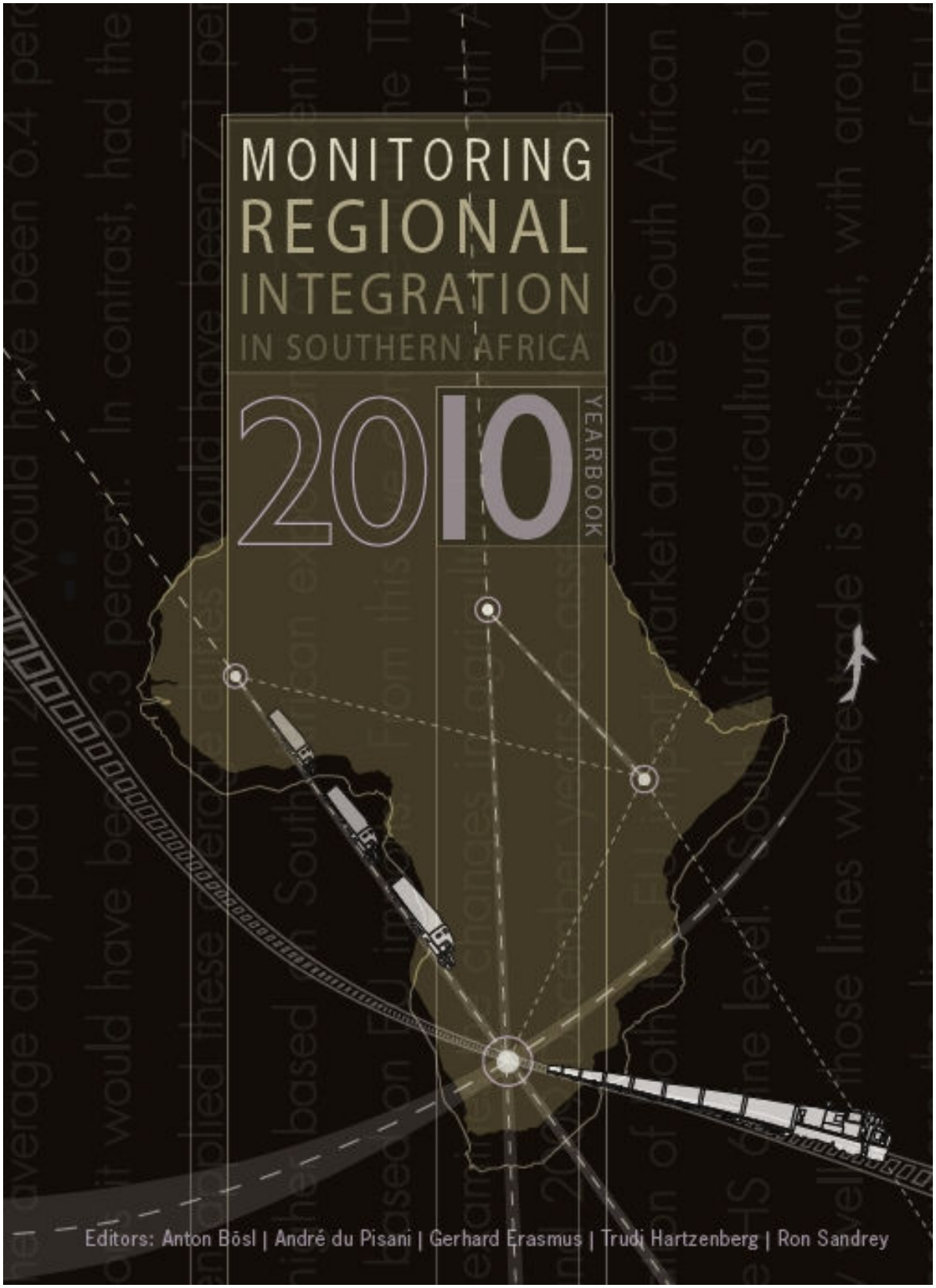

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Introduction

Monitoring the process of regional integration in Southern Africa in 2010

Anton Bösl, André du Pisani, Gerhard Erasmus, Trudi Hartzenberg, Ron Sandrey

The Monitoring Regional Integration Yearbook 2010 marks the tenth edition of this publication. The yearbook started as a small project monitoring developments on the regional integration agenda in Southern Africa in 2001, with specific focus on the Southern African Development Community (SADC). This monitoring exercise, ten years on, is no less relevant than it was at the project's inception. Although there have been significant regional developments during the past decade, many challenges still remain. During the past ten years developments in SADC, as well in the Southern African Customs Union (SACU) have been reviewed. Given the significant overlap of membership among the regional economic communities in Eastern and Southern Africa (ESA), references in recent years to developments in the Common Market for Eastern and Southern Africa (COMESA) and the East African Community (EAC) have also featured in the yearbook.

The SADCTrade Protocol was signed by member states in 1996, and implementation began in 2000. The Trade Protocol provides a framework for SADC's trade integration programme, emphasising the establishment of a free trade area as a key objective. In 2003, an implementation strategy for SADC's trade integration was agreed by member states. This Regional Indicative Strategic Development Programme (RISDP) provided important milestones for SADC to establish a free trade area by 2008, a customs union by 2010, a common market in 2015, a monetary union in 2016 and a common currency in 2018. This very ambitious integration agenda follows the linear textbook model of regional integration. As at 2010, the free trade area has not been fully implemented and the goal of establishing a customs union by 2010 has not been met. The establishment of SADC customs union, however, remains on the agenda albeit without a definite time line at this stage. Is this linear textbook model appropriate for addressing the development challenges of the Southern African region? This and many related questions have been raised in the yearbook during the past decade.

SACU's history differs, of course, from that of SADC and other regional economic communities that were established in terms of decisions taken by sovereign states. SACU was established in 1910 as a result of a decision by a colonial power to facilitate economic and specifically trade transactions in the southern African region. In 2002, the SACU member states signed a new SACU Agreement, providing for a new legal and institutional dispensation. As at 2010, however, many provisions which could provide for a new legal and institutional architecture for deeper integration in SACU, had not been implemented.

In October 2008 the member states of SADC, EAC and COMESA agreed to establish a free trade area encompassing the 26 member states of these three regional economic communities. Although much technical work has been done, and a draft agreement and several annexes have been prepared, negotiations have not yet (as at May 2011) begun. This initiative could assist in the rationalising of the regional integration agenda for Eastern and Southern Africa, with focus not only on trade in goods, but also on services and other new-generation trade issues that could provide a deeper regional integration agenda that effectively addresses the development challenges of this broad region.

Regional integration remains a key component of the development strategies for countries in Southern Africa, and it is useful at this tenth anniversary of the yearbook to reflect on current developments in the southern African region. It is important to keep in mind too, that there is a renewed interest in regional integration globally. In Asia and South East Asia, for example, regional integration developments are driven by a search for efficiency and competitiveness, as supply-chain linkages across national borders are facilitated and promoted. The growth of clusters of excellence in this region demonstrates how production processes can be disaggregated in pursuit of competitive advantage, yielding an increase in trade in tasks across borders. The interconnectedness of the manufacturing and services sectors is fundamental to these developments, demonstrating that it is not possible to be competitive in manufacturing without competitive services inputs. These developments are not yet part of regional integration in Southern Africa.

The overriding adherence to the linear textbook model of regional integration means that the central focus continues to be trade in goods, with much energy still devoted to negotiations on tariff issues. While there is arguably merit in some cases, it is increasingly agreed that the real challenges to regional integration lie behind the border. These behind-the-border challenges include supply-side issues such as infrastructure deficits, poor regulatory regimes, high-cost and inefficient services – issues that negatively impact the capacity to produce tradables competitively. The lack of manufacturing capacity and the lack of industrial diversification across the Southern African region (with the exception of South Africa) mean that the prospects for developing regional supply chains are severely limited. These prospects are further limited by poor regional infrastructure, and lack of regulatory harmonisation. The proposed Tripartite Free Trade Agreement may be an opportunity to address some of these issues.

Regional integration should also be about integration into the global economy. East and South East Asia have adopted a strategy of open regionalism with global integration an important objective of the neighbourhood regional agreements. By contrast, regional integration in Southern Africa continues to be primarily focused on intraregional matters. Given the lack of industrial development and diversification of these countries, and specifically the importance of their natural resource

endowments to global partners, a global trade and integration strategy would make a great deal of sense.

During the past decade, countries in Southern Africa have been negotiating Economic Partnership Agreements (EPAs) with the European Union (EU). These negotiations became necessary to ensure that the trade regime between these partners became World Trade Organisation (WTO) compatible. Trade relations between the EU on the one hand and Africa, the Caribbean and Pacific (ACP) countries, on the other, had been governed for decades by a series of Lomé Conventions and since 2000 by the Cotonou Agreement, and the EU had received a waiver in the WTO until the end of December 2007 for the unilateral preferential arrangement that the ACP countries enjoyed. The EPA negotiations are still not concluded, but they have served a very important role in highlighting several challenges that bedevil the regional integration agenda in Southern Africa. Amongst the challenges that have come to the fore very clearly during the EPA negotiations are the overlapping memberships of regional economic communities, the poor regional integration implementation record and lack of policy-making capacity at national level. For some countries in the region the EPA experience has motivated the search for new partnerships – notably engagement with other developing countries such as China, India and Brazil. While SACU countries have negotiated and still are negotiating trade agreements with India and Brazil, China remains shy of the negotiations of a rules-based regime with any partner country (in South Africa or indeed in Africa). This raises another important theme in a review of regional integration in Southern Africa: the theme of rules-based governance.

Countries in Southern Africa (as in other parts of Africa) have for decades enthusiastically embraced regional integration in a rather superficial manner. They sign agreements or treaties with alacrity, but are much less enthusiastic about implementation of their commitments. The key question is whether the regional integration agreements are seen as robust rules-based regimes. The current saga related to the SADC Tribunal (reviewed extensively in recent yearbooks) demonstrates that member states quickly lose their enthusiasm for regional legal governance institutions when decisions go against them. The decision taken at the he Extraordinary SADC Summit of Heads of State and Government in May 2011 in Windhoek, Namibia, not to reappoint or replace members (judges) of the Tribunal but to extend the moratorium (decided upon at the SADC Summit in August 2010) on receiving any new cases or hearing of any cases until the SADC Protocol on the Tribunal has been reviewed and approved is contentious.

The debate around rules-based regimes also touches on another important theme running through the current regional integration agenda, and that is sovereignty. An independent state exercises its sovereign right when entering into an agreement with other independent states to establish a regional economic community. Such an act has implications which cannot be escaped by invoking its

national laws (even its constitution) as defence. International agreements may well delimit domestic policy space, but sovereignty does not offer an escape clause in this regard.

Even a cursory review of regional integration in Southern Africa confirms that regional integration is a complex endeavour, especially in Africa. The continent remains marginalised from the global economy, and basic infrastructure deficits and other supply-side constraints keep producers from participating in the global commodity chains that provide opportunities to enhance competitiveness and spur innovation and investment in new economic activities. Development challenges such as unemployment and poverty promote a myopic perspective when it comes to regional integration. This 2010 yearbook reminds us that regional integration is multifaceted, covering not only trade and market integration, but also peace and security, geography, and related matters. It is essential that countries in Southern Africa take a step back to reflect on the broad dimensions of development and the kind of regional integration agenda that will assist countries to promote not only intraregional trade, but also competitiveness and development. It is imperative to recognise that the signing of regional agreements will deliver nothing, unless they are effectively implemented. Regional integration in Southern Africa needs fresh commitment and effective political will to deliver economic, social and political benefits for the people of Southern Africa.

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June 2011

Chapter 1

SADC at 30: Re-examining the Legal and Institutional Anatomy of the Southern African Development Community

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Introduction

The growing fear of Africa's marginalisation in an era of globalisation and the poor economic track record of most African states have partly paved way for regional integration in Africa (Chauvin and Gaulier 2002:10). In a bid to overcome these fears and improve the economic fortune of Africa, there have been concerted efforts both at the regional and sub-regional level to jointly harness resources for putting viable development policies in place. These policies are often implemented by regional institutions created by member states. In this regard, having in place effective regional institutions and adequate institutional machinery to oversee the implementation of these development policies becomes an essential condition for regional integration (Mutharika 1972:55).

In the Southern African Development Community (SADC), regional integration traces its origin to the Southern African Development Cooperation Conference (SADCC) which was created in 1980. SADCC was created to foster economic cooperation among its members. It also focused on reducing economic reliance on the then apartheid government of South Africa. Although SADCC was meant to promote economic cooperation among its members, it had a loose institutional structure. It had no binding legal framework and its institutions were decentralised. States took responsibility for the development of particular sectors without vesting powers in a centralised body. However, with the transformation of SADCC into SADC in August 1992, a treaty was adopted and the formerly decentralised institutions of SADCC were collapsed into centralised regional institutions. With the adoption of a treaty and the centralisation of institutions, it invariably meant that states now had a binding obligation to implement regional agreements and the institutions were to oversee the implementation.

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This paper examines the efficacy of these SADC institutions since the transformation from SADCC into SADC. The primary focus is to determine if the institutional shift from decentralised to centralised institutions has improved regional integration capacity in SADC. The ability of these centralised institutions to promote regional integration is gauged from the extent to which they make member states comply with their regional obligations. Also, the relevance of these centralised institutions would be doubtful if they are unwilling or unable to ensure that members seek to comply with their regional obligations.

This paper likewise examines the power dynamics between states and SADC institutions to determine if states have vested adequate powers in these institutions. To this end, the extent to which states comply with their regional obligations and the resultant implications of non-compliance are also examined.

SADC: a historical perspective

SADC as we know it today traces its origin to the Lusaka Declaration of 1980 which had founded SADCC.[1] The Lusaka Declaration was a culmination of efforts that had begun in the 1970s to improve the standard of living of the people of the Southern African region. At the Lusaka Summit where the Declaration was adopted, the Founding Fathers made a commitment to pursue policies aimed at liberating and developing the economies of the region. While developing the living standards of its members was on its agenda, SADCC also served as a defence mechanism against the economic influence of the South African apartheid government (Schoeman 2001:2). This defence mechanism was built in to shield the region from South Africa's strong economic influence. SADCC was conceived as a means to reduce economic dependence on South Africa, create equitable regional integration, promote the implementation of national, interstate and regional policies and secure international cooperation within the framework of the SADCC strategy for economic liberation (Mvungi 1994:79).[2]

[1] SADCC comprised nine Southern African countries: Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe. The formation of SADCC was a result of a long process of consultations by the leaders of Angola, Botswana, Lesotho, Mozambique, Swaziland, United Republic of Tanzania and Zambia, working together as the Frontline States. In May 1979 consultations were held between Ministers of Foreign Affairs and ministers responsible for Economic Development in Gaborone, Botswana. Subsequently a meeting was held in Arusha, Tanzania in July 1979 which led to the establishment of SADCC.

[2] See also the Preamble to Memorandum of Understanding on the Southern African Development Coordination Conference of 29 July 1981, available: http://www.sadc.int/# (28 December 2010).

The change in the political landscape in South Africa and the worldwide drive towards regional integration also necessitated a change in the ideological approach of SADCC towards improving the living standard of its people. With the demise of the apartheid in South Africa and the lifting of sanctions, it became obvious that the future of SADCC had to be reviewed to accommodate South Africa (Ndulo 1999:11). It also made economic sense to bring South Africa on board because it had the largest economy in the region. Also, by the end of the 1980s SADCC policy makers saw the need to have in place a binding legal document that would serve as the operational basis of SADCC.[3] In 1992, the Heads of States or Government signed the SADC Treaty in Windhoek, Namibia which established the Southern African Development Community.[4]

In terms of the mission of the newly founded organisation, there was also a shift in policy given the change in the political landscape. Unlike the Memorandum of Understanding on SADCC which had as one of its objectives the reduction of economic dependency on South Africa, the SADC Treaty was geared more towards developing a robust community where there was interdependence among member states in terms of economic growth and socio-economic development (SADC Treaty 1992: Art 5). The aim of creating this spirit of interdependence among member states was to promote the furtherance of regional integration in various sectors of the region. In general, the transformation from SADCC to SADC brought about an institutional and ideological shift in the *modus operandi* of SADC.

The legal and institutional anatomy of SADC

A year after SADCC was formed, Heads of States of SADCC signed a Memorandum of Understanding establishing the institutions of SADCC (Mvungi 1994: 77).[5] This memorandum did not create a formalistic body – rather it created a basis for loose cooperation among its members. There was no formal binding legal instrument to govern the affairs of SADCC but a more informal conference was created where member states relied on their discretion to propagate the objectives of SADCC.

In other words, the Memorandum of Understanding promoted the independence and sovereignty of member states and a minimum level of institutionalisation was permitted, this

[3]See http://actrav.itcilo.org/actrav-english/telearn/global/ilo/blokit/sadc.htm (6 January 2010).
[4] The Treaty of the Southern African Development Community, August 1992. Article 3, declared SADC to be an international organisation with legal capacity to enter into contracts, own property, sue and be sued.
[5] The Memorandum of Understanding on the Institutions of the Southern African Development Coordination Conference of 29 July 1981.

leading to a decentralised institutional structure within SADCC (Schoeman 2001:3). Also, the Founding Fathers took notice of past attempts at regional cooperation in Africa and were of the view that the abysmal failure that had been recorded partly arose as a result of the sharing of costs and benefits of regional cooperation. To this end, they opted to adopt a decentralised structure where each member state took responsibility for the implementation of policy decisions. However, this did not mean that no institutions were created. Article I (a-e) of the Memorandum of Understanding on SADCC created a Summit, Council of Ministers, Sectoral Commissions, Standing Committee and a Secretariat.

The Summit, which was the supreme organ of SADCC, comprised Heads of States or Governments and it was vested with the responsibility of giving the general directions for the future of SADCC. The Council of Ministers comprised one minister appointed by each member state and was responsible for the overall policy implementation and coordination of SADCC. The Council also had the powers to appoint Ministerial Committees to execute specific programmes. Article IV of the Memorandum of Understanding on the SADCC vested Sectoral Commissions with the responsibility of coordinating development within the SADCC states. In line with this, each member state was allocated a sector to coordinate (Mvungi 1994:80). The role of the Secretariat was to provide a link between member states and the international community.

With the transformation from SADCC to SAD, came a change in the legal character of the organisation. While the operative document of SADCC was a Memorandum of Understanding which created no obligation on the part of member states, the adoption of the SADC Treaty in 1992 brought about a change in legal regime.[6] The SADC Treaty laid down key fundamental principles which were to be the bedrock upon which member states were to relate with one another.[7] The SADC Treaty also enlarged the objectives of the organisation to cater for areas that were hitherto not provided for under SADCC.[8] Enlarging

[6] 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 (Article 2 (I) (a) Vienna Convention on the Law of Treaties 1969).

[7] The principles found in Article 4 of the SADC Treaty 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.

[8] Article 5 of the SADC Treaty lists the following as the objectives of the SADC: promoting sustainable and equitable economic growth and socio-economic development to alleviate poverty, consolidating, defending and maintaining democracy, peace, security and stability, promoting self-sustaining development on the basis of collective self-reliance and interdependence of member states, achieving complementarity between national and regional strategies and programmes, promoting and maximising productive employment and utilisation of resources of the region, achieving sustainable utilisation of natural resources and effective protection of the

the objectives of SADC was a policy response to the changing economic landscape around the world. It became apparent that for the region to remain competitive within the continent and beyond, cooperation was needed in more areas. In terms of institutions, the Summit also took necessary steps to restructure the institutions of SADC in order to avoid institutional constraints which would hamper the transformation process (Extra-Ordinary Summit March 9, 2001).

The signing of the SADC Treaty by necessary implication created rights and duties on the part of member states. The rights and duties created by the SADC Treaty were strengthened by member states giving an express undertaking to uphold the principles and objectives of the SADC Treaty (SADC Treaty 1992: Art. 6). Thus, the obligations undertaken by member states were no longer optional and non-binding; rather, legal obligations had been created, a breach of which would result in the accrual of international responsibility.[9] To this end, the SADC Treaty also made provisions for the adoption of protocols to govern various sectors. Presently SADC has well over 20 protocols which cover various sectors such as trade, health, wildlife, culture, education, and so forth.[10] 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.

Taking cognisance of the fact that a strong institutional base was needed to achieve the objectives of SADC, the SADC Treaty revised the existing institutional structure of SADCC and created more institutions. SADC retained the institution of the Summit of Heads of States or Governments, the Council of Ministers, the Standing Committee and the Secretariat.[11] In addition to these existing institutions, the SADC Treaty created the Organ on Politics, Defence and Security Cooperation, the Integrated Committee of Ministers, the Tribunal, and the SADC National Committees (SADC Treaty 1992: Art 9). The SADC Treaty also vested each of these institutions with the required authority necessary for carrying out their mandates.

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environmen,; strengthening and consolidating the long-standing historical, social and cultural affinities and links among the people of the region, combating HIV/AIDS or other deadly and communicable diseases, ensuring that poverty eradication is addressed in all SADC activities and programmes and mainstream gender in the process of community building.

[9] See Article 16 Draft Articles on State Responsibility.

[10] For a detailed list of all SADC protocols, see http://www.sadc-tribunal.org/pages/protocols.htm [8 January 2011].

[11] The role of the Secretariat was enlarged from just providing links between member states and the international community. The Secretariat became the main institution that oversees the implementation of the activities of SADC.

Composition and functions of SADC institutions

When discussing regional integration, it is pertinent to always ascertain the nature of the specific regional institutions that carry the mandate to implement the integration agenda. This is because at this level, governance transcends individual member states within the region to a level where decision making is delegated to regional institutions that are in a way independent of member states. This is important because the nature and extent of powers vested in the regional institution determines the institution's ability to propagate the region's integration agenda. Generally, the position among scholars of regional integration is that the existence of supranational institutions within an integrating unit is essential for the propagation of the integration agenda. The importance of the existence of supranational institutions in promoting regional integration cannot be overemphasised. As Mutharika (1972:55) rightly notes, economic cooperation requires the delegation of power to a supranational body entrusted with the task of safeguarding the interest of both the multinational grouping as well as that of the individual member states.

Working from the above premise, one question that comes to mind is whether the transformation from SADCC to SADC brought about the creation of supranational institutions. Supranational institutions are largely independent of individual member states and they are vested with decision-making powers which bind member states (Tallberg 2002: 23). However, for these institutions to promote integration, their decision-making powers must be exercised in a manner that portrays the common agenda of the regional body. The key element that supranational institutions have is that they possess decision-making powers which are delegated to them by member states, yet they are independent of member states (Ibid). The European Court of Justice has viewed supranational institutions in terms of their independence from member states and their competence to make decisions that will bind member states and their subjects (Costa 1964: 585). Drawing from this brief illustration of supranational institutions, a regional body would be deemed supranational if it exhibits these elements.

Mvungi (1994:85) has argued that the institutions that existed within the era of SADCC did not qualify as supranational institutions because they had no authority separate from that of their member states. Mvungi points out that article IX of the Memorandum of Understanding on SADCC gave SADCC legal capacity to exercise its functions but made such capacity subject to its consistence with the laws of member states. In this regard, it is valid to argue

that since the legal capacity of SADCC to exercise its functions under the Memorandum of Understanding was made subject to the dictate of national laws, it was practically impossible for it to have supremacy over national laws or have the competence to make decisions that would bind member states. In other words, the institutions that existed under SADCC lacked the requisite features of a supranational institution.

However, while it is conceded that the institutions under SADCC lacked the requisite features of a supranational institution, one must bear in mind that when SADCC was established the political terrain was quite different in that the quest for independence of some southern African states was top on the agenda. And as such, creating an organisation which to an extent would limit the powers of its members would have been impracticable at that time. The focus at the time was to harness resources and to identify and develop the areas of strength and weakness of the region. Be that as it may, the SADCC institutions still worked hard towards the economic development and success of the region (Ndulo 1999:10).

With the emergence of a new legal regime under the auspices of the SADC Treaty, the mandate and nature of the institutions also changed. The SADC Treaty created institutions which have the semblance of supranational institutions. The transformation from SADCC into SADC not only entailed a legal transformation but it also amounted to an institutional change. The change brought about a difference in the manner in which member states handled issues of integration within the region. Although member states are still actively involved in the development of various sectors, the activities are coordinated at the regional level and as such the development of SADC became a common enterprise run by SADC institutions. The pertinent question that is being asked, however, is whether this transformation has helped to improve regional integration in SADC. Put differently, has the transformation from SADCC to SADC brought about the creation of *de jure* and *de facto* supranational institutions in SADC?

Article 9(1) of the SADC Treaty establishes eight institutions which are vested with the responsibility of running the affairs of SADC. The institutions are the Summit of Heads of State or Government, the Organ on Politics, Defence and Security Cooperation, the Council of Ministers, the Standing Committee of Officials, the Secretariat, the Tribunal and SADC National Committees.

The Summit

The Summit is made up of all the Heads of States or Governments of SADC states. It is the supreme policy-making institution in SADC and is vested with the responsibility of controlling and giving policy directions for all SADC institutions and member states. The Summit is headed by a Chairperson and Deputy Chairperson who are elected from the members and they hold office for one year on a rotational basis. The Summit meets at least twice a year, appoints the Executive and Deputy Secretary of the Secretariat, admits new members into SADC, and may create committees and other institutions when necessary. The decisions of the Summit are taken by consensus and are binding (SADC Treaty: Art. 10). [12] However, the SADC Treaty does not state if these binding decisions of the Summit have a direct effect in the territory of member states.

Although the competence of the Summit to make binding decisions is not in dispute, for instance, it has exercised this power when it suspended Madagascar from SADC. But uncertainty remains over whether decisions of the Summit are of direct effect and take primacy over national laws. 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. In principle, a regional institution whose decisions are not directly binding on member states may find it difficult to ensure the implementation of its decisions and this would inevitably tend to affect the process of integration.

The independence of the Summit as a supranational institution is also questionable in that it comprises the Heads of State or Government of member states. Ordinarily, the composition of the Summit should not raise an eyebrow, but given the fact that it is vested with the powers to make all policy decisions, it is doubtful if the Summit can make decisions that are not favourable to some member states but favourable to the region.[13] The Summit's recent inability to direct the Republic of Zimbabwe to comply with a decision of the SADC Tribunal points to the fact that the identity of the Summit and that of its member states might be intrinsically linked. This also points to the fact that the Summit as an institution of SADC has

[12] It is important to also mention that save for the Tribunal, the SADC Treaty is silent on whether decisions of other SADC institutions such as the Council of Ministers are binding on member states.
[13] This point is strengthened by the fact that the Summit reaches it decisions through consensus and as such a member state may decide to protect its interest by voting against a policy and by so doing denying the Summit of the required consensus.

not garnered enough political will to draw the line between the individual interest of member states and that of the region. If this kind of trend continues, the Summit could single-handedly put asunder all the efforts towards regional integration.

The Organ on Politics, Defence and Security Cooperation

The Organ on Politics, Defence and Security Co-operation is headed by a chairperson and a deputy. They are appointed by the Summit and the chairperson of the Summit is precluded from been appointed as the chairperson of the Organ. The Organ reports to the Summit and has a Ministerial Committee which is made up of ministers from member states responsible for foreign affairs, defence, public security or state security (SADC Treaty 1992: Art. 10A). The Organ has as its responsibility the promotion of peace and security, prevention of the breakdown of law and order, development of common foreign policies, enforcement of action in line with international law, promotion of the development of democratic institutions among member states, and so forth (Protocol on Politics 2001: Art. 2). The objectives of the Organ are meant to strengthen regional integration in the region. However, from the composition and reporting structure of this institution, it is evident that it is part and parcel of the Summit and there are no checks and balances in place to guarantee its independence as a distinct institution.

The Council of Ministers

The Council of Ministers consists of one minister from each of the member states and the chairperson and deputy are appointed by the member states holding the chairpersonship and deputy chairpersonship respectively. The Council of Ministers oversees the functioning and development of SADC, implements policies, ensures proper execution of projects, makes recommendations to the Summit, draws up terms of conditions of service for employees of SADC institutions, and develops and implements the SADC common agenda and strategic priorities. The Council meets at least four times a year and its decisions are by consensus. It reports to the Summit and recommends to the Summit applications for membership of SADC (SADC Treaty 1992: Art. 11). In general, the Council serves as the engine room of SADC in that it develops and implements the common agenda of SADC. One challenge which the Council faces 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.

The Integrated Committee of Ministers

The Integrated Committee of Ministers is made up of at least two ministers from each member state and they meet at least once a year. The Chair and Deputy Chair are respectively appointed by the member states that hold the position of Chair and Deputy Chair of the Council. The Integrated Committee monitors the core areas of integration which include trade, industry, finance and investment, infrastructure and services, food, agriculture and natural resources, and social and human development. Decisions of the Integrated Committee are by consensus and are reported to the Council (SADC Treaty 1992: Art. 12).

The Standing Committee of Officials

The Standing Committee of Officials is a technical advisory committee to the Council. It consists of one permanent secretary from the ministry of the member state which serves as the SADC national contact point. The Standing Committee processes documentation from the Integrated Committee of Ministers and reports to the Council. The Standing Committee meets at least four times a year and its decisions are by consensus. The Chair and Deputy are respectively appointed from the member states that hold the position of Chair and Deputy Chair of the Council (SADC treaty 1992: Art. 13).

The Secretariat

The Secretariat serves as the principal executive institution of SADC. It is charged with the responsibility of organising, mobilising, coordinating, implementing and administering the policies and programmes of SADC (SADC Treaty 1992: Art. 14). The Secretariat is headed by an Executive Secretary who is responsible for consulting with governments and institutions of member states, running the affairs of the Secretariat, and fulfilling any other function that may be given to the Secretariat by the Council. The Executive Secretary is appointed for a term of four years which may be renewed for another period not exceeding four years (SADC Treaty 1992: Art. 15).

The fact that the Executive Secretary is appointed by the Summit may affect the Secretariat's ability to pursue member states that do not implement SADC policies. The situation is further complicated by the fact that the tenure of office of the Executive Secretary is not guaranteed. Although he/she is appointed for a term of four years, there is nothing in the

SADC Treaty which precludes the Summit from removing him/her from office before the end of their tenure.

The SADC Secretariat does not have the powers to compel member states to implement SADC policies or programmes. One would expect that an institution like the Secretariat which has the responsibility of implementing SADC programmes would also be given the power to take action against member states who fail to implement the agreed policies.

The Secretariat merely serves as an administrative body which runs the affairs of SADC. The SADC Secretariat has been largely ineffective in ensuring regional integration because it has no real powers assigned to it. Drawing from the example of the European Union, it may be beneficial to SADC if the Secretariat like the European Commission (Consolidated EC Treaty: Art. 226) is expressly granted powers to institute action against a member states who fails to fulfil its obligation under the SADC Treaty or other relevant SADC legislation.

The SADC Tribunal

The SADC Tribunal is a cornerstone to regional integration in SADC. This is because it plays a vital role in ensuring compliance with SADC rules. It ensures that the provisions of the SADC Treaty and its subsidiary legislations are properly interpreted and adhered to. It also adjudicates disputes that are referred to it and its decisions are final and binding. In addition, the Tribunal also gives advisory opinions to the Summit and Council (SADC Treaty 1992: Art. 16). The composition, powers, rules and procedure of the Tribunal are set out in a separate protocol. The Protocol on the Tribunal gives the Tribunal the jurisdiction over all disputes that relate to the interpretation, validity and application of the SADC Treaty and it protocols (Protocol on Tribunal: Art. 14). The scope of the Tribunal includes all disputes between member states and between natural or legal persons and member states (Protocol on Tribunal: Art. 15). The Tribunal has the jurisdiction to entertain disputes between SADC and the member states. Also, an institution of SADC can bring an action against a member state (Protocol on Tribunal: Art. 17).[14] The Tribunal consists of ten judges and is headed by a President. Of the ten judges, five are regular members and the other five are called upon by the President when the need arises (Protocol on Tribunal: Art. 3). The judges are appointed

[14] One would expect that the Secretariat which is vested with the responsibility of ensuring that programmes of SADC are implemented would take advantage of this provision when member states do not comply with the regional obligation. Until now no suit has been initiated against a member state at the instance of any of the SADC institutions.

for a term of five years and may be re-appointed for another term of five years (Protocol on Tribunal: Art. 6).

Recently, doubts have been cast on the competence of the SADC Tribunal and its ability to promote regional integration. These doubts stem from the fact that in August 2010 in Windhoek, the SADC Summit reached a decision to suspend the activities of the SADC Tribunal and directed the Secretariat to commission a study which would review the mandate of the Tribunal. The study would review the operations of the Tribunal, its role and responsibility, the jurisdiction of the Tribunal, its power to review decisions of domestic courts, and so forth.

The Summit's decision to suspend the Tribunal from hearing new cases traces its origin to the displeasure expressed by the Republic of Zimbabwe on the Tribunal's decision in the case of Mike Campbell & others v Republic of Zimbabwe (2007). In the Campbell case, the SADC Tribunal found in favour of the applicants and held that the Republic of Zimbabwe was in breach of Article 6 (2) of the SADC Treaty.

The Republic of Zimbabwe refused to recognise the decision of the Tribunal and openly criticised the Tribunal. The applicants drew the attention of the Tribunal to the fact that Zimbabwe refused to comply with the Tribunal's decision and urged the Tribunal to take necessary action (Campbell v Zimbabwe 2008, Fick v Zimbabwe 2010). The Tribunal, in line with Article 32(5) of the Protocol on the Tribunal, reported Zimbabwe's failure to comply with its decision to the Summit for appropriate action.

The Summit, rather than compel Zimbabwe to comply with the decision of the Tribunal decided to stop the SADC Tribunal from taking new cases for a period of six months in order to review the mandate of the Tribunal and other sundry issues. While the suspension was in effect, the Tribunal would be unable to entertain new cases but would continue to hear cases that had been commenced before the suspension was imposed.

The decision of the Summit to suspend the activities of the Tribunal has caused a crisis for the Tribunal. The suspension has put a question mark on the credibility and independence of the SADC Tribunal. While it is acknowledged that the Summit has the capacity to review the mandate of the Tribunal, suspending the activities of the Tribunal as a result of a member state's dissatisfaction with the decision of the Tribunal casts doubt on the acceptability of decisions of supranational institutions by SADC member states. This is because the Tribunal

like national courts is meant to act as the watchdog in the governance scheme. Where the Tribunal is suspended at a point in time when there is a hot debate on the compliance of its decision by a member state, a suspension of its activities automatically whittles down the Tribunal's efficacy and integrity. This in turn becomes a dangerous precedent for an institution that is entrusted with developing the jurisprudence of the region.

Another challenge facing the SADC Tribunal is its ability to make decisions which are binding and have direct effect in the territory of member states. The SADC Tribunal does not have its own judgement enforcement mechanism; it relies on member states to enforce its decisions. 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. This creates a gap in the enforcement of the Tribunals' decisions because it subjects the enforcement of the Tribunal's decisions to the domestic laws that govern the enforcement of foreign judgements in member states. This scenario recently played out when the Zimbabwe High Court in the case of Gramara (Pvt) Ltd & Another v The Government of Zimbabwe (2009) refused to register and enforce a judgement of the SADC Tribunal on the grounds that the decision of the SADC Tribunal was contrary to public policy in the Republic of Zimbabwe. Actions like this one are clearly in contrast to the spirit of regional integration and send out a signal that member states can undermine regional jurisprudence or fail to honour their obligations under the relevant regional instruments. 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 (Arnull 1999).

The SADC National Committees

The last SADC institution established in terms of Article 9(1) is the SADC National Committees. Each member state is expected to create a National Committee which is made up of stakeholders in the member state. These stakeholders include the: government, private sector, civil society, non-governmental organisations and workers' and employers' organisations. The function of the National Committee is to provide input into the SADC agenda at a national level. It also serves as a starting point for formulating SADC policies and helps to coordinate and oversee at the national level the implementation of a SADC programme of action (SADC Treaty 1992: Art. 16A). The National Committees are relatively important in that through this institution SADC is able to adopt a bottom-up

approach to regional integration, and stakeholders at the national level are able to make inputs in the decisions that are adopted at the regional level.

