

THE PREFERENTIAL TRADE AREA FOR EASTERN
AND SOUTHERN AFRICAN STATES: A Legal Perspective

by

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Dedicated to my late younger brother Vic.

I, Robert Ngosa Simbyakula, do hereby solemnly declare that this dissertation represents my own work and that it has not previously been submitted for a degree at this or another University.

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ABSTRACT

The recently established Preferential Trade Area for Eastern and Southern African States (hereinafter referred to as the PTA) is not a new innovation in this part of Africa. Regional economic co-operation dates back to the era of colonial rule. Interterritorial economic links were established by the colonial powers between the various territories under their rule. There were various treaties, legislative enactments etc, which resulted in the creation of a number of economic institutions to regulate trade between the territories.

With the attainment of political independence the new emergent states were reluctant to sever those economic links established during colonial rule. Not only has it been recognised that most African states' economies are potentially complimentary but also that the key to economic development lies in unity and economic co-operation. The crucial issue, however, is that there has not always been a clear appreciation of the nature of economic co-operation which is possible and desirable in Africa. All over Africa there have been various attempts at joint economic activity with a view to foster development. Sadly, however, these attempts have met with little or no success at all. Nevertheless, African leaders must be given credit for their perseverance and optimistic attitude towards unity.

At the Summit Conference of Heads of State and Government of Eastern and Southern African States, which was held in Lusaka, Zambia on December 21, 1981, nine countries signed the Treaty

establishing the PTA. The nine were the Comoros, Djibouti, Ethiopia, Kenya, Malawi, Mauritius, Somalia, Uganda and Zambia.

The sub-region comprises of eighteen states and if they all ratify the Treaty the PTA will become the largest regional economic grouping in Africa. The region embraces different political and cultural set-ups; it spans the continent from the Atlantic to the Indian Ocean; and covers three official languages; English, French and Portuguese.

Many questions, however, do come to mind: Does the PTA offer anything positive? Indeed will this arrangement succeed where others-such as the now defunct East African Economic Community-have failed?

It is the aim of this dissertation to look at the legal regime governing the PTA. A comparative analysis of other similar regional economic groupings (such as the now defunct East African Economic Community, the Latin American Free Trade Area, the European Economic Community, SADCC, the Andean Pact etc) will be made. Such comparison will enable us to determine whether or not the PTA is a viable venture. Ultimately we shall be able to determine not only whether the legal regime is adequate or economic inequalities among member States that may frustrate the arrangement.

Needless to say, such a study would be incomplete without giving a brief history of similar economic arrangements which existed during the colonial era.

It is proposed to deal with this study under the following heads:-

1. General Background
2. Institutional framework
3. The Trade liberalization scheme
4. A Comparative Analysis
5. Conclusion: hopes and loopholes.

PREFACE

The reader will realize that this study impinges heavily in the realm of economics. This is unavoidable because this is an area where Law and economics interact.

Unfortunately there is little that has been written on regional economic groupings in Africa. I therefore stand convinced that such analysis of law relating to economic integration can lead to the discovery of useful legal elements, as well as exposing deficiencies, and also inspire a necessary discussion and research into the nature of economic co-operation that is desirable for Africa.

I am greatly indebted to many friends and lecturers for their various assistance and encouragement during the preparation of this dissertation. I am particularly grateful to Dr. S. K. Verma, Senior Lecturer in the School of Law (UNZA) who was my supervisor, for her guidance and advice; to Dr. J. M. Mulwila who first whetted my interest in this subject; to my friend Denny Kalyalya from the Economics department; to my friends at the Ministry of Commerce; to my friend Mr. Simamba at the Legal Affairs; and to all those at the PTA headquarters for not only taking their time to grant me interviews but to answer the numerous questions I put to them.

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It would be unfair if those who have contributed so generously are to be implicated in such errors as may remain, for these I must bear responsibility alone.

R N S

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CHAPTER 1

BACKGROUND

1. Colonial heritage:

Regional economic co-operation in Africa is always traced back to the era of colonial rule. The colonial powers were quick to recognize that their colonies had potentially complementary economies and as such they established interterritorial economic links not only between their colonies interse, but also with each other's colonies. At present nearly all African regional economic groupings have their roots from earlier colonial institutions. It is, therefore, pertinent to take a brief look at some of those colonial institutions because of the influence they still exert on the post-independence institutions created by independent African States. In this study we shall confine ourselves to colonial institutions in the region covered by the PTA, i.e., Eastern and Southern Africa.

A) The Congo Basin Treaty:

The General Act of Berlin of February 26th, 1885¹ signed by European powers and the United States of America is the forerunner of economic co-operation in this part of Africa under study. This Treaty commonly referred to as the Congo Basin Treaty dealt with the region forming the basin of The Congo River and its outlets. Under Article 1, of the Treaty the area was defined to include what is today Zaire, Northern and Northwestern provinces of Zambia, Tanzania, Rwanda, Burundi, Uganda, Kenya, Somalia, Mozambique, Malawi, and Northern Angola. It will be noted that all the mentioned countries are in the PTA.²

For our purposes the relevant part of the Treaty is Chapter 1 which is the Declaration Relative to Freedom of Trade in the Basin of the Congo, its mouths and Circumjacent Regions with other Provisions connected therewith. Under article 2 it provided for free access of all flags to the whole of the coastline including navigation of the Congo River and its affluents, lakes, ports and canals within the entire area of the territories described in article 1. More pertinently, the treaty provided that "wares, of whatever origin, imported into these regions under whatsoever flag, by sea or river or overland, shall be subject to no other taxes than such as may be Levied as fair compensation for expenditure in the interests of trade and which for this reason must be equally borne by the subjects themselves and by foreigners of all equally borne by the subjects themselves and by foreigners of all nationalities."³ Differential duties on vessels as well as merchandise were forbidden. Indeed the liberalization of trade in the area was further enhanced by the provision which read as follows: "merchandise imported onto these regions shall remain free from import and transit dues."⁴ Thus by virtue of this Treaty European traders living in this region could bring in goods from European factories cheaply. It must, however, be pointed out that the provisions of this Treaty were only beneficial to the European settlers as African participation in commercial activities-especially in the area of international trade-was virtually non-existent. This was due to the political and social set-up at that time which precluded Africans from the import-export trade.

Article 4 of the Treaty contained a proviso which allowed for revision of the Treaty provisions. Consequently the Congo Basin Treaty was revised by the Convention of Saint Germain-en-Laye of September 10, 1919.⁵ The effect of this convention was essentially to revise the area covered by the Treaty. As far as trade liberalization was concerned there were no significant changes.

B) Customs Agreement between the Union of South Africa and Northern Rhodesia.

A Customs Agreement was entered into between the Union of South Africa and Northern Rhodesia in 1924. This Agreement was superseded by a subsequent arrangement of July 1st, 1930.⁶ The provisions of the Agreement did not apply to that part of Northern Rhodesia falling within the Congo Basin. The aim of the Agreement as seen from the preamble was that it was desirable that trade between the two territories be as free as possible and uninterrupted. Under Article 4 it was provided that there would be a free interchange of the products and manufactures of the Union and of Northern Rhodesia. However, in the event of one party to the Agreement levying an excise duty on any commodity produced or manufactured in its territory, it was entitled to levy a corresponding customs duty on a like item produced in the other's territory if imported into its territory. Insofar as customs tariffs were concerned each party was free to frame them in any manner against a third country.

A schedule was provided in the Agreement containing a list of products which were subject to preferential treatment or otherwise freely interchangeable. In addition to this, provisions were included which dealt with the question of re-exportation of commodities originating from any country, not a party to the Agreement, to the other party. In such cases Articles IO and II of the Agreement provided that a contracting party exporting such goods to the other was required to pay to the latter the customs duties collected by the former subject to a deduction of five per centum of such duties, to cover the cost of collection thereof.

The PTA has also made provisions relating to the exportation of goods originating from non-member countries along similar lines.⁷

It is submitted that this Agreement between South Africa and Northern Rhodesia did infact prove successful in practice, although, it was a one-sided affair in favour of South Africa. This was so because the Union of South Africa was the one exporting more goods than Northern Rhodesia. The latter merely provided a cheap market for South African products and manufactures.

It may be mentioned here that apart from this Agreement, the Union of South Africa was already involved in a similar customs arrangement with the British Colonies of Bechuanaland (now Botswana), Lesotho and Swaziland. This arrangement between South Africa and the three British colonies (commonly referred to as the BLS countries) was created by the Anglo-South Africa Treaty of 1910, which Treaty has now been replaced by the Customs Union Agreement between the Governments of South Africa and the BLS

countries of December 11th, 1969. We shall elaborate on this treaty in Chapter IV where we make a comparative analysis of the PTA vis-a-vis other similar arrangements. The point here to note, however, is that all the BLS countries are members of PTA.

C) Customs Agreement: Southern and Northern Rhodesia.

This agreement dated July 1st, 1930 was a comprehensive arrangement superceding all other existing arrangements between the two territories.⁸ By this Agreement the two Government established a common tariff and brought into conformity the Laws and Regulations of both territories relating to customs and excise duties.⁹ Article 4 of the Agreement provided for free interchange or preferential treatment of commodities produced in the two territories. Similar to the customs Agreement between South Africa and Northern Rhodesia, there was a provision in this arrangement pertaining to the re-exportation of commodities originaling from non-party countries to either of the parties to the Agreement.

Just as in the arrangement between South Africa and Northern Rhodesia, the Agreement between the two Rhodesias was much more beneficial to Southern Rhodesia because that territory was by far much more stronger economically than Northern Rhodesia. In either case only the settler community stood to gain for the reasons stated above.¹⁰

Owing to the existence of the Congo Basin Treaty, the provisions of the Customs Agreements between South Africa and Northern Rhodesia, on the one hand, and the Agreement between the two

Rhodesia on the other, did not apply to that part of Northern Rhodesia falling within the Congo Basin as defined in Article I of the Treaty and as revised by the Convention of Saint Germain-en-Laye of September 1919.

D) The Federation of Rhodesia and Nyasaland:

The federation of the three territories of Southern Rhodesia (now Zimbabwe), Northern Rhodesia (now Zambia) and Nyasaland (now Malawi) which became operative on September 3rd, 1953 was for all intents and purposes a complete economic integration. It became a common market where not only customs duties and other trade restrictions were ameliorated, but there was complete free movement of goods, persons, capital and services. In economic terms the federation was one unit although politically each territory retained a certain degree of autonomy. Part I of the second schedule of the federal constitution empowered the Federal legislature to enact laws pertaining to such vital areas as transport, currency, exchange control, imports and exports etc. A federal tariff came into effect in 1955 but applied to Malawi (Nyasaland) in 1957 after the General Agreement on Tariffs and Trade (GATT) agreed to remove the application of the Congo Basin Treaty. The federal tariff introduced by the federal Government was aimed at protecting industries within the federation. At the same time a customs union was established to widen market for the manufacturing industries in the federation. This arrangement was blatantly in favour of Southern Rhodesia because the majority of industries were located there such that Northern Rhodesia and Nyasaland became the dumping grounds of finished products from Southern Rhodesian industries. Free trade continued between the two Rhodesias after dissolution of the federation but was stopped just before Northern Rhodesia got her independence.^{10a}

E) Economic Co-operation in East Africa:

The three eastern African Countries of Kenya, Uganda and Tanganyika were also engulfed in the Congo Basin Treaty. In 1918 a more intimate arrangement was established when Kenya and Uganda formed a Customs Union. Tanganyika joined later.^{II} "By 1927 not only

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was there a common external tariff, there was also free trade in both locally produced and imported goods."¹²

In 1947 a legal regime was established by the British Government to superintend over the co-operation arrangements. The East African High Commission started to function in 1948. This Commission was composed of the British Governors of the three territories.

As political independence drew near it became necessary to preserve the continuation of the functions of the East African High Commission. With that view in mind, a new institution, the East African Common Services Organization was established in December 1961. The Agreement was entered into by the independent Government of Tanganyika and the then colonial Governments of Kenya and Uganda. When problems beset the Organization a review of the situation was carried out. This resulted in a new Agreement entitled the "Treaty of East African Co-operation"¹³ also known as the Kampala Treaty as it was signed by the three heads of state June 6, 1967 in Kampala. These three states are in the PTA and Kenya and Uganda have ratified the treaty establishing the PTA.

In the preceding pages we have endeavoured to show that regional economic co-operation in this part of Africa under discussion dates back to the colonial era. While it is admitted that those colonial institutions governing inter-territorial economic links were essentially set up to meet the interests of the colonial masters, it is equally true to say that there was some visible economic advantages. Undoubtedly these institutions did work out well though of course not so equitably vis-a-vis all the inhabitants in the territories. It was only a limited

sector of the community which benefitted.

Emergent independent African States have recognized the advantages of regional economic co-operation. This is manifested not only by their reluctance to sever those economic links established during the colonial era, but also their enthusiasm to create new ones with basically the same framework. Now that there is self rule the question of discrimination does not arise. Equal opportunities for all was after all one of the motivating factors for the struggle for independence.

The colonial masters did appreciate the complementariness of the economics of their colonies and they sought to exploit the situation, but to their own benefit. African leaders have also appreciated this point about complementariness of their economics and the need to create a larger market for their commodities. One writer has written that: "the need for a regional, or rather a sub-regional approach in Africa is much stronger than elsewhere, owing to the very small size of so many African Countries.¹⁴ Undoubtedly by forming a large economic entity the states concerned would have a stronger bargaining power in international trade just as the European Economic Community has.

In the following pages it is desirable to take a look at the various types of economic arrangements before we analyse the arrangements under the PTA.

II. Types of economic groupings:

A trade agreement, is a codification of the principles under which trade between parties to the agreement will be conducted. Although it varies greatly in format and content, the basis

of the agreement is the removal or amelioration of restrictions on trade so as to increase its volume and thereby enhance the economic well being of the parties. It is important at the outset to point out that such agreements may be made between countries as far apart as, say, Zambia and West Germany or between neighbouring countries.¹⁵ Furthermore such agreements may be either bilateral or multi-lateral. In a situation where such an agreement involves countries within the same geographical proximity it is termed as a regional economic agreement. Such arrangements are also known as regional economic groupings, regional economic co-operation or simply economic association or economic integration.

An economic association between two or more countries may range from the loosest form of mutual arrangement to the most intimate union. The essential factor, however, is that a group of countries in a region agree to abolish barriers against imports from one another. These various categories of arrangements are classified under the heading of Common Market, Customs Union, Free Trade Area or Preferential Trade Area. We shall now proceed to look at the characteristics of each one of these categorically.

A) Common Market

Robson defines a common market as "a relationship between participating countries in which all tariff and other trade restrictions among them are abolished, a common tariff for imports from non-member countries is established and there is free mobility of factors of production and capital."¹⁶ In such a relationship, therefore, political boundaries become economically irrelevant. Institutions and regulations are made

to cater for free movement of goods, labour and capital.

The fact that there is a common external tariff, necessarily, gives rise to the need to develop a common commercial policy towards the outside world. Undoubtedly the development of a common commercial policy is apt to prove a very difficult exercise. The successful adoption of such a policy depends essentially on the nature of the economies of the countries concerned. Firstly the contracting parties must have a common ideological economic polity. That is to say that all the countries must have either a market economy like that obtaining in the capitalist West or a centrally planned economy like that obtaining in communist states. In such situations it is by far much easier for the countries concerned to re-align their policies to a common commercial policy towards the outside world. A good example here are the EEC countries or Council of Mutual Economic Assistance.

The second point is that member states must to a large extent be equals in terms of economic strength. It is obvious that in order to achieve any objective-especially in the area of economics-the application of equal means among unequals cannot produce the desired results to the benefit of all parties concerned.

In the light of these two points discussed above it is clear that African States have a very difficult task before them. African States have what is commonly termed as a mixed economy. This is essentially a mixture of capitalism and socialism. These two economic theories are applied in varying degrees in the various countries on the continent of Africa. Although they are all classified as developing countries they vary considerably in economic strength. Thus the realization of an African Common

Market by the year 2000¹⁷ as envisaged by African leaders or indeed a common market for Eastern and Southern African States¹⁸ by about 1992 will certainly require not only far reaching political decisions but the exercise of statesmanlike intelligence.

B) Customs Union

This is defined in Article XXIV(8)(b) of the GATT "to mean the substitution of a single customs territory for two or more territories so that duties and other restrictive regulations of commerce (except, where necessary, those permitted under Article XII, XIII, XIV, XV, and XX are eliminated with respect to substantially all the trade between the constituent territories of the Union or at least with respect to substantially all the trade in products originating in such territories..."¹⁹

The same provision provides that members of the union must adopt substantially the same external tariff vis-a-vis the outside world.²⁰ From the definition above we see that a customs union is essentially a common market. The only difference is that while a common market is a higher form of economic integration and all embracing, a customs union may be limited in terms of commodity coverage. Indeed the use of the term "substantially all trade" seems to suggest this. The European Coal and Steel Community was one of such a Customs Union with limited commodity coverage, namely, coal, iron and steel.

It has been pointed out by some writers that a customs union may either be "trade creating" or "trade diverting"²¹. If a union causes a member to replace its own high cost production

There are two main problems associated with such arrangements. The first is the question of arriving at a common list of products which should be tariff free. The Latin American Free Trade Area (LAFTA) has been faced with this problem in that the member countries have not been able to agree on a common list of free commodities. The second problem relates to the question of rules of origin. The GATT provides that commodities to be given this preferential treatment are only those originating from the constituent member states. It may well be that member countries produce the same commodities in which case the removal of tariffs will amount to nothing. Most important, however, is that the economically stronger members stand to gain at the expense of the weaker members.

D) Preferential Trade Area:

A preferential trade is a simpler arrangement than the preceding arrangements outlined above. The essential feature of this type of arrangement is that the constituent countries grant each other more favourable tariff treatment (i.e. preferential treatment) than they give to the outside world. They do not, however, abolish all tariffs as in the arrangements above but only that mutual tariffs on trade with one another are lower than those applied to imports from outside countries. The difference between the two tariff levels is referred to as the margin of preference. Essentially a preferential trade area has the same features as a free trade area-but as we have pointed out they do not completely abolish tariffs inter se. Thus it is a much looser type of economic co-operation. An example of a preferential trade area was the Commonwealth Preferential Area by which England granted its colonies and dominions preferential treatment.

Footnotes:

1. Text of Treaty is found in HERTSLET, "Map of Africa by Treaties" Vol. II, p. 468 (London) 1909.
2. See Article 2(1) of the Treaty establishing the PTA.
3. Article 3 of the Berlin Act.
4. Ibid, Article 4
5. For text of Convention: League of Nations Treaty Series Vol. 8, p. 25
6. Text of Agreement: Ordinance No. 1 of 1930, supplement to the Northern Rhodesia Government Gazette of March 14, 1930.
7. See Annex IV of PTA Treaty, viz, Protocol on the Re-export of goods within the PTA.
8. Source: Ordinance No. 2 of 1930; Supplement to the Northern Rhodesia Government Gazette of March 14, 1930.
9. Articles 2 and 3 of the Agreement.
10. Africans were discriminated against in the import-export trade.
11. Tanganyika was a mandate territory under the British Government and later became a trust territory after the second world war.
12. O.C. Eze: "The legal status of foreign investments in the East African Common Market," Sijthoff (LEIDEN) 1975, p. 9
13. Reference to the provisions of this Treaty is made in Chapter IV
14. A. F. Ewing: "Prospects for Economic Integration in Africa", Journal of Modern African Studies, Vol. 5, 1967 p. 61
15. Eg, the FCN Treaty between the two countries, viz, treaty of Friendship, Commerce and Navigation.
16. P. Robson: "Economic Integration in Africa", G. Allean and Union, (London) 1968 p. 29
- *10a. Constitution of the Federation of Rhodesia and Nyasaland(1953)

17. Decision contained in the Final Act of the Second Extraordinary Session of the Assembly of Heads of State and Government of the OAU held at Lagos on April 28 and 29, 1980.
18. Article 29 of the PTA Treaty.
19. Emphasis added
20. Article XXIV(8)(a)(ii) of GATT
21. A. Hazelwood, ed: "African Integration and Disintegration; studies in economic and political union", Oxford University Press, (London) 1967.
22. Ibid, p. 5
23. Ibid, p. 6
24. *ibid.*
25. A. K. Koul: "The Legal framework of UNCTAD in World Trade, Sijthoff (Tripathi) 1977.
26. Emphasis added.
27. Article XXIV(5)(b)

CHAPTER II

THE PTA: INSTITUTIONAL FRAMEWORK

A. Historical Background:

The PTA has been established through the concerted efforts of the United Nations Economic Commission for Africa (ECA) and the countries in the sub-region. The ECA is a creation of the Economic and Social Council of the United Nations (ECOSOC) by virtue of Article 68 of the Charter of the United Nations which provides that the "Economic and Social Council shall set up commissions in economic and social fields for the promotion of human rights, and such other commissions as may be required for the performance of its functions." By resolution 67I A and B (xxv) of April 29, 1958, ECOSOC established the ECA, defined its geographical scope, laid the operational policy and chose Addis Ababa, the Ethiopian capital, as the Commission's headquarters.^I Other similar economic commissions set up by ECOSOC are the Economic Commission for Europe (ECE), Economic Commission for Asia and the Far East (ECAFE) and the Economic Commission for Latin America (ECLA).

