

Regionalisation through Economic Integration in the Southern African Development Community SADC (SADC)

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DEDICATION

To my late Father and Brothers, Amos Senior; Geoffrey, Tendai and Jethro.

The research for this study was completed on 30 September 2011. This study reflects the legal position in the Southern African Development Community (SADC) and all the related legal instruments referred up to this date.

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PUBLICATIONS AND CONFERENCE CONTRIBUTIONS EMANATING FROM DOCTORAL STUDIES

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Projects

This research will also form part of the Regional African Law and Human Security (RALHS) project.

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACJ	Andean Court of Justice
AEC	African Economic Community
AER	American Economic Review
AERC	Africa Economic Research Consortium
AfDB	African Development Bank
Afr J Int'l Comp L	African Journal of International and Comparative Law
AGOA	African Growth and Opportunity Act
AJBM	African Journal of Business Management
AJCR	African Journal on Conflict Resolution
AJIL	American Journal of International Law
AJPS	American Journal of Political Science
Am J Int'l L	American Journal of International Law
Ann Am Acad Pol & Soc	Annals of the American Academy of Political and Social Science
APRM	African Peer Review Mechanism
APSR	American Political Science Review
ASEAN	Association of Southeast Asian Nations
AU	African Union
AUC	African Union Commission
Cambridge J Econ	Cambridge Journal of Economics
CEMAC	Central African Monetary and Economic Union

CJEU	Court of Justice of the European Union
CML Rev	Common Market Law Review
CMT	Council of Ministers responsible for Trade Matters
Columbia J World Bus	Columbia Journal of World Business
COMESA	Common Market for Eastern and Southern Africa
CRTA	Committee on Regional Trade Agreements
DBSA	Development Bank of South Africa
DPR	Development Policy Review
DSU	WTO Understanding on Rules and Procedures Governing the Settlement of Dispute
Dti	Department of Trade and Industry
EAC	East African Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECR	European Court Reports
EEC	European Economic Community
EJDR	European Journal of Development Research
EJIL	European Journal of International Law
ELJ	European Law Journal
EPA	Economic Partnership Agreement
EU	European Union
FDI	Foreign direct investment
Fordham Int'l L J	Fordham International Law Journal

GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GSP	Generalised System of Preferences
Hum Rts Q	Human Rights Quarterly
ICLQ	International and Comparative Law Quarterly
IJBR	International Journal for Business Research
ILC	International Law Commission
ILR	International Law Reports
IMF	International Monetary Fund
Int'l & Comp L Q	International and Comparative Law Quarterly
IRLE	International Review of Law and Economics
J Afr Econ	Journal of African Economics
JCAS	Journal of Contemporary African Studies
JCMS	Journal of Common Market Studies
J Commonw Comp Polit	Journal of Commonwealth and Comparative Politics
J Dev Econ	Journal of Development Economics
JEPP	Journal of European Public Policy
JHEA/RESA	Journal of Higher Education in Africa
JICLT	Journal of International Commercial Law and Technology
J Int'l Econ L	Journal of International Economic Law
JMAS	Journal of Modern African Studies
JSAS	Journal of Southern African Studies
JWTL	Journal of World Trade Law

LPA	Lagos Plan of Action for Economic Development of Africa
MFN	Most-Favoured-Nation
Mich J Int'l L	Michigan Journal of International Law
Mich L Rev	Michigan Law Review
MLR	Modern Law Review
NAI	New African Initiative
N C J Int'l L & Com Reg	North Carolina Journal of International Law and Commercial Regulation
NEPAD	New Partnership for Africa's Development
NGC	National Governing Council
Nigerian J Int'l Aff	Nigerian Journal of International Affairs
N Ill U L Rev	Northern Illinois University Law Review
NQHR	Netherlands Quarterly of Human Rights
NT	National Treatment
NTB	Non-tariff barriers
NYU J Int'l L & Pol	New York University Journal of International Law and Policy
OAU	Organisation of Africa Unity
OECD	Organisation for Economic Co-operation and Development
ORCs	Other regulations of commerce
PAP	Pan-African Parliament
PER	Potchefstroom Electronic Law Journal
PTA	Preferential Trade Area

Q J Econ	Quarterly Journal of Economics
Recueil des Cours	Recueil des Cours de l'Academie de Droit International
RIA	Regional Integration Agreement
RIPE	Review of International Political Economy
RISDP	Regional Indicative Strategic Development Plan
ROAPE	Review of African Political Economy
RTA	Regional trade agreement
SACU	South African Customs Union
SADC	South African Development Community
SADCC	Southern African Development Coordination Conference
SADCLJ	SADC Law Journal
SAJE	South African Journal of Economics
SAJIA	South African Journal of International Affairs
SAPs	World Bank Structural Adjustment Programmes
SAR	Southern Africa Report
SAYIL	South Africa Yearbook of International Law
S Afr J Econ	South African Journal of Economics
SA Merc LJ	South African Mercantile Law Journal
Syd L R	Sydney Law Review
TDCA	Trade Development and Cooperation Agreement
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

TNF	Trade Negotiating Forum
Transnat'l L & Contemp Probs	Transnational Law and Contemporary Problems
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UEMOA	Union Economique et Monetaire Ouest Africaine
UNECA	United Nations Economic Commission for Africa
U Pa J Int'l Econ L	University of Pennsylvania Journal of International Economic Law
Va J Int'l L	Virginia Journal of International Law
WBER	World Bank Economic Review
WTO	World Trade Organisation
Yale L J	Yale Law Journal
YILC	Yearbook of the International Law Commission

SUMMARY OF THESIS

The regional economic community (REC) of the Southern African Development Community (SADC) comprises 15 Southern African countries. The economic and political aspects of regional integration in SADC dictate the pace of integration while the influence of a legal regime for regional integration remains at the periphery. While the SADC Treaty and its Protocol on Trade are clear about the priority of economic integration; the full implementation of SADC's economic integration is still yet to be realised using these legal instruments. Regional economic integration is also a priority at both continental and global level. The legal instruments applicable at these levels are those established through the African Union (AU) and the World Trade Organisation (WTO) respectively. Analysis of these external legal instruments is relevant because SADC Member States are signatories to agreements establishing these organisations. Thus, rules based trade in SADC should be understood from a regional, continental and global perspective where a community must have well-structured and managed relations between itself and other legal systems as a necessary condition for its effectiveness. These structured relations refers to a legal and institutional framework that defines the relations between community and national laws, spelling out the modalities for implementing community law in Member States, defines the respective competencies of the community and Member States and provide rule based systems for resolution of conflicts.

In setting the scene for an in-depth discussion of the legal and institutional framework for regional economic integration in SADC, this study presents the history of SADC, its political and economic characteristics that have shaped the legal aspects of trade within the region, the continent of Africa and the world at large. Within this context, the definition of regional integration is presented from a general and international understanding but ultimately gets narrowed down to what it means for Africa and SADC. The discussion on the theories behind regional economic integration gives understanding to the integration approach employed in the organisation. South Africa's economic and political leadership is critical in the realisation of economic integration;

hence this study acknowledges that without South Africa's full commitment; regional economic integration will suffer a setback. Besides the challenge of implementing rules based trade in SADC, this study also identifies a number of obstacles to SADC regional economic integration and multiple memberships are identified as a major stumbling block. A comparative study of SADC's institutional framework with that of the European Union (EU) is undertaken to establish the rationale behind SADC's choice of utilising the EU model of integration. This study establishes the critical role institutions play in the implementation of treaty obligations as established by the agreements. The main lesson from this comparative study is that the EU institutions are allowed to fulfill their obligations of implementing treaty provisions, while SADC institutions are handicapped. The future of SADC is presented within the context of a set of recommendations that identifies the tripartite free trade area (FTA) that includes the East Africa Community (EAC) and the Common Market for Eastern and Southern Africa (COMESA) as one of viable legal instrument for deeper integration in SADC and the continent of Africa. General recommendations are made on the need for reform of rules and principles that are necessary for the implementation of SADC Treaty regime as well as possible improvements that are important for the full realisation of regional economic integration.

Key Words

Regional economic integration, SADC Treaty, SADC Protocol on Trade, SADC institutions, Free Trade Area(FTA), Customs Union, Common Market, Regional Indicative Strategic Development Plan(RISDP) African Economic Community(AEC), European Union (EU),World Trade rules, economic characteristics, political characteristics, theories of integration, rules based trade, multilateralism, regionalism, South Africa, doctrine of institutionalism, tripartite FTA.

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CHAPTER 1

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1.1 Background

The countries in Southern Africa have been key drivers of the new global spree of regional trade agreements (RTAs).¹ Consequently, Southern Africa has taken its place on the global stage, mainly because of the Southern African Development Community (SADC),² which continues to evolve in both economic and political terms that are now based on a legally binding treaty. Before the signing of the SADC Treaty, the organisation was run under a loose and non binding structure of the Southern African Development Coordination Conference (SADCC).³ The origins of SADCC lie in the Frontline States,⁴ a group of eminent Southern African countries that fought for independence from colonial rule. Their aim was to help liberate the whole region from colonial rule. In the 1960s and 70s, these newly independent states supported national liberation movements in the region by coordinating their political, diplomatic and military struggle to bring an end to colonial and white minority rule. The idea was to secure international cooperation for economic liberation and collective self-reliance.⁵ At that time, according to the late President of Botswana, Sir Seretse Khama, "economic dependence had in many ways made political independence somewhat meaningless".⁶ Additional effort under former President Kaunda of Zambia was to establish a transcontinental belt of independent and economically powerful nations from Dar es Salaam and Maputo on the Indian Ocean to Luanda on the Atlantic.⁷

¹ Hereafter "RTAS".

² Hereafter "SADC". For a historical background see Abegunrin 1981-2 *Current Bibliography on African Affairs*. The members of SADC are Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. The membership of Madagascar was suspended after a coup d'état by opposition leader Andre Rajoelena

³ Oosthuizen *Southern African Development Community*. See also Abegunrin "Southern African Development Coordination Conference" 36. See also "Southern Africa: Union of the Southern Nine", *Africa* (London 1980) 45. Green argued during the first year of SADCC that at one extreme Lesotho would find a total break with South Africa either impossible or economically suicidal - see Green "First Steps Towards Economic Integration" The Southern African Development Co-ordination Conference was established in 1980 by the governments of Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe.

⁴ Clough and Ravenhill "Regionalism in Southern Africa". See also Thompson *Challenge to Imperialism*. See also Nsekela (ed) *Southern Africa*.

⁵ Tsikata "Southern Africa: Trade". See also Gibb 1998 *Southern Africa in Transition JMAS* 287-306.

⁶ Khama 1979 *Africa Research Bulletin* 51-55. See also Gibb 1998 *Southern Africa in Transition JMAS* 287-306.

⁷ Kaunda "Address" 3-4.

This *de facto* regional organisation needed a treaty and a number of other legally binding instruments.⁸ Thus, SADC was formed as an international regional organisation established in terms of a treaty and declaration referred to as the "Treaty of Southern African Development Community" signed by the heads of state and government of the signatory Member States.⁹

The SADC Treaty provides the legal framework of the organisation by setting out the status¹⁰, principles and objectives¹¹, obligations of Member States¹², membership¹³, the institutions¹⁴, procedural matters relating to areas of cooperation among Member States¹⁵, cooperation with other international organisations¹⁶, financial issues¹⁷, dispute settlement¹⁸ and lastly sanctions, withdrawal and dissolution.¹⁹ The SADC Treaty gives provision for formulation of subsidiary legal instruments such as protocols giving specific mandates to various SADC institutions. A total of twenty three protocols have so far been formulated.²⁰

The SADC Protocol on Trade sets out the basis for regional integration, a key objective of economic liberation. The point is that if SADC desires to participate effectively in the global economy, the region has to undergo regulatory upgrading, in the context of an international trading environment that is easier to access from a regulatory standpoint. Thus, it is important to investigate whether the SADC Treaty is capable of producing the desired results of trade liberalisation in the region and multilaterally. The main challenge for SADC has been the slow process of implementing the Treaty, specifically the SADC Protocol on Trade. Through this

⁸ Olivier "Southern African Development Community".

⁹ The SADC Treaty was signed at Windhoek, Namibia on 17 August 1992, entering into force on 30 September 1993. The Treaty was amended at Blantyre, Malawi in August 2001. A consolidated version of the Treaty and all its amendments can be accessed on the SADC official website <http://www.sadc.int> Accessed 10 June 2010

¹⁰ Article 14 *SADC Treaty*.

¹¹ Chapter 3, Article 4 and 5 *SADC Treaty*.

¹² Article 6 *SADC Treaty*.

¹³ Chapter 4 Articles 37 and 8 *SADC Treaty*.

¹⁴ Chapter 5 Articles 9 and 16A *SADC Treaty*.

¹⁵ Article 21 *SADC Treaty*.

¹⁶ Article 24 *SADC Treaty*.

¹⁷ Chapter 9 Articles 25 to 27 and Chapter 10 Articles 28-30 *SADC Treaty*.

¹⁸ Article 32 *SADC Treaty*.

¹⁹ Chapter 13 Article 33 to 35 *SADC Treaty*.

²⁰ See list of Protocols available on SADC official website <http://www.sadc.int>

Protocol, SADC Member States have made a clear commitment to liberalising trade within the group.

Accession to the SADC Treaty commits Member States to accepting a series of principles, objectives and strategies on mutual, beneficial and equitable cooperation and integration; to participating in the structures and institutions of SADC; and to negotiating a series of the already mentioned protocols to give practical effects to its aims. Specific obligations are to be contained in the respective protocols, which have to "spell out the objectives and scope of, and the institutional mechanism for cooperation and integration".²¹

The fact that most of the protocols have entered into force only since 1998 indicates that SADC still stands somewhat at the beginning of its regional integration process. In highlighting this infancy, the World Bank has noted that, until recently, the gains from cooperation and integration within SADC may relate more to non-traditional gains of regional integration agreements, such as "lock-in" to policy reforms and improved international bargaining as a group, rather than to the traditional gains of an open regional economic space.²² In trying to improve on this implementation impulse, SADC also came up with the Regional Indicative Strategic Development Plan (RISDP).²³ The RISDP has set in motion a seemingly self-accelerating mechanism for regional economic integration and has been hailed as the blueprint for the realisation of SADC's vision of integration beyond the level of integration envisaged by the Protocol on Trade.²⁴ In addition, the RISDP is set to provide SADC Members States, institutions and policy makers with a coherent and comprehensive development agenda on social and economic policies over a decade.²⁵ This agenda has also been modelled on the European linear model of regional integration.

This use of the European model is proof that the continent of Africa continues to be primarily a recipient and not a shaper of globalisation.²⁶ It is not surprising then that its regional and continental trade diplomacy is basically defensive, resulting in

²¹ Article 22(1) *SADC Treaty* (1992).

²² World Bank *Trade Blocs*.

²³ Hereafter "RISDP".

²⁴ Gcayi *Challenges Confronting the Establishment of a SADC Customs Union*.

²⁵ SADC Secretariat *Terms of Reference* (RISDP 2001).

²⁶ Draper and Qobo "Multilateralising Regionalism".

regional integration arrangements not working optimally. Closely related to the use of foreign models in SADC and the African continent is the fact that regulatory and legislative frameworks have been derived from an assortment of colonial powers. African regional trade agreements (RTAs),²⁷ such as SADC, frequently turn to aid for assistance in building their institutional and regulatory capacities, thereby entrenching their status as recipients of imported models and frameworks. For this reason, despite the availability of other compelling regional integration models (especially from Asia) sub-Saharan Africa remains locked into the European orbit.

The European orbit is clearly evident in the SADC regional integration agenda, as already mentioned above. Notwithstanding the incompatibility of this model with the African setting, SADC and many other regional blocs in Africa bravely continue using it. The SADC Protocol on Trade and the RISDP clearly show this trend. Ultimately, the politics of dependence rooted in colonial inheritances clashes with the need for African states, in particular SADC, to leverage their economic and political relations with the West and Europe in particular for their own development. This requires a self-reliance that is anchored in force of rules, which, in turn, demands application and implementation of the SADC Treaty without fear or favour. As will be discussed throughout this thesis, SADC experience shows that this is not being done. A further issue arising from this challenge is whether the SADC regional integration agenda is compliant and compatible with World Trade Organisation²⁸ rules. Do the efforts at regional level strengthen the drive towards multilateral trade liberalisation?

This thesis is an attempt to answer the question as to whether SADC can fulfil its trade liberalisation objectives successfully under the current legal and institutional framework within the SADC Treaty, the African Union (AU) and World Trade (WTO) law. It is not altogether clear to what extent and at what pace the sub-region is moving towards deeper integration, as limited levels of success are only evident in some discrete areas of cooperation. Among the many challenges are political problems, inappropriate institutional mechanisms and the uncoordinated pace of implementation of the regional integration agenda.

²⁷ Hereafter "RTAs".

²⁸ Hereafter "WTO". *Marrakesh Agreement Establishing the World Trade Organisation* (1994) (signed 15 April 1994, entered into force 1 January 1995).

1.2 Area of focus

The interplay between world trade law, RTAs and national or governmental approaches to trade liberalisation raises a myriad of legally relevant questions and challenges. However, for this study to remain focused, a central research question is posed with specific aims being identified.

1.2.1 Central research question

Can SADC realise regional economic integration under the current legal and institutional framework of the SADC Treaty, the AU's Constitutive Act and WTO law? In order to answer the main question, the following ancillary questions are posed:

- i) What is the role of the SADC Treaty and the Protocol on Trade in SADC trade liberalisation as a mechanism for regional integration?
- ii) What are the legal requirements for the establishment of a SADC Free Trade Area and Customs Union under WTO/GATT law and the African Economic Community (AEC)?
- iii) What is the relevance of using the EU model of integration in SADC?
- iv) What is the proposed way forward for SADC deeper integration, notwithstanding the challenges raised?

1.2.2 Aims of the study

This study aims to:

- determine the rationale behind and benefits of regionalism in SADC²⁹
- identify and evaluate the various theories that shape regional integration in the world, on the African continent and specifically in SADC³⁰

²⁹ Chapter 3.

- critically evaluate the legal instruments and conditions that shape the trends of regionalism in Africa³¹
- give an account and analysis of the legal instruments empowering SADC institutions that promote economic integration in the organisation.³²
- identify challenges to SADC economic integration and propose available solutions³³
- distil from international law and regional law the legality of the SADC regional integration agenda³⁴
- make an institutional and legal comparative study of selected SADC and EU institutions whose purpose is to facilitate economic integration.³⁵
- reach a conclusion and make recommendations for a successful formula for regional economic integration that is legally founded, informed by local needs, as well as conducive and compatible with the local economies.

1.3 Hypothesis

This thesis focuses on the time frame, which presents integration challenges for SADC in light of the current paradigm being dictated by the SADC Protocol on Trade, the key driver of which is the RISDP, a 15-year indicative plan tasked with the roadmap for deeper integration to a Free Trade Area (2008); Customs Union (2010); Common Market (2015) and Monetary Union (2018).

If these objectives and deadlines are not met, regional integration in SADC will not be achieved. Furthermore, it is important to point out that if these targeted objectives are not legally binding on Member States (through the Treaty or Protocols); it is not legally possible to enforce them against Member States that fail to implement the regional integration agenda. This poses a serious challenge.

³⁰ Chapter 3.

³¹ Chapter 5.

³² Chapter 6.

³³ Chapter 8.

³⁴ Chapter 9.

³⁵ Chapter 10.

1.4 Methodology

The study begins with a general synthesis of regional economic integration in SADC. There are four main approaches employed in this study: descriptive, analytical, comparative and prescriptive. The descriptive approach will be used to outline and describe the existing legal instruments and institutional frameworks within SADC (i.e. the SADC Treaty, the Protocol on Trade and the RISDP). Legal instruments outside of SADC include WTO law/GATT, the EU Treaties and the African Union. Also included here are other treaties operating on the African continent, for example the treaties establishing the Southern African Customs Union (SACU), the Common Market for East and Southern Africa (COMESA), the East African Community (EAC) and the proposed tripartite FTA that includes all Member States from the three regional economic communities (RECs) identified. The analytical approach is tasked with an evaluation of the said legal and institutional frameworks in order to ascertain whether their current form is conducive to deeper integration in SADC. Furthermore, the comparative approach is particularly useful for comparing SADC with the EU model of integration.

In the comparative study, cognisance was taken to establish how the treaties establishing both the EU and SADC relate to the Member States. The EU was selected for this comparative study for a number of compelling reasons: Firstly, the EU model of integration was unequivocally chosen by SADC; secondly, the EU model is known for groundbreaking developments that have not just shaped its own integration but also trends in integration the world over; and, thirdly, the EU has been also connected to the region through centuries of colonial ties as well as north–south partnerships.

Other RTAs in Africa have been chosen for inclusion in this thesis for the purpose of comparison analysis for a couple of reasons: Firstly, they form part of the developing world and are geographically located in sub-Saharan Africa; and secondly, they also share the same level of economic development, political ideologies and international and regional integration obligations. Most importantly, most if not all the SADC Member States belong to these other RTAs.

Finally, the prescriptive approach forms part of the recommendations and conclusions. The SADC regional integration agenda needs to be rescued in one way or another; hence a number of propositions are made.

1.5 Overview of chapters

Chapter 2 deals with an overview of the character of SADC from a political, economic and legal point of view. Chapter 3 focuses on defining regional economic integration. It is important to understand regional integration trends at the global, African and regional level. Theories are constructed in order to explain, predict and master a given phenomenon. Within the context of Southern Africa, the theories to be discussed will help explain the benefits of regional integration. The role of agreements and the types of regional trade agreements are also discussed. In Chapter 4 the relationship between multilateralism and regionalism is debated. Regional economic integration has become a popular trend after multilateral trade negotiations hit a snag in recent years. The debate goes further in identifying multilateralism as a consequence of globalisation. RTAs have proliferated around the world to the extent that now virtually all the members of the WTO are party to at least one.³⁶ Chapter 5 shows that regionalism is rife on the African continent. However, African countries with the notable exception of South Africa are largely takers rather than shapers of international economic institutions, including regulation. Thus the role of the African Union and its Constitutive Act is analysed in order to determine its role in regional economic integration.

Chapter 6 identifies a number of SADC institutions whose legal mandate from the SADC Treaty is to promote economic integration. This important institutional structure of SADC is examined in order to determine its effectiveness in using the SADC Treaty provisions in the realisation of regional integration. In chapter 7 the role of South Africa in SADC economic integration is under the spotlight. South Africa can either complement or frustrate regional integration efforts in SADC. Chapter 8 shows that economic integration in Africa is often poorly conceived and in some regions suffers from chronic duplication, while the economic and political bases for it are

³⁶ Baldwin and Low (eds) "Multilateralising Regionalism".

often woefully lacking. There are, therefore, a number of challenges regional integration has to overcome in SADC and on the African continent before positive results can be realised.

Chapter 9 gives an analysis of the political and legal reality that regional agreements are here to stay whether or not they comply with WTO rules.³⁷ This chapter discusses the need to find a legal balance and mutual support between RTAs and the WTO. Chapter 10 identifies the EU as generally being seen as the reference point for a successful model of economic integration. This is so because it is widely considered as the model *par excellence* in this domain; however, it is also because this model has been deliberately exported by its promoters.³⁸ This chapter is a clear illustration of SADC's choice of the EU model notwithstanding the EU efforts in exporting this model.

Chapter 11 presents a conclusion and a set of recommendations based on the challenges identified throughout this thesis. The current regional integration paradigm in SADC and sub-Saharan Africa demands flexible and speedy RTAs. The preference for FTAs over customs unions is explained in this chapter. The study's main recommendation is that SADC give total commitment to the full implementation of the SADC Treaty, especially the Protocol on Trade.

³⁷ Pauwelyn "Legal Avenues".

³⁸ Mbala "EU and Regional Integration".

CHAPTER 2

THE POLITICAL, ECONOMIC AND LEGAL CHARACTERISTICS OF SADC

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2.1 Introduction

Integration has many facets that include political, economic and legal dimensions. In this chapter it is important to establish the political and economic rationales for establishing SADC. This is critical since political commitment is the ultimate determinant for the success of regional economic integration in SADC. It is also important that the political will and economic aspirations of SADC find support from a legally binding agreement. Thus, the political and economic characteristics of SADC will be discussed before an analysis of the SADC Treaty and Protocol on Trade. This is because the political leaders of SADC both as a collective and individually representing their countries hold the key to the implementation of SADC Treaty provisions. The August 2001 amendment of the 1992 SADC Treaty brought about significant changes that included an overhaul of structure, policies and processes. The community increased its objectives to include the promotion of:

... sustainable and equitable economic growth ... that will enhance poverty alleviation ... enhance the standard of living and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration.³⁹

This was necessary since the organisation had to find a different focus after the independence of Namibia in 1990 and of South Africa in 1994 meant the initial objective of liberating Southern Africa had been fulfilled. The new SADC looked towards greater trade integration.⁴⁰ In 2003, this ongoing process of transformation resulted in the formulation of the RISDP whose ambitious programmes includes the establishment of a free trade area in 2008, a customs union in 2010, a common market in 2015, a monetary union in 2016 and a regional currency in 2018. The RISDP has been set up as a 15-year indicative plan for SADC to be implemented in phases of three years. In the words of the SADC mission statement, its aims are:

... to promote sustainable and equitable economic growth and socioeconomic development through efficient production systems, deeper cooperation and integration, good governance, and durable peace and security, so that the

³⁹ Article 5(1)(a) *SADC Treaty* (1992).

⁴⁰ Cattaneo *Theoretical and Empirical Analysis of Trade Integration*.

region emerges as a competitive and effective player in international relations and the world economy.⁴¹

Since the inception of SADC, economic and human development challenges remain and the RISDP is an attempt to address them. To complete this task will cost SADC members a lot in terms of effort, apparent loss of sovereignty and economic adjustment.⁴² However; it is important to highlight from the outset that the cost of integration is far less than that of non-integration. The cost of non-integration would be potentially very high and lies not only in foregoing all the gains from the agreed free trade area, but also in a serious loss of credibility and the sacrifice of an opportunity to go further.⁴³ At the same time, SADC is not alone in this drive; the world has seen a proliferation of regional trading arrangements unprecedented at any period in history.⁴⁴ It is in this context that this chapter will highlight the political climate of the region whose dictates have influenced its political leaders to push for economic integration.

2.2 Political characteristics

The discussion of a political climate that is conducive to regional economic integration is relevant in this legal study. National governments are responsible for the implementation of legal commitments to treaties.⁴⁵ Accordingly, the lack of progress in SADC has been attributed to a number of chronic factors, namely, lack of political commitment of Member States, organisational inefficiency and bureaucracy.⁴⁶ Asante⁴⁷ contests that many economic problems involved in integration can be solved only through political measures. The development and orientation of regional trade, the maintenance of full employment, the regulation of cartels and monopolies, the prevention of depression and inflation and the coordination of regional economic plans all necessarily require legal provisions, executive decisions and administrative harmony, which falls within the responsibility of the highest sphere of government. The government is the highest political

⁴¹ Isaksen *SADC in 2003*.

⁴² Evans, Holmes and Mandaza *SADC*.

⁴³ Evans, Holmes and Mandaza *SADC*.

⁴⁴ Sampson and Woolcock (eds) *Regionalism*.

⁴⁵ AERC 2007 siteresources.worldbank.org.

⁴⁶ Mills "Reflections on the 1998 Johannesburg SADC-Mercosul Conference".

⁴⁷ Asante 1992 *New Hope for Africa* 20-22.

authority in any country. Herrera provides the link between politics and legal regimes when he warns:

We have a long way to travel and all the longer, the more we delay in recognising that economic integration cannot be attained exclusively through strictly economic measures, that economic integration is not in itself enough to assure the progress and welfare of nations and that every development progress entails simultaneous struggle on the fronts of technology, law, education, institutions and fundamentally politics.⁴⁸

Furthermore, according to Sampson,

... the original literature on European integration as well as more recent international relations writers have pointed to the strategic motivations behind regional agreements. Regional free trade agreements have for example, been motivated by a desire to reconcile previous enemies or to promote economic and political stability in a neighbouring country.⁴⁹

It is therefore undeniable that politics in the SADC region have shaped SADC's past, dictates the current and will pronounce the future. After many years of political and civil strife, marked by economic decline and social instability, SADC is now experiencing a great deal of political stability and there is hope for economic stability. Having seen political independence from the 1960s to the early 1990s has meant there have been positive steps towards greater political stability being realised in the region. Peace has come to Angola and the DRC held democratic elections for the first time after a long history of civil war.⁵⁰

Since the 1990s, most SADC Member States have adopted multiparty democratic governments. However many instances of rigged elections in Member States have tarnished this good image.⁵¹ Furthermore, some Member States like Zimbabwe have failed to consolidate the gains made after independence; they have fallen back on repressive governments to levels worse or comparable to the time of colonialism. As already mentioned, Madagascar's SADC membership has been suspended as a result of a *coup d'état*.⁵² However, in many countries of SADC where democracy has

⁴⁸ Boidin 1988 *Courier* 67.

⁴⁹ Sampson and Woolkock (eds) *Regionalism* 12.

⁵⁰ Ngidi 2001 www.iol.co.za.

⁵¹ Thornycroft 2008 www.iol.co.za 1.

⁵² Dlamini 2009 www.times.co.sz.

prevailed, such successes have been attributed to improvements in political and economic governance. Such an environment is crucial for poverty reduction through cooperation, trade and integration. Waterston⁵³ emphasises that, in the absence of political commitment or stability, the most advanced form of planning will not make a significant contribution towards a country's development. Political instability should therefore be stressed as one of the major problems that might militate against the effective implementation of the provisions of the SADC Treaty.⁵⁴

In many respects, all the regional organisations, regardless of their purpose, are political in nature. Not only do political objectives motivate the establishment of these organisations, but political actions also bring them into being, and it is politics that also characterises their functioning. Okolo⁵⁵ has stated that these organisations are marked by conflict among participant-actors over goals and over the distribution of costs and benefits just as in politics at the national level. It is not going too far, then, to say that regional organisations are in reality political systems.⁵⁶ They are also intergovernmental organisations in terms of law. Most ruling governments in SADC have political connections with each other, for example the ANC in South Africa, ZANU PF in Zimbabwe, SWAPO in Namibia, FRELIMO in Mozambique, CCM in Tanzania and the MPLA of Angola, to mention just a few.⁵⁷ Rothchild also notes that:

... organisations that are predominantly economic have significant political dimensions if anything, for the simple reason that international organisations are political in their inception, termination and basic arrangements even if the conflict factor is minimised in their daily operations.⁵⁸

The involvement of politics in integrative schemes is more pervasive and more divisive in the case of Africa. This means that African politicians wield a lot of power on the continent. This aspect will be evident in chapter 3 of this thesis. It is aptly said that economic integration in Africa must be sufficiently elastic to accommodate political aspiration and that it is important to marry the economic propositions with

⁵³ Waterston *Development Planning* 4.

⁵⁴ Nathan 2006 "SADC's Uncommon Approach". *JSAS* 605-622.

⁵⁵ Okolo 1985 *Integrative and Cooperative Regionalism* 121-153.

⁵⁶ Asante 1992 *New Hope for Africa* 13.

⁵⁷ These ruling parties met on the sidelines of the World Economic Forum on Africa in Dar es Salaam, Tanzania (5-6 May 2010) - see World Economic Forum 2010 <http://www.weforum.org>.

⁵⁸ Rothchild 1967 *The Political Implications of the Treaty* 14.

political dogma.⁵⁹ It is difficult in the African context to consider economic development problems without considering the political realities. Development projects have been stopped in Africa many times because of political abstractions.

The political aspect of regional integration is always closely related to the commitment of the governments of Member States to regional integration. This is underlined by the Lagos Plan of Action, which stipulates that it is the responsibility of the African states to take "measures to effect the establishment of an African Common Market" that would lead "to the attainment of the aims and objectives of the African Economic Community".⁶⁰ This is particularly important because, as development studies scholars like Stockwell and Laidlaw have recognised, the role of government in development has risen steadily to a point where successful growth is not really possible without the active support of government.⁶¹ John Lewis has gone so far as to argue that there is "no substitute for the continuing lead that governments must supply to developments-promotion efforts".⁶² What this means is⁶³ that if a government is unwilling or unable to play an active positive role in regional integration, the government itself can be considered a barrier to such regional aspirations and such a government presents a fundamental cause of failure of regional policy orientation. Hence, the establishment of effective sub-regional economic schemes depends crucially upon the extent to which the Member States have committed themselves to the concept of regionalism in Africa. Keohane, Bergsten and Nye have noted that politics cannot be so easily disassociated from economics, especially in integrative schemes.⁶⁴ Thus, the implementation of legal obligations relating to integration depends on political will.

2.3 Economic characteristics

Since the formation of SADCC, the region has been well aware of the precarious economic situation it found itself in. This, in fact, influenced the need for cooperation

⁵⁹ Mutharika *Towards Multinational Economic Cooperation* 15.

⁶⁰ *Lagos Plan of Action for Economic Development of Africa* (1980) 128. The LPA will be discussed in detail under chapter 5.

⁶¹ Stockwell and Laidlaw *Third World Development* 251-296.

⁶² Lewis "Overview: Development Promotion" 29.

⁶³ Bergsten, Keohane and Nye 1975 *International Economics* 3.

⁶⁴ Bergsten, Keohane and Nye 1975 *International Economics* 3.

at the first instance.⁶⁵ The 15 members of SADC are at different levels of development,⁶⁶ with most of them being underdeveloped.⁶⁷ For this reason, social and economic growth and development across the region is heterogeneous; some countries post high growth rates while others have very low growth rates. Consequently, the drive towards poverty reduction has led SADC to embark on the implementation of a number of reform measures that aim to promote macroeconomic stability and higher growth combined with an improvement in the delivery of social services. SADC economies have a small manufacturing sector and their manufactured products range is not diversified.⁶⁸ Moreover, to their detriment, they also produce a similar range of products such as foodstuffs, beverages, tobacco, textiles, clothing and footwear, all of which are agriculture based, making them cheap on the market. In addition, the fact that the products are similar means that competition is tough and prices are driven down.

This predicament is compounded by the problem of vertical integration of SADC economies into the northern hemisphere. This is particularly so with respect to the African economies that are largely colonial in character, dependent on and devoted to the export of raw material and therefore failing to industrialise.⁶⁹ In Southern Africa (particularly South Africa, Zimbabwe, Namibia, Angola and Mozambique), integration into Europe was almost complete by virtue of white settler colonialism and its objective of creating white dominions like Canada, Australia and New Zealand.⁷⁰

Foreign trade plays an important role in the economies of the region. The gross domestic product (GDP) figures show that in small countries like Lesotho and Swaziland trade is the main source of revenue.⁷¹ The export trade for Angola, Botswana, Democratic Republic of Congo (DRC), Namibia, South Africa and Zambia is dominated by oil and mineral exports.⁷² The oil and mining industries play an important role as a major foreign exchange earner and sources of inputs to industrial

⁶⁵ Friedland 1985 *The SADCC and the West* 287-314.

⁶⁶ McCarthy 2002 www.sarpn.org.za.

⁶⁷ Schoeman 2001 eh.net. See also World Bank Data Unknown data.worldbank.org.

⁶⁸ Mare 2009 www.un.org.

⁶⁹ Diouf 1994 *Scenarios* 993-998.

⁷⁰ Evans, Holmes and Mandaza *SADC* 12.

⁷¹ Holman (ed) "Regional Survey of the World" 1043.

⁷² See SADC official website: <http://www.sadc.int/index/browse/page/108>

development. While oil and mining ventures are capital intensive, they still generate substantial employment opportunities directly and indirectly through linkages with other supply and input sectors. In other countries, agricultural commodities dominate export trade. The bulk of imports of SADC countries are intermediate and capital goods.⁷³

The discussion of foreign trade in SADC cannot be fully explored without the mention of South Africa as the major economy of the region. Moreover, the influence on trade in the region by other Southern African Customs Union⁷⁴ countries is equally relevant. SACU is the oldest existing customs union in the world.⁷⁵ South Africa's intraregional trade is concentrated in the SACU countries owing to the existence of a customs union and a common monetary area. Among these Southern African countries, Lesotho is overwhelmingly dependant on South Africa for its export market. Moreover, a significant proportion of Zimbabwe's and, to some extent, Malawi's exports also finds markets in Southern Africa, mainly South Africa.

2.4 Economic challenges

The United Nations has already indicated that it believes that Africa will fail to achieve the Millennium Development Goal of halving poverty by 2015.⁷⁶ This is a serious setback considering that, through the MDGs; the African continent had targeted halving poverty by 2015. The brief discussion above has also shown that the region's economies are weak. Indeed, SADC itself has admitted in its official publications that the main challenge in the region is caused by the prevailing economic development framework. Hence, the main challenge is clearly to overcome the underdeveloped structure of the regional economy, improve macroeconomic performance, political and corporate governance and thus unlock the untapped potential that lies in both the region's human and natural resources. Accordingly the main challenge facing the region is the development of an environment that is conducive to regional integration, economic growth, poverty reduction and the

⁷³ See SADC official website: <http://www.sadc.int/index/browse/page/108>

⁷⁴ Hereafter "SACU".

⁷⁵ See WTO 2003 www.wto.org.

⁷⁶ See *UN Resolution A.C.3/65/L.12/Rev.1* (2010). See also Ki Moon 2010 www.tehrantimes.com.

establishment of a sustainable path of development.⁷⁷ If the region is to develop faster and take advantage of regional integration and globalisation, Member States will need to address the constraints facing the supply side of their economies, including those related to inadequate regional infrastructural linkages. Most countries are landlocked and have to rely on transit corridors through other Member States whose roads and rail network are very poor.

The poverty situation in SADC needs to be put into perspective.⁷⁸ Poverty in all its dimensions is one of the major development challenges facing the SADC region.⁷⁹ The poverty situation in the region is largely reflected in the low levels of income and high levels of human deprivation. Available statistics indicate that about 70 per cent of the population in the region lives below the international poverty line of US\$2 per day, while 40 per cent of the region's population, or 76 million people, live below the international poverty line of US\$1 per day. Recent figures from the African Development Bank and the World Bank show that about 80 per cent of the population in some Member States, such as Mozambique and Zambia, is estimated to be living in extreme poverty. With regard to human poverty, this varies among Member States and has shown some fluctuations in the last decade. The levels range from the highest figure of about 54.7 per cent of the population affected by human poverty to the lowest index of 11.6 per cent. A few Member States, such as Mozambique, Malawi and Zambia, are worse affected as they have a human poverty index of above the regional figure of 31.5 per cent. About half of Member States have an index just slightly below the regional average. Although a declining trend was observed during the late 1990s, human poverty is on the increase in some Member States. The greatest deprivation is mainly in the areas of low access to safe drinking water and child malnutrition. Almost half of Member States' indicators on these two components of human poverty are below the regional average. In terms of access to water, the most affected countries are Angola, Mozambique, Lesotho, Malawi, Zambia and Swaziland. Tanzania and Namibia have more than 20 per cent of children under five affected by malnutrition.

⁷⁷ Leal-Arcas 2009 *European Union and New Leading Powers* 345-416.

⁷⁸ See SADC Date Unknown (a) www.sadc.int.

⁷⁹ SADC Date Unknown (a) www.sadc.int.

Furthermore, the poverty situation has been aggravated by the drought that has hit the region. Currently, about 14 million people are threatened with starvation in the region. Poverty in the SADC region is particularly acute among various vulnerable groups, such as households headed by the aged and child-headed households. This trend is now on the increase as a result of the impact of the HIV and AIDS pandemic. Poverty in Southern Africa is a consequence of economic, technical, environmental, social, political and exogenous factors. Accordingly, low incomes are as a result of low and unsustainable rates of economic growth in the wake of higher rates of population growth. The poor also lack adequate capital assets; physical, financial, human, natural and social. Lack of adequate human capital may be the result of an absence of educational facilities, the high opportunity cost of being in school, the high cost of education and the impact of brain drain.⁸⁰

2.5 Legal characteristics

A look at regional integration in Southern Africa confirms that economic integration is the main aim of the SADC Treaty. This aim is part of a broad dimension of development and the kind of regional integration that seek to assist Member States not only in intraregional trade but also competitiveness and development for the peoples of the region. The legal character of SADC is embodied in the SADC Treaty and SADC Protocol on Trade which is most relevant to this study.

2.5.1 The SADC Treaty

The signing of the SADC Treaty on 17 April 1992 bestowed upon the organisation a legal status under international law.⁸¹ The transformation from SADCC to SADC brought with it a change in the legal character of the organisation. The SADCC

⁸⁰ The brain drain is two dimensional in the region. Firstly, the brain drain is experienced when most of the educated and skilled workforce flees to South Africa. In the second instance, the brain drain happens when the educated and skilled leave the African continent altogether in pursuit of better opportunities in Europe, Australia, New Zealand, America and Canada. For a full discussion on the brain drain in SADC, see Saurombe "Context of Economic Partnership Agreements" 362-370.

⁸¹ Article 2 of the *SADC Treaty* (1992), SADC establishment. A treaty is an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (A 2(1)(a) of the *Vienna Convention of the Law of Treaties* (1969)).

operative document was a Memorandum of Understanding which created no obligation of the part of Member States. Article 4 of the SADC Treaty lays down the key fundamental principles which were to be the bedrock upon which Member States were to relate with one another.⁸² These are traditional international law principles applicable to other similar international organisations.⁸³ In Article 6, Member States express their undertaking to uphold the principles and objectives of the Treaty. In addition, if this provision is given direct effect, it would give far reaching consequences when implementing SADC law in the national legal systems of Member States. Thus, the obligations they undertake are no longer optional and non-binding; rather legal obligations had been created, a breach of which would result in the accrual of international responsibility.⁸⁴ The SADC Preamble clearly acknowledges the principles of international law governing relations between States.⁸⁵ Under Article 3 of the Treaty, SADC is an international organisation with an international identity and is bound by international law.⁸⁶ The SADC Treaty is governed by the Vienna Convention⁸⁷ and is aimed at the economic development and integration of Southern Africa, on a basis of balanced equitable and mutual benefit.

SADC also has legal personality with the capacity and power to enter into contract, acquire, own or dispose of movable and immovable property and to sue and be sued.⁸⁸ In its Preamble it is conscious of the importance of guaranteeing democratic rights, observance of human rights and the rule of law as central in the process of

⁸² These principles are: sovereign equality of all Member States, solidarity, peace and security, human rights, democracy and the rule of law, equity balance, and mutual benefit and peaceful settlement of disputes.

⁸³ See generally Articles 1 and 2 of the UN Charter which set out purposes of, and the principles on which the UN is based. Article 4 of the Constitutive Act of the AU also sets out the principles of the AU, these are similar to those of SADC Article 4

⁸⁴ Afadameh-Adeyemi and Kalula 2010 SADC at 30. 5-22.

⁸⁵ See *SADC Treaty* (1992) Preamble of the Consolidated Text.

⁸⁶ Dube and Midgley 2008 *Land Reform in Zimbabwe* 303-341

⁸⁷ See *Vienna Convention on the Law of Treaties* (1969) (done at Vienna on 23 May 1969, opened for signature 23 May 1969, entered into force on 27 January 1980). See also *WTO Official Document WT/DS2/AB/R, AB-1996-1* (1996) p16-17; *WTO Official Document WT/DS8/AB/R* (1996); and *WTO Official Document WT/DS11/AB/R, AB-1996-2* (1996) 13.

⁸⁸ Articles 2 and 3 *SADC Treaty* (1992). See also SADC Tribunal jurisprudence: *Mtingwi v. SADC Secretariat* SADC (T) 1/2007 (27 May 2008); and *Mondlane v SADC Secretariat* SADC (T) 07/2009 (5 February 2010). In these cases the SADC Secretariat was sued as a prospective and former employee respectively.

development and integration. However, SADC is still generally characterised by the reluctance of Member States to yield sovereignty to the organisation.⁸⁹

The broad terms of the SADC Treaty can be summarised as the promotion of economic growth and development, common political values, self sustaining development, productive employment, the consolidation of peace, security and democracy, the protection of the environment, strengthening of historical, social and cultural links and the eradication of poverty.⁹⁰ All these aspects are important for economic integration.

In addition the SADC Treaty also made provision for the adoption protocols to govern its various sectors.⁹¹ The advantage of having protocols to regulate each of these sectors is that definite responsibility is placed on Member States and a binding legal obligation is created. The Protocol on Trade will now be discussed.

2.5.2 The SADC Protocol on Trade

The SADC Protocol on Trade was adopted in 1996 and implementation began in the year 2000. The Protocol on Trade provides a framework for SADC's trade integration programme. Article 22 of the SADC Treaty gives a legal mandate for Member States to conclude such Protocols as may be necessary in each area of cooperation. The Protocol on Trade was therefore created pursuant to the SADC Treaty and met the criteria in Article 22. This Protocol on Trade sets out the basis for regional economic integration, a key objective of economic liberation as set out in the first statement of the SADC preamble. Through the Protocol on trade, SADC has already established a Free Trade Area in terms of Article 2(5) and further integration stages are completely conceived in the RISDP as mentioned in the introduction of this chapter. However, the legality of the RISDP has been questioned since it has not been incorporated into the Treaty and the Protocol on Trade. However, such an argument can be discounted by the fact that the RISDP is not in conflict with the Protocol on Trade, but actually derives its relevance from the Protocol. The purpose of the

⁸⁹ Ng'ong'ola 2000 *Regional Integration and Trade Liberalisation* 485-506.

⁹⁰ Article 5.1 SADC Treaty

⁹¹ Article 22 SADC Treaty

Protocol is to regulate trade among SADC Member States, as well as with third party states at both the bilateral and the multilateral level. Annex VI of the SADC Protocol on Trade establishes a trade dispute settlement mechanism between SADC members and it modelled on the WTO dispute settlement mechanism.⁹² Reference to Annex VI as a dispute settlement alternative for SADC Members dispels the fear and assumption that there will not be a dispute settlement mechanism in SADC as long as the Tribunal remains suspended. However, unlike the SADC Tribunal that has jurisdiction over all SADC legal instruments; Annex VI only deals with trade dispute settlement. The absence of trade disputes in SADC has rendered this forum redundant and there will not be further reference to it in this study.

An exhaustive discussion of SADC legal instruments for economic integration is undertaken in chapter 6 where a number of SADC institutions are analysed as a way of establishing the legal and institutional framework for regional economic integration in the organisation.

2.6 Conclusion

The evolution of SADC from the Frontline States days, to SADCC and to the current SADC is an attempt to keep pace with the ever-changing environment of the political, economic and legal facets of integration. The characteristics of these facets have helped define their role in the regional integration process. The outcome of the analysis of these characteristics has shown that various political, economic and legal facets of regional integration are indispensable and, essentially, play a defining role in the future of deeper integration for SADC. From a political point of view, it is the politicians that decide to embark on a regional integration. Subsequently, economic policies and directions are decided upon by politicians within the context of the prevailing economic conditions. In addition, legal aspects deal mainly with the desires of the parties involved to bind themselves legally to the obligations of an agreement. In the case of SADC, the treaty is ideally placed to play such an important role. The Protocol on Trade, in particular, addresses deeper integration in trade. Hence, economic integration will offer the region a better chance of

⁹² See "Understanding on rules and Procedures Governing the settlement of Disputes", 15 April 1994, Marrakesh Agreement Establishing the World Trade Organisation.

overcoming Southern Africa's vicious scourge of poverty. It is thus clear that the regional integration framework espoused by the SADC Treaty transcends mere economic integration. It is also aimed at political institution building, as well as at promoting economic integration with the objective of fostering the social and political integration that will accompany it and transforming the region into a broader institutionalised community based on the rule of law.

CHAPTER 3**REGIONAL ECONOMIC INTEGRATION**

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3.1 Introduction

In this chapter the author will attempt to define and discuss regional economic integration in order to ascertain its current prevalence the world over while identifying its character in the SADC region. This chapter also sets the theoretical framework of the thesis by discussing the various theories that explain regional economic integration. These theories help in describing and explaining the current wave of regional economic integration in the world, the African continent and SADC. Each of these theories will explain past, current and future integration trends and outcomes in SADC. These theories will also help to identify the sequence, or stages, through which the process of regional economic integration appears to pass. These theories have also influenced the legal framework for regional economic integration in SADC. In certain agreements some theories can be traced in treaty provisions of the RTA. These theories can help to explain why integration efforts have been difficult to implement. There is, consequently, a need to investigate whether these theories are compatible with African conditions, as well as whether they have been properly applied. The goal will be to find propositions for a more suitable theory or theories as ascertained by the study. This discussion will also focus on the benefits of regional economic integration as a way of appreciating why countries and regions embark on it. Furthermore, this examination will show to what extent regional economic integration has benefited those who participate in it. The focal point will be to try and link these benefits to the practical experiences in the SADC region. Ultimately, it is crucial for this discussion to indicate whether the benefits of regional economic integration explain the sudden rush to form RTAs as is being experienced globally and especially in Africa with SADC being at the forefront. This chapter also identifies the role of agreements in the process of integration before it ends with identifying the types of regional trade agreements.

3.2 General definitions

Regional economic integration is among the topics in the international arena the importance of which is currently rising fastest.⁹³ Although there is unlimited literature

⁹³ Padoa-Schioppa "Regional Economic Integration".

and experience on regional integration arrangements,⁹⁴ so far no single definition of regional economic integration has gained widespread acceptance among integration theorists; the concept has therefore provoked considerable discussion and debate in the economic and political literature.⁹⁵ For the purposes of this discussion and despite the uncertainty, the definition that will be used here is the one formulated by renowned economists specialising in international trade in the 1950s.⁹⁶ According to these authors;

... regional economic integration denotes a state of affairs or a process involving the combination of separate economies into large economic regions. Defined as a process, it includes all measures that aim at abolishing discrimination between economic units from different countries. It can also be considered a state of affairs characterised by the absence of the various forms of discrimination between countries.

The characteristics of this definition still manifest themselves in regional economic integration today. This definition is quite close to what John Pinder, with reference to the European Economic Community, now the EU has termed the twin processes involving both negative and positive aspects of integration. He observes that:

While negative integration is that aspect of economic integration that consists in the elimination of discrimination against participating members, positive integration symbolises the formation and application of coordinated and common policies in order to fulfil economic and welfare objectives other than the mere removal of discrimination.⁹⁷

More definitions quoted below share the same meaning. According to Vayrynen, regionalisation "fills the region with substance such as economic interdependence, institutional ties, political trust and cultural belonging".⁹⁸ There are no natural or given

⁹⁴ For a historical perspective on regional integration arrangements, see Viner *Customs Union Issue*; World Bank *Trade Blocs*; Schiff and Winters *Regional Integration*; Teunissen *Regionalism and the Global Economy*.

⁹⁵ De Melo and Panagariya *New Regionalism in Trade Policy* 1.

⁹⁶ Viner 1950 *Custom Union Issues*, Meade JE 1955b, *The Theory of Customs Unions*, Lipsey RG 1957 *Theory of Customs Union* 40-46 and Balassa 1961 *Theory of Economic Integration* 1-17. They agree that regional economic integration brings about the transformation of an international subsystem in a direction in which more weight is accorded to decisions and actions in the name of aggregate factors; and that integration is further a process in which an attempt is made to create a desirable institutional framework for the formulation of a regional economic policy. This can provide for accelerated economic development internally and increase the bargaining power of member countries internationally.

⁹⁷ Krugman "Regionalism versus Multilateralism" 74-75.

⁹⁸ Vayrynen 2003 *Regionalism* 25-51.

regions, "a region minimally refers to a limited number of states linked together by a geographical relationship and by a degree of mutual independence".⁹⁹ There are no groups or states that are destined to form a region.¹⁰⁰ Today, regional economic integration and cooperation are considered in many instances to be among the keys to stability and prosperity in a global context.¹⁰¹ Such integration is generally regarded as holding other potential opportunities, such as the expansion of trade and the enlargement of local markets, as well as contributing to industrialisation.

Regional economic integration refers to a process where an arrangement is made among countries in a geographical region to reduce and unilaterally remove tariffs and non-tariff barriers to the free flow of goods or services and factors of production between each other. It is a situation in which national components of a larger economy are no longer separated by economic frontiers, but function together as an entity.¹⁰² Accordingly, countries in this arrangement would agree to coordinate their trade, fiscal and monetary policies. A geographically discriminatory trade policy is the defining characteristic of a regional integration agreement.¹⁰³ Regional economic integration has also been defined as an association of States, based upon location in a given geographical area, for the safeguarding or promotion of the participants, an association whose terms are fixed by a treaty or other arrangements. Philippe De Lombaerde and Luk Van Langenhove define regional integration:

... as a worldwide phenomenon of territorial systems that increase the interactions between their components and create new forms of organisation, co-existing with traditional forms of state-led organisation at the national level.¹⁰⁴

According to Hans van Ginkel, regional integration refers to the process by which states within a particular region increase their level of interaction with regard to economic, security, political, and also social and cultural issues.¹⁰⁵ Within this context one needs to make a distinction between regionalism and regional integration. Although the two terms are frequently used interchangeably, there is a

⁹⁹ Soderbaum and Van Langenhove "Introduction" 1-14.

¹⁰⁰ Vasilyan 2005 www.caei.com.ar.

¹⁰¹ Vasilyan 2005 www.caei.com.ar.

¹⁰² Hine 1992 *Regionalism and Integration* 120.

¹⁰³ Hereafter "RIAs"

¹⁰⁴ De Lombaerde and Schulz "EU Support to Regional Integration" 377-383.

¹⁰⁵ Van Ginkel and Van Langenhove "Introduction and Context" 1-9.

distinct difference between them. *Regionalism* is a political process where a group of countries agrees to reduce the barriers to trade between them to lower levels than those that exist against the rest of the world. This may, or may not, lead to *regional integration*, which is an economic process whereby the economies of a region become more closely entwined. According to Fawcett, regionalism and regionalisation (that lead to regional integration) are synonymous. According to him, regionalisation refers to the process while regionalism is the policy or project.¹⁰⁶ Deriving from the above discussion and within the SADC context, SADC is using regionalism as a process to closely entwine Member State economies. This process then leads to regional integration.

Regional integration is, therefore, the joining of individual states within a region into a larger whole with the intention of addressing the key issues that have been identified by Van Ginkel. However, the process of integration takes different forms and may also occur at various levels of growth and intensity; a scenario that is prevalent in SADC. In capping the definition of regional integration, the definition accepted by the WTO is equally important. For them it is about the "actions by government to liberalise or facilitate trade on a regional basis, sometimes through free trade areas or customs unions".¹⁰⁷ In practice, however, regional schemes of integration may have a more general or specific meaning.¹⁰⁸ In order to make this discussion relevant to the theme of this thesis, the contextual meaning of regional integration within the SADC and Africa needs to be highlighted.

From an African and a SADC context, regional integration refers to a process and a means by which a group of countries strives to increase its levels of welfare and reduce poverty, indebtedness, conflicts, wars and economic and political malaise. Regional integration recognises that partnerships between countries can achieve these goals in a more efficient way than unilateral or independent pursuance of policy in each country. The degree of integration depends on the willingness and

¹⁰⁶ Fawcett 2005 "Regionalism from an Historical Perspective" 21-37.

¹⁰⁷ The criteria for the formation of RTAs are prescribed in Article XXIV of GATT and will be discussed in Chapter 10. The WTO website provides comprehensive information and analysis of regionalism worldwide. In 1996, the WTO General Council created the Committee on Regional Trade Agreements (CRTA), which examines RTAs to assess whether they are consistent with WTO rules and how they affect the multilateral trade system.

¹⁰⁸ El-Agraa *Economic Integration*.

commitment of independent sovereign states to share their sovereignty. From this African context, the idea of regional economic integration was regarded as a means through which African countries would combine their economic sovereignty in order to improve the living standards of their peoples and to extend the struggle for political decolonisation into one for economic decolonisation. The research on regional integration provides the rationale for expanding intra-Africa trade and distinguishes traditional and non-traditional gains from economic integration. Since Viner's (1950) analysis of the trade creation and trade diversion effects of regional integration, the traditional gains from increased trade have been investigated further in the literature. According to Rivera-Batiz and Romer (1991)¹⁰⁹ and Grossman and Helpman (1991), the new growth theory offers additional support to the traditional arguments linking trade liberalisation and growth.

Asante has also examined briefly the meaning of economic integration in the light of African conditions. He relies on the analysis of Bingu waMutharika:¹¹⁰

..that the peculiarity of the characteristics of the African economies and the evolution of political and other institutions make it unrealistic to apply the term in the same sense as used in the developed world.¹¹¹

In this sense economic integration is defined as a process whereby two or more countries in a particular area voluntarily join together to pursue common policies and objectives in matters of general economic development in a particular economic field of common interest to the mutual advantage of all participating states.¹¹² The essence of this definition is that any scheme of economic integration must be voluntary and that each state must demonstrate its willingness to pursue certain policies in close consultation with other states. This means that economic integration in Africa will have to be broadly based and wide in its application, at least in the initial stages and sufficiently flexible in its practical form to embody social, cultural, political and economic considerations.

¹⁰⁹ Rivera-Batiz and Romer 1991 *Economic Integration and Indigenous Growth* 531-555.

¹¹⁰ Bingu waMutharika is currently the serving President of the Republic of Malawi and was the Chairman of the African Union in 2010.

¹¹¹ Bollard and Mayes 1992 *Regionalism* 196-197.

¹¹² De Melo, Panagariya and Rodrik 1992 *New Regionalism* 37.

3.3 Theories behind regionalism

While regional economic integration in Africa has taken different forms to accommodate the changing national, regional and international environment, all organisations that integrate regional economies have adopted market integration as a component of their strategy with a view to increasing intraregional trade. Since SADC is still at the initial stages of its integration process, these theories may help ascertain the most relevant theory that can assist SADC achieve its high levels of integration going forward. The theories most relevant to SADC to be discussed are regional cooperation, market integration and development integration.¹¹³

3.3.1 Regional cooperation

Bourenane¹¹⁴ defines regional cooperation as:

A collaborative venture between two or more partners, with a common interest in a given issue. Such ventures include execution of joint projects, technical sector cooperation, common running of services and policy harmonisation. It also extends to joint development of common natural resources. The motive being to have economies of large scale production, the forging of production linkages between industrial activities in the various Member States and to have some kind of equitable distribution of industrial development in favour of the relatively less developed countries.

Cooperation is a process in which actors adjust their behaviour to the preferences of others in order to facilitate their objectives and those of their partners.¹¹⁵ Cooperation at the most basic level requires the presence of common problems and tasks, which will lead to a commonality of expectation and the overlapping of interests on the part of the nations.¹¹⁶ The previous chapter has already exposed the common problems of SADC Member States and their collective attempts in trying to resolve them. Regionalism connotes those state-led projects of cooperation that emerge as a result of intergovernmental dialogues and treaties.¹¹⁷ This means that cooperation can lead to regionalism. In the new international

¹¹³ Lee *Political Economy of Regionalism*.

¹¹⁴ Bourenane 1997 *Theoretical and Strategic Approaches*.

¹¹⁵ Keohane *After Hegemony*.

¹¹⁶ Welsh and Willerton 1997 *Regional Cooperation* 33-61.

¹¹⁷ Breslin and Higgott 2000 *Studying Regions* 333-52.

context of the 1990s "a new European regionalism emerged, which led to the more active contribution of the union",¹¹⁸ which, then, strongly encourages the countries grouped regionally to cooperate with each other.¹¹⁹ Different actors, each guided by their own policy interests, play different roles in achieving common goals.¹²⁰

The participants in regional cooperation may also make a joint stand against the rest of the world. Already from this definition and given examples, the characteristics of SADCC are apparent. SADCC was based on a cooperation mechanism that saw different countries being given specific mandates as shown in table 3.1. SADCC mandates were also based on the development of common natural resources as also indicated in table 3.1. At that time, SADCC's regional projects were based on cooperation. Thus, even though regional economic integration was the ultimate goal, it was agreed that Member States should first build on existing bilateral and multilateral links that addressed national needs but which were also regionally oriented.¹²¹ During this time, Asante recognised the experience of SADCC in both agriculture and industrial cooperation as being particularly interesting.¹²² The question to be asked now is why was SADCC not adequately empowered to continue under a regional cooperation system since its characteristics fitted well with the functioning of this theory?¹²³ Maybe an answer can be provided by Evans and Holmes¹²⁴, who remark that:

... the systematic allocation of sectional responsibility in such a manner was to ensure that each Member State is perceived as having an equally important role, regardless of the criteria of suitability and capacity to undertake such responsibilities.

Thus, regional cooperation in SADCC was not particularly meant for deeper integration, but mostly for geopolitical reasons. In this respect, Hanlon argues for example that:

¹¹⁸ Telo *Europe: A Civilian Power?*

¹¹⁹ Smith 2003 *European Union Foreign Policy*.

¹²⁰ Johansson "Northern Europe".

¹²¹ Mtengeti-Migiro "Institutional Arrangements".

¹²² Asante *Regionalism and Africa's Development*.

¹²³ Haarlov *Regional Cooperation*.

¹²⁴ Evans and Holmes *SADC: The Cost of Non-Integration*.

SADCC states recognised that in a free trade zone, the most developed countries, particularly Zimbabwe (at the time) would attract all future development, leaving nothing for those states which are the poorest.¹²⁵

Unfortunately for SADCC, foreign direct investors interested in the regional market preferred to locate in the more market-oriented economies.¹²⁶ However, this decentralised, consensus-style decision-making structure successfully avoided confrontation among Member States.¹²⁷

Table 3.1: SADC sector coordinating units up to 2001

Member state	Coordinated Sector
Angola	Energy Commission
Botswana	Agricultural research and training; livestock production and animal disease control
DRC	No sector responsibility
Lesotho	Environment, land management, water
Malawi	Inland fisheries, forestry and wildlife
Mauritius	Tourism
Mozambique	Culture; information and sport: transport and communications commission
Namibia	Marine fisheries; legal affairs
South Africa	Finance and investment; health
Swaziland	Human resources development
Tanzania	Industry and trade
Zambia	Employment and labour; mining
Zimbabwe	Crop production; food, agriculture and natural resources

Source: <http://www.sadc-sqam.org/sadc/sadcresp.html>

¹²⁵ Hanlon *SADCC: Progress, Projects and Prospects*. This phenomenon exists in the current SADC where South Africa as the most developed economy attracts all the foreign direct investment in the region.

¹²⁶ More on SADCC's possible negative effects of cooperation is discussed in Elliot Berg Associates *Regional Trade*.

¹²⁷ Witulski *Macroeconomic Linkages*.

The above sector coordinating units recorded several successes for the region since most of the countries could readily produce the mandated products owing to the fact that such products were made out of raw materials that were available in the given countries. All projects and programmes were mainly aimed at the objective of reducing economic dependence on apartheid South Africa.¹²⁸ However, the fact that the majority of products produced were raw material meant that the revenue gathered from them was of minimal value, hence, the regional economy remained poor. Additionally, this was meant to be a division of labour to prevent duplication or overload of responsibilities.¹²⁹ The problem with these cooperative schemes was that they imposed considerable constraints on the latitude of national decision making, without providing the means by which sufficient gains to warrant this sacrifice might be realised. These trade liberalisation schemes generated internal contradictions which tended to disjoin such programmes in the absence of planning on a regional scale to distribute the benefits from cooperation more equitably.¹³⁰

When looking at SADCC's cooperation times it is important to realise that such a phase was necessary. According to Haas,¹³¹ regional cooperation is concerned with explanations of how and why states cease to be wholly sovereign, how and why they voluntarily mingle, merge and mix with their neighbours so as to lose the factual attributes of sovereignty while acquiring new techniques for resolving conflict between them. In his assessment, regional cooperation is concerned with the process of getting to regional integration. In other words, regional cooperation may help describe steps along the way to regional integration.¹³² What this means for SADC is that its initial phase of cooperation under SADCC was a preparation for regional integration, hence the study of regional cooperation may be considered to be a part of the study of regional integration. In summing up, Isebill Gruhn's analysis is correct in identifying this kind of integration as leading to the goal or as a goal in itself.¹³³ Under the cooperation of SADCC, the organisation was striving to create the necessary preconditions for a later, more comprehensive, type of economic

¹²⁸ See SADCC *SADCC Industry*.

¹²⁹ Weisfelder "Southern African Development Coordination Conference".

¹³⁰ Ravenhill 1979 *Regional Integration* 227-246.

¹³¹ Haas "Study of Regional Integration" 2-41.

¹³² De Melo, Panagariya and Rodrik 1992 *New Regionalism* 28.

¹³³ Hettne and Inotai *New Regionalism* cited in Mistry "Open Regionalism" 159.

integration.¹³⁴ Therefore, economic cooperation among African countries, as stressed by Adedeji, "is a *sine qua non* for the achievement of national socio-economic goals and not an extra to be given thought after the process of development is well advanced".¹³⁵

The transition from SADCC to SADC was thus a move towards deeper economic integration. However, this transition was not supported by the proper institutional and legal framework.¹³⁶ Even though cooperation integration brought a number of achievements to the region, its limitations of not being supported by a proper legal regime of rules in the form of a treaty was always going to be a major shortcoming. Therefore, SADC had to seek another model that could satisfy the need for deeper economic integration.

3.3.2 Market integration

Market integration was therefore the sensible choice after cooperation integration was considered inadequate. Lee¹³⁷ defines market integration as:

... a linear progression of degrees of integration beginning with a free trade area and ending up with total economic integration. The linear progression of degrees of integration defines market integration.

This trend includes an FTA where tariffs are removed among Member States, but each country retains its own tariffs against non-members. This is followed by a customs union where the FTA remains in place and Member States impose a common external tariff (CET) against non-members. The third stage involves a common market where the customs union remains in place along with the free flow of the factors of production (capital and labour). Fourthly, an economic union is introduced which consists of a common market along with the harmonisation of monetary and fiscal policies. The last stage is of total economic integration, which consists of a common market along with the unification of monetary and fiscal

¹³⁴ Ostergaard *SADCC Beyond Transportation*.

¹³⁵ Adedeji "Comparative Strategies" 408.

¹³⁶ Elago and Kalenga 2007 "Wither the SADC Customs Union". 7. The lack of a proper institutional framework is further discussed under market integration in this chapter.

¹³⁷ Lee 2002 Regionalism in Africa. *Polis/RCSP/CPSR*. 9.

policies. The distinctive results from market integration are based on the notion of trade creation and trade diversion. The former takes place when there is a shift from a high cost, less efficient regional producer to a low cost, more efficient one. On the other hand, trade diversion consists of a shift from low cost, more efficient on-member producers to a high-cost, less efficient regional producer.¹³⁸

By way of analysis Asante argues that:

Each of the forms of economic integration discussed above can be introduced in its own right; they should not be confused with stages in a process which eventually leads to a complete political integration.

A case in point is the transformation of the preferential trade area (PTA) for COMESA, without necessarily going through the process of a customs union. COMESA only concluded a customs union in 2009. However, within each scheme there maybe sectoral integration in particular areas of the economy, for example a common agricultural policy (CAP) as seen in the EU. In fact, Viner and Lipsey are opposed to the creation of customs unions among developing countries. In other words, the conditions that are favourable to trade creation are precisely the opposite of those typically found in developing countries, whose existing trade is usually relative to their domestic production and whose intra-group trade is a minor component to their total trade. However, in recent years there has been a growing criticism about applying Viner's criteria and Lipsey's general conclusions to the possible effects of customs unions among developing countries.¹³⁹

The potential gains from market integration include increased production arising from specialisation according to comparative advantage. Comparative advantage exists when a country produces a good, product or service at a lower opportunity cost than its trading partners.¹⁴⁰ There is also the benefit of increased output arising from the better exploitation of economies of scale. Economies of scale are the cost

¹³⁸ Gerber *International Economics* 221-222, 41-44.

¹³⁹ Whalley "Regional Trade Agreements" 352-387. Also Whalley 1992 *CUSTA AND NAFTA* 125-141.

¹⁴⁰ Robson 1998 *Economics of International Integration* 848-872. Comparative advantage is also a component of free market theory that states that if each nation made just those things which it could produce cheaper relative to a foreign country and then trade with other nations to get that which they could produce relatively cheaper, wealth would expand and everyone would benefit.

advantages that a firm obtains as a result of expansion.¹⁴¹ The region will also benefit in terms of improved trade with the rest of the world. There will also be forced changes in efficiency arising from increased competition within the group. Robson¹⁴² identifies the benefit of integration-induced changes affecting the quality or quantity of factor inputs, such as increased capital inflows and changes in the rate of technological advance. This theory of market integration blends well with the RISDP initiative of SADC. At the NEPAD/SADC Infrastructure Projects Conference held on 8 August 2008,¹⁴³ there was a clear and renewed interest from private sector and development partners to identify and pursue opportunities, including identifying specific infrastructure projects for support, development and implementation. Accordingly, the RISDP's implementation simultaneously has to be implemented together with spatial development initiatives (SDIs), inclusive of development corridors, growth triangles, growth centres and trans-frontier conservation and development areas (TFCDAs). Therefore, if the RISDP is correctly implemented, it will provide the desired results as indicated above.

However, there are specific conditions that have to be met before this theory of market integration produces the desired results. This will be the challenge for SADC as this discussion will show. For the gains to be realised, the theory assumes that there exists perfect competition in the transport markets and that there are no transport costs. This will prove to be one of the biggest stumbling blocks since the transport network of SADC is very distorted and characterised by extremely high costs as shown in figure 4.1. The regional network for rail and road is very poor. As Ordu¹⁴⁴ argues:

Infrastructure coordination may well actually be even more important for regional integration than the removal of trade barriers.

This is a correct assessment since the objective of the removal of tariffs is to promote exports and raise trade volumes. However, this process should be

¹⁴¹ It is also characteristic of a production process in which an increase in the scale of the firm causes a decrease in the long run average cost of each.

¹⁴² Robson 1980 *Economics of International Integration* 147.

¹⁴³ The NEPAD/SADC infrastructure programme conference, 8 August 2008. See Radebe 2008 www.nepadbusinessfoundation.org.

¹⁴⁴ Ordu A African Development Bank/African Development Fund ADF/DB/WP 2008.

supported by infrastructure, for example rail, road and telecommunication networks. Without this support, the low tariff goods and services may still not find their way to the markets. During the AU Summit of July 2005, the Assembly of Heads of State and Government of the AU began exploring possibilities of facilitating travel between countries.¹⁴⁵ Adequate communication networks are essential for trade to exist. Equally, pan-African tourism promotion and the development of service industry markets in areas like roads, railways and air traffic control are essential. Additionally, Etzioni has thus argued that:

Limited horizons, lack of administrative and political skills and preoccupation with problems of domestic modernisation all present major barriers to successful integration efforts in the developing world.¹⁴⁶

Political skill here should not be confused with politicising the debate because, according to Nye:

Integration involving developing countries seem to produce not "gradual politicisation" but "over politicisation". Such premature politicisation of economic issues greatly reduces the scope for bureaucratic initiatives and quietly arranged package deals.¹⁴⁷

This kind of integration may also require a very advanced economy that includes capital markets to be markets in which financial resources (money, bonds, and stocks) are traded.¹⁴⁸

¹⁴⁵ Konare "Statement of the Chairperson".

¹⁴⁶ Onitiri *Regionalism and Africa's Development*. See also Hansen "Regional Integration".

¹⁴⁷ See Anonymous *The Economist* 35.

¹⁴⁸ Samuelson and Nordhaus *Economics*.

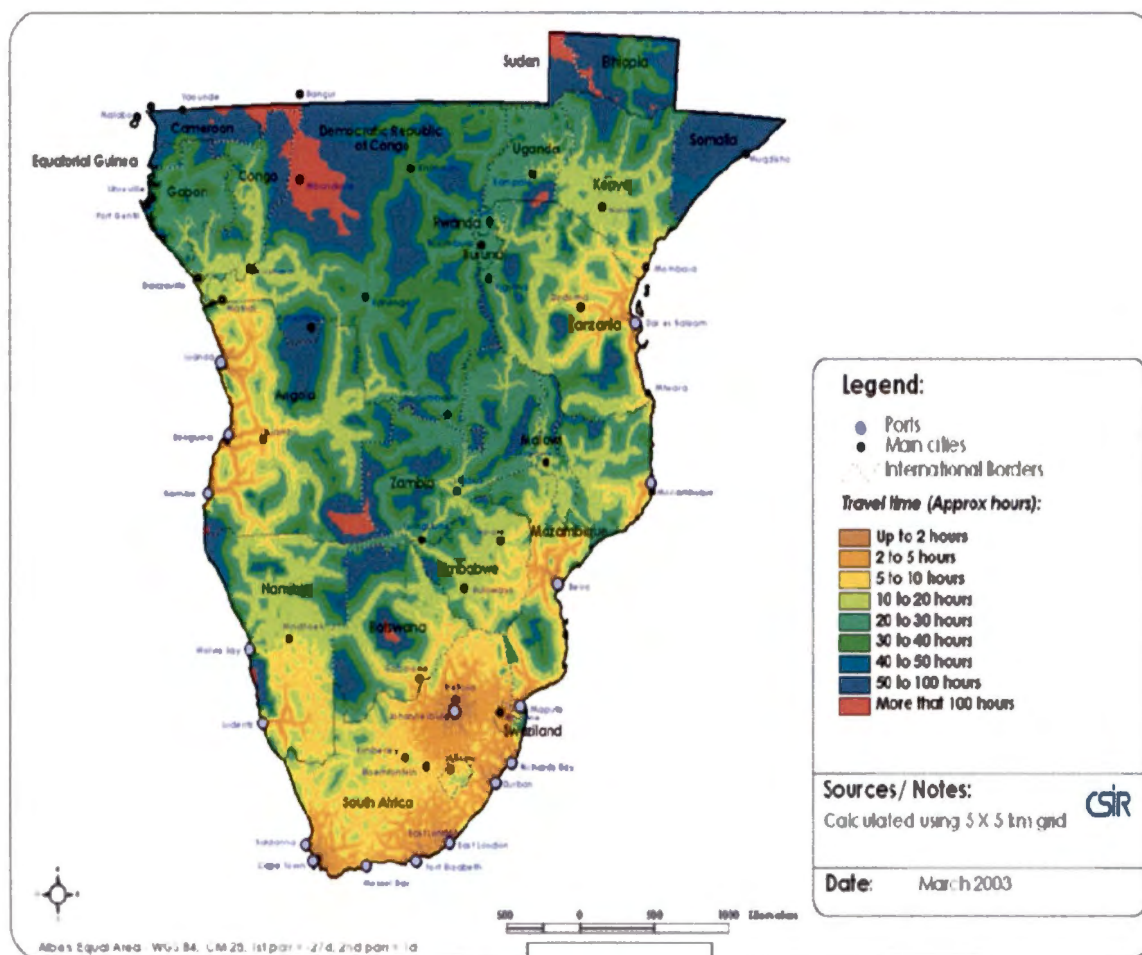


Figure 3.2: SADC road accessibility to ports – approximate time in hours

Source: www.csir.co.za (Accessed on 20 March 2009)

This theory also assumes that tariffs are the only trade restriction in the region. This is not the case in SADC; many studies have shown that tariffs are not the only stumbling block to intraregional trade. Although the mandate of the 2008 SADC FTA is to reduce them, the existence of non-tariff barriers¹⁴⁹ (NTBs) is the biggest challenge. Many years ago, Hazlewood¹⁵⁰ stressed that;

... integration is not simply a matter of lowering tariffs. The existence of tariffs is not the sole, or even the primary impediment to trade between countries of Africa. The main reason for the low levels of trade is to be found in the

¹⁴⁹ Hereafter "NTBs". These are a form of restrictive trade where barriers to trade are set up and take a form other than a tariff. Non-tariff barriers include quotas, levies, embargoes, sanctions and other restrictions, and are frequently used by large and developed economies.

¹⁵⁰ Hazlewood "Economic Integration: Lessons for African Recovery" 592.

economic structure of the countries and in the fact that the "infrastructure" for intra-African trade is generally lacking.

The 2004 Inventory Report¹⁵¹ on NTBs in SADC countries defines NTBs as "any regulations to trade other than a tariff or other discretionary policies that restrict international trade". It groups NTBs into the following three broad categories;

The first group is made up of health, safety and environment NTBs: these barriers include export bans, restrictive sanitary and phytosanitary requirements, standards and conformance requirements.

The second consists of trade policy NTBs: these barriers include broader policy measures including public export assistance, export taxes, import licences, import quotas, production subsidies, state trading and import monopolies, tax concessions, trade remedy practices, for example antidumping, safeguard and countervailing measures.

Lastly, there are administrative NTBs: these barriers include customs clearance delays, lack of transparency and consistency in customs procedures, overly bureaucratic and often arbitrary processing and documentation requirements for consignments, high freight and transport charges and, generally, services that are not user-friendly. All these forms of NTBs were found to be operational in the region. This shows how difficult it is going to be for market integration to succeed in SADC.

The market integration theory also assumes that there are resources, for example labour, that are fully employed. The opposite is true in SADC where unemployment is very high and is on the increase.¹⁵² Market integration has failed on the continent largely because the above-mentioned conditions do not exist for its successful implementation.¹⁵³ Critics have further questioned whether market integration is not part of the problem rather than the solution. For instance McCarthy contests that;

¹⁵¹ Regional Trade Facilitation Programme 2007 rtfp.africaconnect.com.