The SADC Parliamentary Forum

The SADC Parliamentary Forum, though not expressly listed in Article 9 (1) of the SADC Treaty, is also an institution of SADC. It was created by the Summit in 1997 on the basis of Article 9 (2).[15] Among the objectives of the Parliamentary Forum are strengthening the implementation of SADC policies through the involvement of parliamentarians (SADCPF Constitution 2004: Art. 5). Membership of the Parliamentary Forum is open to national parliamentarians of SADC member states (SADCPF Constitution 2004: Art. 6). The SADC Parliamentary Forum does not have legislative powers and does not pass SADC legislation. As part of the Parliamentary Forum's quest to enhance regional integration in the region, it strives to increase awareness and knowledge of SADC protocols, declarations and objectives at the national level (SADCPF Strategic Plan 2006-2010). At the moment, the ability of the Parliamentary Forum to significantly contribute to regional integration in SADC seems to be in doubt as there are still a large number of important SADC protocols that are yet to be ratified by member states. If SADC Parliamentarians are serious about regional integration, they would take the necessary steps to ensure that SADC protocols are ratified by the member states and as such give individuals the right to claim under those protocols in national courts.

The Troika and Subsidiary Institutions

These are two other important concepts in the institutional structure of SADC that are worth mentioning. The first is the Troika system provided for in Article 9A of the SADC Treaty and the other is the concept of subsidiarity. The Troika applies to the Summit, the Organ, the Council, the Integrated Committee of Ministers and the Standing Committee of Officials. The Troika of each of these institutions consists of a chair, the incoming chair and the outgoing chair. They are responsible for decision making, facilitating the implementation of decisions and providing policy directions in-between the meetings of the institution. This invariably makes the Troika the coordinator of the affairs of these institutions. While this concept is commendable in that it ensures that decisions can be reached promptly on

[15] See Bookie Monica Kethusegile-Juru v The Southern African Development Community Parliamentary Forum, Case No. SADC (T) 02/2009. In this case, the SADC Tribunal confirmed that the SADC Parliamentary Forum was an institution of SADC created: see Article 9(2).

important issues that cannot wait until a meeting of the institution is convened, it might also serve as an instrument to perpetrate the self-interest of a tiny cabal.

In implementing programmes under the SADC common agenda, SADC makes use of Subsidiary Institutions. These institutions are created through the principle of subsidiarity and under the notion that 'all programmes and activities are undertaken at levels where they can be best handled. This means that the involvement of institutions, authorities, and agencies outside SADC structures to initiate and implement regional programmes using their own generated resources should be promoted and encouraged' (SADC RISDP 2003: 84). These institutions are not created under Article 9 of the SADC Treaty and they are established by stakeholders in the region with the aim of helping to achieve the objectives of SADC. Though these institutions are housed under the umbrella of SADC, they are not funded by SADC. Examples of these kinds of institutions are the SADC Development Finance Resource Centre[16] and the various structures created under SADC Standardisation, Quality Assurance, Accreditation and Metrology[17].

Conclusion

The role of supranational institutions has long been the subject of discourse for countries involved in regional integration (Best 2005:1). This paper has worked from a premise that prior to the transformation of SADCC to SADC, there were not in existence any central institutions within SADCC to coordinate integration efforts. However, with the adoption of the SADC Treaty in 1992, the new legal landscape paved way for the creation of central institutions which were vested with the responsibility of implementing the regional integration process in SADC. The focus of the paper was to determine if the central institutions have been able to ensure regional integration in SADC. The ability of the central institutions to ensure regional integration was measured by the extent to which they have compelled member states to comply with their regional obligation.

To achieve this goal, the paper outlined the transformation from SADCC to SADC by taking a cursory look at the origins of SADC and briefly discussed the political and economic underpinnings for the creation of SADC. The scope, mandate and functions of SADC institutions were also discussed. From the analysis of the institutions of SADC it is clear that

[16] See http://www.sadc-dfrc.org/index.php?id=13 [10 February, 2011].
[17] See http://www.sadc.int/index/browse/page/168#article9 and http://www.sadcmet.org/ [10 February, 2011].

while in principle there seems to be a shift towards adopting an integration regime which is governed by central institutions, the reality remains that the interest of individual member states still reigns supreme. Put differently, a bulk of the institutions of SADC is controlled by direct representatives of member states and as such it raises doubts as to the independence of these institutions. While one might argue that the presence of direct representatives of member states in the SADC institutions does not necessarily affect the ability of these institutions to reach decisions that would be beneficial to the region, the recent development regarding Zimbabwe casts doubts on the ability of these institutions to ensure that SADC rules are complied with. If this trend continues, doubts would be cast on the efficacy of these central institutions to govern the integration process.

For regional integration to succeed in SADC, the Summit must be ready to exert its political will to sustain the integration process. This can be expressed in the form of empowering the Secretariat and the Tribunal to have the authority to sanction erring member states. These sanctions do not have to be imposed by the Summit as is currently the case. Also, issues of policy creation and implementation should not be delegated to the Secretariat but they should rather be vested in the Secretariat. The Secretariat should have the powers to formulate appropriate legislations that would enhance integration in the region. Likewise, member states have to take the initiative to ratify and implement SADC protocols.

The true test of transfer of powers to central institutions should lie in compliance with decisions of institutions like the Tribunal. Compliance with the decisions of the Tribunal is vital because among all the institutions created in Article 9 (1) of the SADC Treaty, it is the only institution that does not report to the Summit. It is the contention of this paper that member states to a large extent still control the process of regional integration and are yet to yield power to central institutions. While these central institutions do exist, most of them are controlled by member states and the ones not controlled by member states have no real authority over member states. The attitude of the Summit towards Zimbabwe's non-compliance with the decisions of the SADC Tribunal points to the fact that regional integration still has a long way to go in SADC.

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Chapter 2

The Security Dimension of Regional Integration in SADC

André du Pisani

Introduction

Southern Africa is a region ravaged by conflicts. What distinguishes it is not the presence of conflict, but the region's history in attempting to resolve such conflicts. As this chapter will show, this aspect and the politics of the region have proven to be formative for the security dimensions of the project of regional integration (Omari and Macaringue 2007: 45).

Historically, the member states of the Southern African Development Community (SADC) privileged economic cooperation are engaged in what Deng (1995), writing on Sudan, called a 'war of visions'.[1] This in turn mediated an uneven process towards institutionalised regional integration, particularly in the domains of defence and security. The complex interfaces between conflict, security and development is the focus of the *World Development Report 2011* that was released in April 2011. From a comparative perspective formal security cooperation among developing countries is essentially defined by the politics (as distinct from the economics) of a particular region and in the context of the global collective security system of the United Nations (UN) (Cawthra 2007: 23-44).

The most explicit provision about the security functions of regional organisations is contained in Chapter VIII of the UN Charter, that reads: 'The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority' (Article 53.1) and, 'Members of the United Nations… shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council' (Article 52.2). Regional Economic Communities (RECs), such as SADC, thus represent sites of first resort as far as the peaceful resolution of conflicts is concerned, but the UN Charter makes it clear that coercive means of conflict intervention requires the authorisation of the Security Council (Article 53.1).

The division of the international system into regions is not as self-evident as the UN Charter might have envisaged it at the time, and is further complicated by the existence of various

[1] See also Khadigala (1994).

sub-regional organisations, particularly in Africa. The African Union (AU), for example, is supported by a number of such organisations, of which SADC is but one.

Nevertheless, there has been a significant rise in political, economic, and security cooperation at the regional level. From a theoretical perspective (Hettne, Inotai, and Sunkel 2000: xix-xx; CCR 2008), it has been suggested that such forms of regional interaction display the characteristics of 'new regionalism'. Multi-dimensional interaction in the domains of economic, political, social, cultural, and security cooperation that transcends traditional forms of free-trade regimes or security alliances is characterised by the following (Fawcett and Hurrel 1995: 3-4):

- It is driven by a combination of economic or security imperatives, as well as by ecological and other developmental concerns.
- It involves both state and non-state actors, and to some extent is driven from below rather than from above.
- It is outward looking, or 'open', in the sense that it seeks to integrate member states into the global political economy rather than erecting tariff barriers.
- It varies in the extent of institutionalisation, with some regional organisations deliberately avoiding large bureaucracies.
- It sometimes spans the divide between the developed and developing world, e.g., the North American Free Trade Agreement (NAFTA).

Although an absolute distinction cannot be made between 'old' and 'new regionalism', security cooperation in SADC can conveniently be considered from such a perspective, provided that the history and political 'drivers' of such cooperation be kept in mind. In the case of SADC, for example, it can be argued that the security dimensions of regional integration and cooperation are being driven by both *negative* and *positive* features (Baregu 2003: 21).

Given the history of security cooperation in the SADC region and considering the security architecture, especially since 1992 when the current treaty came into force, the idea of a 'security complex' i.e. 'a group of states whose primary security concerns link together sufficiently closely that their national securities cannot realistically be considered apart from one another' (Baregu 2003: 21), is useful for analysing security cooperation in SADC.

A 'security complex', however, does not by and in itself define a region, nor does it adequately explain the nature of security cooperation, but security interactions of this nature are bound to have a significant imprint on the institutional culture and operations of a regional organisation. Furthermore, as regions progress towards deeper and more diverse forms of integration and develop and practise common values, a much closer nexus between security linkages and political cooperation emerges. At such a point, one can talk of 'security regionalism'.

SADC: towards a security community

As a Regional Economic Community (REC), SADC displays characteristics of a nascent 'security community' under construction.[2] It would, however, be premature to argue that SADC has evolved into a robust 'security community'. This is so, because the construct of a 'security community' raises several complex and potentially intractable concepts such as what defines 'community', governance, common institutions, democratic transformation and common values and policies. For a region to qualify as a matured 'security community', there needs to be a *positive and reciprocal* relationship between these variables, the prevalence of mutual trust among the members states and a process of 'collective identity formation' (Adler and Barnett 1998: 29).

From the perspective of 'New Institutionalism' (Hurrell 1993), however, it can be argued that SADC has evolved towards some common values, such as the preference for peaceful, democratic change of political leadership, a common framework for the conduct of legitimate and transparent elections[3], a regional code for policing, common protocols that govern security and development, trade and investment agreements among member states, and the existence of a common doctrine for Peace Support Operations (PSOs). Ultimately, however, a 'security community' would be impossible to sustain in the context where democracies and their normative values are not the norm.

The nature of security cooperation in SADC takes many forms, such as a mutual defence pact (SADC Mutual Defence Pact 2003), common Peace Support Operations (PSOs) under the provisions of the SADC Standby Force (SADCSF) and the African Union (AU), non-

[2] See Deutsch (1957). See also Adler & Barnett (1989). For an initial application of the notion of a 'security community' to SADC, see Ngoma (2005) and Van Nieuwkerk (2009: 99-115).
[3] See the Principles for Election Management, Monitoring and Observation in the SADC Region, adopted on 6 November 2003 at the Kopanong Hotel and Conference Centre, Benoni, South Africa.

aggression pacts, and common collaborative security arrangements augmented through bilateral Joint Permanent Commissions (JPCs). The various protocols, notably the 2001 SADC Protocol on Politics, Defence and Security Cooperation and the subsequent Strategic Indicative Plan for the Organ on Politics, Defence and Security Cooperation (SIPO) of 2004[4], are additional strings in the bow of a nascent 'security community'.

Security cooperation

The SADC Consultative Conference that took place in Windhoek, Namibia, in April 2006, although a good five years ago, is the appropriate starting point for understanding current forms of security cooperation in the region. Hence, key decisions and outcomes of this conference are summarised in this contribution. The principal outcome of this meeting was the Windhoek Declaration on a New SADC-ICP Partnership (or 'Windhoek Declaration'). This declaration came in the wake of significant institutional changes at SADC level. These included the restructuring of key SADC institutions, a more coherent SADC Common Agenda, the development of the Regional Indicative Strategic Plan (RISDP) two years earlier and the Strategic Indicative Plan for the Organ on Politics, Defence and Security Cooperation *(*SIPO), also in 2004.

Earlier formative changes in the regional and global political economy impacted on both the security and development projects of SADC. These included, but are not limited to, the adoption in 2000 by Heads of State and Government at the United Nations General Assembly of the Millennium Declaration, and the acceptance of the Millennium Development Goals (MDGs) as a monitoring framework for progress on key development indicators, as well as the September 2005 World Summit Outcome as adopted by the Heads of State at the Summit.

Together with a number of international memoranda and declarations on aid effectiveness, notably the Paris Declaration on Aid Effectiveness of March 2005, SADC decided in Windhoek to reconfigure cooperation between itself and International Cooperating Partners (ICPs). The Windhoek Declaration put in place a new SADC/ICP Partnership for the implementation of the SADC Common Agenda as outlined in the RISDP and the SIPO.

[4] The original 2004 SIPO is currently under review; see a subsequent discussion in this chapter.

The overall objective of the New Partnership as defined in the Windhoek Declaration (2006: 4) was 'to contribute towards the achievement of the SADC Common Agenda as articulated by SADC, in particular, the attainment of the SADC Mission of promoting sustainable and equitable economic growth and socio-economic development through efficient productive systems; deeper cooperation and integration; good governance; strengthened capacity and participation of stakeholders; and durable peace and security so that the region emerges as a competitive and effective player in international relations and the world economy'.

Specific objectives of the partnership included, among others 'Ensuring regular, institutionalised dialogue at the political, policy and technical levels for constructive engagement, information and experience exchange and the promotion of best practices on development cooperation' (Ibid.).

The New SADC-ICP Partnership was based on 'fundamental principles of good governance, democracy, and respect for the rule of law and human rights, gender equality, peace, stability and security as enshrined in the SADC Treaty and reiterated in the RISDP and the SIPO'(Ibid.: 5).

Significantly, the Windhoek Declaration stated that the 'SADC exercises effective leadership in coordinating and implementing the SADC Common Agenda (RISDP and SIPO) at regional and national levels'. It continues in similar vein [that SADC committed itself to 'Translate the RISDP and SIPO into prioritized results-oriented operational programmes expressed in mid-term expenditure frameworks and annual budgets' while the ICPs committed themselves to 'Respect SADC leadership and help strengthen SADC's capacity to exercise it at regional and international levels' (Ibid.: 5) .

The Windhoek Declaration embodied the understanding that RISDP and SIPO, the two principal policy frameworks on regional development and security respectively, would be aligned with a view toward responding to the wider goals of supporting SADC member states achieve the Millennium Development Goals (MDGs), strengthen human security, and attain their respective poverty reduction strategies. In addition, these two policy frameworks were meant to implement and achieve the objectives contained in the New Partnership for Africa's Development (NEPAD), to which all SADC member states subscribed.

As expected, the Declaration (Ibid.: 13) lists several priority areas for cooperation in the RISDP. These include:

(a) Crosscutting areas, including poverty eradication; the combating of the HIV and AIDS pandemic; gender equality and development; science and technology; environment and sustainable development, and statistics, and

(b) Sectoral cooperation and integration areas – trade/economic liberalisation and development; infrastructure support for regional integration and poverty eradication; sustainable food security; and human and social development. Since the SIPO aims at enabling the realisation of the objectives outlined in the RISDP through the creation of a peaceful and stable political and security environment, the following areas of cooperation were identified:

    (a) Peace support and humanitarian operations;

    (b) Democracy and good governance;

    (c) Disaster management;

    (d) The combating of organised crime including drug trafficking, money laundering and human trafficking;

    (e) Post-conflict reconstruction and social reintegration interventions;

    (f) Mine clearance;

    (g) HIV and AIDS mitigation;

    (h) Small arms and light weapons control;

    (i) Joint training exercises, and

    (j) Food security.

Further to the specific areas of cooperation listed under the RISDP and the SIPO, the Declaration called for ICPs' support for capacity building at both the regional and national levels in order to facilitate effective implementation and monitoring of the various programmes and their respective activities.

The Declaration also dealt with funding arrangements, inclusive of sector-wide and programme support and called for comprehensive results-based monitoring and transparent

reporting at both the strategic and the operational level on progress made with implementing the RISDP and the SIPO. Annual progress reports would be tabled at the Integrated Committee of Ministers and the Ministerial Committee of the Organ on Politics, Defence and Security Cooperation (OPDS), respectively.

Finally, a Joint SADC ICP Task Force (JTF) consisting of a wider group of SADC and ICPs representatives, the latter under the chairpersonship of the Republic of Austria, was established. The meetings of the Task Force would be co-chaired by the European Commission Delegation and the SADC Secretariat.

Recent progress

As shown above, the 2006 Consultative Conference was meant to be formative for subsequent security-related developments in SADC. Substantively, however, implementation of the 2006 Declaration has been slow and uneven, mostly for political reasons and the preoccupation of some member states with domestic reconstruction. One area that has seen meaningful reform, however, is that of policing. Established in 1996, the Southern African Regional Police Chiefs Cooperation Organisation (SARPCCO) has emerged as the key mechanism of cooperation between police in the SADC region. Since 2010 SARPCCO has set the agenda for regional policing with particular emphasis on organised crime (focusing in the initial phase on the illegal trade in stolen vehicles, drugs, weapons and money laundering). SARPPCO also approved a Code of Conduct for SADC police forces, and since 2009-10, the Legal Sub-Committee has concerned itself with the harmonisation of legislation on aspects such as corruption, organised crime and money laundering, while the Training Sub-Committee has initiated various activities – often in collaboration with private research networks and training providers (Van der Spuy 2009:43).

Since its formal recognition by SADC as the key agency in the domain of policing in 2009, SARPCCO has most recently re-engaged the matter of a region-wide Code of Conduct for policing, while training for peacekeeping has been added to a growing list of training needs with the decision to build African peacekeeping capacity.

Given the fragile social fabric and human security fractures in many of the SADC member states, police reform has emerged as a key long-term policy concern. One analyst comments succinctly: 'It is important that the international community and the most influential donors,

in particular, recognize that reform of the police is a long-term project marked by differing stages of consolidation and not the fruits of a once-off short-term intervention' (Van der Spuy 2009: 43).

Another area where progress has been made in 2010 is that of Peace Support Operations (PSOs). Although the Harare-based Regional Peacekeeping Training Centre (RPTC) was duly recognised by the SADC member states as a SADC-funded institution in 2009, since then the RPTC has been reconfigured and training for peacekeeping and peace support operations has commenced albeit with a small permanent staff and rather limited support from some member states. Political difficulties in the host country, Zimbabwe, however, have made it difficult for the RPTC to develop fully, so as to robustly discharge its mandate of building capacity in this vitally important area (Ibid.: 55).

The former SADC Brigade that was officially launched in August 2007 in Lusaka, Zambia, was renamed in 2010 as the SADC Standby Force (SADCSF) in compliance with the provisions that govern the African Standby Force of the African Union.[5] At its inception, the erstwhile SADC Brigade was augmented by a Memorandum of Understanding (M0U) to guide its operations and member states' contributions, while it was widely expected that the SADCSF would be fully operational in June 2010 and its Planning Element suitably strengthened. While meaningful progress has indeed been made, notably in terms of Standard Operating Procedures (SOPs), command and control, logistics, funding, doctrine and training, the main logistic depot is still in its infancy.[6]

While a Regional Early Warning Centre (REWC) was established in 2006 in Gaborone, Botswana, at the time of writing, the REWC was not yet fully operational, notwithstanding the fact that an operational plan had been developed for it. The REWC is only as effective as the willingness of member states to share security-related information and intelligence. Ultimately, the REWC is meant to link up with the Continental Early Warning System of the African Union, as provided for in Article 12 of the 2002 Protocol of the Peace and Security Council of the AU.

[5] Notwithstanding capacity and fiscal constraints, SADCSF conducted a Map Exercise (MAPEX) and a Command Post Exercise, both in 2009, and in 2010 a joint training exercise called 'Dolphino' held along the Namibian coast.

[6] See the chapter by Oppong (2011) in this volume.

Arguably one of the potentially most significant developments in 2010 was a decision taken by the Summit, to recast the original SIPO of 2004. At the time of writing, a Draft Strategic Indicative Plan (2010-2015) for the OPDS has been composed; it however, still awaits formal adoption by the Summit in 2011. As argued above, SIPO together with the RISDP constitutes the two key policy frameworks that guide SADC in the domains of collective and common security, as well as balanced regional development. Since the process was originally initiated to develop an Indicative Strategic Plan for the OPDS in 2001 and its subsequent adoption by the Summit in 2004, the SIPO with its four sectors – the Political Sector, the Defence Sector, the State Security Sector and the Public Security Sector – each with specific objectives and corresponding strategies/activities, was never really fully actualised. Several reasons account for this state of affairs, among these the policy complexity and comprehensiveness of the original SIPO, as well as human resource constraints within the OPDS. Since its inception the OPDS has been understaffed, particularly in the Department for Politics, Defence and Security and its sub-divisions: the Directorate for Politics and Diplomacy, the Directorate for Defence and Diplomacy, and the Strategic Analysis Unit, the latter responsible for the Situation Room in the Regional Early Warning Centre (REWC).

The text of the revised SIPO has more coherence than the original version, while it proposes to strengthen human and public security and the gender dimensions of security and recommends institutional linkages between the Defence Intelligence Standing Committee (DISC) and the Regional Early Warning Centre (REWC), among others. It contains fewer strategies for implementation than the original (2004) version. If adopted by the Summit, it should articulate more closely with the programmatic activities provided for in the RISDP. The revised SIPO harks back to the April 2006 SADC Consultative Conference held in Windhoek and was undertaken with input from research institutions and civil society in the region.

Another matter with both political and security implications that awaits resolution in 2011 is that of the non-compliance of SADC member states with decisions of the SADC Tribunal. To date, there have been three instances in which Zimbabwe has been referred to the SADC Summit Heads of State and Government for its non-compliance with decisions of the SADC Tribunal. At the SADC Summit of August 2010, it was resolved to appoint a committee of suitably qualified persons to report back to the Summit within six, but not exceeding twelve months, on proposed changes to the mandate and powers of the Tribunal.

The report from this committee of experts is still awaited and it is widely expected that it will serve at the Summit in August 2011.

Mediation: Madagascar and Zimbabwe

The last aspect that this chapter addresses is that of the role of SADC in managing political crises and conflicts, with special reference to Madagascar and Zimbabwe. While SADC also engaged Lesotho and the Democratic Republic of Congo (DRC), the focus of this chapter falls on Madagascar and Zimbabwe, since these two conflicts have dominated 2010 and at the time of writing have yet to be resolved to the satisfaction of all parties concerned.

Madagascar

The backdrop to the current crisis in Madagascar dates back to 2001 when Marc Ravalomanana established his grip on presidential power, using his position as mayor of Antananarivo, the capital city, and his considerable business interests to propel him forward. However, his power began to be challenged in 2008 when Andry Rajoelina, another flamboyant business person and former disc jockey, became mayor of Antananarivo, and his challenge, based on popular protests in the capital, culminated in Ravalomanana leaving office after a military intervention in March 2009. With the support of a small but powerful unit of the army, responsible for technical and personnel support, Rajoelina and his allies established a High Transitional Authority (HTA) which became the de facto government, as well as a Military Council for National Defence (MCND).

While the immediate antecedent to the current crisis began in 2009, 'its roots may be traced back to the difficult history of democratic transition in the country, and the failure to consolidate democratic processes and structures' (Cawthra 2010: 13). Madagascar is a Least Developed Country (LDC) with 70 percent of its population living on less than US$2 per day ('Country profile: Madagascar' 2009: 30). With an estimated population in excess of 20 million, this means that there are large numbers of people living in extreme poverty, and the social economy is characterised by deep inequalities.

Both SADC and the African Union (AU) reacted strongly to this unconstitutional change, and SADC subsequently became one of the principal mediators in an international coalition, eventually leading to an agreement for a transitional government. Rajoelina, however, did not honour this agreement, leaving the conflict unresolved.

In August 2005 Madagascar joined SADC, and since then former president, Ravalomana, and the governing party, Tiako-Madagasikara (TIM), cemented ties with the United States of America (US) and opened up the economy for investment from China and South Korea. After the unconstitutional transfer of power from Ravalomanana to Rajoelina in March 2009, Madagascar was suspended from both the AU and SADC. The crisis precipitated an economic meltdown, terminated investment and trade agreements and led to the evaporation of most external funding for the government (constituting about 70 percent of its income). With former president Ravalomanana in exile in South Africa, and with the Rajoelina government de facto in power but not internationally recognised, for SADC, the focus shifted to mediation to resolve the conflict.

Initially instrumental mediation, in the sense of opening up space for communication amongst the political contestants, had been attempted by the Madagascar Council of Churches, but it soon passed to the international community in the form principally of the AU and SADC, with former president Joaquim Chissano of Mozambique, an accomplished mediator, as the principal mediator, appointed on 20 June 2009 by SADC. Throughout the mediation process, the AU remained formally in charge; this subsequently led to tensions between SADC, the AU and a host of other international actors such as the Indian Ocean Commission, the UN and the European Union (EU), which were jointly grouped as the International Contact Group (ICG). The mediation was further complicated when in addition to the two principal political rivals, two former presidents, Ratsiraka and Zafy, proclaimed themselves and their followers as self-styled 'movements', a development that was reluctantly accepted by the international mediators.

The second phase of the mediation took place from 20 to 22 May 2009 and led to agreements amongst the four 'movements' about the holding of elections as soon as possible as well as the establishment of transitional structures, inclusive of a High Authority of the Transition (HAT), a National Council of Reconciliation, an Economic and Social Council, a government to be headed by a prime minister, a Congress of the Transition, a Committee of Reflection on Defence and Security, a High Court of Transition, and an independent electoral commission amongst others. The issue of amnesty was also broached.

A third phase of mediation commenced, when in August 2009, former president Chissano convened a meeting in Maputo, Mozambique where the four 'movements' met in face-to-face negotiations. They agreed to a 15-month transition process and a government of national

unity with a president, a prime minister, three deputy prime ministers, 28 ministers, a legislature with a higher chamber of 65 members and a 'congress of transition' with 258 members, as well as the other transitional arrangements agreed to earlier in May 2009. Rajoelina returned to Madagascar in triumph after the agreement struck in Maputo, especially since it was decided that Ravalomanana would only be able to return to the country when 'favourable political and security conditions' prevailed, according to the *Charte de la Transition* (2009). Furthermore it was agreed that only the president of the transitional government could present himself as a presidential candidate at the end of the 15-month transitional period.

The optimism that accompanied the Maputo agreement of August 2009 soon evaporated as it became increasingly evident that Rajoelina thought he could proceed alone, and disagreements arose over who would fill which public positions. A second conference held in Maputo in the following month, again mediated by former president Joaquim Chissano, during which it was hoped to resolve the allocation of positions in the various transitional structures, fell apart without agreement. Rajoelina then went on to unilaterally install a transitional government, in which some members of the previous government served (including the Minister of Defence) but which was widely rejected by the international community as being unlawful and as violating the previous Maputo agreement. Rajoelina argued that he would respect the terms of the Maputo agreement, provided that the international community lifted sanctions – a demand rejected by all international actors.

In October 2009, further AU mediation followed in Addis Ababa. The three opposition formations agreed that Rajoelina could remain as head of the transitional government provided he did not contest the envisaged presidential elections, and two 'co-presidents' were appointed from the opposition. A formal agreement on the transitional arrangements was signed by the four parties on 7 November 2009, with consensus being reached on the main leadership posts, although the issue of the interim cabinet posts remained unresolved (Cawthra 2010: 15).

This fragile accord was again undermined in December 2009, when the three opposition parties unilaterally and in violation of previous agreements, appointed a 'unity government' after a further meeting held in Maputo. Rajoelina was absent at this meeting, mediated by Joaquim Chissano. Rajoelina retaliated by preventing the return of the opposition groups to Madagascar and pledging to go ahead with parliamentary elections on 20 March 2010 and

rejecting further international involvement in both the elections and the transition. Since then, the brinkmanship and the stalemate continued, and in retrospect, there is now less space for SADC to mediate successfully in the ongoing conflict. Since no SADC members state has core economic or security interests in Madagascar, resolving the conflict in that country is not an immediate concern.

Having briefly outlined the contours of the SADC mediation in Madagascar, the focus now shifts to Zimbabwe.

Zimbabwe

There is a history of political conflict in post-independent Zimbabwe. Initially the conflict was based on contestation between the Zimbabwean African National Union-Patriotic Front (ZANU-PF) and the Patriotic Front-Zimbabwe African National Union (PF-ZANU), the two former liberation movements, which were formed to some extent along ethnic and territorial lines (Raftopoulos and Mlambo 2009: 184-188). There is also a history of authoritarian politics that survived the transition to independence in 1980 and that subsequently undermined the many historical compromises, such as those on land and the integration of military forces of the former ZANU and ZAPU combatants that characterised the Lancaster House Agreement of the previous year and the politics of national reconciliation. Conflict peaked during the mid-1980s. The conflict ended with a unity accord between the two parties in December 1987. With the decline of the 'white Rhodesian vote' (and seats guaranteed under the Lancaster House constitution) Zimbabwe became de facto a dominant party state. A growing political factor, however, was the 'War Veterans' – mainly disgruntled former combatants of ZANU-PF who demanded welfare and other social assistance from the state, including fast-track and large-scale land reform.

The roots of the current economic and political crisis go back to February 2000, when President Robert Mugabe lost a referendum on a new constitution. This constituted the first major recent challenge to his rule and that of his dominant party, ZANU-PF, and followed on the formation of an opposition alliance, the Movement for Democratic Change (MDC), under the leadership of former trade unionist, Morgan Tsvangirai.

While elections in Zimbabwe had been almost completely dominated by ZANU-PF after the end to the Matabeleland crisis of the mid-1980s, the parliamentary election following the lost

referendum of June 2000, was both closely contested and marked, according to international observers, by widespread electoral irregularities (Raftopoulos and Mlambo 2009: 209-210). A subsequent presidential poll held in March 2002 was characterised by violence and, according to most international observers, by irregularities. Significantly, however, many African countries, including SADC member states such as Angola, Namibia and South Africa, declared them legitimate. One of the few dissenting African voices was the SADC Parliamentary Forum, although the SADC Secretariat gave its stamp of approval. All this happened against the backdrop of the second, 'fast-tracked', phase in the history of land reform that proved to generate more conflict inside the country, and growing signs of an economic meltdown, such as inflation and joblessness spiralled out of the control of government.

Cumulatively, these developments led to a significant engagement by the international community, which, however, remained divided on important policy issues and modes of possible intervention in the crisis. In March 2007 at its Dar-es-Salaam Extraordinary Summit, SADC appointed former South African president Thabo Mbeki as its principal mediator.[7] Although Mbeki played a prominent role in making sure that President Mugabe no longer continued to chair the OPDSC at the SADC Summit in August 2001, beyond this, however, Mbeki and SADC took limited action, repeatedly declaring their support for the president and, importantly, characterising the crisis as one of land reform rather than governance, thus giving credence to the nationalist rhetoric of ZANU-PF. The EU and the US imposed 'targeted sanctions' against the leadership of ZANU-PF, and a number of other countries (initially Australia, Canada, New Zealand and Switzerland) followed suit.

The role of the AU in the subsequent mediation has been minimal; it is best seen as playing an 'oversight role' over SADC, and endorsing its decisions. There have also been important differences within SADC over Zimbabwe. President Ian Khama of Botswana openly broke ranks after the contested 2008 presidential elections, condemning President Mugabe as 'repressive' and calling for internationally-supervised elections; the governments of Zambia and Tanzania were also critical about the lack of progress made in implementing the

[7] It was only when the matter of Zimbabwe was referred to the African Union Summit held in Sharm-El-Sheik, Egypt, in late June 2008 that the AU directed that SADC be put in charge of mediating a solution to the crisis. The subsequent appointment of Thabo Mbeki proved to be controversial, with the MDC- Tjangerai formation arguing that he was pro-ZANU-PF. The March 2007 SADC Extraordinary Summit held in Dar-es-Salaam, United Republic of Tanzania, started the process of mediation. Decisions taken in Dar-es-Salaam were endorsed in Lusaka in April 2008 and subsequently by the AU Summit held in Sharm El-Sheik, Egypt, from 30 June to 1July 2008.

October 2008 Global Political Agreement (GPA), brokered by Thabo Mbeki. Cawthra (2010: 30) comments succinctly: 'On the other hand, the dominant trend within SADC is the continuation of the liberation solidarity of the former Frontline States (FLS) period, with the former liberation movements, SWAPO, MPLA, FRELIMO and ANC lining up in solidarity'. They are joined by the DRC, Swaziland and Malawi.

Global Political Agreement

The GPA of October 2008 was crafted on to a Memorandum of Understanding, reached on 21 July 2008 between President Robert Mugabe on behalf of government and the ZANU-PF party, the leader of the Movement for Democratic Change (MDC-T), Morgan Tsvangirai and the leader of the smaller formation of the MDC-M, Arthur Mutumbara.

Alternatively known as the GPA or the Zimbabwe Unity Agreement (ZUA) (2008: 1-19), consensus was reached between ZANU-PF and the two Movement for Democratic Change (MDC) formations, 'on resolving the challenges facing Zimbabwe'. Starting with the usual preamble in which the parties to the agreement reaffirmed their commitment to resolving 'permanently' 'the challenges facing Zimbabwe' such as that 'citizens enjoy equal protection of the law and have equal opportunity to compete and prosper in all spheres of life' (Ibid. 2008: 1), and 'recognizing, accepting and acknowledging that the values of justice, fairness, openness, tolerance, equality, non-discrimination and respect of all persons without regard to race, class, gender, ethnicity, language, religion, political opinion, place of origin or birth are the bedrock of our democracy and good governance' (Ibid.: 1-2).

Apart from the 'Framework for a New Government', provided for in Article XX of the GPA, the agreement provided for the restoration of economic stability and growth (Article III and its sub-articles), endorsed the position of SADC on sanctions imposed against Zimbabwe[8], recognised the primacy of the land question and the need to 'conduct a comprehensive, transparent and non-partisan land audit' as well as 'ensuring security of tenure to all land owners'. The GPA (Ibid: 4-5, Article V 'Land Question') also agreed to 'call upon the United Kingdom government to accept the primary responsibility to pay compensation for land acquired from former land owners for resettlement'.

[8] The enactment of the Zimbabwe Democracy and Economic Recovery Act by the US Congress which outlaws the country's right to access credit from International Financial Institutions (IFIs) in which the US Government is represented or has a stake.

On the need for a new constitution, the GPA concurred, among other complicated aspects, that a Select Committee of Parliament composed of members of the parties to the agreement, would establish sub-committees chaired by a member of parliament on which representatives of civil society would serve. The Select Committee, responsible for the draft constitution, had to be established within two months of the power-sharing arrangement, and had to submit it to a referendum for public endorsement. In the event of the draft constitution being approved in the referendum, it had to be gazetted within one month of the date of the referendum.[9]

The GPA was grounded in recognising key domain values, such as the promotion of equality, 'national healing', cohesion and unity (Article VII); free political activity (Article X); respect for the Rule of Law and for the Constitution (Article XI), and freedom of assembly and association (Article XII). Moreover, the GPA made provision for humanitarian aid and food assistance (Article XVI), legislative agenda priorities (Article XVII) and dealt extensively with issues of the security of persons and the prevention of violence (Article XVIII).

The 'Framework for a New Government' set out in Article XX (inclusive of its various sub-articles) of the GPA provided for a complex political compromise, influenced by an earlier AU mediated agreement on Kenya. One of the key provisions of the GPA (Article XX, 20.1.1) was that of a collegiate executive, in terms of which executive authority would be shared among the president, the prime minister and the cabinet.

The GPA provided for a cabinet, chaired by the president – who also continued to chair the National Security Council. The cabinet was vested with the authority to evaluate and adopt all government policies and programmes, and had the authority to subject to approval by parliament, allocate the financial resources for the implementation of government programmes. The President and the Prime Minister had to agree on the allocation of ministries. This last matter, predictably, led to deep disagreement between the two individuals and undermined the credibility and swift implementation of the GPA from its inception.

