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The Consequences of Retaliation in Southern African Trade Relations

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Introduction: Rules-based Trade as the Norm

There are sound reasons why African Regional Economic Communities (RECs) have been designed as rules-based trade arrangements. Firstly, they have to function in terms of the GATT rules applicable to Regional Trade Arrangements (RTAs)[1]. Practically all African states are WTO members, or are in the process of acceding. Secondly, rules-based trade secures the benefits of trade (and development generally) more optimally, by providing a transparent and predictable environment for producers, traders and consumers. The REC instruments enshrine the guarantees associated with certainty, predictability and formal dispute settlement; as opposed to the machinations of power politics and unilateralism.

The SADC Protocol on Trade is one example of a rules-based African Free Trade Area (FTA). Its general architecture confirms the intention of the Parties to provide for a system based on legal obligations which the Members States (MS) have to respect and comply with. It contains all the typical provisions necessary for conducting trade among them in a rules-based manner.

Article 33 (General Undertaking) is the obvious confirmation that a rules-based system had been contemplated and established. It provides as follows:

> *1. Member States shall take all appropriate measures to ensure the carrying out of the obligations arising from this Protocol.*
>
> *2. Member States shall co-operate in addressing any impediments to intra-SADC trade that may arise as a result of any action or lack of action by any Member State on issues having material bearing on such trade and which are not covered elsewhere in this Protocol.*
>
> *3. In the event that Member States disagree on the existence of impediments to intra-SADC trade, the Member States may have recourse to the provisions of Article 32 of this Protocol.*

Article 32 of the Protocol states that the "*rules and procedures of Annex VI shall apply to the settlement of disputes between Member States concerning their rights and obligations under this Protocol*".

[1] Article XXIV GATT and the Enabling Clause.

Typical rules-based features are further to be found in SADC's provisions on trade remedies[2] and safeguards.[3] They are modelled on WTO disciplines. It means the MS have to follow specific rules and procedures when they consider it necessary to take measures against unfair trade practices or if they deem it appropriate to protect domestic industries against serious injury caused by increased imports; including imports from other SADC members. Article 9 contains a General Exceptions clause and is drafted to reflect the same ideas as found in Article XX GATT.

However, formal dispute settlement has never become part of intra SADC practice. In the five years while the SADC Tribunal existed, it heard about 15 cases. They dealt for the most part with applications by officials of the SADC Secretariat or other SADC institutions against alleged unfair labour practices. Two rulings concerned human rights violations by a MS (Zimbabwe) and were brought by private parties.[4] The judgments in the latter cases resulted in a SADC Summit decision in 2010 to disband the Tribunal. There was not a single application by a State Party involving a violation, by another member state, of a SADC legal instrument.

The absence of formally declared disputes does not translate into a perfect compliance record. The opposite is true; Zimbabwe has repeatedly imposed surtaxes on goods imported from other MS in violation of its obligations under the SADC Protocol on Trade.[5] Other members have not implemented their tariff schedules.[6]

This is an unhealthy state of affairs. It undermines the certainty and predictability inherent in a rules-based trade arrangement and the associated benefits for private traders and investors. Respect for state measures and border controls adopted in pursuance of agreed principles to liberalise trade and commerce are eroded, as well as the potential for broader regional economic development. Concrete deals on deeper integration (on services and trade related matters) are unlikely to be pursued. The record of the MS does not inspire sufficient confidence to justify additional undertakings. Where political pressure does result in new instruments being signed the implementation clauses will be watered down and unilateral state action will prevail. The end result is a flawed and fragmented

[2] Anti-dumping measures are dealt with in Article 18 of the Protocol; while Article 19 covers Subsidies and Countervailing Measures.
[3] Article 20. Provisional safeguards are provided for in Article 20 BIS.
[4] These were the Campbell and Gondo cases. For a discussion, see Erasmus. G. 2012. What has happened to the protection of rights in SADC? tralac Working Paper, available at: www.tralac.org/files/2012/01/S12TB012012-Erasmus-Protection-of-rights-SADC-20120118-fin.pdf
[5] See further discussion tralac Policy Brief, available at: http://www.tralac.org/files/2013/08/tralac-Policy-Brief-final-RISDP-Review-20130814.pdf
[6] See further, *ibid*

regional integration arrangement which cannot deliver the stated expectations. The alleviation of poverty through regional trade and cooperation will be held back; while the lofty ideals found in these integration pacts remain distant promises. Regional integration efforts are likely to be met by growing cynicism; at home and abroad.

