be 'removed' from Article XXIV:8: WTO Committee on Regional Trade Agreements, Note on the Meetings of 16–18 and 20 February 1998, WT/REG/M/16 (18 March 1998), para. 115.

It is clear, though, that ‘substantially all trade’ is not the same as all the trade, and also that ‘substantially all trade’ is something considerably more than merely some of the trade¹².

Various measures have been proposed to determine what constitutes ‘substantially all trade’, such as the number of tariff lines, value or value of trade, or number of industrial sectors covered by the Agreement. The basic argument comes down to a quantitative view versus a qualitative view.

The quantitative view proposes a statistical threshold on the proportion of trade covered. For example, in its negotiations with the African, Caribbean and Pacific (ACP) Countries, the EU has said that ‘substantially all the trade’ should be interpreted as the liberalisation of 90 percent of existing trade between the two sides. That is, the tariff lines accounting for 90 percent of the existing trade should be brought to zero.¹³ Hence the EU focuses on the volume of trade to be covered by the FTA. Australia has proposed an alternative quantitative approach in the WTO Doha Round negotiations, with 95 percent of tariff lines at the six digit level to be liberalised (to zero tariffs) by the end of the FTA transition period and 70 percent of all tariff lines should already have zero tariffs at the start of the entry into force of the FTA. Critics of the quantitative approach counter that a standard threshold would not be sufficiently flexible to deal with multiple situations, and that a volume of trade measure may be biased by the existence of high trade barriers in the base period, and that it does not allow for the possible expansion of trade over time as a result of the FTA.

The alternative qualitative view argues that the provision should be interpreted as meaning that no sector (or at least no major sector) should be left out of FTA trade liberalisation. The reasoning is that FTAs, being an exception to the GATT/WTO MFN principle, should only be granted when the FTA Parties have demonstrated commitment to closer economic integration. If the FTA Parties exclude major economic segments from trade liberalisation (e.g., agriculture), that commitment would appear to be lacking. Again, Australia has argued in a WTO paper that “substantially all the trade” requires that FTAs include all sectors (especially agriculture). The EU has argued in response that ‘substantially’ in GATT Article XXIV does not obligate a party to liberalise all of its trade; otherwise ‘substantially’ would be rendered meaningless and would have been included in the Treaty. However, this approach may simply push the controversy back to the definition of a sector. In practice, the debate revolves around the exclusion of agriculture, or agricultural products, from the regional integration process.

The ACP Countries (including TFTA Parties) have proposed that the WTO approach this issue with special and differential treatment. This would mean flexibility with regard to any analysis, on a case-by-case basis, of the ‘substantially all trade’ requirement for FTAs involving developing countries.¹⁴ In any event, the issue remains unresolved along with much of the WTO Doha Round agenda of negotiating topics.

3.6.2 The Enabling Clause

FTAs between less developed countries may rely on the ‘Enabling Clause’¹⁵ to satisfy GATT consistency and avoid the above issue. The Enabling Clause provides a more lenient standard for FTAs negotiated among less developed countries in several aspects. COMESA¹⁶ and the EAC¹⁷ made their WTO notifications under the Enabling Clause. As the TFTA Agreement involves developing countries, it could qualify for this standard.

Paragraph 1 of the Enabling Clause provides that “[n]otwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties.” According to Paragraph 2(c) of the Enabling Clause, paragraph 1 applies to “regional or global arrangements entered into amongst less-developed contracting parties” for the mutual reduction or elimination of tariffs and non-tariff measures on products imported from one another. Thus, the Enabling Clause provides an exception to the MFN clause of the GATT (discussed elsewhere in this Module) when the preferential tariff treatment is exchanged between less developed countries in an FTA.

¹² Turkey – Restrictions on Imports of Textile and Clothing Products, AB-1999-5, WTO Doc. WT/DS34/AB/R, 22 October 1999, para 48.

¹³ Australia, Submission on Regional Trade Agreements, WTO Doc. TN/RL/W/180, 13 May 2005.

¹⁴ Botswana, Submission on Regional Trade Agreements, WTO Doc. TN/RL/W/155, 28 April 2004.

¹⁵ GATT Contracting parties, Decision of November 28, 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation on Developing Countries, GATT B.I.S.D. 926th Supp.) at 203 (1980) (‘Enabling Clause’).

¹⁶ WTO Doc WT/COMTD/N/3, 4 May 1995.

¹⁷ WTO Doc WT/COMTD/N/14, 9 Oct 2000.

Since FTAs under the 'Enabling Clause' do not have to satisfy the requirement that duties and other regulation of commerce in 'substantially all trade' will be liberalised, negotiators do not need to achieve as high a coverage of trade liberalisation as would be the case for an FTA between developed countries. In addition, in contrast to GATT Article XXIV:8, the Enabling Clause expressly permits 'tariff reduction' as an alternative to 'tariff elimination'.

The requirement with regard to barriers to trade with third parties is also less stringent under the Enabling Clause than under GATT XXIV:5(b). Paragraph 3 of the Enabling Clause sets out a substantive requirement that preferential treatment "shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties."

Those developing countries concluding a preferential trading agreement relying on the Enabling Clause for GATT consistency must notify the WTO Members and furnish all the information deemed appropriate and relevant to the action to enter into the arrangement. The Enabling Clause does not specify where the notification should be made; the only requirement is that WTO Members should be notified. In practice, the notifications of the formation of FTAs pursuant to the Enabling Clause have been made to the Committee on Trade and Development.

Through the application of GATT Article XXIV and the Enabling Clause, FTAs such as the TFTA, involving developing countries can deviate from their MFN obligations under GATT Article I and their tariff commitments under GATT Article II. This allows the TFTA Parties to provide for asymmetrical trade liberalisation through the principles of variable geometry, continued application of pre-existing or co-existing FTA commitments, and the (temporary) exclusion of sensitive products from trade liberalisation.

GATT Article XXIV: 5(c) also provides that any interim agreement leading to the formation of a Free Trade Area shall include a plan for the formation of a Free Trade Area within "a reasonable length of time". As provided in the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 (Understanding), the reasonable length of time should exceed ten years only in exceptional cases. The Understanding provides that if a party believes that ten years will be insufficient they shall provide a full explanation to the Council for Trade in Goods of the need for a longer period. Even if for some products, the phase-out period may last more than ten years, as long as an FTA is formed before ten years, it will not be necessary for FTA Parties to explain to the Council for Trade in Goods the need for a longer period. Although the GATT provides a requirement that completion of the formation of an FTA should be within ten years, it does not appear to be firmly binding. For example, the EU IEPAs contemplate fifteen or even twenty-five year phase-in periods. Of course, a longer phase-out period will delay the effects of the trade liberalisation.

4. Basic Aspects of an FTA

4.1 Defining the parties to the Agreement

The GATT/WTO system recognises nations and customs territories as the basic parties to the international trading system. A customs territory does not have to have nation-state status to have international legal personality and authority. For example, Hong Kong, a special administrative region of China, is a separate Member of the WTO and has its own preferential trade agreements.

Thus, one possible approach to the TFTA negotiations would be to have all twenty-six participants negotiate as independent entities, as they are all nation-states. The Draft TFTA Agreement states that the Agreement is being established by the Member States:

Article 2, Draft TFTA Agreement

"There is hereby established a Free Trade Area among the Member States of the Common Market for Eastern and Southern Africa, the East African Community and the Southern African Development Community."

Indeed, this has been adopted as the negotiating model for the TFTA, with the Member States (for the most part) serving as the main actors in the negotiations.

The other extreme combination would have been a negotiation conducted solely by the RECs. There would be no tariff negotiations among four different subsets of TFTA Members, namely the five EAC Countries, the five Southern African Customs Union (SACU) Countries, the fourteen COMESA FTA Countries, and the twelve SADC FTA Countries.

GATT Article XXIV allows for the establishment of customs unions such as the EAC and SACU. These customs unions have duty free treatment for goods originating within the grouping, as well as a common external tariff for non-originating goods. The EAC and SACU Members have assigned their national authority over customs matters to the customs union of the EAC and SACU; whether the individual Members collectively negotiate on behalf of the customs union, or institutions created by the customs union do so, would be governed by the internal operating structures of the EAC and SACU, e.g., through standing authority provided by the customs union agreement or by special agreement of the Member States. In either case, with regard to trade in goods, the customs unions would have legal status to participate in the talks. For example, Mercosur conducted its FTA negotiations with Egypt, and Israel as a single entity, as Mercosur is a customs union. The EU itself is also a customs union.

Negotiations on issues outside the customs union competency would require the use of shared competency, creating a situation where both the bloc and the Member States have to participate in the negotiations. This may eventually arise in the TFTA negotiations in issues involving services, investment, capital, monetary policy, etc., which go beyond customs issues.