The GPA also made provision for a Council of Ministers, chaired by the Prime Minister, 'to ensure that the Prime Minister discharges his responsibility to oversee the implementation of the work of government' (Article XX, 20.1.5). Finally, provision was made for a Senate of

[9] See the various provisions under Article VI of the GPA (2008: 5-7).

14 members, five appointed by the President, and a further nine, of whom three would be nominated by ZANU-PF, and a similar number by the MDC-T and MDC-M, respectively.

To its credit, the GPA in Article XXII did provide for implementation mechanisms, principally in the form of the Joint Monitoring and Implementation Committee (JOMIC), but to date, this mechanism has not been successful in creating and building mutual trust and confidence between the parties (Ibid.: 17-18).

Since Jacob Zuma became president of South Africa in 2008, and subsequently when he was formally appointed as SADC mediator, he attempted to make progress on all outstanding issues in the GPA. A team consisting of Zuma's international advisor, Lindiwe Zulu, and two former ANC cabinet ministers, Charles Nqakula and Mac Maharaj, was appointed to provide him with decision support.

Reasons given for President Zuma taking a different approach to Zimbabwe include that he is closer to the powerful Congress of South African Trade Unions (COSATU) and its ally the South African Communist Party (SACP) – both of which played significant roles in his ascendance to power. He is also seen to be less rigid than his predecessor and a better listener, open to suggestions.

In November 2009 an emergency summit of SADC took place in Maputo, Mozambique, where the Zimbabwean parties represented in the GPA were told that the Interim Government (IG) had to be made to work and that the 30-day deadline for the resolution of outstanding IG issues (notably agreement on cabinet portfolios and the unilateral appointment of provincial governors and ambassadors by President Mugabe) had to be adhered to. Since then, however, limited progress has been made on outstanding issues. Notwithstanding a number of follow-up meetings between President Zuma, members of his team and the parties to the agreement, at the time of writing, the future of the GPA seems increasingly uncertain, unless the parties to the agreement can restore momentum and agree on a new time frame to implement outstanding issues.

Conclusion

The differences between the mediation of SADC in Madagascar and Zimbabwe are marked. Over the past several years most of the SADC member states repeatedly reaffirmed their solidarity with the ZANU-PF government and the president of that country and publicly

ignored violations of human rights by the parties to the GPA, disrespect for the rule of law and cases of political repression. When SADC eventually took on a mediation role, it is significant to note that this was done not within a multinational framework (save for the endorsement of the AU) but was largely limited to South Africa. Some good, however, did come out of the SADC endorsed mediation, notably the GPA of October 2008 and, subsequently, the construction of an electoral code of conduct for the SADC region.

In contrast, SADC acted swiftly to the political crisis in Madagascar and while it did not impose any sanctions, acted with commendable speed to suspend the country from membership of the regional body, in concert with the AU. The SADC mediation on Madagascar did take place within a multilateral framework, notably, that of the AU, and the SADC mediator remained engaged with the crisis, repeatedly calling on all parties to resolve their differences, and even went so far as preventing Andy Rajoelina from putting in an appearance at the UN General Assembly (UNGA).

The differences can be explained by two principal factors. First, SADC countries have relatively few core economic and political interests in Madagascar, compared to Zimbabwe, and as Cawthra (2010: 34) remarks, 'the economy of which is closely intertwined with that of its immediate neighbours (and which shares economic interests with other countries such as the DRC), and which has a shared history of anti-colonial and liberation armed struggle with a number of SADC member states, and, secondly, incumbency. SADC is essentially a club of states, or more to the point a club of presidents, since all key decisions are by the summit of heads of state. The states – and the presidents – mostly act in mutual deference and support of each other and certainly would not like to see the contagion of non-constitutional overthrow of an incumbent president, as happened in Madagascar'.

Overall, SADC's track record with regard to the two crises has been mixed. To ensure greater coherence of action and more effective diplomacy SADC would do well to insist upon a more robust explicit normative framework around issues of human rights, constitutionality, democratic governance, and the rule of law, and put in place a more dedicated and better resourced capacity in support of its mediation. This might consist of a specialised mediation unit – complementing the one at OPDS level – within the SADC Secretariat consisting of experienced professionals and officials with whom diplomats could interact, and which would provide background analyses of conflicts and decision support to political decision-makers at Summit level.

This chapter has shown that as a nascent 'security community', SADC has made modest progress in 2010 at both the institutional level and in promoting security integration in the region. The 2006 SADC Consultative Conference has proven to be useful, particularly in terms of the SADC Common Agenda and attempts to harmonise the provisions of the Regional Indicative Strategic Plan and the Strategic Indicative Plan for the Organ on Politics, Defence and Security Cooperation. The optimism of 2006, however, has not been realised in respect of every domain of cooperation with ICPs. Much remains to be done.

In 2010 SIPO underwent significant changes, and while the revised SIPO has yet to serve at Summit level, it augurs well for a more coherent and integrated approach to the various conflict fractures that face or could face the region. In its revised form, 'SIPO II' brings together key aspects of human security and collective, state-based security, and is informed by the notion that development and security are mutually constitutive. For SADC to respond comprehensively to the many human and national security challenges that beset the region, accelerated progress in harmonising security and development has become an ever more urgent priority.

Meaningful progress has also been made in respect of the Southern African Regional Police Chiefs Cooperation Organisation (SARPCCO) as the key mechanism of cooperation between police in the SADC region. Since 2010, SARPCCO has set the agenda more meaningfully for regional policing in the domains of training and as a response to transnational crime, while meaningful progress has been registered in harmonising legislation on aspects such as corruption, organised crime and money laundering.

The former SADC Brigade became the SADC Standby Force (SADCSF), and while not yet fully operational in terms of its main logistics depot, marked progress was made in respect of doctrine and training for peace support operations. In this respect, the capacity of both the Regional Early Warning Centre (REWC) and the Harare-based Regional Peacekeeping Centre (RPTC) was moderately strengthened in 2010. More, however, remains to be done.

The 30th 2010 SADC Jubilee Summit also approved a recommendation by Ministers of Justice in the region to review the mandate and jurisdiction of the SADC Tribunal. The Report by a group of experts would serve at the coming Summit of 2011.

Finally, although SADC mediation in the conflicts of Madagascar and Zimbabwe dominated the agenda of the regional body, SADC also continued to play a constructive role, mostly in the domain of confidence-building, in the political life of its member states.

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Chapter 3

The inter-regional mobility aspects of the proposed Tripartite Free Trade Area

Kathleen Rubia

Introduction

The Kampala Communiqué 2008, adopted by Heads of State and Government of the 26 countries that are members of the Tripartite (the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC)) brought to the limelight the need for accelerated cross-regional economic integration.

The outcome of the Kampala Summit (Kampala Communiqué 2008) was consensus on the establishment of a Free Trade Area (FTA) entailing the creation of a large single market with free movement of goods, services and business persons. In addition, joint infrastructure development programmes focusing on transport, information communications technology, energy and civil aviation are also envisaged. Added to this was cooperation in financial payment systems, capital markets competition and commodity exchange plus the development of common positions on the Economic Partnership Agreement (EPA) negotiations.

In the tripartite context, the free movement of business persons targets people engaged in cross-border trade and investment and aims to enhance their mobility by relaxing visa requirements for business people and other professionals.[1] This was incorporated in the Draft Agreement Establishing the Tripartite Free Trade Area, December 2010 ('Draft TFTA') and Annex 12 on the Movement of Business Persons.

As the mobility of business people and investment prospectors is essential for trade and investment, an evaluation of the regional integration programmes of COMESA, the EAC and SADC will be analysed with a view to evaluating the progress made in and assessing the degree of inter-regional mobility that can be expected under the tripartite process.

[1] In 2008 discussions, consideration was given to the establishment of a binding agreement or protocol whereby countries would undertake to relax visas on a progressive basis starting with business people and professionals and then extend it to other citizens, Paragraph 36-39 of the Tripartite Working Document (2008).

The Draft TFTA and Annex 12 on Movement of Business Persons (the Annex) will be the basis of this evaluation taking cognisance of the fact that these are not yet legally binding instruments as countries are yet to finalise and sign the agreement.[2] This means that the draft may be subjected to further changes before substantive negotiations commence.

Temporary movement of persons across borders

Temporary mobility in this paper is defined as the cross-border movement of people from one county to another for a short duration with the purpose of undertaking trade in goods, services or investment in economic activity.

Under the World Trade Organisation (WTO) rules, the only agreement covering some aspects of temporary mobility is the General Agreement on Trade in Services (GATS). Within the context of trade in services, GATS in Article 1.2(d) provides for cross-border movement of persons, Mode 4, which is defined as the supply of a service by a service supplier of one member, through presence of natural persons of a member in the territory of any other member. This means that not all persons supplying services are encompassed by the rules as they only apply to measures that affect people who are either themselves service suppliers or employed by services suppliers of a member. In practice, the categories[3] covered are:

i. Self-employed persons supplying a service to a host-country company or individual: Independent Professionals.

ii. Employees of a foreign services company without a commercial presence in the host country, who enter the territory of another WTO member to supply a service based on a contract between their employer and the host-country service consumer: Contractual Services Suppliers.

[2] According to the Report by the Chair of the Tripartite Task Force (2011:2,3) 'The main FTA document is in the form of the draft Agreement for establishing the Tripartite FTA. The FTA proposal incorporates a roadmap towards the operationalisation of the FTA. It is proposed that there should be a preparatory period for consultations at the national, regional and Tripartite level from early 2010. Member States will use this period to carefully work out the legal and institutional framework for the single FTA using the draft documents as a basis. It is expected that each REC will discuss the Tripartite documents, and that the Tripartite meetings at various levels will deliberate and reach concrete recommendations. Upon signature of the FTA, Member States will have about six months to a year, to finalise their domestic processes for ratifying the Agreement, establishing the required support institutions and adopting the relevant customs procedures and instruments. So far, the approval process has faced some delays due to the inability to set an agreeable date for the Tripartite Summit to meet. It is proposed that once this approval process is accomplished, the Tripartite FTA should be launched'.

[3] For a detailed outline see Carzaniga (2008 :477, 478).

iii. Employees of a foreign services company with a commercial presence in the host country who are transferred to the establishment: Intra-corporate Transferees.

iv. Foreign natural persons seeking entry into another member's territory for the purpose of setting up a commercial presence or negotiating the sale of a service on behalf of a services company thus facilitating future transactions: Business Visitors and Services Sales Persons.

It should be noted that the rules do not, however, affect people seeking access into the employment market of a member, citizenship, residency or employment on a permanent basis.[4] These rules according to Panizzon (2010: 27) therefore create an 'artificial' distinction between 'foreign" and 'domestic' employment. While foreign employment forms part of 'trade' in services under GATS, domestic employment, which is qualified as 'labour migration' is not covered by GATS.

In addition, at multilateral level there is no agreed definition in the literature of what constitutes 'temporary' presence and what constitutes 'temporary' stay. Regarding the period, what is envisaged is a short duration of time for the purpose of supplying a service. In practical terms, an analysis conducted by the WTO (WTO 1998: Paragraph 3) of members' schedules shows that the maximum length of stay permitted under Mode 4 varies with the underlying purpose. Thus, while business visitors are generally allowed to stay up to 90 days, the presence of intra-corporate transferees, tends to be limited to periods of between two and five years.

Under GATS, countries have undertaken limited Mode 4 commitments allowing service suppliers of one country to temporarily move to another country to offer services. This is despite the guarantee that countries retain the right to regulate all service sectors, sub-sectors and modes of supply including the entry of natural persons, their temporary stay and orderly movement across borders, and the assurance that such movement does not apply to natural persons seeking access into the employment market of a WTO member (GATS 1994: Annex on Movement Natural Persons Supplying Services under the Agreement, 1994 (par. 2 and 4). In terms of the impact of the rules on Mode 4 commitments, Carzaniga (2008: 500) observed that governments' concerns, in both developed and developing countries, about temporary migration turning into permanent presence might have influenced the

[4] See GATS, Article 1 and the Annex on Movement of Natural Persons Supplying Services under the Agreement, Paragraphs 1 and 2.

extent of concessions granted in this area. It would appear that bilateral negotiations also seem cautious of these sensitivities and commitments in preferential trade agreements (PTA) on categories of natural persons of most interest developing countries are far from reaching their full potential (Marchetti J.A et al 2008: 10) However, countries have been able to conclude bilateral migration agreements granting significant access levels for the politically sensitive movement of low-skilled (Carzaniga 2008: 500) workers as such agreements involve a mechanism aimed at ensuring return. This raises the question of just how far the tripartite countries will be prepared to go with mobility for business operators.

Within the regional integration programmes of COMESA, the EAC and SADC, attempts have been made to enhance the temporary movement of people not just for the purpose of trade but also for other general purposes such as social , recreational and educational, with varying levels of success. Currently, people move with relative ease across borders though most of this movement is largely on account of bilateral arrangements. With the exception of countries that are members of the EAC and possibly the countries that are members of the Southern African Customs Union (SACU), region-wide general purpose movement is largely constrained by immigration rules. The level of temporary mobility within the economic blocs deserves closer scrutiny as it is expected that progress made intra-regionally will influence the degree of access business people have inter-regionally.

Movement of people within SADC

In an attempt to encourage greater movement within the region, SADC countries negotiated a general Protocol for the Facilitation of Movement of Persons or Free Movement Protocol (2005: Articles 2 and 3) aimed at the progressive elimination of obstacles to the movement of persons of the region and at visa-free entry for citizens of SADC countries for lawful purposes for a maximum of 90 days per annum. Permanent and temporary residency, exercising an economic activity and profession either as an employee or a self-employed person and establishing and managing a profession, trade or business and working in the territory of another SADC country are also permitted subject to national laws. To achieve these objectives it is expected that relevant national laws, immigration practices, statutory rules and regulations would be harmonised or model laws formulated. So far, none of these actions have been implemented as the Protocol has not been endorsed (UNCTAD 2009: 90) by the requisite number of countries.

While the Free Movement Protocol gives access to workers; the more recent SADC Draft Protocol on Trade in Services (2009) seems to limit access in services sectors and unequivocally provides that there is no obligation to extend access to natural persons seeking employment in the labour market of a SADC country (Ibid: Article 17). However, with regard to professionals, the Draft Protocol on Trade in Services provides an opportunity to negotiate mutual recognition agreements among professional bodies which would in turn facilitate access into certain services sector labour markets such as accountancy services, albeit for a short duration; this is despite indications of professional skills deficits and mismatches in the region.

Box 1. Towards a Regional Integration of Professional Services in Southern Africa

An examination of accounting, engineering and legal services in southern Africa observed that:

- Trade in professional services through the movement of natural persons across national borders (Modes 4 in the GATS) is restricted in southern Africa by explicit trade barriers, and by stringent regulatory requirements and immigration policies. Chief among them are discretionary limits through labour market tests imposed on entry of any type of foreign professionals.
- Regional Integration could bring gains given the differences in endowments and levels of development of professional services within southern Africa.
- Regional trade in services remains limited due to complex market structures and market fragmentation.
- Some of the obstacles to increased trade in professional services include skills shortage and skills mismatches.
- Domestic regulations also limit entry and competition and further fragment the market for professional services.
- Services trade barriers and labour mobility restrictions are in place.
- The study concludes that policy reform at national and regional levels is the key to better integrating the regional market for professional services.
- Some of the policy actions proposed include relaxing trade barriers to movement of natural persons, establishment of commercial presence, and cross-border supply of professional services as well as through discriminatory procurement.

Source: Dihel et al (2010)

It would appear that the political sensitivities of generally allowing foreigners into countries even when they are self-employed commercial operators have thus far prevailed and countries are reluctant to free up movement. Nevertheless, the region aims to establish a common market by 2015 that will include the free movement of capital and labour, goods and services, and of the people of the region (SADC Treaty, Article 5.(2)(d)). For this to happen the Draft Protocol on Services may have to be reviewed.

Mobility within COMESA

COMESA has a number of programmes to enhance regional integration through the free movement of people. These are underpinned by the the Free Movement Protocol and the Protocol on the Gradual Relaxation and Eventual Elimination of Visa Requirements. It was envisaged that the Free Movement Protocol would be implemented in stages involving programmes focused on gradual removal of visa requirements, movement of skilled labour and movement of services, the right of establishment and the right of residence, with the aim that it would be fully implemented by 2014. However, to date only four of the 19 member countries have signed the protocol and this has retarded progress on implementation. Three of these countries are also members of the EAC (Burundi, Kenya and Rwanda) while Zimbabwe is a member of SADC).[5]

With regard to the movement for the purpose of supplying services, it is notable that COMESA countries have chosen to focus on allowing fairly skilled people to access the market namely independent professionals, contractual service suppliers, business visitors which include service sellers and persons responsible for setting up commercial presence and intra-corporate transferees which include managers and specialists. Suppliers with lower skills can expect to find more restrictions to their entry. In addition, the Trade in Services Regulations, 2009 (Free Movement Protocol, Annex 1, Paragraph 2) does not apply to natural persons seeking access to the employment market. This provision may hinder the attainment of regional integration as it does not complement the Free Movement Protocol which includes the movement of labour, employed and self-employed people.

[5] See COMESA (2010: 1) and COMESA (2011: 1 and 2)

Movement within the East African Community

The EAC Common Market Protocol (Articles 7 and 10) encompasses visa-free movement of citizens of the member countries subject to national public policy, security and public health limitations; it distinguishes free movement of persons for assorted general, social and business purposes and free movement of labour or workers with the sole purpose of taking up employment; – both are allowed subject to national laws. Nationals of other EAC countries have the right to residency and establishment, and self-employed persons can move along with their dependents. Free movement of workers is also prescribed; however, only select sets of workers can gain entry for ninety days after which compliance with work permit requirements is necessary.[6] Each country has outlined the categories of workers who can work within their schedule on free movement of workers. The lists[7] vary from country to country and are influenced by market needs. It is notable that the movement of 'unskilled' workers is encouraged though in limited categories, namely in recreational, cultural and sporting industries.

Box 2: Some examples from the Schedule on the Free Movement of Workers

Burundi: creative or performing artists

Kenya: roofer, plumber, musicians , singers , choreographers, vocal groups, sportspersons, athletes, acrobats , nightclub and related workers

Uganda : creative and performing artists, singers musicians, dancers ,stage actors

Source: EAC Common Market, Free Movement of Workers Regulations, Annex 11

[6] The legal instruments on these issues are in the EAC Common Market Protocol Part D, the Free Movement of Persons and Labour, Regulations on Free Movement of Persons and Regulations on Free Movement of Workers. EAC has already had an East African Passport allowing visa-free movement of its citizens, though this has not been widely in use, and thus the introduction of an electronic readable identify card is envisaged to ease access; reciprocal opening of border posts is envisaged.

[7] See the Schedule on the Free Movement of Workers and the EAC Common Market Free Movement of Workers Regulations. Annex II. This defines categories of workers that can gain access into the labour market and as service suppliers. For a holistic picture of the type of access granted, this should be read together with the Regulations on Free Movement of Persons which covers visitors for other purposes such as studies and medical treatment.

Clearly, EAC countries have moved faster than the other regions' issues such as regulatory and legislative harmonisation that is an ongoing process. While implementation of the common market on movement of people commenced in earnest in mid-2010, it is too early to say whether or not it is having an impact and enabling smooth border crossings.

Movement of Persons under the Economic Partnership Agreements

As several sub-groups[8] of countries within the regional blocs are negotiating a bilateral EPAs with the European Community (EC), it is essential that a brief scrutiny of what the movement of persons might entail be conducted based on draft EPA instruments that are due for negotiation. All the regional sub-groupings are at different stages of the prenegotiation preparatory phase and in outlining areas of interest, it is essential to note that what is outlined here below is only tentative.

For the SADC EPA group, the EC 2008 draft text proposes temporary entry for periods ranging from 90 to 12 days for natural persons for business purposes. Their interest is in access for skilled service suppliers such as key personnel, business visitors working in a senior position, managers and specialists with uncommon knowledge, graduate trainees all employed by a juridical person, and several categories of self-employed people (Draft EC Trade in Services and E-Commerce, 2008: Articles 12 -15). SADC EPA countries on their part are still in the process of identifying the categories of export interest to them.

The Eastern and Southern Africa (ESA) EPA group seems to have an interest in independent suppliers not linked to employment in a firm (Mode 3) and to extending the period of temporary stay to two to three years and the scope of coverage, for instance encompassing persons engaged in personal care contracts such as home-based care and child-care workers (Draft ESA EC Services Text, 2009: Article 20) while the EAC group, in addition to skilled personnel, would like to negotiate for service suppliers with professional qualifications equivalent to degree level (Draft EAC EPA Text, 2009: un-numbered article).As the negotiations have not been completed, countries still have an opportunity to negotiate an agreement that will complement not only their regional markets but also the tripartite one.

[8] The SADC EPA group (Angola, Botswana, Lesotho, Mozambique, Namibia, Swaziland, and South Africa as an observer) while another six SADC countries (Madagascar, Malawi, Mauritius, Seychelles, Zambia, Zimbabwe) negotiate under the auspices of COMESA, namely the East and Southern African configuration (ESA) while all five East African countries formed one negotiating group.

Whether or these countries grant preferential access to European and suppliers and investors, they still stand to gain from and enlarged tripartite market if Annex 12 is implemented, as their nationals who are resident in these countries and carrying on trade between the tripartite countries will have similar access as tripartite country citizens.

The Proposed Inter-Regional Mobility

It should be noted from the onset that the draft TFTA (2010) in its Annex 12 on the Movement of Business Persons, unlike GATS, does not contain a narrow focus on services suppliers. Rather, coverage extends to business operators and traders engaged in trade in the sale of goods and services, and prospective investors. Article 1 of the Annex includes five categories of people: business visitors, traders, investors, professionals and intracompany transferees at managerial or executive level or possessing specialised knowledge. In arriving at these categories, the Annex seems to have drawn from the categories of natural persons commonly identified for the supply services in GATS.

For business visitors and professionals to gain entry into the tripartite market, proof of residency and documentation indicating the business they will be engaged are mandatory (Annex 12: Articles 2.1(a)(b) and 5.1(a)(b)). This means that foreign nationals residing and conducting business in a tripartite country for an unspecified period of time will gain the same right of entry in another tripartite country as nationals.

The prerequisites for entry for traders and investors are somewhat different, as, in addition to residency, they must show that they carry on substantial trade in goods or services principally between the territory of the tripartite country of which the business person is a resident and the territory of the tripartite country of which entry is sought. In addition, they may be granted entry if they aim to establish, develop, administer or provide advice or key technical services to the operation of an investment to which the business person or the business person's enterprise has committed, or is in the process of committing, a substantial amount of capital, in a capacity that is supervisory, executive or involves essential skills (Annex 12: Article 3.1(a)(b)). The Annex does not define the terms ‘substantial trade’ or ‘substantial amount of capital’ and so the onus may be on the prospective investor and trader to supply this information. In the absence of commonly accepted definitions, countries retain the right to determine the people who can gain access, and this may not rule out arbitrary entry decisions.

Tripartite countries are required not to place preconditions to entry in all the five categories, such as prior approval procedures, petitions, labour certification tests and other procedures, but the Annex does not outline a recourse mechanism for business persons who may find themselves unable to fulfil the substantial business and substantial capital requirements which are preconditions to entry for which procedures may be outlined.

While quantitative or numerical restrictions are outlawed, the reality is that countries often regulate the number of foreign professionals entering their jurisdictions. For instance, in professional service sectors, some southern African countries use domestic regulations to limit entry through licensing requirements, quantitative restrictions on the number of supplier's restrictions on prices and fees, and these constrain the growth of professional services (Dihel et al. 2010: 4-5). Additionally, quantitative restrictions to market access[9] are permitted for natural person employed in particular service sectors if these are incorporated into a country's schedule.

The duration of the stay for all business people has also been left to the discretion of the host country as no common time lines are prescribed in the Annex. This absence of timelines is curious as all regional instruments in all three regions define the time limits for entry and stay[10] depending on a person's purpose. The only exception is establishment and residency in the context of the common market.

Annex 12 envisages the development of further rules on movement as the Sub-Committee on Movement of Business Persons is mandated to develop regulations for its implementation. Some of the issues that could be negotiated include transparency and disclosure of entry regulations through publication and notification of changes and an inventory of minimum documentations required to be produced by Business Visitors as this will ensure that countries do not place arbitrary requirements and in the process restrict interregional mobility.

Another issue applicable for entry of professionals is mutual recognition agreements (MRA) thatextend beyond the supply of services to the supply of goods. All the three regions provide for negotiation of mutual recognition agreements in the areas of services and as

[9]See Article 14.1(d) of the SADC Draft Protocol and Article 26.2(f) of the COMESA Regulations on Trade in Services.

[10] The average time is 90 days in all regions (SADC), though permanent stay in the form of residency is an option in EAC and COMESA.

these are confined to professional bodies and regulators within the region[11] and not to third-party countries. For example, Seychelles and Mauritius are third parties to the EAC countries and cannot negotiate an MRA with them under EAC Common Market Protocol unless it is amended. They can, however, negotiate MRAs with SADC and COMESA countries as they are both members of these two blocs. Since negotiating MRAs is a time-consuming process, a regional bloc could be encouraged to make provision for third countries to accede to already existing regional MRAs. For instance, as negotiations among professional accounting bodies in four East African countries; Uganda, Tanzania, Rwanda and Kenya (Muwanga 2011) are expected to result in the conclusion of an MRA agreement within the first half of 2011, EAC countries could consider granting other tripartite countries an opportunity to accede to the MRA on a reciprocal basis. The Sub-Committee could also be the forum to consider some of the emerging issues that may entail national and regional policy and regulatory review such as extending the scope and coverage of an MRA to professionals supplying goods and services in assorted industries and economic activities.

Conclusion

While tripartite countries have embraced the proposition that effective interregional trade cannot occur in a peopleless environment, they have also recognised that business visitors, traders, investors, intra-company transferees and professionals who sell goods and services need to travel to transact business or prospect for new trade and investment opportunities in the single market. Nevertheless, implementing the entry movement of business persons crossing regionally will be a test of their commitment to the tripartite process as a substantial number of countries have to date not endorsed intraregional movement. Both SADC and COMESA integration programmes face an uphill task as, despite well documented objectives in several legal frameworks, implementation seems to have stalled while the EAC has progressed to the level of implementation.

Given the status of the intraregional mobility agreements, it may be ambitious to expect rapid extension of access to business persons from countries beyond their regions – this may be a gradual process requiring political willingness. Perhaps if interested stakeholders in

[11]See COMESA Regulations Article 15, SADC Draft Protocol on Trade in Services Article, EAC Common Market Protocol Article11 COMESA and SADC Draft Protocol on Trade in Services, revised July 2009, and Article 7 which envisage that such negotiations would take place within two years after its entry into force.

regional business associations, professional and investment bodies advocate and collaborate with governments, the necessary political impetus can be harnessed to ensure that Annex 12 is implemented.

The implementation of the Tripartite Free Trade Area may also require national and regional policy and regulatory reform especially not only in relation to the regulations for entry but also to ensure that other tripartite countries that are third parties to any of the intraregional legal instruments are not hindered from accessing the tripartite market. The possible forum steering reviews would be the Sub-Committee on Movement of Business Persons. Ultimately, if the interests of trade development and investment prevail over political sensitivities related to the movement of people, then one can expect that the Tripartite goal of mobility will be implemented in the long-term and thus spur competition and access to a variety of goods and services as business operators move across borders with ease.

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Chapter 4

Intra-African trade in Southern and Eastern Africa and the role of South Africa

Ron Sandrey

1. Introduction

In another chapter in this publication Ron Sandrey examines the growth of agricultural trade between South Africa (RSA) and the European Union (EU) and how the Trade, Development and Cooperation Agreement (TDCA) may have impacted upon that trade. The purpose of this chapter is to analyse the overall picture of African bilateral trade, with an emphasis on African intra-regional trade to present a foundation to assess the implications for South Africa of the proposed COMESA-EAC-SADC tripartite free trade agreement. Again, there is a focus on agricultural trade. We caution that any analysis of this nature needs to take into account the problem of regional data quality. African countries are notorious for the lack of openness, timeliness and reliability of trade data. For this reason, a wide range of data sources has been investigated and, where possible, the best data for the specific components has been used. Compounding the problems of timeliness and completeness of the data is the inconsistencies in the sector definitions used. In general, this analysis is based on the definitions used by the World Trade Organisation (WTO), but this has not always been practical.

COMTRADE database is used to provide a consistent analysis for the 2006 to 2008 period, followed by an examination of the 'mirror' data for most of the major countries exporting agricultural products to Africa using World Trade Atlas (WTA) data for the December years through to and including 2009. We then examine South African agricultural trade with the rest of the continent and the tripartite region, again using WTA data. Finally, a preliminary assessment is made on the informal agricultural trade in parts of the Southern African Development Community (SADC).

Key points and summary

COMTRADE data confirms the dominance of the EU in African trade, and reports from their database that South Africa, Egypt, Morocco, Nigeria and Algeria were the biggest traders in 2008 overall. They report total African imports of $380 billion, although there is missing data. For the tripartite countries, COMTRADE reports imports of $206 billion, with 13.0 percent intra-African trade. Mirror data for the missing reporters adds another $42 billion, with 7.6 percent of this intra-African trade. Tripartite agricultural imports were $29.5 billion, 10.8 percent of the total. The main agricultural importers were Egypt, South Africa, Angola and Libya, with wheat (Russia and the United States (US)), palm oil (Indonesia and Malaysia) and maize (US and Europe) the main import products.

An examination of the main sources of agricultural imports into Africa using the more recent 2009 data for their exports shows that:

- For agricultural products, the EU exported $12,993 million to African countries in 2009 and imported $15,939 million from the same group. Algeria, Egypt, and South Africa were the main export destinations while Ivory Coast, South Africa and Morocco were the main import sources. Wheat, milk powder and ethyl alcohol were the main exports and cocoa beans, coffee, citrus and cut flowers the main imports.
- The US exported agricultural products worth $4,195 million to Africa in 2009, and imported $1,675 million. Egypt, Nigeria and Morocco were the main export markets, and wheat, corn (maize) and soybeans were the main export products. Ivory Coast, South Africa and Tunisia were the main import sources, with cocoa beans, coffee and olive oil the main import products.
- Other main exporters to Africa examined, with the main product and market in parentheses, were Brazil (sugar to Nigeria and Algeria), Thailand (rice to Nigeria), Malaysia (palm oil to Egypt), China (tea to Nigeria), Indonesia (palm oil to Egypt), New Zealand (milk powders to Algeria), Australia (wheat to Sudan) and Mexico (wheat to Algeria).
- South Africa exported $1,866 million in agricultural products to Africa (33% of the country's global agricultural exports) during 2009. Maize, sugar, food preparations and fruit juices were the main exports, and Zimbabwe, Kenya and Mozambique the main destinations. South African agricultural imports from Africa were only $256 million or

6.0 percent of its total agricultural imports. Tobacco, raw cotton and tea were the main imports.

The overall conclusion from detailed agricultural trade analysis of partner country exports to Africa is that the EU was by far the main supplier during 2009, but that along with the US its exports declined from the 2008 levels; that both the EU and US in particular show exports declining in 2009 over 2008; that most other countries have seen a greater export growth from 2000 than the EU and US; and that the main destinations are Algeria, Egypt, Nigeria and Sudan, with wheat, rice, palm oil, sugar, tea, milk powders and wine as the main products exported from the major sources examined.

Our preliminary analysis supports the general thought that in many instances informal agricultural trade is significant in the wider region, although it is likely that re-exports of some products may be contributing to the trade that is actually being informally transshipped.

2. The COMTRADE database

To undertake the in-depth analysis of total merchandise trade this section uses COMTRADE data for 2008. There is a problem in that COMTRADE data is incomplete for Africa, as, for example, Table 1 does not show data for the non-reporters, Angola and Libya, where the WTO reports imports of $21.1 billion and $11.5 billion respectively. The table shows the available African **total** merchandise imports for 2000 and the most recent 2008. The data represents 92.9 percent of the African import data available on COMTRADE, with only the top 20 importing countries displayed.[1] Shown are the total imports and the percentage of those imports from China, the US and the EU. Several features are apparent, and in particular:

- The dominance of the EU is declining: from an average share of 42.0 percent in 2000 to 31.0 percent in 2008;
- Conversely, the presence of China increased from 3.3 percent in 2000 to 9.1 percent in 2008 (supplanting the US as the second supplier).

[1] The next five importers were Zimbabwe, Cameroon, Malawi, Guinea and Mauritania, which represented a further 3.2 percent of the COMTRADE African imports.

Table 1: African merchandise imports 2000 and 2008 by source

	Imports 2000				Imports 2008			
	Imports ($m)	China	US	EU	Imports	China	US	EU
South Africa	26,771	3.7	11.9	39.5	87,593	11.3	8.0	29.5
Egypt	14,010	4.6	15.0	35.0	52,752	8.4	10.8	25.0
Morocco	11,533	2.3	5.6	57.9	31,650	5.9	6.1	65.2
Nigeria	5,817	4.3	11.4	47.9	28,194	15.2	8.2	28.5
Algeria	9,152	2.3	11.4	57.3	27,631	8.6	7.7	48.9
Tunisia	8,566	1.2	4.6	70.5	24,638	3.7	3.0	54.6
Sudan	1,860	6.8	2.3	21.7	16,417	7.9	0.3	10.3
Kenya	2,891	3.5	4.4	31.9	11,128	8.4	3.6	16.8
Ethiopia	1,260	7.7	4.8	29.8	8,680	20.2	4.6	16.1
Ivory Coast	2,482	2.7	3.6	41.9	7,884	6.9	2.7	26.8
Ghana	2,933	3.2	7.5	42.8	7,278	11.1	7.6	33.7
Senegal	1,553	2.7	3.6	48.0	6,528	6.0	2.0	39.5
Tanzania	1,586	4.1	3.5	20.1	5,919	7.0	3.2	17.4
Botswana	2,072	0.4	1.7	16.0	5,099	2.8	1.2	10.3
Zambia	888	1.2	4.7	14.0	5,060	4.5	1.4	10.1
Namibia	1,435	0.5	1.3	7.1	4,689	3.3	2.0	15.5
Mauritius	2,081	7.6	2.9	27.1	4,670	11.5	2.4	21.3
Uganda	954	3.1	3.2	20.1	4,526	8.1	2.6	18.5
Mozambique	1,162	1.9	3.5	15.8	4,008	3.9	4.0	27.1
Madagascar	991	11.9	4.6	22.0	3,846	21.0	5.0	20.8
Africa Total	110,611	3.3	8.5	42.0	380,403	9.1	6.3	31.0

Source: COMTRADE

2.1 Regional African imports

We next examine the proposed tripartite agreement between the countries of the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) andSADC to set the scene for wider regional integration. Table 2 shows import data for those countries that report to COMTRADE for 2008 (2007 where 2008 data was not available). Countries missing from the table include Angola, Democratic Republic of Congo (DRC), Djibouti, Eritrea, Lesotho, Libya and Sudan, although Angola, Libya, DRC and

Eritrean 'mirror' data is shown in Table 3. The countries are ranked by value of total merchandise imports from the world, and the data also shows the regional (tripartite) imports by value and percentage share, the percentage share of total imports from South Africa, and the value of imports from the second to fifth main sources of Angola (oil), Kenya, Zambia and Mozambique into the relevant countries. While South Africa and Egypt dominate total regional imports, tripartite imports are not significant in either country except for Angolan imports into South Africa. Conversely, intra-regional imports from South Africa are crucial for Botswana, Zambia, Namibia, Mozambique, Zimbabwe and Malawi, while Kenya has established crucial markets in Uganda and Rwanda.

