

## **Monitoring Regional Integration in Southern Africa Yearbook Volume 8 (2008)**

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## **Foreword**

For many years, regional integration has been considered an important and successful tool of economic growth and development. In Southern Africa in particular, with its comparatively small economies, regional integration was meant to play a crucial role in pursuing common strategic interests for the successful economic development of the countries involved.

The negotiations by Southern African countries with the European Union on economic partnership agreements (EPAs) have, however, been widely considered as having a possibly negative impact on the dynamics of regional integration, specifically as regards the Southern African Customs Union (SACU), as well as on the economic growth of the African countries affected. In addition, the global financial crisis and the economic slowdown may impact the development of African countries far more severely than can be projected today. As a result, regional integration – as a paradigm for sustainable economic development – is significantly challenged from a number of angles.

This Yearbook 2008 and its articles therefore provide crucial and other increasingly important information on the status and development of regional integration in the Southern African subcontinent. From 2000 to date, the yearbook was intended – and has indeed served – not only as a pivotal source of well-researched information for academics and politicians alike, but also as a constructive stimulus to debate on regional integration and its potential to thrust forward the Southern African Development Community (SADC), and even the continent itself.

The Konrad Adenauer Foundation shows both a keen interest and deep involvement in regional integration. This reflects the very nature of the organisation – being named after Konrad Adenauer, the first Chancellor of the Federal Republic of Germany and one of the founders of the European Union; but it also bears testimony to the foundation's conviction that regional integration and its dynamics will lead to sustainable development and the eventual benefit of the people. For this reason, by way of its programmes in more than 100 countries, the foundation has been actively associated with regional integration in Europe, Africa, Latin America and Asia.

In order to implement its programmes, the Konrad Adenauer Foundation relies on its qualified partners worldwide. In this instance, therefore, we are most grateful for the vital role played by the Trade Law Centre for Southern Africa (tralac) and the Namibian Economic Policy Research Unit (NEPRU) in their facilitation of this project and this associated publication.

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## Contents

### Introduction

<b>Monitoring the process of regional integration in Southern Africa in 2008</b> <i>Anton Bösl, Willie Breytenbach, Trudi Hartzenberg, Colin McCarthy, Klaus Schade</i>	1
--	---

---

### Chapter 1

<b>Trade integration, production networks and the services sector: implications for regional trade agreements in Eastern and Southern Africa</b> <i>Nicolette Cattaneo</i>	5
---	---

---

### Chapter 2

<b>Regional transport challenges within the Southern African Development Community and their implications for economic integration and development</b> <i>Tsitsi Mutambara</i>	34
---	----

---

### Chapter 3

<b>SADC trade integration – the effect of trade facilitation on sectoral trade: a quantitative analysis</b> <i>Sonja Kurz, Thomas Otter and Felix Povel</i>	55
--	----

---

### Chapter 4

<b>SACU, China and India: the implication of FTAs for Botswana, Lesotho Namibia and Swaziland (BLNS)</b> <i>Ron Sandrey and Hans Grinsted Jensen</i>	74
---	----

---

### Chapter 5

<b>Developing a balanced framework for foreign direct investment in SADC: a decent work perspective</b> <i>Daniela Zampini</i>	94
---	----

---

### Chapter 6

<b>Strengthening SADC institutional structures – capacity development is the key to the SADC Secretariat's effectiveness</b> <i>Leda Giuffrida and Helmut Müller-Glodde</i>	120
--	-----

---

### Chapter 7

<b>Making regional economic community laws enforceable in national legal systems – constitutional and judicial challenges</b> <i>Richard Frimpong Oppong</i>	149
---	-----

---

### Chapter 8

<b>The SADC Tribunal: a legal analysis of its mandate and role in regional integration</b> <i>Oliver C. Ruppel and Francois-X. Bangamwabo</i>	179
--	-----

---

Chapter 9

**The role of parliament in regional integration – the missing link**

*Barney Karuombe*

222

---

Chapter 10

**Peacekeeping and regional integration in Africa**

*Willie Breytenbach*

249

---

Chapter 11

**How countries of the Southern African Development Community (SADC) can use the World Trade Organisation and the European Community flexibilities for better access to affordable HIV/AIDS medicines**

*Stephen S. Kingah, Stefaan Smis and Fredrik Söderbaum*

270

---

Chapter 12

**Land reform in Zimbabwe: context, process, legal and constitutional issues and implications for the SADC region**

*Memory Dube and Rob Midgley*

303

---

Chapter 13

**Measuring regional trade integration in Southern Africa**

*Rigmar Osterkamp*

342

---

Chapter 14

**Fundraising or common foreign policy? 30 Years of SADC Consultative Conference**

*Martin Adelman*

356

---

**Authors' and Editors' Profiles 2008**

378

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## **Introduction**

### **Monitoring the process of regional integration in Southern Africa in 2007**

*Anton Bösl, Willie Breytenbach, Trudi Hartzenberg, Colin McCarthy, Klaus Schade*

2008 was an eventful year for Southern Africa. The Southern African Development Community (SADC) launched its Free Trade Area (FTA) in August. Its target to become a customs union by 2010 is still on the agenda. In October at a Tripartite Summit SADC, the East African Community (EAC) and the Common Market for East and Southern Africa (COMESA) announced their intention to create an FTA comprising the regional economic communities. The member states of these three communities agreed to develop, within six months, a roadmap towards the establishment of this FTA stretching from South Africa in the south to Egypt in the north. Keeping in mind that the establishment of an FTA focuses specifically on a trade-in-goods agenda, it is not only tariff phase-down and alignment among member states that will be required.

The establishment of this FTA will also include work on non-tariff measures, rules of origin, standards, customs management and trade facilitation. With stark differences among the existing regional communities on many of these issues, this promises to be a challenging task. However, the reflection and consideration of trade policy matters within and among member states in this large region could be a very useful exercise. Very diverse perspectives exist among countries in this region. For South Africa and Mauritius, for example, the import tariff is not so much an instrument of trade policy, but of industrial policy, while for countries like Malawi the import tariff is an important source of revenue, with liberalisation posing serious fiscal policy challenges. To accommodate the diverse needs and perspectives within a single FTA will require much deliberation and compromise.

Meanwhile the Southern African Customs Union (SACU) has been experiencing growing internal dissent. Two factors are largely responsible for this acrimonious situation. The first is the increasing concerns about the revenue sharing arrangement, the SACU revenue pool, in terms of which South Africa makes significant transfers to the smaller member states. In recent years, particularly the

Ministry of Finance in South Africa has been voicing concerns about the transfers made to the other SACU members via the revenue pool. Adverse global and regional economic developments during the latter part of 2008 and the global financial crisis can well be expected to contribute to further dissent on this score.

The second reason for growing dissent in SACU stems from the negotiations with the European Union (EU) to conclude an Economic Partnership Agreement (EPA). In April 2007 South Africa joined the other SACU members as a full negotiating member of the SADC EPA Group which consists of the SACU member states, Angola and Mozambique. Tanzania was part of this group, but towards the end of 2007 it opted to join the East African Community and sign an Interim EPA with its EAC member states. The SADC EPA Group is arguably one of the most complex configurations negotiating with the EU. From the configuration of this negotiating coalition it was obvious that the fact that this group cut across existing regional economic communities, would cause major challenges in the negotiations. With South Africa joining the SADC EPA Group as a full negotiating party, the divisions among the members of this group have become even wider. So much so that towards the end of 2008 South Africa indicated that it would consider withdrawing from SACU if the member states that had signed the Interim EPA proceeded to implement this interim agreement. This puts a country like Lesotho, for example, in a very tight corner. More than 50% of its government revenue comes from the SACU revenue pool. However, not implementing the EPA means reverting, for market access to the EU, to the Everything but Arms arrangement (EBA). While EBA offers duty-free, quota-free market access to the EU for least developed countries, it comes with onerous rules of origin. These rules of origin require a double-stage transformation for the clothing and textile industry, for example. For Lesotho, EBA has been totally irrelevant. Its exports of clothing and textiles to the EU are negligible, while market access to the United States under the African Growth and Opportunity Act (AGOA) has led to the development of the clothing and textile industry as Lesotho's largest industry by far. More generous rules of origin are the prime difference between the two market access regimes: AGOA and EBA. Not implementing the Interim EPA means that Lesotho will not be able to address the rules of origin barrier to the EU market for its key manufacturing industry, thus losing an opportunity to address market access

concerns to the EU. These are extremely difficult policy choices that need to be taken, with decisions either way possibly having severe development implications.

The global financial crisis and the concomitant economic slowdown began to impact on the region in the latter part of 2008, and more is most probably in store. The extent of the crisis is perceptible not only in key performance indicators such as employment, income, exchange rates, but also in policy stance. Countries have begun demonstrating more protectionist stances, and this can be expected to further influence not only the regional integration agenda but also the implementation of the liberalisation commitments. There is also evidence of more reactive policy decisions, as contingency protection increases and policy becomes more inward looking. Given the apparent scope of the financial and more general economic crisis, reflection on the regional integration agenda, and more broadly on what constitutes appropriate governance for development, should be on the agenda in the region.

On security and political issues the past year provided very little progress, if any, on new institutional arrangements. In the absence of former presidents Obasanjo of Nigeria and Mbeki of South Africa, Muammar Gaddafi of Libya was elected head of the African Union. His legacy might prove polemical. How his views on rapid political unification but opposition to NEPAD as well as partnerships with Western blocs will turn out, is difficult to say. This might have repercussions for Economic Partnership Agreements with the EU and the United States as planned. This might also complicate or delay Southern African initiatives in this respect.

Politics and security in Southern Africa were dominated by Thabo Mbeki's departure from politics, as well as the SADC mandated mediation by Mbeki in the search for a political solution in Zimbabwe after inconclusive elections. Here the transitional model showed great resemblance with the power-sharing plan adopted in Kenya after inconclusive elections there. This may indeed be a new trend in African politics.

Other developments included peaceful elections in Zambia which augurs well for the consolidation of democracy in that SADC country. An unstable peace still lasts in the DR Congo where the UN still plays an important peacekeeping role. Apart from peacemaking roles such as drafting peace agreements, the AU and SADC are still far from being able to enforce that peace. The old problems of capacity, political will,

and especially funding, are still haunting many African plans for the future. Africans (e.g. Sudan, Zimbabwe and Swaziland) are also still reluctant to compromise on sovereignty which has serious implications for future political integration, and pan-Africanist supranationalism, which is what the new head of the African Union stands for.

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## *Chapter 1*

# **Trade integration, production networks and the services sector: implications for regional trade agreements in Eastern and Southern Africa**

Nicolette Cattaneo

## **1. Introduction**

Regional economic integration in Eastern and Southern Africa has been beset for years by problems relating to overlapping membership of sub-Saharan African regional groupings, lack of political will and institutional capacity, and tensions between intra-African (SACU, SADC, COMESA) agreements and trade agreements concluded either individually or collectively with extra-continental countries or blocs (such as the SA-EU TDCA, SACU-US FTA negotiations, AGOA and the ongoing EPA discussions with the EU). SACU itself has been involved in Free Trade Agreement (FTA) negotiations on several fronts, as well as multilateral trade discussions under the auspices of the WTO.

A suitable framework for regional integration in sub-Saharan Africa has long been debated. Since the mid-1990s the analysis has escaped the confines of the basic orthodox trade creation/trade diversion framework, with recognition of its limitations in the developing country context. A development integration approach has been contemplated, in which economic integration is seen as a vehicle for regional industrial development through, for example, a lowering of the costs of protecting the industrial sector, making use of the advantages of a larger regional market, and cooperation in transport and infrastructural development. In this regard, literature on the region began to consider aspects such as economies of scale, dynamic effects including the impact on investment and the polarisation of industrial development, as well as fuller analyses of mechanisms to facilitate an equitable distribution of the costs and benefits of regional integration among countries at unequal levels of development.<sup>1</sup> Exploration of the lessons of the new trade theory, such as the benefits of intra- versus inter-industry specialisation, has also begun.<sup>2</sup> Recent contributions on African economic integration have nonetheless criticised the region's

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<sup>1</sup> See, for example, Mutambara (2001) and McCarthy (1999).

<sup>2</sup> Cattaneo and Fryer (2002); Visser (2001b); Visser and Hartzenberg (2004); Petersson (2002, 2003, 2005).

adherence to a linear model of regional integration, proceeding from a free trade area to a customs union, common market and finally economic union, notwithstanding the variable geometry approach built into the system (McCarthy 2007).

These developments have still largely focused on trade in final products.<sup>3</sup> However, a significant amount of trade expansion in recent years has been in 'fragmented trade', with the exchange of intermediate and unfinished products comprising as much as 30% of global manufacturing trade. In some countries, growth in such trade exceeds that of trade in final goods, and interest is growing in cases where it has a regional dimension, such as East Asia (Haddad 2007:3; Athukorala 2005; Arndt 2004b). Important questions include what the benefits might be for African developing countries of intra-product specialisation and trade expansion related to the international fragmentation of production, and whether such benefits may be greater, or better harnessed, in a context of regional integration. Whether the integration context is one of a North-South or South-South preferential trading arrangement and, in particular, one between countries at unequal levels of development will also be important. The first aim of this chapter is thus to provide a synthesis of the theoretical literature on the international fragmentation of production and regional integration, and to explore the implications of this body of work for the sub-Saharan African integration context.

The theoretical analysis of fragmented production distinguishes between production blocks or segments (i.e. the different parts of the production process) and the service links required to coordinate these blocks (Petersson 2003: 763-764). An important reason for the growth of the fragmentation of production as an international phenomenon is the reduction in the cost and the improved reliability of these service links internationally. Countries involved in international production networks therefore require services sectors that efficiently support and facilitate manufacturing (Van Long et al. 2001:1). In this regard, and in the light of the increasing importance of the services sector as a proportion of Gross Domestic Product (GDP) in developing countries and the growth of trade in services, the implications of services liberalisation under the General Agreement on Trade and Services (GATS) aspects of the regional integration agreements need to be explored. The second purpose of

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<sup>3</sup> Exceptions include Petersson (2003) and Visser (2001a,b).

the chapter is therefore to highlight the importance of the services sector in manufacturing production and trade, and in this regard to examine the growing literature and debates surrounding the services aspects of regional integration agreements in a developing country context.

The rest of the chapter is organised as follows. Section 2 considers why firms engage in production sharing, and why this phenomenon has acquired an international dimension, leading to fragmented trade. Section 3 explores fragmented trade from a regional perspective. In particular, it examines whether the potential benefits of intra-product specialisation may be more readily attainable through preferential trade agreements (PTAs), especially in the developing country context. More specifically, it considers the implications in the case of regional groupings like SACU and SADC, whose member countries differ significantly in size and level of development. Section 4 highlights the importance of the services sector in production sharing and fragmented trade, while Section 5 explores how services aspects of regional trade agreements (RTAs) can be used to support this role. The concluding section contemplates the implications of the analysis for regional integration policy in Southern Africa. The significance of North-South versus South-South PTA contexts will be explored in this regard.

## **2. Production networks and fragmented trade**

### ***Production sharing***

Production sharing, or fragmentation of the production process, takes place when the stages of production of a commodity are separable into different production blocks. Production stages may then take place at different locations, although the production blocks require coordination through service links. Such links include transport, communications, insurance, quality control, and managerial coordination (Arndt and Kierzkowski 2001:4).

**Figure 1: A simple example of fragmented production**



Source: Arndt and Kierzkowski (2001: 4)

Fragmented production allows intra-product specialisation, where the factor intensity of the component rather than that of the final product, is relevant. Production at each stage can consequently take place in the lowest cost location. In addition, manufacturers may be able to take advantage of scale economies at the component level, for example by supplying numerous final good producers. Such advantages would not be available in an integrated production process. Further, since intra-product specialisation is a form of intra-industry specialisation, some of the benefits of the latter, such as lower adjustment costs when resources are reallocated, may also be forthcoming. These potential advantages are explored in more detail below.

The availability, cost and efficiency of the service links that coordinate production blocks are clearly critical to the extent of fragmentation. Due to the importance of these links, production sharing was until recently predominantly domestic rather than international in nature. Local service links were less costly and proximity was important in keeping coordination costs low (Petersson 2003:764). However, production sharing across borders has been stimulated by a number of factors. These include liberalisation of trade in goods and services, technological advances, especially in information and communication technologies, and greater compatibility in legal and regulatory frameworks across countries (Arndt and Kierzkowski 2001:4).

### ***Fragmented trade***

As a consequence of the above factors, cross-border production sharing has become widespread (Feenstra 1998). Intra-product specialisation across national boundaries has led to trade in intermediates in accordance with comparative advantage, known as fragmented trade. The latter adds to total trade since each component becomes a separate constituent of global trade. It has been estimated that trade in components has grown significantly faster than trade in final goods in some regions, and now accounts for 30% of manufacturing trade (Haddad 2007:3).

Such fragmented trade may take place within a particular firm (intra-firm trade) or between different firms. It has been found that the activities of multinational corporations (MNCs) alone cannot explain the growth and importance of cross-border production sharing (Arndt and Kierzkowski 2001:9). If separate production blocks are accompanied by separation of ownership, then foreign direct investment (FDI) will be less important. Without ownership separation, MNCs and FDI will be more predominant in production sharing; however, neither is necessary *per se* for the phenomenon to occur.

The important question for the purpose of the present chapter is whether the phenomenon of fragmented trade provides benefits or opportunities for developing countries, either in the aggregate welfare sense or in terms of distributional effects, which differ significantly from those suggested by conventional trade theory and its extensions. The rest of this section explores this issue in the context of trade theory more generally, while Section 3 specifically considers fragmented trade in the regional integration context.

In the Heckscher-Ohlin framework, trade in components will be driven by differences in factor endowments between countries and differences in the factor intensities of the production process in each production block. The difference is that the division of labour and specialisation will occur at the level of components rather than of final products. This specialisation will tend to be welfare-enhancing at the aggregate level. However, in addition, the location of component and final good production will now depend on the relative cost and efficiency of the international service links connecting the production blocks, as well as on the usual Heckscher-Ohlin considerations. This aspect is considered further in Section 4.

Of relevance to developing countries like South Africa is that production sharing offers potential opportunities for higher wage producers of labour-intensive goods to improve industry competitiveness by giving up local production of the most labour-intensive industry components (Arndt and Kierzkowski 2001:6). This could counter the usual adverse employment, output and wage implications of trade liberalisation (whether regional or multilateral) for such sectors. In addition, with intra-sectoral resource reallocation, short term costs of adjustment may be mitigated. This is in line with the view that factors of production are likely to be more mobile between the

production of goods within an industry than between the production of goods in different industries (Cattaneo and Fryer 2002:19). In the context of vertical specialisation, however, the applicability of the so-called ‘smooth adjustment hypothesis’<sup>4</sup> depends on how significantly factor requirements differ between the various production blocks.

Another important aspect is that the opportunities for benefiting from economies of scale are extended in the context of fragmented production and trade. If components can be provided to both domestic and international end-good producers, scale economies can be reaped at intermediate stages of production rather than only at the final product stage. In addition, Jones and Kierzkowski (2001:24) argue that the service links that coordinate production blocks are themselves characterised by significant increasing returns to scale.

The implications of fragmented production and trade for development through industrialisation warrant careful consideration. Arndt and Kierzkowski (2001:7-8) argue, for example, that intra-product specialisation ‘broadens the choice of development strategies and generally reduces the hurdles to be overcome in the quest for industrialization’. The reasoning is that, given the benefits of component specialisation, developing country producers need not become adept at all stages of the production chain in order to break into world markets. Developing country firms could begin by specialising in more labour-intensive processes, while developing capabilities in more capital and skill-intensive stages of production. Size advantage could become less important, with small and medium-sized firms competing more readily with MNCs. Firms can save on learning costs as well as benefit from knowledge transfers by engaging in international production sharing. Intra-product specialisation may thus facilitate earlier participation in global industries than would otherwise have been the case.<sup>5</sup>

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<sup>4</sup> See Brühlhart (1999, 2001).

<sup>5</sup> See Ruane and Görg (2001) on implications for developing countries of their study of the Irish electronics industry, which was identified as a target for industrial policy because of the increasingly fragmented nature of production processes in the sector.

### **3. Production sharing and fragmented trade in the regional integration context**

Growth in fragmented trade has often had an important regional dimension, particularly in East Asia. The essential question for the SADC region is whether the potential benefits of intra-product specialisation may be more readily harnessed through Regional Trading Agreements (RTAs), especially in the developing country context. Another important question is whether participation in RTAs which *actively promote* production sharing arrangements can mitigate some of the potential adverse effects of regional integration – such as trade diversion and polarisation of industrial development – amongst countries at unequal levels of development.

As in the case of trade theory more generally, the theoretical rationale for economic integration, both in terms of static and dynamic effects, has largely been analysed with reference to trade in final products. Once fragmented production and trade are recognised or encouraged, however, the potential effects of PTAs and deeper forms of regional integration will differ from the conventional ones. The implications of production sharing and fragmented trade in the context of economic integration may be considered with reference to static trade creation and trade diversion effects, economies of scale, investment effects and polarisation.

#### ***Trade creation and diversion effects***

The static welfare effects of economic integration in the presence of production sharing have been extensively analysed by Arndt (2001, 2003, 2004a,b). The orthodox theory of customs unions examines the welfare effects of economic integration in terms of the balance between trade creation (the replacement of relatively inefficient domestic production by lower-cost imports from a partner country) and trade diversion (the replacement of lower-cost imports from the rest of the world with relatively higher-cost imports from a partner). A free trade area or customs union is considered to be beneficial when the former effect dominates. The traditional analysis has been criticised for its limited applicability in the developing country context (Jaber 1970; Cattaneo 1998); however, extensive use is still made of these concepts in empirical work on both North-South and South-South RTAs.

Arndt (2001) compares the introduction of intra-product specialisation (i) in the absence of trade restrictions, (ii) in a context in which MFN tariffs are applied, and (iii) in the context of preferential tariffs. In the first case (the free trade context), welfare increases unambiguously with the introduction of production sharing, while in the second case (that of most favoured nation – MFN – tariffs) welfare may rise or fall depending on the magnitude of the distortion due to the tariffs in comparison to the efficiency gains resulting from intra-product specialisation.<sup>6</sup> However, when production sharing is introduced in the context of a preferential tariff arrangement (such as an FTA or customs union), it is shown that welfare unambiguously rises compared to a preference situation in which production sharing is absent (Arndt 2001:80-82). The introduction of production sharing into the trade creation/trade diversion framework thus mitigates any trade diversion consequences of integration.<sup>7</sup>

Arndt (2003:5) illustrates the argument with reference to changes in trading patterns in the auto sector following the formation of North American Free Trade Agreement (NAFTA). In the conventional framework, shifts in US motor vehicle imports away from non-NAFTA members (say, Japan) towards Canada and (in particular) Mexico could be interpreted as trade diversion. However, in the context of a preferential trade regime characterised by production sharing, imports of Japanese motor vehicles (produced entirely in Japan) into the US could be replaced by imports of vehicles from Mexico containing US-manufactured components, where Mexico is specialising in labour-intensive assembly and the US in components in which it has a comparative advantage. Production sharing between the US and Mexico facilitates factor cost savings of sufficient magnitude to reduce trade diversion to production in which Japan's cost advantage in the final product translates to all constituent processes.

Allowing for production sharing and fragmented trade in the static trade creation/trade diversion framework therefore increases the opportunities for welfare-enhancing FTAs. In addition, trade creation need not lead to the loss of domestic industry in a given sector, a consideration often raised in the development literature

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<sup>6</sup> The effect of intra-product specialisation on a country's labour-intensive import-competing industry X is similar to the case of technical progress in that the production possibility frontier moves outwards along the X-axis (see Arndt 2001:78, 86).

<sup>7</sup> If the home country is large in the PTA context, there will be a terms of trade effect that will augment the rise in welfare.

on economic integration. If there are two components associated with the production of a given final product, for example, intra-product specialisation may enable both partners to retain production blocks within a given industry, although resource reallocation between blocks within the industry will be necessary. As noted in Section 2, the literature on intra-industry trade suggests that such resource reallocation will be less exacting than in the inter-industry case.<sup>8</sup>

Arndt (2001, 2004a) cautions, however, that potential cost savings from intra-product specialisation may be lowered by restrictive rules of origin in the case of a free trade area. The example given is of rules that divert component sourcing from lower-cost non-FTA countries to higher-cost FTA partner countries. Rules of origin need to be designed in such a way that they fulfil their actual purpose of preventing trade deflection (whereby non-member countries access higher-tariff FTA member country markets via lower-tariff FTA member countries), without being used to hinder intra-regional trade and participation in global trade and production networks (Brenton et al. 2005). This aspect is considered further in the SADC context in Section 6.

### ***Economies of scale***

A major motive for trade integration among developing countries has been the possible exploitation of economies of scale in a larger regional market. Where economies of scale are internal to the firm, a larger regional market will result in benefits from falling average costs as firms move down their cost curves. It has been debated whether the enlarged market in an RTA between countries of unequal size or levels of development where internal scale economies are important, will mainly benefit producers in larger countries (such as South Africa in the SADC context), who may capture the entire regional market.<sup>9</sup> In a study of economies of scale and economic integration in Latin America, Cline (1982), however, argues that smaller countries, by producing for their domestic markets at below minimum optimal scale, stand to gain significantly from regional economies of scale because of the higher excess cost they incur compared to large countries.

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<sup>8</sup> It needs to be borne in mind throughout this discussion that the ability to reap the benefits of intra-product specialisation ultimately rests on the cost and efficiency of the service links that coordinate production blocks, whatever the context. The matter of the service links is considered explicitly in Section 4.

<sup>9</sup> See the discussion in Cattaneo (1998:116-119).

The introduction or promotion of production sharing and fragmented trade within the regional grouping will enhance the opportunities for benefiting from regional economies of scale, provided these economies are production block specific. As noted in Section 2, intra-product specialisation and trade provide room for exploiting economies of scale at intermediate stages of production, as well as at the final product stage. It may be easier, in particular, for smaller, more labour abundant countries within a regional group to specialise in more labour-intensive components to serve the regional market and so obtain benefits from regional economies of scale before attempting to break into less accessible global markets.

### ***Polarisation***

Economies of scale may be external to the firm or production block, and it has been argued that the exploitation of dynamic economies of scale in a larger regional market may lower the costs of infant industry protection during the learning period and allow optimum capacity to be reached in a shorter period of time (Lundahl and Petersson 1991:197-198). It has further been argued that dynamic economies of scale may provide a case for regional integration among countries at unequal levels of development, since favourable spread effects may be induced from the more advanced centres to the less developed regions and to the integrated area as a whole (Lundahl and Petersson 1991: 202). In the context of fragmented production, any such benefits will be strongly dependent on the cost and efficiency of the service linkages between production blocks. In addition, it is widely argued that any favourable dynamic effects from integration may be outweighed by adverse polarisation effects for some members of a regional grouping among countries at unequal levels of development (Vaitsos 1978:739; Robson 1987:169-175). The issue of polarisation has indeed been a prominent theme in the literature on the effects of trade integration in Southern Africa.

Krugman's (1991:96-97) analysis suggests, however, that polarisation is not inevitable, as there is a U-shaped relationship between economic integration (taken to be the absence of transport costs and barriers to trade) and welfare in the peripheral areas of a regional union. This means that closer integration locates production in the periphery, but a limited move towards integration may concentrate industry at the core. Fragmented industrial production within a regional trade

arrangement could provide additional opportunities for limiting or mitigating polarised industrial development. Intra-product specialisation in more labour-intensive components in lower-wage locations could be promoted, but the cost of associated service links (especially transport and other non-tariff barriers) will be critical.

### ***Investment effects***

Provided that economies of scale are reasonably small and simple (so that polarisation is not exacerbated on that score) and that different regions within an RTA do have comparative advantages in different production blocks, polarisation seems less likely than it does under more conventional assumptions (that is, when fragmented production is not considered). Where possibilities are evident for production sharing, the investments needed to generate this production structure are likely to follow. Provided the service links can be guaranteed, the recognition that profitable opportunities exist in component production in peripheral areas should induce MNCs or local investors to invest. In RTAs between countries at unequal levels of development, the introduction of production sharing is likely to be accompanied by FDI flows to less developed member countries.

It has commonly been argued that FDI may be an essential catalyst for the dynamic benefits of economic integration identified in the regional integration literature (Blomström and Kokko 1997:12). In the SADC region, both intra-regional and extra-regional FDI flows would need to be encouraged because of domestic savings shortages in the national economies of the region. There could be particular advantages to attracting FDI from important outward investor developing countries like Brazil, which may have expertise in particular production blocks. It has been argued that South-South FDI may provide significant development benefits due to 'more appropriate technologies, business models, managerial and organisational techniques... better attuned to developing-economy circumstances' (Gammeltoft 2007:3). It has been found that FDI and fragmented trade are complementary in East Asia, and that FDI has been particularly important in explaining fragmented trade in that region (Haddad 2007; Aminian et al. 2007).

In concluding Section 3, it should be noted that while production sharing and fragmented trade may be a feature of economic integration blocs, and while the latter

may provide certain opportunities for benefiting from intra-product specialisation, formal economic integration is not a necessary condition for meaningful growth of the phenomenon. Indeed, in East Asia, although production sharing has a very strong regional dimension, it has developed largely outside formal economic integration arrangements, in contrast to production sharing in the NAFTA or EU regions. This is largely because of the 'naturally' low barriers and transport costs (essentially due to the efficiency of regional service linkages) between countries and the strong emergence of China as a low-cost assembler (Haddad 2007).

There are, however, clearly advantages to production sharing in the context of FTAs and customs unions, especially for countries of unequal size and levels of development. Policies would be needed to identify and target appropriate regional supply chains. Critical in the Southern African context is the issue of the service links required to facilitate production sharing. High costs and inefficiencies will diminish the advantages of regional production sharing in SADC. The following sections of this chapter explore the importance of these service links in supporting manufacturing production and trade, and investigate how their role can be harnessed in developing country RTAs.

#### **4. The importance of the services sector in production sharing and fragmented trade**

As noted in Section 1, an important reason for the growth of fragmented production and trade internationally has been the reduction in cost and improved reliability of the international service links required to coordinate production blocks. For developing countries to participate effectively in international production networks, it is therefore critical that manufacturing production and trade are supported and facilitated by an efficient services sector (Van Long et al. 2001:1). While there is a debate about the core role that the services sector should play in economic development, between those who argue that the sector itself should be the engine of growth and development and those emphasising its role in supporting and facilitating development through industrialisation,<sup>10</sup> the focus in this chapter is specifically on the role of the services sector in fragmented production and trade.

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<sup>10</sup> For a sample of the debate, see Sheehan (2008), Dasgupta and Singh (2006), and Bell and Madula (2001).

Jones and Kierzkowski (2001:24) present two ‘stylised facts’ about the service links required to connect production blocks in the presence of fragmentation. The first stylised fact is that such service links within a country are cheaper than those required to coordinate production blocks across different countries. However, services trade has risen significantly, and services have themselves become subject to significant fragmentation and outsourcing. This suggests that a more nuanced view is necessary, regarding both the presumption that domestic service links are cheaper and fears that outsourcing of services may result in major job losses (Amiti and Wei 2004). It should also be noted that Amiti and Wei (2004:5) find that although services outsourcing is increasing rapidly, its levels are still low in comparison to production outsourcing.

The second stylised fact is that services exhibit strong economies of scale (greater than those that may be found within production blocks themselves). Once fragmentation expands across borders, strong service sector economies of scale come into play, reinforcing the expansion. Jones and Kierzkowski (2001) identify technological progress in the services sector as the key stimulation for international production fragmentation, coupled with the availability of better information about legal and regulatory frameworks. Other authors (such as Langhammer, 2006) emphasise services trade liberalisation and deregulation as the key to lowering the cost of ‘intermediate’ services in production chains.

Nordas (2001) investigates the impact of growth in the Information and Communication Technologies (ICT) sector on producer services (identified as transport, communications, finance and business services) in South Africa and, in particular, whether the development of the producer services sector has had a positive influence on growth and development elsewhere in the economy. She finds that the producer services sectors had markedly higher investment ratios, output growth and labour productivity growth than the economy as a whole in the 1990s. This provides an important potential source of growth and development for the economy, provided that sectors that use these services, such as the manufacturing sector, are able to take advantage of these developments. In particular, as argued in previous sections, efficient and cost-effective producer services are critical for manufacturers to participate in international supply chains. If, as Nordas (2001:10) suggests, South African producer services are becoming internationally competitive,

and are at least competitive within the SADC region, then the country could play a leading role in the development of regional production networks.

Whether Nordas' (2001) assessment is correct, the point is that it is necessary to assess exactly which services should be supplied within countries, which should be internationalised within SADC, and which should be sourced outside SADC. Criteria for this assessment include the importance of a particular service in the envisaged production chain as well as the existing or potential international competitiveness of service providers within SADC. For example, it might be that SADC-based financial services necessary for component production in Zambia could be developed to international standards within a decade. However, it still may be optimal, when the entire production chain is considered, to make immediate use of existing international suppliers rather than incur the costs of waiting for SADC-based suppliers to mature.

Langhammer (2006) provides an analytical framework and an empirical methodology that could potentially be developed into a method for assessing these criteria in the SADC case. He investigates whether the inefficiency of intermediate services causes 'developing countries [to] forego chances in world manufactured markets' (Langhammer 2006:2). The evidence presented is compelling. Firstly, manufacturing in developed countries seems to be considerably more service-intensive than in developing countries. Furthermore, service intensity increased in developed countries between 1990 and 2000, whereas it decreased in developing countries (Langhammer 2006:7). Although this particular implication is not discussed, Langhammer's argument is consistent with the argument that developed countries have been better able to capture the specialisation gains from fragmentation. In developing countries, low utilisation of service inputs presumably indicates that these services tend to be produced 'in house' rather than from specialised service providers.

Secondly, as mentioned above, Langhammer emphasises the regulatory environment as the key source of service sector inefficiency in developing countries. Langhammer (2006:8-11) estimates tariff equivalences for service sector taxation, and finds that both discriminatory and non-discriminatory (MFN) restrictions are much higher in developing countries. This is particularly so in telecommunications and financial services, the liberalisation of which seems to be an important factor in

fragmentation in developed countries. Consideration of which ‘downstream’ sectors (or, in our terminology, ‘production blocks’) are most affected reinforces the impression that careful reform of the services sector will be a crucial factor. As Langhammer (2006:14) puts it, ‘service sector regulation and protection ... impedes just those [labour intensive] industries in the median developing country which are potential export industries. [The] situation is even worse in the service industries’.

## **5. Harnessing services aspects of regional integration agreements in support of the role of the services sector**

If the promotion of production sharing and fragmented trade in a regional context is seen as desirable, how can the services sector best be promoted to support this? In Section 4 it was argued that both the growth and liberalisation of the services sector could stimulate international fragmentation, in conjunction with policies to attract suitable targeted investment. There has, however, been much debate about the pros and cons of services liberalisation in the developing country context. Important questions that follow are, firstly, whether services liberalisation in a regional integration context can address some of the concerns about developing country services liberalisation, or in some way contain the associated risks. Services provisions in RTAs are becoming widespread in both North-South and South-South regional agreements. The second important question for the purpose of this chapter is thus whether services aspects of RTAs can be used to support the role of the services sector in production sharing and fragmented trade in a developing country context.

In much of the burgeoning services literature, the benefits of generalised services liberalisation seem simply to be assumed without question. However, Lintjer (2002) has cautioned that the consequences of hasty or poorly-sequenced liberalisation of services could be severe for the sector itself and the macroeconomy in general. Although Langhammer’s (2006) analysis, for example, suggests that deregulation in banking and telecommunications in particular would yield major gains by enhancing fragmented value chains, there two important grounds for caution. Firstly, protection and regulation are not the only reasons why services are underdeveloped in developing countries. Huang (2002), for example, argues that the primary reason for low profitability and hence low rates of investment, in developing countries is a system-wide coordination failure. It follows that thoroughgoing liberalisation (for

example through extensive ‘horizontal’ commitments in GATS), even if it was politically feasible, would not necessarily result in investment flowing to the critical service link. Reliance on foreign supply of services (including FDI into domestic services industries) and over-commitment in GATS offers could also result in an erosion of what Wade (2003) calls ‘development space’.

This leads to the second point, which is the question of the coordination of the development of entire fragmented production chains. In particular, a coordinating agent is necessary to target dynamic advantages that do not translate into immediate profitability. The essence of coordination failure is that none of the elements in a production chain would achieve their potential unless all of the other elements in the chain have already achieved theirs. This implies that liberalisation should be carefully targeted (taking advantage of the possibility of making sectoral commitments in GATS – see below). It also implies that priority should be given to the formulation of a holistic industrial policy for the region (Chang 2005), which takes into account fragmented production and the importance of service linkages.

Services liberalisation at the multilateral level is governed by the General Agreement on Trade in Services. For a variety of reasons liberalisation of services is recognised as being more complex and sensitive than goods liberalisation. Two key points are, firstly, that because proximity is often required between producer and consumer, international transactions require either producer or consumer to move, or capital to flow to invest in service activities (Stephenson 2002: 2). This leads to the GATS ‘modes of supply’ classification.<sup>11</sup> Secondly, restrictions are largely non-tariff barriers of a kind that are often deeply embedded into national policy frameworks, including national regulations, administrative controls and national laws (Stephenson 2002:2).

GATS contains two types of obligation or discipline. General obligations include MFN treatment and transparency, while specific obligations are national treatment and market access. The latter are specific to service sectors included in a country’s schedule of commitments. A full analysis of the shortcomings and concerns about

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<sup>11</sup> Four modes of supply are identified: Mode 1: Cross-border supply: non-resident service providers supply services across borders into a member’s territory; Mode 2: Consumption abroad: member’s residents purchase services in another member country; Mode 3: Commercial presence: service suppliers from abroad establish, operate or expand commercial presence (such as a branch or subsidiary) in a member’s territory; Mode 4: Presence of natural persons: foreign persons enter and temporarily stay in a member’s territory in order to supply a service (Fryer et al. 2005:23).

GATS is beyond the scope of this paper; however, Wade (2003:629) argues that the agreement makes it extremely difficult for countries to use a wide range of development policies available to successful developers in the past. While the benefits of GATS for developing countries include the important potential for increased FDI inflows, for example, Wade (2003:631) argues that there is not yet any evidence that GATS has raised such inflows. There are ongoing concerns about open financial flows and about pressure from developed countries for services market opening on the part of developing countries to further domestic developed country commercial interests with little cognisance taken of development concerns (Fryer et al. 2005; Wade 2003).

While South Africa and Lesotho's commitments under GATS are already comparatively far-reaching (Mene 2008; Manduna 2005), Mauritius' more cautious approach, discussed in Dabee, is interesting to consider. According to Dabee (2000:4), Mauritius' 'limited liberalisation is consistent with the development objectives of the economy'. There were carefully considered and targeted limitations in tourism (where policies were designed to maintain the quality of the country's tourism provision) and financial services (where there was acknowledgement of the potential dangers of financial liberalisation in such small economies). The study suggests further targeted liberalisation and possible new commitments (for example, in some aspects of computer and related services) which take the Mauritian context into account, considering sectors where advantages could be gained in the light of the country's strengths and development goals. Dabee (2000:4) notes that even though GATS allows some leeway for sectors to liberalise, 'the selection of some important sectors may be influenced by the larger or more advanced member countries at the level of the WTO'. He argues that developed country interests were particularly dominant in agreements on basic telecommunications and financial services.

Concerns about services liberalisation under GATS have led to a growing debate on the costs and benefits of services liberalisation at the regional versus multilateral level (Fink and Jansen 2007; Mattoo and Fink 2002; Stephenson, 2002). In discussing this issue, cognisance needs to be taken of Article V of GATS governing the services provisions of RTAs. Article V appears to require economic integration

agreements in services to be ‘more liberalizing’ than GATS (Stephenson 2002:17).<sup>12</sup> In addition, Fink and Jansen (2007) have argued that there are important ways in which services RTAs have less potential for discrimination than goods RTAs. For example, they argue that GATS Article V.6 generally ties services RTAs to more liberal rules of origin than goods RTAs. Article V.6 provides that a service supplier should ‘be entitled to treatment granted under such agreement, provided that it engages in *substantive business operations* in the territory of the parties to such agreement’ (cited in Fink and Jansen 2007:15; emphasis added). This suggests that service suppliers operating in an RTA member country need not be locally owned or domestically controlled in order to obtain RTA preferences.

It is unclear whether any meaningful equivalent to the 1979 GATT Enabling Clause applies to services provisions of RTAs among developing countries. Article V.3(b) does allow RTAs among developing countries to restrict the granting of preferences to providers of services ‘owned or controlled by persons of the parties’ (Fink and Jansen, 2007:15). However, Fink and Jansen report that little use of this stricter origin rule has been made by developing country services RTAs. This is an area requiring further research.

Mattoo and Fink (2002) consider the conditions under which countries may benefit more from regional as opposed to multilateral services cooperation. Their economic analysis of preferences in the services context takes the orthodox view that, while there is less chance of trade diversion in the services case than under preferential goods liberalisation (since tariffs are not common), and while there are possible benefits from greater competition, economies of scale and knowledge spillovers, non-preferential services liberalisation would be better. They argue that more research is needed to investigate the potential impact of regional services liberalisation on agglomeration forces versus tendencies for the spreading-out of service firms.

Mattoo and Fink (2002) do identify two aspects where regional services liberalisation may be more beneficial. The first is that, depending on the provisions of the agreement, more efficient bargaining may be possible on the part of a services RTA. Secondly, regulatory cooperation may be more feasible or desirable in a regional

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<sup>12</sup> Regional agreements should have ‘substantial sectoral coverage’ (this applies to number of sectors, amount of trade *and* modes of supply) and provide for the ‘absence or elimination of substantially all discrimination’ within a reasonable period of time (Stephenson 2002:17).

context, which may lead to economies of scale. It is argued that a sector-by-sector approach would be most beneficial in order to identify key service sectors (such as transport services) for deeper regional integration. Sequencing of preferential and non-preferential services liberalisation could be important, however, since location-specific sunk costs may mean that a higher-cost supplier becomes entrenched (Fink and Jansen 2007:7). However, learning-by-doing may offset this problem, and some costs may be justified by regulatory or regional development objectives.

If regional services liberalisation has some advantages, is there a case for developing countries to pursue such liberalisation in South-South as opposed to North-South services RTAs? It is too early for a detailed assessment of the impact of most services RTAs, and the necessary data is in any case unavailable in many instances. However, Stephenson (2002) explores the achievements of Latin American RTAs that contain services provisions, noting the proliferation of agreements between developing countries allegedly given impetus by Mexico's participation in NAFTA. She finds that many such RTAs have opted for a 'negative list' approach to regional services liberalisation (where restrictions affecting all services sectors are listed) as opposed to the 'positive list' approach of GATS (where only information on commitments made in specific sectors is listed). This, it is argued, makes the approach to services liberalisation in the RTAs more transparent and stable (Stephenson 2002:6-9). The participants in such developing country RTAs are also able to work towards deeper integration in areas in which a regional approach may be particularly beneficial, such as construction and engineering, professional services and regulatory harmonisation.

Part of the reason for RTAs going further than GATS in terms of services provisions is doubtless due to the need for such groupings to comply with Article V of GATS. However, developing country RTAs in Latin America and the Caribbean do not appear to have made use of special and differential treatment clauses such as Article V.3(b), and seem to be more comfortable with deeper commitments at the regional level while remaining circumspect on services liberalisation at the multilateral level. A sector-by-sector approach is once again indicated, with further analysis needed of which services are more suitably supplied domestically, regionally or internationally.

In southern and eastern Africa, the debate about regional versus multilateral services liberalisation, as well as that about North-South versus South-South regional contexts has been dominated by issues surrounding the Economic Partnership Agreement (EPA) negotiations with the European Union (Kwa 2008; TWN 2008). The implications of this for regional production sharing and trade are considered further in the concluding section below.

## **6. Conclusions and implications for regional integration policy in Eastern and Southern Africa**

The analysis in this chapter suggests that production sharing and fragmented trade could give renewed impetus to regional integration as a vehicle for development through industrialisation. If so, regional integration policy needs to be directed both with respect to services trade liberalisation and the identification and promotion of regional production networks.

With respect to services liberalisation, SADC's options range from restricting services liberalisation offers to the multilateral setting to a full range of negotiations – multilateral, intra-SADC, SADC-EPA and other bilateral negotiations. As noted in Section 5, however, caution is urged due to the implications of haste and/or poor sequencing of liberalisation and deregulation. Properly informed research at the sectoral level, and debate focused on development theory and experience elsewhere, are needed. The discussion in Section 4 suggests that a careful assessment is necessary of which services should be supplied domestically or regionally, and which should be sourced from outside Southern Africa.

One particular question that arises is whether services liberalisation under the EPAs could assist in harnessing the services sector to promote production sharing in eastern and Southern Africa. Jansen (2006:10) argues that whether the region should liberalise services in the EPAs largely depends on the nature of the particular services sector and the competitiveness of that sector in the global context. She notes that the EU is a major trading partner in commercial services for eastern and Southern Africa in both export and import terms, and argues that if the EU is more competitive than other suppliers in a given sector, then the risk of opening up to the EU in a regional context rather than, or prior to, liberalising multilaterally will be lower (Jansen 2006:7-11). However, her sectoral analysis finds that not all sectors are

suitable for liberalisation under the EPAs, given their different characteristics.<sup>13</sup> In addition, the mode of supply is important, with liberalisation under Mode 3 (commercial presence), for example, bringing with it less likelihood of instability than Mode 1 (cross-border supply) liberalisation.<sup>14</sup>

The first significant problem highlighted by this analysis is that if mode and sector are of major importance in the costs and risks associated with regional versus multilateral liberalisation, then services liberalisation in only selected sectors and/or modes of supply in the EPAs may not comply with Article V of the GATS in terms of having sufficient sectoral coverage (see Footnote 12). Secondly, a North-South RTA context will not allow the countries of the region to take advantage of any special and differential treatment provisions of Article V, so that obligations are likely to go further than those required under GATS. Additional concerns are that services liberalisation in the EPAs would follow a positive list approach, as in GATS (Jansen 2006:3), in contrast to the approach adopted in many developing country RTAs. Further, uncertainty surrounds the status and implications of the EU's rules of origin in the context of the opening of services in the EPAs (TJM 2007).

Jansen's (2006) analysis does explore the possible advantages of regional services liberalisation *within* southern and eastern Africa in certain sectors and for particular modes of supply. The discussion, however, is largely conducted in terms of possible regulation and harmonisation benefits in sectors such as professional services and telecommunications. Little attention is paid to infant industry arguments and the potential for learning-by-doing, or to regional development objectives more generally. Further research on the services sector of the region in this regard at the sectoral level will be useful.<sup>15</sup>

The other shortcoming of the analysis is that its focus on services liberalisation in terms of supplier competitiveness and service sector characteristics does not engage with developing country concerns about the EPA negotiations that are of relevance to

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<sup>13</sup> For example, it is argued that telecommunications, transport and business services are more suitably liberalised multilaterally, while financial services, tourism and Mode 4 liberalisation could be fruitfully pursued in the EPAs.

<sup>14</sup> See Jansen and Vennes (2006) for a more detailed discussion of this point in the context of financial services liberalisation.

<sup>15</sup> The work of Kox and Nordas (2007) on how effective and carefully designed domestic regulation in services sectors can lower trade costs and improve competitiveness could be important in this context.

the inclusion of services in the negotiating agenda. A detailed discussion of the contested nature of the EPA negotiations is beyond the scope of this paper, but arguments that are important in the services context include that the EPAs are WTO-plus and, in contrast to their predecessors, are motivated less by development objectives and more by developed country commercial interests. As such, they are said to restrict developing country policy space (TJM 2007). The MFN clause in the EPAs is seen to interfere with SADC's regional integration agenda and with broader South-South RTA agendas, such as those with Brazil and India. The negotiations have fragmented the region into different country groups even within existing blocs like SADC. A common position on services and the Singapore issues within SADC itself have yet to be developed, and more time is needed for the region to develop negotiating, institutional and regulatory capacity (TJM 2007; TWN 2008).

Returning to the analysis of regional production networks, further empirical work is needed, building on the work of Petersson (2003), Nordas (2001), Nordas et al. (2000) and Visser (2001a,b), to identify regional production chains involving the countries of eastern and Southern Africa, and regional policies for their promotion. Such work could fruitfully draw on the lessons of studies such as Langhammer (2006) and Ruane and Görg (2001). In addition, further research is needed on the possible benefits of South-South partnerships with countries such as Brazil with respect to production networks and South-South FDI.

Any discussion relating to regional integration in eastern and Southern Africa would not be complete without reinforcing the need to address two key constraints which continue to hinder the region's trade and development agenda. The first is the complexity of rules of origin in the SADC FTA, together with associated problems resulting from overlapping membership of eastern and Southern African RTAs, and EU rules of origin in the Cotonou Agreement and the EPAs. Research by Brenton et al. (2005) finds that the SADC and EU rules of origin hinder the ability of RTAs in the region to facilitate development through trade. The analysis of Arndt (2001, 2004a) also suggests that such rules may hinder the potential benefits of regional production sharing. Other mechanisms, such as agreed-upon infant industry provisions and safeguard measures, should be used to achieve any necessary intra-regional protection objectives.

The second critical factor is the need to address the ongoing presence of significant non-tariff barriers to trade in the region and, in particular, prohibitive intra-regional transport costs (considered elsewhere in this volume by Mutambara). The prospects for benefiting from regional production sharing and fragmented trade will otherwise be seriously undermined.

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## *Chapter 2*

# **Regional transport challenges within the Southern African Development Community and their implications for economic integration and development**

Tsitsi Mutambara

## **1. Introduction**

With the Southern African Development Community (SADC) forging ahead with effecting deeper economic integration, progressive reduction of tariff and non-tariff barriers to trade becomes the key issues. Transport and communications systems within the region pose significant non-tariff barriers and so the SADC Protocol on Transport, Communications and Meteorology is the instrument through which transport and communications constraints are to be addressed.

The neo-functional integration approach is a relevant theoretical framework for analysing transport and communications issues. The approach is also known as integration through project cooperation in planning and implementing joint sectoral projects in areas that impact on overcoming development-related deficiencies in production and infrastructure. Transport and communications fall in this category of projects and therefore the SADC region stands to benefit from functional cooperation in this sector.

## **2. An overview of road and railway networks within SADC**

Road and rail transport are the dominant modes of transporting goods and people within SADC. They handle the bulk of imports and exports in the respective countries, thus providing a vital transport link for the countries' diverse import and export commodities.

Most of the SADC countries are landlocked, making road and rail networks very important in linking countries to principal ports in South Africa, Mozambique, Angola and Namibia. The national road and rail systems provide links to all major centres in each country as well as to neighbouring countries. The road system provides access to remote districts, thus serving as strategic links to these areas.

## **2.1 Conditions of road networks and initiatives to improve networks**

While SADC has an extensive road network, there is a variation between members in the general condition of their respective road networks. In general, less than 20% of total roads are paved<sup>[1]</sup>. Mauritius had 100% of its road network paved by 2005, and has the best road conditions with 95% rated as in good condition. Botswana ranks second best with 94% regarded as in good condition although only 36% was paved by 2004. In some countries (*viz*: Namibia, South Africa, Swaziland and Zambia), despite the low percentage of paved roads, the networks are considered to be in good condition. The condition of a number of road networks in individual countries has improved greatly due to the construction, rehabilitation and maintenance of inter-country regional corridors. However, a number of road networks in some countries are still in unsatisfactory conditions due to floods, neglect and lack of maintenance, thus deteriorating at alarming rates. The prolonged civil wars in Mozambique, Angola and the DRC resulted in significant damage to road and rail networks in these countries, and the effects continue to be felt despite current initiatives to rebuild the networks. Niekerk and Moreira (2002:17) and SADC (2007:54) note that unsatisfactory network conditions have also been due to increased diversion of rail freight to road transport which puts pressure on roads, as well as overloading by transporters which reduces the economic life of road infrastructure.

Each SADC country has been taking to rehabilitate, upgrade and maintain existing road networks as well as construction of new roads. For example, in Lesotho, the road network is constantly being expanded and upgraded, especially with the Lesotho Highlands Water Project. Development of road network seeks to access the more remote areas. In Madagascar, reforms and rehabilitation are taking place through the Transport Sector Programme. In Mozambique, the Roads and Coastal Shipping Programme led by the World Bank has made developing the internal transport system a priority. Periodic and routine maintenance and rehabilitation are planned for by the government with annual targets set. In Swaziland, resources have been allocated for repair and maintenance of existing roads as well as for paving

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<sup>[1]</sup> The most recent year for which statistical data is available for the percentage of paved road varies between countries, e.g. for Mauritius it is 2005; for Botswana it is 2004; for Malawi and Tanzania it is 2003; for Namibia and Zimbabwe it is 2002; for Angola, South Africa and Zambia it is 2001 and for Lesotho and Mozambique it is 1999 (SADC 2005 & 2006; World Bank 2007; Mutambara 2004).

more roads. Resources are also being made available for roads to provide rural communities with access to the main road network. In Tanzania, the government has a road upgrading and rehabilitation programme to improve accessibility to economically productive areas, the implementation of which began in 2001 (SADC 2006; 2007a).