The aims of the ECA which are set out in paragraph I of its Terms of Reference are to:

- (i) initiate and participate in measures for facilitating concerted action for the economic development with a view to raising levels of living and strengthening the economic relations of the countries in the region;
- (ii) make or sponsor investigations and studies of economic and technological problems and developments within the region and

- (iii) undertake or sponsor the collection, evaluation and dissemination of economic, technological and statistical information;
- (iv) perform such advisory services as the countries and territories of the region may desire.....;
- (v) assist ECOSOC in discharging its functions within the region in respect of any economic problem in the field of technical assistance; and
- (vi) assist in the formulation and development of co-ordinated policies as a basis for practical action in promoting economic and technological development in the region.²

The geographical scope of ECA is defined in paragraph 4 of the Terms of Reference as "the whole continent of Africa, Madagascar and other African Islands". Membership in ECA is open to the named independent states within the geographical scope of ECA (except South Africa) and any state in the area which might thereafter become a member of the United Nations. The list, however, includes all the independent African States. There are two categories of membership in ECA: full membership and associate membership. While full membership is conferred on states that are members of the United Nations and fall within the geographical scope of the commission, associate membership is conferred on non-independent territories such as Namibia and any Metropolitan state that have any territorial responsibilities in Africa.³

In its operations the ECA had divided the African Continent into four sub-regions to facilitate regional economic co-operation. The four sub-regions comprise of the:

- (i) North African States
- (ii) West African States
- (iii) Central African States; and
- (iv) East and Southern African States.

Our area of study is the East and Southern African sub-region which has its sub-regional office in Lusaka. The sub-region embraces eighteen countries namely: Angola, Botswana, the Comoros, Djibouti, Ethiopia, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Seychelles, Somalia, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.

The ECA in accordance with its Terms of Reference has since its inception carried out various investigations and studies and has been the main brain behind all the moves towards economic co-operation on the continent. In this regard the first step was an address by the ECA to the Organization of African States Heads of State conference in 1963.⁴ More pertinent to the sub-region under our discussion was a study undertaken by the ECA in 1965.⁵

At the Tenth Assembly of Heads of State and Government of the OAU in May, 1973 at Addis Ababa in Ethiopia, the African Declaration on Co-operation, Development and Economic Independence was adopted. By this Declaration African leaders agreed to forge greater economic links and one way of achieving this goal was through regional economic co-operation.

In carrying out its function the ECA has nine divisions responsible to the office of the executive secretary. One of these divisions is the centre for economic co-operation which comprises of the Multinational Programming section and the Inter-governmental Negotiations section. The ECA secretariat's four sub-regional

offices in Lusaka, Tangier, Kinshasa and Niarney fall under this section. Each sub-regional office is designated as the Multinational Programming and Operational Centre (MULPOC). It was at the inaugural meeting of the Lusaka-based MULPOC Council of Ministers held in Lusaka on 4th November, 1977 that a decision to establish a sub-regional economic community in principle, was arrived at. Consequently, the first Extraordinary Conference of Ministers of Trade, Finance and Planning took place at Lusaka on 30th and 31st March 1978 at which the ministers adopted the Lusaka Declaration of Intent and Commitment on the Establishment of a Preferential Trade Area for Eastern and Southern African States. This was viewed as an initial step towards the creation of a common market and eventually an economic community in the sub-region.

In that Declaration of Intent and Commitment the ministers declared that their:

"respective Governments AGREE to negotiate among themselves a Treaty for the establishment of a Preferential Trade Area and to obtain ratification of the same ... in accordance with the constitutional procedures of our respective Governments, preferably not later than the end of 1980, and for these purposes HEREBY ESTABLISH an Inter-governmental Negotiating Team Composed of representative of our respective governments, to prepare the drafts of such treaty and protocols..."⁶

Following the adoption of the Lusaka Declaration of Intent and Commitment, the Inter-governmental Negotiating Team held Eight successive meetings in various capitals of the member states

commencing with the first in June 1978 in Addis Ababa in Ethiopia to the eighth and last in January, 1981 in Maseru, Lesotho.⁷

Thereafter Ministers of Trade, Finance and Planning also held a series of conferences which culminated in the summit meeting of Heads of state and Government held in Lusaka in December, 1981.

On the 21st of December, 1981 the Treaty for the Establishment of the preferential Trade Area for Eastern and Southern African States was signed by nine out of the fifteen countries in the sub-region represented at that meeting. Tanzania, Mozambique and the Seychells did not attend. However, other prospective members like Burundi, Rwanda and Zaire attended the meeting as observers. The representatives of SWAPO and ANC of South Africa were also present at the summit. Obviously once Namibia becomes independent and South Africa obtains majority rule, they are expected to join.

B. Objectives of the PTA:

The objectives of the PTA are set out broadly in the preamble to the treaty and more specifically in chapter two. Paragraph six of the preamble sets out the broad objectives as "to foster closer economic and other relationships among their states and to contribute to the progress and development of the African continent and the achievement of an African Common Market."⁸

The PTA is thus viewed as one of the stepping stones towards the fulfillment of the decision contained in the Final Act of the Second Extraordinary Session of the Assembly of Heads of State and Government of the OAU held at Lagos from 28th to 29th April 1980 that there should be established an African Common Market by the

year 2000. Furthermore and perhaps more pertinently paragraph six provides that establishment of a Preferential Trade Area for the sub-region is a first step towards the establishment of a common market and eventually of an Economic Community for Eastern and Southern African States. This objective is spelt out in more specific terms in paragraph 2 of Article 3 of the treaty as follows: "The functioning and development of the Preferential Trade Area shall be reviewed in accordance with the provisions of this treaty with a view to the establishment of a common market and eventually of an Economic Community for Eastern and Southern African States."

From the foregoing, therefore, the PTA can be rightly viewed as a transitional arrangement. It will be utilized as a testing ground before a more intimate arrangement such as a Customs Union and finally an economic community is entered into. As discussed earlier in chapter one a preferential trade Area is by far a much more looser form of economic association than the latter two types in that the degree of sovereignty surrendered is minimised. The conclusion to be drawn from this provision is that member states of the PTA have deliberately chosen to take a cautious approach. The failures of more intimate regional economic associations elsewhere on the continent of Africa⁹ are still fresh in the minds of the African leaders. The member states do not wish to appear to be too overzealous and this cautiousness is evidenced in the preamble by the words: "Having in mind the principles of international law governing relations between nations, such as the principle of sovereignty, equality and independence of all states and non-interference in the domestic affairs of states..."¹⁰

The specific aim of the PTA, however, is "to promote co-operation and development in all fields of economic activity particularly in the fields of trade, customs, industry, transport, communications, agriculture, natural resources and monetary affairs...."¹¹ In order to achieve the aims set out in Articles 3(1) and 3(2) the "member states agreed to implement the undertakings set out in paragraph 4 of Article 3...."¹² As can be seen from the wording of this provision, it means that member states are bound to carry out the undertakings provided in the said Article 3 (4) and indeed as provided elsewhere in the Treaty. These undertakings laid down are to:

- (i) gradually reduce and eventually eliminate as between themselves customs duties in respect of imports of selected commodities produced within the Preferential Trade Area;
- (ii) establish common rules of origin with respect to products that shall be eligible for preferential treatment;
- (iii) establish appropriate payments and clearing arrangements among themselves that would facilitate trade in goods and services;
- (iv) foster such co-operation among themselves in the field of transport and communications...;
- (v) co-operate in the field of industrial development;
- (vi) establish conditions regulating the re-export of products within the PTA;
- (vii) co-operate in the field of agricultural development;
- (viii) promulgate regulations for facilitating transit trade within the PTA;

- (ix) simplify and harmonize their trade documents and procedures;
- (x) co-operate in customs matters;
- (xi) standardize the manufacture and quality of goods produced and traded within the PTA;
- (xii) recognize the unique situation of Botswana, Lesotho and Swaziland and their membership of the Southern African Customs Union within the context of the PTA and to grant temporary exemptions to Botswana, Lesotho and Swaziland from the full application of certain provisions of the treaty.¹³

The foregoing undertakings are to be achieved by way of twelve protocols annexed to the Treaty. Further undertakings include:

- (i) the relaxation or abolishment of quantitative and administrative restrictions among themselves;
- (ii) promotion of the establishment of appropriate machinery for the exchange of agricultural products, minerals, metals, manufacture and semi-manufactures within the PTA;
- (iii) promotion of the establishment of direct contacts between, and regulation of the exchange of information among their commercial organizations such as parastatals, export promotion and marketing organizations, chambers of commerce, associations of businessmen and trade information and publicity centres;
- (iv) ensuring the application of the most-favoured-nation clause to each other;
- (v) progressive adaption of their commercial policy in accordance with the provisions of their Treaty ; and

(vi) taking in common of such other steps as are calculated to further the aims of the PTA,¹⁴

Furthermore the member states undertake to make every effort to plan and direct their development policies with a view to creating a conducive atmosphere for the achievement of the aims of the PTA and to abstain from any measures that may thwart the achievement of the said aims or implementation of the provisions of the Treaty.¹⁵

It is a further aim of the PTA that two years before the expiry of ten years from the date of the definitive entry into force of the Treaty, the Treaty shall be reviewed with a view to transform it into a common market and eventually into an Economic community for the sub-region.¹⁶

C. Membership.

Membership of the PTA is open to the Eastern and Southern African States named specifically in the treaty that sign, ratify or accede to the treaty and such other immediately neighbouring African states that become member states of the PTA under the provisions of Article 46.¹⁷ The term "immediately neighbouring" may have been deliberately used with a view to facilitating the accession to the treaty of such immediately neighbouring countries such as Namibia and upon attainment of her independence South Africa, Burundi,¹⁸ Rwanda and possibly the Sudan.¹⁹ Burundi and Rwanda may have been deliberately left out initially due to their geographical proximity to the Central African sub-region of which the sub-regional Headquarters are in Kinshasa. In that sub-region, however, there is not much activity in the area of regional economic co-operation and hence Burundi deemed it wise to look at

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the much more promising PTA. The same article (Art. 46) in turn makes it legally impossible for a country such as the Congo Brazzaville or the Cameroon from joining the PTA. For obvious reasons the viability of the arrangement would be greatly hampered if there were so many countries which are placed far apart.

(1) Expulsion: The treaty is silent on the question of expulsion of a member but, however, where a member state is in arrears for more than one year in the payment of its financial contribution for reasons other than those of public or natural calamity or exceptional circumstances that gravely affect its economy, it may by a resolution of the Authority be suspended and cease to enjoy the benefits under the treaty.²⁰ There is no indication in the treaty about revoking a suspension order. It can only be deduced that since the Authority is empowered under Article 37(2) to make a suspension order, such an order can be similarly revoked. The Authority can not merely have a power to suspend and not have a liberty to revoke the suspension. It would appear that the question of expulsion has been deliberately left out because it is not necessary, at all since all that the member states need to do is simply to deny the delinquent member the benefits of the treaty.

It is conceded, however, that such a measure would not amount to an expulsion de jure but would certainly amount to an expulsion de facto. Nevertheless, however, it is hoped that spirit of unity contained in the Declaration of Intent and Commitment will continue to grow from strength to strength.

(2) Withdrawal:

A member state is, nonetheless, given the liberty to withdraw from the PTA upon the expiry of one year from the date of a written notice, addressed to the Secretary - General of the PTA, of its intention to withdraw.²¹ During the period of the notice the withdrawing state is required to observe the provisions of the treaty and shall remain liable for discharging its obligations under the treaty.²² It appears that such a state which has ceased to be a member would still be eligible to re-join the PTA. This is so because states eligible to join are specifically named in Article 2(2). And because they are so named they cannot be denied membership. This could be the reason why the treaty is silent on expulsion. An expulsion would require the amendment of Art. 2(2).

This privilege however, does not, extend to other "immediately neighbouring" states who can only become members under Article 46. This is because prior to joining they have to negotiate with all the member states and, needless to say, such negotiations must prove positive for such a state to be allowed to accede to the treaty.

0). Institutions

In order to accomplish its purposes four main organs have been created under the PTA:

- a) the Authority;
- b) the Council of ministers;
- c) the Secretariat; and
- d) the Tribunal.²³

In addition, there are the commission and specialized committees to be established at such times as the council of ministers may decide.²⁴

The four main organs are termed so because they are of a permanent character and as such they become effective upon the definitive entry into force of the treaty.

(I) The Authority²⁵

This is the supreme organ of the PTA and is composed of Heads of State and Government of the member states. It is responsible for laying down the general policy, general direction and control of the performance of the executive function of the PTA and the achievement of its aims. In addition to these general functions there are certain other particular duties which the treaty has assigned to the Authority. Under Article 45 the Authority shall at its first meeting appoint the Secretary-General of the PTA and determine the situate of the headquarters of the PTA.²⁶ The Authority is the only organ that can remove the Secretary-General from office upon the recommendation of the council,²⁷ suspend a member state,²⁸ and amend the treaty.²⁹ Furthermore under Article 3 of the Statute of the Tribunal of the PTA, the Authority is the appointing authority of the members of the tribunal.

The decisions and directions of the Authority are binding on all institutions of the PTA and on those to whom they are addressed other than the Tribunal within its jurisdiction.³⁰ A pertinent question arises on the interpretation of this provision. Does this imply that a decision or directive of the Authority addressed to a member state would be binding on such member state? The answer is yes. This is confirmed by the procedure the decisions

of the Authority are arrived at. Article 6(5) provides that "the decisions of the Authority shall be taken by consensus." This means that there will be no voting, the members will have to persuade each other until they all agree. In such a case a member state will be bound by the decisions of the Authority addressed to it both legally and morally. This is the main advantage of this method of taking decisions, everyone will feel duty bound to carry out the decisions they made together.

While the idea is laudable, it has-like all rules of unanimity-certain obvious disadvantages. The first and foremost is that if a member state feels so strongly about an issue such that it does not leave itself open to persuasion, that will amount to a veto. Secondly, considering the large number of states involved, the meetings are likely to be protracted. It is a very difficult thing for three minds let alone eighteen minds to arrive at a consensus within a short period. This point of decision-making process has been taken up later in this study.

Insofar as meetings are concerned the Authority shall meet at least once in every year for an ordinary meeting. Whenever it is deemed necessary for it to have an extraordinary meeting, either any member may so request and if supported by one-third of the members of the Authority or upon the proposal of the Council of Ministers addressed to the Secretary-General, the Authority shall meet. The treaty has left the determination of the rules of procedure to the Authority and as such it shall determine it's own method of notices for convening meetings, choosing it's chairman and the quorum. It seems, however, that the question of forming a quorum may be irrelevant. This is due to the fact that all decisions to be

taken by the Authority shall be by consensus. In other words all members will necessarily have to be present and if not present they will have to give their consent.

(2) The Council of Ministers

The Council of Ministers of the PTA consists of "such ministers as may be designated by each member state."³¹ The Treaty does not specify the number of representatives from each country. This is compounded by the fact that each member state has different ministers with different ministerial duties which may be pertinent to the PTA. A case in point is the Zambian situation where there is a different minister each for Trade; Economic planning; and Finance. Thus the Zambian delegation may consist of three ministers. At its first meeting³² held in Lusaka in June 1982 the Zambian delegation consisted of two ministers namely: the minister of Trade and the minister for Economic planning. Obviously the senior minister shall be the head of the delegation while the other is treated as a delegate official.

The council is required under Article 7(4) of the Treaty to meet at least twice a year in ordinary session. If any member state so requests, the council may meet in extraordinary session. Such so requests, the council may meet in extraordinary session. Such request, however, should be supported by one-third of the member states. The rationale for the council holding two meetings in a year is partly to provide a measure of continuity for the work of the PTA as a whole and partly to enable it to prepare for the annual meetings of the Authority. In fact Article 7(4) provides specifically that "...one of such meetings shall be held immediately preceeding an ordinary meeting of the Authority."

Its responsibilities are stated in Article 7(2) as:

- (a) to keep under constant review and ensure the proper functioning and development of the PTA in accordance with the provisions of the treaty;
- (b) to make recommendations to the Authority on matters of policy aimed at the efficient and harmonious functioning and development of the PTA;
- (c) to give directions to all other subordinate institutions of the PTA, and
- (d) to exercise such other powers and perform such other duties as are conferred or imposed on it by this treaty or as may be determined from time to time by the Authority.

The council, therefore, is subordinate only to the Authority from whom it takes its orders and to whom it can only make recommendations. All other institutions of the PTA are subordinate to it and its decisions and directives addressed to such institutions other than the Tribunal within its jurisdiction, are binding on them. Here again, for reasons proffered in the case of the Authority, decisions of the council may be binding on a member state.³³ Just as in the case of the Authority, the decisions of the council shall be taken by consensus. Insofar as rules of procedure are concerned the council has been left at liberty to determine its rules of procedure including those for convening its meetings, for the conduct of business thereat and for the rotation of the office of chairman among the members of the council.

While the Authority lays down the general policy of the PTA, it is the duty of the Council to implement such policy. Thus the Council

is the body empowered to establish the commission and the various specialized committees at such times as it considers necessary for the achievement of the aims of the PTA. Furthermore, as a preliminary arrangement the Council shall appoint persons-other than the Secretary-General and members of the Tribunal who are to be appointed by the Authority-to offices in the secretariat.

The subordination of the council to the Authority is further manifested in Article 8. The provision in effect provides that decisions of the Authority and of the Council shall be disseminated by the Authority. This suggests that the Authority shall authenticate decisions of the council. This provision also specifically leaves it to the Authority to determine when such decisions shall come into effect. The Authority does this by way of a "Signification and Publication of Decisions Order."

3. The Secretariat.

Article 9 provides that a Secretary-General appointed by the Authority, shall be the principal executive officer of the PTA. In addition there shall be such other staff appointed by the Council to assist him. An important feature in this provision is that the Secretary-General and his staff will be international officials responsible only to the PTA. The treaty enjoins member states "to respect the international character of the responsibilities of the Secretary-General and the staff of the Secretariat" and desist from seeking to influence them in the discharge of their responsibilities.

The Secretary-General is not only responsible for the administration and finance of the PTA but shall act as the Secretary at all meetings of the Authority and Council where he is also required to

submit reports to the two organs on the activities of the PTA. He is further empowered to undertake such work on his initiative, request member states to furnish him with information as related to the aims of the PTA and to the implementation of the provisions of the treaty. This post, therefore, is a very important post and rightly requires a person of the highest integrity, efficiency and technical competence. The treaty further provides that all appointments in the Secretariat will, as far as it is possible, be equitably distributed among nationals of all the member states.

The Executive Secretary of the Economic Commission for Africa and some of his staff were the interim secretariat of the PTA until December, 1982 when the Authority appointed the Secretary-General and other staff of the PTA.³⁴

While the Authority appoints the Secretary-General for a four-year term he, however, can only be removed from office by the Authority upon the recommendation of the Council. The rationale for this arrangement may be due to the fact that the Council is able to keep a close watch on the working of the Secretary-General.