Table 2: African imports into (most of) the tripartite countries

All merchandise imports ($m)			Regional total (%)		From tripartite sources ($m)			
	Total	Regional	All	RSA	Angola	Kenya	Zambia	Mozam-bique
South Africa	87,593	5,326	6.1	0.5	2,686	37	287	398
Egypt	52,752	1,222	2.3	0.2	0	201	601	0
Kenya	11,128	1,174	10.5	6.1	0	0	27	4
Ethiopia	8,680	232	2.7	0.7	0	30	0	0
Tanzania	5,919	833	14.1	10.1	0	104	19	17
Botswana	5,099	4,099	80.4	78.6	1	1	7	1
Zambia	5,060	3,077	60.8	42.6	0	80	0	53
Namibia	4,689	3,271	69.8	67.8	5	1	14	2
Mauritius	4,670	534	11.4	8.1	0	37	8	7
Uganda	4,526	956	21.1	6.7	0	511	1	0
Mozambique	4,008	1,283	32.0	29.1	3	3	15	0
Madagascar	3,846	390	10.1	6.1	0	7	0	1
Zimbabwe	3,442	2,379	69.1	44.6	0	4	110	125
Malawi	2,204	1,351	61.3	26.6	0	55	69	447
Rwanda	1,146	517	45.2	6.6	0	184	2	0
Seychelles	912	102	11.2	5.9	0	4	0	0
Burundi	315	101	32.2	3.2	0	28	3	0
Comoros	120	10	8.3	2.6	0	0	0	0
Subtotal	206,108	26,858	13.0	7.6	2,695	1,287	1,162	1,056

Source: COMTRADE data

Table 3 completes the analysis shown in Table 2 by showing the missing tripartite partners as viewed from mirror data. Both Angola and Libya are significant importers, and the DRC is a significant importer of regional merchandise. As expected, given the geographical locations, South Africa is a major exporter to the DRC and significant to Angola but hardly registers to Libya.

Table 3: African imports into the remaining tripartite countries, mirror data

All merchandise imports ($m)			Regional % total		Main tripartite sources				
Reporter	Total	Regio-nal	All	RSA					
Angola	20,289	1,431	7.1	4.4	RSA	Namibia	Morocco	Egypt	Nigeria
Libya	17,887	1,760	10.3	0.1	Tunis	Egypt	Morocco	RSA	Sudan
DRC	3,746	1.960	52.3	30.0	RSA	Zambia	Kenya	Ivory	Uganda
Eritrea	256	27	10.5	2.6	Egypt	RSA	Kenya	Nigeria	Morocco
Subtotal	42,178	3,220	7.6	4.8					

Source: COMTRADE data, mirror data.

2.2 Regional agricultural trade

Table 4 extends the analysis of African imports to agricultural imports into the tripartite countries that report to COMTRADE. Shown are the total imports for 2000 and 2008 along with the percentage of these imports classified as 'agriculture' (HS codes HS 01 to HS 24 inclusive, including all fish but excluding wool and cotton fibres). The data is ranked by agricultural imports during 2008, and Egypt is the leading agricultural importer by virtue of its greater share of total imports in agriculture compared to South Africa. South Africa has the lowest agricultural share, but Zimbabwe, Zambia and Tanzania are very close and then only Sudan is in single figures. Eritrea and DRC have the highest shares, followed by Seychelles. Egypt's share of agriculture in total imports has declined over time, while Ethiopia's has increased.

Table 4: The tripartite imports, 2000 and 2008, for total merchandise & agriculture

Reporter	Imports 2000 ($m)			Imports 2008 ($m)		
	Total imports	Agri-cultural	Ag % tot	Total imports	Agri-cultural	Ag % tot
Egypt	14,010	3,577	25.5	52,752	9,034	17.1
South Africa	26,771	1,312	4.9	87,593	4,720	5.4
Angola				20,289	2,844	14.0
Libya				17,887	2,425	13.6
Kenya	2,891	411	14.2	11,128	1,328	11.9
Ethiopia	1,260	90	7.1	8,680	1,313	15.1
Sudan				16,417	1,238	7.5
Mauritius	2,081	299	14.4	4,670	980	21.0
DRC				3,746	780	20.8
Tanzania	1,586	234	14.8	11,838	683	5.8
Namibia	1,435	246	17.1	4,689	666	14.2
Botswana	2,072	292	14.1	5,099	619	12.2
Uganda	954	126	13.2	4,526	580	12.8
Mozambique	1,162	165	14.2	4,008	578	14.4
Madagascar	991	130	13.1	3,846	406	10.6
Zimbabwe				6,883	380	5.5
Zambia	888	75	8.5	5,060	295	5.8
Malawi	532	54	10.1	2,204	266	12.0
Seychelles	342	41	11.9	912	185	20.3
Rwanda				1,146	120	10.5
Eritrea				256	71	27.8
Burundi	150	35	23.4	315	38	12.0
Comoros	36	16	43.4			
Lesotho	613	109	17.8			
Swaziland	1,099	211	19.2			

Note: Zimbabwe and Tanzania data for 2007, while data for Angola, Eritrea, Libya and DRC is mirror data.
Source: COMTRADE.

This next step looks at regional imports into tripartite countries (reporting and mirror) for the individual commodities. Table 5 shows both (a) South Africa's share of these imports and (b) South Africa's share of the trade expressed as the export share on the right-hand side.

Both cases highlight variability in the South African trade shares. Wheat is the major regional import at the next level of disaggregation, with Russia and the US the major sources for wheat. This is followed by palm oil from Indonesia and Malaysia and maize from the US and Belgium (EU).

Table 5: Tripartite country agricultural imports by commodity, 2008

Commodity	Imports ($m)	Main Suppliers		RSA % Imports	RSA % Exports
Subtotal	17,905			19.3	6.5
Wheat	3,917.5	Russia	US	11.1	1.5
Palm oil	2,175.7	Indonesia	Malaysia	13.4	1.6
Maize	1,356.5	US	Belgium	2.0	10.4
Sugar	1,038.2	Brazil	India	5.5	9.9
Rice	932.3	Thailand	Pakistan	49.8	4.9
Soybean oil	923.4	Argentina	Brazil	30.7	4.9
Frozen fish	596.3	Spain	Netherlands	3.9	3.7
Soybeans	549.8	Argentina	US	0.8	0.6
Beef	519.8	Brazil	India	2.4	0.8
Dried beans/peas	456.5	France	Canada	14.0	3.0
Oilcake	417.1	Argentina	US	74.5	2.4
Sunflower oil	411.3	Ukraine	Argentina	13.6	19.5
Milk powder	370.5	New Zealand	USA	6.3	11.6
Ethyl alcohol	363.9	UK	South Africa	69.7	10.1
Other food preparations[1]	337.3	Ireland	US	44.1	11.3
Tobacco	332.5	Zambia	Uganda	31.2	6.1
Poultry	288.3	Brazil	South Africa	65.8	14.7
Tea	275.1	Kenya	India	10.3	3.5
Cotton	270.8	Greece	Zimbabwe	18.8	0.2
Cigarettes	264.5	South Africa	Kenya	6.3	35.0
Subtotal	15,797			18.0	5.3

Note: [1]Including both crop and livestock products; i.a. homogenised composite food preparations; soups and broths; ketchup and other sauces; mixed condiments and seasonings; vinegar and substitutes; yeast and baking powders; stuffed pasta, whether or not cooked; couscous; and protein concentrates.
Source: COMTRADE

3. Partner trade with Africa for 2009

3.1 Overview

The objective for this section is to analyse partner agricultural trade with Africa for the 2009 December year. In an ideal world African import data would be used to compile this sub-section, but given the problems relating to reliable, comprehensive and timely data from Africa mirror data from most of the main exporters to Africa have been employed using December WTA data from the respective countries.[2] Table 6 shows the main features with the values of exports to Africa from these countries for both 2008 and 2009, along with the percentage changes for 2009 over the common base at 2000 and the main destination and main product (to Africa) in each case. The table highlights that:

- The EU was by far the main supplier during 2009, but that along with the US its exports declined from the 2008 levels (we have not researched this facet in detail but assume that the 2008 decline in global commodity prices caused that decline)[3];
- Most other countries have seen a greater export growth from 2000 than the EU and US, with Brazil in particular being the big mover; and
- The main destinations are Algeria, Egypt, Nigeria and Sudan, with wheat, rice, palm oil, sugar, tea, milk powders and wine being the main products exported from the sources shown.

[2] While the WTA data does not represent complete coverage, it does represent most of the external agricultural exporters to Africa. Missing for the tripartite countries, as highlighted from Table 5 on COMTRADE 2008 data, are the sources of Russia (wheat), Pakistan (rice), Argentina (soybean and oil cake products) and Ukraine (sunflower oil).

[3] For example, the EU wheat export average price of $258 per tonne in 2007 increased to $335 per tonne in 2008 before declining to $222 during 2009, while Thailand's rice average of $410 per tonne in 2007 increased to $610 in 2008 but declined marginally to $580 in 2009. For Malaysian palm oil the 2007 average of $711 per tonne increased to $963 in 2008 before declining significantly to $666.

Table 6: Partner agricultural exports to Africa, 2009

Agricultural exports to Africa ($m)			Growth 2000-2009 (% p.a.)	Main destination	Main product
Country	2008	2009			
EU	15,434	12,993	8.5	Algeria	wheat
Brazil	4,499	4,698	24.2	Egypt	sugar
US	5,792	4,195	6.4	Egypt	wheat
Thailand	2,708	2,545	18.8	Nigeria	rice
Malaysia	1,941	1,670	18.3	Egypt	palm oil
China	1,359	1,388	12.5	Nigeria	tea
Indonesia	1,265	951	21.6	Egypt	palm oil
New Zealand	719	604	18.4	Algeria	milk powder
Australia	329	563	6.5	Sudan	wheat
Mexico	448	210	31.0	Algeria	wheat

Source: World Trade Atlas **(**WTA)

Table 6 shows that agricultural exports from the EU to Africa were $12.99 million during 2009, a figure down from $15.43 million during 2008, while the overall growth in agricultural exports to Africa over the decade was 8.5 percent (marginally higher than the comparable growth of 7.6 percent to the world). Algeria (18.2 % of the total) was the main destination, and not shown is that it followed by Egypt (10.8%) and South Africa with 9.4 percent. The top 10 destinations took three-quarters (74.3%) of the total exports during 2009, while Angola and South Africa were the fastest growing markets. Wheat dominates exports with nearly one-quarter by value, followed by milk powders and malt extract. Imports into the EU from Africa by country were some $15.94 billion. The growth rates over the decade of 8.1 percent were marginally below the growth rate of EU exports to Africa, The main sources were Ivory Coast and South Africa and the main products were cocoa beans (25.4% of the total), followed by coffee and citrus fruits. A notable feature of the EU-African bilateral trade for both exports and imports is the degree of concentration. For EU imports, the top three import sources account for 43 percent of the total, while the three top products account for 36 percent. Similarly for exports to Africa, the top three destinations account for 38 percent of the agricultural exports to Africa and the top three products represent 38 percent of the total.

For trade between the US and Africa the three main destinations of Egypt, Nigeria and Morocco account for 64.5 percent of the total agricultural exports to Africa, while wheat is the main export, followed by corn (maize) and then soybeans (22.8% when oils and soy cake are added to soybeans). Again, the concentration is high, 84 percent of the wheat went to Nigeria, Egypt and Ethiopia; 92 percent of the corn to Egypt, Morocco and Kenya; and 100 percent of the soy beans *per se* went to the North African destinations of Egypt, Tunisia and Morocco. During 2009 just over 38 percent of US imports were from the Ivory Coast (cocoa and related products), and 18.4 percent was from South Africa and Tunisia combined. By product, cocoa beans were followed by coffee and olive oil.

4. South Africa's intra-African agricultural trade

This section examines the role of agricultural trade for South Africa and the importance of intra-African trade in that portfolio. It again uses the World Trade Atlas data and starts with a general outline of South African agricultural exports to the world during 2008 and 2009 and shows how Africa fits into that picture, with the historical perspective over the December years 1997 to 2009 inclusive also shown. Note that in general the data excludes intra-Southern African Customs Union (SACU) trade, and while this is an omission from the big picture it is of little relevance to the implication of greater liberalisation in the tripartite countries as intra-SACU trade is virtually free of restrictions[4].

[4] We use 'virtually free of restrictions' advisedly, as there are constraints imposed by the BLNS countries of Botswana, Lesotho, Namibia and Swaziland that are seemingly contrary to the wording and spirit of the SACU Agreement (Sandrey and Vink, 2009).

4.1 South African agricultural exports

Table 7 shows the total South African exports to (a) the world and Africa for the 2008 and 2009 December years. The data is shown at HS 4 level and ranked by agricultural exports to Africa.

Table 7: South Africa: aggregate exports to the world and Africa for 2008 and 2009

HS code	Description	Exports to the world		Growth 1997-2007 (% p.a.)	Exports to Africa		Growth 1997-2007 (% p.a.)	% to Africa	
		2008	2009		2008	2009		2008	2009
	Total agriculture ($m)	5,517	5,603	6.6	1,721	1,866	8.3	31	33
1005	Corn (Maize) ($m)	510	445	4.9	445	419	11.0	87	94
1701	Cane sugar ($m)	218	387	3.8	133	171	7.0	61	44
2106	Food preps, other ($m)	83	89	13.2	73	79	12.9	87	88
2009	Fruit juice ($m)	170	170	7.7	52	66	12.4	31	39
2202	Waters ($m)	65	70	8.0	56	62	7.1	86	88
1512	Sunflower oil ($m)	91	60	9.8	24	60	9.8	27	99
0808	Apples, Pears ($m)	367	365	6.8	59	56	10.3	16	15
1103	Cereal meal, etc. ($m)	52	52	10.2	51	51	10.2	98	99
2204	Wine ($m)	754	727	12.0	54	49	9.2	7	7
2402	Cigarettes ($m)	63	80	3.3	41	47	0.8	65	59
	Top 10 Africa $m	2,373	2,445	7.2	987	1059	9.1	42	43
	Top 10 Africa % Total	43.0	43.6		57.3	56.8			

Source: WTA

Total agricultural exports from SACU to Africa during the two periods of 2008 and 2009 were $1,721 and $1,866 million respectively, representing 31 and 33 percent of South Africa's global agricultural exports respectively. The growth rate of agricultural exports to Africa is also higher than to the rest of the world (8.3% per year as opposed to 6.6%). By commodity, maize, cane sugar and 'other food preparations' were the main exports to Africa, with Africa taking some 94, 44 and 88 percent of the totals in these lines respectively. The top 10 products to Africa shown represent around 43 percent of global exports but a higher 57 percent of exports to Africa.

Table 8 shows the destination of South Africa's agricultural exports to Africa. After a number of years of economic meltdown, Zimbabwe is once again the main destination, followed by Kenya and Mozambique. These three destinations account for 53.8 percent of the intra-African total. Only Nigeria is outside of the tripartite alliance.

Table 8: South African agricultural exports to Africa

	1997	2007	2008	2009	growth	African total	
	$m				% p.a.	%	
World	2,536	4,233	5,517	5,603	6.61		
AFRICA	686	890	1,721	1,866	8.3	**2009**	**cumulative**
Zimbabwe	58	60	421	420	16.5	22.5	22.5
Kenya	128	44	123	333	7.9	17.8	40.3
Mozambique	124	197	262	252	5.9	13.5	53.8
Angola	91	131	179	173	5.4	9.3	63.1
Zambia	42	58	223	135	9.8	7.2	70.3
DRC	39	30	41	61	3.7	3.3	73.6
Mauritius	46	53	54	54	1.4	2.9	76.5
Nigeria	4	41	50	49	20.3	2.6	79.1
Tanzania	18	27	41	42	7.2	2.3	81.3
Malawi	32	23	34	41	2.0	2.2	83.5

Source: WTA

The main exports to Zimbabwe were maize, sunflower seed oils, cereal groats and sugar (41.3 % in total) and to Kenya maize constituted 85.4 percent of the total exports, having increased from $1 million during 2007 to $70 million in 2008 and to $284 million in 2009.

4.2 South African agricultural imports

Table 9 shows that Africa (non-SACU) is not a major source of South African agricultural imports. During 2008 and 2009 these imports were $259 and $256 million respectively and only constituted some 5.5 and 6.0 percent of the total imports over these two periods. Furthermore, with a growth rate of only 2.2 percent from 1997 to 2009 compared to the total growth of 6.8 percent, Africa is becoming less significant as a source of agricultural imports. Imports from Zimbabwe, Malawi, Zambia and Mozambique (68% of the total from Africa) are duty free under the SADC Agreement and hence unlikely to be increased by trade liberalisation. The top 10 countries shown represent 91.8 percent of the total African imports into South Africa for 2009, with nearly one-third (31.4%) from Zimbabwe.

Table 9: South Africa's agricultural imports from Africa for 2008 and 2009

	1997	2008	2009	Growth (% p.a.)	Share of Africa total	
RSA imports from the world ($m)	1,894.2	4,735.3	4,275.7	6.8		
RSA imports from Africa ($m)	195.8	259.0	255.5	2.2		
% from Africa	10.3	5.5	6.0		%	Cumu-lative %
Zimbabwe ($m)	86.4	77.8	80.2	-0.6	31.4	31.4
Malawi ($m)	28.9	43.5	41.7	3.1	16.3	47.7
Zambia ($m)	19.6	26.6	29.4	3.4	11.5	59.2
Mozambique ($m)	8.9	26.4	21.6	7.4	8.4	67.7
Ivory Coast ($m)	20.0	16.2	17.6	-1.1	6.9	74.5
Uganda ($m)	0.2	11.4	14.6	34.8	5.7	80.2
Tanzania ($m)	2.1	15.2	13.7	15.5	5.3	85.6
Kenya ($m)	7.0	7.1	6.5	-0.6	2.6	88.1
South Africa* ($m)	7.2	6.0	5.0	-3.0	1.9	90.1
Ethiopia ($m)	0.3	4.7	4.4	21.5	1.7	91.8

Source: WTA, where * for South African imports are most likely re-imports.

Table 10 shows the major imports into South Africa from Africa by product. Tobacco is the main product (Zimbabwe and Uganda), followed by raw cotton (Zimbabwe and Zambia), tea (Malawi) and cocoa paste (Ivory Coast). The African share of total imports is high in several of these products, indicating that while Africa is not important overall, it is in several niche products.

Table 10: South African imports from Africa by product, $ million and % shares.

Description	2008	2009	Growth (% pa)	Africa share of total imports (%)	
				2008	2009
Total	259.0	255.5	2.2	5.5	6.0
Tobacco	50.3	48.2	2.1	48.3	25.0
Cotton, raw	50.9	45.9	-2.9	100.0	99.9
Tea	23.9	35.1	6.7	83.1	85.6
Cocoa paste	14.8	16.5	10.7	78.9	88.8
Oilcake	17.5	16.3	6.0	69.4	50.8
Oilseeds	5.5	9.7	4.9	56.6	72.1
Molasses	3.8	8.2	27.8	34.9	74.8
Bran	11.2	6.2	9.0	96.8	90.0
Coffee	5.2	6.0	4.5	6.6	11.9
Leguminous vegetables	5.9	4.3	10.2	8.9	6.5

Source: WTA

5. Informal and unreported trade

Accurate and timely trade data is hard to come by, in Africa even more so because of the prevalence of informal and unreported trade. Dongala (1993) reports on Africa's large informal trade and postulates that all manner of goods are traded; that the trade is large in scale, unregulated and undertaken by a multitude of players generally operating on a small scale but with formal networks; that there is generally complete freedom and ease of entry and exits for these players; that they escape many formal requirements such as taxes and use parallel foreign exchange markets to alleviate currency conversion problems; and finally that the goods are traded at market prices. His regression analysis suggested that there are positive links between informal incentives to trade and variations in the money and quasi-money situations and that macroeconomic instability influences informal trade.

Villoria (2008) reports that it is commonly accepted that in some instances over 40 percent of the potential trade flows are informal and unreported: his work systematically estimates the likely magnitude of this missing trade by using a gravity model to assess where high fixed costs can actually prohibit trade within Africa, on the assumption that this may explain at least some of the common zero-valued flows that characterise intra-African trade. Overall his analysis suggests that missing exports were valued at approximately $300 million during the base year of 2001, with missing trade highest in the lowest income countries of Central and West Africa but not Southern Africa.

In Southern Africa, the Famine Early Warning System (FEWS) Network is monitoring cross-border trade that goes on without being recorded and therefore does not form part of official statistics.[5] Currently, 29 border points in the region are monitored and trade that is unrecorded is reported because it is carried out without any formal documentation, and/or is considered so negligible as not to require formal permits and other documentation. Though small, the volumes reported in Table 11 end up being quite substantial in many cases. Only maize, rice and beans are reported on, with maize meal converted into grain equivalents. More recently, a separate analysis has been included to show the proportion of maize meal as against the maize grain. This is a recent addition to the data, and shows that maize meal is around ten percent of the maize total by weight.

Table 11: Informal cross-border food trade, July 2004-July 2010 (tonnes)

	Maize		Rice		Beans	
	Exports	**Imports**	**Exports**	**Imports**	**Exports**	**Imports**
Malawi	31,319	511,718	14,596	9,489	3,182	33,760
Mozambique	421,137	12,588	12,503	1,486	20,531	1,427
RSA	8,321		699		531	270
Tanzania	130,193	16,958	4,875	5,954	19,207	434
DRC		75,214		47,577		32,262
Zambia	130,518	50,879	54,039	9,653	33,674	6,585
Zimbabwe	1,452	55,583	185	12,739		2,388
Totals	722,941	722,941	86,898	86,898	77,125	77,125

Source: FEWS NET Southern Africa, Phumzile Mdladla personal communication

[5]See http://documents.wfp.org/stellent/groups/public/documents/ena/wfp221803.pdf.

Table 12 provides a comparison between the assessed informal trade in these products as shown above and the official reported data from the Food and Agricultural Organisation (FAO) database for maize, rice and beans. These are indicative only, as the years overlap somewhat and the definition may not be directly comparable, but nonetheless if the FEWS NET data is indeed not recorded, in some instances the informal trade is significant:

Table 12: A comparison between formal and informal trade, 2005-2007 (tonnes)

	Exports			Imports		
Maize	**FAO**	**Informal**	**Proportion (%)**	**FAO**	**Informal**	**Proportion (%)**
Malawi	392,882	5,550	1	189,288	312,201	165
Mozambique	123,264	223,251	181	446,150	1,160	0
RSA	2,825,335	1,737	0			
Tanzania	209,568	112,921	54	346,809	4,609	1
DRC	263		0	56,906	22,481	40
Zambia	100,167	39,179	39	178,752	25,150	14
Zimbabwe	1,277	379	30	940,663	17,416	2
Maize, total	3,652,756	383,017	10	2,158,568	383,017	18
Rice						
Malawi	5,120	1,922	38	8,843	6,927	78
Mozambique	334	7,248	2170	1,067,223	14	0
RSA	57,685	146	0	2,521,402		0
Tanzania	34,074	2,731	8	214,492	1,802	1
DRC	0			188,889	26,970	14
Zambia	439	27,929	6362	53,217	1,851	3
Zimbabwe	282	0	0	75,143	2,412	3
Rice, total	97,934	39,976	41	4,129,209	39,976	1
Beans						
Malawi	4,884	1,081	22	11,915	15,044	126
Mozambique		8,615			762	
RSA	9,810	408	4	208,904	0	0
Tanzania	27,390	8,077	29	15,552	4	0
DRC				11,418	22,672	199
Zambia	1,206	23,131	1918	20,994	1,886	9
Zimbabwe	556		0	38,576	944	2
Beans total	43,846	41,312	94	307,359	41,312	13

Source: FAO database and FEWS data, author's analysis

- Except for some relatively minor flows from South Africa to Zimbabwe, the South African informal trade appears to be very low based on this analysis, and given the often large numbers that dominate trade overall in some cases this lowers the overall percentage figures;
- Conversely, there are significant trade flows associated with Mozambique and maize exports and Malawi and maize imports where the informal trade is more than the reported trade. An examination of the FEWS NET data shows that over its entire reporting period this particular bilateral maize flow represents just over half of the total maize informal trade, and that maize is the most significant of the commodities traded;
- Exports of rice from Mozambique and particularly from Zambia are significantly above the reported data; this in turn influences the rice informal percentages. The data shows that the Mozambique exports are to Malawi and Zimbabwe, while the DRC is the destination of most of the large Zambian rice exports;
- The informal trade in beans is dominated by Zambian exports to the DRC (especially in the very early period), Tanzanian exports to Malawi (especially in the later period) and Mozambique's exports to Malawi where the trade is spread evenly across all three periods;
- Overall, for maize the informal trade represents 10 percent of the exports and 18 percent of the imports; for rice, the comparable percentages are 41 percent for exports and an insignificant 1 percent for imports, while for beans the informal exports almost match the FAO data and the formal imports are 13 percent of the reported data.

It is therefore evident that in many instances informal trade is significant while especially with processed products such as rice (not generally grown in the region) it is likely that re-exports of products that may have entered the exporter are reported here and then informally transshipped. This is almost certainly the case within SACU, as except for tariff revenue distribution, there is no real need to report intra-SACU trade flows.

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Chapter 5

An assessment of the Trade, Development and Cooperation Agreement (TDCA)[1]

Ron Sandrey

Abstract

This chapter examines the changes in agricultural exports from South Africa (RSA) to the EU over the 2000 and 2009 December years to assess the impact of the TDCA on these exports. An examination of both the EU import market and the South African export market was made at the HS 6 line level. South African agricultural imports into the EU have performed very well in those lines where trade is significant, with around 57 percent of the trade in lines where the line was increasing as a percentage of EU from both the world and South Africa, and furthermore the increase from South Africa was above the corresponding increase from the world. South Africa is gaining market share in lines that represent a strongly growing EU market. The comparable figure for South African exports to the EU is that some 75 percent of the exports by value are in this high-performing 'star' classification. Encouragingly, there is a high degree of correlation between the values of imports as reported by EU and exports as reported by South Africa. Assessed on South African export values the average duty paid in 2009 would have been 6.4 percent, while assessed on EU imports it would have been 6.3 percent. In contrast, had the prevailing pre-TDCA tariffs been applied these average duties would have been 7.1 percent and R1,066 million **higher** based on South African exports and 6.7 percent and R1,363 million **higher** based on EU imports. From this we conclude that the TDCA preference has been a factor in promoting agricultural exports to, and regional integration with, the EU. Conversely, from an analysis of EU imports into South Africa we assess that the EU is doing well, but that the impacts of the tariffs reductions are more muted than the comparable reductions for South African agricultural imports into the EU.

Introduction

The Trade and Development Cooperation Agreement (TDCA) between South Africa and the European Union (EU) is an important trade agreement for South Africa, as it enables

[1] Much of this paper was written while Dr Sandrey was the Hobart Houghton Research Fellow at Rhodes University during August and September 2010.

preferential access to its largest market for many product lines. Unfortunately those lines exclude many agricultural lines that are of significant interest to South Africa. The Department of Trade and Industry (dti) reports that it was signed in October 1999 after five years of negotiations. It was provisionally applied but only partially applied from 1 January 2000 and fully entered into force on 1 May 2004. This implementation phasing period makes it hard to assess, as it really gives no clear starting point for comparative analysis. We have, however, taken 1 January 2000 as the starting point, but this phasing period may well be a factor in distorting our preliminary results as shown here. Nonetheless, as South Africa's major export-oriented trade agreement, albeit one with considerable exemptions, it behoves analysts to examine the trade effects nearly a decade later.

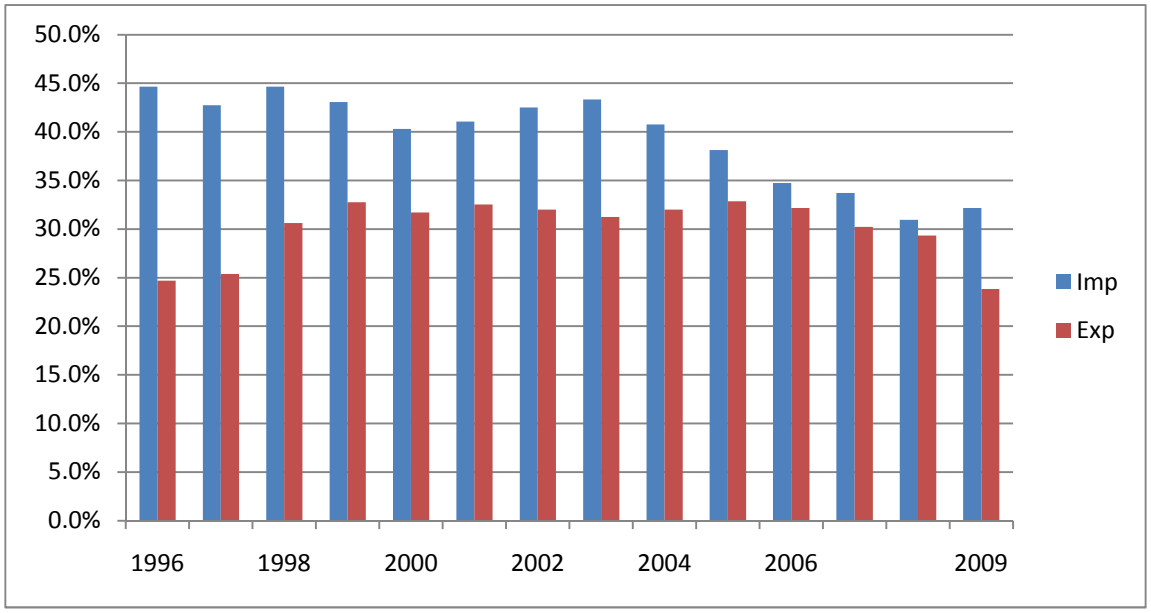
The objective for this paper is to provide a preliminary analysis of how effective the TDCA has been in promoting South African agricultural exports. We do this by firstly assessing how well South Africa has performed in the EU agricultural market since the inception of the TDCA using a variant of shift-share analysis to undertake a line-by-line look at both South Africa's agricultural trade performance in the EU import market and the relative performance of the EU as an export market for South African agriculture. We then examine these performances against the tariff preferences as negotiated by South Africa in the EU market.

The data

Overall trade

Figure 1 provides an initial view of the bilateral merchandise trade between South Africa and the EU as viewed from the South African perspective. It shows that initially from 2000 there was a reversal of the decline in the percentage share of EU imports into South Africa, but from 2003 that decline restarted and continued through to 2008. The post-TDCA high was in 2003 when some 43.3 percent of the South African imports were sourced from the EU, and this declined though to the low of 30.9 percent in 2008. The export share destined for the EU from South Africa was much more stable from 2000 through to 2006 (with a high of 32.9% in 2005) before similarly declining to a low of 23.8 percent in 2009 period.

Figure 1: Bilateral EU-South African trade, 1996 to 2009 in percentage shares.



Source: World Trade Atlas

How well has South Africa performed in the EU market?

We now move to an examination of South Africa's relative performance in the EU market over this period. We again used the World Trade Atlas data from the EU for the two periods 2000 and 2009 December years (expressed in R millions) and examined South Africa's performance relative to its competitors at the detailed HS 6 digit lines. This gave us over 5,000 lines to work with. The first step was to look at the overall performance of EU imports and then South Africa's overall performance. We found that the EU imports in rand had increased by an average of 8.77 percent while those from South Africa increased by a lesser 6.93 percent, showing that overall South Africa was losing market share.

Next we assessed each and every line to see how well that line was doing against its competitors. This gave us eleven separate categories to work from:

- Indeterminate, where there were no imports from South Africa in either 2000 or 2009 with the result that we could not assess an increase. We note at the outset that this is a preliminary assessment, and changes to EU import classifications may have taken place which will exaggerate this category.

- The 'gold stars', where the line was increasing as a percentage of the EU from both the world and South Africa, and furthermore the increase from South Africa was above the corresponding increase from the world – South Africa is gaining market share in a strongly growing EU market.
- The 'stars', were the same as above except that South Africa's share in these lines was above its overall import share but not above the comparable competitor share in this line. South Africa is doing very well in a growth EU market. Both 'gold stars' and 'stars' are doing well.

With the next set of seven categories we can assess the combinations of South African performance against competitor performance in EU markets that can be growing above the EU import average, below the EU import average, or where the EU import average is negative. These lines generally represent 'battlers' where exporters are fighting a steady but sometimes lonely and perhaps losing battle.

- There are two combinations where the increases in the EU lines are above the EU average: (a) where the South African line increase is still positive but below the South African average and (b) where the South African increase is negative.
- Next there are three categories where the increases in the EU lines are still positive but below the EU average: (a) where the South African line increase is above the South African average, (b) where the South African increase is below the average but still positive and (c) where the South African increase is negative.
- These are followed by two combinations where the increases in the EU lines are negative: (a) where the South African line increase is above the South African average, and (b) where the South African line increase is negative.

Finally, there is the bottom category ('real dogs') where this particular line is declining overall in both EU imports from the world and from South Africa. These exporters are engaged in more of a forlorn battle. These categories are represented in Figure 2, where, for example, the top right-hand segment is the 'stars' where the lines are those whose growth over the period has been above both the EU import global average and the South African average growth, and conversely the lower left-hand segment is the 'dogs' that are not doing well. Note that the diagram is concentrated upon the portion above the line that denotes a positive increase in EU imports.

Figure 2: Representation of the market segments

EU increase above average, RSA incr -ve EU overall average increase	EU above av, RSA +ve	Stars both above average
EU incr +ve, RSA incr -ve	EU +ve, RSA below av	EU incr +ve, RSA above av RSA Imp increase rate
Dogs Both negative	EU -ve, RSA +ve RSA average increase	EU -ve, RSA above av

Firstly, overall imports are shown in Table 1, and the overall theme is one where more than half of the imports by values are 'real' or 'basic' stars in that South Africa is increasing imports in lines at a rate above the average South African growth rates in lines where the overall imports into the EU are also increasing above the EU average import growth. Thus, the South African overall performance in the EU market for those lines actually traded has been impressive.

Table 1: Overall imports from South Africa into the EU, 2009

Categories	R million	% share	Import lines		
Totals	**21,373**	**100.0%**	**first**	**second**	**third**
Undetermined	10,303	6.0%	platinum waste	fuels special	petroleum
Real stars	44,589	25.8%	filter machinery	precious metals	wine
Basic stars	42,893	24.8%	coal	coal	platinum
EU incr above av, RSA still +ve	6,880	4.0%	seat parts	part filtering	avocados
EU incr above av, RSA incr -ve	1,382	0.8%	wood doors	anthracite	wood pulp
EU incr still +ve, RSA incr above av	24,544	14.2%	ferro-chrome	vehicles	oranges
EU incr still +ve, RSA incr below av	5,973	3.5%	apples	palladium	fish chilled
EU incr still +ve, RSA incr -ve	11,901	6.9%	gold	diamonds	aluminium
EU incr -ve, RSA incr above av	371	0.2%	precious amalgam	carboxylic	
EU incr -ve, RSA incr still +ve	22,544	13.0%	diamonds	granite	
Real dogs, both -ve	1,652	1.0%	vehicles	data parts	greasy wool

Source: WTA data

Agricultural trade only

We next concentrate upon the agricultural trade as defined by the World Trade Organisation (WTO). The picture relating to agricultural imports from South Africa into the EU over the early part of this millennium is shown in Table 2. As with all imports, we emphasise that while the starting year of 2000 roughly parallels the start of the TDCA and the most recent end year of 2009 are used, given the variations in trade, the choice of other starting years may give different result. This is therefore only a useful snapshot. Encouraging is that a very high percentage of the agricultural trade is assessed as being real stars (37.2%) or stars (19.2%), indicating that South African agriculture is doing very well in the products where it is trading. Similarly, an insignificant 1.0 percent is assessed as being real dogs that are fighting that forlorn battle and losing on all fronts (although we hasten to add that without a significantly more detailed analysis of the trade this is a generalisation as individual exporters may be finding these lines profitable).