¹⁵² SADC Date Unknown (c) www.sadc.int/index.

¹⁵³ Lee *Political Economy of Regionalism* 40.

Instead of market integration, regional economic organisations in Africa should focus on regional co-operation, with market integration as a future goal.¹⁵⁴

Ravenhill also argues that the integration of markets is ill suited to regional integration in Africa.¹⁵⁵ He attributes this to the poor condition Africa find itself in, as well as the fact that it is the world's least developed and politically unstable continent. As this discussion shows, there are so many prerequisites that should be fulfilled before market integration can work.

The European experience of market integration, buttressed by the arguments of orthodox theorists of integration like Viner, Meade and Lipsey, appears to justify further experimentations along these lines, but it soon becomes obvious that orthodox integration theory is entirely inappropriate for regions where the problems are non-orthodox.¹⁵⁶ What this means is that the principal need is not for the consolidation and rationalisation of existing production according to comparative advantage, but the promotion of development by employing previously non-utilised factors of production. None are in place on the continent of Africa. Ultimately, it is not so much a question of the principal method advocated by orthodox theories for market integration being wrong in principle, but that the unintended consequences of its application give rise to major problems that foster regional disintegration.

3.3.3 Development integration

Development integration theory was developed to try and counter the problems created by market integration. According to this theory, the objective of integration becomes economic and social development, and it is therefore linked to development theories. Development integration requires more state intervention than market integration. This means that states must first and foremost make a political commitment to integration, since such commitment is seen as laying the foundation for cooperation. It is anticipated that this will help Member States work towards implementing policies that will help with problems created as a result of unequal

¹⁵⁴ Lee *Political Economy of Regionalism* 40.

¹⁵⁵ Ravenhill 1979 *Regional Integration and Development* 244.

¹⁵⁶ Hazlewood *Economic Integration*.

benefits, one of the major causes of the failure of market integration. With the view to providing a remedy for the unequal distribution of benefits, policies that are of a compensatory and corrective nature are to be implemented. Although designed to correct the problems of market integration, development integration has proven more difficult to implement than market integration. Development integration is relevant to SADC in that the objective of economic and social development is central to SADC's objectives. Hence, The RISDP is a push for economic development to the highest level and at the same time social development is critical for the region where poverty is very high.

3.3.4 Analysis of the theories discussion

From this discussion it is clear that the SADC integration agenda is more associated with market integration and this theory explains its objectives. Market integration has informed the RISDP which envisages a linear process in which there are successive changes in tariffs, trading arrangements and other regulatory regimes. Thus, an RTA might begin with a PTA and the progress moves up the ladder of integration to an FTA, a customs union, a common market, culminating in an economic union. The market integration model broadly informed the SADC integration agenda, as well as the process of EU integration whose model SADC aspires to. Development integration is too advanced for SADC, since implementation challenges for market integration still have to be overcome. The discussion in chapter 2 has shown that cooperation remains the practical method of integration. However, in theory, the RISDP advocates for market integration. It is, therefore, prudent for SADC to use cooperation as a preparatory measure before employing market integration. This discussion also points to the need to explore other theories that can be blended for the African continent and SADC in particular. A hybrid model that includes relevant elements of all the discussed theories can be suggested for this purpose.

The choice of a theory to adopt when pursuing a type of regional integration may be consciously made by the parties involved. However, in regional economic integration many forms of configuration are informed by the inherent characteristics of the Member States, as well as the objectives that they set out to achieve. In addition, external forces may push for a particular model to be followed. This aspect will be

discussed in detail in chapter 10. There are two main types of regional integration, one of which is integration by markets. This entails achieving integration through the use of the marketplace. Using this format; economies in a region trade intensively among themselves without explicit formal PTAs.¹⁵⁷ To facilitate intra-regional trade without the help of legal RTAs, some of the economies may pursue policies of unilateral domestic deregulation and trade liberalisation. On the other hand, others may look at infrastructure improvement, for example roads, ports and railways, as well as streamlined customs procedures. They may also pursue policies that facilitate inward FDI. Thus Member States in an RTA have to form a binding agreement, the importance of which will now be discussed.

3.4 Benefits of regional integration

Before going into a detailed discussion of SADC as a regionally integrated bloc, it is important to identify a number of benefits that may accrue as a result of its formation. More relevant to Southern Africa is the fact that regional economic integration can be a successful tool for poverty reduction. However, this has to be done right in order for it to work. The central attention for regional integration must be the human being, the living standards of the people and their social cohesion.¹⁵⁸ The vision of SADC speaks of a common future, economic wellbeing, improvement in standards of living and quality of life, freedom and social justice and peace and security for the people of Southern Africa.¹⁵⁹ The subject will not, however, primarily be the citizen of a particular nation, but the people of the whole region. Once formed, the regional economic community (REC) can be thought of as an entity participating in international trade just like individual countries constitute such a collective with diverse strengths harnessed together.

From an international trade theory it follows that the best trade policy for this larger entity towards the rest of the world is free trade.¹⁶⁰ Thus, it is in the REC's interests to pursue multilateral trade liberalisation. The most apparent benefit of free trade is that goods and services become available to consumers at lower prices, since there

¹⁵⁷ Aminian *et al* 2008 www.worldbank.org.

¹⁵⁸ Phiri 2008 www.sadcmembers.org.

¹⁵⁹ Phiri 2008 www.sadcmembers.org.

¹⁶⁰ Carstens 2006 www.pide.org.pk.

will be no tariffs added to the cost of the products. So, if trade is enhanced, it produces higher levels of economic growth and material welfare. Countries participating in RECs often seek to secure access to large markets, such as the EU and the United States of America. Developing countries often enjoy considerable access to these markets because trade barriers on industrial products are typically low. They also benefit from unilateral measures, such as the Generalised System of Preferences,¹⁶¹ or the United States of America's African Growth and Opportunity Act.¹⁶² In many respects, AGOA is the greatest and certainly the most immediate opportunity facing Southern Africa.¹⁶³

At the same time, agricultural products, an area where developing countries could reap major benefits, are usually excluded from regional agreements. This means that the motive for increased market access, however partial, remains powerful for many, especially developing countries. If farm subsidies are removed, there will be real returns to farmland and unskilled labour. Real net farm incomes would rise substantially in those developing-country regions, thereby helping to reduce poverty. Accordingly, a Doha partial liberalisation could take the world some way towards those desirable outcomes. In Southern Africa; AGOA has been instrumental in poverty alleviation if one considers the beneficiaries like Lesotho, where their textile products enter the US market duty free. In South Africa, small enterprises have also benefited from the same market access, for example traditional attire and crafts are exported to the US market duty free.¹⁶⁴

¹⁶¹ Hereafter "GSP" The WTO Agreements contain special provisions which give developing countries special rights. The WTO Agreements also contain special provisions which give developed countries the possibility of treating developing countries more favourably than other WTO Members. The special provisions include longer time periods for implementing agreements and commitments, measures to increase trading opportunities for these countries, provisions requiring all WTO members to safeguard the trade interests of developing countries, and support to help developing countries build the infrastructure for WTO work, handle disputes, and implement technical standards. The Enabling Clause is the WTO legal basis for the Generalised System of Preferences

¹⁶² *African Growth Opportunity Act* (2000), hereafter "AGOA" (Legislation 3108). The African Growth and Opportunity Act was signed into law by President Clinton in May 2000, to expand US trade and investment with sub-Saharan Africa, to stimulate economic growth, to promote a high-level dialogue on trade and investment-related issues, to encourage economic integration, and to facilitate sub-Saharan Africa's integration into the global economy. As of January 2010, 38 sub-Saharan African countries were eligible for AGOA benefits. More details are available at Office of the United States Trade Representative 2010 www.ustr.gov.

¹⁶³ Flatters *SADC Rules of Origin*.

¹⁶⁴ See the South African Consulate General Date Unknown www.southafrica-newyork.net.

Secondly, another reason for entering into a regional agreement can be to give a small country an advantage over other similar countries in attracting foreign direct investment.¹⁶⁵ Raising the levels of FDI or domestic investment requires making a country more attractive than other countries. FDI for South Africa has undoubtedly been felt in the whole Southern African region and remains a key focus for all countries in Southern Africa as they plan to improve their productive capacity and create jobs. Increasing market size helps in this regard, as one way of achieving this is by ensuring market access to a major market by entering into a regional agreement. Related to this, in an increasingly integrated world, there is also a gradual realisation among African states that sub-regional and regional groupings provide higher visibility to global investors, promote cross-border trade and investment and reduce production and marketing costs.¹⁶⁶

Thirdly, a regional agreement can also help in dealing with region-specific issues, such as border controls,¹⁶⁷ transit, migration and movement of labour. Countries recognise that barriers other than tariffs can hinder trade. These are non-tariff barriers like border controls, phyto-sanitary restrictions, weak transport systems and regulatory differences. Regional trade therefore increasingly covers some of these issues, which are more suitably addressed at the regional level. Regional agreements also have dispute resolution mechanisms, which, in the implementation phase of the arrangement, have proven to be extremely useful. Dispute resolution is required in different situations: these could be disputes among Member States or disputes involving natural persons of different countries. Disputes may also arise between a national and a country.

Fourthly, and very important for the North and South¹⁶⁸ arrangement like SADC and EU trade arrangements, these regional arrangements can reinforce internal

¹⁶⁵ Hereafter "FDI".

¹⁶⁶ Yanta "African Union".

¹⁶⁷ In the SADC region, South Africa is making efforts to resolve the political disputes in Zimbabwe as a way of trying to ease the influx of Zimbabwean citizens into South Africa. Border controls using the police and the military have proven ineffective and costly. Botswana faces a similar problem.

¹⁶⁸ The North and South: the developing nations have been loosely called the "South", in contrast to the more developed "North". The developed countries are, sometimes as a group, referred to as "the North" or "the West" – the North because all of them except for Australia and New Zealand (and possibly South Africa) are geographically located in the northern hemisphere – and as the

regulatory or structural reforms. This can be done through external treaty obligations and visible political commitments. Often, small countries participating in a regional agreement have just made or are trying to push ahead major reforms.¹⁶⁹ Locking in such reforms clearly motivated agreements between the EU and countries in Central and Eastern Europe. Turning to SADC, a regional regulatory framework that is brought by treaty arrangements is crucial for regional development in all spheres.

Turning to large industrial countries, trade in goods *per se* no longer appears to be the dominant factor for participating in regional integration. A growing number of these agreements include provisions on liberalising services (including financial), investment, protecting intellectual property rights, labour and environmental standards and dispute resolution. Industrial countries are keen to include such issues to counter what they regard as unfair competition resulting from, for example, piracy or poor labour standards. They also desire to open up markets for their service sectors, where they have a comparative advantage.

Economic goals are not the only motives behind RTAs. Political objectives are equally influential. In Africa, regional integration is primarily, but not exclusively, economic.¹⁷⁰ While there was always hope that regional integration would increase the economic bargaining power of African countries, it was also regarded as a political project aimed at increasing their political influence and ensuring peace and stability in the region. The improvement of the political climate in the region was regarded as fundamental for creating the right environment for sustainable economic development.¹⁷¹ Countries that may have far-reaching integration as a goal typically start out with trade agreements as a first step toward the deepening of political relationships. The EU is a clear example of this; initial agreements covered trade and investment, then member countries formed an economic and monetary union and now a process is in place towards a fully fledged political union with a common

West because the majority of them are located in Western Europe, except for the USA, Japan and Canada. What can be clearly noticed here is that the terms are not, strictly speaking, used in their geographical sense.

¹⁶⁹ The Zimbabwe Global Political Agreement (GPA) was as a result of the work of SADC. This was after efforts from the UN, EU and other international parties failed to broker an agreement between the Zimbabwean warring parties.

¹⁷⁰ See political characteristics of regional integration in Africa (chapter 2 of this thesis).

¹⁷¹ See a 3(f) and (i) *African Union Constitutive Act* (2000).

constitution, although some resistance is being met on the way. With the current opposition this will seem very unlikely at the moment. Similarly, forging regional trade ties is often linked to geopolitical and security considerations. Trade policy is a key instrument of foreign policy. Regional agreements can be used to secure regional stability, an area that will be explored in detail later in the SADC context. Experiences around the globe have shown that regional integration has been instrumental in promoting growth, stability and peaceful relations between countries.

Additionally, regional integration might reduce the risk of political and military tensions between countries. This is likely to build trust; raise the opportunity cost of war, and hence reduce the risk of conflicts between countries.¹⁷² Regional organisations can be the locus of multilateral diplomacy and collective action to solve problems shared in common within the region.¹⁷³ Although in Africa, where international conflicts are, in general, political and not popular wars, this argument may be less important, it deserves attention.¹⁷⁴ For instance, the initiators of the European integration saw it also as a way of reducing the risks of intra-European wars. Schiffs and Winters¹⁷⁵ recently provided theoretical foundations to the role of trade in enhancing peace. Secondly, regional integration can foster the lock-in to reforms and their credibility. Although welfare is increasing in the long run, some reforms may be politically hard to implement and time-inconsistency problems may arise for policy makers.¹⁷⁶ In the African context such an issue arises, for instance, for FDI, which requires commitment mechanisms on trade policy to rely on stable institutional and economic conditions.

Lastly, entering into regional agreements may be a defensive act. The cost of non-participation rises as more and more countries enter into regional agreements. While some countries may prefer the multilateral route, they may also feel that not entering into regional agreements can lead to a competitive disadvantage relative to countries

¹⁷² Polachek "Conflict and Trade".

¹⁷³ Langenhove and Thakur "Enhancing Global Governance".

¹⁷⁴ Longo and Sekkat 2004 *World Development* 1309-1321.

¹⁷⁵ Schiff and Winters 1998 *Regional Integration* 271-296.

¹⁷⁶ Kydland and Prescott 1997 *Rules* 473-491.

that have entered into regional agreements.¹⁷⁷ This is a critical factor when one considers the extent of multiple memberships in Southern and East Africa.¹⁷⁸

The discussion of motives for entering into regional agreements may be concluded by saying that while these agreements are signed for a variety of reasons, the impact on trade, growth and unemployment seems crucial in determining the extent to which broader objectives are achieved. It is difficult to identify arrangements that have advanced wider political objectives without having first achieved progress in enhancing trade, and having this seen and reflected in higher rates of sustainable growth and employment creation. Thus, it appears that the willingness to accept trade liberalisation and the accompanying economic adjustments is a first step that may be indicative of progress than can be made in other areas. Proponents of RTAs argue that RTAs help nations gradually work towards global free trade by allowing countries to increase the level of competition slowly and give domestic industries time to adjust. In addition, RTAs can be valuable arenas for tackling volatile trade issues such as agricultural subsidies and trade in services.

Political pressures and regional diplomacy can resolve issues that cause deadlock in multilateral negotiations. Proponents of RTAs, such as the President of the World Bank, Robert Zoellick, a number of economists and trade policy analysts, describe them as circles of free trade that expand until they finally converge to form expansive multilateral agreements.¹⁷⁹ While not at first a best strategy, regionalism can complement more general trade and investment liberalisation. Whether this happens will depend on the vision guiding regional integration.¹⁸⁰ Ultimately for Southern Africa, regional integration can be viewed as a means to achieve sustained economic growth and development, and to overcome the region's structural problems, such as political fragmentation, low per capita incomes and small intra-

¹⁷⁷ This is the basis of the MFN principle of GATT for all WTO members. Being a member of the organisation automatically gives you all the advantages other contracting members offer within the agreement.

¹⁷⁸ Multiple memberships are discussed in chapter 9 of this thesis as one of the major obstacles of SADC regional integration. Suggested solutions to this problem are also discussed.

¹⁷⁹ Ethier 2003 *Regionalism*.

¹⁸⁰ Flatters *SADC Rules of Origin*.

regional markets.¹⁸¹ This will be difficult to materialise in SADC where there is inadequate infrastructure and commitment.

Sampson argues that:

In the current environment, it is not surprising for countries to create what were perceived as safety nets by forming or joining regional trading groupings, it could well be that membership in these trading bloc was seen as an insurance against the possible collapse of the Round and the forerunner of the adoption of inward-looking trade policies in the event of a failed Round. The alternative view was that the growth in regional trade arrangements was taking place for good economic and political reasons, which owed much to the past successes of the multilateral system embodied in the GATT.¹⁸²

3.5 The role of agreements in integration

Since this is a legal study, the discussion of integration that is informed by binding agreements is critical, as the use of legal instruments becomes critical in this kind of formation. The same agreement may carry both features of integration by markets, as well as integration by agreement, although the two may, in practical terms, be complementary to each other. The EU model of integration corresponds more with the policy-driven model of regional integration. This is where institutions and governments have ended up guiding the process, as a number of regional institutions and regional agreements indicate. However, integration by agreement provides a sound legal basis and, from an enforcement point of view, such is important for the rules and regulations to be observed. SADC is a classical example of an RTA that has both features of integration by markets and integration by agreement. It is also important here to mention that the parties can complement any of the forms of integration explained by the theories given when they sign an agreement. This agreement binds the parties to abide by the provisions of such an agreement. The model of such integration does not necessarily have to be identified in the agreement; in many instances there could be a blend of models to an agreement, just as long as such models are not in conflict with what the parties set out to achieve in their agreement.

¹⁸¹ Asante *Regionalism and Africa's Development*.

¹⁸² Sampson and Woolcock (eds) *Regionalism* 12.

3.6 Types of regional trade agreements

In order to give regional integration a legally binding effect, Member States who are party to it normally enter into agreements that are mostly referred to as RTAs. It is important to briefly mention here that traditionally three types of RTAs are distinguished under WTO law. The initial arrangement takes the form of a FTA. Article XXIV:8 of GATT stipulates the types of RTAs as follows:

A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX of GATT) are eliminated on substantially all trade between the constituent territories in products originating in such territories.

A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that (i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX of GATT) 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, and, (ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union.

Even though it is not a requirement that an FTA should precede a customs union, most RTAs start off as FTAs, moving on to customs unions and then further into other forms of deeper integration as illustrated above. Furthering deeper integration into a common market permits free movement of factors, as well goods and services between states.¹⁸³ SADC achieved FTA status in 2008, but the 2010 customs union did not materialise.¹⁸⁴

¹⁸³ According to the RISDP, a SADC Common Market is planned for 2015.

¹⁸⁴ See chapter 11 for details. The types of RTA will also be discussed within the context of SADC regional integration.

In this context, it is not surprising that Southern African countries are striving for greater regional economic integration. However, despite their geographical proximity and cultural affinity, Southern African countries, with the exclusion of South Africa, currently barely trade with each other under any of the forms of RTAs highlighted above.¹⁸⁵ Despite the proliferation of RTAs in sub-Saharan Africa in the past two decades, many of which were specifically created to boost trade among the countries in the region, intra-sub-Saharan trade is still very limited and has hardly grown over time. However, although many authors have shown that intra-sub-Saharan trade is small, none has asked whether the existing level of intra-sub-Saharan trade is higher or lower than one would expect, given some plausible model for the determination of trade flows.¹⁸⁶

3.7 Conclusion

The general discussion of the concept and notion of regional economic integration was given with the intention of deriving an understanding of regional integration globally. This chapter also highlighted definitions of regional integration that are relevant to Africa and specifically applicable to the SADC region. WaMutarika's call for regional economic integration that is relevant for SADC and the whole continent of Africa is important. It calls for the desire to improve the welfare of the people and reduce poverty and indebtedness. SADC is trying to achieve this through economic integration in the face of challenges. This discussion has shown that if regional economic integration is correctly employed, the desired positive results will be produced.

The types of regional trade agreements were highlighted as a way of appreciating the levels of deeper integration Member States choose to partake. Although not exhaustive, the discussion of the benefits of regional economic integration helped to explain the reasons why regional economic integration remains a key component of the development strategies for many countries, especially those from Southern Africa. These benefits may only accrue if regional economic integration strategies and models are correctly employed.

¹⁸⁵ See generally Coussy 1996 *Slow Institutional Progress*.

¹⁸⁶ Foroutan and Pritchett 1993 *Intra Sub-Saharan African Trade* 74-105.

Identifying the correct model or a blend of models for regional integration can pronounce success or failure for any RTA. The use of cooperation in the SADCC worked for some time, but one of this chapter's findings is that cooperation alone is inadequate for deeper integration. Cooperation in SADCC lacked a legal basis that could only be established by the SADC Treaty. Market integration blends well with the RISDP, the key driver for deeper integration in SADC. However, from a practical point of view, most of the prerequisites for market integration to work do not exist in a poor region like SADC. Development integration on its own is also inadequate. However, development integration can be blended well with market integration. Identifying all these challenges can only point to the need for a different approach, maybe a blend of several characteristics of these models into a hybrid model. The processes of integration in Africa are so different from those in the West; hence a call for different theories and models is warranted. It is also important to emphasise the use of agreements in any employed model, as this will go a long way to cementing rules based mechanisms for the enforceability of such agreements. Additionally, the implementation of such an agreement will be easily ascertained.

CHAPTER 4

REGIONALISM AND THE MULTILATERAL TRADING SYSTEM

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4.1 Introduction

Regionalism has become a major trend in recent times.¹⁸⁷ Now that regional economic integration has been defined in the last chapter, this chapter seeks to identify the place of regional economic integration in the international arena. Global forces influence integration at continental and regional levels. In this regard, regional economic integration is also contextualised in the face of globalisation. The discussion goes further to expose the inherent global conditions that shape economic integration at continental and regional level. Accordingly, globalisation is the rapid increase in economic and financial activity across borders, leading to a more integrated global economy that is best evidenced in international trade. Over half of total global trade volume is in the form of intra-regional trade. The intention here will be to show that SADC economic integration is greatly influenced by globalisation. SADC is aware of this and its preamble pledges that the organisation is determined to meet the challenges of globalisation.¹⁸⁸

Neoliberalism is often used interchangeably with "globalisation"; however neoliberalism is not just economics; it goes further to encompass social and moral philosophy. Neoliberalism has set economic policies that have become widespread during the last few decades. This chapter will deal with those policies that have influenced and continue to influence the pace of economic integration in Southern Africa and beyond. In highlighting some of the challenges on the African continent, neoliberalism and its impact on Africa show how the economic policies of the IMF and the World Bank have marginalised Africa in the world economy. Thus, regional and continental integration agreements on the African continent are influenced by the desire for self reliance. For this reason, the discussion will also provide an account of anti-globalisation forces that also influence the trends of economic integration. A discussion and analysis of the relationship between regionalism and multilateralism forms the core of this chapter. This is of great importance, considering the ever present and topical debate on whether RTAs are building blocs or stumbling blocs to multilateral trade.

¹⁸⁷ Farrell, Hettne and Van Langenhove (eds) *Global Politics of Regionalism*.

¹⁸⁸ See Preamble *SADC Treaty* (1992) (consolidated, amended text www.sadc.int).

This chapter will show that regionalism¹⁸⁹ is a process that intensifies when multilateralism stagnates. In other words, regional cooperation fills the gaps left where global cooperation fails and serves to strengthen the process of liberalisation. Thus, the chapter establishes the role of SADC as an RTA in terms of the broader multilateral trading system. The interaction between multilateralism and regionalism is of mutual benefit even though tensions are bound to arise. The two, however, contribute to each other's existence over different time periods. Against this background, it is useful to look at the growing international experience with regional trade agreements and the implications for the design of a successful SADC regional bloc. The chapter lays the foundation for a better understanding of the two chapters that follow, which will deal with regional economic integration in Africa and SADC respectively.

4.2 Historical background

It is difficult to identify when the history of regionalism begins, since there is no single explanation that encompasses the origins and development of the regional idea. However, something significantly clear is that the "new regionalism"¹⁹⁰ of the 1990s, which compares to the "old regionalism" of the 1960s, took place against a background of significant structural changes in the global political and economic order.¹⁹¹ According to Gavin and Van Langenhove,¹⁹² this was growing regionalism in a world of globalisation. However, they went on to ask an interesting question: Is it just a coincidence or the emergence of something new? According to them, regions must organise themselves and develop as a counterweight to any one single pole of power in the global economy. In this context, SADC is conscious of the threat of globalisation and its adverse effects, and acknowledges that the regional bloc stands a better chance speaking with one voice than as individual states. In this worldview, regionalism is about pooling sovereignty to enhance sovereignty.¹⁹³ Criteria such as the desire by states to "make the best of their regional environment" are regarded by certain analysts as elusive; they prefer to consider the history of regionalism in terms

¹⁸⁹ Regionalism is closely associated with regional integration and in many instances the two terms are used interchangeably.

¹⁹⁰ See generally Burfisher, Robinson and Thierfelder "Regionalism".

¹⁹¹ Gavin and Van Langenhove "Trade in the World of Regions".

¹⁹² Gavin and Van Langenhove "Trade in the World of Regions".

¹⁹³ Gavin and Van Langenhove "Trade in the World of Regions".

of the rise of modern institutions. If formal organisation at the regional as opposed to the international level is to be the yardstick for the onset of regionalism, it is difficult to place its origins much before 1945.¹⁹⁴ The more regions can unite, the more they can determine their own destiny in the global order. Because sovereign states feel their sovereignty is being undermined by globalisation, they are "racing to regionalise".¹⁹⁵ Regional economic integration is already attracting a lot of attention in the developing world and attempts are currently underway to revamp dormant regional groupings, for example the re-establishment of the East African Community (EAC) in 2007.¹⁹⁶ The EAC had collapsed in 1977.¹⁹⁷

Efforts are also being put to breathe new life into weak ones or build new ones altogether. The Africa Development Report¹⁹⁸ notes that nearly all the WTO member countries have concluded RTAs with other countries. In the period 1948 to 1994, the GATT contracting parties notified 108 RTAs relating to trade in goods.¹⁹⁹ Of these, 38 were enforced in the five years ending in 1994. Every continental region has at least one major integration movement. According to Estevadeordal, Suominen and the:

RTAs have proliferated around the world in the past decade. Some 200 RTAs currently in force have been notified to the WTO and the number will continue to rise given the many RTAs being proposed and negotiated.

It is estimated that, if one takes into account RTAs which are in force but have not been notified, signed but not yet in force, currently being negotiated, and in the proposal stage, close to 400 RTAs were scheduled to be implemented by 2010.²⁰⁰ Pangeti²⁰¹ states that some of the examples of global and regional integration include the EU, the Association of Southeast Asian Nations (ASEAN), MERCOSUR²⁰² and the North American Free Trade Agreement (NAFTA). There are

¹⁹⁴ Fawcett "Regionalism from an Historical Perspective" 10.

¹⁹⁵ Thomas and Tetreault (eds) *Racing to Regionalize*.

¹⁹⁶ East Africa Community Date Unknown www.eac.int.

¹⁹⁷ Mutua 2007 allafrica.com.

¹⁹⁸ *African Development Report* (2006).

¹⁹⁹ Yanta "African Union".

²⁰⁰ Fiorentino, Verdeja and Toqueboeuf *Challenging Landscape*.

²⁰¹ Pangeti 1997 www.acpsec.org.

²⁰² Mercosur or Mercosul (Spanish: *Mercado Común del Sur*, Portuguese: *Mercado Comum do Sul*, Guarani: *Nemby Nemuha* English: *Southern Common Market*) is an economic and political agreement between Argentina, Brazil, Paraguay and Uruguay. Founded in 1991 by the *Treaty of*

over 250 economic integration arrangements that have been notified to the WTO and most of them are FTAs.²⁰³ According to Sampson,²⁰⁴ in the early 1990s the world witnessed a growth in RTAs unprecedented in history. According to him, this proliferation was rationalised at the time in terms of widespread concern relating to the potential failure of the Uruguay Round of multilateral trade negotiations and the ensuing weakness, if not collapse, of the rule-based multilateral trading system. Accordingly, countries were installing their own safety nets on a regional basis should the multilateral system disintegrate. Irrespective of the rationalisation of the rapid increase in RTAs, the expectation of many was that there would be abatement in the growth in numbers of these arrangements in the event of a successful conclusion to the Uruguay Round.²⁰⁵ Writers like Jackson wrongly predicted more than 30 years ago that:

... as the general incidence of all tariffs and other trade barriers declined worldwide, assuming the trend of the past twenty years continues, the problem of preferential arrangements may fade away.²⁰⁶

However, recent history makes clear that this has certainly not been the case, in fact RTAs have proliferated at an accelerating pace. The discussion above clearly shows the extent of regional integration in today's world. Furthermore, the launch of the Doha Development Round a decade later has also seen the exponential growth of RTAs.²⁰⁷ This new burst of growth is characterised by a number of peculiarities that set it apart from traditional agreements based on the agreed reduction of border restrictions for states located in the same part of the world.²⁰⁸ Many agreements now reach deep into the regulatory structures of the parties concerned, addressing, *inter alia*, regulations relating to competition policy, investment, harmonisation of standards, the environment and labour standards.²⁰⁹ Regional integration has already proven to be a very attractive method for States to regulate their

Asunción, which was later amended and updated by the 1994 *Treaty of Ouro Preto*. Its purpose is to promote free trade and the fluid movement of goods, people and currency.

²⁰³ WTO *World Trade Report*. Notification is an important requirement that will be discussed in chapter 8.

²⁰⁴ Sampson and Woolcock (eds) *Regionalism*.

²⁰⁵ Sampson and Woolcock (eds) *Regionalism*.

²⁰⁶ Jackson *World Trade*.

²⁰⁷ For information on the results of the Doha Ministerial Conference, see *CRS Report RL31206* (2001).

²⁰⁸ Sampson and Woolcock (eds) *Regionalism* 12.

²⁰⁹ Sampson and Woolcock (eds) *Regionalism* 12.

relationships. Leonard²¹⁰ has recently introduced the notion of the "regional domino effect": subscribing that more and more regional clubs will emerge as regions want to do business with other regions. According to him, one will need to be part of a regional club to have a seat at the table of global governance.

While it is true that all geographical areas of the world have several regional organisations and most countries belong to one or more regional organisation, it cannot be denied that regionalism is still most prominent in Europe, Africa and the Americas. Virtually all countries are members of at least one RTA, with most countries belonging to two or more RTAs at once.²¹¹ The geographical reach of RTAs has also changed over time, making "regional" somewhat of a misnomer. This is because while most RTAs are still formed among countries inhabiting the same region or continent, they increasingly involve members that are not immediate neighbours and create partnerships spanning oceans. Trans-Atlantic and trans-Pacific RTAs are gaining in number through such agreements, including the EU–Mexico Economic Partnership Agreement, the EFTA–Chile FTAs and the recently signed Korea–US FTA. Of more relevance to Southern Africa are the SADC economic partnership agreements (SADC-EPA and ESA-EPA).²¹² These agreements are no longer regional in character and span continents to build new agreements or create fusion between existing ones.²¹³ For this reason, one has to be aware of the international context of regional integration.

The economic importance of RTAs has continued to grow. More than half of global merchandise trade flows among countries connected by a common RTA. In addition, RTAs have also gone further than trade in goods; many of them now regulate subjects such as trade in services, investments, standard, intellectual property and competition rules, as well as a host of issues not directly related to trade such as labour and environment.²¹⁴ Examples from SADC can be drawn from the SADC Protocol on Fisheries²¹⁵, the SADC Protocol on Forestry,²¹⁶ as well as the SADC

²¹⁰ Leonard *Why Europe will Run the 21st Century*.

²¹¹ Fiorentino, Verdeja and Toqueboeuf *Challenging Landscape* 58.

²¹² See chapter 9 of this thesis. The EPAs have had the effect of further dividing SADC Member States into smaller groups.

²¹³ Sampson and Woolcock (eds) *Regionalism* 12.

²¹⁴ Fiorentino, Verdeja and Toqueboeuf *Challenging Landscape* 58.

²¹⁵ See *SADC Protocol on Fisheries* (2001).

Protocol on Shared Water Courses.²¹⁷ The body of rules governing international trade has also been extended to matters traditionally considered being within the realm of domestic regulations or those termed "behind the border" measures.²¹⁸

These and other peculiarities of the recently negotiated RTAs raise crucial questions with respect to current and future international economic relations.²¹⁹ According to Zakri:

There is need to understand what motivations lie behind the negotiations of these agreements and is a pattern emerging in their nature and content?²²⁰ Zakri's other important questions are; Do they have implications for the multilateral trading system and if so, are these positive or negative?²²¹ What do the new agreements mean for developing countries looking to expand trade as a vehicle to promote sustainable growth?²²² Are there best practices for parties to follow in negotiating such agreements?²²³

These questions will continue to be addressed in this thesis by looking at the characteristics of SADC and other related RTAs and examining the motivation for their creation.

4.3 Globalisation and neoliberalism

It is important to discuss globalisation and neoliberalism in multilateralism context because what happens at the regional level continues to be influenced by global forces. According to Robert Koehane and Joseph Nye:

²¹⁶ See *SADC Protocol on Forestry* (2002).

²¹⁷ See *SADC Protocol on Shared Water Courses* (1995).

²¹⁸ Nivola *Comparative Disadvantages?* This is an in-depth discussion of the tensions that arise between national regulatory regimes and competitiveness.

²¹⁹ Zakri "Foreword" (Zakri is the Director of the Institute of Advanced Studies, United Nations University, Tokyo.)

²²⁰ This question has been addressed in chapter 2 and continues to influence the debate in this thesis.

²²¹ This debate is being discussed here under the relationship between multilateralism and regionalism.

²²² This question is closely related to the core of the discussion in this thesis in that SADC is made up of developing countries whose intention is to use trade as a vehicle to promote sustainable growth and deeper integration (see RISDP Agenda). In fact, SADC is trying to use the SADC Treaty (Trade Protocol in particular) to expand trade. This means that the new SADC agreements create a very important opportunity to promote sustainable growth. In short, the discussion in this thesis centres on whether SADC will be able to achieve its objectives of trade liberalisation under the current framework.

²²³ Chapter 9 deals with the debate around trying to answer this question. In this case the best practices have to be in line with GATT Article XXIV.

Globalisation is a state of the world involving networks of interdependence at multi continental distances. The linkages occur through flows and influences of capital and goods, information and ideas, and people and forces.²²⁴

Globalisation includes the process of increasing the connectivity and interdependence of the world's markets and businesses. These are also characteristics of economic integration at regional level. Tony Blair was quoted saying:

Globalisation has transformed our economies and our working practices ... any government that thinks it can go it alone is wrong. If the markets don't like your policies they will punish you.²²⁵

This process of globalisation has speeded up dramatically in the last two decades, as technological advances make it easier for people to travel, communicate and do business internationally. Two major recent driving forces are advances in telecommunications infrastructure and the rise of the internet. In general, as economies become more connected, they have not only increased opportunity but also increased competition. However, this increased opportunity is mostly utilised by the industrialised economies while the poor ones suffer, as they cannot compete. There are no adequate legal regimes to regulate this situation. Thus, as globalisation becomes a more and more common feature of world economies, powerful pro-globalisation and anti-globalisation lobbies have arisen. The pro-globalisation lobby argues that globalisation brings about much increased opportunities for almost everyone, and increased competition is a good thing since it makes agents of production more efficient thereby reducing the price of commodities. This will ultimately improve the lives of ordinary citizens. It has been argued that globalisation will lead, or indeed has led, to a reduction in global poverty and inequality.²²⁶ Giddens argues that the main problems of underdevelopment do not come from the global economy itself, or from the self-seeking behaviour on the part of the richer nations.²²⁷

²²⁴ Keohane and Nye 2000 *Foreign Policy* 104-119.

²²⁵ Kaldor, Angheier and Glasius "Global Civil Society".

²²⁶ Giddens *Where Now for New Labour?* See also UK Department for International Development "Eliminating World Poverty".

²²⁷ Giddens *Third Way*.

Some of the most prominent pro-globalisation organisations are the WTO, the IMF, the UN and the World Economic Forum. However, they have been opposed by a whole host of extreme right-wing and left-wing populist organisations.²²⁸ For the purposes of this thesis, the WTO will be analysed in detail. The WTO has already been referred to in previous chapters and a more extensive discussion will be given in chapter 9. The World Economic Forum, a private foundation, does not have decision-making power but enjoys a great deal of importance since it has been effective as a powerful networking forum for many of the world's business, governments and non-profit leaders. The Geneva-based World Economic Forum is an independent organisation with a stated goal of "engaging leaders in partnerships to shape global, regional and industry agendas".²²⁹ SADC Member States are often invited to give meaningful contributions that have a direct impact on foreign direct investment and regional trade.

Neoliberalism calls for limited government intervention in the economy, privatisation, the demise of the welfare state and monetary and fiscal discipline. This is in line with the Washington Consensus.²³⁰ The Washington Consensus of the 1990s therefore represents only a cosmic break with the neo-liberal Washington Consensus of the 1980s.²³¹ According to neoliberalism, effective intervention occurs only in the absence of government intervention.²³² The Washington Consensus encouraged developing countries to position themselves in the international marketplace as agricultural product suppliers according to their comparative advantages.²³³ This policy perspective has been at the forefront of economic policies in Africa in the guise of the IMF and the World Bank Structural Adjustment Programmes (SAPs).²³⁴

²²⁸ Lloyd *Protest Ethic*.

²²⁹ Voice of America 2010 www1.voanews.com. The 20th Annual World Economic Forum on Africa was held in May 2010, Dar Es Salaam, Tanzania.

²³⁰ The term "Washington Consensus" was initially coined in 1989 by John Williamson to describe a set of ten specific economic policy prescriptions that he considered should constitute the "standard" reform package promoted for crisis-wracked developing countries by Washington DC-based institutions such as the IMF, the World Bank and the US Treasury Department. See Williamson 2004 info.worldbank.org.

²³¹ Fine *Social Capital*.

²³² Kiely "Neoliberalism Revised?".

²³³ Botto "Role of Epistemic Communities" 72.

²³⁴ Hereafter "SAPs".

After two decades of SAPs, there is a growing consensus that they have failed, leaving most African countries further marginalised within the world economy.²³⁵

The SADC region has not been spared either. While the demand for an outward-looking trade policy, namely the removal of barriers to trade, has done more to open the economies of Africa than has any regional economic organisation been able to do, such liberalisation has not resulted in increased intra-regional trade among African countries, but instead with the core states within the capitalist world economy. This increased trade has for the most part been one way, with the core countries having flooded the African periphery with more efficiently produced and cheap products that have caused massive industry closures and de-industrialisation. In the SADC region, examples can be drawn from the textile industry that has been hard hit by closures. In South Africa, complete textile industries have been closed down. The same applies to the textile industries in Swaziland and Lesotho. This largely has increased the levels of unemployment and increased poverty for the people of the region. In this context, globalisation negatively affects economic integration. Regional economic integration in Africa is being employed as a way to shield these adverse effects of globalisation.

Ikeme²³⁶ has cautioned against Africa buying uncritically into the neo-liberal approaches to globalisation. His view is that African countries should move away from the ideology of unrestrained export-led growth and move towards the creation of policies that seeks to develop production for internal markets as the first option. They should have recourse to international trade only when they are clearly much more efficient. To globalise the economy by erasure of economic boundaries through free trade, free capital mobility and free or at least uncontrolled migration, is to wound fatally the major unit of the community capable of carrying out any policies of the common good. This is because of the belaboured fact that globalisation weakens national boundaries and the power of national and sub national communities. According to Professor Daly²³⁷ there is need to:

²³⁵ Ndulo "Harmonisation of Trade Laws".

²³⁶ Ikeme "Sustainable Development".

²³⁷ Daly 1999 www.feasta.org.

... move away from the ideology of global economic integration by free trade, free capital mobility, and export-led growth -- and toward a more nationalist orientation that seeks to develop domestic production for internal markets as the first option, having recourse to international trade only when clearly much more efficient.

According to this argument, globalisation reinforces a sense of one world and therefore a sense of responsibility for the needs and rights of distant strangers and, with it, needs for politics that go beyond the narrow confines of state sovereignty.²³⁸ Additionally, globalisation intensifies the worldwide social relations that link distant localities in such a way that local happenings are shaped by events occurring many miles away and *vice versa*.²³⁹ This is particularly correct if one considers the negative effects of the current economic downturn: countries that invested a lot in an export-led growth are suffering more than those whose investments are more inclined to develop their internal markets for domestic production. They have more control to the extent that rescue packages can achieve the desired effect. Globalisation embraces current processes of social and political change.²⁴⁰ In particular, Africa is gravely affected by the global economic downturn. Following half a decade of above five per cent economic growth, the continent could only get 2.8 per cent in 2009, less than half of the 5.7 per cent expected before the crisis.²⁴¹

4.3.1 The impact of globalisation on Africa

Furthermore, Langdon and Mytelka note that:

The contemporary crisis of regional integration in Africa is not a purely nationalistic affair in which states are pitted against each other in conflicts over the interstate distribution of the gains from integration. Rather, the interstate conflict is a reflection of more fundamental problems that are associated with the distribution of gains between national and international (global) capital, as the Multinational Corporation (MNC) seeks to structure not only national but also regional markets around its own needs and interests.²⁴²

Globalisation has had both negative and positive influence the world over. The World Bank has argued that globalisation has helped in the fall of poverty in the last 20

²³⁸ Kiely *Clash of Globalisations* 2.

²³⁹ Giddens "In Conversation".

²⁴⁰ Rosenberg *Follies of Globalization Theory*.

²⁴¹ African Development Bank *et al* 2009 www.oecd.org.

²⁴² Langdon and Mytelka "Africa in the Changing World Economy" 204.

years.²⁴³ In 1980, there were 1.4 billion people living in absolute poverty²⁴⁴ and by 1998, this had fallen to 1.2 billion. The bank has argued that, while the number of people living in absolute poverty has remained constant from 1987–98, taking into account population increases, this amounts to a fall from 28 per cent of the world population.²⁴⁵ Poverty and inequality have fallen and this is due to greater economic integration (globalisation) in the world economy, which constitutes a "stepping stone from poverty".²⁴⁶ However this is far from being a pedantic point, especially as international targets for poverty reduction have been set for 2015, which include halving poverty under the millennium development goals. However, this cannot be said for Africa and its population. This discussion will now focus on globalisation on the African continent.

The existing globalisation has been criticised in Kiely's²⁴⁷ book for the following reasons: intensified exploitation; an increment in social inequality, political inequality, cultural homogenisation and environmental destruction. These issues will now be discussed briefly with relevance to Africa.

Exploitation is a historical fact in Africa. Under colonialism, the goal of the developed countries was to find a place to obtain cheap raw materials and markets for processed goods. Kiely points to the abundance of Export Processing Zones (EPZs) in Africa as a case in point. An EPZ is usually a specified area within a country that specialises in manufacturing exports. Most EPZs in Africa are in the agricultural sectors. The rationale behind them is often linked to the consumption of cheap consumer goods in the "First World" and the exploitation of sweat-shop labour in the developing world. While the promotion of EPZs does constitute a new competitive strategy in the context of intensified global competitiveness, there is a tendency in this argument to exaggerate the mobility of capital.²⁴⁸

²⁴³ This is defined as people living on less than a dollar a day. This "dollar" is adjusted to account for local purchasing power, so it does not mean US dollar but a Purchasing Power Parity (PPP) dollar.

²⁴⁴ World Bank *Globalisation, Growth and Poverty* 30.

²⁴⁵ World Bank *Global Economic Prospects and Developing Countries* 3.

²⁴⁶ Wolf *Financial Times*.

²⁴⁷ Kiely "Neoliberalism revised".

²⁴⁸ Brecher and Costello *Global Village*.

On the issue of globalisation and social inequality, it has already been discussed that global inequality and poverty are decreasing based on highly selective evidence. The reality is that markets are expanding without redistributive mechanisms, the marginalisation of some regions and people from capital flows and the practice of protectionism in cases where the developing world may otherwise enjoy potential advantages. In developing countries, small farmers have won a few important gains.²⁴⁹ According to Chang, the WTO free trade policies have literally "kicked away the ladder" that developing countries hope to climb.²⁵⁰ This has resulted in the intensification of uneven development, as capital concentrates in some areas and marginalises others.

Under globalisation and political inequality, the relationship between globalisation and political inequality is particularly complex, as the rich nations dictate the terms of global trade. At the WTO, the poor are held ransom by fights between the EU and the USA (this has already been discussed earlier). The protection of weaker countries from the stronger ones under the WTO regime is topical. The findings were that developing countries still feel marginalised by the procedural systems of the WTO.

The discussion of globalisation leading to cultural homogenisation is also important. The argument is closely linked to older concerns that Western cultural imperialism has undermined local cultures and led to a process of homogenisation. This will be discussed further under the legacy of imperialism as a reason for regionalism in Africa. The language is couched in terms of the global destroying the local.²⁵¹

The discourse on globalisation leading to environmental destruction has been a subject of discussion since the 1960s. There has been a growing concern over the capacity of the human being to dominate nature, reflected in debates over the use of insecticides in the food chain and the population explosion.²⁵² From Montreal in

²⁴⁹ Engberg-Pederson *Limits of Adjustments*.

²⁵⁰ Chang *Kicking Away the Ladder*.

²⁵¹ Barnett and Cavanagh "Homogenization of Global Culture".

²⁵² Carson *Silent Spring*; see also Meadows *et al Limit to Growth*.

1987²⁵³, to Rio in 1992²⁵⁴, Kyoto in 1998²⁵⁵ and Johannesburg 2002,²⁵⁶ a host of international conferences have addressed the issue of managing the global environment, but with limited success. According to Kiely:

Developed countries reached the developed stage without strong environmental considerations, but developing countries are now being disallowed to follow a similar process of development. Anti globalisation politics have been strongly influenced by green politics.

Many activists and thinkers argue that the targets at Kyoto not only do not go far enough, but that they fail to tackle the root cause of the problem. Sustainable development²⁵⁷ is not simply a case of finding ways to technocratically manage the environment within the current system. Instead, it refers to a radically different approach for a kind of society in which economic growth is at the very least problematised and sometimes rejected. This position can lead to a suspicious attitude to technology, although often great faith is placed in the principle of alternative or appropriate technologies.²⁵⁸ This argument is part of a much broader critique of industrial and post-industrial society, which is based on the premise that societies regard growth as a sign of progress, but this is not actually the case. It leads to all kinds of environmental problems and it is no guarantee of happier, more contented society. This is not an argument against growth, merely one that suggests that there is a tendency in capitalist society to promote capital accumulation and economic growth above all other concerns, at the cost of collective forms of association and provision.²⁵⁹ The question is; if globalisation is associated with the

²⁵³ The *Montreal Protocol on Substances that Deplete the Ozone Layer* is an international treaty that was first agreed to in 1987. Signed by just 24 nations in 1987, but subsequently ratified by over 180 governments, the *Montreal Protocol* is widely considered to be the most successful of the global environmental treaties. See Benedick and Saundry "Montreal Protocol".

²⁵⁴ See the *Rio Declaration on Environment and Development*, a short document produced at the 1992 United Nations "Conference on Environment and Development" (UNCED), informally known as the Earth Summit. The Rio Declaration consisted of 27 principles intended to guide future sustainable development around the world.

²⁵⁵ See the *Kyoto Protocol* is an international agreement linked to the *United Nations Framework Convention on Climate Change*. The major feature of the Kyoto Protocol is that it sets binding targets for 37 industrialised countries and the European community for reducing greenhouse gas (GHG) emissions. These amount to an average of 5% against 1990 levels over the five-year period 2008-2012.

²⁵⁶ See the *Johannesburg Declaration on Sustainable Development* (2002) Chapter 1, Resolution 1. While committing the nations of the world to sustainable development, it also includes substantial mention of multilateralism as the path forward.

²⁵⁷ Brundtland *Our Common Future*.

²⁵⁸ Pepper *Modern Environmentalism*.

²⁵⁹ Hamilton *Growth Fetish*.

expansion of "market society", then we need to address the issue why such expansion is not conducive to a more sustainable society. There is a social cost that is involved here. SADC is included in this social cost of marginalisation and poverty.

Globalisation has posed a threat to state power.²⁶⁰ It is eroding the legitimacy and effectiveness of national governments and intergovernmental organisations, although there has been a corresponding decline in levels of resources and support for international organisations, including the United Nations.²⁶¹ The impact of globalisation in Africa cannot be underestimated, but more importantly its impact on African regionalism in particular has been significant. The fact that globalisation has benefited some parts of the world economy means that some have suffered in the process, as the benefits of globalisation have been unevenly distributed throughout the world.²⁶² This has resulted in many developing and least developing countries, mostly in Africa, being further marginalised within the world economy. Ruth Morgenthau notes that:

The typical developing African nation has a sparse population, small internal markets, limited infrastructure, new and fragile borders and economies vulnerable to fluctuating world prices.²⁶³

Also according to Ann Seidman:

The majority of African people still confront the overriding problem of poverty, living on a continent endowed with extensive mineral and agricultural resources; they still suffer from among the lowest per capita income and the highest mortality rates in the world.²⁶⁴

According to Held:

Contemporary processes of globalisation are historically unprecedented such that governments and societies across the globe have to adjust to the world in which there is no longer a distinction between international and domestic, external and internal.²⁶⁵

²⁶⁰ Garza "NAFTA Parity" 116.

²⁶¹ Langenhove and Thakur "Enhancing Global Governance" 233-240.

²⁶² Solimano 2001 www.worldbank.org.

²⁶³ Morgenthau 1977 "The Developing Status of Africa" 87.

²⁶⁴ Sedman 1978 *Africa* 46.

²⁶⁵ Held 1998 *Globalisation* 24-27.

4.3.2 Anti-globalisation sentiments

The anti-globalisation group argues that certain groups of people who are deprived in terms of resources are not currently capable of functioning within the increased competitive pressure that will be brought about by allowing their economies to be more connected to the rest of the world. According to Tang:

The anti-globalisation movement is not against globalisation, it opposes the negative effects caused by globalisation. The anti-globalisation movement is an expanding social movement of protest. With democratic master framework, the anti-globalisation movement is highly decentralised, and its organisations and groups ally loosely. The anti-globalisation movement is a disparate and divided movement, and its members have various motivations and different goals although anti-corporate globalisation is the main target of anti-globalisation movements.²⁶⁶

Actually, the description of the anti-globalisation movement is not accurate. As Kofi Annan, former UN Secretary General said, anti-globalisation movements do not focus on stopping globalisation; they just oppose the problems caused by it.²⁶⁷ Thus, the anti-globalisation movement may be defined as a movement, which is loosely made up people worldwide who oppose the negative effects of market-driven globalisation.²⁶⁸ Anti-globalisation movements may be described as anti-neoliberalism or anti-US imperialism or anti-corporations movements.²⁶⁹

Important anti-globalisation organisations include environmental groups like Friends of the Earth and Greenpeace; international aid organisations like Oxfam; Third-World government organisations like the G77; business organisations and trade unions whose competitiveness is threatened by globalisation like the US textiles and European farm lobby, as well as the Australian and US trade union movements. The locals are therefore championed as sites of authentic embeddedness against the disembedding effects of globalisation.²⁷⁰ They seek global solidarity on issues like debt relief and war.²⁷¹ They also embrace the eco-feminist principle of respect for "mother earth" in contrast to industrial capitalism, which attempts to dominate the

²⁶⁶ Tang 2009 *Describe Anti-globalisation*. 2

²⁶⁷ Crossley 2003 *Even Newer Social Movements* 287-305.

²⁶⁸ War Resisters International 2001 www.wri-irg.org. See also Anonymous 2003 www.iol.ie.

²⁶⁹ Epstein "Anarchism and the Anti-globalisation Movement".

²⁷⁰ Polanyi *Great Transformation*.

²⁷¹ Kesi 2002 www.monbiot.com.

earth.²⁷² In South Africa, the Congress of South Africa Trade Unions (COSATU) presents the strongest anti-globalisation front in Southern Africa.²⁷³ Speaking ahead of the July 2001 G8 Summit, COSATU General Secretary Zwelinzima Vavi said that:

There is a general distrust of globalisation in the developing world. He warned that developing countries, hurt by the economic injustices of globalisation, might take up arms against the developed world. If the leaders [the G8] are not brave enough to accept changes, they will have to accept that many will opt out of the world system and some will find other means to challenge globalisation. This may lead to an arms race wherein developing societies aim to protect themselves from the social unrest that will be unleashed by the wrecking ball of globalisation. Therefore globalisation has to work towards eradicating the ill social side-effects of the process.

In a nutshell, anti-globalisation movement requires a more fair and just distribution of political power, wealth and income.²⁷⁴

Anti-globalisation forces have targeted the WTO and regional organisations in the process. The global movement for democracy announced itself to the world on 30 November 1999 in Seattle, Washington.²⁷⁵ When the WTO's Third Ministerial meeting was held in Seattle to start a new multilateral free trade negotiation, more than 700 organisations and about 50,000 people outside the meeting protested against the social and environmental problems caused by globalisation. Protesters clashed with police and 587 people were arrested.²⁷⁶ With huge numbers of protestors and large momentum, this demonstration represented the beginning of the anti-globalisation movement.²⁷⁷ On 1 January 1994, the first day of the North America Free Trade Agreement, 4,000 Chiapas people protested against corporate globalisation. Because they took a broad social movement to define the terms of the popular struggle in a new way, it was regarded as the first revolution of the twenty-first century.²⁷⁸ In November 1996, when Philippines hosted the Asia Pacific Economic Corporation Summit, more than one hundred thousand people took part in protests. In May 1999, the WTO held a meeting of G-8 foreign and finance ministers

²⁷² Shiva *Staying Alive*.

²⁷³ Reuters-Sapa-AFP 2001 www.hartford-hwp.com.

²⁷⁴ Boyce 2004 *Democratising* 593-599.

²⁷⁵ Korten *When Corporations Rule the World*.

²⁷⁶ Hari 2002 *New Statesman* 20-22.

²⁷⁷ Roddick *Take it Personally*.

²⁷⁸ Korten *When Corporations Rule the World*.

in London, a Summit of G-8 heads of state in Birmingham and a Second Inter-Ministerial Conference of the WTO in Geneva. Large-scale demonstrations were also held against "Free Trade and the WTO" in Brazil and Germany.²⁷⁹

Another form of anti-globalisation movement is academic protest, which lays a profound theoretical foundation for the anti-globalisation movement. Books such as *Global shift: The silent takeover* and *The age of consent* contribute to the development of anti-globalisation movements.²⁸⁰ The international best seller, *No Logo*, written by Naomi Klein, criticises giant corporations and asks people to stand up for the human spirit; this book functions as the "bible" of the anti-globalisation movement.²⁸¹ Mittelmann interprets anti-globalisation movements as anti-neoliberalism movements. He insists that:

Anti-globalisation movement should involve not only the private daily life, but also the unnoticeable political and cultural life. This type of protest includes purchasing only domestic products, choosing environmental products, and refusing famous brands.²⁸²

However, what is certain is that globalisation and modernisation are irreversible forces, abstracted from real agents and interests and, therefore, submission to these forces is regarded as both inevitable and desirable.²⁸³ Also, globalisation has become a "catch all" term used in mainstream politics, and a "most convenient scapegoat for the imposition of unpopular and unpalatable measures".²⁸⁴

From the above discussion it is clear that there are specific conditions a country or region has to have before globalisation can be beneficial. A country or region should be at a competitive level before it can compete in the global economy, for example being able to produce products that can compete on the international market. The absence of technological advances in Africa and the SADC region in particular makes it difficult to benefit from globalisation. Africa has often been identified as lagging behind the fast-changing world. However, the region has to be linked with

²⁷⁹ Korten *When Corporations Rule the World*.

²⁸⁰ Shaw 2001 *Globalisation and Anti-globalisation* 164-169.

²⁸¹ Roddick *Take it Personally* 84.

²⁸² Li 2003 big5.china.com.cn.

²⁸³ Rustin "Empire".

²⁸⁴ Hay 1999 www.bham.ac.uk 1999.

the global village via good telecommunication, road, rail, air and sea networks. Poor infrastructure in this regard makes SADC very vulnerable to the negative effects of globalisation since a failure to be integrated in the global economy results in global isolation. The exception in SADC is South Africa; its competitive infrastructure and technological advancement has made it possible to bring global attention. Examples can be drawn from South Africa's capability to host global events like the FIFA, rugby and cricket World Cups. South Africa has also successfully hosted major conferences like the World Summit on Sustainable Development. Apart from South Africa, sub-Saharan African countries remain constrained by weak supply and demand capabilities, while lacking institutional capacity. They are, therefore, also less able than other countries to reap potential trade, investment, technological transformation from globalisation, whereas for other communities lack of institutional capacity has contributed to increased impoverishment, inequalities, work insecurity, weakening institutions and social support systems and an erosion of established identities and values.

Sub-Saharan Africa's further marginalisation is ironic in that many of these countries are highly integrated into the world economy, with exports consisting of an estimated 30 per cent of GDP. The problem is that the majority of these exports consists of cheap primary products and thus are subject to price fluctuation on the global markets. Recently, the impact of the financial crisis adversely affected some well-placed economies in the region, for example Botswana, whose reliance on the mineral wealth of diamonds meant they had to cope with the decline in demand. Diamond exports plunged by close to 90 percent in the four months between August and November 2008 as the global recession hit demand for luxury goods, figures supplied by the Central Statistics Office (CSO) revealed.²⁸⁵ At the height of the global economic recession the government of Botswana warned that it was likely to stop the free distribution of anti-retroviral drugs (ARVs) to its citizens by 2010 if the current economic hardships persist. In a statement to the WTO Ministerial conference, the South African Minister of Trade and Industry Rob Davies gave an overview of the effects of the recession when he blamed it for causing job losses in all countries around the world with the developing countries suffering the major impact. According to him, South Africa had 23 percent unemployment before the

²⁸⁵ Benza 2009 allafrica.com.

recession, but had lost an additional three quarters of the million jobs since then, creating further strain on the stability of a highly unequal society and nascent democracy.²⁸⁶ This shows how a globalised economy can easily suffer from problems at the global stage.

In making matters worse, the current bailout packages given to struggling industries in the developed countries could exacerbate existing imbalances in the globalised world. While they are a necessary countercyclical measure, certain programmes have the potential to impact negatively on productive investments in the developing world. It is for this reason that South Africa has supported the proposals made by Argentina and other developing countries that the WTO monitors the impact of such measures on the trade and investment of developing countries. The exports from the region are made up of mostly raw materials that fetch little on the market and in most cases depend on the availability of the processing industry in the First World countries. To make matters worse, the regional markets become the market for the highly priced finished products. Under the circumstances, African states have not increased their export levels, nor have they been successful in securing significant foreign investment.²⁸⁷

With respect to regionalism in Africa, globalisation has resulted in some countries feeling that integration at the regional level is secondary to integration at global level. While clearly for political reasons this is not publicly articulated, it can, however, be seen in practice. As one critic recently noted:

African governments are now being told, and they appear convinced, that globalisation offer new higher economic opportunities for which Africa must, in the words of IMF Deputy Managing Director, "sharply accelerate reforms to fully integrate itself into the world economy and take full advantage of the opportunities of globalisation".²⁸⁸

Thus, the attitude of most African governments now appears to be that of complacency and resignation. They now appear to believe that the ascribed opportunities of globalisation are so great that they are worth the enormous social, economic and political cost associated with adjustment. It is thus a short step from

²⁸⁶ WTO Official Document WT/MIN(09)ST/137 (2009).

²⁸⁷ See UNDP Report UNCTAD/ITE/IIT/Misc.5 , 1999:2,31

²⁸⁸ Lee *Regionalism in Africa*.

recognition that the economy is global in scale to an acceptance of the global economy in its current neo-liberal form.²⁸⁹ In summing up, Wolf's²⁹⁰ claim is valid when he says that so long as there is absolute poverty and inequality; the result is a selective embrace of globalisation. Kierly²⁹¹ seriously doubts the notion that globalisation will lead to a convergence of the rich and the poor. From this discussion one can conclude that the opposite may happen, where the gap between the rich and the poor will continue to widen. The fall in poverty figures as indicated in the introduction cannot be attributed to pro-globalisation policies since Chinese and Indian growth has led to such a result, although these countries do not embrace unambiguously market-friendly, pro-globalisation policies.²⁹²

4.4 The relationship between multilateralism and regionalism

This discussion is key in pointing out the important role RTAs play in promoting the liberalisation and expansion of trade in fostering development in the context of a rule based system. There is need to clarify and improve disciplines and procedures under the existing WTO provisions applying to RTAs.²⁹³ This is necessary because in some instances RTAs go beyond existing multilateral trade rules in the WTO.²⁹⁴

What is not in doubt is that multilateralism and regionalism co-exist to the extent that Schmitter argues that;

... no matter what their original intentions; it should prove difficult to isolate regional deliberations from their context of global economic and political dependence.²⁹⁵

Both multilateralism and regionalism have been used and continue to be used as vehicles to shape and regulate trade relations among States. In conventional terms,

²⁸⁹ Fairclough *New Labour*.

²⁹⁰ Wade and Wolf 2002 *Prospec Debate*. 16-21

²⁹¹ Kiely *Industrialization and Development*.

²⁹² Kiely *Industrialization and Development*.

²⁹³ See Generally, Heydon K 'Regionalism: A complement, not a substitute *in* Regionalism and the Multilateral trading system (by By Organisation for Economic Co-operation and Development) Available online: <http://www.oecdbookshop.org/oecd/display.asp?CID=&LANG=EN&SF1=DI&> Accessed 12 June 2011. This thesis will give a detailed legal analysis of this subject within the SADC context in Chapter 9.

²⁹⁴ Heydon K "Regulatory Provisions"

²⁹⁵ Schmitter *Autonomy or Dependence* 8.

the analysis of the effects of preferential regional trade agreements has been couched in terms of the net trade and welfare effects of the removal of border protection. On this front, empirical studies conducted by the WTO, the World Bank, the Organisation for Economic Co-operation and Development (OECD) and other bodies have all concluded that regionalism has supported the multilateral trading system in the past, and has not in general undermined its influence.²⁹⁶ Regionalism and multilateralism should not be treated as opposites, but rather as interdependent phenomena. Interdependence here is defined as mutual dependence.²⁹⁷ For the purpose of streamlining this debate on the relationship between multilateralism and regionalism, the discussion will focus on the relationship between the WTO and RTAs, as the majority of WTO members are also signatories to RTAs.²⁹⁸ To say the least, these parallel developments appear to be paradoxical; on the one hand, non-discrimination is the pillar of the multilateral trading system,²⁹⁹ on the other, all but two of the 153 members of the WTO are parties to at least one and some as many as 26 preferential trading arrangements.³⁰⁰ The availability of two regimes regulating the same sphere of trade relations was always bound to create positive and negative results. Such desirable and undesirable effects of this relationship will now be discussed.

According to Pascal Lamy, the current WTO Director General, and Luis Alberto Moreno (President of Inter-American Development Bank):

The proliferation of RTAs requires increased attention to be paid to the potential conflicts and complementarities between regional and global rules, the relationship between regionalism and multilateralism has sometimes been framed as one where RTAs are either a building block or a stumbling bloc to multilateralism.³⁰¹

²⁹⁶ Raghavan 1995 sunonline.org.

²⁹⁷ Keohane and Nye *Power and Interdependence*.

²⁹⁸ In 2003 "only three WTO members – Macau China, Mongolia and Chinese Taipei – were not party to a regional trade agreement". WTO Date Unknown (b) www.wto.org.

²⁹⁹ Non-discrimination was the pillar of GATT and now is the pillar of the WTO. Members of the WTO are obliged to grant unconditionally to each other any benefits, favour, privilege or immunity affecting customs duties, charges, rules and procedures that they give to products originating or destined for any other country.

³⁰⁰ There are currently 153 governments that constitute the membership of the WTO (WTO 2008 www.wto.org). These will be referred as WTO members in this thesis. Although the full memberships of the EU are individual members of the WTO, they are represented at WTO meetings (with the exception of the Budget Committee) by the European Commission, which speaks on behalf of all the membership.

³⁰¹ Lamy and Moreno "Foreword".

4.4.1 RTA as stumbling blocs or building blocs

The discourse on "building blocs" and "stumbling blocs" to multilateral trade liberalisation is exhaustively discussed by Bhagwati,³⁰² who first coined the terms. These concepts refer to the nature of the dynamics or time paths that RTA formation can generate.³⁰³ Parties to the agreements are not only firmly committed to multilateral trade liberalisation but prepared to liberalise faster on a regional basis than multilaterally.³⁰⁴ Accordingly, RTAs are building blocs if they accelerate multilateral trade negotiations or progressively enlarge their membership so that they lead to global free trade.³⁰⁵ On the other hand, RTAs are stumbling blocs if they hamper the attainment of global trade liberalisation.³⁰⁶ Sampson asks the question whether RTAs are competing with or complementing multilateral attempts to remove regulatory barriers to trade.³⁰⁷ This question is beyond the scope of the following discussion.

4.4.1.1 Stumbling blocs

Theories have emerged to support the notion that RTAs are obstacles to the multilateral order.³⁰⁸ The stumbling bloc camp argues that RTAs undermine countries' incentives to undertake further multilateral liberalisation because members are unwilling to dilute the preferential access they have to the markets of RTA partners. Members' overzealous entry into multiple RTAs in recent years has seriously damaged the most favoured nation (MFN) rule and the principle of non-discrimination.³⁰⁹ Another argument is that RTAs can create incompatible regulatory structures and standards which lock in members' policies, and increase the adjustment costs associated with multilateral liberalisation, thus making it less attractive. The importance of non-economic motives or interests can make RTAs a

³⁰² Bhagwati 1992 *Regionalism versus Multilateralism* 535-555.

³⁰³ Bhagwati and Panagariya "Preferential Trading Areas" 33-100.

³⁰⁴ Sampson and Woolcock (eds) *Regionalism* 12.

³⁰⁵ See a 3(9) *African Economic Community Treaty* (1991). SADC is being used as a building bloc in the AEC. See chapter 6 of this thesis for further discussion.

³⁰⁶ Bhagwati and Panagariya "Preferential Trading Areas" 33-100.

³⁰⁷ Bhagwati and Panagariya "Preferential Trading Areas" 33-100.

³⁰⁸ Bhagwati and Krueger *Dangerous Drift*.

³⁰⁹ See Sutherland *et al* "Erosion of Non-discrimination" 19-27.

stumbling bloc to global free trade.³¹⁰ This is a typical scenario in Southern Africa where an earlier discussion in chapter 2 exposed political reasons for integration in SADC often overriding economic rationale.³¹¹

RTAs also have a tendency to benefit bigger economies within the group. They can be valuable to a large country because the preferential access to its market allows it to extract cooperation in non-trade matters from smaller partners. Multilateral tariff reductions reduce the value of preferential access to the large market and thus the surplus that can be extracted from potential RTA partners. In SADC, South Africa³¹² stands to benefit from this scenario while the same has been said of Germany in the EU setup.³¹³

Various political-economy models have sought to show that the establishment of an RTA weakens the motivation of the Member States for reciprocal liberalisation with non-members. If an RTA produces disproportionately large gains and relatively small losses to a member so that his utility is raised above what could be achieved with a multilateral deal, multilateral liberalisation will no longer be viable.³¹⁴ According to Krishna, trade diverting RTAs generate large rents tied to the preferences granted by the agreement for producers.³¹⁵ Multilateral trade liberalisation threatens those rents.

Having closely witnessed integration arrangements in Europe, Latin America and the Caribbean, Africa, Asia and elsewhere around the globe, the debate concerning multilateralism and regionalism is more complex. RTAs have delivered important trade gains for their participants, but often they have been a source of trade diversion and have hampered movements towards greater multilateral liberalisation, as in the case with certain rules of origin. In this discussion, the key is to identify those regional rules that promote complementarities with the multilateral trading systems and those that conflict with it.³¹⁶ Lam and Moreno acknowledge that:

³¹⁰ Limao 2007 *Preferential Trade Agreements* 821-855.

³¹¹ Melber "Joining Hands".

³¹² SADC 2008b www.sadc.int. See further discussion in chapter 8 of this thesis.

³¹³ Braun 1990 *German Economy* 101, 114.

³¹⁴ Levy 1997 *Political Economic Analysis* 6-19.

³¹⁵ Krishna 1998 *Regionalism and Multilateralism* 27-51.

³¹⁶ Krishna 1998 *Regionalism and Multilateralism* 27-51.

A great number of scholarly interests have been spawned by regionalism, with both eminent economists and political scientists making many valuable theoretical contributions. But with a few notable exceptions like NAFTA and the EU, very little research has yet been devoted to the actual contents of RTAs.

Thus, there is not enough diversity in regional rules, the differences between these regional rules and multilateral rules, the feasibility of converging towards some common standard and the appropriate methods for assessing the compatibility of regional rules with multilateral rules.

The increasing prevalence of RTAs has often been mentioned as one of the reasons for WTO members' disagreement. RTAs have grown at a phenomenal rate and are a significant contributing factor to the present difficulties of the WTO.³¹⁷ Despite the specific benefits of individual RTAs, when taken as a whole, they tend to undermine the development of a multilateral trade system. Specifically, they pose an institutional threat to the WTO.³¹⁸ However, the RTAs impact on the WTO has not been subjected to a detailed examination from an institutional perspective.³¹⁹ Such perspective considers how RTAs drain states' enthusiasm for multilateral trade negotiations, create conflict between RTAs and the WTO, and divert resources from the WTO to the RTA process. This is more critical for poor African countries whose resources are very limited. Additionally, these institutional harms are interrelated and self-reinforcing. In SADC, the Zimbabwean crisis has created conflict between regional decisions made by SADC under former President Mbeki's initiative of the Global Political Agreement (GPA). This was not acceptable at multilateral level where Britain and the USA repeatedly failed to put the Zimbabwean issue before the Security Council agenda.³²⁰ Despite ongoing efforts, the UN Secretary General said:

I unfortunately have to conclude that neither the [Zimbabwean] government nor the mediator [South Africa, acting on behalf of the regional Southern African Development Community] welcomes a U.N. role.³²¹

This is a clear example of conflict between multilateralism and regionalism, with the latter prevailing over the former.

³¹⁷ See chapter 2 World Bank 2005 siteresources.worldbank.org.

³¹⁸ Picker 2005 *Regional Trade Agreements* 270.

³¹⁹ Frankel, Stein and Wei *Regional Trading Blocs* 214. See also World Bank 2005 siteresources.worldbank.org 38-39.

³²⁰ Goodenough 2008 www.cnsnews.com.

³²¹ Goodenough 2008 www.cnsnews.com.

Furthermore, these institutional challenges may well spell the difference between WTO stagnation and growth, when considered in the context of the WTO's recent problems with non-tariff barriers, services, agriculture, intellectual property rights, trade, human rights, labour, the environment and the many other issues now on the WTO negotiating table at the Doha Development Round.³²² It is critical, therefore, that the WTO take control of this challenge and devise mechanisms to appropriately regulate the institutional impact of this massive proliferation of RTAs. One of the early harvests of the WTO Doha Round has been the establishment, on a provisional basis, of a new transparency mechanism for RTAs.³²³ RTAs have been the subject of some multilateral examination since the days of the GATT. This new transparency mechanism brings a higher level of examination to RTAs: it provides for early announcement of any RTA, and its notification to the WTO; it requires a factual presentation of the notified RTAs to be made to WTO members on the basis of a report prepared by the WTO Secretariat³²⁴ and it mandates that any changes affecting the implementation of an RTA, or the operation of an already implemented RTA, will be notified to the WTO. Finally, at the end of the RTA's implementation period, it calls for the parties to the RTA to submit to the WTO a written report on the realisation of liberalisation commitments in the RTA as originally notified. From this discussion it is clear that RTAs may pose challenges to multilateralism if not regulated properly, but RTAs can also have positive influences on global trade. This will now be discussed below.

4.4.1.2 *Building blocs*

There are strong arguments for the building bloc school of thought. Baldwin has proposed a "domino theory" of regionalism where the establishment of a RTA increases the value for non-members joining the agreement.³²⁵ The creation of a preferential regional trade agreement will reduce the profits of the firms exporting to the region but who are located in a non-member country. This will result in them lobbying their government to join the bloc. This can explain the sudden expansion of

³²² Fergusson 2008 www.nationalaglawcenter.org.

³²³ See chapter 9 of this thesis for further discussion.

³²⁴ See chapter 9 of this thesis for further discussion.

³²⁵ Baldwin "Domino Theory" 48.

the EU.³²⁶ This attraction will result in many countries joining the union until the global goal of free trade is reached. The SADC FTA and customs union were earmarked to have similar effect.³²⁷

Another building bloc argument is that preferential trade liberalisation will help enlarge the exporting sectors and diminish the import-competing sectors in RTA members. According to Baldwin, there will be a "juggernaut effect" when a country which enters into a RTA expands the economic and political strength of its pro-liberalisation constituency. This makes it possible for its government to cut a multilateral deal.

Ethier³²⁸ also finds RTAs to be stepping stones towards a global free trade policy. Accordingly, it may help the government intending to carry out economic reforms to mobilise domestic forces in support of opening up to the wider world. By initially entering into a PTA, the reforming country would be able to capture economic benefits, for example through FDI inflows from its RTA partners that tilt the political balance within the country in favour of economic reform and multilateral liberalisation. This has manifested itself in the former Eastern European countries where FDI inflow from EU partners has influenced the move in favour of economic reforms and multilateral liberalisation.

Harmonisation of trade rules may be the ultimate result if more and more RTAs are established. This happens because as more and more RTAs are formed, the cost to producers of overlapping rules would lead them to pressure governments to harmonise their laws. Additionally and alternatively, their governments may also "multilateralise" these rules. According to Baldwin, as bilateral and RTAs proliferate, a "spaghetti bowl" of rules of origin will emerge. This will, in turn, run against the increasing fragmentation of production as firms find it more cost efficient to locate the manufacturing of parts and components in different countries. Paradoxically, RTA spaghetti bowls can become the building blocs of multilateralism, as off-shoring becomes a force for the multilateralisation of existing regional rules.

³²⁶ Ingham and Ingham *EU Expansion* 215.

³²⁷ See chapter 11 of this thesis.

³²⁸ Ethier 1998 *Regionalism* 1214-1245.

In general terms, the increased debate on RTAs and the outpouring of new studies have not resulted in any consensus on whether they are building blocs or stumbling blocks, and the rule-making dimension has not been covered.³²⁹ The case has been made that RTAs are creating a spaghetti bowl of different rules, but this argument lies essentially in the spaghetti bowl-like rules of origin.³³⁰ While little work has been done on other areas of rule making, it is unsound to draw wider conclusions from this narrow observation. Equally, the case that deep integration is likely to be benign because rules in this area are less likely to be applied in a discriminatory fashion appears to require more empirical testing that involves looking at the substance of various RTAs.³³¹

Another dimension of the subject matter is the discussion whether RTAs or bilateral agreements go "beyond the WTO". This work has to some extent been undertaken by the WTO itself, which keeps an inventory of RTAs, including the rule-making elements of these agreements. The OECD has also produced a number of studies comparing RTA provisions in a range of behind-the-border issues.³³² This discussion has shown that conflict between the WTO and RTA is unavoidable notwithstanding the fact that the WTO through GATT Article XXIV has made provisions for exception for RTAs to operate.³³³ The clear challenge here is to manage and regulate RTAs in order for the WTO to derive optimal benefit.

4.5 Possibility of conflict between RTAs and the WTO³³⁴

The GATT system was conceived as a means of preventing the resurgence of competing economic blocs that had prevailed prior to World War II. RTAs pose important challenges for the multilateral trading system. The growing importance of RTAs has directed attention to the potential conflicts as well as complementarities between the rules that are adopted in RTAs (regional rules) and the multilateral rules

³²⁹ Woolcock *Role of Regional Agreements* 118.

³³⁰ Bhagwati *World Trading System*.

³³¹ Lawrence *Regionalism*. See also Winters *Regionalism v Multilateralism*.

³³² Nielson "Trade Agreements and Recognition" 155.

³³³ This discussion is fully undertaken in chapter 9 of this thesis.

³³⁴ The legal analysis of RTAs' compatibility with the WTO is done extensively in chapter 9 with specific reference to SADC. This part is a general reference to indicate the delicate relationship between multilateralism and regionalism

established in such agreements as the WTO. The discriminatory nature of RTAs puts them in direct conflict with the WTO cornerstone to free trade, the most favoured nation principle. However, as chapter 9 will show, some form of discrimination can help to promote trade liberalisation and not all discrimination is bad.³³⁵

In 2003, the then WTO director, General Supachai Panitchpakdi, appointed a consultative board; chaired by former director General Peter Sutherland, to address institutional challenges facing the WTO in the future. On its publication in 2005, the Sutherland Report expressed serious concern with the spread of RTAs and recommended that the WTO subject such agreements to meaningful review and effective disciplines.³³⁶ Once different legal rules are concurrently applicable to the same issue, conflict is bound to occur. This explains why the concept of conflict of laws is taught in legal studies. For this reason, many scholars have always considered conflict of laws as a separate and distinct part of legal analysis and it may also emerge in public law. In this sense, considering RTAs and the WTO to be separate systems and applicable to different jurisdictions will expose this possibility of conflict. However, WTO law and treaties regulating RTAs fall under public international law.³³⁷ Nevertheless, minor occurrences of such conflict may be beneficial, for example by generating a greater understanding of the law when working through to a resolution of the conflicts.³³⁸ However, major conflicts may increase tension between parties and, to a larger extent, the whole system. This can be the reason for the stagnation of the Doha Trade Round of multilateral negotiations. The conflict has grown bigger and bigger every time parties sit at the table to discuss issues.³³⁹ This can easily result in a full blown "trade war". In many instances, these trade wars can be very harmful to the WTO development, for example by impeding multilateral negotiations as discussed above.