However, the COMESA FTA and SADC FTA groupings present a different issue. Both Agreements are preferential trade agreements among Member States, and as such do not give rise to a separate legal entity for customs purposes as per GATT Article XXIV. For example, the NAFTA Treaty did not create a NAFTA entity that would negotiate with other trading partners, leaving the individual NAFTA Members free to negotiate separate FTAs with others. Hence the GATT does not organically provide that Member States of the COMESA FTA and SADC FTA have created entities with legal personality to negotiate. Such authority would have to be self-generated by the COMESA FTA and SADC FTA Members, whether through standing authority or special agreement of the Member States.

It is not necessary, though, that FTA Members assign negotiating authority to an REC entity. ASEAN has a Free Trade Agreement, the ASEAN Trade in Goods Agreement, and is undergoing regional economic integration. ASEAN also has negotiated Free Trade Agreements with Japan, China, Korea, Australia – New Zealand and India. However, these negotiations were conducted by the ten ASEAN Member States operating on a collective basis, with co-ordination by the ASEAN Secretariat. The outcome of those negotiations is a series of ten bilateral FTAs sharing the same basic text, but with individual annexes for each country. Hence the ASEAN – China FTA is really the Brunei – China FTA, Cambodia – China FTA, Laos – China FTA, etc. This could have been done by the REC Members for the TFTA negotiations. However, this would have presented major organisational issues, as ASEAN itself had great difficulties even achieving this level of co-ordination with its weak institutions. Doing so in the TFTA would have presented an insurmountable obstacle.

In any event, the TFTA Members have resolved these issues regarding negotiating competency, making much of the previous discussion of academic note only. The TFTA Members agreed, at the June 2012 TFTA Summit, that the negotiations should be REC and/or Member/Partner State driven. The current proposal for negotiating modalities calls for this:

Draft Tripartite Tariff Negotiation Modalities, Doc. No. TP/TTNF/IV/2012/3.2.1

“5.1 With respect to negotiations of the tripartite tariff liberalization regime, three groups of countries can be identified:

***Member/Partner States that are already participating in the REC FTA with each other.** No tariff negotiations will take place between them. For example, there should be no tariff negotiations among the 5 EAC countries, or 5 SACU countries, or among 14 COMESA FTA countries or among 12 SADC FTA countries as they are already trading on FTA terms. They will only consolidate into the Tripartite FTA Agreement (TFTA) the level of tariff liberalization achieved in the trade regimes under their respective REC FTAs. However, nothing should prevent these countries to offer or request each other to improve existing levels of tariff liberalization so as to build and improve on the acquis.*

Member/Partner States that are participating in the REC FTA but will have to negotiate tariff liberalization with other Tripartite Member/Partners States of the other REC FTAs. These countries will submit tariff offers to each other.

***Member/Partner States that are not participating in the REC FTA.** These countries will need to negotiate tariff liberalization with all the Tripartite Member/Partner States, i.e., they will submit tariff offers to all the Tripartite Member/Partner States.”*

The liberalisation commitments already made within each REC would be inserted into the new TFTA Agreement. The draft modalities document goes on at para. 5.4 to propose that the EAC and SACU will make their own offers as customs unions, rather than involve their constituent Member States.

4.2 Defining the Negotiating Paradigm

The negotiating paradigm refers to the ‘agreement to agree’ i.e., the definition of what would be required to reach an agreement during the negotiations.

On one the hand, many FTA negotiations involve a traditional single undertaking. All parties agree to the package of commitments as a whole, with parties able to trade offers in exchange for concessions made by other parties. The negotiations can involve multiple sectors, such as goods, services, intellectual property and investment. For example, the WTO Uruguay Round was negotiated on this basis, as WTO Members granted concessions in one sector to achieve benefits in another sector. Without the commitment to a single undertaking, the parties could have elected to accept some Uruguay Round Agreements but not others. The difficulty is that the process of obtaining consensus for a single undertaking is usually time and resource consuming. With such a large number of parties (both nation-states and customs unions) involved, achieving agreement could be quite laborious. In any event, the TFTA Summit in June 2012 agreed to a single undertaking for the trade in goods negotiations. However this single undertaking commitment has become quite redundant when TFTA member states decided to negotiate only trade in goods aspects of the TFTA

Asia offers another approach to FTA talks. As discussed previously, ASEAN has FTAs with Japan, China, Korea, Australia – New Zealand and India. In an effort to harmonise its trade commitments under these FTAs and to expand to other issues, ASEAN has started Regional Comprehensive Economic Partnership negotiations with these existing FTA Partners. ASEAN will agree to begin negotiations on topics on which ASEAN and at least two other FTA Partners have reached agreement. Non-participating FTA Partners can elect to join the negotiations at a later date, but must accede to the commitments already agreed upon by the incumbent parties. The Trans Pacific Partnership talks involving Asia Pacific Countries have a similar mechanism, whereby parties can join the current talks but must accept the body of work which has already been achieved by the incumbent parties. In this way, negotiations can begin and make progress, without being delayed by one or more parties, as would be the case with a single undertaking.

The TFTA talks could apply a similar mechanism in order to ensure progress for the other negotiating items, e.g., services, investment, and other trade in goods issues. However, the TFTA talks would probably require a minimum participation level, both in terms of the total number of parties agreeing to the initial trade commitments, as well as in terms of coverage. For example, the TFTA talks could set aside a minimum requirement of X number of parties, with Y coming from COMESA, Z from SADC and the entirety of the EAC (as it is a customs union). Parties which are not prepared to join the negotiations can do so later, but must accept the incumbents’ draft. A question would then arise about TFTA negotiating parties that do not agree to the final Agreement but later wish to accede. Accession would be determined by the procedure agreed upon in the final Agreement. Those applying for accession could be required to accept the applicable levels

of trade liberalisation then applicable for the TFTA. This approach could be an option depending on how later negotiations proceed.

4.3 Reciprocity

Reciprocity refers to the mutual application of tariff reduction or eliminations by the FTA Partners. In general, as a negotiating principle, the reciprocity condition is a key element of a successful outcome of tariff negotiations to form an FTA, whether the reciprocal exchange of concessions is made on a product-by-product basis or across different products. The TFTA Summit adopted reciprocity as a negotiating principle.

In most FTAs, reciprocity is achieved through the exchange of concessions across different products. Negotiators exchange concessions in different sectors to reach agreement.

Article 16.1, ASEAN – Japan FTA

“Except as otherwise provided for in this Agreement, each party shall, in accordance with its Schedule in Annex 1, eliminate or reduce its customs duties on originating goods of the other parties. Such elimination or reduction shall be applied to originating goods of all the other parties on a non-discriminatory basis.”

However, there are instances where reciprocal treatment is stipulated on a product-by-product basis. In the ASEAN – China FTA, when a party excludes a tariff line from concession to its FTA Partner, a reciprocity condition provides that the party will not receive tariff concessions for its exports from its FTA Partner on that same tariff line.

Paragraph 2, Annex 1, ASEAN – China FTA, Modality for Tariff Reduction and Elimination for Tariff Lines Placed in the Normal Track

“If a party places a tariff line in the Normal Track, that party shall enjoy the tariff concessions other parties have made for that tariff line as specified in and applied pursuant to the relevant Schedules either in Annex 1 or Annex 2 together with the undertakings and conditions set out therein. This right shall be enjoyed for so long as that party adheres to its own commitments for tariff reduction and elimination for that tariff line.”

Under this Agreement, a party can enjoy reciprocal treatment only if a party places a tariff line in the ‘Normal Track’, i.e., the track in which tariffs will be eliminated in ten years. For example, if a party does not place tariffs on imports of washing machines from an FTA Partner in the Normal Track, an exporter of a washing machine from that party will not be able to receive the concessionary tariff from its FTA Partner. For those tariff lines that are only subject to tariff reduction, but not elimination, a reciprocal tariff treatment is provided only when the tariff rates are below 10 percent.

The ASEAN – China FTA uses this version of reciprocity to discourage parties from excluding products from its tariff offers, thereby encouraging liberalisation in theory. However, if a party has import sensitivity for a certain product but has little interest or comparative advantage in exporting the same product to an FTA Partner Country, this concept of reciprocity could actually hinder liberalisation: the party would simply exclude the tariff line. In the ASEAN – China FTA itself, the application of this type of reciprocity has distorted trade within the FTA, and will be addressed in ASEAN’s efforts to rationalise its FTAs with trading partners. In conclusion this kind of reciprocity is to be highly discouraged if TFTA Member States wish to achieve meaningful trade liberalisation.

4.4 Basis of Tariff Elimination/Reduction

The FTA negotiations need to determine the base rate from which tariff elimination/reduction will begin. Most FTAs use applied tariff rates, in force on a certain date, as the base rate.

Article 1(b) of the ASEAN – India FTA

"[A]ppplied MFN tariff rates shall include in-quota rates, and shall:

(i) in the case of ASEAN Member States (which are WTO Members as of 1 July 2007) and India, refer to their respective applied rate as of 1 July 2007, except for products identified as Special Products in the Schedules of Tariff Commitments set out in Annex 1; and (ii) in the case of ASEAN Member States (which are non-WTO Members as of 1 July 2007), refer to the rates as applied to India as of 1 July 2007, except for products identified as Special Products in the Schedules of Tariff Commitments set out in Annex 1."