Table 2: Agricultural imports from South Africa into the EU, 2009

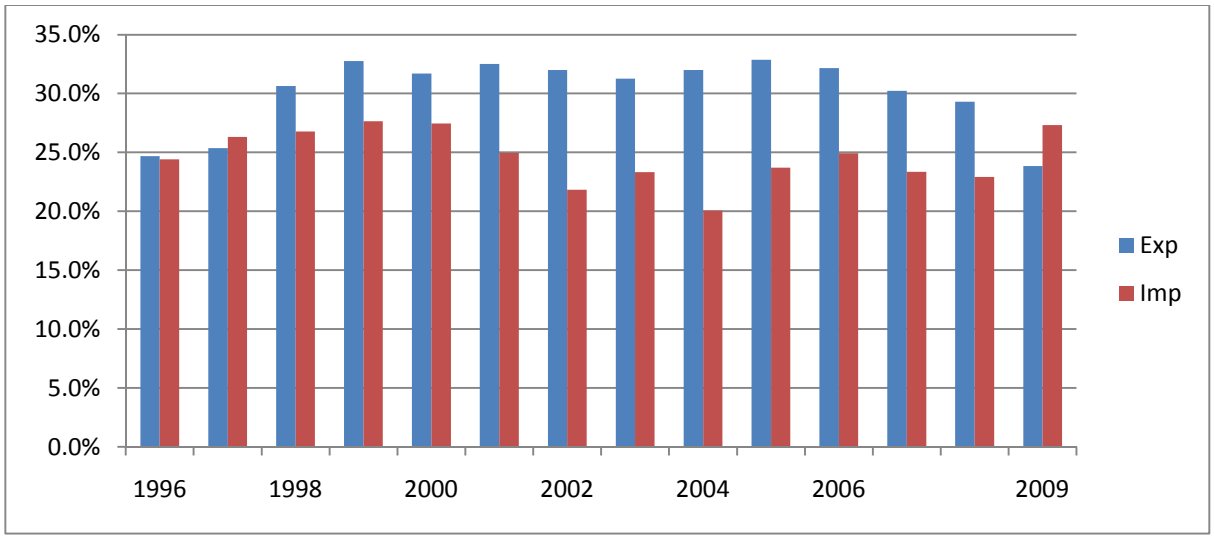
Categories	Rand millions	% share	Import lines		
Totals	**21,372.5**	**100.0%**	**first**	**second**	**third**
Undetermined	955.1	4.5%	lemons	macadamia	chrysan-themum
Real stars	7,954.7	37.2%	wine	wine	pears
Basic stars	4,102.2	19.2%	grapes	peaches	liqueurs
EU incr above av, RSA +ve below av	2,165.8	10.1%	avocados	plums	apricots
EU incr above av, RSA incr -ve	81.8	0.4%	nuts	frozen vegetables	
EU incr still +ve, RSA incr above av	3,713.5	17.4%	oranges	grapefruit	mandarins
EU incr still +ve, RSA incr below av	2,115.7	9.9%	apples	sheep skins	dried grapes
EU incr still +ve, RSA incr -ve	33.2	0.2%	coffee	noils wool	
EU incr -ve, RSA incr above av	10.9	0.1%	wool	peppers	
EU incr -ve, RSA incr still +ve	17.3	0.1%	animal food	dried citrus	
Real dogs, both -ve	222.4	1.0%	wool	wool	wool

Source: WTA data

How well has the EU performed as destination for South Africa?

Figure 2 shows the relative performance of the EU as a South African trading partner in agricultural products over the same 1996 to 2009 periods. The EU is more important as an export destination, and here the share was stable at between 30 to 33 percent 1998 through 2006 before declining to a low of 23.8 percent in 2009. The pattern for agricultural imports is different in that following the TDCA implementation the importance of the EU declined through to a low of 20.1 percent in 2004 before increasing to 27.3 percent in 2009, a figure that was just marginally below the 27.5 percent in 2000 and the high of 27.7 percent in 1999. These variations serve to again caution that the analysis above of South Africa's performance in the EU market and the following comparable analysis of the EU's importance to South Africa are snapshots only and are likely to be influenced by the chosen time periods.

Figure 3: The relative importance of the EU to South Africa's agricultural trade



Source: World trade Atlas

We now extend the analysis to assess the 'mirror' performance of South African exports destined for the EU. Firstly, we note that for South African imports into the EU the value was Rand 21,373 million during 2009, while the comparable export value from South Africa was a lesser rand 15,927 million (or some 75.4% of the import figure). This difference is probably mostly due to shipping costs, as the South African export data is Fob while the EU data is CIF that includes freight and insurance. However, from Figure 2 we note that the exports to the EU as a percentage of South African total agricultural exports is declining.

Table 3: Agricultural exports from South Africa to the EU, 2009

Categories	Rand million	% share	Import lines		
Totals	**15,927**	**100**	**wine**	**grapes**	**oranges**
Undetermined	308	1.9	macadamia	horses	crysanthemum
Real stars	2490	15.6	wine	tobacco	processed fruit
Basic stars	9407	59.1	wine	grapes	apples
EU incr above av, RSA +ve below av	1758	11.0	oranges	grapefruit	peaches
EU incr above av, RSA incr -ve	161	1.0	wool	lamb skins	
EU incr still +ve, RSA incr above av	0	0			
EU incr still +ve, RSA incr below av	1350	8.5	avocados	sheep skin	
EU incr still +ve, RSA incr -ve	211	1.3	peanuts	mangoes	ethyl alcohol
EU incr -ve, RSA incr above av	0	0			
EU incr -ve, RSA incr still +ve	74	0.5	nuts	apple juice	
Real dogs, both -ve	167	1.0	wool	mohair	orange juice

Source: WTA data

Again, the picture is a good one for those lines that are being exported to the EU, with some 15.6 percent of the agricultural exports in a category where there exports are increasing at a faster rate than both the overall South African average and the average to the EU and a further 59.1 percent in the stars where EU exports are outperforming the global exports in that line. Thus, just over three-quarters of the exports are performing well.

Before going on to examine the possible impact of the reducing tariffs from the TDCA it behoves us to look at the data reconciliation by HS 6 to assess how South African exports to the EU relate to EU imports from South Africa, This will have a bearing on how accurate our tariff reduction analysis is. Overall, given that imports include costs of getting the produce to the EU, the reconciliation seems satisfactory; this is an exercise that is often confusing. Note that nine of the top twelve exports are classified as 'real stars' or 'basic stars', while five have that status as EU imports, confirming that in the major trade lines to the EU South Africa is doing well. In addition, there is a correlation coefficient of 98.7 between the trade data for the two reporting countries, verifying that indeed the reconciliation is satisfactory. Complicating the reconciliation analysis in Table 4, EU line HS 08MMM0, a special EU fruit import line, attracted South African imports of R245 million, while HS 080620, another line of grapes, accounted for additional grape exports of R186 million and imports of R201 million (although the latter does not complicate the correlation analysis). Note that wines have done especially well.

Table 4: Reconciliation between South African exports and EU imports, 2009

	Total agriculture		15,927	21,373	
	HS line	Exports from South Africa		Imports into EU	
Basic stars	220421	Wines	3,141.8	3,729.4	**Real stars**
Basic stars	080610	Grapes	2,398.1	3,649.1	**Basic stars**
	080510	Oranges	1,278.0	2,159.3	
Real stars	220429	Wines	1,217.6	1,378.1	**Real stars**
Basic stars	080810	Apples	900.6	1,307.5	
Basic stars	080820	Pears	823.2	1,316.5	**Real stars**
Basic stars	080520	Mandarins	367.3	534.8	
Basic stars	020890	Offal	356.0	364.6	**Real stars**
	080540	Grapefruit	347.3	717.4	
Basic stars	080940	Plums	341.4	574.9	
Basic stars	080550	Lemons	215.0	299.5	
	080440	Avocados	203.2	603.0	
		Subtotal as % total	72.8%	77.8%	

Source: World Trade Atlas

Complicating the reconciliation analysis in Table 4, EU line HS 08MMM0, a special EU fruit import line, attracted South African imports of R245 million, while HS 080620, another line of grapes, accounted for additional grape exports of R186 million and imports of R201 million.

Effects of tariff preferences from the TDCA

In undertaking this analysis we caution that there is no direct one-on-one mapping of tariff lines against the World Trade Atlas data. The trade data is at the HS 6 line level, as a more detailed HS 8 or HS 10 line data is not available from the World Trade Atlas, while the tariff data is at a detailed level. A degree of licence was exercised in assessing the HS 6 trade lines against this more detailed tariff data. Assessed on South African export values, the average duty paid in 2009 would have been 6.4 percent, while assessed on EU imports it would have been 6.3 percent. In contrast, had the prevailing pre-TDCA tariffs been applied these average duties (assuming of course the same 2009 trade figures, figures that would have increased in response to the lower duties) would have been 7.1 percent and R1,066 million higher based on South African exports and 6.7 percent and R1,363 million higher based on

EU imports. Note that the distribution of this R1.3 billion from reduced duties in the EU is not directly assessable, and even though on paper the exporter would have to pay this figure, the complexities of the marketing chain dictate who actually derives these benefits. Along with the exports, other players in the chain include importers, retailers and consumers. And, of course, other duty reductions apply to non-agricultural trade – but we have not assessed these.

An indication as to where these savings have occurred is given in Table 5, where the top 21 HS 6 lines ranked by duty savings in the EU market are given. Almost all are horticultural based if one accepts wine as a horticultural product, with only tobacco and offal the exceptions. There have been duty reductions in all lines that show a range from 1 percent (grapefruit) through to 77 percent (tobacco). Again, we caution that these reductions are probably a good estimate only as we could not obtain a one-on-one mapping from the information available to us at the time.

Table 5: An assessment of duties on the South African export-EU import agricultural trade

	RSA exports to EU 2009, Rand mill			EU tariffs at (%)			EU Imports 2009, R million		
		export	saving	2000	2009	Diff	savings	Import	
	Agr total	**15,927**	**1,130.9**				**1427.3**	**21372.5**	
star	Wines	3,142	502.7	19	3	16	596.7	3729.4	star
star	Grapes	2,398	191.8	10	2	8	291.9	3649.1	star
star	Pears	823	65.9	9	1	8	105.3	1316.5	star
star	Mandarins	367	58.8	19	3	16	85.6	534.8	
star	Peaches	181	47.0	30	4	26	45.3	174.2	
star	Plums	341	20.5	6	0	6	34.5	574.9	
star	Offal	356	24.9	7	0	7	25.5	364.6	star
	Avocados	203	8.1	4	0	4	24.1	603.0	
	Peaches, canned	83	14.2	19	2	17	23.9	140.3	star
star	Veg, Fruit, Nuts	126	21.4	19	2	17	22.6	132.8	star
	Apricots	59	12.4	24	3	21	18.9	90.0	
star	Tobacco	5	3.7	77	0	77	18.1	23.4	
	Pineapple juice	78	13.3	20	3	17	10.8	63.7	
star	Fruits, prep	124	22.2	20	2	18	8.8	48.8	star
star	Tobacco, raw	185	33.4	20	2	18	8.6	47.8	
star	Fruits, Fresh, n.e.s.	118	7.1	7	1	6	8.3	138.2	
star	Melons	12	1.0	9	1	8	8.3	103.5	star
	Grapefruit	347	3.5	1	0	1	7.2	717.4	
star	Vegetables, n.e.s.	37	4.0	12	1	11	6.9	62.4	star
star	Fruits & nuts	33	4.9	17	2	15	6.2	41.4	star
	Grapes, dried	186	5.6	3	0	3	6.0	201.2	
	Subtotal $m	**9,205**	**1,066.3**				**1363.4**	**12757.5**	
	Subtotal % tot	**57.8%**	**94.3%**				**95.5%**	**59.7%**	

Source: WTA trade data, author's calculations on the tariffs

Note from Table 5 that the top seven South African exports, along with a further eight, were rated as 'stars' from South Africa, while the top three imports and another seven were similarly stars in the EU market. Nine of the 21 lines shown were 'stars' in both the export market and the import market. And a final note on the value of the TDCA to South Africa is that some 92.0 percent of the assessed tariff savings in the EU market were levied on

HS lines classified as 'stars' of South African exports even though they paid only 65.5 percent of the total tariffs.

South African imports from the EU

We also assessed the impact of the tariff reductions associated with the TDCA on agricultural imports into South Africa from the EU over the same period. As shown in Figure 2 these imports represent a lower percentage of the total agricultural imports than the comparable exports to the EU, but they have recovered from their 2004 low. During 2009 they were R9,702 million, up from R2,636 million in 2000, with the 2009 figure representing 27.3 percent of total agricultural imports compared to 27.5 percent in 2000. By value, the top HS 6 line in 2009 was whisky, followed by wheat and beer. In 2000 the top three lines were whisky, rice and food preparations, but Asian sources of rice completely dominated South African imports from 2002 onwards.

The assessed tariffs at 2009 are shown in Table 6, along with the comparable 2000 data. In 2000 the average was 12.2 percent on agricultural import, whereas this had reduced to 6.5 percent in 2009. We note here that wheat causes a complication, as the tariff was unilaterally reduced to below TDCA rate and therefore this import has not been factored into calculations of the TDCA effect.

Table 6: Overall EU performance in the South African agricultural import market

	2000	2009
Agr imports from EU (R million)	R2,636m	R9,702m
Agr imports from EU % total agr imports	27.5%	27.3%
Agr imports from EU % total EU imports	3.49%	5.56%
Assessed tariffs	12.2 %	6.5%
Assessed TDCA tariff 'saving' R million & %		R387.5m (3.99%)

Source: WTA data, author's calculations

Table 7 shows the segmentation of EU agricultural imports over the period. Again, a very high percentage (62.8%) is 'stars'. Thus the EU continues to compete well in import lines where it is active.

Table 7: Segmentation of imports from EU into South Africa, 2009

Categories	R million	% share	Import lines		
Totals	9,702	27.3%	whisky	wheat	beer
Undetermined	114	1.2	grape juice	grapes	avocados
Real stars	3,463	35.7	wheat	beer	
Basic stars	2,627	27.1	whiskies	prep cereals	flour
RSA incr above av, EU still +ve	632	6.5	pork	olive oil	flour
RSA incr above av, EU incr -ve	90	0.9	malt	cocoa butter	
RSA incr still +ve, EU incr above av	769	7.9	pet food	rum	citrus peel
RSA incr still +ve, EU incr below av	1,837	18.9	food preps	water	animal feed
RSA incr still +ve, EU incr -ve	100	1.0	ethyl alcohol		
RSA incr -ve, EU incr above av	3	0.03	sugar		
RSA incr -ve, EU incr still +ve	2	0.02	fruit preparation		
Real dogs, both -ve	63	0.65	milk powders	potato starch	

Source: WTA data

From the above analysis of EU imports into South Africa, we assess that the EU is doing well, but that the impacts of the tariff reductions are more muted than the comparable reductions for South African agricultural imports into the EU.

Chapter 6

The economics of Southern Africa from a geopolitical perspective: why and how geography matters

Sören Scholvin

1. Introduction

South Africa's economic links to the rest of Southern Africa have always been very close. Since the first railway lines were built in the region, South Africa's harbours have served as gates to Southern Africa linking especially the landlocked countries to the global market. Labour migration to South African commercial farms and to the country's mining sector has marked entire nations southwards of the equator. Without calling into question that the end of the apartheid regime caused a boom in regional economic interaction, it is puzzling that economic links were close even at the climax of the confrontation between the Frontline States and the apartheid regime. Politics apparently cannot sufficiently explain the degree of economic interaction in Southern Africa. There appears to be a force that is more permanent than rapidly changing political alignments. I suggest that geography is this force and examine why and how it matters.

I propose a geopolitical approach to the economics of Southern Africa. Political scientists and journalists often use geopolitics as an umbrella term for national policies and strategies that they criticise as ruthless pursuit of power. Yet when geopolitics emerged as an academic discipline, it was not meant to be a tool of ruthless pursuit of power. My understanding of geopolitics is based on the fundaments laid by British geographers Halford Mackinder, James Fairgrieve and American political scientist Nicholas Spykman. They conceptualised geopolitics as a science that seeks to explain social phenomena by natural causes: geopolitics addresses the geographical roots of economics and politics by studying the impact of location and physical geography on mankind.[1] Such approaches are not pursued any more by political geographers. Hence, I do not only intend to contribute to empirical knowledge

[1] Using a strict terminology, one should call the perspective that I develop 'geoeconomic' because economics and not politics is explained by geography. However, I stick to the wider understanding of geopolitics following Mackinder, Fairgrieve and Spykman. Geopolitics is not limited to politics but deals with social phenomena (including economics) in general. With this terminology, I also avoid creating confusion given that the term 'geoeconomics' was coined by Edward Luttwak (1990) with a very different meaning.

about Southern Africa but I also seek to revitalise geopolitics and to show that a geopolitical perspective provides insights that cannot be gained from a social scientific viewpoint.

2. The geopolitical perspective: explaining economics by geography

Adherents of the classical version of geopolitics seek to explain social phenomena (e.g. economic interaction and regional integration) by material structures in space or, more narrowly, by location and physical geography. The purpose of Fairgrieve's main work *Geography and World Power* was to derive the course of world history from geography. Fairgrieve (1917: v) distinguished between the 'drama of world history' and the 'stage of world history'. His entire analysis can be summarised as showing how the stage shapes the drama. He argued that geography 'controls' history. This control does not mean a direct causal relation. Geography does not necessarily cause any human action. It does, however, provide opportunities and pose constraints. Human action is possible only within the limits set by geography and often takes paths implied as rational by geography (Fairgrieve 1917: 7-9). To put it in a very simple way: the presence of precious minerals in the northeast of South Africa does not control humans in the sense that it forces them industrialise the country. Only the human decision to use these minerals, which is as such not controlled by geography, leads to industrialisation. Nevertheless, the presence of the minerals is a necessary condition for industrialisation and it makes industrialisation likely because humans just have to act rationally within their geographical setting – their action is 'conditioned by their surroundings' (Fairgrieve 1917: 22).

Being more modest with regard to the range of geopolitical explanations, Spykman deduced the expansion of states from physical geography, which, according to him, provides directions of comparatively easy and economically and strategically beneficial expansion. Expansion into certain areas (e.g. regions with vast resources) and even specific small-scale arrangements to transport infrastructure (e.g. along navigable rivers) are, simply speaking, rational (Spykman & Rollins 1939). Spykman (1942: 90-91, 1944: 23, 28-33) derived the maritime orientation of the United States, for instance, from the location of its centres of economy and population on the Atlantic and Pacific. They guarantee, for topographical reasons (rivers connecting the coast to the hinterland and estuaries providing good locations for harbours), cheap and fast transport to East Asia and Europe. Hence, topography was essential to Spykman for its impact on transport and resources. Transport and resources indicate the trade orientation of a country, which can be either continental or maritime

(Spykman 1938: 229-236). In other words, geography induces economic patterns, which characterise a state and its spatial expansion. This impact of geography on mankind is almost constant. It does not change as frequently as governments or ideational guidelines because geography is constant. Spykman (1942: 41) thus famously wrote that 'ministers come and go, even dictators die, but mountain ranges stand unperturbed', meaning that we should examine the impact of mountain ranges on mankind in order to learn about the long-term guidelines of social processes.

In a speech entitled *The Physical Basis of Political Geography*, Mackinder rendered the concept that location and physical geography shape human action more precise. His central idea was that 'geographical features govern or, at least, guide history' (Mackinder 1890: 78). Referring to an analytical frame, he suggested starting with the impact of geography on human movement and human settlement. Travelling, he said, occurred along lines of least resistance. Settling was linked to geography-based productivity and security (Mackinder 1890: 78-79). The 'Great Trek' exemplifies this approach to studying how mankind interacts with geography: being primarily politically motivated, the eastwards movement of settlers from the Cape reflected geography in the sense that the Voortrekkers followed a geographical line of the least resistance. They moved along a plateau landscape that did not pose severe physical barriers. Moving northwards or southwards was hindered by the Kalahari and the Great Escarpment. The places where the Voortrekkers finally settled were those most suitable to agriculture because of the fertility of soils and relatively high and reliable precipitation – productivity determines settlement. Moving further eastwards was a means to put distance between them and the British in order to stay out of British influence – security determines settlement.

I do not maintain that geography is the only explanation for the Great Trek and for the present-day phenomena analysed below. Yet a geopolitical perspective promises insights that cannot be gained by the standard approaches in social science. Scholars of geopolitics tended to demonstrate the use of their approach by selectively examining certain historical and contemporary phenomena. Reading the works of Mackinder, Fairgrieve and Spykman, one easily gets the impression that they chose phenomena that suited their theory, and then deduced that geography had an overall guiding power on mankind. In order to overcome this weakness in geopolitics, I intend to turn the perspective around: in the following chapter, I will provide an overview of relevant geographical features of Southern Africa and conclude

why and how economic interaction is rational following geography. The relevant features are (1) geomorphology, which reveals obstacles to transport, (2) geology, which shows where key mineral resources are located, as well as (3) climate and soils, which determine the conditions for agriculture. Finally, the question whether economic interaction in Southern Africa reflects what geography implies will be investigated and the limits of a geopolitical perspective highlighted.

3. The geography of Southern Africa: implications for regional economics

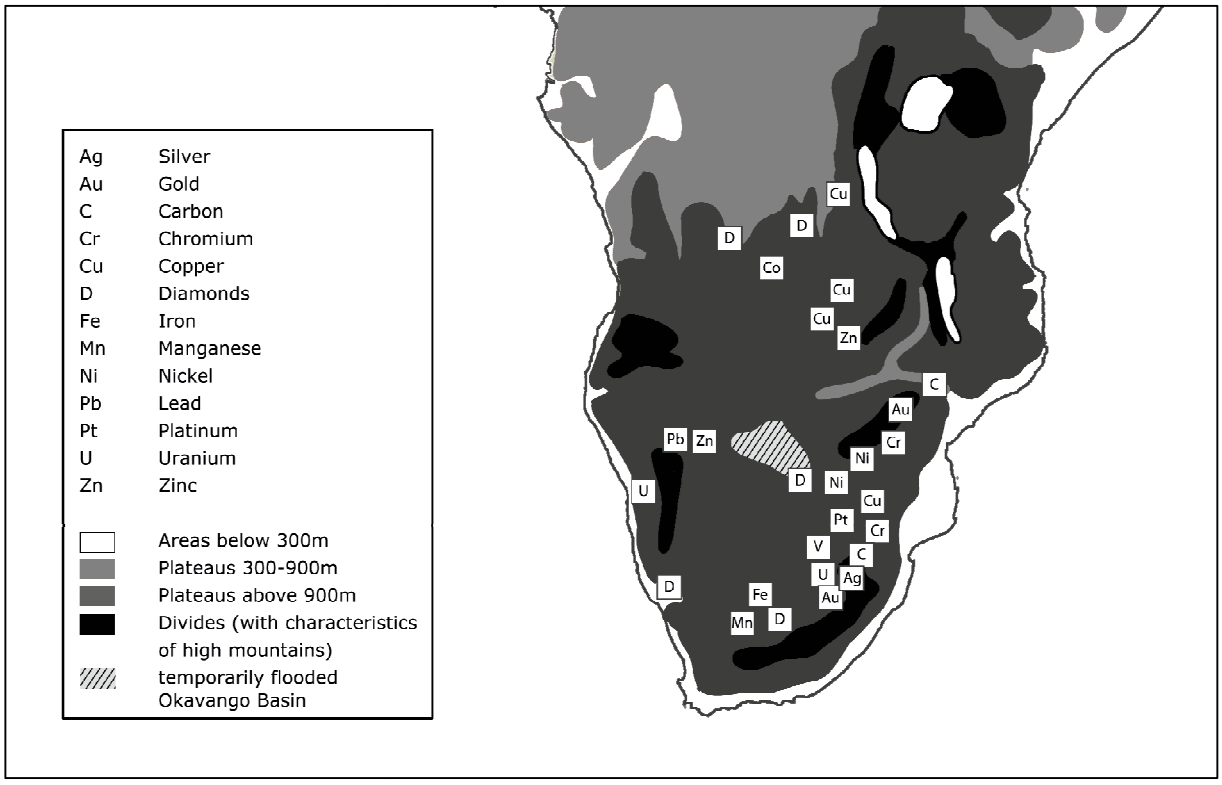
Geomorphology and geology

Looking at a map of Africa, one easily notes that there are no pronounced lowlands. Especially in Southern Africa, the coastal areas are narrow. They are moreover sharply separated from the interior parts of the continent by the Great Escarpment, which forms a semi-circle from Angola to Mozambique and poses a severe obstacle to transport infrastructure. The rivers that pass the Escarpment – many on the eastern and few on the western side for climatic reasons – are useless as waterways because they usually contain waterfalls. The river mouths are often deltaic. Sand bars, mangroves and shallow inshore waters are frequent. Large parts of the coasts are backed by lagoons and swamps. Only South Africa's coasts provide steep cliffs suitable for harbours (Yaw Osei & Aryeetey-Attoh 1997: 7-8). The geomorphology of Southern Africa's coastal zone therefore implies that the subcontinent is hard to link to overseas trading partners. The first problem is the lack of suitable places for harbours. Compared to its neighbour countries, South Africa, however, is in an advantageous position in this regard. The second problem is the close-to-shore barrier posed by the Great Escarpment. Southern Africa is disconnected from the rest of the world on account of its geomorphology. This disconnectedness increases the need and the probability for economic integration within the region.

The second striking feature of Africa's large-scale geomorphology is that, with a few exceptions, the entire continent lacks larger high-mountain regions. Africa's Precambrian basement complex, formed up to 3.5 billion years ago, has been vastly eroded and planed. On top of the basement complex, there are younger sediments. They form modestly waved plateau landscapes at an average altitude of 1,200m. Within this plateau, large basins occur. Southwards of the equator, the Congo and the Kalahari Basin are such formations. The landscape of the dry southern plateau is sometimes altered by cuestas and tectonic ridges.

Otherwise it is marked by monotonous peneplains and inselberge (Mountjoy & Hilling 1988: 14-16). Whilst this plateau landscape creates ideal conditions for transport infrastructure – there are almost no physical barriers to cross – some of the basins pose severe barriers for human movement because they coincide with certain bio- and hydro-geographical features. This becomes apparent by a comparison of the Congo and the Kalahari Basin. The former is marked, because of high precipitation, by a vast river network and a dense rain forest. It is almost impossible to cross the Congo Basin. The Kalahari Basin can, in most parts, hardly be distinguished from its surrounding plateau landscape because it neither contains dense vegetation nor significant rivers. Only in its very north does the Kalahari Basin pose an obstacle to transport because it is flooded by the Okavango River at the end of the rainy season. In addition to these barriers to human movement, tectonic activity has created the East African Rift Valley with steep slopes, which sometimes link areas at the sea level to areas of an altitude of 2,000m on a horizontal distance of 40 to 60km (Best & de Blij 1977: 7-10). It reaches from Eritrea to Kenya to Lake Victoria, Lake Tanganyika and Lake Malawi and cuts the very east of Southern Africa from the interior plateaux. Map 1 shows these geomorphological features of Southern Africa.

Map 1: Geomorphology and Geology of Southern Africa



Because of geomorphology, Southern Africa consists of (1) a vast core area, which includes the interior plateau and the Kalahari Basin. It is cut off from (2) the narrow coastal strip by the Great Escarpment. In the northeast, there is (3) another detached area. It consists of the plateau of Kenya and Tanzania, which is separated from the region's core area by the East African Rift Valley. Lastly (4) the Congo Basin constitutes the key barrier of Southern Africa ashore because of its bio- and hydro-geography. With regard to economic interaction, one may assume dense links in the core area, difficulties to connect the core area with the East African plateau and the coastal strip, almost no interaction with areas northwards of the Congo Basin and stagnation or outward orientation of the coastal strip. Using Spykman's terminology, South Africa, whose centre of economic activity and population, Gauteng, is located beyond the Great Escarpment, fulfils the key criterion of a continental power: geography favours trade ashore and severely hampers trade afloat.

Yet not only the surface of Southern Africa can be expected to have a significant influence on regional economics, but also what lies below the surface, i.e. geology, plays a key role. As already mentioned, the geological core of Africa, the Precambrian basement complex, is one of the oldest formations on earth. It can be divided into cratons: the Kaapvaal and the Zimbabwe Craton are marked by vast quantities of precious minerals. Further southwards, the Bushveld Complex is one of the richest mineral deposits in the world. It contains coal, chromium, copper, diamonds, iron, fluorspar, platinum and vanadium. Antimony, chromium, copper, iron, platinum, vanadium and zinc are also found in the northeast of South Africa (Eriksson 2000: 267-271, 280-281). The Witwatersrand is rich in deposits of gold, manganese and uranium. In the area near Postmasburg, diamonds, iron, manganese and zinc are found. South Africa's border region with Namibia comprises deposits of copper and zinc (Clark 1997: 205-207). The Congo, Kalahari and Tanzania Cratons are also rich in minerals. The Copperbelt in Congo and Zambia has an extension of 200km from east to west and 60 to 80km from north to south. Zimbabwe's 'Great Dyke', which spreads 480km from north to south, contains asbestos, chromium, gold, nickel, platinum and silver (Jürgens & Bähr 2002: 91). In Angola, Botswana and Congo, diamonds can be found in alluvial deposits. They are also located in the Namib Desert in vast quantities. More recent geological processes, dating back to the Carboniferous (280 to 345 million years ago), caused the formation of coal deposits in the Free State, Mpumalanga and KwaZulu-Natal. The area around Hwange and the Zambezi valley are also rich in coal. Most of it can be gained by

surface mining (Jürgens & Bähr 2002: 91). Map 1 shows the key mineral deposits in Southern Africa.

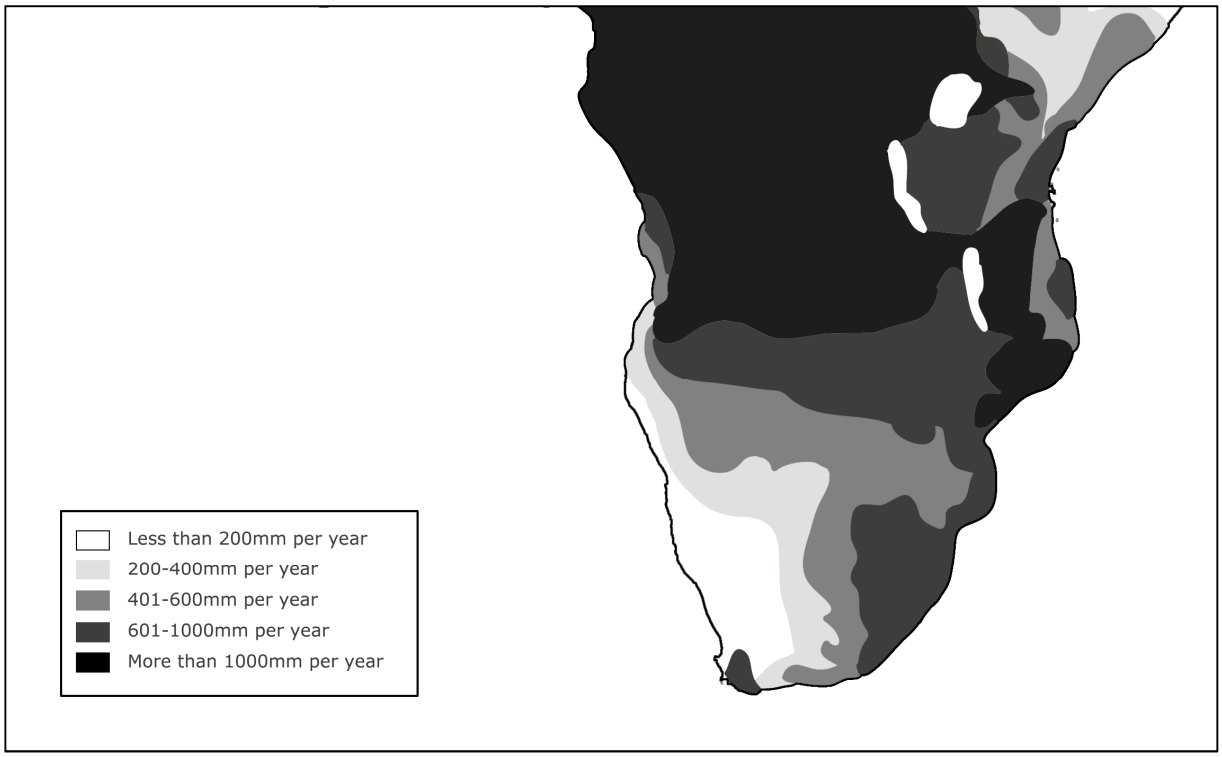
With the exception of cobalt, which is predominantly found in Congo and Zambia, South Africa possesses the greatest variety of mineral resources in Southern Africa. Since the other countries in the region are less diverse regarding their mineral resources, which can often only be used in combination with minerals from South Africa, their mining and industrial activities should, following geography, be linked to the ones of South Africa. The location of the mineral deposits therefore indicates a geographically-induced pattern of economic integration in Southern Africa. In other words, geology enforces the hypotheses derived from geomorphology: the geography of Southern Africa does not only favour a continental orientation of South Africa because of conditions for transport but also because of precious minerals which should, following geography, be the fundament of a regional mining-and-industry complex.

Climate and soils

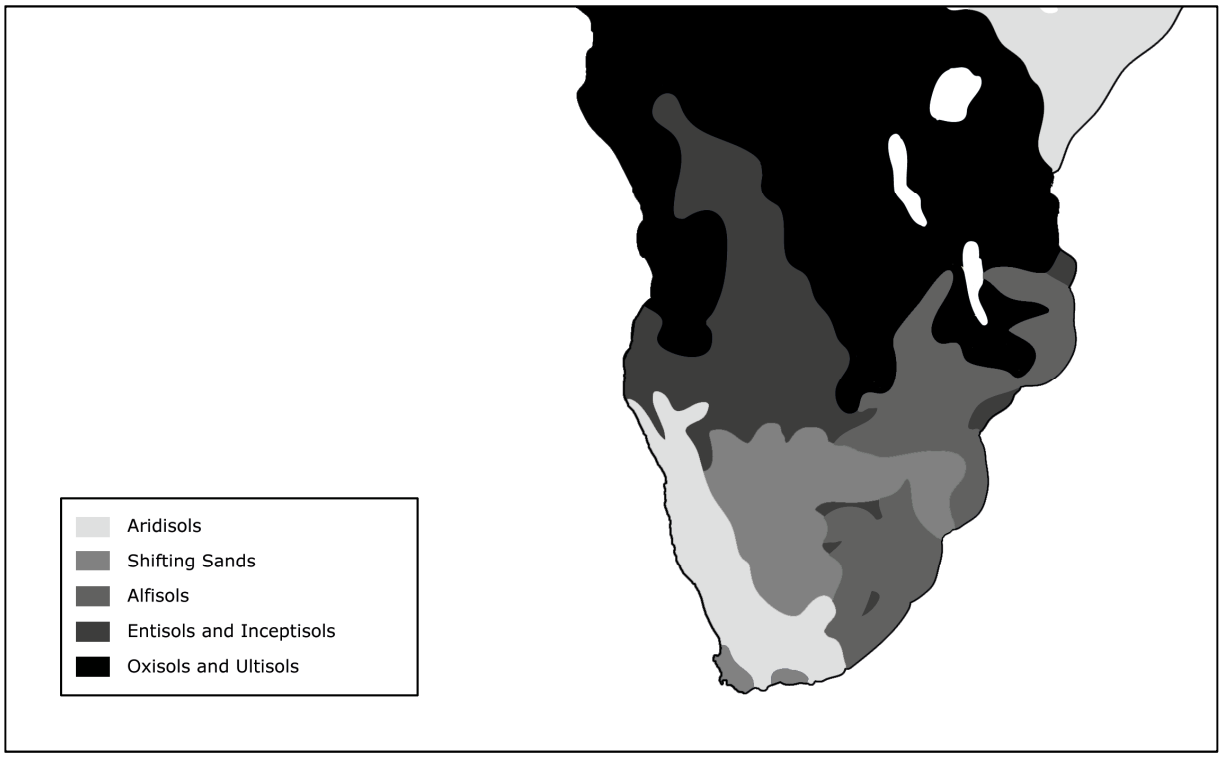
Besides geology and geomorphology, climate is highly relevant for economics in Africa. The first decisive feature is the shift of the Inner Tropical Convergence Zone (ITC) between the Tropic of Cancer and the Tropic of Capricorn. Inside the ITC, upwards air movement causes intense rainfall. Having lost its humidity, this air moves downwards outside the ITC causing aridity. The air movement in higher altitudes from the centre of the ITC to its edges leads to comparatively low pressure near the surface in the centre of ITC and attracts winds from subtropical regions. These winds converge in the ITC and lead to even higher rainfall. Whilst the Congo Basin thus receives more than 1,500mm of rain per year, summers are rainy but winters dry further north- and southwards. Greater distance to the equator means less rainfall: subtropical savannahs (more than 750mm precipitation per year, i.e. a seasonal lack of water) line up with deserts such as the Kalahari (less than 250mm precipitation, i.e. a permanent lack of water). The extreme southwest of the African continent is influenced by westerlies in winter. The westerlies cause a special climate, almost identical to the one of the Mediterranean area. Annual precipitation is about 600 to 800mm. Rainfall, however, varies strongly in the Cape region for topographical reasons. The Great Karoo, which is encircled by the South African Highveld and the Cape Ranges, is one of the driest parts of South Africa.