This situation has become a serious impediment to the functioning of SADC. It destroys mutual trust and may cause some MS to consider countermeasures when obligations are violated. After all, something needs to be done in order to offset the effects of unlawful state action. Domestic pressure to protect private rights and interests has been noted in some SADC member states; while inter-state border post cooperation and mutuality in the administration of standards are deteriorating. In South Africa private parties bring increasingly more court applications to ensure the government will take action when regional or international agreements are violated.[7] Constitutional arguments are employed which maintain that, in such instances, the state is under a constitutional duty to act.[8]

The present paper discusses the consequences of the picture sketched here. It argues that unilateral "retaliation", which might be contemplated as a last resort, have to be weighed carefully. Other international law principles will have to be considered; while a certain amount of political animosity and regional distrust should be expected. However, impunity cannot be condoned.

The rules-based Response

A rules-based trade system (the WTO regime is the typical example) allows for exceptional measures to be taken under certain conditions and provided the applicable rules are respected. Trade remedies (anti-dumping and countervailing measures) and safeguards are the traditional trade remedies but may only be imposed when the applicable requirements are met and the prescribed procedures are followed. They are not discretionary measures. These are permissible import restraints that otherwise would be contrary to the principles of binding tariffs and MFN (most favoured nation) treatment. They are designed to allow relief from imports deemed "unfair," or adjustment from a surge in imports. Article VI of GATT 1994, elaborated by the WTO Anti-Dumping Agreement, allows countries to take action against imports from countries allegedly exporting at dumped prices. Anti-dumping action is

[7] This has happened in order to obtain costs orders and sell Zimbabwean property in the wake of the rulings by the SADC Tribunal in the Campbell case. International criminal jurisdiction is being enforced in the same manner.
[8] See Erasmus, G. 2013. *The domestic status of international agreements: has the South African Constitutional Court charted a new approach and could regional integration benefit?* In Du Pisanie, A. et al. (editors). 2013. Monitoring Regional Integration Yearbook 2012, tralac.

undertaken in response to an application from industry concerning injurious dumped imports. A proper investigation has to be conducted prior to the adoption of anti-dumping measures. The WTO Subsidies and Countervailing Measures Agreement (the Subsidies Agreement) disciplines the use of subsidies.

Safeguard action is "emergency action" and may be taken where a surge of imports causes or threatens to cause, serious material injury to a domestic industry. It allows a country to respond to unexpected and unforeseen increased imports which have caused serious material injury. Imports must be recent enough, sudden enough, sharp enough and significant enough. Safeguard action may involve the restriction of imports of a product temporarily to help the domestic industry to adjust. They are applied on a global basis and may take the form of tariffs, tariff rate quotas, or quantitative restrictions (import quotas). These measures must be temporary, product-specific and they must be applied to all imports irrespective of the source. Safeguard action can only be imposed after a full inquiry by a competent national authority.

It is important to note that trade remedy and safeguard measures may be contested. The majority of WTO disputes are in fact about claims that national trade remedy measures do not comply with the applicable rules. This possibility too is absent from REC regimes such as SADC where the Tribunal has been suspended.

These normal rules on trade remedies or safeguard measures are not applied within the RECs. The fact that the REC members (with a few exceptions[9]) do not have the necessary national institutions and domestic laws in place in order to implement lawful remedial measures is part of the problem. This highlights a deeper dilemma; the incomplete nature of the REC regimes. Their trade protocols provide for the possibility to impose trade remedies (by stating that WTO disciplines have to be followed[10]) but they lack the domestic means to do so. The absence of these essential building blocks may increase the temptation to adopt illegal "protective" measures such as import bans; which will be unlawful in terms of WTO as well as REC rules.