Note that In-quota rates refer to tariff quotas for agricultural goods, which were allowed under this FTA.

The alternative would be to use the WTO bound rate as provided in the schedule annexed to the Marrakesh Protocol to the GATT 1994. However, for some countries, the WTO bound rate can be much higher than the applied rate. Hence, using the WTO bound rates in those cases would result in an exaggerated, misleading reduction of tariffs. The tariff would appear to be reduced in stages, while the actual applied tariff rate is already below the WTO bound rate or already eliminated. Therefore, when the gap between WTO bound rates and the MFN applied rate is large (as is the case with most TFTA Parties), adopting the MFN applied rate as the base rate would serve the purpose of imposing a ceiling on the applied rate by preventing a party from raising the tariff level back to the bound rate.

4.5 Standstill and Rollback

Most FTAs do not prevent a party from lowering a tariff level below the agreed level in its tariff commitments. Compare this with the standstill commitment under the GATT/WTO system, where Members are expected to abide by their bound duty commitments (although they can always modify their applied duty rates). However, if after the tariff reduction, a party raises the tariff back to the agreed level or introduces new tariffs on the same product, such action would represent a withdrawal of benefits previously conferred on the other party. To prevent this, a general 'standstill clause' provides that parties may not raise tariffs (at all) or introduce new tariffs on a product covered by the Agreement. This will cap tariffs on goods, unless otherwise provided for in the Agreement.

In other words, tariffs can be reduced following the tariff elimination schedule, but they cannot be raised nor can a new tariff be introduced other than those already agreed to in the tariff elimination schedule. For example, if the tariff elimination schedule includes only an ad valorem tariff rate, a new duty in the form of a specific duty may not be imposed.

How the standstill clause is drafted can have a major effect on the implementation of the FTA. For example, one possible loophole in the above standstill provision arises when a party raises tariffs which were unilaterally reduced below the tariff level prescribed in the tariff elimination schedule. If the standstill clause specifically provides that "neither party may increase any existing customs duty", the provision would be interpreted as prohibiting a party from raising the tariff back to the tariff level agreed upon in the tariff elimination schedule, even if the tariff was voluntarily lowered below the agreed tariff level to begin with. The revised clause ensures that only tariff reductions can take place, providing a 'no-rollback' obligation (also known as 'rollback'). The following example provides for standstill and rollback in that it stipulates that revisions to tariff elimination schedules can only "progressively reduce" duties:

Chapter 2, Article 1, ASEAN – Australia – New Zealand FTA

"Except as otherwise provided in this Agreement, each party shall progressively reduce and/or eliminate customs duties on originating goods of the other parties in accordance with its schedule of tariff commitments in Annex 1 (Schedules of Tariff Commitments)."

However, if the clause specifies otherwise, then rollback can take place after a unilateral tariff reduction:

Article 2.6, Korea – EU FTA

"Except as otherwise provided in this Agreement, including as explicitly set out in each party's Schedule included in Annex 2-A, neither party may increase any existing customs duty, or adopt any new customs duty, on an originating good of the other party. This shall not preclude that either party may raise a customs duty to the level established in its Schedule included in Annex 2-A following a unilateral reduction."

In addition, the coverage of the standstill and rollback clause is critical. If the standstill and rollback clause applies to all products, including sensitive items, then the flexibility accorded to sensitive products will be more limited, depending on the rigorousness of the standstill and rollback clause. For example, if the standstill and rollback clause applies only to goods selected for liberalisation, the parties retain flexibility to deal with sensitive items. Hence, both of the examples provided above only apply the standstill and rollback principles of the scheduled tariff liberalisation. The following is an example of an Agreement where the standstill and rollback principle applies to all duties, not just those contained in the tariff liberalisation schedule:

Article 2.2, Singapore-Jordan FTA

- "1. Each party shall eliminate its customs duties and charges having equivalent effect on originating goods of the other party in accordance with Annex 2A.*
- 2. Neither party shall increase an existing customs duty and charges having equivalent effect or introduce any such new duties on imports of originating goods of the other party."*

Thus, the standstill and rollback obligations, when combined, provide a 'ratcheting' effect in trade liberalisation. The standstill obligation serves as the baseline for the maximum tariff to be imposed under the FTA, whereas the rollback obligation prevents parties from increasing tariff rates once they have reduced the tariff rates.

4.6 Phase-out Period

The phase-out period between the time of the entry into force of the Agreement and the elimination of tariffs (also known as the staging period) is usually set at ten years or less. This is consistent with the general practice in the GATT/WTO system. However, there have been instances where the maximum phase-out period was set above ten years, such as the EU IEPAs.

Another issue is whether to use a gradual approach to the phase out of duties or a 'big bang' approach (i.e., trade liberalisation occurs at once). The gradual approach allows for less disruption in the short run, whereas the big bang approach will lean towards immediate implementation. Most FTAs use a gradual approach, with tariffs reduced at a consistent (straight line) rate, or with a substantial reduction in the beginning followed by gradual liberalisation, or with an initial grace period of several years followed by elimination of tariffs.

For example, in ASEAN, most goods were placed onto the liberalisation schedules, but sensitive items were placed on an exclusion list. During the phase-in period for the ASEAN Free Trade Agreement, the sensitive items were not subject to trade liberalisation. However, at the end of the phase-in period, almost all of the sensitive items were subject to zero duties, with only a very limited number (agricultural goods) subject to additional negotiation (additional phase-out time was given to the less developed countries in ASEAN):

Table 1: Percent of Tariff Lines in Tariff Liberalisation

ASEAN Member	1993	2004	2011
Brunei	93.45%	97.61%	99.07%
Indonesia	76.38%	98.63%	98.72%
Malaysia	92.35%	97.32%	98.69%
Philippines	83.86%	99.47%	99.69%
Singapore	99.99%	100.00%	100.00%
Thailand	98.59%	100.00%	100.00%
Cambodia	N/A	45.66%	100.00%
Laos	N/A	83.41%	98.96%
Myanmar	N/A	87.30%	99.29%
Vietnam	N/A	94.89%	97.71%

This will be discussed in the comparative section of the Module, Section 4.6.

Parties can elect to accelerate tariff reduction beyond the commitments made regarding timing and rate of reductions made in the FTA. The FTA can be drafted to provide for such acceleration.

Acceleration can also be made by a subset of the FTA Parties. Some FTAs provide that any such acceleration must be provided to the other FTA Parties under the MFN clause. This can be done on an automatic or reciprocal basis, as discussed earlier.

Finally, there is the concept of 'early harvest', allowing for an interim agreement with initial trade liberalisation to be applied earlier, rather than requiring completion of the trade talks. The benefit of this approach is that the parties can enjoy the positive effects of the agreements on an expedited basis, which will build political support for the talks. The downside is that the early harvest approach takes the points of easiest agreement off the negotiating table, leaving the most difficult topics for final agreement. This can effectively delay the final outcome of the talks.

4.7 MFN

As discussed previously the MFN non-discrimination principle is incorporated both in the GATT/WTO system and in FTAs.

Under GATT Article I, this obligation generally applies to all imports from all other GATT/WTO Members. Hence WTO Members must accord all other Members the same duty rates on imports from other WTO Members, unless a deviation is allowed otherwise, such as through a trade remedy. Entering into an FTA covered by GATT Article XXIV or the Enabling Clause allows a WTO Member to deviate from GATT Article I because the Member is providing preferential tariff treatment to goods originating from an FTA Partner. The result is that FTAs allow countries to apply their GATT/WTO MFN rates to most trading partners and the FTA preferential rates to FTA Parties.

In the context of FTAs, there are three forms of the MFN non-discrimination obligation, which were explained previously in Section 2.3 of the Module:

- The obligation to treat all other FTA Parties equally, unless otherwise agreed as per asymmetrical or non-reciprocal treatment;
- The obligation to apply the treatment provided under agreements of a subset of FTA Members to other Members of the FTA (these subset agreements can result from voluntary agreement among the FTA Partners); and
- The obligation to apply the treatment provided to third parties under other FTAs to Members of the FTA (the other FTAs can be pre-existing or come into existence after the FTA has been formed).

These concepts of non-discrimination in FTAs have to be made consistent with other TFTA principles, namely the variable geometry principle and the preservation of trade liberalisation commitments made under other FTAs (see next section).

4.8 Relationship of FTA with previous FTAs

Another relevant issue for the TFTA is the relationship of the TFTA with the previous FTAs. This issue is, of course, linked to the status of the existing RECs with regard to the TFTA, i.e., whether the RECs have legal personality and authority with regard to the TFTA, and whether the RECs will be completely subsumed within the TFTA.

The two extreme outcomes are complete absorption of the RECs by the TFTA and the parallel existence of the RECs with the TFTA. If the REC Agreements are allowed to be applied on a continuing basis, and only among those Members of the REC (and not others), this would represent a deviation from the MFN non-discrimination principle for treatment of trade within the TFTA.