4. The Tribunal of the PTA:

Article IO establishes the Tribunal which is the judicial organ of the PTA. The statute and other matters relating to it have been prescribed by the Authority.³⁵ Thus the Authority is the appointing authority of the members of the Tribunal. Article 3 of the statute of the Tribunal provides that members of the Tribunal "shall be appointed by the Authority from among nationals of the member states who shall be persons of integrity, impartiality and independence and who fulfill the conditions

required in their respective countries for the holding of the highest judicial offices or are jurists of recognized competence." These persons are, however, required to have an extensive knowledge or experience of industry, commerce or public affairs. Altogether a panel of nine persons are appointed but while sitting, the Tribunal shall consist of the chairman and four members who shall be chosen by lot by the chairman from the said panel provided that no two members of the Tribunal may be nationals of the same member state.³⁶

The jurisdiction of the Tribunal extends to all cases concerning the interpretation and application of the treaty including adjudication of such disputes as may be referred to it by member states. Apart from adjudicating upon contentious cases, the Tribunal is empowered under article 9 of its statute, either on its own initiative or at the request of a member state to give advisory opinion on questions of law arising from the provisions of the treaty. Insofar as access to the Tribunal is concerned, only states may be parties in disputes before the Tribunal.³⁷ It appears that even requests for advisory opinions may only be made by states. Thus unlike the practice in the international Court of Justice,³⁸ where only states may be parties in cases before the court and only international organizations may request an advisory opinion, access to the Tribunal of the PTA has been limited to member states only. But, however, institutions of the PTA are likely to use the Tribunal's jurisdiction under Article 9 of its statute to give advisory opinions on its own initiative. This writer is of the view that organs of the PTA will make use

of this device to get the Tribunal to give advisory opinions whenever necessary. If this device does not work then the denial of access to the Tribunal for organs of the PTA is a serious omission in that such organs may from time to time need guidance and authoritative opinions from the Tribunal on important matters that may arise.

A salient feature in the procedure for the settlement of disputes is indicated in Article 40 of the Treaty. This provision enjoins member states to settle their disputes amicably by direct agreement between the parties concerned. However, in the "event of failure to settle such disputes the matter may be referred to the Tribunal by a party to such dispute..." This seems to imply that member states have not been left any options. In other words there is no optional clause under the statute of the Treaty.³⁹ This lack of an optional clause implies that disputes between states can be considered without any conditions or consent of the other party to dispute. In essence this makes the jurisdiction of the Tribunal compulsory ipso facto. Under international Law no sovereign state can be made to appear before an international tribunal without its consent. Article 40 seems to imply that the other party to a dispute need not consent. Indeed the use of the wording "... may be referred to the Tribunal by 'a party' to such dispute..." supports our view. If the intention had been to have the consent of both parties to a dispute the words "by 'the parties' to such dispute" should have been used. The question of consent has always been a perennial problem in international adjudication and has tended to hinder the effectiveness of a Tribunal when states refuse to consent and thereby denying jurisdiction to a Tribunal.

If the construction we have made of Article 40 is correct then it augurs well for the PTA. This will make its tribunal effective.

But, of course, in practice a state ca not be forced to appear before a Tribunal. It is hoped that when disputes arise, goodwill and common sense will prevail.

With respect to the binding nature of the decisions of the Tribunal, Article 12(3) of its statute provides that "a member state shall take without delay, the measures required to implement a decision of the Tribunal." By implication this means that such decision is binding only as between the parties to the dispute. It would have been better if an award of the Tribunal was made res judicata for all member states in respect of any ruling concerning the interpretation or application of the Treaty. Such a situation would ensure uniformity.

The decisions of the Tribunal shall be final and conclusive and shall not be open to appeal.⁴⁰ Under Article 29(1) of its statute the Tribunal has revisionary jurisdiction but only where a new fact, which is of a decisive nature, is discovered. A pertinent question arises: is the Tribunal bound by its own decisions?

This also raises the important question of precedents. We are of the view that while precedents may be applied, the Tribunal should not necessary be bound by its decisions. The rationale being that the Tribunal's options should not be foreclosed. Can Tribunal, therefore, overturn its previous decisions? The answer to us seems to be in the affirmative on the ground that an adjudicative body from which there is no appeal should not have its hands tied. After all law is dynamic and is not static. In an endeavour to strengthen the effectiveness of the Tribunal, member states are

enjoined under Article 12(1) of the statute, to submit all disputes arising out of the interpretation or application of the Treaty to the Tribunal. They should not employ any other methods of settlement other than those provided by the Treaty. This provision aims to encourage member states to resort to the Tribunal and thus gives it credence so that it does not become a dormant organ in the PTA.

5. The Commission and Technical Committees:

These are the main agencies through which the PTA hopes to achieve its aims. Under Article II of the Treaty, it is provided that the Council of Ministers has the duty to establish at such times as it may deem necessary the following institutions:-

- (i) the intergovernmental Commission of Experts;
- (ii) the Customs and Trade Committee.
- (iii) the Clearing and Payments Committee;
- (iv) the Committee on Agricultural Co-operation;
- (v) the Committee on Industrial Co-operation;
- (vi) the Transport and Communications Committee;
- (vii) the Committee on Botswana, Lesotho and Swaziland.

There is, however, further provision for the establishment of more Committees either by the Authority - on the recommendation of the Council - or by the Council, whenever the need arises. The Commission and the Committees themselves are also empowered under Article II(4) to establish sub-committees as and when they deem necessary. The commission and all the above mentioned committees - with the exception of the committee on Botswana, Lesotho and Swaziland - were established by the Council at its first meeting held in Lusaka, from 22nd to 25th June 1982. These bodies consist of representatives from each member state, viz., they are all

intergovernmental in character.⁴¹

The main function of the commission is to oversee the implementation of the Treaty. It achieves this by submitting reports and recommendations concerning the implementation of the Treaty provisions to the council either on its own initiative or upon the request of the council. Furthermore, any member state may also request it to investigate any particular matter. The commission itself is empowered to request any committee for its report or recommendation. Apart from receiving requests from either the commission or Council for reports and recommendations, each committee is entitled to submit them on its own initiative to the commission.⁴²

Needless to say, as the titles of the commission and committees suggest, these are the organs composed of persons qualified or specialized in specific fields. If they are not so qualified they may have advisers.⁴³ These are the people who deal with the brass-tacks of the aims of the PTA. They are the ones who make arrangements for implementation of the twelve protocols. We shall elaborate on their duties vis-a-vis the protocols in the next chapter.

For practical reasons the Treaty has left it to the commission and the committees to determine their own rules of procedure and to meet as often as necessary. As the seat of each of these bodies has not been named, it is assumed that they will hold their meetings in any member state. It seems, however, that certain member states will be designated as seats of different committees.⁴⁴

Insofar as all organs of the PTA are concerned it is apparent that a hierachical arrangement has been made. At the apex is the Authority which lays down the general policy. The Authority is empowered to make decisions and directives, and these are binding on all those to whom they are addressed.⁴⁵ Immediately after the Authority is the Council which is really, in fact, the main decision-making organ of the PTA. It in turn gives directives to the commission which in turn also gives directives to the committees. The main difference between these four organs is that while the former two can make biding decisions, the latter two can only advise. Needless to say that vis-a-vis the Authority, the Council possesses advisory powers only. With regard to the decisions of the two top organs it is provided under Article 8 that the Authority shall determine the procedure for the dissemination of the same and for matters relating to the coming into effect of such decisions and directives.⁴⁶ In our view this provision serves to give authenticity to the decisions and directions of the Council.

Footnotes:

1. Year Book of the United Nations (Y.U.N.) 1958 pp. 194-195.
2. Y.U.N. (1958) p. 194
3. Ibid, paragraph 5 of the terms of Reference.
Today there are only two associate members (Namibia and the Saharan Arab Republic)
4. Approaches to African Integration, towards Economic Planning and on the African Common Market: Annual Report of ECA to ECOSOC (fourth session), E/CN. I4/I68
5. UN, ECA, Report on the sub-regional meeting on Economic Co-operation in Africa (December, 1965), E/CN. I4/346.
6. Paragraph 2 of the Declaration of Intent and Commitment, Government Printer, (Lusaka) 1978.
7. Other Intergovernmental Negotiating Team meetings were held as follows; Mbabane, Swaziland (Dec, 1978); Addis Ababa (Feb - March 1979); Luanda (June, 1979); Addis Ababa (October, 1979); Gaborone (Jan, 1980); Addis Ababa (May - June, 1980).
8. For text of Treaty see International Legal Materials. Vol. XXI, No. 3 May 1982
9. In this connection the East African Economic Community is a case in point
10. Paragraph 8.
11. Article 3(I)
12. Article 3(3) Emphasis added.
13. Article 3(4)(a)
14. Art. 3(4)(b)

15. Art. 4
16. Art. 29
17. Article 2(2)
18. Burundi became the 13th member to sign the in Treaty in October 1982.
19. Sudan is usually included in sports activities involving Eastern and Southern African States.
20. Art. 37(2), the Authority is the Supreme Organ of the PTA.
21. Art. 48(I)
22. Art 48(2)
23. Art 5(I)
24. Ibid, read with Art. II
25. Art 6
26. The first meeting of the Authority was held from 16 - 17 December, 1982 and Lusaka was proposed by President Arap Moi to be the PTA Hq. (see also Art. II)
27. Art. 9(4)
28. Art. 37(2)
29. Art. 47(2)
30. Art. 6(3)
31. Art. 7
32. Art. 45 provides that the Council hold its first meeting within two months of the provisional entry into force of the Treaty. Under Art. 50 the Treaty entered into force provisionally on December 21, 1981 as it was signed by more than the required seven states (nine signed)
33. Art. 7(3)

34. The first Secretary-General is Mr. Moses Kiingi a Ugandan
35. Art. 10(2)
36. Art .3(3) of the Statute of the Tribunal
37. Ibid, 2(I)
38. Art. 34(I) and Art. 65 of the Statute of the ICJ.
39. e.g, Article 36(3) of the Statute of the ICJ is one such optional clause which is based on conditions of reciprocity.
40. Article 40 of the Treaty and Art. 8(I) of the Statute. Of course states may, if they so wish, go to the ICJ if they are not satisfied.
41. Art. II(3) of the Treaty
42. Ibid, Art II(6)
43. Art. II(3)
44. Document ECA/MULPOC/Lusaka/PTA/CM/I /2.
45. Art. 6 of the Treaty
46. Art. 8

CHAPTER III

TRADE LIBERALIZATION SCHEMES

PART I: PREFERENTIAL TREATMENT

As it has been pointed out earlier, the essential characteristic of a preferential trade area is the partial reduction of tariffs on trade among the constituent countries. This, however, is not the only objective envisaged, as the arrangement aims also at reducing non-tariff barriers to trade. Non-tariff impediments to trade include quotas, exchange control regulations, rules of origin, clearing and payments etc. In addition to trade liberalization, the PTA aims at fostering co-operation in various economic activities such as industrial development, transport and communications and agriculture. In this chapter an analysis will be made of the machinery which has been set-up to achieve these aims and objectives.

I) Protocols of the PTA:

Member States have undertaken to implement the objectives embodied in the Treaty by way of protocols.¹ To this effect twelve protocols have been appended to the Treaty as annexes. The legal significance of these annexes is clearly spelt out in Article 49 of the Treaty which provides that:

"the annexes to this Treaty shall form an integral part of this Treaty."²

The twelve protocols are the following:-

- (i) Protocol on the reduction and Elimination of Trade Barriers;
- (ii) Protocol relating to Customs Co-operation within the PTA;
- (iii) Protocol on the Rules of Origin;
- (iv) Protocol on the Re-export of goods within the PTA;
- (v) Protocol on Transit Trade and Transit facilities;
- (vi) Protocol on clearing and payments arrangements;

- (vii) Protocol on Transport and Communications;
- (viii) Protocol on Co-operation in the field of Industrial Development;
- (ix) Protocol on Co-operation in the field of Agricultural Development;
- (x) Protocol on Simplification and Harmonization of Trade Documents and Procedures;
- (xi) Protocol on Standardization and Quality Control; and
- (xii) Protocol relating to the unique situation of Botswana, Lesotho and Swaziland

Being an integral part of the Treaty, the Protocols are, therefore, binding on member states. In the event of any dispute arising among Member States regarding the application of the treaty, the protocols will be used in interpreting the provisions of the treaty.

To implement these protocols, various technical committees and the one and the only Intergovernmental Commission of Experts have been established under Article II. These bodies are charged with the task of dealing with detailed economic and legal matters of the PTA, which neither the Authority nor the Council of Ministers can easily tackle. The important characteristic of these committees is that representatives should possess the necessary expertise. This is underlined by the provision that "such representatives may be assisted by advisers".³ The Committees which have been set-up so far are as follows:-

- (i) the customs and trade committee;
- (ii) the clearing and payments committee;
- (iii) the committee on agricultural co-operation;
- (iv) The committee on Industrial co-operation; and
- (v) the Transport and Communication Committee.

Each one of the above mentioned committees is charged with the task of implementing one or more of the given protocols. In this respect the customs and Trade Committee has been enjoined to implement the following protocols:-

- (1) Protocol on the Reduction and Elimination of Trade barriers;⁴
- (2) Protocol relating to customs co-operation within the PTA;⁵
- (3) Protocol on the Rules of Origin;⁶ and
- (4) Protocol on Simplification and Harmonization of Trade Documents and Procedures.⁷

The clearing and payments which consists of the Governors of the monetary authorities of the member states shall deal with matters pertaining to clearing and payments.⁸ The protocol on "Co-operation in the field of Industrial Development" on the one hand and the protocol on "Standardization and Quality control" on the other shall be implemented by the Committee on Industrial Co-operation.⁹

Implementation of the protocols relating to "co-operation in the fields of "Agriculture Transport and Communications" shall be undertaken by the committee on Agricultural Co-operation and the committee on Transport and Communications respectively.¹⁰ In so far as implementation of the protocols on "Re-export of Goods within the PTA" and "Transit Trade and Transit facilities" are concerned, no particular committee(s) has been enjoined to perform those functions. This, however, does not present any set-back because it is provided in the protocols themselves that the "Council may make regulations for the better carrying of the provisions of this protocol."¹¹ Furthermore there is a provision empowering the Authority-on the recommendation of the council-to establish more such technical committees as and when the need arises.¹²

(2) Customs Duties:-

The basic objective of the treaty is the gradual reduction and eventual elimination of customs duties and non-tariff barriers to trade conducted among the member states inter-se within ten years from the definitive entry into force of the treaty.¹³ Such reduction and eventual elimination shall be carried out in accordance with the provisions of the Protocols on;

- a) gradual reduction and elimination of customs duties; and
- b) co-operation in customs matters.

It appears, however, from the wording of the treaty that only certain selected commodities shall be the subject of preferential treatment. Indeed there is a specific provision to this effect in Article I5. Under this provision the only commodities which are eligible for preferential treatment are those that satisfy the following conditions, namely:

- a) that they originate in the Member States; and
- b) that they are-during the period of ten years specified in Article I3(2) of the Treaty-contained in the common list.

The drafters of the Treaty were obviously mindful of the difficulties which the question of originality of goods is apt to present. To alleviate that problem an elaborate protocol on the Rules of Origin has been annexed to the Treaty. Consequently Article I5(2) of the Treaty provides that "goods shall be accepted as originating in the member states where they satisfy the conditions prescribed in the protocol on Rules of Origin....."

We shall analyse the provisions and efficacy of the Rules of Origin later.

The Treaty provides for two methods of achieving the liberalization of trade within the area. The first consists of adopting a common percentage for the reduction of customs duties to be applied to each commodity or group of commodities appearing in the common list. The second consists of relaxing or completely eliminating non-tariff barriers in respect of commodities appearing in the common list by way of granting concessions stipulated in Article 5(I) of annex I.

Under Article 7 Member States have undertaken to hold bi-annual multilateral negotiations commencing from the date of the definitive entry into force of the Treaty vis-a-vis commodities to be included in the common list.¹⁴ In this respect Member States are required to submit to the secretariat national lists of commodities which are of both export and import interest to them. On receipt of the national lists the secretariat is enjoined to compile a comprehensive list of all such commodities and together with its own proposals forward the same to the Customs and Trade Committee. The detailed negotiations concerning the commodities to be included in the common list are undertaken by this committee and the results of such negotiations are submitted to the Council of Ministers for approval. When so approved by the Council, the common list shall be attached to the protocol on Gradual Reduction and Elimination of Customs Duties - and shall become binding on all Member States.¹⁵

Each round of negotiations shall last not more than six months. But, in so far as the first round of negotiations is concerned it may commence any time within two years from the date of the

definitive entry into force of the Treaty.¹⁶ This initial longer period is necessary to allow member states to determine those commodities which are of export and import interest to them. Under Article 6(3) Member States are required to give effect to such reduction or elimination within one hundred and eighty days after agreement is reached in pursuance of the provisions of the protocol.

3) Tariff Negotiations

In so far as tariff concessions are concerned, commodities in the Common List are to be classified under various groups of which the basic rates shall be progressively reduced and eventually eliminated. Under the interpretation clause, basic rates mean those rates of customs duties applied by Member States on January 1st, 1983 - the date of definitive entry into force of the Treaty - on which tariff reductions shall be based. As for those other commodities which may subsequently be added to the Common List their basic rates shall be the national rates of customs duties applied by the Member States to such commodities on the date on which their inclusion in the common list is approved by the council.¹⁷ Obviously, the objectives and aims of the Treaty would be futile if member states were to be left at liberty to raise customs duties in respect of commodities already appearing in the common list. To guard against this possibility, member states have undertaken not to increase customs duties in respect of commodities appearing in the common list with effect from the date on which they are included in the common list.¹⁸ One anomaly which may arise in this case is that states may get into the practice of raising their duties on commodities immediately prior to their inclusion in the common list. As a result, they may continue to maintain their previous revenues even after

reducing the tariffs. We can foresee many states especially those with weaker economies-indulging in this practice. This situation is difficult to be remedied because the question of raising tariffs is a matter within the sovereign competence of states. Such a sovereign right can only abdicated by an agreement between the states.

Commodities appearing in the common list are classified under six groups, with corresponding tariff reductions by percentages as shown in Table 1 (p. 48) of the chapter. The percentages shown will be the initial reductions to which all commodities shall be subjected to upon their inclusion in the common list.¹⁹ Thereafter the prevailing preferential customs duties in respect of commodities already in the common list shall be the basic rates on which further tariff reductions shall be based. It is the function of the Council-on the recommendation of the committee-to determine a common percentage on which reduction shall be based in respect of each group of commodities at every round of negotiations.²⁰ There is no indication as to how the Council shall make the determination.

The Treaty makes allowance for the special economic conditions of Djibouti and the Comoros²¹ on the one hand and the unique situation of Botswana, Lesotho and Swaziland.²² These five countries have been granted various exemptions from the application of certain provisions of the Treaty. The Comoros and Djibouti have been exempted from applying the full common percentage reductions on their customs duties for the period of two years commencing on January 1st, 1983. Instead they shall be at liberty to reduce their customs duties by only one-quarter of the rates of tariff reduction applicable to other member states.²³ Thereafter the

TABLE I - TARIFF CONCESSIONS^a

Group	COMMODITIES	REDUCTION BY %
I	Food (Excluding Luxury items)	30%
III	Raw Materials: a) Agricultural b) Non-Agricultural	50% 60%
III	Intermediate goods	65%
IV	Manufactured Consumer goods (excluding luxury items) a) Durable consumer goods (excluding (c) and (d) below b) Non-durable consumer goods (excluding (c) and (d) below) c) Highly competing consumer goods d) Consumer goods for particular importance to economic development	41% 35% 30% 70%
V	Capital goods (including transport equipment)	70%
VI	Luxury goods	10%

(a) Article 4 of Annex I

tariff reductions that shall be applicable to these two countries shall be determined at every round of negotiations.

With respect to Botswana, Lesotho and Swaziland, they have been granted full exemption from the provisions of the entire Treaty.