[9] In SADC only South Africa has a national body (the International Trade Administration Commission) which undertakes trade remedy investigations and imposes anti-dumping measures fairly regularly. It is based on the applicable WTO rules.
[10] See e.g. Articles 18 – 20, SADC Protocol on Trade.

An alternative Scenario

Would it be permissible for a Member State of a REC to take "retaliatory measures" in a case of serious and continued breaches of the regional legal code? It seems unlikely that disrespect for essential legal obligations in the RECs will at all times be condoned. The possibility of "retaliatory" measures should not be ruled out. For example; if a REC Member State imposes a ban on the importation of certain goods from another Member State without justifying its measure as a lawful trade remedy or safeguard action, the latter will have little choice but to protect essential national interests. What legal principles and procedures will apply if the affected party decides to "retaliate"?

"Retaliation" has not happened before in any of the RECs but is not implausible. It is discussed here as part of a bigger argument which calls attention to the absence of certain essential features in the RECs and in order to highlight the consequences of the failure to provide for proper dispute settlement mechanisms. The intention is not to argue in favour of unpredictable or ill considered "retaliation". The measures provided for in SADC legal instruments, as well as alternatives allowed by Public International Law, will be investigated.

The REC regimes (such as the SADC Protocol on Trade) do not allow "retaliation". They have been designed as rules-based arrangements in which only typical trade remedies and safeguards may be imposed and where, in addition, formal dispute settlement procedures must be respected.

An export ban would be unlawful because it will not be qualify as a trade remedy or safeguard measure. What remedies would be available to the affected Party under SADC legal instruments? What is the implication of the fact that the SADC Summit has suspended the SADC Tribunal? How should the ensuing dispute be settled?

Annex VI of the SADC Protocol on Trade provides for the possibility of a panel procedure to settle disputes between Members but is not in force.[11] It states expressly that the rules and procedures of this Annex shall apply to the settlement of disputes between Member States concerning their rights and obligations under the SADC Protocol on Trade. Member States must at all times endeavour to agree on the interpretation and application of this Protocol; must make every attempt through cooperation to arrive at a mutually satisfactory resolution of any matter that may affect the operation of this Protocol;

[11] Article 20 of the Annex provides that the CMT shall adopt regulations to facilitate the implementation of this Annex. This has not yet happened.

and must make use of the rules and procedures of this Annex to resolve disputes in a speedy, cost-effective and equitable manner.[12]

The WTO approach with regard to the establishment of dispute settlement panels has inspired the design of this Annex. There must first be consultations, with detailed procedures and timeframes being provided for. The fundamental difficulty is that the Registrar of the Tribunal plays an essential role in these procedures. The Annex provides that any Member State may request in writing the establishment of a panel. "The requesting Member State shall notify the other Member States and the CMT[13] of the request through the Registrar of the Tribunal."[14] There is no Registrar anymore; another reason why this Annex cannot be implemented.

If the consulting Member States fail to resolve a matter pursuant to this provision any such Member State may request in writing the establishment of a panel. The requesting Member State shall notify the other Member States and the CMT of the request through the Registrar of the Tribunal. If the requested Member State "does not respond within 10 days after the date of receipt of the request, or does not enter into consultations within a period of no more than 30 days, or a period otherwise mutually agreed, after the date of receipt of the request, then the requesting Member State may proceed directly to request the establishment of a panel."[15]

Good offices, conciliation and mediation are possible but are undertaken voluntarily if the disputing Member States so agree.[16]

The Registrar of the Tribunal is responsible for establishing a panel and must do so within 20 days from the date of receipt of such a request. [17] The Registrar shall also maintain an indicative roster of panelists nominated by Member States on the basis of their relevant expertise and qualifications as stipulated in Article 7. The roster, as well as any modifications thereto, shall be made known by the Registrar of the Tribunal.[18] This roster does not exist. Appellate review of panel reports is not possible; it involves the defunct Tribunal.