In the tropics, where temperatures and precipitation are high all year long, chemical weathering is a permanent process. It is not interrupted in winter like outside the tropics. Permanent chemical weathering reduces the quality of soils significantly because it leaves neither humus nor fresh minerals for the plants. German geographer Wolfgang Weischet (1977: 18-24) famously deduced the 'ecological disadvantage' of the tropics from this phenomenon. Exceptions from this edaphic disadvantage only occur in higher altitudes. Around the Great Lakes, temperatures are lower and fresh volcanic minerals are available near the surface (Weischet 1977: 25-26). This region is thus highly favourable to intense agriculture. Outside the tropics, the quality of soils increases. However, the subtropics suffer from a seasonal lack of water. Moreover, the variability of rainfall becomes a serious problem: in Botswana, the annual variability of rainfall sharply increases south-westwards from 25% at the border with Zambia to 80% in the extreme southwest. In western and southern Namibia, the variability reaches 50% to 70%. Around Windhoek, it is still 30% to 40%. Rainfall varies around 15% from the mean value at Angola's border with Congo. The variability reaches more than 50% at the coast southwards of Luanda, 30% to 50% in the far southeast and 100% in the far southwest. Even in humid Mozambique, there is a variability of 20% to 40%. In addition to these annual shifts, Southern Africa is marked by a natural, roughly 20-year long cycle of drier and rainier periods (Vogel 2000: 290-292). To cut a long story short: most parts of the tropics receive enough rainfall but lack the edaphic conditions for intense agriculture, whereas the subtropics possess sufficiently good soils but suffer from a high variability of rainfall. Map 2 shows the average annual precipitation in Southern Africa. Map 3 provides an overview of the soils in Southern Africa.

Map 2: Precipitation in Southern Africa



Map 3: Soils in Southern Africa



The second climatic feature that shapes Southern Africa is the sharp contrast between the east and west sides of the continent. As explained above, the comparatively low pressure in the ITC attracts air from the subtropics. Some of the resulting trade winds, those which are directed from land to sea, cause coastal deserts (e.g. the Namib) on the west side. They are hostile to human settlement because agriculture is practically impossible there. Other trade winds, those which are directed from sea to land, lead to high rainfall on the east side. The tropical climate, typical for the equatorial zone, thus reaches far southwards in Mozambique and KwaZulu-Natal. KwaZulu-Natal is marked by an average temperature of 20°C and annual precipitation of 1,000mm. Heavy rain and flooding is frequent in the coastal strip of Mozambique. This further decreases the aptitude of this part of Southern Africa for transport. Whilst the western coast is practically useless for agriculture and depends on fishing and mining activities, the eastern coast provides the opportunity to cultivate tropical crops in subtropical locations. The warm Agulhas Current and the cold Benguela Current enforce the characteristics of the very different climates on the eastern and western sides of Southern Africa.

Finally, Southern Africa's plateau serves as heating surface and thus poses another exception from the latitude-oriented climatic regions. In summer, the heated air on the plateau moves upwards. Air movement in higher altitudes causes, similar to what happens in the ITC, a comparatively low pressure on the ground. This attracts moist easterlies. The upward air movement and the easterlies cause precipitation of annually 500mm to 1,000mm. Rainfall declines sharply in the west to less than 450mm per year. Temperatures moreover decline with altitude, which means that evaporation decreases and at least the 500mm to 1,000mm annual rainfall in the east are sufficient for intense farming. The aridity of the west does not allow much more than extensive cattle grazing. South Africa's best soils are also found in the eastern interior for climatic reasons (Laker 2000: 343-347, 350-351). In short, with the exception of the Great Lakes region, the eastern interior of South Africa, extending partly to Zimbabwe, possesses the best conditions for intense agricultural use in Southern Africa. This area has the geographical potential to produce more than enough food for the entire region and may serve as a buffer to the shifting output of the subtropics, which results from the variability of rainfall.

Yet South Africa also suffers from a significant variability of rainfall. The mean value for the entire country has a 10% variance from the annual long-term average. On the subnational

scale, the problems of varying precipitation become even more apparent: the medium variation is lowest (less than 20%) in Gauteng and in the coastal areas, excluding the far northwest. Near the border with Mozambique and Zimbabwe, it reaches 20% to 30%. In the western interior and the northwest, it increases in semicircles from 20% to 30% in Bloemfontein and north of Cape Town to 40% to 50% near Upington (Wiese 1999: 44-46). Moreover, evaporation is extremely high with up to 2,800mm in the west. In the north, run-off of rivers (the amount of water which reaches the sea) is sometimes as low as 2% because of evaporation. Even in the eastern interior, evaporation, combined with low precipitation, can become problematic for farmers. The flow conditions of rivers are always irregular regardless of around 700mm rainfall in Gauteng (Jürgens & Bähr 2002: 66).

These climatic features are enforced by man-made climate change: man-made climate change is expected to be more intense in Africa than in the rest of the world. It will presumably lead to more rainfall in the tropical parts of Southern Africa in summer and less rainfall throughout the entire year further southwards. On the Southern African plateau, rainfall may decrease by 50%. Temperatures are projected to rise by up to 5°C during the next 75 years. The Sahara and Southern Africa will suffer from a comparatively high increase of temperatures. The Southern African plateau will be most strongly affected (Müller 2009: 21-25), apparently increasing evaporation significantly. In short, the contrast between the lack of water in the subtropics and abundance of water in the tropics will become more pronounced and cereal production will decline by up to 50% in the semi-arid parts of Southern Africa and the eastern parts of South Africa until 2080 (Fischer et al. 2005: 2077). Angola, Botswana, Namibia and Zambia are therefore expected to suffer from 20% shorter growing seasons. In some rather advantageous scenarios, small sections of the Great Lakes Region, southern Mozambique and south-eastern Zimbabwe will experience slightly longer growing seasons (Thornton et al. 2006: 33-38). Moreover, extreme events such as the El Niño Southern Oscillation will become more frequent. This will cause more droughts and more floods (Dollar & Goudie 2000: 52-53). In a wider sense, the natural shifts between drier and wetter periods in Southern Africa will become more pronounced, i.e. the difference between dry and wet periods, in terms of temperature and precipitation, will increase (Müller 2009: 20).

In sum, most parts of South Africa, including its economic core Gauteng, are marked by a lack of water, although Gauteng and its surrounding areas are the most suitable parts for

agriculture in Southern Africa. This natural shortness of water is increased by the fact that South Africa already has the most intense agriculture, the most advanced industrial sectors and the most consuming private household of the entire region: South Africa possesses only 10% of all water resources in Southern Africa. However, it accounts for 80% of the consumption. Following the definition used by the United Nations, South Africa was already on the threshold from a water-stressed to a water-scarce country 12 years ago (Wiese 1999: 53-60). In about 40 years, all of South Africa, the neighbouring parts of Botswana, Mozambique and Zimbabwe as well as the Angolan-Namibian border region will suffer from severe water stress, i.e. more than 40% of all locally available water resources will be withdrawn for human use and accordingly be degraded and depleted (Alcamo et al. 2007: 251). National programmes and the inclusion of tiny Lesotho will not be sufficient in the future. Given the abundance of water in the tropical part of Southern Africa, especially in the Democratic Republic of Congo (DRC), South Africa will depend on its continental neighbours, either as providers of water or as transit countries, in the near future in order to meet its water demands. Taking a broader perspective, the countries located in subtropical Southern Africa should be even more interested in regional integration in order to gain access to the water resources of the DRC. Provided sufficient pipelines are built, the DRC has the potential to balance the variability of rainfall in its subtropical neighbouring countries and contribute to increasing and stable agricultural yields there.

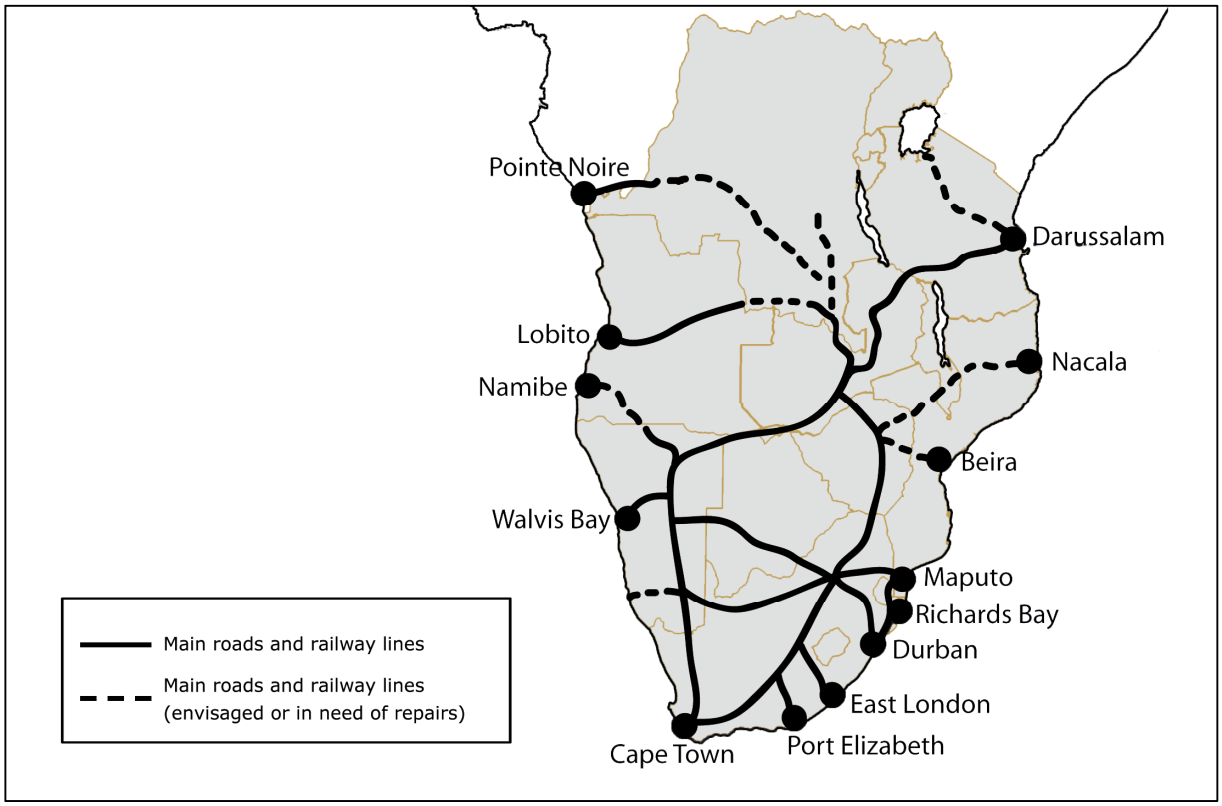
3. The impact of geography on economics: transport, trade and integration

Since Southern Africa was first connected to the European economy via harbours and railway lines in the colonial era, most of the region has been highly dependent on South Africa as direct trading partner – also because of South Africa's advanced manufacturing sector – and as gate for extra-regional trade. Railway lines and roads connect the landlocked countries, and even some countries that possess long coast lines, to South African harbours. Capacities for inland transport and for shipping are only sufficient in South Africa (Odén 2000: 246-247). Economist and political scientists explain this role of of South Africa as regional node of transport and trade by advantages of scale and by contemporary and past policies: shipping goods from Malawi via Durban is cheaper than via Beira because of the total quantity of goods shipped via Durban (Ahwireng-Obeng & McGowan 1998: 14). South Africa possesses a central position in most of today's regional 'Spatial Development Initiatives' (Plagemann & Scholvin 2010) and military force was used by

the apartheid regime to destroy alternative gateways such as the railway line from Harare to Beira (Gibb 1991: 28-33). I do not claim that these explanations are wrong. On the contrary, the economic and political scientific perspectives are essential if one wants to understand why South Africa serves as gateway to Southern Africa. Yet geography offers a different perspective, which contributes to obtaining the entire picture.

It is evident that transport infrastructure (i.e. railway lines and roads) is easier to build in plain areas. Whenever physical barriers such as mountain ranges, vast rivers or dense forests occur, the costs of building transport infrastructure will rise significantly. Given the geomorphology of Southern Africa, it is plausible to assume that transport infrastructure will primarily connect places located on the interior plateau. Connections to the coasts are difficult because of the Great Escarpment. The East African Rift Valley and the Congo Basin delineate the Southern African plateau as an area with dense transport interlinks. A map of existing transport infrastructure in Southern Africa shows this structure.

Map 4: Transport infrastructure in Southern Africa



Interviews with local experts support this delineation of Southern Africa: according to Transnet's Senior Accounts Executive for Africa Trade (Mogale 2010), railway links to Zambia and Zimbabwe are comparatively good. Transport to the DRC suffers from management problems of the DRC's national railway system but is, at least regarding infrastructure, possible to the Katanga Province. With regard to road infrastructure, the Trans-Kalahari Corridor provides an efficient link from Gauteng to central Namibia. South Namibia is connected to the Cape region via the Trans-Oranje Corridor. Links to Zambia and the DRC's Katanga Province are provided by the Trans-Caprivi Corridor. The Trans-Cunene Corridor will connect Namibia, and therefore also South Africa, to Angola. Sufficient transport infrastructure, however, ends a few kilometres before the Angolan border (Plagemann & Scholvin 2010: 4-5). In contrast to what geography suggests, Angola is hardly linked to South Africa by transport infrastructure (Smith 2010). North-eastwards connections from South Africa are provided by the Maputo Development Corridor and the North-South Corridor (direction: Zambia). Connections to Malawi and especially to Tanzania, e.g. via TAZARA, are hampered by the East African Rift Valley: mudslides are frequent on the TAZARA line, and east-to-west transport in Malawi also suffers from the steepness of the terrain (Plagemann & Scholvin 2010: 6-7).

Quantitative data – South Africa's share of the exports to and imports from its neighbours – further supports the thesis that geography matters. Table 1 shows the major trading partners of all member countries of the Southern African Development Community (SADC). South Africa is a key trading partner, especially in terms of imports, for Botswana, the DRC, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Zambia and Zimbabwe. With the exception of Angola, these nine countries are the ones that should, following geography, be most intensively linked to South Africa. The fact that Tanzania, the most distant country, which is also located beyond the African Rift Valley, and the island countries, separated from South Africa by the Indian Ocean, do not possess significant trade links with South Africa can be explained by the fact that geography discourages transport between them and South Africa. Angola's trade relations clearly contradict what geography suggests.

Table 1: Major trading partners of the SADC countries

	Imports	Exports
Angola	1. Portugal 19.7% 5. South Africa 6.6%	1. US 32.1% 5. South Africa 4.5%
Botswana	**1. South Africa 78.6%** 2. UK 5.8%	1. 56.8% UK **2. South Africa 20.3%**
DRC	**1. South Africa 22.5%** 2. Belgium 10.3%	1. Belgium 23.6% -
Lesotho	**1. South Africa 78.2%** 2. China 9.8%	1. US 68.5% **2. South Africa 17.6%**
Madagascar	1. France 13.6% 4. South Africa 6.4%	1. France 31.8% -
Malawi	**1. South Africa 36.1%** 2. India 8.5%	1. Germany 11.7% **2. South Africa 10.0%**
Mauritius	1. India 21.2% 4. South Africa 7.4%	1. UK 35.1% -
Mozambique	**1. South Africa 36.7%** 2. Australia 8.5%	1. Italy 19.4% **4. South Africa 12.3%**
Namibia	**1. South Africa 67.8%** 2. UK 8.0%	**1. South Africa 31.8%** 2. UK 15.0%
Seychelles	1. Saudi Arabia 17.6% 5. South Africa 6.4%	1. UK 23.7% -
Swaziland	**1. South Africa 95.6%** 2. Japan 0.9%	**1. South Africa 59.7%** 2. US 8.8%
Tanzania	1. China 12.0% 3. South Africa 7.7%	1. China 10.3% -
Zambia	**1. South Africa 47.4%** 2. UAE 6.3%	1. Switzerland 41.8% **2. South Africa 12.0%**
Zimbabwe	**1. South Africa 50.7%** 2. China 8.4%	**1. South Africa 33.8%** 2. DRC 8.3%

Source: CIA World Factbook and United Nations

The dominance of South Africa as source of imports for most countries in continental Southern Africa correlates with the expansion of South African private business there. The goods that companies such as Pick n Pay or Shoprite acquire for the South African market

can easily be transported to the rest of continental Southern Africa. Given that South Africa's neighbours possess comparatively weak national markets but favourable conditions for transport to South Africa, many overseas goods available in these countries are imported via South African retailers, who mainly sell their goods on the South African market. Without the strong South African demand, most overseas goods would hardly be available at reasonable prices in countries like Botswana, Namibia or Zambia (Hoffmann 2010). Other businesses from the tertiary sector, however, transcend geography because they are hardly limited by physical barriers: South African telecommunication firms, tourism companies and financial service providers had already gained dominant positions not only in Southern Africa but also in the most lucrative markets of East and West Africa (e.g. Ghana, Kenya and Nigeria) in the second half of the 1990s (Halbach & Röhm 1998: 78-80, 84-89).

Other economic links are created by South Africa's mining companies, which use the strength they gained from exploiting the vast mineral reserves in South Africa in order to expand throughout Sub-Saharan Africa. South Africa is the world's leading producer of chrome, diamonds, gold and platinum. Only a few years after reliable statistics on South African investment in Africa became available, the expansion of South African companies included gold mining in West Africa, diamond mining in Angola, Congo, Namibia and West Africa as well as coal mining in Nigeria, Zambia and Zimbabwe (Halbach & Röhm 1998: 78-80, 84-89). Even more importantly, South African companies possess the expertise and knowledge necessary to evaluate the feasibility of mining projects in Africa and are thus necessary partners for overseas companies which invest in African mining.[2] The fact that leading mining companies from South Africa, such as AngloGold Ashanti, are globalised in their activities and that the mining sectors of South Africa's neighbours are not dominated by South African mining companies but divided amongst firms from all over the world, however, requires an adjustment regarding the impact of geology on Southern African economics: since investment in mining activities does not require the transport of mass goods but primarily expertise and knowledge, the strength of South Africa's mining sector can rather be explained by geography than by its patterns of investment. South Africa is, as shown, very rich in resources (both quantity and variety). Its mining companies have therefore acquired a significant amount of expertise and knowledge. Going back to Mackinder, I conclude that geography guided history in Southern Africa in the sense that the quantity and quality of mineral resources in South Africa laid the foundation for the rise of

[2] Interview with an economic advisor at the American embassy in Pretoria, August 2010.

South African mining companies. More generally, geology explains why South Africa was able to develop a manufacturing sector and export its products to the rest of continental Southern Africa. I acknowledge that this path was only taken because of political factors (e.g. the strong support for the national industry by the apartheid regime) but as Fairgrieve argued, geography provided the necessary material basis for this path and induced it. A leading mining sector could only develop in South Africa because the mineral resources of the neighbouring countries are limited and mining companies are highly dependent on advantages of scale. The abundance of resources in South Africa induced the rise of a mining-and-industry complex there.

Lastly, climate contributes to understanding economic and political integration in Southern Africa. In 1997, the DRC joined SADC. The DRC does not share historical and political features with the other members of SADC to explain its membership. It neither belonged to the Frontline States nor was it a member of the Southern African Development Coordination Conference (SADCC). I suggest that the admission of the DRC to SADC results from the fact that the DRC is of high economic value to SADC for geographical reasons. As elaborated above, the subtropical countries in Southern Africa suffer from a temporal lack of water and a high variability of rainfall. Man-made climate change severely increases these problems. What the subtropical countries need in order to stabilise and increase their agricultural production and provide enough fresh water to private households and industries is a stable source from which they can acquire water especially in winter. South Africa also suffers from a lack of water. Its agricultural sector will hardly sustain its current output and productivity if South Africa does not find a way to gain access to a stable source of water. Given this background, the admission of the DRC to SADC makes perfect sense. Being located in the inner tropics, the DRC is marked by an abundance of water. It has what its southern neighbours urgently need. Moreover, the potential for hydroelectricity is enormous in the DRC: the Inga Dam alone can generate 50,000 megawatts. The Congo and Zambezi Rivers are expected to be able to generate 150,000 megawatts altogether. Yet given that the countries that possess this vast potential for hydroelectricity are economically too weak to invest sufficiently, regional integration and investment from South Africa are the key to generate enough electricity for Southern Africa. South Africa's energy giant Eskom has already realised this potential and therefore guarantees to buy a certain quantity of electricity from future power plants in the region so that South Africa's neighbouring countries can build these plants (Bredenkamp 2010). The integration in Southern Africa,

driven by South Africa's need for electricity and its neighbours' need for investment in their potential to generate electricity, follows a path implied by geography.

4. Outlook

As shown in the previous sections, geography offers significant contributions to understanding the economics of Southern Africa. A geopolitical perspective reveals what economists and political scientists do not see. The ideas that I outlined above may be used for two purposes. The first is an analysis of the geography of Southern Africa in order to advise economic and political decision makers. The fact that transport on the core plateau of Southern Africa is easy and that South Africa is therefore already today a key trading partner for most of the countries south of the Congo Basin implies that it is sensible to concentrate on economic integration in this region. Accordingly steps (e.g. the admission of Zambia and Zimbabwe to SACU) are far more likely to be successful than projects such as the Common Market for Eastern and Southern Africa (COMESA) because they have a geographical basis. Moreover, the geography of Southern Africa indicates why the region is of outstanding relevance to South Africa. The region possesses the resources (energy and water) that South Africa needs in order to overcome its deficits and meet its socio-economic goals. Efforts to become a member of the (Brazil, Russia, India and China) BRIC network may be politically reasonable but geography indicates that South Africa's economic needs ought to be met in Southern Africa. The subtropical countries of Southern Africa should stick to regional integration for the same reasons.

Second, further research may be carried out in order to tackle some scientific shortcomings of my analysis. Strictly speaking, my geographical explanations for regional economics are only plausible. They are not intersubjectively verifiable. I did not prove that geography is the central or even the only factor that explains certain economic patterns in Southern Africa. Correlations, such as the one between trade and the geographical conditions for transport, are not causal relations. Causal relations are very difficult to track. Quantitative methods are hardly helpful in this context. They may only render the causal relation more plausible by using additional or more sophisticated data. Interviews with representatives of companies involved in regional trade and transport as well as representatives of ministries of transport, however, provide a way to trace processes of decision making. These processes of decision making can be shown by cognitive maps, which are an interpretative scheme used by actors to filter events and structures (e.g. the geography of Southern Africa) and connect them with

their goals and options for action (Axelrod 1976, Shapiro & Bonham 1973). Cognitive maps show whether geography is considered relevant and whether key decision makers act accordingly.

Such an approach is, at first glance, at odds with the understanding of geography elaborated above – material structures in space matter and what humans think is irrelevant. It does, however, match Fairgrieve's highly disputed idea that geography has an impact on the strategic thinking of humans. Fairgrieve (1917: 66, 102-103, 117) argues that geography favours certain courses of action which then became patterns guiding human action. Colin Gray (1988: 193) uses the term 'strategic culture' for this concept. This way, human thinking is not totally free anymore. It unconsciously reflects geography, which tends to determine, hence control, human decision making despite Fairgrieve's initial statement that humans are free in their choice of action. With regard to Southern Africa, geography has induced economic links on the plateau delimited by the Congo Basin and the East African Rift Valley for centuries. One may assume that this geographical inducement has become a self-sustaining pattern in the minds of key decision makers because they are socialised within a strategic culture that says that geography favours economic interaction in the delineated region. Process tracing and cognitive maps can reveal whether geography has such a strong impact – an impact on the minds of people.

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Chapter 7

Enforcing judgments of the SADC Tribunal in the domestic courts of member states*

Richard Frimpong Oppong

1. Introduction

The *Mike Campbell* litigation[1] is perhaps the most controversial case that has come before a regional economic community court (hereafter 'community court') in Africa. In *Mike Campbell*, the Southern African Development Community (SADC) Tribunal was confronted for the first time with a challenge to a major and controversial national policy: Zimbabwe's agricultural land reform policy. The jurisprudence of the Tribunal is rich and interesting. However, from a private international law perspective, even more engaging are recent attempts to enforce the Tribunal's judgment in the domestic courts of member states. These attempts have been met with varied responses. In January 2010, the High Court of Zimbabwe refused to register and enforce a judgment resulting from the litigation, but a month later, the South African High Court came to a different conclusion. It is possible that in the near future courts in Namibia and other SADC member states would be confronted with requests to enforce judgments of the Tribunal. Indeed, given that there are currently other active community courts in Africa, such as the East African Court of Justice, the Economic Community of West African States Court of Justice and the Court of Justice of the Common Market for Eastern and Southern Africa, the issues discussed here are of continental importance.[2]

* Parts of this paper are drawn from sections of Chapter 8 of my forthcoming book. See Oppong (2011).

[1] This litigation has generated a host of decisions from the SADC Tribunal. See: Albert Fungai Mutize v Mike Campbell (Pvt) Ltd. (2008); Louis Karel Fick v The Republic of Zimbabwe (2010); Mike Campbell (Pvt) Ltd. v The Republic of Zimbabwe (2008); Mike Campbell (Pvt) Ltd. v Republic of Zimbabwe (2007); Nixon Chirinda v. Mike Campbell (Pvt) Ltd (2008); William Michael Campbell v The Republic of Zimbabwe (2009). Politically, the reaction to these decisions has been very unfavourable, particularly in Zimbabwe. At the 30th Jubilee Summit of the SADC Heads of State and Government in August 2010 it was decided that 'a review of the role, functions and terms of reference of the SADC Tribunal should be undertaken'. The results of this review are likely to undermine the operation and jurisdiction of the Tribunal.

[2] Because the treaties regulating these courts also envisage enforcing their judgments using national courts, a broad approach is taken in the discussion to cover them too.

This paper examines from a private international law perspective the existence or lack thereof of a regime for enforcing judgments of international courts[3], and for that matter the SADC Tribunal, in SADC member states. At present, while SADC member states have regimes for enforcing judgments from foreign national courts (hereafter 'foreign judgments'), they do not have regimes for enforcing judgments of international courts (hereafter 'community judgment'), including the SADC Tribunal.

Enforcing a community judgment raises issues which are not present when enforcing a foreign judgment. This paper argues that the existing regimes for enforcing foreign judgments cannot be used to enforce judgments of the SADC Tribunal. A new and special regime is needed for the enforcement of community judgments. The enactment of legislation which gives national courts jurisdiction to enforce community judgments and deals with other issues attendant with the exercise of that jurisdiction is particularly important. To aid this, the paper provides model legislation on the enforcement of community judgments and recommends its adoption and enactment in SADC member states and, indeed, other African states.

2. Enforcing community judgments in national courts

There has been a proliferation of community courts in recent decades. It is part of the much broader phenomena of proliferation of international courts with compulsory jurisdiction (Romano 1999:709 and 2007:791) and judicialisation of international dispute-settlement procedures (Keohane et al. 2000: 457). Currently, Africa is host to at least four active community courts. The proliferation of community courts has been matched by an improvement in the legal status of individuals appearing before them. Historically, individuals have been granted no or restricted standing rights before international courts.[4] In this context, individuals include all non-state entities such as natural persons, companies, associations and non-governmental organisations. The traditional view prevailed: only states are subjects of public international law. Recently, individuals have been granted *locus standi* to litigate before some international courts. What was essentially the preserve of states has

[3] A community court is an international court operating on a regional basis and under a regional economic integration treaty. A community court faces challenges similar to those faced by international courts, including challenges relating to enforcement of judgments.

[4] See Statute of the International Court of Justice (1945 Art. 34(1)). However, as far back as 1907, individuals had standing before the Central American Court of Justice. See generally Alter (2006:22).

witnessed a fundamental shift. Individuals can now bring action against states, international organisations and their institutions under various treaties.[5]

An important issue for any private litigant is the enforcement of the resulting judgment. This is so whether he is litigating at the national or at the international level. A private litigant at the international level is generally not concerned about the principles of law used to adjudicate his dispute. Nor is he is very much concerned about the fact that those principles may become relevant in deciding future cases. He is often a very parochial actor and a pragmatist. He is more concerned with the judgment as a remedy and the material consequence of being granted such remedy.

However, the grant to individuals standing before international courts has not been matched by a clear articulation, in the realm of private and public international law, of how successful individuals may enforce judgments secured from these international courts. This is especially so when an individual wants to enforce the judgment before a national court. How does an individual in whose favour a pecuniary award has been made against a community institution or a state go about enforcing the judgment? Should he rely on the goodwill of the community to pay? Can he rely on his country of origin or residence to diplomatically assist him to recover the judgment debt?[6] Can he proceed to a national court and enforce the judgment debt as a foreign judgment? What about a judgment which orders a state or community institution to do something other than pay money (non-monetary judgments), for example, an order to release goods unlawfully seized or person unlawfully detained in breach of community law? Can such non-monetary judgments be enforced as easily as monetary judgments? These are not academic questions. In Africa, developments surrounding recent attempts – which are discussed below – to enforce judgments of the

[5] See e.g. the COMESA Treaty 1993: Art. 26; the SADC Tribunal Protocol 2000: Art.15(1)(2)]; the EAC Treaty 1999: Art. 30; the ECOWAS Court Protocol 1991:Art.10].

[6] See Roothman v President of the Republic of South Africa (2006). In this case the applicant sought the aid of the South African government to enforce a judgment on its behalf. The applicant obtained a judgment against the Democratic Republic of Congo (DRC) in an action in South Africa in which the DRC submitted to jurisdiction. The applicant was unable to obtain full satisfaction of the judgment debt either within or outside South Africa. The applicant relied on various constitutional arguments, including the right of access to justice, the rule of law, and the duty of the state to ensure the effectiveness of its courts and to assist its citizens to enforce their rights, and sought a declaratory order that the state takes reasonable steps to assist him to ensure compliance with the judgment. The respondent argued that the matter was governed by the private international law regime on the enforcement of foreign judgments, and it was from that regime that the applicant should seek remedy. The court held that the state has created mechanisms for enforcing judgments against commercial creditors. There was no reason for the state to take additional steps in cases involving a commercial contract between a citizen and a foreign state. Thus, there was no duty on the state to intercede on the applicant's behalf.

SADC Tribunal in various national courts and the difficulties encountered in the process make addressing these questions of more than theoretical importance.

Historically, various mechanisms have been used to enforce judgments of international courts. They include the use of international non-judicial institutions, self-help and diplomatic negotiations. Under Article 94(2) of the United Nations Charter enforcement of judgments of the International Court of Justice (ICJ) falls within the jurisdiction of the Security Council. It provides: 'If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment'. Similarly, under Article 46(4) of the Statute on the African Court of Justice and Human Rights,[7] 'where a party has failed to comply with a judgment, the Court shall refer the matter to the [Assembly of Heads of State and Government], which shall decide upon measures to be taken to give effect to that judgment'. Thus, the Statute does not envisage using national courts to enforce judgments of the African Court of Justice and Human Rights; that is the responsibility of the Assembly of Heads of State and Government. Self-help can take many forms, including confiscation of assets, economic sanctions and military action. It is also often the case that when an international court comes out with a decision the parties enter into negotiations on how to implement the decision.

Generally, these mechanisms were devised at a time when the individual had no *locus standi* before international courts. It was reasoned that 'the function of enforcing a decision of an international tribunal is an executive function, and as such should be confined, in the ordinary case at any rate, to a body which is invested with executive powers. It becomes in any event, *a political as distinguished from a judicial matter'* (Hudson 1944:128). To Rosenne (1957:102), 'in international law the separation of the adjudicative from the post-adjudicative phase is a fundamental postulate of the whole theory of judicial settlement … this leads to the consequence that enforcement partakes of the quality of an entirely new dispute to be regulated *by political means'*. These observations suggest that international law did not contemplate direct enforcement of the decisions of international courts by national courts. Rather, it contemplates enforcement through diplomatic or political means. Even though it

[7] The Protocol on the Statute of the African Court of Justice and Human Rights (2008), which is currently not in force, merges the African Court for Human and Peoples' Right and the Court of Justice of the African Union.

has its defects, as between states, such an enforcement mechanism, which is power-oriented, is unproblematic. Studies have shown good compliance rates as regards decisions and recommendations of the ICJ and the World Trade Organisation (WTO) panels and Appellate Body, all of which are forums for inter-state (as opposed to individual-state) dispute settlement.[8] As between an individual and a state or international institution judgment debtor, the absence of a rule-orientated enforcement mechanism can be disadvantageous.[9]

In the few cases in which individuals have sought to enforce judgments of international courts in national courts, national courts have been reluctant to recognise and/or enforce such judgments. In Socobel v. Greek State (1951), a company sought to enforce a judgment of the Permanent Court of International Justice before a Belgian national court. The action failed because the company was not, and indeed, could not have been, a party to the action before the Permanent Court. To the Belgian court, it was inconceivable that, 'a party which, by definition, was not admitted to the bar of an international court should be able to rely on a decision in a case to which it was not a party'.[10] More recently, the Supreme Court of the United States (US) held that a judgment of the ICJ was not directly enforceable as domestic law and could therefore not prevail over state procedural rules.[11] Like *Socobel*, this action was instituted by an individual who was not, and could not have been, a party to the ICJ proceedings. It is open to question whether both judgments would have been different had the international judgments been issues as a result of actions instituted directly by the individual applicants.

Notwithstanding national courts' reluctance to enforce decisions of international courts at the instance of individuals, it has long been recognised that diplomatic protection is ineffective or often inaccessible to individuals who seek to rely on or enforce judgments of international courts. Accordingly, some commentators have advocated using national courts

[8] See Paulson (2004: 434); Schulte (2004); Davey (2009: 119).
[9] Comparatively, a study on compliance with decisions of the African Commission on Human and Peoples' Rights – a forum for individual state litigation – showed very minimal compliance rate. Viljoen & Louw (2007). See also OPEN SOCIETY JUSTICE INITIATIVE (2010). They conclude in this study that an implementation crisis currently afflicts the regional and international legal bodies charged with protecting human rights.
[10] Socobel v Greek State (1951) at 5. See also Committee of United States Citizens Living in Nicaragua v Ronald Wilson Reagan (1988).
[11] See Medellin . Texas (2008); Breard v Greene (1998); Sanchez-Llamas v Oregon (2006). But see also Hombre Sobrido v The French State2000) and Merce Pesca Company v The French State (2000).

to enforce judgments of international courts.[12] Reisman argued for an enhanced role for national courts in enforcing the judgments of the ICJ (Reisman 1969: 25). He proposed a *Draft Protocol for the Enforcement of I.C.J. Judgments.* Signatories to this protocol were to undertake 'to enact such internal legislation as is necessary to require domestic courts and tribunals to enforce international judgments, and rights arising thereon, solely and exclusively upon certification of the authenticity of said judgment' (Ibid.: 27). Schachter (1960:13) had earlier suggested that there seemed to be 'good reasons' for national courts to recognise international awards. Nantwi (1966:145) left open the possibility of using national courts to enforce judgments of international courts, and noted that 'the special circumstances of any particular case' may merit this. Jenks (1964: 681-682, 706-715) also discussed the possibility that specific judgments of international courts may be treated as equivalent to a foreign judgment and enforceable by municipal procedures available for the enforcement of such foreign judgments.