The unique position of these countries stems from the nature of their dependence on the Republic of South Africa and their limited options for independent economic development. The three countries entered into a Customs Union Agreement with South Africa whereby all customs and excise duties are paid into a common pool managed by South Africa from which they received their share of duties

collected.²⁴ By the terms of that agreement Customs and Excise duty tariffs in force in South Africa are applied to goods imported into the Common Customs Area from countries outside the area. For our purpose the most pertinent provision in that agreement, however, is one which precludes Botswana, Lesotho and Swaziland from joining other regional economic groupings that affect their tariff structure without the consent of South Africa.²⁵ Thus these three countries have been exempted from the application of the Treaty until such time as they sort out their situation with South Africa.²⁸

The Treaty further provides that where no customs duties exist on commodities contained in the common list no customs duty shall be introduced on such commodities when traded within the PTA.²⁷ This is in line with the provisions which prohibit member states from raising customs duties on goods already in the common list. In furtherance of the aim of eliminating tariff barriers the council of ministers is empowered to accelerate the rate of reduction of tariffs notwithstanding the programme as set out in Article 13 of the Treaty. But before arriving at such a decision the council will have to take into consideration the effects which such reduction of customs duties might have on the revenues of Member States.

At the time of writing this paper, the committee has been holding negotiations with a view of arriving at a common list. It is pertinent to observe at this juncture that the Treaty which established the Latin American Free Trade Area (LAFTA) provided for freeing of 25% of the trade among the countries concerned during the first three years. Nevertheless great difficulties were experienced in arriving at a common list of items. One can only hope that this does not happen with PTA.

4. Non-tariff barriers:

These are defined in the interpretation clause to mean those non-tariff measures for the regulation of trade which have the effect of restricting or otherwise controlling the importation or exportation of goods, including import and export licence permits, foreign exchange licencing, temporary restriction or prohibition of certain imports or exports, advance import deposit requirements, specification of import sources, the levying of special charges for the acquisition of foreign exchange licences, advance registration by foreign exporters as a condition for granting import permits and other measures with similar effect.²⁸

The Treaty provides for the gradual relaxation and eventual elimination of non-tariff barriers for those commodities appearing in the Common List. The nature of non-tariff restrictions and the corresponding concessions to be granted are set out in Table II of this chapter. In certain circumstances Member States are allowed to introduce or continue to impose restrictions or prohibitions on goods appearing in the Common List. These circumstances are enumerated in various paragraphs under Article I6 as exceptions. In fact the Treaty borrows the wording contained in Articles XI, XII, XX of the GATT vis-a-vis the exceptions. Such restrictions or prohibitions may be necessary for instance to prevent or relieve critical shortages of foodstuffs; to offset or adjust balance of payments difficulties;²⁹ to protect an infant or strategic industry. They also include those restrictions and/or prohibitions affecting the application of security laws and regulations; control of arms, war equipment and military items; the protection of human, animal or plant health or life; the transfer of gold, silver and precious stones; the protection of national treasures; or the control of

nuclear materials, radio-active products or any other material used in the development or exploitation of nuclear energy.³⁰

The only condition for a Member State imposing or intending to impose such restrictions is simply to "inform the other member states and the Secretary-General of the PTA as soon as possible of such restrictions."^{30a}

Just as in the case of the determination of tariff concessions, the non-tariff barriers applied by the Member States on the date of definitive entry into force of the Treaty shall be those on which concessions in respect of goods appearing in the Common List will be based.³¹ All other rules pertaining to negotiations *vis-a-vis* tariff concessions apply also to non-tariff concessions. The Treaty further provides that in no case shall trade concessions granted to a third country under an agreement with a Member State be more favourable than those applicable under this Treaty.³² One point of concern is that while tariff concessions on commodities appearing on the common list are irrevocable, non-tariff concessions, however, could later be withdrawn.³³ It is submitted that they could only be of limited significance from the point of view of creating new economic activities. This is so because, undoubtedly the most troublesome trade barrier is the import quota (i.e. quantitative restrictions). In spite of lowering of tariffs, the goods will be granted limited entry, by virtue of quantitative restrictions. But then to completely dismantle quotas is a practical impossibility. For instance once a country is faced with balance of payments difficulties, restriction of imports becomes a question of survival. This is, therefore, a perennial problem. The problem assumes sad proportions when restrictions are made on political or other non-economic grounds.

TABLE II

NON-TARIFF BARRIERS AND CONCESSIONS

NON-TARIFF BARRIERS	CONCESSIONS
a) Quantitative restrictions	Preferential Treatment in allocation of Quotas
b) Export and Import licensing	Preferential Treatment in issuing licences
c) Foreign exchange licencing	Preferential Treatment in issuing licences
d) Stipulation of Import Sources	Preferential Treatment
e) Prohibition or temporary prohibition of imports	Exempted where possible
f) Advance import deposits	Preferential Treatment
g) Conditional permission for imports	Exempted
h) Special charges for acquiring foreign exchange licences	Preferential Treatment

5. Dumping:

The Treaty under Article I7 prohibits the practice of dumping goods within the Preferential Trade Area. Paragraph (2) of the said provision defines dumping to mean the transfer of goods originating in a Member State to another member state for sale at a price lower than the comparable price for similar goods in the member state where such goods originate and under circumstances likely to prejudice the production of similar goods in the importing country.

It is usually pointed out that there are four types of dumping in international trade, namely:

- a) Price dumping;
- b) Social dumping;
- c) Service dumping; and
- d) Exchange dumping.

Social dumping arises where a country uses low priced labour, e.g. forced labour or pays low wages such that the factors of production are reduced thereby resulting in low priced products.³⁴ Service dumping occurs where a government uses subsidies or other discriminatory practices to enable an exporter through, for instance, minimal freight rates so that he is able to offer his products in a foreign market at low prices. And exchange dumping occurs where governments manipulate the exchange rates to achieve cost advantage for exports. But whatever tag we give to each specie of dumping the end result is always the same and that is that the sale of goods in an importing country is at prices lower than the comparable prices charged for similar goods in the exporting country. Under the GATT, however, only price dumping has been recognized with the result that there is no remedy

for these other types of dumping. The GATT provides two remedies for price dumping, namely, the imposition by the affected country of either,

a) an anti-dumping duty

or

b) a countervailing duty on the

imported commodity in question to equate its prices with that of domestic prices.³⁵ Unlike the GATT, the PTA Treaty is silent on the point of measures which an injured member state may take against another member state practicing dumping. The Treaty merely prohibits and does not provide any remedy. It appears that insofar as those commodities NOT appearing on the common list are concerned, an injured state if a member of the GATT, could invoke the remedies provided in the GATT without breaching the Treaty.³⁶ But to allow a member state to impose either anti-dumping or countervailing duties on commodities appearing on the common list would certainly amount to a breach of Articles I3(2) and 6(I) of the Treaty and Annex I respectively. These two provisions as we saw prohibit members from raising customs duties on commodities appearing in the Common List. On the other hand, the PTA cannot sit idly and watch helplessly while a member state suffers. There is only one instance when a member can be suspended and cease to enjoy the benefits provided for under the Treaty. This can happen where a member state is in arrears for more than one year in the payment of its contributions for reasons other than those caused by public or natural calamity or exceptional circumstances that gravely affect its economy. Then by a resolution of the Authority it can be suspended.³⁷ It seems, therefore that the only recourse available to an aggrieved state is to refer the matter to the Tribunal to settle the dispute.³⁸

Albeit, GATT does allow countervailing and anti-dumping duties and it is submitted that an injured party should be entitled to impose them. For justice to be seen to be done a delinquent state should not be seen to take advantage of treaty provisions for the perpetuation of an injustice. Furthermore, while member states within a regional grouping enjoy exemption from GATT obligations, they cannot be allowed to engage in practices which go against world trade rules. It is, therefore, submitted that if a GATT member within the PTA fails to get redress from PTA, it should be entitled to seek recourse to GATT if the offending state is also a GATT member.

6. Rules of Origin:

The Treaty explicitly provides that the only commodities that shall be eligible for preferential treatment are those that originate in Member States.³⁹ To determine the origin certain conditions must be satisfied. These conditions are set out in the protocol on the Rules of origin under Rule two. Thus goods shall be accepted as originating from member states if:

- a) they have been produced in the member states by enterprises which are managed by a majority of nationals and are subject to at least 51 per cent equity holding by nationals of the member states or a Government or Governments of the member states or their institutions;
and
- b) they are consigned directly from a member state to a consignee in another member state;
and
- c) they satisfy one of the following criteria; i.e. :
 - i) they are wholly produced in the member state; or
 - ii) where imports are used, that the c.i.f. value of the

- the imports does not exceed 60 per cent of the total cost of materials used in the production; or
- iii) where imports are used, the value added resulting from the process of production accounts for no less than 45 per cent of the ex -factory cost. If, however, the product is of particular importance to economic development to the member states then the value added may amount to no less than 25 per cent of the ex-factory cost. Similarly, if the product is consumed in large quantities and is in short supply in the PTA the value added may be as less as 30 per cent of the ex-factory cost; or
- iv) they have undergone such substantial transform as a result of which they become classifiable under a CCCN tariff⁴⁰ heading other than the CCCN tariff heading under which they were imported and are contained in either "Lists A" or list "B".

With respect to the amount of equity holding in the enterprises referred to above, the Treaty makes allowance for those Member States in which participation by nationals is still minimal due to historical reasons. For instance there are certain countries like Zimbabwe which until recently were under oppressive regimes. In this connexion, therefore, the following countries have been granted certain temporary exemptions with effect from the date of definitive entry into force of the Treaty:

- I. Zimbabwe; during the first two year period the amount of equity holding shall not be less than 30 per cent while for the next successive period of two years not less than 40 per cent and at the end of the fifth year (from January, 1st, 1988) be not less than 51 per cent.⁴¹

- the imports does not exceed 60 per cent of the total cost of materials used in the production; or
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- I. Zimbabwe; during the first two year period the amount of equity holding shall not be less than 30 per cent while for the next successive period of two years not less than 40 per cent and at the end of the fifth year (from January, 1st, 1988) be not less than 51 per cent.⁴¹

2. Mauritius- During the first two years 30 per cent while for the next successive period of two years be not less than 40 per cent and the end of the sixth year (ie 1989) be not less than 51 per cent.⁴²

3. Botswana, Lesotho and Swaziland - during the first five years the equity holding should be not less than 30 per cent and thereafter the council of minister shall determine the amount of equity holding.⁴³

4. The Comoros and Djibouti- during the first five years the equity holding should amount to no less than 25 per cent and thereafter the Council shall determine the amount of equity holding.⁴⁴

Products which shall be regarded as wholly produced in the Member States are enumerated in Rule 3. Mere packing, assembly of components or simple mixing of ingredients imported from outside the PTA, are not processes which would confer origin.⁴⁵ On the other hand, however, raw materials or semi-finished goods originating, in accordance with the provisions of the protocol, in any of the member states and undergoing processing in any one or more member states, shall be deemed to originate from the member state where the final process of manufacturing took place.⁴⁶

Finally documentary evidence certifying that the goods originate from a member state is required to be produced by every exporter in the prescribed manner.⁴⁷

In order to forestall false documentation such certificates have to be authenticated by an authority designated for that purpose by each Member State.⁴⁸ Secondly where a producer himself is not an exporter, he is required to furnish the exporter of the goods a declaration that the goods originated in the Member State. In case of doubt the authenticating authority may require verification of the statement contained in the certificate in which case the form prescribed in appendix III shall be utilized.

The possibility of exporters or producers making untrue claims is obviously expected and as such the Treaty enjoins member states to pass necessary legislation to deal with such instances.⁴⁹ If the complaint is raised against another member state, the offended member state may bring the matter to the council for appropriate action.⁵⁰

In order to achieve the objectives under the protocol, honesty on the part of all concerned is necessarily vital. It is very tempting for exporters, be they individuals or Governments, to try and make quick foreign exchange by re-exporting goods imported from elsewhere. Multinationals may also use individuals to export their goods.

7. Re-exportation of goods:

Under Article I9, member state undertake to facilitate trade in re-export of goods. The main point is that re-exports are not eligible for preferential treatment.⁵¹ The Treaty on the one hand, explicitly prohibits re-export of goods imported from South Africa to a member state and also, on the other hand, prohibits the re-export of goods imported from a member state to South Africa.⁵² Furthermore, a member state from which goods, to be

re-exported, originate may also object to their re-export.

Where re-export is done according to the Treaty, it is provided that if it so done within twelve months from the date the goods are received in the importing state, the exporter is entitled to a refund of all such import duties less import subsidies, if any, if he re-exports the goods in an unused condition.⁵³ In the case of the Comoros and Djibouti they shall, during the first five years from January 1st, 1983, be required to refund only 50 per cent of the import duty charged less import subsidies, if any.

The Treaty has provided for sanctions against anyone who re-exports goods to or from South Africa. This also includes re-exportation of goods originating from member state which objects to their re-export. The breach of this provision will result for the goods in question to lose the benefits of transit facilities and other privileges provided for in the Treaty.⁵⁴

It must also be pointed out that Member States have undertaken to grant each other freedom of transit through their territories of goods proceeding to or from another member state through their territories.⁵⁵ Landlocked countries are certainly going to benefit immensely from this provision. One cause of concern, however, is that three member states which have ports, namely Tanzania, Mozambique and Angola have not yet acceded to the Treaty. Probably their reluctance may be due to their concern about the anticipated loss of revenue from handling and other related port charges.

8) Clearing and Payments:

The main objective of regional economic co-operation is the freeing of trade among the constituent countries. A perennial problem, however, which has continuously faced developing countries in international trade is the question of foreign exchange reserves with which to purchase imports. It is no secret that they have not always had enough of it. The cause of this situation is that whenever demand for their exports falls and the consequent fall in prices on the international market, there is little foreign exchange to be realized. The cumulative effect of this state of affairs is huge deficits in their balance of payments. They thus resort to external borrowing so that they may import while hoping that at some point in time in future, demand for their exports may pick up. Sad to say that such hope still remains dreams. Many of the countries in the PTA are burdened with a crippling debt burden. Obviously intra-regional trade will not be stimulated to any large extent if member states lack the foreign exchange with which to import from each other.

The founding fathers of the PTA were very much alive to this bottleneck. They have thus come up with what may ease this problem and expand trade inter se without the inhibition of foreign exchange. Under Article 22 of the Treaty Member States have undertaken to promote the goods and services within the PTA by:-

- a) encouraging the use of national currencies in the settlement of eligible transactions between themselves;
- b) establishing adequate machinery for the settlement of payments among themselves;
- c) reducing as much as possible the use of foreign exchange by the member states in their inter-state transactions; and

- d) consulting regularly among themselves on monetary and financial matters.

In this endeavour a protocol on clearing and payments has been provided which sets out the manner in which the aforementioned objects will be achieved.⁵⁶ To implement this protocol is the clearing and payments committee which consists of all Governors of the monetary authorities of the member states. By monetary authority is meant a central bank or any other institution authorized by a member state to issue currency within its territory.⁵⁷ At a time, to be determined by the said committee, a Clearing House for the multilateral clearing and settlement of payments in respect of eligible transactions among the Member States shall be established. As an interim measure, however, the committee may designate a central bank of a member state to perform the functions of the clearing House. The functions of the clearing House are set out as follows:⁵⁸

- a) to undertake clearing operations in respect of eligible transactions among member states;
- b) to regulate and oversee transfers of payments expressed in the Unit of Account of the Preferential Trade Area (UAPTA) and made in pursuance of eligible transactions;
- c) to facilitate the speedy transfer of payments between the member states, the efficient use of credit facilities available through the Clearing House and the use of national currencies expressed in UAPTA for transactions made within the framework of the PTA; and
- d) to undertake such other activities as the council of ministers may on the recommendation of the committee determine.

Undoubtedly it would certainly be too much to expect from the Governors of the central banks if they were to handle the day to day running of the Clearing House. So the day to day running of the Clearing House will be dealt with by a staff which shall be subject to such regulations as the committee may determine. The central bank of each member state shall act as the agent of the Clearing House.

With respect to the use of national currencies, the committee is enjoined to establish a UAPTA and determine its value.⁵⁹

Thereafter it is the duty of the Clearing House to compute and determine from time to time the par value of each national currency in terms of the UAPTA and inform the central bank of the each member state accordingly. The member state is required to communicate to the Clearing House the official exchange rate and any subsequent changes thereto, of its currency against its reference currency.

The settlement of payments in national currencies, however, is limited to eligible transactions only. By eligible transaction is meant all monetary and financial transactions between member states relating to trade in all goods and services affected by the provisions of the Treaty. This, therefore, means that it is only those commodities appearing in the Common List which shall be affected by such an arrangement. Thus the extent to which national currencies will be used and the resulting expansion in the volume of trade inter se, will necessarily depend on the magnitude of the Common List, viz. number of goods or commodities appearing therein.

The clearing of payments vis-a-vis eligible transactions among the members shall be undertaken on a multilateral basis.

Provision has, however, been made for those member states which are unable to enter on a multilateral basis of transactions upon the definitive entry into force of the Treaty. Such countries have been allowed to enter into bilateral clearing and payments arrangements with other member states for the duration of a transitional period not exceeding five years from the definitive entry into force of the Treaty. The relevant provision provides thus:

"bilateral clearing and payments arrangements means arrangements entered into between monetary authorities of two member states whereby payments for goods and services are, within defined limits, settled in national currencies of the two countries and the excess of which is settled in convertible currencies."

It appears from the foregoing that this latter arrangement is for the benefit of those member states faced with relatively more acute balance of payments problems and who, perhaps, need to earn more foreign exchange.

The committee shall periodically determine a period, called the "transactions period", during which settlements may be made in national currencies. The debit and credit positions arising from multilateral clearing shall be determined thereafter for the settlement to be made by each debtor monetary authority. At the end of the transactions period there will be another period- "the settlement period"- again determinable by the committee during which settlement of outstanding debit balances shall be made by

debtor monetary authorities. The importance of these periods lies in the fact that delay or failure to settle the payments within the stipulated periods will attract certain sanctions. For instance, net balances outstanding at the end of each transaction period shall be settled in convertible currency by the debtor monetary authorities within the settlement period.⁶²

Essentially this implies that national currencies will only be acceptable during the transactions period. Delay in settling debts within the stated periods is considered as a breach of the Protocol and will attract such daily interest at rates to settle outstanding debts will attract stiffer sanctions which provides, inter alia, suspension of the delinquent monetary authority from the Clearing House by the Council of Ministers - on the recommendation of the committee- for such period as it may determine.⁶³ A pertinent point to note, vis-a-vis suspension, is that in practice it may prove difficult to suspend an erring monetary authority because of the decision-making procedure of the council of ministers. As we have noted earlier, decisions of the council of ministers are to be taken by consensus,⁶⁴ and as such it will certainly be difficult to arrive at a unanimous decision. We are of the view that referring this matter to the council of ministers will cause delays in arriving at decisions especially with the minister from the defaulting state present. A more efficacious procedure would have been to empower the committee itself to make the decision.

The whole system of using national currencies in intra-state trade is not without problems and one can foresee many. First

and foremost, the settlement of debts in intra-state transactions by use of national currencies is to a large extent akin to the barter system of trade. For barter system to succeed there has to exist, what in economics is termed a "double coincidence of wants," - viz. each country must offer something that the other desires.⁶⁵ The problem then is the method of determining the equivalent value of the goods to be exchanged. It can be improved by the use of a medium of exchange acceptable in all markets for all kinds of goods. On the international markets, what is used, is known as foreign exchange, viz convertible currencies such as the US dollar or the British sterling. For the PTA, the UAPTA is not a medium of exchange, it is a means of indicating prices- that is the rate at which one commodity could be exchanged for another. Since foreign currencies are required only for making payments to the countries that issue them, the currency of a member state realized from its exports will only be usable in the markets of the issuing state. This means a member state may earn from its exports perhaps more currency than it requires for the purchases it wishes to make in that currency. Thus a "double coincidence of wants" must exist. An obvious solution would be possible if a surplus of one currency can be exchanged for an additional supply of another currency within the PTA. The protocol is silent on this aspect. Another possible solution would be to require the issuing monetary authority to exchange the surplus into a convertible currency. But such an alternative would be inconsistent with the objective of the protocol. Be as it may, it appears, however, that the founding fathers recognised the problem pointed out. Article 6 (2) of the protocol provides that the committee shall determine the maximum limits of net debit and credit positions for each monetary

authority on the basis of the volume of trade of each member state within the PTA.