Initiatives to rehabilitate, upgrade and maintain road networks have to an extent taken off, in part, because countries have, as per Chapter 4 Article 4.4 of the SADC Protocol on Transport, Communications and Meteorology, established the institutional arrangements (*viz*: Roads Boards, Autonomous Road Authorities, and Road Funds) needed to oversee, construct, manage, maintain and regulate road networks on a commercial basis. For SADC countries which are also members of the Common Market for Eastern and Southern Africa (COMESA), the encouragement to establish these institutions has also come from COMESA since the management and funding of road infrastructure in COMESA have always been linked with establishing these institutions (COMESA 2004:9).

The establishment of dedicated Road Funds and Roads Boards with active private sector participation was evident in Lesotho, Mauritius, Malawi, Mozambique, Namibia, South Africa, Tanzania and Zambia. Autonomous Road Authorities had been established in Malawi, Mozambique, Namibia, South Africa and Tanzania, while the other countries were processing legislation required to effect the reform (SADC 2002; 2006; 2007a; Van Niekerk and Moreira 2002:61, 62). Positive effects of these institutions are found, in for example, Malawi where, through its National Roads Authority set up in 1997, a number of roads have been constructed and rehabilitated since 2000. In Namibia, the Roads Authority was established in 2000 and since then routine maintenance is contracted out through it. In South Africa, the National Roads Agency manages the national road network. The formation of Tanzania Roads Agency has improved road maintenance (SADC 2005; 2006; 2007a).

Governments within SADC have realised the importance of public-private sector partnerships in infrastructure provision and SADC (2002) notes that governments agreed that policy reforms were needed so as to promote 'market-based and private sector-led infrastructure and private service provision as well as divestiture by governments'. Promoting private sector participation in road infrastructure

provisioning is in line with Chapter 2 Article 2.4 Paragraphs (i) and (j) of the SADC Protocol on Transport, Communications and Meteorology.

While the involvement of the private sector in financing road infrastructure has been slow, increased private sector involvement has been evident in some countries. For example, currently in South Africa, delivery of infrastructure and services is based on public-private partnerships while government is confined to policy, planning and regulation. In Swaziland, the private sector is earmarked for an increasing role in the operations of roads and government planned to complete the privatisation of maintenance for the main road network during 2000. In Zambia, the Road Sector Investment Programme is in place and aims to commercialise road maintenance and ensure availability of resources from both the public and the private sector. Identified investment opportunities in which the private sector can actively participate are in road rehabilitation, maintenance and consultancy. In Madagascar, the country focusses on creating independent agencies through partnerships with private sector to be involved in rehabilitation and maintenance of infrastructure and equipment through privatisation, concession or leasing (SADC 2002; 2006; 2007a).

## **2.2 Conditions of rail networks and initiatives to improve networks**

SADC has an extensive railway network which complements road networks to move millions of tons of freight all year round. For many years, the conditions of some of the railway networks in the region have been deteriorating since track maintenance was being deferred due to lack of funding. Angola and the DRC have the worst rail network conditions due to the long periods of civil war which damaged most of their infrastructure. In Madagascar, there is a need to rehabilitate infrastructures and equipment and huge sums of money are needed for urgent works. In Zambia, there is a vital need to rehabilitate and keep the network in good working order as it handles huge volumes of goods on local and international routes (SADC 2006; 2007a). Van Niekerk and Moreira (2002:18) observe that performance standards of rail transport within SADC have declined due to, among other things, frequent unavailability of appropriate wagons, poor maintenance of tracks, border delays, unpredictable delivery times, and difficulties in obtaining information on wagon and consignment. However, SADC (2006; 2007a) notes that the conditions of some rail networks have been improving due to the construction, rehabilitation and

maintenance of SADC inter-country regional corridors. This is evident in, for example, Malawi, Mozambique, and Tanzania.

Governments have taken initiatives to invite and encourage private sector participation in railway network development so as to improve conditions of railway infrastructure and achieve sustainable commercial viability. This is being done through joint venture partnerships with the private sector or concessioning<sup>[2]</sup> the railway infrastructure. For example, the Mozambique government privatised the EP (CFM) railway operations through long term lease concessions to a consortium of companies. Other railway systems concessioned are the Ressano Garcia line and the Sena line. The Madagascar government established a 2003-2008 programme aimed at handing over management of railway to private entities. In Malawi, Malawi Railways became the Central East African Railways Company and became fully operational as a private company in 2000 (SADC 2002; 2006; 2007a; Van Niekerk and Moreira 2002:61-62).

In South Africa, rail network falls under the control of Spoornet and the South Africa Rail Commuter Corporation of which the former runs an extensive network throughout the country. In Tanzania, both the Tanzania Railway Corporation and the Tanzania-Zambia Railway were up for privatisation by 2002. In Zambia, the Zambia Railways was concessioned in 2003 to a consortium of companies and is now known as the Railway Systems of Zambia. A rail line linking Zambia and Tanzania underwent privatisation and was to be leased to the private sector (SADC 2002; 2006; 2007a; COMESA 2004:9-10). In Zimbabwe, the Bulawayo-Beitbridge line which links Zimbabwe and South Africa was concessioned in 1999. Angola and Mauritius have passed Port Authority Acts (SADC 2002; 2006; Van Niekerk and Moreira 2002:62).

The SADC Railway Restructuring Programme is an initiative to increase autonomy of railways and thus increase private sector involvement in the provision, operation and management of railway systems. This initiative is in line with Chapter 13, Article 13.6 of the SADC Protocol on Transport, Communication and Meteorology. For SADC

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<sup>[2]</sup> The concessionaire will provide the railway services for a specified period, has the responsibility for financing specified new investment, and must transfer the railway infrastructure back to the government on the expiration of the agreement (SADC 2002). The private operator retains ownership over any improvements made during the concession period.

countries which are also members of COMESA, measures to improve rail networks have benefited and been complemented by initiatives by COMESA, for example the COMESA Infrastructure Priority Investment Plan, which, among other things, seeks to identify and address the issue of missing railway links in various corridors (COMESA 2004:10).

### **2.3 Challenges in private sector participation in road and rail infrastructure provision**

As SADC (2002) rightly argues, the private sector has finance, skills and technology to more easily transform and modernise the transport and communication sector so that it performs efficiently. Deloitte (undated) notes that with private sector participation in infrastructure provision, costs of the investment are spread over the lifetime of the asset, thus allowing infrastructure projects to be brought forward compared to the traditional pay-as-you-go way of financing infrastructure projects which governments often adopt when they provide infrastructure. Furthermore, the private sector often has a track record of on-time, on-budget delivery compared to the long and expensive delays often experienced when governments provide infrastructure. Certain risks are transferred to the private sector, thus providing an incentive for assets to be properly maintained, while the cost of infrastructure can be lowered by reducing both construction costs and overall lifecycle costs.

Despite the possible positive effects of private sector participation in infrastructure development and government initiatives to invite and encourage private sector participation in road and rail infrastructure development in SADC, the response has generally been slow and this has negatively affected the pace at which infrastructure has been developed. Private participation in infrastructure (PPI) and public-private sector partnerships (PPPs) as investment methods in infrastructure development within SADC face challenges related to, among other things, government agencies or departments which generally lack skills required to drive the PPPs; in some cases there is lack of political will; the limited PPP experience that countries have, create an element of risk and fear by the private sector; substantial capital investment is needed and there is always increased competition for limited investment and financial resources. To these can be added weak and ineffective legal, regulatory and enforcement frameworks to support complex PPP ventures, government/political interference with the autonomy of PPPs, fluctuating budgetary allocations or non-

availability of government funds for PPPs initiated but requiring government support; high levels of political uncertainty in some countries which make cross-border financing of trans-boundary road and rail projects risky, lack of multilateral agreements amongst affected states to jointly implement and finance trans-boundary projects, difficult access to long-term capital at affordable rates due to the underdeveloped local capital markets, and lack of bankable projects that can be marketed for investment by interested parties (Madzongwe 2005; Salomao 2008; Viljoen Undated; Shaw Undated).

### **3. A regional approach to infrastructure development within the SADC region**

The Southern African Development Coordination Conference (SADCC) was transformed into Southern African Development Community (SADC) in August 1992. While the thrust of the regional grouping shifted to trade and market integration, the spirit of collective self-reliance and sectoral coordination remained. Therefore cooperation and coordination in infrastructural development projects continued as it was still regarded as important in providing a basis for the development of the region. The rationalisation and centralisation of the SADC Programme of Action in 2004 saw the setting up of four directorates at the SADC Secretariat to implement the SADC Programme of Action instead of continuing to have specific countries coordinating specific sectoral projects (see Table A-1, Appendix 1).

#### **3.1 Theoretical justification for a joint approach to sectoral projects**

The neo-functional integration model provides justification for the joint approach to sectoral projects which SADC has adopted and continues to pursue through the four directorates. The approach originates in the functionalism of Mitrany (1943) and Haas (1972). It is argued that the economic integration process can begin from functional cooperation, where cooperation by countries in one sector, for example, transport, could spur on and necessitate further cooperation in other areas and later facilitate economic integration through spill-over effects of cooperation in the sectoral projects.

Stewart and McCarthy (1995) and Balassa and Stoutjesdyk (1975) note that this approach is also known as integration through project cooperation involving

cooperation in planning and implementing joint projects or schemes between countries in areas such as transport, communications, water, mining, and so forth. Davies (1994) observes that the model gives priority to cooperation of joint projects that aim at overcoming underdevelopment-related deficiencies in the spheres of production and infrastructure.

It is important to note that the selection of projects should be closely adjusted to meet functional requirements of countries involved and to focus on those areas where there are possible benefits for all parties involved. According to Haarlov (1988), agreements can range from matching of under-utilised capacity in one country with needs in another, and specialisation or complementarity agreements between existing or planned industries to the establishment of plants that can supply the needs of the whole region.

A number of factors that determine the success of the model have been cited by various authors, viz (i) cooperation should begin with areas like infrastructure that are not politically controversial so as to avoid political frustrations that arise as a result of lack of immediate benefits from a free trade area; (ii) having spill-over effects from one area makes it necessary to intensify cooperation and gradually spread it to cover other sectors as well; (iii) challenging existing nationally-based power structures and special interest groups should be avoided; (iv) adopting mutually reinforcing complementary measures and policies that increase demand for goods and services so that the improved regional infrastructure can be of value in the regional integration process; (v) phasing in programmes that address critical barriers to regional integration; (vi) encouraging subgroups of two or more countries to integrate more rapidly than others where necessary (without necessarily forming a separate regional grouping) whenever they perceive mutual benefits (variable geometry), thus countries which are eager to proceed more quickly would not be held back by the more cautious or reluctant ones; and (vii) geographic proximity of participating countries as well as cultural and historical links (Haarlov 1988; Stewart and McCarthy 1995).

The neo-functional integration model gives rise to economic benefits. For example, functional cooperation in projects can help to prepare the region for market integration. The loose, function-based model helps to develop regional political

cohesion which is necessary for the countries to move to the more comprehensive market-driven integration approach. The project-orientated nature of the approach may also serve to provide the necessary physical requirements for balanced and desirable higher-order market integration in the long term. For example, by improving and upgrading transport, communications or electricity-generating infrastructure or availability of water in all participating countries, locational decisions of firms may be influenced positively and industrial development depolarised (Stewart and McCarthy 1995).

Balassa and Stoutjesdyk (1975) note that the ripple effects of the projects can bring economic benefits if production on a regional scale leads to cost savings compared to production on a national scale, taking into account production and distributional costs. Cost savings can be achieved directly through large-scale operations, fuller utilisation of existing capacity and greater specialisation in production, joint management and coordinated use of jointly owned resources like water basins and lakes. Cost savings may also be achieved through coordinated planning, construction and operation of transport facilities, for example regionally integrated railway networks with identical railway gauges, regional shipping companies and integrated highway and communications systems. Such coordinated investments in transport and communications may have beneficial effects of an indirect nature in promoting trade among the partner countries. The improvement of intra-regional trade will help to facilitate deeper integration.

It has also been noted that the sector-by-sector approach minimises the problem of distributing costs and benefits among member states. It also circumvents the problems inherent in the ceding of powers from national to supranational institutions. It also holds more promise as it presents integration from below (Haarlov 1988 cited in Ostergaard 1993).

Despite the relevance of the neo-functional model, criticisms have been levelled against this model. For example, the model has the implicit assumption of a direct link between project cooperation and integration. Stewart and McCarthy (1995) argue that while project cooperation has the potential to reduce real barriers to intra-regional trade and may contribute towards the generation of a common regional identity, this may not in itself lead to any deeper integration.

Ostergaard (1993:41) notes that interest groups, which are the major force in neo-functional integration, have to be properly organised and active. However, such highly organised groups may not necessarily be found in developing countries, and as a result, the head of states or governments become the sole and supreme decision-making authority. Therefore the integration process initiated will either stand or fall depending on whether or not cordial relations are maintained between the personalities concerned.

There are complex and time-consuming negotiations at state, industry and firm level if an agreement is to be concluded. If countries regard the project as a zero-sum game, then problems are bound to arise and negotiations may stall. Some projects could be too ambitious and thus equitable distribution of costs and benefits could be quite a challenge (Haarlov 1988:24; Haarlov 1997:47-50; Balassa and Stoutjesdyk 1975:50-55).

Despite the criticisms, the neo-functional integration model is relevant for SADC's approach for a joint infrastructure development approach to try and address the transport and communications constraints the region faces. The joint approach would help the region to address the transport problems more easily and faster as resources are pooled. The ultimate effects of these initiatives are to boost traffic and capacity, improve linkages between countries, reduce transport and communication costs, and improve transport reliability and efficiency within the region. This would help to reduce transport-related investment risks, thereby helping the region to provide much-needed support to the current industrial base as well as to build a favourable investment climate.

### **3.2 The regional joint approach to transport infrastructure development**

With the transformation to SADC, Mozambique continued to be in charge of the SADC transport and communication coordinating unit (SATCC) which was responsible for the region's transport and communication. In line with the regional grouping's spirit of cooperation and coordination in sectoral projects The SADC Protocol on Transport, Communications and Meteorology was signed on 24 August 1996 in Maseru, Lesotho, as the instrument through which transport and

communications constraints were to be jointly addressed within the SADC region. This protocol entered into force in 1998.

Through the protocol (Chapter 2, Article 2.3), an efficient, cost-effective and fully integrated infrastructure will be provided to meet the needs of the region in terms of service standards, adequacy and capacity. Mobilisation of resources for infrastructure development is to take the form of public-private sector partnerships with strategic partnerships between government and a responsible and competent regional private sector, as well as partnerships between international cooperating partners and regional stakeholders (Chapter 2, Article 2.4 Paragraphs (i) and (j)).

The SADC joint approach to transport infrastructure projects led to constructing inter-country regional transport corridors. Some of the projects were completed as far back as 1999 while others are still underway. Eight SADC countries are also members of COMESA, which through its Sub-Saharan African Transport Programme (SSATP), also implements and supports the inter-country corridor approach as one of the most effective methods of transport facilitation in a regional grouping (COMESA 2004:10). In this regard therefore, some of the SADC inter-country regional transport corridors are recognised and supported financially within COMESA. Therefore, to date, most of SADC's strategic corridors have been equipped with modern technology.

The inter-country transport corridors are meant to enhance regional cooperation and integration and to stimulate economic development and promote tourism. As a result, a number of inter-country transport corridors are being transformed into regional development corridors and spatial development initiatives because SADC's focus is no longer solely on investment to develop its ports and the connecting road and rail network systems as was before – this is now being done in conjunction with developing and promoting investment opportunities.

Thus, regional development corridors and spatial development initiatives now serve a dual purpose: (i) to serve as effective transport and communication networks that facilitate intra-regional trade and integrate regional countries; and (ii) stimulate investment in sectors along the corridors and help develop the region as investment opportunities can be harnessed more easily due to easier transport and access to resources, markets and ports. In this regard, the development corridors and spatial

development initiatives become defined anchor projects around which business and development-related projects would be built. The regional trunk road and rail network in these corridors continue to be developed so as to reduce non-tariff barriers and disruptions.

By 2006, ten development corridors were in place, that is the Beira and Zambezi Development Corridors which link Malawi, Mozambique, Zambia and Zimbabwe; the Limpopo Development Corridor linking Mozambique, South Africa, Zimbabwe, Botswana, and Zambia; the Lobito Development Corridor linking the DRC, Zambia and Angola; the Maputo Development Corridor which links South Africa and Mozambique; the Mtwara Development Corridor linking Malawi, Mozambique, Tanzania and Zambia; the Nacala Development Corridor linking Malawi and Mozambique; the Tazara Development Corridor which links South Africa, Zimbabwe, Zambia, and Tanzania; the North-South Corridor (the Durban Corridor) which links to other corridors such as the Trans-Kalahari, Beira, Dar es Salaam, Maputo, and Nacala Corridors and links Botswana, the DRC, Malawi, Mozambique, South Africa, Zambia and Zimbabwe; the Swaziland-South Africa Tourism and Biodiversity Corridor which links South Africa and Swaziland; and the Walvis Bay Corridor linking Botswana, Namibia, South Africa, Zambia, the DRC, Zimbabwe, and Angola. Two spatial development initiatives were in place by 2006, *viz*, the Okavango Upper Zambezi International Tourism (OUZIT) Spatial Development Initiative linking Angola, Botswana, Namibia, Zambia and Zimbabwe and the Lubombo Spatial Development Initiative linking Swaziland, Mozambique and South Africa (SADC 2005; 2006; Makumbe 2007:5; Van Niekerk and Moreira 2002:65).

#### **4. Policy recommendations**

Regional transport infrastructure is central to the sustainability of regional economic development, deeper market integration and intra-regional trade through facilities such as hubs, domestic internal transport links and regional development corridors. To this end, as shown in Section 3 above, the roadmap for SADC transport infrastructure development compelled the region to put in place a robust programme of corridor infrastructure development to facilitate and support the free movement of people, goods and services. However, on evaluating the performance of the corridors, Madakufamba (2008) notes that the Director of the SADC Infrastructure

and Services Directorate observes that the operations of some of the corridors are hampered by poor roads, bridges, curves and logistics. Furthermore, the performance of the corridors when compared to other corridors around the world reveal high costs of transportation due to poor levels of efficiency and poor turnaround, resulting in poor competitiveness of exports from the region in the global markets. Ragoobur (2008) notes that inadequate and inefficient transport networks continue to represent the biggest obstacle to doing business and trade within SADC as this entails high transport costs, which does not augur well for a conducive regional business and trade environment. COMESA (2004:2) and Van Niekerk and Moreira (2002:59) note that the cost of transport in the region constitute up to 40% of business (or the total value of goods sold within the sub-region) compared to an average of 12% in developed countries.

Given the above assessment, it is important to note that there is a serious need to make constant follow-ups and ensure implementation of the initiatives that have been put in place to monitor, improve, and address transport infrastructure effectiveness and efficiency problems. Initiatives that need close monitoring to ensure that they achieve the desired and expected results of improving the performance of the corridors include the Road Sector Development Programmes, the SADC Regional Infrastructure Development Plan, the Southern African Regional Action Agenda, the SADC Subsidiary Bodies in Infrastructure Development, the NEPAD transport programme, the NEPAD business foundation, and the SADC Corridor Strategy. The status of each of these should be reviewed constantly so as to identify constraints and address them timeously.

As Radebe (2008) and Salomao (2008) rightly note, the responsibility for ensuring the rapid expansion of infrastructure within SADC lies directly and largely with each member state, and therefore government budgets have to continue to be the main drivers of infrastructure development. Be as it may, one should note that for most SADC countries, public sector driven infrastructure development is a huge challenge due to severe financial constraints. In this regard, it is therefore imperative for individual countries to continue to encourage and reinforce PPPs, encourage business to business cooperation on infrastructure projects, as well as to engage with investment and merchant banks for expertise and access to funding. This would

entail that each country needs to create a conducive environment by addressing the constraints raised earlier in Section 2.3.

COMESA (2004:10) notes that USAID is providing assistance to some of the corridors within the COMESA region. Therefore sections of the SADC corridors that form parts of the COMESA corridors will be able to benefit. The COMESA Fund (which seeks to mobilise financial resources for transport infrastructure development within COMESA) is another funding instrument which would also help transform infrastructure development in those SADC countries which are also members of COMESA. Salomao (2008) notes that through the NEPAD Infrastructure Project Preparation Facility (IPPF), NEPAD has provided financial support for several infrastructure projects within SADC. Van Niekerk and Moreira (2002:65) note the financial support which the World Bank has given to SADC in terms of a combination of loans, grants, and technical assistance towards the SADC transport corridors, most notably the Maputo Development Corridor. SADC (2006; 2007a) note that the Roads and Coastal Shipping programme in Mozambique is led by the World Bank and this has made developing the internal transport system a priority. Van Niekerk and Moreira (2002:105, 106) also note financial support by the European Union for the Namibian Corridor, sections of national roads in Zambia, as well as the Nacala Corridor. The Development Bank of Southern Africa (DBSA) focuses on infrastructure funding where the SADC regional transport initiatives have benefited, for example the Maputo Development Corridor which is a PPP-based infrastructure project and other infrastructure projects (Madzongwe, 2005; Viljoen, Undated).

In order for SADC to get adequate financial support for infrastructural projects, there is a need to properly plan regional transport projects and package them appropriately so that they can attract funding; and this can be realised through increased technical assistance to prepare and package projects. There is also a need for capacity building for skills and institutional to handle and facilitate PPPs. Notable also is the need to develop local capital markets so as to mobilise local currencies to support and augment private sector investment. The DBSA is willing to offer assistance to the region so that it can meet these challenges. Furthermore, there is also a need to explore co-financing through collective investment by signing inter-governmental and inter-state memoranda of understanding for trans-boundary projects. Innovative

credit structures that encourage diversity of funds as well as improving access to long-term capital should also be explored. There is also a need to put in place cost recovery frameworks (e.g. toll gates), for users of the infrastructure so that costs can be recovered as well as for building revolving funds (Madzongwe 2005; Salomao 2008; Viljoen Undated).

Notable constraints to the effective operations of the SADC corridors that have often led to significant transport delays and increased transport costs hinge around differing regulations in each of the countries the corridors pass through. These include complicated and non-harmonised customs border procedures and documents, inefficient border infrastructure and services (i.e. unharmonised weighbridge equipment, weighbridge equipment, weighing procedures, acceptable tolerance limits, overload control certificates, management of weighbridges), differing axle load limits and vehicle dimensions between countries, vehicle licensing and insurance issues, road user charges, bond guarantee schemes, and others. SADC is reportedly in the process of identifying specific trade facilitation measures to address these issues through compatible and harmonised policies and legislation (Madakufamba 2008; Radebe 2008; Ragoobur 2008; COMESA 2004:9; Makumbe 2007:4, 8; Van Niekerk and Moreira 2002:63).

However, it is interesting to note that COMESA introduced trade and transit transport facilitation instruments several years ago which are currently in operation to address these very same issues which SADC is battling with. Such instruments are Harmonised Road Transit Charges, COMESA Carrier's License, Harmonised Axle Loading and Maximum Vehicle Dimension, COMESA Insurance Scheme and COMESA Customs Bond Guarantee Scheme (COMESA 2008:35, 48). It is not clear why SADC as a regional grouping cannot adopt these same instruments and use them to address the aforementioned challenges it currently faces – bearing in mind that: (i) most of the SADC member states are also members of COMESA; and (ii) the Acting Director for the SADC Infrastructure and Services Directorate indicated at the fifth intermodal Africa conference in 2007 that SADC agreed with COMESA and the East African Community to jointly implement transport programmes and instruments so as to have harmonised regulations and services across the three sub-regions. Implementing the existing COMESA instruments would save SADC the costs and

energy of coming up with separate trade and transit transport facilitation instruments and thus refocus its energies on other important outstanding transport infrastructure development issues.

To date, very few SADC countries have adopted and are using the COMESA trade and transit transport facilitation instruments. For example, (i) the COMESA harmonised axle load limits are being implemented in only five SADC countries, i.e. the DRC, Malawi, Swaziland, Zambia and Zimbabwe; (ii) the COMESA Carrier's Licence which harmonises licensing requirements and thus enables a carrier to operate throughout the region, thus enabling more efficient use of the region's transportation fleet and reducing transport costs is currently operational in only four SADC countries, namely Malawi, Swaziland, Zambia and Zimbabwe; (iii) the Harmonised Road Transit charges to enable governments to meet costs of maintaining national transport infrastructure are only implemented in three SADC countries, namely Malawi, Zambia and Zimbabwe; while (iv) the COMESA Yellow Card Scheme which is a motor vehicle insurance scheme facilitating cross-border movement of vehicles is implemented in only five SADC countries, namely the DRC, Malawi, Tanzania, Zambia and Zimbabwe (COMESA Undated).

Poor domestic road and rail networks in any one country, if not addressed, have serious negative implications for the region as a whole because national road and rail network systems provide links or feeder roads to the corridors that link the neighbouring countries. Therefore each member states should seriously take up its responsibility of continuously upgrading, rehabilitating and maintaining its internal transport networks, otherwise the region becomes less reliable and less able to reduce transport delays and costs. This would mean that road and rail networks would continue to be a significant non-tariff barrier which would hinder intra-regional trade despite tariff reductions initiatives to implement the SADC Free Trade Agreement (FTA). Implications on industry would be poor performance and underutilisation of installed industrial capacity.

The coming into effect of the SADC FTA in January 2008 and officially launched in August 2008 entails intensifying the use of corridors as traffic increases due to easier accessibility of countries. It is therefore important to constantly evaluate the effectiveness of corridors with measures put in place to improve performance. In this

regard, it is commendable that SADC (2006) highlights that by 2006 major progress had been made with corridor facilitation effectiveness for the Beira Corridor, Walvis Bay Corridor, North-South Corridor, and the Dar es Salaam-Kapiri-Mposhi Corridor, and that measures were also put in place for performance improvement, for example measures relating to control of overloading, infrastructure improvements and road safety.

Poor road and rail conditions have effects on the investment attractiveness of the region in general as transport costs are one of the locational factors. Therefore, countries with better road and rail conditions, *ceteris paribus*, would present more favourable investment climates, possibly luring investors away from those with sub-standard transport conditions. Therefore, as integration proceeds, polarisation of industries could occur, raising concerns in the distributional effects of economic integration since this has implications for development in member states. However, it is important to note that polarisation does not need to be inevitable because, if transport and communications constraints are adequately addressed and reduced substantially and eventually removed, weaker SADC countries need not lose industries to the core with the SADC FTA in place.

## **5. Conclusion**

This paper has attempted to give an overview of the nature of the transport network systems within SADC, discussing initiatives at both country and regional levels to address transport constraints.

The ultimate effects of SADC initiatives in infrastructure development will be to boost traffic and carrying capacity of rail and road networks, reduce transport and communication costs, and improve transport reliability and efficiency within the region. Infrastructural development initiatives would also enhance internal connectivity within the domestic economies as well as achieve increased regional interconnectivity. This would therefore help to develop a strong regional integrated market (by making it easier for countries to access each other) and cross-border trade facilitation.

The initiatives would also help to reduce transport-related investment risks, thereby helping the region to provide the much-needed support to the current industrial base

as well as to build a favourable investment climate. It can also be argued that while resources are unevenly distributed between member states, polarised location on the basis of availability of resources would be reduced as firms could locate in countries which could be less endowed with resources but offering other unique locational advantages, and still access the needed resources from the resource-rich countries through an improved transport system. Also, polarised industrial location on the basis of market availability could be reduced as industries could still locate in countries with a limited domestic market but with other locational advantages, and still access the required markets in other countries more easily through the improved transport and communication infrastructures.

The implementation of the SADC FTA in January 2008 is a firm step toward deeper economic integration of member states. Therefore, among other things, continued cooperation in transport infrastructure development would help to drive forward the agenda of economic integration.

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## Appendix 1: Additional Information for Section 4

**Table A-1: The SADC programmes (2004 to the present)**

<b>SADC Directorates</b>	<b>Programmes/ technical units</b>
Food, Agriculture and Natural Resources (FANR)	Agricultural Information Management (AIMS). Crop Development. Livestock Development. Natural Resources Management (NRM). Environment and Sustainable Development. Agricultural Research and Development.
Trade, Industry, Finance and Investment (TIFI)	Customs Cooperation and Modernisation. Investment and Development Finance. Macroeconomic Convergence. Mining. Productive Competitiveness. Regional and Multilateral Trade Policies.
Infrastructure and Services (I & S)	Communication and Meteorology Programmes. Energy Programmes. Regional Tourism Organisation of Southern Africa. Transport Programmes. Water Programmes.
Social and Human Development and Special Programmes (SHD & SP)	Culture and Information. Health and Pharmaceuticals. HIV and AIDS. Education, Skill, Development and Capacity Building. Employment, Productivity, Labour, Social Security. Special Programmes.

Source: SADC (2007b).

### *Chapter 3*

## **SADC trade integration – the effect of trade facilitation on sectoral trade: a quantitative analysis**

Sonja Kurz, Thomas Otter, Felix Povel<sup>1</sup>

### **1. Introduction**

Regional integration is seen by many policy makers all over the world as an important policy instrument. This is particularly true for developing countries. Interest in regional integration has increased recently; notably, the European Union (EU) has upgraded regional integration to a key pillar of its development cooperation. Consequently, it is important to measure progress in regional integration.

Regional integration has long been seen as a major instrument for economic progress worldwide and has been studied widely, both in general terms as well as in the context of developing countries (e.g. Balassa 1961; El Agra 1999). While interest in regional integration has been part of the development discourse since the Second World War, there has been a new wave of interest in regions in the development process since the 1990s. The questions ‘Why do countries form regions?’ and ‘How do they affect their members, those excluded, and the international system?’ are back on the agenda (Page 2000). This can be understood against the background of wide-ranging changes at international, regional and national levels.

At a global level, the multilateral trading system has been extended (to include new issues such as competition, intellectual property rights, non-tariff barriers, subsidies and investment) and strengthened following the establishment of the World Trade Organisation (WTO). At a national level, governments changed the way they intervene and regulate. At a regional level, we see rising intra-regional trade, more formal regional organisations, and other evolving forms of cooperation.

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The international structure is becoming more diverse with a mix of countries and groups at various stages or degrees of integration. Both regionalisation and globalisation are evolving in parallel. Many economists see regional integration as contradicting and undermining global integration – as a second-best solution that is at best a ‘stumbling block’ on the way to that first-best situation. Often multilateral rules are bypassed when new protections are built into regional designs. However, others see regional integration more positively: as complementing global integration, as being a stepping stone to global integration, or as helping to reduce possible negative consequences of globalisation.

Although many share the view that the world tends to be carved up into regions, this cannot be taken for granted. While the benefits of global integration are currently questioned by many (as suggested by the stalled talks on multilateral trade negotiations), so the progress of regional integration is also being questioned. Furthermore, the depth of regional integration varies widely. At one extreme, the integration of the EU has grown considerably; the EU now speaks as one unit in international trade negotiations and uses a single currency in much of Europe. Nevertheless, the integration process of the EU as planned is far from completed and how far it will actually go is uncertain. As the discussions and divisions in the EU constitution show, deep economic and political regional integration is not at all certain. More importantly, this vision of deep regional integration is not the one pursued by other regional blocs who see regional integration as more of an open process. At the other end, Africa’s progress in regional integration has not reached far. One can argue that the political and social conditions for regional integration seem no easier to meet than those for global integration (Page 2000).

The ‘new regionalism’ takes a comprehensive view of regional integration, going beyond economics to refer to politics, security, culture and also diplomacy. Furthermore, it goes beyond the focus of government and looks at other actors such as business and the civil society as well, complementing the ‘top-down’ with the ‘bottom-up’ perspective. The new regionalism can also be described as more spontaneous and open, and thus compatible with an interdependent world economy. The new regionalism is more dynamic, as it is also driven by the private sector. Although the advocates of regional integration and the general public see regional

integration as positive, this cannot be taken for granted. Empirically, the questions whether regional integration has positive or negative results for economic growth, how this growth is distributed, how poverty is affected, and others are not conclusively answered.

The idea of this paper came up after a series of interviews with the private sector in the Southern African Development Community (SADC) region showed that within the selected countries, as well as in trade and production sectors, doubts about SADC benefits prevail over the belief in new trade and job opportunities throughout regional integration. The private sector has a pragmatic acceptance that SADC integration is an ongoing process which will deepen in the future. Nevertheless, according to our interviews, expectations in positive effects of trade facilitation are bigger than expectations towards positive effects of a Free Trade Agreement (FTA).

The aim of this paper is to search for empirical evidence on how big the effects of trade facilitation could be in the SADC region, to shed some light on the relationship between trade facilitation and trade flows, and to evaluate the potential benefits of trade facilitation in terms of boosting exports.

This issue is of growing interest in the trade policy debate since trade facilitation has been included in the Doha Development Agenda. The mandate for the WTO negotiations on trade facilitation was adopted in July 2004. Special and differential treatment as well as technical assistance and capacity building are integral parts of the negotiations and are linked to the final outcome. The mandate encourages WTO members to assess their trade facilitation needs and priorities, mainly those of developing and least-developed countries. Any trade facilitation efforts made by developing countries to accomplish the WTO mandate will unquestionably have a positive effect on trade volumes and will help to improve economic development and living standards. While other trade costs (tariffs and non-tariff barriers) have fallen as a result of WTO trade negotiations and regional integration agreements, transaction costs related to cross-border trade procedures have become relatively more important.

## 2. Modelling trade facilitation

The measurement and quantification of the potential benefits of trade facilitation have only recently been investigated. Although increasing attention has been paid to this issue, no consensus has been reached regarding the trade policy discourse on the definition of trade facilitation. In most cases, two ways of defining this concept have been used. On the one hand, trade facilitation in a narrow sense includes the so-called 'at the border procedures', such as customs documentation or the time involved in crossing a border. On the other hand, trade facilitation in a broad sense also includes some 'inside the border' elements, such as institutional quality, regulatory environment and service infrastructure. Since the effect of institutional quality and regulatory environment on trade has already been investigated elsewhere, we focus here on the narrow definition and consider only 'border' related elements. In this line, trade facilitation is understood as the reduction, or at least the simplification, of 'at the border procedures', comprising a number of documents and the time involved in crossing the border as well as the transaction cost incurred. In addition, we consider the Technological Achievement Index as a proxy for services infrastructure, whose composition includes several indicators of service infrastructure.

As far as we are aware, the effects of trade facilitation on trade volumes at a disaggregated level have not yet been investigated. The innovation of the paper consists in using recent methodological developments to address the issue of trade facilitation at the sectoral level.

### 2.1 Empirical analysis

#### *Model specification*

One of the main devices used to analyse the determinants of international trade flows is the gravity model of trade.<sup>2</sup> Recently, some authors have referred to this model as

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<sup>2</sup> The gravity model of international trade has become one of the standard tools for analysing trade patterns and trade. In its usual modern articulation, the gravity model hypothesises that the larger, the richer and the closer together two countries are, the more they trade. Also, the more things they have in common, such as currency, language, shared political histories or colonial connections, a border, the more intensively they trade. Coastal states trade more than landlocked states because they connect more easily. Standard gravity models explain about two-thirds of the variation in global trade, leaving only one-third to be explained by other trade theories.

the ‘workhorse’ of empirical trade studies (Eichengreen and Irwin 1998; Cheng and Wall 2005). A (traditional) gravity equation augmented with trade facilitation variables is specified and estimated for disaggregated data. The estimated equation is:

*Basic equation*<sup>3</sup>:

$$X_{ij} = \beta_0 + \beta_1 \text{contig}_{ij} + \beta_2 \text{comlang\_soff}_{ij} + \beta_3 \text{Indist}_{ij} + \beta_4 \text{landl\_ex}_i + \beta_5 \text{landl\_im}_j + \beta_6 \text{Intariff}_j + \beta_7 \text{servinfr05\_im}_j + \beta_8 \text{servinfr05\_ex}_i + \beta_9 \text{Ingdpim}_j + \beta_{10} \text{Ingdpex}_i + \beta_{11} \text{Inpopim}_j + \beta_{12} \text{Inpopex}_i + \mu, \text{ where}$$

- $X_{ij}$  is the total trade flow from country  $i$  to country  $j$  in 2005;
- $\text{contig}_{ij}$  is a dummy taking the value one if trading partners are contiguous;
- $\text{comlang\_off}_{ij}$  is a dummy taking the value one if trading partners share a common official language;
- $\text{Indist}_{ij}$  is the natural log of the distance (in kilometers) between the trading partners’ capitals;
- $\text{landl\_ex}_i$  is a dummy taking the value one if the exporting country is landlocked;
- $\text{landl\_im}_j$  is a dummy taking the value one if the importing country is landlocked;
- $\text{Intariff}_j$  is the natural log of the average tariff applied by the importing country;
- $\text{servinfr05\_im}_j$  proxies the services infrastructure of the importing country;<sup>4</sup>
- $\text{servinfr05\_ex}_i$  proxies the services infrastructure of the exporting country;<sup>5</sup>
- $\text{Ingdpim}_j$  is the natural log of the importing country’s GDP (in USD);
- $\text{Ingdpex}_i$  is the natural log of the exporting country’s GDP (in USD);
- $\text{Inpopim}_j$  is the natural log of the importing country’s population;
- $\text{Inpopex}_i$  is the natural log of the exporting country’s population; and
- $\mu$  is the error term.

In a second step, the basic equation is enlarged by dummy variables indicating whether the trading partners belong to one of the regional integration schemes that are officially recognised by the African Union (i.e. Arab Maghreb Union (UMA), Community of Sahel-Saharan States (CEN-SAD), Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC), Economic Community of West African States (ECOWAS), Economic Community of Central African States

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<sup>3</sup> For the selection of countries, data, sources and variables see Annex 1.

<sup>4</sup> The services infrastructure proxy is composed of three equally weighted parts: (i) telephones (fixed mainlines) per 1000 people in 2005, (ii) telephones (mobile subscribers) per 1000 people in 2005, (iii) internet users per 1000 people in 2005.

<sup>5</sup> See footnote above.

(ECCAS), Inter-Governmental Authority on Development (IGAD), Southern African Development Community (SADC); cf. Economic Commission for Africa/African Union (2006:vii)). A 'SADC13' dummy is added in order to capture possible trade-enhancing effects of SADC if South Africa is not considered to be part of it. A dummy for SACU membership is excluded from the analysis because only in 16 out of 1231 cases such a dummy would show a positive value in such a variable.<sup>6</sup>

Thirdly, we add to the basic equation 'doing business' indicator variables, namely the time needed to export/import (days), documents needed to export/import (number), and the natural log of costs needed to export/import (USD per container). Thus, we analyse how trade facilitation impacts on African trade flows.

Fourthly, we interact the 'doing business' indicator variables as well as the tariff variable with the SADC dummy to see how trade facilitation and tariffs affect trade flows in the case of Southern Africa.

Finally, we apply the same procedure to the SADC13 dummy in order to find out whether the SADC membership of South Africa biases our results.

## 2.2 Results

Table 1 shows a standard Ordinary Least Square (OLS) regression which analyses the dependence of the value of bilateral exports for all African countries in the data set (basic equation), for the influence of SADC as a whole (SADC14) and for the influence of SADC without considering South Africa (SADC13), on the variables listed in the first column.

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<sup>6</sup> We tried out what the result would be of including a SACU and RIA (Regional Integration Agreement) dummy in the basic equation. Doing so generates a coefficient of minus 5.14, highly negative and additionally significant (t-value-3.7)! This result suggests additionally that including a SACU dummy variable in the data set does not make sense, since the structure of our data base is not proper for telling a separate SACU impact story.

**Table 1: Tariffs and trade zones**

	basic equation		basic equation + RIA dummies (SADC14)		basic equation + RIA dummies (SADC13)	
	coefficient	t-values	coefficient	t-values	coefficient	t-values
contig	0.31	0.51	0.55	0.87	0.71	1.12
comlang_off	2.73***	9.08	2.82***	9.37	2.82***	9.41
Indist	-3.95***	-15.08	-3.46***	-11.83	-3.40***	-11.80
Landl_ex	-0.20	-0.58	-0.46	-1.33	-0.44	-1.29
Landl_im	-1.74***	-5.28	-1.84***	-5.61	-1.82***	-5.58
Intariff	0.69*	1.78	1.40***	3.39	1.42***	3.50
servinfr05_im	0.12***	4.01	0.11***	3.65	0.12***	3.97
servinfr05_ex	0.17***	5.59	0.16***	5.17	0.17***	5.51
lngdpim	0.20	0.87	0.27	1.19	0.25	1.07
lngdpex	0.65***	2.59	0.69***	2.76	0.66***	2.64
lnpopim	1.04***	4.34	0.93***	3.80	0.98***	4.05
lnpopex	0.96***	3.93	0.97***	3.98	1.04***	4.27
censad			-0.72	-1.55	-0.74	-1.60
Uma			-1.84	-1.22	-2.01	-1.34
comesa			0.97**	2.01	0.81*	1.68
Eac			1.41	0.55	1.33	0.52
ecowas			2.34***	3.12	2.43***	3.26
eccas			-0.66	-0.69	-0.55	-0.58
lgad			-2.96*	-1.89	-2.86*	-1.84
Sadc			1.99***	3.61		
Sadc13					2.64***	4.60
Cons	-15.50***	-3.47	-21.98***	-4.69	-23.43***	-4.99
N	1231		1231		1231	
adj R-squared	0.4289		0.4412		0.4448	

Notes: contig=dummy that equals 1 if trading partners are contiguous; comlang\_off=dummy that equals 1 if trading partners share a common official language; Indist=natural logarithm of the distance between the trading partners' capitals (in kilometers); landl\_ex=dummy that equals 1 if exporting country is landlocked; landl\_im=dummy that equals 1 if importing country is landlocked; Intariff=natural logarithm of average tariffs applied by importing countries; servinfr05\_im=proxy for services infrastructure of importing country; servinfr05\_ex=proxy for services infrastructure of exporting country; lngdpim=natural logarithm of the importing country's GDP; lngdpex=natural logarithm of the exporting country's GDP; lnpopim=natural logarithm of the importing country's population; lnpopex=natural logarithm of the exporting country's population; censad=dummy that equals 1 if both trading partners belong to CENSAD; uma=dummy that equals 1 if both trading partners belong to UMA; comesa=dummy that equals 1 if both trading partners belong to COMESA; eac=dummy that equals 1 if both trading partners belong to EAC; ecowas=dummy that equals 1 if both trading partners belong to ECOWAS; eccas=dummy that equals 1 if both trading partners belong to ECCAS; lgad=dummy that equals 1 if both trading partners belong to IGAD; sadc=dummy that equals 1 if both trading partners belong to SADC; sadc13=dummy that equals 1 if both trading partners belong to SADC excluding South Africa; N=number of observations; asterisks denote the statistical significance of the coefficients at the 10% (\*), 5% (\*\*), and 1% (\*\*\*) levels

The most striking empirical results are highlighted in the table above. We find in the basic equation that the coefficient of the 'Intariff' variable is positive (!) and significant, which would mean the higher the tariffs, the higher the trade flows. Of course we know that in reality this is not true. Apparently we face a problem of endogeneity (where the independent variable volume of trade in its monetary value is correlated with the error term of the equation). Nevertheless, there are some imaginable

situations where higher trade is correlated with higher tariffs, i.e. importing countries raise (import) tariffs the more they import, in order to augment government revenue.

The fourth and fifth columns verify whether the membership in trade or regional integration bodies has an additional effect on trade flows besides those already identified in the basic equation. Bear in mind that this second model includes trade flows between all SADC countries, including South Africa. We find that COMESA, ECOWAS, and SADC impact positively on trade (trade flows increase), but that IGAD impacts negatively (!) on trade (trade flows decrease). Unfortunately we still have no explanation for this last finding. Further research would be necessary to better understand this result.

Finally, the last two columns apply the same model as the former one, excluding South African trade from the analysis. We find that the positive impact of SADC on trade is not due to an apparently positive South African influence on SADC trade flows. What is more, the positive impact of SADC on trade seems to be even higher when excluding South African participation from the analysis rather than including it. In other words, even if there is no doubt about the importance of the South African role for the existence and performance of SADC as an integration body, South African participation in SADC trade not only increases trade; the increase won by South African participation is partly at the expense of the loss of some trade opportunities for other SADC countries, which in the end is exactly what many of our interview partners stated in the conversations.

**Table 2: Time, documents and costs**

	basic equation + doing business (time)		basic equation + doing business (documents)		basic equation + doing business (costs)	
	coefficient	t-values	coefficient	t-values	coefficient	t-values
contig	0.57	0.94	0.34	0.55	0.66	1.10
comlang_off	2.68***	9.04	2.72***	9.01	2.57***	8.73
Indist	-3.89***	-15.04	-3.93***	-14.96	-3.90***	-15.25
landl_ex	1.12***	2.74	-0.17	-0.51	2.15***	4.79
landl_im	-1.47***	-3.88	-1.71***	-4.72	-1.49***	-3.26
Intariff	0.77**	2.00	0.71*	1.79	0.77**	1.98
servinfr05_im	0.11***	3.43	0.12***	3.95	0.11***	3.36
servinfr05_ex	0.15***	4.88	0.17***	5.00	0.05	1.57
lngdpim	0.23	1.00	0.20	0.89	0.25	1.06
lngdpex	0.42*	1.69	0.68***	2.65	1.50***	5.60
lnpopim	1.04***	4.37	1.04***	4.33	1.00***	4.11
lnpopex	1.27***	5.14	0.94***	3.79	0.06	0.21
time_ex07	-0.09***	-5.49				
time_im07	-0.01	-1.29				
doc_ex07			-0.05	-0.59		
doc_im07			-0.01	-0.17		
lncost_ex07					-3.83***	-7.73
lncost_im07					-0.34	-0.74
cons	-13.39***	-3.02	-15.54***	-3.47	9.07	1.56
N	1231		1231		1231	
adj R-squared	0.4424		0.4281		0.4549	

Notes: contig=dummy that equals 1 if trading partners are contiguous; comlang\_off=dummy that equals 1 if trading partners share a common official language; Indist=natural logarithm of the distance between the trading partners' capitals (in kilometers); landl\_ex=dummy that equals 1 if exporting country is landlocked; landl\_im=dummy that equals 1 if importing country is landlocked; Intariff=natural logarithm of average tariffs applied by importing countries; servinfr05\_im=proxy for services infrastructure of importing country; servinfr05\_ex=proxy for services infrastructure of exporting country; lngdpim=natural logarithm of the importing country's GDP; lngdpex=natural logarithm of the exporting country's GDP; lnpopim=natural logarithm of the importing country's population; lnpopex=natural logarithm of the exporting country's population; time\_ex07= time needed to export (days); time\_im07= time needed to import (days); doc\_ex07=documents needed to export (number); doc\_im07=documents needed to import (number); lncost\_ex07=natural logarithm of costs needed to export (USD per container); lncost\_im07=natural logarithm of costs needed to import (USD per container); N=number of observations; asterisks denote the statistical significance of the coefficients at the 10% (\*), 5% (\*\*), and 1% (\*\*\*) levels

Table 2 shows the regression results checking for the influence of time, bureaucracy (number of documents) and costs on trade flows. Again, the most striking results are highlighted in the table. The results in the first pair of columns of the table refer to the effect of time on trade flows, in the middle pair of columns refer to the number of documents and the last pair of columns refers to the costs. We find that in relation to time, being landlocked is significantly positive (landlocked countries trade more) and time to export has a significantly negative impact on trade flows (the more time it takes to export, the lower the trade flows). One possible interpretation of this result is

that it would seem that non-landlocked (coastal) countries prefer to export to overseas countries, whereas landlocked countries prefer to export to neighbouring countries.

In the second specification (the basic equation + doing business (documents)) we find that the number of documents needed to trade (this is for import and/or for export) does not matter. This has no significant impact on trade flows.

In the third specification (the basic equation + doing business (costs)) we find that being landlocked is significantly positive (landlocked countries have higher trade flows); costs to export has a significantly negative impact on trade flows (the higher the costs, the lower the trade flows). Interestingly, costs impact on trade seems to be quite tremendous. We must try to understand these last two results jointly in their context. For landlocked countries, trade costs are usually higher than for non-landlocked countries, so high costs reduce trade flows. Nevertheless, trade openness is a need in a modern world, and since trade integration with neighbouring countries (see Table 3) is one possibility of reducing trade costs, being landlocked can show positive effects on trade at the same time when costs impact negatively on trade.

**Table 3: Time, documents and costs for SADC14**

	basic equation + (SADC14*time)		basic equation + (SADC14*documents)		basic equation + (SADC14*costs)		basic equation + (SADC14*tariffs)	
	coefficient	t-values	coefficient	t-values	coefficient	t-values	coefficient	t-values
Contig	0.18	0.29	0.20	0.33	0.21	0.34	0.16	0.26
Comlang_off	2.73***	9.12	2.71***	9.07	2.67***	8.98	2.72***	9.12
Lndist	-3.67***	-13.67	-3.65***	-13.52	-3.60***	-13.37	-3.69***	-13.77
landl_ex	-0.40	-1.17	-0.40	-1.18	-0.61*	-1.77	-0.36	-1.07
landl_im	-1.80***	-5.50	-1.79***	-5.45	-1.69***	-5.16	-1.77***	-5.40
Lntariff	1.17***	2.88	1.23***	3.02	1.40***	3.41	1.10***	2.76
servinfr05_im	0.12***	3.82	0.11***	3.74	0.10***	3.26	0.12***	3.80
servinfr05_ex	0.17***	5.34	0.17***	5.41	0.18***	5.76	0.17***	5.31
Lngdpim	0.21	0.91	0.20	0.89	0.28	1.22	0.23	1.00
Lngdpex	0.63**	2.53	0.61**	2.44	0.48*	1.90	0.62**	2.51
Lnpopim	1.00***	4.16	1.01***	4.21	0.94***	3.92	0.98***	4.08
Lnpopex	0.98***	4.02	1.01***	4.16	1.13***	4.61	0.99***	4.11
stime_ex07	0.03	1.15						
stime_im07	0.02	1.04						
sdoc_ex07			0.27	1.58				
sdoc_im07			-0.01	-0.08				
slncost_ex07					2.83***	3.24		
slncost_im07					-2.47***	-2.90		
Stariff							1.00***	3.94
Cons	-18.09***	-4.03	-18.54***	-4.12	-18.86***	-4.20	-18.08***	-4.03
N	1231		1231		1231		1231	
adj R-squared	0.4355		0.4362		0.4401		0.4356	

Notes: contig=dummy that equals 1 if trading partners are contiguous; comlang\_off=dummy that equals 1 if trading partners share a common official language; Lndist=natural logarithm of the distance between the trading partners' capitals (in kilometers); landl\_ex=dummy that equals 1 if exporting country is landlocked; landl\_im=dummy that equals 1 if importing country is landlocked; Lntariff=natural logarithm of average tariffs applied by importing countries; servinfr05\_im=proxy for services infrastructure of importing country; servinfr05\_ex=proxy for services infrastructure of exporting country; Lngdpim=natural logarithm of the importing country's GDP; Lngdpex=natural logarithm of the exporting country's GDP; Lnpopim=natural logarithm of the importing country's population; Lnpopex=natural logarithm of the exporting country's population; stime\_ex07=(dummy that equals 1 if both trading partners belong to SADC)\* (time needed to export (days)); stime\_im07=(dummy that equals 1 if both trading partners belong to SADC)\* (time needed to import (days)); sdoc\_ex07=(dummy that equals 1 if both trading partners belong to SADC)\* (documents needed to export (number)); sdoc\_im07=(dummy that equals 1 if both trading partners belong to SADC)\* (documents needed to import (number)); slncost\_ex07=(dummy that equals 1 if both trading partners belong to SADC)\* (natural logarithm of costs needed to export (USD per container)); slncost\_im07=(dummy that equals 1 if both trading partners belong to SADC)\* (natural logarithm of costs needed to import (USD per container)); stariff=(dummy that equals 1 if both trading partners belong to SADC)\*(natural logarithm of average tariffs applied by importing countries); N=number of observations; asterisks denote the statistical significance of the coefficients at the 10% (\*), 5% (\*\*), and 1% (\*\*\*) levels

Table 3 shows the same specification as Table 2, checking for trade flows between all SADC countries (trade flows if importer and exporter belong to SADC, considering all 14 member states), and again checking for the effect of time, bureaucracy and costs.

We find that time to trade does not impact significantly on intra-SADC trade, neither for import nor for export. This is interesting because, for trade with states outside SADC, time had a negative effect on trade.

As already observed in Table 2, just as for intra-SADC trade, the number of documents does not impact significantly on intra-SADC trade. However, costs associated with trade matter considerably in the case of intra-SADC trade; costs to export impact significantly positively on (increase in) trade flows; costs to import impact significantly negative on (decrease in) trade flows. The fact that high import costs reduce trade sounds quite understandable. But what about the positive impact of high export costs? An imaginable sequence for this issue could be the following: in the first stage, direct neighbouring export markets are gained (because it is less costly to export to them), but once these markets are fully supplied, additional export expansion needs to search for markets farther away. If export to these markets is successful, trade flows and export increase at the same time as costs (per unit) do. Some further research would be necessary to fully understand the positive relation between higher trade and higher costs and to understand whether this is the case for the year 2005 (our data base).

We also found that within SADC, tariffs impact positively on trade flows. To understand this result, we have to take into account that we are using a static and not a dynamic model for analysing trade flows. SADC member countries are currently involved in a tariff reduction process, but the dynamics in this process, the speed of tariff reduction and the real tariffs applied in 2005 (our data base) were not the same for all SADC countries. If trade flows were higher for countries which reduce tariffs at a lower speed, we would get this kind of relationship between high tariffs and high imports. Some further research on this issue is needed.