These suggestions have now found their way into treaties. Some of Africa's economic integration treaties contain provisions that seek to use national courts to enforce judgments of their respective community courts. Article 44 of the EAC Treaty provides that 'the execution of a judgment of the [EAC court] which imposes a pecuniary obligation on a person shall be governed by the rules of civil procedure in force in the Partner State in which the execution is to take place'. Similar provisions are found in the Economic Community of West African States (ECOWAS) and Common Market for Eastern and Southern Africa (COMESA) treaties and the SADC Tribunal Protocol.[13] There are two notable differences in the provisions. Firstly, while the EAC and COMESA provisions refer to judgments which impose 'a pecuniary obligation', the ECOWAS Court Protocol and SADC Tribunal Protocol refer to 'any judgments' and 'judgment' respectively. In other words, the EAC and COMESA provisions are restricted to enforcement of only monetary judgments, while the ECOWAS and SADC provisions encompass both monetary and non-monetary judgments. For individuals litigating before community courts, this is significant as some community judgments are likely to be non-monetary judgments. Secondly, it appears that national courts in COMESA and the EAC have the discretion to enforce such

[12] See O'Connell (1990: 891); Reilly and Ordonez (1995-1996: 435); Reisman (1969); Schachter (1960); Schreuer (1975: 153); Sagay (1972:600). .

[13] See the COMESA Treaty, Art. 40; ECOWAS Court Protocol, Art. 24(2); SADC Tribunal Protocol, Art. 32(1)(2)(3). See also Treaty on the Harmonization of Business Law in Africa (1997 Art. 25). These provisions can be traced to Article 92 of the Treaty establishing the European Coal and Steel Community (1951) of the Treaty establishing the European Economic Community (1957) (now Article 299 of the Consolidated Version of the Treaty on the Functioning of the European Union (2007), (2010) and Article 164 of the Treaty establishing the European Atomic Energy Community (1957).

judgments. Under the ECOWAS Court Protocol, enforcement, which is to be made by a designated competent national authority, is mandatory.

The significance of using national courts to enforce international judgments cannot be underestimated. It is perhaps the most potentially effective means for securing compliance with decisions of international courts and enhancing the effectiveness of international adjudication. National courts contribute to international rule of law and strengthening the status of international law in national legal systems. Also, using national courts to enforce international judgments enhances individual rights by depoliticising the post adjudicative phase of international litigation. Furthermore, the provisions which seek to adopt national rules for enforcing foreign judgments to enforce the judgments of community courts provide a means of linking community and national legal systems. They aim at integrating community and national judicial structures, and offer an opportunity for cooperation and dialogue between them. This opportunity should be explored to enhance economic integration in their respective sub regions. For individuals, these provisions represent a positive change in the direction of international law. The post adjudicative phase of litigation before international courts is often politicised. Inherent in the traditional international law enforcement mechanisms are elements of power relations that weigh heavily against individual judgment creditors. Although it has its own challenges, enforcement through national courts is rule-oriented, and can therefore be beneficial to individuals. Subject to the need for assets of the state judgment debtor within the state where enforcement is sought, national courts are easily accessible and their processes can be invoked directly by individuals and without the need for state intervention or consent.

Until recently, the provisions which seek to use national courts to enforce community judgments remained untested in Africa. This was so even though there have been a few instances in which the community courts have made pecuniary awards in favour of individuals. For example, in Muleya v Common Market for Eastern and Southern Africa (2004), the COMESA court awarded damages of $2000 against the respondent for publishing defamatory matter about the applicant. In Manneh v The Gambia (2008) the ECOWAS court also award damages of $100,000 in favour of an applicant, a journalist who was unlawfully detained by the Gambian government, and compensation of CFA fr. 100,000 in favour of an applicant who was adjudged to have been enslaved in Niger (Mme Hadijatou Mani Koraou v. The Republic of Niger 2008).

In 2010, the High Courts of Zimbabwe and South Africa decided two separate applications that were made to register and enforce judgments of the SADC Tribunal (Gramara (Private) Ltd. v Government of the Republic of Zimbabwe 2010 and Fick v Government of the Republic of Zimbabwe 2010). In Mike Campbell (Pvt) Ltd. v The Republic of Zimbabwe (2008),[14] the applicants challenged aspects of Zimbabwe's agricultural land reform policy as inconsistent with the SADC Treaty. The Tribunal found the respondent in breach of its obligations under the SADC Treaty. It ordered that the respondent take all necessary measures to protect the possession, occupation and ownership of the lands of the applicants and to take all appropriate measures to ensure that no action is taken to evict from, or interfere with, the peaceful residence on, and of those farms by the applicants. It further ordered the respondent to pay fair compensation to the applicants. It was these orders which the applicants sought to enforce in Zimbabwe and South Africa.

The High Court of Zimbabwe declined to register the Tribunal's judgment. The court held that it is generally not contrary to Zimbabwe's public policy to enforce judgements of the Tribunal because Zimbabwe was under an international obligation to do so. However, in the instant case, the legal and practical consequences of recognising and enforcing the Tribunal's judgment were such that the court should refuse to register it. The court reasoned that, legally, the land reform programme had been mandated by the Zimbabwean Constitution, and its constitutionality was upheld by the Supreme Court of Zimbabwe. Practically, registering the Tribunal's judgment would compel the Zimbabwean government to act contrary to the law parliament had enacted. Also it would necessitate the government having to reverse all the land acquisitions that had taken place since 2000 under the policy, with all the ramifications. In contrast, the High Court of South Africa, in a short judgment which contained no reasons registered the Tribunal's judgment.[15] The absence of detailed reasoning for the decision of the South African court (which in itself is problematic given the significance of the case) makes any attempt to analyse or criticise the judgment difficult. However, these opposing judgments from Zimbabwean and South African courts expose

[14] For a comprehensive account on the background to this case and judgments, see Naldi (2009); Hemel and Schalkwyk (2010).

[15] The substance of the judgment read: 'HAVING HEARD counsel(s) for the party (ies) and having read the documents files of record IT IS ORDERED THAT the rulings by the South African Development Community (SADC) Tribunal delivered on 28 November 2008 and 5 June 2009 are declared to be registered, i.e. recognised and enforceable in terms of Article 32 of the Protocol on the SADC Tribunal, by the High Court of South Africa, and the quantum of the costs pursuant to the latter ruling is declared to be as determined by the Registrar of the SADC Tribunal in the allocator, namely US$5 816.47 abd ZAR112 780.13'.

some of the challenges which individuals who obtain judgments from the community courts are likely to face when they seek to enforce the judgments.

3. Challenges of reliance on national courts

There are a number of challenges in trying to use national courts to enforce community judgments. Among the challenges are the following. Firstly, can the existing national common law and statute law regimes for the enforcement of foreign judgments be suitably adapted for the purpose of enforcing community judgments? Secondly, if they can be suitably adapted, can national courts review community judgments? Thirdly, will the use of civil procedure rules, which differ from country to country, afford equal or adequate protection to individual judgment creditors? If these challenges are not addressed, they may deny individuals the benefits of the judgments, and could also undermine the relations between national and community courts. In general, given the demands of economic integration, within which context community courts operate, and the international character of community judgments, the extant national regimes for enforcing of foreign judgments cannot, unthinkingly, be extended to community judgments.

This is a position that was realised at the time of the creation of the European Communities (now European Union). The founding treaties contained specific provisions that created a special regime for enforcing judgments of the Court of Justice of the European Union (ECJ) and other community institutions.[16] The provisions now find expression in Articles 280 and 299 of the Consolidated Version of the Treaty on the Functioning of the European Union (2007). They provide:

> Article 280
>
> The judgments of the Court of Justice of the European Union shall be enforceable under the conditions laid down in Article 299.
>
> Article 299
>
> Acts of the Council, the Commission or the European Central Bank which impose a pecuniary obligation on persons other than States, shall be enforceable.

[16] See the Treaty establishing the European Coal and Steel Community (1951: Art. 192); Treaty establishing the European Economic Community (1957: Art. 192) (now Art. 299 of the Consolidated Version of the Treaty on the Functioning of the European Union (2007), (2010); Treaty establishing the European Atomic Energy Community (1957 Art 164).

> Enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The order for its enforcement shall be appended to the decision, without other formality than verification of the authenticity of the decision, by the national authority which the government of each Member State shall designate for this purpose and shall make known to the Commission and to the Court of Justice of the European Union.
>
> When these formalities have been completed on application by the party concerned, the latter may proceed to enforcement in accordance with the national law, by bringing the matter directly before the competent authority.
>
> Enforcement may be suspended only by a decision of the Court. However, the courts of the country concerned shall have jurisdiction over complaints that enforcement is being carried out in an irregular manner.

Even though some member states of the EU have enacted legislation creating special regimes for enforcing judgments of the ECJ and other EU institutions[17] – an express admission that the regime for enforcing foreign judgments is inadequate for this purpose – there is very little reported case law on their operation. Article 280 and 299 and their predecessors do not appear to have been subjected to interpretation by the ECJ. Indeed, the regimes' operation does not appear to have been comprehensively examined from an academic perspective.[18]

The effective enforcement of community judgments will demand review of national laws. For example, it is envisaged, under Rule 41(4) of the Rules of the Court of Justice of the Common Market for Eastern and Southern Africa (COMESA Court Rules) (2003), that penalties imposed on non-attending witnesses will be enforced by national courts under the provision of Article 40 of the COMESA Treaty. This may, however, not be possible in some COMESA countries. Under both the common law and statute law, the court will not enforce

[17] See e.g. United Kingdom: European Communities (Enforcement of Community Judgments) (1972); Ireland: European Communities (Enforcement of Community Judgments, Orders and Decisions) (2007); Malta: European Communities (Enforcement of Community Judgments) (2007); Gibraltar: Judgments (European Community)(Enforcement) Act (1973).

[18] In the chapters on enforcement of judgments, leading English treatise on private international law devote less than a page to the subject. See e.g. Collins (2006: 679-680); Fawcett and Carruthers (2008: 587); Hill and Chong (2010: 491). For a more detailed discussion see Smit et al. (2010: Articles 280 and 299).

a judgment which is a penalty.[19] Thus, the effective implementation of this Rule, which is essential for the administration of justice within the COMESA, will demand changes in the laws of some member states.

The use of national courts to enforce community judgments also raises questions as to the relations between community and national courts: what limitations exist on the constitutionally-conferred jurisdictional powers of national courts when it comes to enforcing community judgments? Can national courts review those judgments, set them aside or modify them? So far, there appear to be no answers to these questions. Although it did not involve a review of the SADC Tribunal's judgment, the decision of the Zimbabwe High Court not to enforce the Tribunal's judgement on the ground that enforcement will, *inter alia*, be inconsistent with a decision of the Supreme Court of Zimbabwe provides a concrete illustration of a national court refusing to enforce a community decision on the basis of national law (Gramara (Private) Ltd. v. Government of the Republic of Zimbabwe 2010). National courts are slow to review foreign judgments, but the power to review remains, especially where there is allegation of fraud. If national courts review community judgments, it will undermine the administration of justice within the communities, and render the communities' legal systems subject to the varying demands of member states' laws. On the other hand, it can be argued that review by national courts introduces a measure of accountability in international adjudication. However, in the context of economic integration, it is likely that the destabilising effect of such national judicial reviews will far outweigh the benefits of accountability. Accordingly, it is proposed that, firstly, in the context of economic integration, national courts in Africa should not have the power to review or invalidate community judgments. Secondly, national courts should not have jurisdiction to decline to enforce community judgments. This is especially so when the applicable law for such a decision will, as in *Gramara (Private) Ltd*, be national law.

The former proposition finds support in international law. In the Chorzow Factory (1928: 33) case, the Permanent Court of International Justice held that a national court did not have the power to invalidate an international judgment. Both propositions are also consistent with the view that the community legal system should not be subjected to national legal systems. Admittedly, both propositions offend the long-established discretion in national courts to

[19] See e.g. Kenya: Foreign Judgment (Reciprocal Enforcement) Act 1984 sec. 3(b); Zimbabwe: Civil Matters (Mutual Assistance) Act 1995 sec. 6(h)(ii).

enforce foreign judgments. They also challenge national constitutions which make the judiciary the ultimate source of judicial power. To grant community judgments this privileged status will require amendment of national laws. At the community level, the acceptance of these propositions will demand greater responsibility from community courts to ensure the integrity of the processes that result in their judgments. This will make up for the proposed absence of discretion in national courts to decline to enforce these judgments.

Another drawback in using the existing national regimes to enforce community judgments is that some do not provide for the enforcement of non-monetary judgments. However, in the context of economic integration, non-monetary judgments are more likely to be a major component of community judgments. There is a movement in some countries towards enforcing foreign non-monetary judgments.[20] With the exception of South Africa, which is currently considering proposals to enforce non-monetary judgments, Africa remains largely insulated from this movement.[21] In Gramara (Private) Ltd (2010), one of the arguments against the enforcement of the SADC Tribunal's judgment was that aspects of it entailed administrative consequences and was not for the payment of a fixed sum of money. The High Court held that it would be 'contrary to principle to restrict the scope of recognition proceedings by reference to the specific remedies enjoined by a given foreign judgment'. In other words, the mere fact that a judgment of a community court did not entail the payment of money should not automatically lead a national court to dismiss an application to enforce it. This is an important pronouncement given that some judgments of the community courts are likely to be of a non-pecuniary character.

Most community judgments will probably be against sovereign states. It is therefore troubling that the treaties are silent on the issue of state immunity from enforcement actions at the national level. States often enjoy exemption from execution against their assets in their own territory or elsewhere. Thus, national law on this issue will be highly relevant regarding enforcement actions brought by individual judgment creditors. A successful claim of immunity from execution will rob an individual of the benefits of a community judgment.

[20] See Pro Swing Inc. v Elta Golf Inc. (2007); Brunei Investment agency v Fidelis Nominees Ltd. (2008); Miller v. Gianne (2007). See generally Oppong (2006: 276-282).
[21] See South African Law Reform Commission (2006: 4.2.17-4.2.25.

Although there has been a perceptible trend towards restrictive state immunity, it still remains a formidable challenge.[22]

The above has assumed that the provisions in the community treaties which seek to use national courts to enforce community judgments are binding on national courts. However, the absence of domestic legislation, especially in dualist countries implementing the community treaties[23] raises questions as to the binding effect of the provisions. A treaty is not effective within a state unless implemented by domestic legislation. Without domestic legislation, courts may be incompetent to give effect to the provisions and use them as the basis to enforce community judgments. From a comparative perspective, this problem appears to have been explicitly acknowledged by the drafters of Article 26 of the Agreement establishing the Caribbean Court of Justice (2001). Accordingly, they provided: 'The Contracting Parties agree to take all the necessary steps, *including the enactment of legislation* to ensure that … any judgment, decree, order or sentence of the Court given in the exercise of its jurisdiction shall be enforced by all courts and authorities in any territory of the Contracting Parties as if it were a judgment, decree, order or sentence of a superior court of that Contracting Party'. Reisman's *Draft Protocol for the Enforcement of I.C.J. Judgments* (Reisman: 1969) also suggested the need to enact 'internal legislation'. It is unfortunate that the community treaties do not recognise, or at least are silent, on the need for domestic legislation, especially on this issue. To my knowledge, no African country has as yet enacted legislation on the enforcement of community judgments.

In Gramara (Private) Ltd (2010), the court rightly noted that Zimbabwe had not taken any specific internal measures to domesticate the SADC Treaty or the Protocol of the Tribunal. More specifically, no legislative or administrative steps had been taken to implement Zimbabwe's obligations under Article 32 – the provision calling for the use of national civil procedures to enforce the Tribunal's judgment – or to transform those obligations into effectual provisions of the municipal law. Rather than address this prior and important question, the court appeared to have wrongly assumed that the mere fact that Zimbabwe is subject to the jurisdiction of the Tribunal (by virtue of the fact that it ratified the Treaty, which then binds it in international law) gives it jurisdiction to hear the application to

[22] See generally Ostrander (2004: 540); Crawford (1981: 820).
[23] The exception is the EAC Treaty which has been given the force of law in Kenya, Uganda and Tanzania. See Tanzania: Treaty for the Establishment of East African Community Act, 2001, (Act No. 4); Kenya: Treaty for the Establishment of East African Community Act, 2000, (Act No. 2); Uganda: East African Community Act, 2002.

enforce the Tribunal's judgment. Comity provides the basis for enforcing foreign judgments. However, it is suggested that it cannot provide the basis for enforcing community judgments in national courts. This proposition may appear unconvincing on first reading, as it can be argued that whatever arrangement governs the output of another state's judiciary should apply to a judiciary operating on behalf of a number of states, i.e. a community court. However, it is worth noting that a judgment of a community court is, in a sense, international law. Even though here we are looking at the judgment as a remedy (e.g. damages, compensation, restitution, injunctions and declarations of right) as opposed to a judgment as principles of law, it is undeniable that the remedy is a right – akin to a human right – created by international law. By assuming jurisdiction to enforce it and enforcing it on the basis of comity rather than an express national legislation, a national court will be circumventing national constitutional provisions on the reception of international law.

A characteristic of many African constitutions is that they clearly outline their vision of the relations between international and national law. This vision will directly affect enforcement of community judgments in national courts. Traditionally, the relationship between national and international is discussed from monist-dualist perspectives (Nollkaemper and Nijman 2007; Brownlie, 2003: 31-53; Aust 2007: 178-199). Monism has its root in natural law theories which see all law as the product of reason. It envisions international law as automatically being part of national legal systems. The foundation of dualism is in legal positivism. It posits that international and national laws operate on separate legal planes: international law governs relations between states, and national law regulates relations between individuals and the state. Under dualism, international law can play no role in the national legal systems except in so far as it has been received or adopted by them. The monism-dualist paradigm has been a target for trenchant academic criticism, but it is still useful for understanding how states implement international law, especially treaties. This is especially so if, in approaching the paradigm, we appreciate that what really matters is not the doctrinal debate but rather the actual practices of states.

African constitutions reflect the monist-dualist perspectives (Oppong 2007; Maluwa 1998; Adede 1999; Tshosa 2007 and 2010:). There are other constitutional provisions that appear to merge aspects of both perspectives.[24] Generally, the former British colonies have

[24] See the Constitution of the Republic of Burundi 2004, Art. 292; Constitution of the Republic of Cape Verde 1992, Art. 11; Constitution of the Federal Democratic Republic of Ethiopia 1995, Art. 9(4); Constitution of the Republic of Gabon 1991, Art. 114; Constitution of the Republic of Namibia 1990, Art. 144.

provisions that tend towards dualism; international law does not have the force of law in the Commonwealth countries unless it has been expressly given that force by a national measure, usually an Act of Parliament.[25] Many other African countries, most of them former French colonies, have constitutional provisions that adopt the monist perspective. Their provisions are modelled on Article 55 of the French Constitution of 1958. In general, they provide that treaties or agreements duly ratified or approved shall, upon their publication, have an authority superior to that of domestic legislation, subject, for each agreement or treaty, to application by the other party.[26] A national court, such as the South African High Court, which gives effect to a community judgment without regard to these international law implementation provisions, arguably, acts unconstitutionally (Medellin v. Texas 2008).

In the opinion of this writer, legislation which gives national courts jurisdiction to enforce community judgments and deals with other issues attendant with the exercise of that jurisdiction is particularly important. Enforcement of a community judgment raises issues which are not present with a foreign judgment for which the existing national regimes have been designed. Unlike a foreign judgment, which has its sole source in a foreign state, a community judgment may actually be a 'review' of an earlier decision of a court of the country in which the enforcement is sought. Ordinarily, this would be a conflicting judgment and, therefore, unenforceable. Let us assume, after exhausting local remedies, that an individual proceeds to a community court. He obtains a judgment contrary to that of national courts that the individual has 'exhausted'. His attempt to enforce the community judgments may meet significant challenges.

Firstly, a national court will be reluctant to enforce a judgment which contradicts its own judgment, and, even more so, if the first judgment was from a superior court in that country. At present there are no constitutionally mandated hierarchical or horizontal relations

[25] See the Constitution of the Republic of Ghana 1992, Art. 75; Constitution of the Republic of South Africa 1998, Art. 231; Constitution of the Republic of Malawi 1994, Art. 211; Constitution of the Republic of Uganda 1995, Art. 123; Constitution of the Federal Republic of Nigeria 1999, Art. 12; Constitution of the Republic of Zimbabwe 1979, Art. 111B; Constitution of the Kingdom of Swaziland, Art. 238(4); Namibia Constitution, arts. 32(3)(e) and 63(2)(e); Constitution of the Republic of Seychelles, 1993, Art. 64(3)(4)(5).

[26] See the Constitution of Burkina Faso 1991, Art. 151; Constitution of Cameroon 1996, Art. 45; Constitution of Mali 1992, Art. 116; Constitution of the Republic of Benin, Art. 147; Constitution of the Republic of Algeria, Art. 132; Central African Republic Constitution 2004, Art. 72; Chad Constitution 1996, Art. 222; Constitution of the Federal Islamic Republic of the Comoros 1996, Art. 18; Constitution of the Democratic Republic of the Congo 2005, Art. 215; Constitution of the Republic of the Congo 2002, Art. 185; Cote d'Ivoire Constitution, Art. 87; Constitution of the Republic of Guinea 1990, Art. 79; Constitution of Republic of Madagascar 1998, Art. 82.3(VIII); Constitution of the Islamic Republic of Mauritania 1991, Art. 80; Niger Constitution, Art. 132; Constitution of the Republic of Senegal 2001, Art. 98; Constitution of the Republic of Rwanda 2003, Art. 190.

between national and community courts. The community courts exist outside national judicial structures. As the Zimbabwean Supreme Court ominously observed, 'the SADC Tribunal has not been domesticated by any municipal law and therefore enjoys no legal status in Zimbabwe. I believe the same obtains in all SADC States, that is, that there is no right of appeal from the South African Constitutional Court, the Namibian Supreme Court, the Lesotho Supreme Court, the Swaziland Supreme Court, the Zambian Supreme Court and the Supreme Courts of other SADC countries to the SADC Tribunal' (Commercial Farmers Union v The Minister of Lands and Rural Resettlement 2010).[27] Without legislation, a national court is not bound by decisions of any community court no matter how exalted the community court is.

Secondly, from the above illustration, the community judgment will, in principle, be a review of earlier decisions of national courts. In some countries, this will raise a constitutional question as to the *locus* of final judicial power. Under Article 125(3) of the Constitution of the Republic of Ghana, the judicial power of Ghana shall be vested in the Judiciary and neither 'the President nor Parliament nor any organ or agency of the President or Parliament shall have or be given final judicial power'.[28] Ordinarily, this is a classic separation of powers provision. However, when read in the context of international adjudication and its effect on states, it is debatable whether it would be constitutional to give the ECOWAS court final judicial power in Ghana, even if that power was restricted to defined matters. In the absence of a specific constitutional provision, which makes community law supreme over domestic law, transfers some of the powers excercised by states powers to the community, or legislation to regulate enforcement in such cases, enforcing a community judgment could amount to an unconstitutional subjection of Ghana's legal systems to the community legal system.

The above exposition reveals that the proposed use of national courts to enforce community judgments is riddled with problems. So far, these problems have not been carefully thought through, let alone resolved. Member states of the communities should examine these problems and legislate to resolve them. There is the need for community input here to ensure that community judgments are not subjected to varying national laws,

[27] Another interesting case in this respect is the Kenyan case of Joseph Kimani Gathungu v Attorney General (2010) in which the issue of the role of the International Criminal Court in Kenya's judicial set-up was discussed.

[28] See Constitution of the Republic of Sierra Leone 1991, Art. 120; Constitution of the Republic of South Africa 1998, Art. 165.

which might result in accordingly dissimilar effect to community judgments. For example, as regards pecuniary judgments, national law may vary on issues such as prescription, the currency in which the obligation may be discharged, and the mode of calculating interest on the judgment. Indeed, what is needed is detailed and well-considered community law setting out the legal framework for enforcing community judgments in member states' national courts. Simply providing that the execution of community judgments shall be governed by the rules of civil procedure in force in the member state in which enforcement is sought is not enough.

Various reasons have been given for noncompliance with community judgments, including arguments about national sovereignty, absence of strong economic interdependence among African countries, and a preference for negotiation instead of adjudication (Kufuor 1996:6-11). Whether the use of national courts to enforce community judgments will assist individuals to overcome or bypass these argument remains to be seen but it offers a better prospect than enforcement through political and diplomatic processes. There have been three instances in which Zimbabwe has been referred to the SADC Summit of Heads of State and Government for its noncompliance with decisions of the SADC Tribunal. To date, no such action appears to have been taken. It is unlikely that a decision of a national court to enforce the decision of the Tribunal in a member country would have been met with the same degree of inertia. Indeed, following the decision of the South African High Court to register the Tribunal's judgment, it has been reported that the judgment creditors have attached some assets of Zimbabwe in South Africa.

In conclusion, it has been argued above that the existing state of national laws is inadequate to meet the community treaties' demand that national civil procedure rules on enforcement of foreign judgments be used to enforce judgments of the community courts. Appendix I provides model legislation on the enforcement of judgments of community courts that could overcome some of the challenges identified above. It is the sincere hope of this writer that African governments will enact laws to facilitate enforcement of judgments of the community courts, which have been established and operating, in national courts.

Appendix I

Enforcement of Community Judgments Act

1. Short title

This Act may be cited as the [*insert name of community*] (Enforcement of Community Judgments) Act.

2. Interpretation

In this Act —

"Community" means [*insert name of community*].

"Community court" means [*insert name of community court or tribunal*].

"Community judgment" means any decision, judgment, order or arbitration award that is enforceable under or in accordance with [*article 40 of the Treaty establishing the Common Market of Eastern and Southern Africa*] [*Article 24 of the Protocol on the Court of Justice of the Economic Community of West African States*] [*Article 44 of the Treaty establishing the East African Community*] [*Article 32 of the Protocol on Tribunal and Rules of Procedure thereof of the Treaty establishing the Southern African Development Community*].

"Registration order" means an order made by the High Court under section 3(1) of this Act.

"Treaty" means [*insert title of community constitutive treaty*].

3. Registration Orders for Community Judgments

(1) The High Court shall, upon application duly made at any time for the purpose by the person entitled to enforce it, forthwith, make an order permitting the registration of a Community judgment.

(2) An application to the High Court for a registration order may be made without notice.

(3) An application for a registration order must be supported by an authenticated copy of the Community judgment for which the registration order is sought.

(4) Where the Community judgment is not in [*insert official language of the High Court*], a translation of it into [*insert official language of the High Court*] shall be provided by the person

seeking the registration order. The translated copy must be certified by a public notary or other qualified person; or accompanied by written evidence confirming that the translation is accurate.

(5) Where the application for a registration order is for a Community judgment that is a monetary judgment, the application must state –

> (a) the name of the judgment creditor and his address for service within the jurisdiction;
>
> (b) the name of the judgment debtor and his address or place of business, if known; and
>
> (c) the amount in respect of which the judgment is unsatisfied.

(6) Where it appears that a Community judgment, under which a sum of money is payable, has been partly satisfied at the date of the application for a registration order, the order shall be made only in respect of the balance remaining payable at that date.

4. Challenging Registration Orders

(1) A copy of the registration order must be served on every person against whom the Community judgment was given.

(2) The registration order must state the name and address for service of the person who applied for registration, and must exhibit a copy of the Community judgment for which the registration order was made.

(3) The registration order must also state the right of the person against whom the order was made to apply within 28 days for the variation, suspension or cancellation of the order.

(4) An application for a variation, suspension or cancellation of a registration order shall be made within 28 days of the date on which the registration order was served on the person against whom it was made, and it shall state the grounds for the application.

(5) A registration order may be varied, suspended or cancelled, as the case may be on the ground that:

> (a) the Community judgment has been wholly of partly satisfied;

(b) the applicant intended to challenge the Community judgment using the procedures set out in the Treaty, and has in fact taken material steps in that direction; or

(c) the Community court has varied, cancelled or suspended the Community judgment.

(6) The person against whom a registration order is made must satisfy the court on the balance of probabilities that one or more of the grounds stated in section 4(5) exist. For the avoidance of doubt, there shall be no other basis for varying, cancelling or suspending a Community judgment.

(7) The High Court may, in the case of a Community judgment, which is not a monetary judgment, dispense with the requirement for notice under section 4(1) or stipulate a duration shorter than that provided under section 4(3) within which the person against whom a registration order has been made can apply for its variation, cancellation or suspension.

5. No Review on the Merits

In proceedings under this Act the High Court shall not enter into the merits of the Community judgment.

6. Registration of Community Judgment

(1) Where a person against whom a registration order is made fails to satisfy the court under section 4(6) or fails to apply for a variation, cancellation or suspension of the registration order under section 4(4), the High Court shall forthwith register the judgment and issue an order for its enforcement.

(2) A Community judgment that is a monetary judgment shall be registered and enforced in the currency in which it is expressed.

7. Effect of Registration of Community Judgment

1. A Community judgment registered in accordance with Article 6(1) shall, for all purposes of execution, be of the same force and effect, and proceedings may be taken on the judgment as if the judgment had been a judgment or order given or made by the High Court on the date of registration.

3. Unless otherwise provided in the Community judgment, any sum payable under the Community judgment shall carry interest from the date on which the Community judgment was made, and at such rate as if the Community judgment, order or decision had been a judgment or order given or made by the High Court.

2. The High Court shall have jurisdiction over complaints that enforcement of a Community judgment is being carried out in an irregular manner.

8. Immunity

1. A state shall not enjoy immunity from jurisdiction in an action to enforce a Community judgment

2. Without prejudice to section 8(1), nothing in this Act shall be construed as derogating from the law of [*insert name of country*] relating to immunity of that State or of any foreign State from execution.

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Chapter 8

Is SADC losing track?

Christian Peters

1. Introduction

The SADC Summit of 2010, held in the Namibian capital Windhoek, ended with two widely reported disappointments: the customs union – envisaged for 2010 – was neither established nor was an indication given for its eventual establishment. Moreover, the SADC Tribunal was in fact temporarily suspended until May 2012 after the Zimbabwean Government refused to comply with a controversial ruling by the SADC institution (allafrica.com 2011) and the SADC leaders felt unable to react to that violation of the operational terms of the Tribunal immediately. This raises questions about SADC's general ability to deal with integration obstacles and whether it still can achieve its set targets.

These developments point to three crucial issues of regional integration:

1. the adherence to self-set deadlines and timetables
2. the economic convergence
3. the political convergence.

In the following chapter these three issues will be analysed with regard to SADC to determine whether SADC is still on track to meet its integration targets or whether it is temporarily or totally off-track.

2. SADC timetables and deadlines

Legally, regional integration is usually based on agreements between states. Such agreements– as in the case of the SADC Treaty – often provide integration objectives and general provisions of how to achieve them. However, only if such agreements are legally binding – and not just voluntary in nature – and come attached with deadlines and timeframes do regional integration endeavours have a chance to succeed. Without agreements of an obligatory character and a timeframe such political agreements tend to be

postponed, referred to working groups or are conveniently forgotten if they do not fit into the immediate national political landscapes. Africa's history of regional integration is full of failed attempts because regional agreements were not honoured at national level.

Looking at SADC's 30-year history, a maturing process with regard to the legal character of agreements can be observed. Initially, under the Southern African Development Coordination Conference (SADCC)[1], mere regional cooperation objectives were pursued whose sectoral agreements were neither legally binding nor equipped with timetables for the attainment of regional targets[2]. This began to change when the current SADC was formed in1992. The SADC Treaty allowed for sector protocols as the new main integration mechanism. Both the Treaty as well as the protocols had to be ratified by the national parliaments of at least two-thirds of those member states which had signed them in order to enter into force. Through the ratification process and the depositing of the legal instruments with the SADC Secretariat, protocols became national law and had to be implemented. However, few of the protocols have timetables attached to them; implementation has been left to the goodwill of the participating governments.

The SADC Treaty stipulated a range of objectives which were translated by various protocols into implementable policies. That was achieved – although mostly without setting timeframes – for several socioeconomic issues but only for few of the political objectives pronounced by the Treaty. The promotion of 'common political values and systems', 'democracy', 'rule of law' and 'human rights' are among the principles of the Treaty (SADC 1992: Art. 4) and were later reinforced by the Strategic Indicative Plan for the Organ (SIPO). In fact, SIPO went even further and stated as its first objective 'to protect the people and safeguard the development of the Region against instability arising from the breakdown of law and order, intra-state and inter-state conflicts and aggression' (SADC 2004: 17). It also calls for the evolution of 'common political values and institutions' and the promotion of 'democratic institutions and practices' (Ibid.: 18ff.).

[1] SADCC was formed in 1980 by nine states of southern Africa and in 1992 transformed into the current SADC.

[2] The only deadlines set under SADCC were those for the implementation of individual projects funded by donors, and even these targets were often not met. None of the project deadlines, however, can be regarded as having a direct cooperation or integration bearing.

It is therefore interesting to note that SADC leaders never made any attempt to concretise these objectives, translate them into legally binding policies or agree on implementation schedules for their achievement.

Regional integration not only needs legally binding agreements but also enforcement mechanisms. SADC established one such enforcement instrument with the adoption of the Protocol on Tribunal in 2001. It was probably owing to the need to be able to adjudicate anticipated disputes emanating from the implementation of the Trade Protocol that the Tribunal was eventually established in 2005. Its (temporary) suspension in August 2010 is a severe blow for the enforcement of SADC principle and policies.

2.1 Adherence to timetables with regard to trade-led integration in SADC

The Protocol on Trade was regarded from the very beginning as the centrepiece of the regional integration process in SADC. Aiming at the establishment of a Free Trade Area (FTA) it was signed in 1996 and ratified in January 2000[3] after long and intensive discussions (Peters 2010: 161ff). It was agreed that an 'offer' approach designed on the basis of asymmetry, which takes into account the level of development of member states, would govern the implementation of the protocol (SADC 2005: 33).

The SADC Trade Protocol (1996: Article 3.1(b)) set a first crucial deadline, which subsequently strongly influenced all further planning schedules for the trade-led regional integration in SADC: '… the elimination of barriers to trade shall be achieved within a time frame of eight (8) years from entry into force of this Protocol'. Although it is the protocol's main stated objective '… to phase out tariffs and Non-Tariff Barriers (NTBs) over eight years…' (Mudzonga 2008: 15), it lacked more detailed implementation schedules; also, the amended Trade Protocol of 2000 only partially addressed this shortcoming by stipulating in a new annex that 'each member state shall deposit an instrument of implementation, indicating the date upon which the member state intends to implement the Protocol and this Amended Protocol' (SADC 2000: Art. 9).

[3] All member states but the Seychelles and the Democratic Republic of Congo (DRC) have so far acceded the protocol and made it applicable to their tariff structures. Angola eventually signed the protocol and 'promised' to apply it.

While SADC was slowly moving towards more quantifiable approaches of regional integration in form of the protocols, the African Union (AU) set clear reference points for a continental economic integration in the form of the African Economic Community (AEC) by reconfirming the timetable as set out in the Abuja Treaty of 1992. This includes six stages of which the second stage – to be completed in 2007 – required the strengthening of integration within the eight officially acknowledged Regional Economic Communities (RECs); and stage three – to be completed by 2017 – requires the establishment of an FTA and a customs union in each of the RECs (EAC 2010:11; Peters (2010):82). The continental timetable acted for some of the existing RECs as an accelerator and also spurred SADC into action.

In 2003, SADC went a step further in making time-bound decisions with the adoption of the Regional Indicative Strategic Development Plan (RISDP) at the SADC Summit in Dar es Salaam. The RISDP contains a specific and detailed strategic plan (Fundira 2010) but unlike the SADC Treaty and Protocols, it is a voluntary (political) agreement with no legally binding obligations.