³³⁵ Hudec and Southwick "Regionalism and WTO Rules" 47-90.

³³⁶ Steger "Why Institutional Reform of the WTO is Necessary".

³³⁷ Pauwelyn 2001 *The Role of Public International Law in WTO*. For extensive discussion on the issue see also Charney 1998 *Recueil des Cours* 101; Guillaume 1995 *Int'l & Comp L Q* 848; Kingsbury 1999 *NYU J Int'l L & Pol* 679; Jennings 1995 *ASIL Bulletin* 2.

³³⁸ Furthermore, RTAs can also contribute to conflict elimination, countries that trade with each other do not fight each other, but the benefit of the bilateral trade relationship should exist as easily within a multilateral as in bilateral context. See Alai, Broude and Picker (eds) *Trade as the Guarantor of Peace* 192-207.

³³⁹ The Doha round started in 2001 and has been 10 years without a conclusion. See WTO Date Unknown (a) www.wto.org.

From this discussion it is clear that there have been clear instances of conflict between RTAs and the WTO. There has been a very public and repeated failure by the WTO to overcome this conflict with RTAs and there is need to put mechanisms in place to resolve this conflict before it gets serious.³⁴⁰ This conflict will in any event cast a shadow over the WTO and its legitimacy as a "rules"-based international organisation. The danger is that if the WTO cannot manage this situation well, this crisis of legitimacy could spill over into other aspects of the WTO.

Conflict is likely to arise at the formation and implementation stages of RTAs. At the formation and negotiation stage, the conflict may exist as a result of the conflicting goals of the government negotiators. An example could be concessions on agricultural protection in the RTA, while holding firm against any such reductions within the multilateral process. The EU has taken this position if one considers the impact of its Common Agricultural Policy on which they refuse to compromise.³⁴¹ This policy is an example of a novelty with negative impacts on world trade policy. Conflict at the implementation stage is unavoidable. Another conflict that may arise with respect to negotiations within the WTO is when the RTA has committed to negotiate as one group rather than through the individual Member States of the RTA.³⁴² Achieving consensus in this case is difficult. This situation creates conflicts and eventually may impede the ability of the RTA and its members to participate in the WTO negotiations.³⁴³ Once the RTA is concluded and the provisions are in operation, the possibilities for conflict between RTAs are bound to exist. The conflicts could be as a result of substantive or competitive factors. The substantive conflicts between RTAs and the WTO occur because the RTA includes provisions or rules that may suggest different requirements than those of the WTO. An example of this kind of conflict appears in NAFTA where there is no clear resolution on the issue of the relationship between the WTO and NAFTA agreements.³⁴⁴

³⁴⁰ Okamoto 2001 old.npf.org.tw.

³⁴¹ EU Date Unknown (a) europa.eu.int.

³⁴² See article 218 TFEU as an example of the EU's procedure for negotiating and concluding agreements with international organisations.

³⁴³ Abbott 2000 *Distributed Governance at WTO*.

³⁴⁴ Abbott "North American Integration Regime" 169, 177-184 (examining NAFTA's effects on the world trading system).

In the final analysis, Sampson's concluding remarks on this subject are appropriate when he says:

Regional trade agreements are a fact of life, given their characteristics and the number of RTAs currently under negotiation, it is clear that their incidence will grow and their nature will evolve over time. When asking whether regional agreements are building or stumbling blocs, it is timely to ask what role regional agreements can play in this multi-level process and how the international community can ensure that the measures taken on the respective levels are consistent and mutually reinforcing.³⁴⁵

RTAs could consolidate regulatory rules and practices that might either facilitate or hinder the establishment of new WTO provisions. For example, if different RTAs create divergent regulatory rules in new policy areas, this could obstruct the development of new disciplines at the multilateral level. In such cases, RTAs might be seen as a stumbling block and vice versa.³⁴⁶ In conclusion this discussion has revealed that regionalism and globalisation cannot cancel each other out.³⁴⁷ Regional integration cannot be separated from global forces.

4.6 Conclusion

Regionalism through RTAs has been on the increase the world over. The trend has been to try and keep trade liberalisation aspirations alive at a time when multilateralism faces its toughest challenge through the protracted Doha Development Agenda (DDA). Some issues that remain unresolved at the DDA are finding their way to the regional-level negotiating table, thus regionalism plays a critical role in facilitating trade liberalisation at a time when multilateralism is facing its greatest challenges. Accordingly; Sampson concludes that RTAs make it possible for countries to install their safety nets on a regional basis should the multilateral system disintegrate. The debate continues on whether regional integration arrangements encourage or discourage globally freer trade. The likely conflict between RTAs and the WTO needs to be addressed and chapter 9 of this thesis will give a detailed analysis of this matter. An observation relevant to SADC's situation indicates that the Protocol on Trade is an attempt to improve free trade at both

³⁴⁵ Sampson and Woolcock (eds) *Regionalism* 12.

³⁴⁶ Rieter "EU-Mexico Free Trade Agreement".

³⁴⁷ Gavin and Van Langenhove "Trade in the World of Regions" 56.

regional and multilateral level.³⁴⁸ Therefore, within the SADC context, regionalism is a way towards the convergence at multilateral level. Convergence at continental level is expected through the efforts of the African Economic Community, which will be discussed in detail in the next chapter. What is evident from this chapter is that Africa cannot ignore and escape the effects of globalisation. Consequently, efforts should be directed at taking advantage of the positive aspects of globalisation while shielding against its adverse effects.

³⁴⁸ See Preamble *SADC Protocol on Trade* (1996).

CHAPTER 5

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5.1 Introduction

Economic integration in Africa is set within a legal and institutional framework that still require contemplation on how African countries can best employ the inherent underlying reasons for regional integration on the continent. The discussion on regional economic integration in Africa will expose the ambiguity of the legal framework; how the various RTAs are in operation on the continent, but still fail to implement their stated objectives and also evidence the lack of rules to bind RECs' integration agendas to those of the continent. African countries sign agreements or treaties with alacrity, but are much less enthusiastic about implementation of their commitments.³⁴⁹ Regional integration in Africa is supported by the AU, which has prescribed step-by-step processes that aim for the highest level of integration, resulting in the African Economic Union by 2028.³⁵⁰ In line with continental integration objectives; on 12 June 2011, African leaders from 26 African countries signed an agreement to launch talks on the continent's biggest free trade bloc that aim to create a single, continent-wide market potentially worth US\$1 trillion by 2013.³⁵¹ Closely related to this renewed hope for regional economic integration on the continent will be the discussion of the role of equally influential but non- legally binding initiatives of the AU like the African Peer Review Mechanism (APRM) and New Partnership for African Development (NEPAD) in the continental regional integration paradigm. The discussion will therefore be laying the foundation for the understanding on regional economic integration in SADC.

5.2 Background

African leaders have long recognised the need for close regional ties as a way to overcome the fragmentation which was caused by colonialism. Fragmentation also created small markets on the continent, which is one of the major constraints to its

³⁴⁹ Bösl et al *Introduction* 1.

³⁵⁰ The *Lagos Plan of Action* was adopted by the OAU Summit in 1980. See Samir Amin's contributions to Amin et al *La Crise de l'Impérialisme*; Amin et al *Dynamics of Global Crisis*; Amin and Frank *N'attendons pas 1984*.

³⁵¹ See COMESA Date Unknown programmes.comesa.int. The Tripartite FTA includes SADC, EAC and COMESA. The implications of this grand FTA on SADC regional integration will be discussed in chapter 11 of this thesis.

economic development.³⁵² They perceive regional economic integration as a promising vehicle for enhancing economic and social development in their respective countries. This creates a natural bond of inter-dependency.³⁵³ Among other factors, the increasingly dominant view that openness to world trade and investment plays a vital role in a country's development and economic growth contributed to the reorientation of recent regional initiatives.³⁵⁴ Thus, regional economic integration retains a strong symbolic appeal for African leaders.³⁵⁵ In Africa, regional unity is seen as a possible solution to the continent's deep and prolonged economic and social crisis, at a time when private energies are being released thanks to the strengthening of civil society and the deregulation and privatisation of national economies, while the continuing decline of state-imposed barriers to inter-country flows is paving the way for increased regional trade.³⁵⁶ The economic conditions in most African countries are nothing to write home about.³⁵⁷

Most African countries came to independence at a time when enthusiasm for regional integration reached its peak and many believed it was the only way to Africa's development. As the founding President of Tanzania Nyerere said:

Together, or even as groups, we are much less weak. We have the capability to help each other in many ways, each gaining in the process. And as a combined group we can meet the wealthy nations on very different terms; for though they may not need any of us for their own economic health, they cannot cut themselves from all of us.³⁵⁸

The strategy of regionalism in Africa was given a new lease of life with the adoption of the Lagos Plan of Action in April 1980. At this juncture, African leaders committed themselves to the creation at national, sub-regional and regional levels of a dynamic and interdependent African economy and thereby pave the way for the essential establishment of an African common market leading to an African economic community. Regional economic integration was discussed in every chapter of the

³⁵² Ndulo 1993 *Harmonisation of Trade Laws* 103. See also Saurombe "The SADC Trade Agenda". 695-709

³⁵³ Ndulu 2006 "Infrastructure, Regional Integration" 212.

³⁵⁴ Sachs and Warner *Economic Reform*.

³⁵⁵ Ravenhill "Future of Regionalism".

³⁵⁶ World Bank Report 1994 62-76, 230-231.

³⁵⁷ Bhattacharyya 2009 "Root Causes". 745

³⁵⁸ Nyerere *Non-alignment in the 1970s* 12.

Lagos Plan of Action. It is ever present in the plan to the extent that Browne and Cummings comment that without regional integration the LPA collapses as a concept and strategy, so no allowance is made for failure in achieving it.³⁵⁹

Rapid economic growth in Europe is attributed in large part to the success of the European Economic Community and the arguments for regional economic integration among least developed countries (LDCs) put forward by the Economic Commission for Latin America under Raoul Prebisch, reinforced the Pan-African sentiments of African leaders.³⁶⁰ Africa has, since the colonial period, had several attempts at integration. There are a number of RTAs operating in Africa and these attempts include the ECOWAS, EAC, the CAF, COMESA, SACU³⁶¹ and, more importantly for this thesis, SADC. Most of these regional groupings emerged after independence. This evidence shows that more than any other region in the world, Africa has a strong case for pursuing regional economic integration.³⁶²

Africa is not only the largest regional sub-system in terms of territorial size and number of states, it is also the least industrialised and one characterised by the most inequality.³⁶³ Studies conducted by the Economic Commission for Africa (ECA) and the World Bank have found that Africa is still the most subdivided continent in the world. Africa has at least 165 borders dividing 51 countries.³⁶⁴ The average African country has the same economy of a typical American town of sixty thousand people. In sub-Saharan Africa, there is one phone line per 200 inhabitants (excluding South Africa) and fewer than one in five Africans use electricity. There are more internet connections in New York City than in Africa and only 16 percent of the roads are paved.³⁶⁵ These statistics are alarming to the extent that one starts to question the capacity of African countries to be able to compete on the global markets. Questions also arise as to whether Africa is ready to implement deeper levels of regional economic integration when the institutional infrastructure is lacking. Most states in

³⁵⁹ Browne and Cumming *Lagos Plan of Action* 37.

³⁶⁰ Ravenhill "Future of Regionalism" 44.

³⁶¹ See glossary of terms for full names.

³⁶² Yanta "African Union".

³⁶³ Gordenker "OAU and the UN" 105-119.

³⁶⁴ Yanta "African Union".

³⁶⁵ Akukwe 2007 www.alrn.org.

Africa are too fragile and none have the full confidence with which to enter into supranational arrangements.³⁶⁶ They have no regard for regional legal governance,

Most African states are unable to meet the basic human needs and there are growing inequalities; its future prospects are gloomy.³⁶⁷ There are uneven rates and results of development, with its interrelated political, economic, social and strategic component which have served to exacerbate inequalities and tensions both within and between the states of Africa, as well as between continental and global actors.³⁶⁸

The above scenario has led Gavin and Van Langenhove to question the aspirations of the developing world towards regional integration by asking:

Is regionalism³⁶⁹ a game for big players such as the European Union and the United States? It looked that way in the 1990s, but the international trade environment has changed profoundly over recent years.³⁷⁰ Developing countries have begun to claim more "ownership" over multilateral institutions and they too are investing more in capacity-building for regionalism. In Africa, where the 1990s was a lost decade for development, a radical new departure for continental-wide integration on the basis of European model has been initiated.³⁷¹

The newly proposed SADC, COMESA and EAC Tripartite FTA is testimony to this renewed surge of regionalism in Africa.³⁷² Within the context of this background it is also important to discuss a number of other ever existing reasons behind regional economic integration that predates the current legal and institutional framework. The influence of these reasons are still relevant in the current dispensation, hence they have also helped to shape the legal and institutional structure at continental level.

³⁶⁶ Evans, Holmes and Mandaza *SADC* 12.

³⁶⁷ Shaw and Grieve 1978 *Political Economy of Resources* 1-32.

³⁶⁸ Shaw 1975 *Discontinuities and Inequalities* 369-390.

³⁶⁹ The notion of *regionalism* in this chapter has already been defined in chapter 3 to mean a political process where a group of countries agree to reduce the barriers of trade between each other to lower levels than those that exist against the rest of the world. This may, or may not, lead to *regional integration*, which is an economic process whereby the economies of a region become more closely entwined.

³⁷⁰ Gavin and Van Langenhove "Trade in the World of Regions" 56.

³⁷¹ Gavin and Van Langenhove "Trade in the World of Regions" 56.

³⁷² See detailed discussion in chapter 11.

5.3 Reasons behind regional integration in Africa outside the legal and institutional paradigm

A realistic approach to regionalism in Africa must start with the recognition that, while integration is an instrument for the realisation of desired ends, integration itself is not necessarily good or evil, nor can *a priori* case can be made for any regional scheme.³⁷³ Regional economic integration becomes a vehicle that drives towards the desired aspirations for development in Africa. The realisation of the structural diversity in African states and their ideological diversity is important. A consideration of these factors should produce a more realistic assessment of the type of gains that can be expected from regional cooperation. Depending on the motivation, the desire for and the extent of genuinely deeper integration may be of more or less importance. This is in line with the existing literature on regional agreements, which has discussed the various motivations behind the efforts to create regional agreements from the economic, strategic and political economy perspectives.³⁷⁴ Regional cooperation must also start from the premise that the requisites for integration do not currently exist but must be created. Regional integration can therefore not be legislated from above but a "bottom-up approach" should be employed. It is also agreed that regionalism was necessary with "its roots in the soil of real economic, social and financial cooperation" and proposed such cooperation among developing countries on the sub-regional, regional and international levels in a number of areas.³⁷⁵

5.3.1 Fighting the legacy of imperialism

Regional economic integration is seen as one of the avenues that can be used to break the shackles of the colonial past. The persistence of the colonial legacy has prevented Africa from forming a strong position on regional cooperation. Most trade relations in Africa were and are still biased by the influences of colonialism.³⁷⁶ The association with former colonial masters could be a drain on African economic

³⁷³ Robson P *Economics of International integration* 147.

³⁷⁴ Sampson and Woolcock (eds) *Regionalism*.

³⁷⁵ Anguile and David *L'Afrique Sans Frontieres*.

³⁷⁶ Anderson and Norheim "History, Geography and Regional Economic Integration" 39-41. This discussion describes British and French RTAs with their former colonies.

integration processes.³⁷⁷ The actions of external actors or "external penetration", as labelled by Schmitter, can have a profound effect on the direction of an integrative undertaking, for example, in both America and the European Union foreign investments have played a key role, even though in neither instance was that the original plan.³⁷⁸ For instance, in West Africa, the inability of the Anglophone and Francophone countries to break their colonial heritage and form effective economic groupings that cut across them becomes one of the key obstacles to successful integration. In fact, some of the former colonial powers have encouraged this disunity among African countries as it continues to serve their geopolitical interests. Chime³⁷⁹ observes that:

Foreign intrusions on the continent are the "Godfather syndrome" in which foreign actors capriciously determine events and outcomes on the continent through activating their sphere of influence.

Much of the present growth in RTAs is related to continuing colonial associations.³⁸⁰ The EPAs in Africa and more specifically in SADC are a case in point.

Many African countries are still conditioned by strong attachment to pre-independence colonial economic ties, whatever contrary impression the rhetoric gives.³⁸¹ According to Nye:

It is widely recognised that regional change processes are not autonomous or self-generated but rather they are responsive to a context of global interdependence and interaction.

Imperialism remains embedded, unacknowledged, within the constitution of international law. At independence most African countries' natural resources remained legally tied under colonial contracts and treaties with the support of international law. This is a cycle of renewing and repeating the dynamics of colonial relationships, even as it claims to overcome them.³⁸² In making this argument,

³⁷⁷ Amuwo 1999 "France and Economic Integration" 1.

³⁷⁸ Vernon 1969 *The Role of US Enterprises Abroad* 123. See also Vaitos *Role of Transnational Enterprises*.

³⁷⁹ Chime *Integration and Politics* 391-397.

³⁸⁰ Anderson and Norheim "History, Geography and Regional Economic Integration" 95.

³⁸¹ Renninger *Multinational Corporations*.

³⁸² Anghie *Imperialism, Sovereignty and the Making of International Law* 4.

Anghie creates a compelling and confronting argument that lays down a singular challenge for international lawyers: how to create an international law that transcends its colonial history and that can truly claim to be "universal".³⁸³ This is still to be achieved. What clearly can be ascertained from Anghie's argument is that imperialism has shaped the current notion of international law that governs relations between states especially between the rich and the poor. There continues to be problematic relationships between the newly independent states of Africa and their "equal" former colonial masters under the multilateral regimes of the United Nations, IMF, the World Bank and the WTO. These relations are clearly governed by way of treaties at bilateral, regional and multilateral level. What it means for poor African countries is that their economic situation under colonialism did not change much after political independence since the regime of international law has not changed much. For this reason, in the specific case of Africa, there is ample empirical evidence to indicate that African countries experience serious problems of guaranteeing sovereignty over wealth and natural resources within the context of an integration framework.³⁸⁴ Such a situation can only breed poverty. Poverty is seen as a condition in which people are poor because they lack access to income-earning activities generated by the market.³⁸⁵

Since international law can be used to undermine the underdeveloped, such activities continue to manifest themselves under the current trade agreements, for example the EPA agreements, as will be discussed in chapter 9. The former colonial masters still need to use Africa as a source of raw materials, as well as a market for their manufactured products. Furthermore, a standoff between economic powerhouses like the EU and the USA will inevitably affect the poor countries. The dispute over farm subsidies between these giants has, to some extent, held the Doha Round of trade negotiations hostage to the disadvantage of the poor countries who rely mostly on agriculture. The US and the EU must make meaningful offers to cut agricultural protection if the Doha round is to progress.³⁸⁶ According to a 2004 OECD study, US farm programmes resulted in higher food prices and had the effect of transferring more than \$16 billion from American households to domestic farmers

³⁸³ Chiam 2006 *Imperialism* 205.

³⁸⁴ Behrman 1969 *Multinational Corporations* 15-22.

³⁸⁵ World Bank Report 1994 at 63.

³⁸⁶ Markheim and Riedl 2007 www.heritage.org.

over and above what the farmers received from direct government assistance.³⁸⁷ Barriers to agricultural trade are not only a burden on American households; they also depress world prices of agricultural products, negatively affecting farmers in developing countries and blocking their efforts to rise from poverty and improve their living standards. The US argues for free trade and economic liberalisation, and yet it refuses to eliminate the very policies that would truly allow developing countries to pursue and achieve economic prosperity. William Cline³⁸⁸ of the Institute for International Economics has estimated that by removing trade barriers, developed countries would transfer economic benefits to developing countries that are worth about twice the amount of their annual aid transfers.

The cost of these farm subsidies on the poor countries is very clear. Failure to conclude the Doha development agenda successfully would mean significant lost opportunities for countries around the world to make economic gains. The World Bank estimates that the continued reduction of tariffs on manufactured goods, the elimination of subsidies and non-tariff barriers, and a modest 10 percent to 15 percent reduction in global agricultural tariffs would allow developing countries to gain nearly \$350 billion in additional income by 2015. Developed countries would stand to gain roughly \$170 billion.³⁸⁹

Accordingly, if the multilateral system is failing to lead the way in global trade, Africa's participation in regional economic integration is a way of keeping trade moving. Furthermore, Africa will have the opportunity to create its own regime of rules applicable to its unique situation, thereby eliminating the likelihood of incompatibility of rules and models developed by the industrialised countries. As already indicated in the discussion on models of integration, some of them have failed dismally to resolve Africa's economic problems.

5.3.2 The Pan-African agenda

The Pan-African agenda has been hailed as an attempt to rediscover the African identity that is free from the influence of colonialism and its legacies. According to

³⁸⁷ OECD 2005 www.oecd.org.

³⁸⁸ Cline 2005 www.cgdev.org.

³⁸⁹ World Bank *Global Economic Prospects 2004*.

Murithi,³⁹⁰ historically, slavery and colonialism destroyed the base upon which Africans could define themselves. Margaret Lee³⁹¹ gives two reasons why regionalism is pursued in Africa. The first is to enhance political unity or the Pan-Africa agenda. This is the reason for the birth of the AU, which has been criticised in different circles as a reaction to colonialism and does not go much beyond the re-Africanisation of the continent as an objective.³⁹² Additionally, at this particular time, the problem of nation and state building was huge in Africa.³⁹³ The second reason has been economic, the desire to foster growth and development. Regionalism, especially market integration, has been seen as a way to solve the problems created by small economies. By integrating, it is argued, economies of scale would be realised and enhanced industrialisation would follow. Regional aspirations also constitute a response to the manifested incapacity of the state to generate development. They thus include a search for solutions extending beyond what existing nation-states appear capable of providing, including better regional infrastructure, better management of the region's resources and even a broader range of freedoms.

According to Keet:³⁹⁴

Some of the strategic aims and objectives of African unity are well detailed in various policy documents and debates. These include the significant need to remove the artificial lines drawn across the continent by colonial powers that randomly cut across societies, ethnic groups and families and indifferent not only to common linguistic and cultural spheres, but also natural ecological zones and ecosystems and relations on the ground in Africa.

Africans need to create appropriate institutional and legal frameworks supported by political means and modalities to counter and undo the divisive and destabilising effects of such imposed patterns. In this regard, it is necessary to use regional economic integration to regroup the huge number and multiplicity of arbitrarily created, frequently economically unviable and environmentally unsustainable countries in Africa. These include many that are small in territory and population and

³⁹⁰ Murithi 2006 *African Approaches* 9-34.

³⁹¹ Lee M "Regionalism in Africa" 9.

³⁹² Frobel, Heinrichs and Kreye *New International Division of Labour* part 3.

³⁹³ Haas *Obsolescence of Regional Integration Theory* 17.

³⁹⁴ Keet *NEPAD and the AU*.

partly to totally landlocked. Examples from the SADC region include small countries like Lesotho and Swaziland.³⁹⁵ Many Africans are aware that the kingdoms and cultures of most of the continent were relatively well integrated in pre-colonial times. It is common in Africa that the same ethnic community exists at either side of the borders of Member States. Through regional economic integration, these countries need to combine with wider, more naturally and sustainable ecological zones, realistic and rational economic entities reflecting the real and potential inter-linkages on the ground. Increased linkages among African countries, through an expansion of intraregional trade, can be a crucial device for creating the necessary growth spill-overs and fostering regional take-off.³⁹⁶

The regional groupings mentioned above can collectively formulate and negotiate joint programmes to address the uneven resources and imbalanced relations between the stronger and weaker, larger and smaller economies in Africa. This will result in more balanced, just, stable and mutually beneficial development. This is particularly important for closely interlinked countries where uneven development and underdevelopment are some of the conditions that have often been deliberately engineered by colonial authorities and corporate interests. This is the true scenario created by the apartheid regime in South Africa and in relation to the rest of Southern Africa. It is also a true reflection of the South African-created SACU of 1910, where the BLNS countries were meant to supply raw materials and labour for the South African industries, at the same time providing a good market for their finished products.³⁹⁷

The mobilisation of the huge developmental potential in the combined natural resources, human, financial and technical means within larger groupings of countries, with joint cross-border infrastructure and production programmes, would also contribute to increased intraregional trade within larger regional markets. These

³⁹⁵ Lesotho's territory is completely surrounded by South Africa.

³⁹⁶ Longo and Sekkat 2004 *World Development* 1309-1321.

³⁹⁷ The origins of SACU can be traced back to the 1889 *Customs Union Convention* between the British Colony of the Cape of Good Hope and the Orange Free State Boer Republic, making it the oldest customs union in the world today. In 1910, the agreement was extended to cover the Union of South Africa and the British High-Commission Territories of Bechuanaland, Basutoland and Swaziland, now respectively known as Botswana, Lesotho and Swaziland (BLS). Namibia only became an official SACU member after attaining independence in 1990, having previously been a member by virtue of its status as a South African administered territory since 1915.

together would provide the basis for more internally integrated, multidimensional and more self-sustaining economies that are thereby less deeply dependent upon external economies and external resource inputs and less extremely vulnerable to manipulations by external economic forces and shocks emanating from the international economy. In Africa, efforts towards regional integration have not yielded the desired results owing to a number of factors. Since most of these problems are generic in nature, examples will be given and discussed in chapter 9.

For many African states, independence from colonial rule had a much deeper meaning than the world expected at the time. Many countries felt that independence of one country or a few while the others were still colonised was just half the struggle. In 1965, when Ghana obtained independence from the British, Kwame Nkrumah, the first President of Ghana, lamented the fact that the independence of Ghana was meaningless until the whole of Africa was free. Nkrumah also held the doctrinaire view that political unity must precede economic integration.³⁹⁸ Thus one of the earliest manifestations of the idea of regional economic integration in Africa was reflected in the resolution of the 1945 Fifth Pan-African Congress held in Manchester, England under the leadership of Kwame Nkrumah and George Padmore of the West Indies.³⁹⁹ Pan-Africanism was viewed both "as an integrative force" and "as a movement of liberation".⁴⁰⁰ He admirably captured the feeling of Africa when he said:

Indeed, the total integration of the African economy on a continental scale is the only way in which the African states can achieve anything like the levels of industrialised countries.⁴⁰¹

Nkrumah dreamt of a United States of Africa, an idea held in high esteem by the late and former AU Chair President Gadaffi of Libya.⁴⁰² His agenda of trying to forge ahead with the formation of the United States of Africa with a single government was met with resistance at the AU Summit of July 2009.⁴⁰³ Nevertheless, a divided Africa could never control its own economic destiny and therefore never be genuinely

³⁹⁸ *Asante Political Economy of Regionalism in Africa.*

³⁹⁹ Padmore (ed) *History of the Pan-African Congress.*

⁴⁰⁰ Asante and Chanaiwa "Pan-Africanism" 724.

⁴⁰¹ Nkrumah *Africa Must Unite* 163.

⁴⁰² See BBC 2009 news.bbc.co.uk.

⁴⁰³ AU 2009 www.africa-union.org.

independent.⁴⁰⁴ Political independence was important for leading the way towards economic independence and African leaders' independent decision making is critical in fulfilling this objective. Recently in the SADC region, the protracted Zimbabwean crisis has taken a long time to resolve owing to different opinions over a SADC proposed government of national unity as a solution, while the West preferred a regime change. The former has been implemented to the delight of the African intelligentsia like the former President of South Africa, Thabo Mbeki. However, an Africa renaissance has not been truly realised.⁴⁰⁵

Many African countries felt that the current boundaries or borders dividing African countries were artificially imposed by imperialism and had to be removed. In the 1870s, European nations were bickering between themselves over the spoils of Africa. In order to prevent further conflict between them, they convened the Berlin Conference of 1884–1885 to lay down the rules on how they would partition up Africa between them.⁴⁰⁶ The same philosophy and ideology was well expressed by the Frontline States in Southern Africa as has already been discussed in chapter 1. African countries still maintain strong trade relations with their former colonial masters at the same time ignoring neighbouring states that may have the capacity to trade with them on even more competitive terms. The political thought of having to find African solutions for African problems has become very popular to the extent that Western involvement in African issues is always treated with suspicion.⁴⁰⁷ In an effort to make regional economic integration efforts rules based and politically binding, African states had to sign agreements to regulate the formation and implementation of these commitments. The following discussion concerns such agreements whose purpose is to promote regional integration on the continent. These agreements were signed within the context of the African Union and its predecessor the Organisation of African Unity (OAU). In order to bring a full understanding of the regional integration efforts under the AU, it is prudent to make reference to the OAU.

⁴⁰⁴ Asante "Towards a Continental African Economic Community" 78.

⁴⁰⁵ Joseph "Idea of an African Renaissance".

⁴⁰⁶ For a discussion on the Berlin Conference, see Shah 2010 www.globalissues.org.

⁴⁰⁷ See generally Hestermeyer 2002 www.germanlawjournal.com. See also South African Department of Foreign Affairs 2002 www.dfa.gov.za.

5.4 The current legal and institutional framework for regional economic integration in Africa

5.4.1 Background

The African Union (AU) is Africa's primary continental organisation. It formally replaced the Organisation of African Unity (OAU) in 2002. The AU has set itself important objectives that include economic integration. The OAU was established on 25 May 1963 in Addis Ababa, on signature of the OAU Charter by representatives of 32 governments.⁴⁰⁸ A further number of states joined gradually over the years. As early as 1979, however, it had become evident that a need existed to amend the OAU Charter in order to streamline the organisation to gear it more accurately for the challenges of a changing world. This was accepted when the Committee on the Review of the Charter was established. According to Isaksen,⁴⁰⁹ as a way of expediting the process of economic and political integration on the continent, members of the OAU decided in the year 2000 to transform the OAU into the AU for a number of reasons. It had for some time been widely recognised that the organisation needed change. *Firstly*, the need for greater organisational efficiency had become very clear; *secondly*, there had been an emerging consensus that conflicts and undemocratic regimes constitute important blockages to development and that it was a country's right to be concerned about the internal affairs of another. This made it necessary to reconsider the OAU principle of non-interference. *Thirdly*, the criticism that the OAU kept undemocratic and dictatorial heads of state in power was widely accepted.

According to Mayall:

From the start, the existence of the OAU had been far more important to African Statesmen and politicians than any functional role it may perform in promoting economic cooperation or even the alignment of foreign policy....by merely being there, the OAU was only indeed performing one vital role on African diplomacy- it bestowed legitimacy on its members and on the movements and causes which they chose to recognise....It has always been

⁴⁰⁸ See *OAU Charter* (1963). See also Mays *Africa's First Peacekeeping Operation*; Beyani and Stringer *African Exodus*; South African Department of Foreign Affairs 2002 www.dfa.gov.za; South African Department of International Relations and Cooperation 2009 www.dfa.gov.za.

⁴⁰⁹ Isaksen *Restructuring SADC*.

the OAU's main task to set the tone of legitimacy on both the distribution of power within African states and on those liberation movements, mainly in Southern Africa, which were contesting power with colonial regimes or minority regimes.⁴¹⁰

Additionally Cervenka laments that:

... compared with the progress made by the OAU on decolonisation and the success of its international campaign against apartheid, its performance in the economic field had been disappointing. After so many years, the real struggle for the liberation of the continent of Africa from economic domination by outside powers had hardly begun.⁴¹¹

Around 1980, analysts were voicing their concern as to how the OAU in its existing form could survive.⁴¹² Assessments around the time of its twentieth anniversary evinced an unsatisfactory record and pessimism about the future.⁴¹³ The economic crisis in the region had now become literally a matter of life and death and had to be dealt with as such.⁴¹⁴ By that time the persistence of conflict on the African continent was deeply rooted in the underdevelopment of African states, political and economic underdevelopment being a major cause of international conflict in Africa.⁴¹⁵ This led to the devising of the African economic recovery programme of 1977 to 1980. By 1988, after twenty-five years of OAU history, hardly any analysis of the organisation was made without suggestions of reform, particularly because the contemporary challenges faced by the continent were no longer the same as those of 1963.

The OAU also adhered rigidly to the old principle of non-interference in the domestic affairs of a country and had been criticised in the face of genocide, crimes against humanity and other horrendous aggressions perpetrated by governments against their citizens.⁴¹⁶ Consequently, the OAU failed to provide the framework for either political stability or economic growth.⁴¹⁷ This resulted in the forward-looking Lagos Plan of Action adopted in April 1980. The plan was to be implemented over the

⁴¹⁰ Mayall 1977 *The OAU* 86.

⁴¹¹ Shaw 1978 *International Perspective* 44-49; Shaw 1973 *International Perspectives* 31-34.

⁴¹² Parker and Rukare 2002 *New African Union* 365-379.

⁴¹³ Legum 1983-1984 *The OAU After Twenty Years* A61.

⁴¹⁴ See generally; Tokarev *Organisation of African Unity*; Asobie 1988 *The OAU in the Year 2000* 259; Olusanya 1988 *Reflections* 67; Tekle 1988 *Africa Today* 7.

⁴¹⁵ See Nyerere *Tanzania Rejects Western Domination of Africa*. See also Price *US Foreign Policy in Sub-Saharan Africa*.

⁴¹⁶ Gavin and Van Langenhove "Trade in the World of Regions" 56.

⁴¹⁷ Gavin and Van Langenhove "Trade in the World of Regions" 56.

ensuing twenty years and represented a significant OAU initiative for the radical review of African development. The main objective was to promote development within African States, as well as between them. This was to be done through progressive integration, in particular at the sub-regional level. Ultimately, integration was to be achieved by establishing a common market for the region in the form of the African Economic Community, which will be discussed latter in this chapter.

The OAU's Pan-Africanist agenda not supported by economic development was always going to be difficult to maintain. According to Diaku,⁴¹⁸ the promotion of economic growth and development, the raising of the living standards of the people and the maintenance of political stability became the dominant concern of young African states. In addition Ndulo notes that:

... the early years of independence saw African countries successfully expanding their basic infrastructure and social services, but after this period of growth, most economies faltered and went into decline.⁴¹⁹

Ndulo goes on to mention that in the face of increased hunger and accelerating ecological degradation, the earlier progress made in social development was being eroded. According to Mazrui⁴²⁰ the Plan of Action, in different circumstances, has adduced evidence to show that the continent of Africa is the most "brutalised" by poverty and ignorance and yet is one of the wealthiest in natural resources. This scenario has not changed for the better, indeed, in many instances the situation has worsened. Over the past decades, the outcome of regional integration in Africa has been disappointing.⁴²¹ Overall, Africans are said to be almost as poor today as thirty years ago.⁴²² Econometric analysis confirms that regional integration has not been successful in Africa⁴²³ and that no regional integration scheme has been successful

⁴¹⁸ Diaku "African Development Bank/African Development Fund" 36.

⁴¹⁹ See generally World Bank *Sub-Saharan Africa* for a detailed study of the condition of sub-Saharan African economies. See also *African Alternative Framework to Structural Adjustment Programmes for Social-Economic Recovery and Transformation E/ECA/CM15/6/Rev.3* (1989).

⁴²⁰ Mazrui *African Condition*. See also Amin 1982 *Africa Development* 23-42.

⁴²¹ Longo and Sekkat 2004 *World Development* 1310. Depending on the country, the shares of such a trade in total trade ranged from 0.02% to 8% in 1970 and from 0.1% to 10.5% in 1990. Compared with other regions, the Africa record is also unsatisfactory, for instance the shares of intraregional trade in total trade are more than five times higher in the EU and in NAFTA.

⁴²² World Bank *Sub-Saharan Africa* 16.

⁴²³ Elbadawi 1997 mpra.ub.uni-muenchen.de.

in elevating intra-Africa trade beyond a negligible portion of total trade.⁴²⁴ The severe economic crisis in Africa has inspired many African governments and institutions to review their strategies for development, with a view to taking measures to address the ever-worsening crisis.⁴²⁵

The first steps towards change were brought about by the establishment of the AU, based on the unanimous will of Member States at the 5th Extraordinary OAU/AEC Summit held in Sirte, Libya from 1 to 2 March 2001.⁴²⁶ In the decision, Heads of State and Government specified that the legal requirements for the Union would have been completed upon the deposit of the 36th instrument of ratification of the *Constitutive Act of the African Union*. South Africa deposited its instrument of ratification of the *Constitutive Act of the African Union* on 23 April 2001 with the OAU General Secretariat and became the 35th Member State to do so. South Africa's ratification as one of these 36 Member States means that it is a founding member of the African Union. On 26 April 2001, Nigeria became the 36th Member State to deposit its instrument of ratification. This concluded the two-thirds requirement and the Act entered into force. The inaugural meeting was held in Durban, South Africa. The OAU's former General Secretariat served as the AU Commission for an interim period of one year.⁴²⁷

5.4.2 The Constitutive Act of the African Union⁴²⁸

The discussion of the AU as an integral part of regional integration in Africa cannot be complete without a discussion of the Constitutive Act. The AU Constitutive Act entered into force on 26 May 2001.⁴²⁹ In practical terms, the entry into force of the Constitutive Act marked the end of the OAU, which had united all African States since 1963. The Constitutive Act came into being because the OAU and its Charter were judged to be inadequate for the region and reform was inevitable. This marked

⁴²⁴ Foroutan 1998 *Membership* 305-336.

⁴²⁵ Damiba, Muhith and Bihute *Development Strategies* 1-47.

⁴²⁶ *Sirte Declaration EAGH/Draft/Decl.(IV)Rev.I* (1999). See also South African Department of Foreign Affairs Date Unknown www.dfa.gov.za.

⁴²⁷ *Sirte Declaration EAGH/Draft/Decl.(IV)Rev.I* (1999). See also South African Department of Foreign Affairs Date Unknown www.dfa.gov.za.

⁴²⁸ See *Constitutive Act of the African Union* (2000) para 10. The *Constitutive Act* comprises 33 articles. See also Mangu 2007 *SAYIL*.

⁴²⁹ See OAU 2001 www.oua.org.

the start of the new political, judicial and economic organisation of Africa. According to Mbeki:

"The Constitutive Act is the supreme law of the continent which has been approved by all our parliaments, the parliaments of the people of Africa to meet the challenges facing Africa today,"⁴³⁰

Thus if the Constitutive Act is the supreme law of the continent, its endorsement of regional economic integration is paramount. In the Preamble of the AU Constitutive Act, African Heads of State and Government undertook to "promote and protect human and peoples' rights, consolidate democratic institutions and ensure good governance and the rule of law". These are all important catalysts for regional economic integration. Article 3(a-n) advocates for greater unity and solidarity between the peoples of Africa and economic integration of the continent. Article 4 (a-p) lists 16 principles that shall guide activities of the union, especially the participation of the African peoples in the Union activities. The AU as an organisation now comprises, among other institutions, the Pan-African Parliament, the Court of Justice and the Central Bank.

5.4.3 The African Economic Community (AEC)

The Treaty establishing the African Economic Community (AEC) was signed in Abuja, Nigeria in 1991. The AEC offers a framework for continental integration. The RECS are mere building blocs towards the full realisation of the AEC. The AEC ambition is to integrate the various economies into sub-regional markets that will eventually combine and form an Africa-wide economic union. This was formulated under the vision of the OAU and AU. It is for this reason that 32 African countries signed a Charter establishing the OAU as mentioned earlier. The Lagos Plan of Action adopted in 1980 by African Heads of State and Government was the first step towards increased integration on the African continent. It set the target of achieving the African Common Market by the year 2000.⁴³¹ It is clear now that this target was not achieved, although the Lagos Plan of Action advocated regional integration central to the socioeconomic development of the continent. The AEC designated CEMAC/Economic Community of Central African States, COMESA and the EAC;

⁴³⁰ See Babarinde 2007 aei-dev.library.pitt.edu.

⁴³¹ Onwuka "An African Common Market" 36.

ECOWAS, IGAD, SADC and the Arab Magrab Union as pillars in an effort to achieve Africa-wide economic integration.⁴³²

The Treaty establishing the AEC set out the following key regional integration objectives in Article 4 of the Treaty. These are as follows:

- (a) to promote economic, social and cultural development and the integration of African economies in order to increase economic self-reliance and indigenous and self-sustained development
- (b) to establish, on a continental scale, a framework for the development, mobilisation and utilisation of the human and material resources of Africa in order to achieve a self-reliant development
- (c) to promote cooperation in all fields of human endeavour in order to raise the standards of living of African peoples and maintain and enhance economic stability, foster close and peaceful relations among Member States and contribute to progress, development and the economic integration of the continent
- (d) to coordinate and harmonise policies among existing economic communities in order to foster the gradual establishment of the community.

The AEC is an attempt to create an economic community covering the whole of Africa's 53 countries; if successful the AEC will be the largest in the world.⁴³³ The community, as can be seen from the goals it seeks to achieve, is more than a trading arrangement or a mechanism for promoting cooperation in production based on the creation of a common market. In addition, it seeks to integrate of national markets and cooperation in production. The states joining the community also undertake to cooperate with each other in certain functional areas, for example social, political, and economic matters. Central to this agenda is the improvement of the lives of African citizens.

⁴³² Sampson and Woolcock (eds) *Regionalism* 12.

⁴³³ Frimpong Oppong 2010 *African Union* 92-103.

Article 4(2) of the AEC provides several ways in which the objectives of the Treaty are to be achieved. Among them are the liberalisation of trade and the abolition of non-tariff barriers among Member States in order to establish an FTA. The objective of the relaxation and eventual abolition of qualitative and administrative restrictions and the evolution of a common trade policy are central. The continent, through the AEC Treaty seeks the gradual removal, from Member States, obstacle to the free movement of persons, goods, services and capital and the right of residence and establishment.⁴³⁴

The diverse legal systems on the continent are a major non-tariff barrier (NTB). The membership of the community represents at least four main legal systems, namely those of common law, Roman Dutch law, Islamic law and civil law. Each, in turn, comprises many different systems of law, including traditional customary law. Every country has its own legal traditions, its own system on legal thought, and its own method of law-making and its own process of judicial determination of disputes.⁴³⁵ This is a major obstacle to cross-border trade where traders need to conclude mutual transactions for both goods and services.

Articles 29 to 34 of the Treaty establishing the AEC require Member States to take measures to eliminate customs duties, quotas, other restrictions or prohibitions, administrative trade barriers and other NTBs. They also require adoption by Member States of a common external customs tariff.⁴³⁶ This will be in preparation for the African Customs Union.

The absence of the institutional framework, within which there would be a clear mandate and capacity to undertake the complex task of harmonising Community trade law, is a major challenge, as it is crucial for the establishment of regional bodies in Africa. These regional blocs would deal with these modalities and these bodies would be expected to have a clear mandate and capacity to undertake the complex task of harmonising Community trade laws. They would spearhead the

⁴³⁴ See *Treaty Establishing the African Economic Community* (1991).

⁴³⁵ Ndulo 1987 *United Nations Convention* 127.

⁴³⁶ See Article 30, 31 and 32 *Treaty Establishing the African Economic Community* (1991).

creation of a physical, technical and legal infrastructure that would support regional exchanges in goods, services, labour and capital.

5.4.4 Modalities for the establishment of the AEC

The Abuja Treaty requires the RECs mentioned earlier to have the establishment of the AEC as one of their final objectives,⁴³⁷ with the idea of eventually establishing an African Economic Union. Article 6 of the Treaty sets out the modalities for the establishment of the AEC, which would cover a period of 34 years. The six stages are highlighted below. An immediate analysis of each stage follows its brief introduction.

Stage 1⁴³⁸ consists of the strengthening of existing RECs and the creation of new ones where needed and was given a timeframe not exceeding five years. This stage has been fulfilled on the continent since there are a variety of RECs already in existence. The availability of many RECs has actually led to multiple memberships, a problem that will be addressed extensively in this thesis.

Stage 2⁴³⁹ focuses on the stabilisation of the economies and the strengthening of sectoral integration, particularly in the field of trade, agriculture, finance, transport and communication, industry and energy, as well as coordination and harmonisation of the activities of the RECs, and should be undertaken in eight years. By way of application of this stage, SADC has used the period between the years 2000 to 2008 to prepare for the FTA that was launched on 17 August 2008.

In stage 3⁴⁴⁰, the RECs have to establish FTAs followed by CUs over a period of 10 years. During this period, a common external tariff is expected to be adopted in preparation for the customs union. However, SADC's launch of the FTA will soon be followed by a CU in 2010. This immediate move from a FTA to a CU has its advantages and disadvantages, which will be discussed at length in the following chapters.

⁴³⁷ Article 88 *Treaty Establishing the African Economic Community* (1991).

⁴³⁸ Article 28.1 *Treaty Establishing the African Economic Community* (1991).

⁴³⁹ Article 28.2 *Treaty Establishing the African Economic Community* (1991).

⁴⁴⁰ Article 29 and 32 *Treaty Establishing the African Economic Community* (1991).

Stage 4⁴⁴¹ calls for the formation of a continental CU through the coordination and harmonisation of tariff and non-tariff systems among RECs within two years. As already indicated under stage 3, SADC is at this critical stage and has already failed to establish the CU planned for 2010.

In stage 5⁴⁴², a further four years is given for the establishment of an African Common Market and the adoption of common policies.

Stage 6⁴⁴³ is the final stage that envisages the integration of all sectors, the establishment of an African Central Bank and a single African currency, the establishment of an African Economic and Monetary Union and the creation of the first Pan-African Parliament within five years.⁴⁴⁴ However, the Pan African Parliament has already been established with its seat in Midrand, South Africa. It is a fully functional Parliament with a President.⁴⁴⁵

All these stages have been allocated specific time periods. There is, however, provision in the Treaty for the Assembly of Heads of State and Government to determine at the end of each stage whether expectations have been sufficiently fulfilled to enable a transition to the next stage. In short, a particular stage may be extended beyond the period specified by Article 6(2), provided that the entire six transitional periods do not exceed a period of forty years.

5.4.5 The Protocol on the Relations between the AEC and RECs

To emphasise the importance of these RECs in the establishment of the AEC, a Protocol was concluded in 1998 on the relations between the AEC and RECs.⁴⁴⁶ This protocol is significant because it stands ready to drive regional integration in

⁴⁴¹ Article 32 *Treaty Establishing the African Economic Community* (1991).

⁴⁴² Article 33 *Treaty Establishing the African Economic Community* (1991).

⁴⁴³ Article 44 *Treaty Establishing the African Economic Community* (1991).

⁴⁴⁴ The Pan-African Parliament (PAP) has already been established with its seat in Midrand, South Africa.

⁴⁴⁵ See a 2 *Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament* (2001).

⁴⁴⁶ Article 88, para 1 and 3 *Treaty Establishing the African Economic Community* (1991). Details of cooperation among RECs in particular, through the coordination and harmonisation their policies, measures, programmes and activities in all fields and sectors. See also Oppong 2010 *African Union* 110.

Africa through the harmonisation of conflicting policies. This Protocol serves as a framework for the harmonisation of integration between the RECs on one hand and the RECs and the AEC on the other. This Protocol demonstrates to what extent the African Union formalises its support for regional integration at continental level. Evidence of this important relationship will be demonstrated by reference to the relevant articles of the Protocol. Article 2 of the Protocol deals with the scope of application that includes the implementation of economic measures for mutual benefit. Article 3 (a) lists the objective of formalisation, consolidation and promotion of closer cooperation among the RECs and between them and the Union through the coordination and harmonisation of their policies, measures, programmes and activities in all fields and sectors. Under the provisions of Article 3(b) the protocol aims to establish a framework for co-ordination of the activities of the Constitutive Act and the Treaty. It is also the objective of Article 3(c) to strengthen the RECs in accordance with the provisions of the Treaty and decisions of the Union. Under Article 3(g), the aim is to establish a co-ordination mechanism of regional and continental efforts for the development of common positions by its members in negotiations at multilateral level. Article 3(h) encourages the sharing of regional integration experiences in all fields among RECs. Article 4(d) calls for parties to support each other in their respective integration endeavours and agree to attend and participate effectively in all meetings of each other and in the activities required to be implemented under this Protocol. Under Article 5(d) the African Union undertakes to discharge fully its responsibility of strengthening the RECs as well as coordinate and harmonise their activities.

The institutional framework for the implementation of the Protocol is laid out in Chapter 2 of the Protocol. Article 6 establishes the Institutional Organs to facilitate this implementation. Article 7 to 10 lists the role players and their functions in the relationship on the AU and the RECs. Article 15 of the Protocol deals with joint programmes and closer cooperation between the two entities, while Article 18 establishes the status of RECs at Union meetings. Article 20 also deals with status of the Commission at meetings of the RECs and Article 22 empowers the Union to make decisions binding on the RECs.

5.4.6 Analysis of the role played by the Protocol on Relations

The Abuja Treaty clearly adopts an economic integration strategy that depends on the RECs. Accordingly Article 88(1) of the Abuja Treaty states that:

..the Community shall be established mainly through the co-ordination, harmonisation and progressive integration of the activities of the RECs.

Thus, the RECs play a pivotal role of building blocks for African continental economic integration. However there exist some gaps in the legal and institutional relations of the RECs and Abuja Treaty. The most apparent challenge is that the RECs are not bound by the Abuja Treaty.⁴⁴⁷ It is only Member States that are signatories to the Abuja Treaty. The RECs have their own separate legal personalities that are separate from their Member States. Thus, Member States cannot individually enter into international agreements with the intention of binding the RECs they represent. It is therefore clear that the interests of the RECs were not taken into consideration during the drafting of the Abuja Treaty. This should have been possible since the RECs existed before the signing of the Abuja Treaty.⁴⁴⁸

The Protocol on Relations only tries to legitimise the relations between the RECs and the AU but does not create the basis for a binding obligation on the part of the RECs. Article 2 of the Protocol referred to earlier only lays down the scope of the application of the protocol. This is just a mere stipulation of the application of the protocol in order to fulfil the responsibilities placed on the RECs by Article 6 and 88 of the Abuja Treaty. One can easily conclude that this article was drafted on the assumption that Article 6 and 88 of the Abuja Treaty creates a binding obligation on the RECs. Accordingly Oppong is right in suggesting that there is no legal basis to assume that the RECs will integrate to form the AEC as provided for in Article 88 (1) of the Abuja Treaty. On the contrary, one may argue that this creates third party rights as provided for in Article 36 of the Vienna Convention on the Law of Treaties 1969. In the final analysis this grey area may be further proof of the ambiguity of the existing legal framework.

⁴⁴⁷ Oppong *Legal Aspects of Economic Integration*.

⁴⁴⁸ See Bensah 2011 www.panafricanistinternational.org.

5.4.7 Other Africa legal and institutional framework weaknesses

The Abuja Treaty has failed to give a clear understanding on how to prevent Member States from belonging to more than one REC. According to Mattli⁴⁴⁹ records show that 95 percent of the African states belong to more than one REC, making it difficult for them to honour the regional economic integration obligation.⁴⁵⁰ While it is recognised that most RECs predate the Abuja Treaty, the legal framework of the treaty would have been strengthened if the drafters of the treaty or of subsequent protocols expressly prohibited overlapping memberships.

The AEC also does not have a separate identity from the AU.⁴⁵¹ In reality, the functions of the organ of the AEC are also carried out by the organs of the AU. Mutai⁴⁵² and Ng'ong'ola⁴⁵³ have criticised the AU institutions within the AEC. Mutai's criticism focuses on the large size of the AU, pointing to the difficulties surrounding the amount of time consumed in seeking consensus. He also cites high transaction cost. Ng'ong'ola criticises the political nature of the AU which cannot handle technical responsibilities that the Abuja Treaty might require. Under these circumstances, the institutions of the AEC may not be able to effectively enforce their supranational authority within the structures of the AU. This may be so notwithstanding the provision of Article 3(e) of the Abuja Treaty that advocates for the observance of the legal system of the Community. This may not be practically possible within the AU structures that are political in nature. Evidence shows that one of the AU's main Organ; the Commission is not given sufficient powers to ensure compliance in driving the process of economic integration. Thus; the AEC needs its own Secretariat which will be mandated to drive economic integration separate from the AU Commission.

The Abuja Treaty also lacks an enforcement mechanism. A systematic approach to regional economic integration will require an enforcement mechanism, thus it is important to create a Court that will handle disputes that arise from the Abuja Treaty.

⁴⁴⁹ Mattli *Logic of Regional Integration* 41.

⁴⁵⁰ See Chapter 8 of this thesis for a discussion on the problems of multiple memberships in Africa with specific reference to SADC. See also Maruping "Challenges for Regional Integration".

⁴⁵¹ See generally Thomson 1993. *Economic Integration in Africa* 743

⁴⁵² Mutai *Compliance with International Trade Obligations* 107.

⁴⁵³ Ng'ong'ola 1999 *Regional Integration* 145.

A criticism has been levelled against the proposed African Court of Justice and Human Rights. This criticism is based on the Court's lack of jurisdiction.⁴⁵⁴ This is because the Protocol to the African Court of Justice permits only State Parties to the Protocol, the Assembly, the African Union Parliament, organs of the African Union authorised by the Assembly and staff of the African Union to bring disputes before the Court.⁴⁵⁵

5.4.8 Recommendations

The weaknesses of the legal and institutional framework for the process of African economic integration need to be addressed. The rules to guide the process of economic integration need to be clearly defined and fully implemented. There is need to put in place competent and functional institutions to oversee the integration process. This can be done by amending the current legal instruments to empower supranational institutions to have power to spearhead the integration process. Thus, the African Union is urged to amend the Abuja Treaty to reflect a robust framework for regional economic integration. The Commission or the Union Secretariat can be empowered to lead the process of economic integration as opposed to the current role that is mostly administrative in terms of Article 22 of the Abuja Treaty.

The RECs should also be made signatories to the Abuja Treaty. This will require that RECs be allowed to negotiate terms that reflect their various stages of development and the rate at which they can afford to move. Within this set up, there is also need to create a mandatory reporting mechanism which will enable the legal framework to take stock and evaluation of the integration processes of all RECs. This is necessary so that Member States and RECs can be held accountable for failure to honour their Abuja Treaty obligations.⁴⁵⁶

The terms of this amended agreement should also clearly prohibit Member States from belonging to more than one REC.

⁴⁵⁴ Oppong *Legal Aspects of Economic Integration*.

⁴⁵⁵ See a 29 *Protocol on the Statute of the African Court of Justice and Human Rights* (2008).

⁴⁵⁶ Parallels can be drawn from the European Experience; see Article 226 *Treaty Establishing the European Community* (1998) (consolidated version).

There is need to speed up the process of transforming the African Union Commission into the African Union Authority. The transformation is aimed at improving the mandate of the Commission to reflect increased powers to monitor economic integration.⁴⁵⁷ Furthermore, the proposed African Court of Justice and Human Rights needs to be given jurisdiction that cover matters of economic integration. The current set up in terms of Article 29 of the Protocol on The Statute of The Court of Justice and Human Rights limits the jurisdiction of the Court to only State parties to the Protocol, the Assembly, the African Union Parliament, organs of the AU authorised by the Assembly and staff of the African Union. The amendment needs to include RECs, natural and juristic persons. These amendments can only be done by the assembly. The fact that the Assembly is dominated by politicians means that a lot of political good will needs to be lobbied for to speed up the process.

Outside the legal framework of the AU and related instruments, a number of initiatives promoting regional integration on the African continent cannot be ignored. These will now be discussed.

5.5 The New Partnership for Africa's Development (NEPAD)

5.5.1 Historical background

Support for regional economic integration on the African continent is also provided by the New Partnership for African Development.⁴⁵⁸ In an effort to foster the economic development of the continent, OAU Heads of State and Government adopted the Strategic Policy Framework and a new vision for the revival and development of Africa. During the 37th and last session of the OAU Assembly of Heads of State and Government held in July 2001 in Lusaka, Zambia, they adopted the New Africa Initiative (NAI).⁴⁵⁹ The NAI later became the NEPAD.⁴⁶⁰ A better

⁴⁵⁷ See *AU Doc Assembly/AU/Dec.341 (XVI) - Assembly/AU/10(XVI)* (2011).

⁴⁵⁸ Hereafter "NEPAD".

⁴⁵⁹ The New Partnership for Africa's Development, (NEPAD) (NEPAD 2010 www.nepad.org - hereafter NEPAD Framework Document]. At its adoption the NEPAD was known as the New African Initiative (NAI). See *Declaration on the New Common Initiative AHG/Decl.1 (XXXVII)* (2001). The name was changed to the New Partnership for Africa's Development at the first meeting of the Implementation Committee in October 2001. For full details on the origins of NEPAD. See Taylor *NEPAD: Towards Africa's Development*.

understanding of NEPAD can only be realised by visiting its origins. NEPAD is the culmination of the merger of the Millennium Partnership for the African Recovery Program (MAP) and the OMEGA Plan which were finalised on 3 July 2001. This was an initiative by the founding states of South Africa, Nigeria, Egypt, Senegal and Algeria,⁴⁶¹ the idea for which began in 1999 when former Presidents Mbeki of South Africa, Obasanjo of Nigeria and Bouteflika of Algeria agreed that Africa had been reacting for too long to ideas and offers of support from the rest of the world, without developing its own plan.⁴⁶² These Presidents identified a number of reasons why African plans had historically failed. These included timing, a lack of capacity and resources, a lack of political will and the interference of outside interests. The AU's institutional framework has been the implementation vehicle for the plan, while NEPAD Heads of State were required to report to the AU annually. NEPAD has combined the goals of MAP and OMEGA into four main objectives. These include the promotion of accelerated and sustainable development; the eradication of widespread and severe poverty; stopping the marginalisation of Africa in globalisation and accelerating the empowerment of women.

In so doing, NEPAD has not departed from its commitment of using a people-centred, sustainable development plan based on democratic values.⁴⁶³ According to Mangu,⁴⁶⁴ democracy is a precondition for the African Renaissance Project. NEPAD requires a democratic environment for it to thrive. This is a widely shared view by other scholars like Kabongo,⁴⁶⁵ Nzongola-Ntalaja,⁴⁶⁶ Ake,⁴⁶⁷ Hinden⁴⁶⁸ and Kaba.⁴⁶⁹ Democracy and good governance also belong to Africa and are feasible in Africa.⁴⁷⁰ Hoffman argues that democracy remains one of the most discussed and contested notions of political theory.⁴⁷¹ According to Nwabueze, "no word is more susceptible

⁴⁶⁰ Mangu *Road to Constitutionalism* 108. See also *Declaration on the New Common Initiative AHG/Decl.1 (XXXVII)* (2001).

⁴⁶¹ Gavin and Van Langenhove "Trade in the World of Regions" 56.

⁴⁶² Startup Date Unknown www.uiowa.edu.

⁴⁶³ Nabudere "NEPAD".

⁴⁶⁴ Mangu *Road to Constitutionalism* 264, 270, 272, 281.

⁴⁶⁵ Kabongo "Democracy in Africa" 35.

⁴⁶⁶ Nzongola-Ntalaja "State and Democracy in Africa" 246-247.

⁴⁶⁷ Ake *Democracy and Development* 130.

⁴⁶⁸ Hinden *Africa and Democracy* 2-3.

⁴⁶⁹ Kaba "Power and Democracy". 1464-1591

⁴⁷⁰ Mangu *Road to Constitutionalism* 108.

⁴⁷¹ Hoffmann *State, Power, and Democracy* 31. See also Schochet "Introduction". See also Ihonvbere *Towards a New Constitutionalism*; Mamdani "Social Movements" 239.

of a variety of tendentious interpretations than democracy".⁴⁷² This is the most recent African development initiative and has been hailed as one of the key mechanisms to solving Africa's problems. Democratic governments in Africa have reaped and will continue to benefit from regional integration, since the attraction of FDI in democratic states also guarantees the rule of law.

NEPAD is very relevant to the SADC integration process since one of its strongest supporters is South Africa. South Africa's political and economic leadership in both SADC and Africa is of critical importance to regional integration. Former South African president, Thabo Mbeki, was instrumental to its formation of NEPAD and presided over the inaugural Summit held in July 2002 in Durban, South Africa.⁴⁷³ Jacob Zuma, the current South African President has indicated his willingness to continue supporting NEPAD as a strategy to economic development of Africa.⁴⁷⁴ NEPAD was integrated into the AU structures by a decision of the participating states during the Summit held in Libya in March 2007.⁴⁷⁵ These strong links were initiated by former President Mbeki in line with his ideology of the African renaissance.⁴⁷⁶ NEPAD recognises that after many decades of economic and political planning, Africa has not made much progress in the implementation of earlier development plans. The use of the phrases such as the "African Renaissance" and the "African Century" are just some of the innovative ways used in an attempt to change the negative perceptions about the future of Africa. Various meetings held between NEPAD crafters and the IMF, the World Bank, the EU and the G-8 were meant to deal with changing this negative perception.⁴⁷⁷

5.5.2 The role of NEPAD in African regional economic integration

Under NEPAD the plan is to rebuild the African continent by attracting FDI from industrialised countries.⁴⁷⁸ Additionally, NEPAD is a plan by Africans to redevelop

⁴⁷² Nwabueze *Constitutionalism* 1.

⁴⁷³ See *AU Doc Assembly/AU/Decl1(1)* (2010)

⁴⁷⁴ See NEPAD 2010a www.nepad.org.

⁴⁷⁵ Mangu "Changing Human Rights Landscape" 388.

⁴⁷⁶ See Mbeki 1998 www.unu.edu. See also Mbeki 2002 www.dfa.gov.za.

⁴⁷⁷ IMF 2004 www.un.org.

⁴⁷⁸ IMF 2004 www.un.org.

the African continent.⁴⁷⁹ NEPAD is considered the last chance for Africa to rescue itself from continuous underdevelopment⁴⁸⁰ and has received the support of the G8 Countries at their Summit meeting in Canada in June 2002. When it was unveiled, Africa's economic decline was reflected in the fact that 34 African countries are ranked among the world's least developed countries compared with 27 in 1996. Overseas development aid to Africa had fallen from US\$24.2 billion in 1989 to US\$14.2 billion in 1999 and, according to the United Nations; FDI was set to fall by 40 per cent in 2001, even before the terrorist events of 11 September in the United States.⁴⁸¹ NEPAD is a programme that was initiated prior to the AU, but has now been adapted into the AU by resolution.⁴⁸² This means that NEPAD has become part of the AU institutional organs.

What distinguishes NEPAD from other African developments plans in many respects is that it was designed with a view to fostering partnerships between North–South and South–South as fundamental to achieving much needed socioeconomic progress on the continent. South–South partnerships call for the poor countries to join hands in the fight against underdevelopment. Thus, regional integration among African countries is well envisaged in NEPAD's purpose.

Under NEPAD, regional integration is seen as one of the fundamental ways of terminating Africa's exclusion from "the malaise of underdevelopment and exclusion in the globalising world".⁴⁸³ NEPAD's expected outcomes are growth in development and increased employment; reduction in poverty and inequalities; diversification of product activities; enhanced competitiveness in international market by increased exports and, most importantly, increased African integration.

The NEPAD document also states that "the objective is to bridge existing gaps between Africa and the developed world so as to improve the continent's

⁴⁷⁹ Startup Date Unknown www.uiowa.edu 116.

⁴⁸⁰ Cornwell "New Partnership for Africa's Development".

⁴⁸¹ Gavin and Van Langenhove "Trade in the World of Regions" 56.

⁴⁸² See 22nd NEPAD Heads of State and Government Implementation Committee, Addis Ababa, Ethiopia. 30 Jan 2010. Available on: www.africa-union.org/.../30%2001%2010_22nd%20HSGIC%20-%20Opening%20Remarks%20by%20the%20Chairperson.doc Accessed on 12 March 2010.

⁴⁸³ Paragraph 1, See also Makgetlaneng *Continental Political Governance*.

international competitiveness and to enable them to participate in the globalising processes". NEPAD at various points touches on many of these aims and the motivations for African cooperation and integration outlined above. These include the observation that "most African countries are small both in terms of population and per capita income".⁴⁸⁴ Therefore, there is a need for Africans "to pool their resources and enhance regional development ..."⁴⁸⁵ and the importance of "the provision of essential regional public goods such as transport, energy, water, environmental preservation, disease eradication and regional research capacity ..."⁴⁸⁶ All these aspects are essential to the success of regional integration in Africa. Thus, the goals of regional integration in Africa are intertwined with those of NEPAD.

African states are always on the guard against outside interference by rich countries outside the continent. Rather, the emphasis should be on African economic cooperation and integration, in keeping with the spirit of the Lagos Plan of Action and the Abuja Treaty, both of which emphasised the primacy of these goals. In this regard, it is vital that NEPAD should not evolve as an initiative that concerns only African Heads of States and top bureaucrats, as such a development that would doom the whole effort to failure. Instead, civil society, intellectuals and the broad masses of the people, most of whom are far more committed to African economic and political cooperation and integration than their leaders, should be closely associated with and play an active role in this effort.⁴⁸⁷ Only in this way would NEPAD be provided with the solid base of broad social support it needs for it to succeed.

NEPAD is being challenged to come up with programmes that are aimed at addressing Africa's core development challenges. In the short to medium term a Western-style market-led approach is viewed as being inappropriate to tackle such development problems.⁴⁸⁸ Already there is evidence that the condition of the poor has deteriorated further as governments across Africa are compelled to cut public expenditure and restrict necessary imports to conserve foreign exchange as part of

⁴⁸⁴ Para 93.

⁴⁸⁵ Para 94.

⁴⁸⁶ Para 95.

⁴⁸⁷ Bond *Fanon's Warning*.

⁴⁸⁸ See chapter 3 of this thesis for a detailed analysis of market integration.

the IMF and World Bank economic restructuring programmes, thereby curtailing investment in productive sectors.⁴⁸⁹ Access to basic services, such as education, health, potable water, electricity and food, has decreased as a result of the Economic Structural Adjustment Programme (ESAPs).⁴⁹⁰ NEPAD is thus challenged to avoid taking doctrinaire and dogmatic approaches to issues such as privatisation and limiting the role of the state in development. The provision of agricultural subsidies by the EU and the USA shows that government intervention in the economy can be a necessary measure to protect the economy and population against the harmful effects of global trade. This phenomenon has continued with the current financial crisis that has affected all economies in the world. The US government has been at the forefront of bailing out its domestic struggling industries; however, this state of affairs is bound to impact negatively on the regional economies of SADC where countries are not able to provide such bailout mechanisms, as has already been discussed.⁴⁹¹

In the sub-Saharan region, the markets have thus far had limited success in providing basic needs and services to the poor. The role of NEPAD should therefore be the promotion of access to basic services for the poor. Conditions in Africa demand that the states should be strengthened and regional blocs empowered. The promotion of sustainable domestic and regional policies is critical if NEPAD is to produce desirable results on the continent. For instance, development cannot occur without regional trade and cross-border industrialisation. At the core of the development strategy in Africa should be the need to promote coordinated trade development and regional industrial policy in a regional integration framework with a stable and predictable policy environment.

Many of the past African development plans invariably failed to indicate a well-integrated and coordinated approach. Most of them discussed the progress of individual countries in a disjointed fashion, apparently ignoring the fact that most industries are interrelated and interdependent. These development plans tended to be inward looking and to refer to measures for increasing economic growth within the

⁴⁸⁹ Ikeme *Sustainable Development* 76.

⁴⁹⁰ Kawewe and Dibié 2000 *Impact of EPAs* 79-82.

⁴⁹¹ WTO Official Document WT/MIN(09)/ST/137 (2009).

country concerned. Consequently, none of the development programmes initiated during the early 1960s attempted to coordinate industrial development in one country with the industrial growth of the neighbouring country.⁴⁹² Cognisant of the challenges and opportunities deriving from NEPAD, among others, SADC adopted the RISDP as a SADC response to the implementation of NEPAD at regional and national levels.

5.5.3 Analysing the influence of NEPAD on regional integration

The positive implications of NEPAD on regional integration and trade liberalisation are clearly evident. Underpinning NEPAD is the idea that Africans themselves and the resources of their continent hold the key to their development. Therefore, the plan calls for the partnerships between the peoples of Africa and the acceleration of continental integration. The SADC agreement, as well as its integration agenda, is in harmony with NEPAD. The NEPAD plan also provides a single platform for Africa to engage the rest of the world. Subsequently, SADC has become a building bloc for the AU, as well as a critical organ for establishing and regulating relations with the outside world, for example the role SADC is playing in the EPAs and WTO negotiations.⁴⁹³

It has long been conceded that Africa's poor infrastructure problem hinders regional integration (figure 4.2, chapter 4 shows the poor state of transport networks). One of NEPAD's top priorities is the creation of short-term regional infrastructure to work on transport, energy, water and sanitation, and information and communication technology. These are critical areas that need urgent attention as they will complement the RISDP. NEPAD also has a plan for the implementation of sub-regional food security and development programmes and is also supposed to come up with a coordinated strategy for debt relief, market access and official development assistance reforms. All of these programmes complement efforts of SADC towards deeper regional integration. Finally, NEPAD has been hailed as not just a plan but an implementation strategy. This means that efforts are being harnessed for Africa's progress to find fruition as opposed to the long-held idea of African aspirations and

⁴⁹² Asante 1997 www.alrn.org.

⁴⁹³ Page 2002 www.acp-eu-trade.org.

plans that cannot materialise. Among the main issues NEPAD is trying to address is the poor economic governance in Africa. NEPAD can therefore be the blueprint for sustainable development for the AU.⁴⁹⁴ In the long run, if NEPAD succeeds and since it is based on the EU model, the success of SADC's integration agenda is possible.

5.6 The African Peer Review Mechanism

Another very important initiative launched by African leaders is the African Peer Review Mechanism (APRM).⁴⁹⁵ The APRM is a mutually agreed non-legal instrument, voluntarily acceded to by the members of the AU. It is a self-monitoring mechanism founded in 2003,⁴⁹⁶ with the aim of encouraging conformity with regard to political, economic and corporate governance values, codes and standards, among African countries and the objectives in socioeconomic development within NEPAD. Heyns and Killander⁴⁹⁷ developed the country self-assessment APRM questionnaire that was formally adopted by the APR Secretariat in February 2004, in Kigali, Rwanda, by the first meeting of the APR Forum, made up of representatives of the Heads of State or Government of all states participating in the APRM. This list is used to assess whether an AU Member State participating in NEPAD complies with the standards as listed. These standards are divided into four sections, namely, democracy and political governance, economic governance and management, corporate governance, and socioeconomic development. Ghana, Rwanda and Kenya were the first three countries to be subjected to the APRM. This was done by an African Review Panel using APRM codes and standards on one hand and with NEPAD nine objectives on the other. According to Mangu,⁴⁹⁸ these cords, standards and objectives are international law friendly. This is so because the questions to be

⁴⁹⁴ Taylor 2002 "Zimbabwe's Debacle".

⁴⁹⁵ Hereafter APRM. See Cilliers *Peace and Security*. For a country self-assessment for the APRM questionnaire, see ss 1, 1.1-1.3 in Heyns and Killander *Compendium* 302-305.

⁴⁹⁶ See *MOU on the APRM NEPAD/HSGIC/03-2003/APRM/MOU* (2003) adopted in Abuja, Nigeria. This MOU effectively operates as a treaty. It came into effect immediately with the agreement of six countries to be subject to its terms. However, those countries that do not accede to the document are not subject to review. The March 2003 meeting also adopted a set of "objectives, standards, criteria and indicators" for the APRM. The meeting also agreed to the establishment of a secretariat for the APRM and the appointment of a seven person "panel of eminent persons" to oversee the conduct of the APRM process to ensure its integrity. At the end of 2010, 30 countries had formally joined the APRM by signing the MOU on the APRM.

⁴⁹⁷ See generally Killander 2008 *African Peer Review Mechanism* 41-75.

⁴⁹⁸ Mangu *Road to Constitutionalism* 108

addressed in the codes and standards are designed to assess states' compliance with a wide range of African and international human rights treaties and standards.

5.6.1 The APRM's relevance to regional integration in Africa

Although broad objectives have been set for the APRM, for the purpose of this chapter it is important to focus only on those affecting regional integration on the continent. These will now be discussed. In brief, the APR Panel found that Ghana,⁴⁹⁹ Rwanda and Kenya had signed or ratified several international treaties that have a bearing on democracy and good political governance, for example the Constitutive Act as discussed earlier. However, where such ratification occurred, it was not always followed by the incorporation of these legal instruments into domestic law. Furthermore, treaties were not always enforced when they had been domesticated and the states concerned seldom complied with their reporting obligations on ratification of some instruments. This kind of assessment is necessary for regional economic integration treaties. Since almost all African countries are signatories to several regional economic agreements, the same process for their ratification should be followed by incorporating such instruments into domestic law. As will be discussed later, most SADC Member States are not complying with this process. Instead, some of the Protocols signed under SADC have not been implemented. This does not bode well for economic integration in the region. In the case of SADC, future analysis of this non compliance will focus on the SADC Protocol on Trade as well as the establishment of the SADC Tribunal. Thus, the APRM, as an instrument, may be able to accelerate the process of regional integration if it can be used to put pressure on African states to implement treaty obligations timeously. Through the APRM participating Member States are supposed to implement the findings of the process.

Recommendations made to the three countries mentioned above may also be applicable to the rest of Africa and SADC for solving similar problems. One of the most important recommendations is the one that calls for Member States to be time

⁴⁹⁹ APR Secretariat 2005 www.eisa.org.za.

conscious when acceding to treaties and protocols. In addition, there is a need for timely reporting on the implementation of such instruments enshrined in NEPAD.

The need to improve on democracy and political governance is also critical for regional integration, as regional integration should be anchored in democracy, that is, the notion of procedural or institutional democracy.⁵⁰⁰ Healthy democracy promotes full and equal participation of all citizens and the private sector in a country. These are key stakeholders in regional integration, private citizens in Africa account for a huge percentage of intra-regional trade. The involvement of the private sector in cross border business is as a result of a sound institutional democracy that allows the courts and public offices to function in a way that promote regional integration. However, it is not the intention here to enter this contentious debate about democracy, as there is no universally accepted definition of the concept, because it is highly contested in analytical and ideological discourse.⁵⁰¹ However, most African scholars, such as Ake, Shivji⁵⁰² and Amin, have embraced the substantive popular and people-driven democracy based on values, constitutionalism and respect for all human rights, and not civil and political rights only. This democratic right is important even in regional economic integration because the right to economic, social and cultural development is provided for in the African Charter of Human and Peoples Rights.⁵⁰³ This provision, which provides African countries with the instruments to monitor their own behaviour, can play an effective role in reducing external intervention in the affairs of African countries.⁵⁰⁴ Care should be taken, however, that it does not end up becoming a mechanism for doing what outside forces are unable or reluctant to do through direct intervention.

⁵⁰⁰ Dahl *Polyarchy*; See also Dahl *Democracy and its Critics* 220-224. See also Sorensen "Democracy and the Developmental State" 423; Wiseman *New Struggle for Democracy*.

⁵⁰¹ Wiseman *New Struggle for Democracy* 435.

⁵⁰² Shivji 2009 *Contradictory Class Perspective* 1.

⁵⁰³ Article 22 *African Charter on Human and Peoples' Rights* (1981). It was adopted on 27 June 1981 in Nairobi, Kenya and came into force on 21 October 1986. It was complemented by the Protocol establishing the African Court in Human and People's Rights, which came into operation in January 2004.

⁵⁰⁴ Hereafter "APRM". The APRM requires each country to perform a self-evaluation in the areas of democracy, governance and socioeconomic development. The APRM is designed to increase a country's attractiveness to foreign investors, with each country's rating acting as an indicator of that country's potential. The G8, African Development Bank and bilateral donors have indicated their aid may be tied to a country's APRM score: Startup Date Unknown www.uiowa.edu 116.

Under the APRM, governance is defined as "the art and skill of utilising political or collective power for the management of society at all levels".⁵⁰⁵ In terms of this mechanism African leaders acknowledge that development is impossible in the absence of true democracy, respect for human rights, peace and good governance.⁵⁰⁶ According to Mangu:⁵⁰⁷

From an African perspective, good political governance is therefore democratic governance, based on respect for the rule of law, the separation of powers, the supremacy of the constitution, the independence of the judiciary and the promotion of human and people's rights.

Therefore if signatories to RTAs embrace good governance and the rule of law in their respective countries, it is most likely that they also do the same at regional level where the implementation of regional integration provisions of the treaties is paramount.

5.6.2 Analysis of the challenges of the APRM

The discussion on the APRM and its purpose cannot be complete without a discussion of its challenges. This will be done in brief. Such an exercise is important if SADC intends to benefit fruitfully from the APRM experience. Firstly, compliance with codes and standards is not exhaustive; The APRM merely lists the international conventions, agreements or treaties that have been or should have been signed, ratified and domesticated, without paying attention to their actual enforcement in domestic law. The other problem pertains to inclusiveness and the broad scope of the process. The APRM is a state and cabinet-driven showcase. Nevertheless, the procedure for the selection of stakeholders to the seats on the National Governing Council (NGC)⁵⁰⁸ is unclear. This will definitely compromise the results of the exercise since in many of the occasions civil society organisations and other stakeholders who are sympathetic to the governments of those states being peer reviewed are selected to participate.