**Table 4: Time, documents and costs for SADC13**

	basic equation + (SADC13*time)		basic equation + (SADC13*documents)		basic equation + (SADC13*costs)		basic equation + (SADC13*tariffs)	
	coefficient	t-values	coefficient	t-values	coefficient	t-values	coefficient	t-values
contig	0.32	0.52	0.39	0.64	0.40	0.65	0.30	0.49
comlang_off	2.74***	9.17	2.72***	9.12	2.69***	9.06	2.73***	9.16
Indist	-3.64***	-13.62	-3.60***	-13.38	-3.57***	-13.28	-3.66***	-13.71
landl_ex	-0.40	-1.17	-0.40	-1.20	-0.54	-1.59	-0.36	-1.07
landl_im	-1.80***	-5.50	-1.78***	-5.46	-1.72***	-5.25	-1.76***	-5.38
Intariff	1.16***	2.90	1.24***	3.10	1.34***	3.33	1.09***	2.76
servinfr05_im	0.12***	4.08	0.12***	4.03	0.12***	3.80	0.12***	4.05
servinfr05_ex	0.17***	5.61	0.18***	5.71	0.18***	5.87	0.17***	5.59
lngdpim	0.19	0.85	0.19	0.82	0.23	1.01	0.22	0.95
lngdpex	0.61**	2.47	0.59**	2.36	0.50**	2.00	0.60**	2.44
Inpopim	1.03***	4.32	1.05***	4.41	1.02***	4.28	1.01***	4.24
lnpopex	1.02***	4.21	1.07***	4.40	1.13***	4.64	1.04***	4.31
s13time_ex07	0.03	1.25						
s13time_im07	0.03	1.28						
s13doc_ex07			0.30*	1.67				
s13doc_im07			0.03	0.16				
s13lncost_ex07					2.15**	2.33		
s13lncost_im07					-1.73*	-1.92		
s13tariff							1.22***	4.58
Cons	-19.07***	-4.24	-19.87***	-4.40	-20.03***	-4.45	-19.11***	-4.24
N	1231		1231		1231		1231	
adj R-squared	0.4381		0.4397		0.4415		0.4381	

Notes: contig=dummy that equals 1 if trading partners are contiguous; comlang\_off=dummy that equals 1 if trading partners share a common official language; Indist=natural logarithm of the distance between the trading partners' capitals (in kilometers); landl\_ex=dummy that equals 1 if exporting country is landlocked; landl\_im=dummy that equals 1 if importing country is landlocked; Intariff=natural logarithm of average tariffs applied by importing countries; servinfr05\_im=proxy for services infrastructure of importing country; servinfr05\_ex=proxy for services infrastructure of exporting country; lngdpim=natural logarithm of the importing country's GDP; lngdpex=natural logarithm of the exporting country's GDP; Inpopim=natural logarithm of the importing country's population; Inpopex=natural logarithm of the exporting country's population; s13time\_ex07=(dummy that equals 1 if both trading partners belong to SADC excluding South Africa)\* (time needed to export (days)); s13time\_im07=( dummy that equals 1 if both trading partners belong to SADC excluding South Africa)\* (time needed to import (days)); s13doc\_ex07=( dummy that equals 1 if both trading partners belong to SADC excluding South Africa)\* (documents needed to export (number)); s13doc\_im07=( dummy that equals 1 if both trading partners belong to SADC excluding South Africa)\* (documents needed to import (number)); s13lncost\_ex07=( dummy that equals 1 if both trading partners belong to SADC excluding South Africa)\* (natural logarithm of costs needed to export (USD per container)); s13lncost\_im07=(dummy that equals 1 if both trading partners belong to SADC excluding South Africa)\*(natural logarithm of costs needed to import (USD per container)); s13tariff=(dummy that equals 1 if both trading partners belong to SADC excluding South Africa)\*(natural logarithm of average tariffs applied by importing countries); N=number of observations; asterisks denote the statistical significance of the coefficients at the 10% (\*), 5% (\*\*), and 1% (\*\*\*) levels.

Table 4 repeats the exercise from Table 3, including all SADC members except South Africa. We find that time to trade does not impact significantly on intra-SADC13 trade. In other words, since this is the same result as for SADC14, we hereby prove that the irrelevance of time is not an issue related to South African trade. The number of documents needed to export has a significantly positive impact on intra-SADC13 trade. We should not interpret this result as 'the higher the number of documents the higher the trade flows'. We should instead consider that if markets

and business opportunities are interesting, exports will take place even if bureaucracy is complicated. The costs associated with trade also matter considerably in the case of intra-SADC13 trade; costs to export impact significantly positively (!) on trade flows, while costs to import impact significantly negatively on trade flows. Again, we should try to understand this result in the context of an ongoing but unequal process of tariff reduction.

Finally, also within SADC13, tariffs impact positively on trade flows. Recall that in Table 1 we found a different level of positive impact of SADC in general on trade, with or without South Africa. The overall impact is positive, but the impact without South Africa is even more positive. But now, checking on several details such as time, bureaucracy and costs, there is no difference for intra-SADC trade with or without South Africa. The results are just the same.

### **3. Conclusions**

Private sector experiences with trade integration bodies different from SADC such as SACU or COMESA are ‘better’ than with SADC in the sense that exporting under COMESA or SACU rules is easier according to the opinion and experience of our interview partners. Nevertheless, empirical analysis shows quite different results, where SADC even happens to be a trade-increasing institution. One possible source for these contradictory results could be based on the fact that the qualitative interviews are not based on a representative selection.

Trade facilitation is more important for businessmen than mere tariff reductions. This private sector perception is consistent with empirical results. Several of our interview partners mentioned the hope that the implementation of an FTA would not only represent a tariff reduction but would go hand-in-hand with increasing trade facilitation.

Empirically, the most important source of trade facilitation is time. This is consistent with costs associated with a longer process for managing external trade in border customs offices. It is not the number of documents required. Surely fewer forms to fill in or easier forms to complete will represent a short saving of time, but, empirically, these possible savings happen to be of little importance considering the amount of time wasted due to slow transport.

Since this is true, implementing the FTA should be based on more efficiency in the border offices, and this efficiency gain is not necessarily linked to SADC procedures alone. A second important point regarding trade facilitation and the amount of time used for carrying out an export operation is infrastructure.

Interestingly, South Africa is empirically not that important for gaining advantages out of intra-SADC trade. In other words, there are SADC trade opportunities outside South Africa. Perhaps trade facilitation and an FTA could try to concentrate on these opportunities, identify them, and facilitate dissemination about their knowledge and access to them.

The empirical exercise showed that:

- Tariffs impact positively on trade (interpretation: problem of endogeneity, i.e. importing countries raise tariffs the more they import in order to augment government revenue).
- COMESA, ECOWAS and SADC impact positively on trade; however, IGAD impacts negatively on trade (this can be explained because all IGAD members are also COMESA members).
- The positive impact of SADC on trade is not due to a South African bias.
- Being a landlocked exporting country is significantly positive on trade (interpretation: it seems to be that non-landlocked countries prefer to export to overseas countries whereas landlocked countries export to neighbouring countries).
- Time to export has a significantly negative impact on trade flows in general.
- The number of documents needed to trade does not matter (neither positive nor negative impact).
- Costs to export have a significantly negative impact on trade flows; impact seems to be huge.
- Time to trade does not impact significantly on intra-SADC trade. This is because existing SADC trade would take place anyway, even if it were more time consuming, but it does not mean that there could be more and additional trading opportunities if time (and time-associated costs) were lower.
- Number of documents does not impact significantly on intra-SADC trade.

- Costs associated with trade matter considerably in the case of intra-SADC trade.
  - Costs to export have a significantly positive impact on trade flows (additional research required).
  - Costs to import have a significantly negative impact on trade flows.
- Also within SADC, tariffs impact positively on trade flows.

In conclusion, empirically seen, SADC is better for trade than businessmen perceive. We have been able to show that not all business opportunities are related to South Africa. So there seems to be important trade integration in SADC which does not flow through South Africa. Time and costs are crucial, but time and cost reduction do not seem to be closely related to number of documents. From a pragmatic point of view, this seems to mean that customs should rather 'make it quicker', which does not necessarily mean to 'make it easier'. Filling in eight or ten forms does not make a difference but waiting two or three days at the border does. This is understandable since more time in business means higher costs. 'Make it quicker' in practice could mean to double human resources in the customs office or even to expand customs infrastructure at the border. But it also means improving infrastructure (highways, railways, ports and airports) in order to move goods more quickly from one country to the other. Of course, no businessmen would complain about less bureaucracy, but data shows that the gains that could be achieved from these adjustments are less important than gains in time and costs. According to our empirical results, this is more important for intra-SADC trade rather than for trade from SADC to another African country outside SADC. As stated above, the fact that time and tariffs seem to not be important for intra-SADC trade does not mean that there could not be an intra-SADC trade increase or new or additional trading opportunities with lower tariffs or quicker trade facilitation. It means instead that the 2005 intra-SADC trade flows took place in spite of existing difficulties. But this is only true for exports; intra-SADC imports are more sensitive to the lack of trade facilitation than intra-SADC exports. This is consistent with the finding that SADC helps to increase exports, even to African countries outside the bloc. So we can see that there is an increasing export capacity in SADC countries; but not all of this increase goes to other SADC countries since there is a lack of import facilitation.

All these findings are consistent with the main results of the interview series with the private sector. Exporters do not object to tariff reduction, but cost reduction via better infrastructure and a shorter waiting time at the border have a much higher cost-reducing impact than tariff reduction could have had.

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## **Annex 1: Selection of countries, data, sources and variables**

### *Country selection*

- Trade flows from 2005:
  - exporting countries (33): Algeria, Benin, Botswana, Burundi, Cameroon, Cape Verde, Central African Republic, Côte d'Ivoire, Egypt, Ethiopia, Gabon, Gambia, Ghana, Madagascar, Malawi, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, São Tomé and Príncipe, Senegal, Seychelles, South Africa, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, Zimbabwe
  - importing countries: all 53 African countries
- $52 \times 33 = 1716$ ;  $N = 1231$  because of missing values, e.g. in the case of 'doing business' indicators
- Gravity equations based on trade data from 2006 were also calculated. The results of these regressions are not reported here because they yield very similar results. Furthermore, they have less explanatory power, since in 2006 there is only data on exports of 24 African countries (in comparison to 33 African countries in 2005); i.e. the number of observations in 2006 is smaller.

### *Data and sources*

We have a data set for all African countries and a data set for Southern Africa.

Data sources:

- Data on bilateral trade flows stems from the UNCOMTRADE online database.
- Data on distances between trading partners, a common official language, being contiguous and being landlocked stems from the Centre d'Etudes Prospectives et d'Informations Internationales (CEPII), available:  
<http://www.cepii.fr/anglaisgraph/bdd/distances.htm> [30 March 2008].
- Data on average tariffs on imported goods stems from Market Access Map (International Trade Centre – UNCTAD/WTO, available:  
<http://www.macmap.org/>, 30 March 2008). We use tariffs from 2006 and 2007

respectively, depending on the country. Unfortunately, it was impossible to obtain data on tariffs from 2005. We assume that the average applied tariff from African countries did not change much between 2005 and 2007.

- Data to approximate services infrastructure stems from the World Bank's World Development Indicators 2007. The services infrastructure proxy is composed of three equally weighted parts: (i) telephones (fixed mainlines) per 1000 people in 2005, (ii) telephones (mobile subscribers) per 1000 people in 2005, (iii) internet users per 1000 people in 2005.
- Data on the Gross Domestic Product (GDP) (in US dollars) and population of trading partners stems from the World Bank's online 'quick query', available: (  
  
- <http://ddp-ext.worldbank.org/ext/DDPQQ/member.do?method=getMembers&userid=1&queryId=27> [30 March 2008].
- Data on African regional integration schemes stems from: The Economic Commission for Africa/African Union. 2006. *Assessing Regional Integration in Africa II – Rationalizing Regional Economic Communities*. Addis Ababa. The eight trading blocs used for this analysis (i.e. Arab Maghreb Union (UMA), Community of Sahel-Saharan States (CEN-SAD), Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC), Economic Community of West African States (ECOWAS), Economic Community of Central African States (ECCAS), Inter-Governmental Authority on Development (IGAD), and the Southern African Development Community (SADC)) are the only African ones that are officially recognised by the African Union (cf. Economic Commission for Africa/African Union (2006:vii).
- Data on time, documents and costs for trade stems from the 'doing business' indicators of the World Bank (online database, available: <http://www.doingbusiness.org/> [30 March 2008]). In the analysis, 'doing business' indicators from 2007 were used, mainly due to two facts: (i) 'doing business' indicators are very stable over time, therefore it is reasonable to assume that the values from 2007 are almost the same as those from 2005; (ii) in 2007 there are many more 'doing business' indicators for African countries than in previous years.

*Chapter 4*

**SACU, China and India: the implication of FTAs for Botswana, Lesotho, Namibia and Swaziland (BLNS)**

Ron Sandrey and Hans Grinsted Jensen

**Summary and key points**

China and South Africa (more specifically, SACU) have mooted entering into a free trade agreement (FTA), although one must say that there is apprehension in South Africa about such an agreement. Meanwhile, India and SACU are actively discussing the prospects of entering into a free trade agreement. This paper uses the pre-release Version 7 of the Global Trade Analysis Project (GTAP) database to assess the welfare and trade gains for the BLNS (Botswana, Lesotho, Namibia and Swaziland) from FTAs between SACU and China and SACU and India as determined by merchandise goods access only.

The results for a South African/China FTA show that there are comfortable welfare gains to South Africa, but negating these are the labour market-related losses where employment falls by 0.13% and the real wage declines by 0.19%. Scrutinising the production and trade results reveals that South Africa gains modestly in the agricultural sector, but the big action is in the manufacturing sector.

Both Botswana and the rest of SACU (Lesotho, Namibia and Swaziland as one 'region) gain modestly in terms of enhanced welfare of a little over one half of a percent of real GDP. For Botswana there is a large decline in the apparel sectors performance but overall not much other change to the productive sectors other than output price declines in most of these. The biggest change in production after the apparel losses is gains to textiles and the vehicle and parts sectors, and, although constraints to services are not modeled, the second-round effect here accounts for much of the overall production increases. In trade, the direct effects are of less important than the indirect effects as Chinese imports in particular replace those from South Africa and other sources. For the rest of SACU the increases in production are greater but they are spread unevenly across sectors. Gains in the production value of 'other agriculture', 'other meats', textiles and non-ferrous metals (NFM) are recorded, while exports overall decline to South Africa but increase to both China and the rest

of the world. Overall imports into the rest of SACU increase by more than exports, with big increases in textile imports from China leading the way.

For the Indian FTA we find that a simulation of comprehensive tariff reform in India is dominated by the massive effects on South Africa's gold sector, and given the implausibility of this we have opted for an alternative simulation that holds the Indian non-ferrous metal (gold) tariffs at their initial value. This simulation still produces an outstanding welfare gain of \$1,200 million for South Africa and a lesser but still good \$715 million gain for India, with most of the results concentrated in South African agriculture (sugar) and natural resources (coal).

For the BLNS the welfare results are a decline in real GDP of 0.12% in Botswana but a marginal increase of 0.04% in the rest of SACU. For Botswana there are declines in output for many sectors, but except for apparel and vehicles and their parts, and especially services, these are minor. Following declines in the exports of all manufacturing sectors except non-ferrous metals, the relatively small changes show an overall reduction, while for Botswana's import profile modest increases from India and the rest of the world more than displace South African imports, with the latter leading to an overall decline in imports. Changes for trade in the rest of SACU are even more modest, with slightly increased exports to India and a richer South Africa just ahead of declines to the rest of the world. For imports, the Indian displacement of South African exports (around \$40 million in each case) paves the way for increased imports of \$6 million from the rest of the world, giving the final modest increase of \$7 million overall.

The direct effects of these FTA results are modest, with most of the changes coming about as the BLNS trade with South Africa changes at the margin.

## **1. Introduction**

In assessing the future trade policy options for SACU, China and India's dramatically increasing role as trading giants on the world scene has to be taken into account in these considerations. The focus in this paper is on how the SACU trading relationships with both China and India may be advanced by the adoption of free trade agreements between SACU (that includes BLNS) and China and SACU and India. To assist with this analysis the internationally accepted benchmark Global

Trade Analysis Project (GTAP)<sup>1</sup> database and the associated general equilibrium model will be used as the analytical tool. In undertaking this analysis, the starting point is a simulation of the 'known' and best estimate conditions that will prevail at the end of a given period (2020 in this case) followed by an assessment of the difference that the selected policy change under consideration is likely to make. The implications of these FTAs for South Africa have been discussed in Sandrey et al. (2008). The objective of this paper is to discuss the implications for the BLNS countries.

## **2. The direct trade background**

It is difficult to obtain a complete picture of the trade between the BLNS countries and China. Much of the import trade from 'outside' of SACU comes through South Africa, and the BLNS trade data itself tends to be dated. To proxy the direct trade between the BLNS and China we have used the Chinese data as sourced from the World Trade Atlas (WTA), a commercially obtainable source. The data is shown in Table 1, where 'total imports into China' represents the BLNS exports as given by Chinese import data, and similarly 'total exports from China' are the BLNS imports as given by Chinese export data. Totals and the main HS 6 lines are given. Botswana and Namibia are given on the left-hand side of the table, with Lesotho and Swaziland on the right. Imports into China from BLNS are basically commodities; exports from China to BLNS are concentrated in fabrics and clothing.

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<sup>1</sup> See the GTAP website at <https://www.gtap.agecon.purdue.edu/> for a full introduction to the model.

**Table 1: Direct trade between BLNS and China, year to June 2008, US\$ million**

	<b>Year June 2008</b>		<b>Year June 2008</b>
<b>Botswana</b>	\$m	<b>Lesotho</b>	\$m
<b>Total imports into China</b>	<b>121.65</b>	<b>Total imports into China</b>	<b>0.87</b>
Nickel ores	105.89	Animal hair	0.85
Diamonds	12.81		
<b>Total exports from China</b>	<b>142.98</b>	<b>Total exports from China</b>	<b>58.20</b>
Sweaters	9.28	Televisions	9.16
Women's trousers	6.72	Fabric	9.68
Men's trousers	7.96	Knitted fabrics	6.56
		Denim	4.27
<b>Namibia</b>		<b>Swaziland</b>	
<b>Total imports into China</b>	<b>193.75</b>	<b>Total imports into China</b>	<b>17.47</b>
Lead ores	29.43	Chemical wood pulp	7.51
Unrefined copper	13.99	Chemical wood pulp	9.15
<b>Total exports from China</b>	<b>161.83</b>	<b>Total exports from China</b>	<b>11.80</b>
Bed linen	29.88	Fabrics cotton	0.80
Trucks	12.03	Dyed fabric	0.87
Curtain	13.21	Woven fabric	0.41
Portland cement	6.89	Telephones	0.75

Source: World Trade Atlas, Chinese data

### 3. The GTAP database/model

GTAP is supported by a fully documented, publicly available, global database and underlying software for manipulating data and implementing the model. The framework is a system of multisector country economy-wide input/output tables linked at the sector level through trade flows between commodities used both for final consumption and intermediate use in production. The latest GTAP pre-release Version 7 database divides the global economy into 106 countries/regions with 57 commodities specified in the database. The Version 7 database represents the global economy/trade in the year 2004 measured in millions of 2004 US dollars. At the time of writing, the Version 7 pre-release was not available for public release but tralac, through its association with the Institute of Food and Resource Economics, University

of Copenhagen (as a Board Member of GTAP), was able to use it. For a full discussion of the GTAP model as used in this paper, see Sandrey and Jensen (2008).

The FTA primary scenario considered in this chapter entails the result from the removal of trade barriers between China (India) and South Africa (SACU) as measured in the year 2020 in a world shaped by the baseline scenario. Differences between the so-called baseline scenario and this so-called primary scenario are therefore the results of implementation of the goods-only South African/China (India) FTA. With India we model scenarios with and without elimination of tariffs on imports of non-ferrous metals (gold) into India from South Africa, and report on the ‘without gold’ as our main scenario.

#### **4. GTAP results for the SACU/China FTA**

##### **The big picture results**

Table 2 shows the changes in welfare from the FTA assuming the eliminations of merchandise tariffs, with the data expressed in US\$ millions as one-off increases in annual welfare at the assessed end point of 2020. South Africa’s gains are \$295 million, a figure much lower than China’s \$1,364 million. Notable are the enhanced welfare results accruing to both Botswana (\$67m) and the rest of SACU (\$93m) from increased investment expanding the capital stock and allocative efficiency in particular.

**Table 2: Change in welfare (EV of income) due to SACU/China, US\$ millions at 2020**

	Total	Allocative efficiency	Change in unskilled labour employment	Change in capital stocks	Term of trade
South Africa	295	337	-133	417	-326
China	1,364	231	47	612	474
Botswana	67	29	2	33	3
Lesotho, Namibia, Swaziland	93	13	11	62	7
Total including others	3,471	820	-109	2,761	-1

Source: GTAP results

In further examining the GTAP results we are able to decompose the results to find that:

- South Africa's welfare gains of \$535 million all derive from better access into China. This is, however, negated by losses of \$111 million as China, following the SACU tariff eliminations, makes inroads into the South African market, and a further \$103 million and \$29 million as China competes more vigorously with South Africa in Botswana and rest of SACU respectively.
- China's gains are overwhelmingly from SACU tariff reductions with better access into South Africa (\$1,210m), Botswana (\$50m) and the rest of SACU (\$43m), with these augmented by gains of \$52 million from elimination of its own tariffs against South African imports.

The results also show real GDP increases in Botswana of 0.60 and in the rest of SACU of 0.82%, and these are relatively high for an FTA. For the rest of SACU in particular, the impacts upon agricultural factor income are very positive. Land prices increase significantly, while contributions from employed unskilled agricultural labour also rise. Thus, a SACU/China FTA is beneficial for SACU's agricultural sector.

### Changes in trade flows

Table 3 starts by introducing the aggregate overall changes to trade flows for the partner countries in 2020, expressed as percentage changes for both exports and imports, and then in US\$ million for the trade balance. Neither Botswana nor the rest

of SACU registers much overall change (albeit slightly negative change) in their trade balances, with both exports and imports increasing in percentage terms.

**Table 3: Percentage change in the quantity of total import\export & trade balance, 2020**

	South Africa	Botswana	RSACU	China
Exports % change	2.8	0.7	2.5	0.1
Imports % change	2.2	0.8	3.2	0.2
Trade balance US\$ millions	-103	-5	-6	796

Source: GTAP results

### **The specific sector results**

This section will discuss the production, trade and relative price changes in the main GTAP sectors as they relate to firstly Botswana and then the rest of SACU (Lesotho, Namibia and Swaziland). Note that only those sectors where there has been a change in output of greater than \$100,000 (\$0.1m) at 2020 are included.

### **The production and trade impacts in Botswana from the China FTA**

Table 4 shows the general overview of the changes by GTAP sector for Botswana. Column 1 shows the GTAP sectors; Column 2 shows the percentage changes in production while Column 3 shows the value of that change in production. Columns 4 and 5 show the respective percentage changes in Botswana's exports and imports, while the final Column 6 shows the percentage change in domestic output prices. Note that in some sectors (rice, for example), the changes are off a very low base so the percentages are misleading.

**Table 4: Change in Botswana's GTAP sectors, \$ million and percentage**

	Change in production		% Change in quantity of		Market
		value	exports	imports	price
	% change	US\$ millions	%	%	% change
<b>Primary agriculture</b>					
other grains	0.5	1.0	-0.4	0.9	0.2
vegetable/fruit	0.1	0.3	6.1	0.6	0.3
cattle	0.0	0.7	0.2	0.3	0.3
other agricultural products	0.4	0.4	1.8	0.6	0.2
<b>Resources</b>					
other metals	0.1	3.3	0.1	0.6	-0.1
<b>Secondary agriculture</b>					
beef, sheep meat	-0.4	-0.2	-1.6	1.9	0.2
other meats	0.5	1.4	-0.1	0.9	0.0
dairy	0.5	0.4	1.9	0.6	-0.3
rice	18.8	0.7	19.0	0.4	-4.4
other foods	2.0	2.3	3.4	0.3	-0.8
<b>Manufacturing</b>					
textiles	34.9	17.0	36.8	-0.1	-9.0
apparel	-42.0	-22.3	-47.0	2.5	-9.2
leather	-24.9	-7.2	-25.7	0.6	-0.6
lumber	-0.7	-1.2	-2.7	1.2	-0.4
paper products	1.7	1.1	3.2	0.4	-0.9
petroleum, etc.	0.2	0.2	-0.5	0.7	0.1
non-ferrous metals	-3.1	-3.6	-3.1	2.5	0.4
other metal prod	1.8	2.1	-1.4	0.9	-1.2
vehicles & parts	4.2	12.0	4.2	0.9	-1.1
other transport	8.5	2.7	9.4	0.4	-1.2
elect goods	-3.8	-0.5	-5.2	0.8	-0.7
machinery equipment	-0.8	-1.4	-1.0	0.8	-0.7
other manufacture	-0.2	-1.7	1.6	6.9	-0.5
Services	0.7	47.3	0.9	0.2	-0.3
<b>Total</b>		<b>55.2</b>			

Source: GTAP results

There are limited changes to agriculture and natural resources, with the action concentrated in the manufacturing and service sectors. There is a major reduction in the production of apparel in particular as Chinese imports become more competitive, but there are solid increases in the production of textiles and motor vehicle parts. The output prices in most manufacturing sectors decline. Finally, it is notable that services output increases by \$47 million, a figure that represents most of the total output increase of \$55 million. This is because the service sector represents a large share of Botswana's production value; therefore a small increase in production/price of services results in a relatively large change in value. Even though the service sector in this analysis faces no change to its trade barriers, the increased investment and expansion of the capital stock in Botswana make the production of services more competitive relative to other sectors, expanding domestic production and consumption.

The main trade implications for Botswana of a SACU FTA with China are not the direct trade with China but the changes in trade with South Africa and the rest of the world as Chinese trade impacts on South African production and trade patterns. Analysis of the export data shows that there are minor changes in Botswana's exports to China (\$3m), but a decline in exports to South Africa (\$-25m) and an increase of \$43 million to the rest of the world that results in an overall increase of \$21 million. By sector, textile exports to the rest of the world increase by \$24 million but reduce to South Africa for an overall gain of \$17.7 million, while motor vehicle parts increase by \$11 million to South Africa – and this accounts for almost all of the global gains of \$12 million in this sector. Overall apparel exports decline by \$15 million as exports to South Africa decline by \$19 million in response to Chinese competition in that market.

At the start we must note that changes in imports are likely to be underestimated in the BLNS GTAP results, as a lot of the 'outside' (outside of SACU) imports into these countries come through South Africa and may not be recorded as 'outside' trade. For imports into Botswana, however, the direct effects of imports from China following an FTA are significantly more important than was the case with exports to China. These imports increase by \$228 million, but as total imports only increase by \$26 million, most of the imports from China are merely diversion away from other sources.

Analysis of the data shows that imports from South Africa into Botswana decline by \$153 million and those from the rest of the world decline by another \$49 million. By sector, this is especially evident in the textile, clothing and leather (footwear) sectors; total imports only change by \$0.2 million but imports from China increase by \$151 million as Chinese imports are displacing previous imports from South Africa (\$131m) and the rest of the world (\$21m). Imports from China also increase by \$22 million in the chemicals, plastic and rubber sectors and by \$24.8 million in the 'other metal products' sector, with again much of this merely displacing South African imports.

### The production and trade impacts in rest of SACU from the China FTA

Table 5 shows the general overview of the changes by GTAP sector for rest of SACU from the China FTA, with the layout of the table as given in Table 4.

**Table 5: Change in rest of SACU's GTAP sectors, \$ million and percentage**

	Change in production		% Change in quantity		Market
		value	exports	imports	price
	% change	US\$ millions	%	%	% change
<b>Primary agriculture</b>					
other grains	-0.2	2.5	-3.3	2.2	1.4
vegetable/fruit	-1.2	-0.4	-3.3	2.7	1.1
oil seed crops	-0.3	0.9	-5.3	4.6	1.6
plant fibre	-1.5	-0.2	-2.9	1.1	0.6
other crops	-0.6	0.5	-6.3	3.6	1.2
cattle	-0.6	1.9	-3.0	2.0	1.1
other agricultural products	6.7	28.7	-6.7	19.3	3.1
raw milk	0.1	0.8	-8.5	4.8	1.3
wool	4.6	0.3	6.3	5.4	-0.1
<b>Natural resources</b>					
fish	0.4	1.6	1.0	3.0	0.7
forestry	0.0	1.8	-0.8	0.4	0.6
other metals	0.3	3.2	-0.1	1.5	0.1
<b>Processed agriculture</b>					
beef, sheep meat	-0.9	-0.6	-5.1	3.7	0.7

	Change in production		% Change in quantity		Market
		value	exports	imports	price
	% change	US\$ millions	%	%	% change
other meats	31.8	42.5	92.6	7.0	1.8
dairy	0.3	0.7	-1.5	2.7	0.4
rice	0.2	0.2	-0.6	1.0	0.3
sugar	-1.8	-2.2	-2.5	1.5	0.5
other foods	0.0	2.4	-0.5	1.1	0.2
<b>Manufacturing</b>					
textiles	8.1	22.2	28.5	21.7	-3.4
apparel	-2.0	-2.7	19.4	19.5	-2.7
leather	-7.1	-5.8	0.4	13.8	-1.1
lumber	0.8	0.5	2.6	2.9	-0.6
paper products	0.4	0.5	0.1	1.5	-0.4
chemical plastic rubber	1.3	10.1	2.9	2.6	-0.4
mineral products	0.3	0.2	0.3	2.6	-0.2
iron, steel	0.1	-0.1	0.8	0.6	-0.2
nonferrous metals	4.3	15.7	5.0	2.4	-0.2
other metal prod	-1.0	-4.8	-2.7	7.0	-0.2
vehicles & parts	1.4	5.9	3.3	1.8	-0.5
other transport	2.7	1.9	3.9	0.7	-0.5
elect goods	-20.5	-10.4	1.5	6.6	-0.3
machinery equipment	0.0	-1.6	0.3	2.7	-0.3
other manufacturing	0.9	0.3	3.4	2.0	-0.5
<b>services</b>	0.8	90.7	0.3	0.7	-0.1
<b>Total</b>		<b>207.6</b>			

Source: GTAP results

A feature for the rest of SACU is that the changes in production are spread more widely across the economy. In primary agriculture the production of 'other agricultural products' increases by some \$28.7 million in response to a price increase of 3.1%, while other meats increase production by an even larger \$42.5 million in response to a price increase of 1.8%. Note that there is a small loss in sugar production (Swaziland) even though sugar prices increase marginally. Prices in the entire

manufacturing sectors decline, although some of these declines are small. Production and trade increase in textiles and non-ferrous metals but decline in electrical goods in particular. Note that there is little change in the apparel sector overall even though the FTA has a huge negative impact on this sector in South Africa. Again, there is a large increase in service output as relative prices change in Lesotho, Namibia and Swaziland.

Examination of the data shows that exports of other meats (\$44m) and non-ferrous metals (\$9.6m) are the largest sector-specific increases in exports to China that increase by \$62 million overall. Overall exports to South Africa decline by \$11 million, with declines across most sectors, but overall exports increase by a much larger \$117 million as the gains in exports to China are augmented by increases in textiles of \$56.6 million to the rest of the world.

Imports from China increase by \$241 million, with imports of textiles (\$106 million), electrical goods (\$38m) and machinery and equipment (\$22m) leading the way. Imports from South Africa, however, decline marginally across most sectors, as do those from the rest of the world. This cuts the total from China by 50% to an overall increase in imports following the FTA of \$122 million.

### **Tariff reductions and the tariff revenue implications**

Sandrey (2007) explores the implications of SACU trade agreements with respect to changes in tariff revenues, and highlights that there are large welfare transfers to the BLNS countries in that they are obtaining revenues over and above what they would have collected at their own borders if, in fact, there was no Customs Union. There are two pathways through which reduced tariff revenue will flow into the revenue pool from an FTA with China. The first is the obvious one in that without an FTA all merchandise goods from China now enter SACU duty-free. The second is that augmenting these duty-free imports are those that previously come from non-Chinese sources but now come duty-free from China (trade diversion). We have not calculated the first direct revenue loss but note that duty foregone from the second pathway of trade diversion is some \$477 million. This overall tariff revenue effect may well have a larger impact upon the BLNS countries than the direct production and

trade impacts following an FTA with China given the distributive formula of the current SACU Agreement.

## **5. The results of the SACU-India FTA for the BLNS**

The FTA primary scenario considered in this section entails the result from the removal of trade barriers between SACU and India as measured in the year 2020 in a world shaped by the baseline scenario. This implies that all ad valorem tariffs and ad valorem equivalents of specific tariffs between SACU and India are abolished. Differences between the so-called baseline scenario and the so-called primary scenario are therefore the results of implementation of the SACU/India FTA. Note that we are not modelling reductions in either services or any non-tariff barriers.

In running this primary scenario we do, however, obtain seemingly implausible results from the model in that welfare gains to South Africa are exceedingly high; and analysis shows that this result is driven by the removal of tariffs on Indian gold exports from South Africa. This result is consistent with the research presented in Sandrey et al. (2007). While in reality this is a happy juxtaposition of the world's (until 2007) leading gold producer meeting a large jewellery exporter that enables both partners to prosper as India's costs are reduced, we consider that the results are, as stated, implausible. This leaves us with several options, one of which would be to spend considerable time in disaggregating the GTAP database in the particular non-ferrous metal sector and isolating gold from the other precious metals produced in South Africa (platinum, for example). Another would be to place some artificial constraints upon capital accumulation for that same sector in South Africa. We opted for a third situation whereby there is no change to the duty assessed on non-ferrous metal (mainly gold) imports from South Africa as our main scenario.

### **The big picture results**

Table 6 shows the changes in welfare from the FTA assuming complete elimination of all merchandise tariffs except the NFM sector, with the data expressed in US\$ millions as one-time increases in annual welfare at the assessed end point of 2020. South Africa's gains are \$1,200 million, a figure higher than India's \$715 million. Note that Botswana loses \$28 million in welfare (from terms of trade losses as South African export prices increase) while the outcome for the rest of SACU is neutral.

**Table 6: Change in welfare (EV of income) due to SACU/India, US\$ million at 2020**

	Total	Allocative efficiency	Labour	Capital	Terms of trade
South Africa	1,200	170	131	371	528
India	715	-95	32	852	-74
Botswana	-28	-1	-1	-9	-16
Lesotho Namibia Swaziland	1	0	1	3	-3
Total including others	-800	-614	71	-257	-1

Source: GTAP results.

In contrast to the China FTA, real GDP in Botswana records a loss of 0.12% while the rest of SACU's 0.04% gain is modest. Botswana's 0.17 percentage decline in total factor income is split between losses in unskilled labour, skilled labour and capital, with modest increases from land and natural resources. For the rest of SACU there are modest gains across all sectors. For all SACU members, and for South Africa in particular, the impacts upon agricultural factor income are very positive, for the BLNS land prices increase, and there are minor contributions from unskilled labour and capital in agriculture.

### Changes in trade flows

Table 7 starts by introducing the aggregate overall changes to trade flows for the partner countries in 2020, expressed as percentage changes for both exports and imports and then in US\$ million for the trade balance. South Africa has increases in both exports and imports globally once all markets are accounted for, but these result in a deteriorating trade balance as imports increase by more than exports. India has a slightly reduced trade balance as, again, imports increase more than exports. Neither Botswana nor the rest of SACU registers much overall change in their trade balances.

**Table 7: Percentage change in the quantity of total import/export and trade balance, 2020**

	South Africa	Botswana	RSACU	India
Exports % change	1.7	-0.2	0.2	0.5
Imports % change	2.1	-0.5	0.1	0.8
Trade balance US\$ millions	-48	-1	0	-280

Source: GTAP results

### The specific sector results

This section will discuss the production, trade and relative price changes in the main GTAP sectors as they relate to firstly Botswana and then the rest of SACU (Lesotho, Namibia and Swaziland). Again, only those sectors where there has been a change in output of greater than \$100,000 (\$0.1m) at 2020 are included.

### The production and trade impacts in Botswana from the Indian FTA

Table 8 shows the general overview of the changes by GTAP sector for Botswana, with again the same layout as Table 4.

**Table 8: Change in Botswana's GTAP sectors, US\$ millions and percentage**

	Change in Production		% Change in quantity		Market price % change
	% change	value US\$ millions	exports %	imports %	
<b>Primary agriculture</b>					
other grains	0.1	0.9	2.0	-2.4	0.5
vegetable/fruit	0.9	0.9	-1.9	-1.6	0.6
oil seed crops	2.5	0.3	6.0	-4.9	1.1
other crops	2.5	0.4	-0.1	-2.1	1.2
cattle	-0.4	-0.7	3.4	-4.2	0.1
other agricultural products	0.3	0.4	1.5	-1.9	0.5
<b>Natural resources</b>					
coal, oil, gas	0.0	1.1	0.3	0.3	0.6
other metals	-0.1	1.1	-0.1	-1.4	0.1
<b>Secondary agriculture</b>					
beef, sheep meat	-0.5	-0.6	-0.8	-8.0	0.1

	Change in Production		% Change in quantity		Market price
	% change	value	exports	imports	% change
		US\$ millions	%	%	
other meats	-0.4	-0.8	0.7	-7.8	0.1
dairy	0.1	1.2	-1.3	-3.6	0.6
other foods	0.9	2.7	1.9	-1.7	0.5
<b>Manufacturing</b>					
textiles	-2.9	-2.1	-2.9	-4.7	0.2
apparel	-13.7	-6.4	-21.4	-1.3	0.2
leather	-1.8	-0.4	-3.1	-1.3	0.3
lumber	1.2	1.6	0.4	-1.9	0.3
paper products	1.0	2.1	0.4	-0.9	0.5
petroleum etc	0.0	0.2	-0.4	-1.0	0.3
chemical, plastic, rubber	-0.1	0.8	-1.3	-1.0	0.5
minera products	0.5	0.6	0.1	-1.3	0.2
non-ferrous metals	3.8	4.3	3.8	-1.9	-0.5
other metal products	-1.7	-4.7	-7.8	-2.0	0.5
vehicles & parts	-3.2	-10.6	-3.2	-1.0	0.5
other transport	-1.9	-0.5	-2.1	-0.8	0.5
elect goods	-2.4	-0.2	-2.6	-0.9	0.4
machinery equipment	-0.7	-0.3	-0.9	-0.9	0.4
other manufacture	-1.0	-1.1	-3.0	-2.1	0.6
<b>Services</b>	-0.8	-72.2	-0.5	-0.5	0.1
<b>Total</b>		<b>-81.5</b>			

Source: GTAP results

There are limited changes to agriculture and natural resources, with the action again concentrated in the manufacturing and service sectors. There is a reduction (-6.4%) in the production of apparel as Indian imports become more competitive, and there is an even greater decline in motor vehicle and parts as Indian competition both here and in South Africa is felt. Market prices in most manufacturing sectors increase although the output picture in manufacturing is mixed. The export picture is also

mixed, but imports decline in all sectors. Note also that there are output declines in the service sector that account for most of the overall production changes.

The main trade implications for Botswana of a SACU FTA with India are again not the direct trade with India but rather the changes in trade with South Africa and the rest of the world as Indian trade impacts on South African production and trade patterns. Analysis of the export data shows that there are minor changes in Botswana's exports to India (\$11m), but declines in exports to South Africa (\$-19m) and to the rest of the world (\$-23m) that result in an overall decline of -\$23 million. By sector, coal exports to India increase by \$8 million, but this is at the expense of exports to other destinations with no real change overall. For apparel exports to South Africa decline by -\$6.4 million and this is carried over to a total decline of the same amount. The other main change is in motor vehicles and parts where exports to South Africa decline by -\$10.2 million and are again carried through to declines in total exports.

For imports into Botswana the direct effects of imports from India following an FTA are marginally more important than was the case with exports to India. These direct imports from India increase by \$27 million, while imports from South Africa into Botswana decline by \$84 million, and those from the rest of the world increase by \$37 million to complete a picture whereby total imports from all sources actually decline by - \$19 million. By sector, the changes to overall imports are almost all in the manufacturing sectors where minor declines take place across virtually all sectors. Imports from India show increases that are again concentrated in the manufacturing sectors, with increases of \$7.1 million in 'machinery and equipment' and \$7.8 million in chemicals, plastics and rubber as the main contributors. The large declines from South Africa are in machinery and equipment (-\$21.9m) and chemicals, plastics and rubber (-\$14.0m) as Indian competition replaces South African trade at the margin.

### **The production and trade impacts from the Indian FTA in the rest of SACU**

Table 9, using the now-familiar layout, shows the general overview of the changes by GTAP sector for rest of SACU from the Indian FTA.

**Table 9: Change in rest of SACU's GTAP sectors, US\$ millions and percentage**

	Change in production		% Change in quantity		market price
	% change	value US\$ millions	exports %	imports %	% change
<b>Primary agriculture</b>					
other grains	0.0	1.0	-0.3	-2.0	0.5
vegetable/fruit	0.0	1.1	-0.2	-1.8	0.5
oil seed crops	-0.1	0.2	-1.8	-0.7	0.5
other crops	0.3	0.8	-1.6	-4.2	0.5
cattle	0.6	4.7	4.4	-2.9	0.6
other agricultural products	0.0	1.4	1.2	-2.3	0.5
<b>Natural resources</b>					
fish	0.3	1.5	-0.5	-0.7	0.8
other metals	0.1	2.1	-0.1	0.8	0.2
<b>Secondary agriculture</b>					
other meats	0.0	0.6	-2.4	-4.6	0.5
vegetable oils	0.0	0.3	-1.5	-2.5	0.3
dairy	0.2	0.4	-1.3	-3.0	0.3
rice	-0.1	0.2	-2.0	-1.3	0.4
sugar	-0.8	-0.9	-1.2	-0.8	0.3
other foods	-0.3	-1.3	-0.7	-1.5	0.3
beverages and tobacco	0.1	1.7	0.1	-0.7	0.2
<b>Manufacturing</b>					
textiles	0.0	-1.0	1.1	1.7	-0.2
apparel	-1.3	-0.8	0.0	2.1	-0.1
leather	-0.8	-0.5	-1.3	0.7	0.1
lumber	0.1	0.8	-0.8	-1.4	0.2
paper products	1.2	10.8	2.4	-1.8	0.2
petroleum, etc.	0.9	0.3	-0.3	-0.2	0.2
chemical, plastic, rubber	-0.1	0.7	-0.9	-0.8	0.2
mineral products	0.4	1.4	-0.4	-2.0	0.2
Iron, steel	0.0	0.2	-0.6	0.4	0.1
non-ferrous metals	0.6	2.9	0.5	-1.4	0.2
other metal products	0.1	1.1	-2.8	-1.3	0.1
vehicles & parts	0.2	2.3	-0.8	-0.8	0.2

	Change in production		% Change in quantity		market price
	% change	value US\$ millions	exports %	imports %	% change
other transport	-0.4	-0.2	-0.3	0.1	0.1
machinery equipment	0.3	3.0	-0.7	-0.6	0.1
other manufacturing	9.1	6.5	30.8	1.1	0.1
<b>Services</b>	<b>-0.1</b>	<b>7.2</b>	<b>-0.6</b>	<b>0.2</b>	<b>0.1</b>
<b>Total</b>		<b>48.9</b>			

Source: GTAP results

Again, the direct impacts on production are modest, although there are increases in almost all sectors that total \$49 million. The largest increases are in 'other' manufacturing, paper products (Swaziland?) and cattle (Namibia?). Notably, there are market price increases in all sectors except textiles and apparel.

The data shows very little change to the rest of SACU's export profile to India. These increase by \$9 million, as do total exports, since the increases of \$25 million to South Africa are exactly offset by declines of that level to the rest of the world. Some \$7.4 million of the increase to both India and rest of the world is in the same 'other' manufacturing sector where the largest increase in production takes place. Exports to South Africa increase in the non-ferrous metals sector (gold?), paper products and live cattle. These increases generally transfer across to total export increases but they are balanced by declines to the rest of the world across almost all sectors.

A similar pattern is seen in imports into the rest of SACU. Those imports directly from India increase by \$41 million, with this almost exactly balanced overall by a decline of -\$40 million from South Africa. There is, however, not the same one-for-one mapping in the detailed sector profile except that South African imports decline in almost all sectors while Indian imports increase in all sectors. Textiles with an increase of \$14.8 million show the largest increase from India, followed by apparel, machinery and equipment and 'other' manufacturing, with declines in machinery and equipment, and chemicals, plastic and rubber showing the largest declines from South Africa.

Increased imports of textiles (\$3.9m) are the only sector that increase imports in total by more than \$1.2 million.

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*Chapter 5*

**Developing a balanced framework for Foreign Direct Investment in SADC:  
a decent work perspective**

Daniela Zampini

SADC countries are both recipients and providers of Foreign Direct Investment (FDI). Multinationals and Social Policies (MNEs) are currently found in a diverse range of sectors from construction, industrial chemicals, telecommunications and media to paper, packaging, metal and mining industries. Recently, a Protocol on Finance and Investment (FIP) has been developed as a tool for achieving regional integration through the harmonisation of financial and investment policies in member states. However, there are still instances (see for example the Namibia Ramatex case) of SADC countries competing with each other for foreign investment without being able to measure the benefits derived from the investment vis-à-vis the costs of the incentive package provided by the government.

There is growing concern that the process of competitive bidding between countries for FDI may be inducing countries to offer concessions on regulation, taxes, environmental protection and labour standards that are unnecessary. Apart from the direct social and environmental impact, these concessions may impair the competitiveness of the domestic economy, reduce the potential for such investment to contribute to development, and ultimately impede the entry of FDI. 'Beggars-thy-neighbour' investment incentive competition may even distort the international allocation of FDI away from sites with a potentially higher return in terms of development and to investors.

The paper explores the political feasibility of a SADC balanced development framework for FDI, where countries begin to act collectively to resolve the issue of investment policy competition by making incentives more transparent. Two main questions are addressed, namely i) What is the rationale for a SADC-wide framework for FDI? and ii) What are some of the building blocks of a regional policy framework that promotes FDI inflows and more balanced outcomes?

## 1. Introduction and premises

This paper moves from the premise that, contrary to anecdotal reports, studies conducted on the application of *core labour standards* provide no sufficient evidence that lower labour standards are a key factor driving the investment decision by foreign investors. Nor is a country's poor performance vis-à-vis decent work measures correlated to a competitive advantage in trade (Hayter 2004:15)<sup>[1]</sup>.

Building on this argument, in attempts to deal with the myths and facts of globalisation, and with its social dimensions in particular, some may argue that globalisation and its related increased mobility of capital are not the unavoidable trigger for downward spiralling trends in living and working conditions of poor people around the world.

However, scholars complain that existing studies do not account for the behaviour of governments bent on attracting investment and increasing their export competitiveness, or of that of MNEs seeking out the most favourable business environment. It is a widely accepted practice for governments to provide incentives (such as tax benefits) to entice foreign firms to invest in their country. According to UNCTAD (1996), the number of countries offering incentives and the variety of these incentives are on the rise. On the other hand, some literature indicates that, given certain circumstances, it does not really matter what thriving or newly-created investment promotion agencies (IPAs) endeavour to achieve with their one-stop-shops and investment facilitation propositions<sup>[3]</sup>. Investors become enthusiastic about or steer completely away from countries for reasons that do not always appear to be strictly correlated to a country's reputation for offering stable and viable economic

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<sup>[1]</sup> See Kucera (2001). The paper uses country-level measures of worker rights (constructed from coding textual information and emphasising de facto considerations) in econometric models of foreign direct investment inflows and manufacturing wages in samples of up to 127 countries. The wage model is used to address a key hypothesised mediating link between worker rights and FDI, but also considered are other possible causal channels through which worker rights might influence FDI, such as through enhancing political and social stability and human capital development. Worker rights addressed are in regard to freedom of association and collective bargaining, child labour, and gender discrimination and inequality.

Please note that this analysis only refers to FDI (definition: a certain amount of holding interest in an enterprise by a foreign investor). It is a long-term ownership of assets in one country by residents of another country for purposes of controlling the use of those assets. FDI stands in contrast to foreign portfolio investment (FPI), where the investor does not necessarily seek to exert control over the foreign assets. See Graham & Krugman (1995). Hence, the considerations expressed above do not preempt the findings of research on MNEs participating in global production systems.

<sup>[3]</sup> See for instance Morriset (2003).

and democratic governance conditions. Common wisdom would suggest that free cross-border capital flows are a reflection of good practice in government policy and corporate governance and that investors would pull out if companies and/or countries were not well run<sup>[4]</sup>. However, the controversial flow of South-to-South investments to the Sudan or the recent USD400 million investment by AngloPlatinum in Zimbabwe<sup>[5]</sup> may hint at different prevailing dynamics. The case of Zimbabwe, in particular, leads to a first consideration of political economy, which is certainly relevant in the context of SADC countries, that is, the difference between dealing with mineral rents (investment in mining) and other kinds of FDI, such as the more foot-loose manufacturing. We reiterate later in the paper the importance of this distinction not only from a methodological and analytical point of view, but also in terms of implications and recommendations for SADC policy makers, business organisations and other stakeholders, such as trade unions and human rights groups.

There is a body of literature on both determinants of FDI and regional integration. However, it still contentious whether regional integration processes have an impact on the amount and the 'quality' of FDI that individual countries and regional value chains can hope to attract.

The rationale for the International Labour Organisation (ILO)<sup>[6]</sup> to invite its constituents to begin to deal with the regional dimension of FDI was offered by instances, such as the Namibia Ramatex case (see Box 1), where SADC countries were competing with each other for foreign investment without being able to measure the benefits derived from the investment vis-à-vis the costs of the incentive package. The lack of transparency in the system of investment incentives provided by

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<sup>[4]</sup> See argument in Ha-Joon Chang (2007).

<sup>[5]</sup> See, among others, the following websites:

<http://www.guardian.co.uk/business/2008/jun/25/angloamericanbusiness.zimbabwe> and

<http://www.timesonline.co.uk/tol/news/world/africa/article4207971.ece>. Some of Anglo's shareholders said that they would raise the investment with the company amid concern that it may breach pension fund ethical guidelines. Legal & General is Anglo's largest single shareholder with about 5% of the company. A spokesman said: 'We have a corporate and social responsibility policy and that overrides all investment activity. We do engage with companies to ensure they act in an appropriate fashion.' Roy Bennett, treasurer of Zimbabwe's opposition MDC party, said: 'Any company doing business in Zimbabwe is keeping that regime alive. Anglo American is complicit with the regime as whatever they are doing in Zimbabwe has the endorsement of the regime. The money they invest is a lifeline to the politicians and government of Zanu PF.' On the other hand, the author is not aware of what type of discussions the company entertained with the Government of Zimbabwe and what type of pressure the management has been subject to.

<sup>[6]</sup> For more information about the ILO, please visit [www.ilo.org](http://www.ilo.org).

governments is at the core of the 'beggar-thy-neighbour' policy competition, which can reduce the benefits from investment for host countries as a whole and possibly also place downward pressure on labour standards. It is very clear in the case of Ramatex that lack of coordination and dialogue among SADC member states led to questionable outcomes for the workers in all countries involved.

A consensus seems to emerge that regional collective action may be necessary to prevent a situation in which countries seeking to attract much needed investment are be pitted against one another, with negative consequences for workers and for development. Already in 2004, the Report of the World Commission on the Social Dimension of Globalisation (ILO 2004) recommended that 'as a first step toward a balanced development framework for FDI, countries begin to act collectively to resolve the issue of investment policy competition by making incentives more transparent'. At the global level, the Report of the World Commission has generated concern that the process of competitive bidding between countries for FDI may be inducing countries to offer concessions on regulation, taxes, environmental protection and labour standards that are unnecessary. Sometimes countries are forced to offer incentives merely because other countries offer them, and not because they would choose to do so based on a cost-benefit analysis. The result is a 'winner's curse' phenomenon, where the winning country in the FDI competition wishes it had not won because the costs from the attracted investment, primarily in the form of revenue loss but also including other costs, are much greater than the benefits derived from the FDI influx. Apart from the direct social and environmental impact, these concessions may ultimately impair the competitiveness of the domestic economy, reduce the potential for such investment to contribute to local development, and prevent the entry of FDI. 'Beggar-thy-neighbour' investment incentive competition may even distort the international allocation of FDI away from destinations with a potentially higher return in terms of development and to investors, as well as a reduction of world efficiency and welfare as compared to the level which could be attained if countries agreed not to pursue such policies.

This paper was prompted by the interaction with SADC institutions and SADC social partners conducted during the implementation of a programme of collaboration

between the ILO and the SADC Secretariat<sup>[8]</sup>. Entitled ‘SADC: Harnessing social dialogue and corporate social responsibility to achieve Decent Work objectives’, the project was aimed at equipping SADC business’ and trade unions’ umbrella organisations with the necessary tools and analytical skills to participate meaningfully in policy-level discussions concerning SADC regional integration. The main consideration underpinning these efforts is that if SADC policies are generated through a process of social dialogue they are more likely to deliver on both their social and economic objectives. The project also recognised FDI as a priority area among issues of regional relevance where social partners could make a positive contribution (value addition proposition). The project used as a framework of reference one of the ILO instruments dealing with FDI impacts, i.e. the Declaration of Principles concerning Multinationals and Social Policy (MNE Declaration). The MNE Declaration is the only ILO instrument that contains recommendations for enterprises in addition to governments, employers and workers’ organisations. The dual objective of the MNE Declaration is to encourage the positive contribution that multinationals can make to economic and social progress and to minimise and resolve the difficulties to which their various operations may give rise. It provide guidelines on how enterprises should apply principles deriving from international labour standards concerning employment, training, conditions of work and life, and industrial relations. They are intended to guide multinational enterprises (whether they are of public, mixed or private ownership), governments, and organisations of employers and workers in home countries as well as in host countries. The principles laid down in the declaration reflect good practices that all enterprises – multinational and national – should try to adopt. Both should be subject to the same expectations in respect of their conduct in general and their social practices in particular.