The second problem which may well arise is that member states may resort to simply printing more of their currency with which to purchase imports within the PTA. If this should occur it will mean that the supply of the currency of such country on the PTA market will be greater than the demand for it. And consequently, that currency will depreciate in terms of others. The effect of such a situation will be that imports in that country will be dearer and at the same time its exports will be cheaper. Obviously, such a practice will be detrimental to the delinquent state.

In the long run, however, member states will certainly benefit by the system of UAPTA. This is so because the Common List is to contain commodities which are both of import and export interest to member states.⁶⁶ Therefore, the question of "double coincidence of wants" has been taken care of.

The ultimate aim is the establishment of a payments union which would, inter alia, provide machinery for the provision of assistance to member states in difficulties as regards their balance of payments as a result of the implementation of the Treaty.⁶⁷

Furthermore, there is a provision that the Clearing House may, on approval by the committee, negotiate and conclude agreements on special clearing arrangements or monetary co-operation with monetary authorities or payments unions of third world countries.⁶⁸

Such an arrangement with other third world countries, such as India, can certainly go a long way in expanding trade between the PTA and the other third world countries.

7. Simplification and Harmonization of Trade Documents and Procédures

In stricto sensu though not a barrier to trade, the volume of documents, formalities, administrative processes and other related procedures do cause delay to trade. In view of the anticipated expansion in the volume of trade among the member states, it is only logical that trade documents and procedures be simplified and harmonized. In this respect member states have undertaken to do so under the aegis of the protocol on Simplification and Harmonization of Trade Documents and Procedures.⁶⁹ The method of achieving this objective is by:

- a) designing standard trade documents;
- b) reducing to a minimum the number of trade documents;
- c) reducing to a minimum the number of institutions required to handle documents referred to above in (b); and
- d) harmonizing the nature of the information to be contained in documents referred to above in (a)⁷⁰

In fact, the member states have declared themselves prepared to ignore or forgo international requirements *vis-a-vis* trade procedures that do not suit conditions prevailing among themselves by adopting common standards of trade procedures within the PTA.⁷¹ The committee responsible for the implementation of this protocol is the Customs and Trade Committee. In particular the committee has been enjoined to deal more with those documents and procedures relating to the following:⁷²

- a) customs operations pertaining to the exportation, re-

- exportation and importation of goods;
- b) the collection and remission of customs duties;
- c) export and import licensing;
- d) foreign exchange control;
- e) clearing and forwarding of goods by agents;
- f) insurance of goods and transit traffic bonds;
- g) operations relating to transit trade;
- h) transport operations and licensing of carriers; etc.

This protocol is certainly very necessary to curtail delays and beauracratc tendencies.

PART II CO-OPERATION IN OTHER FIELDS

The Treaty provisions discussed above are all dealing with matters which have a direct bearing on trade per se, their basic aim being both to increase the volume of trade and facilitate its flow through the reduction of barriers, better trading arrangements and improved payment mechanisms. The crucial fact, however, is that there can be no real increase in trade unless there is a wider range of goods to trade in. In this respect the Treaty contains provisions pertaining specifically to key productive sectors of the economy, their aim being to foster closer co-operation in the creation of viable production capacities in agriculture and industry as well as related infrastructural facilities.

I) Industrial development:

Under Article 24 the Treaty provides for co-operation in the field of industrial development to promote collective self-reliance, complementary industrial development, the expansion of trade in industrial products and provisions related to training facilities within the PTA. In this connection a protocol on

co-operation in the field of Industrial Development has been provided.⁷³ This protocol specifically aims to;

"promote self-sustained industrialization within the PTA designed to expand trade in industrial products and effect structural transformations of industries for the purpose of fostering the overall social and economic development of the member states."⁷⁴

Certain priority areas for co-operation have been identified. These include the establishment of multinational enterprises in which all or some of the member states have an interest; the adoption of common industrial programmes directed towards multi-sectoral industrialization; the rational and full use of existing industries; co-operation in specific industrial projects including their financing; industrial research, training and exchange of technological information.

Unlike in developed countries, the industrial map in Africa is relatively empty and the task is not so much the freeing of trade in what is already being produced but building up on a joint basis, new industry. One author has written that, "if there is some scope for increasing intra-African trade through the reduction of barriers, better trading arrangements and improved payment mechanisms, the essence of the matter is that there can be no real increase in trade unless there is a wider range of goods to trade in, especially industrial."⁷⁵ It is the wider range of goods to trade in that has made the European Economic Market such a model of success.

The PTA has placed particular emphasis on the development and

on the development of "consumer goods industries for the purpose of obtaining the economies of scale, reducing external dependence for the supply of industrial products and achieving complementarity of the economies of member states."⁷⁷ One likely problem that may arise vis-a-vis the question of sectoral industries is the question of the localization of industries, especially the envisaged multinational enterprises. One writer on regional co-operation in Latin America has pointed out that "the contradiction between optimum industrial localization (more efficient and accelerated regional growth) and equitable and equal distribution of benefits (i.e. preferential growth of the less developed countries)"⁷⁸ may be a source of conflicts.

Indeed, there is always a tendency towards industrial concentration in the more developed countries within a region for the purpose of achievement of the maximum of efficiency and production. Such a tendency as was evidenced in the now defunct East African Economic Community (comprising of Tanzania, Uganda and Kenya) may lead to the sharpening imbalances and frustration of the lesser developed countries. On this important question the protocol provides that the member states shall determine the guidelines relating to the establishment, inter alia, of "the location of multinational industrial enterprises and the criteria to be applied in that respect."⁷⁹ Regional co-operation is a very complicated proposition because there must be a very considerable amount of political agreement, so wrote Jean-Pierre Brunet in 1965.⁸⁰ In 1977 Parkinson wrote that industrial development "though receiving some encouragement on the technical level, was defeated on the political plane in the Central American Common Market".⁸¹ The Treaty establishing the Central American Common Market

establishment of:

- a) large scale capital and intermediate goods industries;
- b) food and agricultural industries;
- c) consumer goods industries for the purpose of obtaining the economies of scale;
- d) multinational enterprises;
- e) joint industrial supporting institutions; etc.

The multinational industrial enterprises envisaged are those that would require the combined markets of more than one member state to be profitable and which would require for their consumption large quantities of natural resources or raw materials of the member states which are either exported to third countries or are unused.⁷⁶ There are many obvious advantages of such multinational enterprises. The most obvious being the provision of substantial employment or reduction of unemployment within the member states.

The adoption of common industrial co-operation programmes directed towards rapid self-sustained, multi-sectoral industrialization will certainly go a long way in achieving collective self-reliance within the PTA. Multi-sectoral industrialization envisages complementariness; thus this would provide guaranteed markets for all and lessen competition among the member states. It cannot be over-emphasized that the criteria for success in this venture is not only the ready flow of raw materials and other primary commodities among the members but also the effective demand for manufactured goods particularly those requiring significant scales of economies. On this aspect the PTA had placed emphasis

made provision for new industries to be created and located in the most suitable country and not in all of them.

2. Agricultural Development:

Under Article 25 of the Treaty, member states of the PTA have recognized the vital role of agricultural development, more particularly the production of food. Thus under the protocol on co-operation in the Field of Agricultural Development Member States have undertaken to ensure within the PTA adequate supply of food by the promotion of agricultural development that would lead to the production of surpluses of food and storage facilities; to co-ordinate their activities relating to the export of crops, livestock, livestock products fisheries, and forest products⁸²; and to co-operate in the promotion of agro-industries in specific fields.⁸³ An important function of the committee responsible for the implementation of this protocol viz, the committee on Agricultural Development, is the establishment of "an export research centre which shall undertake studies on the development of existing markets, the exploration and establishment of new markets and the securing of stable prices for specific agricultural commodities".⁸⁴ It is only after such studies have been carried out that a common agricultural policy on the scale of the European Economic Community (EEC) can be achieved.

The Common Agricultural Policy of the EEC is based on a system of unified prices in the community, identical guarantees to all producers, preferential access for regional agricultural producers to European consumer markets, etc.⁸⁵ Although the Common Agricultural Policy (CAP) of the EEC is criticized for its protectionism which is excessively rigid in limiting the access

of agricultural commodities from outside the community, it has a number of advantages. Some of the advantages of the CAP include the effective protection offered to European agriculture against the rest of world and the rapidly increasing productivity in European agriculture.⁸⁶ Admittedly, although the potential in agriculture is there in the PTA, the levels reached are not yet comparable to that of the EEC. Thus the main pre-occupation of the PTA is firstly to achieve self-sufficiency in food. In his address to the Summit Conference of the Heads of States and Governments of member states held on December 21st, 1981 (the date of the signing of the Treaty) in Lusaka, Kenyan President Arap Moi observed that "some of our nations in the subregion have at least occasional surpluses of cereals. Unfortunately, these surpluses are often sold to industrialized nations while at the same time other member states are importing food from other continents."⁸⁷ President Moi advocated that the committee should monitor the production, consumption and storage of cereals throughout the subregion, forecast surpluses and shortages and advise on the orderly trade of cereals among all member nations. Moi's observations are largely true. It is common to see member states exporting grains to Asia, while others are importing the similar grains from North America or Australia. A common agricultural policy based on the EEC scheme would be most satisfactory.

3) Transport and Communications

Most developing countries are ill-served by transportation and other links in their regions. The absence of all weather roads and other connecting links has been a major restraining factor in promoting greater inter-state trade. Suffice to say,

however, compared to South East Asia, transportation by road and rail is not a very serious problem at least in the Southern States of the PTA. Be that as it may, member states have, nevertheless, undertaken to evolve co-ordinated and complimentary transport and communication systems; to improve and expand their existing ones and to construct new ones as a means of furthering the physical cohesion of member states and the promotion of greater movement of persons, goods and services within the PTA.⁸⁸

With respect to road transport member states have undertaken to ratify or accede to the United Nations Conventions on Road Traffic and Road Signs and Signals of 1968, and take such steps as may be necessary to implement their provisions.⁸⁹ In addition they have undertaken to adopt common rules, regulations, standards and documents pertaining to various aspects of road transport. Most importantly they have undertaken not to discriminate against each other (as used to happen) viz-a-viz the operations of inter-state transport operations.

Most of the freight transport in the sub-region is by railway. It is the most efficient and cheapest means (apart from maritime transport). To improve this mode of transport member states have undertaken to institute measures to facilitate the deployment of railway rolling stock ; the transfer of railway wagons used for inter-state transport without discrimination; the allocation of adequate storage facilities and the harmonization and adoption of common rules, regulations etc.⁹⁰

On air transport there is nothing much to expand hence they have merely agreed to standardize their airport facilities and civil

aviation rules and regulations by implementing the provisions of the Chicago Convention on International Civil Aviation. In addition they have undertaken to grant each other not only preferential treatment in the granting of air traffic rights and in the use of maintenance facilities but also to charge the same rates relating to scheduled air transport services inter'se⁹¹. This is obviously in a bid to reduce competition among themselves. Similar undertakings have been taken vis-a-vis maritime, inland waterways and harbours. In so far as harbours are concerned many of the benefits should certainly accrue to the seven Land-locked Member States in the sub-region (Botswana, Lesotho, Malawi, Swaziland, Uganda, Zambia and Zimbabwe). Needless to say these benefits will depend on the co-operation of those countries that can offer access to harbours.⁹²

For the Southern African States the question of transport is very crucial. This is so because the majority of them, viz. the land-locked countries namely, Botswana, Lesotho, Malawi, Swaziland, Zambia and Zimbabwe depend heavily on the transport network of an unfriendly Republic of South Africa for their trade links outside the African Continent. In this connection another regional organization, the Southern African Development Co-ordination Conference (SADCC) comprising Angola, Botswana, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe was created in April, 1980. SADCC had drawn up ambitious plans with greatest emphasis on the transport sector. The main objective of SADCC, however, is to reduce dependence on South Africa.⁹³

Footnotes:

- I. Article 3(4) of the Treaty
2. Emphasis added
3. Art. II(3)
4. Annex I, Art. I
5. Annex II, Art. I
6. Annex III, Art. I
7. Annex X, Art. I
8. Annex VI, Art I
9. Annex VII, Art I and Annex IX, Art. I
10. Art I of Annex IX, and Art I of Annex VII
11. Art 6 of Annex IV and Art. 12 of Annex V respectively
12. Art II(2) of the Treaty
13. Arts. 12(a) and 13(3) of the Treaty.

Note: By virtue of Art 50 the Treaty shall enter into force provisionally when signed by or on behalf of seven high contracting parties and definitively upon ratification by at least seven signatory states. The Treaty entered into force definitively on January I, 1983.

14. Annex I.
15. Ibid, Art 3(I)
16. Ibid, Art 7(3)
17. Ibid, Art 7(6)(b)
18. Art 13(2) of the Treaty and Art. 6(I) of Annex I.
19. Art. 4(2) of Annex I.
20. Ibid, Art. 7(6)(a)
21. Art. 30 of the Treaty
22. Art 3I of the Treaty
23. Art. 4(3) of Annex I.
24. Customs Union Agreement Between South Africa and Botswana, Lesotho and Swaziland of 1969. UNTS 1969
25. Ibid, Art. 19

26. Art. 30 of the PTA Treaty.
27. Art. 4(4) of Annex I.
28. Art. I of Annex I
29. Needless to say, for developing countries, the balance of payments problem is a perennial one and member states of PTA are no exception. Thus these restrictions will necessarily be a perpetual feature in the PTA. Under GATT by Article XII (4)(b) GATT reviews annually all restrictions applied thereunder by contracting parties, such that should any inconsistency in the restrictions arise viz-a-viz the provisions of Articles XII and XIII, such inconsistency shall be suitably modified. And if the state applying the restrictions does not modify them accordingly, the injured state is entitled to be released from GATT obligations with respect to the offending State. These provisions are there to check unwarranted continuance of imposition of quantitative restrictions. Under the PTA no such sanction is provided for.
30. Art I6 of the Treaty.
- 30.a. Ibid, paragraph 7
31. Art 6(2)(b) of Annex I
32. Art I8(2) of the Treaty.
33. Art I6 of the Treaty
34. South Africa through its apartheid policies is one such country which uses low priced labour
35. Art VI of the GATT
36. If, however, an injured state is a non-GATT member it may resort to similar measures. It can not obviously just sit and do nothing about the situation.
37. Art. 37(2) of the Treaty.
38. Art. 40 of the Treaty

39. Art. 15(2) of the Treaty
40. CCCN = Customs Co-operation Council Nomenclature
41. Rule 2(2)(d) of Annex III
42. Ibid, Rule 2(2)(b)
43. Ibid, Rule 2(2)(c)
44. Ibid, Rule 2(2)(a)
45. Rule 5
46. Rule 2(4)
47. Appendix I of Annex III
48. Ibid, Appendix II
49. Rule 2(I)
50. Rule 2(3)
51. Art. 2(2) of Annex IV
52. Art. 19(3) of the Treaty and Art. 3 of Annex X
53. Art. 4 of Annex IV
54. Art. 19(4) of the Treaty
55. Art. 19(2) of Treaty and Protocol on Transit Trade (Annex V)
56. Annex VI
57. Ibid, Art. I
58. Art. 4(2) of Annex VI
59. Ibid, Art 5(I)
60. Ibid, Art I, emphasis added
61. Ibid, emphasis added
62. Ibid, Art. 6(5)
63. Ibid,
64. Ibid, Art. 6(6)
65. J.L. Hanson, "Monetary Theory and Practice," (McDonald & Evans, London, 1978)
66. Supra, Annex I.
67. Art. II of Annex VI
68. Ibid, Art. 8

69. Art. 26 of the Treaty and Annex IO
70. Art. 2 of Annex X
71. Ibid, Art 3(c)
72. Ibid, Art 5(I)
73. Annex VII
74. Ibid, Art 2(I)
75. A.F. Ewing, "Prospects for Economic Integration in Africa",
Journal of Modern African Studies, Vol. 5, 1967 at page 54.
76. Art. 4 of Annex VIII
77. Ibid, Art. 2(2)(a) (iii)
78. Alicia Puyana, "Latin America; Lessons of the strength and
weaknesses of Regional Co-operation". (Regionalism and the
New International Economic Order), Edited by Nicol, Echeverria
and Peccei, (Pergamon Press, New York, 1981) p. 6I
79. Art. 4(2)(b)(i) of Annex VIII
80. D. Thompson (Ed); The Expansion of World Trade, "Regional
Co-operation between Developing Countries", (British Institute
of International Co-operation and Comparative Law, London,
1965.)
81. International Economic Integration in Latin America," Year
Book of World Affairs, Vol. 3I, 1977 at page 255.
82. Art. 3 of Annex IX
83. Ibid, Art. 4
84. Ibid, Art. 6
85. Arts. 38-47 of the Treaty of Rome
Lipstein; The Law of European Economic Community (Butterworths,
London, 1974)

86. D. Nicol, L. Echeverria, A. Peccei (Eds), Regionalism and the New International Economic Order, ch. 8 (Article by Jacques Bourrinet) (Pergamon Press, New York, 1981).
87. Special African Trade Bulletin on the PTA (Supplement) (September, 1982 ECA) page I9.
88. Art. 23 of the Treaty and Annex VII
89. Art. 3 of Annex VII
90. Ibid, Art. 4
91. Art. 5
92. Countries with harbour facilities include Angola, Kenya, Mozambique and Tanzania.
93. For a discussion on SADCC see chapter IV of this study.

CHAPTER IV

A COMPARATIVE ANALYSIS

From the history of regional Co-operation one can find several parallels from which certain conclusions about the PTA can be drawn. In this endeavour one should look **at some of the** organizations in Latin America, Europe and Africa. This is with a view to analyse the objectives, institutional framework and trade liberalization schemes of these other arrangements and see how far their successes and/or failures may be a lesson for the PTA.

A. Regionalism in Central and South America

I The Central American Common Market (CACM):

This arrangement was comprised of five Central American countries, namely, EL Salvador, Guatemala, Nicaragua, Costa Rica and Honduras. It was brought into existence by the General Treaty for Central American Economic Integration (known as the Treaty of Managua) of 1960. The primary objective was the creation of a common market within five years by the liberalization of existing trade inter partes and establishment of a standard customs tariff. Further objectives were the joint organization of integrated industrial development in the region, the establishment of a Central American Bank for Economic Integration (CABEI) and a Clearing House. The value of intra-area exports within the region increased from 33 million dollars in 1960 to 290 million in 1970.^I The regime for integration

industries provided for the assigning of particular industries to each Member State. These were the industries which would require access to the Central American Market in order to operate under reasonable economic conditions. Thus the Common Market was to be a guaranteed market for each integration industries.

The institutional set-up consists of the Central American Economic Council as the supreme organ.² This is composed of Economics Minister of each contracting party. The function of this organ is essentially policy making and general direction of the Treaty. As for the taking of decisions, the Council decides unanimously at the outset whether the matter should be settled by the concurring votes of all its members or by a majority vote.³ As is always the case when decisions are to be based on unanimity, progress is always slow. This has been a major stumbling block in CACM.

The next organ is the Executive Council comprising of Governmental delegates nominated on an ad-hoc basis. Its functions are to lay down measures that are necessary to ensure the fulfillment of the directives as outlined by the Ministers. Unlike the Economic Council, the Executive Council reaches its decisions by majority vote.⁴ Just as in the case of the PTA there is also under CACM a permanent Secretariat,⁵ whose function is to watch over the application of the Treaty and related instruments and to initiate research projects. The procedure for the settlement of disputes is provided for under Article 24 of the Treaty; viz, disputes are to be settled amicably through the Executive Council or the Central American Economic Council. If agreement cannot be reached, the States concerned submits the matter to arbitration. For the purpose of constituting the Arbitration Tribunal each Member State nominates to the General Secretariat of the

Organization of American States (ODECA), three judges from their respective Supreme Courts of justice. The Secretary-General of ODECA and governmental representatives attached to that body selects by drawing lots one arbitrator for each of the contracting parties, whereby all the arbitrators must be of different nationality. The award of the Arbitral Tribunal requires the concurring votes of not less than three members and has the force of res judicata for all the contracting parties in respect of any ruling concerning the interpretation or application of the provisions of the Treaty.⁶

This set up for settlement of disputes under CACM is almost similar to that under the PTA but with two main differences. Firstly, the Tribunal under the PTA is a permanent one in the sense that it is not constituted afresh each time there is a dispute. Secondly, the Statute of the Tribunal and the Treaty establishing the PTA are silent on the bindingness of a decision of the tribunal vis-a-vis the non-disputant Member States. Without such a provision for the PTA it means, therefore, that although the disputing states shall remain bound by a decision of the Tribunal, other Member States are not so bound.⁷ This may give rise to a repetition of similar disputes being brought before the Tribunal. We submit that not only will it be time wasting, but it may well happen that the Tribunal might decide differently a dispute falling on all fours with their previous decided cases. If there has to be a common practice or application of the Treaty the PTA decisions regarding application or interpretation of the Treaty must apply to all Member States.