⁵⁰⁵ See Country Review Report (CRR) of the Republic of Ghana

⁵⁰⁶ See NEPAD Declaration para 71

⁵⁰⁷ Mangu *Road to Constitutionalism* 108.

⁵⁰⁸ Hereafter "NGC".

The other problem pertains to public ownership of the whole process. NGCs are cabinet centred and even exclude other branches of state authority such as the parliament and the judiciary. Instead, the self-assessment process is conducted by the cabinet, which chairs the NGC, establishes a Focal Point, controls the APRM National Secretariat and claims responsibility for the drafting of the country self assessment report CSAR.

The other challenge concerns the independence of the APR panel, as well as its integrity. As discussed above, the cabinet dominating the process is often tempted to manipulate the work and undermine the independence of the members of the APR Panel. The cabinet can also engage in dispute over the accuracy of information, which puts pressure on the APR Panel and at times forces them to make concessions where they might have reached a decision to the contrary. As the government of the participating country is the one that appoints panel members, it can also dismiss them at any particular time. Thus, the APR panel can be subjected to undue influence that will ultimately compromise its work.

According to Mangu,⁵⁰⁹ the most serious problem with the APRM is that "it has no teeth". That is to say, there are no effective sanctions that can be applied for a persistent lack of democracy and good political governance in a country. Lack of democracy and good political governance is widely encountered in African leaders, who support each other blindly in the face of bad governance and democracy. This situation is exacerbated when such support comes from the initiators of NEPAD and the APRM. A case in point is the support offered to Robert Mugabe's leadership by President Mbeki of South Africa on the endless Zimbabwean crisis. The same state of affairs used to prevail under the OAU, which was considered to be a "club" of authoritarians and dictators.

⁵⁰⁹ Mangu *Road to Constitutionalism* 108

5.7 Conclusion

The continent of Africa finds itself playing the regional integration game, where the possibility of success and failure depends on how role players manipulate the inherent conditions to their advantage. Africa's unique history, current manifestations and future prospects of regional integration can help bring development to the continent. Hence, to continue blaming the legacy of colonialism without harnessing the current continental prospects being provided for by economic integration would be missing the point. Pan-Africanism has gained new momentum under the AU and NEPAD and the realisation that African challenges are better resolved by Africans themselves is timeous. This chapter has revealed that the use of RECs as building blocs in the AEC is producing positive results. The Protocol on relations between RECs and the AEC requires legal precision. African countries just have to implement the regional integration commitments as set out the treaties they signed. The launch of negotiations for the SADC, COMESA and EAC tripartite FTA is a clear example of this phenomenon. The AU has also taken direct control of these developments.

NEPAD is not just a plan but an implementation formula for African development and its incorporation into the AU institutions is an achievement. Thus, the implementation plans for NEPAD are a step away from being legally enforceable. NEPAD shares this situation with the RISDP, which acts as an implementation vehicle for SADC's integration plan, as envisaged in the Protocol on Trade. The modalities for the establishment of the AEC are clear and the step-by-step approaches are achievable even though some stages are falling behind schedule. However, the goal for an AEC is feasible and the AEC presents a great opportunity for regions like SADC to pursue their own agenda for integration within the continental paradigm. The SADC integration agenda actually complements that of the AU and, as such, all the regional groupings in Africa are building blocs. Having now discussed regional economic integration from a global and continental point of view, the next chapter focuses on regional economic integration manifestations in SADC.

CHAPTER 6

REGIONAL ECONOMIC INTEGRATION IN SADC

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6.1 Introduction

The discussion in chapter 2 gave the historical background, current set-up and future aspirations of SADC. In addition, in chapter 4, the theoretical framework exposed the theories behind the forms of regional economic integration in SADC. Flowing from this discussion and notwithstanding the challenges highlighted, the existence of SADC itself constitutes not only a statement of intent and resolve to overcome the burden of history, but also an acknowledgement of the immense benefits of regional economic integration. The SADC Treaty itself and its various institutions and legal instruments constitute an important step in that direction.⁵¹⁰ The challenge now is on how SADC Member States are willing to subject themselves to supranational governance as provided for by the Treaty and implemented by the key institutions that also derive their mandate from the Treaty. SADC needs the political consensus necessary among its Member States and the technical capacity required among those charged with the responsibility for such a task for both an unequivocal commitment to deep integration and the full acceptance of the inevitable, but short-lived, political costs of such an undertaking. Sovereign states of SADC will undoubtedly feel the effects integration will have on their sovereignty. However, it has to be pointed out here that SADC only came into being within the context of a freely concluded agreement; hence, the fear of the supranational structures of the organisation jeopardising national sovereignty is not convincing. According to Erasmus:⁵¹¹

It is an act of sovereignty to conclude international agreements, to establish trade arrangements with neighbouring countries, and to do this on the basis of reciprocity.

All these undertakings have to be anchored on the legal framework of the SADC Treaty and the Protocol on Trade. Thus, SADC institutions are empowered by these legal instruments to play a meaningful role in regional integration. Erasmus⁵¹² poses a number of related questions which governments involved in regional integration will have to address. These are: How will they ensure non-disciplinary treatment and put

⁵¹⁰ Evans, Holmes and Mandaza *SADC* 12.

⁵¹¹ Erasmus 2011 *SADC SADC Trade Regime* 17.

⁵¹² Erasmus 2011 *SADC Trade Regime* 17.

a stop to non-tariff barriers in the markets of the other states parties to the agreement? What are the implications of the treaty obligations for the parties' citizens? How will their national policies be affected? What happens in the case of non-compliance? The answers to these questions are provided for in the analysis of the legal provisions that form the basis of the functioning of the key SADC institutions under investigation in this chapter. In addition, Erasmus observes that:

The more comprehensive the trade arrangements and the more advanced the integration process, the stronger the need for appropriate institutions with supranational powers.

Thus, the drive towards deeper integration in SADC should equally be supported by stronger supranational mechanisms. Regional economic integration in SADC will be discussed at length with a thorough examination of the important institutional and legal structures of the organisation. This discussion will focus on the various institutions whose legal mandate is related to the economic integration process. These institutions are authorised by the Treaty and the Protocol on Trade to; among other things harmonise the political and social economic policies of Member States, and encourage popular participation in the activities of SADC and the implementation of SADC initiatives.

6.2 SADC's important institutional structure

In deciding on the SADC's institutional framework, the founders were particularly sensitive to the lessons and experiences of past attempts at regional cooperation in Africa, some of which had ended in dismal failure and bitter disappointment. Such failure was largely because sensitive issues of how best to equitably share the cost and benefits of regional cooperation had not been sufficiently addressed and agreed upon at both national and regional levels. To avoid similar pitfalls from the beginning, SADC placed particular emphasis on a decentralised institutional arrangement that would ensure that Member States are the principal actors in the formation and implementation of policy decisions. The SADC Treaty basically re-enacted the institutional structure of the SADCC.⁵¹³ However deeper integration and trade liberalisation was not going to be realised under a decentralised institutional

⁵¹³ Jakobeit, Hartzenberg and Charalambides *Overlapping Membership* 12.

arrangement. Deeper integration requires governance that transcends individual Member States within the region to a level where decision making is delegated to regional institutions that are to some extent independent of Member States influence. This is important because the nature and extent of powers vested in regional institutions determines the institutions' ability to propagate the region's integration agenda.⁵¹⁴ Therefore the importance of the existence of supranational institutions in promoting regional integration cannot be overemphasised.⁵¹⁵ According to Mutharika⁵¹⁶;

Economic cooperation requires the delegation of power to a supranational body entrusted with the task of safeguarding the interest of both the multinational groupings as well as that of the individual Member States.

The principal organs driving regional economic integration in SADC are the Summit made up of Heads of State and Government; the TROIKA; the Council of Ministers; the Integrated Committee of Ministers; the Tribunal; SADC National Committees; Standing Committee of Officials and the Secretariat. The SADC Tribunal was the only new institution provided for under the Windhoek Treaty. For the purposes of this thesis only the important institutions relevant to regional integration will be discussed. Each institution will be discussed according to the provisions of the Treaty and the mandate of the Protocol on Trade. The role of each of these institutions in SADC regional integration is also analysed.

6.2.1 The Summit⁵¹⁷ and its role in regional integration

The Summit is made up of Heads of State and/or Government from all SADC Member States. The decisions of the Summit are taken by consensus.⁵¹⁸ It is the ultimate policy-making institution of SADC and is responsible for the overall policy direction and control of functions of the Community.⁵¹⁹ The Summit is also a

⁵¹⁴ Afadameh-Adeyemi and Kalula 2010 *SADC at 30*.

⁵¹⁵ Afadameh-Adeyemi and Kalula 2010 *SADC at 30*.

⁵¹⁶ Mutharika *Towards Multinational Economic Cooperation*.

⁵¹⁷ Article 10 *SADC Treaty* (1992).

⁵¹⁸ Article 10 *SADC Treaty* (1992). This power was exercised when the Summit suspended Madagascar after the overthrowing of a legitimate government in a coup d'état.

⁵¹⁹ Ng'ong'ola 2000 *Regional Integration and Trade Liberalisation* 485-506.

legislative organ.⁵²⁰ Over and above the Tribunal, the Summit is described as an organ capable of making decisions that are "binding".⁵²¹ The Summit usually meets once or twice a year around August or September in a Member State.⁵²² It appoints the Executive and Deputy Secretary of the Secretariat and admits new members into SADC. The official Heads of States and Government Summit for 2008 was held in South Africa where the South African Chairmanship of the Summit presided over the launch of the SADC FTA at the 28th SADC Summit on 18 July 2008.⁵²³ Speaking at the Summit, President Thabo Mbeki said SADC Member States needed to assess how best they could advance the integration effort and the region's trade performance, noting that the most serious constraints to growing the region were underdeveloped structures and supply capacity.⁵²⁴ The Windhoek Summit of 2010 resolved that SADC should not proceed to form a customs union.⁵²⁵ This shows that the Summit plays a critical role in SADC regional integration. Moreover, in terms of Article 22 of the SADC Treaty, it has a legal mandate to adopt legal instruments for the implementation of the provisions of the Treaty. This mandate was clearly exercised by the August 1996 Summit through the creation and implementation of the Protocol on Trade.⁵²⁶

Special Summit meetings are also called to discuss issues of emergency and whenever there is a need. The Summit is a critical institution that has to approve policy before it is considered for adoption into law, for example protocol formulation. Even the judgements of the SADC Tribunal have to be referred to the Summit, since it is the only body that can sanction the findings of the Tribunal.⁵²⁷ Many commentators have placed the hope of SADC integration on the political willingness of regional leaders. In future, SADC's ambitious trade timetable needs to be matched by the political will to meet the deadlines in order to restore the organisation's

⁵²⁰ Article 10(3) *SADC Treaty* (1992) empowers the Summit to adopt legal texts and instruments for the implementation of the Treaty. Some of the work can be delegated to the Council of Ministers.

⁵²¹ Article 10(8) *SADC Treaty* (1992).

⁵²² Article 10(5) *SADC Treaty* (1992).

⁵²³ Mbola 2008 www.southafrica.info.

⁵²⁴ Mbola 2008 www.southafrica.info.

⁵²⁵ Anonymous Date Unknown www.southerntimesafrica.com.

⁵²⁶ See SADC 1996 www.issafrica.org.

⁵²⁷ Article 10 *SADC Treaty* (1992): "The Tribunal shall also have advisory jurisdiction at the request of the Summit or the Council of Ministers".

flagging credibility.⁵²⁸ This means that this body has to show political willingness in implementing the SADC integration agenda. Unfortunately this is lacking, as regional leaders are reluctant to surrender state sovereignty for the benefit of the region.

Regional integration is a priority for the Summit. The SADC Trade Protocol itself is evidence of this understanding. In 2006, the Summit agreed to convene an Extraordinary Summit to discuss regional integration matters.⁵²⁹ The Extraordinary Summit was held in South Africa and the SADC Heads of State and Government reviewed the state of integration of the region and resolved to accord this process high priority bearing in mind the key milestones approved by the RISDP. The priority accorded to regional integration at the Summit suggested that there is political momentum which seems to have developed in recent years. Subsequently, the Ordinary Summit held in Lusaka in August 2007 focused its attention on the imperatives to deepen regional economic integration and fast-track implementation of infrastructure development in the region. From there on the Summit has been on target in trying to implement the RISDP, as evidenced by the implementation of the FTA in August 2008.⁵³⁰ The implementation of the RISDP will be exhaustively discussed in chapter 10. Additionally, more functions of the Summit are enumerated under Article 10 of the SADC Treaty.

The above discussion has emphasised the importance of the Summit in SADC economic integration. The Summit, as the supreme policy-making institution, has to promote economic integration objectives if deeper integration is to be realised in SADC. The leadership of the Summit has not always been specified in this regard. As part of its structure the Summit is led by a chairman and vice-chairman elected "for an agreed period" and "on the basis of rotation".⁵³¹ However, the election procedures have not been specified, which has left the Heads of State and Government some latitude in the selection of the political leader for the organisation at any particular time. This leadership role is not necessarily taken on by persons best qualified to guide the SADC agenda at any particular time; thus regional integration efforts may be either weak or robust depending on the calibre of the

⁵²⁸ Games 2008 www.rtfp.org.

⁵²⁹ Mosisili "Official Opening Remarks".

⁵³⁰ See SADC 2008a www.sadc.int.

⁵³¹ Article 10(4) *SADC Treaty* (1992).

current leader. Another weakness in the role of the Summit in regional integration is that, since the Heads of State and Government cannot meet as often as there are binding decisions to be made, the efficiency of the organisation is seriously compromised.

The SADC Treaty does not state if the binding decisions of the Summit have a direct effect in the territory of Member States. The silence on the part of the SADC Treaty creates a gap in the quest for regional integration in SADC because the manner in which decisions of the Summit are implemented is left to the discretion of Member States. To complicate the matters further, it is also notable from Article 10(8), 11(3)(6) and 13(6) that the Summit and other subsidiary organs make decisions by consensus,⁵³² and yet there are no provisions in the Treaty for breaking an impasse where a consensus cannot be reached. In order to reach consensus, decisions are clouded in vague formulations and wide discretions that undermine legal certainty and are, in fact, anathema to rules-based trade.⁵³³ This was clearly illustrated by the Summit's refusal to sanction the judgement given against Zimbabwe in the Campbell case. To make matters worse, this case has led to the suspension of the Tribunal with its judges pronouncing that the actions of the July 2011 Summit clearly amounted to Tribunal dissolution.⁵³⁴

It is now very doubtful if the Summit can make decisions that are not favourable to some Member States but favourable to the region. This point can be illustrated this way; if the Summit reaches its decisions through consensus and as such a Member State may decide to protect its individual interests by voting against a policy and by so doing it will deny the Summit of the required consensus. Given this scenario, the critical decision-making processes affecting regional integration are subjected to uncertainties to some extent. There is need to deal with these uncertainties. One way of dealing with these uncertainties is to amend the provisions of the Treaty in order to reflect who should be in charge of making sure that Member States implement their SADC Treaty obligation. It is clear from this discussion that the Summit is playing a pivotal role in SADC regional integration at the moment and in

⁵³² Articles 10(8), 11(3)(6) and 13(6) *SADC Treaty* (1992).

⁵³³ Erasmus 2011 *SADC Trade Regime* 130

⁵³⁴ See Rabkin 2011 www.businessday.co.za.

the foreseeable future. However, the Summit as an institution of SADC has not garnered enough political will to draw the line between the individual interest of Member States and that of the region. Thus, these challenges encountered will have to be addressed if this organ is to remain a formidable backbone to regional integration in the region.

6.2.2 The TROIKA⁵³⁵ and its role in SADC regional integration

The Extraordinary Summit decided to formalise the practice of a Troika system, consisting of the Chair, incoming Chair and the outgoing Chair of SADC, which has been effective since it was established by the Summit in Maputo, Mozambique in 1999.⁵³⁶ According to Article 9(1), the Troika also applies with respect to not only the Summit but also the Organ, the Council, the integrated Committee of Ministers and the standing Committee of Officials.⁵³⁷ Other members may be co-opted into the Troika as and when necessary. This system has enabled the organisation to execute tasks and implement decisions expeditiously, as well as provide policy direction to SADC institutions in periods between regular SADC meetings, as it is easy to convene. This is a key institution responsible for decision making,⁵³⁸ facilitating the implementation of decisions,⁵³⁹ and providing policy directions.⁵⁴⁰ The Troika has been very functional with regard to the issues pertaining to the resolution of the Zimbabwean crisis,⁵⁴¹ as well as the instabilities in the DRC and Madagascar.

The Troika is an important institutional organ that has to keep the integration agenda on track during its frequent meetings. Strategically, it plays a critical role in meeting more often than the Summit and its decisions and work are closely linked to the Summit. The main weakness of the Troika is its subordination to the Summit, as its resolutions can be nullified by the Summit; for example, important resolutions on

⁵³⁵ Article 9A *SADC Treaty* (1992).

⁵³⁶ AU Date Unknown (a) www.africa-union.org.

⁵³⁷ This wide scope means that the Troika is a flexible institution that can be used as an instrument for progress. This flexibility is evident in a 9.7 that allows each institution to have power to create committees on an ad hoc basis. A 9.8 leaves the Troika of each institution to determine its own rules of procedure.

⁵³⁸ Article 9.6.1 *SADC Treaty* (1992).

⁵³⁹ Article 9.6.2 *SADC Treaty* (1992).

⁵⁴⁰ Article 9.6.3 *SADC Treaty* (1992).

⁵⁴¹ See Anonymous Date Unknown emergingminds.org.

Zimbabwe made at the Troika Summit of the Organ on Politics and Defence held in Livingstone, Zambia, were not endorsed by the Summit, which met the following month. The Summit merely noted the resolution; a move that did not convey any legal significance.⁵⁴²

It is evident in the character of the Troika that SADC intended to foster continuity of SADC activities. The idea of putting together an organ consisting of the current, outgoing and incoming Chairs is an ideal strategy for promoting continuity and is critical for the regional integration process which requires an organisation that embraces change. In its practical work, the Troika will be an ideal vehicle for the full implementation of the RISDP. Another advantage for the regional integration that can be derived from the Troika is its ability to involve as many stakeholders as possible for regional integration within the SADC Treaty. Regional integration is a process that is highly likely to succeed if there is buy in from as many stakeholders as possible.

6.2.3 The Council of Ministers and its role⁵⁴³ in regional integration

The function of the Council of Ministers should remain as provided for under Article 11 of the Treaty. In general, the Council serves as the engine room of SADC in that it develops and implements the common agenda of SADC.⁵⁴⁴ This Council consists of Ministers from each Member State, usually from the Ministries of Foreign Affairs and Economic Planning or Finance.⁵⁴⁵ The Council has an important responsibility to oversee the functioning and development of SADC and ensure that policies are properly implemented. Under the new structure it is recommended that Council should meet four times a year.⁵⁴⁶ Since the RISDP is still really a policy consideration without legal basis, the Council has to facilitate its implementation and take stock of its progress in its frequent meetings. Consequently, the Council of Ministers is the direct link between SADC and Member States and these Ministers are mandated to express Member States policy positions on regional matters. At the

⁵⁴² See generally SADC 1996 www.issafrica.org. See also Smith-Hoehn 2011 nzcn.wordpress.com.

⁵⁴³ Article 11 *SADC Treaty* (1992).

⁵⁴⁴ Afadameh-Adeyemi and Kalula 2010 *SADC at 30*.

⁵⁴⁵ South African Department of International Relations and Cooperation 2009 www.dfa.gov.za.

⁵⁴⁶ Article 11(4) *SADC Treaty* (1992).

same time they play a critical role of promoting SADC initiatives in their various countries. This is critical since regional integration that lacks popular support from ordinary citizens of Member States is bound to fail.

A very important role of this institution is its advisory role to the Summit on matters of overall policy, and the efficient and harmonious functioning and development of SADC.⁵⁴⁷ Since the Summit normally meets once or twice a year, this advisory role is critical in keeping the most important organ of SADC well informed of the developments around regional integration. Closely associated with this role is the Council's duty to perform such other duties as may be assigned to it by the Summit of the Treaty.⁵⁴⁸ The Council of Ministers also approves the policies, strategies and work programmes of SADC. This role is important for regional integration; especially for programmes initiated by the RISDP. The role of convening conferences and other meetings for the purpose of promoting the objectives and programmes of SADC is also important for regional integration.⁵⁴⁹ A number of these activities are necessary for the success of regional integration in SADC, for example the awareness that is created through these conferences. The Council's role to consider and recommend to the Summit any application for membership⁵⁵⁰ directly influences the process of regional integration. The addition of new members to SADC is also a mirror of the pace of regional integration in SADC.

The main weakness of the Council of Ministers is that it has no power to make binding decisions; it must report all its actions to the Summit. For an institution that oversees the implementation of SADC policies, it would have been vital to have the power to make binding decisions.⁵⁵¹

⁵⁴⁷ Article 2(3) *SADC Treaty* (1992).

⁵⁴⁸ Article 2(12) *SADC Treaty* (1992).

⁵⁴⁹ Article 2(11) *SADC Treaty* (1992).

⁵⁵⁰ Article 2(7) *SADC Treaty* (1992).

⁵⁵¹ Afadameh-Adeyemi and Kalula 2010 *SADC at 30*.

6.2.4 The Integrated Committee of Ministers⁵⁵² and its role in regional integration

The Integrated Committee of Ministers is made up of at least two ministers from each Member State with a mandate of meeting at least once a year. This is a new institution aimed at ensuring proper policy guidance, coordination and harmonisation of cross-sectoral activities. The Integrated Committee of Ministers oversees the activities of the four core areas of integration, notably Trade, Industry, Finance and Investment;⁵⁵³ Infrastructure and Services;⁵⁵⁴ Food, Agriculture and Natural Resources;⁵⁵⁵ and Social and Human Development and Special Programmes,⁵⁵⁶ including the implementation of the Strategic Plan in their areas of competence. These are key area for SADC regional integration. For the purpose of emphasising the importance of this Committee, it is important to realise that the issues dealing with trade and integration are first highlighted in this committee. Thus, they take an initiating role in influencing policy on regional integration. The Committee comprises at least two Ministers from each Member State and should be responsible to Council. The representative nature of this committee allows it to enjoy the support of all Member States.⁵⁵⁷ Member ownership of SADC programmes is key to regional integration.

The Integrated Committee of Ministers also provides policy guidance to the Secretariat and makes decisions on matters pertaining to the Directorates, as well as monitoring and evaluating their work. It also has decision-making powers and referendum to ensure rapid implementation of the programmes that would otherwise wait for a formal meeting of the Council.⁵⁵⁸ This is a critical characteristic given the fact that the RISDP is faced with critical deadlines that can do without the bureaucracy of the organisation. Critically, it is tasked with monitoring and controlling the implementation of the RISDP once approved by Council.⁵⁵⁹

⁵⁵² AU Date Unknown (b) www.africa-union.org.

⁵⁵³ Article 12.2.1 *SADC Treaty* (1992).

⁵⁵⁴ Article 12.2.2 *SADC Treaty* (1992).

⁵⁵⁵ Article 12.1.3 *SADC Treaty* (1992).

⁵⁵⁶ Article 12.1.4 *SADC Treaty* (1992).

⁵⁵⁷ Article 12.1 *SADC Treaty* (1992).

⁵⁵⁸ Article 12.2.3 *SADC Treaty* (1992).

⁵⁵⁹ Article 12.2 *SADC Treaty* (1992).

The main challenge of this institution is that its decisions are made by consensus and are reported to the Council.⁵⁶⁰ The weakness of consensus has already been emphasised under the discussion of the Summit.

6.2.5 The Standing Committee of Officials⁵⁶¹ and its role in regional integration

The Standing Committee of Officials forms a technical advisory committee to the Council. It is made up of one permanent secretary from the ministry of the Member State which serves as the SADC national contact point. This makes this committee an important and strategic channel of information dissemination from SADC to the Member States national contact points; a feature that promotes awareness for economic integration among Member States. They meet at least four times a year with their decisions being made by consensus. Their frequent meetings can serve as a expediting tool for the SADC regional economic integration agenda that has often been accused of a slow pace. Their main function is also to process documentation from the Integrated Committee of Ministers and Report to the Council

6.2.6 The SADC Tribunal⁵⁶² and its role in regional integration

The SADC Tribunal is currently not operational after the decision to suspend it by the 2010 Windhoek Summit. The 2011 Summit put a further moratorium barring the Tribunal from taking any new cases even those not related to the Campbell case. The Summit also paralysed the Tribunal by not renewing contracts for sitting Judges or replace them, thus the Tribunal would be unable to accept new cases since it did not comply with Tribunal composition requirements as prescribed by Article 3 of the SADC Tribunal Protocol.⁵⁶³ Notwithstanding the current status of this judicial forum, the rationale for this discussion is to demonstrate the legal mandate given to the Tribunal by the SADC Treaty and the way in which that mandate relates to regional integration. The Tribunal of SADC is provided for under Article 16 of the Declaration

⁵⁶⁰ Article 12 *SADC Treaty* (1992).

⁵⁶¹ Article 13 *SADC Treaty* (1992).

⁵⁶² Article 16 *SADC Treaty* (1992).

⁵⁶³ Scholtz W *Review, SADC Tribunal* 197.

and Treaty Establishing SADC of 1992. The Community's members approved the Protocol required to set up the Tribunal in the year 2000. Finally, the Protocol entered into force with the signing of the Agreement Amending the Treaty of SADC in August 2001. This amendment marked renewed energy in the integration of the community, making the Protocol on the Tribunal an integral part of the Treaty and thus automatically applicable to all Member States.

The Tribunal shall be constituted to ensure adherence to the proper interpretation of the provisions of the SADC Treaty and subsidiary instruments, and to adjudicate such disputes as may be referred to it.⁵⁶⁴ The Tribunal is also authorised to determine, *inter alia*, any disputes regarding the interpretation and application of the Treaty and its Protocols that cannot be settled amicably.⁵⁶⁵ This provision is reiterated in Article 14 of the Protocol of the Tribunal.⁵⁶⁶ If the interpretation of the SADC Treaty becomes an issue, the SADC Tribunal should be an independent forum to rule on the correct interpretation or application of the legal instruments at stake.⁵⁶⁷ Persistent failure to fulfil obligations under the Treaty can result in the imposition of sanctions on the defaulting member.⁵⁶⁸ However, such sanctions can only be imposed by the Summit.⁵⁶⁹ Accordingly, sanctions can be imposed on a Member State that persistently, without good reason, fails to fulfil obligations assumed under the SADC Treaty.⁵⁷⁰ However, in view of the Summit's consensus-based character, the resort to such drastic measures is not contemplated since the defaulting member would have to support the sanction resolutions.⁵⁷¹

The Tribunal is critical for the integration process for SADC, as it provides a legal basis for all SADC institutions and, most importantly, can play an oversight role during the implementation stages of the integration agenda. Its decisions are final

⁵⁶⁴ Article 16.1 *SADC Treaty* (1992).

⁵⁶⁵ Article 3 *SADC Treaty* (1992).

⁵⁶⁶ According to a 16.2 *SADC Treaty* (1992), the composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol, which shall, notwithstanding the provisions of a 22 of this Treaty, form an integral part of this Treaty, adopted by the Summit.

⁵⁶⁷ Erasmus 2011 *SADC Law Trade Regime* 130.

⁵⁶⁸ Article 33 *SADC Treaty* (1992).

⁵⁶⁹ Article 33.2 *SADC Treaty* (1992).

⁵⁷⁰ Article 33.1 *SADC Treaty* (1992).

⁵⁷¹ Article 10(8), Tribunal Protocol.

and binding.⁵⁷² If SADC is truly rules based, its rulings will, as a rule, be binding on the parties involved.⁵⁷³

However, the discussion of the SADC Tribunal will point to the apparent weaknesses and, most importantly, its failure to sanction its judgment on the Campbell case.⁵⁷⁴ On 28 November 2008, the SADC Tribunal ruled that 78 white Zimbabwean farmers could keep their farms because the Zimbabwean land reform programme had discriminated against them.⁵⁷⁵ The Zimbabwean Government rejected this ruling, challenging its legality and lobbied the Summit to suspend the Tribunal. The Tribunal was dully suspended in August 2010, pending an independent six-month review of its "role, functions and terms of reference".⁵⁷⁶ The review process was required to address *inter alia*, the jurisdiction of the Tribunal; the interface between Community law and national laws in SADC; the mandate of the existing appeals chamber of the Tribunal; the recognition, enforcement and execution of the Tribunal's decisions; the lack of clarity in some provisions of the SADC Treaty and the Tribunal Protocol; the tendency by Member States to give primacy to domestic laws or jurisdiction over SADC law and the reluctance of Member States to relinquish some aspects of their sovereignty to SADC.⁵⁷⁷ However, after the review was completed, SADC justice ministers and attorney generals questioned anew its fundamental elements and then initiated a new partisan review. This led the June 2011 Summit to suspend all work for the Tribunal, going as far as to stop it from hearing new cases unrelated to the Campbell case. The decision not to reappoint or replace the Tribunal's 10 judges, rendered the Tribunal inoperative until at least August next year. The remaining four judges⁵⁷⁸ of the SADC Tribunal described this move as amounting to dissolution of the Tribunal altogether. This is contrary to the findings of the review process that had even recommended that the Tribunal ruling was legitimate and suggested a need for further strengthening of the Tribunal. The Tribunal had acted within its mandate when it took a decision in accordance with Article 32(5) of the Protocol on the

⁵⁷² Article 16.5 *SADC Treaty* (1992).

⁵⁷³ Erasmus 2011 *SADC Trade Regime* 130.

⁵⁷⁴ See *Mike Campbell v Republic of Zimbabwe* SADC (T) No. 2/2007 (28 November 2008).

⁵⁷⁵ Ebobrah 2009 *Human Rights development* 329.

⁵⁷⁶ Scholtz W *Review, SADC Tribunal* 198.

⁵⁷⁷ Scholtz W *Review, SADC Tribunal* 198.

⁵⁷⁸ These judges include the Tribunal President, Mauritius Chief Justice Ariranga Pillay and Justices Rigoberto Kambovo, Onkemetse Tshosa and Frederick Chomba.

Tribunal to make a report of non-compliance to the Summit of SADC. However, this procedure shows the handicap of international judicial institutions in terms of ability to enforce their own decisions. The SADC Tribunal does not have its own judgement enforcement mechanism; it relies on Member States to enforce its decisions.⁵⁷⁹ Article 32(1) of the Protocol on the Tribunal requires the decisions of the Tribunal to be registered and enforced by Member States as foreign judgements.⁵⁸⁰ This creates a gap in the enforcement of the Tribunal's decisions because it subjects the enforcement of the Tribunal decisions to domestic laws that govern the enforcement of foreign judgements in Member States.⁵⁸¹ This provision is an example of a matter on which the SADC instruments are unclear and deserve urgent attention and clarification.⁵⁸²

The weakness of the above mechanism played itself out when the Zimbabwe High Court in the case of *Gramara (Pvt) Ltd and Another v The Government of Zimbabwe* (2009) refused to register and enforce a judgement of the Tribunal on the grounds that the decision of the Tribunal was contrary to public policy in the Republic of Zimbabwe. Zimbabwe's action is contrary to the spirit of regional integration and sends out a wrong message that Member States can undermine regional jurisprudence or fail to honour their obligations under the relevant regional instruments.⁵⁸³ Accordingly, if regional integration is to be firmly rooted within SADC, the SADC Tribunal must be allowed to develop the jurisprudence of SADC law as was the case with the European Court of Justice in the formative years of the European Union.⁵⁸⁴

This discussion demonstrates that political organs of international institutions are vital for the creation of a culture of compliance.⁵⁸⁵ The actions of the Summit are actually illegal since, without amending the SADC Treaty and Protocol on the Tribunal, the Summit has no power to restrict the Tribunal's jurisdiction or to overrule

⁵⁷⁹ Scholtz W *Review, SADC Tribunal* 200.

⁵⁸⁰ Afadameh-Adeyemi and Kalula 2010 *SADC* at 30.

⁵⁸¹ Afadameh-Adeyemi and Kalula 2010 *SADC* at 30.

⁵⁸² Scholtz W *Review, SADC Tribunal* 200.

⁵⁸³ Afadameh-Adeyemi and Kalula 2010 *SADC* at 30.

⁵⁸⁴ Arnulf *European Union*.

⁵⁸⁵ By the organisational structure of SADC, the Summit is made up of Heads of State and Government and is the highest authority of SADC.

the protocol. The suspension of the Tribunal as a result of a Member State's dissatisfaction with the decisions of the Tribunal casts doubt on the acceptability of decisions of supranational institutions by SADC Member States.

In the assumption that the Tribunal gets reinstated, its influence and credibility has already been eroded. If it is envisaged that the Tribunal will then be called upon in the near future to decide on issues relating to regional integration, and if the Zimbabwean experience is used as a precedent, Member States may get away without being sanctioned after a breach of their obligations under the SADC Treaty. This is a dangerous precedent for an institution that is entrusted with developing the jurisprudence of the region.⁵⁸⁶ The Summit can, at will, decide to make decisions that directly impact on the path of regional integration in SADC. There are already several regional integration breaches that are happening in the region, especially to citizens of the region. An example is the charging of high tariffs on imports. This state of affairs was supposed to end by the time of the establishment of the FTA in 2008. The FTA covers 85 per cent of all goods except motor vehicles and parts, as well as clothing material. However, high tariffs on substantially all trade in goods are still being reported in the region. The Tribunal is the most relevant forum to address these issues because the court has jurisdiction to hear matters affecting private citizens.⁵⁸⁷

The Tribunal is empowered by the Treaty to apply SADC law without fear or favour and to pave the way for the harmonisation of business law to the extent that these laws can also be applied by the Tribunal.⁵⁸⁸ The harmonisation of policies or the adoption of similar policies is a signal that a regional arrangement is seeking to achieve a high degree of economic integration.⁵⁸⁹ The drastic action taken to dissolve the Tribunal has sent the worst possible signal to the SADC region and to potential investors and the whole international community, reflecting SADC's poor image on human rights, democracy and the rule of law.⁵⁹⁰

⁵⁸⁶ Afadameh-Adeyemi and Kalula 2010 *SADC at 30*.

⁵⁸⁷ See *Mondlane v SADC Secretariat* SADC (T) No. 7/2009 (5 February 2010); *Kanyama v SADC Secretariat* SADC (T) 5/2009 (29 January 2010).

⁵⁸⁸ The Tribunal will be discussed further in chapter 8 under the legality of SADC Treaty: compliance and compatibility with legal instruments.

⁵⁸⁹ Goode *Dictionary of Trade Policy Terms* 359.

⁵⁹⁰ Rabkin 2011 www.businessday.co.za.

6.2.7 The Secretariat⁵⁹¹ and Executive Secretary's role in regional integration

The SADC Secretariat is the principal executive institution of SADC responsible for strategic planning, coordination and management of SADC programmes.⁵⁹² It is headed by an Executive Secretary and has its headquarters in Gaborone, Botswana.⁵⁹³ The Extraordinary Summit agreed that the Secretariat should be strengthened in terms of both its mandate and the provision of adequate resources for it to be able to perform its functions effectively as provided for under Article 14 of the SADC Treaty and consistent with the Abuja Treaty. Currently, the Secretariat is involved in a robust exercise of recruiting additional staff that will help speed up the process of integration. The SADC Secretariat's main functions are to spearhead strategic planning and management of the SADC programme.⁵⁹⁴ It is also tasked with implementing the decisions of the Summit and Council. This is a key responsibility with specific reference to SADC's regional integration agenda and the implementation of the FTA, customs union and common market falls within the mandate of the Secretariat. The SADC Secretariat will be called upon to vigorously pursue SADC-related objectives in the negotiations and implementation of the SADC, EAC and COMESA Tripartite FTA.

The other task of organising and managing the SADC meetings rests on the shoulders of the Secretariat;⁵⁹⁵ hence the timeframe of the full implementation of the RISDP has to be done properly. The responsibility for financial and general administration⁵⁹⁶ is critical for the SADC integration agenda and funding for the implementation of the RISDP has to be properly managed. Since SADC depends mostly on donor funding, proper management and administration of such is critical if SADC wishes to secure future funding. The SADC Secretariat is called upon to mobilise financial support from both the private and public sector stakeholders for the purpose of funding regional integration programmes like transport corridors.⁵⁹⁷

⁵⁹¹ Article 14 *SADC Treaty* (1992).

⁵⁹² Article 14.1.1 *SADC Treaty* (1992).

⁵⁹³ Article 2.2 *SADC Treaty* (1992).

⁵⁹⁴ Article 14.1.2 *SADC Treaty* (1992).

⁵⁹⁵ Article 14.1.3 *SADC Treaty* (1992).

⁵⁹⁶ Article 14.1.4 *SADC Treaty* (1992).

⁵⁹⁷ Article 14.1.11 *SADC Treaty* (1992).

The representation and promotion of SADC is also a key responsibility of the Secretariat,⁵⁹⁸ as SADC requires key representation at regional and multilateral levels. SADC is highly regarded in Africa as one of the most promising RECs. This reputation is based on to SADC's image and vision when compared to other RECs operating in Africa. In addition, SADC has already been identified by the African Union as one of the key pillars for the AEC. Outside the African continent the Secretariat also represents SADC. Recently, on 29 March 2010, Executive Secretary, Dr Tomaz Augusto Salomão, signed a cooperation framework agreement with the Government of the Federative Republic of Brazil on behalf of SADC in Brasilia, Brazil. The objective of the Agreement between the Government of the Federative Republic of Brazil and SADC is to promote the economic, industrial, scientific and technological development of the people of Brazil and the SADC region. The priority areas for cooperation include, *inter alia*, infrastructure development with a special emphasis on energy, food security, information and communication technology, and science and technology. These are critical areas for the full implementation of the RISDP, in line with the drive for the development of capacity.⁵⁹⁹

The infrastructure problem has been identified as one of the challenges for regional integration in SADC. The cooperation and partnership between the Government of the Federative Republic of Brazil and SADC is intended to take the following forms: the formulation and implementation of programmes and projects in areas of common interest, the exchange of information, undertaking of internships and technical missions, organisation of seminars, meetings and trainee programmes, as well as development of research studies on areas of common interest. All these aspects touch on technology transfer, a critical area for development in Southern Africa. On the same day, SADC also signed an Agreement with the Community of Portuguese Speaking Countries (CPLP) on the Provision of Financial Support for the Translation of the Content of the SADC Website into Portuguese. In terms of the Agreement, CPLP will provide the financial support for the translation of the content of the SADC website into Portuguese.⁶⁰⁰ Such a translation will be useful for SADC since

⁵⁹⁸ Article 14.1.7 *SADC Treaty* (1992).

⁵⁹⁹ Article 14.1.11 *SADC Treaty* (1992).

⁶⁰⁰ SADC 2010 www.sadc.int.

Mozambique and Angola are Portuguese-speaking countries, whose optimal participation in SADC programmes has always been hampered by the language barrier. Through this effort deeper integration will be enhanced.

The Secretariat plays a critical role in the promotion and harmonisation of the policies and strategies of Member States.⁶⁰¹ The task of exercising this mandate is important at this critical phase of the FTA and customs union, as these stages require that Member States find a common ground on the elimination of all trade barriers for the FTA, as well as a compromise on a common external tariff acceptable for all Member States. The common external tariff will be a challenge, since the lowest level in existence in the proposed CU has to be adopted. Mauritius tariffs have already reached zero, hence the CET cannot go beyond that. With most SADC members still relying on tariffs as sources of revenue, a common ground will be difficult to find and an agreement can only be achieved once individual states' policies are harmonised. Common strategies to achieve common objectives are the starting point that the Secretariat is tasked to promote. The Secretariat has also been given a mandate to drive appropriate strategies for self-financing and income-generating activities and investments, as well as undertaking research on community building and the integration process.

The biggest challenge for the Secretariat is still the apparent reluctance on the part of Member States to surrender national initiative and active representativeness to the principle of supranationalism.⁶⁰² The Secretariat is also poorly funded and relies mostly on donor funds. Similarities can be drawn from other regions like ASEAN.⁶⁰³ Hafeez⁶⁰⁴ also observes that:

[t]he ASEAN Secretariat to be understaffed and underfunded, has no open recruitment, staff seconded by member states.

The governments of SADC Member States still fill positions within the Secretariat by way of secondment. When jobs are advertised, interested candidates have to apply

⁶⁰¹ Article 14.1.8 *SADC Treaty* (1992).

⁶⁰² Evans, Holmes and Mandaza *SADC*.

⁶⁰³ See the ASEAN Date Unknown www.asean.org.

⁶⁰⁴ Hafez *Dimensions of Regional Trade Integration*.

through each Member State's national contact point⁶⁰⁵ and applications made directly to the Secretariat are not considered.

6.3 Analysis of the role of SADC institutions in regional integration

From the above discourse, it is apparent that the transformation from SADCC to SADC did not completely bring about the creation of supranational institutions. The current SADC institutional structure is not supranational because it is not independent of individual Member States. According to Tallberg⁶⁰⁶:

Supranational institutions are largely independent of individual Member States and they are vested with decision-making powers which bind Member States.

This is not the case for SADC; evidence from the dissolution of the SADC Tribunal clearly shows that SADC institutions are not independent from the influence of Member States. Furthermore, key institutions within an organisation should work in harmony and exercise their powers in a manner that portrays the common agenda of the regional body. The SADC Summit is clearly playing a bullying role on other institutions. The current SADC setup creates institutions which only have the resemblance of supranational institutions. The pertinent outcome of this analysis is that the SADC institutional framework is not independent from the influence of Member States. The influence of consensus in decision making for all institutions also weakens the organisation. Therefore these institutions cannot be fully relied upon to propel SADC towards deeper regional integration.

6.4 Conclusion

The SADC Treaty and Protocol on Trade provides a solid legal and institutional platform for its Member States to integrate their economies. Each and every SADC institution discussed in this chapter has a unique role to play in this regional integration process. The debate on the success of the SADC regional economic integration agenda has not been the focus of this chapter; hence, it will not be

⁶⁰⁵ Article 16A *SADC Treaty* (1992).

⁶⁰⁶ Tallberg 2002 *Delegation to Supranational Institutions* 23-46.

concluded here. However, it is very important to realise that, in the current SADC legal and institutional framework, though not adequate, the effort of putting SADC on the sphere of regional integration has not gone unrewarded. With the kind of legal mandate given by the SADC Treaty to the various institutions discussed in this chapter, it can be concluded that the SADC Treaty is very ambitious on paper, but the institutions have a poor record with regard to implementation. According to Erasmus, "the question marks are not about the formal legal dimension: it is mostly about poor implementation and insufficient monitoring of compliance". This chapter has clearly demonstrated that SADC institutions are not capable of completely fulfilling their legal obligations, although, in some instances, it was clearly a matter of the legal instruments themselves being incomplete and needing further reform. The Summit not respecting the judgments of the Tribunal is a clear example. The *de facto* suspension of the Tribunal subsequent to Zimbabwe's non-compliance with its orders creates the impression that SADC members are not committed to regional integration under the auspices of SADC.⁶⁰⁷ It can also be concluded that SADC Member States neglect their legal obligations in fulfilling the obligations of the Treaty, for example, the full implementation of the 2008 FTA and the enforcement of the judgments of the Tribunal. A further assessment of the SADC institutional structure is done in chapter 10 where a comparison to the EU institutional structure is undertaken. Thus, under the current legal and institutional framework, SADC's regional integration agenda faces major implementation challenges.

⁶⁰⁷ Scholtz W *Review, SADC Tribunal* 201.

CHAPTER 7

THE ROLE OF SOUTH AFRICA IN SADC REGIONAL INTEGRATION

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7.1 Introduction

The discussion in the previous chapter has shown how SADC institutions are influencing the pace of regional integration. In many respects South Africa's role in SADC is as equally important. For that reason it is prudent to discuss the importance of South Africa as the most influential Member State in the SADC regional integration process. This chapter will expose South Africa's dominance and influence in Southern Africa and how, at times, it uses this position against its weak neighbours.⁶⁰⁸ SADC dependence on South Africa dates back to the colonial era and SADCC times, as discussed earlier in chapter 2.⁶⁰⁹ The main reason for this dependence is the strength of the South African economy.⁶¹⁰ Since attaining a democratic government, South Africa has prioritised Southern Africa in its foreign relations. Accordingly, post-apartheid South Africa has made the pursuit of regional economic rejuvenation, mainly through the instruments of regional trade integration, the cornerstone of its foreign economic policy.⁶¹¹ This is shown by its commitment to all spheres of the SADC agenda, including the political, social and economic wellbeing of the region. South Africa's relationship with the region is delicate. The country has to balance its roles as a regional, continental and global player, which makes it difficult for South Africa to please all these diverse stakeholders in international trade relations. The scope of this chapter focuses on the role of South Africa on trade and regional economic integration. It is also important to mention here that the SADC Treaty does not give South Africa a special mandate to lead in regional economic integration, nor does South Africa feel legally obligated to take this leadership role. This leadership role merely depends on South Africa's economic and political leadership capacity.

South Africa has taken a leading role in the region to address issues such as closer collaboration and economic integration and has used SADC as a vehicle to drive this agenda for the region. To some extent this has benefited the region, since South Africa's spotlight on the global front helps magnify the region's potential in many

⁶⁰⁸ Keet 1996 *Development Southern Africa* 555-566. See also Keet 1997 *Development Southern Africa* 285-293.

⁶⁰⁹ Mahler *Dependency Approaches*. See also Weggors *SADCC's Investment and Trade Cooperation*.

⁶¹⁰ Torado *Economic Development*.

⁶¹¹ Dlamini-Zuma *South Africa's International Relations*.(Report)

respects. However, this has not always brought the desired results for the SADC region. This chapter will show instances where South Africa chooses to isolate itself from the region by signing trade agreements for self interest without considering the interests of other SADC Member States. Likewise the region may choose to isolate South Africa in its own trade agreements with the rest of the world. This is due to the unequal and uneven levels of development between and within the Southern African countries; this imposes an obvious hierarchy of power which, if not managed well, could undermine regional economic integration.⁶¹² The region is characterised by the dominance of the South African economy and a long history of more than a hundred years of cooperation in a particular kind of customs union that has existed since colonial days.⁶¹³

7.2 Background

In fulfilling the legal requirements for SADC membership, on 29 August 1994, at the Heads of State Summit in Gaborone, Botswana, South Africa acceded to the SADC Treaty.⁶¹⁴ In satisfying the South Africa domestic legal requirements, this accession was approved by the Senate and the National Assembly on 13 and 14 September 1994 respectively. After joining SADC, South Africa was given a sector responsibility for finance, investment and health. This was a decision that was informed by South Africa's comparative advantage in this area, as South Africa is undoubtedly the most developed and advanced economy in SADC and on the continent of Africa. This position cannot be ignored if the possibility of regional integration is taken seriously on the continent and in the region. For this reason it is important to point out that, owing to its economic strength, South Africa has the potential to make or break regional integration in the region.⁶¹⁵ South Africa can be described as the economic hub of the region with its economic predominance being underscored by the fact that the country produces 80 per cent of Southern Africa's gross domestic product (GDP).⁶¹⁶

⁶¹² Evans, Holmes and Mandaza *SADC* 12.

⁶¹³ Erasmus 2004 *Tralac Brief*.

⁶¹⁴ Ng'ong'ola 2000 *J Regional Integration and Trade Liberalisation* 133.

⁶¹⁵ Saurombe 2010 *The Role of South Africa* 3.

⁶¹⁶ Soko 2008 *Building Regional Integration* 55-69.

South Africa's role in the region is therefore crucial and commercial relationships between South Africa and the regional economies should, on balance, deliver mutually beneficial outcomes. South Africa's dilemma, however, is to try to balance its domestic, regional, continental and global interests. In this process, the likelihood of a conflict of interest is inevitable. Nevertheless, the success of the SADC regional integration agenda undoubtedly depends on South Africa's willingness to support it and the RISDP cannot be implemented without the support of the biggest economy of the region. SADC needs South Africa but the fear is that the same cannot be said of South Africa needing SADC. It is important to note here that integration will not succeed unless every partner benefits, because anyone who think they will not benefit will not participate and there will then be no integration. The benefit is for everyone or no one.⁶¹⁷

7.3 South Africa's domestic challenges

As mentioned earlier, South Africa is the strongest economy in the region and on the African continent. Many commentators have attributed the prominence of SADC as a REC in Africa to the South African membership. Any REC in Africa would welcome South African membership with open arms, as having preferential trade relations with the best economy on the continent pay dividends. This best economy on the continent makes the country very attractive in the labour market. The country has traditionally attracted workers from all spheres of the SADC workforce, including unskilled, semi-skilled and highly skilled labour.⁶¹⁸ This has also cushioned the adverse effects of the brain drain suffered by South Africa at the hands of other attractive destinations like Europe, Australia, New Zealand, Canada and the USA. South Africa has lost 25 per cent of its graduates to the United States alone.⁶¹⁹ Additionally, South Africans account for 9.7 per cent of all international medical graduates practising in Canada. Of all the medical graduates produced by the

⁶¹⁷ Hazlewood "Economic Integration: Lessons for African Recovery" 601.

⁶¹⁸ Libby *Politics of Economic Power*. See also Molamu *Botswana Migrant Workers*. Unskilled labourers include general labour working in the mines and farms, domestic workers and labourers working on many of the country's 2010 soccer stadium projects. Of late, South Africa's Department of Home Affairs has been issuing permits to economic asylum seekers from Zimbabwe. South Africa also employs a high number of educators from the region. Highly skilled labour includes sectors like medical doctors, engineers, university professors and company CEOs.

⁶¹⁹ Olesen 2002 *Migration Return and Development* 125-150.

University of Witwatersrand in the last 35 years, more than 45 per cent (or 2,000 physicians), have left the country. South Africa's Bureau of Statistics estimates that between 1 million and 1.6 million people in skilled, professional and managerial occupations have emigrated since 1994 and that, for every emigrant, 10 unskilled people lose their jobs.⁶²⁰ SADC is yet to conclude the Protocol on the movement of persons.⁶²¹

South Africa compensates for these losses by attracting labour from the region. However, this has not always been viewed as an advantage by various stakeholders in the South African labour force. Trade unions are very strong in the country to the extent that they resist the employment of foreign nationals.⁶²² The labour market is equally highly regulated by strict employment legislation like the Employment Equity Act that reserves first preference for black South Africans who were disadvantaged during the apartheid past.⁶²³ This means that foreigners are only considered for employment in the country as a third option after the South African blacks and whites. This is not an unfamiliar position since any other country in the world safeguards employment for its people. The presence of strict regulations has, however, failed to stop the illegal employment of foreign SADC nationals in all sectors of the economy, for example the foreign farm workers are known to be harder working than South Africans. They also accept less payment for the same work done.⁶²⁴ Therefore, conflict is inevitable leading to undesirable consequences like the xenophobia attacks of 2008 that saw a significant number of foreigners from the SADC region die at the hands of the locals who accused them of stealing their jobs.⁶²⁵ This shows that in as much as South Africa desires to help its SADC neighbours, pressing issues at home are equally important. Regional commitments are always bound to be influenced by the domestic environment.

⁶²⁰ Ndulu 2004 *Human Capital Flight* 57-91.

⁶²¹ See South African Department of Home Affairs 2006 www.pmg.org.za.

⁶²² Michie and Padayachee 1998 *3 Years After Apartheid* 623-636.

⁶²³ See *Employment Equity Act* 55 of 1998.

⁶²⁴ Croucher 1998 *South Africa's Illegal Aliens* 639-660.

⁶²⁵ For more details on the extent of the xenophobia attacks in South Africa see: <http://www.thetimes.co.za/PrintEdition/News/Article.aspx?id=768363> Accessed 10 June 2010.

7.4 South Africa's regional integration interests

South Africa has significant regional integration interests in the Southern African region, with SADC providing an export market for South Africa's internationally uncompetitive products, as does the SACU.⁶²⁶ According to Alde and Pere,⁶²⁷ South Africa's biggest export market is SADC. This is often overlooked when surveying South Africa's trade figures, the reason being that a large portion of South Africa's exports to other countries is hidden within SACU. Consequently, the importance of the SADC market to South Africa should not be underestimated. Since 1994, the South African government has regarded the Southern African region as the most important priority of its foreign relations. To illustrate the importance attached to this region, the first foreign policy document adopted by the South African democratic government was in fact a "Framework for Co-operation in Southern Africa" approved by Cabinet in August 1996. In terms of this Framework:

South Africa's vision for the Southern African region is one of the highest possible degree of economic cooperation, mutual assistance where necessary and joint planning of regional development initiatives, leading to integration consistent with socio-economic, environmental and political realities.⁶²⁸

South Africa has taken a leading role in the region to address issues such as closer collaboration and economic integration. These include the establishment of an FTA in the region,⁶²⁹ the development of basic infrastructure,⁶³⁰ the development of human resources and the creation of the necessary capacity to drive this complicated process forward, as well as the urgent need for peace, democracy and good governance to be established throughout the region.⁶³¹ The new system of subscription contributions from SADC membership is based on a formula that reflects the members' GDP. Owing to this formula South Africa contributes 20 per

⁶²⁶ SACU is the oldest customs union in the world, see WTO 2003 www.wto.org.

⁶²⁷ Alden and Le Pere *South Africa's Post-Apartheid Foreign Policy* 57.

⁶²⁸ Barber "South Africa's Foreign Policy" 312-344; Chhabra *South African Foreign Policy* 197-211.

⁶²⁹ For more information on the launch of the SADC FTA see Mbola 2008 www.southafrica.info.

⁶³⁰ South Africa is a major shareholder in the Development Bank of South Africa (DBSA), a key lender and sponsor of developmental infrastructural programmes in SADC. The DBSA is at the forefront of financing major infrastructural projects that are key to trade facilitation in SADC, for example the building of roads, railway and communication lines.

⁶³¹ South Africa is one of the biggest contributors to regional and continental peace-keeping missions, e.g. in Rwanda and Darfur, Sudan.

cent of the SADC budget with smaller countries paying a minimum of 5 per cent.⁶³² Thus, South Africa's economic strength is very influential in determining the pace of regional integration in SADC.

However, South African efforts have been hampered by SADC's own deficiencies, typified by institutional differences over leadership, security and democracy, as well as the problem of poor managerial expertise. South Africa has failed to persuade Zimbabwe to hold free and fair elections, or to pressure President Mugabe to release and accept the election results or to step down gracefully.⁶³³

In many other instances South Africa bullies its regional partners.⁶³⁴ The conclusion of the SADC Trade Protocol was delayed by South Africa's commitments to finalise its FTA with the EU.⁶³⁵ South Africa attempts to wield its economic power when negotiating with partners in both SACU and SADC.⁶³⁶ South Africa's military intervention in Lesotho in 1998 was marred by controversy and this created doubt as to its true intentions in the region.⁶³⁷ This ignorance plays itself out in the way some South African government officials view their regional partners, for example in response to questions about the consequences of the negative impact that an EU/SA FTA would have on its SACU members. Former Director of Regional Economic Organisations within the South African Ministry of Foreign Affairs (Willem Bosman) noted that

... there is need for a shock treatment that is necessary to fellow SACU members, ... now you are on your own, South Africa cannot any longer provide for 50% of your budget ... Now you have to tax your own people; you have to work according to the structures of a free independent country.⁶³⁸

⁶³² Hess *New Economic Geography*.

⁶³³ Matlosa "Managing Democracy" 153-176. For a review of the development of relations between South Africa and Zimbabwe, see Van Wyk 1999 *Politeia* 70-95. See also Nkiwane "Zimbabwe's Foreign Policy" 199-214; and Leysens 2000 *Critical Theory* 265-276. South Africa's dominance in Southern Africa is discussed in, for example, Simon 2001 *Trading Spaces* 377-405.

⁶³⁴ Hlatshwayo 2002 *South African Role* 36-37.

⁶³⁵ Bertelsmann 1998 *Trade Integration* 48. South Africa signed the framework agreement for the SA-EU FTA in October 1999.

⁶³⁶ Molefhe 2009 www.mmegi.bw.

⁶³⁷ Mda 2003/4 *South Africa's Role* 138.

⁶³⁸ Interview with Willem Bosman, Director of Regional Economic Organisations, 2 June 1998, Pretoria, South Africa, quoted by Grobbelaar 2004 www.saiia.org.za.

This statement was based on the way in which the SACU revenue pool was shared among Member States. The irony of this statement is that even if the new SACU agreement replaced the old agreement in 2002, SACU remains an apartheid-created relic, designed to ensure that South Africa would have a captive market for its agricultural and non-international competitive manufactured products.⁶³⁹ This economic dependency by the SACU states on South Africa was part of a strategy to ensure South Africa's economic hegemony.⁶⁴⁰ If the SACU states experienced economic deterioration as a result of the EU/SA FTA, who will buy South Africa's non-international competitive manufactured products? By making global level integration a priority, South Africa also risks national and regional economic destabilisation.

In the negotiations on the SADC FTA, South Africa negotiated on behalf of SACU, largely without any discussion with the other SACU members.⁶⁴¹ Although this resulted from a lack of capacity on the part of the other SACU members, there can be little doubt that South Africa primarily pursued its own interests and the SADC FTA agreement was in large part tailored to suit the perceived interests of its business community. This is reflected in the exclusion of motor vehicles, motor vehicle parts and certain clothing material from the goods that can be traded under the duty-free 2008 FTA.⁶⁴² Furthermore, in the negotiations on the SADC FTA, South Africa's strategy was essentially aimed at opening up regional markets for its products, while protecting its domestic agricultural and manufacturing sectors as much as possible.⁶⁴³ Despite the reservations against South Africa, the countries in the region hope to benefit from improved access to South Africa's market and to attract FDI from its business community.⁶⁴⁴ Yet, there are occasionally mixed feelings about FDI, as some fear a South African "take over" of their domestic economies. This is a sentiment that prevails in countries where South African businesses like the Shoprite chain of supermarkets have set up operations; in

⁶³⁹ Walker 2009 ictsd.org.

⁶⁴⁰ Qobo Date Unknown www.politicsresearch.co.za.

⁶⁴¹ Lee *Political Economy of Regionalism* 130.

⁶⁴² Saurombe 2011 *The Southern African Development Community* 1-33

⁶⁴³ Jourdan Date Unknown www.unctad.org. See also Suranovic 1999 internationalecon.com; and Lee *SADC and the Creation of a Free Trade Area*.

⁶⁴⁴ See UNCTAD 1999 www.unctad.org.

Angola, Malawi, Mozambique, Tanzania, Zambia and Zimbabwe.⁶⁴⁵ Products sold in these stores are exclusively South African. Perishables like fruits are still imported from South Africa, while similar and even cheaper products can be sourced from local suppliers within these countries.⁶⁴⁶ In Tanzania, South African operated hotels and lodges show the same picture; even soap and toothpaste is from South Africa. Surely these South African companies investing in SADC countries should do their part to promote products from the host countries. The Tanzanian banking sector has also been taken over by South African banks.⁶⁴⁷

Since joining SADC, South Africa has become very involved in the activities of the Community.⁶⁴⁸ The activities are transportation and communications, agriculture, trade, energy and mining, and are actively pursued by the relevant South African line function departments. South African interests in access to economically strategic resources may be of even greater importance than free trade. These interests relate to mining, water and energy. South Africa has a relatively developed mining industry and seeks to secure investment destinations for it.⁶⁴⁹ In addition, South Africa has vast interests in the DRC's mining potential and to a lesser extent its water.⁶⁵⁰ Both South Africa's agricultural and industrial sectors are dependent on regional water resources, particularly for their future development.⁶⁵¹ Future water imports are expected to come from countries further north. It is argued that the military intervention of South Africa in 1998 on a purported SADC mandate was motivated by the objective of avoiding a disruption in the Lesotho Highland Water Project to the industrial hub of Johannesburg.⁶⁵² All these South African interests in SADC are safeguarded by bilateral treaties that are permissible under SADC law.

⁶⁴⁵ Bench Marks Foundation 2009. www.bench-marks.org.za. See also Lutchman and Naidu 2004 *Post Apartheid South Africa* 343-378; and Economic Commission for Africa 2004 www.uneca.org.

⁶⁴⁶ Dakora, Bytheway and Slabbert 2010 *Africanisation* 748-754.

⁶⁴⁷ See Anonymous 2010 en.islamtoday.net.

⁶⁴⁸ Leon "Africa's Economic Future".

⁶⁴⁹ Grobbelaar 2004 www.saiia.org.za. See also Naidu "Unmasking South Africa's Corporate Expansion".

⁶⁵⁰ Miti "South Africa's Relations with its SADC Neighbours" 91.

⁶⁵¹ Erasmus 2003 *Sustainable Sharing* 1.

⁶⁵² Ajulu "Survival in a Rough Neighbourhood". The current South African President, Jacob Zuma has reiterated that the Zimbabwean problems cannot be isolated from South Africa.

Another major interest of South Africa in the region is that of limiting immigration.⁶⁵³ This could be one of the reasons why South Africa is at the forefront of solving the Zimbabwean crisis since this is having a negative impact on the South African economy, for example the public health expenditure in containing the cholera outbreak.⁶⁵⁴ In reference to what has already been discussed, some sections in the South African population became involved in xenophobic attacks on foreigners as a result of a scramble for scarce resources.⁶⁵⁵ The current South African President Jacob Zuma has reiterated that the Zimbabwean problems cannot be isolated from South Africa itself. Accordingly, South Africa has taken a leadership role in making sure that the Zimbabwean problems are resolved since regional peace is essential for the national economy of South Africa; more so for SADC economic integration. However, many have questioned former South African President Thabo Mbeki's impartiality in the process. Mbeki's subsequent unwillingness to criticise President Robert Mugabe's dismal rule in Zimbabwe was devastating for NEPAD's credibility.⁶⁵⁶ What this means is that there has to be a balance of interest between national, regional and global integration aspirations for South Africa.

7.5 South Africa's leadership role in Africa

South Africa's African vision is more embodied in the AU's initiatives and the NEPAD.⁶⁵⁷ The underlying philosophy of South Africa's vision is that South Africa's destiny is inextricably linked to that of the region and the rest of Africa.⁶⁵⁸ South Africa is an active champion of the AU and NEPAD, playing an essential role in reshaping the security discourse on the continent.⁶⁵⁹ Accordingly, South Africa has actively championed NEPAD and has expended enormous financial and diplomatic capital on efforts to end conflicts in several African countries.⁶⁶⁰ It has also invested heavily in developing the AU and its constituent structures, including the

⁶⁵³ See Miti "South Africa's Relations with its SADC Neighbours" 91.

⁶⁵⁴ Hogan 2008 www.info.gov.za.

⁶⁵⁵ Klotz 1997 www.iss.co.za; see also Masuku 2006 www.iss.co.za.

⁶⁵⁶ Taylor 2006 www.foreignaffairs.com.

⁶⁵⁷ Akokpari 2004 *The AU, NEPAD* 243-263.

⁶⁵⁸ Akokpari 2004 *The AU, NEPAD* 243-263.

⁶⁵⁹ Ezeoha and Uche *South Africa, NEPAD and the Africa Renaissance*. See also Mbeki 2003 *African Union* 44-45.

⁶⁶⁰ See Anonymous (a) *The Economist*.

Pan African Parliament.⁶⁶¹ Both the Pan African Parliament and the NEPAD Secretariat have their seats in South Africa. This is in recognition of the reality that South Africa's destiny is inextricably tied to that of Africa. South Africa is leading the continent into an era of stability and prosperity, encapsulated in Mbeki's Africa renaissance doctrine.⁶⁶²

Evidence abounds from foreign policy undertakings during Mandela's presidency that strove to propound the cardinal tenets of human rights, democracy, justice and international law.⁶⁶³ The old South Africa era of regional destabilisation has made way for a policy that emphasises dialogue and mediation as key means of conflict resolution in the region. This is a new policy South Africa has sought to export to the rest of Africa.⁶⁶⁴ South Africa has successfully helped in bringing peace to Angola, DRC and Sudan, to mention just a few examples. In these activities South Africa is given a legal mandate without the required funding by the AU to resolve conflicts in Africa. Thus the economic strength of South Africa makes it possible to fund regional and continental peace activities. In many instances, these efforts have been followed up by the establishment of trade and economic ties that impact positively on regional integration in SADC.

South Africa has also shown a more developmental rather than a narrowly mercantilist approach to the region and Africa more generally. This ideology was confirmed by the former South African Department of Trade and Industry⁶⁶⁵ Director General Tshediso Matona's remarks when he stated:

South Africa's economic strategy in Africa was guided by asymmetry and the country needed to make bigger concessions in trade and economic dealings with African partners. This strategy needed to be multi-faceted by promoting trade and supply capacity as well as being conducive to promoting investment and infrastructure development. Finally this strategy had to be located within the NEPAD framework and should emphasise the importance of partnerships on the continent.⁶⁶⁶

⁶⁶¹ Majavu *Z Net Africa*.

⁶⁶² Seale *Daily News*.

⁶⁶³ Dlamini 2003/4 *Ten Years of Foreign Policy* 1-2.

⁶⁶⁴ Mda 2003/4 *South Africa's Role* 1-3

⁶⁶⁵ Hereafter "Dti".

⁶⁶⁶ Saurombe A "The Role of South Africa".

According to Davies,⁶⁶⁷ the original vision for SADC was not confined narrowly to trade per se, but

... what is needed in the Southern African region is not a programme of trade integration alone, but one combining trade integration, sectoral cooperation and policy coordination in ways that address the major challenges of developing production structures and infrastructure as well as promoting mutually beneficial trade.

This outlines neatly the broad regional integration imperative that is high on the political agenda in sub-Saharan Africa. Ultimately, the Department of Trade and Industry (Dti) wishes to see the establishment of integrated regional manufacturing platforms capable of competing globally. This can be achieved by building institutional strength to effectively negotiate with external actors.

7.6 South African's global economic integration agenda

South African economic integration aspirations go beyond SADC and the African continent, thus furthering SADC's integration agenda is not the only priority for South Africa. South Africa needs to integrate its economy to a greater extent into the world economy.⁶⁶⁸ This could well be at the expense of regional partners. However, for South Africa to attract good FDI, an environment of peace and tranquillity needs to be seen not just in South Africa but across the region.⁶⁶⁹ Many global players who are interested in investing in Africa see South Africa as a base.⁶⁷⁰

A further complication to South Africa's role in SADC is compounded by external partners in the region, especially the EU and the USA. With regard to the EU, the outcomes of the EPA negotiations will fundamentally change the pace and nature of regional economic integration in Africa.⁶⁷¹ In addition, other global players refuse to be sidelined. This has been shown by the establishment of the China–Africa office in

⁶⁶⁷ Davies 1996 www.issafrica.org. Davies is now the South African Minister of Trade and Industry.

⁶⁶⁸ Nkuhlu "New Partnership for African Development".

⁶⁶⁹ Dupasquier and Osakwe "FDI in Africa".

⁶⁷⁰ Marafa 2007 www.uneca.org.

⁶⁷¹ See Szepesi Date Unknown www.ecdm.org. See also Bertelsmann-Scott and Draper 2005 "Impact of Economic Partnership Agreements" www.ictsd.org.SAIIA

South Africa in March 2008.⁶⁷² South Africa's Trade development and Cooperation Agreement with the EU will now be discussed in highlighting the impact of South Africa's global aspiration on SADC.

7.6.1 The Trade Development and Cooperation Agreement (TDCA)⁶⁷³

South Africa has tried to integrate its economy in the world economy in various ways, but at times this has come at the expense of its regional integration partners. It is important to mention here that this was inevitable in the long run. The EU/SA TDCA agreement establishing an FTA reflects this phenomenon. This agreement provided for the establishment of an FTA between the parties, with a ten-year transition period for the EU and twelve years for South Africa.⁶⁷⁴ The negotiation of the TDCA came about as a consequence of the EU's unwillingness to offer preferential access to South Africa under the Lome/Cotonou processes. The TDCA is reciprocal in nature; hence it establishes compliance with GATT Article XXIV.⁶⁷⁵ South Africa was only granted an observer status in the SADC-EPA negotiations since South Africa had already established trade relations with the EU.⁶⁷⁶ The problem, however, was that this process excluded South Africa's SACU and SADC neighbours who are affected by this agreement.⁶⁷⁷ South Africa signed this agreement knowing that it would have a devastating impact on the members of both SACU and SADC. With respect to SACU, the agreement was reached without consulting with the other SACU members.⁶⁷⁸ This was a clear disregard of the SACU Treaty, which stipulates that such agreements must be approved by all SACU members.⁶⁷⁹ By acting independently of other regional members, South Africa is trying to maximise benefits for itself at their expense. SADC trade with the EU is skewed in favour of South

⁶⁷² See Anonymous 2009 english.peopledaily.com.cn. For a detailed history of China's relations with Africa, see Bräutigam 2003 *Close Encounters* 447-467; Chang *From Brothers to Partners*; Eisenman and Kurlantzick 2006 *China's African Strategy* 219-224; Wenping 2003 bic.cass.cn; Kaplinsky, McCormick and Morris 2006.uneca.org 37; King "Aid Within the Wider China-Africa Partnership"; Lambard 2007 *Africa's China Card* 1; Siddiqi 2007 *African Markets* 4; Smith 2006 www.wsws.org.

⁶⁷³ Hereafter "TDCA".

⁶⁷⁴ Page *et al* *SADC-EU Trade Relations* 34.

⁶⁷⁵ See *Report of Panel on EEC-member States' Import Regimes for Bananas DS38/R* (1994) (unadopted) para 159. Article XXIV provisions set out the criteria for the establishment of FTAs and customs unions.

⁶⁷⁶ Le Roux *Business Day*.

⁶⁷⁷ Draper "Overview of South Africa's Trade Negotiation Agenda".

⁶⁷⁸ Saurombe A "SADC Trade Agenda" 695-709.

⁶⁷⁹ Article 31 *SACU Agreement* (2002).

Africa.⁶⁸⁰ Furthermore, South Africa's classification in the Uruguay Round as a "developed country" has had some devastating effects on its SACU and SADC partners. The implementation of developed country commitments in the Uruguay Round meant that South Africa's average bound rate was reduced to almost half that of comparator countries. The reality was that since South Africa is part of SACU, these cuts would apply to three small and vulnerable economies and least developed countries that would have not otherwise have taken formula cuts.⁶⁸¹

With respect to SADC, the fear of EU goods flooding the regional market has been realised.⁶⁸² Once EU goods have entered the South African market, controlling their movement into SADC and SACU is clearly impossible. This has undermined the agricultural and industrial sectors. Some SADC Member States have complained that South Africa only became serious about completing the negotiation for the SADC FTA when it had completed negotiations with the EU. Some South African trade officials, however, feel that the EU/SA FTA agreement will allow them to become more integrated into the world economy, notwithstanding the fact that the consequences could also be quite severe for South Africa's own economy.⁶⁸³ A look at the TDCA agreement will show that South Africa has divided attention, with more focus on its trade with the EU than SADC.⁶⁸⁴ This Agreement pursues several objectives: strengthening dialogue between the parties, supporting South Africa in its economic and social transition process, promoting regional cooperation and the country's economic integration in Southern Africa and in the world economy, and expanding and liberalising trade in goods, services and capital between the parties. The extent of loss of revenue is very high since SACU and SADC states will not be able to levy duties on the EU products once they have been imported through South Africa.

⁶⁸⁰ Ngwenya 2002 *Fair Deal* 24-32.

⁶⁸¹ *WTO Official Document WT/MIN(09)ST/137* (2009).

⁶⁸² European Commission Date Unknown ec.europa.eu: "The goods exports from the EU to South Africa in 2008 amounted to 20,215 million Euros in 2008, some of these products end up in the SADC region especially in light of the 2008 SADC FTA and more severely the envisaged Customs Union of 2010."

⁶⁸³ Van Heerden "Implications for South African Business" 99-105.

⁶⁸⁴ See Bertelsmann 1998 *Trade Integration* 48.

Based on respect for democratic principles, human rights and the rule of law, the Agreement establishes regular political dialogue on subjects of common interest, both at bilateral and regional level (within the framework of the EU's dialogue with the countries of Southern Africa and with the group of the African, Caribbean and Pacific (ACP) countries). The duration of the Agreement is unspecified, but provision is made for its revision every five years of the date of its entry into force in order to consider possible amendments. The Agreement covers a number of areas and includes a future development clause making it possible to widen the field of cooperation. The TDCA⁶⁸⁵ establishes preferential trade arrangements between the EU and South Africa, with the progressive introduction of an FTA.⁶⁸⁶ The EU is South Africa's main trading and investment partner. Accordingly, the FTA aims to ensure better access to the community market for South Africa and access to the South African market for the EU. As a result, it plays an important role in South Africa's integration into the world economy. The agreement covers around 90 per cent of current bilateral trade between the two parties.

The Agreement provides for the liberalisation of 95 per cent of the EU's imports from South Africa within ten years, and 86 per cent of South Africa's imports from the EU in twelve years. In order to protect the vulnerable sectors of both parties, certain products are excluded from the FTA and others have been only partially liberalised. For the EU, these are mainly agricultural products,⁶⁸⁷ while for South Africa they are industrial products, in particular certain motor vehicle products and certain textile and clothing products. However, since December 2006, provision has been made for a strengthening of trade liberalisation in the motor vehicle sector.

The Agreement sets out detailed rules of origin in order to ensure that products benefiting from the preferential arrangements come only from South Africa or the EU, effectively blocking SADC products. To take account of modern international production processes, special provisions make the rules of origin more flexible. Accordingly, South Africa and the EU may implement safeguard measures when an imported product threatens to cause serious injury to the national industry. The

⁶⁸⁵ The *TDCA Agreement* (2004).

⁶⁸⁶ Article 5 *TDCA Agreement* (2004).

⁶⁸⁷ This is to the disadvantage of the SADC partners, whose strength lie in exporting agricultural products.

Agreement also allows South Africa to adopt transitional safeguard measures (e.g. an increase or reintroduction of customs duties). In addition, similar measures make it possible to protect the economies of members of the Central African Customs Union and the outermost regions of the EU. On the South African side, poor border controls may allow EU goods to slip through into SADC Member States.⁶⁸⁸

The Agreement includes provisions aimed at avoiding abuse by firms with a dominant position in the market and thus ensuring free competition among the companies from the EU and South Africa. Cooperation takes place within the framework of consultations between the competent authorities. In addition, the EU provides technical assistance to help South Africa restructure its competition laws. The Agreement also recognises the need to provide adequate protection for intellectual property and provides for urgent consultations, where necessary, and technical assistance for South Africa. SADC is clearly opposed to the provisions protecting intellectual property rights, especially in the pharmaceuticals industry, since this will drastically increase the price of medicines for a region ravaged by diseases like malaria, cholera and HIV and Aids.

Lastly, the TDCA provides for close cooperation in a wide range of fields linked to trade, including customs services, the free movement of services and capital, and technical obstacles such as certification and standardisation. The EU has therefore long viewed itself as a natural supporter of regional initiatives.⁶⁸⁹ It is up to South Africa to safeguard SADC's interests in its trade relations with the EU. South Africa has to strike a balance between its interests and those of SADC.

7.6.2 Analysis of the impact of the TDCA on SADC regional integration

The TDCA impact on SADC is closely associated with the effects it has on the BLNS countries, since all the BLNS countries are SADC members. The Agreement has had a large impact on the BLNS who are effectively *de facto* parties to the TDCA.⁶⁹⁰ Because of the common external tariff in SACU, the BLNS will be forced to reduce

⁶⁸⁸ Thomas 2000 *EU-South Africa Trade* 20-41.

⁶⁸⁹ European Commission 1996 aei.pitt.edu.

⁶⁹⁰ Grant *Southern Africa and the European Union*.

their tariffs on imports from the EU at the rate agreed to by South Africa in the TDCA. This will have an impact on tariff revenue for the BLNS and it has been estimated that this could be around a 21 per cent decrease.⁶⁹¹ Botswana has been estimated to lose around 10 per cent of its total national income as a result of the TDCA.⁶⁹² In a further negative twist, as a result of the rules of origin provisions in the TDCA, the BLNS will not be able to take advantage of the preferential access to the EU market provided for South Africa. The result of the TDCA could, therefore, be described as "lose-lose" for the BLNS and SADC.⁶⁹³ This impact will further be felt in the mega tripartite FTA that also includes the EAC and COMESA.

7.6.3 Other influential role players

The United States of America has jumped at the opportunity to establish economic ties with South Africa after seeing the EU's prospective penetration of the South African market. Talks between South Africa and the US on an FTA had fallen through because demands made by the USA were deemed to be detrimental to South Africa's development.⁶⁹⁴ Also, the USA wanted complete access to South African markets while refusing to open up its own markets to South African products.⁶⁹⁵ In all these endeavours South Africa did not even consult its SADC neighbours. This is a clear sign that South Africa is feeding into the notion of South African exceptionalism, leading to a further divide between South Africa and its SADC partners, with many experiencing nostalgia about the good old days when South Africa was not a member of SADC.⁶⁹⁶ If the USA had given South Africa attractive terms, the proposed SA-USA FTA could have been concluded, which would, consequently, have had a detrimental effect on SADC and SACU members.

The discussion above indicates that South Africa's economic interests extend far beyond the region (SADC), to the continent of Africa and ultimately the globe. For this reason it is unfair for SADC to expect South Africa to push exclusively for the

⁶⁹¹ Greenberg 2000 *Raw Deal* 16-19.

