LEGAL OPINION

Mozambique–Zimbabwe Preferential Trade Agreement and SADC

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Introduction

According to the Ministry of Industry Trade (MIC), the preferential trade agreement (PTA) between Mozambique and Zimbabwe has been ratified and in effect since 1959. MIC recently increased the number of items with PTA status. Can Mozambique legally maintain its PTA with Zimbabwe under current SADC rules? If so, how should the PTA be addressed in SADC? If not, could a waiver or amendment of SADC provisions enable implementation of the PTA? This paper reviews the complex factual and legal issues that will be raised by SADC's review of the PTA, along with issues involving other agreements and other countries. All will affect how Mozambique should proceed. An appropriate strategy for Mozambique is recommended.

Recommendations Summary

If Mozambique wants actions under the PTA to be clearly consistent with SADC obligations, it should not implement PTA preferences until SADC has reviewed the PTA and clarified or modified SADC provisions. Directly seeking clarification or modification of SADC obligations to authorize PTA preferences will be contrary to Mozambique's interests in the PTA and to the interests of SADC. Because Articles 27 and 28 of the SADC Protocol on Trade affect all SADC members and their trade arrangements with other members or with third parties, clarification and modification of the articles must be comprehensive. No clarification or modification will resolve Mozambique's concerns for the PTA and be viable without affecting broader interests of other members. For example, SADC members have been interested in discovering where, as is the case with this issue, SADC provides far less to its members than the WTO provides to developed and developing contracting parties. In addition, it would be counterproductive for Mozambique to take action that admits that the PTA is inconsistent with SADC obligations. The interests of SADC will be best served by a broad consideration of the complex issues involved here, including examination of how such issues have been approached under other agreements. In sum, we recommend that Mozambique not initiate action in SADC to confirm authority for the PTA, or propose amending provisions to permit the PTA.

Should Mozambique decide to implement or maintain preferences without a broad review and resolution by SADC, it could risk unilateral adverse action or retaliation by adversely affected SADC member states. If the PTA were subject to SADC dispute resolution, remedy would be prospective and afford an opportunity for corrective action. And even if the PTA were found inconsistent with SADC, dispute resolution procedures provided for in Article 18 of Annex VI to the SADC Protocol on Trade assert that "compensation and the suspension of

concessions are temporary measures available in the event that the recommendations of the panel, as adopted, are not implemented within a reasonable period of time."

Because the trade arrangements of the member states raise similar issues, existing arrangements and modifications of them or future arrangements make SADC examination of related issues increasingly important. Mozambique should support a broad consideration of how SADC can best address the trade arrangements of member states.

Applicable SADC Legal Obligations

Paragraph 1 of Article 27 of the SADC Protocol on Trade authorizes member states to maintain preferential trade and other arrangements. This provision is not limited by its text to arrangements between member states, although arrangements involving third parties are dealt with specifically in Article 28. Paragraph 1 limits authorization as follows:

1. The scope of the authorization extends only to "preferential trade and other related arrangements;"
2. Such arrangements may only be "maintained"; and
3. The arrangements must have been "existing at the time of entry into force" of the Protocol on Trade.

ARTICLE 27, PARAGRAPH 1

1. Entry into Force

Only the term "entry into force" is defined in the Protocol. Article 37 provides that the Protocol enters into force 30 days after two-thirds of member states have deposited Instruments of Ratification. This date was reported to the WTO as being September 1, 2000, but the Protocol states that it entered into force on January 25, 2000. There is no distinction for the PTA, but the later date would reinforce concerns that the East African Community (EAC) is post-SADC. The TOR refers to the PTA beginning in 1959, but the PTA itself refers to an agreement being "signed in 1959 between Portugal and the Federation of Rhodesia and Nyasaland to facilitate commercial relations between their respective territories." The PTA does not refer to itself as having entered into force in 1959, but contains in Article XXV an entry-into-force provision which states that the PTA "shall come into force on a date to be determined by the Contracting Parties and confirmed by an exchange of diplomatic notes."

Whether or not the PTA has or will enter into force, it is clear that such date is after September 1, 2000. If it has not entered into force, questions would arise regarding tariff reductions already implemented by Mozambique. The PTA is not the only agreement involving a SADC

member that raises this issue, especially when the other terms of Article 27 are taken into account.