As discussed previously in this Module, the EU IEPAs and the MFN non-discrimination obligation contained in those Agreements present another set of challenges to the TFTA Parties. Under the terms of the IEPA Agreements, the MFN obligation is not symmetrical. The EU agrees to provide MFN treatment for trade preferences arising out of any later FTAs that it signs, whereas the SADC, ESA and EAC States agree to provide MFN treatment only for trade preferences arising out of later FTAs with any 'major trading economy'. Fortunately, the TFTA Agreement itself should not trigger this obligation, as none of the TFTA Parties or groupings would qualify. Furthermore, the ESA and EAC IEPAs provide an exception for African regional integration projects such as the TFTA.

4.9 Variable Geometry

Another deviation from MFN non-discrimination is 'variable geometry', the concept that FTA negotiations can result in an agreement which is not uniformly binding on all parties to the FTA. Asymmetrical trade commitments can exist even without commitments made under other FTAs. This concept, also known as 'two-speed' liberalisation, is intended to allow for broader participation in the FTA.

The most notable example of variable geometry would be the EU, with most EU Members participating in the Euro common currency but others not. Another example would be in ASEAN, where the concept of a subset of ASEAN Members proceeding with trade liberalisation beyond that applied by the entire grouping is called 'ASEAN-X'. Those wishing to proceed can do so, with the consent of those not participating in the programme. This is currently being done in the ASEAN Trade in Goods Agreement (ATIGA) with regard to origin certification for goods.

4.10 Sensitive Products

The initial major issue is how to define the sensitive products. The FTA could contain criteria to define sensitive items such as tariff levels, collected revenue, number of companies, employment levels, competitiveness, growth potential, value addition and/or position in national production. By establishing explicit criteria in the Agreement (and thereby in the negotiations themselves) the FTA Parties can limit the number and coverage of sensitive items in the FTA. However, usually these criteria are selected by the FTA Parties themselves, as the national governments are best able to determine which products are considered sensitive in their countries.

The FTA text more often contains limits on the number of sensitive products, whether defined by the number of tariff lines covered or the volume or value of trade involved. For example, the ASEAN – Korea FTA set a limit for sensitive items of 10 percent of the tariff lines and 10 percent of the total value of imports. Explicitly limiting the number of sensitive products can promote the coverage of the FTAs and reduce the likelihood of negotiating disputes over sensitive items.

FTAs deal with sensitive products generally by providing additional time for trade liberalisation, shifting the reduction in tariff rates to the end of the implementation period, or even excluding the products from tariff liberalisation completely. For example, rice and other agricultural products are excluded from Japan's FTAs, and dairy products had much longer phase-out periods in the US – Australia FTA (17 years) and the Thailand – Australia FTA (20 years). This is despite the GATT/WTO general practice of limiting the phase-out period to ten years. Alternatively, sensitive items could be set aside until the end of the initial liberalisation process and either incorporated wholesale into the FTA tariff liberalisation schedule at that point, or subjected to additional negotiations, whether as a group or on a bilateral basis between FTA Partners. Finally, FTA Parties may elect to deal with sensitive items through special safeguard measures, restrictive rules of origin or other measures.

All FTA negotiators must address 'sensitive' products during the talks. These are products for which immediate adjustment or at rates allowed for most products would cause severe political/economic problems. Sensitive products vary with countries but generally cover certain agricultural products (for food security reasons and to protect farmers) and labour intensive manufactures such as textiles and garments (to protect Small and Medium Enterprises (SMEs) and employment). The parties to the negotiations will define the sensitive products, and can even agree to limit the number of sensitive products that can be so designated by individual parties, in an effort to reduce their influence on the negotiations. FTAs generally deal with sensitive products by providing additional time for trade liberalisation, shifting the reduction in tariff rates to the end of the implementation period, or even excluding the products from tariff liberalisation completely.

4.11 Organisation

An FTA also has to make arrangements for the negotiation, implementation and administration of the FTA. During the negotiating process, the FTA Parties will need to share information, circulate drafts and communicate among themselves. This could be done by an inter-governmental committee or by an administrative secretariat made up of seconded officials from the FTA Member States or newly hired officials.

After the negotiations are completed and the trade liberalisation commitments established, the FTA Parties will need to monitor the implementation of the FTAs, co-ordinate policy among the FTA Parties, deal with third parties, handle disputes among the FTA Parties, and ensure that FTA Parties adhere to their commitments. Again, it is possible to do this through inter-governmental committees, but the need to monitor and possibly

take action against FTA Parties makes such an approach difficult to implement. This is because the FTA Party in question would be part of the inter-governmental committee itself, a dynamic which existed under the old GATT system and resulted in many failures of the institutional process in dispute resolution and implementation.

Thus, most FTAs create administrative secretariats to handle the various functions, as described earlier, associated with the implementation and administration of the FTA. The extent of authority accorded the secretariat can vary greatly, with examples ranging from the ASEAN Secretariat with relatively weak authority to the European Commission Secretariat which has strong monitoring and enforcement powers. To a large extent, the weakness of an FTA administration entity can be offset by a strong dispute resolution process, such as in NAFTA. Thus, a strong dispute resolution process could be based on an arbitration procedure or a regional tribunal. Finally, the FTA Parties could elect to create a legislative body made up of government representatives or even directly elected Members, such as the European Parliament. All of this will depend on how ambitious the FTA Parties will be. The Module will provide comparative examples from other regional integration initiatives in Section 4.

4.12 Annexes and Side Letters

Most agreements stipulate that annexes form an integral part of the Agreement, subject to the same procedural and substantive requirements contained therein. Allowing otherwise could permit parties to undermine their trade liberalisation commitments. For example, rules of origin are commonly placed outside the main text of the Agreement as a Protocol or Annex. To maintain the integrity of the FTA rules, amendments to the rules of origin should be subject to ratification by the FTA Parties.

Nevertheless, parties may wish to memorialise commitments, yet do not wish to make them subject to the same procedural requirements as the formal text and annexes of the Agreement. Such commitments could cover areas where the parties may want to deal with a temporary issue, for example, with regard to enacting a law under domestic legislation; or a party may explain to the other party the intent of a domestic law and wish to assure it that it can see no reason why it would be applied to the other party; or it may be that some minor difficulty was discovered after the negotiations on a chapter were completed. In such instances, an exchange of letters confirms the understanding without having to re-open negotiations. Sometimes the parties simply confirm their respective understanding of a policy maintained by a party.

Side letters are thus a useful way to deal with minor negotiating problems. On the other hand, if there are too many side letters, especially in areas that in treaty terms should be fairly unexceptional, negotiators would be well advised to ask what the reason for all these letters might be and deal with those issues in the main body of the text.

4.13 Amendment and Review

Agreements should be subject to amendment, whether to cover unanticipated situations or to reflect the will of the parties. Amendment usually requires consent of the parties.

An amendment clause can be relatively simple, just requiring mutual agreement of the parties. Other clauses can allow for regional institutions (e.g., a council representing the Member States) to make those amendments on behalf of the Member States.

Some agreements provide that subsequent legal instruments can also form part of the Agreement. These would be, in effect, amendments to the Agreement.

Finally, an FTA can mandate a self-authorised review to take place sometime after the Agreement's entry into force. The review usually takes place at the ministerial level. It is usual to have a first review about one year after the Agreement has entered into force. By that time it should have become reasonably clear where the main implementation difficulties are occurring. This is then followed by a provision for general reviews on a periodic basis.

4.14 Accession

Accession clauses are not necessary for an FTA. However, the absence of an accession clause does not prevent parties from acceding, as the act of accession could also be considered as an amendment to the FTA. Accession to the FTA involves consent of the incumbent parties to the Agreement.

5. Comparative Analysis of Other Regional Economic Integration Efforts

The TFTA talks are an ambitious effort to achieve regional economic integration among the REC Members, and eventually in Africa itself. As the TFTA Member States consider how to achieve the TFTA, it would be useful to review and compare the economic integration experiences in other regions.

5.1 Overview of Other Regional Integration Projects

5.1.1 European Union

The European Union (EU) is the most developed regional economic integration process, now involving 27 countries. The process began with integration of iron and steel industries, then a customs union, single market and monetary union. The foundation document is the 1957 Treaty of Rome, which established various regional institutions such as the Commission, Council of Ministers and Court of Justice. Later the EU institutions developed political competencies, such as in foreign affairs.

The original EU Member States were developed countries, with strong legal and political institutions. Hence the Treaty of Rome and its amendments themselves created strong regional institutions for the governance of the regional bloc. The laws and principles of the EU are thus developed by active decision- and policymaking of these institutions through secondary legislation, administrative rulings and court cases. These institutions are empowered with international legal personality and authority to negotiate international trade agreements on behalf of the EU.

The EU practices some variable geometry with regard to new Members, such as with regard to movement of persons or monetary union. However, new Members have immediate access to free trade in goods within the EU after accession and vice versa, i.e., there is no asymmetrical application of the trade benefits.