⁶⁹² Sandrey "Is the Region Ready?"

⁶⁹³ Grant *Southern Africa and the European Union*.164.

⁶⁹⁴ See Trade Reports International Group 2006 www.twinside.org.sg.

⁶⁹⁵ The *Washington Trade Daily* "interview with Tshediso Matona", former Director General of the Department of Trade and Industry (Dti) quoted in *Business Day* (WTD 9/20/06).

⁶⁹⁶ Lee *Political Economy of Regionalism* 40.

SADC economic integration agenda while ignoring the other aspects of the global economy. Trade negotiations in South Africa, as in many countries, have become intertwined with foreign policy.⁶⁹⁷ In the multilateral system, for example, the foreign policy imperative revolves around how to mesh South Africa's economic interests with the positions taken by the African group in the WTO, given that resolving Africa's problems is the central foreign policy terrain.⁶⁹⁸ In keeping with global trends, a new wave of bilateralism has broken out. This is broadly guided by the DTI's Global Economic Strategy, and is divided into three tracks. The first track is the European Free Trade Area (EFTA) and Mercosur; the second is India and China and the third is Singapore/ASEAN, Japan, South Korea, Nigeria and Kenya. Track one is currently underway with the EFTA recently completed and Mercosur close to completion. Negotiations with the USA have run into serious difficulties because the USA insists on the inclusion of sensitive areas like investment, government procurement and other Singapore issues that are not negotiable as far as South Africa is concerned. Track two will commence at a later stage.

7.7 The role of SADC Member States in getting a fair deal from South Africa

Individually, almost every SADC Member State has bilateral agreements with South Africa operating independent of the SADC Treaty.⁶⁹⁹ This has resulted in intra-SADC trade being conducted outside the legal mandate of the SADC Protocol on Trade. However, it has to be pointed out here that the SADC Treaty does not forbid such undertakings as long as they are not in conflict with the Treaty. Since South Africa has interests in the region as shown in these bilateral agreements, seeking a better deal in the interest of the region will be crucial. SADC members will not need to look far. The fact that South Africa is very particular when signing its own agreements with the EU, USA and other major role players can be used as a model by the neighbours. They need to have serious negotiations with South Africa. SADC should also insist on South Africa upholding the SADC Treaty in all its trade agreements. South Africa's participation in SADC allows access to a market of approximately 140

⁶⁹⁷ South African Department of Foreign Affairs 1996 www.info.gov.za.

⁶⁹⁸ Draper and Khumalo 2008 www.voxeu.org.

⁶⁹⁹ See generally Malik 2011 www.12graysinn.com.

million, which is expected to grow at an annual rate of around 3 per cent.⁷⁰⁰ This means that SADC can also force South Africa into economic integration relationships that are mutually beneficial. Smaller players have some space to provide ideas, to take forms of entrepreneurial and technical leadership, as well as combine in blocking coalitions of the weak.⁷⁰¹ SADC Member States can still exercise their sovereignty and limit South Africa by invoking the SADC principle of non-interference⁷⁰² in the internal affairs of Member States.⁷⁰³ SADC Member States, notably Angola and Zimbabwe, have refused to accept South Africa as the guardian of their interests.⁷⁰⁴ Mda observes that:

Naturally, a group of nation states will resent a counterpart that dominates, whether by default or design. Perceptions of an overwhelmingly powerful South Africa could cause feeling of unease amongst its peers, in a region that still emphasises the importance of military prowess as the ultimate means of enforcing authority.⁷⁰⁵

South Africa's economic dominance of the SADC region is the key reason why Zimbabwe opted to negotiate for the EPAs under the Eastern and Southern African configuration created under COMESA. COMESA's attraction to Zimbabwe derives partly from Harare's calculation that it has a competitive advantage over its COMESA regional partners that it does not have within SADC.⁷⁰⁶

This discussion has shown that South Africa has tried to exercise a balancing act in terms of trying to satisfy its own domestic, regional, continental and global demands on the economic integration front. South Africa's overwhelming political and economic dominance of its regional partners puts the country in a strong position to assume a leadership role in the region.⁷⁰⁷ South Africa has shown itself willing to provide goods, services and leadership for its weaker SADC neighbours.⁷⁰⁸ What is clear, however, is that South Africa cannot afford to be held back by SADC

⁷⁰⁰ See SouthAfrica.info Date Unknown www.southafrica.info.

⁷⁰¹ Tussie "Regionalism" 99-116.

⁷⁰² Soko 2008 *Building Regional Integration* 55-69.

⁷⁰³ Aden and Soko 2005 *South Africa* 367-392.

⁷⁰⁴ Mda 2003/4 "South Africa's Role". 159.

⁷⁰⁵ Mda 2003/4 "South Africa's Role". 159.

⁷⁰⁶ Masiwa 2005 *Trade Policy Briefing* 153-176.

⁷⁰⁷ Dolega 2009 www.stratfor.com.

⁷⁰⁸ Kalaba 2007 www.sadctrade.org.

neighbours whose economies still have a long way to progress.⁷⁰⁹ Members of SADC should actually use South Africa's position to their advantage by upgrading their economies to match that of South Africa. They should negotiate for better deals from South Africa, since they rely on each other for intra-regional trade. South Africa legitimises its predominance in SADC and positions itself as the central state around which SADC integration can be rooted. South Africa has also managed to bring to the doorsteps of SADC competitive trade partners like the EU, the USA and the first world. It is ideally placed as both a neighbour and a leader to the benefit of the whole region. As long as South Africa remains a member of SADC, differences in levels of economic development will continue to plague the region. However, South Africa's SADC membership is an advantage to the region and the benefits far outweigh the disadvantages. It is not envisaged that South Africa will quit SADC in the foreseeable future, hence the fulfilling of SADC integration agenda can still be realised as long as the problems highlighted are addressed.

The Republic of South Africa's relatively developed economy and dominance of the regional market holds a risk of economic polarisation within the region, while the pace of South Africa's economic reforms could accelerate or delay regional integration initiatives.⁷¹⁰ To accommodate sub-regional objectives such as "balanced development" there is a need for counterbalancing or countervailing mechanisms, but none of the predominant countries is sufficiently wealthy to consider introducing outright compensatory mechanisms.⁷¹¹ Furthermore, South Africa, and implicitly SACU, could possibly have an incentive to strengthen economic relations and cooperation with developed countries and markets, rather than in South-South regional cooperation with the countries in the region and their intractable internal problems. According to Van Niekerk⁷¹² the question is:

How can a regional integration strategy accommodate the disparate levels of development in Southern Africa, which from South Africa's perspective resembles more a North-South relation?

⁷⁰⁹ Hess 2004 eprints.ru.ac.za.

⁷¹⁰ See Kritzinger-van Niekerk Date Unknown siteresources.worldbank.org.

⁷¹¹ Kritzinger-van Niekerk Date Unknown siteresources.worldbank.org.

⁷¹² Kritzinger-van Niekerk Date Unknown siteresources.worldbank.org.

The answer to this question comes from Gathii's proposition of variable geometry. His call is for RTAs like SADC to develop rules, principles and policies for economic integration treaties that give Member States particularly the poorest members' two options. The first option is for policy flexibility and autonomy to pursue at slower paces time-tabled trade commitment and harmonisation objectives. The second option is to develop mechanisms to minimise distributional losses by creating opportunities such as compensation for losses arising from implementation of region-wide liberalisation commitments and policies aimed at the equitable distribution of the institutions and organisations of regional integration to avoid concentration in any other member.

7.8 Conclusion

The role of South Africa in SADC has been discussed as having both a building and a compromising effect on the organisation. However, what is not in doubt is the dependence of the region on South Africa for both political and economic leadership. South Africa has been instrumental in resolving political conflicts in the region. In addition, if SADC membership contributions are based on each Member State's GDP, South Africa would contribute in excess of 20 per cent of the total SADC finances. However, from a SADC Treaty point of view, there is no legal basis to single out South Africa as a leader of the regional organisation; hence, South Africa has the discretion to make regional integration decisions that ultimately suit its wide-range of objectives. On the other hand South Africa's leadership role in formulating domestic legal rules impacting on of global trade like intellectual property rights will impact on the region in both negative and positive terms. There is certainly a need to include treaty obligations that can define and regulate the relationship between unequal trade partners. The principle of solidarity within the SADC Treaty needs to be clearly expressed so that the political and economic responsibilities of South Africa can find meaning in regional economic integration for the region.

This chapter has demonstrated that South Africa is the gateway to the Southern African region and any other Member State in SADC that is seriously interested in regional integration and trade liberalisation will have to let South Africa play a significant role. For this reason the SADC bloc will have to find a better way to

manage the role of South Africa going forward, since the benefits of its membership in the bloc far outweigh its absence. On an individual basis, many SADC countries have concluded economic bilateral treaties with South Africa, a move that is not forbidden under the SADC Treaty and Protocol on Trade. Through these bilateral treaties, these Member States are able to seek trade preferences that are equally beneficial to SADC regional integration.

CHAPTER 8

OBSTACLES TO SADC ECONOMIC INTEGRATION

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8.1 Introduction

A number of challenges to SADC economic integration will be identified in this chapter. Some of these challenges are generic in nature and are common on the rest of the African continent. At the same time some of the challenges relate to the SADC region specifically. This chapter is not being exhaustive of all the economic integration challenges for SADC; an attempt is therefore made to identify the major ones. Many of these challenges are not legal *per se*, but play a very significant role in hindering deeper economic integration in the region. From a legal point of view, most challenges relate to Member States signing a number of trade agreements with conflicting or duplicated objectives. This challenge of overlapping memberships among African states remains topical, while at the same time the Member States are reluctant to resolve the issue even though some credible solutions have been identified. Overlapping memberships often lead to the challenge of establishing which RTA judicial jurisdiction applies in the face of alternatives. SADC Member States also face the challenge of different levels of economic development. The previous chapter has demonstrated how the South African strong economy dominates the rest of the region. The other challenge identified within this chapter is termed "the brotherhood syndrome", a term referring to the failure by African states to criticise each other on issues of differences, especially in areas like democracy, human rights and non-compliance with international law that forms part of the agreements they sign. The brain drain among SADC Member States will also continue to negatively affect the regional labour market where developed economies like that of South Africa continues to benefit from weak economies in the region. The urgent finalisation of the Protocol on the Movement of Persons in SADC is therefore required as a way of resolving this challenge. The problems relating to lack of infrastructure development has already been identified in chapter 3 as one of the challenges that continues to hamper intra-regional trade development.

8.2 Overlapping memberships

The RTAs' configuration is diverse and becoming increasingly more complex, with overlapping RTAs and networks of RTAs spanning within and across continents at

the regional and sub-regional levels.⁷¹³ It is clear that there now exists a plethora of RTAs in all hemispheres of the world.⁷¹⁴ The proliferation of regional economic arrangements on the African continent is one of the major obstacles to deeper integration. Of the 54 countries in Africa, only nine belong to one RTA while the rest belong to at least two or more RTAs.⁷¹⁵ This problem is compounded by the fact that these different arrangements are at different stages of economic integration. Moreover, the challenges of multiple memberships is a major cause for concern, as conflicting interests and varied commitments are stalling the economic integration process.⁷¹⁶ Swaziland belongs to three RTAs- COMESA, SADC and SACU. Of all the five members of the EAC, four are also members of COMESA while Tanzania is a member of SADC. The eight members of SADC are also members of COMESA. Consequently, no synchronised developmental agenda has been possible with SADC Member States. The fact that SACU is already a CU and SADC wants to achieve the same status raises the possibility of conflict with the WTO since, according to GATT Article XXIV; a Member State can only belong to one CU at a time. A more detailed discussion on the legality of customs unions under the WTO rules will be discussed in chapter 10.

The multiplicity of regulations and duplication of procedures operate to create business uncertainties that hamper interregional trade. The duplication of efforts through the creation of too many groupings with no logical justification is a clear problem. If all the countries in the SADC region belonged to one existing regional organisation, there might be little confusion. However, in a situation where membership is not uniform, or at least consistent with geographical delimitation, and where the agendas of the different organisations are inconsistent and work against each other, the situation becomes hopelessly confused. This duplication of membership has to be sorted out before regional integration objectives can be realised. SADC countries have to make hard choices regarding their membership in the overlapping regional trade structures and agreements.⁷¹⁷ The general uncertainty and unpredictability caused by this also impacts negatively on the investment climate

⁷¹³ Sampson and Woolcock (eds) *Regionalism* 12.

⁷¹⁴ Sampson and Woolcock (eds) *Regionalism* 12.

⁷¹⁵ Gathii.2009 works.bepress.com.

⁷¹⁶ Saurombe A "The context of Economic Partnership Agreements" 362.

⁷¹⁷ Bertelsmann-Scott "Impact of the Economic Partnership Agreement" 83-116.

in these countries and their organisations. There is an agreed need that these overlaps have to be addressed as they are a clear problem. The recognition of overlapping systems in interpreting foreign policy alternatives and possibilities for states with dual membership is both a more powerful and more realistic way of looking at foreign policies than is the attempt to force such states exclusively into one area or the other.⁷¹⁸

8.2.1 The extent of multiple memberships and their legal implications

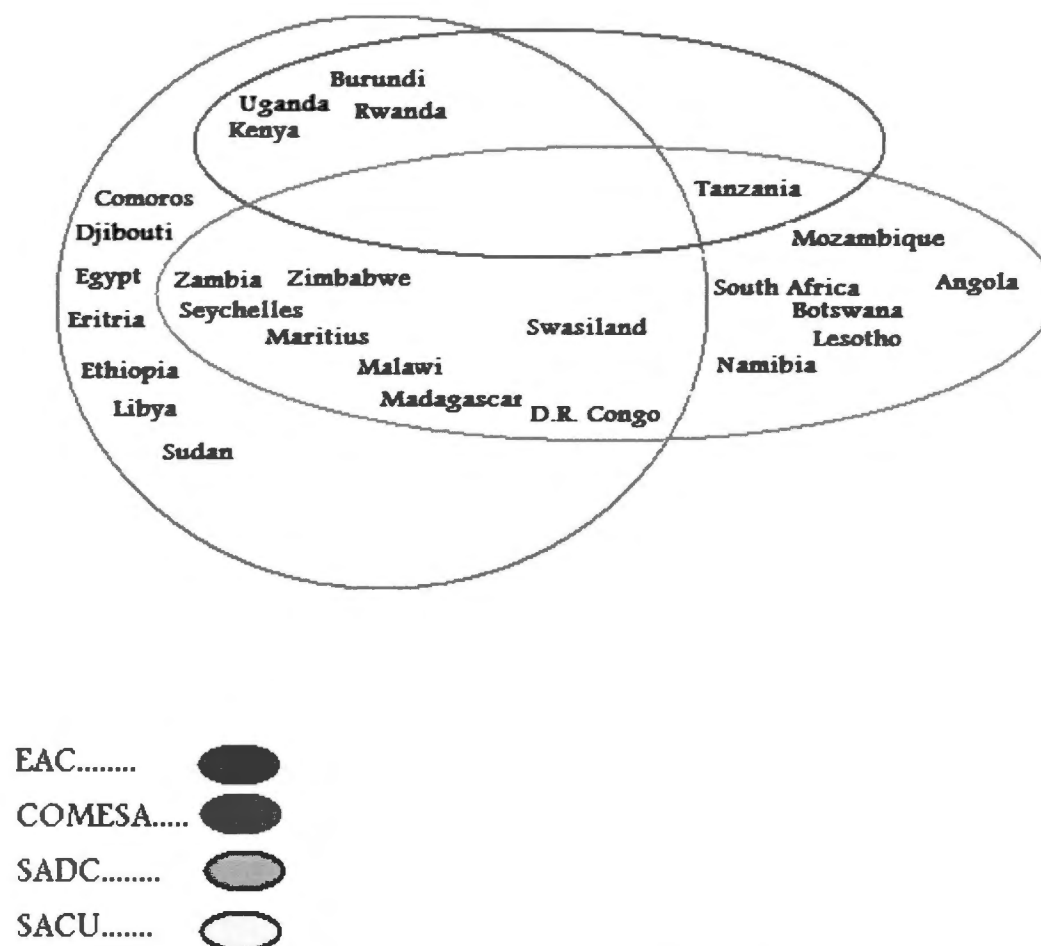


Figure 9.1: Source: Gathi 2009 works.bepress.com 64.

⁷¹⁸ Zartman 1967 *International Organization* 145-165.

The above graphic illustration is a reflection of the large number of all sorts of bilateral and RTAs that Bhagwati has referred to as the spaghetti bowl.⁷¹⁹ These overlaps are a cause for concern as they create many problems and uncertainties. Conflicts in jurisdiction arise where two different integration organisations have similar mandates, or where a country belongs to two or more integration blocs that have conflicting policies. This will, in turn, increase the burden placed on these organisations and their Member States, already lacking the necessary capacity and resources. Multiple memberships can lead to legal uncertainties in cases where more than one trade arrangement applies to trade between two countries. Uncertainties of this nature not only undermine the implementation of the agreements that aim to establish rules-based dispensations, but it also adds considerably to transaction costs and duplication in both regional trade and trade with outside partners. Many of the RECs in Africa have dispute settlement forums like the courts and Tribunals. It will be difficult for Member States who are involved in a conflict situation to agree on where to take their dispute especially in the absence of consent by the disputing Member States to subject themselves to a specific forum. The following discussion will demonstrate the extent of multiple memberships and their jurisdictional consequences.

8.2.1.1 SADC and SACU

All five SACU countries are members of SADC and they have implemented the SADC Trade Protocol. These members have also made it possible for SADC to reach its threshold of 85 per cent duty-free trade in order for SADC to realise the FTA in 2008. They have liberalised their tariff structure way below the 100 per cent mark that made it possible for the 85 per cent tariff liberalisation average to be reached for all members of SADC even though the others still have high tariffs. The overlaps pose no problems to the SADC FTA at the moment; however, once SADC establishes a CU as proposed in 2010, SACU countries will not be able to participate in a SADC FTA unless the two organisations' customs rules and CETs are harmonised. Owing to the importance of this challenge, SADC has postponed the proposed launch of the SADC CU in 2010.

⁷¹⁹ See generally Bhagwati "US Trade Policy" 1-18; Bhagwati, Greenaway and Panagariya 1998 *Trading Preferentially* 1128-1148.

The New SACU agreement of 2002 proposes the creation of a SACU Tribunal for the purpose of settling “any disputes regarding the interpretation or application of the Agreement or any disputes arising there under at the request of the Council.”⁷²⁰ On the other hand, even though not functional, the SADC Tribunal was also created for the purpose of settling disputes regarding the interpretation or application of the SADC Treaty.⁷²¹ This is a clear indication of the existence of a jurisdiction overlap. It is highly likely that disputes between Member States of both SACU and SADC could be brought before either the SACU Tribunal or SADC Tribunal. For this reason, despite the suspension of the SADC Tribunal, trade disputes involving Member States belonging to both SADC and SACU can be brought before the SACU Tribunal.. Relying on the current economic integration status of both SACU and SADC, an example can be made of private citizens complaining of high import tariffs from countries that both belong to SADC and SACU. These citizens have a choice to invoke the provisions of the FTA in SADC as well as the customs union in SACU. In both the FTA and customs unions, tariffs are supposed to be reduced on substantially all trade.

8.2.1.2 SADC and COMESA

Eight members of the fifteen SADC members also belong to COMESA. Tanzania, Namibia and Lesotho have recently withdrawn from COMESA. Madagascar, although serving a suspension because of the *coup d'état*, still remains a member of both SADC and COMESA. In June 2009, COMESA launched a CU, while SADC sought but failed to do the same in 2010. If this development materialises, it makes it impractical for SADC members to also remain part of the COMESA CU.

Conflict over jurisdiction between the SADC Tribunal and the COMESA Court of Justice is also expected. The COMESA Court of Justice is empowered to ensure the adherence to law in the interpretation and application of the COMESA Treaty.⁷²² The Court has jurisdiction to hear disputes under the COMESA Treaty as between Member States, as well as disputes referred to it by the COMESA Secretary General

⁷²⁰ For a detailed background see SACU Date Unknown www.sacu.int.

⁷²¹ Article 16.1 *SADC Treaty* (1992).

⁷²² Article 19 *COMESA Treaty* (1993).

on private parties.⁷²³ This Court has been in operation since 1998. In practice a trade dispute between SADC Member States that also belong to COMESA, could fall under the jurisdiction of either the COMESA Court of Justice or the SADC Tribunal. Since import tariffs are a major impediment to intra Africa-trade, the example of high tariffs can also be cited here. Member states belonging to both COMESA and SADC can actually chose where they prefer to take their disputes, but in face of conflict, they may fight over the choice of forum.

There have been suggestions that these two organisations will have to merge in an attempt to resolve this problem. However, the matter is very politically sensitive. Efforts have been made to coordinate the work of the two organisations in order to prevent duplication and conflict in their programmes, projects and activities. Since 2001, the two organisations have been cooperating on a number of areas such as trade analytical work, capacity building and negotiations, transport issues and international relations such as the EPA negotiations with the EU, as well as on WTO multilateral issues. In October 2008, the COMESA, SADC and EAC Tripartite Summit took place in Kampala, Uganda exactly seven years after COMESA and SADC agreed to convene a joint meeting on the harmonisation of policies.

On 12 June 2011 the Heads of State and Government representing Members States of the three regional economic communities of the EAC, COMESA and SADC signed an agreement to launch the negotiations that will lead to the establishment a Tripartite FTA consisting of all threes RECs. This has been hailed as a major milestone not only for the three RECs involved but also for the whole African continent whose efforts through the AU had long regarded the three RECs as building blocs towards the ultimate establishment of the AEC. In this regard the Tripartite FTA is therefore a step in the right direction for African continental integration. They are expected to gather again in future to assess their achievements and map the way forward for more regional integration discussions. The meeting by the three blocs is set to eventually address overlapping membership conflicts as the regional organisations plan to establish a single CU in the future. Chapter 12 of this

⁷²³ Articles 19, 24-26 *COMESA Treaty* (1993).

thesis will have a detailed discussion of the Tripartite FTA as a way forward for regional economic integration for SADC.

8.2.1.3 *SADC and EAC*

Tanzania belongs to both the EAC and SADC. This adds further complications to the matter, as Tanzania withdrew from COMESA in 1999, citing the COMESA proposals to reduce customs duties by 90 per cent as the main reason. Tanzania argued that it wanted to focus on its membership of the EAC and on implementing the SADC Trade Protocol. This state of affairs will have to change once SADC moves towards becoming a CU, as Tanzania cannot implement more than one CU CET. What this means is that the EAC will also have to maintain customs and Rules of Origin to ensure that products entering into Tanzania under the SADC Trade Protocol do not find their way into Kenya and Uganda, effectively avoiding having to pay the normal import duty in those countries. Further, it means that the EAC is therefore only a partial CU at the moment.

The EAC Treaty provides for an East African Court of Justice.⁷²⁴ The chances of a dispute involving Tanzania and another SADC Member state being brought before this court currently is non-existent since there is no risk of an overlap. However, the possibility of the other EAC Member States joining SADC has been mooted, giving rise to the assumption that such an overlap may exist in the near future. Evidence of such a possibility can be substantiated by Rwanda's unsuccessful application for SADC membership in the past.⁷²⁵ The DRC's application for SADC membership was accepted.

8.2.1.4 *SACU and COMESA*

Swaziland is the only SACU member that is also a Member State of COMESA. Accordingly, being part of a progressing COMESA FTA and CU while maintaining the CET of SACU will be problematic. COMESA FTA members had to give Swaziland derogations from its obligations under the COMESA FTA. This means

⁷²⁴ Article 9 *EAC Treaty* (1999).

⁷²⁵ See Konopo 2005 www.mmegi.bw.

that Swaziland enjoys preferential access to the markets of COMESA FTA states, but does not have to reciprocate these preferences. This is necessary as Swaziland cannot break SACU's CET without the consensus of other SACU Member States. Namibia enjoyed the same derogations as Swaziland until it withdrew from COMESA in 2004.

8.2.1.5 COMESA and EAC

The EAC has been a fully fledged CU since January 2005. Kenya and Uganda are both members of the EAC and COMESA, which until recently did not pose problems, since the EAC was basically a fast track of the COMESA integration agenda. However, the implementation of the CU in 2005 meant that Kenya's and Uganda's membership of COMESA became incompatible with their EAC membership as soon as COMESA moved to become a CU. In order to prevent this, harmonisation of the two organisations' CET will be a prerequisite. Maybe this explains the absence of members of the EAC at the launch of the COMESA CU at Victoria Falls in Zimbabwe in June 2009. President Museveni of Uganda cited the absence of Tanzania as a complement to EAC's common voice as one of the reasons for not being ready for the COMESA CU.⁷²⁶

This problem has been exacerbated by the fact that COMESA launched a CU in June 2009. Consequently, the position of Swaziland has become untenable and will require a serious discussion and decisions in SACU on how to deal with this situation. Swaziland has maintained that it is highly dependent on the trade with COMESA and that these markets have been developed over a long period of time. However, Swaziland is in breach of its SACU Agreement mandate that requires the consensus of other Member States before concluding or amending any new trade arrangements with third parties.⁷²⁷

⁷²⁶ See ZANIS 2009 www.lusakatimes.com.

⁷²⁷ Article 13 *SACU Agreement* (2002).

8.2.1.6 *The SADC EPA Configuration*

The Southern and Eastern African region is the only one within the group of ACP countries that does not negotiate in its original integration frameworks but in newly created regional bodies, designed for EPA negotiations only.⁷²⁸ This further complicates the already apparent problem of multiple memberships. The ESA–EPA and the SADC–EPA encompass all members of the existing four integration schemes, hardly mirroring the countries' economic and strategic interests and the consequences for deeper integration. Countries have already signed interim EPAs or are ready to sign full EPAs, although they are not coherent with the regional framework and the regional obligations they entered into. How the issue of overlapping memberships could be addressed and made consistent with EPA negotiations will be discussed under the recommendations in chapter 10 and different scenarios will be drawn.

The biggest complicating factor for this configuration is the FTA between the EU and South Africa, the TDCA. As discussed earlier, although the agreement is only between the EU and South Africa, it applies *de facto* to the SACU countries as a result of its membership with SACU. Because of this existing agreement, South Africa only has observer status in the EPA negotiations, as the EU and South Africa have indicated that they do not wish to renegotiate the terms of the TDCA. This creates many uncertainties as to the options available for the SADC EPA configuration, as SACU countries are already in effect providing the EU with reciprocal market access while they are not members of the TDCA. This means that they will not enjoy the same market access as they were enjoying under the Cotonou Agreement and the EBA initiative. The main objective of the EU is to increase existing market access for ACP countries through the EPA. The Cotonou Agreement that is to be replaced by the EPAs contains a commitment that EPAs would at a minimum be "equivalent to their existing situation".⁷²⁹ This means that the ACP countries should be no worse off than their position under Cotonou in terms of market access.

⁷²⁸ Meyn *Regional Integration* 140.

⁷²⁹ Article 37 *Cotonou Agreement* (2000).

The question is; can the SACU members be included in an extended TDCA? If so, a number of annexes will have to be negotiated to insure the preservation of their preferences. It will also have to provide for specific development provisions for the SACU members. The position of the LDCs like Lesotho, Mozambique and Angola, will further complicate the issues. If they decide to join the SADC EPA, they will have to face reciprocal EU market access, something they have to avoid at all costs.

8.2.1.7 The ESA configuration

The Eastern and Southern Africa (ESA) EPA configuration consists of Burundi, the Comoros, Djibouti, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Uganda, Zambia and Zimbabwe. As pointed out earlier, Kenya's and Uganda's membership of the EAC becomes incompatible with their membership of COMESA and therefore incompatible with their membership of the ESA configuration once COMESA is a CU. This fear has been realised with the launch of the COMESA CU in June 2009.

Malawi, Mauritius, Zambia, the DRC and Zimbabwe are members of both SADC and COMESA. If they want to remain part of the ESA configuration in the future, they will have to adopt the COMESA CU. If these countries choose to pursue a CU for SADC, they cannot also remain members of an EPA configuration that will eventually form a separate CU. Therefore, unless these various CUs are harmonised, these countries will have to make the decision to withdraw from a certain EPA grouping or organisation.

8.2.1.8 Proposed solution: expand SACU

The expansion of SACU was previously mooted by the apartheid regime as part of a policy to broaden SA hegemony and counter anti-apartheid forces in the region.⁷³⁰ It has gained currency in recent years, largely in response to a number of strategic developments in Southern Africa, including the ongoing EPA negotiations between the EU and several counties in the region, and the increasing political and economic

⁷³⁰ Lee *Political Economy of Regionalism*.

presence of external powers such as China and India.⁷³¹ It is also proposed that SACU should swallow SADC.⁷³² How will it happen? It has been suggested that SACU expansion would advance domestic investment within the CU and economies of scale, even though possible industrial relocation effects would have to be properly assessed.⁷³³ This will be difficult for SADC, notwithstanding members' significant linkages to South Africa; other SADC countries have developed different institutional arrangements and traditions to those of SACU.⁷³⁴ Enlargement would also be a nightmare to negotiate, as there is opposition from within SACU itself in terms of those who wish to safeguard their space and privileges. The more favourable solution is the tripartite FTA that will be discussed in chapter 11.

8.3 Differences in levels of economic development

In Africa, there are wide economic development disparities that have prevailed since the colonial era. According to Wallerstein's⁷³⁵ world system framework:

A few Africa states, either by invitation or by accident, will come to enjoy upward mobility in the international hierarchy, while the majority will continue to stagnate and remain underdeveloped in the semi-periphery.

The economies of the region are largely competitive rather than complementary. Significant restructuring of African economies, with wide dynamic advantages for African majorities, cannot be expected to emerge from this export-manufacturing growth.⁷³⁶ This is due to the inherited colonial duplication of commodities. As a result, intra-regional trade in Africa and more specifically SADC has remained very marginal. Issues pertaining to the differences in levels of economic development have not been given much attention, although concerns have been raised over the position of South Africa as a stakeholder in the regional trade set up. Most importantly, South Africa has exercised her ability to negotiate bilateral trade agreements with the developed world. Such agreements have diverse consequences for the region, bearing in mind the dependence of the region on South

⁷³¹ Draper *Business Day*.

⁷³² Qobo "Political Economy of Regional Integration".

⁷³³ Draper *Business Day*.

⁷³⁴ Davies 1996 www.issafrica.org 27-38.

⁷³⁵ Wallerstein 1974 *Dependence* 1-26.

⁷³⁶ Langdon and Mytelka "Africa in the Changing World Economy" 204.

Africa for imports. As already discussed in the previous chapter, South Africa concluded the TDCA with the EU without consulting other stakeholders.

The TDCA was under review in 2007 and South Africa failed to ask a single SADC member to attend the meetings even as an observer. South Africa's position has not been seriously put under the spotlight within the context of regional integration. SADC countries are not homogenous; hence, EPAs should not be premised on the TDCA as has been suggested by some writers and commentators. Members have to recognise the economic strength of South Africa and the fact that they cannot negotiate for an EPA with South Africa on an equal footing with the rest of the bloc. Consequently, differences in development have to be clearly defined. Some members are developing countries while others are LDCs. Zimbabwe does not have an LDC status in the Cotonou Agreement so it can be expected that it will not be allowed to trade under the non-reciprocal EBA initiative.⁷³⁷ If this issue is not clearly resolved it can be a recipe for division. Thus, there should be a clear definition of development so that SADC countries know what they are including as a development chapter in the EPA negotiations. Proposed solutions to this problem are included in chapter 10 under the recommendations.

The SADC FTA has been in force since 2008. However, the process could be skewed by inherent challenges; for example, following the drafting of the Trade Protocol, some countries renewed dormant bilateral trade agreements or formed new ones. This has raised the question of the Trade Protocol not being very attractive to Member States. This is discussed in more detail under the discussion of the SADC Trade Protocol in chapter 8.

8.4 The brotherhood syndrome

The issue of brotherhood and solidarity has clouded the RTA agenda in that Member States fail to engage fellow members on issues of differences. This phenomenon has already been discussed under the rationale behind the formation of the AU after

⁷³⁷ Meyn 2008 *Economic Partnership Agreements* 515-528.

major shortcomings of the OAU.⁷³⁸ The dynamics of regional integration go far beyond personal politics and trade-focused integration has become a global trend since the 1990s.⁷³⁹ There is, therefore, a need to put SADC's house in order before negotiating as a pact, as this would go a long way towards cementing the unity of the bloc. A common trade policy is necessary in a CU since it would increase common interests, thereby strengthening unanimity and negotiating power.⁷⁴⁰ SADC Member States have to make a joint effort with regard to the issues pertaining to development at the centre of current and future trade negotiation.

8.5 Brain drain and labour mobility

There is an absence of a SADC collective standing on labour mobility. The Protocol on the movement of persons has not been the subject of intense regional discussion by SADC member's Heads of States for some time now. There is thus great doubt as to whether there is the political will to push the process. Unfortunately, the SADC Secretariat, which coordinates trade and regional integration initiatives, does not have the legal basis to ensure accountability, compliance and enforcement of decisions. It is submitted that this would pose a serious challenge to SADC in achieving its goal of a common market by 2015. The effects of the brain drain within and outside the region is being felt with minimal or no effort to address the problems. South Africa is the main beneficiary of the consequences of the brain drain in the region. However, South Africa could be compensating for its own losses of the brain drain to other global destinations. This area of law needs regulation, such as regulations that facilitate the free movement of workers like in the EU. Writing on the free movement of workers prior to the conclusion of the Maastricht Treaty in 1992, the late Judge GF Mancini observed that "it can be said to be a good thing that our Europe is not merely a Europe of commercial interests, it is the judges of the Court of Justice who take much of the credit".⁷⁴¹

Other serious problems include institutional weaknesses, such as transport problems, as shown in figure 9.1. Weak market networks and banking and monetary

⁷³⁸ See chapter 5 of this thesis

⁷³⁹ Jakobeit "Theoretical Dimensions" 9-35.

⁷⁴⁰ Schiff and Winters 1998 *Regional Integration* 271-296.

⁷⁴¹ Mancini "Free Movement of Workers" 68.

problems are apparent. There is also the fear among smaller states that the larger ones will dominate. This fear has materialised in that South Africa is a dominant figure in SADC as indicated in the discussion above. The same applies in the EAC where Kenya holds the balance of power in that region. In West Africa's ECOWAS the dominance of Nigeria can never be over-emphasised.

Political instability that is compounded by a lack of political commitment to the integration process is evident in SADC. Member States are unwilling to surrender their sovereignty for the benefit of regionalisation. Old rivalries are evident and without much effort to solve the problem, unity will be difficult to achieve.

8.6 The lack of infrastructural development

Regional integration requires trade supporting infrastructure across the region. The whole continent is lagging behind on this issue, although it is heartening to note that both SADC and NEPAD have put the development of infrastructure high on the agenda. However, this is a long-term solution, since the building of roads and railways and the upgrading of ports may take a long time to realise. This is a problem if one considers that the RISDP requires short-term solutions to fit in the 10 years left for SADC to realise the highest level of integration. The RISDP fully recognises that the development of regional infrastructure is critical for sustaining regional economic development and trade through the sharing of production, management and operations infrastructure facilities and through hubs as well as development corridors.

At the Ordinary Summit of SADC Heads of State and Government held in Lusaka, Zambia in August 2007, the focus was on imperatives to deepen regional economic integration and fast-track the implementation of infrastructure development in the region. The roadmap approved by the Summit compelled the region to put in place a robust programme of corridor infrastructure development to facilitate and support the free movement of people and goods. To this end, SADC Ministers responsible for transport convened a High Level SADC Ministerial Corridors Review Meeting, Corridor Investment Programme and also launched the SADC Corridor Strategy in Windhoek from 2 to 5 June 2008.

8.7 Conclusion

Solutions to most of the challenges identified in this chapter have been highlighted. Most of these solutions are not new; however, SADC has not been able to implement them. Therefore, the likely reason for this state of affairs could be SADC's incapacity or unwillingness to implement these recommendations. The proposed tripartite FTA involving SADC, EAC and COMESA is the most feasible solution to the problem of multiple memberships. Member States who belong to more than one customs territory have to choose where to commit their allegiance. The complication resulting from the EPAs can also be simplified by seeking negotiations with the EU while Member States remain in their traditional RTAs. This is still applicable to those Member States who have not signed a full EPA. The EPA experience should provide SADC with a very important lesson of the need to negotiate as a pact. The challenge of the poor regional infrastructure is being tackled and efforts to improve the regional infrastructure are gaining momentum, with a number of development corridors being implemented. The best solution to the "brotherhood syndrome" is for SADC Member States to abide by all the Treaty obligations that they have entered into. The implementation and enforcement of obligations under international law cannot be compromised. The next chapter will expose the extent to which the SADC Trade legal instruments are compliant and compatible with international law.

CHAPTER 9

SADC TRADE LEGAL INSTRUMENTS COMPLIANCE WITH CERTAIN CRITERIA OF GATT ARTICLE XXIV

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9.1 Introduction

SADC and the WTO share common features and both promote trade liberalisation between states. However, the WTO is a broad multilateral organisation, while SADC is a regional entity; thus, there is a need to clarify their individual roles as well as their relations in global trade. Both the WTO and SADC are intergovernmental organisations in terms of international law. The WTO's core functions are rule making, negotiating market access, settling disputes and reducing information asymmetries.⁷⁴² The legal basis for the establishment of SADC as a Treaty is enshrined in international law. Under international law there is no hierarchy among treaties, except for the supremacy of the Charter of the United Nations over any other international agreements, as expressly provided for in Article 103 of the Charter.⁷⁴³ Given this basis, one may argue that, in the event of conflict between any rules of the WTO and the RTA, there is no clear-cut hierarchy among them since both belong to the same category of international treaties. Accordingly, their relationship would be determined in light of Article 30 of the Vienna Convention which deals with the application of successive treaties relating to the same subject matter.⁷⁴⁴ However, the fallacy in this approach of resorting to Article 30 and equating similar status to RTAs and WTO rules would be evident if we take into account the provisions of Article 41(1) of the Vienna Convention.⁷⁴⁵ Thus, as Article

⁷⁴² Low "Is the WTO Doing Enough".

⁷⁴³ See a 103 *Charter of the United Nations* (1945) and a 30 *Vienna Convention on the Law of Treaties* (1969).

⁷⁴⁴ According to a 30(1) subject to a 103 of the *Charter of the United Nations* (1945), the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs: "(2) When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail. (3) When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty. (4) When the parties to the later treaty do not include all the parties to the earlier one: (a) as between States Parties to both treaties the same rule applies as in paragraph 3; (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations."

⁷⁴⁵ This article allows agreements to modify multilateral treaties between certain of the parties only. Accordingly: "1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if: (a) the possibility of such a modification is provided for by the treaty; or (b) the modification in question is not prohibited by the treaty and: (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole. 2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in

XXIV of the GATT allows the execution of international treaties in the form of custom unions and FTAs, by virtue of Article 41(1) of the Vienna Convention, the latter type of treaty could modify the provisions of the former only if it is allowed by the former.⁷⁴⁶ Therefore, the argument is tenable that Article 41(1) implies that WTO rules are inherently of a higher rank than RTAs.⁷⁴⁷

The fact that this debate exists highlights the importance of the WTO rules governing the establishment of RTAs to neutralise their adverse systemic effects on the multilateral trading system. It has, therefore, been argued that there is a place for regional governance in the multilateral framework for global governance. Nothing precludes a group of nations from forming a regional trade organisation⁷⁴⁸ that seeks to harmoniously harness regional resources for the common good of their citizens. However, there are certain rules and procedures that have to be followed by such an organisation for it to exist lawfully and harmoniously within the global context. It is important to investigate whether SADC's integration drive is within the confines of WTO rules, notably GATT Article XXIV and V provisions. However, as will be shown in this chapter, Article XXIV of GATT has been a source of vexation and puzzlement since the Treaty's inception in 1947.⁷⁴⁹

This chapter will establish whether the legal instruments within the SADC Treaty as well as the GATT are sufficient catalysts for deeper integration in the region. Thus, the central theme of this discussion is whether regionalism under SADC can provide a satisfactory solution to the authority and manifestation paradox of the global governance of trade. There is need to deal with the exact legal status and effect of WTO norms within the SADC legal order and vice versa. Additionally, regional governance is not incompatible with and does not negate global governance; on the contrary it has the potential to strengthen global governance.⁷⁵⁰

question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides."

⁷⁴⁶ Cottier and Foltea "Constitutional Functions of the WTO" 43.

⁷⁴⁷ Cottier and Foltea "Constitutional Functions of the WTO" 43.

⁷⁴⁸ The term "regional trade agreement" will be used commonly in place of free trade areas and customs union unless the author intends to differentiate between the two. The term "preferential trade area" (PTA) may also be used to depict the same meaning in the wording of Article XXIV

⁷⁴⁹ Chase 2006 *Multilateralism Compromised* 1-30.

⁷⁵⁰ Langenhove and Thakur "Enhancing Global Governance" 56.

The chapter begins with an emphasis on the supremacy of the WTO Agreement and the legal principles of trade liberalisation. Within this context, the Most Favoured Nation Principle and the National Treatment Principle will be discussed as the cornerstones of free trade. This discussion is of critical importance since it presupposes the need for an exception before the existence of an RTA is considered legitimate under WTO rules. Without the exception, RTAs would be considered illegal under WTO rules. This exception is found under GATT Article XXIV. The discussion will focus on four selected criteria that outline detailed requirements that RTAs like SADC will have to comply with. The selected prescribed criteria of Article XXIV to be discussed include the notification requirement; the neutrality of trade restrictiveness requirement; the substantially all trade requirement and the prescribed transitional period. These criteria will be used to ascertain SADC's compliance with the exception of GATT Article XXIV.

In trying to establish SADC Trade Protocol and RISDP compliance with WTO rules, a look at sector-specific questions concerning how particular SADC policies are affected by the provisions of the relevant agreements will be undertaken. In the process there is a need to examine the extent to which and the way in which the SADC institutions and organs seek to integrate the substantive obligations contained in the various agreements into their political and legislative processes.

9.2 Supremacy of WTO Agreement and the legal principles of trade liberalisation

RTAs are subservient to the rules of the WTO in the same manner as ordinary legislation of parliament in a domestic legal context would be to provisions of the Constitution.⁷⁵¹ The fact that this debate and understanding exist highlights how important it is that WTO rules governing the establishment of RTAs should neutralise their adverse systemic effects on the multilateral trading system. Article XXIV has opened the space where RTAs could blossom and enter into a mutually beneficial competition with the multilateral system. The supremacy of the WTO Agreement is

⁷⁵¹ Cottier and Foltea "Constitutional Functions of the WTO" 43.

enshrined in that its provisions will prevail should they come into conflict with any provisions of the multilateral trade agreements.⁷⁵²

In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organisation (referred to in the agreements in Annex 1A as the 'WTO Agreement'), the provision of this Agreement, i.e. the Marrakesh Agreement shall prevail to the extent of the conflict.

As a prerequisite of membership, Member States' domestic laws must be brought into conformity with the WTO rules and principles.⁷⁵³ The WTO multilateral trade regime is a treaty-based system and, as such, is not applicable to non-consenting third parties. WTO members are free to join any other trading arrangements, regional as well as bilateral, provided that their obligations under these arrangements are consistent with WTO obligations, which can override the former to the extent of inconsistency or repugnancy.⁷⁵⁴ This means that once a state becomes a WTO member, WTO law will reign supreme over and above any other treaties the member state is a signatory to. The Marrakesh Agreement of the WTO is registered with the United Nations Secretariat under Article 102 of the UN Charter.⁷⁵⁵ The legal implication of such registration is that all WTO agreements and annexes may validly be cited, invoked or relied upon in any debates and negotiations in the UN system. WTO law advocates for fair trade.⁷⁵⁶ According to Fine,⁷⁵⁷ the widely accepted definition of fair trade is as follows:

Fair Trade is a trading partnership, based on dialogue, transparency and respect that seek greater equity in international trade. It contributes to sustainable development by offering better trading conditions to, and securing the rights of, marginalised producers and workers – especially in the South. Fair trade organisations (backed by consumers) are engaged actively in supporting producers, awareness raising and in campaigning for changes in the rules and practice of conventional international trade.

⁷⁵² See *Vienna Convention on the Law of Treaties* (1969); see also *General Interpretative Note to Annex 1A of GATT (Uruguay Round Agreement)*.

⁷⁵³ Samnang and Hach Date Unknown www.wto.org.

⁷⁵⁴ Articles XIII and XXIV *GATT* (1994).

⁷⁵⁵ Article 102 *Charter of the United Nations* (1945); UN Date Unknown untreaty.un.org.

⁷⁵⁶ See the upcoming MFN debate in this chapter.

⁷⁵⁷ Fine 2001 www.eftafairtrade.org. See also: Howse and Trebilcock 1996 *Fair Trade* 61-79.

Fair trade presupposes the availability of full and equal competitive opportunity for all participating Member States in world trade. It requires the conduct of multilateral trade on a non-discriminatory basis. In order to attain this fairness in trade, the cornerstone of the WTO Agreement is the non-discrimination principle.⁷⁵⁸ In trying to achieve this goal GATT adopted two principles of equality. These are the Most Favoured Nation (MFN)⁷⁵⁹ and the National Treatment principle (NT). The MFN provides rules for non-discrimination in multilateral trading relations. On the other hand, the NT ensures the equal treatment of imported and domestically produced goods once they have entered the market. A brief discussion of the MFN principle follows.

9.2.1 Most-favoured-nation principle (MFN)

The MFN principle provides that any "advantage, favour or privilege" which a contracting party extends to products which originate in or are destined for "another country", must be extended "immediately and unconditionally" to any "like products" which originate in or are destined for the territories of all other contracting parties. In terms of effect, the MFN principle ensures that all contracting states will be accorded MFN treatment flowing from any existing or future bilateral/multilateral trade agreement even if the other WTO members/states are not parties to the agreement/treaty prescribing such treatment. Furthermore, the MFN treatment must be accorded "unconditionally". This means, for instance, that a state can invoke MFN without granting some advantage in return. The MFN provision is the cornerstone of the international trade rules embodied in the GATT principle of non-discrimination.

The term itself maybe somewhat confusing, as it has been mistakenly construed as indicating that there is a country or countries that are the most favoured.⁷⁶⁰ According to the preamble of GATT, the elimination of discriminatory treatment in

⁷⁵⁸ Kessie "Legal Status" 120-125

⁷⁵⁹ Article 1.1 *GATT* (1994).

⁷⁶⁰ In US domestic law, the term has now been officially replaced by "normal trade relations" in order to clarify the policy behind it (i.e. the goal is not to favour certain countries by designating them with MFN treatment, but rather to provide those countries with normal treatment given to others), see, e.g., *US Bill S.747* (1997): "To amend trade laws and related provisions to clarify the designation of normal trade relations". See also *Public Law 105-206* (1998) 112 Stat 789, Sec 5003: Clarification of Designation of Normal Trade Relations.

international trade is one of its fundamental goals. In a bid to prohibit discrimination among trading partners, GATT requires each of its members to treat each other as favourably as it treats its most favoured member. This means a treatment equal to the nation with which it has the most unimpeded commerce. In terms of the free trade theory, this ensures equality of trading opportunity among WTO members by turning original bilateral commitments for concession into multilateral commitments. For this reason it establishes the sovereign equality of states with respect to trading policies. The Scope of Article 1 of GATT covers the following:

- 1) Customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports;
- 2) the method of levying such duties and charges, with respect to all rules and formalities in connection with importation and exportation (GATT Art I (I) and
- 3) all matters in relation to the national treatment of internal taxes and charges for imported goods (GATT Art.III (2)), and all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use (GATT Art III(4)).

Accordingly, the standard of treatment with respect to "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or is destined for another country shall be accorded immediately and unconditionally to the 'like products' originating in or destined for the territories of all other contracting parties".⁷⁶¹

In complementing this obligation, GATT Article II imposes on every member an obligation to grant to other members treatment no less favourable than that provided for in the tariff classifications and concession schedules annexed to regulations affecting international trade. The meaning and range of these obligations have been

⁷⁶¹ See *The WTO Legal Texts* 424.

addressed in *EC-Customs Classification of Frozen Boneless Chicken Cuts*.⁷⁶² Apart from the general obligation of MFN Treatment in Article I(I), GATT 1994 contains other specific MFN clauses.⁷⁶³

9.2.1.1 *The nature of MFN application*

The MFN rule imposes a general injunction on preferential trade deals that result in differential and unequal outcomes.⁷⁶⁴ The MFN treatment is a contractual obligation of a country towards other trading countries under an international treaty, that is, the GATT. It obliges such a country to afford to another the same favourable treatment that the former has granted to any third trading country under the treaty. This treatment must not be less favourable than, or inferior to, that of the most favoured trading country. What this means for other trading nations is that they can claim as a matter of right all advantages and benefits associated with the treatment immediately and unconditionally without being required to compensate or reciprocate. The meaning of the expression "immediately" implies that the beneficiary trading countries acquire the right to be treated equally as soon as the granting trading country accords MFN treatment to any other trading country. Article 1 does not state explicitly whether the special concessions granted to the most favoured trading country include both past and future concession. Since time is of the essence in any business transaction, one would assume that "immediately" implies that the right exists at that very moment MFN is granted. The requirement of placing the beneficiary trading countries on equal footing with the most favoured trading country indicates that it ought to include concessions granted in both the past and the future.⁷⁶⁵

⁷⁶² See *WTO Official Document WT/DS269/AB/R* (2005).

⁷⁶³ These are Aa (III)(7), dealing with internal mixing requirements, IV(b), dealing with cinema films, V(2), (5) and (6) dealing with freedom of transit of goods, IX(1), dealing with marks identifying the origins of products, XIII(I), dealing with quantitative restrictions, XVII(I), dealing with state trading enterprises, XVIII(20), dealing with governmental assistance to economic development, and XX(J), dealing with measures applying to goods in short supply. A 4 *TRIPS Agreement* (1994) and A II(I) *GATS* (1995).

⁷⁶⁴ *WTO Official Document WT/REG/W/37* (2000) para 27.

⁷⁶⁵ Wang 1996 *Most Favoured Nation Treatment*. For a historical perspective of MFN after GATT 1947, see also Jackson *World Trade* 249.

There is no place for discriminatory treatment in the WTO as long as the MFN is applied. Through it, states maximise the benefit of equal opportunity. In the *US Nationals in Morocco case*, the International Court of Justice (ICJ) held that the aim of the MFN clause as an international treaty is to "establish and maintain at all times fundamental equality without discrimination among all of the countries concerned".⁷⁶⁶

The MFN rule in GATT Article 1 imposes a general injunction on preferential trade deals that results in differential and unequal outcomes.⁷⁶⁷ The obligation for equal treatment emanates from the GATT provision and not from the favoured position of the third trading members, which only serves to determine the nature and extent of favour to which other WTO members are entitled. These beneficiary members enjoy only a consequential and variable right, the content of which depends upon and varies with the trading relationship between the members granting MFN treatment and those receiving it. In the absence of such a relationship, the right of any third trading member lacks any real substance and is exercisable only in the domain covered by the MFN clause and in compliance with the terms, conditions and limitations set out in the treaty provisions. The International Law Commission (ILC) is of the opinion that "under the MFN Clause the beneficiary State acquires for itself or for the benefit of a person or things in a determined relationship with it, only those rights which fall within the limits of the subject matter of the clause".⁷⁶⁸

The equality of rights does not ensure equal material benefits to all WTO members owing to the unknown and uncertain effects of equal treatment. The MFN clause prevents the granting member from discriminating in favour of the receiving member, and against other members. In this effort to achieve equal treatment, the other beneficiary members may end up receiving concessions over and above those granted to the most favoured trading member. The net result may be a double standard. While treating one trading partner as the MFN with respect to a product is considered preferential and discriminatory and is therefore prohibited, other beneficiary members' additional gain beyond the benefits conceded to the most favoured trading member is not preferential or discriminatory and as such is

⁷⁶⁶ *Rights of US Nationals in Morocco (United States v France)* 1952 ICJ Rep 176 192.

⁷⁶⁷ *WTO Official Document WT/REG/W/37* (2000) para 27.

⁷⁶⁸ ILC 1978 *MFN Clause* 21.

permissible under GATT. This was an intended anomalous outcome. What this means is that the expression of "unconditionally" in Article 1 of GATT therefore needs to be understood objectively and relatively. In addition, its connotation in a real-life situation is anything but unconditional and absolute. A number of derogations in the form of conditional MFN treatment and exemptions have been inserted in Article 1 by subsequent decisions of GATT Conferences, with a view to overcoming its unequal effects on WTO members, and the conflict of members' competing material interests. For example, the Generalised Systems of Preferences that exempts WTO member countries from MFN for the purpose of lowering tariffs for the LDCs.⁷⁶⁹

9.2.1.2 *How the MFN principle evolved*

The MFN principle apparently has at least a 700-year history in trade agreements.⁷⁷⁰ It is in the last 200 of these years that it has become very important.⁷⁷¹ MFN clauses in bilateral or plurilateral agreements assure each party that, if the other parties to their treaty enter into any other agreements with third parties which provide more favourable treatment for the exports of those third parties, these more favourable conditions will be extended to the parties to the first agreement, meaning that no other countries will be treated favourably. This shows that this principle is not static; it changes each time Member States negotiate better trade terms among themselves. The MFN principle became prominent in bilateral commerce and trade treaties negotiated in the 18th century.⁷⁷² In 1979, the Tokyo Round⁷⁷³ favoured conditional MFN, particularly in negotiating the reduction of not-tariff barriers (NTBs). This conditional MFN was based on the premise that privileges and concessions should be granted only where there was equivalent reciprocity. Of the nine codes and arrangements on NTBs produced in the Tokyo Round, the Subsidies Code and the Agreement on Government Procurement were the most onerous in that they contained MFN provisions with the greatest number of conditions.

⁷⁶⁹ Cooper *Generalised System of Preferences*.

⁷⁷⁰ Jackson *World Trading System*.

⁷⁷¹ Jackson *World Trading System*.

⁷⁷² Ustor 1968 "The Most Favoured Nation Clause". Vol ii, para 6.

⁷⁷³ For an analysis of the Tokyo Round see Jackson, Louis and Matsushita 1982 *Implementing the Tokyo Round* 267-397.

The Uruguay Round⁷⁷⁴ of multilateral trade negotiations sought to prevent the erosion of the rigour of the MFN principle by returning to unconditional MFN in the WTO multilateral system. It rejected the conditionality of the Tokyo Round codes in favour of multilateral agreement involving all WTO members. The Marrakesh Agreement,⁷⁷⁵ which established the WTO in 1994, circumscribes possible derogation in respect of new multilateral trade agreements. It limits the waiver of MFN obligations by requiring a waiver to be granted only in exceptional circumstances and subject to the concurrence of three-fourths of the members.⁷⁷⁶ The importance of MFN is reaffirmed with the continuing prevalence it has in the new area as a general obligation. Examples can be drawn from its inclusion in the TRIPs agreement.⁷⁷⁷

In finalising the discussion on the MFN clause, it is evident that, in the WTO Agreement, the MFN entails greater breadth and new content. It automatically extends to all members any advantage granted by one WTO member to another, thereby having a universal effect. This capacity to generalise or equally distribute the benefits and burdens of a contractual arrangement renders MFN a substantive principle of the WTO.⁷⁷⁸ Each WTO member plays a dual role as both a grantor and a beneficiary of MFN treatment towards other members. In granting unconditional MFN treatment to the goods, services and intellectual property of other members, each member is, in turn, mutually entitled to claim MFN treatment immediately and unconditionally. MFN operates as a legal restraint on sovereign and discretionary powers of WTO members in matters of world trade law and policy, for the purpose of achieving a balance of obligations and entitlements. Given its universal reach and effect, MFN has the potential to play a pivotal role in promoting the expansion of global free trade on the basis of equality and non discrimination.⁷⁷⁹

⁷⁷⁴ See generally Van den Bossche *Law and Policy of the World Trade Organization* 309-318, 377-441. See also Bhala *Modern GATT Law* 173-337; Trebilcock and Howse *Regulation of International Trade* 177-193, 49-82; Jackson, Davey and Sykes *Legal Problems* 338-386, 415-446.

⁷⁷⁵ See Preamble *Marrakesh Agreement Establishing the World Trade Organization* (1994) ("Marrakesh Agreement").

⁷⁷⁶ Articles IX(3) and (4) *GATT* (1994).

⁷⁷⁷ Article 4 *TRIPS Agreement* (1994).

⁷⁷⁸ Evans *Lawmaking under the Trade Constitution*; see also Cass 2001 *The Constitutionalisation of International Trade Law* 53.

⁷⁷⁹ Abu-Akeel 1999 *The MFN* 107.

9.2.2 *The National Treatment*⁷⁸⁰ *Principle*

The NT requirement has always been, and remains, one of the core principles of the GATT/WTO.⁷⁸¹ It is another pillar in the quest for fair trade. This principle is enshrined in Article III of the GATT 1994, which states that:

The contracting parties recognise that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

This Article contains provisions for NT on internal taxation and regulation. It requires every WTO member to treat products imported from other WTO members no less favourably than the domestic product or like product. The drafters of the GATT decided that the NT Rule would be applied even where no concessions had been made; thereby creating a broader obligation against discrimination that applies regardless of whether or not circumvention of concessions had occurred.⁷⁸² The scope of NT is discussed here under:

- i) Members are prevented from applying internal taxes, charges, laws, regulations and requirements pertaining to the internal sale, offering for sale, purchase, transportation, distribution, or use of products in specified amounts or proportions to imported products with a view to providing protection to domestic production
- ii) Imported products should not be subject, overtly or covertly, to internal taxes or charges in excess of those applied to like domestic product.
- iii) Imported products must be accorded treatment no less favourable than those accorded to domestic like products in respect of laws, regulations and requirements relating to their

⁷⁸⁰ Hereafter "NT".

⁷⁸¹ Lester *et al* *World Trade Law*.

⁷⁸² For a historical perspective of the NT principle see Jackson *World Trade*.

internal sale, offering for sale, purchase, transportation, distribution and use.

- iv) No member can establish or maintain any internal quantitative regulation for mixing, processing, or using products in specified amounts or proportions requiring that a fixed amount or percentage must come from domestic or external sources of supply.
- iv) In applying internal maximum price control measures on imported products, the importing member must take account of the interests of exporting members with a view to avoiding or minimising any prejudicial effects.

However a number of exceptions to the obligation of NT are applicable. These are:

- i) The application of differential internal transportation charges based on the economic operation of transport, not on the nationality of the product, is permissible.
- ii) Laws, regulations or requirements dealing with government procurement, where products are purchased for government purposes and not for commercial resale or in the production of products for commercial sale, are permissible.
- iii) The payment of subsidies exclusively to domestic producers of a product is permissible.
- iv) The establishment or maintenance of internal quantitative regulations relating to exposed cinematograph films is permissible.

The definition of like product is contentious and is interpreted on a case-by-case basis.⁷⁸³ Some of its essential features include the end use of the product, consumer taste and habits, and the properties, nature and quality of the product in a particular market. Domestic production includes both the like products and the products that are direct competitors, the latter also being determined on a case-by-case basis. The

⁷⁸³ See relevant comment in Ahn 1999 *Environmental Disputes* 891-870. See also Diebold 1994 *Reflections* 335-346.

discipline of NT is applicable regardless of the nature of tariff, bound or unbound, on an imported product. It is applicable even when the trade effect of discrimination between the imported product and the domestic like product is negligible. The obligation of NT provides a fundamental tenet for trade liberalisation on a non-discriminatory basis in important WTO agreements, notably GATS (Art 17) and TRIPs (Art 3). The Dispute Settlement Body (DSB) has recently dealt with the issue of discriminatory treatment of imported products in contravention of Article II and III of GATT 1994.⁷⁸⁴

9.2.2.1 *Nature of National Treatment Application*

NT is much more prominent than MFN in GATT/WTO jurisprudence. This is probably because the main reason countries breach the MFN principle is due to FTAs and CUs, which are permitted under GATT Article XXIV, provided certain conditions are met. MFN violations are fairly infrequent, as countries rarely attempt to favour some trading partners over others. By contrast, NT violations are much more common and are very likely to cause friction with trading partners. Where NT issues arise, it is usually due to a perceived attempt to discriminate against foreign products, thereby triggering concerns among competing foreign producers and often leading to formal trade disputes.

The concept of NT is very complex in GATT/WTO jurisprudence. It is also one of the most sensitive of all WTO rules.⁷⁸⁵ The precise scope given to it will have a substantial impact on the ability of WTO members to regulate in non-trade policy areas. Because all domestic tax and regulation measures coming within the broad scope of the rules must comply, any domestic policy area, from labour rights to environmental protection to income taxes, can be subject to scrutiny under the NT requirement.

After a lengthy discussion on both MFN and NT, the discussion now shifts to exception allowed under the WTO trading system. The specific requirements as

⁷⁸⁴ *WTO Official Document WT/DS302* (2005). In this case Honduras considered that Dominican Republic's measures are inconsistent with Articles II:1(b), III:2, III:4, X:1, X:3(a), XI:1, and XV:4 of GATT (1994).

⁷⁸⁵ Lester *et al* *World Trade Law* 195.

prescribed under GATT Article XXIV for the creation of RTAs will be discussed below.

9.3 GATT Article XXIV

The focus now shifts to the legal framework establishing RTAs in the WTO. Following the discussion on the MFN and NT principles, it is clear that the objective of granting preferences to other trading partners is a violation of the non-discrimination principle of the multilateral trading system. The existence of Article XXIV, despite its contradictions with the MFN rule, has been seen as an endorsement of the idea that RTAs could serve as a supplemental, practical route to broader trade liberalisation. Article XXIV of the GATT establishes the basis for allowing RTAs as an exception to the MFN. Consequently, an exception on the general prohibition against RTAs has been inserted in Article XXIV.⁷⁸⁶ The WTO rules on regional agreements are designed to minimise the possibility of non-parties being adversely affected by the creation of the regional arrangement and that the arrangements themselves do not become narrow and discriminatory trading entities.⁷⁸⁷

Article XXIV lays down the legal principles with which RTAs have to conform.⁷⁸⁸ Based on these principles, WTO members have the mandate to determine the legality of RTAs under the GATT. This Article permits both regional and bilateral preferential trade agreements leading to the formation of CUs and FTAs, and seeks to integrate them in the multilateral trading system envisioned for the world. Similar

⁷⁸⁶ See *WTO Official Document WT/DS34/AB/R* (1999) paras 45 and 58.

⁷⁸⁷ Sampson and Woolcock (eds) *Regionalism* 12.

⁷⁸⁸ Article XXIV:8 stipulates the requirement for RTAs in the form of CUs and FTAs as follows: "For the purposes of this Agreement: (a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that (i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, 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, and, (ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union; (b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories."

provisions are found under the "Enabling Clause"⁷⁸⁹ where a decision by signatories to the GATT contracting parties in 1979 allows derogations to the MFN (non-discrimination) treatment in favour of developing countries. In particular, its paragraph 2(c) permits preferential arrangements among developing countries in goods trade. It has continued to apply as part of GATT 1994 under the WTO. Further provisions were developed for trade in services negotiated during the Uruguay Round and are found in Article V of the GATS. From the outset, Article XXIV:4 states:

The WTO members recognise the desirability of increased freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognise that the purpose of a customs union or of a free trade area should be to *facilitate trade* between the constituent territories and *not to raise barriers* to the other contracting parties with such territories.

From the wording of this provision, it is clear that CUs and FTAs are ways of achieving closer integration. In this regard, Article XXIV: 4 explains that Preferential Trade Areas⁷⁹⁰ (PTA) are desirable and should facilitate rather than raise new barriers. A close comparison to GATS Article V does not contain a similar statement regarding the desirability of PTAs, but in paragraph 4 it does refer to facilitating trade and not raising barriers.

In this chapter, GATT Article XXIV is also used as an instrument in assessing the SADC Trade Protocol's legality and that of the SADC trade agenda. The Article spells out what is expected in terms of liberalisation both between the parties of the agreement and between the signatories and third parties; it also establishes a minimum level of commitment necessary in order to enter into an RTA.⁷⁹¹ In fact, there are conditions that are attached to the formation of RTAs in order to minimise the adverse effects of preference and maximise the process of convergence; these are:

⁷⁸⁹ The Enabling Clause is part of the WTO Agreements that contain special provisions which give developing countries special rights. The WTO Agreements also contain special provisions which give developed countries the possibility to treat developing countries more favourably than other WTO Members. These provisions are also referred to as "special and differential treatment provisions". See Bartels 2003 *J Int'l Econ L* 507-532.

⁷⁹⁰ Hereafter "PTAs".

⁷⁹¹ Reiter "EU-Mexico Free Trade Agreement".

- i) The RTA must cover the bulk of inter-party trade and trade barriers must be "eliminated on substantially all" trade.
- ii) Trade barriers against non-members must not be higher than pre-existing ones.
- iii) PTAs must be transparent in their operation to members and non-members alike.⁷⁹²

9.3.1 Contents of the 1994 understanding on the Interpretation of Article XXIV

The Understanding on the Interpretation⁷⁹³ of Article XXIV of GATT 1994 clarifies and enforces the criteria and procedures for reviewing compliance with the conditions of Article XXIV by CUs and FTAs, and for evaluating their effects on third parties. It also contains the procedure for compensation to be followed in cases of increase in bound tariffs. Its preamble⁷⁹⁴ reinforces the procedural requirement for notification and consultation with the WTO when members want to create their RTAs. The RTAs have to comply again with the following:

- i) Transparency of their operation
- ii) Subject to the WTO dispute settlement mechanism
- iii) Faithful to GATT 1994
- iv) Sympathetic in entering into negotiations with non-members affected by the increase of tariff rates and customs duties
- v) Obligated to report periodically to the WTO on their operation.

⁷⁹² The meaning of these conditions will be discussed at length later in this chapter.

⁷⁹³ See *Doha Ministerial Meeting: Briefing Notes* (2001). The interpretation's main principle is that the purpose of an RTA should be to facilitate trade between the constituent countries and not to raise barriers to the trade of other WTO members not parties to the RTA. This understanding has made it clear that a question as to whether Article XXIV is being followed by any member when it forms a PTA (SADC is one) can be brought before the Dispute Settlement Body. This clarification is vital as the examination of PTAs by contracting parties during the GATT years could not yield any noticeable result in ensuring their consistency with GATT rules.

⁷⁹⁴ See *Doha Ministerial Meeting: Briefing Notes* (2001). The interpretation's main principle is that the purpose of an RTA should be to facilitate trade between the constituent countries and not to raise barriers to the trade of other WTO members not parties to the RTA. This understanding has made it clear that a question as to whether Article XXIV is being followed by any member when it forms a Preferential Trade Area (SADC is one) can be brought before the DSB. This clarification is vital as the examination of PTAs by contracting parties during the GATT years could not yield any noticeable result in ensuring their consistency with GATT rules.

The preamble recognises the widespread proliferation of PTAs since the creation of GATT in 1947 and their increasing coverage of a significant portion of world trade. If their trade liberalisation is extended to all trade, PTAs can contribute to the expansion of world trade. The preamble reiterates that the purpose of PTAs is to facilitate trade between PTA parties and not to raise trade barriers for their non-party trading partners. The formation and enlargement of PTAs is expected to avoid any adverse effects on the trade of non-PTA members. It reinforces the need to maintain an effective role of the Council for trade in Goods in reviewing PTAs by clarifying the criteria and procedures for assessment and improving transparency of all PTAs formed under Article XXIV. In its bid to promote a common appreciation of the obligations of members under Article XXIV, the understanding requires all PTAs for the formation of current and future CUs and FTAs to comply with the conditions of Article XXIV⁷⁹⁵, and modifies certain aspects of the requirements of paragraphs 5 to 7, and 12 of Article XXIV.⁷⁹⁶

Article XXIV⁷⁹⁷ deals with the methods of evaluating the duties and other regulations of commerce applicable after the formation of a PTA. These duties and regulations on the whole should not be higher or more restrictive than before. This assessment is based on import statistics for a previous representative period, supplied by the PTA involved in the assessment process. In the case of a CU the duties and charges are based on an overall assessment of weighted average tariff rates and custom duties collected. The WTO Secretariat computes and assesses them according to the methodology used in assessment of tariffs offers in the Uruguay Round of Multilateral Trade Negotiations. The duties and charges refer to the applied rates of duties, rather than designated bound rates.⁷⁹⁸ The examination of individual measures, regulations, products covered and trade flows affected may be necessary in assessing the incidence of other trade regulations that present quantification and aggression problems.⁷⁹⁹

⁷⁹⁵ Article XXIV paras 5-8 *GATT* (1994).

⁷⁹⁶ Article XXIV para 1 *GATT* (1994).

⁷⁹⁷ Article XXIV para 5 *GATT* (1994).

⁷⁹⁸ *WTO Official Document WT/DS34/AB/R* (1999) 198.

⁷⁹⁹ In the *Turkish Import Restriction dispute*, the Panel held that the requirement of para 5(a) includes an economic test in assessing the compatibility of a customs union with A XXIV and the Appellate Body concurred.

However, the negotiators saw no need to provide a GATS equivalent to the distinction between CU and FTA found in Article XXIV. The relevant Article refers only to economic integration agreements for services, rather than CUs and FTAs.⁸⁰⁰ However, these have been encumbered by the loose wording in these provisions and the lack of any operational criteria for assessing the impact of rule making in RTAs and FTAs. Additionally there is no consensus on how to apply Article XXIV or GATS Article V to common rules on behind-the-border issues within the region.⁸⁰¹

9.3.2 Current status of WTO negotiations on RTAs

The current discussions on how to improve WTO disciplines on RTAs in the WTO are going nowhere, because there is no way of assessing whether common regional rules restrict or facilitate trade and investment.⁸⁰² Moreover, the renegotiation of requirements for RTAs under Article XXIV is not expected in the near future. The status quo, therefore, seems to be the correct buffer needed for regionalism and multilateralism to coexist with fewer tensions. As long as RTAs have a convergence effect towards multilateralism under the WTO (on issues like reduction of tariffs), their conflict with multilateralism will continue to disappear. The very success of the WTO in establishing a rules-based system for promoting multilateral trade has led to arguments for the development of more democratic institutions and more positive instruments, partly to build on the success of a cooperative international organisation, which has allowed for the peaceful resolution of disputes between states.

In the introduction of this chapter, a selected prescribed criterion of Article XXIV was highlighted. The discussion on those four requirements and the analysis of their pertinent provisions will now be undertaken, starting with the requirement for notification. The ultimate goal is also to establish SADC's compliance with the said requirements.

⁸⁰⁰ Sampson and Woolcock (eds) *Regionalism* 12.

⁸⁰¹ Trachtmann 2003 *Towards Open Regionalism* 459-492.

⁸⁰² Woolcock "Role of Regional Agreements".

9.3.3 The requirement of notification⁸⁰³

9.3.3.1 Historical overview

WTO members with an intention to enter into an RTA that covers trade in goods must notify the Council of Trade in Goods. This is to fulfil the transparency requirement, as it will be useful for all other WTO members to be aware of arrangements that may result in trade preferences that exclude them. The purpose of notification is highlighted in Crawford's⁸⁰⁴ description of the mandate of the Committee on Regional Trade Agreements (CRTA)⁸⁰⁵:

The mandate of the Committee, which is open to all WTO Members and observers, includes carrying out examinations of RTAs and considering their implications for the multilateral trading system... The aim of the CRTA was not only to provide a single committee to conduct the examination of regional trade agreements, but also to provide a forum for the discussion of systemic questions with a view to their clarification or eventual resolution.

The CRTA was established by the WTO General Council in 1996.⁸⁰⁶ It is the successor to the GATT Article XXIV working parties. Under its set up, every member of the WTO could participate in the CRTA and decision making was subject to consensus. Between its establishment in 1996 and the launch of the Doha Development Agenda in November 2001, the CRTA held thirty sessions of two to three days each and completed the examination of a total of 69 RTAs.⁸⁰⁷ At this stage, the scope and mandate of the CRTA was technically broad based and far reaching. This is highlighted in the Decision Establishing the CRTA providing the Committee with Authority to

... carry out the examination of RTA and thereafter present a report to the relevant body for appropriate action and further direct the Committee with

⁸⁰³ Article XXIV, para 7.

⁸⁰⁴ Crawford 2007 *Singapore Year Book of International Law and Contributors* 133-140.

⁸⁰⁵ The CRTA's terms of reference can be found in *WTO Official Document WT/L/127* (1996). The WTO General Council established the CRTA in 1996. Its two principal duties are to examine individual regional agreements; and to consider the systemic implications of the agreements for the multilateral trading system and the relationship between them. The Protocol is supposed to be subjected to the criteria set out by the CRTA of 1996. Furthermore, the Transparency Mechanism of 2006 is based on the two principle duties of CRTA OF 2006; hence, the *SADC Protocol on Trade* (1996) is subjected to the transparency criteria.

⁸⁰⁶ See *WTO Official Document WT/L/127* (1996).

⁸⁰⁷ Crawford 2007 *New Transparency Mechanism* 133-140.

authority to consider the systemic implications of such RTA and regional initiatives for the multilateral trading system.⁸⁰⁸

Furthermore, Article XXIV:7(b) of the GATT requires members to make available to them such information as will enable the working party to such reports and recommendations to contracting parties as the working party deems appropriate.

The language of Article XXIV:7(b) relating to interim agreements is similar and perhaps even stronger on this point, stating that the parties shall not maintain or put into force, as the case maybe, such agreement if they are not prepared to modify it in accordance with these recommendations.⁸⁰⁹ In retrospect these broad powers provided for the CRTA to conclude in its report that the RTA at issue was, in fact, not compatible with Article XXIV and recommend that either its dismantling or alteration were far reaching. This has proved insurmountable even under determinations made through consensus. Prior to the implementation of the WTO, GATT Article XXIV working parties, for political and theoretical reasons, often disagreed on the compatibility of proposed RTAs and simply declined to make a formal decision. In fact, only one working party ever agreed by consensus on the consistency of a PTA with Article XXIV of GATT.⁸¹⁰ Decision making through consensus marginalised the CRTA, hence the call for a shift from the ad hoc working party to a standing CRTA that may create coherent and consistent decisions. Another challenge arose out of the fact that membership of the CRTA is open to all WTO members, including those RTAs under examination. It is logical that such members would not judge their RTAs as incompatible with the rules. For these reasons, by November 2001, when WTO members met in Doha for their Ministerial Conference, there was widespread recognition that something had to be done to unlock the stalemate in the CRTA.⁸¹¹

⁸⁰⁸ Paras 1(a) and (d) of the Decision Establishing the CRTA in *WTO Official Document WT/L/127* (1996).

⁸⁰⁹ This is no longer the position under the Transparency Mechanism for Regional Trade Agreements: *WTO Official Document WT/L/671* (2006).

⁸¹⁰ *WTO Official Document L/7501* (1994).

⁸¹¹ Crawford 2007 *New Transparency Mechanism* 204.

9.3.3.2 *Current status*

The surge in RTAs has continued unabated since the early 1990s. RTAs have, in recent years, become a very prominent feature of the Multilateral Trading System. Between January 2005 and December 2006 a further 55 RTAs were notified to the WTO, raising the total number of RTAs notified and in force to 214.⁸¹² Currently, some 462 RTAs were notified to the GATT/WTO up to February 2010. Of these, 345 were notified under Article XXIV of the GATT 1947 or GATT 1994; 31 under the Enabling Clause; and 86 under Article V of the GATS. On the same date, 271 agreements were in force. The overall number of RTAs in force has been increasingly steadily, a trend likely to be strengthened by the many RTAs currently under negotiation. Of these RTAs, FTAs and partial scope agreements account for 90 per cent, while CUs account for 10 per cent of goods agreement.⁸¹³ All regional trade agreements involving RTA members are to be notified to the WTO and be considered.⁸¹⁴ This falls short of the total number of RTAs in existence, because not all WTO members fulfil their WTO obligations by notifying agreements to which they are party.

Article XXIV, paragraph 7 sets the obligation for parties to a RTA to notify other members, and to make available to them

[...] such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties [...].⁸¹⁵

According to the Transparency Mechanism, member parties to a newly signed RTA shall convey to the WTO, in so far as and when it is publicly available, information on the RTA, including its official name, scope and date of signature, any foreseen timetable for its entry into force or provisional application, relevant contact points and/or website addresses and any other unrestricted information.⁸¹⁶ Upon receipt of this information the WTO Secretariat will post it on the WTO website and will

⁸¹² Crawford and Fiorentino *Changing Landscape*.

⁸¹³ WTO Date Unknown (c) www.wto.org.

⁸¹⁴ Sampson and Woolcock (eds) *Regionalism* 12.

⁸¹⁵ Article XXIV, para 7(a) GATT (1994).