This paper is based on interviews with the SADC Secretariat, business organisations and trade unions from the SADC region as well as on the review of the existing policy orientations as expressed by the SADC institutions and individual governments.

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<sup>[8]</sup> The ILO and SADC have a Memorandum of Understanding (MoU) covering several aspects of their collaboration. The MoU was recently renewed (July-September 2008).

**Box 1: The Namibia Ramatex case in a nutshell** (based on Jauch 2004 and Jauch 2008)

**1995:** The Namibian Government introduces the Export Processing Zones (EPZ) Act. Among other incentives provided such as tax holidays, exemption from import duties on imported intermediate and capital goods, free repatriation of profits, the Labour Act of 1992 would not apply to the EPZ sector. The government saw the non-application of labour laws in the EPZ sector as a delicate compromise in order to create employment. When the National Union of Namibian Workers (NUNW) challenged the exclusion of the labour laws in EPZs, a compromise was reached whereby the labour law was allowed to apply in the EPZs, but strikes and lock-outs were outlawed for a period of five years.

**2001:** The Ministry of Trade and Industry claims to have grabbed a N\$1 billion project ahead of South Africa and Madagascar which had also been considered as an investment location by the Malaysian clothing and textile company Ramatex. This was achieved by offering even greater concessions than those offered to other EPZ companies and an incentive package which included subsidised water and electricity, a 99-year tax exemption on land use as well as over N\$100 million to prepare the site including the setting up of electricity, water and sewage infrastructure. This was justified on the grounds that the company would create 3,000–5,000 jobs during the first two years and another 2,000 jobs in the following two years. Considering that Ramatex employed up to 7,000 workers at N\$500 per month, the subsidy is equivalent to 34 months of wage bill.

**2003:** 2,000 to 5,000 thousand jobs are created in Namibia while Ramatex closes its Tay Wah Textiles and May Garments operations in South Africa. 2,500 jobs are lost in South Africa.

**2005:** 2,000 more jobs are created in Namibia but they are mostly migrant workers from Asia.

**2008:** Workers are told to go home at 16h00, due to a power failure at the plant. When they return the next morning, they find the factory gates closed and they are told that Ramatex has closed operations. Upon pressure by the Namibia government they receive one month's severance pay and one week's wage for each year of service.

## **2. Key elements of the FDI context in SADC: labour and business perspectives<sup>[9]</sup>**

If the case of Ramatex was the point of departure for the ILO to draw some serious considerations on the need to identify feasible governance solutions to the ‘bidding war’ to attract FDI, an important milestone in this process was the first bilateral meeting of SADC business and workers organisations to debate the question of whether or not there should be a development-friendly regional policy framework for investment. Held during the SADC meeting of Heads of State and Government (Johannesburg, August 2008), this FDI Policy Dialogue brought together representatives from the regional umbrella organisations, SATUCC (Southern African Trade Union Coordination Council) and SEG (SADC Employers Group). Position papers were prepared with the support and facilitation of the ILO and a set of recommendations emerged, which were brought to the attention of the SADC Ministers of Trade and Industry and the SADC Secretariat.

Labour and business representatives participating in the FDI Policy Dialogue identified some key issues that should be investigated further from a regional perspective and discussed at subsequent regional tripartite fora on FDI, i.e.:

1. Factors behind investment decisions and the attraction of FDI: business environment and the relationship between labour standards and FDI.
2. Market-seeking versus resource-seeking FDI. Implications of a SADC single market for FDI.
3. The relationship between movement of people and FDI.
4. The impact of bilateral investment treaties (BITs); the role of performance requirements; the impact of multilateral initiatives, including codes of conduct and charters.

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<sup>[9]</sup> This section is based on the presentations and discussions held at the FDI Policy Dialogue, an event facilitated by the author of this paper.

**Factors behind investment decisions and the attraction of FDI: business environment and the relationship between labour standards and FDI.** In the position papers presented and discussed at the FDI Policy Dialogue, labour argues that, contrary to neo-liberal theoretical expectations linking FDI flows to the ease of doing business, there is no relationship between the two. SADC countries are ranked by both ease of doing business indicators and FDI inflows<sup>[10]</sup>, and thereafter the Spearman's rank correlation coefficient is calculated. The coefficient is -0.022, casting doubt on expectations that FDI inflows are influenced by the ease of doing business.

It is worth noting that the international labour movement has a fairly idiosyncratic relationship with the way information is presented in the Doing Business reports of the World Bank and International Finance Corporation (IFC) since their first issue, in October 2003. The International Trade Union Confederation (ITUC) claims that the data collected through the Doing Business process has been used to promote labour market deregulation and to recommend that governments implement specific measures to infringe workers' rights (such as social protection) with flagrant disregard to the poverty impact of such measures and their implications for employment, wages, working conditions and respect for workers' fundamental rights (ICFTU 2006)<sup>l</sup>. One example is the case of South Africa. In the Doing Business 2006 report, the country was considered a 'business unfriendly environment' with reference to the 'Grounds for firing' category<sup>[12]</sup>, which does not look positively upon rules such as 'the employer may not terminate employment contract without cause' and 'the law establishes a public policy list of "fair" grounds for dismissal'. It was argued that the report failed to remind the reader that the higher hiring-and-firing indicators for South Africa (as in comparison to Organisation for Economic and Cooperation Development (OECD) countries) were explained in part by the country's affirmative action programmes, adopted by post-apartheid governments to overcome the legacy of decades of racial discrimination in the labour market (Ibid.:12). In 2008, also Business Unity South Africa (BUSA), the voice of South African organised

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<sup>[10]</sup> Data is from the World Bank and the International Financial Corporation: Doing Business Report, 2008. FDI inflow data is from UNCTAD (2008)

[11] ICFTU, How the World Bank and IMF Use the Doing Business Report to Promote Labour Market Deregulation in Developing Countries (Washington, 2006)

[12] 'Hiring and Firing Workers' indicators were called 'Employing Workers' indicators starting with Doing Business 2007.

business, expressed concerns over the methodology and approach adopted in the Doing Business reports<sup>[14]</sup>.

Starting in 2003, Doing Business indicators have been used with a regional leverage.<sup>[15]</sup> Countries were advised to gauge their labour market rigidity indices as recorded under the 'Hiring and Firing Workers' section and take actions to get them lower than the regional average. Unions argue that the 'Doing Business' has been used in SADC countries to place downward pressure on workers' protection. For instance, in the 2006 Article IV Consultation report for Lesotho, the IMF (2006:16-17) recommends a 'downward flexibility of real wages' in Lesotho so as to 'improve competitiveness', without mentioning that wage levels in Lesotho are already lower than those in other countries in the Southern African region (for example wages in the garment manufacturing sector were already less than a third of those in neighbouring South Africa). In turn, Lesotho's low wage levels are mentioned in the IMF's Article IV report for Swaziland, in connection with a recommendation to the local government to 'reduce the cost of doing business', which emphasises that wages in Lesotho are only half of those in Swaziland (IMF 2007:14-15). Labour also observes how in its Country Partnership Strategy (CPS) for the Republic of Mauritius the World Bank announces the availability of a Development Policy Loan for 'reforming the labour market', one facet of which will be 'overhauling the current tripartite wage-setting machinery'. The overall aim of the reform, according to the CPS, 'is to secure a position for Mauritius in the top ten most investment- and business-friendly locations in the world (according to the Doing Business survey) (ITUC/Global Unions 2007:23)'.

**Market-seeking versus resource-seeking FDI. Implications of a SADC single market for FDI.**<sup>[19]</sup> Resource seeking motives play a major role with regard to inward FDI flows into SADC countries and the long-term prospects for raw material value

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<sup>[14]</sup>See the websites [http://www.silobreaker.com/DocumentReader.aspx?Item=5\\_905584147](http://www.silobreaker.com/DocumentReader.aspx?Item=5_905584147) and <http://www.itinews.co.za/companyview.aspx?companyid=21871&itemid=097B5744-55A5-4030-94C9-6E60EFC73D49> (30 September 2008).

<sup>[15]</sup> The World Bank's World Development Report (World Bank 2005:19) entitled 'A better investment climate for everyone' devoted itself to the issue. It argued that a 'good investment climate fosters productive private investment – the engine for growth and poverty reduction. It creates opportunities and jobs for people'. As a result, regional development plans such as the SADC's Regional Indicative Strategic Plan (RISDP) (2004) and the New Economic Partnership for Africa's Development (NEPAD) rely heavily on achieving macroeconomic stability as a basis for attracting investors (cited from the SATUCC position paper).

<sup>[19]</sup> This study covered predominantly European parent companies with operations in SADC.

chain activities remain dominant. During the past two decades, most of the inflows were in the primary and services sectors owing largely to the existence of vast natural resources, privatisation schemes, and the high prices of major commodities<sup>[20]</sup>. In the case of South Africa, the share of the primary sector in inward FDI stock increased from 5% in 1996 to 41% by 2006, while that of the manufacturing sector almost halved from 40% to 27% respectively. In Botswana, the primary sector accounted for more than 60% of the FDI stock in 2005. Only in a few relatively small FDI recipient countries (Madagascar, Namibia and Tanzania), the share of the manufacturing FDI inflows increased in the 1990s. In Madagascar, the share of FDI in the primary sector increased more than it did in the manufacturing sector. In the apparel and textiles sector, FDI inflows suffered from the end of the Multi-Fibre Arrangement (MFA) in 2005.

An analysis of South-to-South investment over ten years suggests that FDI flows into Africa from other developing countries have had two major sources, i.e. Asia (China, Taiwan and India), and South Africa itself (Gelb 2005). South Africa is the largest recipient of Asian FDI, while Mauritius is the largest recipient of FDI from India and Malaysia. Chinese investment is concentrated in the manufacturing sector<sup>[22]</sup> (with, of course, different distribution according to whether we look at number of project or value terms), while the sectoral distribution of South African investment (by number of projects) shows that 20% were in manufacturing, 15% in mining, and a few in agriculture. The vast majority were in service industries: in utilities, hospitality and tourism, construction, IT and banking (Gelb 2005:202).

SADC regional meetings often give consideration to the dominant role of South Africa in the region: is it a magnet for FDI to flow into the region or is it diverting FDI away from other SADC countries? Most regional economies are too small for market-seeking FDI. As Jenkins and Thomas (2002) found, market seeking is more important than cost considerations as a motivation for location in Southern Africa.

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[20] Interestingly, a comparison of UNCTAD's index of inward FDI performance to that of inward FDI potential shows that many African economies are still far below their potential. In this regard, we would like to mention the noteworthy study by ANSA (ANSA, 2007), which looks at how the narrow focus on resource-seeking activities will remain the driving force of FDI inflows to Africa, yet the challenge is to diversify these economies, which have fostered an enclave type of development, with a bias towards extractive activities.

[22] Distribution by investment project is: 46% in manufacturing, 40% in services and 9% in resource-related industries, while in value terms, extractive and resource-related projects comprise a much higher share at 28%, while manufacturing obtains 64% of the value of Chinese investment in Africa

The analysis conducted by Stephen Gelb and Anthony Black (September 2002) shows that except for primary and infrastructure firms, foreign firms entered South Africa for market-seeking purposes: on average, 81% of starting sales went to the domestic market. South Africa is the main recipient of FDI in the region because of its superior infrastructure, physical and financial, and the fact that it has the largest economy. In this context, incentive competition would not make sense and the focus should be on cooperation rather than on competition. The interaction between domestic and regional shares suggests a pattern whereby sectors like information technology (IT) and machinery and equipment (M&E) have dramatically increased their regional share since 1994. In five sectors, the increase in the regional share was at the expense of the domestic share. In four sectors with domestic and regional share together over 85% (consumer goods, M&E, finance and business services and pharmaceuticals) South Africa and the region appear to be a single market (Gelb & Black September 2002).

**The relationship between movement of people and FDI.** Literature that integrates international trade negotiations, FDI and the movement of people is relatively sparse. Given the current interest in liberalising temporary migration, more rigorous studies of the relationships between trade and FDI and patterns of international migration are needed (Manning and Bhatnagar 2004).

If we trace the origins and development of SADC initiatives on regional cooperation on population movement, we realise that huge obstacles have been in the way of the development of a regionally harmonised approach to migration management. The far-reaching 1995 SADC Draft Protocol on Free Movement of Persons ran aground in Mauritius in September 1998<sup>[25]</sup> and it still has not been ratified by the required number of member states, despite having been relaunched recently and promoted throughout the region. Some of these negotiations remain confidential while the movement of people is an increasingly politically sensitive topic in view of the situation in Zimbabwe and other concerns. Moreover, the current economic situation makes it difficult to negotiate access to a country's labour market by those charged

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<sup>[25]</sup> Only nine SADC member states have signed the protocol as of March 2008. See website: [http://www.sadc.int/english/documents/legal/protocols/facilitation\\_of\\_movement.php](http://www.sadc.int/english/documents/legal/protocols/facilitation_of_movement.php) The protocol will only enter into force 30 days after two-thirds of SADC member states have ratified it in accordance with their national constitutional procedures and have lodged their ratification documents with the SADC secretariat. At the time of writing, only Botswana, Mozambique, and Swaziland have done so.

with trade and FDI negotiations, given the complexity of the issues and difficulty in assessing the potential trade-offs.

**The impact of bilateral investment treaties (BITs), the role of performance requirements, the impact of multilateral initiatives, including codes of conduct and charters.** FDI has induced a number of national policy changes in SADC countries since the early 1990s. Several reforms have resulted in the removal of obstacles to the operation of Transnational Corporations (TNCs) so that they now operate in most industries of the economy. Limitations on profit remittances and repatriation of capital have been dropped or substantially relaxed, the practice of imposing performance requirements is now less prevalent and access to incentives available to domestic firms has been granted in most reforming economies. It has been observed that in a number of cases foreign companies are being granted even better incentives. The signing of bilateral investment treaties to protect such investments against political risks has complemented the liberalisation of FDI regimes. By December 2006, African governments had signed over 1,120 such treaties (687 Bilateral Investment Treaties [BITs] and 438 Double Taxation Treaties [DTTs]) (UNCTAD 2008). All of the SADC member states are parties to the Multilateral Investment Guarantee Agency (MIGA) of the World Bank. The result is competition over FDI with widespread and generous incentives to make it more attractive. For example, Angola, Botswana, Malawi, Tanzania, and Swaziland are some of the countries that provide exemption from customs duties and taxes to inward FDIs. As observed by SATUCC in their position paper, the correlation between signing BITs and DTTs and attracting FDI inflows is not obvious. Some countries that have not signed as many BITs and DTTs have attracted larger inflows of FDI (see UNCTAD 2008). Typically, BITs allow investors to accrue rights as 'aliens' without being burdened with obligations.

During the 1990s, export processing zones providing extremely generous incentives were established in Madagascar, Malawi, Namibia, Tanzania and Zimbabwe with similar developments in Swaziland, Lesotho, Botswana and South Africa (spatial development initiatives – SDIs). According to the unions, the lowering of labour standards in the in the EPZ sector in Namibia and Zimbabwe (in the mid-1990s)

showed the levels to which governments in the regions were prepared to bend backwards to attract investors.

International investment agreements do not address social issues such as labour or environmental concerns. The focus is almost exclusively on delivering a liberal environment conducive to flows of investment. Where such social clauses are included, they are merely declaratory and not legally binding. Moreover, international investment agreements are between states, and hence do not create direct obligations for investors. Where provisions for not lowering standards are included in free trade agreements, as in the Americas, or where labour and environmental issues are covered, unfortunately, the remedies only apply to trade-related disputes, leaving investor behaviour to the regulation of host governments. Similarly, the trend of excluding social issues is also evident in multilateral investment agreements. In Africa, only two investment agreements include social goals and conditionalities, at least in a declaratory sense, i.e. SADC in its founding treaty and the Francophone West African Monetary Union.

### **3. The political feasibility of an Integrated Regional Policy Proposal for Balanced Development Framework for Foreign Direct Investment in SADC**

The bottom line of many theoretical enquiries is that as countries continue to receive (or succeed in attracting new) FDI, they may as well identify ways to maximise its positive impacts and deal with the downsides. Moreover, we argue, it would be better done by SADC countries as a regional economic community (REC) rather than as individual member states. The Ramatex case showed how competition among governments effectively shifted profits from the host country to the multinational enterprise, which enjoyed a typical advantage of MNEs over states: capital owners can organise much more easily than can states. Some RECs<sup>[26]</sup> have adopted labour frameworks and established tripartite socio-labour committees to oversee the implementation. SADC has an employment and labour sector (ELS) committee.

The context of our analysis on the political feasibility of a SADC balanced framework for FDI is defined by the interaction between regional integrations tools, such as FIP

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<sup>[26]</sup> For instance, the MERCOSUR's Socio-Labour Declaration of 1998 committed member states to a list of rights based on the ILO conventions they had ratified.

(the 2007 SADC Finance and Investment Protocol), and other SADC instruments, such as the SADC Charter of Fundamental Social Rights, adopted in 2003.

The SADC Protocol on Finance and Investment (2007:26) raises concern about ‘...the low level of investment into the SADC, even though a number of measures have been taken to improve the investment environment’. Using the World Bank’s World Development Indicators, the Alternatives to Neo-liberalism in Southern Africa (ANSA 2007) shows that on the basis of the share of trade (imports and exports) in GDP, the SADC region is more integrated into the global economy than the average Sub-Saharan African country, making it particularly vulnerable to occurrences such as the current financial crisis. Thus, reform of the investment climate has occurred to the extent that UNCTAD fears that the ‘swing in attitudes has been such that expectations may have become too high in terms of what TNCs can do. While they can, indeed, contribute to the development effort in many ways, the performance of the domestic sector is typically much more important’ (UNCTAD 1999:11).

When dealing with the global governance of FDI, public frameworks such as bilateral trade agreements and bilateral investment treaties have often been the preferred option. In other cases, transnational corporation have opted for private frameworks (such as codes of conduct). What role do these new frameworks play in stopping any downward pressure on labour standards that may exist, improving working conditions and promoting development?

It has been shown that bilateral and multilateral agreements are skewed towards liberalising the policy environment, often providing right for MNEs, without focusing on their responsibilities. In some instances, even issues that had been rejected at the multilateral level such as investment and competition policies and government procurement are being sneaked into such agreements. These seek to provide national treatment for FDIs and prohibit affirmative measures that favour domestic capital (see for instance the proposed Economic Partnership Agreements (EPAs) and the Africa Growth and Opportunity Act (AGOA)). As Penfold (2003) pointed out, there are three potential areas of public support for FDIs, i.e. bilateral and multilateral investment agreements; government export credit agencies offering overseas investment insurance; and regional and national development finance institutions offering private sector financing. These three groups provide a series of services to

foreign direct investors and can be tied to social responsibility obligations, which can be mandatory or voluntary.

A key objective of the SADC Protocol on Finance and Investment is the harmonisation of financial and investment policies to make them consistent with the objectives of SADC and to ensure that any changes in the financial and investment policies in one state do not necessitate adjustments in other state parties. Article 19 of the Protocol states that harmonisation is aimed at creating a 'SADC investment zone'. The protocol seeks to achieve this objective through the facilitation of regional integration, cooperation and coordination within finance and investment sectors. The Protocol on Finance and Investment sets up multiple policy bodies, committees, and technical working groups with responsibility for implementation, such as the Committee of Ministers for Finance and Investment; the Committee of Central Bank Governors in SADC; and the Peer Review Panel (made up of the two Committees). States may place emphasis on industries that provide upstream and downstream linkages and have a favourable effect on attracting foreign direct investment and generating increased employment. The protocol permits member states to exclude short-term portfolio investments of a speculative nature or any sector sensitive to its development or which would have a negative effect on its economy. In doing so, states have to notify the SADC Secretariat for information purposes within a period of three months. Article 10 of the SADC Protocol on Finance and Investment on Corporate Responsibility simply states that foreign investors shall abide by the laws, regulations, administrative guidelines and policies of the host state, with no specific reference to the core international labour standards.<sup>[27]</sup> The responsibilities with respect to labour/employment issues can therefore be derived from, and based for instance on, the ILO's MNE Declaration, which is tripartite and also addresses the responsibility of MNEs. Remedies should be applied to the social issues, as much as they apply to the investment ones to achieve an integrated and balanced framework<sup>[28]</sup>.

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[27] In contradistinction, Article 13 of the protocol considers it inappropriate to encourage investment by relaxing domestic health, safety or environmental measures, while Article 14 allows member states to regulate in the public interest where investment is not sensitive to health, safety or environmental concerns.

[28] Member countries also agree to ratify and implement relevant ILO instruments, with the priority given to the core ILO Conventions. Virtually all SADC member states have ratified the eight core ILO Conventions. The charter also provides for information, consultation and participation of workers to

The SADC Social Charter could offer a framework to consider the long-term implications of investments. It embodies the recognition by governments, employers and workers in the region of the universality and indivisibility of basic human rights as adopted through such instruments as the UN's Declaration of Human Rights, the African Charter on Human and People's Rights, the Constitution of the ILO, and the Philadelphia Declaration. Article 4 of the charter encourages member states to create an enabling environment that is consistent with ILO Conventions on freedom of association, the right to organise, and collective bargaining. There is therefore a need to align national legislation with international labour standards so that they have legal force. The underlying element of the reference to ILO instruments is that they are addressed to all key stakeholders, namely governments and employers' and workers' organisations.

SADC governments are beginning to link trade and investment with the social responsibilities of business, with a focus on labour and environmental issues. In South Africa, for instance, companies are considering a code of conduct (based on the MNE Declaration) or a set of ethical principles that would govern various aspects of doing business in Zimbabwe. Such a code has been suggested for South African companies doing business with the rest of the African continent and this broader idea is currently under discussion in National Economic Development and Labour Council (NEDLAC) among the key constituencies of Government, Business and Labour<sup>[29]</sup>. However, these efforts run the risk of being fragmented and remain sometimes only declaratory in their intents. A regional development framework for FDI would offer a more comprehensive approach to dealing with these issues and the social aspects of globalisation. The starting point ought to be the promotion of a paradigm shift so that social issues are not treated as residual, but as an integral part of the development strategy, at all levels, namely, national, regional and, indeed, global.

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promote industrial and workplace democracy. Issues of education and training, as well as health, safety and environment, social protection, equal treatment of men and women are also covered by the charter. The responsibility for the implementation of the charter lies with national tripartite institutions and regional structures, which are encouraged to promote social legislation and equitable growth within the region. On the basis of Article 18, SATUCC has proposed the amendment of the charter. This could offer an opportunity to strengthen the charter by linking it to the ILO's MNE Declaration on MNEs in order to secure a common floor of fundamental principles and rights at work in the context of competition to attract international investment.

<sup>[29]</sup> Based on an interview with Business Unity South Africa (BUSA) and the Department of Trade and Industry (DTI) in South Africa.

It is in this context that the ILO has invited SADC business and workers organisations to participate in a FDI policy dialogue that looked at the role of national policies in maximising the benefits and minimising the costs of FDI, and the role of regional policy frameworks in promoting the flow of FDI to developing countries and more balanced outcomes. The interaction between the two dimensions (national and regional) is a key element in tackling the issue of investment competition. At the national level, for instance, there are questions as to what is the extent of incentives and the effects in respect of the investment diversion. Some of the countries participating in the policy dialogue have supported the idea of developing a multilateral inventory of investment incentives in order to assess the effects. Most importantly, one would need to understand which incentives are part of a longer term development package and which fuel beggar-thy-neighbour policy competition with little real benefit to the domestic economy. As incentives and guarantees are paid with public money, the expectation would be that investments could also be shaped to benefit broad public interest. It is very difficult to say, with reference to SADC countries, what policies have been most effective in promoting backward linkages and what effect have content requirements had on promoting these linkages, or what policies have been most effective in promoting the transfer of technology. This discussion is also relevant to the current debate about the use of performance requirements to maximise the benefits of MNEs for host countries. There are two contrasting approaches in this regard: one that argues in favour of using performance requirements (such as local content and technology requirements) to encourage the development of backward linkages and the transfer of skills and technology, and another that argues in favour of leaving MNEs quite free to design their competitive strategy, while putting appropriate accompanying policies in place. Some authors (e.g. Moran 2007) argue that in a number of industries the latter seems to be a superior method of maximising the benefits in terms of technology transfer, skills upgrading and developing local suppliers.

Some key questions would need to be answered on the role of regional policy frameworks in promoting the flow of FDI to developing countries and more balanced outcomes. In particular:

- What are the development provisions that are needed? How can the national policy measures be supported in a regionally agreed development framework for FDI so that investment can be shaped to benefit broad public interest? How can the necessary policy space for development be accommodated in a regional policy framework?
- How can the interests of home and host countries, investors (both foreign and domestic) and workers be balanced? How should issues such as the right to regulate in the public interest, expropriation and compensation be dealt with? How should disputes be settled?
- What should the modalities be in the pre-establishment phase and post-establishment phase? What should the provisions be on transparency, non-discrimination and national treatment?
- What exceptions and safeguards need to be included?
- What is the role of voluntary regulations and rules governing FDI such as codes of conduct or the ILO MNE Declaration?
- How can transparency and information be shared in a manner that encourages a more balanced international distribution of FDI and reduces information asymmetries?

One important point also arises as to where these issues should be discussed, at what fora and with what institutional arrangements.

For instance, the Nepad/OECD Africa Investment Initiative<sup>[31]</sup> uses a Policy Framework for Investment (PFI) and has explored options for introducing a PFI-like investment dimension in the African Peer Review Mechanism. The OECD PFI covers ten policy areas and addresses some 82 questions to governments to help them design and implement policy reform to create a truly attractive, robust and competitive environment for domestic and foreign investment. The ten policy areas include investment, investment promotion and facilitation, trade, competition, tax, corporate governance, responsible business conduct, human resources development, infrastructure and financial sector development, and public

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<sup>[31]</sup> [Online]. Available:  
[http://www.oecd.org/document/51/0,3343,en\\_2649\\_34893\\_36167091\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/51/0,3343,en_2649_34893_36167091_1_1_1_1,00.html).

governance. These are all considered to be critical points in the assessment of the investment climate.

According to the OECD, the PFI is neither prescriptive nor binding. It emphasises the fundamental principles of rule of law, transparency, non-discrimination and the protection of property rights, but leaves for the country concerned the choice of policies, based on its economic circumstances and institutional capabilities.

In this respect, the OECD also stresses that, although addressed to governments, the PFI needs to be seen in the broader context of other converging international initiatives to improve the investment climate and managing FDI impacts, including the OECD Guidelines for Multinational Enterprises. These guidelines belong to a set of internationally recognised instruments that provide guidance and orientations to TNCs as to how they can manage their social responsibilities. This instrument is similar to the ILO MNE Declaration and initiatives like the Global Compact. They all provide some level of response to the request for better global governance of FDI. Private codes of conduct adopted by multinationals draw intensively on these international instruments<sup>[32]</sup>.

International Framework Agreements<sup>[33]</sup> between trade unions and MNEs can complement efforts at regional level to achieve more balanced outcomes. Such agreements can make MNEs responsible for the behaviour of the often complex global supply chains of contractors and suppliers they have created.<sup>[34]</sup> More importantly, they represent a point of departure for understanding how our global actors investing in multiple countries can balance the interests of investors (both foreign and domestic) and workers in home and host countries. Two South African companies already have IFAs, i.e. Nampak with UNI (Union Network International) and AngloGold with ICEM (International Confederation of Chemical, Energy, Mine

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<sup>[32]</sup> The MNE Declaration is unique in the sense that it is a tripartite instrument, negotiated through a process of social dialogue between business, unions, and governments.

<sup>[33]</sup> International Framework Agreements (IFAs) are instruments negotiated between a multinational enterprise and a Global Union Federation (GUF) concerning the international operations of the company. They are aimed at establishing an ongoing and stable relationship between the parties. Sectoral trade unions from the home country of the company also participate in the negotiation of the agreement. As of 14 August 2008, there are 59 IFAs in place.

<sup>[34]</sup> For quite some time, MNEs argued that they were not responsible for the behaviour of their subcontractors, insisting that their relationships were transaction-based rather than hierarchical. The growth of such supply chains of suppliers and contractors has resulted in new forms of employment characterised by temporary work placement, agency working, cross border outsourcing and flexibility.

and General Workers' Unions). Moreover, a number of companies with investments in SADC have IFAs, as in the case of Lafarge, BSN/Danone, and, of course, several multinationals in the automotive industry, such as BMW, DaimlerChrysler, and Volkswagen with IMF (International Metalworkers' Federation).

Framework agreements are often cited in the corporate responsibility discourse as instruments where multinational enterprises can formalise their commitment to applying the same labour standards to their employees in all the different countries in which they operate. Framework agreements are the result of negotiation between companies and international workers' representatives and may well be one of the most interesting developments in the sphere of industrial relations in the era of globalisation. Most framework agreements make reference to the entire supply chain, even if supplier companies are not parties to them. Companies usually commit to inform all their subsidiaries, suppliers, contractors and subcontractors about the agreement. Most framework agreements also include mechanisms for the global union federation to raise a case if the company violates the terms of the agreement. They could be quite a powerful instrument. As indicated above, some MNEs from SADC and many MNEs operating in the SADC region have adopted IFAs. This could represent a common regional base from which discussions and negotiations on a regional development-oriented framework for FDI could stem.

#### **4. Conclusions and implications for future research**

The discussion with SADC employers and trade unions at the FDI Policy Dialogue highlighted three major trends with regard to incentives and labour issues, i.e. that:

- 'fundamentals' rather than 'incentives' are important factors behind investment decisions. In the case of labour, it is mainly its productivity and the level of skills rather than its cost that matter.
- studies that have carried detailed cost-benefit analyses of incentive-driven policies of FDI such as EPZs concluded that the costs outweigh the benefits (see for instance Jauch et.al. 1996; Kanyenze et.al. 1994).
- the use of generous incentives often attracts 'footloose' type of investors who do not have a long-term perspective.

A regional framework for FDI:

- Could provide a mechanism for advocating policy actions aimed at improving local capacities such as infrastructure development across the region, skills upgrading and expansion of technological capabilities. It has been shown that a coordinated regional approach to infrastructure, training, investment and other sectoral initiatives offers better benefits than country-specific approaches (see ANSA Kanyenze 2007). Critically therefore, regional, as opposed to individual country initiatives offer better prospects for beneficial balanced inward investment flows. One example could be, for instance, the identification of regional value chains, where regional investment in human capital could stir a process of upgrading of enterprises for their integration in these value chains. The author has studied the case of diamond manufacturing, where several SADC countries would benefit from regional investment in skill development with regard to the value addition phase of the process (cutting and polishing).
- Could promote foreign and intra-regional investments into manufacturing and services, thereby encouraging economic diversification and sustainable growth. Studies also show that SADC looks like a single market in at least four sectors (machinery and equipment, financial services, pharmaceuticals and retail).
- Could help to strengthen consultations with the private sector and trade unions. Some commentators have indicated that one of the major hurdles preventing the implementation of FIP is the fact that the participation of the organised private sector has so far been missing, due to the limited participation in the technical committees, subcommittees and working groups related to FIP. This approach emphasises the role of social dialogue not only through the employment and labour sector, but also through other committees with the view to create the necessary political space. More importantly, dialogue with employers' and workers' organisations should also permeate other Directorates of the SADC Secretariat, including TIFI (Trade Investment and Finance).

In Section 2 and 3 of the paper we looked at some of the considerations involved in the development of a regional balanced framework for FDI, including potential building blocks. They range from the existing policies and tools promoted by SADC to innovative approaches such as International Framework Agreements emanating from

MNE and Global Unions. A common understanding of these issues would provide the basis for moving forward to develop an actual proposal for such regional framework. The institutional question of where such a framework should be developed would arise out of an assessment of the substantive policy issues, rather than the other way around.

Over the years, there have been different responses to the increasing social demand for new forms of global governance of FDI. One of the justifications commonly used for global governance is the supply of public goods. Some authors argue that the '[p]rovision of international public goods must include maintaining the rule of law (and especially provide for the settlement of disputes in trade, FDI, and other areas), ensuring monetary and financial stability, setting common standards and regulations for business, managing global communication and transportation, and solving environmental problems' (Gilpin 2001).<sup>9</sup> Though we could not yet find sufficient literature, it may be worthwhile also exploring the impact of incentives that are meant to enhance the provision of public goods, such as for instance the right to enjoy a clean environment. Maybe the Clean Development Mechanism (CDM) under the Kyoto Protocol could represent a first interesting case study in this respect.

Another interesting area for further research would include the analysis of the impact of the home country regulatory frameworks, *ceteris paribus*. It would for instance be interesting to look at the impact of similar investments from China and South Africa in SADC countries to understand what elements of the home-country regulatory framework have a bearing on the developmental impact of the investment.

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## *Chapter 6*

# **Strengthening SADC institutional structures – capacity development is the key to the SADC Secretariat's effectiveness**

Leda Giuffrida & Helmut Müller-Glodde

## **1. Introduction**

This paper combines inside and outside perspectives of the SADC Secretariat. It is based on recent study results (including the Job Evaluation Study, an Institutional Audit, and a Capacity Development Needs Assessment) and takes into consideration recent SADC Council directives and decisions with regard to strengthening SADC institutional structures. SADC institutional reform focuses on strengthening SADC governance and decision making as well as management structures, in particular, the capacities and competences of the SADC Secretariat, subsidiary organisations and SADC national institutional structures required to deliver expected Regional Indicative Strategic Development Plan (RISDP) and Strategic Indicative Plan for the Organ (SIPO) results. For this to happen, the Secretariat, as principal executive institution, needs a distinct organisational identity (as expressed in the Vision, Mission and Values Statement) as well as a clear and an agreed upon understanding of its mandate and core functions. It needs policies and strategies, which provide direction and give focus, and a conducive organisational and managerial structure.

From the authors' point of view,

- only a competent interplay of financial, organisational and management development inputs lead to a sustainable service delivery;
- SADC Institutional Capacity Development (ICD) has to be process- and value-based and has to consider economic, social and ecological issues;
- at individual level: people have to be enabled to participate in their society;
- at organisational level: organisational (institutional) development means to improve its business processes as well as the organisational and leadership culture;

- at societal level: to create an enabling environment such as law and order, participatory decision-making processes, an equitable, socially just and ecologically sound market system;
- ICD is management of transformation owned and driven by SADC management, who are responsible for the key result areas achieved; and
- ICD is a complex process and requires a high level of strategic and process management competence, to 'direct' the various players with their different ICD instruments towards more organisational effectiveness.

The paper analyses institutional capacity issues and emphasises an urgent need for change. It refers primarily to the integrated Secretariat Framework for Capacity Development, which has recently been endorsed by the SADC Council of Ministers for implementation and is based on the prioritised SADC Integration Agenda. The analysis includes critical issues of SADC's 'dance of change' and illustrates institutional challenges, opportunities as well as first achievements. Furthermore, the paper reflects on the role of International Cooperating Partners (ICP) in supporting the RISDP/SIPO implementation process and strengthening SADC's ownership and visibility. The proposed 'SADC Partnership Facility for Capacity Development' is seen as a potential step forward in implementing the Windhoek Declaration commitments. Finally, this article intends to show that in the last two years a momentum for change has been built up among SADC Institutions which could at last consolidate the institutional restructuring process initiated in 2001.

## **2. SADC Institutional restructuring**

The Southern Africa Development Community (SADC) has undergone complex and challenging institutional restructuring efforts since its creation. The most significant is arguably the process initiated in 2001 at the Extra-ordinary Summit in Windhoek, where Head of States approved a Report on the Restructuring of SADC Institutions<sup>1</sup>. The critical issue emphasised in the report was whether the organisation actually had the ability to promote regional cooperation and integration, and what would be the appropriate institutional framework to "make SADC a more effective and efficient vehicle for Community Building" (SADC 2001).

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<sup>1</sup> Report on the Review of Operations of SADC Institutions March 2001

Key elements of the restructuring process were the following:

- the decision to streamline the institutional and management structures in charge of implementing and coordinating the SADC Common Agenda (centralisation of functions at the new SADC Headquarters in Gaborone, Botswana);
- the formulation and implementation of the socioeconomic and political frameworks, i.e. the Regional Indicative Strategic Development Plan and the Strategic Indicative Plan for the Organ on Politics, Defence and Security Cooperation; and
- the development of a self-financing mechanism in form of a regional SADC Development Fund.

The decision to develop the RISDP and SIPO was considered necessary to provide strategic direction to the Organisation. As the Chairperson of the SADC Council of Ministers at the launch of the RISDP explained, “the intention was to provide a clear direction for the region’s policies, programmes and activities over the long term. [The RISDP offers] the blueprint [SADC] must follow for the region’s liberation from poverty”.<sup>2</sup>

However, the RISDP provided a very broad spectrum of priority intervention areas, strategies and activities. During the Summit of October 2006, the need for re-prioritisation of the RISDP was in fact one of the two critical issues recognised that needed to be tackled in order to consolidate the restructuring process. This re-prioritisation exercise would ensure that resources were not thinly spread over too many projects and programmes. The second issue was the alignment of SADC Governance and Institutional Structures with priorities and limited resources.

At the time some commentators<sup>3</sup> argued that the restructuring had been completed only in a “formal” sense and that the ‘engine room of the organization’ (the SADC Secretariat) remained particularly weak in its strategy development and policy formulation capacity as well as in its human and financial capacities.

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<sup>2</sup> Speech by His Excellency Benjamin William Mkapa, President of the United Republic of Tanzania and Chairperson of SADC, at the launch of the SADC Regional Indicative Development Plan, AICC – Arusha, 12 March 2004.

<sup>3</sup> Tjønneland, Isaksen and le Pere (2005).

However, since 2006 the Council has taken a series of decisions aiming at reviving and consolidating the restructuring process and boosting SADC internal capacities. A summary of relevant SADC decisions is provided in Box 1.

### **Box 1: Recent SADC Decisions on the institutional restructuring process**

SADC Summit of August 2006, Maseru, Lesotho: The SADC Heads of State recognised the need to fast-track the implementation of the integration agenda and therefore set up a task force on Regional Economic Integration which comprised the ministers responsible for finance, investment, economic development, trade and industry. These were to advise on measures to scale-up and to accelerate the RISDP implementation process with special attention to the deeper regional economic integration priorities. The Heads of State also recommended strengthening the SADC Secretariat, reviewing the role of the Integrated Committee of Ministers (ICM), and focusing on selected priorities. Meanwhile the Council instructed the SADC Secretariat to evaluate all staff positions ('job evaluation' exercise), with the aim of realigning the Secretariat organisational structure to the SADC priorities.

Extraordinary SADC Summit of October 2006, Midrand, South Africa: The Summit reaffirmed the need to align the Secretariat structure to RISDP priorities, so as to turn the Secretariat into an efficient and effective instrument of regional integration.

SADC Council Meeting of March 2007, Maseru, Lesotho: The Council invited the Standing Committee of Senior Officials to reprioritise SADC programmes and projects, abiding by the RISDP guiding principles of 'additionality' and 'subsidiarity'. The idea was to avoid limited resources being thinly spread over too large a number of different projects and programmes. The meeting of Senior Officials<sup>4</sup> was held in Lusaka in August 2007.

SADC Council Meeting of August 2007, Lusaka, Zambia: The findings of the Senior Officials were presented and the reprioritised programmes approved. The SADC Council of Ministers recommended that

- the reprioritised programmes become the focus of the Secretariat's activities;
- the Secretariat's financial resources and structure should be aligned to the approved priorities;
- member states should strengthen SADC institutions by building the capacity of the

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<sup>4</sup> SADC Prioritisation and Planning Workshop, 6-8 August 2007, Lusaka, Zambia

SADC National Committees and exchanging best practices on how to integrate the RISDP into national policies and strategies.

In addition, the role of the ICM was discussed. In July 2007, a task force of Senior Officials had met to review the added value of ICM functions and mandate in relation to the Council and Sectoral Ministers' Meetings.

Extraordinary SADC Council Meeting of November 2007, Lusaka, Zambia: The SADC Council decided to replace ICM with six Ministerial Clusters and also discussed proposals towards realignment of the Secretariat structure with SADC priorities and limited resources and, in particular, approved

- the proposed new management structure;
- the streamlined technical and administrative structures;
- the Castellion method for the job grading system; and
- the revised Performance Management and Appraisal System.

SADC Council Meeting of February 2008, Lusaka, Zambia: Recommendations regarding functions and responsibilities of the Secretariat's decision-making structures were taken during this Council Meeting. The Executive Secretary was to be responsible principally for strategic and sensitive issues, while management and technical issues should be delegated to the appropriate management level, i.e. the Deputy Executive Secretary and Directors' level.

SADC Council Meeting of August 2008, Johannesburg, South Africa: With regard to the strengthening of the Secretariat's capacities, a SADC Capacity Development Framework, developed by the Secretariat and presented at the SADC International Consultative Conference on Poverty and Development in April 2008, was endorsed.

### **3. Review of Institutional Assessment Findings & Recommendations**

To understand the consolidation process of the SADC institutional restructuring exercise, one may start with the findings from three institutional assessments undertaken between 2006 and 2007:

- the 'Job Evaluation study' by KPMG with focus on aligning the SADC governing and Secretariat organisational structure, grading system, remuneration structure as well as performance management and appraisal system;

- the European Commission assessment through Ernst & Young, with focus on improving SADC Secretariat operating policies and procedures;
- the assessment of Institutional Capacity Development Needs of the SADC Secretariat supported by the German Government through Gesellschaft für Technische Zusammenarbeit (GTZ), with focus on strengthening staff competences, organisational cohesion and capacities.

Main findings and recommendations of the studies are summarized below in form of six core issues to be urgently addressed.

### **Issue 1: Structure**

The assessments reviewed both SADC Institutional Structure (i.e. the governing structure) and the Secretariat organisational structure.

The current SADC Institutional Structure as laid down in the SADC Treaty comprises the Summit of Heads of State or Government, the Council of Ministers and the Integrated Committee of Ministers (ICM), the Standing Committee of Officials, the SADC Secretariat, and SADC National Committees.

Following the SADC Council directive to align the SADC structure to the new priorities, special attention was given to the role of the ICM, a relatively new institution created after the dismantlement of the Sectoral Committees. The ICM is to carry a sort of quality assurance function (SADC Treaty, Art. 12), overseeing the activities of the technical directorates at the Secretariat and monitoring the implementation of the RISDP. At the same time, the ICM is to provide policy guidance to the Secretariat on the areas of integration (i.e. Trade, Industry, Finance and Investment; Infrastructure and Services; Food, Agriculture and Natural Resources; Social and Human Development and Special Programmes). Finally, the institution has the authority to make decisions related to the programmes so as to speed up their implementation.

The main problems observed were that, due to its wide range of representatives<sup>5</sup>, the ICM was not able to provide the policy guidance as expected, and its dysfunctional

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<sup>5</sup> The ICM consists of at least two ministers from each member state but the SADC Treaty does not dictate the composition.

structure did not add value to SADC decision-making processes. As the ICM seemed unable to fulfil its mandate, some of the former Sectoral Committees were reestablished in some key areas, for example, Energy and Trade (Tjønneland et al. 2005), thus duplicating structures and efforts. Consequently, it was recommended to restore Sectoral Committees of Ministers in line with SADC regional integration priorities because these institutions were actually in a better position to provide policy guidance.

In terms of the SADC Secretariat's organisational structure, the studies assessed the key decision-making positions (Treaty positions) as well as its technical and administrative structures. They found that the division of labour, reporting lines and responsibilities between the three top management positions, in particular between the Deputy Executive Secretary (DES) and the Chief Director, were neither clear nor consistent with the Treaty provisions. Unclear lines of authority and responsibilities might prevent coordinated decision making at the top management level and consequently reduce the Secretariat's efficiency and performance.

To address these issues, the studies outlined two alternatives:

- a second DES position could be established to replace the Chief Director position: one DES would be responsible for the activities of the technical directorates, the other DES would oversee the support functions such as administration and finance;
- two Chief Directors would be appointed, who would report to the DES, with a similar division of labour as described above for the two DES positions.

Regarding the Secretariat's administrative structures, the assessments recommended a streamlining of the organisational units responsible for the support functions.

## **Issue 2: Vision, Mission, Values and Mandate**

It is fundamental for SADC to have a distinct organisational identity based on its Vision, Mission, Values and Mandate, which need to be effectively communicated and understood by all staff. Even though the Secretariat formally has a clear Vision

and Mission and Value Statement<sup>6</sup>, it seems that more work is required to internalise it. This also applies to the respective values, organisational culture and cohesion.

### **Issue 3: Leadership and result orientation**

Leadership is in general the key component of successful institutional development processes. In this context, the role of the leaders is to provide an environment in which reforms, innovation and capacity development can occur. It was recommended that, due to the new composition of staff and management, the Secretariat's senior management functions and responsibilities need to be clarified as well as supervision and reporting lines.

Due to the numerous functions of the Secretariat, senior management needs to balance for time spent by the directorates on each of their core functions. The senior management should regularly review the plans of the directorates to ensure their consistency with the Key Result Areas of RISDP and SIPO.

In terms of leadership style, results-based management is deemed to be a prerequisite if SADC shifts its focus towards key result areas linked to key performance indicators in its operations.

### **Issue 4: Strategy and policy formulation**

The Secretariat requires strategic direction to guide its over-all actions and day-to-day work. To this effect, the two strategic documents (RISDP and SIPO) need to be unpacked. The Secretariat has already started such a process for the RISDP by developing:

- a unit-based 15-year RISDP Implementation Framework, with milestones defined;
- directorate-/unit-based 5-year RISDP Strategic Plans (now 2009/10–2013/14);
- detailed directorate-/unit-based Annual Business Plans and Budget.

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<sup>6</sup> The Secretariat's Vision is: 'A reputable, efficient and responsive enabler of regional integration and sustainable development'. The Secretariat's Mission: 'To provide strategic expertise and coordinate the harmonisation of policies and strategies to accelerate regional integration and sustainable development'. The Secretariat's Values: 'Quality service and competency, professionalism; integrity; commitment and passion; team spirit; mutual respect and trust; courtesy; equality of opportunity; transparency and frankness'.

An urgent need was identified to strengthen Secretariat's policy and strategy development capacities. Secretariat management and senior staff need to be trained in the use of policy and strategic management tools for defining and measuring results. In this context, the role of the Strategic Planning, Monitoring and Reporting is extremely important. Technical directorates need assistance in using these tools for developing their sectoral strategies and improve coordination with other regional strategies. The cross-cutting Policy and Strategic Planning, Monitoring and Reporting function of the Secretariat needs to be strengthened in order to provide strategic direction to member states and to ensure robust monitoring of RISDP implementation and achieve synergies between directorates.

In conclusion, in order to fulfil more effectively its functions the Secretariat needs to be strengthened in the following areas: systematic policy analysis, strategy development and setting policy priorities, as well as planning, monitoring and reporting.

#### **Issue 5: Processes and systems**

The assessment of SADC operating policies and procedures, in particular, Accounting, Audit, Internal Controls and Procurement tested Secretariat's procedures against international best practices.

The assessors found that the SADC Rules and Procedures<sup>7</sup>, approved by the Council in August 2006 and implemented from April 2007 onwards, do not always clearly document actions with regard to procedures, roles and responsibilities. Consequently, the Secretariat services have difficulties to adhere to the approved Rules and Procedures and need guidance. However, the assessment was concomitant to the implementation of the new Rules and Procedures, and desk instructions or activity manuals had not yet been developed at the time.

Overall, the assessment uncovered some weaknesses in the four areas of the Secretariat financial management system, which could be strengthened with additional capacity development support, ensuring the application of international standards. The application of international best practices is expected to improve

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<sup>7</sup> The New SADC Rules and Procedures include SADC Procurement Rules and Procedures, SADC Financial Regulations and Procedures, SADC Internal Audit Charter and SADC Standing Orders.

management and accountability, the efficiency and effectiveness of the SADC Secretariat.

### **Issue 6: Staff and HR management**

In terms of recruiting, the two most critical constraints observed by the assessments refer to the issues of the 'needs driven growth' of the Secretariat and the adherence to a recruitment system based on national quota, which assures a balanced representation of all SADC countries.

The Council meeting in Arusha in 2004 decided that the expansion of the Secretariat's structure should be incremental in response to the justifiable increase of functions and activities required to implement the deeper regional integration agenda. According to the assessment, this arrangement 'impacted on the functional relationships of the core business of the Secretariat, the directorates and organisational units' (Kasanga et al. 2007).

In addition, a non-competitive remuneration policy and the quota system limit the number of staff that can be recruited from any single country. These may prevent SADC from recruiting the best candidate for a given position or even from filling an approved position, thereby creating a situation where the current staff's workload becomes excessive. In fact, one of the assessments found a severe mismatch between the activities to be undertaken by the directorates according to the Strategic Plans and the staff available to do so.

Thus, the assessment concluded that the Secretariat 'may not be able to discharge its role and responsibilities exhaustively and effectively due to staff shortages' (Ernst & Young 2007).

The analysis of the six core issues, based on the three studies, explores distinct but intertwined facets of SADC institutional constraints and expresses the need for:

- An organisational structure with clear reporting lines, well-defined roles and responsibilities, and with strong internal and external communication and coordination systems;

- Responsive recruiting and grading policies, a competitive remuneration system, and a robust performance and appraisal system;
- Robust and responsive operating rules and procedures, supported by an appropriate Management Information System;
- Adequate management practices and systems supported by staff with appropriate competencies, whose culture and value systems also provide the 'glue' required to make the Secretariat function more effectively and deliver its outputs (SADC Secretariat Capacity Development Framework 2008).

The assessments also gave recommendations on how SADC could address the identified institutional and capacity constraints. They envisage the development of a comprehensive organisational capacity development programme, providing a framework for the management of the institutional development process and capacity interventions.

The following section will explain how SADC dealt with the assessments and in particular how the Secretariat came back to this last recommendation.

#### **4. SADC integrated approach to institutional capacity development**

It has been established that SADC, in particular the Secretariat, faces a number of challenges in order to efficiently and effectively deliver RISDP and SIPO results. The assessments focused on institutional and human capacity constraints that need to be addressed without delay.

In the roadmap for implementing institutional change (SADC Secretariat Capacity Development Framework 2008), the Executive Management explained that the three core intervention areas for the consolidation of the SADC Institutional restructuring were:

- the reprioritisation process of the SADC Integration Agenda and the refocusing of the regional Governance Structures;
- interventions aimed at strengthening the SADC Secretariat Capacities and Management Processes ; and lastly,

- interventions to strengthen National SADC Governance & Management Structures (including regional subsidiary organisations, the SADC Tribunal and regional Centres of Excellence).

The process of reprioritising the SADC Integration Agenda started with the SADC Heads of State (Summit of August 2006) recommendation for the Secretariat to focus on selected priorities. Due to limited resources and the need to sequence RISDP activities, a prioritisation exercise was undertaken the following year. The Standing Committee of Senior Officials met in Lusaka in August 2007 to review the twelve intervention areas proposed in the strategic plan and to prioritise them according to their added value for the deeper regional integration process and contribution towards poverty reduction.

Based on the RISDP principles of subsidiarity, additionality, poverty reduction and variable geometry, the Council meeting of August 2007 in Lusaka approved the following programmes in support of deeper regional integration (SADC Council Record August 2007, Lusaka):

- Peace and security cooperation (democracy and good governance) as a pre-requisite for regional integration;
- Trade/economic liberalisation and development through progressive Market Integration, i.e.:
  - Free movement of goods, services and factors of production
  - Stability oriented macroeconomic convergence
  - Financial market integration and monetary cooperation
  - Intra-regional investment and foreign direct investment
  - Productive competitiveness and supply side capacity
- Regional Infrastructure and Services (transport, energy, water and ICT);
- Special programmes of regional dimension regarding Education and Human Resource Development, Health, HIV/AIDS and other communicable diseases, Food Security and Transboundary Natural Resources, Statistics, Gender Equality, Science and Technology.

The prioritisation exercise revealed that interventions in the above areas contribute to deeper regional integration and therefore would best be managed at central level by the Secretariat which should align its financial and human resources to reflect these priorities. Interventions outside these priorities should be considered areas for regional cooperation to be coordinated at member state level.

As far as the focusing of the governing structure was concerned, the key issue was the role of the ICM, which had been debated since its establishment. It has been argued that the ICM is not adding value and only duplicates the Council's role. In November 2007, the Council, after wide consultations, abolished the ICM (which had its last meeting in June 2008) and established six ministerial clusters, namely:

- Cluster for Trade, Industry, Finance and Investment (former Ministerial Task Force on Regional Integration);
- Cluster of Infrastructure and Services in Support of Regional Integration;
- Cluster of Food, Agriculture, Natural Resources and Environment;
- Cluster of Social, Human Development and Special Programmes;
- Cluster of the Organ of Politics, Defence and Security Cooperation;
- Cluster on cross-cutting issues related to Science and Technology and Gender.