EU Member States have overlapping Membership in customs unions/trade agreements. Belgium, the Netherlands and Luxembourg operate an economic union, Benelux, which predated the 1957 Treaty of Rome, having been founded in 1944. The individual Member States of Benelux signed the Treaty of Rome rather than the Benelux entity, however. The relationship of overlapping Membership in FTAs and customs unions has been discussed elsewhere in this Module.

5.1.2 NAFTA

The North American Free Trade Agreement (NAFTA) represents another approach to regional integration involving, in this case, two developed countries (Canada and the United States) and a developing country (Mexico). This approach is a normative approach, dependent on enforcement of the 1992 NAFTA Treaty's very specific obligations on trade in goods, services, financial services, investment, intellectual property rights, technical barriers to trade, sanitary and phyto-sanitary measures, safeguard measures and dispute settlement.

With five volumes of text, annexes, tariff schedules and side agreements, NAFTA is purpose built for regional economic integration through preferential trade and investment among the Members, but without recognised trade and customs documentation and information.

Notably, the NAFTA Treaty did not create regional institutions similar to those of the EU, i.e., there is no NAFTA equivalent of the Commission or Parliament. However, the NAFTA Treaty did create a robust dispute resolution process involving arbitration panels, administered by a Secretariat. Hence the precise nature of the NAFTA Treaty is necessary because the dispute resolution Panels need to adapt NAFTA to changing environments without invoking negotiations among the parties to amend the Treaty. The NAFTA Parties thus established definitive norms in the NAFTA Treaty, with enforcement of those norms through dispute resolution being the means of ensuring the continuing economic integration of the region.

5.1.3 Mercosur

Mercosur is a common market established by the 1991 Treaty of Asunción, signed by Argentina, Brazil, Paraguay and Uruguay (Venezuela joined in 2012). The Treaty provides for the free transit of goods and services among the Member States, a common external tariff (Mercosur is a customs union), and co-ordination of economic and sectoral policies on foreign trade, agriculture, industry, taxes, monetary system, exchange,

capital, customs, transport, and communications. The Mercosur integration process initially focused on co-ordination of policies on free trade zones, then customs union, and finally a common market.

Like the EU, the Treaty of Asunción and the later Ouro Preto Protocol created regional institutions. The Common Market Council, composed of Member States' foreign affairs and finance ministers, conducts Mercosur's policy and monitors compliance with Mercosur directives. Mercosur also has a Common Market Group of bureaucrats from the foreign affairs and finance ministries, and central banks; a Trade Commission responsible for oversight and the overall interest of Mercosur; and a Court of Mercosur.

5.1.4 ASEAN

Unlike the other examples discussed here, ASEAN was founded for political purposes rather than economic integration. The 1967 Bangkok Declaration created a regional association in Southeast Asia to promote peace and stability, eventually including all ten countries by 1999. However, ASEAN did not create strong regional institutions, and did not formalise its internal operations until it adopted the ASEAN Charter in 2007.

Regional economic integration did not start until 1992 with the Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area, which established a system of preferential tariffs for intra-ASEAN trade (ASEAN is not a customs union). This was replaced in 2010 by the ASEAN Trade in Goods Agreement, and supplemented by investment and trade in services agreements.

ASEAN's regional institution, the ASEAN Secretariat, has limited authority to collect information and monitor economic integration. It does not have authority to negotiate trade agreements on behalf of ASEAN. Rather, ASEAN's Member States co-operate on a collective basis in trade negotiations, but FTA agreements concluded are actually bilateral FTAs between each of the individual ASEAN Member States and the trading partner.

5.1.5 Lessons for TFTA

The above examples provide the TFTA Parties with multiple ways of achieving regional economic integration. Their regional institutions range from strong (EU), to weak (ASEAN), to virtually non-existent (NAFTA). They also contain varying levels of political integration, as well as varying levels of reliance on legal norms through dispute resolution, regulation and administration. Ultimately the TFTA Parties will need to formulate a governing system which works best for the TFTA's unique circumstances.

5.2 Standstill and Rollback

Other regional FTAs have relatively strong standstill and rollback clauses. For example, the ASEAN Trade in Goods Agreement has an explicit standstill and rollback clause:

Article 19, ASEAN Trade in Goods Agreement

"3. Except as otherwise provided in this Agreement, no Member State shall nullify or impair any tariff concessions applied in accordance with the tariff schedules in Annex 2 referred to in paragraph 5 of this Article.

4. Except as otherwise provided in this Agreement, no Member State may increase an existing duty specified in the schedules made pursuant to the provisions of paragraph 2 of this Article on imports of an originating good."

So does NAFTA:

Article 301.2, NAFTA Treaty

"Except as otherwise provided in this Agreement, no party may increase any existing customs duty, or adopt any customs duty, on an originating good."

As does Mercosur's Treaty of Asunción:

Article 5(a), Treaty of Asunción

"During the transition period, the main instruments for putting in place the common market shall be:

A trade liberalisation programme, which shall consist of progressive, linear and automatic tariff reductions accompanied by the elimination of non-tariff restrictions or equivalent measures, as well as any other restrictions on trade between the States parties, with a view to arriving at a zero tariff and no non-tariff restrictions for the entire tariff area by 31 December 1994 (Annex I)."

For a standstill clause explicitly drafted to exclude a rollback obligation, see the standstill clause in the Canada – Costa Rica FTA, which specifically provided that it would not prevent either party from raising a tariff back to an agreed level in accordance with the phase-out schedule in the Agreement following a unilateral reduction.

n 3, Article III.3, para. 1, Canada – Costa Rica FTA

"This paragraph is not intended to prevent either party from modifying its tariffs outside this Agreement on goods for which no tariff preference is claimed under this Agreement. This paragraph does not prevent either party from raising a tariff back to an agreed level in accordance with the phase-out schedule in this Agreement following a unilateral reduction."

5.3 Phase-out Period

Most FTAs follow a ten year maximum phase-out period, as this is consistent with the GATT/WTO system as described earlier. This was done in Mercosur. NAFTA phased out its tariffs over a five-to-ten year period. ASEAN phased out its duties in two tranches, with the first period of eight years reducing the duties to 0–5 percent, and a second period of ten years reducing the duties to 0 percent. In all of these cases, sensitive products had additional time.

A longer phase-out period is possible. For example, in the United States (US) – Australia FTA, a phase-out period of eighteen years is allowed for products such as pears and peaches. Sensitive products also have a longer phase-out period.

5.4 MFN

The MFN non-discrimination clause is not a given for all FTAs. For example, non-discrimination clauses in an FTA do not have to be applied to all products. In the US – Morocco FTA, a product-specific MFN clause is provided for beef and other agricultural products. In the event that Morocco grants any other trading partner in its future FTAs market better access to the above-mentioned products than that granted to the United States under the FTA, Morocco is obliged to grant the same treatment to the United States.

Para. 3 (a), Annex 1, General Notes to the Tariff Schedule of Morocco, Annex IV, US – Morocco FTA

"In the event that Morocco grants or maintains with respect to any other trading partner market access better than that granted to the United States under this Agreement for any good listed in subparagraph (b) below, Morocco shall immediately grant such better market access to the United States."

Note that the United States is not obliged to do likewise, so the obligation is not reciprocal.

The ASEAN Trade in Goods Agreement (ATIGA) calls for negotiations among Members should an ASEAN Member enter into an agreement which provides more favourable treatment than that accorded by the ATIGA.

Article 5, ASEAN Trade in Goods Agreement

"With respect to import duties, after this Agreement enters into force, if a Member State enters into any agreement with a non-Member State where commitments are more favourable than that accorded under this Agreement, the other Member States have the right to request for negotiations with that Member State to request for the incorporation herein of treatment no less favourable than that provided under the aforesaid agreement. The decision to extend such tariff preference will be on a unilateral basis. The extension of such tariff preference shall be accorded to all Member States."

This provision enables a party to open tariff negotiations in order to receive the same benefits its counterpart grants to its future FTA Partners.

Mercosur's Treaty of Asunción has a stricter non-discrimination clause that calls for immediate application of the more favourable treatment:

Article 8(d), Treaty of Asunción

"They shall extend automatically to the other States parties any advantage, favour, exemption, immunity or privilege granted to a product originating in or destined for third countries which are not members of the Latin American Integration Association."

The automatic nature of the clause contrasts with the reciprocal application of the MFN (as in the COMESA Agreement and the Draft TFTA Agreement) and the use of negotiations only (as in the ATIGA example provided earlier). However, this obligation does not apply to commitments made under the Latin American Integration Association, an agreement which pre-dated Mercosur (a topic discussed in the next section).

However, if parties wish to discriminate between the parties in a preferential trading agreement, incorporating this type of clause would not be warranted. For example, in NAFTA, Mexico's tariff elimination schedule with regard to imports from Canada is not the same as that from the United States for agricultural products such as dairy, poultry, eggs, and sugar.¹⁸

5.5 Relation with Other FTAs

Another issue is the relationship between the FTA and other FTAs.