⁸¹⁶ WTO Official Document WT/L/671 (2006). This forms part of the feature of "early announcement". There is no obligation in A XXIV to announce agreements early.

periodically provide members with a synopsis of the communications received. This requirement is important because it promotes transparency and fairness in global trade.⁸¹⁷ This purpose is highlighted here:

Upon receiving information concerning the RTAs, other WTO members are entitled to make recommendations, which the RTA parties should be ready to abide to.⁸¹⁸

The need for notification of an FTA, CU or interim agreement to the WTO is clearly stated and emphasised.⁸¹⁹ The required notification of an RTA by members that are party to it shall take place as early as possible. As a rule, it will occur no later than directly following the parties' ratification of the RTA or any party's decision on application of the relevant parts of an agreement, and before the application of preferential treatment between the parties. The weakness of this provision is that no adequate guidance is given as to when notification should be made to the WTO. It has been customary since the 1950s for WTO members to notify the WTO after the regional agreement has been adopted in Member States' legislative systems. This procedure is logical given that it removes the risk of the regional arrangement being rejected by domestic legislatures after it has obtained the approval of the WTO. However, notification of an RTA does not equate with approval.

The WTO Council is against this practice.⁸²⁰ It insists that prompt notification requires that Member States of the regional organisations promptly notify the WTO of the arrangement after it has been signed by all contracting parties. This has to be done so that such an arrangement can be on the agenda of the Council's first meeting after the signing of the regional arrangement; however, RTAs only appear on the Council's agenda for information purposes. The Council's position is meant to

⁸¹⁷ A list of notified RTAs is available on WTO 2008a www.wto.org.

⁸¹⁸ Article XXIV, para 7(b) *GATT* (1994). This is only the case for agreements which are notified to the WTO as "interim agreements". In practice, WTO members do not notify their RTAs as interim agreements.

⁸¹⁹ Article XXIV para 7 *GATT* (1994). In notifying their RTA, the parties shall specify under which provision(s) of the WTO agreement it is notified. They will also provide the full text of the RTA and any related schedules, annexes and protocols, in one of the WTO official languages; if available, these shall also be submitted in an electronically exploitable format. Reference to related official Internet links shall also be supplied.

⁸²⁰ Clarified under para 3 *Transparency Mechanism on RTAs* (2006).

encourage Member States to enter into arrangements which provide a shorter time period between the signing of the agreement and its coming into force.⁸²¹

9.3.3.3 *Importance of the New Transparency Mechanism*

On 14 December 2006, the General Council established on a provisional basis a new transparency mechanism for all RTAs. The new transparency mechanism negotiated in the Negotiating Group on Rules provides for early announcement of any RTA and notification to the WTO. The Transparency Mechanism clarifies and strengthens the notification obligations of WTO Members and introduces new procedures to enhance the transparency of RTAs.⁸²² This was a result of widespread acknowledgement among Members that the existing RTAs surveillance mechanism was largely ineffective.⁸²³ Evidence shows that over the CRTA's five-year existence, the quality of the Standard Formats and statistics information provided by members had varied considerably, with some members providing detailed statistics at the tariff line level to support the examination process and others expressing themselves unable or unwilling to do so.⁸²⁴

Under the New Transparency Mechanism, members will consider the notified RTAs on the basis of a factual presentation by the WTO Secretariat. The CRTA will consider RTAs falling under Article XXIV of GATT and Article V of the (GATS) while the Committee on Trade and Development will consider RTAs falling under the Enabling Clause (trade arrangements between developing countries). The transparency mechanism is implemented on a provisional basis and is to be replaced by a permanent mechanism to be adopted as part of the Doha Round of Trade Negotiations.⁸²⁵ Members are to review, and if necessary modify, the decision, and replace it with a permanent mechanism adopted as part of the overall results of the Doha Round.

⁸²¹ Kumar and Blumberg *Article XXIV of GATT* 4.

⁸²² Crawford 2007 *Singapore Year Book of International Law and Contributors* 204.

⁸²³ Crawford 2007 *Singapore Year Book of International Law and Contributors* 204.

⁸²⁴ Crawford 2007 *Singapore Year Book of International Law and Contributors* 204.

⁸²⁵ WTO Official Document WT/MIN(01)/DEC/1 (2001) para 47.

Upon notification, and without affecting member's rights and obligations under the WTO agreements under which it has been notified, the RTA shall be considered by Members under the procedures established in paragraphs 6 to 13 of the Transparency Mechanism for RTAs.

9.3.3.4 *Subsequent notification and reporting*

It is also important that continuous reporting is undertaken, since RTAs are not static and in most cases levels of deeper integration are key milestones, as indicated under the SADC RISDP. The required notification of changes affecting the implementation of an RTA, or the operation of an already implemented RTA, shall take place as soon as possible after the changes occur. Changes to be notified include, *inter alia*, modifications to the preferential treatment between the parties and to the RTA's disciplines. The parties shall provide a summary of the changes made, as well as any related texts, schedules, annexes and protocols, in one of the WTO official languages and, if available, in an electronically exploitable format.⁸²⁶ At the end of the RTA's implementation period, the parties shall submit to the WTO a short written report on the realisation of the liberalisation commitments in the RTA as originally notified.⁸²⁷ Upon request, the relevant WTO body shall provide an adequate opportunity for an exchange of views on the communications submitted under paragraphs 14 and 15.⁸²⁸ The communications submitted under paragraphs 14 and 15 will be promptly made available on the WTO website and a synopsis will be periodically circulated by the WTO Secretariat to Members.⁸²⁹

9.3.3.5 *Bodies entrusted with the implementation of the Transparency Mechanism*

The CRTA and the Committee on Trade and Development (CTD) are instructed to implement this Transparency Mechanism. The CRTA shall do so for RTAs falling under Article XXIV of GATT 1994 and Article V of General Agreement on Trade in Services (GATS), while the CTD shall do so for RTAs falling under paragraph 2(c) of

⁸²⁶ Para 14 *Transparency Mechanism on RTAs* (2006).

⁸²⁷ Para 15 *Transparency Mechanism on RTAs* (2006).

⁸²⁸ Para 16 *Transparency Mechanism on RTAs* (2006).

⁸²⁹ Para 17 *Transparency Mechanism on RTAs* (2006).

the Enabling Clause. For the purposes of performing the functions established under this Mechanism, the CTD shall convene in dedicated session.⁸³⁰

9.3.3.6 *The extent of transparency*

Any Member may, at any time, bring to the attention of the relevant WTO body information on any RTA that it considers ought to have been submitted to members in the framework of this Transparency Mechanism. The WTO Secretariat shall establish and maintain an updated electronic database on individual RTAs. This database shall include relevant tariff and trade-related information, and give access to all written material related to announced or notified RTAs available at the WTO. The RTA database should be structured so as to be easily accessible to the public.⁸³¹

9.3.3.7 *Scope of application of the Transparency Mechanism*

This decision shall apply, on a provisional basis, to all RTAs. With respect to RTAs already notified under the relevant WTO transparency provisions and in force, this decision shall apply as follows:

- i) RTAs for which a working party report has been adopted by the GATT Council and those RTAs notified to the GATT under the Enabling Clause will be subject to the procedures under Sections D to G above.
- ii) RTAs for which the CRTA has concluded the "factual examination" prior to the adoption of this Decision and those for which the "factual examination" will have been concluded by 31 December 2006, and RTAs notified to the WTO under the Enabling Clause will be subject to the procedures under Sections D to G above. In addition, for each of these RTAs, the

⁸³⁰ Since SADC's RTA fall under A XXIV, the CRTA is in charge of implementing the Transparency Mechanism.

⁸³¹ WTO Official Document WT/L/671 (2006) (21).

WTO Secretariat shall prepare a factual abstract presenting the features of the agreement.

- (c) Any RTA notified prior to the adoption of this Decision and not referred to in subparagraphs (a) or (b) will be subject to the procedures under Sections C to G above.

9.3.3.8 *Analysis of the transparency mechanism*

The discussion on the transparency mechanism indicates the willingness of the WTO to assist both members of an RTA and those who may not be party to such an agreement on issues of mutual benefit. Putting the relevant information in the public domain makes fair trade even more certain. The apparent weakness of the Transparency Mechanism is that it is not legally binding. Article XXIV:7(a) of the GATT does not require CRTA approval before members form a RTA. As long as the requirements of Article XXIV of GATT are met, members are free to enter into RTAs. Even information obtained through the factual presentation cannot be used by any parties in dispute settlement procedures or in creating new rights and obligations for members. The question arises then that if a mechanism is to be used as an effective tool, it should lead to recourse and if there are obligations that were not complied with there should be a legal basis to lay a claim. However, the objective of the Transparency Mechanism is to promote the transparency of RTAs by removing the spectre of consistency assessment from the proceedings. Members always have the option of dispute settlement if they consider an RTA is not in conformity with the rules.

Another controversy could arise in that, in its dealings with the newly created RTA, a WTO member or another RTA may discover aspects of the factual presentation to be similar to their own findings, whose basis could result in dispute settlement procedures. If this can be established, the factual presentation is a tool that can be used by any RTA in the face of dispute settlement procedures. On the other hand, those seeking dispute settlement procedures can use it by wisely, manipulating the findings of the factual presentation to appear different while the substance remains the same. Clearly, there are no clear guidelines to deal with such an eventuality. The existence and purpose of this firewall between information made available in the

Factual Presentation and the dispute settlement process can easily be manipulated as suggested above.

Under the Transparency Mechanism, the WTO Secretariat is precluded from making any value judgement. This may lead to a situation where a partially correct factual presentation is provided, all in the name of refraining from making any value judgement. The creation of new rights and obligations for members is bound to happen, since an RTA is allowed from time to time to update its agreement through amendments and annexes, for example the SADC Treaty has had several amendments. For that matter, it is difficult to monitor if such amendments, which lead to the creation of new obligations, are not derived from the factual presentation. However, there is a provision in Section D of the Transparency Mechanism for changes in the RTA to be subsequently notified.

In the final analysis the transparency mechanism is only as good as a mirror in the WTO's hands, pointing to the defects on the face of the RTA, at the same time failing to address those defects. Surveillance is not good enough and there is a need to make the Transparency Mechanism more useful. This will result in transparency without consistency assessment.

Since 1996, however, the CRTA has proved unable to fulfil its role in confirming WTO compatibility with economic integration agreements. Despite a tremendous increase in the number of RTAs notified to the WTO since the late 1990s, there has not been a single RTA for which compliance has been formally established. This is in part due to the lack of a common understanding on the interpretation of Article XXIV. But it is also due to a lack of a common understanding on the parallel roles of the Dispute Settlement Mechanism and the CRTA in defining WTO compliance of RTAs. There was hope that the new Transparency Mechanism would help break the current logjam in the WTO on RTAs. In the words of the WTO Director General, Lamy:⁸³²

... this is an important step towards ensuring that regional trade agreements become building blocks, not stumbling blocks to trade, the procedures do not provide consequences or penalties for failure to abide by the new procedures.

⁸³² See WTO 2006 wto.org.

This statement points to both the strength and weakness of the Transparency Mechanism. Although the Transparency Mechanism was not designed as an enforcement tool, the absence of defined and accepted consequences after failure to abide by the process of the Transparency Mechanism is an advantage that can soon turn into a challenge if abused. Thus, the mechanism in its current state is not adequate in supporting a rules-based system that is ready to be enforced by the DSB. On the contrary, it can be argued that the Transparency Mechanism tightens up existing provisions on notification by stipulating in paragraph 3 that notification is to take place "as early as possible". Thus, it may be misunderstood as a voluntary mechanism that may curtail integration both at the regional and multilateral levels.

9.3.3.9 SADC – compliance with notification

On 2 August 2004, SADC notified the Protocol on Trade in the SADC and the Amending Agreement to the Protocol to the WTO under Article XXIV:7(a) of the GATT 1994, as aiming at establishing an FTA.⁸³³ SADC would have also qualified to notify under paragraph 4(b) of the Enabling Clause since the RTA involves developing countries. The terms of reference for the examination of the Protocol were adopted by the Council for Trade in Goods on 1 October 2004.⁸³⁴ The text of the Protocol and the Amendment Protocol were circulated to WTO members as documents WT/REG176/1 and WT/REG176/2/Rev.1⁸³⁵ The SADC Trade Protocol entered into force in the year 2000, hence the notification date of 2004 means notification was not strictly complied with.

Reasons for the delayed notification could be that some SADC members were unhappy that the protocol on trade provides no favourable solution to the problems faced by the region, including industrial polarisation and trade diversion. Despite these suggested reasons; notification is a requirement that has to be fulfilled "as early as possible" – no later than directly following the parties ratification of the RTA or any party's decision on application of the relevant parts of an agreement, and

⁸³³ WTO Official Document WT/REG176/N/1/Rev.1 (2004). The delegation from the Tanzanian Mission presided over the notification.

⁸³⁴ WTO Official Document WT/REG176/3 (2004).

⁸³⁵ WTO Official Document WT/REG176/1 (2004) and WTO Official Document WT/REG176/2/Rev.1 (2004).

"before" the application of preferential treatment between the parties. In practice, this means that WTO members have to be informed before the implementation of the RTA.

Prompt notification after the signing of the agreement by Member States has not been done, hence, in practical terms SADC was in violation of the notification requirement because some years had passed since SADC had signed the Protocol on Trade.⁸³⁶ This is not unique to SADC; however, the obligation for notification has not been complied with in a systematic manner by WTO members and Crawford⁸³⁷ notes that:

While the wording of GATT Article XXIV suggests that an RTA should be notified before the entry into force of the RTA, notifications are generally received after entry into force, in some cases months or even years after.

From Crawford's observation, it is clear that the WTO has not put strict measures in place to ensure compliance with the notification requirements, thus SADC's breach of this requirement seems to be of no consequence. The discussion now turns to the second requirement that needs to be complied with under Article XXIV of GATT.

9.3.4 Elimination of barriers on "substantially all trade"

The meaning of "substantially all trade" in Article XXIV:8 has given rise to much discussion over the years.⁸³⁸ To date, WTO members have been unable to agree on the proportion of trade that amounts to "substantially all trade",⁸³⁹ or how "all trade" within an RTA is to be measured.⁸⁴⁰ According to provisions of Article XXIV,⁸⁴¹ all

⁸³⁶ The Protocol on Trade entered into force on 1 September 2000; however, notification was only done on 27 August 2004. A period of four years passed and if one applies the Transparency Mechanism, SADC was in violation of prompt notification.

⁸³⁷ Crawford 2007 *Singapore Year Book of International Law and Contributors* 204.

⁸³⁸ Lockhart and Mitchell "Regional Trade Agreements".

⁸³⁹ New Zealand has suggested, in view of the many difficulties surrounding the word "substantially", that the word should be removed from A XXIV:8: *WTO Official Document WT/REG/M/16* (1998) para 115.

⁸⁴⁰ *WTO Official Document WT/REG/W/46* (2002).

⁸⁴¹ Article XXIV sub-para 8(a) *GATT* (1994) refers to CUs whose duties and other restrictive regulations of commerce (except where necessary, those permitted under Aa XI, XII, XIII, XIV 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. For FTAs, the corresponding requirement is contained in A XXIV:8(b),

restrictive duties and regulations of commerce should be *eliminated on substantially all trade* between the contracting parties to the RTA; and where the parties choose to adopt a common external tariff and trade policy, such should *be no more restrictive than the policies/tariffs of the individual states prior* to the formation of the trading bloc.⁸⁴² The main objective of Article XXIV was to prevent RTAs from becoming obstacles to the development of multilateral trade, but rather to make them a stepping-stone towards open trade. According to Article XXIV paragraph 8, RTAs (be they free trade agreements or customs union) should result in elimination of duties and non-tariff barriers on "substantially all the trade". As will be shown in the next section, this provision has proved to be one of the most contentious and hardest to define.

9.3.4.1 Fulfilling the "substantially all trade" requirement

The elimination of tariffs on substantially all trade is a requirement that has openly been questioned. The question is "what amounts to substantially all trade"? The requirement to liberalise "substantially all trade" within a RTA has been criticised by many analysts. According to Bhagwati:⁸⁴³

This notion needs clarification because it is not clearly defined how much "all" is "substantially" all. This ambiguity is likely to lead to loopholes, thereby contributing to exclusion in related agreements of sensitive sectors such as agriculture and steel. To avoid this kind of loophole, it is suggested that the notion be changed into a phrase that requires liberalisation of "all the trade". Setting a certain percentage, for instance 80% percent or 90% of liberalisation across all sectors can also be considered as alternative to the "all the trade" requirements.

What this means is that there is a need to clarify and specify the "substantially all trade" requirement. The two suggestions of reform discussed above will contribute to successfully mitigating the regionalist tendency of the current world economy, but they also entail shortcomings. The suggestions of Bhagwati, for instance, seem to be too ambitious and idealistic and it is also uncertain whether a total elimination of

referring to duties and other restrictive regulations of commerce (except where necessary, those permitted under A XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all trade between the constituent territories in products originating in such territories.

⁸⁴² Article XXIV sub-para 8(a)(i) *GATT* (1994). See discussion in Kumar and Blumberg *Article XXIV of GATT* 3.

⁸⁴³ Bhagwati "Regionalism and Multilateralism".

trade restrictions will increase overall welfare.⁸⁴⁴ In regions like SADC and many other African RTAs where intra-regional trade is significantly low, the removal of tariffs will not result in an increase in welfare. If adopted by the WTO, Bhagwati's suggestion is also expected to give rise to unfair treatment between the existing and new regionalism. On the other hand, it considers only the liberalisation aspect of RTAs, thus leading to insufficient consideration of deep integration, which is also one of the main effects of regional economic integration.

9.3.4.2 *Selected WTO Jurisprudence on the meaning of "substantially all trade"*

Appellate body panels have been called to interpret the term "substantially all trade" in dispute settlement. Up to now no panel has provided a satisfactory and detailed interpretation of this notion. A few cases will be highlighted here in showing this trend. In the *Turkey–Textiles* case:

the Appellate body's interpretation was that "substantially all trade" is not the same as all trade but that "it is something considerably more than merely some of trade".⁸⁴⁵

This interpretation means that the relevant amount of trade falls somewhere between some and all trade among the RTA parties. In the case involving the *US–Line Pipe*, the USA submitted evidence that NAFTA eliminated "duties on 97 percent of the Parties' tariff lines, representing more than 99 percent of trade among them in terms of volume".⁸⁴⁶ In this case the Panel held that the USA had established a prima facie case that NAFTA met the definition of an FTA under Article XXIV:8(b).⁸⁴⁷ This decision was made after the review of the evidence given and without offering an opinion on the meaning of "substantially all trade" and the Appellate Body took the view that it was not necessary to address it and declared it to be of no legal effect.⁸⁴⁸

⁸⁴⁴ Frankel, Stein and Wei *Regional Trading Blocs*. Frankel's analysis is convincingly illustrative in this respect. His econometric model generates more favourable welfare effects in cases of partial liberalisation than in cases of total liberalisation. Based on this result, he argues that a removal of 100% intra-bloc trade barriers may not need strict enforcement, although he recognises the danger of accepting partial liberalisation as a rule.

⁸⁴⁵ *WTO Official Document WT/DS34/AB/R* (1999) para 48.

⁸⁴⁶ *WTO Official Document WT/DS202/R* (2001) para 7.142.

⁸⁴⁷ *WTO Official Document WT/DS202/R* (2001) para 7.144.

⁸⁴⁸ *WTO Official Document WT/DS202/R* (2001) paras 198–199.

If the panels and Appellate Body are left to decide on this notion, they are more likely to develop a flexible test premised on dividing the term into two. Firstly, "substantial" will be meant to indicate that the elimination of internal restrictions must cover a very considerable proportion of trade between the parties. Secondly, "all trade" will be used in identifying the broad base against which internal liberalisation is to be measured. This will ultimately allow the panels to reach a conclusion based on the specific facts at issue, each case being decided based on the facts at hand. This jurisprudence can now help give an interpretation of what amount to "substantially all trade" in SADC.

9.3.4.3 *Application of the "substantially all trade" interpretation in SADC*

In trying to fulfil the requirements listed above, the SADC Trade Protocol has made provisions for the phased elimination of tariffs and non-tariff barriers.⁸⁴⁹ The Committee of Ministers responsible for trade matters has determined the process to be followed for the phased elimination of tariffs and non-tariff barriers by doing the following:⁸⁵⁰

- i) prescribing the eight-year time frame for the elimination of barriers⁸⁵¹
- ii) granting a period of grace to afford additional time to those Member States that are of the opinion that they maybe or have been adversely affected by the removal of tariffs and non-tariff barriers⁸⁵²
- iii) recognising that different tariff lines may be applied within the agreed time frame for different products in the process of eliminating tariffs and non-tariff barriers⁸⁵³

⁸⁴⁹ According to a 3 *SADC Protocol on Trade* (1996), import duties on goods originating in Member States will be phased out gradually and eventually.

⁸⁵⁰ Article 3 *SADC Protocol on Trade* (1996).

⁸⁵¹ Having been started in the year 2000, this was accomplished in 2008 by the launch of the FTA.

⁸⁵² In line with this provision, SADC Member States like Angola and the DRC did not join the FTA at its launch; they sought additional time to adjust to the low tariffs since their economies depended heavily on tariffs for revenue.

⁸⁵³ Article 3(e) *SADC Protocol on Trade* (1996). A Trade Negotiating Forum was responsible for negotiating the process and method of eliminating barriers to trade and the criteria to be followed for listing products for special consideration.

In fulfilling this requirement, the 85 per cent threshold for elimination of tariffs and non tariff barriers was considered sufficient by SADC. To liberalise 80 to 90 per cent of total trade among member countries of an RTA may be in line with the welfare argument raised by Frankel,⁸⁵⁴ which established an econometric model generating more favourable welfare effects through partial liberalisation rather than through total liberalisation. Partial liberalisation is ideal for SADC where the majority of Member States still rely heavily on tariffs as a source of revenue.⁸⁵⁵ Evidence is shown by how much BLNS countries are also dependent on the income from the SACU Revenue Pool that accounted for between 13 per cent (Botswana), 28 per cent (Namibia) and 51 per cent (Lesotho and Swaziland) of total government income in 2001.⁸⁵⁶ Stern⁸⁵⁷ emphasises that:

Revenue losses can arise as a direct effect of adopting a different tariff structure and in particular as a result of agreeing to apply no import tariffs to intra-group trade.

Further problems are envisaged in that trade volume in one sector is not the result of one single factor; trade impediments may also influence trade relations. Consequently, it will not be easy to identify the product lines, for which tariffs should be eliminated, to come to the specified percentage. Additionally, shifts in demand and supply may affect the trade flows differently, which will also make it quite impossible to reach the exact value of the 80 to 90 per cent for all trade. This situation has manifested itself in SADC as illustrated below.

The 85 per cent duty-free threshold was the target SADC set before launching the FTA.⁸⁵⁸ The interpretation of this provision is open to criticism, since there is no prescribed formula for reaching such a threshold. SADC only managed to reach the 85 per cent threshold by working out an average calculation covering all Member States. There was no uniform reduction of tariffs within SADC and member countries

⁸⁵⁴ Frankel, Stein and Wei *Regional Trading Blocs* 216.

⁸⁵⁵ Kirk and Stern *New Southern African Customs Union Agreement*.

⁸⁵⁶ *WTO Official Document WT/TPR/G/114* (2003) 7.

⁸⁵⁷ Development Network Africa 2007 www.dnafrica.com 50.

⁸⁵⁸ See FTA Brochure "Handbook on SADC FTA, Growth, Development and Wealth Creation". Available on www.sadc.in/fta/index/browse/page/219 Accessed on: 20 August 2010, See also the SADC RISDP.

failed to implement targets.⁸⁵⁹ In fact, the 85 per cent was only made possible because the SACU members who are also members of SADC had very low tariffs, reaching zero in many instances. Since SACU is already a CU with its tariffs very low, its contribution in the 85 per cent average was enormous. This brings into question the rationale behind the requirement for eliminating tariffs, if the idea is to eliminate tariffs and increase trade within the trade agreement. Although there are valid reasons for accepting an asymmetrical approach to tariff liberalisation, the elimination of tariffs should be implemented equally across the board, especially considering that SADC Member States with the exception of South Africa have poor economies.

Since the substantially all trade requirement is not clear and considering the fact that SADC has reached a certain level of tariff elimination that is exceptional, this requirement has been complied with. The term "substantially" implies that the totality of the trade does not necessarily have to be covered. It is therefore argued that there is the flexibility to leave some of the trade outside the coverage of liberalisation. The parties would have the discretion as to which part of total trade to liberalise.⁸⁶⁰ How much trade can be left outside the coverage, however, remains an unanswered question. Additionally, another question could be what criteria should be used in the selection of products that form part or do not form part of the substantially all trade category. Some Member States argue that "substantially all trade" should be represented by a quantitative benchmark, such as the percentage of trade covered, and/or a percentage of the total number of tariff lines. It is also argued that a qualitative benchmark is necessary in addition to the quantitative one. A qualitative benchmark is generally defined as the absence of systematic exclusion of any major sectors such as agriculture or textile. The preamble to the Understanding on Article XXIV alludes to the importance of not excluding any sectors from liberalisation in order to maximise benefits from RTAs. It notes that the positive contribution that RTAs can have through the expansion of world trade

... is increased if the elimination between the constituent territories of duties and other restrictive regulations of commerce extends to all trade, and diminished if any sector of trade is excluded.

⁸⁵⁹ Niyiragira Date Unknown www.pambazuka.org.

⁸⁶⁰ See *WTO Official Document WT/REG/W/22/Add.1* (1998).

African countries probably have an interest in a qualitative benchmark for trade coverage. Sectors and products where tariff peaks in or restrictions to preferences are most commonly found are those where African countries have a comparative advantage (textiles, agricultural products). The EU's interpretation of the substantially all trade requirement has traditionally been that liberalisation should extend to at least 90 per cent of existing trade between the members of an RTA. This 90 per cent coverage can be split unevenly between RTA members, in order to reflect development asymmetries.

A calculation of the liberalisation granted by SADC members as a whole within the context of the Trade Protocol can be obtained by aggregating the duty-free tariff lines granted by each SADC member. In this formula, SACU is counted as one because it has already achieved a CU status. The technique used is a simple average based on the total number of tariff lines and the total number of lines liberalised. Using this approach, calculations show that the overall liberalisation by SADC members amounts to 40.8 per cent of tariff lines liberalised on entry into force of the Agreement. By 2015, when the last Member State, Mozambique, fully liberalises, it is assumed that the figures will rise to 99.7 per cent. In terms of trade value (based on average 2002–2004 import values), overall liberalisation by SADC members amounts to 36.3 per cent on entry into force. By the end of the implementation period it is anticipated to reach 90.9 per cent.⁸⁶¹

There is no accepted formula for calculating substantially all trade in the WTO; hence, SADC's formula is equally ungrounded. However, if one looks at the kinds of products not covered by the 85 per cent threshold, it becomes clear that the choice of not including motor vehicles, motor vehicle parts, textiles and certain clothing materials only points to the protection of such industries. Furthermore, the finger then points to South Africa as the only industrialised member within the region, which seeks to protect its motor vehicle manufacturing industry,⁸⁶² as well as its textile industry. The South African motor industry was one of South Africa's most heavily protected industries prior to the trade liberalisation programme that was launched in

⁸⁶¹ This statistical analysis has been provided by the WTO Factual Presentation.

⁸⁶² See generally Bell 1989 *S Afr J Econ* 68-79.

the 1990s,⁸⁶³ but the levels of protection have not yet gone down to acceptable levels. Critically, what this means is that South Africa is not willing to liberalise sectors where it has a comparative advantage. In some sense this portrays protectionist tendencies that are against the very objective of trade liberalisation. All the other sectors forming the 85 percent threshold could also be in areas where other SADC Member States have comparative advantage. The argument now is that substantially all trade should be as close to 100 per cent as possible, so that trade liberalisation benefits can be felt in the majority of the sectors and for all countries involved. The substantially all trade requirement has been complicated by the interim EPA pact that gives several of the SADC countries different levels of liberalisation, for example Botswana, Lesotho and Swaziland will liberalise 86 per cent of trade by value and tariff lines by the start of 2010, while Mozambique will liberalise 80.5 per cent of trade.⁸⁶⁴

In finalising the discussion on the debate on substantially all trade, the merits and shortcomings of the suggested interpretations bring constructive ambiguity. This prevents countries from applying selective and/or sectoral liberalisation in just a few areas. This effect is expected to strengthen if the international organisation, which possesses the power of ruling and enforcement, has enough authority to judge on it. Therefore, it seems that the problem currently being experienced is not the ambiguity incorporated in the substantially all trade requirement, but the fact that there has yet to be found an appropriate governance system for regionalism to prevent the misuse of the existing rules.⁸⁶⁵ Furthermore, although the DSB of the WTO can always be used, Members have shied away from using it for a variety of reasons, not least the fact that virtually all WTO members are engaged in RTAs and any resulting jurisprudence may have negative effects on their own arrangements. This form of governance would, ideally, be relevant at both the multilateral level (WTO) and regionally (SADC and any other RTA). Therefore RTAs will have to find a better formula in the interpretation of substantially all trade, an interpretation that equally balances trade liberalisation both within and outside the RTA. In the final analysis the reason behind these obligations is clear, the drafters wanted to ensure that each

⁸⁶³ Flatters and Netshitomboni 2006 qed.econ.queensu.ca.

⁸⁶⁴ Kruger 2007/8 *Trade Negotiations Insights* 8-9.

⁸⁶⁵ Whether the Committee on Regional Trading Arrangement (CRTA), which is established within the WTO, can take up this task needs still to be proved.

RTA, on the whole, facilitated, as opposed to hindered or burdened, trade. Furthermore, they wanted to ensure that RTAs could not be used merely to promote preferential arrangements on a select range of goods or economic sectors.

9.3.5 Tariffs or policies no more restrictive than those in place before formation of RTA

RTAs will not qualify for the exception under Article XXIV:5 if they apply "duties and other regulations of commerce" that are higher or more restrictive than before the RTA was formed. This means that the period after the formation of a RTA should be marked by tariffs or trade policies that are no more restrictive than those present before its formation. This requirement makes it illegal for Member States within the RTA to increase tariffs to levels above those in operation before the RTA was formed. The precise character of this condition differs from CUs and FTAs, for CUs the condition is framed in the wording of Article XXIV:5(a):

The duties and other regulations of commerce imposed at the institution of a customs union in respect to trade with WTO members not part to such union ... shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union ...

The conditions for FTA compliance are contained in Article XXIV:5(b):

The duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of an FTA to trade of WTO members not included in such area ... shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the FTA ...

The provisions quoted above are relevant to SADC, since the objective of deeper integration contained in the SADC Trade Protocol includes both CUs and FTAs as key milestones.

9.3.5.1 *What is the meaning of "duties and other regulations of commerce"⁸⁶⁶ (ORCs)?"*

There is a direct correlation between Article XXIV:5(a), 5(b) and 8(a)(ii) and sub-paragraph 8(a)(i) and 8(b) in the words "duties and other regulation of commerce". Sub-paragraph 5(a) and 8(a)(ii) form a coherent pair, both dealing with CUs. According to sub-paragraph 8(a)(ii), the parties to a CU must "substantially" harmonise duties and other regulations of commerce applied to trade of countries that are not part of the RTA, whether or not they are WTO members. Sub-paragraph 5(a) requires that the newly harmonised Other Regulations of Commerce, plus any remaining unharmonised ORCs, applied in respect of trade with WTO Members that are not party to the RTA, are no more restrictive than the ORCs previously applied in respect of such trade.

Examples of Regulation of Commerce that could potentially constitute ORCs, includes border measures⁸⁶⁷ regulating either the import of goods from third countries or the export of goods to third countries or the export of goods to third countries; and marketplace measures that may be applicable to goods of third countries; to goods of both third countries and RTA parties; or to goods of RTA parties. During the Uruguay Round, one proposal was that the words "duties and other regulations of commerce" should be interpreted to cover "all border measures taken in connection with importation or exportation which have a differential impact on imported products as compared to domestic products".⁸⁶⁸ This proposal was rejected owing to, among other things, the inclusion of the word "exportation". This might suggest that the negotiators did not agree that ORCs include export measures. A further difficulty with interpreting ORCs as including border measures on exports is that such measures are generally applied by RTA parties to their own goods when destined for third country markets and therefore cannot be described as being

⁸⁶⁶ Hereafter "ORCs".

⁸⁶⁷ This relates to ORCs relevant to sub-paras 5(a), 5(b) and 8(a)(ii) of A XXIV. These measures are applied to external trade; examples are custom duties and similar charges, import prohibitions, quantitative restrictions and administrative rules regulating importation. Administrative rules include rules of origin used to distinguish between imports of goods originating in an RTA party and those originating in a third country. Border measures that restrict exports from RTA parties to third countries are more problematic.

⁸⁶⁸ *WTO Official Document WT/REG/W/17/Rev1* (1998) para 10.

applicable or applied "to the trade of third countries" within the meaning of Article XXIV:5(b) and 8(a)(ii).

In making this provision GATT wanted to make sure that trade liberalisation continues even within the confines of an exception that created RTAs. This requirement concerns, in principle, the trade diversion effects to non-members of the RTA. It has also been controversial. Preferential treatment provided to a partner country of an RTA leads to a reduction of demand for products from non-member countries, even though external tariffs are not raised. Besides the compensation in case of raising external tariff rates, the GATT fails to address such trade diversion and ignores the impacts such arrangements might have on outsiders even when they do not raise external tariffs.

McMillan⁸⁶⁹ has proposed one way to effectively avoid trade diversion. He suggests that any RTAs have to design external barriers, so that trade volume with the outside remains at least at the old level. With agreements leading to FTAs or CUs which inherently contain preferential market access provisions to member countries, this would be made possible by a corresponding reduction of external barriers. Along the same line with this proposal is the one raised by Bhagwati,⁸⁷⁰ suggesting that the lowest pre-union tariff be adopted as a common external tariff.⁸⁷¹ By eliminating the effects of trade diversion, this proposal would confine the effects of preferential agreements to trade creation, leading to improvement of welfare for the countries involved.

Furthermore, another merit of McMillan's proposal is that it will provide the members of RTAs with an incentive to continue expanding membership of the agreement until all the important trading partners are included. If adopted by the WTO as a governing

⁸⁶⁹ McMillan "Does Regional Integration Foster Open Trade?".

⁸⁷⁰ Bhagwati and Panagariya "Preferential Trading Areas" 33-100

⁸⁷¹ Adopting this rule would make countries with low tariffs less attractive partners for a CU, and would thus lead to a reduction in the number of RTAs. However, high tariff countries will also be inclined to form CUs, strengthening the trade diversion effect. It will be interesting to see what situation will arise in SADC where a proposed CU is due in 2010. Some SADC countries still have high tariffs while others have gone as far as zero. SACU tariffs, by virtue of it being a CU, are very low while Mauritius has even lower tariffs. If this rule has to be followed, the lowest tariffs that must be adopted for the SADC CU are those of Mauritius. This is unlikely since some SADC members still rely heavily on tariffs for revenue.

principle of regionalism, and the effect mentioned above comes to be realised, then this proposal has the potential to become an important instrument to widen the possibility for regionalism to become open regionalism, which leads eventually to the strengthening of multilateralism.

However, this proposition has its own shortcomings, which comprise both conceptual and practical challenges. In reality, in order to implement MacMillan's suggestion, countries should know, prior to the agreement, what kind of compensation they would have to pay. It is even more alarming to realise that there will inevitably be greater uncertainty about the extent of trade diversion likely to occur. Moreover, after the agreement comes into effect, separating the effects occurring because of trade-diverting aspects of the agreement from other economic changes will be difficult, because a reduction in imports from the rest of the world may be influenced by other factors too. Additionally, RTAs could have dynamic effects that lead to increased intra-RTA investment flows and to accelerate economic growth. This is highly likely to happen in an RTA like SADC where there is one very strong and dominant economy (South Africa) that can increase intra-RTA investments.⁸⁷² In the final analysis therefore, outsiders could gain from increased imports induced by higher income generated by these dynamic effects even though, in the short term, they may lose as a result of trade diversion.

9.3.5.2 SADC – fulfilling the requirement of less restrictive tariffs or policies

In fulfilling this requirement, SADC Member States may apply export duties provided that third parties are not granted less favourable treatment than Member States.⁸⁷³ In addition, when dealing with intra-SADC trade, Member States shall adopt policies and implement measures which will lead to the elimination of all existing forms of non-tariff barriers.⁸⁷⁴ Accordingly, Member States must also refrain from imposing any new non-tariff barriers. This is to be the general policy unless the Protocol provides otherwise.⁸⁷⁵ Although this shows compliance on the part of SADC, the

⁸⁷² This aspect has already been emphasised in the discussion on the role of South Africa in chapter 8.

⁸⁷³ Article 5 *SADC Protocol on Trade* (1996).

⁸⁷⁴ Article 5 *SADC Protocol on Trade* (1996).

⁸⁷⁵ Article 6 *SADC Protocol on Trade* (1996).

fulfilment of this requirement is difficult to measure; non-tariff barriers are still very high in the region.

The GATT also advocates the removal of qualitative restrictions; Member States shall not apply new qualitative restrictions. According to the Trade Protocol, existing restrictions on imports originating in Member States will instead be phased out.⁸⁷⁶ Any deviation from this understanding will have to be provided for otherwise by the SADC Protocol on Trade.⁸⁷⁷ The levying of quantitative restrictions on exports to other Member States is also prohibited unless it is provided for by the Protocol. An exception is, however, provided for Member States to take measures necessary to prevent the erosion of any prohibitions or restrictions which apply to exports outside the community as long as third parties are not granted less favourable treatment than Member States.⁸⁷⁸

Even the general exception clause does not deviate from the spirit of trade liberalisation in the Protocol on Trade. Further, even more importantly the exception does not seem to be in conflict with WTO regulations. The exception actually confirms compliance with the WTO obligations. The general exception reads as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Member States, or a disguised restriction on intra-SADC trade, nothing in Article 7 and 8 of this Protocol shall be construed as to prevent the adoption or enforcement of any measures by a Member State;⁸⁷⁹

- i) necessary to secure compliance with laws and regulations which are consistent with the WTO;
- ii) necessary to protect intellectual property rights, or to prevent deceptive trade practices; or
- iii) necessary to ensure compliance with existing obligations under international agreements⁸⁸⁰

In concluding this discussion on the requirement that new trade restrictions need to be "not on the whole higher" than those that existed before the formation of the RTA,

⁸⁷⁶ Article 3 *SADC Protocol on Trade* (1996).

⁸⁷⁷ Article 7 *SADC Protocol on Trade* (1996).

⁸⁷⁸ Article 8 *SADC Protocol on Trade* (1996).

⁸⁷⁹ Article 8 *SADC Protocol on Trade* (1996).

⁸⁸⁰ Article 9 *SADC Protocol on Trade* (1996). This Article also contains all the remaining provisions.

it is important to realise that there are shortcomings in the application interpretation for this requirement. The proposed solutions also have their own shortcomings, therefore it is not easy to make recommendations or give a final decision about whether the provisions should really be reformed. If the GATT rule is maintained, it should be regarded as a minimum restriction on new RTAs. A reduction of external tariffs is desirable in global liberalisation, but in the current setting that is what the RTAs have to decide for themselves; either in a voluntary manner or influenced by pressure from trading partners. Here, the potential for open regionalism to contribute to the strengthening of multilateralism can be identified; if there is a sufficient number of countries willing to exchange liberalisation, members of an RTA may be pressured to do the same, thus leaving regionalism open to outsiders.⁸⁸¹

9.3.6 The prescribed transitional period

Another unclear aspect of the WTO Article XXIV rules on RTAs pertains to the length of the transition period for interim agreements. Liberalisation within RTAs is commonly achieved by steps of gradual tariff reduction. In such a circumstance, the interim agreement must include a plan or a schedule for the finalisation of the CU or PTA. As part of the Uruguay Round, WTO members agreed to the Understanding on the Interpretation of Article XXIV of the GATT 1994, which *inter alia* provides that a reasonable period of time shall be construed as not more than 10 years without a full explanation of why a longer period of time is provided for in the interim agreement. The period between the entry into force of an RTA and complete liberalisation between its members is called an interim agreement. Paragraph 8(c) of Article XXIV mentions that the following:

Interim agreements should be implemented "[...] within a reasonable length of time". The Understanding on the interpretation of Article XXIV, paragraph 3 specifies: "the reasonable length of time [...] should exceed 10 years only in exceptional cases". Furthermore, the same paragraph adds that such exceptional circumstances require "[...] a full explanation to the Council for Trade in Goods of the need for a longer period".

⁸⁸¹ Park "Regionalism".

9.3.6.1 *SADC – compliance with transitional period*

SADC has complied with the implementation of the transitional period. Accordingly, SADC implemented the FTA after eight years of phased tariff reduction, while the "reasonable time" should not exceed 10 years. Notwithstanding the fact that a few members of SADC are not part to the FTA, its implementation in eight years (2000–2008) means that those who have not implemented it had a grace period of two years and 2010 was supposed to be a watershed year for the fulfilment of this requirement. SADC can still seek to extend the transitional period by approaching the Committee for Trade in Goods (CTG). This should be done in line with the decision by Mozambique and Zimbabwe to have fully complied with the FTA by 2015 and 2014 respectively.

The current arrangements on RTAs thus leave some degree of flexibility for transition periods of longer than 10 years. However, the absence of any agreed definition on "exceptional cases" and "full explanation" leaves a high degree of uncertainty, which could jeopardise the legal security conferred by this flexibility. In existing North-South RTAs, transition periods sometimes exceed 10 years. For example, the Tunisia Euro-Med agreement allows Tunisia up to 12 years to liberalise.⁸⁸² South Africa has been granted the same timeline to finalise its opening.⁸⁸³ In contrast, Egypt was granted 15 years to liberalise some products under its Euro-Med agreements.⁸⁸⁴ Finally, in its agreement with Canada, Chile was allowed 19 and a half years to achieve its liberalisation.⁸⁸⁵ Although it is the members that grant themselves long transition periods, the WTO does not endorse or prohibit such a situation. Therefore, this remains a grey area.

9.3.6.2 *Transitional period in the EPA context*

SADC member states are part of the ACP countries that are in the process of concluding EPA agreements with the EU. The ACP-EU relationship was essentially a

⁸⁸² See generally Grethe, Nolte and Tangermann "Development and Future of EU Agricultural Trade Preferences" 2005. See also Löfgren, El-Said and Robinson "Trade Liberalisation" 129-146.

⁸⁸³ Greenberg 2000 *SAR* 16-19.

⁸⁸⁴ Montalbano 2007 *EIU WP Law* 45-64; see also McQueen 2002 *World Economy* 1369-1385.

⁸⁸⁵ Kuwayama and Yusuke "Comprehensiveness of Chilean Free Trade Agreements".

trade aid package that presented an innovation establishing a legal framework between a group of developing countries on the one hand and a group of developed countries on the other.⁸⁸⁶ The ACP-EU relationship has been in existence for just over 25 years and involves 77 developing countries in all. Of these, 48 are African countries and 39 are LDCs.⁸⁸⁷ Under the ACP agreements, the ACP countries had preferential market access in the form of duty-free entry or a duty that was significantly lower than the normal MFN rate applied to the goods originating in the beneficiary countries.⁸⁸⁸ EPAs are considered north-to-south RTAs and, hence, compliance with the WTO is required. An earlier discussion showed that EPAs came into being as measures for trying to make trade between ACP countries and the EU WTO compliant. The EPAs sought to replace the Cotonou trade waiver that was not based on reciprocity since it gave the ACP preferential treatment for exports into the EU market but did not require the ACP countries to grant preferential treatment to the EU.⁸⁸⁹

It is very likely that ACP countries will need long transition periods in the EPA process. In fact, ACP countries, in their submission on RTAs to the WTO, have requested that periods of at least 18 years be allowed. A long transition period would be crucial for them in the context of EPAs, and other future RTAs, in order to grant enough time for their industries to adapt to radically increased competition, as well as to introduce necessary measures to compensate for heavy tariff revenue loss. Finally, long transition periods will also be necessary to enable African countries to achieve regional integration prior to opening their trade to the EU, for example SADC's RISDP and the African Economic Community's 2028 goals. The modalities for transition periods are also unclear, thus a number of questions remain unanswered. These are: What legal regime should be applied during the transition agreement? Are interim agreements subjected to some of the obligations of Article XXIV(5) and (8) as discussed earlier? How much of the trade between the two parties should be liberalised during the transition period and what of the other

⁸⁸⁶ Gakumu *Lomé IV Convention*.

⁸⁸⁷ Prior to the *Cotonou Agreement*, there were four successive conventions between the fifteen EU countries and the seventy one countries in the ACP. These were: *Lomé I*, concluded on 28 February 1975 for a period of five years; it was renewed by *Lomé II* (1980-85), *Lomé III* (1985-90) and *Lomé IV* (1990-2000).

⁸⁸⁸ Onguglo "Developing Countries and Trade Preferences" 109.

⁸⁸⁹ Saurombe A "The Context of the Economic Partnership Agreement". 362

restrictive regulations of commerce? How much of the trade between the two parties should be liberalised during the transition period and what of the other restrictive regulations of commerce?

SADC's compliance with the transitional period can be lost in this confusion. However, SADC can defend its position based on this wide scope of interpretation. In conclusion, it is clear that the GATT has not been effective in enforcing the rules relating to transitional periods. Some agreements have such long periods for implementation that they can justify discriminatory treatment without full internal liberalisation for extensive periods. Furthermore, many agreements between developing countries have not come close to meeting the GATT rules.⁸⁹⁰

In finalising this discussion, it is important to note that the implementation of Article XXIV has not worked well in practice. In the GATT's 47-year history, only one working party determined that a regional trading arrangement had satisfied the provisions of Article XXIV,⁸⁹¹ yet none were found to be incompatible with GATT Rules. To emphasise the challenges of Article XXIV, a former GATT Deputy Director General complained that:

Of all the GATT Articles, this is one of the most abused, and those abuses are among the least noted.⁸⁹²

Additionally, the Leutwiler Group 1985 report to the GATT Director General similarly noted:

The exceptions and ambiguities which have thus been permitted have seriously weakened the trade rules. They have set a dangerous precedent for further special deals, fragmentation of the trading system, and damage to the trade interests of non-participants...GATT rules on customs unions and free trade areas should be examined, redefined so as to avoid ambiguity, and more strictly applied.⁸⁹³

⁸⁹⁰ Finger "GATT's Influence".

⁸⁹¹ This was the 1993 customs union between the Czech and Slovak Republics, two countries that had been joined together as an independent state for the previous 75 years.

⁸⁹² World Trade Organization (WTO) 1995 63.

⁸⁹³ See Sutherland *et al* 2005 www.wto.org.

From this analysis it is clear that the GATT Article XXIV rules are very elastic and vague. Although this problem has been well documented, the call for reform has been resisted simply for fear of compromising the already delicate situation that exists between regionalism and multilateralism. Under the circumstances SADC compliance with the rules is hard to determine. Although SADC can argue compliance under the circumstances, there is not much room for the WTO to establish non-compliance to these rules which have a wide scope of interpretation.

9.4 Conclusion

It was important to discuss the MFN and NT as critical cornerstones of the multilateral trading system. It helps understand, although not fully, that Article XXIV is an exception that the GATT could not do without. From a legal point of view "exceptions to the rule" have to be clearly defined so that any "deviation" can be identified in order for proper sanction to be taken. However, this seems not to be the case for GATT Article XXIV. The GATT Treaty's loopholes for FTAs in Article XXIV has puzzled and deceived prominent scholars.⁸⁹⁴ It has subsequently been criticised for being "extremely elastic",⁸⁹⁵ meaning that it can be stretched to undesirable limits. It is also "unusually complex" and is branded "a failure, if not a fiasco".⁸⁹⁶ Moreover, it is difficult to understand and its application also produces complex results, while the meaning also gets lost in this complexity. Bhagwati⁸⁹⁷ describes it as "full of holes". He states that its language is full of ambiguities and "vague phrases", adding that it is an "absurdity" and a "contradiction". This has resulted in a call for Article XXIV to be formulated differently. McMillan and Krueger have even proposed changes to the rules for RTAs. On the other hand, Lawrence calls for the effective enforcement of the existing provisions. This is possible for those provisions that are clear. All this points to the fact that Article XXIV has not worked well in the past and the future is equally unpredictable. This explains why the issue of RTAs is still a subject of immense discussion at WTO level. However, after all this extensive critique of GATT Article XXIV, its position in the multilateral trading system continues to strengthen, therefore no one can talk of doing away with it altogether because it

⁸⁹⁴ Chase 2006 *World Trade Review* 185.

⁸⁹⁵ Curzon *Multilateral Commercial Diplomacy*/

⁸⁹⁶ Dam *GATT: Law and International Economic Organisation*.

⁸⁹⁷ Bhagwati "Regionalism and Multilateralism".

remains the legal basis for the existence of RTAs. The discussion in this chapter underlines this and also explains why there has been a rush towards regionalism while multilateralism seems to stall. Nevertheless, it was not the intention of this chapter to solve the paradox and controversies of Article XXIV and the GATT, but rather to make an attempt to understand its practical application to RTAs like SADC more completely. The enquiry into how RTAs can comply with such vague provisions can only be satisfactorily concluded if there is meaningful reform of Article XXIV.

Flowing from the above discussion, finalising the debate of SADC's compliance and compatibility with Article XXIV has not been made easier. In the context of the vagueness of Article XXIV; the SADC RTA has made strides towards compliance with the provisions of the WTO law. The determination of non-compliance has been made difficult because such can be hidden in the elasticity of the agreement itself. RTAs are always meant to contractually benefit the signatories and satisfying third parties is bound to be difficult. There are, however, areas where SADC could have done better and those will be discussed as part of the recommendations in chapter 11. Members to RTAs have chosen not to clarify some of the issues in Article XXIV since the *status quo* suits them. As long as Article XXIV remains a grey area, RTAs stand to benefit.

CHAPTER 10

THE EU AS A MODEL OF REGIONAL INTEGRATION IN SADC – AN INSTITUTIONAL COMPARATIVE ANALYSIS

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10.1 Introduction

The discussion in chapter 6 indicates that trade liberalisation in SADC can only be achieved when the Treaty establishing the organisation is fully implemented through the functions of the different institutions. These institutions are treaty based; hence this comparative discussion is relevant in showing how institutions in both SADC and the EU play influential roles in economic integration as mandated by their Treaties. These institutions have defined roles pertaining to law-making processes and in relation to the adjudication of the Union's activities. It is therefore unfair to compare SADC's experience of regional integration with that of the EU, because of the different levels of economic development and divergent historical and socio-political experiences. However, the rationale behind this discussion is mainly informed by the choice SADC has made in electing the EU linear model of integration. The choice of using the EU as a model was irresistible for SADC and, in the words of Frankel, "the EU is a living laboratory for the integration theory".⁸⁹⁸ It is for this reason that this thesis investigates the rationale behind the choice, its implications and ultimately whether such an ambitious agenda can produce the desired results.

It is also important to realise that this path cannot be changed; SADC has already gone too far and it may have to do with any eventuality in the future.⁸⁹⁹ The EU, now comprising 27 vastly different Member States, is proof that the efforts of investing in regional integration pay dividends – economically, socially and politically.⁹⁰⁰ According to Risse,⁹⁰¹ the EU experience is regarded as unique and its exceptionalism as sufficient reason not to compare it with other regional arrangements. Perhaps one of the hallmarks of this Union method of integration and the greatest difference between the EU and other regional organisations of this day is "the sophistication and intensity of its institutional fabric underpinned by the organic system of law".⁹⁰² Article 13(1) TEU provides that the Union shall have an "institutional framework which shall aim to promote its values, advances its objectives, serve its interests, those of its citizens and those of member states, and

⁸⁹⁸ De Melo, Panagariya and Rodrik *New Regionalism* 12.

⁸⁹⁹ The SADC integration agenda has already been exhaustively discussed earlier under the RISDP.

⁹⁰⁰ Bösl *et al* "Introduction".

⁹⁰¹ Risse 1999 *ECSA Review* 1999.

⁹⁰² Laffan 1997 *eiop.or.at*. See also generally Sweet Stone and Sandholtz 1997 *JEPP* 297-317.

ensure consistency, effectiveness and continuity of its policies and actions.⁹⁰³ Article 13(2) TEU further provides that each institution shall act within the limits of the powers conferred on it by the Treaties. Thus, each institution can only act if it has been expressly authorised to do so by the EU Treaties. This chapter is not an attempt to describe what the EU is about, but rather how it works so that such can be transferred to SADC. Some have argued that the EU is "less than a federation, more than a regime",⁹⁰⁴ while some constitutional scholars have labelled it a federation of states.⁹⁰⁵ On the other hand, political scientists have seen it as a form of "intergovernmental federalism"⁹⁰⁶ or of institutionalised intergovernmentalism.⁹⁰⁷ Although the EU is still primarily an intergovernmental forum, it is one where states are far more linked than in other international regimes.⁹⁰⁸

European integration is primarily about coordinating national economic policies to adapt to an increasingly interdependent world market.⁹⁰⁹ The European experience supports the view that both smaller and bigger states can gain from trade relations based on rules and the associated institutions that apply them – and not power.⁹¹⁰ Regional integration in Europe continues to be a dynamic process, processing an incremental nature, by which Member States of the EU have gradually established their institutional and legal arrangements as the framework and basis for integrating their markets and developing common policies in ever-increasing fields, while broadening the membership across the continent.⁹¹¹

It is, therefore, very ambitious for one to draw wider lessons from this experience for South to South integration.⁹¹² For instance, in terms of different historical legacies,

⁹⁰³ The following seven Union institutions are recognised by A 13(1) TEU: the European Parliament; the European Council; the Council; the European Commission; the Court of Justice of the European Union; the European Central Bank and the Court of Auditors. These institutions will be compared with SADC institutions of similar function. The European Central Bank and the Court of Auditors will not be discussed since there are no institutions of similar function in SADC.

⁹⁰⁴ Wallace "Less than a Federation".

⁹⁰⁵ See Beaud O La souverainete de Etat et l'Empire, in B. Therae(ed) 1993 *L'Etat, la finance de Droit administratif*, 9(1): 1045-68.

⁹⁰⁶ Quermonne *Système Politique*.

⁹⁰⁷ Menon 2003 *Comparative European Politics* 177-209.

⁹⁰⁸ Slaughter *New World Order*.

⁹⁰⁹ Milward *European Rescue*.

⁹¹⁰ Evans, Holms and Mandaza *SADC* 12. See also Lijphart *Patterns of Democracy*.

⁹¹¹ Ziller "Challenges of Governance" 6.

⁹¹² "South to South" is used here to mean developing and least developed countries that make up the membership of SADC.

the EU never experienced slavery and colonialism. The economies in the EU never went through ESAPs as determined by the IMF and the World Bank in Africa.⁹¹³ However, the relationship between Africa and Europe goes back a long way. The EU is a major trading partner of sub-Saharan Africa⁹¹⁴ and the two continents are geographically and historically bound through colonial relations;⁹¹⁵ the Younde and Lomé conventions and, of late, the Cotonou agreements that have been replaced by the EPAs, attest to this.⁹¹⁶ The assessment made by Rosecrance⁹¹⁷ is extremely relevant here:

The possible paradox is the fact that the continent which once ruled the world through physical impositions of imperialism is now coming to set world standards in normative terms, there is perhaps a new form of European symbolic and institutional dominance even though the political form has entirely vanished.

What this means is that European presence in Africa is very evident; it just takes a different form. According to Koutrakou, the main driving force of this relationship was the continued economic interests of the EU Member States in Africa.⁹¹⁸ Both critics and supporters of the current negotiations towards EPAs tend to agree that they are likely to have a significant impact on the development prospects of many African states.⁹¹⁹ According to Holland,⁹²⁰ historical ties, rather than need, have been the criterion for determining preferential trade and aid relations. Furthermore, the advent of NEPAD based on various European endorsed ideas has further strengthened the ties between Africa and Europe. Through such interactions, there is no doubt that the experiences of regional integration, such as those from the EU, had some influence in shaping the thinking of African leaders on issues pertaining to regional integration.

From the above introduction it becomes clear that using the EU as a model for integration for SADC was not a choice the author sought; rather, this discussion is

⁹¹³ For a detailed analysis of the impact of the IMF and World Bank policies on Africa, see Brown *European Union and Africa*; see also Parfitt 1996 *ROAPE* 53-66.

⁹¹⁴ Hurt 2005 pambazuka.org.

⁹¹⁵ See Mbaye "Le Destin du Code Civil en Afrique" 443-466. Mbaye recalls that Africa was mainly divided between France and its codes and the United Kingdom and its common law tradition which legal divisions are still apparent to this day.

⁹¹⁶ On EU relations with Africa, see Kühnhardt *African Regional Integration*.

⁹¹⁷ Rosecrance "European Union" 22.

⁹¹⁸ Koutrakou "New Directions" 120-133.

⁹¹⁹ Koutrakou "New Directions" 120-133.

⁹²⁰ Holland *European Union* 27.

influenced by the choices SADC and other regional blocs in Africa made in this regard. SADC copied the EU model and this is why this discussion is important. The creation of many regional integration initiatives in Eastern and Southern Africa have been based on the model of the European Union⁹²¹ and SADC's admiration for the EU format of integration is undisputed. This chapter will show that the EU itself has also contributed to the externalisation of its model over time.⁹²² Accordingly, the strategy has been to secure market access for European producers while selling the concept of the European model of regional integration.⁹²³ The EU is also able to strengthen or protect its economic power since fostering regional cooperation "tends to go hand in hand with facilitating trade and investment by EU economic actors".⁹²⁴

In this chapter, questions will be raised as to whether this choice is the best for SADC. The EU clearly has the most highly elaborated set of regional institutions based on Treaties, with supranational organisations⁹²⁵ (the Commission, Parliament and Court of Justice), an intergovernmental body (Council), a capacity to establish secondary legislation, a body of law and regulations, as well as a broad set of common policies and instruments. This institutional strength is lacking for SADC. Despite the pauses and lapses in the integration process, Europe is a paradigmatic case of the reciprocal interaction of economic and institutional integration.⁹²⁶ However, this emphasis on, and the high hopes for, regional integration do not appear to match the real progress made. As the European example shows, regional integration is a long-term and complex process, in which the EU stands as the model for endurance and effectiveness.⁹²⁷ For this reason, the integration frameworks of regional organisations in Latin America⁹²⁸ and Africa tend to follow to varying degrees that provided for in the Treaty on the Functioning of the European Union.⁹²⁹

⁹²¹ Stratsis Incite 2010 stratsisincite.wordpress.com.

⁹²² Holmes and Young "Exporting Rules" 28.

⁹²³ Farrell "EU and Inter-regional Cooperation" 19.

⁹²⁴ Smith K "The end of civilian power EU" 11-28

⁹²⁵ McCormick *European Union* 10.

⁹²⁶ Henning "Regional Economic Integration" 79-100.

⁹²⁷ Volcansek "Courts and Regional Integration".

⁹²⁸ For a detailed analysis of EU relations with Latin America, see e.g. Piening *Global Europe* 119-138.

⁹²⁹ Tatham Dare Unknown www.ies.be.

Firstly this chapter attempts to historically unearth the origins and characteristics of the EU and SADC. The second part of the chapter looks at the rationale for SADC's use of the EU as a benchmark. According to Sandholtz and Sweet's analysis, the "theory of institutionalism" lays down the foundation and emphasises the importance of institutions in an organisation and how the EU has managed to use institutionalism in enhancing deeper integration. The discussion will be enhanced by a comparison of the institutional structure and framework of both organisations. In conclusion, the gaps and shortcomings identified in the comparative analysis will lead to the proposal of a set of lessons that SADC can learn as part of the concluding remarks.

10.2 Historical background

In 2007, the EU celebrated its 50 years since the original six countries signed the Treaties of Rome.⁹³⁰ The EU was officially established by the Treaty of Maastricht in 1993,⁹³¹ on the foundations laid down by the European Economic Community (EEC).⁹³² This laid the firm foundations for the modern EU, which now consists of 27 Member States. The political climate after the devastation of the Second World War favoured the unification of Europe.⁹³³ The then political leaders resolved to fight and overcome the enemy in extreme forms of nationalism. In the aftermath of the Hague Convention of 1948,⁹³⁴ it was realised that the rebuilding of Europe meant not only the recovery of the national economies, but also the design of a European project to prevent future wars.

Based on the Schuman plan,⁹³⁵ six countries signed a treaty to run their heavy industries of coal and steel under a common management. In this way, none could on their own make the weapons of war to turn against the other, as had happened in the past. Accordingly, in 1951, the six countries⁹³⁶ signed the Treaty of Paris covering the integration of coal production and steel.⁹³⁷ Building on this Treaty, two

⁹³⁰ Kupchan 2007 www.cfr.org.

⁹³¹ Turnbull-Henson "Negotiating the Third Pillar" 28.

⁹³² Turnbull-Henson "Negotiating the Third Pillar" 28.

⁹³³ Gamer 2009 historicalaptitude.wordpress.com.

⁹³⁴ See *Congress of Europe, May 1948* Council of Europe 1999.

⁹³⁵ See generally Diebold *Schuman Plan*.

⁹³⁶ These countries were Belgium, France, Germany, Italy, Luxembourg and The Netherlands.

⁹³⁷ See generally Mathijsen *Guide to European Union Law*. See also BBC Date Unknown news.bbc.co.uk.

more treaties were signed (Treaties of Rome) in 1957.⁹³⁸ A further relevant outcome of the second Treaty was the birth of the first integrated policy on the Common Agricultural Policy of 1962.⁹³⁹ This signalled the first example of the adaption of the countries to the European Economic Community's⁹⁴⁰ regulation. Instead of having tariffs and subsidies decided at national level, starting in 1962, tariffs between the EEC members and national subsidies would disappear and external tariffs would be harmonised. Subsidies and agricultural regulations would be decided at the European level based not on the needs of individual countries but on targets for certain products. The rationale behind this was to prevent competitive distortions. The EEC transition into the FTA was realised in 1967.⁹⁴¹ The entrance of new members meant that the period of the 70s and 80s saw a need for a new and enlarged FTA and a single market for goods, services, capital and labour. The roadmap for the realisation of these milestones was launched in 1986 and was hailed as a major step in the right direction. Its full implementation was realised in 1993 by the Single European Act.⁹⁴²

The African continent shares a special relationship with the EU dating back to the colonial period. The EU's relationship with Africa has been formalised since the creation of the organisation in 1957. Owing to the insistence of the French government, the Treaty of Rome included articles providing for the association of African colonies. Thus, in terms of trade and aid arrangements, a special relationship between the EU and Africa has been in existence for almost five decades.⁹⁴³ In the process, the EU relations with Africa and SADC in particular, have helped shape the trends of regional integration in the region.

In order to make a balanced comparative study of the historical background, a brief reference to SADC is necessary. In 2010, SADC celebrated its 30-year anniversary

⁹³⁸ The first Treaty created the European Treaty of Energy: Euratom. The second crafted the plan whose objective was for a total FTA and CU for goods and services. This also included complete freedom of migration between the members of what was then called the European Economic Community (EEC)

⁹³⁹ Buckwell *et al* *Feasibility of an Agricultural Strategy*.

⁹⁴⁰ Hereafter "EEC".

⁹⁴¹ Skully 1976 *Journal of Baltic Studies* 220-230.

⁹⁴² Parsons 2010 *Journal for Comparative Political Studies* 706-734.

⁹⁴³ Hurt 2005 pambazuka.org.

at the SADC Heads of State and Government Summit in Windhoek, Namibia.⁹⁴⁴ Prior to that, the year 2008 was a milestone for the SADC bloc when a concrete step towards deeper integration was achieved by the launch of the FTA.⁹⁴⁵

10.3 Background analysis

From this brief background of the EU and the SADC, it is clear that the main reasons for their formation were more political in nature. However, as this discussion progresses it will soon become apparent that economic rationales became the cords that bind these two organisations' deeper integration drive.

For the EU, through the Europeanisation of the former national coal and steel industries, integration became a cornerstone for the dynamics of unity and a preventive measure to ensure that Germany would never again be able to produce weapons.⁹⁴⁶ As such, the EU originally started as a peace project and effectively led to the longest period of peace Europe had known for more than a thousand years. Peace, prosperity and security for its members are now the norm in the EU, which at the same time has developed into the world's largest FTA, which allows its citizens, goods and services to move freely between Member States. As for SADC, the political nature of the bloc dictates that politics still remains the main reason for the integration although economic reasons are fast influencing how the organisation operates going into the future. The common feature of these two blocs is that a stable political climate becomes an important ingredient for economic integration.

The path to the current EU as it is today was not an easy one. Its many challenges and successes should not overlooked, as lessons can be drawn from its achievements, mistakes and unfinished business. In this regard, there are similarities that can be drawn between the Member States of SADC and the EU. Firstly, the existence of Member States with vast differences in welfare and development is clear. Parallels can be drawn from the economic dominance of Germany in the EU where Member States like Spain, Portugal and the Netherlands are not at the same

⁹⁴⁴ See SADC 2010a www.sadc.int. See also Tera 2010 allafrica.com.

⁹⁴⁵ For a comprehensive discussion on the history of SADC, see chapter 2 of this thesis.

⁹⁴⁶ Ross *Jacques Delors*.

level as Germany. Worse still, in the fifth enlargement of 2004 and the sixth enlargement of 2007, 10 states from Eastern and Central Europe joined the European Union. Although economic efficiency and per capita income of the population in these new member states are well below the average of the EU 15, their accession to the EU was considered of great importance as it marked the end of the political division of the European continent.

SADC can learn from the way in which differences were addressed and continue to be addressed in the EU. One example is the way in which SADC can address the issue of economic imbalance in the region. This will be discussed in the last chapter on recommendations. However, each bloc of countries intending to cooperate more intensely obviously has to find its own way to take over ownership of the integration process. The author strongly believes that there is an African way of regional integration which most probably differs from the EU and from other models from Asia and the Americas. This is because of the home grown challenges that are regional in nature. However, key to the EU processes is the willingness of Member States, old and new, to embrace reform. In contrast, this has proved very difficult in the SADC region where the need for change has been equated to new imperialism.

There is a debate in the EU and its members about the problems of a reduction of national sovereignty, while in Africa the debate focuses on a need for nation-states to be strong enough to be able to integrate regionally with others.⁹⁴⁷ The loss of sovereignty is one of the most important issues among AU states, since they argue that it has been newly acquired.⁹⁴⁸ Whereas Pan-Africanism was the historic underlying context of the first wave of regional integration, since the 1990s one has to acknowledge and consider the dynamics and prevalence of globalisation and its effects on Africa generally and on SADC in particular.⁹⁴⁹ SADC has not been spared this wave: a few examples can be drawn from the experiences of SADC when it was called upon to negotiate a trade agreement with the EU (EPAs) as a divided complement. In its external affairs, the EU puts countries together on a regional basis. This is "a striking and unusual feature to its foreign relations as there is no

⁹⁴⁷ Ring, 2008 *Va J Int'l L.*

⁹⁴⁸ Mbeki 2009 www.saiia.wits.org.za.

⁹⁴⁹ The effects of globalisation on Africa have been discussed extensively in chapter 4.

other international actor that does this to the same extent".⁹⁵⁰ Accordingly, the EU is well positioned to shape and encourage the apparently increasing regionalisation in the world while also building its identity as a global actor and leader. Soderbaum points out that:

Inter-regionalism not only justifies and promotes the EU's "actorness" (both within the EU itself and to the rest of the world), but also strengthens the legitimacy of other regions which, in turn promotes further region-building and inter-regionalism has implication not only for the foreign policy of the EU, but also for the organisation of the world polity where regional actors such as the EU gain legitimacy.

The EPAs will determine and regulate the relationship between Africa and the EU going into the future and have also brought about high-level expectations of regional integration growth for both SADC and the EU. The EU is not only an economic block of 27 countries but also considers itself a political union⁹⁵¹ with a common history, common values and a pluralism of cultures and languages.⁹⁵² Africa, and more relevantly SADC, could possibly look more at its common values and political virtues in order to take integration beyond its economic dimension.

10.4 Rationale for choice of the EU model

10.4.1 Preliminary remarks

The European experience has been meticulously studied.⁹⁵³ Since the 1990s, EU external relations policy has included support for and promotion of regional integration and cooperation in other parts of the world.⁹⁵⁴ Promoting regional cooperation is evidently an EU external relations objective, deriving directly from its own internal identity as "the most successful regional grouping in the world seeking to impart its own experiences to others".⁹⁵⁵ This promotion of the EU's own model of cooperation, partnership and regional integration,⁹⁵⁶ one relatively untainted by the

⁹⁵⁰ Smith K "The end of civilian power EU" 11-28

⁹⁵¹ Collignon 2006 www.eurointelligence.com.

⁹⁵² Peter *et al* "Cultural Pluralism". See also Christiansen, Jorgen and Wiener 1999 *JEPP* 528-544.

⁹⁵³ Telo *European Union*; see also Nicolaidis and Howse 2002 *JCMS* 767-792.

⁹⁵⁴ Wallace and Wallace *Policy-making in the European Union*.

⁹⁵⁵ Smith K "The end of civilian power EU" 11-28

⁹⁵⁶ Bretherton and Volger 2003 *European Union* 8.

stigma of colonialism attaching to its Member States, includes its own particular judicial model. Thus, the EU's soft power, the attractiveness of its model,⁹⁵⁷ reinforces its pursuit of the objective. The cumulative impact of its external activities might suggest that the EU is a significant actor in the global political system.⁹⁵⁸

The historical background of both SADC and the EU has already highlighted some of the reasons why SADC decided to follow the EU model of integration. Hence, this discussion will show that the reasons behind the choice are two pronged. In spite of SADC making a clear choice, the efforts of the EU in exporting its model of integration cannot be underestimated.

According to Mary Farrell:⁹⁵⁹

The EU model has inspired many schemes of regional integration, and the question of exporting the European model is an important one ... the EU has served as an existing case study and at times as a counter-example of what countries do not want to create.

10.4.2 EU efforts in exporting its model of regional integration

The issue here is not about the exportability of the EU model, but rather the realisation that the EU has made tremendous efforts in the export of its form of regional integration. According to Petiteville,⁹⁶⁰ the EU uses "soft diplomacy to export its model of integration". In this context, he defines "soft diplomacy" as:

A diplomacy that resorts to economic, financial, legal and institutional means in order to export values, norms and rules as well as to achieve long-term cultural influence. EU diplomacy is a way of "proposing" values, norms and rules rather than "imposing" them as a sort of "soft imperialism" whereby the recipient countries would be tied into a learning process.

Given Petiteville's definition, it is clear that while it is strongly arguable that the EU exercised its "soft imperialism" towards the accession countries in Central and

⁹⁵⁷ Nye *Soft Power*:

⁹⁵⁸ Bretherton and Volger 1999 *European Union*.

⁹⁵⁹ Farrell 2005 www.princeton.edu. See also Farrell, Hettne and Van Langenhove *Global Politics of Regionalism*; Hooghe and Keating 1994 *JEPP* 367-393.

⁹⁶⁰ Petiteville "Exporting 'Values'?" 134.

Eastern Europe,⁹⁶¹ it has, nevertheless, projected itself beyond its continental and near abroad, in a soft diplomatic way. This was a deliberate contribution to the worldwide debate over which values, norms and rules are necessary to bind the international community together in a globalised order,⁹⁶² and is well embodied in its external relations policy. In 2005, Peter Mandelson, the then EU Commissioner responsible for trade, spoke to the EU-ACP Joint Parliamentary Assembly meeting in Bamako about the significance of regional integration in EU external relations and particularly with respect to the African countries, he said:

... regional integration, if implemented properly, will build markets where economies of scale, return on investment, and enhanced domestic competition become really meaningful and stimulate economic growth.⁹⁶³

In this context it can be construed to mean that the EU Commissioner for trade was trying to encourage his African counterparts to join the growing band of regions participating in regional integration based on the EU model. The EU policy of promoting regional integration in other parts of the world, most notably in Africa, is evident.⁹⁶⁴ This promotion is a classic example of "structural diplomacy".⁹⁶⁵ The EU largely acts by persuasion, relying on a legal framework, diplomacy and financial support to regional groupings and encouraging cooperation within regions. As discussed in the previous chapter, the EPAs currently being negotiated, and in some instances being concluded, is proof that the EU is actively exporting its model of regional integration. Many commentators have backed this finding by identifying the EPAs, especially for the African region, as being completely a product of EU interests without much input from the African regions themselves.⁹⁶⁶ The current status, post Lisbon, shows that the field of EU external relations has received greater permanence and profile with the High Representative assisted by a new European External Action Service; consequently, the number of participants in the field and the demands for intra-European co-ordination remain high. Thus, beyond the Member States, the European Council and main European organs, certain interregional

⁹⁶¹ Tatham *Enlargement of the European Union* 84-111.

⁹⁶² Petitville "Exporting 'Values'?" 134.

⁹⁶³ EU Date Unknown (c): europa-eu-int, accessed on 20 January 2008.

⁹⁶⁴ Farrell *EU and Inter-regional Cooperation*.

⁹⁶⁵ Keukeleire 2003 *Diplomacy and Statecraft* 47.

⁹⁶⁶ Griffith *Much to Lose, Little to Gain*; Stevens *et al New EPAs*.

dialogue formats involve a great number of other actors, ranging from the business world to nongovernmental organisations and the national parliamentary level.

However, the European Commission has argued that it does not export its model of integration given the absence of conducive and favourable factors present in the EU. The EU, therefore, argued that its efforts to promote and support regional integration among developing countries should not at all be interpreted as an attempt to "export" the European integration model. Clearly, there are different approaches to integration and economic development. It should be recognised that the European model, shaped by the continent's history, is not transferable or necessarily appropriate for other regions. On the other hand, the European model of integration has become an unavoidable "reference model" for virtually all regional initiatives. The EU should share with other interested parties its experience in improving the functioning of regional institutions and sharing the benefits from integration.⁹⁶⁷

Consequently, the EU does not seek to promote its particular model but rather the general lessons from its experience.⁹⁶⁸ In line with Mandelson's earlier comments, the EU shares its experience on how regional economic agreements that liberalise trade encourage growth and development. It also provides regional institutions that provide a way of overcoming historical grievances and the need to enhance good governance and the rule of law. From this understanding, the EU seeks to use these methods as a way of underpinning peace and security for states in regional groupings.⁹⁶⁹

10.4.3 Non-EU efforts in exporting the model

There are other reasons why many regions in Africa, including SADC, have chosen the EU model. As the EU does not have the capacity to completely influence independent regions, it is important to establish why regions like SADC made the choice to follow the EU model. It is, however, not completely realistic to speak of the export of the EU model of regional integration. By its application of community law,

⁹⁶⁷ See European Commission 1995.

⁹⁶⁸ Smith *European Union Foreign Policy* 79.

⁹⁶⁹ Santander and Ponjaert *EU and its Far-abroad, Interregional Relations* 283-307.

the European Court of Justice is the only legal institution that can be an active and, has been an influential, actor in promoting the process of integration. However, its legal jurisdiction does not extend beyond the boundaries of the EU. Furthermore, the European Commission or any EU individual Member States cannot resort to European law in order to enforce integration provisions outside the EU since the Community obligations apply only to the signatories of the Treaty. The well-known norm of *pacta sunt servanda* means that every treaty in force is binding upon the parties to it and must be performed by them in good faith. Accordingly, *pacta sunt servanda* is based on good faith and entitles states to require that obligations be respected and to rely upon the obligations being respected. This good faith basis of treaties implies that a party to a treaty cannot invoke provisions of its municipal (domestic) law as justification for a failure to fulfil its treaty obligations.⁹⁷⁰

Countries have options and alternatives in deciding how to conduct their international relations and foreign policies, even to the extent that the range of options are shaped, or even limited, by the circumstances of the individual country, and by its political and strategic capabilities. This indicates that exporting European law is not an option at the moment except through the enlargement of the European Community. According to Farrell:

When we consider the issue of the exportability of the EU model it is clear that the model cannot be exported in its entirety nor can the EU impose the degree of political and legal integration on external partners to be found within its membership.

The European Commission's competence in external relations lies in the field of trade policy and economic relations generally.⁹⁷¹ To this extent, the EU can have considerable influence to replicate the success achieved in internal integration elsewhere. As already mentioned, the EPAs elaborate the support for regional cooperation and integration in the context of EU-Africa relations;⁹⁷² this further points to the question as to why SADC is trying to implement the EU model. In 1995, the

⁹⁷⁰ Article 26 *Vienna Convention on the Law of Treaties* (1969), and the *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations* (1986).

⁹⁷¹ See Mcleod, Hendry and Hyett *External Relations of the European Communities*.

⁹⁷² See Aa 28, 29 and 30 *Cotonou Agreement* (2000) for full details on economic integration and functional regional cooperation respectively.

EU listed several factors necessary to the success of regional economic integration schemes,⁹⁷³ which were highlighted as the existence of genuine common interests; compatible historic, cultural and political patterns; political commitment; peace and security; rule of law, democracy and good governance; and economic stability.⁹⁷⁴

Even in the absence of EU efforts in exporting the model, the successful nature of the EU model is viewed from outside as a model. This means that even if the EU makes no effort to export its model, the import demand is always there. Through its international relations, the EU promotes integration. In order to understand fully why groups of countries desiring deeper integration have chosen the EU model; a brief analysis of the EU as a benchmark is hereby undertaken.