The regime of integration industries provided for under CACM tackles the burning issue of industrialization adequately. The Treaty provided for distribution of integration industries by rounds of negotiations. Wionczek wrote that it "took account of not only the prospective effect upon employment and income of each of the member countries and future international trade flows, but also the high political prestige attached to the industrialization process in any underdeveloped society."⁸ Though laudable in its legal form, the Treaty has been frustrated by political considerations. After an initial good start, Member states could not agree on the localization of industries. Such failure to agree is compounded by the Treaty provision which requires unanimity in policy decisions by the Central American Economic Council.⁹ Furthermore political events in Central America since the mid-sixties have followed a particularly violent course.¹⁰ CACM was particularly and greatly disturbed by the effects of the "football war" between EL Salvador and Honduras in 1969. The two countries clashed militarily following football matches between them in the qualifying rounds of the 1970 World Cup Competition! And they also broke off economic ties. Such emotional nationalism is usually manifested in developing countries.

2. Latin American Free Trade Area (LAFTA):

The arrangement which encompasses all the South American Countries (Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Uruguay and Venezuela) and Mexico was brought into existence by the Treaty Establishing a Free Area and Instituting the Latin American Free Trade (the "Treaty of Montevideo" of 1960). The objective of LAFTA as set out in

Article 2 of the Treaty is to liberalize trade among the constituent states by the amelioration of all trade barriers inter-se as opposed to the creation of a Customs Union. It envisaged the achievement of a free trade area within a period of 12 years from the date of entry into force of the Treaty in December 1961, viz, by 1973. The Treaty incorporates two methods for removing trade barriers in a progressive manner. The first consists of annual bilateral negotiations on a product by product basis by which annual unilateral reductions amounting to 8 per centum of the weighted average tariffs charged against imports from third countries are made.¹¹

These concessions, termed as the National Schedules, must be granted to other LAFTA members on a most-favoured-nation basis inter partes.¹² However, a member state is free to withdraw any item from the "National Schedules."

The second method is the multilateral negotiation of a Common Schedule which is essentially the transference of the "National Schedules" to the "Common Schedule". It is required that such negotiations be held at the end of each of the four three-year periods which together make up the 12 years. And by virtue of Articles 7 and 8 the commodities making up the "Common Schedule" must amount up to 25 per cent of the total value of the trade inter se. Unlike the "National Schedules," the "Common Schedule" is cumulative and irrevocable and commodities appearing therein were to be free from all duties by the year 1973.

The scheme met with very marginal success. Ever since the first session of 1964 at which 180 products were included in the Common Schedule LAFTA Countries have failed to agree on further products to include in the schedule for fear of loss of revenue on those products.¹³ And Furtado quite correctly observes that "the lengthy and unsuccessful negotiations concerning the common list, made it clear that the signatories to the Montevideo Treaty did not really have in mind any drastic changes in their traditional and existing trading patterns."¹⁴

Charles de Visscher was perhaps not very wrong when he said that national sovereignty is so strong that efforts at international co-operation are not based on any sense of a community of nations, but rather are mere "spontaneous harmonies" which are not durable.¹⁵ But opponents of de Visscher dismiss his skepticism and argue that this idea is not tenable and belongs to a period when the need for international co-operation was in its infancy. While we subscribe to the latter view, the glaring manifestations of unsuccessful economic co-operation ventures such as in Latin America or indeed the now defunct East African Economic Community in Africa should surely temper an outright rejection of de Visscher's bold assertion. As pointed out earlier in this study, the nationalistic romanticism indulged in by newly acquired political independencies can be as constructive for inter-state economic co-operation as it could be destructive.

Consequently the Treaty of Montevideo was amended in 1969 and by the terms of the Caracas Protocol, the twelve year period was extended to 1980 while the 8 per cent annual concession was reduced to 2.5 per cent.¹⁶

It will be recalled that the liberalization scheme under the PTA involves bi-annual multilateral negotiations vis-a-vis commodities to be included in the Common List.¹⁷ Similar problems encountered by LAFTA may be experienced by the PTA.

The organizational structure of LAFTA is fairly simple: it consists of a Conference of Contracting parties composed of representatives of each member State meeting in regular annual sessions and a Standing Executive Committee composed of a permanent representative of each Contracting party. The Standing Executive is supported by a Secretariat consisting of technical and administrative personnel. Albeit, trade did grow but there was an immediate tendency toward trade concentration among the three big countries (Argentina, Brazil and Mexico).

3. The Andean Common Market

The sluggishness of LAFTA gave rise to the evolution of alternative sub-regional groupings within the region. The Declaration of the Presidents of America at Punta del Este on April 14, 1967 declared inter alia that such sub-regional approach was compatible with the Treaty of Montevideo.¹⁸ Thus the Andean Common Market was established by the Agreement on Andean Sub-regional Integration signed at Bogota, Colombia on May 26, 1969.¹⁹ It comprises of the countries of relatively economically less developed (Bolivia, Colombia, Chile, Ecuador Peru and Venezuela) in South America, all linked by the Andies Mountain range. It has three basic aims namely:

- (i) Creation of a Customs Union by 1982 (1987 for Bolivia and Ecuador);

- (ii) Planned industrialization; and
- (iii) a firm subregional control of foreign investments.

Intra-state trade is to be liberalized through annual reductions of tariffs on trade by 10 per centum while for trade with third countries a Minimum Common External Tariff was installed in December, 1973. With respect to industrial development, the agreement follows closely the CACM approach. The Andean scheme provides for a sectoral industrial programme. "Each of such programmes is to identify the product which is to be subjected to it, assign industries to the various member States and establish its own norms for the Common External Tariff."²⁰ The PTA's protocol on Co-operation in the Field of Industrial Development is largely based on the Andean Model. In fact some wording of the provisions of said protocol are taken per verbatim.²¹

Some problems encountered by the Andean Sectoral programme include economic disparity among the countries; the redistribution of resources; the limitation in effective demand for manufactured goods all compounded by the variety of the make-up of their internal markets, endowments of resources, the relations between the urban and rural population, productivity factors, the capacity of the external sector and the various internal social and political structures.²² Some members did not simply want certain industries to be assigned to them on the ground that their employment and other needs would not be satisfied.

Another new phenomenon brought about by the Andean Pact is in the area of foreign investments. The Latin Americans readily admit

that "foreign private enterprise will be able to fill an important function in assuring achievement of the objectives of integration."²³ But all the same they desired that it be controlled. To that effect the Andean Pact adopted on July 17, 1971 Decision 24 titled the Common Regime of Treatment of Foreign Capital and of Trademarks, patents, licences and royalties (the Andean Foreign Investment Code).²⁴

The Code has laid down clearly defined rules concerning direct foreign investments. Article one of the Code classifies business enterprises into three categories:

- a) national enterprise (where more than 80 per cent of the capital belongs to nationals (whether natural or juridical);
- b) Mixed enterprise (where between 51 per cent to 80 per cent of the capital is owned by nationals); and
- c) foreign enterprise (where there is less than 51 per cent of the capital is owned by nationals.

By Article 27 of the Code foreign enterprises' products are barred from enjoying advantages deriving from the duty - free program. Thus it is only national and mixed enterprises which can do so. New foreign enterprises, that is those coming into being after July 1, 1971 must agree to a gradual transformation into mixed or national enterprises.²⁵ Under Chapter III of the Code new foreign enterprises are barred from participating in certain sectors of the economy and those engaged in the exploitation of minerals of all kinds, including liquids and gaseous hydrocarbons, gas pipelines and exploitation of forests are exempted from the process of transformation but they can not enjoy the duty-free program.

It is also significant that the Code seeks to control the repatriation of capital by limiting the transfer of profits to 14 per centum annually of the total investment.²⁶ And in another endeavour to assert their control they have inserted a provision akin to the "Calvo Clause." The effect of the Calvo Clause is simply to provide that no instrument pertaining to investments or the transfer of technology may contain clauses attempting to remove possible conflicts or controversies from the jurisdiction of the recipient country or allow the subrogation by States of the rights and actions of their national investors.²⁷ With respect to the Calvo Clause it has long been, held that the clause is ineffective if it amounts to a denial of justice but the International Court of Justice has held that "the rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary law."²⁸ Interestingly enough the code is silent on the question of nationalization.

Under the PTA the question of foreign investments has not been provided for adequately. The Treaty under Article 7 (2) of Annex 8 merely provides that "the member States shall endeavour to adopt a common approach to and determine the terms and conditions governing the transfer or adaptation and development of technology." It may well be that the Member States of PTA failed to reach a consensus on a common approach due to their divergent political ideologies. It must be borne in mind that within the PTA several countries are at opposite ends of the political spectrum. Indeed some are Marxist regimes while others are capitalist oriented.²⁹

Another novel idea which the PTA has borrowed from the Andean Common Market is the creation of multinational enterprises.³⁰

Alicia Puyana reports that the Code and industrial promotion endeavours provoked reaction not only in the public and private external sector, but also in the national industrial sector in different member countries who did not seem to be interested in the implementation of rules that would transform the nature of their relations with investors.³¹ In fact the reactions led to reforms of important articles of the Code by liberalizing the regime in what concerned the exclusion of sectors from foreign investment, profits with drawing rights and repatriation of capital.³² In spite of this the Andean Common Market is called a significant experiment.³³

B. Regional Co-operation in Africa

I. The East African Economic Community:

The historical background of regional co-operation in East Africa encompassing Kenya, Tanzania and Uganda has already been discussed. The Treaty for East African Co-operation was signed on June 6, 1967 at Kampala and entered into force on December 1, 1967. By it the three East African countries established among themselves the East African Community and the East African Common Market as an integral part of the Community.³⁴ The aims of the Community were "to strengthen and regulate the industrial, commercial and other relations of the Partner States to the end that there shall be accelerated, harmonious and balanced development and sustained expansion of economic activities, the benefit whereof shall be equitably shared."³⁵ In particular the

Community aimed at, inter alia, the dismantling of restrictions on trade inter se; the establishment and maintenance of a common customs and excise tariffs; inauguration of a common agricultural policy, establishment of the East African Development Bank, maintenance of freedom of both current and capital account transactions; harmonization of the monetary policies- operation of the services common to the Partner states; and coordination of the economic and transport policies of the Member States.³⁶ As for the institutional set up, nine principal institutions were created under Article 3 and these were as follows:

- (i) The East African Authority-composed of the three Presidents of the Partner States as the principal executive authority;
- (ii) the East African Legislative Assembly-composed of three East African Ministers, three deputy East African Ministers (if any), twenty seven appointed members (nine from each state), the Chairman of the Assembly, the Secretary-General and Counsel to the Community. The Assembly passed bills and submitted them to the Authority for Assent;
- (iii) The East African Ministers - composed of three ministers each one nominated by his State but appointed by the Authority. Their main function was to assist the Authority in the exercise of its executive function. They were responsible for the day to day running of the Community;
- (iv) The Common Market Council-Consisting of the three East African Ministers and nine other members. Its function, inter alia, was to ensure the smooth running

- of the common market and it could give binding directives to member states;
- (v) The Communications Council-Consisting of the three Ministers and three other members. Its functions, inter'alia, were to deal with Communications matters;
 - (vi) The Economic Consultative and Planning Council-consisting of the three Ministers and nine other members. Its function was to assist the national planning of the member states and advise the Authority on long term planning of the Common services;
 - (vii) The Finance Council-consisting of three Ministers and three other members (finance ministers). Its function was to consult on the major financial affairs of the Community and consider and approve major financial decisions relating to common services;
 - (viii) The Research and Social Council-consisting of three Ministers and nine other members. Its function was to assist by consultative means in the co-ordination of the policies of the member States and the community on research and social matters;
 - (ix) The Common Market Tribunal - composed of a chairman and four other members all appointed by the Authority. The functions of the Tribunal and its powers are similar to the Tribunal under the PTA. In fact it appears that the Common Market Tribunal has been used as a model for the PTA's Tribunal.³⁷

In addition to the above institutions there were four corporate institutions of the community viz, the East African Railways Corporation; the East African Harbours Corporation; the East African

Posts and Telecommunications Corporation and the East African Airways Corporation.

While Chapter II of the treaty established a common customs tariff vis-a-vis goods imported from third countries, Chapter III provided for tariff disarmament among themselves. The cumulative effect of these provisions was the creation of a customs union. In addition Article 12 prohibited quantitative restrictions at the outset. The abrupt introduction of a customs union on the member States is given as one of the reasons for the demise of the Community.

The Treaty also provided for the Community to administer certain services which are normally the preserve of any government, viz., collection and administration of customs, excise and income levies; civil aviation; a common court of appeal; negotiation of air traffic rights with foreign countries and through its corporations the provisions of facilities relating to air services, posts and telecommunications, harbours and railways. These provisions essentially later brought about the Community's demise. To begin with the three States were at different stages of economic development with Kenya at one end of the spectrum and Tanzania at the other. The major difficulties were firstly the redistribution of benefits (viz. the various revenues realized) and secondly the meeting of liabilities (eg which their common Airline might from time to time incur) etc. Kenya always seemed to benefit more out of the arrangement. The Treaty was deficient in this aspect.

Another problem which brought about dissatisfaction was in the area of the industrial development policy. Here again the Treaty provisions were not thorough. As a measure to promote balanced industrial development, the Treaty merely provided for a "common scheme of fiscal incentives towards industrial development."³⁸ Article 20 provided for a system of "transfer of tax". The Article provided thus: "as a measure to promote new industrial development in those Partner States which are less developed industrially transfer taxes...may be imposed notwithstanding the provisions of Article II (I) [which dismantled internal tariffs inter se]."³⁹ Essentially what this system did was to allow an industrially less developed partner state to impose tariffs on imports of manufactures from relatively more developed Partners. Such tax was imposed only if at the time of the imposition of the tax goods of similar description" are being manufactured or are reasonably expected to be manufactured within three months of the imposition of the tax."⁴⁰ It is difficult to appreciate how this provision could influence the creation of new industries. Further on excise duties there was a provision that "a common excise tariff in respect of excisable goods manufactured, processed or produced in the Partner States" was to be maintained and payable to the consuming state.⁴¹ In this regard, Kenya which had a bigger industrial base was able to raise more revenue from excise duties.

It is submitted that equality among unequals cannot be achieved by applying equal means. In the second place the Treaty was inadequate in its provisions relating to the disbursements of revenue. One commentator on East African co-operation wrote: "That the provisions set up in the Treaty for East African

Co-operation of 1967 have not been successful in distributing the gains of the common market equitably is now of common knowledge."⁴² This deficiency in the Treaty resulted in suspiciousness and acrimony. In the third place the partner states imposed the community upon themselves too abruptly without giving themselves sufficient time for cushioning the effects of the Treaty.

It appears that Tanzania refused to sign the PTA Treaty because she could not trade with Kenya unless the problem of sharing the liabilities and assets of the defunct East African Community had been resolved.⁴³ In fact at the eighth meeting of the Inter-governmental Negotiating Team to consider the draft treaty, for establishing the PTA, Tanzania proposed that a further provision be included in the Treaty to permit the non-applicability of the Treaty between any two or more members States who did not wish the Treaty to regulate relations between them.⁴⁴ The Tanzanians stand was obviously aimed at Kenya. The proposal, however, was rightly rejected by the Team on the ground that such a provision would undermine the spirit of the Treaty. Thereupon Tanzania reserved her position. She went on to explain that such decision not to accept her proposal might influence the timing of her accession to the Treaty.⁴⁵ Since the demise of the Community in 1977 the borders between Kenya and Tanzania have remained closed.

The lessons to be learnt from the East African Community are many. One of them is caution. The Kenyan President who during the life of the Community was Vice President of Kenya, pointed out in his address already referred to when he said: "The Treaty

we are about to sign (viz. PTA) is less ambitious, more practical, more clearly beneficial to its members, and hence more promising of future development and expansion than those earlier attempts."⁴⁶

2. Economic Community of West African States (ECOWAS)

ECOWAS was established by the Treaty of the Economic Community of West Africa on March 28, 1975.⁴⁷ The Community originally embracing fifteen West African States (Benin, Gambia, Ghana, Guinea, Guinea-Bissau, Ivory Coast, Liberia, Mali, Nigeria, Niger, Senegal, Sierra-Leone, Togo and Upper Volta) was joined by Cape Verde in 1976 when she got her independence.

The objectives of ECOWAS are to "promote co-operation and development in all fields of economic activity particularly in the field of industry, transport, telecommunications, energy, agriculture, natural resources, commerce, monetary and financial questions and social and cultural matters".⁴⁸ More specifically, however, the Treaty seeks for the abolition of customs duties on trade among the member States; abolition of quantitative restrictions; the establishment of a common customs tariff and a common commercial policy towards third countries; abolition as between the members of the obstacles to free movement of persons, services and capital; harmonize the agricultural policies; evolution of a common policy in transport, energy, communications; harmonization of economic and industrial policies and elimination of disparities in the level of development in member states; harmonization of monetary policies; and the establishment of a Fund for Co-operation, Compensation and Development.⁴⁹ Undoubtedly these objectives are very wide and indeed all embracing.

Because of this ECOWAS envisaged a gradual approach to the establishment of a Customs Union within a transitional period of 15 years beginning immediately after the coming into force of the Treaty, that is to say by the year 1990.⁵⁰ Within that period customs duties or similar charges on imports must be eliminated on trade inter se. Quantitative restrictions must be removed and a common customs tariff and a common commercial policy towards third countries must be established. The actual regime as envisaged in the Treaty is that during the first two years of the coming into force of the Treaty Member States are not obliged to reduce customs duties but are required to supply information on their Customs duties to the Executive Secretariat. At the end of the tenth year (1985), all Custom duties or similar charges and quantitative restrictions must be removed.⁵¹ And by the end of the fifteenth year (1990) a common customs tariff viz-a-viz third countries must be established.⁵²

With respect to industrialization programme the Treaty has made provision for three stages in which to achieve the objectives. The first stage requires the Members to furnish one-another with major feasibility studies and reports on projects within their territories.⁵³ The second stage provides for Member States to harmonize their industrial policies so as to ensure a similarity of industrial climate and to co-operate with each other by exchanging their industrial plans so as to avoid unhealthy rivalry and wastage of resources.⁵⁴ In the third stage Member States are required to exchange skilled personnel, provide technical training for Community citizens in their training institutions and where appropriate to venture in joint development projects.⁵⁵

A notable feature in the Treaty is the fund for Co-operation Compensation and Development. Its purposes, as set out in Article 52, are:-

- (i) to finance Community projects-
- (ii) to provide compensation to Member States which have suffered losses as a result of the location of Community enterprises; or
- (iii) losses due to the application of measures for the liberalization of Trade; and
- (iv) to use it to promote development projects in the less developed member States.