In the ASEAN regional integration process, the ASEAN Trade in Goods Agreement allowed for the Member States to determine which agreements would be superseded by the new Agreement. The ASEAN Member States invoked this Article to subsume the ASEAN Free Trade Area Agreement into the ASEAN Trade in Goods Agreement.

Article 91, ASEAN Trade in Goods Agreement

1. *Subject to paragraph 2 of this Article, all ASEAN economic agreements that exist before the entry into force of ATIGA shall continue to be valid.*
2. *Member States shall agree on the list of agreements to be superseded within six (6) months from the date of entry into force and such list shall be administratively annexed to this Agreement and serve as an integral part of this Agreement.*
3. *In case of inconsistency between this Agreement and any ASEAN economic agreements that are not superseded under paragraph 2 of this Article, this Agreement shall prevail."*

The US – Canada FTA was similarly superseded by the NAFTA Treaty. However, this was done by providing, in the NAFTA Treaty, that the Treaty would prevail in the case of any inconsistency with other agreements, and passing domestic legislation in the United States and Canada suspending indefinitely the applicability of the US – Canada FTA.

At the other extreme, FTAs can co-exist with other FTAs even when they involve the same parties. For example, the ASEAN – China FTA for trade in goods was implemented in 2005, yet Singapore (an ASEAN Member) and China signed a bilateral FTA in 2008. The China – Singapore FTA does not contain language stipulating which FTA shall have priority in the case of inconsistency, but instead merely calls for consultations.

Article 112.2, China – Singapore FTA

"In the event of any inconsistency between this Agreement and any other agreement to which both parties are parties, the parties shall immediately consult with each other with a view to finding a mutually satisfactory solution."

¹⁸ See Agriculture Fact Sheet, Tariff Elimination, www.fas.usda.gov/itp/policy/nafta/tariff.html.

Although the China – Singapore FTA provided greater trade benefits to Singapore than China accorded to other ASEAN Members under the ASEAN – China FTA, the ASEAN – China FTA did not contain an MFN clause obligating China to accord similar treatment to the other ASEAN Members. The ASEAN – India FTA allows for co-existence of other FTAs:

Article 16, ASEAN – India Trade in Goods Agreement

“This Agreement shall not apply to any agreement among ASEAN Member States or to any agreement between any ASEAN Member State and India unless otherwise agreed by the parties to that agreement.”

Other ASEAN FTAs with external trading partners contain similar language to allow for co-existing FTAs:

Chapter 18, Article 4, ASEAN – Australia – New Zealand FTA

- “4. Nothing in this Agreement shall prevent any individual ASEAN Member State from entering into any agreement with any one or more ASEAN Member State and/or Australia and/or New Zealand relating to trade in goods, trade in services, investment, and/or other areas of economic co-operation.*
- 5. The provisions of this Agreement shall not apply to any agreement among ASEAN Member States. The provisions of this Agreement shall also not apply to any agreement involving any ASEAN Member State and/or Australia and/or New Zealand unless otherwise agreed by the parties to that agreement.”*

Similar provisions in the ASEAN – Japan and ASEAN – Korea FTAs allow individual ASEAN Member States to sign their own bilateral FTAs with these trading partners. However, recalling that the ASEAN FTAs are legally bilateral FTAs to begin with (i.e., ten bilateral FTAs that use the same text), the potential for inconsistency is lessened. The ASEAN Members did not provide for co-existing FTAs among a subset of ASEAN Members, with the limited exception of the ‘ASEAN-X’ principle, to be discussed in the next section.

Finally, in Mercosur’s Treaty of Asunción, the parties agreed to abide by commitments made in previous agreements and to co-ordinate positions in other trade negotiations:

Article 8, Treaty of Asunción

“The States parties undertake to abide by commitments made prior to the date of signing of this Treaty, including agreements signed in the framework of the Latin American Integration Association (ALADI), and to co-ordinate their positions in any external trade negotiations they may undertake during the transitional period. To that end:

- a) They shall avoid affecting the interests of the States parties in any trade negotiations they may conduct among themselves up to 31 December 1994;*
- b) They shall avoid affecting the interests of the other States parties or the aims of the common market in any agreements they may conclude with other countries’ members of the Latin American Integration Association during the transition period;*
- c) They shall consult among themselves whenever negotiating comprehensive tariff reduction schemes for the formation of free trade areas with other countries’ members of the Latin American Integration Association;*
- d) They shall extend automatically to the other States parties any advantage, favour, exemption, immunity or privilege granted to a product originating in or destined for third countries which are not members of the Latin American Integration Association.”*

5.6 Variable Geometry

Variable geometry is not new. The concept first arose in the EU, which has many instances of regional commitments which were not adopted by the entire bloc, e.g., the Euro common currency and the Schengen Agreement on free movement of persons.

Other regional integration projects have similar examples of variable geometry. ASEAN allows a subset of Member States to proceed with liberalisation beyond that contained in the economic bloc’s agreement through the ‘ASEAN-X’ formula, with ‘X’ being the number of countries which have elected to proceed with the additional liberalisation. The subset is allowed to proceed with the consent of the entire ASEAN Membership. The implied objective is that the other ASEAN Members will eventually join the subset, but this is not explicit in the ASEAN Charter.

5.7 Sensitive Products

Sensitive products have been addressed in multiple ways in FTAs.

5.7.1 ASEAN

The predecessor agreement of the ASEAN Trade in Goods Agreement, the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area, addressed sensitive products by creating multiple classifications of sensitive goods. First, the sensitive goods were placed on an Exclusion List and not subject to tariff liberalisation during the eight year phase-out period:

Article 2.3, CEPT Agreement

“Exclusions at the HS 8/9 digit level for specific products are permitted for those Member States, which are temporarily not ready to include such products in the CEPT Scheme. For specific products, which are sensitive to a Member State, pursuant to Article 1 (3) of the Framework Agreement on Enhancing ASEAN Economic Co-operation, a Member State may exclude products from the CEPT Scheme, subject to a waiver of any concession herein provided for such products. A review of this Agreement shall be carried out in the eighth year to decide on the final Exclusion List or any amendment to this Agreement.”

ASEAN Countries then categorised the products on the Exclusion List into a Temporary Exclusion List of goods which were eventually moved to the trade liberalisation schedules during the CEPT’s trade liberalisation timeframe based on mutual agreement; a Sensitive List of goods which were moved to the trade liberalisation schedules at the end of the trade liberalisation timeframe; and a Highly Sensitive List of goods which were not subject to any trade liberalisation and remain excluded under the currently applicable ASEAN Trade in Goods Agreement through a special protocol on trade in rice and sugar. Over time, the scope of such excluded goods has been reduced.

5.7.2 South Asia Free Trade Area

The South Asia Free Trade Area (SAFTA) Agreement provides that the parties will negotiate their lists of sensitive products, with a maximum number of sensitive products to be determined. The sensitive products are excluded from any trade liberalisation. The consolidated Sensitive List is reviewed every four years to determine which products can be moved off the list. There is no time limit for the eventual removal of products from the Sensitive List.

Article 3, South Asia Free Trade Area Agreement

- “a) Contracting States may not apply the Trade Liberalisation Programme as in paragraph 1 above, to the tariff lines included in the Sensitive Lists which shall be negotiated by the Contracting States (for [least developed countries (LDCs)] and Non-LDCs) and incorporated in this Agreement as an integral part. The number of products in the Sensitive Lists shall be subject to maximum ceiling to be mutually agreed among the Contracting States with flexibility to Least Developed Contracting States to seek derogation in respect of the products of their export interest; and*
- b) The Sensitive List shall be reviewed after every four years or earlier as may be decided by SAFTA Ministerial Council (SMC), established under Article 10, with a view to reducing the number of items in the Sensitive List.”*

5.7.3 Mercosur

Mercosur’s Treaty of Asunción provided that sensitive products would be excluded from the initial trade liberalisation. However, the number of sensitive products would be reduced and moved to the trade liberalisation schedules over a ten year period.

Articles 6 and 7, Treaty of Asunción*Article 6*

The tariff reduction timetable referred to in articles 3 and 4 of this annex shall not apply to products included in the schedules of exceptions submitted by each of the States parties with the following quantifies of ALADI nomenclature items:

<i>Argentine Republic:</i>	<i>394</i>
<i>Federative Republic of Brazil:</i>	<i>324</i>
<i>Republic of Paraguay:</i>	<i>439</i>
<i>Eastern Republic of Uruguay:</i>	<i>960</i>

Article 7

The schedules of exceptions shall be reduced at the end of each calendar year in accordance with the following timetable:

- a) For the Argentine Republic and the Federative Republic of Brazil, by 20 per cent per year of the component items; this reduction applies from 31 December 1990;*
- b) For the Republic of Paraguay and the Eastern Republic of Uruguay, the reduction shall be at the following rates: 10 per cent on the date of entry into force of the Treaty*
 - 10 per cent on 31 December 1991*
 - 20 per cent on 31 December 1992*
 - 20 per cent on 31 December 1993*
 - 20 per cent on 31 December 1994*
 - 20 per cent on 31 December 1995.”*

5.7.4 NAFTA

NAFTA allowed for sensitive items to be phased out over a fifteen year period, longer than the five to ten years allowed for most products.