RISDP formulated a 15-year framework for intensified regional integration (2003 – 2018) which set the first (ambitious) clear time-bound targets for a trade-driven regional integration approach of SADC (2008: 5):

- the establishment of the SADC FTA until 2008, with the objective of liberating 85% of the regional trade in goods;
- the completion of negotiations for the establishment of the SADC Customs Union by 2010;
- the completion of negotiations for the establishment of the SADC Common Market by 2015;
- the establishment of the SADC Monetary Union and the SADC Central Bank by 2016; the launch of a regional currency and the establishment of an Economic Union by 2018.

The clear timetable of the RISDP has, since then, in the public image, been confused with a binding regional integration schedule for SADC. On the one hand that has intensified the

political pressure on SADC to deliver but on the other hand it has also increased the potential for frustration as the timetable is very ambitious and failures had to be expected.

The RISDP reinforces the trade-driven approach to regional integration and apart from the general timetable also provides more detailed targets for the attainment of a first step, i.e. an FTA (Elago & Kalenga 2008; Peters 2010: 156ff). The Heads of State adopting the RISDP in 2003 agreed to a gradual approach towards establishing the FTA with the aim of eliminating 85% of tariffs of all intra regionally traded goods by January 2008. The tariffs for the remaining 15% of the (sensitive) goods were to be eliminated by all member states until 2012.

Having two documents with a different legal character has led to the rather paradoxical situation that the legally binding Trade Protocol does not include a detailed implementation schedule for the FTA whereas the legally non-binding RISDP proposes such a schedule not only for the detailed implementation of the FTA but also for the further steps of creating an Economic Union in the SADC region. In other words, the 11 member states which acceded the Trade Protocol agreed mainly on a non-binding basis to follow the implementation schedule prescribed by RISDP.

However, due to monitoring of the implementation process by the SADC Secretariat supported by regular reviews and audits[4], most of the member states which have acceded the protocol complied at least in general terms with the phasing-out of tariffs for goods of Categories A and B until 2008 (see Table 1).

[4] The SADC Secretariat commissioned a Midterm Review of the implementation process of the FTA in 2004 and has since 2007 conducted, with the assistance of USAID, annual audits of the phasing-down of tariffs by the member states.

Table 1: The tariff elimination phases according to the RISDP

Tariff elimination phase	Countries covered	Stipulations
Phase 1: January 2000	South Africa, Botswana, Lesotho, Swaziland and Namibia	Category A goods: tariffs were removed upon FTA establishment.
Phase 2: 2000 – 2008	SACU member states	Category B goods: gradual reduction of tariffs in equal instalments to zero between 1 and 8 years
Phase 3: 2004 – 2008	Mauritius, Zimbabwe	Category B goods: as above
Phase 4: 2006-2008	Malawi, Mozambique, Tanzania, Zambia	Category B goods: as above
Phase 5: 2008 – 2012	All countries	Category C goods: sensitive goods (less than 15% of overall traded goods)
Open	All countries	Category E goods: excluded goods

Source:Trade Hub (2007); Mudzonga (2008)

Explanation:

Category A tariffs: *immediate liberalisation*; applies to all SACU members

Category B tariffs: *gradual liberalisation;* tariffs on these goods will reduce gradually to zero until 2008 according to member state, as these goods constitute significant sources of customs revenue

Category C tariffs: *sensitive products;* tariffs on these goods are to be eliminated between 2008 and 2012. Category C is limited to a maximum of 15% of each member's intra-SADC merchandise trade.

Category E tariffs: *goods that can be exempted;* these goods are exempt and their tariffs will not be touched or reduced to zero.

The FTA was established according to the timetable of the RISDP and officially launched during the SADC Summit in August 2008 in Johannesburg but suffered from the very

beginning from several shortcomings. For one, not all of the 11 member states which had ratified the Trade Protocol complied with the requirements of phasing down their intraregional tariffs and training their customs officials sufficiently as prescribed by the RISDP. A comprehensive audit on the implementation of the SADC Protocol on Trade in 2007 found[5]'…significant non-compliance in conjunction with serious compliance constraints …' and that '… four Member States – Malawi, Mozambique, Zimbabwe and Tanzania – are not up to date on the implementation of their tariff down schedules'[6]. The result was that while the SADC FTA officially existed, the realities on the ground were far from compatible with a free trade area.

In the latest audit (2010) of the implementation of the SADC Trade Protocol SADC 2010b), two countries perpetuated the delays in the envisaged tariff reductions for 2010. Malawi still had the same tariff levels as in the 2004 (Ibid.: 7ff)[7], while Zimbabwe requested a derogation for the scheduled reductions until 2012-14 due to economic difficulties (Ibid.: 17ff).

When at the end of the Windhoek Summit in August 2010 the announcement was made that the establishment of the SADC Customs Union would have to be postponed, one reason given was the delay in phasing down the tariffs for the FTA. The delays in turn were to some extent caused by the tendencies of some SADC member states (Malawi, Mozambique and Zambia) to 'back-load' their tariff reductions by spreading the adjustment costs towards the end of the final phase (Mudzonga 2008: 17). Malawi, for example, had promised to reduce all their tariffs in 2007/8 but failed to do so as the immediate adaptation costs (loss of customs revenue) would have been too high for the already strained national budget.

Another reason for SADC's reluctance to progress to a customs union is the ongoing negotiation process between SADC and the Common Market for Eastern and Southern Africa (COMESA) and the East African Community (EAC) regarding the establishment of a 'tripartite' FTA[8]. This could be a first step to address the problem of SADC countries

[5] The phase-down of 85% of intra-regional tariffs was supposed to have been effective by 1 January 2008.

[6] See the Audit on the Implementation of the SADC Protocol on Trade, SADC (2010b) 2010 Audit of the Implementation of the SADC
Protocol on Trade DRAFT FOR DISCUSSION (SADC/TNF/40/2010/3[A]) by the Trade Hub, Gaborone

[7] In the budget speech (28 May 2010) the Malawian Minister of Finance announced wide-ranging tariff reductions in line with the SADC requirements; however, at the time of writing it was still unclear to what extent the reductions had really been carried out and if they were sufficient to meet the SADC requirements.

[8] COMESA already established (at least on paper) a customs union in 2005, while the EAC established a customs union in 2009 and is now already on the way to a common market.

belonging to more than one customs union which under WTO rules (and practical considerations) is not possible[9]. This problem was highlighted by the 2007 audit of the Trade Protocol: some SADC member states belonging also to another customs union had applied tariffs on SADC imports without regard for commitments emanating from the SADC Trade Protocol. Tanzania, for example, made concessions to Uganda and Kenya under the 'common external tariff' (CET) of the EAC Customs Union (Mudzonga 2008).

Apart from the loss of revenue, overlapping membership and general implementation weakness a further reason for the delays in advancing from the FTA status to a customs union is the difficult process of harmonising the economic policies amongst SADC member states as required by a customs union. Agreeing on one external tariff regime amounts to giving up control of an important element of domestic industrial policy and thus national sovereignty (Kalenga 2008: 92). And it would require a clear decision by SADC Heads of State whether a SADC customs union would serve an inward-looking objective (to protect the regional market from external competition) or promote the integration of the region into the global market by applying low tariffs (Ibid.: 93).

Despite the work of a Ministerial Task Team to develop options for the process of establishing the SADC Customs Union the time for addressing all the above listed problems was insufficient to allow for the launch of the customs union in August 2010. The SADC Summit in Windhoek had to acknowledge this and thus postponed the establishment of the customs union. In order to develop a way out of this quagmire the SADC Heads of State appointed a high-level expert group to look at how the process of establishing the customs union can be sped up and to report back to SADC by December 2011.

In summary, with regard to the implementation of the Trade Protocol and the establishment of an FTA, SADC was more or less on course according to the prescribed time schedule. The FTA was launched as envisaged in August 2008 albeit with a number of deficiencies. As far as the legally binding Protocol on Trade is concerned, the12 SADC member states which eventually acceded the protocol fulfilled their legal obligations. The postponement of the customs union in 2010 was necessary because of critical unresolved issues.

[9] Tanzania belongs to the EAC customs union; Malawi, Mauritius, Mozambique, Zambia and Zimbabwe belong to the COMESA customs union as well as Swaziland which is also a member of the Southern African Customs Union (SACU).

However, unlike the establishment of the FTA, the launch of the customs union in 2010 was not a legally required necessity. The date, emanating from the RISDP, expressed merely a political intention. Nevertheless, the delay in launching the customs union sends a negative signal to international business interests and the international cooperating partners. Indirectly, it also points to the weak role the private sector in the SADC region has played so far in the negotiation process towards the formation of a customs union. Previously, in the four years before the ratification of the Trade Protocol, the private sector assumed a much more active and determining role in the context of the Trade Negotiation Forum (Peters 2010: 162ff).

SADC's failure to establish a customs union according to the RISDP timetable puts into focus also to some extent the still unclear relationship between protocols and the RISDP. While SADC Directorates have developed implementation plans for some protocols (SADC 2005: 79), they have not yet made them compatible to the planning format of the RISDP (one-year operational, five-year medium-term plan and fifteen-year long-term plan) and are therefore not sufficiently monitored under the RISDP monitoring framework.

2.2 Adherence to macroeconomic convergence in SADC

The problems pertaining to the harmonisation of economic policies required for the establishment of a customs union – agreement on the direction/objective of the customs union, willingness to relinquish certain areas of national sovereignty, preparedness to restructure government revenue – are only one range of economic issues which have to be addressed before regional integration can deepen further. Another set of issues refers to the macroeconomic convergence (MEC) of the member states of SADC.

MEC describes the narrowing-down of economic differences between countries at the highest possible level[10]. MEC is a crucial requirement for integration beyond FTA status as it prepares the participating national economies for the increasing degree of external competition they are going to be faced with as a member of a customs union and later an economic union. It also lowers the danger of unequal distribution of costs and benefits within the regional economic community. MEC aims at achieving a certain degree of

[10] In fact, it is hardly perceivable that one country would lower its economic development level in order to let other countries catch up.

structural economic stabilisation. The Economic Commission for Africa (ECA 2008: 2) in its third assessment of regional integration in Africa states:

> The success of regional integration depends critically on member countries pursuing convergent macro-economic policies. Misalignments of tariffs, inflation rates, exchange rates, debt-to-GDP-ratios, rate of money growth and other vital macroeconomic variables between member countries would be disruptive to economic integration…It is therefore imperative that the process of strengthening regional integration should include guidelines for the convergence of the macro-economic and trade policies of the entire regional space so as to strengthen the overall regional integration agenda.

Even before the RISDP was agreed upon, SADC started to think about the issue of MEC. The first approach was made by the governors of the SADC central banks whose ideas were formalised in 2002 in a Memorandum of Understanding (MoU). Selection and quantitative targets for the MEC indicators were strongly influenced by the so-called 'Maastricht Criteria', which guided the European Union into a currency union. In a more generalised form the MEC indicators were incorporated in the SADC Protocol on Finance and Investment, which had been signed in 2007 by all member states but is still awaiting ratification. Once ratified the protocol provides SADC with a set of generally defined economic indicators (Ibid.: 39):

(a) the rate of inflation in a State Party;

(b) the ratio of the budget deficit to GDP in a State Party;

(c) the ratio of public and publicly guaranteed debt to GDP, taking account of the sustainability of such debt, in a State Party; and

(d) the balance and structure of the current account in a State Party.

The quantified and qualified (timeframe) primary MEC indicators had already been defined in the MoU of 2002. The RISDP of 2003 added a number of secondary MEC indicators. In November 2008, a SADC workshop to review the MEC indicators produced a combined set of MEC indicators which provide a realistic approach to measure MEC in SADC. This latest set of MEC indicators are as follows:

Table 2: Proposed architecture of indicators for Macroeconomic Convergence

Year/Indicator	2008	2012	2018
Primary Indicator			
Annual Inflation Rate	<10%	< 5%	< 3%
Secondary Indicators			
Primary Fiscal Balance/GDP *	Tba (see: Explanation below) (< 5%)	Tba (< 3%)	Tba (< 3%)
Public Debt/GDP	< 60%	< 50%	< 40%
Current Account Balance/GDP	< 9%	< 7%	< 5%

Source: SADC (2009:20)

*Explanation: In the MoU on MEC tight limits were set for acceptable fiscal deficit levels (shown in brackets); due to an ongoing discussion on appropriate fiscal deficit levels for developing countries this indicator has been left blank in the proposed architecture for MEC indicators for the time being until some agreement can be reached.

The first phase of MEC was supposed to have been reached in 2008. Despite widespread problems to gather correct economic data it is possible to check the degree of MEC attainment for 2008 for all SADC member states. If the indicator for the 'Primary Fiscal Balance' as originally set by the MOU on MEC is applied, the overall picture with regard to meeting the initial MEC indicators for 2008 is not satisfactory. None of the 14 member states (the Seychelles has not been included) has reached all the macroeconomic targets set for 2008; ten reached three out of the four targets, three reached two targets and Zimbabwe might have reached one of the targets (see Table 3).

The performance of the SADC member states was the least successful with respect to the target for the primary indicator, the annual inflation rate. Only Madagascar, Malawi and Mauritius managed to keep the inflation rate in single digits. However, apart from the DRC and Zimbabwe, the other SADC member states missed the inflation target by only a small margin (0.3% to 3.6%). The best performances were achieved with regard to the target for the 'Primary Fiscal Balance' and the target for the 'Debt to GDP Ratio' with 13 and 12 member states respectively fulfilling the indicator.

Table 3: Attainment of primary Macro Economic Convergence criteria in SADC 2008

Country	Inflation target (single digit)	Fiscal balance target (< -5% of GDP)	Debt target (< 60% of GGDP) that is generally known as an abbreviation	Current account target (<-9% of GDP)	Score in 2008
ANG	13.2	+8.9	33.0	+21.2	**3 of 4**
BOT	12.6	-0.8	6.0	+15.0	**3 of 4**
DRC	23.8	+0.7	n/a	-7.3	**2 of 4**
LES	10.8	-1.0	55.0	+12.6	**3 of 4**
MAD	9.4	-4.7	30.0	-22.8	**3 of 4**
MAL	8.8	-6.3	46.4	-6.3	**3 of 4**
MAU	9.7	-3.4	57.7	-10.5	**3 of 4**
MOZ	10.3	-2.8	40.0	-6.1	**3 of 4**
NAM	10.3	=4.7	18.7	+3.8	**3 of 4**
RSA	11.6	-0.7	32.0	-7.4	**3 of 4**
SWA	12.6	-1.3	17.8	-15.4	**2 of 4**
TAN	10.3	-3.8	38.0	-12.5	**2 of 4**
ZAM	13.6	+1.0	18.1	-4.2	**3 of 4**
ZIM	1,594,745	+29.9*	114.7	-16.6	**1 of 4**
TOTAL	**3 of 14**	**13 of 14**	***12 of 14***	**9 of 14**	

Source: SADC (2009c); own compilation

*Explanation: The high surplus in the case of Zimbabwe is not the product of prudent economic policies but the result of the collapse of the economy: revenue collected in local currency was impossible to be spent by government as a result of its loss of value (SADC 2009c:10). Under normal circumstances, Zimbabwe would have recorded a fiscal deficit.

It is also important to note that 2008 was a year when a booming global economy and high commodity prices started to impact on price levels. Just a year before 11out of the 14 SADC member states had inflation rates of below 10% and would have fulfilled the primary indicator. Thanks to the Heavily Indebted Poor Countries (HIPC) initiative, nearly all SADC countries received substantial debt relief. This together with better fiscal management made their external debt positions manageable once again. Tanzania was the last of the eligible SADC member states to reach the completion point under the HIPC initiative providing some debt relief in 2007 (Peters (2010): 244; AfDB 2010:3ff).

The economic data available for 2009 indicates that the world economic crisis hit the SADC region quite hard. Regional economic growth dropped from +6.3% in 2008 to -1.4% in 2009 but promised to bounce back to around +4% in 2010 (AfDB 2010:4). While average inflation rates for most SADC countries dropped to 8.4% in 2009 inter alia due to sharply decreasing oil prices they picked up slightly again in 2010 when the world economy started to get back into gear. The development for the other three MEC indicators was less favourable (Ibid.: Annex 3) but either still within the set target range or close to it:

- The fiscal balance dropped from +2.6% in 2008 to -5.1% in 2009 for the region.
- The current account position for the region deteriorated from -2.5% in 2008 to 9.2% in 2009.
- The regional debt position increased from 24.7% of GDP in 2008 to 27.2% in 2009.

Although the overall trend concerning MEC in the SADC region has been rather positive for the last decade (Ibid.: Annex 3), the volatility of macroeconomic fortunes over the last three years shows how vulnerable the national economies in southern Africa are with regard to global developments. Macroeconomic stability in the SADC region is therefore heavily dependent on external forces (high global demand and prices for regional commodities; special development initiatives such as HIPC; global financial speculation such as the current high inflow of funds into South African Government Bonds) and might thus be more accidental than sustainable.

In summary, it appears that SADC is on a good way towards increasing regional MEC until 2008 although it was thrown back first by the impact of the overheating of the world economy (which increased regional inflation) and then in 2009 by the global recession. For 2008, most countries met three of the four MEC indicator values but had difficulties meeting the primary inflation-related indicator.

The MEC targets have probably been rather ambitious in view of the strong dependency of the SADC economies on external factors. But from a mere economic point of view they are necessary in order to map out a path to MEC in the SADC region.

In terms of the adherence to timetables, SADC has been close to meet the targets for 2008 and might have a good chance to meet to a large extent the targets for 2012 – if the global economic recovery continues. The latter point underscores how open the realisation of the

MEC targets is to external influences and how limited the room for manoeuvre is for most SADC member states to influence economic performance through appropriate domestic policies.

2.3 Adherence to democratic convergence in SADC

Although less prominently discussed and written about, regional integration can only work if not only the economies converge but also the political systems become more democratic. Political democratic convergence (PDC) is defined as '… the collective process within a regional integration body towards the adoption and practice of higher degrees of democracy at national level' (Peters 2010: 266). It is a crucial requirement for deeper regional integration because PDC ensures similar political and economic conditions and thus predictability in all member states. Less democratic or autocratic states are less predictable in their application of the rule of law, regime stability and economic development orientation and thus a liability for regional integration – as the example of Zimbabwe aptly emphasises.

SADC has produced some protocols which deal with aspects of democratisation and governance:

- the SADC Treaty
- the Protocol on Politics, Defence and Security Cooperation
- the Protocol on Tribunal and the Rules of Procedure
- the Protocol against Corruption

None of these protocols or other SADC agreements referring to democracy such as the Mutual Defence Pact, which was signed by most SADC members in 2003 but still awaits ratification, or the SADC Charter of Fundamental Social Rights, which entered into force in 2003, contains any implementation schedules.

The SADC Treaty itself in the form of general objectives refers to the promotion of democracy and good governance but does not consider this a precondition for deeper regional integration. These principles were reinforced by the Protocol on Politics, Defence and Security[11] and the SIPO. However, 'politics' is still understood by most SADC leaders as

[11] It is interesting to note, however, that the term 'democracy' does not appear in the title of the protocol and rather a more neutral expression – 'politics' – is being used.

'stability and security' and not so much as 'democracy and good governance' as the Protocol on PDS shows (SADC 2001:Art. 2).

The Protocol on the Tribunal provides for the establishment of an important instrument not only for the settlement of SADC disputes but also for the enforcement of democratic standards of the rule of law. Being established in Windhoek, the Tribunal officially started functioning in 2007; according to its operational brief no time schedules or deadlines were set.

With the Protocol against Corruption (signed in 2001 and entering into force in 2005) SADC employed an instrument to tackle one of the big problems of the region. According to the protocol, the member states are supposed to report regularly on its implementation to an overseeing committee. However, until now the committee has not yet been established and the protocol in fact not been implemented (Noa 2010). All deadlines have been ignored by the SADC member states.

The SADC Treaty and instruments are not providing any measurable yardsticks for PDS. And unlike in macroeconomics there are also no specific and objective indicators which could express the degree of democratisation or good governance in a country. However, a number of indices exists which – when combined – can provide an approximation of the state of democratisation and governance in individual countries.

In this chapter, despite the missing formal link between regional integration and the attainment of democracy, we will treat the issue as a general necessary requirement for the success of regional integration in the SADC region. The following indices are used to analyse to what extent the SADC region is moving towards PDC:

- The Corruption Perception Index (CPI) of Transparency International, which attaches a value regarding the degree of transparency between 1.0 and 10 to most countries in the world.
- The Bertelsmann Transformation Index (BTI) of the Bertelsmann Foundation, which inter alia attaches values regarding the degree of transformation towards democracy and market economy for some 120 transformation countries on a scale from 1 to 10 (full transformation).

- The Freedom House Index of Freedom House (US) measuring the degree of attainment of civil rights and civil liberties on a scale from 1 to 7 (totally unfree).
- The Ibrahim Index (II) of the Mo Ibrahim Foundation measuring to what degree African countries have achieved good governance and looking at '… the delivery of public goods and services to citizens by government and non-state actors'[12] on a scale from 1 to 100 (good governance) .

The picture concerning corruption in the SADC region is, on the whole, negative. The perceived level of corruption in the SADC member states in 2010 was higher than in 2000 although it marginally improved as compared to 2004 and 2006. In seven out of 15 member states, corruption levels rose while they fell in another seven and stayed the same in one country. South Africa is among those countries in which perceived corruption levels have worsened. As a region, SADC consists of one group (Botswana, Mauritius, Seychelles, South Africa and Namibia) with moderate levels of corruption, another group with serious corruption problems (Lesotho, Malawi, Swaziland and Zambia) and a third group of states where corruption is endemic – this group is the largest. On the whole, the majority of SADC member states can be perceived as being corrupt (ratings of below 4 on the CPI scale) and only two countries (Botswana and Mauritius) show a value of above 5 on the overall scale.

[12] See www.moibrahimfoundation.org/en/section/the-ibrahim-index.

Table 4: Transparency in the SADC region 2000 – 2010

	2000		2004		2006		2008		2009		2010		Trend
	Rank	Value	Rank	Value	Rank	Value	Rank	Value	Rank	Value	Rank	Value	
ANG	85	1.7	129	2.0	142	2.2	158	1.9	162	1.9	168	1.9	+
BOT	26	6.0	29	6.0	37	5.6	36	5.8	37	5.6	33	5.8	-
DRC	n/a	n/a	133	2.0	156	2.0	171	1.7	162	1.9	164	2.0	**0**
LES	n/a	n/a	n/a	n/a	79	3.2	92	3.2	89	3.3	78	3.5	+
MAD	n/a	n/a	82	3.1	84	3.1	85	3.4	99	3.0	123	2.6	-
MAL	43	4.1	90	2.8	105	2.7	115	2.8	89	3.3	85	3.4	-
MAU	37	4.7	54	4.1	42	5.1	41	5.5	42	5.4	39	5.4	+
MOZ	81	2.2	90	2.8	99	2.8	126	2.6	130	2.5	116	2.7	+
NAM	30	5.4	54	4.1	55	4.1	61	4.5	56	4.5	56	4.4	-
SA	34	5.0	44	4.6	51	4.6	54	4.9	55	4.7	54	4.5	-
SEY	n/a	n/a	48	4.4	63	3.6	55	4.8	54	4.8	49	4.8	+
SWA	n/a	n/a	n/a	n/a	121	2.5	72	3.6	79	3.6	91	3.2	+
TAN	76	2,5	90	2.8	93	2.9	102	3.0	126	2.6	116	2.7	+
ZAM	57	3.4	102	2.6	111	2.4	115	2.8	99	3.0	101	3.0	-
ZIM	65	3.0	114	2.3	130	2.4	166	1.8	146	2.2	134	2.4	-
Aver		**3.8**		**3.4**		**3.3**		**3.4**		**3.4**		**3.5**	-

Source: www.transparencyinternational.org; various years; own compilation

The BTI 2010[13], portrays a divergent picture of the political and economic transformation of the SADC region (13 of the 15 member states were covered by the BTI for 2007–2009). While four member states of SADC can be categorised as democracies (Botswana, Mauritius, Namibia and South Africa), six as democracies with deficiencies (Lesotho, Madagascar, Malawi, Mozambique, Tanzania, and Zambia), three are classified as outright autocracies (Angola, DRC and Zimbabwe). Only Angola, the DRC and Malawi improved their ratings between 2003–5 (BTI 2006) and 2007– 9 (BTI 2010); two other member states (Tanzania and Zambia) more or less maintained their values while the other seven countries covered by the BTI showed a deteriorating level of transformation. Reason for concern is that amongst the backsliders are all the SADC member states which are regarded as democracies. On the whole, the democratic (and economic transformation) in the SADC region shows a negative trend.

[13] Covering the period between February 2007 and January 2009.

Table 5: The BTI for SADC countries 2003 – 2009

	2003–5	2005–7	2007–9	Trend
ANG	3.41	3.82	4.56	**++**
BOT	7.98	7.94	7.81	**-**
DRC	2.62	3.16	3.53	**++**
LES	n/a	n/a	5.35	**0**
MAD	6.45	6.23	5.30	**--**
MAL	4.89	5.35	5.56	**+**
MAU	8.17	8.33	7.94	**-**
MOZ	6.01	5.56	5.71	**-**
NAM	7.15	7.32	6.99	**-**
SA	7.98	7.98	7.16	**-**
TAN	5.65	5.84	5.58	**0**
ZAM	6.07	5.97	5.99	**0**
ZIM	3.38	3.39	3.01	**-**
Average	**5.81**	**5.91**	**5.73**	**-**

Source: www.bertelsmann-stiftung.org, different years; own compilation

The Freedom House Index on 'freedom in the world' shows stagnation for the SADC region between 2000 and 2009. Six countries improved their ratings; four countries remained at the same level and in five member states 'freedom' became more restricted. The average value remained the same and puts the region as a whole at the 'partly free' level. Not surprisingly, one of countries whose rating slipped is Zimbabwe but another one is South Africa, the most important member state of SADC. Four of the 15 rated SADC countries are considered as 'free', amongst them also South Africa (the others are Botswana, Mauritius and Namibia), seven as 'partly free' and four as 'un-free' (Swaziland, Zimbabwe, Angola and DRC). The overall picture provided by the Freedom House ratings shows a region clearly divided into three groups with little if any movement towards regional democratic convergence. Predominantly, the countries of the SADC region have not yet reached the level of free and democratic states.

Table 6: Development of political freedom in SADC 2000–2007

	2000	2004	2005	2006	2007	2008	2009	Trend
ANG	6	5.5	5.5	5.5	5.5	5.5	5.5	+
BOT	2	2	2	2	2	2	2	0
DRC	6.5	6	6	5.5	5.5	6	6	+
LES	4	2.5	2.5	2.5	2.5	2.5	3	+
MAD	3	3	3	3	3.5	3.5	5	-
MAL	3	4	2	2	4	4	3.5	-
MAU	1.5	1	1	1.5	1.5	1.5	1.5	0
MOZ	3.5	3.5	3.5	3.5	3	3	3.5	0
NAM	2.5	2.5	2	2	2	2	2	+
SA	1.5	1.5	1.5	2	2	2	2	-
SEY	3	3	3	3	3	3	3	0
SWA	5.5	6	6	6	6	6	6	-
TAN	4	3.5	3.5	3.5	3.5	3.5	3.5	+
ZAM	4.5	4	4	3.5	3.5	3	3.5	+
ZIM	5.5	6.5	6.5	6.5	6.5	6.5	6	-
SADC	3.7	3.6	3.5	3.5	3.6	3.6	3.7	0

Source: www.Freedomhouse.org; different years; own compilation

The Ibrahim Index in general depicts a rather positive trend as far as good governance is concerned. The Index shows a steady improvement for most countries in the SADC region. Only three (Madagascar, Mozambique and Zimbabwe) of the 15 SADC member states had lower values in 2009 than in 2000. Some countries in the region, such as Angola, the DRC, Lesotho, Mauritius and Zambia showed considerable improvement. Of the ten top performers for Africa in 2009, six were from the SADC region[14]. With the exception of the DRC and Zimbabwe and the rapidly improving Angola, all the other SADC member states show results which are above the African average. Five top performers are to be noted: Mauritius, Botswana, the Seychelles, South Africa and Namibia.

[14]The country data and composite values of the Mo Ibrahim Index are usually two years old when published. The Ibrahim Index of 2009 will therefore depict data for2007.

Table 7: Governance in the SADC region

	2001	2003	2005	2007	2008	2009	Trend
ANG	23.4	27.4	30.7	32.1	37.0	39.3	+++
BOT	74.5	74.6	75.3	76.2	76.4	75.9	+
DRC	25.6	25.9	29.4	31.5	32.8	31.1	++
LES	54.8	57.1	57.9	59.5	59.4	60.1	++
MAD	55.7	54.3	54.8	56.6	55.0	48.7	--
MAL	49.8	49.3	49.0	50.4	51.7	51.7	+
MAU	77.9	77.7	79.3	79.5	82.2	83.0	++
MOZ	52.6	53.6	52.5	51.3	50.9	52.1	-
NAM	67.5	67.4	65.9	69.1	68.7	67.3	0
SA	72.3	72.0	70.9	72.8	70.9	71.5	-
SEY	73.6	74.4	75.5	78.0	77.0	78.5	+
SWA	45.9	45.8	46.3	50.0	51.1	50.8	+
TAN	53.0	52.3	51.9	54.8	55.5	55.0	+
ZAM	49.4	50.3	50.5	54.4	54.8	54.9	++
ZIM	35.9	35.8	33.5	32.3	31.6	32.7	-
Average	**54.1**	**54.5**	**54.9**	**56.6**	**57.0**	**56.8**	+

Source: www.moibrahimfoundation.org; different years; own compilation

In the Ibrahim Index the contrasting positive development trend as far as good governance is concerned[15]may be caused by a stronger incorporation of socioeconomic factors. However, in the context of this study it is more important that the index also identifies more or less the same groups of advanced and badly performing member states as the other three indices. The emerging image is that of a divergent region with three distinct groups of countries as far as democratic convergence is concerned:

- a 'democratic' group of countries with Botswana, Mauritius, Namibia, South Africa, and to some extent the Seychelles;
- an 'intermediate' group of countries with deficient democracies including Lesotho, Madagascar, Malawi, Mozambique, Tanzania and Zambia;
- an 'autocratic' group of countries including Angola, DRC, Swaziland and Zimbabwe.

[15] The Ibrahim Index is a composition of four indices: 'safety and the rule of law'; 'participation and human rights'; 'sustainable economic opportunity'; and 'human development'.

The dynamics in the 'democratic' group point to a gradual worsening of democratic features especially as far as South Africa is concerned. The development in the 'intermediate' group is towards more democracy and adherence to democratic procedures. The third group of autocratic states is rather static.

The slow regressive development concerning democratic convergence in SADC found its political expression in the non-operational Protocol against Corruption and the temporary suspension of its only organ of policy enforcement: the SADC Tribunal in 2010. Established in 2001, the latter became eventually operational in late 2005 with certain briefs to deal with, inter alia the interpretation of the treaty and the protocols, and disputes between member states and natural or legal persons and the state[16]. Apart from a minor case the Tribunal was for the first time severely tasked when in October 2007 a group of white Zimbabwean farmers challenged the expropriation of their farms by the Zimbabwean Government as being motivated by racism and as such contradicting Article 6 of the SADC Treaty.

In a first ruling, the Tribunal in December 2007 ordered the Zimbabwean Government to stop any further actions and allow the farmers to remain on their farms until the Tribunal would pass a final ruling – a decision which the Zimbabwean Government duly ignored. The SADC Tribunal in July 2008 ruled the Zimbabwean Government to be in contempt of the court and indicated that it would report the matter to 2009 SADC Summit for further action. In November 2008, the Tribunal made his final ruling on the farm expropriations in Zimbabwe:

- Prohibiting legal appeals against farm eviction orders was illegal;
- Article 6 of the SADC Treaty was violated (racism);
- All ongoing farm evictions had to be stopped;
- Those who were already evicted from their farms had to be appropriately compensated (Peters 2010:188ff).

The Zimbabwean Government – predictably – refused to accept the rulings and questioned their legality: it argued that Zimbabwe did not ratify the Protocol on Tribunal. However, this argumentation does not hold much legal water as the Protocol on Tribunal was deliberately

[16] See www.SADC.int/tribunal/.

approved by a Heads of State Summit in a way to avoid the need for ratification at national level; Zimbabwe had gone along with this procedure[17]. The Zimbabwean refusal to accept the Tribunal rulings exposed the Tribunal for what is really is: a good-weather mechanism which stalls when the sea is getting stormy. In fact, the absence of effective sanction and enforcement mechanisms for the Tribunal makes it dependent on the 'good will' and compliance of the member states – something the Zimbabwean Government was not prepared to provide.

In order to avoid an outright embarrassment, the 2010 Summit decided to commission a review of the role, functions and terms of reference of the Tribunal which produced a report by the end of February 2011[18]. The extraordinary Summit in Windhoek on 20th of May 20111 ignored to a large extent the findings of the report, upheld the suspension of the Tribunal and commissioned the SADC Ministers of Justice to initiate a process to amend the legal instruments of SADC (Konrad Adenauer Foundation, Nairobi 27.5.2011). SADC conveyed a negative message with this factual suspension of the Tribunal: good governance is not high up on the agenda.

Assessing the developments in the region over the last decade shows a clear non-favourable trend when it comes to PDC:

- Three distinct groups exist with regard to adherence to good governance and democracy which are not converging on each other.
- The level of democracy and good governance has suffered on the whole over the last decade. SADC's lead country South Africa dropped in most categories measuring aspects of good governance.
- The SADC Tribunal as the only independent mechanism to facilitate good governance in the region was at least temporarily shut down and its reputation seriously damaged.

[17] See: Zimbabwe Human Rights NGO Forum. 20.08.2009 (mimeo)
[18] See: SADC Communiqué of the 30th Jubilee Summit of SADC Heads of State and Government

3. Conclusion

Overall, SADC is still on track but deviates somewhat from the straight road towards deeper regional integration. In terms of economic integration, SADC is more or less on course but political integration appears to lag seriously behind regional integration requirements.

Contrary to media speculation, SADC had not legally committed itself to establish a customs union in 2010; the timetable of the legally binding Trade Protocol foresaw the establishment of a Free Trade Area for 2008 – which SADC achieved – but did not go any further. The RISDP, which set the start of a customs union for SADC at 2010, is not a legally binding document but a mere declaration of intentions. Its targets with regard to trade-led regional integration had been overambitious even at the date of drafting and they were probably strongly influenced by the pan-African integration targets of the AU under the Abuja Treaty.

The SADC region experienced a development towards macroeconomic convergence over the last decade which constitutes a necessary condition for deeper trade-led regional integration. The qualitative targets set for 2008 were nearly achieved; however, the impact of the world economic crisis in 2009 cancelled out some of the macroeconomic accomplishments and slowed down convergence to some extent. This macroeconomic backsliding highlighted once more the high sensitivity of the SADC economies towards external factors which are outside their sphere of direct political influence. Macroeconomic convergence in SADC will always remain partially dependent on favourable global economic factors.

Democratic convergence towards stable, legitimised and participatory regimes practising good governance in the SADC region seems to be moving ahead at a snail's pace – if at all. Three distinct groups of member states (one group of countries which are more or less democratic, one hybrid group of democracies with deficiencies, and one group of autocratic states) exist within SADC. They are not converging much towards the first group and whose democratic champions – such as South Africa and Botswana – are starting to backslide. The prevailing regional political culture of authoritarian rather than participatory rule, the dominance of personal rulers, and the absence of a universal application of the rule of law in the region do not bode well for a deepening of regional integration in SADC. The temporary

suspension of the Tribunal underscores the problems SADC leaders have with good governance concepts.

In summary, SADC has not (yet) lost track but risks to lose the necessary momentum to carry regional integration further. Currently, there is a mismatch between the political fundamentals of regional integration and economic ambitions resulting in a reduced commitment for deeper regional integration, especially when questions of national sovereignty are at stake. Without an increasing political convergence towards greater democracy and a stronger commitment for the rule of law the political leaders are not sufficiently legitimised to agree on the upcoming required decisions regarding the introduction of a customs union (level of external tariffs, distribution of customs revenue, and harmonisation of economic and financial policies).

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