2. Maintaining

The Protocol does not define "maintained." This raises a more complex issue for Mozambique and for SADC. Treaty interpretation practices, however, construe deviations from a provision narrowly. Provisions such as Article 27 have been examined under the GATT. The GATT has treated authority to continue grandfathered provisions narrowly.

For example, the GATT Panel on Newsprint, L/5680, paragraphs 50, 52, narrowly construed the GATT's permission for contracting parties to continue preferences (and margins of preference). These authorized deviations from a GATT obligation were referred to in GATT Article I and the preferences themselves were contained in annexed schedules. The Newsprint Panel was addressing permitted deviation from Most Favored Nation (MFN) treatment as provided in GATT Article I. The panel determined that deviation was permitted only for "maintenance" of preferences (margins of preference) not "modification." This was interpreted as meaning that "even purely formal changes" to tariff schedules (that did not impair GATT obligations) were "modifications" of preferences requiring renegotiation.

Similarly, the GATT Panel on the Manufacturing Clause found that "the Protocol of Provisional Application" (an authority to maintain certain GATT-inconsistent legislation) did not authorize contracting parties to lessen inconsistency and then enact legislation increasing GATT inconsistency even if the extent of inconsistency was only brought back to the level of the grandfathered "existing legislation." This has been referred to as a "one way street" away from inconsistency. In the Manufacturing Clause case, the United States legislated a termination date for a grandfathered provision, allowed it to terminate, and then extended it after only a gap of several days.

This means that "existing" "preferential trade and other arrangements" modified after the Protocol on Trade entered into force might not qualify as having been "maintained." Therefore, as "modified" arrangements they could be considered "new," and not qualify for Article 27, paragraph 1.

3. Preferential Trade and Other Related Arrangements

SADC obligations do not define "preferential trade or other related arrangements." In GATT and WTO practice, "preferential" arrangements are those undertaken for the benefit of developing countries. Preferences granted by developed to developing countries, such as the Generalized System of Preferences (GSP), have been dealt with by waivers under GATT Article XXV. Preferential agreements between developing countries have been considered authorized by the 1979 Enabling Clause. Free trade agreements and customs unions that involve a developed country are notified and considered under GATT Article XXIV. These

agreements are not referred to as "preferential." Free trade agreements and customs unions involving *only* developing countries are notified under the Enabling Clause and referred to as "preferential."

The WTO describes the Enabling Clause as "the legal basis for regional arrangements among developing countries and for the Global System of Trade Preferences (GSTP), under which a number of developing countries exchange trade concessions among themselves."

Even if the PTA is considered to have been "existing" on September 1, 2000, and even if it was "maintain(ed)," does the status of the parties as "developing countries" make the PTA a "preferential trade or other related arrangement?" If the agreement is preferential in the sense that it is among developing countries, the question arises as to when the status of "developing" is determined. If Portugal at the time of the 1959 agreement was not a developing country, the agreement may not qualify as preferential. But if developing status is determined as of September 1, 2000, when Mozambique may assert being a successor, as might Zimbabwe, the agreement might satisfy that requirement. In addition, preferential status might change for a member of another arrangement after SADC's entry into force, and affect whether that other arrangement is considered preferential.

ARTICLE 27, PARAGRAPH 2

1. Required Consistency of New Preferential Trade Arrangements Between SADC Member States with the Provisions of the Protocol

Article 27, paragraph 2, requires new preferential trade arrangements between SADC member states to be consistent with other provisions of the Protocol. This includes Article 28, paragraph 1, which requires member states to "accord Most Favored Nation Treatment to one another."

2. MFN Not Defined

SADC does not define MFN Treatment. Article 28, paragraph 1, requires it to be afforded, but does not define it. Article 28, paragraph 2, restates some terms from GATT Article I, but only applies to an "advantage, concession", etcetera, granted under "preferential trade arrangements with third countries." Paragraph 1 is silent on what MFN means as an obligation between member states. This omission is complicated because paragraph 2 does not have the scope of GATT MFN since SADC's third-country provision is termed as a limit on preferential trade arrangements with third countries. GATT MFN deals with "advantage," etcetera, to "any product" whether imported or exported to or from "any other country."