The functions of these clusters was to provide policy guidance to the directorates in the core areas of regional integration, to review the progress made by the directorates, to ensure synergy among the different sectors, and to constitute the 'clearing house' for issues to be referred to Council.

The next step in the institutional restructuring process was the alignment of the SADC Secretariat's functions to the integration agenda. Core functions of the new Secretariat are (SADC Secretariat Capacity Development Framework 2008):

- 'Think tank' with the capacity to strategically advise and guide the member states on the implementation of the SADC Common Agenda;
- Principal regional coordinator of policies, strategies and programmes of the deeper regional integration process;

- Provider of support services (legal, administrative, financial and procurement services) to technical directorates; and organiser of annual consultative conferences and meetings of the SADC decision-making structures;
- Professional 'programme manager', to strategically plan and budget, facilitate the implementation process, monitor organisation programmes, and systematically report on progress in close coordination and cooperation with SADC stakeholders.

The Council approved a new SADC organisational structure based on proposals of the job evaluation study. The position of Chief Director was abolished and a second Deputy Executive Secretary position introduced. Thus, the two Deputy Executive Secretaries are to be responsible respectively for Regional Integration and for Finance and Administration. This new arrangement is expected to bring clarity into the lines of authority and improve coordination among senior management structures. The role and responsibilities of each Deputy Executive Secretary position shall be established and described within their respective job descriptions. Furthermore, the new senior management structure shall allow the Executive Secretary to hand over some of the management and business responsibilities, so as to focus on more strategic and sensitive issues<sup>8</sup>. The SADC Secretariat's organisational chart (Fig.1) reflects the newly aligned Secretariat organisational structure.

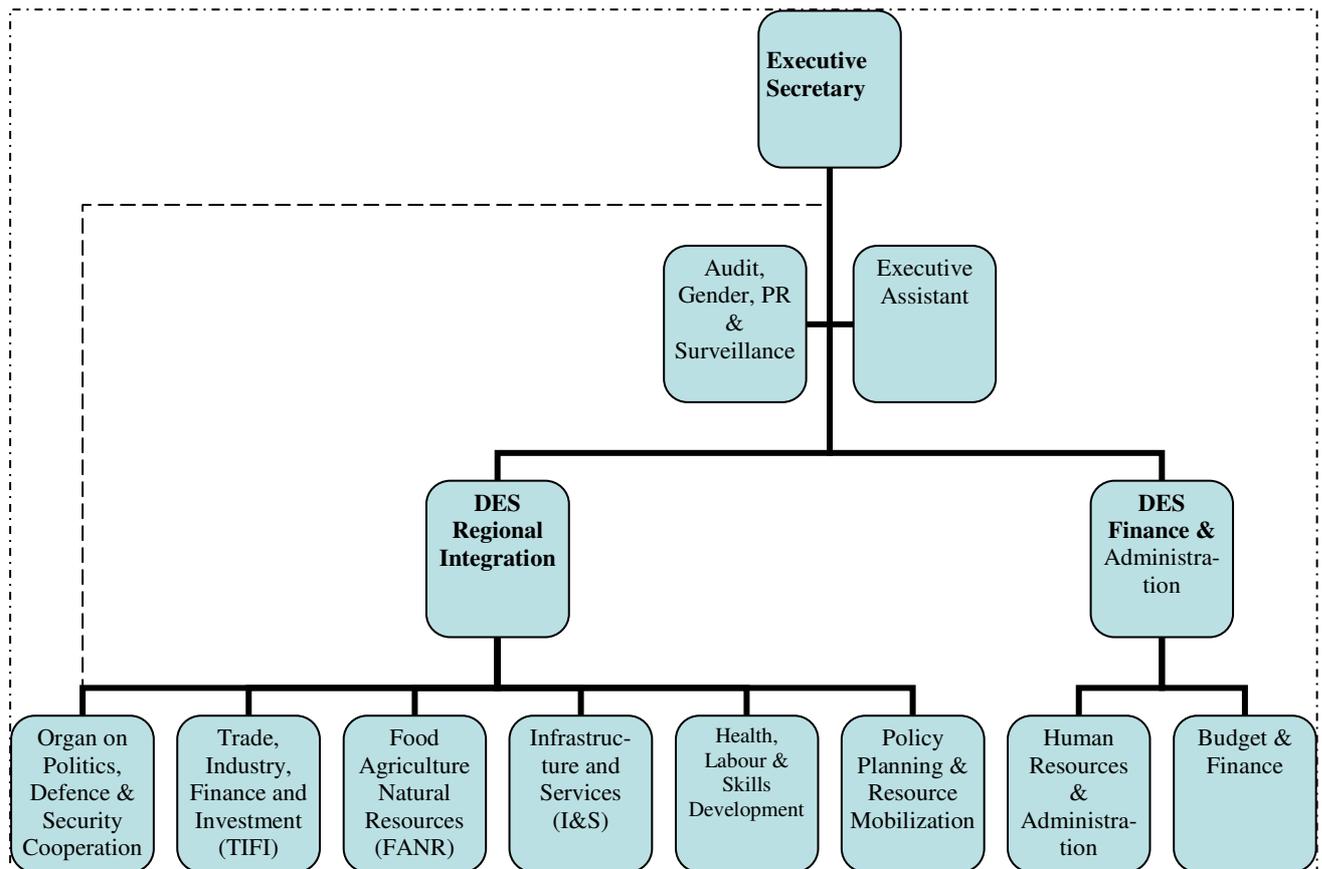
The Deputy Executive Secretary for Regional Integration is responsible for overseeing the programmes of regional integration of the technical directorates as well as the work of the directorate for policy planning and resource mobilisation. The latter is of great importance because it shall provide strategic direction to the Secretariat, recommend regional policies and coordinate with other Regional Economic blocks.

The Deputy Executive Secretary for Finance and Administration is responsible for the two directorates: Human Resources and Administration, and Budget and Finance. The new organisational structure streamlines the support functions of the Secretariat and established clear reporting lines.

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<sup>8</sup> SADC Council decision of February 2008

**Figure 1: Secretariat organisational structure**



Regarding the new Secretariat's structure, all job descriptions and reporting lines have been aligned to the Secretariat's new functions and to the SADC integration priorities. The new Secretariat structure requires serious strengthening of the Secretariat's human and managerial capacities and competences, if the Secretariat is to perform according to required standards.

Secretariat management recognised that in order to consolidate the restructuring process, it needed to develop an integrated framework for managing all capacity interventions. Thus, a 'SADC Secretariat Capacity Development Framework' was developed and presented by the Deputy Executive Secretary at the April 2008 SADC International Consultative Conference on Poverty and Development, in Mauritius. The document spells out the objective of the SADC Secretariat Institutional Capacity Development Programme (ICDP): improving operations by strengthening managerial skills and day-to-day business processes. It proposes a detailed plan with activities to

be undertaken within a set time frame and budget implications, with key results expected to be achieved.

#### **4.1 SADC Secretariat Institutional Capacity Development Programme**

The Secretariat Institutional Capacity Development Programme (ICDP) is an integrated and comprehensive capacity development response to the re-aligned Secretariat organisational structure and staff establishment in order to tackle internal institutional capacity constraints as identified in the various institutional assessment studies. The Secretariat, as principal executive institution, has to be strengthened according to its mandate, core functions, set priorities, vision, mission and values with the aim to efficiently execute its day-to-day business processes and to deliver expected results with regard to RISDP/SIPO programme implementation. Thus, the main objectives of ICDP are to consolidate the institutional restructuring process and to increase efficiency and effectiveness of the Secretariat, while strengthening managerial skills and staff technical capacities in order to provide quality service. Within the ICDP, the Secretariat has embarked on the following key intervention areas (SADC Secretariat Capacity Development Framework) as summarised in Figure 2. Implementation of the ICDP will not only require the full commitment of the SADC member states and the Executive Secretary, but also additional financial resources to be mobilised through support of International Cooperating Partners. Thus, effective engagement of ICPs will therefore be important.

#### **4.2 First results of Institutional Capacity Development Interventions**

Figure 2 shows the stages of each key intervention area and illustrates where work is already underway.

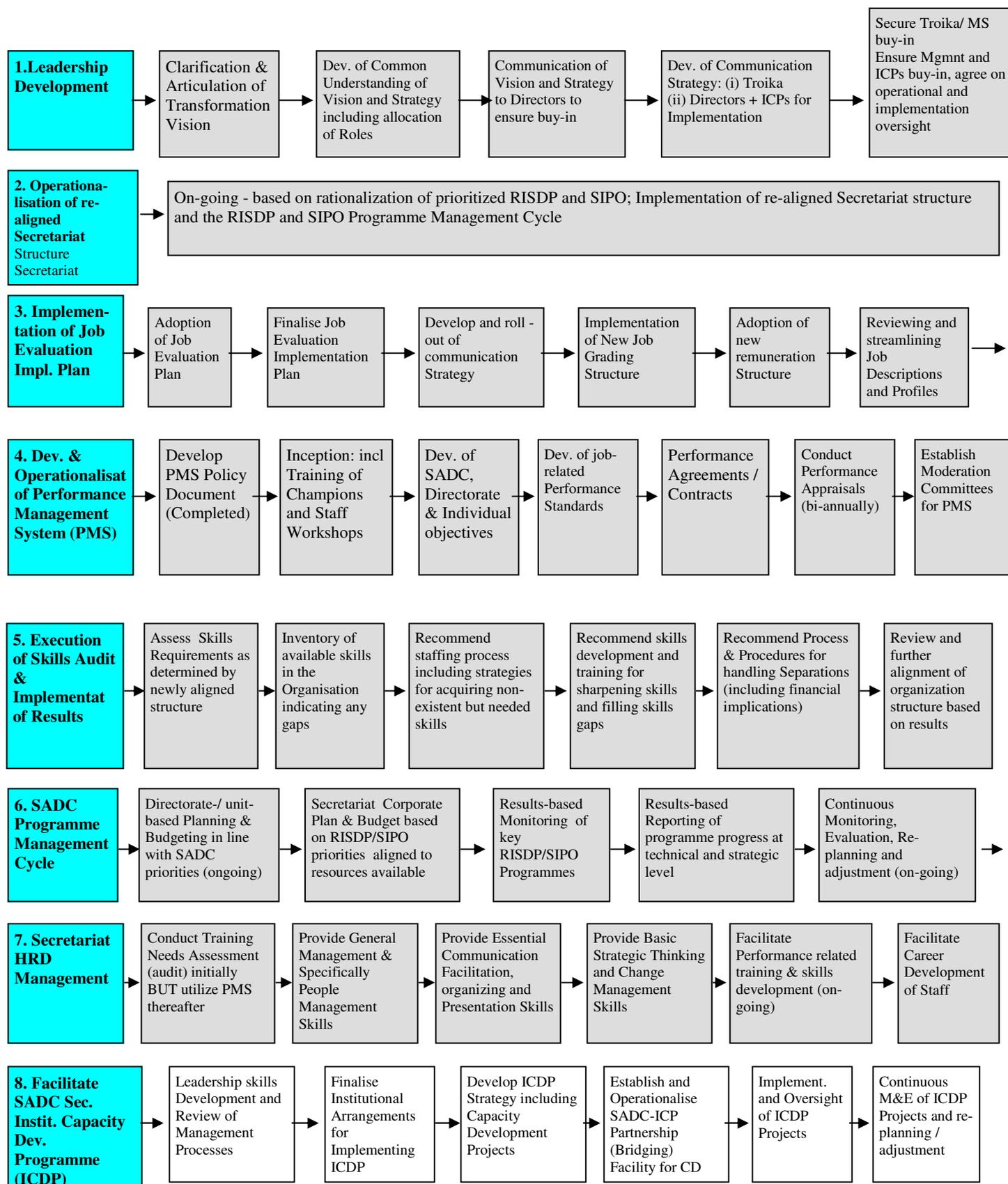
In 2007 Secretariat management institutionalised a SADC (RISDP/SIPO) Programme Management Cycle on the basis of the RISDP prioritisation and operationalisation exercise and the need for alignment of financial and human resources with the deeper regional integration priorities. Secretariat staff has now developed a directorate-based 5-year Strategic Plan and Budgets and more detailed one-year Annual Business Plans and Budgets outlining key result areas, outputs and indicators so that the governing structures and key SADC stakeholders can use them

to measure progress. This may be regarded as a strong move towards institutionalising the programme planning and monitoring function in the Secretariat.

The directorate-based strategic and operational plans together with the budgetary frameworks include sources of funding and indicate potential resource gaps. This provides a transparent platform for International Cooperating Partners to align their SADC support portfolios and contribute additional resources into SADC priority programmes.

Furthermore, ongoing interventions have led to the development of the Secretariat's Performance Management Policy, providing a guiding policy framework for the implementation of the Performance Management and Appraisal system. The overall objective of the policy is to outline roles and responsibilities of key players and to guide the implementation of the system.

**Figure 2: Key Elements of the Consolidation of the SADC Secretariat Restructuring Process: Road Map**



## **5. Implications of SADC restructuring and the Secretariat Capacity Development Framework for International Cooperating Partners**

The SADC Secretariat Capacity Development Framework and its related Institutional Capacity Development Programme endorsed by the SADC Council of Ministers in August 2008 are driven by the Secretariat executive management. By implication, all Secretariat capacity development interventions supported by International Cooperating Partners shall fall under this framework. This is in line with the SADC-ICP Windhoek Declaration (Paris Declaration, Accra Agenda for Action) and corresponds to the five pillars of Aid Effectiveness, namely Ownership, Alignment, Harmonisation, Management with view to results, and Mutual Accountability. Thus, ICPs should align their SADC capacity development support with the Secretariat Capacity Development Framework, its Institutional Capacity Development Programme and priorities.

By applying the principles of the new SADC-ICP Partnership Framework ('Windhoek Declaration'), SADC proposes to establish a SADC Partnership Facility to be sourced through a Joint Programme Financing Arrangement. Such a joint SADC-ICP arrangement can make significant financial and technical assistance contributions to the implementation of the ICDP. Thus, Secretariat executive management has urged ICPs during the April 2008 SADC International Consultative Conference on Poverty and Development in Mauritius for a coordinated support towards a harmonised implementation of its Capacity Development Framework, using the Partnership ('Bridging') Facility. The 'Partnership Facility' can provide an entry point for ICPs to channel their funding support for the implementation of the outlined Secretariat Capacity Development Framework, assuring commonly accepted quality standards in managing and disbursing funds. It would also provide a temporary vehicle for 'on the job training' in operating ICP funds and the setting up of a common fund handling process. Capacity Development Projects funded by the Partnership ('Bridging') Facility for Capacity Development through a joint programme financing arrangement will greatly enhance SADC Secretariats' efficiency, credibility and ensure greater ownership.

Over time this vehicle will reduce transaction costs and enhance the fund absorption capacity of SADC through the establishment of a well coordinated, efficient and transparent fund handling process, beginning with the development of quality

Capacity Development Projects, prioritisation, effective implementation, procurement, spending and accounting and ending with comprehensive, result-based reporting.

## **6. Conclusions and outlook**

The paper demonstrates that a momentum for change has been recently built among SADC institutions, in particular with regard to the Secretariat. It is essential for the organisation to keep up the momentum and consolidate the restructuring process so that the SADC Secretariat can fulfil its function and facilitate regional integration. Recent international developments (e.g. the global financial crisis, basic food price increase, climate change, oil price increase, regional energy crisis, and the regional negotiations for the Economic Partnership Agreements) have shown that SADC may be very vulnerable to the rapidly changing environment and that its institutions need to be strengthened in their policy formulation and strategy development capacities including conflict management, mediation and negotiation skills as well as regional forecast capacities to be able to respond adequately and adapt quickly.

SADC, and in particular its executive institution, needs to effectively and efficiently deliver expected results. The rapid results-oriented implementation of the recently approved institutional capacity development programme shall in fact increase the organisation's service delivery capacity. Some achievements in this direction have been made:

- SADC has a more focused governing and decision-making structure;
- SADC has a prioritised integration agenda and key regional integration programmes to be centrally coordinated and managed by the SADC Secretariat;
- the Integrated Committee of Ministers has been replaced by six Ministerial Clusters to guide and accelerate the deeper regional integration process;
- a Secretariat vision, mission and values has been developed and the core functions of the Secretariat as 'think tank', principal regional coordinator of policies, Provider of support services, and professional programme manager have been clarified;

- a new and more functional Secretariat organisational structure consistent with the Secretariat's mandate and in line with SADC integration priorities has been approved;
- the Secretariat presently implements the Council decision to align the SADC Secretariat's financial and human resources with priority areas and programmes of regional integration;
- a comprehensive SADC Secretariat Capacity Development Framework has been approved, and an institutional set-up to drive the implementation process of the ICDP is proposed;
- selected capacity development interventions such as the institutionalisation of the Performance Management and Appraisal System have been successfully started; and
- a joint SADC-ICP Partnership Facility for Capacity Development is proposed, and various ICPs have indicated their willingness to financially and technically support the implementation of the ICDP.

But, keeping in mind the limited human and financial resources (and institutional capacity constraints) at regional and national level; taking into consideration that policy formulation, strategy development, planning and budgeting of key regional integration programmes are an imminent political, interest-led process of negotiating and agreeing in order to add value and visible benefits to the ongoing national plans and programmes; and notwithstanding the significant achievements obtained so far, there are still structural, managerial and programme delivery challenges for SADC and its executive bodies at regional and national level to successfully deliver key regional integration programmes.

These short-, medium- and long-term challenges are:

- **rapid results-based implementation of the** (recently endorsed by Council) **SADC Capacity Development Framework and ICDP**, so that the Secretariat is able to play a more proactive and competent role in regional integration;

- **prioritisation and ranking of strategically important RISDP/SIPO** programmes with SADC member states for the next five year on the basis of approved RISDP/SIPO priorities;
- **clarification of roles** in implementing the key RISDP/SIPO programmes at regional and national level, that is role clarification with regard to decision making, planning, coordinating, programme management, monitoring and reporting of SADC institutional structures at regional and national level;
- **buy-in of key SADC stakeholders** and cooperating partners into key RISDP/SIPO programmes through trust building and participation at various levels, political commitment, and mobilisation of resources: the need to align their resource envelopes with prioritised RISDP/SIPO programmes;
- **member states need to jointly demonstrate strong political commitment to the common values laid down in the SADC Treaty;**
- **SADC visibility and ownership**, in particular in driving SADCs priorities and key regional programmes needs to be strengthened;
- **need to strengthen SADC National Coordination and Implementation Structures** (Come 2007) in line with SADC priorities;

It is quite evident that member states are at different stages in the establishment and operationalisation of SADC National Committees (SNCs) and strengthening of RISDP/SIPO implementing structures. Some member states have taken a number of progressive steps to institutionalise the SNCs, supported by dedicated resources. Others, however, appear to have accorded SNCs low priority, leaving the responsibility for coordinating SADC programmes at national level to a single or a few officers within the National Contact Points. In future it is important that, with regard to SADC's priorities, the relevant sector ministries become involved to accelerate the RISDP implementation process at national level and that RISDP/SIPO programmes are

- 'unpacked' amongst the member states so as to determine levels at which specific interventions are to be implemented;

- integrated into national annual and medium-term plans and budgets by the member states;
- coordinated, implemented, and monitored according to regionally agreed performance benchmarks that all member states adhere to;
- more visible and owned by SADC stakeholders at national level.

Consequently, the national coordination and implementing structures of RISDP/SIPO programmes have to be adequately technically capacitated and resourced, and the communication and coordination lines between all public, private sector and civil society actors involved at different levels have to be strengthened and responsibilities clarified (SADC Secretariat Capacity Development Framework).

Further short-, medium- and long-term challenges are:

- **the need, in particular, to strengthen RISDP/SIPO Planning and Operationalisation of key SADC programmes at National level:**

the attainment of the SADC goal will largely depend on the extent to which member states will implement prioritised RISDP/SIPO. This implies that member states should become deeply involved in developing and implementing national plans that are in line with aspirations of the RISDP. Thus, the RISDP/SIPO planning and budgeting at national level should correspond with the overall RISDP Implementation Planning Framework at regional level, and at the same time the regional RISDP planning framework should be aligned with the national development processes in the respective SADC member states. Translating RISDP objectives, priorities and programmes into action requires an operational framework at regional and national level. For many SADC member states, the Poverty Reduction Strategy Paper (PRSP) will constitute the primary strategic and implementation vehicle to meet RISDP/SIPO targets. Within the framework of their Country Strategy Papers, SADC member states will need to develop their own, country-specific numerical and time-bound RISDP/SIPO implementation plans directed at meeting the RISDP objectives and priorities, and also articulate the respective policies and programmes to attain these. Consequently, each member state should include a chapter on regional integration (RISDP/SIPO) programmes in their respective National Plan and

Budget, which highlights the relevance of regional integration goals to their short- and medium-term national strategies and policies and provides information on their resource allocation to implement RISDP/SIPO programmes at national level;

- **setting up a results-based monitoring, evaluation and reporting system at national level:**

Under the leadership of the National Contact Points, designated in the member states, the SADC National Committees have the responsibility to provide coordination function in the development of the Monitoring and Evaluation framework for RISDP at national level. To own and sustain the system, the RISDP Monitoring framework should be an integral part of the central planning system of the national governments. In many countries monitoring of national development goals and objectives is the responsibility of planning commissions in the office of the president and cabinet or ministries of economic planning and development. The National Contact Points in the Ministries of Foreign Affairs (in a number of countries in the region) provide the interface with the SADC Secretariat. The National Contact Points need to ensure that they integrate RISDP/SIPO programmes in their national plans and budgets which have to be implemented by line ministries where sector-specific country targets and objectives are concerned. The achievements of the RISDP targets at national level will have to be regularly reported (i.e. quarterly and annually) to the Central Planning Commission who in turn will have to report to SADC Secretariat. The country reports will then be aggregated into a regional report. The SADC National Committees with their coordinating responsibility will from time to time review and endorse the country-based RISDP/SIPO progress reports before they are finally sent to SADC Secretariat. The annual RISDP/SIPO country report will inform the wider public and policy and decision makers of progress towards major milestones of the deeper regional integration programmes. It is essential that these country-specific RISDP reports do not generate parallel processes but should support good statistics and strengthen national implementation capacities for RISDP including capacities in poverty monitoring and analysis.

- **need for a solid institutional two-tier structure at regional level: political and technical:**

Due to its mandate, SADC has both a political and a technical role. Consequently, the Secretariat should be structured accordingly, so that the Executive Secretary is able to perform his core functions as laid down in the SADC Treaty. The Executive Secretary needs additional policy and strategy development capacities, to strategically advise member states on important regional integration policy issues and additional technical capacities and competences in programme management, planning, monitoring, finance, procurement and administration.

The Secretariat requires an institutional two-tier-structure with three departments:

- (i) a department in charge of policy formulation and strategy development to provide strategic direction and guidance of the SADC Common Agenda, particularly of the RISDP/SIPO road map (i.e. first tier: political in nature, with focus on policy and strategy development);
- (ii) a department responsible for key regional integration programmes with the overall technical function to professionally plan, promote, facilitate and monitor the programme implementation process of the politically prioritised programmes in close coordination and cooperation with SADC stakeholders and ICPs (i.e. second tier: technical in nature, with focus on programme management); and
- (iii) a department responsible for the financial management and administration of the key regional integration programmes (i.e. second tier: technical in nature, with focus on programme finance, accounting, audit, internal controls and procurement).

The three departments with their own distinct organisational culture within the institutional two-tier structure are interlinked and have to deliver different quality services in order to contribute through deeper regional integration to more productive competitiveness, political stability, peace and security, poverty reduction and sustainable development. Already in June 2006, the ICM

highlighted the need to strengthen both, the political and technical mechanisms to drive the integration agenda.

- **need to strengthen the mandate of the Executive Secretary**, to meet the deeper regional integration challenges and to strategically advise the Member States on important regional integration issues;
- **institutional strengthening according to mandate and principles of added value and subsidiarity of regional (SADC) subsidiary and stakeholder organisations** including
  - Development Finance Resource Centre (DFRC), River Basin Organisations (RBOs), Southern African Power Pool (SAPP), Regional Electricity Regulators Association (RERA), Regional Tourism Organisation of Southern Africa (RETOSA), Regional Peace Training Center (RPTC), regional Centers of Excellence (e.g. GOBABEB Training and Research Centre, CESPAM)
  - SADC Parliamentary Forum, SADC Electoral Commissions Forum, SADC Council of NGOs
  - SADC Private Sector Business Self-Help Organisations such as ASCCI, FESARTA, MIASA, SACAU, SADC Bankers Association (SBA), and SADC Employers Group (SEG)

in response to the growing institutional challenges within the SADC region and the need for more coordination, harmonisation, and broader participation of all SADC stakeholders in key SADC programmes.

- **strengthening of the institutional capacities of the SADC Tribunal** according to its mandate and role as defined in the SADC Treaty.

As far as strengthening the Secretariat's capacities is concerned, the Secretariat Capacity Development Initiative can be successful only if the Institutional Capacity Development Programme is systematically planned and implemented, with strong leadership commitment.

Lastly, the need to establish and implement a robust Monitoring, Evaluation and Reporting System for SADC is not only an essential management tool for Quality

Assurance but also very urgent to adequately institutionalise if the RISDP/SIPO implementation process is to be managed efficiently and effectively. The system should be simple, manageable and versatile enough to be utilised and applied at all levels of RISDP/SIPO implementation.

If you want to travel fast –  
travel alone  
If you want to travel far –  
travel together.

**(African proverb)**

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## **Abbreviations**

ASCCI	Association of SADC Chambers of Commerce and Industry
CESPAM	Centre of Specialization in Public Administration and Management
DES	Deputy Executive Secretary
ES	Executive Secretary
FANR	Food, Agriculture and Natural Resources (Directorate, SADC Secretariat)
FESARTA	Federation of East and Southern African Road Transport Associations
I&S	Infrastructure and Services (Directorate, SADC Secretariat)
ICDP	Institutional Capacity Development Programme
ICM	Integrated Committee of Ministers
ICP	International Cooperating Partner
ICT	Information and Communication Technology
RERA	Regional Energy Regulators Associations
RISDP	Regional Indicative Strategic Development Plan
SACAU	Southern African Confederation of Agricultural Unions
SADC	Southern African Development Community
SIPO	Strategic Indicative Plan for the Organ
SNC	SADC National Committees
TIFI	Trade, Industry, Finance and Investment (Directorate, SADC Secretariat)

*Chapter 7*

**Making regional economic community laws enforceable in national legal systems – constitutional and judicial challenges**

Richard Frimpong Oppong

**1. Introduction**

A principal challenge in regional economic integration is how to make community laws legally binding and enforceable within national legal systems. Community laws take the form of treaties, protocols, regulations, decisions, principles, objectives and general undertakings.<sup>[1]</sup> I characterise this challenge as one of law translation. The absence of law translation creates a disjunction between the community and national legal systems. It leads to the alienation of natural and legal persons from the economic integration processes and their benefits. Generally, it undermines the effectiveness of economic integration. Law translation enhances the effectiveness of regional economic integration processes. It decentralises the community law enforcement machinery and makes it accessible to residents of the economic community. Decentralisation reduces the burden on the community's institutional structures set up to monitor and seek redress for violations of community laws.

Law translation encompasses all processes and principles that render international law capable of enforcement or application within national legal systems. Examples of these are national incorporation of international law, use of foreign laws as aids to construction, use of foreign laws as the applicable law under the rules of private international law, and taking judicial notice of foreign laws.

A number of factors influence the extent to which community laws can be effectively translated within national legal systems. They include national constitutions, judicial philosophy which informs judgments, legal culture and public awareness. Drawing on materials from Eastern, Southern and Western African states and economic integration processes in these regions, this paper comparatively explores from constitutional and case-law perspectives how law translation is approached in

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<sup>[1]</sup> In this paper, a broad definition is given to the concept of law. It encompasses values, goals and objects of the community. These may not be positive laws properly so called, but are treated as such here because they can produce legal effects.

Africa's economic integration processes. It focuses on how the treaties establishing the Economic Community of West African States (ECOWAS), Common Market of Eastern and Southern Africa (COMESA), East African Community (EAC), national constitutions and judicial philosophy deal with law translation.<sup>[2]</sup>

The paper argues that on the whole the regional economic community treaties, national constitutions and case-law are not conducive to facilitating the translation of community laws into legally binding and enforceable national laws. It suggests that other processes and principles of law translation can be used to make community laws legally relevant for individuals at the national level. It further suggests that, to strengthen Africa's economic integration, there is the need to rethink national constitutional laws, and the judicial philosophy which informs the determination of cases in which community issues are involved.

## **2. Community treaties and law translation**

### **2.1 Community principles for law translation**

#### **2.1.1 Introduction**

The constitutive treaties of regional economic communities often contain provisions aimed at defining the relations between community and national law. This is done to make community law effective in national legal systems. This section examines some of these provisions. In a sense, the issues arising here are part of the broader question of the place of international law in national legal systems. After all, community law is a special breed of international law. In the absence of community treaty provisions which define how community laws can be effective in national legal systems, one must look for answers in national constitutions and jurisprudence.

Indeed, even where the community treaties define the place of community law in national legal systems,<sup>[3]</sup> one still has to look to national constitutions and jurisprudence to determine whether the approach adopted by the treaties can be accommodated by national legal systems. This is because states are sovereign and,

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<sup>[2]</sup> Occasionally, reference will also be made to the Southern African Development Community (SADC).

<sup>[3]</sup> See e.g. Treaty establishing the European Community (EC Treaty), article 249. It provides 'a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.'

for the ‘intrusion’ of foreign laws into their legal systems to be accommodated, the sovereign’s imprimatur is necessary.

### 2.1.2 The principle of direct applicability of community law

The principle of direct applicability allows community law to become part of national legal systems without intervening national measures which aim at transforming the community law into a national one. The European Court of Justice defines the principle to mean that the entry into force of community law is ‘independent of any measure of reception into national law’.<sup>[4]</sup> The measure could be a parliamentary resolution, an act of parliament, or an executive act such as cabinet approval.<sup>[5]</sup> The character of the measure often determines the domestic effect or status of the relevant international law. In general, and especially in common law countries, an act of parliament is required before international law<sup>[6]</sup> becomes enforceable;<sup>[7]</sup> mere ratification by parliament will not be enough.<sup>[8]</sup>

Direct applicability maintains the specificity of community laws within national legal systems. Their character as community laws is not obscured by their transformation into national laws. This renders issues involving community law relatively more visible. Direct applicability also circumvents a consequence of the traditional international law modes for giving effect to international law in national legal systems, namely, subjecting the translated international law to national laws on the hierarchy of laws. Within a national hierarchy of laws, conflict of laws are resolved using national rules such as the *lex posterior derogate priori* rule. In economic integration, the application of this rule to community law upsets the vertical relations between

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<sup>[5]</sup> See e.g. Uganda: Ratification of Treaties Act 1998, Chapter 204, Section 2(a) which allows cabinet to ratify defined treaties without resort to parliament. See also Constitution of the Republic of South Africa, Article 231(3).

<sup>[6]</sup> Customary international law is often treated differently. Subject to proof that it exists, it is automatically considered part of national legal systems. See Constitution of the Republic of South Africa, Article 232; Constitution of the Republic of Malawi, Article 211(3); Constitution of the Republic of Namibia, Article 144. In common law, customary international law is deemed part of the national legal system. Community law is principally treaty based; therefore, it is unlikely to benefit from this treatment of customary international law.

<sup>[7]</sup> See e.g. Constitution of the Republic of South Africa, Article 231(4). It provides that ‘an international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament’.

<sup>[8]</sup> See e.g. Constitution of the Republic of Malawi, Article 211(1). It provides that ‘any international agreement ratified by an Act of Parliament shall form part of the law of the Republic *if so provided for in the Act of Parliament ratifying the agreement*’.

community and national legal systems, hinders the uniform application of community law within the member states' legal systems, and generally makes community law ineffective.

This is illustrated in the South African case of *Moolla Group Ltd. v Commissioner for SARS* (2003).<sup>[9]</sup> The case involved a conflict between a South African statute incorporating a bilateral trade agreement between South Africa and Malawi and the bilateral agreement itself. It was held that in cases of such conflict, the national legislation should prevail. In the words of the court: 'If there were to be an apparent conflict between general provisions of the statute and particular provisions of an agreement, difficulties of interpretation might indeed arise. *The Act must, of course, prevail in such a case: the agreement once promulgated is by definition part of the Act.*'<sup>[10]</sup> The dictum seems to wrongly suggest that, by incorporation, an international instrument loses its independent existence.<sup>[11]</sup> It shows a danger inherent in 'nationalising' international agreements absent the principle of direct applicability.

Although some regional economic integration treaties provide for direct applicability of community law,<sup>[12]</sup> none of the African regional communities examined here provide for it. This does not imply that the importance of the principle in ensuring the effectiveness of community law is not appreciated in Africa. Indeed, in his commentary on the Draft Treaty establishing the East African Community, Mvungi (2002:89) advocated the introduction of a provision to make for the 'direct application of community law and decisions in the domestic jurisdiction of the Partner States'. Unfortunately, this call was not heeded by the drafters of the EAC Treaty. Rather, the community treaties leave it to member states to resort to their respective constitutional procedures to give effect to community law.<sup>[14]</sup> For example, under Article 5(2) of the COMESA Treaty:

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<sup>[9]</sup> Case No 139/20002 (26 March 2003). For a critical comment on the case, see Erasmus (2003:157).

<sup>[10]</sup> Case No 139/20002 (26 March 2003) at [15].

<sup>[11]</sup> Compare *Peter Anyang' Nyong'o v. Attorney General* (2007:9) where the Kenya court held that the fact that the Treaty establishing the East African Community has been given the force of law though the Treaty establishing the East African Community Act did not make the treaty lose its 'independent existence'.

<sup>[12]</sup> See e.g. EC Treaty, Article 249; EEA Agreement, Article 7(a).

<sup>[14]</sup> See EAC Treaty, Article 8(2); COMESA Treaty, Article 5(2); ECOWAS Treaty, Article 5(2); SADC Treaty, Article 6(5).

Each Member State shall take steps to secure the enactment of and the continuation of such legislation to give effect to this Treaty and in particular: ...

(b) to confer upon the regulations of the Council the force of law and the necessary legal effect within its territory.

This provision, which has neither a defined time frame for the legislation to be enacted nor a sanction for non-compliance is susceptible to breach.<sup>[15]</sup> To my knowledge, it is only within the East African Community that all the founding member states have enacted legislation giving ‘the force of law’ to ‘the provisions of any Act of the Community ... from the date of the publication of the Act in the Gazette’.<sup>[16]</sup> It appears the other regional economic community member states have been remarkably coy about giving the force of law to community laws in their national legal systems. For example, Bethlehem (2005:434) notes that ‘in most instances, the trade, financial and economic agreements to which South Africa is a party have not been enacted into municipal law’. This does not deny the fact that specific provisions in national legislation may be informed by aspects of community law even if not expressly so stated in the legislation.

It must be pointed out that there are provisions in the community treaties that may be interpreted as implying the direct applicability of community law. Article 9(6) of the ECOWAS Treaty provides that decisions of the Authority of Heads of State and Government ‘shall automatically enter into force sixty days after the date of their publication in the Official Journal of the Community’.<sup>[18]</sup> Almost identical provisions are contained in the EAC<sup>[19]</sup> and COMESA treaties.<sup>[20]</sup> In the light of the fact that the

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<sup>[15]</sup> Compare EAC Treaty, Article 8(2). It provides that ‘each Partner State shall, within twelve months from the date of signing this Treaty, secure the enactment and the effective implementation of such legislation as is necessary to give effect to this Treaty, and in particular ...

(b) to confer upon the legislation, regulations and directives of the Community and its institutions as provided for in this Treaty, the force of law within its territory’.

<sup>[16]</sup> See Kenya: Treaty for the Establishment of East African Community Act 2000, Article 8(1); Uganda: East African Community Act 2002; and Tanzania: Treaty for the Establishment of East African Community Act 2001.

<sup>[18]</sup> The same rule applies to regulations adopted by the Council of Ministers. See ECOWAS Treaty, Article 12(4).

<sup>[19]</sup> Article 14(5): ‘...the Council of Ministers shall cause all regulations and directives made or given by it under this Treaty to be published in the Gazette, and such regulations or directives shall come into force on the date of publication unless otherwise provided therein’.

treaties already envisage the use of national constitutional procedures to give the 'force of law' to community law, it can hardly be argued that these provisions were meant to enshrine the principle of direct applicability.<sup>[21]</sup> Indeed, a cursory reading of Article 10 of the COMESA Treaty, which was obviously borrowed from Article 249 of the EC Treaty, reveals that the phrase 'directly applicable' was deliberately omitted.<sup>[22]</sup>

The reliance on national constitutional measures to give effect to community law is one of the principal reasons for the failure of Africa's economic integration process, at least to the extent that the presence of the communities is not immediately felt at the national level. The approach is too broad and does not discriminate between various types of community laws. I argue that while it will be appropriate to subject the founding treaty to such a national procedure, there is no reason why some pre-agreed types of laws emanating from duly constituted institutions under the treaty and following the correct laid-down legislative procedure should not be immediately or directly applicable in national legal systems which have already given legal effect to the treaty – the foundation of the subsequent community law. This is an approach worth exploring by Africa's regional economic integration organisations to overcome the perennial problem of states not giving (or delaying in giving) effect to community laws.

Delay in giving effect to community law is only one of the disadvantages of relying on national constitutional procedures for law translation. As noted above, the very facts of incorporating community law into national legal systems and its concomitant subjection to national rules on resolving conflict of laws, may affect the effectiveness of community law. A provision like Article 39(2) of the Protocol on the establishment of the East African Customs Union to the effect that 'the customs law of the Community shall apply uniformly in the Customs Union except as otherwise provided for in this Protocol' is unlikely to be effective where a conflict between an

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<sup>[20]</sup> Article 12(1): 'Regulations shall be published in the Official Gazette of the Common Market and shall enter into force on the date of their publication or such later date as may be specified in the Regulations'.

<sup>[21]</sup> See COMESA Treaty, Article 5(2)(b); EAC Treaty, Article 8(2)(b); ECOWAS Treaty, Article 5(2).

<sup>[22]</sup> While Article 249 of the EC Treaty provides that 'a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States', Article 10(2) of the COMESA Treaty provides that 'a regulation shall be binding on all the Member States in its entirety'. The other paragraphs in the two articles on directives, decisions, recommendations and opinions are similarly worded.

‘incorporated customs law’ and a national law is resolved using the *lex posterior derogate priori* rule.<sup>[23]</sup> Happily, the EAC Treaty provides for the principle of supremacy of the laws of the community.<sup>[24]</sup> The principle may be applied to prioritise an ‘incorporated customs law’ which conflicts with a national law.

### 2.1.3 The principle of direct effect of community law

Direct effect of community law enables individuals to invoke community law before national courts.<sup>[25]</sup> It allows national courts to use community law as an independent, direct and autonomous basis of decisions. It turns national courts and persons who litigate before them into private enforcers of community law. It brings ‘home’ to persons rights created by the community.

Direct effect should be distinguished from direct applicability. Direct applicability deals with the processes or means by which community law becomes part of national legal systems. Direct effect determines whether community law creates enforceable rights within national legal systems. Thus, although all directly effective laws can be considered as part of national legal systems, not all directly applicable laws are directly effective. A directly applicable law may be so vague, ambiguous, conditional, or so targeted at a particular group or issue that an enforceable right cannot be founded on it. This does not mean that such a law is useless in national legal systems; it may, for example, inform a court’s interpretation of another national law.

The COMESA, EAC and ECOWAS treaties are silent on the issue of whether they (or laws generated under them) are directly effective. This is so notwithstanding the fact that they all envisage a role for individuals in the integration process. An example of this is their provision for a preliminary reference procedure, which allows national courts to refer questions of community law to community courts for answers.<sup>[26]</sup> Implicit in this is an assumption that issues of community law can be raised before national courts through means which include the direct invocation of the community law by individuals.

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<sup>[23]</sup> See also SADC Treaty, Article 6(4) which provides that ‘member states shall take all steps necessary to ensure the uniform application of this Treaty’.

<sup>[24]</sup> See EAC Treaty, Article 8(4).

<sup>[25]</sup> See generally Craig (1992).

<sup>[26]</sup> See COMESA Treaty, Article 30, Protocol of the Economic Community of West African States Community Court of Justice (as amended), Article 10(f); EAC Treaty, Article 34, Protocol to the Southern African Development Community Tribunal and Rules Thereof, Article 16.

To date, the jurisprudence of the COMESA, EAC and ECOWAS courts of justice has not dealt with the issue of direct effect of community laws. However, unlike in other trade arrangements, the principle of direct effect is not explicitly denied.<sup>[29]</sup> Accordingly, there is room for a teleological interpretation of the community treaties, which is informed by a vision to facilitate law translation to make the principle of direct effect part of the communities' legal system.<sup>[30]</sup> It is also possible for states to legislate that a cause of action can be directly based on community law. An example of this is the Uganda Law Reform Commission's proposed WTO (Implementation) Agreement Bill.<sup>[31]</sup> Article 12 of the bill allows for private actions on WTO agreements with the consent of the Attorney General.<sup>[32]</sup>

## **2.2 Protecting translated community law**

Regional economic communities have an interest in ensuring and facilitating law translation. This interest should be matched by principles aimed at protecting translated laws from inimical treatment which may render them ineffective within national legal systems. As noted above, the ECOWAS, COMESA and EAC treaties have adopted a less effective but perhaps politically expedient means for translating community laws into national legal systems, that is, the reliance on national constitutional procedures instead of the principle of direct applicability. They are also silent on the issue of direct effect of community law, and, accordingly, have rendered uncertain the issue of whether individuals can invoke community law before national courts.

On the other hand, the treaties are endowed with principles or procedures that one can characterise as aimed at protecting translated community laws from the vagaries of national legal systems. The principle of supremacy of community law, which is enshrined in Article 8(4) of the EAC Treaty ensures that conflicts between community law and national law are resolved in favour of the former. The principle of supremacy

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<sup>[29]</sup> See e.g. North American Free Trade Agreement, Article 2021. It explicitly prohibits state parties from allowing any private right of action under the treaty in national courts. It provides that 'no Party may provide for a right of action under its domestic law against any other Party on the ground that a measure of another Party is inconsistent with this Agreement'. In Panel's Report-US-Section 301-310 of the Trade Act of 1974, WT/DS/152, 7.72, it was held that 'neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect'.

<sup>[30]</sup> It is worth remembering that, like the COMESA, ECOWAS and EAC treaties, the EC Treaty, 1957, was also silent on the issue of direct effect. It was through the jurisprudence of the European Court of Justice in the celebrated case of *Van Gend en Loos* (1963) that the principle became part of EC law.

<sup>[32]</sup> Compare Canada: World Trade Organisation Agreement Implementation Act 1994, Section 5 & 6.

assumes that conflicts can arise between national law and community law before national courts. The preliminary reference procedure<sup>[34]</sup> ensures that questions of community law arising in national legal systems are ultimately and authoritatively decided at the community level. Through this, the interests of the community are protected and inimical and conflicting national interpretations are avoided.

The preliminary reference procedure also serves as a means for diffusing into national legal systems a uniform understanding of community law. The direct access that legal and natural persons have to community courts<sup>[35]</sup> ensures that breaches of community law occurring within national legal systems are brought to the communities' attention for remedy, even in cases where such breaches might have escaped the attention of the community.

The presence of these protective principles and procedures could be useful when the community courts of justice ultimately approach the issue of law translation. It can be argued that these instruments envision a stronger place for community law in national legal systems than the treaties *prima facie* suggest. With the active involvement and cooperation of national courts such a vision can be realised.

### **3. National constitutions, jurisprudence and law translation**

#### **3.1 Community law and national constitutions**

The place of community law in national legal systems is greatly influenced by national constitutions<sup>[36]</sup> and the judicial philosophy on the relations between international and national law.<sup>[37]</sup> Because states are sovereign, giving effect to or enforcing a law emanating from another legal system should often have the express or tacit approval of the state. Where the courts enforce or use foreign laws without this approval, they are accused of inappropriate judicial activism and of blurring the lines between executive, judicial and legislative functions.

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<sup>[34]</sup> See COMESA Treaty, Article 30; Protocol of the Economic Community of West African States Community Court of Justice (as amended), Article 10(f); EAC Treaty, Article 34; Protocol to the Southern African Development Community Tribunal and Rules Thereof, Article 16.

<sup>[35]</sup> See e.g. COMESA Treaty, Article 26; Southern African Development Community Protocol on Tribunal and Rules of Procedure Thereof, Article 15(1)(2); EAC Treaty, Article 30; Protocol of the Economic Community of West African States Community Court of Justice (as amended), Article 10.

<sup>[36]</sup> See generally Hilf (1993).

<sup>[37]</sup> This does not discount the importance of non-legal factors such as the political climate of the country. For example, post-Apartheid South Africa has shed its hostility towards international law and has become more international-law friendly as reflected in Articles 231–233 of its constitution.

An examination of how African constitutions are engineered to receive community laws should begin with the extent to which they acknowledge the communities' existence. In some constitutions, there are passing references to the communities' existence (here one should include the Organisation of African Unity, now African Union) and a constitutional commitment to abide by their principles or work towards achieving their goals. For example, Article 40 of the Constitution of the Republic of Ghana provides: 'In its dealing with other nations, the Government shall adhere to the principles enshrined in or as the case may be, the aims and ideals of (ii) the Charter of the Organisation of African Unity; ... (iv) the Treaty of the Economic Community of West African States'.<sup>[38]</sup>

Other constitutions make reference to foreign policy objectives such as 'promoting sub-regional, regional and inter-African cooperation and unity' (Sierra Leone Constitution 1991, Art. 10(b)), 'promotion of African integration and support for African unity' (Nigeria Constitution 1999, Art. 19(b)), and 'respect for international law and treaty obligations' (Namibia Constitution 1990, Art. 96(d)).

Although these provisions are very superficial, they are useful. They demonstrate sensitivity to the existence and ideals of African economic integration processes. However, as channels for integrating community law into national legal systems they are of limited use. They mainly relate to the conduct of inter-state relations. This is reflected in the fact that they are often part of the 'foreign policy' provisions of the constitutions. They do not purport to make community law part of the national law. It will take a great deal of difficult legal arguments and judicial imagination for effect to be given to community law on their basis. However, courts can have regard to them in the interpretation and enforcement of national law vis-à-vis community law.

The above acknowledgements of the communities' existence and their objectives are therefore important. But, even more salient is the constitutions' vision of the relations between national and international law. This vision directly affects the place of community law in national legal systems. Traditionally, the relations between national and international law is discussed from the monist-dualist perspectives.<sup>[42]</sup> Monism

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<sup>[38]</sup> See also Constitution of the Kingdom of Swaziland, 2005, Article 236(1)(d) which provides that 'in its dealing with other nations, Swaziland shall ... (d) endeavour to uphold the principles, aims and ideals of ... the African Union, the Southern African Development Community...'

<sup>[42]</sup> See generally Brownlie (2003:31-53); Aust (2007:178-199).

has its root in natural law theories which see all law as the product of reason. It envisions international law to automatically be part of national legal systems and suggest that no conflict can arise between international and national law because they derive from the same source. 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 governs 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 national legal systems approach international law, especially treaties.

Current constitutional arrangements in Africa reflect both approaches to international law. The former British colonies adhere to dualism; international law does not become part of or have the force of law in national legal systems unless it has been expressly given that force by a national measure, usually an act of parliament.<sup>[43]</sup> The former French colonies adhere to monism. 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'.<sup>[44]</sup> This provision gives the force of law to international law and determines its status within the national hierarchy of laws. Under this provision, as soon as an international treaty or agreement is ratified or approved it has precedence over national laws, subject to implementation by the other parties to the treaty or agreement. The international treaty becomes applicable as law in the national legal system as soon as it is ratified. It may be invoked directly in national courts.

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<sup>[43]</sup> See e.g. Constitution of the Republic of Ghana, Article 75; Constitution of the Republic of South Africa, Article 231; Constitution of the Republic of Malawi, Article 211; Constitution of the Republic of Uganda, Article 123; Constitution of the Federal Republic of Nigeria, Article 12; Constitution of the Republic of Zimbabwe, Article 111B; Constitution of the Kingdom of Swaziland, Article 238(4).

<sup>[44]</sup> See e.g. Constitution of Burkina Faso, Article 151; Constitution of Cameroon, Article 45; Constitution of Mali, Article 116; Constitution of the Republic of Benin, Article 147; Constitution of the Republic of Algeria, Article 132; Constitution of the Central African Republic, Article 72.

Although the above provision in the French colonies makes treaties superior to domestic legislation, there are conditions that must be satisfied for this to happen.<sup>[45]</sup> First, the agreement has to be duly ratified or approved and published. Due ratification usually entails ensuring legislative and sometimes judicial intervention or participation before the treaty is ratified.<sup>[46]</sup> This contrasts with the approach in the common law jurisdictions where the executive negotiates and concludes treaties that must subsequently be approved by the legislature. The judiciary has no role in the treaty making.<sup>[47]</sup> The second requirement, which is reciprocity in the application of the treaty,<sup>[48]</sup> also does not exist for the common law jurisdictions. Indeed, in economic integration, to make the domestic application of community law contingent on its reciprocal application by another state is inimical to the coherent development of the community legal system.<sup>[49]</sup>

The reception of community law into national legal systems, especially in the dualist countries, still leaves unanswered the question of its status in the legal system. What is the place of community law in a national legal system's hierarchy of laws? Will community law trump national law in case of conflict? And will all national courts have jurisdiction to adjudicate matters in which community law or the community is engaged?<sup>[50]</sup> These are weighty issues and one must look at national constitutions for answers.

A feature of many African constitutions is provisions which self-proclaim the constitutions as the supreme law of the land. Article 1(2) of the Constitution of the Republic of Ghana captures this. It provides that 'this Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision

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<sup>[45]</sup> See generally Kronenberger (2000).

<sup>[46]</sup> See e.g. Article 82(8) of the Constitution of Republic of Madagascar, which provides that 'prior to any ratification, treaties shall be submitted by the President of the Republic to the Constitutional Court. In case of non-conformity with the Constitution, ratification may take place only after constitutional revision'. In Madagascar Constitutional Court (2007), the court held that the SADC protocol against corruption did not contain any provision that is contrary to the constitution.

<sup>[47]</sup> See e.g. Constitution of the Republic of Ghana, Article 75 and Constitution of the Republic of South Africa Constitution, Article 231.

<sup>[48]</sup> For a critique of the reciprocity requirement, see Cassese (1985:405-408).

<sup>[49]</sup> In this respect, it is significant that one of the principal arguments used for denying direct effect to WTO law is that other countries do not provide for direct effect of WTO law. See Eisenberg (1993-94:127) and Schlemmer (2004:125)

<sup>[50]</sup> An interesting provision in the treaties on this is to the effect that 'disputes to which the Community is a party shall not on that ground alone, be excluded from the jurisdiction of the national courts'. See EAC Treaty, Article 33(1); COMESA Treaty, Article 29(1). The ECOWAS Treaty does not contain a similar provision.

of this Constitution shall, to the extent of the inconsistency, be void’.<sup>[51]</sup> Others are less flamboyant, and shy away from spelling out the consequence of the constitution being supreme. For example, Article 1(6) of the Constitution of the Republic of Namibia tersely provides that ‘this Constitution shall be the Supreme Law of Namibia’. Whatever the phraseology adopted, the import is the same: the constitution is the *grundnorm* of the national legal system from which all laws derive their legal validity.

The accommodation of community law within national legal systems demands that the *grundnorm* recognises community law. Also, the *grundnorm* should, in some instance, allow itself or a national law to be displaced by community law. This may be politically unpalatable. It amounts to a surrender of sovereignty, a key component of statehood. However, unbridled adherence to sovereignty may be an obstacle to an effective economic integration process. In this respect, it is noteworthy that in the preamble to the ECOWAS Treaty, member states were ‘convinced that the integration of the Member States into a viable regional Community may demand the partial and gradual pooling of national sovereignties to the Community within the context of a collective political will’.

What is significant from the above exposition is that, so far, it appears that African governments have not appreciated the fact that economic integration makes constitutional demands and, on some issues, requires a rethink or amendment of constitutional or legislative provisions to accommodate community law and the community itself.<sup>[52]</sup> The fact that there appears to be no national legislation to address the many challenges created by economic integration is testament to the lack of appreciation of the legal demands for successful integration. Perhaps, the slow pace at which the economic integration processes are moving has rendered the constitutional demands not immediate. It is open to question whether it is the lack of national legislation on community issues that is slowing down the integration process,

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<sup>[51]</sup> See also Constitution of the Republic of Malawi, Article 5; Constitution of the Republic of Sierra Leone, Article 171(15); Constitution of the Republic of South Africa, Article 2; Constitution of the Republic of Liberia, Article 2; Constitution of the Federal Republic of Nigeria, Article 1(3); Constitution of the Republic of Gambia, Article 4; Constitution of the Republic of Zambia, Article 1(2); Constitution of Republic of Kenya, Article 3; Constitution of the Republic of Uganda, Article 2(2); Constitution of the Republic of Tanzania, Article 64(5); Constitution of the Republic of Zimbabwe, Article 3; Constitution of the Republic of Lesotho, Article 2; Constitution of the Kingdom of Swaziland, Article 2(1).

<sup>[52]</sup> See generally Southern African Development Community Protocol on Immunities and Privileges.

or the slow pace of integration that has led to the absence of national legislation. Whatever the case, it is obvious that a disjunction exists between community and national legal systems in Africa's economic integration processes. This needs immediate attention.