[12] Article 2 of Annex VI.
[13] The Committee of Ministers responsible for trade matters.
[14] Article 3(7) of the Annex.
[15] Article 3(4) of the Annex.
[16] Article 4(1) of the Annex.
[17] Article 5(1) of the Annex.
[18] Article 6 of the Annex.

This brief discussion of the SADC panel procedure unfortunately confirms the lack of essential institutional arrangements, which are necessary for the settlement of disputes. The dispute sketched in the scenario discussed here cannot be resolved by invoking Annex VI.

Nothing prevents the parties to the dispute contemplated here to settle the matter through consultations, good offices, conciliation, mediation or arbitration. However, this requires agreement by all parties to the dispute to pursue that avenue and to accept the outcome as binding.

It is claimed that the CMT is frequently involved in discussions about derogations or failures to implement tariff liberalization and other obligations. Article 3(1)(c) of the SADC Protocol on Trade provides that "Member States which consider they may be or have been adversely affected, by removal of tariffs and non-tariff barriers (NTBs) to trade may, upon application to CMT, be granted a grace period to afford them additional time for the elimination of tariffs and (NTBs). CMT shall elaborate appropriate criteria for the consideration of such applications."

There are several reasons why the procedure under this provision is problematical. The "appropriate criteria" for grating temporary relief under this provision are lacking. Article 3 in fact provides for an escape clause which undermines the disciplines which should apply, namely to justify national non-compliance on the basis of safeguard action or trade remedies. This is not a substitute for rules-based implementation of obligations and is definitely not a dispute settlement mechanism. Article 3 is about grace periods with respect to the duty of Members to implement obligations involving tariff liberalization and the removal of NTBs. The outcome is that non-compliance is condoned or that derogations are extended.

This practice is part of the problem and should rather be viewed as evidence that a proper monitoring and dispute settlement mechanism is urgently needed. The Secretariat does not enjoy any monitoring powers and no Member State has ever taken a firm stand to ensure respect for the law. There is an additional complication; SADC institutions take their decisions on the basis of consensus; which is interpreted as allowing a dissenting member to veto proposals with which it disagrees. The SADC record shows no constructive growth towards increased compliance.

Does Public International Law allow for a Remedy?

If one ignores the possibility that the "subsequent practice" in SADC might have created an alternative reality which differs from the stated legal requirements on the implementation of

obligations, and that estoppel could not be argued, the question regarding effective dispute settlement remains. How could respect for SADC legal obligations be ensured? How could disputes such as the kind suggested here, be resolved and what would affected parties be entitled to do?

An inter-state dispute is justiciable when a specific disagreement exists and when that disagreement is of a kind which can be resolved by the application of rules of law by judicial processes, including arbitration.[19] It must be possible to show that a binding obligation has been violated. To take the same example; a trade ban would be a violation of the applicable SADC law. An affected SADC Member is entitled to declare a dispute with the Party imposing such a ban. How will the ensuing dispute be settled?

The dispute settlement mechanism provided for in the SADC Protocol on Trade is not operational and cannot be used. Good offices, conciliation, mediation or arbitration requires prior agreement of all parties to the dispute and will not be available. Would it be possible to invoke general principles of public international law in order to ensure that respect for the applicable law is restored?

Public International Law allows for countermeasures. This entails "the possibility for a state to resort to 'private justice' when its demands for cessation of an illegal conduct and/or adequate reparation are not met by the wrongdoer".[20] Countermeasures do not admit the use of force; the injured state must first call upon the wrongdoing state to cease the wrongful conduct and to make reparation for any injury. There must be notification of the decision to take countermeasures as well as an offer to negotiate.[21] Since countermeasures are intended to exert pressure on the wrongdoing state in the absence of an impartial adjudicator, "they must not be taken while a dispute is pending before an international adjudicative organ".[22] If the conduct of the wrongdoing party prevents the available adjudicative organ from exercising its jurisdiction it should be possible to implement countermeasures. Mexico once took countermeasures against the USA for the breach of a NAFTA obligation, after having its access to a NAFTA panel blocked by American inaction.[23] Countermeasures must also be proportional to the wrongful conduct.