The source of funds are from member states' contributions; income from community enterprises; foreign sources and from duly authorized sources of all kinds.⁵⁶

This is certainly a very important provision which T.O. Elias describes: "as a key provision of the Treaty and it is specifically designed to remove doubts and anxieties of the smaller and less developed member States of the Community, while at the same time attempting to do equity by providing reasonable compensation for the richer ones that will suffer losses as a result of the reduction of duties and other concessions made to favour the former."⁵⁷

The organic structure of ECOWAS is very much akin to that of the PTA. At the apex is the Authority of Heads of State and Government which is the highest decision making body. Its function is that of general direction and control of the performance of the Community. The next organ is the Council of Ministers

of two representatives from each State. Its main

functions are to keep under review the functioning and development of the Community and to make recommendations to the Authority on matters of policy. An Executive Secretariat headed by an Executive Secretary performs the co-ordinating function. There is also a Community Tribunal for the settlement of disputes and interpretation of the Treaty. Lastly, there are four technical and specialized commissions to deal with matters in the fields of trade, customs, industry, agriculture, transport, telecommunications, energy, immigration, monetary, social and cultural affairs to mention a few. Just as in the case of the PTA these Commissions make recommendations to the Council of Ministers through the Executive Secretary on ways through which the Community could achieve its objectives in their respective fields.

Another notable provision in the treaty is Article 27 which provides for free movement of persons, viz. "member states shall enter into agreements with one another to exempt Community citizens from having to possess visitors visas and residence permits." And such citizens have the right to work and undertake commercial and industrial activities within the territories of the member States. It may be recalled, however, that early this year (1983 February), Nigeria expelled two million citizens of other member States of ECOWAS (mainly from Ghana) on the ground that they were illegal immigrants. Legally the Nigerian action was justifiable but the affair will certainly have serious implications on ECOWAS vis-a-vis Article 27. The abolition of visas was the first protocol signed by the Member States but the said protocol only allows residence for 90 days, without the right to work.⁵⁸

In actual practice ECOWAS has never really taken off up to date. And as such adjustments to the 15 year period were made. In this connection an eight year liberalization programme designed to create a free trade zone in West Africa by 1989 (instead of 1985 as envisaged in Treaty) was approved in 1980. The programme was to have started officially on May 28th, 1981. But at its fifth annual summit ordinary session held in Cotonou (Benin) on 28th and 29th May, 1982, the Conference of Heads of State and Government was told by the Executive Secretary of ECOWAS that "the liberalization programme is trembling on the brink of becoming operational".⁵⁹ Another point of contention at the summit was the provision of Article 20, viz, the most-favoured-nation treatment. The lesser developed States argued that the application of the provision would be injurious to them and prayed for exemption from the provision. The Conference thus directed that a ministerial Committee on derogation be convened and report in November, 1983 to the Heads of State and Government.⁶⁰ On this point one would have thought that since one of the purposes of the Fund on Co-operation, Compensation and Development is to provide compensation to member states which have suffered losses due to the application of measures for the liberalization of trade, such apprehensions and anxieties need not arise.⁶¹ But by the fact that these anxieties have so arisen we would conclude that either the Fund has not altogether been set up as yet or if set up the fund itself is not sufficient to meet the losses envisaged.

In conclusion, we submit that the inertness or failure to take off of ECOWAS is due to its unpragmatism in the sense that its objectives are too wide. Secondly, the member states comprise of some very poor states and rich countries, that is to say their levels of development are very different. Thirdly, it appears that the political will is lacking. Fortunately the PTA is not as wide in fact it is quite pragmatic. The question of political will still remains to be tested.

3. The Southern African Development Co-ordination Conference
(SADCC)

Two views exist as to the actual evolution of SADCC. The first stems from the political concept of Front-line States hatched during the liberation wars in Southern Africa to the realization of the need for economic co-operation through a legal framework. The idea of Front-line States began as a grouping of those independent States in Southern Africa committed to assisting in the political liberation of the remaining colonies and minority-ruled states in Southern Africa. Tanzania and Zambia were the two original members but with the attainment of independence by Angola and Mozambique and the inclusion of Botswana, the group expanded to five. The move towards economic co-operation was taken at a meeting of Ministers of Foreign Affairs of the Five Front-line States in Gaborone, Botswana in May, 1979. At that meeting it was agreed to summon a conference in Arusha, Tanzania in July that year to discuss the details, forms and strategy that this co-operation would take.⁶²

The second view is that SADCC was a result of "diplomatic initiatives of African and western States for a massive reconstruction programme in Southern Africa after years of war. In other words some kind of 'Marshall Plan' for the region to be financed by western Countries."

Whatever the case may be, at the Arusha Conference (SADCC) a number of goals were discussed and the number of States was expanded to include Lesotho, Malawi and Swaziland. It was further resolved that Zimbabwe and Namibia would join upon attaining their independence. The Arusha Conference identified certain areas in which the member states were acutely dependent on South Africa with a view to reducing this dependence. The Transport and Communications sector was identified as one such area and given utmost priority. To that end, the Southern African Transport and Communications Commission (SATCC) was immediately established with its headquarters in Maputo, Mozambique. The other key areas, included food production and distribution with a view to reducing the need for imports from South Africa.

Following the Arusha Conference, was a Summit meeting which took place in Lusaka, Zambia in April, 1980 of all the nine member states, now including Zimbabwe. It was at this summit that a legal regime was adopted in the form of the Lusaka Declaration signed by all the nine States. Furthermore, a Programme of Action involving a number of projects was adopted. The objectives of SADCC as set out in Lusaka Declaration are:

- 1) Reduction of economic dependence, particularly, but not only on the Republic of South Africa;
- 2) The forging of links to create a genuine and equitable regional integration;
- 3) The mobilization of resources to promote the implementation of national, interstate and regional policies; and

- 4) Concerted action to secure international Co-operation within the framework of a strategy for economic liberation.⁶⁴

With respect to the projects adopted it was estimated that I.9 billion US dollars would be needed to carry them out. The member States, being cognizant of the fact that the realization of these grand goals required vast sums of money that cannot be generated within the framework of their economies, decided to seek external financial support. To that end a conference - SADCC 2 - whose main purpose was to collect pledges from possible donors, was held in Maputo in November, 1980. Approximately 650 million US dollars were pldged by various donors which were mostly western countries and the World Bank.

Before we make an appraisal of SADCC it is pertinent at this juncture to briefly look at its institutional setup. The organs of SADCC are set out in the Memorandum of Understanding on the Southern African Development Co-ordination Conference signed by all the nine member States in Harare (Zimbabwe) on 20th July, 1981. There are five organs established and these, arranged in a descending order, are:

1. the Summit:
2. the Council of Ministers:
3. Sectoral Commissions:
4. the Standing Committee of Officials; and
5. the Secretariat.

Article 2 of the Memorandum establishes the Summit which consists of all the Heads of state and Government of the member States. This is the supreme body of SADCC and its function is the overall

"direction and control of the functions of the SADCC and the achievement of its objectives." The Summit meets at least once in a year-in any Capital of any member state.⁶⁵ Thus this provision does not rule out any informal meetings at any time. Just as in the case of the Authority of the PTA, the Summit reaches its decisions by consensus.⁶⁶ While the essence of this provision is that the widest possible consultation and agreement is necessary in reaching decisions, a set-back of this approach is that it could easily give rise to a veto power to any single member or a small group of them.

The next organ in importance is the Council of Ministers whose functions include, overall responsibility for the policy of SADCC, general co-ordination of policy, supervision of its institutions and the execution of its programme.⁶⁷ It consists of nine Ministers one from each member State. From these provisions above it can be seen that the Council is the principle decision making organ of SADCC even though, it is subordinate to the Summit. As in the case of the Summit, decisions of the Council are also taken by Consensus.

Under Article 4, the Council is empowered to establish Sectoral Commissions as and when it deems necessary. And any such Commission so established shall be governed by a Convention ratified by the member States. Sectoral Commissions are normally enjoined to handle programmes in functional sectors or areas.⁶⁸

The standing Committee of Officials established under Article 5 is yet another organ of SADCC. Its task is essentially to do

preparatory work for consideration by the council of Ministers. The Council is also empowered under this same provision to appoint sub-committees on an ad-hoc basis to take programmes in specific areas and report to the standing committee.

Finally, but not the least, under Article 6 a Secretariat headed by an Executive Secretary who is appointed by the Summit is established.⁶⁹ The Secretariat which became operational on July 1st, 1982 is based in Gaborone, Botswana which is also the headquarters of SADCC. The functions of the Executive Secretary include the general servicing and liaison with SADCC institutions; co-ordination of the execution of the tasks of SADCC, custodianship of SADCC property; and such other functions as may from time to time be approved by the Council.⁷⁰

The scheme for the achievement of the objectives of SADCC is based on a programme of action. In this respect a unique decentralised structure has been devised whereby all member states have been charged with the responsibility of co-ordinating at least one sector. For example Mozambique is responsible for transport and communications; Zimbabwe for food security; Tanzania for industrial development; Botswana for Crop research and animal diseases; Lesotho and Zimbabwe for soil conservation and land utilization; Angola for energy development and conservation; Malawi for manpower development, Zambia for the Southern African Development Fund; etc.⁷¹ As has been already pointed out, apart from the little that can be raised internally the finance for these projects is being funded from external sources. At the SADCC meeting held in Blantyre, Malawi in November, 1981 it was reported that much

of the projects are already underway.⁷²

The dependency on the Republic of South Africa which SADCC aims at reducing is in the areas of transport, trade and migrant labour. In the transport sector the six land-locked countries (viz. Botswana, Lesotho, Malawi, Swaziland, Zambia and Zimbabwe) depend heavily on the South African transport network for their trade links outside the African Continent. They are thus in a very vulnerable position should South Africa decide to deny them the use of its facilities. Similarly, vis-a-vis trade, it is not a secret that nearly all the SADCC members-with the exception of Angola and Tanzania-have trade links with South Africa. In fact they import more than they export to South Africa. Here again this is seen as an unhealthy situation. In so far as migrant labour is concerned, workers from the SADCC states have, since the turn of the century, gone to work to the South African mines. This phenomenon which still continues, though it is on the decline, now has been a cheap source of labour for South Africa.

Thus by improving their own transport network by way of rehabilitating their existing systems and creating new ones, dependency on South African facilities will be reduced substantially. And by increasing their industrial and agricultural outputs, they will not only reduce the need to import from South Africa but will also create more jobs for their people thereby cutting down on migrant labour as well.

SADCC has already got a good start and this is evidenced by some notable success in the transport sector where some one-quarter of the 97 projects outlined are already underway. The reasons for

SADCC's good chances of succeeding are firstly, the pragmatic approach, secondly the institutional structure is not "top-heavy" especially with its decentralized structure and thirdly there is in existence great political will which we submit has been fostered by a common foe being the Republic of South Africa. It appears that political will is necessarily a precondition for any economic co-operation.

It is pertinent to note that all the nine states in SADCC are also members of the PTA but five of them have not yet ratified the PTA Treaty.⁷³ Some of the reasons which have been advanced for their reluctance to join PTA are firstly that SADCC and PTA have essentially identical objectives and that PTA is therefore a duplicity. Secondly they are quite content with SADCC as they deem it more practical and their view seems to have been reinforced by the early successes being scored by SADCC. The practicality of SADCC is underlined especially in the transport sector where concrete measures have been taken to achieve its objectives. On the other hand the PTA provisions on the transport sector are merely promotional in the sense that they urge member States to co-operate without providing concrete measures of how to do so. Since the Treaty is silent on the question of funds for the projects, it appears that member States will have to raise them internally and needless to say, this will be quite a task. On the industrial programme, SADCC unlike the PTA has already devised a system of industrial location taking into account comparative advantages. Obviously SADCC members have recognized that before trade can be liberated there has to be goods in which to trade in. Of course, one possible problem which may confront SADCC is the over-dependence on external financial support.

This can open SADCC to foreign manipulations in the long run because the donors are the same major trading partners of South Africa.

In conclusion, however, we submit that SADCC and the PTA are in fact complimentary. While the former may be said to be trade creating, the latter is trade liberating.

C. Regional Co-operation in Europe

I. The European Economic Community (EEC)

The EEC is by far the most successful regional economic grouping. The EEC may be said to be a direct consequence of the European Coal and Steel Community (ECSC) created by the Treaty of April 18, 1951.⁷⁴ By this Treaty Six European Countries created a single market in the limited sphere of Coal, iron and steel for the benefit of all the members.⁷⁵ This was achieved by way of eliminating barriers to trade such as tariff barriers, quantitative restrictions, all forms of price discrimination, restrictive agreements and cartels. The success of ECSC spurred the six to sign the Treaty of Rome on April 17, 1957 which came into force on January 1, 1958.⁷⁶ The purpose of the Treaty is to create one big market area, viz. a Customs union.

Under its various provisions the means of achieving its objectives include; abolition of customs barriers and quantitative restrictions inter se; free movement of persons, services and capital; establishment of a common external tariff and a common commercial policy vis-a-vis third countries; harmonization of laws and co-ordination of

policies in the commercial agricultural, financial, taxation sectors. In essence the EEC "embraces the economy of the member States in every field, even where it may be sensitive or vulnerable (e.g. agriculture)"⁷⁷. There is thus complete economic integration in Europe. To reach the state of complete economic integration the Treaty imposed obligations on member states "to take, according to a prescribed time-table, a series of accurately defined measures leading to the progressive elimination of mutual trade barriers and the creation of a common external tariff."⁷⁸

The institutional structure of the EEC is fairly simple and has four main organs namely the Council of Ministers which consists of one representative from each of the Member States. This is the policy-making organ. The Commission of the European Communities "consists of nine members, who are chosen on the grounds of their general competence and whose independence is beyond doubt."⁷⁹ Both of these organs may make decisions which are legally binding on the subjects of the communities. The Commission specifically is involved in policy-making function as well as co-ordinating the functions of the Community. The third organ is the European Parliament - which is very akin to the defunct East African Legislative Assembly - consists of representatives of the peoples of the EEC, but unlike the East African Legislative Assembly, it has no legislative powers. It is used as a consultative body and the Commission is accountable to it. The fourth important organ is the Court of Justice. Its functions include the settlement of disputes, the giving of binding opinions and the giving of preliminary rulings whenever the interpretation, application and implementing of the Treaty is involved.

Unlike most courts of an international character, the European Court of Justice is accessible not only to member States and institutions but also to private parties against member States.

The success of the EEC is based essentially, firstly, on the fact that all member States are already developed, that is to say there is in existence a strong industrial base and thus goods to trade in are in abundance. Secondly the member States are almost on par in terms of development stages. They can thus afford to free their trade. Thirdly and perhaps quite important too, is the fact that all the States have basically a common political ideology, viz. a free market economy. Their difference in language and culture do not present any obstacles at all.

One important point to note is that a customs union involves a substantial surrender of national sovereignty, but EEC countries have been willing to do so. In the PTA, the three elements we have identified are lacking. This is apt to present serious obstacles.

Lastly we may mention that the EEC has an Association Agreement under Article 238 of the Treaty with the African, Caribbean and Pacific Countries known as the Lome Convention under which it has, inter alia, granted them preferential access to its market.⁸⁰ Most Member States of PTA are signatories of the Lome Convention.

2. The Council for Mutual Economic Assistance (COMECON OR CMEA)

This is an economic organization of Easter European Countries and Cuba. In fact there are nine member States and all have centrally planned economies. These are Bulgaria, Cuba, Czechoslovakia, German Democratic Republic, Hungary, Mongolia, Poland, Rumania and the U.S.S.R. COMECON was established in January, 1949 at an economic conference in Moscow. The purposes and principles of COMECON as set out in Article I of the Charter of the Council for Mutual Economic Assistance are "to promote by uniting and co-ordinating the efforts of the member countries of the Council, the extension and improvement of co-operation and the development of socialist economic integration, the balance planned development of the national economies, acceleration of economic and technological progress in these countries, a rise in the level of industrialization in countries with less developed countries, an uninterrupted growth of labour productivity, gradual equalization of levels of economic development and a steady advance of the well - being of the peoples in the Council's member Countries."⁸¹ The Charter emphasises that COMECON is based on the principles of the sovereign equality of all the member-countries.⁸² The scheme for the implementation of COMECON'S objectives involves:-

- a) the organization of all-round economic, scientific and technical co-operation of COMECON'S member-countries in speeding up the development of their productive forces;
- b) helping improve the international socialist division of labour by means of Co-ordinating national economic development plans, and the specialization and co-operation of production in COMECON'S member countries;

- c) taking measures to study economic, scientific and technological problems which are of interest to COMECON'S members;
- d) assisting COMECON'S members in working out, co-ordinating and implementing joint measures for the development of transport, the most efficient utilization of the investments allocated by COMECON'S member States for the development of the mining and manufacturing industries and also the construction of major projects which are of interest to two or more countries; the development of commodity turnover; and exchange of services amongst the member-countries etc.⁸³

The Co-operation among member-countries calls for the creation of direct ties between the ministries and other government organs, between enterprises, scientific research, planning, and design organizations of the member-countries. In fact "ties are to be established directly whenever there is a mutual interest of the parties to implement specific measures on a co-operative basis."⁸⁴ Furthermore co-operation and specialization in production also requires the establishment of direct ties.

The essential feature of COMECON is that discussions are held by COMECON and recommendations are made. It is up to each member-state if so interested to implement the decisions or recommendations in accordance with its legislation.⁸⁵ Sometimes decisions pertaining to "plan co-ordination" may necessitate their inclusion in the development plan of each member-State.

The institutional framework of COMECON consists of the following

organs and agencies in descending order of importance:⁸⁶

- I. Session of the Council:
2. Executive Committee of the Council;
3. Committees of the Council
4. Standing Commission of the Council
5. The Secretariat.

The session of the council is the body which consider's fundamental matters in economic, scientific and technological co-operation. The Executive Committee is responsible for directing the implementation of the tasks of COMECON. The Committees and standing commissions deal with functional tasks. COMECON is neither a customs Union nor a free trade area. Indeed the Charter does not deal with the question of tariffs at all. It appears the COMECON'S main preoccupation is the mutual co-operational in a "comradely" manner in various sectors of the economy. It is more concerned with increasing outputs in industry, agriculture, transport etc. The question of competition among corporations inside each State does not arise as all means of production are owned by the State.

Of interest to PTA may be the issue of direct ties between ministries in the execution of a common objectives. The other point of interest is the inclusion of plan co-ordination in the development plans of member-states. Such inclusion may indicate the seriousness of purpose and intention to carry out the objectives.

D. Compatibility with GATT:

It is important at this stage to analyse the compatibility of the PTA with GATT. Under Article I (the most-favoured-nation Clause of GATT,

contracting parties undertake to grant one another favourable treatment as they grant any other country. This is subject to the right under Article XXIV which permits contracting parties to form any of the three types of regional arrangements, namely, a Customs Union; a Free Trade Area; or an Interim Agreement. If particular conditions of any one of these arrangements are met, then the member-states concerned are entitled to an exception to GATT obligations, and such exception is automatic. The conditions or legal requirements to be satisfied are:

- a) the removal of internal tariffs on substantially all trade and the adoption of a common external tariff, viz., a Customs Union;⁸⁷ or
- b) the removal of internal tariffs [only] on substantially all trade, viz. a Free Trade Area;⁸⁸ or
- c) a plan and schedule that will lead to the formation of either of the two defined arrangements above, within a reasonable length of time, viz. an Interim agreement.⁸⁹

For a Customs Union or a free trade area, the common essential requirement is the removal of tariffs on substantially all trade. An arrangement which falls short of this requirement is neither a customs union nor a free trade area. The term, "substantially all trade," implies a large portion of trade. In other words it is almost all-embracing. Thus an arrangement such as the European Coal and Steel Community is neither a Customs Union nor a free trade Area as per strict construction of the provisions of Article XXIV, because it limits itself to trade in Coal, Steel, iron and pig iron only. In fact it is not even an interim agreement anyway in the sense that it does not lead to the formation of either of the former or the latter. On the other hand, the European Economic Community per se, may be said to be

a customs union because it covers "substantially all trade." The European Coal and Steel Community applied for exception under Article XXV(5) which has a provision for waiver that can be applied to allow a regional arrangement not otherwise fulfilling the GATT criteria to exist consistently with GATT obligations.