Comparatively, it is worth noting that some European countries have effected significant constitutional amendments in response to the legal demands of European integration.<sup>[53]</sup> An example is Article 148 of the Constitution of Romania, a new member of the European Union. It provides:

(1) Romania's accession to the constituent treaties of the European Union, with a view to transferring certain powers to community institutions, as well as to exercising in common with the other member states the abilities stipulated in such treaties, shall be carried out by means of a law adopted in the joint sitting of the Chamber of Deputies and the Senate, with a majority of two-thirds of the number of deputies and senators.

(2) As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act.

(3) The provisions of paragraphs (1) and (2) shall also apply accordingly for the accession to the acts revising the constituent treaties of the European Union.

(4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of Paragraph (2) are implemented.

(5) The Government shall send to the two Chambers of the Parliament the draft mandatory acts before they are submitted to the European Union institutions for approval.

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<sup>[53]</sup> See e.g. Belgium Constitution, Article 34; Luxembourg Constitution, Article 49bis, Netherlands Constitution, Article 92–94. United Kingdom, European Communities Act 1972; Constitution of Poland, Article 91(3).

Presently, this level of constitutional accommodation, which definitely facilitates law translation, has no parallel in African constitutions. Admittedly, the stage of development of the European Community makes demands on national legal systems very different from those which may be the case at this stage of Africa's integration processes. But, it is undeniable that Africa's constitutions have remained largely ambivalent towards community law.

Historically, some countries did have constitutional provisions which aimed at strengthening Africa's integration. The immediate post-independence constitutions were imbued with preambles that extolled the virtues of African unity and Africans uniting. They contained specific and legally binding provisions that envisaged the ultimate surrender of national sovereignty to aid African unity. For example, Article 13 of the 1960 Constitution of the Republic of Ghana provided that 'the independence of Ghana should not be surrendered or diminished on any ground other than the furtherance of African unity'. In Article 2, the people of Ghana 'in the confident expectation of an early surrender of sovereignty to a union of African states and territories' conferred on parliament 'the power to provide for the surrender of the whole or any part of the sovereignty of Ghana'. Article 34 of the 1958 Constitution of the Republic of Guinea had earlier provided that 'the Republic may conclude with any African State agreements providing for association or the establishment of a community and involving partial or total relinquishment of Sovereignty with a view to the achievement of African Unity'. Similar provisions in other countries have been chronicled by Schwelb (1960:640-642). The speed with which the Organisation of African Unity (OAU) was formed is a testament to the importance of these constitutional provisions which encapsulated a national consciousness favourable to uniting Africa.

It is ironic that against the background of these provisions, when the Charter of the Organisation of African Unity came to be drafted and the organisation formed in 1963, 'sovereign equality of all Member States', 'non-interference in the internal affairs of States' and 'respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence' were entrenched as cardinal guiding (ultimately, debilitating) principles of the OAU (OAU Charter, Art. III(1)(2)(3)). The OAU never purported to be an economic integration organisation or at least did

not set out a clear economic integration agenda. Accordingly, the effect the post-independence constitutional provisions could have had on economic integration and especially on the issue of law translation remains uncertain.

What is certain is that these constitutional provisions did not make their way into subsequent constitutional revisions in the respective states. However, a few of such provisions still exist.<sup>[56]</sup> The fact that they have largely disappeared from the constitutions says a lot about national legal commitment to Africa's economic integration processes. Significantly, most of the current constitutions, which pay very little attention to the legal demands of economic integration, were promulgated after the signing of the Treaty establishing the African Economic Community in 1991. The treaty envisages an integrated economic area covering all of Africa. The objectives of the treaty include the promotion of economic development and the integration of African economies in order to increase self-sufficiency, the promotion of endogenous and self-sustained development, and the fostering of the gradual establishment of the African Economic Community through coordination and harmonisation among existing and future regional economic communities.

### **3.2 National constitutions in the community treaties**

Community law interacts with national constitutions on various issues. Through a number of provisions, community treaties acknowledge the existence of national constitutions, adopt conclusion legitimised by national constitutions or utilise their procedures for the implementation of community law.<sup>[58]</sup> As noted above, an area where this is visible is in giving effect to treaties or other community laws. Under Article 5(2) of the ECOWAS Treaty, 'each Member State shall, in accordance with its

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<sup>[56]</sup> See e.g. Constitution of the Central African Republic, Article 70. It provides that 'the Republic may, after referendum, conclude agreements with any African States association or merger agreements, including partial or total abandonment of sovereignty in view of realising African unity'. A similar provision is contained in Article 146 of the Constitution of the Republic of Burkina Faso. See also Constitution of the Republic of Gambia, Article 79(2). It provides that 'The Gambia shall not – (a) enter into any engagement with any other country which causes it to lose its sovereignty without the matter first being put to a referendum and passed by such majority as may be prescribed by an Act of the National assembly; (b) become a member of any international organisation unless the National Assembly is satisfied that it is in the interest of The Gambia and that membership does not derogate from its sovereignty'.

<sup>[58]</sup> In one provision, the community treaty seems to dictate to national constitutions. Article 145 of the EAC Treaty provides that 'a Partner State may withdraw from the Community provided: (a) the National Assembly of the Partner State so resolves by resolution supported by not less than a two-thirds majority of all the members entitled to vote'. Member states of the EAC have their own constitutional provisions which dictate the number of votes needed on any particular issue.

constitutional procedures, take all necessary measures to ensure the enactment and dissemination of such legislative and statutory texts as may be necessary for the implementation of the provisions of this Treaty'. Although the COMESA (Art. 5(2)) and EAC (Art. 8(2)) treaties do not make reference to constitutional procedures, this can be implied into them.

Community institutions also draw on institutions established by national constitutions for their makeup. The composition of the Assembly of Heads of State and Government, council of ministers and community parliaments is contingent on national institutions. Indeed, Article 1 of the EAC Treaty defines Head of State and Head of Government as 'a person designated as such by a Partner State's Constitution'. Similarly, under Article 50(2)(b), a person shall be qualified to be elected a member of the Assembly of the EAC by the National Assembly of a Partner State if such a person is, among others, 'qualified to be elected a member of the National Assembly of that Partner State under its Constitution'.

Another area of interaction is in the fact that community treaty provisions sometimes reflect values already entrenched in national constitutions. This is so on human rights, the rule of law and democracy. At first sight, this may appear superfluous as these values are already entrenched, at least on paper, at the national level. However, that is not so. Through this reflection, community law becomes an added layer of legality by which the conduct of national governments may be judged. This becomes important in instances where national governments violate of their own constitutional values. In the Ugandan case of *Katabazi v Attorney General of Uganda* (2007), the applicants, who were being tried for treason, were granted bail by the High Court of Uganda. However, armed security agents surrounded the court premises and prevented the execution of the bail. They rearrested the applicants, reincarcerated and recharged them before a Court Martial. They were not released even after the Constitutional Court of Uganda so ordered. This conduct was held to be a violation of the rule of law enshrined in Article 6(d) of the EAC Treaty.<sup>[61]</sup> It is

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<sup>[61]</sup> It provides that the fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include: good governance including adherence to the principles of democracy; the rule of law; accountability; transparency; social justice; equal opportunities; gender equality; as well as the recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and People's Rights.

worth remembering that the Constitution of the Republic of Uganda (Ch. 4) contains a bill of rights. More recently, the Southern African Development Community Tribunal in *Mike Campbell (Pvt) Ltd and others v The Republic of Zimbabwe* (2008) found Zimbabwe to be in breach of its commitment to respect human rights, democracy and the rule of law in Article 4(c) of the SADC Treaty. At issue in the case was the state's acquisition of lands belonging to the applicants.

From the above, it is evident that the relations between community law and national constitutions go beyond giving effect to community law at the national level or resolving conflicts between community and national law (Wouters 2000:25-27). Community law can influence national constitutional values on issues such as democracy, the rule of law and human rights. The community treaties contain provisions stipulating democracy, respect for the rule of law and human rights as guiding principles.<sup>[64]</sup> These principles can inform constitution making and interpretation at the national level. Indeed, as one writer (Adewoy 1997) has observed, there is a strong positive correlation between constitutionalism at the national level and the effectiveness of regional economic integration processes. The community treaty provisions can also be useful in adjudicating at the community level the legality of conduct at the national level. In sum, community law can provide constitutional guidance at the national level.

### **3.3 Community law and national judicial philosophy**

National courts are an important institution in economic integration.<sup>[66]</sup> Equally important is the judicial philosophy that informs their decisions in cases involving community issues. Judicial philosophy has a direct impact on the place of community law in national legal systems. This is especially so in instances where community law has not been incorporated into national law nor is directly applicable in national legal systems.

Judicial philosophy that is attuned to the goals and demands of economic integration, and is sensitive to national constitutional limits on the exercise of judicial power, especially on issues of foreign policy, is important for ensuring the effectiveness of

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<sup>[64]</sup> See e.g. ECOWAS Treaty, Article 4(g)(j); EAC Treaty, Article 3(3)(b), 6(d), 7(2); COMESA Treaty, Article 6(e)(g)(h).

<sup>[66]</sup> See generally Mann (1972).

community law in national legal systems. Judicial philosophy which takes account of the goals of economic integration can be relevant in courts' approach to the principle of consistent interpretation, general reliance on laws emanating from other states, the taking of judicial notice, and the application of the rules on proof of foreign law. These can be utilised to enhance the place of community law in national legal systems.

We noted above that in many African legal systems an executive or parliamentary measure is required for international law to have the force of law. However, it is legally possible for national courts to give effect to a treaty, and hence community law, even though it has not been incorporated into national law. This possibility is visible in human rights law. In a number of cases, courts have relied on human rights treaties, even when they had not been incorporated into national law.

In *Unity Dow v Attorney General* (1991), the Botswana court's interpretation of a statute was 'strengthened' by the fact that Botswana was a signatory to the OAU Convention on Non-Discrimination even though Botswana had not ratified it – a fact which the judge expressly acknowledged. On appeal, the Attorney General specifically took issue with the court's reliance on unincorporated treaties, but the Court of Appeal affirmed the trial court's use of unincorporated treaties.<sup>[68]</sup> It held that even if treaties and conventions do not confer enforceable rights on individuals within the state until parliament gave them the force of law, they could still be used as aids to construction. In Ghana, *Justice Archer in New Patriotic Party v Inspector General of Police* (1993-94:466)<sup>[69]</sup> held that the fact that Ghana had not passed specific legislation to give effect to the African Charter on Human and People's Rights did not mean it could not be relied upon in adjudication.<sup>[70]</sup> In Kenya, the Court of Appeal has also held that even though Kenya subscribes to the common law view that

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<sup>[68]</sup> *Dow v Attorney General* (1996:159-162). In this case, the applicant challenged the constitutionality of provisions of the Citizenship Act of 1984 as being discriminatory and an infringement on her constitutional rights and freedoms. These provisions, in essence, denied citizenship to children born to female citizens of Botswana who were married to foreign men.

<sup>[69]</sup> Compare *Chihana v Republic* (1992) where the Malawi Supreme Court held that the United Nations Universal Declaration of Human Rights is part of the law of Malawi, but the African Charter on Human and People's Rights is not, and added, 'Malawi may well be a signatory to the Charter and as such is expected to respect the provisions of the Charter but until Malawi takes legislative measures to adopt it, the Charter is not part of the municipal law of Malawi and we doubt whether in the absence of any local statute incorporating its provision the Charter would be enforceable in our Courts'.

<sup>[70]</sup> See *Botha & Olivier* (2004) for other cases in South Africa where courts have relied on various unincorporated treaties in adjudication. In these cases, unlike the Ghana and Botswana cases, the reliance had a constitutional foundation. South African courts are constitutionally mandated to consider international law in adjudication.

international law is only part of domestic law where it has been specifically incorporated, current thinking on the common law theory is that both international customary law and treaty law can be *applied* by courts where there is no conflict with existing state law, even in the absence of an implementing legislation.<sup>[71]</sup>

Judicial philosophy that enables effect to be given to unincorporated treaties has also been felt in the non-human rights contexts. In Ghana, Justice Ocran was influenced in *Products (GH) Ltd. v Delmas America Africa Line Inc* (2004) by the United Nations Convention on the Carriage of Goods by Sea. He found Article 5 on the liability of carriers ‘highly relevant’ although at the time, the convention had not been incorporated into Ghana law. In South Africa, the Supreme Court of Appeal in *De Gree v Webb* (2007) was influenced by the principles of the Hague Convention on the Protection of Children and Cooperation in respect of Inter-Country Adoption which, although ratified by South Africa, had not been implemented domestically at the time.<sup>[73]</sup> Similarly, in *Roger Parry v Astral Operations Ltd* (2005), the South African Labour Court was prepared to be ‘guided by’ Article 6 of the European Community’s Rome Convention on the Law Applicable to Contractual Obligation.<sup>[75]</sup> It is suggested that similar treatment can be afforded to community laws in disputes in which they may be relevant.

Aside from promoting interpretations that may enhance the effectiveness of community law, judicial philosophy may allow rights to be conferred on individuals under the doctrine of legitimate expectation.<sup>[76]</sup> In *Abacha v Fawehinmi* (2000),<sup>[76]</sup> the Nigerian Supreme Court accepted that an unincorporated treaty might give rise to a legitimate expectation by citizens that the government, in its act affecting them, would observe the terms of the treaty.<sup>[77]</sup> But, in the Zimbabwean case of *Movement for*

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<sup>[71]</sup> *Rono v Rono* (2005:550). This principle was affirmed in *Kenya Airways Corporation v Tobias Oganya Auma* (2007).

<sup>[73]</sup> See also *K v K* (1999: 691) on the application of the Hague Abduction Convention at a time when it had not been incorporated into South Africa law.

<sup>[75]</sup> The court noted that South Africa was not bound by the Convention. However, it is relevant to consider the convention since Article 39(1) of the South African Constitution mandates the consideration of international law in the determination of cases.

<sup>[76]</sup> In the *Abacha* case the respondent sought a declaration that his arrest and detention without charge contravened provisions of the 1979 Constitution of Nigeria and the African Charter of Human and People’s Rights (Ratification and Enforcement) Act of 1983.

<sup>[77]</sup> *Ogundare JSC* (Par. 2-13) delivering the lead judgment, and *Achike JSC* cited with approval the Privacy Council opinion in *Higgs v. Minister of National Security* (2000:1375) to the effect that an unincorporated treaty ‘...may have an indirect effect upon the construction of statutes... Or *may give rise to a legitimate expectation* on the part of the citizens that the government, in its acts affecting

*Democratic Change v The President of the Republic of Zimbabwe* (2007), the court rejected this possibility. It held that the Southern African Development Community Principles and Guidelines on the Holding of Democratic Elections, approved by the Zimbabwean Government, was not a direct source of rights and obligations under Zimbabwean law. In the court's view, the signing of the agreement by the government indicated to the national and to the international community that the government ascribed to the minimum standards set out in the guidelines. But, it did not give the applicant or any other citizen of Zimbabwe a cause of action that was enforceable in a domestic law court based on the guidelines.

From the above, it can be argued that besides instances where community law has been directly incorporated into national law or made a source of domestic law<sup>[79]</sup> the doctrine of legitimate expectation, the rule that national legislation should be interpreted in a manner consistent with the international law and a general judicial philosophy that allows courts to be guided by norms external to the legal system may be used to give effect to community law. In other words, judicial philosophy can provide an avenue through which unincorporated community laws can be given effect in national legal systems. This will be advantageous to the community, individuals and, indeed, government officials. For example, an administrative decision founded on international law is more likely to withstand judicial scrutiny than one which is not (*Chairman, Board of Trade and Tariffs v Branco* (2001:528-529)).

It remains to be seen whether African courts, through their jurisprudence, will accommodate community law. Indeed, there have been a few cases in which reliance has been placed on the objects or goals of the communities. For example, in *R v Obert Sithembiso Chikane* (2003), the Swaziland court held that 'in cases where cross-border criminals are convicted, the Courts must express the displeasure of the Southern African Development Community that serious cross-border crime shall not be tolerated'. In *Shah v Manurama Ltd* (2003), the Uganda court held that in East Africa there could no longer be an automatic and inflexible presumption for the courts to order security for costs against a plaintiff resident in the East African Community.

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them, would observe the terms of the treaty', and added that this 'represents the correct position of the law, not only in England but in Nigeria as well'. [Emphasis added].

<sup>[79]</sup> See Proposed New Constitution of Kenya, Article 3, which listed the laws of the East African Community as part of the laws of Kenya. But for the rejection of this constitution in a referendum in November 2005, this provision would have transformed the place of EAC law in Kenya's legal system.

Judicial reliance on the goals of regional communities when deciding cases is important at the present stage of the communities' development. By paying attention to the goals, courts can fashion remedies or produce judgments that ultimately strengthen economic integration. Areas where this could be useful include the enforcement of judgments from other African countries, national restrictions on cross-border commerce, rights of migrant workers and treatment of assets of migrants.

There have been other instances where courts paid attention to substantive community laws. In *Friday Anderson Jumbe v Humphrey Chimpano* (2005), the Malawian court relied on the Southern African Development Protocol against Corruption for guidance on principles relating to corruption. In *Chloride Batteries Limited v Viscosity* (2006), the Malawian court took judicial notice of Article 55 of the COMESA Treaty which deals with the competition policy of member states in granting an injunction restraining the defendant from marketing alleged counterfeit batteries imported from Kenya, Malawi. In *Hoffman v South African Airways* (2001), the South African Constitutional Court referred to the 1997 Code of Conduct on HIV/AIDS and Employment in the Southern African Development Community. In the Lesotho case of *Molifi v Independent Electoral Commission* (2005), the male applicant challenged the constitutionality of legislation that designated particular electoral divisions, including the one in which he wanted to stand for elections for the local assembly as reserved for women candidates only. One of the international instruments the court found useful in rejecting the applicant's challenge was the 1997 SADC Declaration on Gender and Development.

In almost all of the above cases, the courts did not engage in depth with the community laws or goals that were used. However, the cases are important first steps. They demonstrate some level of awareness on the part of lawyers and judges of the existence and relevance of community law. It is hoped that with time this awareness will translate into more rigorous judicial and legal national engagement with community law. In furtherance of this, academics and institutions have a crucial role to play. They must sow the seeds of community law in the minds of future generations of lawyers and judges. This can be done through specific courses on regional integration in Africa or integrating relevant aspects of community law into

already existing courses such as international law and commercial law.<sup>[87]</sup> Regional economic integration studies should not be confined to a few postgraduate students. The presence of a strong juristic group with interest in community law is perhaps the surest way of ensuring the effectiveness of community law in national legal systems.

Admittedly, in the absence of specific legislation giving effect to community law, the role judicial philosophy can play is limited. Its role will be constrained by constitutional law including the doctrine of separation of powers. The degree to which judges and lawyers are aware of community laws and are willing to deploy them in the dispute settlement process is equally important. Also, the role of judicial philosophy is contingent on litigation in which community law is engaged and legal arguments in which community issues are raised. Where there is a culture of settling disputes out of court or of not invoking community law in litigation, perhaps due to a lack of awareness, there is not much the judiciary can do.

A yet to be explored issue as regards the relations between national judiciaries and community law is the extent to which or the possibility that national courts can judicially review community law. For example, can the Supreme Court of The Gambia review the constitutionality of The Gambia's membership of ECOWAS on the ground that it amounts to a surrender of sovereignty and, hence, an infringement of Article 79(2) of the constitution? The ability of national judiciaries to review community law against national constitutions or other laws depends on their jurisdiction. In theory, the existing constitutions do not seem to exclude the possibility of such reviews. However, it is likely that the courts may avoid reviewing community law unless there is something flagrantly unconstitutional or in violation of their national law about it. Indeed, individual challenges to trade agreements before African national courts are rare, and the issue of judicial review of community law is unlikely to be an immediate issue for Africa's economic integration processes. However, the possibility of such review should make community law makers more attentive to national constitutional laws. This will avoid tensions between community laws and national laws.<sup>[88]</sup>

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<sup>[87]</sup> It is significant here that European Union Law is a key component of the undergraduate law curriculum in EU countries.

<sup>[88]</sup> An obvious illustration of this lack of attention is Rule 41(8)(b) of the Rules of the Court of Justice of the Common Market of Eastern and Southern Africa, 2003, which provides that a member state *shall*, at the instance of the court of justice, prosecute before its competent court a witness who violates an oath or affirmation the witness took before the court of justice. In some COMESA jurisdictions, the

#### **4. Conclusion**

This paper reveals a degree of ambivalence towards the issue of law translation within both community and national legal systems in Africa. The approaches of the community treaties to the issue have left uncertainties in their wake. Hopefully, in the not too distant future the interpretative jurisdiction of the community courts of justice will be called upon to clarify some of these uncertainties.

National legal systems have also largely shied away from this question – a state of affairs reflected in their constitutions and court jurisprudence. Indeed, it was suggested that in some instances current constitutional provisions may be inimical to law translation. At present, community law does not enjoy any preferred position within member states' legal systems. It is treated as any other international law. Community law's genesis in international law cannot be denied. However, it has been argued that the effectiveness of economic integration in Africa will sometimes demand a different approach to community law.

After many years of African regional economic integration processes, the above represents an unfortunate state of affairs. The disjunction between community and national legal systems, which results from the lack of attention to the issue of law translation, works against the effectiveness of economic integration. As these communities envision progression on the various stages of integration – free trade areas, customs unions, common markets and economic communities – it is hoped that they will become more attentive to the issue of law translation. The issue of law translation becomes increasingly more important as economic integration progresses. The communities have to provide a more robust and defined legal framework for law translation.

Similarly, national legal systems should analyse the challenges their laws and jurisprudence pose for law translation and, where necessary, effect amendments or legislate to overcome them. This task should be founded on member states' undertaking in the community treaties to create conditions favourable for the development and achievement of the goals of the communities and to abstain from

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power to prosecute for a criminal offence is solely at the discretion of the Attorney General or Director of Public Prosecution. See e.g. Constitution of the Republic of Kenya, Article 26(3)(8) and Constitution of the Republic of Zambia, Article 56(6).

measures likely to jeopardise the achievement of the aims of the communities.<sup>[89]</sup> National rules that work against the effectiveness of community law offend this undertaking.

Finally, it is suggested that a more systematic and rigorous academic study into the issues raised in this paper is needed to inform community and national legal systems in their approach to the issue of law translation, and to shape the future course of Africa's regional integration processes.

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<sup>[89]</sup> COMESA Treaty, Article 5(1); EAC Treaty, Article 8(1)(a)(c); ECOWAS Treaty, Article 5(1).

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## Chapter 8

### **The SADC Tribunal: a legal analysis of its mandate and role in regional integration**

Oliver C. Ruppel and Francois X. Bangamwabo

*One of the vital components for sustainability of regional integration processes is the legitimacy and effectiveness of the dispute settlement mechanisms.<sup>1</sup>*

#### **1. Introduction**

Established under Article 9 of the Southern African Development Community (SADC) Treaty, the Southern African Development Community Tribunal (SADC Tribunal) became operational in 2005. The establishment of the SADC Tribunal is a major event in the history of SADC as an organisation and in the development of SADC law and jurisprudence. The Tribunal was established in 1992 by Article 9 of the SADC Treaty as one of the institutions of SADC. The Summit of Heads of State which is the Supreme Policy Institution of SADC pursuant to Article 4(4) of the Protocol on the Tribunal appointed the members of the Tribunal during its Summit of Heads of State and Government held in Gaborone, Botswana, on 18 August 2005. The inauguration of the Tribunal and the swearing-in of the members took place on 18 November 2005 in Windhoek, Republic of Namibia. The seat of the Tribunal was designated by the Council to be Windhoek. Article 22 of the Protocol on the Tribunal provides that the working languages of the Tribunal shall be English, Portuguese and French.<sup>2</sup>

Currently, a linkage exists between the political situation in Zimbabwe (which is internationally observed with interest and concern) and the Tribunal's activities. In 2007 the Tribunal received its first cases. One of these cases is related to the ongoing land reform in Zimbabwe and highlights the relevance of the new Tribunal for SADC and its potential significance *inter alia* for the protection of human rights. The regional expectations with regard to the Tribunal's future influence are high and the outcome of the above case is an indicator for its future relevance.

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<sup>1</sup> As held by the workshop on *Specific Aspects of the Experiences of the European Union and the Andean Community* held in São Paulo, Brazil in October 2004. See Vos (2005).

<sup>2</sup> See <http://www.sadc.int/tribunal/> (20 July 2008).

No doubt, the SADC Tribunal is expected to serve as a key actor in the SADC legal and institutional integration process. The European Union experience has demonstrated that such dispute settlement bodies can indeed play a significant role in regional integration. However, in order to develop the current SADC dispute settlement system into an ideal model, improvements may have to be considered.

African states have historically resisted supranational judicial supervision of their sovereignty. The belief that a state is independent and free from any other exterior influence has stifled growth and the realisation of the interdependence among states has been rather slow. In the early days of decolonisation, economic problems to be faced by young independent African nations were explored and discussed. Consensus gradually emerged that the smallness and fragmentation of young and underdeveloped African markets constitute an obstacle to the creation of modern and competitive enterprises in the era of globalisation. It is a pressing reality that a century of change has tied the people of the earth in unprecedented intimacy of contact, interdependence of welfare and vulnerability. Thus, it was agreed that new African countries should promote economic cooperation through regional integration. In this regard, two options were advocated: a pan-Africanist approach, that is, a regional continental arrangement comparable to the European Union model, or, alternatively, a narrow approach that will have its roots at the sub-regional levels and built on sub-regional groupings and cooperation. Most African countries favoured the narrower approach of sub-regional economic integration and cooperation. It is against this backdrop that many sub-regional arrangements were put in place.

Southern Africa was not immune to the above developments and consequently joined forces in creating *inter alia* the Southern African Development Community. To ensure the effectiveness of its mandate there was a need for another instrument whose primary objective was to adjudicate over disputes that might arise among the member states or in relation to the provisions of the SADC Treaty – a step forward, though tentative, to the achievement of a more internationally oriented judicial system. In the light of the above, the jurisdictional scope of the SADC Tribunal, applicable laws in this jurisdiction, enforcement of its decisions, its judicial independence and impartiality, its role in advancing and protecting human rights and contributing to economic regional integration will be monitored.

## 2. The first cases

Although the SADC Tribunal became operational in 2005, its jurisprudence remains meagre in that so far only a few cases have been filed with the Tribunal. The authors are not aware of cases which might have been brought to this jurisdiction, but may have been rejected in terms of the admissibility provisions.<sup>3</sup> Meanwhile, during the course of 2008, a number of new cases were filed at the Tribunal. In the ensuing paragraphs, only the first two cases filed with the Tribunal will be examined in their chronological order.

### 2.1 Ernest Francis Mtingwi v the SADC Secretariat<sup>4</sup>

This case involved a labour dispute which arose between Ernest F. Mtingwi, a national of Malawi (herein applicant), and the SADC Secretariat (herein respondent). From the facts and submissions by both parties, three issues for the determination of the dispute were identified, namely: (a) the existence or otherwise of a contract of employment between the parties; (b) whether the respondent was in breach of contract; and (c) whether the remedies sought are available to the parties.

The applicant approached the SADC Tribunal seeking following reliefs: (a) an order or declaration that the decision to terminate his employment was done in breach of the rules of natural justice; (b) an order or declaration that the respondent's decision was contrary to applicant's legitimate expectation; (c) an order that the respondent's decision was illegal, arbitrary, capricious, unreasonable, made in bad faith, and therefore *ultra vires* and *void ab initio*; (d) an order or declaration that the applicant was still in the employ of the respondent as a Senior Programme Manager, Customs Cooperation and Modernisation; (e) alternatively, an order or declaration reinstating the applicant in this position; (f) punitive and/or exemplary damages for breach of contract; (g) or in the alternative, compensation in lieu of reinstatement; (h) any relief as the Tribunal may deem fit and necessary; and finally, (i) costs.

The respondent opposed the application and in addition made a counter-claim relating to costs incurred on account of the applicant.

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<sup>3</sup> See Article 15 of the Protocol.

<sup>4</sup> SADC(T) Case No. 1/2007.

With regard to the competence of the Tribunal to adjudicate in the matter, the Tribunal invoked the SADC Protocol on the Tribunal and Rules of Procedure thereof.<sup>5</sup> Article 18 of the Protocol reads:

Subject to the provisions of Article 14 of this Protocol, the Tribunal shall have exclusive jurisdiction over all disputes between natural or legal persons and the Community. Such disputes may be referred to the Tribunal either by the natural or legal person concerned or by the competent institution or organ of the Community.

After deliberation, the Tribunal was satisfied that there were an offer and acceptance of employment between the parties, subject, however, to other future (uncertain) events such as those contained in Rule 14.2.6 of the SADC Administrative Handbook. The Tribunal therefore held that this was a conditional contract of employment in terms of which applicant was to report at the duty station to make it effective (*Ernest Francis Mtingwi v the SADC Secretariat SADC (T) Case No. 1/2007:13*). The Tribunal further found that the applicant deliberately failed to fulfil this condition, and that no binding employment contract had therefore come into existence between the parties. The Tribunal agreed with the respondent's contention that the applicant was still a candidate as long as he did not report at the duty station for commencement of duties. The Tribunal (in *Ernest Francis Mtingwi v the SADC Secretariat SADC (T) Case No. 1/2007:14-15*) further held:

As a candidate, the applicant was neither an employee nor a staff member of the respondent. Consequently, he was not entitled to the rights that accrue to the employees or staff of the respondent under the Treaty or other instruments made thereunder.

Having resolved the issue of whether or not there was a contract of employment between the parties in the negative, it was not necessary for the Tribunal to address the remaining issues, viz issues (b) and (c). With regard to the respondent's counter-claim, the Tribunal found that the respondent had failed to adduce sufficient evidence as to the alleged loss. The counter-claim was also dismissed. No order as to costs was made.

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<sup>5</sup> For convenience, the SADC Protocol on the Tribunal and Rules of Procedure thereof will be referred to simply as the (SADC) Protocol.

The above case is a historical one, simply in that it was the first case to date to be filed with and finalised by the SADC Tribunal.

## 2.2 Campbell v the Republic of Zimbabwe<sup>6</sup>

On 11 October 2007 Mike Campbell (Pvt) Limited, a Zimbabwean registered company, instituted a case with the Tribunal to challenge the expropriation of agricultural land in Zimbabwe by the government of Zimbabwe. The matter was also pending in the Supreme Court of Zimbabwe at the time.<sup>7</sup> As a result, an application was brought in terms of Article 28 of the SADC Protocol for an interim measure to interdict the government of Zimbabwe from evicting Mike Campbell (Pvt) Limited *et al.* from the land in question until the main case has been finalised. This is referred to as *interlocutory relief*.

The claimant argued that the Zimbabwean land acquisition process was racist and illegal by virtue of Article 6 of the SADC Treaty and the African Union Charter that outlaw arbitrary and racially motivated government action. The SADC Treaty in its Article 4 stipulates that SADC and its member states shall act in accordance with the principles of human rights, democracy and the rule of law as well as equity, balance and mutual benefit; and the peaceful settlement of disputes, *inter alia*. According to Article 6 (2) of the SADC Treaty, ‘SADC and member states shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture or disability’.

It was brought forward that the constitutional amendments behind the farm seizures were contrary to SADC statutes and that the Supreme Court of Zimbabwe failed to rule on an application by Campbell and 74 other Zimbabwean commercial white farmers to have the race-based acquisition declared unlawful (‘Klagerschar vervielfacht’ 2003). The claimant alleged that he had suffered a series of invasions on his farm. The defendant state in turn argued that the land must be given back to even out colonial imbalance and that Campbell had not exhausted local remedies. The central problem of this case seems to be the relationship between the legal regime of SADC on the one side and Zimbabwe’s national law on the other.

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<sup>6</sup> See SADC (T) Case No. 02/2007.

<sup>7</sup> See Mike Campbell (Pvt) Ltd et al. v The Minister of National Security responsible for Land, Land Reform and Resettlement and the Attorney-General (2007).

The Constitution of Zimbabwe in its Section 23 states: ‘No law shall make any provision that is discriminatory either of itself or in its effect; and no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority’.

In 2005, however, the Constitution of Zimbabwe was amended. The Constitutional Amendment Act No. 17 of 2005 allows the government of Zimbabwe to seize or expropriate farmland without compensation and bars courts from adjudicating over legal challenges filed by dispossessed and aggrieved white farmers. Section 2(2) of the above amendment provides that ‘all agricultural land – (follows the description of such agricultural land identified by the Government)...is acquired by and vested in the State with full title therein...; and...no compensation shall be payable for land referred to in Paragraph (a) except for any improvements effected on such land before it was acquired’.

The practical implications of the Constitutional Amendment Act No. 17 resulted in farm seizures, where the majority of the approximately 4000 white farmers were forcibly ejected from their properties with no compensation being paid for the land, since, according to Harare, it was stolen in the first place. The government has compensated some farmers only for developments on the land such as dams, farm buildings and other so-called *improvements*.<sup>8</sup>

On 13 December 2007 the SADC Tribunal ruled that Campbell should remain on his expropriated farm until the dispute in the main case had been resolved by the Tribunal:

The Tribunal grants the application pending the determination of the main case and orders that the Republic of Zimbabwe shall take no steps, or permit no steps to be taken, directly or indirectly, whether by its agents or by its orders, to evict from or interfere with the peaceful residence on and beneficial use of the farm known as Mount Campbell in the Chetugu District in Zimbabwe, by Mike Campbell Ltd and William M Campbell, their

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<sup>8</sup> These land reform measures have, as a side note, plunged Zimbabwe into severe food shortages.

employees and the families of such employees and of William Michael Campbell.<sup>9</sup>

The above interim relief was also applied for by and granted to other applicants/interveners on 28 March 2008.<sup>10</sup>

On 22 January 2008, the Zimbabwean Supreme Court (sitting as a Constitutional Court) dismissed the application by the white commercial farmers challenging the forcible seizure and expropriation of their lands without compensation. The Court ruled that 'by a fundamental law, the legislature has unquestionably said that such an acquisition shall not be challenged in any court of law. There cannot be any clearer language by which the jurisdiction of the courts is excluded'.<sup>11</sup>

On 23 January 2008 the Zimbabwean government announced that it would seize the farm. Land Reform Minister Dydimus Mutasa said the farm would be handed over to a black owner as part of state land reforms and following the ruling by the Zimbabwean Supreme Court.<sup>12</sup>

The main hearing before the SADC Tribunal was scheduled for 28 May 2008, but postponed until 16 July 2008. In the meantime the claimant, Campbell, and members of his family were brutally beaten up on their farm in Zimbabwe and allegedly forced to sign a paper declaring that they would withdraw the case from the SADC Tribunal ('Simbabwe: Brutaler Überfall' 2008). On 18 July 2008, applicants and other interveners in the Campbell case made an urgent application to the Tribunal seeking a declaration to the effect that the respondent state was in breach and contempt of the Tribunal's orders. After hearing the urgent application, the Tribunal found that the respondent state was indeed in contempt of the Tribunal's orders. Consequently, and in terms of Article 32(5) of the Protocol, the Tribunal decided to report the matter to the Summit for the latter to take appropriate action.

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<sup>9</sup> See: Mike Campbell (Pvt) Ltd & one other v The Republic of Zimbabwe SADC (T) Case No. 02/2007 (Interim order granted on 13 December 2007).

<sup>10</sup> See Cases SADC(T) No. 03/08; 04/08 and 06/08.

<sup>11</sup> See the following website:

[http://www.thezimbabwean.co.uk/index.php?option=com\\_content&view=article&id=13001:campbell-case-heads-of-argument-summary&catid=31:top%20zimbabwe%20stories&Itemid=66](http://www.thezimbabwean.co.uk/index.php?option=com_content&view=article&id=13001:campbell-case-heads-of-argument-summary&catid=31:top%20zimbabwe%20stories&Itemid=66)

(18 June 2008).

<sup>12</sup> See also article in this publication by Dube (2008).

Meanwhile, a significant number of recently resettled indigenous farmers filed an application seeking an order to allow them to intervene in the main case.<sup>13</sup> This application was, however, dismissed with costs. In the Tribunal's view, the applicants/interveners could not be allowed to intervene in the main case for the following reasons:

- The present application to intervene was filed out of time and no good reason was advanced to justify the inordinate delays;<sup>14</sup>
- the alleged dispute in the present application is between present applicants and applicants in the main case (Campbell case) and not between persons (either natural or juristic) and a state;<sup>15</sup> and
- the applicants in the present application have failed to demonstrate any legal right or interests which are likely to be prejudiced or affected by the Tribunal's decision in the Campbell case.<sup>16</sup>

The hearing of the Campbell case was finalised on 28 November 2008.<sup>17</sup> The SADC Tribunal in its final decision ruled in favour of the applicants Mike and William Campbell and 77 other white commercial farmers.<sup>18</sup>

In conclusion, the Tribunal held that the Republic of Zimbabwe is in breach of its obligations under Articles 4(c) and 6(2) of the SADC Treaty and that:<sup>19</sup>

- the Applicants have been denied access to the courts in Zimbabwe;
- the Applicants have been discriminated against on the ground of race,<sup>20</sup>

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<sup>13</sup> See *Nixon Chirinda et al v Campbell Ltd et al. and the Republic of Zimbabwe* (2008).

<sup>14</sup> In fact, Rule 70 (2) of the Tribunal provides that an 'application in terms of this Rule (application to intervene) shall be made as soon as possible and not later than the closure of the written proceedings in the main case...'

<sup>15</sup> The Tribunal based its reasoning on the content of Article 15(1) of the Protocol which reads: 'The Tribunal shall have jurisdiction over disputes between States, and between natural or legal persons and States'. Thus, where a dispute involves only persons (either natural or juristic), the Tribunal shall not be competent to adjudicate upon such dispute.

<sup>16</sup> The Tribunal further held that the applicants/interveners had failed to adduce any evidence showing that they had indeed been denied access to justice and had suffered racial discrimination or loss. See *Nixon Chirinda et al. v Campbell Ltd et al* (2008).

<sup>17</sup> It has to be noted that this article was submitted for final editing in October 2008. Due to the high relevance of the Tribunal's final ruling, the editors of this volume, however, granted permission to the authors of this article to subsequently include the following paragraph on the Tribunal's main findings.

<sup>18</sup> *Mike Campbell (Pvt) Ltd & one other v the Republic of Zimbabwe SADC (T) Case No. 2/2007*.

<sup>19</sup> *Mike Campbell (Pvt) Ltd & one other v the Republic of Zimbabwe SADC (T) Case No. 2/2007:57f*.

- fair compensation is payable to the Applicants for their lands compulsorily acquired by the Republic of Zimbabwe.

The Tribunal furthermore directed the Republic of Zimbabwe to take all necessary measures to protect the possession, occupation and ownership of the lands of the applicants who had not yet been evicted from their lands, and to pay fair compensation to those three applicants who had already been evicted from their farms.

The ruling is considered to be a landmark decision which will without any doubt influence the legal landscape in the region.

### **3. Access to and Jurisdiction of the SADC Tribunal**

The SADC Protocol on the Tribunal and Rules of Procedure thereof circumscribes the Tribunal's jurisdiction. Article 16(1) of the SADC Treaty provides that the primary mandate of the Tribunal is as follows:

The Tribunal shall be constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it.

The SADC Tribunal was set up to protect the interests and rights of SADC member states and their citizens, and to develop the community jurisprudence also with regard to applicable treaties, general principles and rules of public international law.<sup>21</sup> Subject to the principle of exhaustion of local remedies, the Tribunal has the mandate to adjudicate disputes between states, and between natural and legal persons of the Community (Protocol Art. 15(2)).

In the Campbell Case the Tribunal raised the issue of jurisdiction *mero metu* where it ruled that it had jurisdiction since the dispute in this case involves a member state

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<sup>20</sup> The issue of racial discrimination was decided by majority of four to one. Judge Tshosa in his dissenting opinion concluded that 'Amendment 17 does not discriminate against the applicants on the basis of race and therefore does not violate the respondent obligation under Article 6(2) of the Treaty'. He argues that 'the target of Amendment 17 is agricultural land and not people of a particular racial group' and that – although few in number – not only white Zimbabweans have been affected by the amendment. See *Mike Campbell (Pvt) Ltd and others v The Republic of Zimbabwe (2007)*: dissenting opinion of Hon. Justice Dr Onkemetse B. Tshosa.

<sup>21</sup> See Chidi (2003).

and a natural and legal person. The Tribunal has, however, made it clear that it is not competent to adjudicate in disputes involving only natural or juristic persons.<sup>22</sup> Further, the Protocol states that the Tribunal shall have jurisdiction over all matters provided for in any other agreements that member states may conclude among themselves or within the community and that confer jurisdiction to the Tribunal (Hugo 2007). Finally, the Tribunal has exclusive jurisdiction in disputes between organs of the community or between community personnel and the community (Protocol Art. 18-19). It is on this ground that the Tribunal exercised its jurisdiction in the case of Ernest Francis Mtangwi v. SADC Secretariat (2007). The dispute in this case arose between the SADC Community Secretariat and one of its staff members [*sic*].

Apart from jurisdiction in contentious proceedings, the tribunal also has advisory jurisdiction at the request of the Summit or the Council of Ministers (Protocol Art. 20). At this stage, it is worth noting that Article 16 of the SADC Treaty provides that the decisions of the Tribunal are final and binding. The subject-matter jurisdiction (*ratione materiae*) of the Tribunal is laid down in Article 14 of the Protocol as follows:

The Tribunal shall have jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and this Protocol which relate to: i) the interpretation and application of the Treaty; ii) the interpretation, application or validity of the Protocols and subsidiary instruments adopted within the SADC, and acts of institutions of the community ;and iii) all matters specifically provided for in any other agreements that States may conclude among themselves or within the community and which confer jurisdiction on the Tribunal.

#### **4. Locus standi in judicio**

Article 15(1) of the SADC Protocol makes it clear that both natural and juristic persons have the right of audience to the Tribunal.<sup>23</sup> Once local remedies have been

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<sup>22</sup> See the ruling in the case of Albert Fungai Mutize et al. v Mike Campbell (Pvt) Ltd et al (2008:4).

<sup>23</sup> This right of audience is, however, subject to certain requirements, namely the exhaustion of local remedies, and the fact that the dispute also involves a member state. The question whether the SADC Tribunal will also recognise and apply public complaint, the so-called *actio popularis* has not yet plagued the Tribunal, but it is anticipated that it may be of importance in the long run. The International Court of Justice (ICJ) has refused to entertain any action brought by a member state that has no vested interest in the matter. In the light of the foregoing, and considering the fact that the Protocol

exhausted, such persons have *locus standi* before the Tribunal when the dispute at hand involves the state's obligations under community law (Protocol Art. 15(2)). It is contended that the requirement of exhaustion of local remedies leads to the conclusion that the SADC Tribunal can be considered as a *final court of appeal* rather than a court of first instance.

## 5. Exhaustion of local remedies

Article 15(2) of the SADC Protocol regulates that 'no natural person shall bring an action against a State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction'.

The SADC Tribunal's admissibility stage requires litigants to have exhausted local remedies unless they are unduly prolonged, ineffective or unavailable. The rule of exhaustion of local remedies is not peculiar to the SADC Tribunal.<sup>24</sup> There are two legs to the principle of local remedies: first, there may not be any breach of international law at all until all legal remedies have been exhausted, that is, the breach only consists in the failure to afford a remedy. Secondly, the breach can be established independently of the action of local tribunals, but in that event a bar to the admissibility of any international claim in respect of the breach continues so long as any remedies afforded by the local law have not been exhausted (Fitzmaurice 1993:686).

It follows that failure to exhaust local remedies will not constitute a bar to a claim if it is clearly established that in the circumstances of the case, an appeal to a higher municipal tribunal would have had no effect. Nor is a claimant against another state required to exhaust justice in that state where there is no justice to exhaust. According to Dugard (2003:293), where the local remedies are futile or provide no reasonable possibility of effective redress there is no need to attempt to exhaust

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establishing the SADC Tribunal is silent on the issue, it is difficult to determine whether the Tribunal will entertain *locus standi in judicio* based on *actio popularis*.

<sup>24</sup> In fact, all major human rights instruments (both regional and international) do provide for the rule on the exhaustion of local remedies: e.g. Article 35(1) of the European Convention on Human Rights, 1950; Article 46 (1) of the American Convention on Human Rights, 1969; 56(5) of the African Charter on People's and Human Rights, 1981; and Articles 2 and 5(2)(b) of the Optional Protocol to the International Covenant on Civil and Political Rights, 1966. In regard to the Rome Statute of the International Criminal Court, the principle of exhaustion of domestic remedies is substituted by the *complementarity principle* as laid down in Article 17 (a) of the ICC Statute. This article makes it clear that the International Criminal Court will only accept a case where a state which has jurisdiction over it is unwilling or unable to genuinely carry out the investigation and/or prosecution.

them. Additionally, local remedies need not be exhausted where the responsible state has waived compliance with this requirement. Such a waiver, if any, must be express and not implied.<sup>25</sup>

Courts and scholars have propounded the so-called *reasonable possibility test* in order to assess the existence or otherwise of local remedies in any given jurisdiction. The reasonable possibility test holds that wherever a *possible* remedy exists, recourse must be had to it, even if this is in fact highly unlikely to be successful. As a rule, it is for the applicant (claimant) to prove that there are no effective remedies to which recourse can be had; no such proof is required if legislation exists which on the face of it deprives the private claimants of a remedy (Dugard 2003:293).

The issue of non-exhaustion of local remedies was raised in the first hearing of the Campbell Case. In fact, when the applicants in this case approached the SADC Tribunal seeking an interim order in terms of Article 28 of the Protocol as read with Rule 61(2) and (5) of its Rules of Procedure, the respondent state argued that the application was not properly placed before the Tribunal in that the applicants had not exhausted local remedies in terms of Article 15(2) of the Protocol.<sup>26</sup>

When the matter was filed with the Tribunal in October 2007 the Supreme Court of Zimbabwe, sitting as a Constitutional Court, was still dealing with the constitutional challenge of Section 16B of the Zimbabwean Constitution brought by the same applicants as in the Campbell Case.<sup>27</sup> The relief which was being sought from the Zimbabwean highest court is similar to the one applicants were seeking from the SADC Tribunal. However, the Tribunal held as follows:

Referring to the issue of failure to exhaust local remedies by applicants, we are of the view that the issue is not of relevance to the present application but that it may only be raised in the main case. It may not be

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<sup>25</sup> See International Court of Justice (1989:42).

<sup>26</sup> Mike Campbell (Pvt) Ltd and others v the Republic of Zimbabwe. SADC (T) Case No. 2/2007. Interim order dated 13 December 2007, p. 6.

<sup>27</sup> Mike Campbell (Pvt) Ltd et al. v The Minister of National Security responsible for Land, Land Reform and Resettlement and the Attorney – General. Constitutional Application No. 124/06 (unreported case: Supreme Court of Zimbabwe).

raised in the present case in which applicants are seeking an interim measure of protection pending the final determination of the matter.<sup>28</sup>

In February 2008, the Zimbabwean Constitutional Court ruled that the Constitutional Amendment No. 17 of 2005 was valid and therefore constitutional in that its purpose is to acquire the land for public purpose. It follows that the issue of non-exhaustion of local remedies was no longer relevant. In any event, it is worth noting that new Section 16B of the Zimbabwean Constitution, which is the creation of Constitutional Amendment No. 17 of 2005, deprives affected landowners of their right to seek remedy within domestic courts.<sup>29</sup>

## **6. Judicial independence of the SADC Tribunal**

### **6.1 Appointment of the judges**

Article 16(3) of the SADC Treaty and Article 4 of the SADC Protocol provide for the appointment of judges. Ten judges are appointed for five years renewable by the common accord of the governments of the member states. For obvious practical reasons, the number of judges cannot be equal to that of the states. However, Article 3(5) of the Protocol provides that if it eventually becomes apparent that there is need for an increase in the ten judges initially chosen, the Council of Ministers may increase the number at the proposal of the Tribunal.

Once the ten judges have been appointed, the Council has to designate five as regular members who have to sit regularly. The remaining five constitute a pool from which the President may invite a member to sit on the Tribunal whenever a regular member of the Tribunal is temporarily absent or otherwise unable to carry out his or her functions (SADC Protocol Art. 3(2)). At all times the Tribunal will be constituted of three members – this forms the ordinary sitting. In cases where the Tribunal decides to constitute a full bench, the members should be five in number (SADC Protocol Art. 3(3)).

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<sup>28</sup> Mike Campbell (Pvt) Ltd and others v the Republic of Zimbabwe. SADC (T) Case No. 2/2007. Interim order dated 13 December 2007.

<sup>29</sup> In fact, Section 16B(3) of the Zimbabwean Constitution reads: ‘... a person having any right or interest in the land (expropriated land) shall not apply to court to challenge the acquisition of the land by the state, and no court shall entertain such challenge...’

The Tribunal may not include more than one national from the same state (SADC Protocol Art. 3(6)). In the unlikely event that it happens that two judges are in fact chosen, it might be worth adopting the position taken by the ICJ according to which, if two candidates of the same nationality are elected at the same time, only the elder is considered to have been validly elected. At most, a judge may only serve for two consecutive terms after which he or she ceases to qualify for holding office (SADC Protocol Art. 6).

Article 6 of the Protocol provides that

of the members initially appointed, the terms of the two (2) of the regular and two of the additional members shall expire at the end of three years. The members whose term is to expire at the end of three years shall be chosen by a lot to be drawn by the Executive Secretary immediately after the first appointment.

It is submitted that the above provision is included in order to ensure a certain measure of continuity. Two-fifths of the court, that is four judges, are elected every three years and the other three-fifths are left until their five years lapse. The same method was also adopted by the ICJ, whose judges run for a maximum term of nine years, but a third of them are elected every three years (Muller et al. 1997:67).

Member states have great latitude in choosing whom to nominate for the Tribunal. All state parties to the Treaty have the right to propose a candidate. The only limitation is that they should qualify for appointment to the highest offices in their respective states or who are jurists of recognised competence (Protocol Art. 3(1)).

It should be emphasised that, once elected, a member of the Tribunal is a delegate neither of the government of his own country nor of that of any other state. Unlike most other organs of international organisations, the Tribunal is not composed of representatives of governments. Members of the Tribunal reach their decisions with complete independence and impartiality. However, in some way or other they represent their legal system, that is, the judges' professional experience and their background obviously have a way of showing in their decisions. This is in no way a weakness; in fact, this has the valuable consequence that the Tribunal operates as a comparative law jurisdiction, merging experiences and understandings of lawyers

skilled in the wide range of different legal (civil and common law) systems and indeed families of law.

## **6.2 Independence and impartiality of the Tribunal**

Judicial independence can be defined as:

The degree to which Judges believe they can decide and do decide consistent with their own personal attitudes, values and conceptions of judicial role (in their interpretation of the law), in opposition to what others, who have or are believed to have political or judicial power, think about or desire in like matters, and particularly when a decision adverse to the beliefs or desires of those with political or judicial power may bring some retribution on the Judges personally or on the power of the court (Becker 1970:15).

In order to effectively fulfil its functions it is essential that the culture of judicial independence is sustained by procedures for appointment which must be fair, transparent and reasonable.<sup>30</sup>

Certainly, a proper and concrete assessment of the judicial independence and impartiality of the SADC Tribunal is not easy without reference to its jurisprudence. This, however, is not possible given the fact that the Tribunal is still in its infancy stage. Several provisions have been included in the Protocol to guarantee the independence and impartiality of the judges. Before taking up their duties, the members of the Tribunal are required to make a solemn declaration in open session that they will exercise their powers independently, impartially and conscientiously (SADC Protocol Art. 5). The implication and essence of this solemn declaration by all members is that the Tribunal should only act on the basis of the law, independently of all outside influence or interventions whatsoever, in the exercise of its judicial function entrusted to it alone by the SADC Treaty and the Protocol.

In order to guarantee judicial independence, no member of the court can be dismissed unless in accordance with the rules (SADC Protocol Art. 8(3)). Members

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<sup>30</sup> See Ruppel's conference paper (2008). The conference was organised by the Konrad Adenauer Foundation: Rule of Law Programme for Sub-Saharan Africa.

of the Tribunal may not hold any political or administrative office in the service of a state, community, or any other organisation (SADC Protocol Art. 9). This provision seeks to protect the judges from the influences of member states and other institutions. In addition, it fosters the general public's confidence in the Tribunal as a separate and independent judicial entity.

While the European Court of Justice (ECJ) forbids its judges from engaging in any occupation, whether gainful or not, the judges of the SADC Tribunal, for practical reasons, are employed on a part-time basis and can therefore hold other judicial offices (Hunnings 1996:52). With regard to the well known principle of *nemo iudex sua causa est*, Article 9(2) of the Protocol stipulates that 'no member of the Tribunal should participate in the decision of any case (dispute) in which he was previously involved'.<sup>31</sup>

Another feature relevant to the independence of the Tribunal is the fixed term of office of its judges (five years renewable). It has been argued that the possibility of renewal of their appointment could encourage judges to try to please their governments in order to get another renewal nomination (Hunnings 1996:53). While this might pose a problem with the ECJ where each member state nominates one candidate, this does not apply to the SADC Tribunal. The selection process is such that not all member states can have a candidate sitting on the bench. The result is that the Summit is forced to consider the qualifications of the candidates recommended by the Council in order to make their choice. In the end, the judge on the bench will not feel compelled to please his/her government to ensure another term in office. Furthermore, when engaged in the business of the Tribunal, the judges enjoy privileges and immunities to ensure that their decisions are not tainted with the fear of being held accountable at the end of their tenure (Protocol Art.10).