This brief discussion of countermeasures suggests that they would indeed be available in an instance where a particular SADC Member States could muster the resolve to implement them. This would be

[19] Collier and Lowe, *The Settlement of Disputes in International Law*, Oxford University Press, 1999 at 10.
[20] James Crawford, *Brownlie's Principles of Public International Law,* 8th edition, Oxford University Press, 2012 at 585.
[21] Ibid at 587.
[22] Ibid.
[23] Ibid.

a lawful response, provided all requirements (prior notification, an offer to negotiate and proportionality) are complied with. Extra-legal retaliation (action not sanctioned by the law of state responsibility) would be without legal justification and should be avoided; it would undermine the precarious state of SADC law even further.

Why do SADC Member States not litigate against each other in matters of trade?

African regional integration has its roots in the continent's own history of political liberation and economic development.[24] This perspective bestows a sense of legitimacy and destiny on regional and continental integration endeavours. Regional institutions have been shaped in a way to demonstrate African political solidarity and the common quest for economic emancipation. The preambles of African regional integration agreements pay homage to the ideals which inspired the quest for decolonization. These instruments recall and affirm sentiments such as "the strong and indissoluble bonds of freedom, liberation struggles, friendship, solidarity, history and culture" among African people and governments.[25] This historical and philosophical context, ironically, seems to undermine the essential rules-based approach required for successful regional integration arrangements under contemporary global conditions.

African governments do not litigate against each other when legal obligations in regional trade agreements are violated. Such steps are said that to be "culturally" unacceptable and would signify hostile behaviour. Border disputes are really the only area where intra African disputes have been settled through adjudication, mainly by referring them to the International Court of Justice.

This is a rather surprising approach to how trade is conducted. One could argue that in many instances it would result in less hostility if independent courts are granted the responsibility to sort out technical issues and demarcate legal responsibility. Be that as it may; the REC instruments adopted in order to promote trade and integration contain clear dispute settlement provisions. If it means that they were adopted and ratified without any serious intention to use them; and consequently to enforce the obligations accepted by the Parties, then the present state of affairs does not come as a surprise. They do however come at a considerable cost. If agreed border measures can e.g. not be relied upon there will be serious disruptions and harm to essential national interests. By leaving such matters unresolved

[24] See e.g. the discussion in J.M. Biswaro *The Quest for Regional Integration in the Twenty First Century: Rhetoric versus Reality – A Comparative Study,* Mkukina Nyota, Dar-es-Salaam, 2012, at 316 *et seq*.
[25] From the Preamble of the Draft Tripartite Agreement.

good neighbourliness cannot be said to be promoted. The argument that respect for obligations will be ensured through consultations is not borne out by reality. The practice in SADC refutes this claim.

Another consequences is that private entities are left without means to protect their rights. They are not parties to international agreements but, as the ultimate traders, investors and drivers of commerce, should be able to ascertain what is legally permissible. They must be able to rely on the agreed arrangements and remedies provided for. The unwillingness of governments to protect the rights of their nationals against unlawful actions of foreign states leave them vulnerable and without remedies.

Compliance with international legal obligations also introduces the 'sovereignty issue'. A substantial part of the African integration debate focuses on the loss of 'sovereignty' when implementation of legal arrangements becomes an issue, although the real concerns might be about the loss of control and about 'interference'. The distinction between state and government is frequently glossed over; ignoring that sovereignty is technically a feature of states and not of governments.

Fears about threats to national sovereignty may be well founded in instances where supra-national bodies act outside the scope of their powers or when they usurp powers over areas best left to legitimate national structures.[26] This has been a long-standing debate in the European Union where the European Commission enjoys extensive powers over areas which used to fall under national institutions. Some European commentators detect a democratic deficit. However, African regional institutions such as REC secretariats do not enjoy similar powers. The local dilemma is often the opposite: REC institutions suffer from ill-defined mandates and vague powers. The monitoring of compliance with community norms is weak and the collective voice is silent.