5.7.5 Andean Community

The Andean Community's Cartagena Agreement allowed parties to exclude products, but required their inclusion in tranches over a three year period. Some products remained outside the scope of liberalisation, to be addressed at a later date.

Article 85, Cartagena Agreement

“Up until December 31, 1970, each of the Member Countries may submit to the General Secretariat a list of products currently being produced in the Subregion, in order to exempt them from the Tariff Reduction Program and from the establishment of the External Tariff. Colombia and Peru's lists of exceptions cannot contain products that are included in more than two hundred and fifty items of the NABALALC.

Within one hundred and twenty days after its Instrument of Accession to the Agreement, Venezuela will present to the General Secretariat a list of exceptions which may not cover products that are already included in more than two hundred and fifty items of the NABALALC.

The products included in the lists of exceptions shall be completely free of levies and other restrictions and covered under the Minimum Common External Tariff or the Common External Tariff, whichever is appropriate, through a process that shall include three stages of 44, 44 and 87 items, the first of which shall be liberalised on December 31, 1993; the second on December 31, 1994, and the final one on December 31, 1995.

Colombia, Peru, and Venezuela may maintain, after December 31, 1995, a set of residual exceptions that shall contain products that are included in no more than 75 items of the NABALALC.”

5.8 Organisation

The regional institutions created by the EU, NAFTA, ASEAN and Mercosur are discussed in Section 4.1 of this Module.

5.9 Annexes and Side Letters

Other FTAs specifically declare that annexes and attachments are part of the basic Agreement. For example, see the ASEAN Trade in Goods Agreement.

Article 93.1, ASEAN Trade in Goods Agreement

"The Annexes and Attachments to this Agreement shall form an integral part of this Agreement."

Article 2201 of the NAFTA Treaty also states that annexes are part of the Agreement.

For examples of how an exchange of side letters works, please see the following:

May 6, 2003

The Honorable Ralph F. Ives
Assistant US Trade Representative for Asia, the Pacific and APEC Affairs
Office of the US Trade Representative

Dear Mr. Ives:

This letter confirms that the United States and Singapore affirm their right to apply prudential measures regarding the supply of insurance services. In this regard, the Government of Singapore clarifies that, for prudential reasons, its commitments regarding the cross-border supply of MAT intermediation by brokerages in Singapore paragraph 1(e) in Annex 10A is limited by the requirement that the US brokerages can only place MAT insurance with US financial institutions. Singapore would remain open to consulting on this issue.

Sincerely
Tommy Koh
Ambassador-at-Large
Ministry of Foreign Affairs

Source: <http://www.sice.oas.org/tradee.asp#Singapore>

The reply in this case is brief. More often, the reply repeats the original letter:

May 6, 2003

The Honorable Tommy Koh
Ambassador-at-Large
Ministry of Foreign Affairs

Dear Ambassador Koh:

The United States acknowledges Singapore's clarification on its commitments regarding the cross-border supply of MAT intermediation by brokerages contained in your letter of May 6, 2003.

Sincerely,
Ralph F. Ives
Assistant US Trade Representative
for Asia, the Pacific and APEC Affairs

Source: <http://www.sice.oas.org/tradee.asp#Singapore>

Through this exchange, the FTA Parties can come to an understanding without having to re-open previous negotiations or place commitments within the formal text.

5.10 Amendments and Review

The NAFTA Treaty provides for modification or addition to the Treaty through mutual consent of the three parties:

Article 2202, NAFTA Treaty

1. *The parties may agree on any modification of or addition to this Agreement.*
2. *When so agreed, and approved in accordance with the applicable legal procedures of each party, a modification or addition shall constitute an integral part of this Agreement."*

The ASEAN Trade in Goods Agreement allows for amendment by mutual consent. It also allows the responsible regional organ (the ASEAN Free Trade Area (AFTA) Council) to amend the Agreement, as well as to approve instruments which form part of the text.

Article 94, ASEAN Trade in Goods Agreement

- “1. The provisions of this Agreement may be modified through amendments mutually agreed upon in writing by the Member States.
2. Notwithstanding paragraph 1 of this Article, the Annexes and Attachments to this Agreement may be modified through amendments endorsed by the AFTA Council. The said amendments shall be administratively annexed to this Agreement and serve as an integral part of this Agreement.”

Article 93.2, ASEAN Trade in Goods Agreement

“Member States may adopt legal instruments in the future pursuant to the provisions of this Agreement. Upon their respective entry into force, such instruments shall form part of this Agreement.”

Finally, the ATIGA provided for a review of its terms on a periodic basis:

Article 95, ASEAN Trade in Goods Agreement

“The AFTA Council or their designated representatives shall meet within one (1) year of the date of entry into force of this Agreement and then every two (2) years or otherwise as appropriate to review this Agreement for the purpose of fulfilling the objective of this Agreement.”

5.11 Accession

The NAFTA Treaty has a relatively simple accession clause, without any limitation on the number or geographic scope of potential Members:

Article 2204, NAFTA Treaty

- “1. Any country or group of countries may accede to this Agreement subject to such terms and conditions as may be agreed between such country or countries and the Commission and following approval in accordance with the applicable legal procedures of each country.
2. This Agreement shall not apply as between any party and any acceding country or group of countries if, at the time of accession, either does not consent to such application.”

FTA accession clauses can contain language which restricts the scope of potential acceding parties, geographically or otherwise. The Trans Pacific Strategic Economic Partnership, the legal basis for the Trans Pacific Partnership negotiations, has a relatively open accession clause with regard to the terms of accession but still limits the geographic scope for potential acceding parties to the Asia Pacific Region:

Article 20.6.1., Trans Pacific Strategic Economic Partnership Agreement

“This Agreement is open to accession on terms to be agreed among the parties, by any APEC Economy or other State. The terms of such accession shall take into account the circumstances of that APEC Economy.”

Mercosur also contains a geographic limitation as well as a temporal limitation:

Article 20, Treaty of Asunción

“This Treaty shall be open to accession, through negotiation, by other countries members of the Latin American Integration Association; their applications may be considered by the States parties once this Treaty has been in force for five years.”

Notwithstanding the above, applications made by Member Countries of the Latin American Integration Association who do not belong to sub-regional integration schemes or an extra-regional association may be considered before the date specified. Approval of applications shall require the unanimous decision of the States.

The Andean Community provides for accession by other Latin American countries and reserves special and differential treatment for less developed countries. It also provides a role for the regional institution in defining the terms of accession.

Article 151, Cartagena Agreement

"This Agreement may not be signed with reservations and shall remain open to the accession of the rest of the Latin American countries. Least developed countries which accede to the Agreement shall be entitled to a treatment similar to that agreed upon in Chapter XIII for Bolivia and Ecuador.

The terms of the accession shall be defined by the Commission, which shall bear in mind that the incorporation of new members shall comply with the objectives of the Agreement."

6. Lessons Learnt from Other FTAs and Options for the TFTA Negotiations

The TFTA negotiators will need to consider both the needs and goals of their constituents as well as overall objectives of the TFTA Agreement. This will require balancing of these various objectives and a resolution ultimately decided by the TFTA leaders.

Nevertheless, some possible drafting suggestions are presented here, which would advance the overall objective of consolidating upon the existing REC commitments and expanding trade among the TFTA Members.

6.1 Standstill and Rollback

The current TFTA standstill clause does not contain a rollback clause. Under this clause, TFTA Parties would be obliged not to impose new import duties. However, the TFTA Draft Agreement does not contain a rollback clause. Perhaps the clause could be amended to contain rollback so that trade liberalisation is progressive and consistent. This would be done by stating that duties could not be increased. It should also be made applicable to all trade liberalisation schedules, including those for sensitive products. This would be done by not making reference to tariff schedules (which might not include sensitive goods) but making the commitment applicable to all duties.

Article 8.2, Draft TFTA Agreement (revised text underlined)

"Tripartite Member States shall not impose new import duties or charges of equivalent effect or increase import duties or charges of equivalent effect except as provided for under this Agreement."

6.2 Phase-out Period

A ten year phase-out period would be consistent with past practices in other FTAs and with the general practice in the GATT/WTO system. The tariff reductions could be consistent during the transition period for most goods. Sensitive goods could have their tariff reductions take place later in the transition period.

6.3 MFN

The current Draft TFTA Agreement has sufficiently detailed MFN non-discrimination clauses and should be retained. However, perhaps Article 6.2 could be amended to reflect variable geometry and allowances for existing REC obligations:

Article 6.2, Draft TFTA Agreement (additional text underlined)

"Nothing in this Agreement shall prevent a Tripartite Member State from maintaining or entering into new preferential agreements with third countries provided such agreements do not impede or frustrate the objectives of this Agreement and that any advantage, concession, privilege and favour granted to a third country under such agreements are extended to the Tripartite Member States on a reciprocal basis, unless otherwise provided in this Agreement."