## **7. Applicable law**

Article 21 of the Protocol specifically deals with the applicable law by the SADC Tribunal. It provides that the Tribunal shall apply the SADC Treaty, its Protocols and all subsidiary instruments adopted by the Summit, by the Council or by any other institution or organ of the community pursuant to the Treaty or Protocols.

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<sup>31</sup> This may happen in many ways, e.g. where the judge has acted previously in the dispute at hand as an agent, an attorney or advocate, a legal adviser or as a judge at domestic level.

**Table 1: SADC Legal instruments**

- Declaration and Treaty of SADC
- Amended Declaration and Treaty of SADC
- Protocol Against Corruption
- Protocol on Culture, Information and Sports
- Protocol on Combating Illicit Drugs
- Protocol on Education and Training
- Protocol on Energy
- Protocol on Extradition
- Protocol on Control of Firearms, Ammunition and Other Related Materials
- Protocol on Fisheries
- Protocol on Forestry
- Protocol on Health
- Protocol on Immunities and Privileges
- Protocol on Legal Affairs
- Protocol on Mutual Legal Assistance in Criminal Matters
- Protocol on Mining
- Protocol on the Facilitation of Movement of Persons
- Protocol on Politics, Defence and Security CoOperation
- Protocol on the Development of Tourism
- Protocol on Trade
- Amended Protocol on Trade
- Protocol on Transport, Communications and Meteorology
- Protocol on Tribunal and the Rules of Procedure Thereof
- Agreement Amending the Protocol on Tribunal
- Protocol on Shared Watercourse Systems
- Revised Protocol on Shared Watercourses
- Protocol on Wildlife Conservation and Law Enforcement
- SADC Mutual Defence Pact

Source: SADC Parliamentary Forum, 2007 Compendium of SADC Protocols and other legal instruments

While the Tribunal has the mandate to develop its own jurisprudence, it must also give regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law applicable in member states (Protocol Art. 21(b)). This exhortation indicates a clear desire for the Tribunal to influence the direction and speed of the integration process for the community. It also reflects a

desire to create a truly supranational law applicable to the Community Member States: law that is now a pure reflection of the political agreements and consensus at the level of the heads of states in the region.

Unlike the East African Community treaty law (EAC Treaty Art. 8(4) and 33(2)), the treaty law of SADC does not contain any provisions dealing with the relationship between community law and domestic law. In addressing this issue, the SADC Tribunal could, however, resort to Article 21 of its Protocol.<sup>32</sup>

Corollary to the issue of applicable law is the interrelationship between (SADC) community laws and municipal laws. Differently put, in the event that there is a conflict or inconsistency between community law and domestic laws of member states, which law should prevail? The answer to this question also depends on the various national constitutions and the status (legal force) of conventional law in member states, and on the relationship between domestic laws and conventional law in particular (e.g. monist or dualist approach<sup>33</sup>).

## **8. Effect and review of the Tribunal's judicial decisions**

According to Article 24(3) of the Protocol, the Tribunal's decisions and rulings are final and binding. As to the finality of decisions the provision implies that there is no further instance of appeal within the legal regime of SADC to review a decision or ruling issued by the Tribunal. This may be subject to criticism but can be justified on various grounds. Regarding cases brought by natural or legal persons, the rule of exhaustion of local remedies does play a significant role in the context of the lack of an appeal instance. Taking into account that, in principle, a case can only be brought before the Tribunal if all available remedies under domestic jurisdiction have been exhausted, the Tribunal itself can in these cases be regarded as an instance of appeal, since a national court has already ruled on the case.

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<sup>32</sup> As mentioned earlier, this provision permits the Tribunal to apply general principles and rules of public international law and any rules and principles of the law of states. In the view of the authors, this would include jurisprudence of other regional or international courts or tribunals.

<sup>33</sup> As to the Namibian approach in respect of the reception of international law into the national legal system, cf. Erasmus (1991:81ff.) See also Bangamwabo (2008:166ff.).

The fact that there is no appellate body in the classical sense does not mean that SADC Tribunal decisions cannot be subject to review at all. Article 26 of the Tribunal's rules of procedure provides as follows:

An application for review of a decision may be made to the Tribunal if it is based upon the discovery of some fact which by its nature might have had a decisive influence on the decision if it had been known to the Tribunal at the time the decision was given, but which fact at the time was unknown to both the Tribunal and the party making the application.

Different is the situation found in the European Union, where, with the implementation of the Court of First Instance (CFI) on 31 October 1989, a major change occurred in the judicial system of the European Communities. Article 225 of the EC Treaty (*ex* Article 168 A EEC) became the legal foundation for the new CFI.<sup>34</sup> The main reason for establishing a new court in the Judicial System of the European Communities was the rapidly growing workload and the increasing complexity of the cases before the Court of Justice of the European Communities (ECJ), which led to a great backlog of cases and a general increase in the average time the ECJ was taking to complete the cases submitted to it. Since the SADC Tribunal became active only in 2007, it is to be seen how the court will manage its workload in future. With the transfer of jurisdiction to the CFI, the ECJ took on a new role as an appellate court in the identified areas of jurisdiction. Article 225 Par. 1 of the EC Treaty provides that the CFI exercises its jurisdiction subject to a right of appeal to the ECJ, on points of law only and in accordance with the conditions laid down by the Statute of the Court.

Also the conflict resolution mechanism in the World Trade Organisation (WTO) in comparison to its predecessor GATT (General Agreement on Tariffs and Trade) has been shown to become more effective once the WTO dispute settlement system is introduced an appellate review of panel decisions. This not only enhanced the enforceability of all commitments but ensured greater confidence in the quality of legal finding. The WTO Appellate Body was established in 1995 under Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The Appellate Body can uphold, modify or reverse the legal findings and

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<sup>34</sup> This was based on Decision 88/591/ECSC, EEC, EURATOM (1989) C 215/1.

conclusions of a panel, and Appellate Body Reports, once adopted by the Dispute Settlement Body (DSB), must be accepted by the parties to the dispute. The improved structure of this two-tier system has given WTO members an ability to defend their rights. The review mechanism presented in the appellate body allows conflicting parties to show how determined they are to fight their case.<sup>35</sup>

Regardless of the question whether the principle of *res judicata* is to be applied by the judicial organ of the African Union, which is hopefully operational in due course (Viljoen 2007:502), the SADC rules of procedure clearly state that the decisions of the Tribunal are of a binding nature. However, it may be discussed whether the decisions are binding only *inter partes*, meaning upon the parties to the dispute, or whether the binding effect also unfolds to the national courts of other SADC member states, i.e. a binding effect *erga omnes*. Article 32(3) of the Protocol addressing the issue of enforcement of the Tribunal's decisions clearly states that '[d]ecisions of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and enforceable within the territories of the States concerned'.

Decisions by the Tribunal therefore do not have an *erga omnes* effect in its classical sense. The consequence of judicial acts by the SADC Tribunal for national jurisdictions can nonetheless be subject to discussion. Whether or not such rulings have an influence on national jurisdictions is generally to be determined by the national law of each SADC member state.<sup>36</sup> In summary, especially in common law countries, the Tribunal's rulings will at least have a guiding effect upon the jurisdiction of national courts. In order to warrant a higher degree of transparency, legal certainty and predictability, it is, however, recommended that provision be made within the legal framework of SADC that actually imposes a duty on national judges to adhere to the jurisdiction of the Tribunal.

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<sup>35</sup> For the WTO dispute settlement system, see report by Sutherland et al. (2005:49).

<sup>36</sup> Taking the example of Namibia, the Constitution in its Article 81 declares the decisions of the Supreme Court as binding on all other courts and all persons in Namibia. In all other cases, the answer to the problem of the binding nature of court decisions is to be found in Article 78 of the Namibian Constitution which states that the Namibian courts are independent and that they are subject only to the Namibian Constitution and the law. The latter implies that each judge is independent in his or her decision and not bound to judicial acts of other judicial organs whether national decisions or decisions of other – possibly higher ranked – judicial organs.

## 9. Enforcement of the Tribunal's judicial decisions

Article 16(5) of the Treaty of SADC provides that the decisions of the SADC Tribunal shall be final and binding on the parties of the dispute. Were the Tribunal's decisions not binding, i.e. enforceable and executable by member states, the whole purpose of creating such a court would be a nullity. The primary responsibility to enforce and execute the SADC Tribunal's decisions and rulings lies with member states to the SADC Treaty and the Protocol on the Tribunal. This is buttressed by the well-rooted principle of international law *pacta sunt servanda*, i.e. obligations undertaken in international or regional treaties or conventions must be honoured in good faith. True, the bulk of international law and its enforcement are based on consent and good faith among states.

Provision for the enforcement of the Tribunal's decisions is made in Article 32 of the Protocol. According to this provision, enforcement and execution of judgments are governed by the law and rules of civil procedure for the registration and enforcement of foreign judgments in force in the territory of the state in which the judgment is to be enforced. It is furthermore the obligation of member states to take all measures necessary to ensure execution of decisions of the Tribunal. In the event that a state fails to comply with a decision, such failure can be referred to the Tribunal by any party concerned, and if the Tribunal is satisfied that such failure of compliance exists, the latter is to be reported to the SADC Summit<sup>37</sup> to take appropriate action. These are the theoretical steps in terms of enforcement of the Tribunal's decisions, which may be considered to be inadequate and ambiguous for the reason that they are ineffective. This is so as member states can escape their international obligations by invoking rulings of domestic courts in their favour (Erasmus and Coleman 2008).

Due to the fact that so far only one case has just recently reached the initial stage of enforcement, it cannot be determined how the enforcement mechanisms are put into practice. Ultimately, it is upon the SADC Summit to decide whether the SADC dispute resolution mechanism is a *tiger with or without teeth*. According to Article 33(1) and (2) of the SADC Treaty, the Summit is the institution within SADC that has to decide on a case-by-case basis whether and which sanctions are to be imposed against a

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<sup>37</sup> Consisting of the Heads of States or Government of all Member States: cf Article 10 of the SADC Treaty.

member state in case a state fails to comply with its obligations. Article 33 does not, however, mention any possible sanctions that may be imposed. It would seem appropriate to include a provision containing at least a non-exhaustive list of possible coercive measures. In the style of the United Nations legal framework, such a list could include complete or partial interruption of economic relations, interruption of rail, sea, air, postal, telegraphic, radio, and other means of communication, as well as the severance of diplomatic relations.<sup>38</sup> Further possible measures could be the freezing of those assets belonging to the defaulting state that are to be found in the territory of the state which is the successful party, as well as in that of third states, or the suspension of voting rights or other rights and privileges.<sup>39</sup> It is upon the SADC Summit to ensure respect for its legal instruments. Without doubt, the Council's activities in this regard are closely connected to the political and economic problems and diplomatic aspects play a significant role in these cases (Erasmus and Coleman 2008). It is hoped that the SADC Summit will in present and future cases be progressive enough to take appropriate initiatives where necessary in order to guarantee an effective regional mechanism ensuring stability in the region.

The issue of failure or refusal to comply with and execute the SADC Tribunal's judgments has already plagued the SADC Tribunal in the case of *Mike Campbell (Pvt) Ltd et al. v The Republic of Zimbabwe* (2008). When the applicants in this case approached the Tribunal in October 2007, they not only sought to challenge the legality of the expropriation of land in and by the respondent state, but they also sought and were granted an interim order or interdict in terms of which the respondent state was ordered not to evict, or interfere with, the peaceful occupation of the applicants in their respective farms until the finalisation of the main dispute on 13 December 2007.<sup>40</sup> This same interim order was sought by and granted to other applicants/interveners on 28 March 2008.<sup>41</sup> On 18 July 2008, applicants made an urgent application to the Tribunal seeking a declaration to the effect that the

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<sup>38</sup> Those are the measures that the United Nations Security Council may impose with respect to threats to the peace and acts of aggression: cf. Article 41 of the UN Charter.

<sup>39</sup> An example of an effective enforcement mechanism is the World Trade Organisation's system of imposing limited trade sanctions in the form of the suspension of concessions or other obligations as provided for in Art. 22 of the Dispute Settlement Understanding (DSU). Due to the great political and economic significance, such sanctions are suitable to ensure compliance with the rulings of the WTO judicial organ, DSB.

<sup>40</sup> See Cases SADC(T) No. 2/07, 02/08, 03/08/, 04/08, and 06/08.

<sup>41</sup> *Ibid.*

respondent state is in breach and contempt of the orders of the Tribunal. After deliberations, the Tribunal found that the respondent state was indeed in contempt of Tribunal's orders as it had not only failed to execute the Tribunal's orders, but, more surprisingly, it was in the process of prosecuting the applicants for remaining on their lands, and subsequently evicting them upon conviction.<sup>42</sup>

In the circumstances, and in terms of Article 32(5) of the Protocol, the Tribunal decided that the breach and contempt of court by the respondent state should be reported to the Summit for the latter to take *appropriate action*. The meaning of the phrase *appropriate action* in this regard is unambiguous. One would expect the heads of states, viz the Summit, to order and instruct the recalcitrant state to comply and execute the Tribunal's decisions, for failure of which the same state would face sanctions as stipulated by Article 33 of the SADC Treaty. Article 33(1)(a) provides that 'sanctions may be imposed against any Member State that persistently fails, without good reason, to fulfil obligations assumed under Treaty...'

In the light of the above, it can be observed that, without the political will and good faith on the part of the SADC member states to meet and comply with their obligations as spelled out in ratified treaties and conventions, a concrete economic regional integration is likely to remain a pie in the sky. When compared to the European system (where the ECJ can also order penalty payments for the members that have not complied with its rulings), the difference becomes obvious.

## **10. Between regional integration and state sovereignty?**

Regional integration in Southern Africa can in general terms be described as a path towards gradually liberalising the trade of developing countries and integrating them into the world economy (Andresen et al. 2001:3). Recognising that each SADC country on its own would have little chance to attract *inter alia* the necessary financial transfers and technology, the concern about achieving regional integration started to increase in the 1990s (Hansohm and Shilimela 2006:7). The SADC reforms agreed upon in 2001 can be seen as a milestone in this context. The Heads of State and Governments agreed to restructure SADC in order to strengthen the community as a supranational organisation responsible for the economic, political and social

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<sup>42</sup> See Ruling in Case SADC(T) No. 11/08, p. 3.

dimensions of the integration process within the region.<sup>43</sup> Focal point of this structural modernisation by the way of institutional and market-related reforms, infrastructure development, human resources development and a strengthening of social capital was the opening-up of the member countries to create an enlarged economic space through trade integration and gradual harmonisation of regulatory environments, as well as economic and social conditions.

The recent Summit of SADC Heads of State and Government of SADC was held in Sandton, South Africa, 16–17 August 2008. The Summit launched the SADC Free Trade Area (FTA) which is the first milestone in the regional economic integration agenda. Summit recognised that free trade in the region would create a larger market, releasing potential for trade, economic development and employment creation. The SADC regional integration programme includes the establishment of the Free Trade Agreement<sup>44</sup> to be followed by a Customs Union by 2010, a Common Market by 2015, a monetary Union by 2016 and a single currency by 2018.<sup>45</sup>

During the same meeting the Summit (SADC 2008) recognised that

the region had managed to consolidate peace and democracy in SADC. With regard to the challenges in Zimbabwe, Summit noted the outcomes of the Extraordinary Summit of the Organ held in the course of the Summit and reaffirmed its commitment to work with the people of Zimbabwe in order to overcome the challenges they are facing. Summit called for the acceleration of interventions to further deepen the regional integration agenda through the development of a programme of cooperation aimed at expanding regional production capacity which entails provision and rehabilitation of regional infrastructure to facilitate efficient movement of goods and people in a more open regional economy. In addition, Summit emphasised the need for full implementation of the SADC Protocol on Trade in order to ensure that the FTA is sustainable and the envisaged Customs Union in SADC is attainable.

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<sup>43</sup> For details on the restructuring process see Hansohm and Shilimela (2006:7ff.).

<sup>44</sup> While 12 member states (Botswana, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe) have already ratified the SADC Protocol on Trade, Angola and the Democratic Republic of the Congo (DRC) will join the SADC Free Trade Area (FTA) at a later stage.

<sup>45</sup> See SADC (2008).

The fear of loss of state autonomy, the fear of loss of identity, socio-economic disparity among members, historical disagreement, lack of vision and unwillingness to share resources are, *inter alia*, obstacles when it comes to regional integration. It is therefore necessary to look at some of these major obstacles to the integration process and subsequently to the determination of the role the SADC Tribunal can play with regard to the latter.

The controversy around sovereignty is often encountered, especially when it comes to concepts of regional integration. In the so-called Sutherland Report (Sutherland et al. 2005:29), sovereignty is described as one of the ‘most used and also misused concepts of international affairs and international law’.<sup>46</sup> The Report (Sutherland Par. 111) continues as follows:

Acceptance of almost any treaty involves a transfer of a certain amount of decision-making authority away from states, and towards some international institution. Generally this is exactly why “sovereign nations” agree to such treaties. They realise that the benefits of cooperative action that a treaty enhances are greater than the circumstances that exist otherwise.

Sovereignty has an external and internal dimension and cannot be understood only as a right but also as a right that brings obligations. But how does all this affect regional integration in SADC? It is undeniable that discrete territorially bound state units no longer have exclusive control over the process of governance pertaining to the societies that live in the territory. In this context, governance has come to be conceptualised in multilevel terms as power has become widely dispersed amongst a range of institutions and actors. The dispersion of power and the increase in integration activities leading to multiple levels of governance are also challenges faced by SADC. With the Campbell Case the question immediately arose how, within SADC, can state sovereignty be reconciled with the universal recognition of inalienable human rights deriving from respect for human dignity and popular sovereignty? How far can the universal recognition of human rights change the subjects, structures, general principles, interpretative methods and object and

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<sup>46</sup> The concept of sovereignty and its relevance to the WTO is discussed in depth in the report by Sutherland et al. (2005:29).

purpose of international law and actually limit state sovereignty to renounce human rights treaties and to refuse domestic implementation of international obligations for the benefit of domestic citizens? No doubt regional integration is intended to provide for increased opportunities through the creation of multiple institutional frameworks accessible to individuals and groups. It will, however, be seen how the SADC Tribunal will deal with the issue of multilevel protection of individual rights and how SADC members will respond in protecting their national sovereignty in spite of being a signatory to a treaty that requires a certain amount of sovereignty transfer to the Tribunal (Petersman 2008).

### **11. Regional integration and legal harmonisation**

Another challenge of the regional integration process was and still is the heterogeneity of SADC countries. This heterogeneity is not only reflected by surface area, population figures, size of the domestic markets, per capita incomes, the endowment with natural resources and the social and political situation, but also by the variety of legal systems applied in different member states.

Comparative law is the interdisciplinary science that since its beginnings tended to classify the legal systems of the world into various legal families or categories which describe the juristic philosophy and techniques shared by a number of nations with broadly similar legal systems by recognising the important relationship between law, history and culture. Over the centuries several main categories of legal system have been described in the course of the world's legal history. Main categories include civil (or Romano-Germanic) and common law, socialist law (which has obviously forfeited relevance since the fall of the iron curtain) and several religious legal systems (Menski 2006).

Due to the broad variety of applied legal systems on the African continent, African legal systems have always been an object of fascination to comparative lawyers as well as to legal ethnologists and sociologists. In the states of sub-Saharan Africa, the concept of legal pluralism is predominant, describing a situation in which two or more types of law or legal traditions operate simultaneously in the same country. Despite the legal influences of the ex-colonial powers, a large number of Africans still live under indigenous customary law (Hinz 2002).

**Table 2: Heterogeneity of nonreligious legal systems within SADC<sup>47</sup>**

Country	Legal Systems		
Angola	Civil Law		Customary Law
Botswana	Roman Dutch Law	Common Law	Customary Law
DR Congo	Civil Law		Customary Law
Lesotho	Roman Dutch Law	Common Law	Customary Law
Madagascar	Civil Law		Customary Law
Malawi		Common Law	Customary Law
Mauritius	Civil Law	Common Law	
Mozambique	Civil Law		Customary Law
Namibia	Roman Dutch Law	Common Law	Customary Law
Seychelles	Civil Law	Common Law	
South Africa	Roman Dutch Law	Common Law	Customary Law
Swaziland	Roman Dutch Law	Common Law	Customary Law
Tanzania		Common Law	Customary Law
Zambia		Common Law	Customary Law
Zimbabwe	Roman Dutch Law	Common Law	Customary Law

Source: Author's composition

The above table demonstrates the heterogeneity of applied legal systems within SADC. This is why it is much easier, for instance, for a lawyer from Malawi to understand a lawyer from Tanzania, Zambia or even from England, than a lawyer from Mozambique, a country geographically located right next door. In view of the heterogeneity of legal systems within SADC but also with regard to a harmonious jurisdiction, the SADC Tribunal can play a key role in the integration process. It thus appears useful to divide potential cases to be brought before the Tribunal into two categories: the first category describes all cases typically occurring between member states or community institutions with regard to community related issues in the first place. These cases will have an impact on the national level if they are decided by the Tribunal, but they arise on community level. One example for this first category of cases might be a dispute over export or import restrictions according to the SADC

<sup>47</sup> Of course, this is a very rough categorisation. Each of the SADC countries has its very own particularities in terms of its legal system. It would go beyond the scope of this paper to go into more detail for each country. The source used for this table is the University of Ottawa (<http://www.droitcivil.uottawa.ca/world-legal-systems/eng-monde.php>) with adaptations made by the authors of this paper where necessary.

Protocol on Trade. The second category of cases relates to those that have their roots on the national level and which after the exhaustion of national remedies are taken one step higher to the community level. An example of this second category of cases is the Campbell Case. While the first category of cases *per se* contributes to regional integration due to the nature of the conflict, the second category is also relevant for the integration process in the sense that it appears to be essential for a harmonious jurisdiction to exist in cases that stripe principles laid forward by the community. Taking into consideration the heterogeneity of applied legal systems within the community, this seems to be a major challenge. It could be argued that in the long run, the legal systems within the community should be unified (Latigo 2008).

As a recommendation from the International Conference on Regional Integration and SADC Law held in Maputo in April 2008<sup>48</sup> a Regional Centre of Studies on Integration and SADC Law was established.<sup>49</sup> The main tasks of this Centre of Study will be: (i) to promote investigation on regional integration and legal systems, (ii) to coordinate the investigation and the activities of the Regional Academic Partnership Network, (iii) to collect and disseminate all legal material on SADC institutions and member countries, (iv) to organise debates, training, research, seminars, workshops, and conferences on specific issues (harmonisation of laws in various areas and publication of compendiums on trade laws, economic laws, investment codes, taxation laws, intellectual property laws, transport laws, and so forth). Even though legal issues are the core business of the Regional Centre of Studies on Integration and SADC Law, considering that the integration process involves economic, political and institutional features, the centre should be multidisciplinary and take on board contributions from other faculties. The Regional Centre of Studies on Integration and SADC Law will be based at the Eduardo Mondlane University (UEM), Maputo, Mozambique. It will have an autonomous statute and have the legal capacity to raise funds and to receive grants and donations.<sup>50</sup>

In order to achieve effective harmonisation and unification of national legal systems, the establishment of a Regional Academic Partnership Network in SADC countries was recommended at the above conference. As the national legal systems in the

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<sup>48</sup> One of the authors of this paper personally attended this historical conference.

<sup>49</sup> See the following website: [http://knowledge-sharing.uneca.org/uneca/member-states/copy\\_of\\_trade-ministerial-conference-of-african-and-south-american-countries](http://knowledge-sharing.uneca.org/uneca/member-states/copy_of_trade-ministerial-conference-of-african-and-south-american-countries) (8 August 2008).

<sup>50</sup> *Ibid.*

region are fairly different it is necessary that all operators in the legal profession and civil society participate in the debate on the harmonisation and unification of legal systems in order to achieve a more adequate synthesis and/or compromise for the elaboration of an efficient SADC legal system.<sup>51</sup> The main objective of the Regional Academic Partnership Network will be to boost research on regional integration and run regional capacity building programmes. It has been recommended that the Faculties of Law of each country should be the driving force of the process and should take on board all the relevant players and stakeholders including the civil society.<sup>52</sup>

Of increasing significance for SADC member states will be the harmonisation of law working by the implementation and transformation of protocols and guidelines and aiming to reduce or eliminate the differences between the national legal systems by inducing them to adopt common principles of law. In terms of regional integration, the conformation of law is one central instrument to reduce normative barriers within the community. Unified law promotes greater legal predictability as well as legal certainty, both essential for the investment climate and economic development in general. However, the extent and method of harmonisation is problematic as national positions have to be taken into consideration and, as a matter of fact, the differences that exist in respect of legal traditions in different countries of the world must also be respected, even in times of globalisation. The process of harmonisation of law therefore has to take place in small steps.<sup>53</sup>

Instead of radically equalising the legal systems applied in the community, the SADC Tribunal can in this regard contribute to towards integration if its decisions are properly enforced on the national level and if they serve as guidelines for national courts when deciding on questions that might also be relevant on the regional level. This in turn enhances the harmonisation of SADC relevant jurisprudence. Community law is typically jacketed by the various instruments of national law and affects national law in the shape of a unifying Trojan horse. In practice, this reflects the application of community law by national judges. Harmonisation, however, can

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<sup>51</sup> *Ibid.*

<sup>52</sup> In this respect, the Faculty of Law of the University of Namibia (UNAM) and the Faculty of Law of Eduardo Mondlane University (UEM) in Maputo have expressed mutual interest in engaging in a future partnership.

<sup>53</sup> See the following website: [http://knowledge-sharing.uneca.org/uneca/member-states/copy\\_of\\_trade-ministerial-conference-of-african-and-south-american-countries](http://knowledge-sharing.uneca.org/uneca/member-states/copy_of_trade-ministerial-conference-of-african-and-south-american-countries) (8 August 2008).

only take place if the application of law by national courts in comparable cases leads roughly to the same results – because only in cases of comparable results do the same competitive conditions prevail for all member states.<sup>54</sup> National courts therefore have to consider community law when ruling on community relevant issues. One essential precondition for such consideration of community law by the national courts is that there should be a common understanding of community law in order to guarantee legal certainty in terms of the predictability of legal decisions. With the SADC Tribunal a central institution was created that can give impulses and guidelines for a community-wide common understanding of community law. In the light of the integrative effect of the Tribunal's function, the Tribunal can become similar to the ECJ – a 'motor of integration' (Schwarze 1988:13ff.).

Domestication of the regional integration agenda means introducing 'a certain way of thinking and acting into the mainstream and to let it develop into a natural behaviour in order to penetrate and lead to change of mentality in the mainstream' (Minega 2007). Regional integration issues should thus become a key component of the basic training in the curriculum of SADC university education. The education systems of SADC member states are still based on their colonial model. Many SADC countries have gone through some reform process to adapt the system to the needs of the society. The academic authorities have to decide how to harmonise the system. In various cases it may even become necessary to revise the curricula of the law faculties and to include regional integration issues as a basic component of lawyers' training.

During the SADC Lawyers Association Conference and Annual General Meeting held in Dar Es Salaam, Tanzania, 21–24 June 2007, the SADC Bar Associations and Law Societies expressed their desire to share the same vision, beliefs and aspirations with regard to upholding the rule of law, promoting the respect for human rights and the development of their respective legal systems in order to ensure the proper administration of justice, and generally to work towards the harmonisation of their respective legal systems and to advance the interests of the members. The above example demonstrates harmonisation effort.<sup>55</sup>

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<sup>54</sup> *Ibid.*

<sup>55</sup> See the following website:

## 12. Regional Indicative Strategic Development Plan

In March 2001, the Heads of State and Government met at an Extraordinary Summit in Windhoek and approved the restructuring of SADC institutions by means of a Regional Indicative Strategic Development Plan (RISDP). The RISDP reaffirms the commitment of SADC member states to good political, economic and corporate governance entrenched in a culture of democracy<sup>56</sup>, full participation by civil society, transparency and respect for the rule of law. With regard to monitoring the implementation of the RISDP, the Summit will exercise continuous oversight using progress reports from the Secretariat.<sup>57</sup>

The focal point of the RISDP is thus to provide strategic direction with respect to SADC programmes and activities, and to align the strategic objectives and priorities of SADC with the policies and strategies for achieving its long-term goals. The RISDP is indicative in nature, merely outlining the necessary conditions that should be realised towards achieving those goals. The purpose of the RISDP is to deepen regional integration in SADC. The RISDP has identified gaps and challenges in the current policies and strategies, and used them to reorient those policies and strategies. In the light of the identified gaps and challenges, Chapter 4 focuses on a number of priority intervention areas of both cross-sectoral and sectoral nature that are critical for the achievement of SADCs objectives, in particular in promoting deeper regional integration, integrating SADC into the world economy, promoting balanced, equitable and balanced development, eradicating poverty and promoting gender equality. The RISDP focuses on promoting trade, economic liberalisation and development as a means of facilitating trade and financial liberalisation, competitive and diversified industrial development and increased investment through the establishment of a SADC Common Market. In order to attain this goal, SADC will *inter alia* need to harmonise policies, legal and regulatory frameworks for the free movement of factors of production and to implement policies to attain macroeconomic stability and build policy credibility.<sup>58</sup>

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<http://www.lssa.org.za/LinkClick.aspx?link=SADC+2007+Concluding+Statement.doc&tabid=53&mid=403> (18 September 2008).

<sup>56</sup> For an analysis of the state of democracy in the SADC region, see Breytenbach (2002).

<sup>57</sup> See the following website: <http://www.sadc.int/index/browse/page/106> (19 September 2008).

<sup>58</sup> See the following website: <http://www.sadc.int/index/browse/page/106> (19 September 2008).

The RISDP is a strategic plan which can be adapted. However, It is not binding and makes no specific reference to the SADC Tribunal. Yet, at every Summit in recent years member states reaffirmed their commitment to regional integration as per the RISDP. Despite this political commitment to RISDP regional integration, there is growing agreement in the region that the RISDP milestones are unrealistic, and, indeed, the linear model of regional integration which underpins this strategic plan does not address the real challenges of regional integration and sustainable development of the region (Hartzenberg 2008).

### **13. Concurrent jurisdiction and overlapping membership**

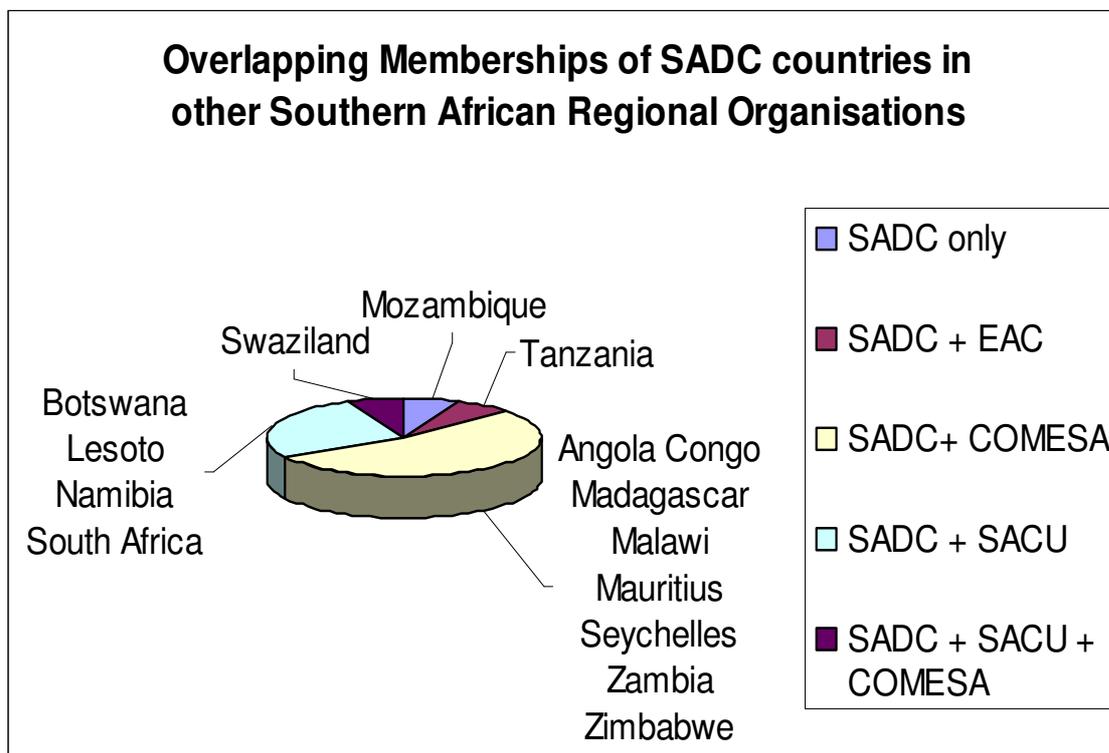
From a long-term perspective and with a view to their merging into a single institution, regional economic communities such as SADC must be strengthened and consolidated. However, the fact that many African states are members of various regional economic communities can be regarded as a hurdle in respect of the integration process (Viljoen 2007:525).

Except Mozambique, all SADC countries are at the same time members of at least one other trade agreement in the region.<sup>59</sup> Eight SADC members are also members of the Common Market of Eastern and Southern Africa (COMESA), four countries are members of SADC and the Southern African Customs Union (SACU), Swaziland is a member of SADC, SACU and COMESA, and Tanzania is a member of SADC and the East African Community (EAC). Various bilateral free-trade agreements as well as the membership of all SADC countries in the African Union (AU) may be regarded as obstacles to deeper integration in many respects. Multiple memberships raise problems such as multiple costs for membership contributions and negotiation rounds, the application of different external tariffs, or the eventual lack of identification with SADC as the one integration project (Brandt et al. 2001:11). The question of concurrent jurisdiction of different judicial organs is one further problematic issue with regard to multiple memberships which needs to be addressed.

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<sup>59</sup> For a detailed discussion on overlapping memberships in COMESA, EAC, SACU and SADC see Jakobeit et al. (2005).

**Figure 1: Overlapping memberships**



Source: Authors' composition

All aforementioned organisations have judicial organs, at least to some extent.<sup>60</sup> The SACU Agreement provides for a Tribunal (SACU Tribunal), an independent body of experts, yet to be established.<sup>61</sup> Plans include adjudication on any issue concerning the application or interpretation of the 2002 SACU Agreement or any dispute arising thereunder at the request of the Council.<sup>62</sup>

COMESA established the COMESA Court of Justice in 1994 as one of the organs of COMESA. The COMESA Court of Justice has jurisdiction to hear disputes to which member states, the Secretary General, residents of member states (individuals and legal persons) may be parties. The court has jurisdiction to adjudicate upon all matters which may be referred to it pursuant to the COMESA Treaty. The seat of the court was temporarily hosted within the COMESA Secretariat from 1998, but in

<sup>60</sup> For a more detailed discussion see Ruppel (2009).

<sup>61</sup> It is anticipated that it will be operational by March 2009.

<sup>62</sup> See the following website: <http://www.sacu.int/main.php?include=about/tribunal.html> (28 July 2008).

March 2003 the COMESA Authority decided that the seat of the court should be moved to Khartoum in the Republic of Sudan.<sup>63</sup>

The East African Court of Justice is the judicial arm of the East African Community. The court has jurisdiction over the interpretation and application of the EAC Treaty and may have other original, appellate, human rights or other jurisdiction upon conclusion of a protocol to realise such extended jurisdiction.<sup>64</sup> Reference to the court may be by legal and natural persons, member states and the Secretary General of the community. The East African Court of Justice is the replacement for the East African Court of Appeals that shut its doors upon the dissolution of the East African Community in 1977. Upon the revival of the East African Community in 1999, the Treaty for the Establishment of the East African Community provided for a different kind of regional court. Rather than the Court of Appeals, which acted as a high court for criminal and civil matters incorporated within the legal system of each partner state, the treaty created the supranational Court of Justice situated in Arusha, Tanzania.<sup>65</sup>

Further judicial organs of relevance for all SADC member states are the judicial bodies on the level of the African Union. The African Court on Human and Peoples' Rights (ACHPR) which is to be merged with the African Court of Justice was established in 2002. The Court is located in Arusha, Tanzania.<sup>66</sup> Although the first eleven judges were elected in 2006, the court has not yet become operational. The merged court will have jurisdiction over all disputes and applications referred to it which *inter alia* relate to the interpretation and application of the AU Constitutive Act or the interpretation, application or validity of Union Treaties, as well as human rights violations. To date, the African Commission on Human and Peoples' Rights, a quasi-judicial body established by the African Charter on Human and Peoples' Rights is responsible for monitoring compliance with the African Charter on Human and Peoples' Rights.

From the above it becomes clear that, in the near future, the issue of conflicting jurisdiction of regional courts on the African continent will become a prominent one.

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<sup>63</sup> See the following website:

[http://www.comesa.int/institutions/court\\_of\\_justice/Multi-language\\_content.2003-08-21.2608/view](http://www.comesa.int/institutions/court_of_justice/Multi-language_content.2003-08-21.2608/view) (28 July 2008).

<sup>64</sup> For some recent decisions of the Court see Mutai (2007:177-203).

<sup>65</sup> See [http://www.aict-ctia.org/courts\\_subreg/eac/eac\\_home.html](http://www.aict-ctia.org/courts_subreg/eac/eac_home.html) (28 July 2008).

<sup>66</sup> *Ibid.*

For the time being, the consequence of overlapping jurisdiction is that a claimant may in fact choose to which judicial body a case is to be submitted<sup>67</sup>, as a competent court may not decline jurisdiction – the argument being that another court may as well be competent. In terms of regional integration, the absence of a judicially integrated Africa is, however, undeniably a problem for the reason of divergent interpretation of one normative source by different judicial bodies (Viljoen 2007:502).

#### **14. The SADC Tribunal and human rights**

No doubt, the protection of human rights plays an essential role in economic development as it has an impact on the investment climate, this again contributing to growth, productivity and employment creation – all essential for sustainable reductions in income poverty. At the first glance, the promotion and protection of human rights might not be in the focus of SADC as an organisation furthering socioeconomic cooperation and integration as well as political and security cooperation among the 15 Southern African states. However, the community's territory is home to approximately 240 million inhabitants and many human rights related provisions can be found within the legal framework of SADC. Although primarily set up to resolve disputes arising from closer economic and political union rather than human rights, the Campbell Case impressively demonstrates that the Tribunal can also be called upon to consider human rights implications of economic policies and programmes (Viljoen 2007:503).

The SADC Treaty itself refers to regional integration and to human rights directly or indirectly at several stages. In its preamble, the treaty *inter alia* determines to ensure, through common action, the progress and well-being of the people of Southern Africa and recognises the need to involve the people of the region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the rule of law. The preamble's corner points are given even more substantiality within the following provisions of the SADC Treaty. Under Chapter 3 of the treaty, which deals with principles, objectives, the SADC common agenda and general undertakings, it is provided that SADC and its member state shall act in accordance with the principles of human rights, democracy and the rule of law (SADC Treaty Art. 4(c)). Moreover, the objectives of SADC

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<sup>67</sup> Referred to as *forum-shopping*: see Viljoen (2007:502).

(SADC Treaty Art. 5) in one way or another relate to human rights issues: poverty alleviation, for instance, with the ultimate objective of its eradication being one of SADCs objectives contributing to ensure a decent standard of living, adequate nutrition, health care and education (UNDP 2000:8). Other SADC objectives such as the maintenance of democracy, peace, security and stability refer to human rights such as the sustainable utilisation of natural resources and effective protection of the environment, known as third generation human rights (Ruppel 2008:101).

There is also growing evidence that the European Union (EU) is becoming more involved in human rights protection and has the capacity to turn into an unprecedented post-national human rights protection institution. The EU institutional framework presents advantages that fit the general criteria of institutional design in the human rights context. Of course, many doubts and critiques may be raised against an entity which started primarily as a functional and economic institution (Besson 2006:323-360). Since their inception the ECJ and the European Court of Human Rights (ECHR) have built a remarkable record in the field of international dispute settlement. With regard to the interpretation of human rights standards, there is certainly a potential for conflict between the two courts. However, the process of European integration and the shared political, social, economic and legal values of the states concerned have favoured the dialogue and interaction between the two judicial bodies, minimising possible discrepancies and contributing to their success as dispute settlement mechanisms in Europe (Lebeck 2007:195-236). In this respect SADC still has a long way to travel.

## **15. Concluding remarks**

The SADC Tribunal is a judicial dispute settlement organ that can still be considered to be in its infancy. The Tribunal can therefore not yet be expected to offer ideal procedures and solutions. Criticism has been expressed when it comes to a lack of an appeal instance. Thus, SADC can perhaps learn from other experiences. The conflict resolution mechanism in the WTO in comparison to its predecessor GATT is shown to have become more effective after its Appellate Body was established in 1995. In the European Union, with the implementation of the Court of First Instance (CFI), the ECJ took on a new role as an appellate court in the identified areas of jurisdiction.

Further obstacles must be overcome within SADC: the lack of harmonised laws, endangerment of judicial independence through national executive influence, national sovereignty, the lack of coercive measures in case of non-compliance, and overlapping of regional legal regimes.

One aspect that is particularly problematic is that compliance with the SADC Tribunal's decisions depends on the political will of the Summit. This differs from the European system, which reflects the division of power also on the supranational level. When a SADC member state fails to comply with a decision of the Tribunal, such failure can again be referred to the Tribunal. If the Tribunal confirms that such failure has occurred, it can report its finding to the Summit for the latter to take the appropriate action (Tribunal Protocol, Article 32). However, the general rule is that the Summit operates on a basis of consensus. This means that also a member that has not been able to conform to the decision of the Tribunal has to condemn its own action if the Summit is to make any official decision on the matter.

Formal supranational bodies like the SADC Tribunal alone cannot create regional integration. Intergovernmental and inter-parliamentary action are equally important and of common concern. However, what becomes clear is that the SADC Tribunal can serve as a key actor in promoting the SADC legal and institutional integration process. The European Union experience has demonstrated how such dispute settlement bodies can promote regional integration. As a supranational institution in the region, the SADC Tribunal is a part of a complex system of multilevel governance. The effectiveness of supranational action depends crucially on the strength of interdependence between the supranational and national levels.

The very fact that the first cases before the SADC Tribunal deal with human rights issues and have been brought by private parties contains a particular message. This needs further exploration because it tells us other things about the state of integration (or lack of it) in Southern Africa – neglect of internal rule of law and the absence of more effective interstate mechanisms for protecting human rights. The absence of litigation about, for example, trade, institutional matters, division of power and commercial cross-border issues (the areas typically associated with regional integration) is another significant indicator. Human rights issues are not of the first

ranking when it comes to traditional regional integration debates and normally follow later (as happened in EU).

In conclusion, it is hoped that the SADC Tribunal will be able to heal domestic failures in human rights matters even though such matters are not the general aim of the institution or its mandate for regional integration. It remains to be seen not only what types of cases will become pending in future but also whether SADC is advanced enough to apply necessary lessons from sophisticated and well developed systems such as the European Union. Meanwhile, Zimbabwean land reform is feared to affect its neighbouring countries. If SADC and its institutions continue to fail to respond to member states protecting their national sovereignty although being a signatory to the SADC Treaty which requires a certain amount of sovereignty transfer to the Tribunal, its judgements will not have the expected effect in promoting regional integration. The recent ruling of the Tribunal making the Zimbabwean land reform subject of discussion and the increasing number of cases pending have shown that the Tribunal is growing towards a regional legal institution of the utmost importance. The question, however, of how SADC member states cope with the decisions delivered by its own legal body remains open for the time being.

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## *Chapter 9*

### **The role of parliament in regional integration – the missing link**

Barney Karuuombe

#### **Introduction**

The growing emphasis on the need for good governance and greater accountability has resuscitated researchers' and practitioners' interest in the institution of parliament and its potential value and contribution to democracy and development. To this I would add integration, especially in Africa. The article is premised on the hypothesis that parliaments and parliamentarians are not sufficiently included in the process of integration and development, and the executive replicates its national dominance in that 'the ruling elite set [and approves] the integration agenda and implement the same with little involvement of other non-state stakeholders [including parliaments]' (Matlosa 2006: 118). Regional integration treaties and other instruments related to critical areas such as human rights, trade, environment and many others used to, and in certain instances continue to, pass through the House (of Parliament) instead of being passed by the House. This resulted in little, if any, debate on the instruments and their implications on domestic policy domestication, and harmonisation thereof became and remains difficult if not virtually impossible.

International treaties were and sometimes continue to be treated as the prerogative of the Head of State and the Executive. In recent years, the policy frontier has shifted to the regional, continental and international levels as decisions made at these levels (including those by unelected institutions such as the World Trade Organisation (WTO) and transnational companies) increasingly dictate the direction of national policy. It is therefore no longer business as usual for parliaments and parliamentarians as they are increasingly expected to know and oversee regional and international policy instruments which have a bearing on the national policy context.

Evidently, as well argued by Matlosa (2006: 118) 'the regional integration project underway in Southern Africa [and SADC in particular] propelled through both the

Regional Indicative Strategic Development Plan (RISDP) and the Strategic Indicative Plan of the Organ on Politics, Defence and Security Cooperation (SIPO) are state-centric and driven by the ruling elites and therefore lacks broad participation by other key stakeholders including political parties and legislatures'. Worth mentioning are also the SADC Protocols and other legal instruments which, despite parliaments' ratification, where so required, lack domestication and implementation mainly due to insufficient, if not total non-involvement, of parliamentarians. The need to enhance the role of parliamentarians and the institution of parliament in regional integration is therefore more profound than before. The continued negation of this cardinal role which can potentially enhance SADC and African integration is seen as the missing link in the SADC integration process. A comparative overview of the different African Regional Parliamentary Assemblies (RPAs) will be presented to show how parliament remains at the periphery of the African integration project. On the other hand, the European integration process which is hailed as a good model to emulate shows how progressively parliament was and continues to be drawn to the centre of the integration process, thus filling a potential gap. Using the SADC Parliamentary Forum as a reference point, the author argues that SADC parliaments are not fully engaged or drawn to the centre of regional integration. The ongoing debate about the transformation of the forum into a regional parliament or establishing a SADC regional parliament is reflected upon. In conclusion, the paper asserts that parliaments cannot on their own chart the integration process but they definitely do have a role to play. There is, however, a correlation between the level and resolve to deeper integration and the role that parliament can play. To the extent that SADC may remain more of an intergovernmental regional bloc holding on to member states' sovereignty instead of gradually graduating into supranationalism, the role that RPAs and other community institutions will perform will remain limited.

### **The missing link: exclusion of parliament in regional integration**

Although African regional parliaments and parliamentary assemblies are intended to assume the legislative and democratic oversight functions of regional integration organisations and processes in the long run, they remain so far at an infant stage of organisational development and are far from exercising the roles that fully-fledged parliaments play in democratic setups (Terlinden 2004). This can be attributed to many reasons but two are worth mentioning. The first is the fact that parliament's role

is weakened by the constitutional and legislative framework which gives primacy to the executive: in many countries the executive is a domineering structure wielding discretionary power and rendering parliaments subservient (Bretton Woods Project 2008). This results in parliament minimally exercising its prerogative over legislation. Secondly, parliaments are bypassed in policy-making processes and confined to rubber-stamping institutions or, where they are consulted, only a few members or select committees are involved.

For the first four decades of Africa's independence, the legislature did not actively take part in regional integration and development as this was almost a preserve of the executive, and parliaments only had to concern themselves with domestic legislative issues. The institution of parliament was as such reduced to making 'rubber stamp' decisions including regional and international treaties, protocols and other instruments, often without any parliamentary debate on these. In some legislatures, this practice continues as parliaments are constitutionally not mandated to ratify international instruments or because of executive manoeuvre which results in such instruments not being subject to proper parliamentary scrutiny. Regional and international instruments therefore continue to be passed through parliament instead of being passed by parliament resulting in lack of ownership by the legislature. Oversight and domestication of such instruments therefore become a challenge as the legislature is not fully part of the process and this leads to a slow integration process in Africa and in SADC in particular. This in turn results in people not participating in and adequately benefiting from regional integration and development.

The attention to the institution of parliament as a significant role player is in part owed to the external cooperating partners who have been calling for good governance, accountability and transparency as well as expressing the need to establish regional parliamentary assemblies (RAs). The Cotonou framework of Agreement stipulated the creation of the African Caribbean and Pacific-European Union Joint Parliamentary Assembly (ACP-EU JPA) as well as the strengthening of the capacities of national parliaments in matters of regional integration (Terlinden 2004: 2). The Group of Eight (G8) Action plan also emphasised effective parliamentary involvement in political decision-making processes. Despite the strong emphasis on good governance contained in the New Partnership for Africa's Development (NEPAD) the mechanism for parliamentary involvement is not stipulated and parliamentarians and

the broader civil society claim to have been left out in the development of the continental development plan.

Parliaments hardly influence the integration process currently being pursued by SADC at the national level, given that they do not always get involved in the activities of the SADC National Committees (SNCs) where they are operational (Matlosa 2006: 129). It is a fact that, in some instances, national parliaments are not even required to ratify or approve treaties or protocols and such instruments becomes part of national law without parliamentary involvement. 'It is also worth noting that not only are parliaments in the SADC region dominated by executives to the extent that they are unable to play their rightful role of ensuring accountability and constructive criticism of governments, they are also overwhelmingly dominated by ruling parties' (Ibid: 129-130).

The advent of globalisation has resulted in international democracy deficit as international and regional unelected institutions started to direct national policy to the exclusion of the elected representatives of the people and parliaments. The national context, especially in weaker/vulnerable states, is increasingly influenced externally including by transnational companies. The paradox of our time, on the other hand, is that while the substance of politics is fast globalising (trade, environment, terrorism, etc.) the process of politics is not (parliaments, elections, political parties, etc. remain firmly rooted at the national and local levels) (Inter-Parliamentary Union 2006: 155-8). Since Parliament is the embodiment of participatory democracy and the only institution constitutionally mandated to represent the people, to make laws and to exercise oversight over the work of the legislature, it follows that this triple role of parliament should be realised at the national, regional, continental and international levels to ensure an inclusive globalisation process. The inclusion of parliamentarians in the process of regional integration will ensure better results in the implementation and monitoring of regional and international instruments as well as constant feedback to and from the communities on the impact of such instruments. SADC through the SADC Treaty (of 17 August 1992) has graduated or is expected to graduate from mere cooperation to deeper regional integration where a degree of supranationalism is expected to gradually override the historical emphasis on state sovereignty. More specifically, SADC through the Treaty commits itself to the promotion of sustainable and equitable economic growth and socio-economic development through deeper

cooperation and integration, good governance and durable peace and security. Complementary to the Treaty, SADC has developed 27 SADC protocols and only 20 of them are enforced, the remainder lacking the requisite ratification by at least nine members. SADC protocols deal with important issues such as corruption, education and training, health, trade, the Tribunal, energy, fisheries and forests, shared watercourses, tourism, mining, transport and many more (SADC Parliamentary Forum 2006).

The expectation is that the region will achieve policy complementarity and harmonisation through the domestication of these protocols and achieve regional development for its citizens. At its 18th Plenary Assembly Session held on 1 June 2005, in Ezulwini, Swaziland, the SADC Parliamentary Forum extensively discussed the challenges in the implementation of protocols and lamented the slow ratification and implementation of protocols as well as their non-domestication, which according the Forum was largely a result of the non-involvement of the people's representatives, namely the parliamentarians (SADC Parliamentary Forum 2005). Furthermore, parliamentarians noted that they rarely knew which Protocols their governments had ratified or had not ratified – this making oversight over protocols impossible. To this challenge, the SADC Parliamentary Forum in collaboration with a South African based non-governmental organisation called SaferAfrica developed a comprehensive Compendium on SADC Protocols and other legal instruments which they then disseminated to parliaments, SADC Council of Ministers and other stakeholders.

Of concern to parliamentarians and other stakeholders of SADC integration is the SADC Protocol on the Facilitation of Free Movement of Persons which has been applauded as the most important protocol, in fact so much so that it is referred to as 'the mother' of all protocols. Surprisingly, this protocol could not even receive half the signatures of SADC Heads of State and Government – which is unusual for SADC Protocols. Currently, only six countries signed and only Mozambique ratified the protocol. Whilst the ratification and implementation of this protocol may rightly be viewed as vital for the process of true SADC integration, all indications are that this protocol may not be ratified any time soon. Although the interrogation of why the SADC Executive is refusing to sign and ratify this protocol may be beyond the scope of this article, the involvement of parliamentarians in this process would have

solicited the views of the ordinary people on this matter and paved the way forward. The lack of progress on this critical protocol has brought to question the commitment of the SADC Executive to deeper integration and the prospects thereof.

SADC has also put in place its integration, developmental and governance instruments, namely the Regional Indicative Strategic Development Plan (RISDP) and the Strategic Indicative Plan of the Organ on Politics (SIPO). Through the RISDP which is SADC's main macroeconomic policy framework, the region wants to promote sustainable and equitable economic growth, accelerate poverty eradication and attain other socioeconomic development goals. The RISDP also presents the region's integration road map which is to establish a free trade area by 2008, a customs union by 2010, a common market by 2015, a monetary union by 2016 and a single currency by 2018. Whilst a free trade area was launched in Johannesburg at the community's recent summit in Johannesburg despite Angola and the Democratic Republic of Congo's (DRC) non-participation, the realisation of the remainder of the milestones remain to be seen due to a multiplicity of factors such as multiple membership amongst member states, the impact of the ongoing Economic Partnership Agreements (EPAs) negotiations, questionable ability and willingness to meet certain integration prerequisites, and scepticism of individual member states agreeing to gradually forego national sovereignty for supranationalism. Through SIPO, the region commits to a regional politico-security architecture underpinned by the promotion of political, defence, state, and public security. The Organ on Politics, Defence and Security Cooperation is the principal driver of SIPO.