Is the loss of sovereignty a well–founded fear? Are all states equally concerned? Regional organisations do not enjoy inherent powers; they are the creatures of international agreements concluded by the very states which have come together in the belief that such bodies will improve trade, development and effective cooperation. The objective is to achieve what states cannot accomplish through unilateral effort; no state can prosper in isolation. The real problem comes later; when the consequences and disciplines of integration have to be accepted. Regional integration (as well as the multilateral trade system) will eventually touch on areas formerly under the exclusive

[26] The notion of "subsidiarity" conveys the same concern, which has been recognised in e.g. the UNDP's 1999 report on decentralisation: *Decentralization, or decentralising governance, refers to the restructuring or reorganisation of authority so that there is a system of co-responsibility between institutions of governance at the central, regional and local levels according to the principle of subsidiarity, thus increasing the overall quality and effectiveness of the system of governance, while increasing the authority and capacities of sub-national levels.*

control of national agencies. The real challenge involves accepting the logic of deeper integration and preventing fragmentation. It is an act of sovereignty to establish regional structures and grant them the powers necessary to fulfil their mandates. Such designs should be allowed to accomplish what they have been created for.

Sovereignty is best understood as a legal concept which protects territorial integrity and jurisdiction; but which also requires states to comply with their international obligations. The sovereign entitlement of one state is the obligation of another. Sovereignty is protected by the fact that in the absence of ratification or accession (which indicates sovereign consent) international agreements cannot bind states. However, they cannot invoke their national laws or constitutions to justify subsequent non-compliance. If that were possible none of the benefits associated with international legal certainty and enforcement would be available and will leave societies without the means to reap the benefits of regional integration. The same logic applies to state efforts to e.g. combat terrorism or address environmental decay.

What are the lessons to be learned from the sovereignty debate? International agreements are intended to be effective and should be taken seriously. Their texts should reflect the true intentions of the parties. If regional courts are established they will render judgements when parties file application about disputes over which they enjoy jurisdiction. These considerations should be weighed before they are formulated as provisions in international agreements.

Conclusion

One way out of the present SADC predicament is to urgently revisit the process now underway to redraft the SADC Tribunal Protocol, which aims at scaling down its jurisdiction and to allow for inter-state disputes only. Another major concern is the fact that ratification will be required in order for the new Protocol on the Tribunal to enter into force. Many more years will pass before SADC will have a new Tribunal; which will only enjoy jurisdiction over those states which have ratified the new Protocol. The outcome will be a fragmented and ineffective regime. The present exercise to draft a new Protocol for the Tribunal should take the need for legal certainty into account and provide for effective answers to existing problems around non-compliance with trade rules.

Another option is to strengthen the formal dispute settlement provisions in the SADC Protocol on Trade and Annex VI. This is not the most optimal solution but will restore the SADC trade regime to a

healthier condition where respect for the rule of law may be provided with some much needed oxygen. A formal dispute settlement mechanism has to be retained in order to protect essential features of SADC's trade regime and to prevent an unrestrained downward spiral of mutual retaliation. A failure to take these steps will result in a more dangerous outcome; an increase in unilateralism.

The fragmented nature of the African continent, featuring small markets, small economies and small countries, fragile and weak states, a large number of land-locked countries, provides a strong motivation for effective regional integration. It would bring greater market access opportunities and hopefully encourage domestic industrialization and generally the promotion of inclusive growth. Since the post-independence phase African countries have embraced regional integration as an integral component of their development strategies, with the intention to eventually move towards a 'deeper regional integration agenda'[27]. The founding treaties of all RECs articulate clear developmental objectives which support inclusive growth to eradicate poverty. This approach requires efficient institutions, the preparedness to implement the applicable agreements, and legitimate dispute settlement mechanisms.

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[27] UNCTAD (2007), Global and Regional Approaches to Trade and Finance. United Nations.