3. *What Does MFN Treatment Mean Between Member States?*

Article 28, paragraph 2, which paraphrases GATT language but limits the MFN concept to preferential trade arrangements, can provide some guidance on the meaning of MFN treatment. The GATT contains explicit and comprehensive language not found in paragraph 2. Thus, to use the GATT's expansive definition, one must ignore two elements of SADC's only elaboration of the term. Even so, the GATT provision of MFN treatment is qualified by exceptions to MFN treatment for free trade areas and customs unions. These exceptions are provided in GATT Article XXIV (for agreements involving developed countries), the Enabling Clause (for agreements among developing countries). General authority to waive GATT obligations found in GATT Article XXV has been used to approve preference schemes that deviate from MFN treatment.

In dealing with SADC's undefined inclusion of MFN treatment, and in seeking guidance from the GATT, one must ask whether the WTO's concept of MFN treatment should be incorporated *en toto*, incorporating the exceptions. This is a difficult matter to interpret, and SADC itself has no experience using dispute resolution to provide such interpretations. If dispute resolution is resorted to define "MFN treatment," Mozambique and other least developed member states should object because they will be disadvantaged by the ongoing failure of SADC to respond to Mozambique's proposals for making the dispute resolution system fairer and more affordable for all SADC members.

4. *Need for SADC Examination of the Proper Process*

In contrast to the WTO, SADC does not have a mechanism for reviewing customs unions and free trade areas. The WTO recognizes the complexity of unions and free trade areas and that developing countries should be afforded broad discretion in improving trade relationships. Free trade and customs union agreements are notified under GATT Article XXIV, and working parties are established under established procedures. In other words, GATT procedures recognize that the clarity of obligations, and the complexity of analysis involving multiple parties, may be resolved more appropriately in a working party. Dispute resolution may be appropriate, but the working party process eliminates the need for many disputes, or refines and narrows the issues. SADC has not yet decided how to approach issues raised by preferential trade arrangements among SADC members. Some of SADC's obligations, however, do provide a means for resolving concerns or reaching a consensus.

SADC Article 27, paragraph 3, provides an obligation to "undertake to review the further application of such (existing) preferential trade arrangements, with a view to attaining the objectives of this Protocol." Article 24 of the SADC Treaty also contains a "best endeavour" obligation to "coordinate their trade policies and negotiating positions in respect of relations with third countries or groups of third countries."

SADC provisions seem to intend for such cooperative efforts to occur before formal measures, such as dispute resolution. It is also more efficient to consider an issue that affects many arrangements in a broad context, rather than in the context of a single agreement between two members. This has tactical implications for Mozambique's strategy for the PTA.

Agreements of Other Member States Raise Same Concern

Interpretation of Article 27, paragraph 1, is of concern for at least two agreements that involve other SADC member states. Zambia's agreement with Zimbabwe raises most of the same issues as Mozambique's PTA with Zimbabwe. The present SACU customs union agreement was signed and entered into force more than two years after September 1, 2000. Article 51 of this 2002 SACU customs union agreement provides that the 1969 SACU Agreement "shall terminate on entry into force of this Agreement…" Should the present agreement be accepted as "existing" on September 1, 2000? SACU 2002, like the PTA, as opposed to the 1959 agreement, was modified after September 1, 2000. Was SACU 2002 "maintain(ed)" as required by Article 27, paragraph 1? Even if requirements were satisfied, does it qualify as a "preferential trade or related arrangement" since the agreement was notified under the WTO under GATT Article XXIV rather than under the Enabling Clause? This is an indication that at least under the WTO, SACU is not a "preferential" arrangement; not all SACU members are considered developing countries, at least for purposes of GATT Article XXIV. The WTO only maintains a list of least developed countries, and a single or clear definition of developed and developing counties does not exist.

Agreements with Third Countries

SADC Article 28, paragraph 2, imposes conditions with respect to third countries that are similar to the conditions in Article 27. It contains language that incorporates or paraphrases part, but not all, of GATT Article I, which specifies the WTO's MFN obligation. These SADC conditions with respect to third country arrangements are specified as follows:

> Nothing shall prevent granting or maintaining preferential trade arrangements that 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. (*Emphasis added to undefined terms.)*

A separate provision in paragraph 3 provides an exception to the obligations of paragraph 2, as follows:

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

This exception extends to "preferences" but not "preferential trade or other arrangements." It applies only to "another trading bloc," which is not defined, but might be assumed not to include bilateral agreements. The exception does not alter Article 27, paragraph 1, with

respect to the authorization to maintain agreements, *per se*, but deals only with Article 28, paragraph 2, and its application to preferences concerning "third countries" of another trading bloc "which that Member State was a member at the time of entry into force of this Protocol." This can be interpreted to mean that maintaining preferences is conditioned on membership in a trading bloc with a third country, and not imposing a requirement that the preferential arrangement itself be "maintain(ed)".