Developed countries have a much easier task in removing tariffs on substantially all trade because of, inter alia, a wide range of goods to trade in. As for developing countries, their economic arrangements are mainly concerned with creating new industries and large markets rather than intensifying competition between existing markets. One writer argues that such tendency "runs against the rule that arrangements should substantially cover all the trade and provide for the complete elimination of tariffs on trade among members".⁹⁰ But in discussing movement towards regional integration, a clear distinction has to be drawn between already developed and developing regions. "The experience of Western Europe has shown that where there is a group of economies at a high and reasonably comparable level of per capita income, fairly rapid progress can be made towards the lowering of trade barriers against industrial goods, with a beneficial effect on total industrial output, productivity and the volume of trade."⁹¹ This is the reason why developing countries have an uphill task in forming arrangements by way of a customs union or free trade area. Professor Jackson rightly observes that there is "an unexpressed view that the technical requirements of Article XXIV are not well adapted to the evaluation of regional arrangements among less developed countries."⁹²

The PTA is neither a customs union nor a free trade area, but is rather an interim agreement leading to the formation of the former. We arrive at this conclusion after analysing the provisions of Article 29 read in conjunction with Articles 3(2); I4 and I5 (I)(b) of the Treaty. As pointed earlier, all that is required to satisfy the legal requirements of an interim agreement envisaged under GATT are, a plan and schedule that will lead to the formation of the defined arrangement, viz. either a customs union or a free trade area, within a reasonable length of time. To begin with the envisaged "arrangement" to be formed is a Customs union because the Treaty provides for the gradual elimination of internal tariffs (Art. 3(4)(a)(i)) and the gradual establishment of a common external tariff in Article I4. Article 3(4)(a)(i) reads that:- "the member states undertake by way of protocols annexed to this Treaty to gradually reduce and eventually eliminate as between themselves customs duties in respect of imports..."

And Article I4

enjoins the Commission on the recommendation of the Trade and Customs Committee to submit from time to time to the council for its approval, "a programme for the gradual establishment of a common external tariff." Indeed Article 3(2) provides that "the functioning and development of the Preferential Trade Area shall be viewed in accordance with the provisions of this Treaty with a view to the establishment of a Common Market and eventually of an Economic Community for Eastern and Southern African States. As for the "plan and schedule" these may be inferred from Articles I3(3) and 3(4)(a)(i). The former provides that the "commission shall....recommend to the council for its approval, a programme for the progressive reduction of customs duties among the member states with a view to eliminating such duties not later than ten years after the

definitive entry into force of this Treaty..." The latter provides that "the member states undertake by way of protocols.... to achieve their objectives". Under these two provisions a common list of goods eligible for preferential treatment is provided for.⁹³

The reasonable length of time has been put at ten years from the date of definitive entry into force of the Treaty. To this end Article 29 is of relevance as it provides that "two years before the expiry of ten years from the definitive entry into force of this Treaty, the Commission shall propose to the council for its consideration and recommendation to the Authority for its approval, measures which in addition to the provisions of this Treaty would be required to be implemented as from the end of the said period of ten years, in order to assist in the development of the Preferential Trade Area into a Common Market and eventually into an Economic Community for Eastern and Southern African States."

Because the PTA satisfies the legal requirements under Article XXIV (5)(c) of GATT of:-

- a) a defined arrangement;
- b) a plan and schedule-; and
- c) a reasonable length of time

it is compatible with GATT. In any case a waiver under Article 25 is also applicable anyway. "In fact", according to Jackson, "all regional arrangements so far brought to GATT for approval or excepted under GATT have been basically interim agreements, demonstrating the practical impossibility of achieving either a customs union or of a free trade area without a period of transition."⁹⁴

During the colonial era, the economies of colonies were structured

in such a way as to make them exporters of raw materials for European factories and importers of manufactures and processed goods therefrom. This trend has continued even after the achievement of their political independence with the result that trade links among developing countries are still minimal. The countries in the Eastern and Southern African sub-region of PTA are no exception to this general trend. The irony of it all, as President Moi of Kenya observed, is that some countries in the sub-region do have occasional surpluses in cereals but these surpluses are often sold to developed countries while at the same time countries (in the sub-region) are importing food from other continents. The desire now, therefore, is to exploit their resources for the transformation of their economies for the benefit of their people by increasing intra-regional trade and thus enhancing collective self-reliance.

Footnotes

- I. Source: C. Furtado, "Economic Development of Latin America; Historical Background and Contemporary Problems", (Cambridge, London, 1976)
2. Art. 2I of the Treaty of Managua: Text of Treaty in 1967
16 I.C.L.Q. 9II
3. Ibid,
4. Ibid,
5. Art. 23
6. Art. 24
7. See Chapter II of this study.
8. M.S. Wionczek, "Economic Integration and Regional Distribution of Industrial Activities: A Comparative Study Part I. Central America", East African Economic Journal, Vol. 2, 1966 page 55 at page 62.
9. Supra n. 3
10. K.R. Simmonds, "Central American Common Market: an experiment in regional integration", 1967 16 I.C.L.Q. 9II
- II. Arts. 4-I3
12. Ibid,
13. Furtado, op. cit. n. I at page 235
14. Ibid
15. C. de Visscher: "Theory and Reality in Public International law," (Princeton University Press, New Jersey, 1968)
16. Text of Protocol
17. Art 7 of Annex I of PTA treaty. (see the discussion in Chapter III of this study).
18. Text of Declaration in 6 International Legal Materials (1967)
p. 535
19. Text in 8 International Legal Materials (1969) pp. 910-939
20. L. D. Nelson, "The Andean Common Market", Year Book of World Affairs, vol. 29, 1975

21. Annex 8
22. Alicia Puyana op. cit (n. 78 in Ch. III) page 62
23. Supra, note 18
24. Text in II I.L.M. (1972)
25. Art. 30 of the Code
26. Ibid, Art. 37
27. Ibid, Art 5I
28. Interhandel (Preliminary Objections Case) [1959] I.C.J. Rep, 27
29. See Table in Ch. IV for examples
30. Supra see our discussion in Ch. III
31. Alicia Puyana, op. cit n. 22, page 58
32. Especially Venezuela and Colombia
33. L. D Nelson, op. cit. n. 20, page 211
34. Art. I(I) of the Treaty
35. Ibid, Art. 2(2)
36. Art. 3
37. See discussion in Chapter II
38. Art. 19
39. Italics added
40. Art 20(6)
41. Art. 17
42. Parbati K. Sircar, "Toward a Greater East African Community",
Africa Quarterly, Vol. 16, No. 3. 1977
43. Africa Research Bulletin (Economic and Financial Technical)
15th December, 1981 - 14th January 1982 at page 6266
44. Document ECA/MULPOC/LUSAKA/PTA/X at page 18. The meeting
was held in Maseru, Lesotho from 12th - 16th January 1981
45. Ibid
46. op. cit. (note 87 in Chapter III) emphasis added
47. I4 I.L.M. (1975) pp. 1200 - 1209
48. Art. 2(I) of the Treaty

49. Ibid, Art 2(2)
50. Art. II The Treaty was ratified almost immediately in 1975 and thus came into force the same year.
51. Art. I3
52. Art. I4
53. Art 29
54. Art. 30
55. Art. 3I
56. Art 50
57. T. O. Elias, "The Economic Community of West African States", Year Book of World Affairs, Vol. 32, 1979 at page IIO
58. South Magazine, March 1983 pp. 24-25
59. Africa Research Bulletin, May 15th - June 14th 1982 page 6438
60. Ibid
61. Art. 52 of the Treaty
62. R. Leys and A. Tostensen, "SADCC", Review of African Political Economy, 23 (1982) p. 52
63. Ibid
64. Southern Africa toward Economic Liberation - A Declaration by the Governments of Independent States of Southern Africa, Lusaka, April 1980 (Govt. Printer).
65. Art. 2(2) of the Memorandum
66. Ibid, Art 2(4)
67. Art 3
68. An example here is SATCC governed by the Transport and Communications Convention.
69. The First Executive Secretary is Mr. Frederick Blumentris
70. Art. 5(4) of the Memorandum

- 71 Southern African Co-ordination: Economic Liberation, Blantayre, Malawi, November 1981 (Govt. Printer, Zomba).
72. Ibid, eg of the 97 projects in the Transport sector, one quarter (involving rehabilitation) are already underway.
73. The five are Angola, Botswana, Mozambique, Swaziland and Tanzania.
74. Text of Treaty, UNTS 261 140 (1957)
75. The Six were France, West-Germany, Italy, Netherlands, Belgium and Luxemburg.
76. UNTS 298, 4, cmnd 4863 (1972)
77. K. Lipstein: "The Law of the European Economic Community", Butterworths, (London, 1974) p. 10
78. P. J. Kapteyn and P. Verloren Van Themaat: "Introduction to the Law of the European Communities", Sweet and Maxwell, (London, 1973) p.21
79. Ibid, Loc. cit. p. 69
80. Art. 9(2)(a) of the second ACP-EEC Convention signed on October 31, 1979
81. Text of Treaty from "The Multi-lateral Economic Co-operation of Socialist States: A collection of Documents, Progress Publishers, U.S.S.R. 1977. (Translation from Russian
82. Ibid, Art. I(2)
Note: the Charter came into force on April 13, 1960
83. Art. 3, emphasis added.
84. D. Nicol, L. Echeverria, A. Peccei (eds), Regionalism and the International Economic Order, Pergamon Press, (New York 1981)
85. Art. 4(I) of the Charter.
86. Art. 5

87. Art. XXIV(8)(a) of GATT
88. Ibid, Art. XXIV (8)(b)
89. Art. XXIV (5)(c)
90. A. K. Koul, "The legal framework of UNCTAD in World Trade",
Sijthoff (TRIPATHI, 1977)
91. A. G. Ewing; "Prospects for Economic Integration in Africa",
Journal of Modern African Studies, Vol. 5, (1965) p. 54
92. J. H. Jackson; "World Trade and the law of GATT", Bobbs-Merill
Co. Inc, (New York, 1969). p. 590
93. See discussion on the Common List in Chapter II of this study.
94. Jackson, op. cit. n. 92 at page 584.

CHAPTER V

CONCLUSION

1. Hopes:

Although, due to similar economic history, the industries in the sub-region are similar and hence competitive, some comparative advantages do exist. In fact, their economies are intertwined to a certain extent. As pointed out above, nearly half of the member states are landlocked and depend on their neighbours for transport and communications access. By creating a regional economic grouping the subregion will not only become a wide market for the products of member states but will also have a bigger bargaining power in the world trade. By lowering tariffs trade will certainly be enhanced inter se, in the sense that the availability of goods will increase by the easier access to each others markets. And by proper utilization of comparative advantages, import substitution can be carried out because in fact member states in the PTA are to a large extent complimentary.

There is a great hope for PTA due to the undertaking by member states to use national currencies in the settlement of some transactions between themselves.¹ This is the kind of pragmatism that gives PTA good chances of succeeding where other economic groupings have failed. It is a trite fact that all member states are faced with chronic shortages of foreign exchange and the lowering of tariffs would be of no avail if member states do not have the means to purchase, whatever there is to purchase, from each other.

The lowering of tariff and non-tariff barriers per se cannot,

of course, increase trade because they are only one variable among many which restrict inter-African trade. Other impediments include the limited ability to produce processed and semi processed goods. In other words, if the volume and range of industrial products is limited, then free trade in itself is not likely to make much difference. The founding fathers of PTA were cognizant of this fact and that is why provisions relating to co-operation in the field of industrial development are included in the Treaty.² As we saw in our discussion with respect to industrial development, the Treaty enjoins members to utilize their available raw materials.³ This is in an endeavour to lessen the general trend of exporting raw materials and then importing the finished products. More pertinently the adoption of common industrial co-operation programmes..." will ensure that member states do not engage in wasteful competition among themselves.⁴ The other serious impediment to trade is a transport network. In this regard the Treaty has addressed itself to this issue.⁵ Obviously a cheap and efficient transport network to transport products to the market will certainly expedite trade. Needless to say, the landlocked member state stand to benefit as access to seaports will improve.

A further important cause for hope is the nature of the institutional framework. The highest policy-making body, the Authority, consists of the Heads of states and Governments.⁶ This augurs well for the PTA on the ground that those who have the political authority to carry out decisions in their own countries actually participate in making decisions. They thus have a moral and indeed legal obligation to implement their decisions. The Authority, however, has not been saddled with too many decision-making duties. This task has been left to the council of minister, for good reasons too.⁷

The meetings of Heads of State and Government are not ideal (forums) for discussing intricate economic and legal details. Their meetings are usually spent on ceremonial activities.

Of significance also is the manner of decision - making in all the institutions. The Treaty provides that decisions of the Authority and the council of ministers will be taken by consensus.⁸

Admittedly, though not the same thing as the rule of unanimity, consensus may amount to unanimity. The difference, however, is that while in the rule of unanimity the casting of a negative vote (i.e. veto) by one member would bring the discussion to an end, no votes are taken in consensus. Instead, discussion is continued until agreement has been reached. Persuasion is normally perceived as the best course of action as opposed to voting which creates a sense of the "vanquished" (the minority) and the "victors" (majority), which breeds ill-feelings.⁹

Lastly and perhaps very important is the gradual approach. A gradual approach is obviously needed to allow for economic adjustments to cushion the dislocations, disruptions and havoc that would be caused by abrupt change in the trading rules.

2. Loopholes:

In the preceding paragraphs above we have looked at the hopes of the PTA. We now look at some possible loopholes in the sense of their being either inadequate or deficient provisions of the Treaty.

In our view the first and foremost likely source of problem is the Common List.¹⁰ Great difficulties may be experienced in arriving at a common list. The experience of the Latin American

Free Trade Area (LAFTA) is of relevance here.

It was seen in the last chapter how LAFTA has failed to reduce tariffs completely because of the difficulty in agreeing on a common schedule. The obvious cause for failure to agree on a common list is the reluctance by some members in reducing tariffs on commodities through which revenue is raised. The implication of all this then is that the common list may only involve very little commodities. Needless to say the degree of trade liberation will depend on the vastness of the Common List. In other words, it will be determined by the number of goods appearing therein. The larger the list, the greater the trade liberation. The problem may be compounded by the fact that member states produce to a certain extent the same type of commodities, especially in the agricultural sector. But as we mentioned above, some comparative advantages do exist especially in the area of agriculture.

A major problem in the Treaty is related to the provision pertaining to quantitative restrictions.¹¹ The Treaty allows member states to impose quantitative restrictions under various circumstances. Of particular concern are the provisions dealing with balance of payments difficulties and protection of infant or strategic industries. The latter provision permits member states to impose restrictions for the purposes of protecting infant or strategic industry for such period as may be determined by the council of ministers.¹² The Treaty does not suggest any criteria which the council should use in determining the duration of imposition of such measures. This is to say, the Treaty does not suggest any indications as to when an infant industry or strategic industry should cease to be regarded as such. The council has been left

with a wide discretionary power in determining the duration of the period. In our view this may be a source of conflict between the council and the member state concerned. The problem is further compounded by the fact that a strategic industry has not been defined. If this is the case, for protectionist purposes, a member state would simply designate any industry as strategic industry and claim the right to impose quantitative or other similar restrictions. It would have made matters easier if guidelines and definitions of the said industries were given. The provision relating to restrictions to alleviate balance of payments problem is even more problematic.¹³ Here again the Treaty merely empowers the council to determine a specific period during which the member state concerned may continue to impose restrictions. To begin with it is a well known fact that nearly all developing countries are faced with a chronic balance of payments difficulties. There is no way of knowing when the situation will improve. It, therefore, appears that the period for imposition of restrictions may be indefinite. Undoubtedly, quantitative restrictions are a very effective way of restricting trade. This is so because the lowering or dismantling of tariffs does not make a great deal of difference if states can not trade with each other. Thus the provisions of the GATT can be said to be more appropriate. Under Article XII (4), GATT provides for consultation among contracting parties as to the nature of the difficulties, possible alternative corrective measures and the effect that such restrictions would have on the economies of other contracting parties. It further provides for periodical review of restrictions with a view to affecting suitable modifications. And if a contracting party through injudicious application of restrictions damages or threatens to damage the trade of any contracting party, such injured state may be released from GATT obligations vis-a-vis the

delinquent contracting party. The Treaty has only provided for the Council to review the operation of any quantitative restriction applied under paragraphs 3,5 and 6.¹⁴ In our view consultations among all the member states should have been provided for as under the GATT.

The rules of origin may yet pose another loophole.¹⁵ The chances of falsifying certificates of origin exist. The best situation would have been to use independent personnel in preparing such forms. But such would be an expensive venture. Here all that is called for is honesty and good will.

With regard to institutions of the PTA, the first loophole one can see is the decision-making process. It seems top-heavy in the sense that the council of ministers has been saddled with too many decisions to make. Under Article II of the Treaty committees report to the commission which in turn makes recommendations to the council, which then takes a decision.¹⁶ Secondly the composition of each organ is such that members do not sit on them as independent persons,¹⁷ but as representatives of their respective states. Thus each of them acts on instructions and by the authority of his government. Accordingly, the affairs or interests of the PTA will be viewed through the spectacles of national interests. Suffice to say the subject-matter, political climate and indeed political orientation of members will be the major determinants for arriving at consensus. This then brings us to the important question of the diversity of political ideologies followed by the various members. We have attached Table I showing the political orientation of member states in the PTA. As can be seen from the Table the PTA is a mixed bag of capitalist and socialist oriented states. The problem is that they may not

always agree on the best course of action.

Finally, but not the least, we find that the provisions relating to industrial development are not specific in the sense that they do not provide concrete ways of fostering industrial development.¹⁶ In our view the said provisions are merely promotional. Indeed the use of the terms, "shall endeavour to co-operate", "co-operation in the promotion of....", "agree to promote and encourage", etc., suggest that these provisions are merely promotional and not necessarily binding on member states. In our view, the provision should have been more specific, and concrete ways of co-operation such as in SADCC should have been provided for.

In conclusion we submit that, notwithstanding, the loopholes we have pointed out above, the PTA is by far a less ambitious regional arrangement which has taken cognizance of the economies of member states. The legal provisions appear to us to be rather inadequate especially vis-a-vis the creation of the necessary infra-structure; the institutions; quantitative restrictions etc. But, albeit, in the final analysis the success of PTA does not depend on lawyers or indeed economists but rather on those on whom there is the duty to guide the destiny of the member states of the PTA.

TABLE I - POLITICAL ORIENTATION

Country	Year of Independence	Form of Govt.	Political orientation	Population (1980)
Angola	1975	One-Party	Socialist	8,136,000
Botswana	1966	Multi-party	Capitalist	819,000
The Comoros	1975	One party	Socialist	360,000
Djibouti	1977	One party	Socialist	198,000
Ethopia		One party	Socialist	31,468,000
Kenya	1963	One-party	Capitalist	15,948,000
Lesotho	1966	Monarchy	Capitalist	1,337,000
Madagascar	1960	Multi party	Capitalist	8,654,000
Malawi	1964	One party	Capitalist	5,968,000
Mauritius	1968	Multi party	Capitalist	959,000
Mozambique	1975	One party	Socialist	12,130,000
Seychelles	1976	Multi party	Socialist/ Capitalist	66,000
Somalia	1960	Military/ One party	Socialist	4,637,000
Swaziland	1968	Monarchy	Capitalist	549,000
Tanzania	1961	One-party	Socialist	18,545,000
Uganda	1963	Multi party	Socialist	12,777,000
Zambia	1964	One party	Socialist/ Capitalist	5,679,000

Zimbabwe	1980	Multi party	Capitalist	7,360,000
Rwanda	1962	Military	Socialist	
Burundi	1962	Military	Socialist	

*Source: PTA. Towards a Subregional Economic Community.

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Footnotes:

- I. Art. 22 of the Treaty, and Annex VI
2. Art. 24 and Annex VIII
3. Art. 2 of Annex VIII
4. Ibid, Art. 3(a)
5. Art. 23 of the Treaty and Annex VII
6. Art. 6 of the Treaty
7. Art. 7 of the Treaty
8. Arts. 6(5) and 7(6) of the Treaty
9. eg voting at the United Nations and the OAU
10. Arts. 13 and 15 of the Treaty and Annex I
11. Art. 16, especially paragraphs 3, 5 and 6 thereof
12. Art. 16(6) of the Treaty
13. Art. 16(5)
14. Art. 16(8)
15. Art. 15(2) of the Treaty and Annex III
16. Art. 11(5) and 11(6)
17. Compare with the Commission in EEC which consists of independent persons, the body nevertheless makes binding decisions along with the council

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