This language would clarify that deviation from the general MFN obligation within the FTA is acceptable when specified elsewhere in the TFTA Agreement.

6.4 Relation with Other FTAs

The TFTA Agreement addresses the co-existence of FTAs with third parties by providing that those benefits can be applied to TFTA Members, but only if Members agree to do so on a reciprocal basis. The requirement of reciprocity thus allows some flexibility in that TFTA Members will be able to claim benefits provided by other TFTA Members in third party FTAs only if they themselves are willing to give those benefits on a reciprocal

basis. In effect, the reciprocity condition mandates some sort of consultation before the third party FTA benefits are applied to other TFTA Members (consultation being another way to approach this issue). The downside is that this can lead to varying levels of trade preferences within the TFTA, but the upside is that the TFTA can be made somewhat more flexible in terms of its application.

Furthermore, for the Tripartite Parties, the MFN clause contained in the EU IEPAs will be a major issue. The IEPA contains a requirement for signatories to extend to the EU any treatment that is more favourable than it might give in the future to a 'major trading economy'. 'Major trading economies' relate to any developed country, or any country accounting for a share of world merchandise exports above 1 percent, or any group of countries accounting collectively for a share of world merchandise exports above 1.5 percent in the year before the entry into force of the preferential trade agreement in question. This principle applies only to the ACP signatories (including the TFTA Parties) and does not cover only tariffs but also rules of origin. However, the TFTA itself should not be covered by the IEPA MFN clause, as the TFTA Parties and groupings are not at the 1 percent level, and the ESA and EAC IEPAs also exclude African regional co-operation programmes, such as the TFTA, from the MFN obligation.

6.5 Variable Geometry

If the principle of non-discrimination is not going to be applied to the FTA commitments of the TFTA Members due to their existing REC commitments, then the non-discrimination principle can also be relaxed for other reasons. Countries may also want to move in subsets of TFTA Membership to implement policies that go beyond the overall scope of TFTA commitments in terms of scope and time.

Given the various REC commitments and differing levels of development, this may be inevitable. However, the number and degree of such deviations should be limited in scope and time so that the TFTA does not become too difficult to administer or become reduced in its beneficial effects for trade within the bloc. For example, ASEAN allows its Members to proceed with trade liberalisation among a subset of Members through the 'ASEAN-X' approach (with 'X' constituting those Members who are not part of the subset), but requires the consensus of all Members before allowing this to occur. This allows the non-participants to study the progress made by the subset, and also allows the grouping as a whole to impose time and scope limitations.

6.6 Sensitive Products

TFTA negotiators thus need to consider the following in drafting a sensitive products clause:

- How will sensitive products be defined? Unilaterally or by mutual agreement?
- How long will products be excluded from trade liberalisation? The entire phase-out period? An unspecified time?
- What method will be used to move products to the trade liberalisation schedule? An automatic system? A discretionary system? Who will decide, the Member States or the TFTA institutions?
- How often will products be moved to the trade liberalisation schedule?
- Will products remain on the Sensitive List indefinitely?
- How often will the Sensitive List be reviewed?

In general, the fewer the items on the Sensitive List, the less the discretion involved and the faster the items are shifted off the Sensitive List, the greater the scope of trade liberalisation.

Finally, the TFTA negotiations could elect not to provide for any special clauses for sensitive products, but instead allow the TFTA Member States to apply safeguard measures on an as-needed basis. The difficulty will be that the application of safeguard measures will require TFTA Member States to provide compensation to the affected Member States, whereas creating a list of sensitive products would not.

6.7 Organisation

The Draft TFTA Agreement, representing the first step to the formation of a new regional grouping and acknowledging the existence of the other RECs, does not contain regional institutions for legislation (as in the EAC, Mercosur or the EU). It does provide for dispute resolution procedures and the establishment of a Tripartite Secretariat to deal solely with dispute resolution. Dispute resolution is covered by another Module, and the issue of whether to establish a legislative function in the TFTA is beyond the scope of this Module.

The choice and design of institutions for the TFTA will depend on the TFTA negotiators' agreement to what extent authority will rest with the TFTA itself. The current Draft TFTA Agreement does not create institutions with their own authority, but instead creates institutions for the TFTA Member States to exercise authority on a collective basis (e.g., the Summit, Committee and Sub-committee). Hence there is no Secretariat created for administrative matters (the Tripartite Secretariat would handle only dispute resolution), even though most FTAs have secretariats for administrative functions. Perhaps the Co-ordination Units are meant to serve the administrative function of a secretariat, but that is not evident from the text of the Draft TFTA Agreement.

Hence the current Draft TFTA Agreement relies on the capability of the TFTA Member States to work on a collective basis, without the assistance of a TFTA-specific organ. This type of system can work if the dispute resolution system is robust and active, and the Agreement is detailed (as in NAFTA) or if the Member States are very active and co-operative. As the TFTA will have an initial Membership of 26 nations and eventually more, the latter is not a given. Other FTAs and the GATT itself have demonstrated that collective administration of a trade agreement can be difficult, most often because the FTA Party not in compliance is part of the administration itself. That is why most FTAs have an administrative secretariat or similar entities devoted to the FTA itself.

Under such circumstances, the TFTA negotiators should give serious consideration to including a Secretariat for the TFTA. The level of authority given to the Secretariat is up to the ultimate agreement of the parties, but could include the following:

- **Right of oversight** – The TFTA Secretariat would be obligated to comment in writing on all national and multinational measures affecting implementation of TFTA goals and principles. The commentary and analysis would be couched in terms of what measures would best serve the development of the TFTA as a single market. Over time, TFTA Secretariat opinions would create a body of TFTA commentary that would influence administration of the TFTA.
- **Right of inquiry** – The TFTA Secretariat would have the right to inquire with TFTA Members on their implementation and administration of measures affecting the TFTA. The Member States would be obligated to respond to these inquiries.
- **Right of proposal** – The TFTA Secretariat would have the right to propose measures, on its own initiative, which would advance TFTA goals and principles.
- **Right to initiate action** – The TFTA Secretariat could be empowered to initiate actions against Member States for failure to fulfil their obligations for the commitments undertaken under the TFTA Agreement.
- **Right of sanction** – The TFTA Secretariat would have the right to impose sanctions on Member States not in compliance with TFTA goals and principles.

Obviously acquisition of the last three powers would make the TFTA Secretariat more like that of the European Commission. Indeed the combination of all of these powers would provide for a TFTA Secretariat with powers almost on a par with the European Commission Secretariat. At this time, the TFTA Member States would not want such a powerful supranational entity. However, these individual powers are listed to demonstrate the spectrum of additional powers that could be delegated to the TFTA Secretariat (and there may be other powers not discussed above).

6.8 Annexes and Side Letters

The current Draft TFTA Agreement text stating that annexes are part of the text is sufficient. The use of side letters should be limited, but can be useful to deal with relatively minor agreements or negotiating difficulties.

6.9 Amendment and Review

The current Draft TFTA Agreement text regarding amendment by a two thirds majority is acceptable. Total consensus among all of the TFTA Member States would be extremely difficult to achieve. It may eventually be useful to provide that the TFTA Council may approve instruments relevant to the interpretation and implementation of TFTA obligations. Whether such instruments should also be considered part of the TFTA Agreement should also be considered by the TFTA negotiators.

6.10 Accession

As discussed previously in this Module, an open accession clause would be consistent with the aim of establishing the TFTA, i.e., to consolidate and spread the gains already achieved through African regional trade integration in the RECs. Allowing non-TFTA Parties to join the TFTA would expand the coverage of the TFTA.

The negotiating paradigm will also affect the accession process. TFTA negotiating parties that do not agree to the final Agreement but later wish to accede could be required to accept the applicable levels of trade liberalisation then applicable for the TFTA. However, the TFTA signatories may wish to make accession more palatable to latecomers by providing that the trade liberalisation schedule would apply based on the first year of implementation, rather than the current year. This concession could also be accorded to non-TFTA negotiating parties, but this would dilute the incentive for TFTA negotiating parties to join in the initial negotiation.

LIST OF ABBREVIATIONS

ACP	African, Caribbean and Pacific
AFTA	ASEAN Free Trade Area
ASEAN	Association of Southeast Asian Nations
ATIGA	ASEAN Trade in Goods Agreement
CEPT	Common Effective Preferential Tariff Scheme
CLMV	Cambodia, Laos, Myanmar and Vietnam
CMT	Committee of Ministers of Trade
COMESA	Common Market for Eastern and Southern Africa
EAC	East African Community
EU	European Union
FTA	Free Trade Area
GATT	General Agreement on Tariffs and Trade
IEPA	Interim Economic Partnership Agreements
LDC	Least Developed Countries
MFN	Most Favoured Nation
NAFTA	North American Free Trade Agreement
REC	Regional Economic Community
SADC	Southern African Development Community
SACU	Southern African Customs Union
SAFTA	South Asia Free Trade Area
SME	Small and Medium Enterprises
TFTA	Tripartite Free Trade Area
US	United States
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

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