This interpretation raises yet another issue. Obliging extension of preferential arrangements between SADC member states to all member states, but not if the preference is for a third party, might encourage a perverse result. Obliging extension to all members, even those with a differential tariff rate under SADC, might discourage preferences among least developed member states while encouraging better treatment for third parties.

With respect to arrangements involving third parties, terms in Article 28 are not defined, and some common issues arise. This raises questions about the consistency of such agreements. For example:

1. COMESA may be considered a "preferential trade or related arrangement." As reported by COMESA "(T)he Free Trade Area (FTA) was achieved on 31st October 2000." While the agreement itself entered into force on December 8, 1994, under SADC Article 27 the issue is raised whether the agreement as it existed on SADC's entry into force, January 25 or September 1, 2000, has been modified rather than being "maintain(ed)." COMESA achieved a free trade agreement after September 1, 2000, and it has yet to conclude agreement on a common market. Recall that the GATT Panel on Newsprint considered even a formal change to a GATT preferential provision in an annexed tariff schedule a "modification." Therefore, the COMESA Customs Union arrangement, or the Treaty, if considered modified, could not be maintained consistently with SADC. COMESA preferences extended by a SADC member to third parties might be maintained without extension to SADC member states. This might be possible pursuant to Article 28, paragraph 3, discussed above, and might apply prospectively to preferences beyond those that existed on January 25, 2000 or September 1, 2000, whichever is the date of the Protocol's entry into force.

2. On November 30, 1999, Kenya, Uganda, and Tanzania signed the treaty establishing the East African Community (EAC), which came into force on July 7, 2000 and was formally launched on January 15, 2001. Like other African regional agreements, the EAC had predecessors, but the treaty itself existed on September 1, 2000, not January 25, 2000. EAC may be considered a "preferential trade or related arrangement" if the date notified to the WTO is correct. If the date listed in the Protocol of 25 January 2000 is correct, the EAC did not exist when the SADC Trade Protocol entered into force. In any event, the Protocol on the Establishment of the EAC Customs Union was not signed until March 2, 2004, and the EAC Customs Union did not begin operations until January 1, 2005 following official ceremonies on January 31, 2004. Therefore, it is unlikely that the agreement can be

considered to have been "maintain(ed)" as that term has been interpreted. But, like COMESA preferences, under Article 28, paragraph 3, the preferences extended to third parties of a trading bloc that existed on September 1, 2000 might not be required to be extended to SADC member states.

3. New agreements, including free trade agreements and economic partnership agreements (EPAs), between SADC member states and third parties raise similar questions. The European Union seeks to negotiate EPAs with members of regional trade arrangements, and has sought withdrawal from SADC of member states that were also in, for example, COMESA.

With respect to COMESA and the EAC, the interpretation of "preferences of another trading bloc" might be construed to apply only to preferences that existed on SADC's entry into force. But a reasonable reading of the reference in Article 28, paragraph 3, is to the *membership* as of that date, not the preference itself.

Conclusion

Trade agreements among SADC member as well as with third parties raise many issues of consistency with SADC obligations. A number of statements and papers have raised the consistency of Zimbabwe's PTAs with Mozambique and Zambia as an issue. Several of these can be found on TRALAC's website (http://www.tralac.org/) .

The issues facing Mozambique are not unique, even though other SADC members may not yet recognize these same issues in their own arrangements. SADC contains a "best endeavour" obligation to coordinate matters involving third parties (Article 29), and broad institutional mechanisms to address issues as envisioned in Article 31. When the interpretation and application of the Protocol is disputed, members must try to agree on interpretations and application and, through cooperation and consultation, to arrive at a mutually satisfactory agreement.

SADC does not contain a provision authorizing waivers of obligations, such as exists in GATT Article XXV. This may be a defect that merits further examination. SADC, however, does provide for amendment of the Protocol in Article 34, which makes reference to Article 36 of the SADC Treaty. Once an amendment is reviewed, which could take a significant period of time, approval of a three-fourths majority is required. Amending Articles 27 and 28 to permit the PTA will be very difficult at best.

In conclusion, it is not to Mozambique's advantage to admit inconsistency by requesting an amendment. Instead, Mozambique should state that the issue is far broader than the insignificant trade between Mozambique and Zimbabwe, and that it should be dealt with comprehensively.