10.4.4 The EU benchmark

The use of the term "benchmark"⁹⁷⁵ has to be explained and put into context before a detailed engagement of the subject is undertaken. However, the term will not be analysed exhaustively since its purpose in this discussion is kept to a general understanding only and in so far as the desired outcomes are realised. This means that a few, or general, characteristics of benchmarking relevant to regional integration will be used in this discussion. At the end it should be easy for one to understand why SADC chose to follow the EU model of integration. It should be noted that there is a "demand" from regional groupings in search of a workable set of formal, cooperative arrangements for economic integration.

One of the general characteristics of benchmarking that are to be referred to in this discussion are "a benchmark as a standard for comparison". This is ideally relevant if one considers that the EU is regarded as one of the best models for regional integration with its great success being evident. In this case a benchmark can be used as an "indicator for past success". Reference can be made to the EU's long history of successive levels of integration that started with high fragmentation but

⁹⁷³ See European Commission 1996 aei.pitt.edu 9–10.

⁹⁷⁴ See Commission (1995) at 8. See also Monar "Political Dialogue with Third Countries" 266; Flaesch-Mougin "Competing Frameworks" 30.

⁹⁷⁵ This brief discussion on benchmarking is influenced by the writings of Robert J Boxwell Jr (Boxwell *Benchmarking* 225).

ended with a fully successful monetary union; in addition, efforts to establish a political union are ongoing. However, future integration efforts face challenges ranging from vast economic and political differences in countries like Romania and Bulgaria.⁹⁷⁶ These two countries failed to meet the political and socioeconomic joining criteria, the so-called "Copenhagen Criteria" in time for 2004 accession.⁹⁷⁷ Moreover, at times the Netherlands has been at the forefront of the rejection of the EU Constitution.⁹⁷⁸

A benchmark can also be "a reference from which to compare"; the discussion above clearly shows that the EU has high levels of success in regional integration. The fact that SADC desires to reach the same level of integration success makes the EU an ideal organisation for comparison. Closely associated with this characteristic is the fact that a benchmark can be a "point of reference by which something can be measured". The RISDP and the SADC Protocol on Trade, as discussed earlier, portray an ambitious agenda that needs to be streamlined by making reference to an existing and practical experience of integration that develops in stages that are supported by both an institutional and legal framework. Although the SADC regional integration agenda includes a CU and a monetary union, the FTA is the only level of integration mentioned in the Protocol on Trade.⁹⁷⁹ Hence, the experience of the EU in its streamlining exercise becomes relevant, since every level of integration is provided for in the Treaty.

Since there is no single benchmarking process that has been universally adopted, an attempt at using the characteristics discussed above is not farfetched; rather it is very sensible since SADC desires to reach the same level of deeper integration experienced by the EU. However, before benchmarking can be applied to any organisation or processes, it is important for one to know their own organisational

⁹⁷⁶ See generally Drew and Sriskandarajah Date Unknown www.ippr.org.uk. See also EU Date Unknown (b) www.europa.eu.int.

⁹⁷⁷ Drew and Sriskandarajah Date Unknown www.ippr.org.uk. See also EU Date Unknown (b) www.europa.eu.int. The Copenhagen Criteria is as follows: Democracy, the rule of law, human rights and respect for minorities; a functioning market economy and the capacity to cope with competitive pressures of the internal European market, the ability to take on the obligations of membership (in other words, to apply effectively the EU's rules and policies).

⁹⁷⁸ Aarts and Henk van der Kolk 2006 *Political Science and Politics* 243-246. See also Hobolt and Brouard 2010 prq.sagepub.com.

⁹⁷⁹ Article 27 *SADC Protocol on Trade* (1996).

functions, problems and processes. This has been done already in chapter 6 of this thesis.

In summary, the EU can be used by SADC as a benchmark, since both have embarked on similar processes although the latter is still its infancy while the former is well advanced. Secondly, benchmarking is about identifying leaders in particular areas: the EU is a leader in regional integration.⁹⁸⁰ Linked to this idea is the fact that the EU can be applauded for its "best practice" with a leading edge in regional integration matters. For that matter the EU is willing to exchange mutual experiences beneficial to other interested parties especially in Africa. Through the experiences of the EU, new and improved models of regional integration can be implemented. This will bring new opportunities for RTAs like SADC. However, there are few regions of the world where the apparently spectacular progress of the European Community towards economic and political union has failed to evince a response.⁹⁸¹ An experience from Africa where the EU model has been applied shows unconvincing results. A brief discussion of the EU experience now follows.

10.5 EU regional integration experiences

10.5.1 Economic aspects

Since its origin, the EU has established a single economic market⁹⁸² across the territory of all its members. Currently, a single currency is in use between the 16 members of the euro zone. Considered as a single economy, the EU generated an estimated nominal GDP of US \$16.83 trillion in 2007, amounting to 31 per cent of the world's total economic output, which makes it the largest economy in the world by nominal GDP and the second largest trade bloc economy in the world.⁹⁸³ It is also the largest exporter of goods, the second largest importer, and the biggest trading partner to several large countries such as India and China. According to the *Fortune Global 500* of 2010, one hundred and seventy of the 500 largest corporations

⁹⁸⁰ Hardacre 2008 www.intracen.org.

⁹⁸¹ Fawcett 1995 "Regionalism from an Historic Perspective" 23.

⁹⁸² Baldwin and Wyplosz Date Unknown www.unige.ch.

⁹⁸³ Warin *Euro at 10*.

measured by revenue have their headquarters in the EU.⁹⁸⁴ In May 2007, unemployment in the EU stood at 7 per cent while investment was at 21.4 per cent of GDP, inflation at 2.2 per cent and a public deficit at -0.9 per cent of GDP. There is a great deal of variance for annual per capita income within individual EU states: these range from US\$7,000 to US\$69,000.⁹⁸⁵ This information is crucial if one has to understand why it will be very difficult for SADC to benchmark its integration agenda against the EU when the two economies are very different; indeed, there are vast differences between the two. Although the EU economy is way too advanced to be used as a model by SADC, whose economy is very poor and lacking direction, this does not discount the EU model, since its beginning was also marked by uneven economies of the rich and poor.

In comparison, SADC's average level of per capita income, as measured by gross national income (GNI)⁹⁸⁶, is very low and has been declining in most countries over the last three decades. In the year 2002, SADC average GNI per capita stood at US \$1,563. Seychelles, a country with approximately 82,000 inhabitants, has the highest GNI per capita at US \$6,530. Other high-income countries in the region include Mauritius (US \$3,830), Botswana (US \$3,100) and South Africa (US \$2,820). The low per capita income countries in the SADC region, with income levels below USD \$500, are the Democratic Republic of Congo (US \$80), Malawi US \$160, Mozambique (US\$ 210), Tanzania (US \$270), Zambia (US \$320), and Zimbabwe (US \$480).⁹⁸⁷

If the region is to achieve the Millennium Development Goal (MDG) of halving poverty levels by 2015,⁹⁸⁸ GNI per capita must grow consistently over the next few

⁹⁸⁴ See generally European Parliament Date Unknown www.abouteu.fi.

⁹⁸⁵ See Webster Online Dictionary Date Unknown 195.101.2.36.

⁹⁸⁶ This economic analysis has been sourced from the SADC Official Website: SADC Date Unknown (c) www.sadc.int.

⁹⁸⁷ SADC Date Unknown (c) www.sadc.int.

⁹⁸⁸ The MDG Summit of 20 to 22 September 2010 expressed deep concern that it falls short of what is needed to meet targets. See UN General Assembly 2010 www.un.org. The MDGs are eight international development goals that all 192 UN member countries and at least 23 international organizations have agreed to achieve by the year 2015. They include reducing extreme poverty, reducing child mortality rates, fighting disease epidemics such as AIDS, and developing a global partnership for development. Available on UN Date Unknown www.un.org.

years at rates of approximately 10 per cent.⁹⁸⁹ This is of particular relevance to the less developed countries in the region. GNI per capita growth should also be accompanied by appropriate policies of wealth distribution to achieve poverty reduction. The main contributing factors to the current level of per capita income include distorted and underdeveloped structures of production, poor economic performance, problems in macroeconomic management and an unfavourable international economic environment. However, economic growth in the region is going to be hindered by the global economic recession.

Two of the original core objectives of the EU were the development of a common market, subsequently renamed the single market, and a CU among its Member States. The single market involves the free circulation of goods, capital, people and services within the EU. The EU customs union involves the application of a common external tariff on all goods entering the market. Once goods have been admitted into the market they cannot be subjected to customs duties, discriminatory taxes or import quotas, as they travel internally. Half of the trade in the EU is covered by legislation harmonised by the EU.

Free movement of capital is intended to permit movement of investments such as property purchases and the buying of shares between countries.⁹⁹⁰ Until the drive towards economic and monetary union, the development of the capital provisions was very slow.⁹⁹¹ The original free movement of capital provisions envisaged that the liberalisation of capital would take place in stages, using directives adopted under Article 69 EEC and by the end of the transitional period. The EEC Treaty provisions were drafted in what the Court in *Casati* called "less impressive terms".⁹⁹² The Court in this case ruled that complete free movement of capital could undermine the economic policy of the Member States or create an imbalance in the balance of payments. Therefore Article 67(1) EC was not directly effective and free movement of capital should be available only to the extent necessary to ensure the proper functioning of the common market. Some 20 years after the end of the transitional

⁹⁸⁹ Chinn and Fairlie *Determinants of the Global Digital Divide*. See also Arbache and Page *More Growth or Fewer Collapse?*.

⁹⁹⁰ Hindelang *Free Movement of Capital* 448.

⁹⁹¹ See generally Flynn 2002 *CML Rev* 773. See also Peers "Free Movement of Capital".

⁹⁹² *Criminal Proceedings Against Casati* (203/80) 1981 ECR 2595 para 19.

period, Council dir.88/361/EEC⁹⁹³ brought about the full liberalisation of capital movements which includes current payments covered by the directive which is still referred to in case law.⁹⁹⁴ Post-Maastricht there has been a rapid developing corpus of ECJ judgments regarding this initially neglected freedom.⁹⁹⁵ Article 106(1) EC required Member States to authorise means of payment as consideration for trade in goods, persons, services or capital. This, therefore, distinguishes the means of payment from the free movement of goods. In *R v. Thompson* the Court stated that Article 106 EC was perhaps the most important provision in the EC Treaty for the attainment of the Common Market. Article 106(1) EC was declared directly effective in *Luisi and Carbonne*.⁹⁹⁶ The free movement of capital is unique insofar as that it is granted equally to non-Member States. This has not been the case for SADC where, since the formation of the SADC Tribunal, only a few cases have been decided with undesirable results.⁹⁹⁷

The free movement of persons is also key to achieving the desirable high levels of economic integration in SADC. The economic, social and political facets of integration in SADC cannot be realised without the participation of the region's population. The overall objective of the SADC Draft Protocol on the Facilitation of Movement of Persons is to develop policies aimed at the progressive elimination of obstacles to the movement of persons of the region generally into and within the territories of State Parties.⁹⁹⁸ The free movement of persons means citizens can move freely between Member States to live, work, study or retire. For this to materialise, the lowering of administrative formalities and recognition of professional qualifications of other states is required. Currently, for SADC, the Protocol on the movement of persons is not ready for implementation. According to Karuuombe:⁹⁹⁹

The Protocol on the Facilitation of Free Movement of Persons has been applauded as the most important Protocol; in fact so much so that it is referred to as 'the mother' of all Protocols, but surprisingly this Protocol could

⁹⁹³ The scope of this directive includes: loans and mortgages, the taxation of dividends, guarantees linked to the provision of services, the use of golden shares by governments when publicly owned companies are privatised.

⁹⁹⁴ *Manfred Trummer and Peter Mayer* (C-222/97) 1999 ECR I-1661.

⁹⁹⁵ *Manfred Trummer and Peter Mayer* (C-222/97) 1999 ECR I-1661.

⁹⁹⁶ *Luisi and Carbonne v Minisero del Teroso* (286/82 and 26/83) 1984 ECR 377.

⁹⁹⁷ See discussion of Campbell case in chapter 8.

⁹⁹⁸ Article 2 *Draft Protocol on the Facilitation of Movement of Persons* (1997).

⁹⁹⁹ Karuuombe 2008 "The Role of Parliament in Regional Integration".

not even receive half the signatures of SADC Heads of State and Government which is unusual for SADC Protocols. Whilst the ratification and implementation of this Protocol may rightly be viewed as vital for the process of true SADC integration, all indications are that this Protocol may not be ratified anytime soon.

There is no regulation of movement of persons; there is lack of political willingness to push the process of finalising the Protocol on the Movement of Persons. South Africa is the main beneficiary of the brain drain in all sectors of employment. From skilled to semi-skilled labour, South Africa continues to plunder the region of its workforce and human capital. The EU has lowered all formalities on free movement of services and this allows self-employed persons to move between Member States in order to provide services on a temporary or permanent basis, thus fulfilling de Gaulle's aspirations when he remarked in 1962:

We are in politics when we jointly handle tariffs, when we convert the Coal Board, when we make sure that salaries and social security contributions are the same in the six states, when each state allows workers from five others to come and settle within it, when we consequently make decrees, when we ask for parliament to pass laws, grant credits, impose necessary sanctions.... We are in politics when we deal with the association of Greece, or African states, or the Malagasy republic....We are in politics when we consider the candidacies put forward by other states concerning their participation or association. We are still in politics when we are led to envisage the demands announced by the United States with regard to their economic relations with the Community.¹⁰⁰⁰

These remarks indicate the commitment of the political leadership during the initial stages of the European Community, something that is lacking in the current SADC where plans are very good on paper but the political will and leadership to implement them is lacking. According to Mansfield,¹⁰⁰¹ the EU is about:

Knowing who leads and represents political dynamics..has been at the heart of debate since political science came into being.

The current set-up in terms of the free movement of persons in the EU centres essentially on the fundamental principle of non-discrimination based on nationality.¹⁰⁰² The Court has moved the concept of free movement along the lines of

¹⁰⁰⁰ De Gaulle "Conference de presse du 09 septembre 1965".

¹⁰⁰¹ Mansfield *Taming the Prince*.

¹⁰⁰² Art 12 EC and Art 18 TFEU.

the free movement of goods by looking at non-discriminatory measures which may be a barrier or disincentive to free movement.¹⁰⁰³

On the part of the Monetary Union,¹⁰⁰⁴ the creation of a European single currency became an official objective of the EU in 1969, but could only be implemented with the advent of the Maastricht Treaty in 1993 when Member States were legally bound to start the monetary union no later than 1 January 1999. On this date the euro was duly launched in eleven of the fifteen Member States of the EU.¹⁰⁰⁵ It remained an accounting currency until January 2002, when the euro notes and coins were issued and national currencies began to phase out the Eurozone, which by then consisted of twelve Member States. The Eurozone has since grown to sixteen countries, the most recent being Slovakia, which joined on 1 January 2009. Consequently, the objectives of the use of the euro are being fulfilled: it was designed to help build a single market by, for example, easing travel of citizens and goods, eliminating exchange rate problems, providing price transparency, creating a single financial market, price stability and low interest rates and providing a currency used internationally and protected against shocks by the large amount of internal trade within the Eurozone. It is also intended as a political symbol of integration and a stimulus for more. However, recently the Eurozone has faced challenges from the debt crisis where its legality has been brought into question. German Chancellor Angela Merkel, and now French President Nicolas Sarkozy, have said that a change to the EU Treaties might be necessary to achieve stronger economic governance, including tougher sanctions for Member States that violate the bloc's budget rules.¹⁰⁰⁶

The SADC plan for a single currency by 2018 may be hard to come by if the EU experiences have to be taken into account. The period of planning from 1969 up to implementation in 2002 was very rigorous for the EU, including 33 years of

¹⁰⁰³ *URBSFA v Bosman* (C-415/93) 1995 ECR 4921; *Alpine Investments v Minister van Financien* (384/93) 1995 ECR 1-1141; *Gebhard* (C-55/94) 1995 ECR 1-4165.

¹⁰⁰⁴ See generally Snyder "EMU Revisited". The Member States made the first political announcement to work towards economic and monetary union (EMU) in 1969 at the Hague Summit (European Commission 1969 ec.europa.eu para 8).

¹⁰⁰⁵ Herve' Carre' and Johnson 1991 *Federal Reserve Bulletin* 76-783; Kenen *Economic and Monetary Union*, and Solomon *Money on the Move*.

¹⁰⁰⁶ See Open Europe 2010 www.openeurope.org.uk

commitment and accomplishment of phases that were precisely calculated. The plan for a SADC monetary union by 2018 should have been preceded by precise plans of action and preparation dating beyond our current times, but up to now there have been no preparations. The reserve bank governors of the SADC region have signalled that the region is not ready to harmonise some good performing economies with collapsed ones like Zimbabwe, where inflation rose into the million before the the Zimbabwean dollar was abandoned.¹⁰⁰⁷ Currently, Zimbabwe has no official currency; the South African rand and the US dollar are being used as legal tender.¹⁰⁰⁸ However, there is still optimism regarding the feasibility of a common SADC currency by 2018. Jacob Nyambe, a senior researcher at the Namibian Economic Policy Research Unit (NEPRU), says it is possible for the SADC to have a single currency by 2018.¹⁰⁰⁹ However, he believes the pace at which the drivers of integration have been implemented leaves a lot to be desired.

Drivers in this case are the Protocols and programmes. For various reasons, it will take years for SADC to fully implement a Protocol. Firstly, SADC is governed by a political governance model that requires a full buy-in by all Member States before such could be implemented.¹⁰¹⁰ This is difficult to change in that it is a political approach in terms of which Heads of States have to suggest and agree to any change. Secondly, Member States are at different economic levels of development and so every Member State views a programme from the perspective of in its own interests and so delays become common. Lastly, Member States have taken various multiple-membership affiliations and, as such, for a Member State to make a move in implementing a programme or a protocol requires that Member State to revisit some of its other priorities in other regional economic communities. Therefore, although it is possible for a single currency to be operational by 2018, considering the current experience as reflected in how introducing a SADC customs union has been delayed makes expectation of a single SADC currency by 2018 ambitious.¹⁰¹¹

¹⁰⁰⁷ Alweendo "Prospects for a Monetary Union in SADC"; see also Frankel 2007 www.hks.harvard.edu.

¹⁰⁰⁸ Biti 2009 www.newzimbabwe.com.

¹⁰⁰⁹ See generally Nyanguwa 2010 www.thestandard.co.zw.

¹⁰¹⁰ See chapter 6 of this thesis on how decisions are made by consensus in the Summit, SADC's supreme decision maker.

¹⁰¹¹ Nyangwa 2010 www.thezimbabwemail.com.

10.5.2 EU legal aspects

There is a deeper relationship between law and economics, and more particularly the role of law in economic development.¹⁰¹² Indeed, the law has a real influence on the economy and plays a significant role in the construction of the economy space and, consequently, its absence in the process may have negative effects.¹⁰¹³ The use of law plays a central role in the EU integration experience. The EU firmly proclaimed, in the common provisions of the Treaty of Europe (TEU), that it was founded on respect for the rule of law and respect for these principles was made an explicit condition of application for membership.¹⁰¹⁴ This has been achieved in three ways. Firstly, the type of secondary legislation used by the Union to harmonise the different laws of the Member States regulations (directives and decisions) differs from that of classical international treaties. A directive is a legislative act of the European Union which requires Member States to achieve a particular result without dictating the means of achieving that result.¹⁰¹⁵ A decision is a legal instrument which is binding upon those individuals to which it is addressed.¹⁰¹⁶

It is EU policy to achieve uniformity in laws of Member States to facilitate free trade and the protection of citizens.¹⁰¹⁷ The function of these instruments, especially directives, has been to attempt to combine homogeneity in rules in the Union with flexibility in their implementation. The directives of the EU do not focus on or contain comprehensive regulation of the entire law; they regulate some very specific issues and regulate them only for particular circumstances and only for particular types of parties.¹⁰¹⁸ This is most prevalent in EU contract law.¹⁰¹⁹

In the EU, Directives require transposition into the domestic legal system of the Member State in order to become effective. If a Member State fails to transpose the

¹⁰¹² See generally, contributions made in the XXXI Congress of the International Institute for the Right to French Expression and Inspiration (IDEF 2008 www.institute-idef.org).

¹⁰¹³ Cistac "L'integration regionale dans 'tous' ses etats" 128.

¹⁰¹⁴ Fairhurst *Law of the European Union*.

¹⁰¹⁵ Article 288 para 2 TFEU. See also Nanda, Folsom and Lake (eds) *European Union Law After Maastricht* 5.

¹⁰¹⁶ Article 288 para 4 TFEU; Craig and De Búrca *EU Law* 86.

¹⁰¹⁷ Nygh and Butt (eds) *Butterworth Australian Legal Dictionary* 543.

¹⁰¹⁸ Hesselink "Ideal of Codification" 49.

¹⁰¹⁹ Hesselink "Ideal of Codification" 49.

Directive in a timely manner or fails to do it at all, the Directive will take "direct effect", that is, individuals are able to derive rights from that Directive directly despite not being transposed into domestic law.¹⁰²⁰ A Directive could be transposed through enactment under legislation from the national parliament or through agreement by reference.¹⁰²¹ The Directives are flexible to the extent that the national authorities of the Member States have the choice of the form and method of the implementation of the Directive. This takes into account the fact that Member States have differing legal systems.¹⁰²² This, as a result, allows the establishment of a harmonised framework of laws whilst preserving the established national laws of each member.

Secondly the creation of the Court of Justice of the EU as an independent judicial body charged with ensuring the proper interpretation, as well as the validity of EU law; although, as with classical international courts, Member States can bring actions to it.¹⁰²³ Accessibility to this court is also extended to other Union institutions, as will be discussed later. According to Article 1, the Court of Justice shall be constituted and shall function in accordance with the provisions of the Treaty on the European Union (EU Treaty), that is, the Treaty establishing the European Community.¹⁰²⁴

Lastly, and most importantly, is the fact that national courts may engage in a judicial dialogue with the Court of Justice through a preliminary reference procedure. Through this process national courts can seek the Court of Justice's interpretation of an EU legal element that they stumble upon. This strategy has allowed the Court of Justice to develop over time many of the basic principles of law in the whole of Europe. These include human rights; state liability for breach of EU law; and the need for national remedies to protect breaches of rights derived from EU law.¹⁰²⁵ A comparison of the EU and SADC judicial institutions will be undertaken later in this chapter.

¹⁰²⁰ Vogenauer and Weatherill *Harmonisation of European Contract Law* 50. See generally Fairhurst *Law of the European Union*

¹⁰²¹ Vogenauer and Weatherill *Harmonisation of European Contract Law* 50. See generally Fairhurst *Law of the European Union*

¹⁰²² Craig and De Búrca *EU Law* 203; Vogenauer and Weatherill (eds) *Harmonisation of European Contract Law* 115.

¹⁰²³ See a later discussion on the European Court of Justice in this chapter.

¹⁰²⁴ *Protocol No. 6 on the Statute of the Court of Justice* (2001).

¹⁰²⁵ Tatham *EC Law in Practice* 1-43, 44-95, 96-147.

Before a comparison of the different sets of institutions in SADC and the EU, it is important to discuss the theory of institutionalism as a way of laying the foundation for its importance and defining its role in regional integration.

10.6 The theory of institutionalism

The question that needs to be addressed here is whether organisations need institutions for them to exist and function properly. This discussion will indicate that institutions are essential drivers of organisations and their role in regional integration is therefore very important.

According to Volcansek:¹⁰²⁶

Almost none of the newly established regional trade arrangements have hard or institutionalised regionalism as their main goal and they aspire to do more than foster trade and economic growth within a specific geographical sphere. So long as the rules agreed upon through state to state negotiations are followed to the satisfaction of the negotiating partners, there is no apparent requirement for complicating matters by the introduction of any institutions. But as the experience of the older regional trade or human rights associations demonstrate, at some point a choice must be made between effective monitoring of the rules and more genteel diplomacy.

As a background to the upcoming discussion and comparison of the SADC and EU institutions, it is important to deliberate on the "theory of institutionalism" and explore the insights it may offer on the role of the various institutions in SADC and the EU. Accordingly, this discussion will borrow from Stone Sweet and Sandholtz's analysis of the theory.¹⁰²⁷ This analysis is important because there is a need to devise a framework for comparing institutional characteristics. The framework of institutionalisation presented by Stone Sweet and Sandholtz to explain different aspects of the EU is useful not only for understanding the aetiology of regional agreements, but also their progression towards or into supranational arrangements. According to them, this theory manifests itself in the EU in what began as an interstate bargain that transformed into a multidimensional, quasi-federal polity. According to this theory, European society became transnational and the economic,

¹⁰²⁶ Volcansek "Courts and Regional Integration". See also Volcansek "Courts and Regional Trade Agreements" 23-41.

¹⁰²⁷ Sandholtz and Stone Sweet (eds) *European Integration*.

social and political transactions and communications regularly crossed national borders. In the process, state actors soon found that national legal rules created transactions costs and inhibited the generation of wealth and other collective goods, therefore exerting pressure on the nation-state and its decision makers who, in turn, naturally had their own vested interests in preserving state autonomy and control. State actors started entering into intergovernmental negotiations as a result of the pressure for increased integration.¹⁰²⁸

Those state actors engaging in cross-border transactions sought European rules to govern transaction costs and to lower the price of cross-border dealings. A single standard of transaction would have to be applied for customs, health, technical standards, environmental regulations, commercial law and currency exchange rates. After all these mechanisms are in place and operational; the transition to supranational governance will begin. This takes the form of integration that ranges from intergovernmentalism to supranational governance, with various points along the space denoting different degrees of linkages among transnational actors on different policies and in different realms.¹⁰²⁹ This is what the EU has gone through and also the path SADC is expected to follow if the desired results are to be achieved.

The supranational bodies are institutionalised and expected to have jurisdiction over a geographical area of all the states concerned. They will have influence over both nation-states and individuals. The institutions are also influenced in a reciprocal manner. However, there is need to have a balance in the pattern of integration between supranational politics and intergovernmental politics. It is important also that the institutions work together in harmony and for the common good of the organisation.

In explaining this theory, Stone Sweet and Sandholtz's thesis is three pronged. The first element deals with transnational society that leads to interdependency. Supranational rules are second and, finally, the creation of supranational organisation. This is the same process that led to the EU in its current form and also

¹⁰²⁸ Stone Sweet and Sandholtz "Integration, Supranational Governance" 2-26.

¹⁰²⁹ Stone Sweet and Sandholtz "Integration, Supranational Governance" 2-26.

explains and gives a prediction of the direction of the newly emerging regional trade agreements such as the SADC FTA. In practice, there is always bound to be a fight between the interests of economic elites from various nations advocating for reduced cross-border transaction costs, while, on the other hand, state interests for sovereignty resist any kind of amalgamation. However, pressure on state decision makers to form RTAs will bear fruit and, at some stage, state interests and those of social and economic actors converge and the process leading to the creation of FTAs and CU begins. This is so since economic elites, exporters and investors are likely to be the ones to prevail, usually over the wishes of other interests, to secure a reduction in cross-border transaction costs.¹⁰³⁰

A further stage as expounded by this theory is the creation of a series of rules to govern the new entity. These include rules of origin, restrictive measures, anti-dumping, subsidies, countervailing duties, non-tariff barriers, health and environmental standards, just to mention a few. Such rules are necessary for the provision of fair competition for all players and to harmonise and replace national trade norms. As this discussion will show later, rules imply that an enforcement mechanism is required.

In concluding this brief discussion on the "institutionalism theory", Volcansek¹⁰³¹ notes that:

Without some level of institutionalisation or other means of enforcement, national commitment to a regional trade area can wax and wane with each electoral cycle and subsequent shift in national administration. Accordingly, transnational trade is obviously inhibited when the validity and enforcement of contracts, obligation and rules cannot be guaranteed beyond the term of office of an administration.

For this reason Stone Sweet and Sandholtz's framework for analysing organisations becomes relevant. Some powers separate from nation-state control must exist to produce, monitor and enforce the rules. Cross-border transactions created the need for transnational rules, but the efficacy of the rules depends on the mechanism to administer them. From this situation, a desire for supranational governance arises.

¹⁰³⁰ Hout and Grugel "Regionalism Across the North-South Divide" 176.

¹⁰³¹ "Courts and Regional Trade Agreements" 23-41.

However, this framework does not necessarily imply an inevitable motion toward diminution of national sovereignty and a rise in federalism; rather, they recognise substantial variation by policy domain. State-centred integovernmentalism may remain the essential means of carrying out some policies, whereas supranational governance may pre-dominate others. Since the early days of the European Coal and Steel Community, the EU is an embodiment of national primacy and *supra*-nationalism. The discussion involving a comparison of SADC institutions with those of the EU will indicate whether the theory of institutionalism is applicable to SADC as experienced by the EU. Furthermore, questions may be raised on the application of this theory in SADC where economic actors play a secondary role behind political drivers. This does not discount the usefulness of the theory since it truly explains the evolution of the EU, whose model SADC desires to follow. Ultimately, SADC will have to implement this theory if the desired objectives are to be met.

10.7 EU and SADC: institutional comparison

10.7.1 Preliminary remarks

Before venturing into a comparison of the institutional structure, it is important and necessary to look briefly at how the EU model of regional integration operates in practice. The EU operates at many levels that link the sub-national, the national and supranational with an institutional framework.¹⁰³² The institutional framework includes the European Commission, the European Parliament, Court of Justice, the European Council and the Council of the European Union. Besides the EU framework being in the driving seat, there are an array of policies that are implemented by Member States.¹⁰³³ The European Commission plays a pivotal leading role as well as a coordination role in initiating new policy initiatives.¹⁰³⁴ The central question to be addressed by a comparison of SADC and the EU is whether SADC should import the EU model in its entirety: the entire panoply of institutions, organisations and policies. Can or must all these be adopted? Part of the answer to

¹⁰³² Monar "Institutionalising Freedom" 187.

¹⁰³³ Bache *Politics of European Regional Policy*. See also Marks "Structural Policy" 391-410. Marks, Hooghe and Blank 1996 *JCMS* 341-378.

¹⁰³⁴ Armstrong "Role of Evolution" 23-63. See also Thielemann 2000 *Current Politics and Economics of Europe* 181-198.

this question is "no", because the SADC Treaty has already established institutions that are driving the integration process. However, SADC will have to import substantial elements of the EU model if the desired results are to be achieved. EU institutions are at the centre of treaty interpretation, implementation and reform. Consequently, SADC should be able to implement a similar approach. Caution should be observed too in giving an opinion on this as one may suggest a pick and choose strategy, forgetting that the functions of the EU as a whole are pivotal to these institutions. The EU works well because of the driving force of its institutions.

Other questions to be answered are: At what stage does one adopt an ever-evolving system like the EU has become? Additionally, can it be argued that the evolution in the EU is being influenced by conditions inherent in the EU itself? If so, it means the picture will be different in another setting. According to Farrell:

These institutions and the policies and political processes have evolved in gradual and complex processes of regional integration that are difficult to capture in a simple model that is easily replicated and duplicated in other situations and region.¹⁰³⁵

This assessment shows that the EU regional integration experiences are complicated and are difficult to copy in a different setting. This chapter has already shown how different the EU and SADC are. The discussion now shifts to a comparative analysis of the important institutions of both SADC¹⁰³⁶ and the EU. It is important to note here that the comparison seeks to analyse identical institutions as they may appear in either organisation. However, in the absence of identical institutional entities, those with similar functions and characteristics will be discussed and compared. This approach is influenced by the key objectives of this chapter which seek to compare the entire model.

¹⁰³⁵ Moravcsik 1993 *Preferences and Power* 473-524.

¹⁰³⁶ See chapter 6 of this thesis.

10.7.2 The European Parliament¹⁰³⁷ and the SADC Parliamentary Forum¹⁰³⁸

The SADC Parliamentary Forum, established in 1996 and formalised by SADC Summit of Heads of State and Government in 1997, is a regional Parliamentary organisation representing fourteen SADC Member Parliaments. As the name already suggests, the SADC Parliamentary Forum is still a nongovernmental organisation without any SADC institutional mandate and legal basis. However, this comparison will help to emphasise the importance of establishing a SADC Parliament with the same status as the EU one. For this reason, the need to enhance the role of parliamentarians and the institution of parliament in regional integration is more profound than before.¹⁰³⁹ In emphasising the importance of parliament, as well as the state of affairs in SADC, Matlosa¹⁰⁴⁰ notes that:

The regional integration project underway in Southern Africa is propelled by both the Regional Indicative Strategic Development Plan (RISPD) and the Strategic Indicative Plan of the Organ on Politics, Defence and Security Cooperation (SIPO) which are state-centric and driven by the ruling elites and therefore lacks broad participation by other key stakeholders including political parties and legislatures.

Furthermore, it is important to realise that even though the SADC Protocols are ratified by the Member States' parliaments, their involvement is reduced to "rubber stamping" the decisions of the Executive, in most cases the Heads of State and Government. Therefore, the future of the SADC Parliament modelled on the EU Parliament is very unlikely.

The EC Treaty, as it was originally drawn up in 1957, included provision for "an Assembly" whose task was to "exercise the advisory and supervisory powers" conferred upon it.¹⁰⁴¹ The Assembly is now called "The European Parliament" and the words "advisory and supervisory" have disappeared.¹⁰⁴² The progress of the European Parliament seems so spectacular that some read it as the story of an

¹⁰³⁷ The provisions of the EU Treaties governing the European Parliament are A 14 *TEU* and Aa 223-234 *TFEU* (previously Aa 189-201 *EC Treaty*).

¹⁰³⁸ More details can be found on the SADC Parliamentary Forum website. Date Unknown www.sadcpf.org.

¹⁰³⁹ Karuuombe 2008 *The Role of Parliament in Regional Integration* 264.

¹⁰⁴⁰ Matlosa 2008 *Role of Political Parties* 116-139.

¹⁰⁴¹ Fairhurst *Law of the European Union* 268.

¹⁰⁴² Fairhurst *Law of the European Union* 268.

uninterrupted conquest and predict that it will lead to the Union's complete parliamentarisation.¹⁰⁴³ The reason for the formation of the European Parliament also pertains to a formation of institutional mimesis; the political culture of European leaders led them to think that, in order for this regime to be legitimate, it must be given the essential features of a parliamentary regime.¹⁰⁴⁴ The European Parliament shares the legislative and budgetary authority of the Union with the Council. It is democratically elected and has been hailed as one of the most powerful legislatures in the world with legislative and executive oversight powers.¹⁰⁴⁵ It is representative of all the Member States, making it the largest trans-national democratic electorate in the world, representing 375 million eligible voters in 2009.¹⁰⁴⁶ The closest comparable parliament of such magnitude on the African continent is the Pan-African Parliament; however, its members are not voted in but appointed.¹⁰⁴⁷ On the part of SADC, the SADC PF is not a recognised institution under the SADC Treaty; its membership only consists of delegated Parliamentarians seconded by their governments to the forum. These governments are encouraged to send an opposition party member as one of the two delegates. SADC PF does not have any legislative power; it is treated as a nongovernmental organisation by SADC. This is different to the EU where, although the European Parliament does not have legislative initiative, it does possess more legislative power than other such bodies above it. It does, however, have *de facto* capacity, as will now be discussed.¹⁰⁴⁸

It is important to have a SADC regional parliament whose membership is representative of its people, as a people-driven regional integration process is bound to succeed. Since 1979 the European Parliament has been directly elected.¹⁰⁴⁹ It exercises functions of political control and consultation as laid down in the

¹⁰⁴³ Cobertt *European Parliament's Role*; see also Westlake 1998 *The European Parliament* 431-444.

¹⁰⁴⁴ Korler-Koch 2003 *Organised Interest in European Integration* 513-531; see also Rittberger 2001 *Institutions for Post War Europe* 673-708.

¹⁰⁴⁵ Farrell 2007 www.europarl.europa.eu.

¹⁰⁴⁶ See *The Washington Post*, 8 June 2009 Available on: <http://www.washingtonpost.com/wpdyn/content/article>. Accessed 12 August 2010.

¹⁰⁴⁷ See Pan-African Parliament Date Unknown www.pan-african-parliament.org.

¹⁰⁴⁸ Williams Date Unknown www.theparliament.com.

¹⁰⁴⁹ See European Parliament Date Unknown www.europa.eu. Originally, its members were drawn from nominees from national parliaments. But now it is the only directly elected institution in the Union. Article 14(3) *TEU* states that "The members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot".

Treaties.¹⁰⁵⁰ In 1984, the European Parliament was involved in the "draft Treaty establishing the European Union". Although this work was not adopted, many of its ideas were later implemented by other treaties. Its representative nature is shown by the expansion of the membership whenever new membership joined, for example in 1994 after the reunification of Germany.

The European Parliament has power and influence. Accordingly, it can pressure the Commission as experienced in 2004 when, following the elections, the Parliament forced President Barroso to change his proposed Commission team.¹⁰⁵¹ The Commission can equally be compared to the SADC Secretariat as will be discussed later. Hence, its existence in SADC can provide an oversight role in terms of the SADC Secretariat. In 2007, the European Parliament was formally included in the talks for the second Schengen Information System even though Members of the European Parliament only needed to be consulted on the substance of the package. This worked very well to the extent that Parliament became involved in all justice and criminal matters therefore pre-empting the new powers they could gain as part of the Treaty of Lisbon.¹⁰⁵² The work of the Parliament is evident in the 2009 Lisbon Treaty. In terms of this Treaty, Parliament was granted power over the entire EU budget, making Parliament's legislative powers equal to those of the Council in nearly all areas and linking the appointment of the Commission President to Parliament's own elections. Compared to SADC, this kind of achievement is of high magnitude, a development that could be of critical importance if the SADC Parliament were to be given equal powers to those of the SADC Summit. In addition, this would spell the end to the dictators club, who cannot criticise one another in the face of stolen elections, human rights abuses and the compromise of the rule of law in the region.

As part of the compromises made to the Parliament in terms the Lisbon Treaty, the Parliament President will attend high-level Commission meetings. Moreover, the Parliament will have a seat on the EU's Commission-led international negotiations and have a right to information on agreements. This is of critical importance that such be adopted in SADC, where the Summit always meets behind closed doors

¹⁰⁵⁰ Article 14(1) *TEU*.

¹⁰⁵¹ Tobias Date Unknown www.cafebabel.com.

¹⁰⁵² Beunderman 2007 euobserver.com.

and only emerges with a compromised *communiqué*. At the height of the Zimbabwean crisis, the Summit was well known for having meetings that ended after midnight, leaving the SADC Executive Secretary to address the press the next day with a statement of little substance.¹⁰⁵³

The European Parliament also has the power to amend and reject legislation, as well as to make proposals for legislation.¹⁰⁵⁴ However, it needs the Commission to draft a bill before anything can become law. According to former Parliament President Hans-Gert Pottering:

The Parliament does have the right to ask the Commission to draft such legislation and as the Commission is following Parliament's proposal more and more Parliament does have a *de facto* right of legislative initiative.

Additionally, the European Parliament exercises a great deal of indirect influence through non-binding resolutions and committee hearings. It also has an indirect effect on foreign policy, as it must approve all development grants, including those overseas. This means that it has a direct bearing on the current EPAs being negotiated by the EU with SADC. This reference already indicates that the EU is more prepared to deal with such negotiations and is also well informed by its constituencies. The interests of the citizens of Europe are clearly evident in the EPAs. An example can be drawn from the push by the EU for the protection of intellectual property rights and foreign investments in the EPA agreement. This reflects a need to protect its domestic entrepreneurs as well as foreign investor interests. The same cannot be said for SADC, where the EPA process has not been transparent; even Parliamentarians and senior government officials cannot comprehend the substance of this agreement. This has led to mixed signals, for example at a certain stage Namibia initialled the interim EPA but later strongly voiced a desire to pull out of the process altogether.¹⁰⁵⁵

¹⁰⁵³ See SADC 2008c www.sadc.int.

¹⁰⁵⁴ See A 289 *TFEU* on ordinary legislative procedure.

¹⁰⁵⁵ Hoffmann 2008 www.slideshare.net; see also Weidlich 2009 allafrica.com.

10.7.2.1 Parliamentary oversight role

The Parliament has to approve the Council's proposal for the President of the European Commission,¹⁰⁵⁶ which is an important oversight role the Parliament plays over the Council. In practice, the Parliament has never voted against a President or his Commission, but it did seem likely when the Barroso Commission was put forward. The Commission was ultimately not rejected because certain compromises were adopted and some changes more acceptable to parliament were made.¹⁰⁵⁷ This went a long way in cementing the Parliament's position and its ability to make the Commission accountable, rather than a rubber stamp. To further exercise its independence; Members of Parliament vote along party lines as opposed to national allegiances even if they are under pressure from national governments. This cohesion and willingness to use the Parliament's power ensures greater attention from national leaders, other institutions and the public.¹⁰⁵⁸ A two-thirds majority censure of the Parliament can force the resignation of the entire Commission. This nearly happened to the Santer Commission which subsequently resigned of its own initiative even though the pressure from Parliament was the defining and ultimate reason.

The Parliament also requires the Commission to submit reports to it and answer questions from members of parliament. Under Parliamentary guidelines the President in office of the European Council is required to present their programme at the start of their presidency. The MEPs also have the right to make proposals for legislation and policy to the Commission and Council. Above all, they also have a right to question members of those institutions.¹⁰⁵⁹ This is way too advanced for African regional parliaments according to Terlinden:¹⁰⁶⁰

African regional parliaments and parliamentary assemblies are intended to assume the legislative and democratic oversight functions of regional integration organisations and processes in the long run, they remain so far at the infant stage of organisational development and are far from exercising the roles that fully-fledged parliaments play in democratic setups.

¹⁰⁵⁶ See A 334 *TFEU* (consolidated version). See also Kreppel 2006 web.clas.ufl.edu.

¹⁰⁵⁷ Bowley 2004 www.iht.com.

¹⁰⁵⁸ Murray 2004 www.cer.org.uk.

¹⁰⁵⁹ See European Parliament Date Unknown (a) www.europarl.europa.eu.

¹⁰⁶⁰ Terlinden *African Regional Parliaments*.

The Maastricht Treaty also gave the European Parliament other general supervisory powers. These include the power to set up a Committee of Inquiry, for example over the mad cow disease that resulted in the creation of the European Veterinary Agency. Disasters like those have happened in SADC and have not been addressed from a SADC perspective, for example the cholera outbreak of 2008. The European Parliament can also take other institutions to the European Court of Justice if they break EU law on treaties.¹⁰⁶¹

This discussion has shown that the role of Parliament cannot be underestimated. The EU model of integration has the Parliament as a pivotal institution, whereas the SADC Parliamentary Forum plays a very insignificant role in the SADC integration process. The results of not having a Parliament speak for themselves if one considers that the integration process is not familiar to ordinary SADC citizens. This is the opposite in the EU where domestic politics share the same significance with EU politics. Experience in the EU shows that where their governments have given them the opportunity to do so, national parliaments have been able to recover margins of control they had lost following integration.¹⁰⁶² The recent anti-EU sentiments shown by the rejection of the EU constitution maybe an indication that citizens of Europe are aware of what is happening around them. Such a critical role of awareness is undoubtedly played by the European Parliament. SADC will have to establish a legally binding parliament for a start if the desire to follow the EU model is to be realised. The SADC Parliamentary Forum is merely a glimpse of what could be if a SADC Parliament were to be given powers like in the EU.

10.7.2.2 The possibility of a SADC Parliament in the near future

The current impasse in SADC results from the SADC Executive (through the Council of Ministers and the Summit), which has failed to act as a collective and to grant the transformation of the Forum to a regional Parliament.¹⁰⁶³ It is also believed that the SADC Executive's caution with transforming the Forum into a regional parliament resulted from the Forum's election observation of the Zimbabwean election in 2000

¹⁰⁶¹ See European Parliament Date Unknown (b) www.europarl.europa.eu.

¹⁰⁶² Bergman 1997 *National Parliaments* 373-387; see also Raunio and Hix 1998 *European Integration* 142-168.

¹⁰⁶³ Karuuombe 2008 *The Role of Parliament in Regional Integration* 264.

in which the parliamentary observation mission contrary to the SADC mission did not give the election a clean bill of health.¹⁰⁶⁴

10.7.3 The European Council and the SADC Summit of Head of State and Government

It was easy to pair these two institutions together since both are made up of the Heads of State and Government in the EU and SADC respectively. However, their functions may differ from time to time, resulting in reference to them being made under other different institutional comparisons. The European Council is in the driving seat in defining the general political direction and priorities of the Union.¹⁰⁶⁵ The European Council has no formal legislative power and is mostly concerned with defining general political guidelines for the EU. The SADC Summit plays a more central role for the organisation, taking a leadership role not just in the political affairs of the region, but also in all facets of the organisation. The whole SADC institutional structure is completely under the control of the Summit, including the economic and political direction of the organisation.¹⁰⁶⁶ In contrast, it remains difficult to reduce European decision making to a single outline.¹⁰⁶⁷ A similar experience and model to SADC can be drawn from the African Commission, which allows a focus on reconciliation and consensus as a means of settling disputes rather than upon contentious procedures, and is more in keeping with African culture.¹⁰⁶⁸ For this reason, the reason why the Summit is very important for the SADC regional integration agenda was discussed at length in chapter 6. This is in sharp contrast to the European Council, where even in areas where they have agreed to decide by qualified majority, the governments remain marked by a spirit of unanimity. Since the mid-1990s, between 75 and 85 per cent of decisions within the Council have been made through a unanimous vote.¹⁰⁶⁹

The SADC Summit has been in place since the formation of the regional body under the Front Line States years, the progression towards the SADCC and the current

¹⁰⁶⁴ Karuuombe 2008 *The Role of Parliament in Regional Integration* 264.

¹⁰⁶⁵ See consolidated versions of the *TEU* and the *TFEU*.

¹⁰⁶⁶ Article 10 *SADC Treaty* (1992).

¹⁰⁶⁷ Peterson and Boberg *Decision-making in the European Union*.

¹⁰⁶⁸ Davidson *Human Rights*.

¹⁰⁶⁹ Mtila and Lane 2001 *Why Unanimity in the Council* 31-52.

SADC with the RISDP and Protocol on Trade. The Summit commissioned the RISDP as a strategy to implement the RISPD among other things and it continues to provide leadership for SADC at the highest level. This differs from the European Council, whose prominence only came to the fore in 1961 when informal summits between the leaders of the European Community were initiated as a result of the then French President Charles de Gaulle's resentment at the domination of supranational institutions. This was in reaction to the domination of the integration process by the European Commission. This was not the case for SADC where in fact the Summit formulates the integration process and all other facets of the SADC Treaty. The inaugural European Council was held in Dublin on 3 October and 3 November 1975,¹⁰⁷⁰ years after the European integration had started; however, the same cannot be said of the SADC Summit, whose composition was the first to exist in Southern Africa regionalism under the SADC initiative.

Although it can be described as the driver of EU integration, the European Council does so without any formal powers. However, it does give important impetus to the influence by the national leadership of its composition. National leaders give it executive power of the Member States and the direct result is great influence outside established areas, for example foreign policy.¹⁰⁷¹ However, with powers over the supranational executive of the EU, as well as other additional powers and influences, the European Council has been described as the "supreme political authority".¹⁰⁷²

The discussion above shows that the European Council is an embodiment of controlled power while the SADC Summit as an institution with too much power. This clearly will not work for regional integration in SADC. There has to be a measure of control in SADC as exercised in the EU. According to Volcansek:¹⁰⁷³

... there are bound to be problems in state to state negotiations to resolve disputes and the obvious is, of course, that no resolutions may be possible. A second in the hierarchy among nations that prevents some from bargaining or asserting their claims on an equal footing.

¹⁰⁷⁰ Stark Date Unknown www.dragoman.org. See also A 2 *Treaty of Lisbon* (2007) officially introduced the term "European Council" as a substitute for the phrase "council". The Lisbon Treaty officially made the European Council a formal institution and created the present permanent presidency. Former Prime Minister of Belgium, Herman Van Rompuy was elected its first permanent President.

¹⁰⁷¹ Peers Date Unknown www.statewatch.org.

¹⁰⁷² Banks *Parliament Magazine*.

¹⁰⁷³ Volcansek "Courts and Regional Trade Agreements" 23-41.

This is the scenario in SADC where the Heads of State and Government at Summit level cannot face up to each other in resolving conflicts. By contrast, EU Member States are forced to respect the principles of democracy and the rule of law under the watchful eye of their partners; consequently, there is less risk of them slipping into authoritarianism.¹⁰⁷⁴ According to Article 4(c) of the SADC Treaty, Member States are obliged to respect principles of human rights and democracy but in reality this has not been done.

10.7.4 The Council of the European Union and the SADC Council of Ministers

The Council of the European Union is officially known as the Council, but it is most commonly referred to as the Council of Ministers. This institution shares a similar name with the SADC Council of Ministers. However, as this brief comparison will show the EU Council is more advanced and well defined in its functions while the SADC Council of Ministers works in the shadow of the Summit. In the EU this Council represents the governments of Member States in the institution legislature and is composed of 27 national ministers.¹⁰⁷⁵ However, numbers may vary depending on the topic under consideration; for example if it is a discussion on agricultural policy, the council will consist of 27 national ministers whose portfolios include this policy area. The European Commissioner for the related portfolio contributes but has no voting powers.

This approach differs from the SADC perspective where the Council of Ministers is made up of foreign affairs ministers only or finance ministers from the Member States. The diverse nature of the EU Council makes practical sense in that the composition of the Council is streamlined according to the purpose of the portfolios. The SADC scenario of having foreign affairs ministers making decisions on all aspects of regional integration will not produce the optimal and desired results.

In trying to streamline the activities of the European Council and avoid the overload experienced in the SADC Council of Ministers, the European Council is divided into

¹⁰⁷⁴ Weiler 1998 *European Citizen* 495-519.

¹⁰⁷⁵ *Treaty on the European Union* (2002) (consolidated amended text) 21.

several different council configurations according to Article 16(6) of the European Union, which provides that:

The Council shall meet in different configurations, the list of which shall be adopted in accordance with Article 236 of the Treaty on the Functioning of the European Council. The General Affairs Council shall ensure consistency in the work of the different Council configurations. It shall prepare and ensure the follow-up meetings of the European Council, in liaison with the President of the European Council and the Commission.

In its functions, each Council configuration deals with different functional area, for example agriculture and fisheries. In its formation the Council has put together ministers from each state government responsible for the specific area. The 10 formations in the council are as follows:

General Affairs, foreign affairs, economic and financial Affairs, Agriculture¹⁰⁷⁶ and fisheries, justice and Home Affairs council, Employment-social Policy-Health & Consumer Affairs, Competitiveness, Transport, Telecommunication and energy, Environment and finally Education, Youth and Culture.

Although SADC has Protocols almost equally mirroring this kind of approach, the institutional arrangement and exclusive functions as provided for under the European Council is lacking in the SADC approach.

The voting aspect in the European Council is very diverse, with certain situations demanding majority voting and, in others, unanimity. In terms of power and procedure, both Council and Parliament share legislative and budgetary powers equally.¹⁰⁷⁷ In some cases the Council may initiate new EU law.¹⁰⁷⁸ The main purpose of the Council is to act as one of the two chambers of the EU's legislative branch, the other chamber being the European Parliament. This makes sense in that even in national parliaments, the ministers always work closer with the parliament and are accountable to it. However, since there is no parliament in SADC, the Council of Ministers is accountable to the Summit. The division of the EU's legislative authority between the Council and Parliament is unique and results in a balance of power. As the relationships and powers of these institutions have developed, various

¹⁰⁷⁶ The development of the farming sector is a good illustration of this exercise; see Delorme "Les Agriculteurs et les institutions".

¹⁰⁷⁷ Hoskyns and Michael *Democratizing the European Union*.

¹⁰⁷⁸ See Council of European Union; Available on: <http://www.consilium.europa.eu>.

legislative procedures have been created for adopting laws, with the key procedure being that the consent of the Council and Parliament has to be sought before the law can be adopted.¹⁰⁷⁹

10.7.5 The European Commission and the SADC Secretariat

The decision to compare the two institutions, the European Commission and the SADC Secretariat, was informed by the fact that both are responsible for the day-to-day running of their respective organisations. They are also executive bodies responsible for overseeing the implementation of decisions made by the organisations. The European Commission is sometimes perceived as a Secretariat, following the outlines established by De Gaulle.¹⁰⁸⁰ However as this discussion will show, there are several differences that portray the SADC Secretariat as a much weaker institution, whereas the European Commission is able to exercise its role in the Union owing to the executive power given to it by the Treaties.¹⁰⁸¹ The Commission is generally considered the most original of the Union's institutions.¹⁰⁸² The SADC Secretariat, in contrast, is small and poorly staffed.¹⁰⁸³ Moreover, SADC has continued to be weakened by significant institutional problems, particularly the lack of managerial expertise to tackle the multitudinous facets of regional integration.¹⁰⁸⁴ In comparison, the European Commission accounts for two-thirds of the 30 000 European civil servants.¹⁰⁸⁵ Monnet¹⁰⁸⁶ writes in his memoirs that:

Some hundreds of European civil servants would suffice to set thousands of national experts to work and have the powerful machinery of enterprise and governments used for the treaty's missions.

The lack of power on the part of the SADC Secretariat clearly transmits to the lack of progress in various critical areas of the organisation. Important for this thesis is the realisation that the Secretariat faces challenges in implementing the SADC regional

¹⁰⁷⁹ See European Parliament Date Unknown (c) www.europarl.europa.eu.

¹⁰⁸⁰ Magonette *What is the European Union?*

¹⁰⁸¹ See generally Denousse "Community Competences".

¹⁰⁸² Ross *Jacques Delors*; see also Cini *European Commission*; Nugent (ed) *At the Heart of the Union*; Spence and Edwards (eds) *European Commission*.

¹⁰⁸³ Giuffrida and Muller-Glodde 2008 *Strengthening SADC Institutional Structures* 1.

¹⁰⁸⁴ Marais *Reinforcing the Mould*.

¹⁰⁸⁵ Stevens and Stevens *Brussels Bureaucrats?*

¹⁰⁸⁶ Monnet *Memoires*.

integration agenda and the RISDP, which is considered to be the blueprint SADC must follow for the region's liberation from poverty.¹⁰⁸⁷ Some commentators¹⁰⁸⁸ have argued that the restructuring of the SADC Secretariat has only been completed in a "formal" sense and that the "engine room of the organisation" (the SADC Secretariat) remains particularly weak in its strategy development and policy formulation capacity, as well as in its human and financial capacities. Under the current structure and circumstances,¹⁰⁸⁹ the Secretariat has been unable to execute its mandate as provided for in the Treaty, especially that of undertaking strategic planning and management. For example; there is poor communication between the Secretariat and National Contact Points and haphazard distribution of responsibilities and obligations. There is also a rapid increase of sectors, resulting in a plethora of priorities and activities dependant on limited resources, which has led to a proliferation of meetings and an increase in associated costs. In comparison, the European Commission has legitimacy owing to its "inseminating effect" on Member States' national political systems.¹⁰⁹⁰ It even consults¹⁰⁹¹ private actors to avoid being accused of partiality.

In emphasising the influence and strength of the European Commission; former Belgian Prime Minister Guy Verhofstadt suggested changing the name "European Commission" to "European Government", saying that the name "commission" was ridiculous.¹⁰⁹² The role of the Commissioners is clearly defined like that of ministers in a national cabinet. In such an arrangement, the level of responsibility is easily ascertained. Furthermore, it was the Commission that saved the EU from near collapse. Accordingly, Mr Delors's Commission rescued the European Community from the doldrums after he arrived when Euro-pessimism was at its worst.¹⁰⁹³ He promoted the idea of the first single market and, in his second term, he pushed ahead with the far more ambitious goals of economic, monetary and political

¹⁰⁸⁷ Mkapa "Speech".

¹⁰⁸⁸ On the need to strengthen SADC National Coordination and Implementation Structures in line with SADC priorities, see Come, E *Institutional Capacity Development Needs of the SADC National Committees* (Commissioned by the SADC Secretariat supported by the German Government).

¹⁰⁸⁹ SADC 2001 *SADC Extraordinary Summit, Windhoek, Republic of Namibia: Draft Annotated Agenda*, 9 March 2001.

¹⁰⁹⁰ Radaelli 2000 *Governance* 25-43.

¹⁰⁹¹ Armstrong 2002 *Rediscovering Civil Society* 102-132.

¹⁰⁹² Verhofstadt *United States of Europe* 69.

¹⁰⁹³ Merrit 1992 www.nytimes.com.

union.¹⁰⁹⁴ This cannot be said of the SADC Secretariat, although it runs the day-to-day activities of the organisation, the power to drive regional integration still lies with the political leadership that is exercised by the Summit. This comparison highlights the need for SADC to have an ideal institution running the day-to-day activities of the organisation outside the influence of the Summit.

The work to produce the RISDP had to be commissioned by the Summit and its final implementation will depend on the Summit. In reality, politics in SADC always supersedes other areas. For that reason, it is not surprising that the launch of the SADC FTA in 2008 was overshadowed by the talks on the Zimbabwean crisis, leading to the implementation of the Global Political Agreement.

The EU Commission was set up as an institution to wean the EU from the authority of individual governments. It was meant to be a supranational authority with members proposed by all the governments of the Member States but bound to act independently. This is in contrast to the Council, which represents governments, and the Parliament, which represents citizens and the Economic and Social Committee, which represents organised civil society.¹⁰⁹⁵

According to Article 17 of the Treaty on the European Union the responsibilities of the Commission are as follows;

..ensure the application of the Treaties and of measures adopted by the institutions pursuant to the Treaties. It shall oversee the application of Union law under the control of the Court of Justice of the European Union.¹⁰⁹⁶

In addition to these responsibilities and by virtue of the entrance into force of the Treaty of Lisbon, the Commission can now exercise executive power. This executive power is shared with the Council.¹⁰⁹⁷ One of the strengths of the Commission is that it can initiate legislation, something other institutions cannot do. Although Council and Parliament may request legislation, in most cases the Commission initiates the

¹⁰⁹⁴ Merrit 1992 www.nytimes.com.

¹⁰⁹⁵ See EU Date Unknown (a) europa.eu.

¹⁰⁹⁶ For a descriptive analysis of the functions of Commission see Hix *Political System of the European Union* 32.

¹⁰⁹⁷ Bernmann Date Unknown jeanmonetprogram.org.

basis of these proposals. This monopoly is designed to ensure coordinated and coherent drafting of Union Law. However, this has been criticised in some circles where others felt the Parliament should have the right to do so, since this is the practice in national parliaments.¹⁰⁹⁸ This argument may be unnecessary since Council and Parliament may request the Commission to draft legislation and the Commission does not have the power to refuse such a request.¹⁰⁹⁹ Formally, however, the Commission alone is authorised to submit decision-making proposals to the Council and the Parliament.¹¹⁰⁰ In another further development under the Lisbon Treaty, EU citizens are now able to request the Commission to legislate in an area if they can provide a petition supported by one million signatures.¹¹⁰¹ In the final analysis, the Commission's power and influence is very relevant in proposing law that is centred on economic regulation and, owing to the size of the European market, the effect is even felt in the global market.¹¹⁰² As recently as 2007, the Commission has initiated moves for creating European criminal law when criminal law proposals on intellectual property rights directives were put forward.¹¹⁰³ This work can also be done by the SADC Secretariat if it is given the correct mandate supported by legal instruments.

In an effort to make sure that there is compliance with the legislation passed by the Council and Parliament, the Commission has the responsibility to ensure the implementation of the legislation. This is done through the Member States or through its agencies. This is not the position in SADC where power is centralised in the Summit. The European Commission is tasked with the responsibility to ensure the treaties and laws are upheld, while the Council can take the Member State or any other institution to the Court of Justice in a dispute.

The Commission's role in representing the Union externally is similar to that of the SADC Secretariat. The Commission represents the EU in bodies like the WTO. The SADC Secretariat, meanwhile, has been instrumental in the signing of a number of partnership and funding agreements on behalf of SADC, for example the signing of

¹⁰⁹⁸ Murray 2002 www.cer.org.uk.

¹⁰⁹⁹ Peterson and Michael 2006 *Institutions of the European Union* 152.

¹¹⁰⁰ Magnette 2005 *What is the European Union?* 288.

¹¹⁰¹ Wallis and Picard 2010 www.eumap.org.

¹¹⁰² Charlemagne 2007 www.economist.com.

¹¹⁰³ Charter 2007 *People Power Process* 23-25.

the Agreement with the Community of Portuguese Speaking Countries(CPLP). However, the SADC Member States still represent themselves individually in forums like the WTO.

The European Commission's relationship with the ECJ is very different to the relationship that the SADC Summit has with the Tribunal. The European Commission serves as a filter to the court, for example from 1961 to 1982, the Commission received about 9000 complaints and found about 200 admissible, but only thirty were referred to the court.¹¹⁰⁴ Over the next ten years, however, 379 cases reached the judiciary body.¹¹⁰⁵ This cannot be said of SADC, where inter-institutional rivalries characterise the relationship between the Tribunal and the Summit. The discussion that follows shows how the SADC Tribunal has been at the mercy of the Summit; currently the Summit has suspended the Tribunal pending an investigation into the mandate of its functions. This will now be discussed at length.

10.7.6 The European Court of Justice¹¹⁰⁶ and the SADC Tribunal

10.7.6.1 *The importance of a regional court in RTAs*

The success of the EU model of integration mostly depends on express institutionalism of the ECJ, whose different instruments provide for integration principles. There is also a need to determine the necessity or desirability of a formal dispute settlement system. The Stone Sweet and Sandholtz concept of insitutionalisation discussed earlier is helpful here. According to this concept, a movement towards supranational and institutionalised arrangements is preconditioned by the success of the regional agreement. A court or other formal mechanism to resolve disputes has a number of attributes to commend it. Foremost is the assumption of a specially trained and impartial staff that objectively applies preordained rules consistently in all disputes. The fear that nation-states have such a device is that they cannot control the outcome in any specific case and that, over

¹¹⁰⁴ Jackson "The United Kingdom confronts the European Convention on Human Rights".

¹¹⁰⁵ Jackson "The United Kingdom confronts the European Convention on Human Rights".

¹¹⁰⁶ Hereafter "ECJ".

time, the process of regionalism becomes judicialised.¹¹⁰⁷ In that situation, the power of the supranational judges is enhanced at the expense of national politicians and judicial decisions begin to reach into more traditionally political spheres.¹¹⁰⁸ Transferring the power to settle disputes among trading partners from the negotiating table to a legal forum further institutionalises the regional system and shifts power towards the supranational plane.¹¹⁰⁹ The rule of law is critical for the proper function of any organisation and the EU method of integration has used law as a prominent tool to achieve its aims.¹¹¹⁰ The rule of law can define the willingness of a group of Member States to compromise their domestic judicial independence. According to Richard Abel:¹¹¹¹

Conflicts are part of the fabric of social relationships and are transformed into disputes when conflicting claims are asserted publicly. Some disputes remain sorely between the competing parties, whereas others gain momentum and are driven to seek a third party to intervene and apply the rules authoritatively.

Shapiro¹¹¹² adds by stating that:

The intervention of a third party, whether as a mediator, arbitrator or judge, carries such obvious logic that courts have become a universal political phenomenon. The simple act of including a dispute-settlement device may actually force the parties to resolve their conflict without involving the outside third party. This judicialisation process refers to the infusion of judicial decision-making and court-like procedures into political arenas like RTAs where they did not previously reside.¹¹¹³

One study of the newly emerging regional trade associations recognised the obvious need for a formal mechanism to resolve competing claims and strongly recommended that all such agreements should provide for open forum dispute-resolution mechanisms and access to the dispute settlement boards of the WTO.¹¹¹⁴ The GATT experience is a good example of how a diplomacy-based approach in 1952 had to evolve in 1979 to legal mechanisms as a central feature to the whole

¹¹⁰⁷ Volcansek "Courts and Regional Trade Agreements" 23-41.

¹¹⁰⁸ Vallinder "When the Courts go Marching in" 13-14.

¹¹⁰⁹ Volcansek "Courts and Regional Trade Agreements" 23-41.

¹¹¹⁰ Ziller "Challenges of Governance" 44.

¹¹¹¹ Abel 1973 *Comparative Theory* 224-247; see also Metcalf and Papageorgiou *Regional Integration*.

¹¹¹² Shapiro *Comparative and Political Analysis*.

¹¹¹³ Vallinder "When the Courts go Marching in" 13.

¹¹¹⁴ Serra *Reflections on Regionalism* 54-55.

structure and, ultimately, the Uruguay Round of negotiations institutionalised the legal approach.¹¹¹⁵ This mechanism also provides the much-needed presumption of self-regulation.¹¹¹⁶ Given the above arguments in favour of the establishment of a court or tribunal, it is logical that a third-party intervention mechanism is required in international and transnational arrangements like the EU and SADC.¹¹¹⁷

10.7.6.2 *Historical perspective: the ECJ and SADC Tribunal*

The ECJ was established on 1 December 2009 and it presents a rich history of jurisprudence on how the EU has managed to abide by the rules as embodied in the treaties that have been signed over a long period of time.¹¹¹⁸ The reference to the ECJ in national courts is linked to the quality of intra-Union trade in which a nation is involved.¹¹¹⁹ This rich history is in contrast to that of the SADC Tribunal, which is still in its infancy and fighting for survival.¹¹²⁰ Furthermore, as this thesis has already discussed, the SADC Tribunal is currently facing challenges of legitimacy and a lack of support from the supreme institution, the Summit.¹¹²¹ At the 2010 SADC Summit where Heads of State and Government gathered to celebrate 30 years of its formation, the Tribunal was suspended. Zimbabwe has called for the Protocol to be renegotiated and to have a judgment passed against it withdrawn and nullified.¹¹²² The SADC Summit of 2011 went a step further and suspended all Tribunal functions and failed to renew or confirm the reappointment of its judges.¹¹²³ It has to be mentioned here, however, that all these challenges arose out of a decision to challenge a Member State's domestic policy and law. The weakness of the SADC Tribunal can also be equated to the ECJ during its initial days. Karen Alter recalls this weakness:

¹¹¹⁵ Hudec *Enforcing International Trade Law* 11-15.

¹¹¹⁶ Coleman and Underhill (eds) *Regionalism* 9-10.

¹¹¹⁷ International and transnational arrangement examples are the International Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights, the WTO's dispute-settlement bodies and the NAFTA dispute settlement panels, for more elaboration on these see Bognanno and Ready (eds) *North American Free Trade Agreement* 38. See also Stack "Human Rights in the Inter-American System" 105.

¹¹¹⁸ Fijnaut "Police Co-operation" 272; see also Occhipinti "Police and Judicial Co-operation" 183.

¹¹¹⁹ Stone Sweet and Brunnell 1998 *APSR* 92.

¹¹²⁰ See chapter 6 of this thesis for a detailed account of the SADC Tribunal current status.

¹¹²¹ See chapter 6 of this thesis for a detailed account of the SADC Tribunal current status.

¹¹²² Staff Reporter 2010 www.newzimbabwe.com.

¹¹²³ See chapter 6 of this thesis.

... the ECJ can say whatever it wants, [but] the real question is why anyone should heed it.¹¹²⁴

However, in most cases the EU Member States abide by the decisions of the Court. The difference between SADC and EU in this regard is that, in the EU, national courts were clearly of crucial importance in the acceptance and enforcement of European Court's pronouncements. The ECJ has been able to answer the question on why anyone should heed it by providing one of the best platforms for the manifestation of regional integration. This has not been the case in SADC, as indicated by the Campbell case,¹¹²⁵ where Zimbabwe clearly treated the ruling of the Tribunal with utter contempt.

To date, the Zimbabwean government has not yet obeyed the Tribunal's ruling.¹¹²⁶ Zimbabwean courts have also refused to recognise and register the ruling of the Tribunal.¹¹²⁷ However, in South Africa, the Tribunal ruling was given recognition when farmers approached the North Gauteng High Court to have the ruling registered in South Africa.¹¹²⁸ In the High Court ruling, the farmers were granted an order to attach Zimbabwean government non-diplomatic properties in South Africa. The South Africa, government is, however, reported to be seeking legal advice on the propriety or otherwise of the SADC Tribunal's decision regarding Zimbabwe, despite the confirmation of the ruling by the North Gauteng High Court. The reality of the matter is that the Tribunal ruling has been met with contempt, not only from the Zimbabwean government, but also from its judiciary.

Zimbabwe has disputed the ruling of the Tribunal based on its non-ratification of the Protocol. However, according to Beukes,¹¹²⁹ a party to an international agreement cannot escape its obligations especially if that specific state has acceded to an

¹¹²⁴ Alter 1996 *European Courts* 458, 449.

¹¹²⁵ See *Mike Campbell v Republic of Zimbabwe* SADC (T) No. 2/2007 (28 November 2008).

¹¹²⁶ In one newspaper report, the Zimbabwean Minister of Justice, Mr Patrick Chinamasa, is quoted defiantly challenging the Tribunal to make as "many such judgements as possible" so that Zimbabwe will ignore them.

¹¹²⁷ See, for instance the case of *Etheredge v Minister of State for National Security Responsible for Lands, Land Reform and Resettlement* HC 3295/08 2009 ZWHHC 1 (4 February 2009) in which Gowora J remarked that the supreme law of Zimbabwe is as spelt out in the constitution and there is no statute that puts the SADC Tribunal in a superior position to the courts of Zimbabwe.

¹¹²⁸ *Louis Karel Fick, Richard Thomas Etheredge and William Michael Campbell v Government of Zimbabwe* Case 77881/2009 (25 February 2010). See also Saurombe 2009 *SA Merc LJ*.

¹¹²⁹ Beukes 2008 *Zimbabwe in the Dock* 228-243.

international agreement, in this instance the SADC Treaty.¹¹³⁰ She further argues that the state cannot rely on its domestic law and the sovereignty of states argument. The sovereignty of states argument actually trumps the commitment to the international obligations argument, since it is an act of sovereignty to enter into an international agreement.¹¹³¹ Accordingly, the Zimbabwean government was in breach of its SADC Treaty obligations.¹¹³² This case has resulted in the suspension of the Tribunal, a serious dent in the rule of law as a catalyst for regionalism in SADC.

10.7.6.3 *Jurisdiction and analysis of the role of the court in the EU and SADC*

The SADC Tribunal is not very popular among the SADC citizens since most are unaware of its existence. At some stage the same can be said of the ECJ, as evidenced by the fact that as recently as 1993, half a century after its creation, most of the European electorate had no knowledge of the ECJ.¹¹³³ The discussion and comparison of these two institutions will now shift to a jurisdiction point of view.

The jurisdiction of the ECJ was established under EU Treaty, the same way the SADC Tribunal jurisdiction is found in the SADC Treaty. By virtue of being a member of the EU, Member States abide by the jurisdiction of the Court. The same interpretation was given by the SADC Tribunal in establishing its jurisdiction to hear the Campbell case as discussed earlier. The European Court of Justice decides matters of EC law for Member States and national courts; publishes the European Court Reports; and shapes all of European Union law. Individual European citizens are not able to bring a case to the ECJ directly. They have to first bring a case to their relevant national court. The same approach is used under the SADC Tribunal requirement, that is, one needs to exhaust local remedies before approaching the Tribunal.¹¹³⁴ In the EU, the local court has the power to request a preliminary ruling

¹¹³⁰ See *Pacta sunt servanda* principle discussed earlier.

¹¹³¹ See *Pacta sunt servanda* principle discussed earlier.

¹¹³² See *Pacta sunt servanda* principle discussed earlier.

¹¹³³ Gibson and Caldiera 1995 *Legitimacy* 459.

¹¹³⁴ Article 15(2) *Protocol on the SADC Tribunal* (2000), similar provisions in the EU can be found under A 35(1) *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1952) (ECHR).

on an interim reference to the ECJ.¹¹³⁵ The reason for the indirect method of approach to the ECJ is to prevent the court from being overburdened with cases that could be decided on a national level. The advantage of this approach is that it allows national courts to structure judgments in line with the way European law has been enacted in their own countries.

If it happens that a Member State has failed to observe or correctly implement European Community legislation, the European Commission may bring a case against that Member State in the CJEU.¹¹³⁶ In the same manner, another Member State may bring proceedings for the same reasons.¹¹³⁷ The Court is also empowered to order a Member State found in breach of EC law to take action to remedy the breach and heavy fines can be imposed if the Member State decides not to take action. These fines can be in the form of a fixed or a recurring penalty; each penalty being decided on the severity of the case. The interpretation of the Treaty articles of the EU also falls under the jurisdiction of the ECJ as the Supreme Court. This includes the interpretation of individual regulations and directives that make up the majority of European Community law. Even private law has been recognised as Europeanised.¹¹³⁸

In comparison, the Tribunal has jurisdiction over all disputes and all applications, referred to in accordance with the SADC Treaty, which relate to the interpretation and application of the Treaty.¹¹³⁹ The Tribunal also has jurisdiction over disputes between states and between natural and legal persons and states.¹¹⁴⁰ It can be argued here that the need for the Tribunal not to be overburdened by cases is paramount. Additionally, there is a need for the national courts to work in harmony with both the ECJ and the Tribunal in either jurisdiction. Usually when natural or legal persons take their cases to the Tribunal, they would have failed to resolve the matter within their states.¹¹⁴¹ As in the EU, the *locus standi* given to natural persons before

¹¹³⁵ Article 234 *ECHR*.

¹¹³⁶ Article 226 *ECHR*.

¹¹³⁷ Article 227 *ECHR*.

¹¹³⁸ Joerges 1997 *Impact of European Integration* 378.

¹¹³⁹ Article 14 *Protocol on the SADC Tribunal* (2000).

¹¹⁴⁰ Article 15 *Protocol on the SADC Tribunal* (2000).

¹¹⁴¹ Oosthuizen *Southern African Development Community*. The recognition of individuals as participants and subjects of international law is very complex and this area of law is still under development. Individuals are not considered as subjects of international law at the moment.

the Tribunal is an appreciation of the modern practice of recognising individuals as participants and subjects of international law.¹¹⁴² The question of the status in international law of individuals is closely bound up with the rise in the international protection of human rights.¹¹⁴³

It should also be mentioned here that the exhaustion of local remedies is an international norm that is a recognised principle of international law and should not just be viewed in terms of domestic law, especially when the remedies may be non-existent or manifestly inadequate or the process may be unduly prolonged. This rule was tested in the Campbell case,¹¹⁴⁴ where the Tribunal found out that there was no realistic prospect of exhausting domestic remedies because Amendment 17 of the Zimbabwean Constitution precluded one from instituting any legal proceedings with regard to the matter. When the applicants in the Campbell case sought an interim order, the government of Zimbabwe objected on the grounds that all internal remedies had not been exhausted as the matter was still pending before the Supreme Court of Zimbabwe. However, in this case, the Supreme Court had taken too long to make a decision on the matter and the possibility of proceeding under the domestic jurisdiction was minimal.¹¹⁴⁵

The Tribunal also considered that some circumstances in Zimbabwe under the violent land grab period had rendered the exhaustion of local remedies impossible. This was because Amendment 17 all but ousted the jurisdiction of the Zimbabwean courts in all matters involving the compulsory acquisition of agricultural land that left the farmers without any avenue to pursue proceedings in any domestic court. The land grabs intensified from 31 July 2000¹¹⁴⁶ and the Zimbabwean government's radical methods of acquiring farms were so effective that, by the end of October

¹¹⁴² Shaw 2008 *International Law* 258. See also generally Clapman 2010 *Individual in International Law* 1-6. See further Cassese *The Human Dimension of International Law. Selected Papers* (2008).

¹¹⁴³ Shaw 2008 *International Law* 258; see also Oppenheim *Oppenheim's International Law* Chapter 8; Higgins *Problems and Process* 48-55; Brownlie *Principles of Public International Law* Chapter 25; Mullerson 1990 *Human Rights* 33.

¹¹⁴⁴ *Mike Campbell v Republic of Zimbabwe* SADC (T) No. 2/2007 (28 November 2008).

¹¹⁴⁵ See A 15(2) *Protocol on the SADC Tribunal* (2000).

¹¹⁴⁶ Thomas 2003 *Land Reform in Zimbabwe* 691-694.

2002, only an estimated 600 to 800 out of 4,500 white farmers remained on their land.¹¹⁴⁷ You have discussed this issue in a previous chapter

The exhaustion of local remedies was also not possible in the Campbell case because section 3 of the Zimbabwean Constitution proclaims the supremacy of the Constitution and how it supersedes all law and invalidates any law that is inconsistent with the Constitution. In the different but related Zimbabwean Case of *Smith v Mutasa*,¹¹⁴⁸

It was declared that such supremacy is protected by the authority of an independent judiciary, which acts as an interpreter of the constitution and all legislation.

By excluding the jurisdiction of the courts on land acquisition matters, Amendment 17 essentially violates the substantive due process of law by allowing individuals to be arbitrarily deprived of their property without judicial recourse.¹¹⁴⁹

In trying to compare the protection of fundamental human rights protection under the Tribunal, a reference to the European Convention for the protection of Human Rights and Fundamental Freedoms of 1954 is relevant and is also pivotal in the drafting and creation of similar conventions, courts and jurisprudence in Latin America and Africa. The African Court on Human and People's Rights applies the 1981 African Charter on Human and Peoples' Rights,¹¹⁵⁰ while the Inter America Court of Human Rights enforces and interprets the 1969 America Convention on Human Rights.¹¹⁵¹ Article 1 of the European Convention for the protection of Human Rights and Fundamental Freedoms of 1954 protects the individual's rights to property:

¹¹⁴⁷ De Villiers *Land Reform*. For a full account of the land invasions and an analysis of legal issues arising, see Dube and Midgley 2008 *Land Reform in Zimbabwe* 21.

¹¹⁴⁸ Naldi 1993 *Land Reform in Zimbabwe* 3; see also Coldham 1993 *Land Aquisition Act* 82-88.

¹¹⁴⁹ Naldi 1993 *Land Reform in Zimbabwe* 3; see also Coldham 1993 *Land Aquisition Act* 82-88.

¹¹⁵⁰ Evans and Murray (eds) *African Charter*. In terms of a recent resolution this court will be merged with the African Court of Justice (A 2(1) *Protocol on the Statute of the African Court of Justice and Human Rights* (2008)). See also A 18 *Constitutive Act of the African Union* (2000). According to A 47(1) of the Protocol the seat of the Court is to be determined by the Assembly from among States Parties. It appears that the Court will be based in East Africa (*AU Doc Assembly/AU/Dec.83 (V)* (2005) para 4).

¹¹⁵¹ Pasqualucci *Practice and Procedure*; see also Gros Espiell 1989 *La Convention Americaine* 220.

... except in the public interest and subject to the conditions provided for by law and the general principles of international law.

The European Court of Human Rights qualified this understanding by reference to international law that property of nationals has to be protected by the state.¹¹⁵² According to Naldi,¹¹⁵³ two principles emerge from the judicial interpretations of this Article regarding disposition of land and compensation that accrue from it. These are:

- i) Prompt, adequate and effective compensation in accordance with the general principles of international law....does not apply to the taking by a state of property of its nationals but is designed for the protection of aliens and
- ii) Article 1 did not guarantee a right to full compensation in all circumstances since legitimate objectives of public interest such as pursuing measures of economic reform might call for less than full compensation.

The lack of compensation in the Zimbabwean land reform programme was criticised by the Tribunal and led it to find the Zimbabwean government in violation of its obligations under the SADC Treaty. This is a similar finding that could have been given under the European judicial system. Furthermore, Article 4¹¹⁵⁴ of the SADC Treaty requires Member States to act in accordance with the principles of "human rights, democracy, and the rule of law". According to the Campbell case (heads of arguments), abiding by these principles entails a three-pronged approach, that is; integrated commitment of the Member States of SADC to attaining economic development, encouraging regional peace and cooperation, and ensuring respect for basic human rights and the rule of law; and this include other international legal instruments that members have ratified.¹¹⁵⁵

¹¹⁵² *Lithgow v United Kingdom* Series A No 102 75 ILR 438.

¹¹⁵³ Naldi 1993 *Land Reform in Zimbabwe* 586-600.

¹¹⁵⁴ Article 4(c) *SADC Treaty* (1992).

¹¹⁵⁵ For an exhaustive discussion of the international jurisprudence on the subject of the expropriation of alien property, see Dugard *Public International Law* 225-233; Brownlie *Principles of Public International Law* 531-545; Mouri *International Law of Expropriation* 236-374; Dixon and McCorquodale *Cases and Materials* 430-445; Wallace *International Law* 164-174; Malanczuk *Akehurst's Modern Introduction* 235-240; and Shearer *Starke's International Law* 269-275.

The right to legal redress for land expropriation in Zimbabwe violates the very foundation of the rule of law, as it emasculates the judiciary which is responsible for ensuring adherence to the law. Furthermore, the principle of separation of powers was ignored. The judiciary thus became a tool in the hands of the executive and Zimbabwe was in complete breach of the provisions of Article 4 of the SADC Treaty. The Tribunal focused on the aspect of rule of law at length and pointed out that

... the concept of rule of law embraces at least two fundamental rights, namely, the right to access the courts and the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation... Any existing ouster clause in terms such as "the decision of the Minister shall be subject to appeal or review in any courts" prohibits the court from examining the decision of the Minister if the decision affecting the legal rights of individuals arrived at by a procedure which offended against natural justice was outside the jurisdiction of the decision making authority so that, if the minister did not comply with the rules of natural justice, his decision was *ultra vires* or without jurisdiction and the ouster clause did not prevent the court from enquiring whether his decision was valid or not.

In emphasising the jurisdiction of the Tribunal, the SADC Treaty requires Member States to take all necessary steps to give the Treaty the force of national law in their countries.¹¹⁵⁶ This means that, in the process of implementing national policy and legislation, states should promote the provisions of the SADC Treaty and be consistent with its rules. The implication of this requirement is that the Zimbabwean constitution and its amendments as well as national law cannot be used to violate SADC law. The same understanding prevails in the EU judicial system where national courts are even supposed to seek the ECJ's interpretation of the EC law if they are not sure of its meaning and are supposed to get the ECJ to clarify a point concerning the interpretation of Community law, so that they may ascertain, for example, whether their national legislation complies with the EC law. Such interpretation by the ECJ is very substantive in that it becomes a precedent. In practice, with the passage of time, this mechanism became a means by which private individuals were able to get the Court to compel national authorities to obey European law.¹¹⁵⁷ The ECJ cooperates with all the courts of the Member States, which are the ordinary courts in matters of Community law. This is to ensure the effective and uniform application of Community legislation and to prevent divergent

¹¹⁵⁶ Article 6(5) *SADC Treaty* (1992).

¹¹⁵⁷ *Alter Establishing the Supremacy of European Law*.

interpretations. The actions of the Zimbabwean government show the opposite: they actually demand that the Tribunal respect the ruling of the Zimbabwean Supreme Court. The Zimbabwean Justice Minister, Patrick Chinamasa was quoted as saying:

At the moment the Tribunal is trying to reverse the decisions of our Supreme Courts, in fact it's purporting to rewrite our constitutions,...as you know our land reform is constitutional, and our courts have adjudicated over the matter and given the ruling, the land reform is legal, it's constitutional.¹¹⁵⁸

On the contrary, national courts are an important institution in economic integration.¹¹⁵⁹ In Europe, the European Court of Justice and national courts found an almost natural interest in cooperating.¹¹⁶⁰ In showing the opposite stance to the Zimbabwean government, the Court of Justice of the European Communities has confirmed repeatedly since the case of *Costa v. ENEL*¹¹⁶¹ on 15 August 1964 and established that the following:

All claims by states to insist upon their constitutional requirements above the norms of Community law is a fermenting agent for dislocation, contrary to the principle of membership to which the Member States submitted themselves freely and with sovereign power.

Furthermore, the Luxembourg Court, in its landmark case of *Van Gend en Loos*,¹¹⁶² has clearly established that:

The Community Treaties conferred on individuals rights that the national courts had to protect, not only when the provisions in question considered them as legal subjects, but also when they imposed a well-defined obligation on Member States.¹¹⁶³

¹¹⁵⁸ The Zimbabwean Minister of Justice, Mr Patrick Chinamasa, is quoted defiantly challenging the Tribunal to make as "many such judgements as possible" so that Zimbabwe will ignore them. See also the case of *Etheredge v Minister of State for National Security Responsible for Lands, Land Reform and Resettlement* HC 3295/08 2009 ZWHHC 1 (4 February 2009) in which Gowora J remarked that the supreme law of Zimbabwe is as spelt out in the constitution and there is no statute that puts the SADC Tribunal in a superior position to the courts of Zimbabwe.

¹¹⁵⁹ Mann *Function of Judicial Decision*.

¹¹⁶⁰ Weiler 1991 *Transformation of Europe*. Symposium International Law 100(24) 3–83.

¹¹⁶¹ *Costa v ENEL* (6/64) 1964 ECR 585. In this case the CJEU stated that the precedence of Community law is confirmed by A 288 whereby a regulation "shall be binding" and "directly applicable" in all member states. This provision is subject to no reservation, would be meaningless if a state could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law.

¹¹⁶² *Van Gend and Loos v Nederlandse Administratie der Belastingen* (26/62) 1963 ECR 1.

¹¹⁶³ The Court of Justice of the Cartagena Agreement has equally confirmed this on many occasions (Cases *I-IP-87*, *2-IP-88* and *2-ip-90*).

This interpretation of the purpose of the Tribunal is tantamount to abuse by the Zimbabwean government. To make matters worse, the SADC Summit has suspended the Tribunal for six months pending the review of its functions and terms of reference.¹¹⁶⁴ Many analysts like Dirk Kotze¹¹⁶⁵

Labelled this move as showing unwavering support for the Zimbabwean government by the Summit, anything to the contrary would be punitive and it has to be weighed against other political considerations such as maintaining the unity government.¹¹⁶⁶

Furthermore, the SADC Treaty¹¹⁶⁷ obliges its Member States to desist from acting in a manner that would jeopardise the "sustenance of its principles, the achievement of its objectives and the implementation of the provisions." If the Zimbabwean case is to be taken as an example and precedent, such an obligation is clearly not being met. The Summit is the supreme institution of the organisation but is at the forefront of disregarding its own treaty and law. A situation like this would not manifest in the EU, where institutions can actually take each other to the ECJ. In the EU, under a new Article 7 TEU, the rights of Member States could be suspended if the Council of Ministers determined that a Member State had been in "serious and persistent breach" of its obligations to respect civil, political and human rights. The balance of power that exists in the EU institutional landscape is nonexistent in SADC. There is consequently a need to withdraw community law from the hands of the politicians and bureaucrats and place it in the hands of the people.¹¹⁶⁸

SADC may also be in breach of its obligations, guidelines and principles as laid down under the WTO rules.¹¹⁶⁹ Some of the guiding principles are prompt settlements of disputes;¹¹⁷⁰ creating predictability in the dispute settlement system;¹¹⁷¹ an express prohibition on nullification or impairment of benefits accruing

¹¹⁶⁴ Ibid.

¹¹⁶⁵ *Mail and Guardian Online* (17 August 2010).

¹¹⁶⁶ Lesieur 2010 www.mg.co.za.

¹¹⁶⁷ Article 6(1) *SADC Treaty* (1992).

¹¹⁶⁸ Mancini and Kelling 1994 *Democracy and the European Court* 175-193.

¹¹⁶⁹ See the *WTO Understanding on Rules and Procedures Governing the Settlement of Dispute* (1996) (DSU), published as Annex 2 in the WTO publication, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2007) 354-379.

¹¹⁷⁰ Article 3(3) *DSU* (1996).

¹¹⁷¹ Article 3(2) *DSU* (1996).

to a member;¹¹⁷² the need to engage in consultations before litigating;¹¹⁷³ the use of good offices, conciliation and mediation;¹¹⁷⁴ and the establishment of panels.¹¹⁷⁵ This should be expected since both the EU and SADC are made pursuant to the provisions of the WTO.¹¹⁷⁶

The ECJ also plays an important role in facilitating deeper integration in the EU. It has also been credited with the transformation of the European Treaties into a constitution and the establishment of a system of supranational governance.¹¹⁷⁷ A brief overview of the process indicates that the ECJ was created by the Treaty of Paris in 1951 and, more than a decade later, the constitutionalisation of the treaties started with the decision in *Van Gend en Loos*¹¹⁷⁸. This decision established the doctrine of direct effect and enabled citizens of various signatories to the treaties to assert their right in national courts.¹¹⁷⁹ This principle of direct applicability allows Community law to become part of the national legal system without intervening national measures which aim at transforming the community law into a national one.¹¹⁸⁰ The Campbell case should have had the same effect on SADC Member

¹¹⁷² Article 3(5) *DSU* (1996).

¹¹⁷³ Article 4 *DSU* (1996).

¹¹⁷⁴ Article 5 *DSU* (1996).

¹¹⁷⁵ Article 6 *DSU* (1996).

¹¹⁷⁶ According to A XXIV(5) *GATT* (1994), the provisions of the WTO Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; to conditions specified in paragraphs (a)-(c) of the same provision.

¹¹⁷⁷ Maduro *We the Court* 7-30. See also Weiler *Constitution of Europe* 221-224.

¹¹⁷⁸ *Van Gend and Loos v Nederlandse Administratie der Belastingen* (26/62) 1963 ECR 1.

¹¹⁷⁹ Examples of European countries that effected significant constitutional amendments in response to the legal demands of European integration are: Belgium (a 34 *Constitution*), Luxembourg (a 49 *Constitution*), the Netherlands (a 92-94 *Constitution*), the United Kingdom (*European Communities Act* 1972) and Poland (a 91(3) *Constitution*) to mention just a few.

¹¹⁸⁰ The European Court of Justice defines the principle to mean that the entry into force of community law is "independent of any measure of reception into national law". The measure could be a parliamentary resolution, an act of parliament, or an executive act such as cabinet approval. This is not given the same interpretation in a number of Africa countries as highlighted in the few examples, especially those from SADC. (See e.g. Uganda: *Ratification of Treaties Act* 1998, Chapter 204, s 2(a) which allows cabinet to ratify treaties without having them pass through parliament. See also a 231(3) *Constitution of Republic of South Africa*, 1996). The character of the measure often determines the domestic effect or status of the relevant international law. In general and especially in common law countries, an act of parliament is required before international law (See a 232 *Constitution of the Republic of South Africa*, 1996, a 211(3) *Constitution of the Republic of Malawi*, a 144 *Constitution of the Republic of Namibia*) becomes enforceable, mere ratification by parliament is not enough. For a general overview on the influence of national constitutions on community law in national legal systems, What is clear from this exposition is that many African governments have not appreciated the notion that economic integration requires a rethink or amendment of constitutional or legislative provisions to accommodate community law (*SADC Protocol on Immunities and Privileges* (1992)).

States, for instance the ability to register the judgment as done by the Northern Gauteng High Court.¹¹⁸¹

In the EU, the result was that enforcement of the treaties was transferred from interstate negotiations to national courts. In the year that followed, the doctrine of the supremacy of Community law over any conflicting national law was asserted in *Costa v. ENEL*.¹¹⁸² The status of treaties was elevated to a supranational plane based on this doctrine and the concept of direct effect. A host of other decisions that followed cemented the position of European treaties and solidified their legitimacy.¹¹⁸³ However, all is not lost for SADC, since the experience of the EU shows that at the time when the Court was founded, the practice of constitutional justice was still largely foreign to European political culture. Among the six founding members of the European Communities, only two states, which had just recovered from authoritarianism, Italy and Germany, had established a constitutional court in their new fundamental law.¹¹⁸⁴ The predominant legal doctrines on the continent remained hostile to the unwarrantable interference of legal instruments in the highest political spheres.¹¹⁸⁵ Ultimately, however, the jurisprudence of the Court seems to reflect the evolution of political preferences.¹¹⁸⁶

10.7.6.4 *Enforcement of judgments in the EU and SADC*

The threat of supranationalism is compounded by the question of compliance with judicial decisions. Enforcement of legal decisions is hardly automatic even within the confines of a single national state.¹¹⁸⁷ The discussion so far has already identified similarities and differences in the judicial systems of the EU and SADC, especially when one considers the desire for deeper integration for the two regional organisations. It is not easy to miss the vast differences that exist in the enforcement of judgments by the ECJ in the EU and the Tribunal in SADC from what has already

¹¹⁸¹ This registration meant that the affected farmers can now attach Zimbabwean assets in South Africa. Two properties in Cape Town, South Africa have already been attached and auctioned with the proceeds given to the farmers.

¹¹⁸² *Costa v ENEL* (6/64) 1964 ECR 585

¹¹⁸³ Stone Sweet 1994 *Supranational Constitution* 441-444.

¹¹⁸⁴ Magonette *In the Shadow of the Law*.

¹¹⁸⁵ Magonette *In the Shadow of the Law*.

¹¹⁸⁶ Maduro *We the Court*.

¹¹⁸⁷ Canon and Johnson *Judicial Policies*.

been discussed. The SADC Tribunal has no power to enforce its decisions except through decisions of the Summit. Guarantees of compliance with transnational rules, whether decided by a court or other formal dispute settlement mechanism, still depend largely on the trustworthiness of the other contracting parties. Furthermore, compliance with decisions reached, in a manner more likely than the outcome of the persistent renegotiation of rules and some external pressure to comply, appears even more essential in regions where the trading partners are less homogeneous, as in SADC.

This is not the case in the EU where signatories to the treaties are all historically committed to the rule of law and share a common political, economic and cultural context; hence, the movement towards supranationalism could not be stemmed. The ECJ has the power to order a Member State found in breach of EC law to take action to remedy the breach and can issue heavy fines if this does not happen.¹¹⁸⁸ Thus, the EU is a regulatory regime whose laws impact directly on its citizens and it requires their acknowledgement of it as binding on them and therefore their recognition of the EU as a rightful source of valid law.¹¹⁸⁹ Even if the offending party is one of the EU institutions, the Community institution concerned is called on to act and where the failure to act is held to be unlawful, it is for the institution concerned to put an end to the failure by appropriate measures. Member nations can even be held financially liable for damages resulting from failure to meet their obligations under the treaties.¹¹⁹⁰ The jurisdiction to hear actions for failure to act is shared between the Court of Justice and the Court of First Instance according to the same criteria as for actions for annulment. If SADC was following the EU system, it could have meant that the Tribunal decisions were easily enforced by the Summit or any other Treaty-empowered organ to do so and would have called upon Zimbabwe to reverse the land reform programme without delay. Failure to comply would have led to the imposition of a fixed or periodic financial penalty. Additionally, if the Tribunal operated like the ECJ, the Summit would also have been answerable to the Tribunal and would have also faced sanctions. This is not the case and the separation of powers among institutions as exercised in the EU is not evident in SADC. The

¹¹⁸⁸ Tatham *Enlargement of the European Union* 254.

¹¹⁸⁹ Beetham "Legitimacy".

¹¹⁹⁰ Tridimas "Member States Liability".

separation of powers is critical because it creates the necessary checks and balances needed among institutional organs.

The fact that the Tribunal has already been suspended for six months, pending a review, shows that the Summit is overzealous and does not appreciate the doctrine of separation of powers. Too much power concentrated in one institution in an organisation is bound to create problems and, from a model point of view, it can be concluded that SADC attempted to adopt the EU model on paper but remains a politically driven organisation whose leaders fear contentious issues can split the bloc, which has struggled to act with a united voice on Zimbabwe even at the height of electoral violence in 2008. If SADC wishes to progress towards deeper integration, certain sacrifices have to be made, especially in addressing the wrongs by individual Member States. SADC has already demonstrated this through the suspension of Madagascar after the army backed the ousting of President Marc Ravalomanana by the former mayor of the capital, Andry Rajoelina in March 2009. However, such a bold step will have to be exercised across the board, especially on issues pertaining to the rule of law and if the rulings of SADC Tribunal are not adhered to, the credibility of SADC as a whole will be put at risk. On the other hand, the EU experience suggests that legitimacy can be guaranteed through classic democratic competition over inputs.¹¹⁹¹ EU supranational governance was contingent on a convergence of several factors. These include a supranational court staffed with strategic-minded judges, compliant national judges and a means of citizen access.¹¹⁹² The model of the EU Court of Justice is a vital piece of the EU model of integration. Its success has been based on, *inter alia*, a developed system of independent national and EU courts, an expert and active legal profession, the proper implementation and enforcement of the EU Court of Justice rulings before national courts by their agreement and the development in legal processes and, in fact, in the various legal cultures in the Union, whether based on the common law or civil law and their different permutations.¹¹⁹³

¹¹⁹¹ Hix 1998 *The Study of EU* 38-65.

¹¹⁹² Volcansek "Courts and Regional Trade Agreements" 23-41.

¹¹⁹³ Ziller "Challenges of Governance" 6.

In the final analysis it is also important to look critically at the strategies the EU used to persuade national courts and government to embrace community law. According to Alter:

The ECJ employed a judicial strategy whereby it took large judicial strides by providing national policy makers with immediate material and political rewards; when the Court established a far-reaching legal doctrine; it did not apply it against the state whose action was challenged.¹¹⁹⁴

Additionally, the different time horizons of politicians and judges worked to the advantage of the judges.¹¹⁹⁵ This strategy made sure that there was no direct loss to the state as a consequence of ECJ decisions when first announced, which diminish potential negative reaction by state actors. The other role player in solidifying the power of the ECJ was the citizenry of member nations. Without individual litigants, there would be no cases presented to national courts and thus no basis for legal integration.¹¹⁹⁶

Both the positive and negative aspects of a formal dispute-settlement system for monitoring and enforcing RTAs are obvious. A formal institution fixes the rules and determines when a violation has occurred; if independent from national governments, it can insure the integrity of rules. On the other hand, however, it cannot ensure compliance.¹¹⁹⁷ The proliferation of both trade and rules in turn requires someone to monitor, apply and enforce the rules. The more intense and pervasive the rules and transactions become; the greater will be the authority of the organisations devised to execute the rules. This is typically how the ECJ has operated in Europe but the same cannot be said for SADC, where the Tribunal's first judgment presages a rocky path ahead. From the above exposition and analysis of the SADC Tribunal, a few useful lessons for the SADC region in the context of the rule of law emerge.

While the Campbell litigation was about land and discriminatory expropriatory laws that make no provision for compensation, it can also be viewed as a challenge to the whole idea of institutionalism in SADC. The fact that the Zimbabwean government

¹¹⁹⁴ Alter 1998 *Who are the Masters of the Treaty* 121-122.

¹¹⁹⁵ Alter 1998 *Who are the Masters of the Treaty* 121-122.

¹¹⁹⁶ Mattli and Slaughter 1995 *Revisiting the European Court of Justice* 459.

¹¹⁹⁷ Hudec 1993 *Enforcing International Trade Law* 295.

has displayed a stubborn reluctance to abide by the decision points to the weaknesses in the SADC legal implementation regime rather than weaknesses in the substantive legal provisions as such. Hence, a rule-based dispute settlement mechanism is important and necessary for the full implementation of SADC Protocol in the realisation of regional integration in SADC. In most cases, SADC Member States as individuals and as a collective are not committed to the rule of law, in sharp contrast to the EU situation.

10.8 Reference to other African courts

Against this sharp contrast between the EU and SADC legal systems, it is important to make a brief reference to other courts and tribunals in Africa for comparison. The existence of this plethora of tribunals is an indication that a certain recognition for the rule of law exists and that adherence to community law is desirable. It has to be mentioned here that these courts enjoy better recognition in their respective regions.¹¹⁹⁸ The first one is the Economic Community of Central African States¹¹⁹⁹ Court of Justice, which was originally set up under Article 5 of the 1994 CEMAC Treaty and Articles 73 and 74 of the Convention governing the Economic Union of Central Africa. The 2008 CEMAC Treaty established the Court of Justice under Article 10 as well as Articles 46 and 48. The jurisdiction of the Court is set out in the Convention Governing the Court of Justice of CEMAC.¹²⁰⁰ Additionally, the East Africa Community (EAC) established a Court of Justice under Article 9 of the 1999 EAC Treaty and its jurisdiction is dealt with in Chapter 8 of the Treaty.¹²⁰¹ COMESA also has a Court of Justice set up under Article 7 of the 1994 COMESA Treaty and its jurisdiction is set out in Articles 19 to 44. OHADA¹²⁰² Common Court of Justice and Arbitration was established under Article 3 of the 1993 OHADA Treaty and its jurisdiction is set out in Articles 6 and 7 and 14 to 20. OHADA is working towards the harmonisation of business laws in all its contracting states. The OHADA Common

¹¹⁹⁸ See generally Cistac "Harmonisation of National Legal and Regulatory Frameworks".

¹¹⁹⁹ Hereafter "CEMAC".

¹²⁰⁰ See a 4 and 14-24 *CEMAC Treaty* (2008).

¹²⁰¹ Articles 23-47 *CEMAC Treaty* (2008). The EAC covers Burundi, Kenya, Tanzania, Rwanda and Uganda.

¹²⁰² *Organisation pour l'Harmonisation en Afrique du Droit des Affaires*, Organisation for the Harmonisation of Business Law in Africa comprises mainly francophone States in Central and West Africa.

Court of Justice and Arbitration has held that the "mandatory force of the OHADA uniform acts and their superiority over provisions of national laws",¹²⁰³ which is equally called a rule of supranationality directly derived from Article 10 of the OHADA Treaty. This give it a supranationality effect, since it provides for the direct and mandatory application of the uniform acts and establishes supremacy over the antecedent and later provisions of domestic law.¹²⁰⁴ These two concepts are clearly linked to two of the most famous cases in the jurisprudence of the CJEU, that is, the cases of *Costa v ENEL*¹²⁰⁵ and *Simmenthal*.¹²⁰⁶ Lastly, the UEMOA Court of Justice was re-established by Articles 16 and 38 of the 2003 modified UEMOA¹²⁰⁷ Treaty (originally signed in 1994) and its jurisdiction is provided in Additional Protocol No 1 relating to the UEMOA Supervisory Organs.¹²⁰⁸ The UEMOA Court's application of community law can be equated to the CJEU case law¹²⁰⁹ when it ruled that:

... it is important to underline that the Union (UEMOA) constitutes in law an organisation of unlimited duration, endowed with its own institutions, with legal personality and capacity and above all with powers born of a limitation of competences and of a transfer of responsibilities of Member States which have intentionally granted to it a part of their sovereign rights in order to create an autonomous legal order which is applicable to them as it is to their nationals".¹²¹⁰

The wording of this Court's statement is related to the findings in the CJEU judgment of *Costa v ENEL*.¹²¹¹

¹²⁰³ See *OHADA Court, Avis Consultative, No 0002/99/EP* (1999) (request for an opinion from Mali).

¹²⁰⁴ See *OHADA Court, Avis Consultative, No 001/2001/EP* (2001) (request for an opinion from Ivory Coast).

¹²⁰⁵ *Costa v ENEL* (6/64) 1964 ECR 585

¹²⁰⁶ *Amministrazione delle finanze dello Stato v Simmenthal* Case No 106/77 1978 ECR 629 where the CJEU held that a national court is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislation or other constitutional means.

¹²⁰⁷ *Union économique et monétaire ouest-africaine*, West Africa Economic and Monetary Union comprises mostly francophone countries in West Africa.

¹²⁰⁸ UEMOA Article 5-19.

¹²⁰⁹ Chevalier E "La déclinaison du principe de primauté dans les ordres communautaires: l' exemple de l' union économique et monétaire ouest". 12

¹²¹⁰ *UEMOA Court, Avis No 002/2000* (2 February 2000) (demande d'avis de la Commission de l'UEMOA relative a l'interprétation de l'article 84 du traité de l' UEMOA.

¹²¹¹ *Costa v ENEL* (6/64) 1964 ECR 585.

A reference to the Central American Court has also maintained that:

... between the law of integration, Community law and national law, harmony must exist since the law is a whole which must be analysed principally in a systematic and teleological manner, like a single normative body".¹²¹²

Additionally, Latin American courts pronounce similar findings. The Andean Court (ACCJ), in ruling on the characteristics of the action against a Member State for failure to act, observed that

... the action for failure to act has a declaratory character. This action in a cornerstone in the construction, development and effectiveness of the Community legal order, since its operation allows the control of the behaviour of states.¹²¹³

This is in line with the ECJ, where Mayras AG was able to regard the fact that the failure also incurred when "a Member States promulgates or keeps in force a law or rule incompatible with the treaty or with Community secondary legislation".¹²¹⁴ This reference to other regional courts in Africa and beyond has indicated that the operation of the SADC Tribunal within the institutional framework of SADC is very alien to international standards, especially the notion of a State acceding to an international agreement and then refusing to fulfil the obligations of the same treaty. This kind of situation cannot be allowed to happen since the rule of law is a prominent tool to achieve objectives set out in any treaty.

Finally, it has to be realised that the relations between community law and national constitutions go beyond giving effect to community law at the national level or resolving conflicts between community and national laws.¹²¹⁵ Community law has the effect of influencing national constitutional values on issues related to democracy, the rule of law and human rights.¹²¹⁶ As shown in this discussion, community treaties contain provisions stipulating democracy, respect for the rule of law and human rights as guiding principles. These principles can inform constitution making and

¹²¹² See CCJ, 27 novembre 2001, *Nicaragua v Honduras Asunto del Tratado de Delimitacion Maritima entre la Republica de Honduras y la Republica de Columbia*

¹²¹³ Article 23 of the Treaty creating the ACC

¹²¹⁴ *Commission v Italy* (39/72) 1973 ECR 101.

¹²¹⁵ Wouters 2000 *Legal Issues of Economic Integration* 25-27.

¹²¹⁶ Oppong 2008 *Making Regional Economic Community Laws* 1-31.

interpretation at the national level. In supporting this argument Adewoye¹²¹⁷ has observed:

There is a strong positive correlation between constitutionalism at the national level and the effectiveness of regional economic integration processes.

Accordingly, SADC has tasked Member States with honouring their Treaty obligation in keeping with the *pacta sunt servada* principle as discussed earlier in this chapter.¹²¹⁸ This is in line with the obligations under the Vienna Convention on the law of Treaties.¹²¹⁹

10.8 Conclusion

This chapter has exposed the vast institutional differences between SADC and the EU and has ideally shown that it would be an error to believe that one could merely transfer the EU model of regional integration to another regional context such as Southern Africa.¹²²⁰ The process of institution building, law making, policy integration and market creation in the European Union (EU) has produced a European model of internationalisation with distinctive characteristics.¹²²¹ This spells out the difference between the two organisations and no wonder SADC is always plagued by the illegitimacy criticism. Accordingly, political power is legitimate if it is acquired and exercised according to established rules and the rules are justifiable according to socially acceptable beliefs in light of the rightful source of authority and the proper standards of government.¹²²² Positions of authority are confined by the express consent or affirmation on the part of appropriate subordinates and recognition from other legitimate authorities.

These characteristics are the full embodiment of the EU model, where the European voters understand what is at stake and consider the EU to be as legitimate as their own national democracies, in spite of it being plagued by issues of legitimacy as a

¹²¹⁷ Adewoye Date Unknown www.idrc.ca.

¹²¹⁸ Adewoye Date Unknown www.idrc.ca.

¹²¹⁹ Adewoye Date Unknown www.idrc.ca.

¹²²⁰ Bösl 2007 *Monitoring Regional Integration* 1.

¹²²¹ Laffan 1998 *The European Union* 235-253.

¹²²² Weale and Neutwich *Political Theory and the European Union*

major point of criticism.¹²²³ By contrast, the opposite may well be happening in SADC where illegitimacy manifests itself in breaches of the rules, resulting in legitimate deficit, weak justifiability and contested beliefs. Legitimation is, in a sense, a feature of all political orders and SADC's institutional and legal framework has to subject itself to it since the legitimacy of an organisation and the extension of its power are thus intimately connected.¹²²⁴ Furthermore, the most important reason for treating the legitimacy of EU institutions seriously is the impact it has on the legitimacy of the Member States themselves. The latter can no longer be regarded as independent of the former. If SADC desires to follow the EU model of institutional and legal framework, the same approach as the EU has to be followed. This has not been happening; no wonder the drive towards deeper regional integration is proceeding so slowly. SADC Member States still try to safeguard their sovereignty at the expense of deeper integration. This has to change since the path to integration is understood as a process leading towards greater centralisation of governmental functions.¹²²⁵ The EU experience sends a clear message: any state actor interested in retaining sovereignty and limiting transnational incursions into domestic affairs should eschew a separate and formal mechanism for resolution of disputes in regional trade arrangements at supranational level.¹²²⁶ Thus, member states like Zimbabwe should respect the pronouncement of the rule of law by the SADC Tribunal.

The powers of EU institutions are equally balanced, making sure that there is clear oversight among institutions. This was clearly highlighted in the 1991 Maastricht Treaty where the ECJ was denied any role in new policy areas of the EU, particularly those in which national sovereignty is most directly implicated in justice and home affairs.¹²²⁷ This is not so in SADC, where this chapter has shown that the Summit possesses absolute power over all other institutions. When institutionalisation is contemplated, the lessons of the EU are instructive.¹²²⁸ Of great significance is the oversight role the EU institutions play on one another; for example, in 1999 when the

¹²²³ Habermas 2001 *Why Europe Needs a Constitution* 5-26.

¹²²⁴ Beetham *The Legitimation of Power* (McMillan 1996); see also Cederman *Nationalism and Integration*.

¹²²⁵ Shaw "Introduction".

¹²²⁶ Volcansek "Courts and Regional Trade Agreements" 23-41.

¹²²⁷ Wood and Yesilada *Emerging European Union* 111.

¹²²⁸ Volcansek "Courts and Regional Trade Agreements" 23-41.

Parliament and the Commission itself examined their internal functioning following allegations of fraud and corruption.¹²²⁹ Throughout the 1980s, the European Parliament relied on the Court to defend its rights against the Council and the Commission.¹²³⁰

With so many regional agreements emerging, there will undoubtedly be great variety in the structures, longevity and trajectories among them, and the nation-state is not likely to disappear.¹²³¹ SADC needs to take counsel from the historian Fernand Braudel¹²³² (1963) and the sociologist Norbert Elias¹²³³ (1978), who understood that the formation of the Union constitutes a new stage in the continuous dynamics of integration which has characterised the Western world since the eve of modernity. The current phase of European integration has been constitutionalised by the Lisbon Treaty and SADC is nowhere near this milestone. In the EU there is more a spirit of recognition and protection, of "legitimate diversity".¹²³⁴ SADC is plagued by political problems, inappropriate institutional mechanisms and the uncoordinated pace of regional integration. All hope is not lost, however, SADC is still in the initial stages of regional integration and there is still a long way to go. SADC can at least start by letting the institutional structure function as provided for by the SADC Treaty. If the desire to follow the European model of regional integration is a preferred choice, as discussed in this chapter, SADC can even consider amending its treaty to give legal basis to such an undertaking.

¹²²⁹ Lequesne and Rivaud 2001 *Revue Francaise de Science Politique* 867-880.

¹²³⁰ Bradley 1987 *Maintaining the Balance* 41-67.

¹²³¹ Horsman and Marshall *After the Nation-state* 264.

¹²³² Braundel *Grammaire des Civilisations*.

¹²³³ Elias *Civilising Process*.

¹²³⁴ Scharpf 2003 *Zeitschrift Fur Staats- und Europawissenschaften* 32-60.

CHAPTER 11

RECOMENDATIONS AND CONCLUSION

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11.1 General

Despite various efforts at economic integration in the region, no substantial progress has been made. Each of the previous chapters has dealt with the challenges faced by SADC in its desire to use the available legal instruments to forge ahead with deeper integration. Within the context of that discussion, a number of viable recommendations were proposed. For that reason, those recommendations will not be repeated in this chapter. This chapter discusses at length the way forward for SADC in terms of the challenges presented by the current regional integration agenda. Additionally, a brief summary of other general recommendations is given. Regional integration experiences in SADC have led to the realisation that economic union cannot be considered in isolation from political unification and *vice versa*. The relationship between economic factors and political goals therefore needs to be defined and streamlined so that the desired results of deeper integration can be achieved. Political considerations have to work with the reality that economic building blocs are used in constructing integration arrangements.¹²³⁵ McCarthy therefore asks the question; "What in the current paradigm requires reconsideration and why should it be questioned?" In answering this question, the current thinking and planning of SADC's regional integration is put into perspective. It is described as grand schemes that are launched with relatively ambitious time frames for integration arrangements that in consecutive steps will deepen the level of market and even political integration.¹²³⁶

This chapter focuses on what should be done in SADC given the missed timeframes amid institutional and legal framework challenges. Related to this will be the need to solve the ever-present problem of multiple memberships, as well as defining the role of South Africa as the economic leader in the region. Within that context, the proposition of a hub-and-spoke scenario will be suggested. Recommendations for the role of SADC in deepening regional integration in the region will also be considered, since the case for an "African economic union is a compelling one".¹²³⁷

¹²³⁵ McCarthy 2007 *African Economic Integration* 6-43.

¹²³⁶ McCarthy 2007 *African Economic Integration* 6-43.

¹²³⁷ Green and Seidman *Unity or Poverty?*

11.2 Revising the SADC trade agenda

The SADC Protocol on Trade and the RISDP have been hailed as windows of opportunity for SADC to truly harness regional efforts and resources in finding solutions to the problems that plague the region. This thesis identified the RISDP as the vehicle that spells out the implementation strategy of the SADC Protocol on Trade. The challenge is that the RISDP has been allotted all too little time and resources.¹²³⁸ The implementation of the indicative plan is vital for the realisation of the regional economic integration in SADC. The RISDP is no longer on track. This thesis has been trying to address this challenge. It is one of the findings of this thesis that the timeframe is too short.¹²³⁹ The following discussion centres on the way different milestones were not achieved in the prescribed timeframes. Following that, recommendations will be given on the way forward.

11.3 The full implementation of the FTA

The most significant character of a regional trading bloc is its ability to progressively lower barriers to intra-regional trade. Thus, the SADC FTA, launched in 2008 was a key milestone which became the first serious attempt at deeper integration in SADC. It has been discussed in this thesis that the main objective of FTAs is to secure trade liberalisation.¹²⁴⁰ SADC Member States are legally bound to implement the FTA in terms of the Trade Protocol.¹²⁴¹ In an effort to transform the regional grouping into an FTA, SADC engaged on a programme to gradually liberalise trade with each other to harmonise policies and other economic instruments and to diversify their industries and, in so doing, their export products. In order to achieve this, a number of economic strategies and tasks were adopted. These are the gradual elimination of intra-regional tariffs¹²⁴²; the elimination of non-tariff barriers¹²⁴³; the adoption of common rules of origin¹²⁴⁴; the attainment of internationally acceptable standards;

¹²³⁸ See generally Isaksen 2002 hdl.handle.net; see also Mseleku 2008 www.sadc.int.

¹²³⁹ See chapter 2 of this thesis.

¹²⁴⁰ Fundira 2010 www.tralac.org.

¹²⁴¹ Article 22 *SADC Treaty* (1992). See also Fundira Date Unknown www.tralac.org.

¹²⁴² Article 3 *SADC Protocol on Trade* (1996).

¹²⁴³ Article 6 *SADC Protocol on Trade* (1996).

¹²⁴⁴ Article 14 *SADC Protocol on Trade* (1996).

the harmonisation of customs rules and procedures; the harmonisation of sanitary and phyto-sanitary measures¹²⁴⁵ and the liberalisation of trade in services.¹²⁴⁶

In most cases, these legal obligations have not been realised, since the Protocol on Trade is not being implemented effectively.¹²⁴⁷ Reduction of tariffs varies among Member States mainly because of the diverse economic conditions in each country.¹²⁴⁸ The discussion in chapter 8 has indicated that countries like Mozambique and Zimbabwe will only finalise their tariff phase down by 2015 and 2014 respectively. This is in sharp contrast to Member States' commitment in agreeing that the phased reduction of tariffs should reach zero per cent on substantially all trade by 2008.¹²⁴⁹ Thus, crucial deadlines have been missed by the Member States concerned. There is also the possibility that Malawi may be pressurised by other Member States to participate fully in the FTA, as the report by the Services Group¹²⁵⁰ showed that there are some products dutiable for SADC in Malawi's applied tariff, that are in fact duty free under the MFN. Thus the reduction of tariffs is not negotiable if the FTA is to be realised.

It is therefore recommended that as a way of fulfilling the FTA requirements, SADC Member States are called upon to complete the elimination of intra-regional tariffs as agreed under the Protocol on Trade. Since this is identified in the Treaty, enforcement of sanctions on Member States who fail to fulfil their obligations is necessary.¹²⁵¹ However the enforcement of sanctions is not likely to happen if one considers the precedent from the Campbell case,¹²⁵² where the Summit never hinted at employing sanctions even in the face of non-compliance and failure to abide by the ruling of the SADC Tribunal. Instead, the SADC Tribunal now faces an uncertain future after the Summit *de facto* suspended its functioning even after a review process exonerated it from any wrongdoing in the Campbell case judgment.

¹²⁴⁵ Article 16 *SADC Protocol on Trade* (1996).

¹²⁴⁶ Article 23 *SADC Protocol on Trade* (1996). See also *EAC Official Document ECA-SATPUB/2008/1* (2008).

¹²⁴⁷ UNECA, AUC and AfDB 2010 www.uneca.org.

¹²⁴⁸ See generally McCarthy 1994 *Transnat'l L & Contemp Probs* 4.

¹²⁴⁹ *EAC Official Document ECA-SATPUB/2008/1* (2008) 20.

¹²⁵⁰ Services Group *Audit* 12-13.

¹²⁵¹ According to A 33(1) *SADC Protocol on Trade* (1996) sanctions may be imposed against any Member State that: persistently fails, without good reason, to fulfil obligations assumed under this Treaty; and implements policies which undermine the principles and objectives of SADC.

¹²⁵² See chapter 6 and 9 of this thesis.

Additionally, since moral persuasion is typically useful,¹²⁵³ Member States should continue to persuade each other to lower intra-regional tariffs. It's long been recognised in SADC that Member States enter into bilateral agreements outside the domain of the Protocol on Trade. Member States can therefore use these bilateral legal instruments to lower intra-regional tariffs. The FTA's 85 percent threshold for duty-free trade in SADC has to be fulfilled as a concrete step towards deeper integration in SADC.

On the issue of the elimination of non-tariff barriers, this study relied on scholars like Hansohm and Shilimela¹²⁵⁴ who have observed that non-tariff barriers are actually on the rise in SADC. Although non-tariff barriers are difficult to identify, there is need to put in place effective monitoring mechanisms to eradicate them. According to Sandrey *et al*¹²⁵⁵ NTBs in SADC include excessive health and safety regulations, costly customs procedures and government procurement policies that favour domestic over imported services. Other examples of non-tariff barriers identified in this thesis are administrative documentation procedures, immigration procedures, cumbersome inspection requirements, police road blocks, varying trade regulations among the countries, duplicated functions of agencies involved in verifying the quality, quantity and dutiable value of imports and export cargo, and business registration and licensing. Since the study of Hansohm and Shilimela¹²⁵⁶ has indicated that NTBs are on the rise, it is recommended that a drive to eliminate these known NTBs is necessary.

The discussion of NTBs in this study also found out that the harmonisation of customs rules and procedures has equally not been attained. Each country still has its own customs rules and procedures, making it difficult for traders to pass through the border posts.¹²⁵⁷ In cases where harmonisation has been attempted, the use of different technological systems by different Member States renders harmonisation difficult to achieve.¹²⁵⁸ Customs procedures are a thorny issue in the region where in

¹²⁵³ Moral suasion has been employed in Africa as a diplomatic tool to get fellow Member States to comply with their obligations without using the fast and hard threat of punishment.

¹²⁵⁴ Hansohm and Shilimela *Monitoring Economic Integration*.

¹²⁵⁵ Sandrey *Non-tariff Measures*.

¹²⁵⁶ Hansohm and Shilimela *Monitoring Economic Integration*.

¹²⁵⁷ See generally Maluleka 2000 repository.up.ac.za.

¹²⁵⁸ Maluleka 2000 repository.up.ac.za.

some instances different procedures are being implemented at the same border post depending on which customs official is serving. Hence, harmonisation at regional level should only be considered a secondary goal after each Member State has clearly defined and exercised its procedures and established certainty.

There is no excuse for the slow pace in the harmonisation of customs rules and procedures in SADC, bearing in mind that the international cooperating partners have provided the technology and systems that can aid in this harmonisation.¹²⁵⁹ The EU has donated funds and technology systems to aid in this process.¹²⁶⁰ The harmonisation of customs procedures and the standardisation of customs is important to ensure effective movement of goods and services in the region. Accordingly, customs authorities should urgently examine their existing practices and institute a programme of reform for those procedures that are identified as inefficient or redundant. Reference should be made to existing international conventions on customs process simplification and harmonisation (the Kyoto Convention of the CCC).¹²⁶¹ Perhaps the biggest contribution to facilitative customs procedures can be made through the proper application of information technology. Indeed, not only can information technology permit customs formalities to be completed much more quickly, it can also act as a catalyst for the reform of existing inefficient procedures.¹²⁶² Information technology can also be used to store information that includes legal instruments used at border posts.

The issue of the adoption of the common rules of origin is complicated by the presence of South Africa, an industrialised economy that demands a complicated set of rules of origin that may result in hindrance to intra-regional trade.¹²⁶³ With the disappearance of tariff barriers, rules of origin are a way to protect products and industry sectors, as countries use them to exclude third parties from PTAs.¹²⁶⁴ An example would be preventing a Chinese product, repackaged in South Africa, from finding its way into the EU under South Africa and the EU's Trade and Development Cooperation Agreement (TDCA). The complexities of the rules help shield industries

¹²⁵⁹ Maluleka "Complexity of One-Stop Border Crossing".

¹²⁶⁰ See generally McCarthy, Kruger and Fourie 2007 aprodev.eu.

¹²⁶¹ Customs Cooperating Council 1994 www.un.org.

¹²⁶² Customs Cooperating Council 1994 www.un.org.

¹²⁶³ Van Den Bosch 2010 ipsnews.net.

¹²⁶⁴ Van Den Bosch 2010 ipsnews.net.

like clothing and textiles from competition. The effect and result of this would lead to an impediment on intra-regional trade as envisaged in the tripartite FTA.¹²⁶⁵ Thus, it is recommended that SADC adopts simple common rules of origin.

Furthermore, the adoption of common rules of origin should be addressed within the context of economic development.¹²⁶⁶ South Africa, as the most developed country in the region, needs to be conscious of the economic situations of its neighbours.¹²⁶⁷ South Africa is the largest foreign investor in Southern Africa.¹²⁶⁸ This same approach can be applied to attain internationally acceptable standards and quality. This status can be attained with due consideration of each Member State's economic strength. Since most of the SADC Member States are WTO members, the WTO Agreement on Rules of Origin should be used to establish internationally acceptable standards.¹²⁶⁹

Attaining the FTA, as discussed above, is a key objective of the Protocol and its full implementation is a major milestone towards establishing a CU as envisaged by the RISDP.¹²⁷⁰ It is the finding of this thesis that the CU is not mentioned in the Protocol on Trade; hence its legal status is compromised. SADC's intention was for the FTA to prepare the way for the CU, which has often been called an FTA with a common external tariff.¹²⁷¹ Since it is clear from the above discussion that the achievement of the FTA objectives is not on track, forging ahead with a CU in 2010 was a challenge and ultimately, the 2010 CU did not materialise.

Soon after the establishment of the FTA, SADC Member States started the negotiations for a CU for 2010. The most critical issue of the negotiations was the adoption of the common external tariff. A ministerial task force on regional economic integration was created and charged with the responsibility of driving the CU process. The task force then approved the establishment of four technical groups to

¹²⁶⁵ See generally Kalenga 2005 *Rules of Origin* 25-35.

¹²⁶⁶ Development Network Africa 2007 www.dnfrica.com.

¹²⁶⁷ Saurombe A "The Context of Economic Partnership Agreements". See also Aden and Soko 2005 *South Africa* 367-392.

¹²⁶⁸ Saurombe A "The Context of Economic Partnership Agreements". See also Aden and Soko 2005 *South Africa* 367-392.

¹²⁶⁹ See Uruguay Round Agreement on Rules of Origin.

¹²⁷⁰ Fundira 2010 www.tralac.org.

¹²⁷¹ Kerr and Gaisford *Handbook on International Trade Policy* 83.

deal with all the necessary preparations as follows: the common external tariff; legal administrative and Institutional arrangements; revenue collection and the harmonisation of customs-related policies.

These technical working groups were intended to facilitate the development and adoption of a SADC Common Customs Act, a Regional Transit Management System and Common Customs Training modules. In addition, the technical working groups would also assess respective Member States' revenue dependency on trade taxes, as these have an impact on the pace of trade liberalisation within the Community. Related tasks will be to assess the economic and fiscal impact of the implementation of the proposed CET and make suggestions on how budget shortfalls could be made up. There is also a need to assess the options for customs revenue collection and distribution, including compensation mechanisms. The critical issue for SADC's self-financing mechanism will have to be considered. The development of a legal framework for the administration of the SADC CU is also of paramount importance. All these processes have not yet been complied with, hence the launch of the CU in 2010 collapsed. Key to the SADC CU will be the legal and institutional arrangements to support it.

Considering the above discussion, the prospects for a SADC CU in the near future are not good. In some circles, this has been labelled as a huge failure on the part of SADC. However, many commentators like Hartzenberg have lauded the move by the Summit of SADC Heads of State and Government to put the launch of the CU on the backburner.¹²⁷² She actually argues that establishing a CU at this stage would be premature, as a great deal of work still needs to be done on non-tariff barriers, a draft services protocol and services liberalisation. This can be done in the SADC FTA and a CU is not necessary.¹²⁷³

The question that now follows is about how SADC can move forward with its regional integration roadmap if a key milestone in the form of the CU is missed or postponed. The way forward will be proposed as one of the recommendations for the future. The challenge now is to find ways of sustaining the process of regional integration in

¹²⁷² Van Den Bosch 2010 ipsnews.net.

¹²⁷³ Van Den Bosch 2010 ipsnews.net, comments by Trudi Hartzenberg.

SADC. As a way of addressing this challenge, the tripartite FTA will be discussed as a recommended way forward for SADC regional integration.

11.4 The Tripartite FTA as opposed to the customs union

The tripartite FTA is an attempt to merge SADC, COMESA and the EAC. The tripartite FTA will be an expanded trade bloc comprising 26 countries that make up half of the African Union (AU) membership.¹²⁷⁴ This new FTA will comprise a population of more than 600 million people and 624 billion dollars with a per capita GDP averaging 1 trillion dollars.¹²⁷⁵ In June 2008, the Secretaries-General of EAC, COMESA and SADC announced that they wished to see a coordinated approach between their members.¹²⁷⁶ In addition, an October 2008 Tripartite Summit of Leaders from the three groups' 26 Member States announced that they wished also to work towards a free trade zone, which has long been a goal of the region as a whole, but has proved difficult to implement in the past.¹²⁷⁷ Discussions at Secretariat level have for some years been focusing on the harmonisation and coordination of programmes and policies in areas of common interest.¹²⁷⁸ The official communiqué of the 2008 COMESA-EAC-SADC tripartite summit stated that the FTA is a crucial building bloc towards achieving the AEC as outlined by the Treaty of Abuja.¹²⁷⁹

The Tripartite Summit of June 2011 signed an agreement to launch negotiations for the establishment of the FTA. Thus the tripartite FTA has a trade liberalisation legal mandate endorsed by all Member States from the three RECs.¹²⁸⁰ This tripartite FTA will also facilitate the free movement of business persons, the joint implementation of inter-regional infrastructure programmes, as well as institutional arrangements on the basis of which the three RECs would foster cooperation. The tripartite FTA is a more

¹²⁷⁴ Van Den Bosch 2010 ipsnews.net.

¹²⁷⁵ See COMESA website: www.comesa.int. See also "Regional Trade Facilitation Programme", 2008 Available on: www.rtfp.org/eac.php Accessed 13 October 2010.

¹²⁷⁶ Lui 2008 www.ecdpm.org.

¹²⁷⁷ Lui 2008 www.ecdpm.org.

¹²⁷⁸ Fundira 2010 www.tralac.org.

¹²⁷⁹ The Official Communiqué is available on COMESA-EAC-SADC 2008 www.comesa-eac-sadc-tripartite.org.

¹²⁸⁰ Shilimela Date Unknown www.foprisa.net.

realistic and attainable alternative for Africa.¹²⁸¹ It will bring a much-needed solution to the multiple membership problems in the region. According to Francis Mangeni, Director of Trade, Customs and Monetary Affairs for COMESA:

The Tripartite FTA would address multiple membership issues and it is aimed at creating a larger market to attract investors and enhance continental integration.¹²⁸²

Thus, the tripartite FTA supports the idea of the AU's African integration plan to facilitate trade across Africa and in this context SADC is the recognised REC for Southern Africa.¹²⁸³ This massive FTA will help resolve the spaghetti bowl conundrum of overlapping memberships of RECs in Southern and East Africa.¹²⁸⁴ This problem has not only retarded plans for individual RECs, but also the wider AEC envisaged for the African continent as a whole.

A number of advantages associated with the Tripartite FTA will be mentioned here. The first advantage of the proposed tripartite FTA is that trade agreements involving market access concessions may be negotiated more easily and more quickly than in multilateral agreements because fewer parties are at the table. This scenario will be in sharp contrast to the WTO situation where the Doha Round of trade negotiations has been slow as a result of many factors including the huge size of the forum.¹²⁸⁵ Thus, in the case of the tripartite FTA, parties can secure advantages that are harder to win in bigger forums.

Secondly, an enlarged market for duty-free access is likely to increase trade creation as opposed to trade diversion. It is most likely that trade diversion will not occur since market access is not really a challenge for most countries currently enjoying preferential treatment for their goods in major markets. It is, however, likely that there will be gains from an increase in intra-industry trade, as trading partners trade goods that are currently produced in their own countries.¹²⁸⁶ With greater specialisation and

¹²⁸¹ Shilimela Date Unknown www.foprisa.net.

¹²⁸² Chikololere 2010 allafrica.com.

¹²⁸³ Chikololere 2010 allafrica.com.

¹²⁸⁴ Gathii 2010 *N C J Int'l L & Com Reg*.

¹²⁸⁵ See chapter 5 of this thesis for a full debate on multilateralism v regionalism.

¹²⁸⁶ Fundira 2010 www.tralac.org see also Petersson 2003 *SAJE* 71.

efficiency, trade creation is the likely outcome, as the demand for goods produced regionally increases.¹²⁸⁷

Thirdly, the FTA will be an opportunity to simplify the Rules of Origin requirements in the region, a challenge identified earlier in relation to the positions of South Africa and Egypt. Rules of Origin requirements often dilute the liberalising effect of FTAs and, if the Tripartite FTA can simplify these requirements, true liberalisation can be realised in the whole region. These hidden tariff-like measures would then no longer affect the price of domestically made inputs.¹²⁸⁸

The fourth advantage deals with the elimination of non-tariff barriers. In the SADC region, as well as the other partners, the FTA comes as a result of decreased tariffs. This is not the case with NTBs, which are always likely to increase.¹²⁸⁹ This study has identified NTBs as any measures or interventions, other than tariffs, which distort or restrict trade in goods, services and factors of production.

A number of challenges to the tripartite FTA also need to be identified here. The emergence of a few poles of industrialisation in the region may lead to polarisation of investment towards the larger and more diversified economies. For this reason, there may be a need to set up a regulated compensatory payment system like the one currently operating within the SACU common revenue pool.¹²⁹⁰ This will be a big challenge if the SACU experience is considered. Currently, South Africa is not happy with the burden of supporting the weak economies of SACU countries like Lesotho and Swaziland.¹²⁹¹ According to van den Bosch:¹²⁹²

Plummeting revenues from the Southern African Customs Union (SACU) could cause severe financial difficulties in the region, economic experts warn. To make matters worse, the organisation is split over the future of its tariff pool that largely bankrolls the national budgets of its poorer members.

¹²⁸⁷ Fundira 2010 www.tralac.org see also Petersson 2003 *Production Fragmentation* 71.

¹²⁸⁸ See generally Krishna Date Unknown elsa.berkeley.edu.

¹²⁸⁹ Shilimela Date Unknown www.foprisa.net 324.

¹²⁹⁰ Mongardini, Benicio and Thomson 2010 www.imf.org.

¹²⁹¹ Lute 2009 www.gazettebw.com. See also Shongwe 2010 www.times.co.sz.

¹²⁹² See Van Den Bosch 2010a ipsnews.net.

Customs revenue losses are expected in the tripartite Member States and this will be unwelcome news for many governments that depend on the revenue for the national budget. The SACU experience is equally relevant here: in 2009, the Namibian government obtained a staggering 39 per cent of its fiscal income from SACU revenue.¹²⁹³ Lesotho and Swaziland derive more than half (in some years up to 70%) of their national budgets from the customs union, while Botswana's derive 29 per cent from SACU revenue, according to its central bank. Only South Africa is less dependent on the union, as it receives a residual payout after all other member countries have received their share.¹²⁹⁴ This scenario is likely to play itself out in the proposed tripartite FTA and the effects will be exacerbated, since there are poorer countries in the proposed combined FTA. To mitigate these challenges, there is need for trade reforms which will have to be accompanied by appropriate fiscal revenue policies to compensate for this loss of revenue. The legal implications flowing from this are that such policies will have to be negotiated into the tripartite FTA treaty.

Short-term losses resulting from the larger FTA could also include output and employment losses, as the removal of tariffs under the FTA will have different effects on sectors, sub-sectors and firms in each country.¹²⁹⁵ The effects of this kind of situation are already felt in SADC and SACU, where South Africa benefits from employment losses of the region.

The final and decisive challenge to this tripartite FTA is the political dimension of how the application of the tripartite FTA is undertaken. There are political tensions in some members of the proposed wider FTA. In SADC alone the political situation in the DRC, Madagascar and Zimbabwe has not been resolved. In the EAC, the situation concerning the new members, Rwanda and Burundi, is also unclear and requires definition. COMESA holds the highest of membership, with similar political problems in some of its Member States. On a political level, Member States are likely to face the problem of scrambling for positions of influence in the new tripartite FTA especially given that its Member States are negotiating the FTA as individual states.

¹²⁹³ Van Den Bosch 2010a ipsnews.net.

¹²⁹⁴ Van Den Bosch 2010a ipsnews.net.

¹²⁹⁵ Fundira 2010 www.tralac.org.

It is recommended that SADC Member States negotiate the tripartite agreement within the mandate of the SADC Treaty and SADC Protocol on Trade; otherwise the activity of joining the Tripartite FTA may conflict with SADC legal instruments.

There is need to legitimise the tripartite FTA by creating a legal framework for its adoption in the three RECs. The new FTA also needs legal recognition from the AU and other international treaty bodies like the WTO and the UN.¹²⁹⁶ Chapter 5 of this study gave a detailed account of the Protocol on the Relations between the African Union and the RECs.¹²⁹⁷ The tripartite FTA will have to operate within the ambit of this protocol. The WTO also requires notification of any RTA established under the provisions of Article XXIV.¹²⁹⁸ If successful, the tripartite FTA will definitely lead to deeper integration as envisaged in SADC and the whole continent of Africa. On the challenge of the polarisation of investment towards the larger and more diversified economies, a viable solution is to create a hub-and-spoke scenario. South Africa in the South, Kenya in the East and Egypt in the North become the hubs that are systematically linked to the rest of the other Member States as spokes in the grand FTA.¹²⁹⁹ The key challenge that needs to be addressed is overcoming the reluctance by Member States to implement the SADC FTA, a situation that may play itself out again in the tripartite FTA.

11.5 Other general policy recommendations

The set of recommendations to be discussed here addresses pertinent challenges to the SADC regionalisation drive, as identified in most of the chapters of this thesis. The liberalisation of trade in services is currently one of the most rewarding disciplines in world trade and SADC cannot afford to be left behind.¹³⁰⁰ However, the domestic industry should reach a certain level of development before attempting regional and global competitive levels.¹³⁰¹ As it stands, the liberalisation of the

¹²⁹⁶ See chapter 9 of this thesis.

¹²⁹⁷ See chapter 5 of this thesis.

¹²⁹⁸ See chapter 9 of this thesis.

¹²⁹⁹ Githinji 2010 www.standardmedia.co.ke.

¹³⁰⁰ See generally Adlung *Contribution of Services Liberalisation*. See also Dabee 2000 www.aercafrica.org. See also Hoekman *Liberalising Trade*. See also Konan and Maskas 2006 *Quantifying the Impact* 142-162.

¹³⁰¹ See generally Sheehan "Beyond Industrialisation". See also Tralac *Trade in Services*.

services sector is likely to benefit South Africa more than any of the other countries in the region, hence, there is need to finalise the Services Protocol at the regional level, whose objective is clearly to try and level the playing field for the services industry to benefit the whole region.¹³⁰²

The services sector has been earmarked to bring the world out of the global recession. Services are important contributors to the GDP and provide for a huge area of employment.¹³⁰³ Consequently, services will become a catalyst in solving most of SADC intra-regional trade challenges, for example infrastructure and trade facilitation. Transport, logistics and distribution services are crucial for moving goods and services among countries in the region. In addition, services will be a vital input to the trade in goods since the two sectors are related. The banking and insurance sectors can easily facilitate an increase for trade in goods, since entrepreneurs can borrow funds for their business ventures as well as insure the risk that may befall their goods in transit. Business, telecom and financial services reduce transaction costs and support trade. The potential gains from a more open services trade are greater than those from liberalising goods.¹³⁰⁴ All these efforts will address the challenges of infrastructure development discussed in chapter 8.

The problems of SADC are generic for most of the African continent and this thesis has already identified the challenges that could lead to Africa failing to reach key Millennium Development Goals. At the recently held EU-Africa Summit in Libya, President Zuma of South Africa warned that Africa may fail to implement the MDGs thereby failing Africa's poor.¹³⁰⁵ However, ensuring access to services is a means for achieving the MDGs. The building of roads and telecommunication networks can easily reduce poverty levels, access to hospitals and schools. In 2007, the continent's total services trade reached \$174 billion, more than half of which was imports. During the same year, Africa exported \$76 billion worth of services.

¹³⁰² See generally Jansen *Services Trade Liberalisation*. See also Jansen *Liberalising Financial Services Trade*. See also Stephenson *Can Regional Liberalisation of Services Go Further*.

¹³⁰³ UNCTAD 2006 www.unido.org.

¹³⁰⁴ UNCTAD 2006 www.unido.org. See also Jones and Kerzkowski "Role of Services" 31-48.

¹³⁰⁵ Sapa 2010 mg.co.za.

The overall benefit of services trade liberalisation will be economic growth and an increase in living standards in the region. This development will also transmit to domestic services capacities. Individual Member States will be empowered to focus on social development and poverty reduction. The cost of exporting products will also subsequently be reduced, thereby giving exporters a competitive edge in the markets. The services sector will also promote structural change in the regional economies and individual Member States will be carried along.¹³⁰⁶

The legal instrument to be used for services liberalisation in SADC is Article 23 of the SADC Protocol on Trade which mandates Member States to negotiate trade in services. According to this Protocol:

Member States recognise the importance of trade in services for the development of the economies of SADC countries. Member States shall adopt policies and implement measures in accordance with their obligations in terms of the GATS, with a view to liberalising the services sector with the Community.

From this mandate SADC has developed a Draft Annex on Trade in Services that uses the GATS model. This defines trade in services according to the four modes of supply as defined in the GATS. These modes are cross border, consumption abroad, commercial presence and presence of natural persons.¹³⁰⁷ It is not yet clear whether the annex applies to all sectors, hence SADC has to finalise this soon. It is important also to note here that the negotiation of the Draft SADC Annex will have to take into account the special needs and circumstances of LDCs. The Draft Annex seeks to promote investments in services by providing for the development of a legal framework and model laws, regulation for investments as well as mechanisms for joint investments in, particularly, small and medium size enterprises.

11.6 Political considerations

Since political challenges in SADC dictate the pace and implementation of regional integration, it is recommended that there is a need for political will in supporting

¹³⁰⁶ See generally Mene "Liberalising Services". See also Nordas "Information Technology and Producer Services".

¹³⁰⁷ Chang, Karsenty and Mattoo Date Unknown tradeinservices.mofcom.gov.cn. See also Mattoo and Fink *Regional Agreements*.

regional integration. Economic integration thrives in peaceful and democratic regions; thus SADC Member States need to embrace democracy and the rule of law, as these are the conditions that are conducive to the success of economic integration. In theory these are principles of the SADC Treaty which have not been implemented.

South Africa's leadership role in this is critical. There is a need to clearly define South Africa's role in the region. SADC Members States as individuals and collectively need to deal with South Africa from their point of strength and bilateral agreements with South Africa need to reflect this understanding.¹³⁰⁸ South Africa has already embarked on an African infrastructural development drive and SADC is ideally placed to benefit from the North to South corridor.¹³⁰⁹

It is clear from the findings of this study that regional integration in SADC needs to be shaped by regional aspiration as opposed to external influences. The role of the EU in Africa's regional integration needs to be legally defined especially under the current EPA negotiations. This can be done by negotiating the EPAs that reflect regional integration aspirations for SADC and many other African RECs.¹³¹⁰ The starting point should have been seeking to negotiate the EPAs as a complete SADC bloc without division. In the face of globalisation, SADC should be better prepared to shield itself from the negative effects thereof, while at the same time benefitting from the opportunities created by globalisation. This can be done by investing in regional markets while also creating external markets far and wide. There is need for SADC to create an institutional framework to regulate external interests seeking to invest in the region.

SADC and the rest of Africa should be better prepared to face the impact of globalisation by reducing their dependence on the volatile global markets and regulatory regimes. The negative effects of the ESAPs, as discussed in chapter 3, are a case in point. State power erosion by globalisation can only be countered by

¹³⁰⁸ See generally Fryer, Hlungwane and Cattaneo 2005 *South Africa* 19-26.

¹³⁰⁹ Lamy 2009 www.wto.org.

¹³¹⁰ Saurombe A "The Context of Economic Partnership Agreements"362

regionalism. The focus should not be on stopping globalisation but opposing the problems caused by it.

There is also a need to create a regulatory framework that clearly identifies the SADC integration model. It is recommended that this model consist of all the elements of market integration, development integration and cooperation integration, as discussed in chapter 4. Market integration blends well with the RISDP and can be used for the creation of sustainable regional markets. Cooperation appears to have been useful in the SADCC era when individual Member States were tasked with spearheading specific projects that were mostly informed by comparative advantage. The approach to integration most likely to succeed will be pragmatic and incremental, allowing two or more countries to move with cooperative arrangements wherever opportunities arise. In the final analysis a tailor-made theory informed by SADC's inherent needs is recommended.

SADC and Africa at large can make use of RTAs to further south-to-south cooperation and resist unfavourable terms proposed by the developed world.¹³¹¹ Therefore, there is need to approach multilateralism from a regional perspective. Africa as a continent and SADC as a region stand a better chance of being heard as a collective at forums like the WTO and UN. SADC's mistake of negotiating for the EPAs as a divided complement is a clear example of how the EU took advantage of the divisions.¹³¹²

There is also need for SADC to overcome the legacy of imperialism by curbing dependence on former colonial masters for trading partners, governance models, development aid and political approval. SADC and Africa should take ownership of their destiny and stop blaming former colonial masters for all the challenges they face.

In light of the above, other progressive efforts by the likes of NEPAD and the APRM need to be embraced by all members of SADC. Africa needs to depend on itself. Therefore, RTAs in Africa need greater organisational efficiency that places

¹³¹¹ See generally Wade 2003 *What Strategies* 621-644.

¹³¹² Kwa 2008 www.focusweb.org.

economic growth at the forefront. They also need to tackle the problem of undemocratic and dictatorship governments at regional and continental levels. The political union of the AU should be supported by economic growth and development.¹³¹³

SADC needs to create an institutional and legal framework with a clear mandate and capacity to undertake the complex task of harmonising community trade law. SADC can follow the OHADA model of harmonising business laws.¹³¹⁴

Since the SADC Trade agenda goes beyond the confines of the Treaty and the Protocol on Trade, there is a need to bring it into the confines of the Treaty for the purposes of legal enforceability in the face of implementation resistance from Member States. Member States should be obliged not to delay in signing SADC Protocols. Most delays that are related to Protocol implementation in SADC have to do with Member States taking too long in ratifying SADC Protocols. Additionally, after ratification subsequent problems are mostly to do with implementation.

On the part of the WTO, the elasticity of the GATT Article XXIV means that compliance and compatibility with the WTO rules cannot be truly established. Consequently, the WTO needs to finalise the renegotiation of Article XXIV. If necessary, the renegotiation of Article XXIV should be separated from the Doha Round, which is taking too long to conclude. Renegotiation of Article XXIV should not be packaged with other items on the agenda.

11.7 Lessons from the EU¹³¹⁵

Most of the suggested recommendations in this chapter can be implemented by drawing a number of lessons from the EU. After all, this study has revealed that SADC follows the EU model of economic integration. The primary source for law that relate to regional economic integration in SADC is the SADC Treaty and its Protocol on Trade. The ECJ considers the TFEU as a primary source of law for the EU to

¹³¹³ Diaku "African Development Bank/African Development Fund".

¹³¹⁴ See Saurombe 2009 *SADC Trade Agenda* 21.

¹³¹⁵ See chapter 10 of this thesis.

which all the subsidiary laws must conform. The lesson for the SADC Tribunal relates to the manner in which the ECJ has interpreted some key provisions of the TFEU. A relevant example relates to the free movement of goods, workers and services within the EU. All these are key activities that promote economic integration. This thesis has discussed and demonstrated how the ECJ has been instrumental in the realisation of key objectives and milestones of regional integration, from the loose Treaty establishing the 1951 Coal and Steel Community to the current 2009 Treaty on the EU. The SADC Tribunal can gain from the wealth of jurisprudence developed by the ECJ.¹³¹⁶ Relevant economic integration examples of jurisprudence developed by the ECJ relate to elimination of customs duties and to measures having equivalent effect to qualitative restrictions on imports and exports.

Other related sources of law for SADC economic integration have been identified from the legal instruments of the AU as well as the WTO. Recommendations related to the role of the AU and the WTO have exhaustively been discussed in chapters 5 and 9 respectively. What is essential is that SADC economic integration utilises the favourable legal framework of the AU that supports economic integration. SADC is a building bloc for the ultimate establishment of the AEC. As far the WTO is concerned; the study has revealed that SADC's compliance with the legal provisions of GATT Article XXIV cannot be full established mainly because of the deficiencies within the WTO legal instrument. Thus a call for reform and renegotiation of GATT Article XXIV was made.

The implementation of the SADC Treaty is reserved for SADC institutions such as the Summit, the Council and the Tribunal. It is one of the findings of this study that even though the SADC Treaty refer to subsidiary legal instruments such as the protocols, it does not specify the nature of actual legal instruments to be adopted or what their effect in the national legal systems of the signatory Member States. Thus, this omission creates a certain amount of legal uncertainty pertaining to the very nature of SADC law itself. This study has pointed out the dilemma created by the economic integration mandate given to the RISDP and yet fails to establish its legal basis in terms of the Treaty and the Protocol on Trade.

¹³¹⁶ According to A 21, the Protocol allows the Tribunal to make use of international law in its law making process. The work of the ECJ constitutes international law.

This *lacuna* can be filled in with lessons that can be drawn from the EU where the TFEU's legal provisions are specific in identifying the types of legal instruments which can be adopted by EU institutions. In addition the TFEU prescribes various procedures which are available to the EU institutions to adopt the instruments. Article 288 of the TFEU is clear in stating the effect of each of these legal instruments and as a result it removes any uncertainty and ambiguity. In the same context, the AU, through the provisions of Article 10 and 13 AEC Treaty, specifies the various types of legal instrument which can be adopted by the institutions of the AU as well as the relevant organs empowered to adopt the instruments. These provisions of the AEC Treaty clearly specify the effect of the decisions and regulations of the AU institutions. Thus EU and AU provisions are clear and portray a true embodiment of complete legal regimes. It is therefore recommended that SADC adopt similar approaches to give effect to legal regimes that go beyond mere intergovernmental cooperation and encroach on the rights and obligations of private citizens.

Related to this discussion is the role played by institutions in implementing economic integration obligations created by the SADC Treaty and the Protocol on Trade. It is not clear within the SADC context, who is given powers to hold these institutions accountable especially when they fail to implement Treaty provisions giving effect to economic integration. The question of liability of these institutions for unlawful acts or omissions in their functions is not specifically addressed by the Treaty or Protocols. There should have been clear provisions on how to hold the Summit accountable for not implementing the Tribunal decision against Zimbabwe in the Campbell case. If the SADC Treaty provisions and the Protocol on the Tribunal is insufficient, it is recommended that the Tribunal should find "state liability" on the basis of general principles of international law which require states to make good any harm they have caused to other states or private persons. The Tribunal may well be assisted by provisions of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts.¹³¹⁷ Article 2 of the Draft sets clearly the elements of an internationally wrongful act of a state as being state conduct consisting of an action or omission which is attributable to the state. Article 11 is useful in setting out the details of what and how acts are attributable to the state. In

¹³¹⁷ See *UN General Assembly Resolution 56/83* as adopted by the ILC, 12 December 2001.

addition Article 31 places the state under an obligation to make full reparation for injury caused by wrongful acts while Article 34 and 37 identifies restitution, compensation and satisfaction as the forms of reparation which are available for wrongful acts. These principles are applicable as customary international law and as such form part of rules and principles of public international law that can be applicable in SADC *albeit* at secondary level after a norm of international law has been contravened. Furthermore, the Tribunal can learn from the experience of the ECJ in developing a considerable body of jurisprudence based on the concept of "general principles of law" drawing from international and national law. In the process the ECJ has managed to infuse fundamental human rights and freedoms into the *corpus* of EU law.

Within the same context of SADC institutions not being held accountable, another lesson can be drawn from EU where there are principles governing liability of EU institutions and Member States of the EU for breach of obligation under EU law. Chapter 10 has noted that the liability of EU institutions is provided for in the TFEU. The liability of Member States is only created by the treaty interpretation of the ECJ. Thus, the TFEU does not set out the principles governing the liability of EU institutions; the task is left to the ECJ through the development of general principles of law common to Member States. This development is required in SADC so that the Tribunal can hold institutions like the Summit accountable for its unlawful acts or omissions.

This study recommends that the Tribunal be reinstated. An appeal chamber is also required as a way of expanding the appellate jurisdiction in order to provide for a further instance of appeal in the context of the SADC legal regime.¹³¹⁸ This study also made clear that the Tribunal has a wide mandate to apply both general rules and principles of public international law and any rules and principles of law of the Member States as sources of law. Thus, the Tribunal should be able to apply where necessary, jurisprudence developed by the ICJ, the ECJ and other international courts or tribunals like the Court of Justice of the AU and other regional courts in Africa. The SADC Tribunal can also utilise jurisprudence from specialised courts like the WTO's arbitration panels. If a trade dispute arises during the suspension of the

¹³¹⁸ Scholtz W *Review, SADC Tribunal* 200.

Tribunal; it is recommended that SADC Member States take their disputes to other forums since there are jurisdictional overlaps in the African and global arena.¹³¹⁹

This study also found out that enforcement of treaty provisions and decisions of the Tribunal is a major challenge for SADC. In SADC, it is the responsibility of the Summit to enforce judgements of the Tribunal. The challenge experienced in the Campbell case was that the Summit dragged its feet in implementing the Tribunal ruling and at the same time Zimbabwe refused not just to comply with the judgement but also refused the jurisdiction of the Tribunal. It was also discussed that the suspension and further censure of the Tribunal from hearing cases is a ploy by the SADC Heads of State and Government to support the decision of Zimbabwe to disregard the ruling. This situation is not unique to SADC as this study has revealed that the EU faced similar challenges in its early stages of development when a number of states refused to comply with judgements of the ECJ and in some cases prejudicing the rights of private citizens.¹³²⁰ SADC can learn from the EU's intervention that developed the principle of state liability for breached of EU law. The SADC Tribunal can develop a similar approach to ensure the effectiveness of SADC law. In this way private persons can even approach national courts of Member States to seek relief against states as is now widely practiced by private persons in the EU.

The challenges discussed above relate to the deficiencies of the legal regimes tasked with the process of economic integration. In addition, it is clear that such rules require amendments, and in cases where the rules do not exist, the political leaders of SADC have to make these rules. Political leaders also need to realise that the surrender of some aspects of their sovereignty to SADC is long overdue. The 'pooling sovereignty' is important for regional integration and states should be aware that sovereignty is not absolute: it has evolved in response to the needs of the international community.¹³²¹ Thus, recommendations relating to the political dimension of regional integration discussed in this thesis are equally important for this study.

¹³¹⁹ Saurombe A "An exposition of dispute settlement forum shopping"

¹³²⁰ See the following cases: *Commission v France* (232/78) 1979 ECR 2729; *Commission v Italy* (7/68) 1968 ECR 423.

¹³²¹ Scholtz W *Review, SADC Tribunal* 201.

11.8 Conclusion

The recommendations discussed in this chapter deal with the need to rescue SADC's regionalisation drive, which is almost collapsing under the weight of different challenges that are mainly related to SADC's failure to implement its treaty and Protocol on Trade. SADC should not compromise on the adoption of a rules based regime. The proposed SADC, COMESA and EAC tripartite FTA is one of the attempts at rescuing SADC and Africa integration agenda. If properly implemented, the tripartite FTA will go a long way towards resolving other challenges plaguing SADC, for example the problem of multiple memberships. The tripartite FTA needs a legal mandate to execute the key objectives of the three RTAs in Southern and Eastern Africa. The most important objective is trade. The A U support for this endeavour has never been in doubt since this massive FTA promotes convergence towards the ultimate goal of establishing the AEC. Furthermore, this approach is not in conflict with the WTO goal of global trade liberalisation. There is need to raise the political momentum for strong alliance of Member States, which can form an "engine" for SADC rule based trade.

The rule of law is the glue that binds the EU together. Unless such an alliance appears in SADC; there is a danger that the organisation may be left politically unguided to the detriment of its deeper integration agenda and development in the region. This study has demonstrated that SADC's regional economic integration processes, community-state, interstate and inte-community legal relations have been neither carefully thought through nor situated on a solid legal and institutional framework. Where attempts were made to create a sound legal and institutional framework, such processes have been incomplete and sometimes grounded on questionable rationales. In the final analysis the rule of law may form the basis to the realisation of regional economic integration in SADC. In instances where these rules do not exist, the author proposes radical reforms to community and national laws.

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