In addition to SADC's designed development and integration instruments mentioned above, the region has acceded to other continental and international instruments such as the New Partnership for Africa's Development (NEPAD), its Peer Review Mechanism (APRM) and the Millennium Development Goals (MDGs). The APRM which is a governance instrument is, however, a voluntary instrument and not all member states acceded to it. NEPAD is a continental development plan whilst the MDGs are internationally accepted development goals in which at present Southern Africa amongst the regions of the world is seriously lagging behind. The design of both the regional and international instruments did not spell out a clear role for parliamentarians, and this omission, whether by design of default, casts doubt at the attainability of the many noble goals contained in the RISDP, SIPO, NEPAD, MDGs,

and many other instruments. If included, parliamentarians would have ensured that these instruments were domesticated, popularised, included in the budget and planning processes, and that the implementation was monitored and guided through parliamentary debate. The role of parliament in regional development and integration is therefore indispensable, and where it is omitted – as in this case – it becomes the missing link to attaining deeper regional integration.

### **Overview of experiences of African Regional Parliamentary Assemblies (RPAs) and integration**

The wave of regional integration embarked upon in the 1990s ushered in the establishment and consolidation of regional integration institutions including Regional Parliamentary Assemblies (RPAs) as institutions to uphold good governance, accountability and transparency. On the African continent, some of the RPAs established, notwithstanding their varying status of operation, the East African Legislative Assembly (EALA), Economic Community of West African States Parliament (ECOWAS-P), Inter-Parliamentary Union of Intergovernmental Authority on Development (IPU-IGAD), Network of Parliamentarians of the Economic Community of Central African States (REPAC), Pan-African Parliament (PAP), Parliament de l' Union Economique et Monetaire Quest Africaine (P-UEMOA) and also the Southern African Development Community Parliamentary Forum (SADC-PF) which with its proposed transformation into a fully-fledged parliament will be examined in more details in the next section. For details on the membership of each of the RPAs, see Annex 1. Other more ad hoc or theme-based parliamentary bodies such as the African, Caribbean and Pacific States, European Union Joint Parliamentary Assembly (ACP-EU JPA), African Parliamentarians' Forum for NEPAD and others were also established.

After the collapse of the first RPA and the then East African Community (EAC) in 1977 the community in its 1999 new EAC treaty proposed the EALA which was inaugurated in November 2001. In its revised treaty of 1993, the Economic Community of West African States (ECOWAS) introduced a parliament and signed the protocol for its establishment but it was not until March 2000 that it entered into force. The ECOWAS-P held its first session in January 2001. The SADC Parliamentary Forum was initiated through the 1993 'Windhoek Initiative' and

ultimately endorsed by the SADC Heads of State and Government Summit in 1997 as a parliamentary deliberative body without legislative powers. The continental parliamentary body, the Pan-African Parliament, was inaugurated on 18 March 2004, however as a deliberative body with consultative and advisory powers only. Far less established is the IPU-IGAD whose founding protocol was signed by Speakers in 2004 but it is yet to start operations in earnest.

The legitimacy and authority of any representative body, and in particular a parliament, depends on the process through which its membership is composed, namely the electoral or appointment process. All the RPAs named above (with the exception of EALA) are indirectly elected and or appointed through the national parliaments, as was the case for the European parliament between 1952 and 1979. In the case of EALA, Members of the Regional Parliamentary Assembly (MRPA) are nominated by parties represented in parliament, but serving MPs are themselves not eligible. Whilst this procedure may well broaden the political space and actors and allow EALA to consider its regional mandate, it potentially lead to a division between the regional body and the national assemblies at the expense of EALA's means to push the regional agenda at the national level (Terlinden 2005: 5). The RPAs do require parliaments to ensure fair political and gender representation in their nominations of Members of Regional Parliamentary Assemblies (MRPAs).

Some of the RPAs in their constitutive legislation have indicated their willingness to adopt the universal adult suffrage in the recruitment of their members in future. Desirable as it may be, its implementation will not only be costly but will face challenges of defining the constituencies and the management of the electoral process itself. Proportional representation versus representation of member states is another issue of concern in the membership of RPAs. Only the ECOWAS-P applies a degree of proportional representation in which Nigeria because of its population size of more than 126 million is allocated 35 seats on the 120-member parliament with the rest distributed to the other members almost in equal proportion. Nigeria also substantially pays more than the other member states into the budget of the regional parliament.

Except EALA, all other African RPAs only perform an advisory role without the traditional oversight role and lawmaking function of budget control. Even when this

role may be exercised, the executive is not obliged to take the advice and recommendations given. EALA may request the Council to submit proposals on matters which according to the parliament require their attention – and they have done so in the past (Terlinden 2004: 6). The ECOWAS-P, IPU-IGAD and SADC PF have virtually no oversight powers or lawmaking function. EALA and PAP may request people to appear before them, but in the case of refusal they are powerless and cannot subpoena as in the case of national parliaments. EALA reportedly asked 19 questions to the executive and they were all ‘duly’ answered. The limitation of this right to question the executive is that the questions automatically lapse if not answered within six weeks.

An important power to be exercised by parliament is the passing and oversight of the budget. Both EALA and PAP have limited budgetary oversight as they do not have the power to change the budget but only to review it. This reduces RPAs to merely ‘rubber stamp’ the budgets. EALA, ECOWAS-P and PAP all receive their budgets from their respective regional executive and this implies a high degree of dependence on regional executives and national governments which is not ideal for the independence and autonomy of a parliament. The SADC Parliamentary Forum, on the other hand, receives its money directly from parliaments in the form of membership contributions and contribution to the capacity-building initiatives through its Parliamentary Leadership Centre (PLC). This arrangement and contributions from cooperating partners allow a degree of self reliance and autonomy both from donors and the regional executive. The challenge with the contributions to the Forum is that all parliaments make the same contribution irrespective of the size of their respective national economies or size of population.

As a parliament EALA is entitled to make laws but this is also seriously constrained as the parliament ‘can only put forward and vote on motions and bills if they have no cost implications to any fund of the community’ (Terlinden 2004:7-8). Even bills by EALA or the Council do not become law until the three heads of state, namely of Kenya, Uganda and Tanzania assent. If no assent is received for a second time, such bills lapse and the East African Executive can therefore be said to have a veto right over EALA’s decisions.

## Evolution of the European Parliament (E-parliament): a brief overview

The European Parliament (E-Parliament) which is hailed worldwide as a classic example of transnational democracy has over the years graduated from a fig-leaf status to a colegislature. It was not until 1979 that the E-Parliament was merely a forum to be consulted on a small range of legislative proposals prior to their adoption by the European Council. Worth noting is the fact that the Parliament was nevertheless given the right to dismiss the Commission in a vote of censure with a two-thirds majority. The system whereby ministers alone could adopt legislation suffered from 'democratic deficit' and Parliament had to fight for its powers; this it has done with considerable success (Corbett et al. 2005: 2-4).

The E-Parliament over the past four decades has evolved both in scope and powers to being a bicameral system in conjunction with the Council. This role was supposed to be enhanced through the new EU Constitution which is unfortunately facing an impasse after it could not pass the referendum in crucial EU states. The step-by-step increase in legislative powers of the E-Parliament is demonstrated in the table below.

**Table 1: Chronology of the evolvement of the European Parliament**

Year	Development	Implication
1970-1975	<b>Budget treaties</b>	Council and Parliament jointly became the budgetary authority in which case Parliament could exercise final vote on its adoption or rejection.
1975	<b>Conciliation procedure</b>	The procedure was to regulate the Council's legislative powers and Parliament's budgetary powers in which any disagreement would be referred to a conciliation committee composed of Council and an equal number of Members of European Parliament (MEPs). It would, however, be up to the Council to adopt the legislation in question
1979	<b>MEPs first election by universal suffrage</b>	Enhanced democratic legitimacy and more public debate on European issues as well as providing the Parliament with full-time MEPs

<b>Year</b>	<b>Development</b>	<b>Implication</b>
1980	<b>Isoglucose judgement of the Court of Justice (cases 138 and 139/79)</b>	Legislation was struck down because the Council did not allow Parliament to express its opinion and this enhanced the Parliament's bargaining power as the Council could no longer afford to by-pass the parliament.
1987	<b>Single European Act/Procedures for the adoption of Community Acts</b>	1. <i>Cooperation Procedure</i> – consultation procedure requiring Council's position be referred back to Parliament which then had three months to adopt or reject; 2. <i>Assent procedure</i> – Parliament assumed equal rights with Council in the ratification of accession treaties and association agreements.
1 November 1993	<b>Treaty of Maastricht</b>	This brought significant increase to the powers of the European Parliament including the right to vote for the President of the Commission, President of the Central Bank and the Ombudsman, all of whom have to serve terms of five years in line with the Parliament term of office
1 May 1999	<b>Treaty of Amsterdam</b>	Scope of codecision was extended to include most nonagricultural legislation. Parliament's vote on the European Commission President became binding.
1 February 2003	<b>Treaty of Nice</b>	Further extended the scope of codecision to enable parliament to take other institutions to court, in line with the expanding EU the number of MEPs increased to more than 700 – the preferred ceiling,
Unknown	<b>New constitution</b>	Parliament spearheaded the constitutional process which proposed to (i) consolidate Parliament's position as colegislator with Council, (ii) codecision to apply to virtually all areas including agriculture and the whole annual budget, (iii) increase in Parliamentary powers including scrutiny and recall of Commission decisions, (iv) reinforcement of Parliament's position in the election of the Commission President.

For more information refer to Corbet et al. (2005: 3-6).

The developments and changes above have resulted in what is now referred to as a classic two-chamber legislature in which the Council represents the states and the

European Parliament represents the citizens (Hix 1999 quoted in Corbet et al. 2005). It is evident from Table 1 above that the European Parliament has gradually been taking centre stage in shaping the European integration and asserting its role and function at the continental level. In 1999, the European Parliament also demonstrated its power of scrutiny including dismissal of the Commission which had hitherto seemed only theoretical. Parliament set up an independent Committee of experts to investigate the Santer Commission and it was evident that a vote of no-confidence was imminent. Within two hours before this, the Commission pre-empted it and resigned. In the autumn of 2004, President-elect Barroso realised that unless he changed his team, he would not obtain the necessary approval from Parliament and three months later returned with a new team.

It is unimaginable what Europe would have been without a power-wielding transnational parliament which represents not only the European capitals but also the diversity of political interests including opposition parties and civil society. The unique feature of the Members of the European Parliament is that they further engage not merely as ruling versus opposition parties but are based on political groupings such as Christian Democrats, Greens, Alliance of Liberals and Democrats for Europe, Independents or Democrats, the non-attached groups, and so on. The full-time arrangement of MEPs allows them not only to spend time at the heart of decision making in Brussels but, most importantly, to ask questions, knock on doors, dialogue with each other in and across political groups, give feedback to their constituencies and obtain new negotiating mandates. This makes the EU system more open, transparent and democratic than would otherwise be the case. 'In short, the Parliament brings pluralism into play and brings added value to the scrutiny of EU legislation' (Corbett et al. 2005: 6).

### **The SADC parliamentary forum and SADC integration**

Before the Parliamentary Forum was established, there had existed no regional mechanism for parliamentarians of SADC member states to debate and inform SADC of the popular views on development and other issues affecting the peoples and countries of SADC. In other words, there was no mechanism for introducing and sustaining SADC's regional integration agenda in national parliaments. It was understood that through the Parliamentary Forum, the ordinary people of SADC

would know SADC, its objectives, programmes and activities better. The establishment of the SADC Parliamentary Forum has also ushered in a mechanism for parliamentary-civil society interaction which in turn is an enhancement of plural democracy. The approval of the establishment of the SADC Parliamentary Forum by the SADC Executive confirmed the need to provide a parliamentary mechanism at the regional level to accelerate the process of establishing the enabling legislative, regulatory, policy, institutional and democratic environment for regional integration. It was observed that without adequate information, knowledge and relevant competencies on SADC issues both at national and regional levels, parliamentarians and national parliaments could not effectively exercise their influence and legislative roles for the benefit of the region and its peoples.

The establishment of the SADC Parliamentary Forum, though only as a parliamentary platform to discuss matters of regional concern, has presented SADC parliamentarians with an opportunity to participate, albeit only at a deliberative level, in the region's development and integration agenda. The ideal situation for true parliamentary participation in regional integration is the transformation of the Forum into a truly regional legislative assembly, an ideal which the Forum continues to strive for. The stated vision of the Forum is to be 'a delivery-focused, people-centered institution that accelerates and promotes parliamentary participation in the regional decision making for the benefit of the citizens of SADC' (Strategic Plan 2006–2010). The primary objective of the Forum is to strengthen the implementation capacity of SADC by involving parliamentarians in SADC activities (SADC Parliamentary Forum 2000–2005: 2). Notably, an analysis of the Parliamentary Forum's objectives shows that seven of the fifteen objectives, namely i, ii, iv, v, vi, xii and xvi (SADC Parliamentary Forum Constitution, Art. 5(a-o)) relate directly to capacity building for effective implementation of SADC policies. Accordingly, a number of awareness, advocacy, research, capacity building and institutional development activities have also been implemented in the areas of HIV/AIDS, Information Communication Technologies (ICTs) for effective parliamentary and legislative performance and many other areas.

The Forum has identified four strategic objectives as key focus areas for intervention, namely

1. Improvement of Institutions of Democratic Governance in the SADC Region
2. Effective Implementation of Regional Integration Programmes
3. Enhancing increased professional performance of Members of Parliament and Parliamentary Staff under the Parliamentary Leadership Centre
4. Establishing strategic partnerships and alliances for parliamentary cooperation.

The creation of the Forum has presented SADC parliamentarians with an opportunity to interrogate important regional and development challenges and make recommendations on the same. The communiqués which emanate at the end of each major conference are powerful instruments in communicating parliamentary consensus on any matter of regional importance. The Forum at the level of plenary and thematic meetings is serving as a platform for parliamentarians to acquire information, exchange knowledge and experiences and promote best practices where necessary. SADC parliamentarians through the SADC Parliamentary Forum discuss and continue to engage in important issues for the region such as HIV/AIDS, gender, elections, African debt, trade and integration, the energy crisis, information communications technologies (ICTs), SADC protocols, transboundary waters, poverty and development, aid and development, and many others.

The Forum is widely acknowledged for its regional role in promoting democracy and governance through its election observation programme and also its work on gender and women empowerment. The Parliamentary Forum since 1999 has observed more than 10 elections in the region including the Democratic Republic of Congo (DRC) elections held in 2007 and, as a result, has participated in other elections missions and activities beyond the region. The Forum's formulation of the Norms and Standards for Elections (2001) which even preceded the SADC's Principles and Guidelines for Elections and which has been the principal instrument used by parliamentarians in election observation missions is acknowledged as classic parliamentary leadership in promoting governance in the region. In addition, the Forum developed a comprehensive guide to be used mainly by its election observers who constitute parliamentarians and their supporting staff. This covers the

observation framework, mission preparation, in-country orientation, the pre-election period, voting and counting, and the post-election period.

This document and the Norms and Standards are hailed as the most comprehensive election observation instruments 'from which other institutions could learn important lessons on monitoring and observation of elections' (Matlosa 2006: 133). A comparative analysis of the Forum's Norms and Standards and its guidelines and the SADC's Principles and Guidelines reveals that the former's strength lies in its details and emphasis in respect of election management whereas the latter puts more emphasis on election observation. Undoubtedly, through the SADC principles, the SADC executive has expressed a commitment to credible and legitimate elections in conformity with the AU principles (Matlosa 2006: 133). Another noteworthy elections observation in the region is the Electoral Institute of Southern Africa (EISA's)/ECF Principles for Election Management, Monitoring and Observation in SADC (PEMMO). There have been calls to merge the three elections instruments into one, but such calls ignore the fact that the instruments are diverse and serve divergent political interests.

The Forum has also played a critical role in the promotion of gender equality and advancement of women's empowerment in the region. The Forum's advocacy work in this area is also credited for having influenced SADC's raising the bar for women in political decision-making positions from 30% to 50% and monitoring the same. Currently, the SADC Parliamentary Forum's gender desk is engaged with the SADC Gender Unit to mobilise for the upgrading of the Gender Declaration into a protocol. As a gender advocacy mechanism, women's caucuses were created in some SADC parliaments and at regional level. An MP's guide on gender and development was developed on which basis the Forum conducts training sessions for MPs in gender advocacy and analysis skills. The Forum's gender programme has also extensively reached out to civic groups working in the area of gender and women's empowerment. The overall impact of the programme is on sensitisation about gender, gender budgeting and mainstreaming, and women's empowerment.

The Forum also continues to make many strides in its contribution to SADC integration and development such as in the area of capacity building and advocacy for parliamentarians in respect to HIV/AIDS, Information Communications

Technologies, Regional Integration and many more. With the creation of the Parliamentary Leadership Centre in 2005 which is the capacity-building wing of the Forum, parliamentarians and staff of parliament receive practical and functional training aimed at improving their services and the professional performance of the institution of parliament as a whole. The above is an indication that the Forum, notwithstanding its current status that it is not yet a parliament, contributes greatly to SADC integration through capacity-building initiatives for parliamentarians and staff of parliament. Its advocacy work in the areas of governance and democracy has greater impact beyond parliaments as is evident from the elections work.

### **The forum versus a regional parliament**

On 8 September 1997, the SADC Summit of Heads of State or Government 'approved the establishment of the SADC Parliamentary Forum as an autonomous institution of SADC, in accordance with Article 9(2) of the Treaty' (SADC 1997: 18). In approving the establishment of the Forum, Summit noted that 'the main objective of the Forum is to constitute a Parliamentary Consultative Assembly. The ultimate goal of the Forum is to establish a Regional Parliamentary Framework for dialogue on issues of regional interest and concern' (Ibid.). It needs to be pointed out, however, that the position of the Forum as a treaty organisation proper is viewed as tenuous even from within the SADC Secretariat, and this has resulted in a continuously more informal relationship between the two organisations instead of the ideal complementary formal relationship between them. In part, this relates to the claim of autonomy by the Forum which is necessary, given that it is a parliamentary institution that should be distinct from an executive institution such as the SADC Secretariat. Secondly, the continuous non-transformation of the SADC Parliamentary Forum by the executive into the long-awaited regional parliament has added to this tenacity.

Notwithstanding this, the Forum has undertaken several missions to present its case to many heads of state and government in the region and has received support from a number of them privately and publicly. Currently, the impasse results from the SADC Executive through the Council of Ministers and the Summit which fails to act as a collective and to grant the transformation of the Forum to a regional parliament. It is also believed that the SADC Executive's caution with transforming the Forum into a regional parliament resulted from the Forum's election observation of the 2000

Zimbabwean election in which the parliamentary observation mission contrary to the SADC mission did not give the election a clean bill. It is believed that as a result the Forum was not invited to the 2008 Zimbabwean Presidential and General Elections despite having successfully observed elections in more than ten countries for close to ten years.

The transformation of the Forum into a regional parliament should also be analysed in the context of the general executive-parliamentary relationships on the continent. The Pan-African Parliamentary which is supposed to be a continental parliamentary body was instituted without legislative powers, and its assumption of such powers after the first five years is not automatic but will depend on executive assent. As discussed earlier, only the East African Legislative Assembly was given limited legislative powers whilst the ECOWAS Parliament has mere consultative and advisory powers. This brings to question the willingness and readiness of the African executive to subject itself to regional and transnational parliamentary scrutiny and oversight.

Notwithstanding the SADC Executive's non-transformation of the Forum into a legislative body, the Forum's 13-member parliaments (with the exception of one) have been paying their membership fees faithfully over the past eleven years. Not only that, but the Plenary Assemblies which are usually held twice a year and bring together more than 60 parliamentarians including Speakers of Parliament who are Members of the Executive Committee, have been well attended. Attendance of the many thematic meetings and other capacity-building activities over the years has been very high. Plenary Assemblies usually receive the host Head of State or Government or his most senior representative to deliver the keynote address whilst ministers or their deputies do the same in the case of thematic meetings which are held in the different member states. The presidents or their representatives and members of the cabinet who presided over the Forum activities never disowned or denounced the SADC Parliamentary Forum publicly. Instead, many of them would welcome the Forum as an important regional player in need of transformation into a fully fledged regional parliament. It is evident from this that there is general support for the existence of the Forum and the course that it stands for, but this, however, does not translate into a regional collective consensus necessary to transform the Forum into the requisite regional parliament.

Reasons advanced for the refusal to establish a SADC Parliament include

- financial and resource (technical, human) constraints arising from the creation of the SADC Parliament and also sustaining the Pan-African Parliament;
- ceding of a degree of sovereignty by national parliaments and member states before the Parliament is empowered to legislate;
- current configuration of the geopolitical regions of the African Union (AU), which is the basis of organisation for PAP, excludes a significant number of SADC countries;
- need to respect national policies in the context of a regional framework.

The SADC Parliamentary Forum's response to this is that the Parliament is envisaged to gradually evolve and develop once the legal framework is in place (SADC Parliamentary Forum 2007). It is believed that financial constraints could be overcome through the secondment of staff from national parliaments and the possibility of renegotiating donor finance, which is currently available to the Parliamentary Forum.

Pending legislative powers, the SADC Parliament could begin the process of harmonising laws and regulations. Notwithstanding the small size of the Southern Africa geopolitical region, SADC Parliaments collectively played a decisive role in the preparation of the PAP Protocol, a process that has strengthened cooperation and understanding among the members of the Parliamentary Forum. The Forum further believes that it wants to consolidate this cohesion which in turn will strengthen SADC.

The Parliamentary Forum posits that the current status of the SADC Parliamentary Forum does not allow it to fulfil its potential role and, in addition, results in the perception that it is nothing more than an association without recognition from the leaders of SADC. A SADC Parliament can act as a vehicle that promotes the political, economic and social development of the region guided by a common agenda and strengthened by broad participation. The SADC Parliamentary Forum in its Constitution Article 8(2)(b) provides that 'upon the Forum becoming a Parliamentary structure, the Plenary Assembly would be the legislative body in full consultation with SADC authorities and without infringing on the sovereignty of SADC national Parliaments' legislative functions'.

The proposed establishment of a SADC Parliament should be seen in the context of a region integrating and firmly placed on a path of lasting growth and development. The Parliament would add value to the process of integration by spreading a culture of human rights and gender equality, as well as encouraging good governance, transparency and accountability, thereby consolidating democracy throughout the region. By providing a regional forum for dialogue and consultation, the Parliament would promote public participation in regional governance and encourage greater political, cultural and social contact between peoples and institutions. It would strengthen economic integration and accelerate development as well as assist in the necessary process of rationalising the multiplicity of Regional Economic Communities that have overlapping membership. The Parliament would help to develop an understanding amongst peoples with diverse political, cultural and legal backgrounds as well as enhance the development of a SADC consciousness and identity with a vision of a common destiny. A SADC Parliament, it is believed, would also promote peace and stability through advancing peaceful means of resolving differences in the region.

A critical question about SADC integration is whether its integration will move towards more supranational features in its structures and decision-making process, at least in the foreseeable future, or whether it will just remain an intergovernmental arrangement as is currently the case. It will therefore not be inaccurate to suggest that the future role of the SADC Parliamentary Forum and other parliamentary bodies in regional governance and regional development will be shaped, to a large extent, by the future scenario of what will happen to SADC itself (Ibid. Constitution Article 8(2)(b)). In case this assessment is correct, chances for the SADC Parliamentary Forum to mobilise enough political will for its speedy transformation into a fully-fledged regional parliament with a reasonable amount of oversight, investigative and law-making powers unfortunately may not be sufficiently high, unless and until such time that SADC integration itself moves again into higher gear.

The real arena for parliamentarians to accelerate regional integration for the time being thus remains the national parliament in the member states whilst the motion for a regional parliament can continue to be debated. The focus therefore should be on how the knowledge and skills of SADC parliamentarians could be enhanced so that they could more effectively drive the regional integration agenda from within their

respective national contexts. Again, the role of the regional level would be that of a platform for knowledge sharing, peer learning, exchange of experience and the highlighting of lessons learned and good practice. This, in turn, should again inform policies and policy debates on national level where the real decision-making power lies. Parliaments as the legislative arm of government are, by nature, very much at the heart of governance.

The Forum through the Parliamentary Leadership Centre and other parliamentary stakeholders can fill this capacity gap whilst continuing to convene parliamentarians at regional fora to act as a necessary pressure group on issues of regional importance. Four ‘generic’ areas for parliamentary intervention are discernible, namely *regional integration, development, governance and democracy*.

### **The case for parliamentary role in regional integration**

Parliamentary role in regional and multilateral affairs is necessitated by the fact that the distinction between foreign or international and national or domestic has become increasingly blurred. ‘Parliaments must therefore step beyond the traditional Executive prerogative in international affairs, and subject governments to the same degree of oversight as in domestic policy arena’ (Inter-Parliamentary Union 2006: 157). In practical terms, the First Conference of Presiding Officers of Parliaments held in 2000 decided to operationalise this by, amongst others,

- Influencing their respective countries’ policy on matters dealt with in the United Nations and other international negotiating fora;
- Keeping themselves informed of the progress and outcome of these negotiations;
- Deciding on ratification, where the constitution so foresees, of texts and treaties signed by governments; and
- Contributing actively to the subsequent implementation process.

However, according to the Inter-Parliamentary Union (2006) there are certain prerequisites for enhancing the role of parliament at the regional and international level such as:

- Having a clear legal basis for a parliamentary involvement;
- Being informed sufficiently in advance of government policies and negotiating positions together with accurate information about the policies and their background;
- Having the necessary organisation and resources to address the issues, including sufficient expertise among the individual parliamentarians involved through their work in specialised committees;
- Being afforded an opportunity to put questions to ministers and negotiators, and thus be able to express its political (though not necessarily legally binding) views to the government;
- Being included as a matter of course in governmental delegations to international fora.

Parliament is an institution constitutionally mandated with the triple role of representation, lawmaking and oversight including passing and reviewing government budget/expenditure. Mohammed Salih (2005: 13), however, expounds on this by arguing that with multiparty democracy, African parliaments began to assume more seriously the six generic roles of political governance which are

1. Legislation, where proposals and programmes emanate, in the main, from the political executive;
2. Representation by providing the link between government and people;
3. Scrutiny of the executive to ensure that government is accountable, including the power to remove it;
4. Political recruitment of a pool of talent, some of which is expected to find its way to leading political and decision-making positions;
5. Legitimacy through representative legislation, debating public affairs and government performance openly; and finally
6. Conflict management.

It needs to be stressed that in positioning themselves as important role players in regional and international policy matters, parliaments never laid claim to a negotiating

mandate, nor sought one, as this remains the task of the executive. However, parliaments must be able to scrutinise the negotiations and be kept fully informed as they unfold and be afforded an opportunity to express to the executive their political views (Salih 2005:13). It is important for the envisaged regional role of parliament to be complemented by the new concepts such as shared governance or the governance continuum linking state-centered and societal-centred governance. African parliaments are increasingly invited to take a more profound role in anti-corruption campaigns, gender auditing, observance of social justice, and ethnic or violent conflict management (Salih 2005:13). As part of acknowledging the increasing regional and transnational role of parliaments it is argued that parliamentary diplomacy has resulted in the proliferation of international and trans-national parliamentary bodies, as well as an increased international role for national and regional parliaments (Manda 2008: 11-13, quoting Stavridis 2002).

Parliamentary diplomacy may be defined as activities of regional parliamentary institutions aimed at promoting good relations between states by bringing about tolerance, pluralism and mutual understanding and which provide a channel for advocating, negotiating and ultimately articulating the interests of the peoples of the region (Manda 2008: 11-13, quoting Stavridis 2002). Regional integration, on the other hand, is a process in which nation states volunteer to pull their resources as a means of achieving greater economies of scale harnessed through a larger and diverse market. It is also important to highlight the potential political gains of regional integration as an integrated region adopts and harmonises its policies and political agenda.

The advent of the Pan-African Parliament underscores the need for Regional Parliaments. The Protocol in Article 3(9), 11(7) and Article 18 envisages a greater role for regional parliaments which are supposed to be the building blocks of PAP. Article 18, for instance, provides that PAP

...shall work in close cooperation with the Parliaments of Regional Economic Communities and the National Parliaments or other deliberative organs of member states. To this effect, the PAP may, in accordance with its Rules of Procedure, convene annual consultative fora with the parliaments of the Regional Economic Communities and the National

Parliaments or other deliberative organs to discuss matters of common interest.

The above clearly highlights the need for Regional Parliamentary participation in the functioning of PAP. The relationship between the African Union and the Parliamentary fora of the Regional Economic Communities is complementary and mutually reinforcing. Although it is clear from the protocol that the establishment and functioning of the Pan-African Parliament does not depend on the existence of parliamentary fora of Regional Economic Communities, parliamentary fora are necessary for PAP to fulfil the specific objectives and functions as set out in Articles 3 (9), 11 (7) and 18. In other words, a Regional Economic Community without a parliamentary forum will be deprived of interaction with the existing Regional Parliaments during PAP meetings and be dependent on bilateral parliamentary contacts. In the case of SADC, the SADC Parliamentary Forum is currently not an integral part of SADC and without its transformation into a regional parliament or a treaty organisation proper it cannot formally influence the SADC Summit or any other important organ. Participation in this forum would be of great advantage to SADC.

### **Conclusions**

The limited powers of the RPAs is indicative of the general approach governments take towards regional integration in that the integration process is primarily intergovernmental rather than supranational (Terlinden 2004). The continued emphasis and adherence to preserving national sovereignty in both the executive and legislative spheres renders what most currently refer to as 'integration', that is an institutionalised form of intergovernmental cooperation, thus retaining the core elements of the then Southern African Development Coordinating Conference (SADCC).

The struggle over the establishment and strengthening of RPAs as Terlinden (2004) rightly puts it must therefore be regarded as an extension of the domestic struggles between executives and parliaments over political space and influence. To an extent, the creation and consolidation of RPAs have also led to an intraparlimentary competition between the national and regional legislature and especially between members at both levels as to who has overriding powers. Such competition should

be avoided and managed, and the complementarity of the two entities should be emphasised by which national parliaments can enforce regional parliamentary consensus because of their full parliamentary status. RPAs can serve as fora for such consensus building and advocacy on important regional matters. The PAP as the continental parliamentary body, though not with any legislative powers, can be instrumental in advocating for harmonisation of parliamentary business at the national and regional levels. Its assumption of using RPAs as building blocks which is currently not clearly defined in its protocol must be clarified, at least operationally.

While RPAs may not necessarily steer the path of regional integration, they can support it by acting as accelerating catalysts, provided they are willing to pick up the challenge and assert that role (Terlinden 2004). Learning from the European integration process and in particular the gradual process that the E-Parliament took to assume the legislative and oversight powers it has today, which, admittedly, is not as comprehensive as they would want it to be, is a lesson that integration is a process and not an event. The role of parliament in the integration process (which in the case of Europe grew gradually and cumulatively) will not occur automatically but will require legislature to assert itself. For deeper integration to take root, the legislative and executive hold on to sovereignty must gradually give way to transnationalism. External challenges which threaten African and SADC integration such as the ACP-EU Economic Partnership Agreements should be confronted head on and the African community should be guided by its ideal to promote unity and integration for the benefit of the African populace.

**Annex 1: Member states of Regional Parliamentary Assemblies**

<b>Regional Parliamentary Assembly</b>	<b>Country Membership</b>
East African Legislative Assembly	Kenya, Tanzania and Uganda
ECOWAS –Parliament	Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, Togo. (Mauretania quit)
Inter-Parliamentary Union of IGAD Member States (IPU-IGAD)	Djibouti, Eritrea, Ethiopia, Kenya, Somalia, Sudan, Uganda
Network of Parliamentarians of the Economic Community of Central African States (REPAC)	Angola, Burundi, Cameroon, Central African Republic, Chad, Congo, DRC, Gabon, Equatorial Guinea, Rwanda, São Tomé and Príncipe
Pan-African Parliament (PAP)	Each of the 54 AU member states of Africa except Morocco
Parliament of UEMOA (P-UEMOA)	Bernin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal and Togo
SADC Parliamentary Forum (SADC PF)	Angola, Botswana, Democratic Republic of Congo (DRC), Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe (SADC except Seychelles which is currently processing its application).

Source: Terlinden (2004)

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## *Chapter 10*

### **Peacekeeping and regional integration in Africa**

Willie Breytenbach

#### **Introduction**

Peacekeeping in Africa dates from the late fifties when the United Nations deployed in the Suez Canal region in 1956 (Malan 1997:18-21). Then came the first African (i.e. Organisation of African Unity) mission in 1963. It was an observer mission during the conflict between Algeria and Morocco, followed by a similar mission in Chad in 1981 (Gumbi 1995:35). Ever since, the United Nations (UN) and the Organisation of African Unity/African Union were the only roleplayers in the African 'peacekeeping' scenario.

At that stage (before 1993) there were no regional missions. This only became reality after the adoption of the Lagos Plan of Action in 1980 (driven by the UN Economic Commission for Africa and the OAU) that envisaged regional economic integration in Africa. All the while, pan-African security and defence structures were absent. These were only created in 1993 with the OAU's adoption of the 'Cairo Declaration' that provided for the Central Organ of the OAU Mechanism for Conflict Prevention, Management and Resolution. Before that, since 1988, the OAU would often rely on the sources and experience of the United Nations. Significantly it alluded to five regions for economic cooperation and integration in Africa (making this ruling compatible with Ch. VIII of the UN Charter on 'regional arrangements'), and the need to organise peace and security accordingly (Meyns 2002:142-143).

The African system not only accepts the authority of the United Nations system but defers to its mandates and has modelled its own institutions on the UN system. For example, both are hierarchical with the UN Security Council at the top of the UN system and the AU Peace and Security Council (PSC) at the top of the African system.

Both systems provide for similar types of functions modelled on the UN example as explained hereunder: peacemaking (Ch. VI); peacekeeping ('Ch. VI $\frac{1}{2}$ '); peace-

enforcement (Ch. VII) and regional arrangements (Ch. VIII) of which the PSC and its regional/subregional institutions are examples. The African PSC defined itself in its own protocol as an example of the UN Charter's Ch. VIII (Regional Arrangements) institutions. The PSC Protocols of 2004 also mirror UN mandates. But the UN has of late tended to make its commitments in Africa conditional to the AU making ceasefires and peace agreements first. To be sure, this dates from 2000 when the Brahimi Report recommended that the UN would not enforce peace where there is no peace to keep. The onus was therefore on Africa to conclude peace agreements beforehand, such as the Arusha Agreement on Burundi, the Pretoria Agreement on the Democratic Republic of the Congo (DRC) and the Nairobi Agreement on the Comprehensive Peace Agreement for Sudan. Only then would the UN deploy peacekeepers.

Chapter VI of the UN Charter deals with the peaceful settlement of disputes. This chapter makes no provision for unsolicited intervention, which must be impartial and can only be implemented with the consent of all parties concerned. UN missions were usually unarmed and only the General Assembly or the UN Security Council could deal with the issue of arming? (Malan 1997:16-22). The interpretation in those days was narrow: peacemaking peacefully. But under Secretary General Dag Hammarskjöld (1961) the term '6½' emerged when more discretionary powers for the UN General Assembly were made. These were, however, never captured in the UN Charter, and implied three peacekeeping conditions: impartiality, consent, and the non-use of force. Before 1988, all UN peacekeeping took place under the conditions set out in Ch. VI. But after 1988, when conditions changed, the principles of consent and the non-use of force became eroded as the environment became more robust. Only impartiality was to remain.

Chapter VII provided for the use of force, i.e. enforcement. Only the Security Council can decide on such actions, implying that Permanent Members of the UN can veto such decisions (Art. 27 and 43). This made serious cases of conflict hostage to superpower politics, especially during the Cold War. But the same has since happened in the case of Sudan where China and Russia tend to veto intervention from the outside. Other crucial issues that were to emerge only later were post-conflict reconstruction and development, peace building, and the sharing of responsibilities in the case of hybrid (UN and AU) operations. It has now been

accepted that the AU should not only make peace agreements, but should deploy in advance of the UN (Cilliers 2008:7). As mentioned, this is in line with Brahimi thinking.

Meanwhile the UN has deployed in Namibia, Mozambique and Angola since 1989. These were all 'Ch. 6½' mandates, i.e. peacekeeping duties which involved more than peacemaking but also managing security in these conflict situations. This was in line with UN Resolutions as well as with UN mandates from the Security Council and the Secretary General. But it was not a case of enforcement yet.

African missions with military capacity, i.e. to enforce peace where robust intervention was required, were never deployed by the OAU (Berman 2004:28), for reasons mentioned hereunder. More robust operations (Ch. VII), as well as all classical peacekeeping missions (so-called 'Ch. 6½' mandates), were therefore always left to the United Nations: in Somalia and Rwanda in the early nineties; in Liberia and Sierra Leone since late nineties; and in the DR Congo, Sudan and Darfur (from 2005 onward).

Major hindrances to more robust interventions by both the UN and the OAU/AU related to a number of factors: the cost of troop interventions, the paralysing impact of Security Council vetos (or abstentions) by permanent members of the Council, the upholding of the doctrine of non-intervention by African states which almost always rejected such actions on the basis of the principle of the non-violation of state sovereignty. To be sure, the AU can now intervene legally, but remains reluctant. More recently, President Robert Mugabe of Zimbabwe consistently refused to take foreign advice on the normalisation of democracy in Zimbabwe on the basis that Zimbabwe is a sovereign state – not a colony of the United States of America, or Britain.

Apart from the non-intervention and sovereignty principles (see Ajulu 2002:2-3; Van Nieuwkerk 2004:41-62; Van der Westhuizen 2005:5-6; and De Coning 2005:83-116), another factor that weakened African compliance with rules of good governance is the lack of political will by African leaders to criticise fellow-African leadership. Why this is the case is unsure. The criticism of the Mugabe government at the AU Summit in 2008 was the first of its kind. This has yet to happen in the case of Sudan.

### **The beginning of a new era?**

The end of the Cold War heralded the withdrawal of superpowers from African conflicts, as in the cases of Angola, Mozambique and Ethiopia. This was also the beginning of new types of conflict in Africa (erupting from within, and not necessarily between African states) – the notable exceptions here were the wars between Ethiopia and Eritrea, and neighbouring states participating in the war in the eastern Democratic Republic of Congo since 1998. In other words, the wars in places such as Angola, Uganda, Sudan, Somalia, Liberia, Sierra Leone and Côte d'Ivoire were internal civil wars fought between militaries of weak states and rebels, between warlords and private military companies, and between fighters on both sides that often included children and foreigners. How does one make peace in conflicts where the state is not always party to the conflicts, or where the state violates its own citizens, or where soldiers are not the only combatants? Whose responsibility is it to protect? What is the role of the International Criminal Court? What is the significance of the US African Command? Does it link with the African Standby Force? And finally, who are the peacemakers in Africa, and what is their agenda? Does it help or hinder African integration?

These questions spawned a whole series of new realities: humanitarian considerations could override objections based on non-intervention; the International Criminal Court in The Hague was willing to look at gross violations of human rights (e.g. war crimes and genocide); the American government decided to station an African Command on African soil (see discussion hereunder); the concept of the Responsibility to Protect (R2P) gained ground; and as far as Africa itself was concerned, the OAU was replaced by the African Union in 2002 with its own Peace and Security Council which mandated the creation of an African Standby Force (ASF), a Continental Early Warning System, and a Panel of the Wise. As mentioned before, the UN began to insist that peace agreements should be in place before UN involvement. As will be pointed out later, many of these agreements failed (for example, the Arusha Agreement of Rwanda in 1993). But quite a few succeeded (for example, the Lomé Agreement on Sierra Leone in 1999 and the Arusha Agreement on Burundi in 2000). Here follows an overview of the new realities:

Although the UN (in fact, really the US) intervention in Somalia in 1992/93 was a failure, it was the first time (Melvern 2001:102) that UN member states under the UN Security Council disregarded the sovereignty principle in Africa and launched a humanitarian mission, including an outside armed force (UN Resolutions 749 and 775) in a sovereign state. Intervention was therefore justified by its humanitarian goals (Samkange 2002:73). But despite Somalia, military intervention for whatever motive has– not been universally welcomed except for purposes of self-defence in terms of Article 51 of the UN Charter (Samkange 2002:73 & 80).

After Rwanda (1994) and Kosovo (1998) the UN Secretary General Kofi Annan (in 1999) challenged the international community to respond to these crises. The first to act was the Canadian government whose action led to the creation of the independent International Commission on Intervention and State Sovereignty in September 2000. The feeling was that intervention had to be considered more often, but only when properly authorised by the UN Security Council. The right to intervene had to be balanced by the responsibility to protect ('R2P'), implying the protection of citizens (Petruczynik 2006:26-27). Although these were UN – and Western – rather than AU initiatives, these trends were in line with new thinking in the Constitutive Act of the African Union, especially Article 4.

Another element of this latest era on security and humanitarian thinking was the establishment of the International Criminal Court in The Hague in 1998, based on decisions taken at the Rome Conference. It entered into force in 2002. A total of 139 states signed, and 92 ratified, including South Africa. Zimbabwe, Liberia, Sudan and the US are not parties to the Rome Statute (Du Plessis 2003:6). Despite this, the ICC decided to issue a summons for the arrest of the Sudanese president in July 2008. But South Africa (in the person of President Mbeki) is on record as having rejected this initiative. China and Russia opposed.

One particular issue that is still controversial is the American eagerness to obtain military bases in Africa, in the form of an African Command, called 'Africom'. Africom will become operational in late 2008. Its intended aims are to create stable environments in Africa, to train and equip African militaries, and to assist with humanitarian, border and maritime security issues. Bases are planned for Libya, Algeria, Morocco, Liberia, Senegal, Uganda, Cameroun, Gabon, Equatorial Guinea

and Djibouti. What is striking about this list is that all, with the exception of Uganda, Cameroun and Gabon, have Muslim majorities. Also, all of the rest, with the exception of Uganda, Senegal and Djibouti, have oil. But Djibouti is strategically situated at the southern tip of the Red Sea where the US already has an army base. The common denominators therefore seem to be military strategy, oil and Islam. But a common denominator could also be to discourage China's role in Africa (Neethling 2008:43), although this is denied by the US.

No wonder that African leaders are sceptical about being too close to Washington (Swart 2007:2), and that Libya and Algeria have already refused US presence. SADC governments have also decided that no member state would host US armed soldiers (Neethling 2008:43). Commentators believe that this is about protecting American interests, such as access to African oil and monitoring political sentiments in Muslim countries, especially those related to the US 'global war on terror' after the 9/11 attack on the US (2001). Africom is also a Department of Defence, and not a State Department initiative. Is this a new Cold War, with anti-terrorism, rather than anti-communism, as new US foreign military policy? Will it lead to a diminishing of US support for UN peacekeeping in Africa, except when the purpose also fits into American plans?

In Africa, the Organisation of African Unity was converted into the African Union in 2002, formulating a Protocol on an (African) Peace and Security Council (PSC) that was adopted on 25 May 2004. Article 13 of this Protocol provides for an African Standby Force (ASF) with one central and five regional brigades that would be mandated by Ch. VIII of the UN Charter, and could carry out Ch. VII-type mandates – something that had never been conducted by African missions before. Significantly, the US Africom debates do not (yet) allude to cooperation between Africom and the ASF. It therefore looks like a 'stand alone' initiative.

In 2006/2007 eight UN missions were deployed in Africa, which represents 70 per cent of UN peace operations worldwide. These eight states are the DRC, Liberia, Côte d'Ivoire, Burundi, Southern Sudan, Ethiopia and Eritrea, and Darfur in north-western Sudan. The African involvement in peacekeeping in Burundi and Darfur – and Somalia in 2008 – became test cases for Africa's new resolve to cater for its own peace and security. Burundi also became Africa's biggest test case for the

application of strategies for post-conflict reconstruction and development through the concepts of demilitarisation, demobilisation and reintegration (DDR) and security reforms carried out by the government of national unity (similar strategies were applied in the DRC). But this was always under UN, not AU, supervision.

This is where the PSC and the ASF come in. The PSC initiative is the only new African initiative in operation today. And Africom stands alone. The ASF and Continental Early Warning System, however, are not functional yet. The ASF will consist of one brigade at the AU head office in Addis Ababa, plus five brigades or forces for each of Africa's regions: North Africa, West Africa, Central Africa, East Africa and Southern Africa.

South Africa enthusiastically endorses this concept (Shelton 2005). However, to call these entities 'forces' is perhaps misleading, as military components will be for each region and not in each region and therefore remain in their countries of origin (De Coning 2005:85) and only deployed when required. As is the case with the UN, the doctrine will be one of collective security – typical of Ch. V and VI of the UN Charter on the one hand, and three more military scenarios on the other, including Ch. VII-type of peace enforcements (Neethling 2005). The time line for implementation is 2005 to 2010, but at the time of writing in 2008, nothing had come of that yet, although much preparations had been made (Cilliers & Malan 2005; Cilliers 2008).

The long delays relate mainly to two arguments: the first is the lack of political will, of which the will to override the sovereignty of errant states in the name of intervention (see the Lomé Declaration and Article 4(b) of the African Union's Constitutive Act of 2002) may be the biggest challenge (Van der Westhuizen 2005:6), whereas the second argument is about insufficient funding and capacity to perform (Neethling 2005:4). This weakness is recognised by the AU Peace and Security Council, which provides for a Special AU Fund as well as 'hybrid AU and UN forces'. To this might be added 'other resources'. Examples could include logistics (the capacity for rapid deployment), the realisation of rapid deployment of troops, the timeous appointment of the panels of the wise and the implementation of early warning systems, plus the availability of enabling legal frameworks such as Memoranda of Understandings, Protocols, Treaties and Defence Pacts (Alusala 2004:120).

The PSC/ASF mandate for African conflicts is quite wide: it restates the Cairo (1993) as well as UN Charter (1945) mandates without reservations. It goes even further by committing the AU to common defence structures and common defence policies (Aboagye 2004:185). It alludes to the overriding of the principle of non-interference when it justifies intervention in the case of 'grave circumstances'. According to Van der Westhuizen (2005:7) this builds on the Lomé Declaration of 2000 as well as on Article 4(h) of the Constitutive Act of the African Union of 2002 that approves intervention in the cases of war crimes, genocide and crimes against humanity. The point is: sovereignty was made softer, but not abandoned in favour of R2P.

Sovereignty has once been described as the kind of right that creates a space within which the bearer is free to do what is morally wrong (Bhoke 2006:5). Non-intervention and sovereignty may, however, just have been replaced by the new principle of non-indifference. The candid criticisms expressed about the re-election of Robert Mugabe as president of Zimbabwe at the time of the African Union Summit in Egypt in July 2008, may serve as an example of this trend.

Africa's major contributing nations of peacekeeping troops on the continent since the AU came into being are Nigeria and South Africa (Molukanele et al. 2004). Nigeria's commitments date back to the adoption by both the OAU and the AU of Nigeria's proposal about the Conference on Security, Stability, Development and Cooperation in Africa in 1999 (based on the Cairo Declaration of 1993), while South Africa's commitments date mainly, but not exclusively, from the Mbeki era and his role in putting the African Union and NEPAD together in 2002.

Apart from the issue of South Africa and Nigeria playing leading roles in continental and regional peacekeeping, the absence of stable African democracies contributing to peacekeeping is worrying. Although some of the SADC contributors to African missions included many of the poorer states such as Zambia, Namibia, Mozambique, Zimbabwe and Tanzania, one of the more democratic and wealthier states, namely Mauritius, had not yet made any troop contributions to either the UN or the AU (Kent & Malan 2003; Kamidza, Mbugua & Pillay, 2005). Botswana only contributed to personnel for Somalia. Whether these facts relate to lack of resources, financial or otherwise, or the lack of political will, is uncertain, and calls for further investigation. But such an investigation should also attend to the question of whether the rest of

Africa is not regarding this whole initiative as a hegemonic project that only concerns the continental ambitions of some of the founding members of the AU such as Gaddafi (Libya), former president Obasanjo (Nigeria) or former president Mbeki (South Africa) (Kagwanja,2006:39-58). With Obasanjo already retired and Mbeki having stepped down as president of South Africa, one wonders whether this initiative will have sufficient momentum after 2009. As it is, the Mbeki-driven NEPAD initiative already lost momentum even while he was still South African president. The Mbeki breakthroughs in the case of Zimbabwean mediation in September 2008 also never alluded to NEPAD, only to SADC.

South Africa is perhaps the only other AU member state with a specific public commitment to peacemaking in the form of the (RSA) White Paper on Defence (1996), the Defence Review (1998), and the White Paper on South African Participation in International Peace Missions (1999). Neethling (2005:53) describes this as ‘... the most important foreign policy document of the last decade to pass Cabinet’. This White Paper, however, is not Africa-specific, as it covers the whole international spectrum and refers to participation in ‘a mission’, presumably anywhere in the world, irrespective of being UN or AU controlled. Does this reflect South Africa’s UN ambitions? Much more Africa-specific is the SADC Mutual Defence Pact of 2003 where South Africa committed itself to assisting fellow-members in the case of external aggression. What is puzzling, however, is that the Mutual Defence Pact (MDP) is linked to external aggression at a time when conventional threats are deemed to be about zero (Shelton 2005:10). Even where such a scenario becomes a reality, Article 6(3) of the MDP states that each state shall participate in such collective action in any manner it deems appropriate. Therefore, as a kind of defence alliance, it is hardly an example of advanced regional military integration as participation remains voluntary.

What is also puzzling from a regional perspective is that the SADC Organ for Politics, Defence and Security is not linked neither to the ASF or nor its regional SADC Brigade (Neethling 2005:5), nor is the ASF linked to SADC’s Interstate Politics and Defence Committee (De Coning 2005:87-88). From these points of view, the ASF/SADC Brigade is therefore neither cause nor consequence of regional integration (Fisher & Ngoma 2005:8). It stands alone, and creates the impression of being imposed.

One positive development, however, is that all SADC members have pledged support of the SADC Brigade of 6000 troops by 2010 (Rudman 2005) including Botswana. As this date is situated in a post-Mbeki dispensation, we shall be better able to speculate then about the future of the AU and of NEPAD after 2009.

Whether these initiatives will help or hinder integration will be assessed in the conclusion hereunder after the case studies have been dealt with.

### **Case studies: Burundi and Darfur**

Burundi reflects the most complete case of African efforts to restore peace on the continent (Southall, 2006:110-111). The other important examples are the Inter-Congolese Dialogue (2002-2003) on peace in the DR Congo and the conflict in Sudan, particularly Southern Sudan and Darfur. Following the signing of the Lusaka Ceasefire Agreement (1999), on the DRC, the UN established Mission of the UN in the Congo (MONUC), the UN mission in the DRC. In other words, there was never an African mission, or a SADC mission (the DRC is a member of SADC) in the DRC. That is why it cannot be compared to Burundi, as the latter had an African Mission in Burundi (AMIB) until the UN rehatting in 2004 (i.e. the same African troops now wore UN helmets) with the introduction of a hybrid force. The UN component was then also bigger than the AMIB part.

In the case of Burundi, the appropriate peace plan was the Arusha Peace Agreement signed on 28 August 2000. As no less than seven African heads of state played a role in this process, Curtis (2003:3) says it served as an example of African leadership and cooperation. It was under Nelson Mandela's presidency that South Africa became involved in the peacemaking initiatives in Burundi. But under Thabo Mbeki the pace picked up, possibly to demonstrate that Mbeki's NEPAD initiative had to be taken seriously. It was under Mbeki's presidency that South African troops were deployed (in 2001) almost two years before the African Union deployed more African troops in Burundi. These were deployed under the banner of AMIB since June 2003. The other AMIB troops – apart from South Africa – came mainly from Ethiopia and Mozambique. Then came the rehatting of 2004.

What makes this AU project in Burundi different is the strategy for post-conflict nation and state building captured in the Arusha Agreement of 2000.

The Arusha Peace Agreement (2000) consists of five protocols covering truth and reconciliation, new systems of governance, peace and security, reconstruction and development, and implementation. But the South African government realised there were shortcomings relating, among others, to issues such as an appropriate ceasefire and guidelines about power-sharing among the Hutu (85% of the population) and the Tutsi (14% of the population). This led to the adoption of the Pretoria Protocols in late 2003 (Alusala 2005:4-5). The ceasefire of late 2002 was significant as the United Nations stated this as a condition for its participation in the peace process (Curtis 2003:3-4). During this period, the Burundi peace process was seen as a South African (not SADC) initiative despite seven African heads of state participating in this process (Curtis 2003:3; Southall 2006:129-131). South African funding and costs to the taxpayer escalated as the ceasefire was soon violated by almost all parties to the conflict (Ajulu 2004:1-2). Hence the appeal for UN support, which was forthcoming in 2004, whereupon the abovementioned rehatting took place. At that stage the European Union saved AMIB financially with the amount of €25 million (Powell 2005:28).

On 21 May 2004, the UN Security Council passed Resolution 1545 – with a Ch. VII mandate – for the UN Mission in Burundi (ONUB) to take over from AMIB on 1 June 2004 (Alusala 2005:5 & 12). With more money, more troops were deployed, mainly from Kenya, assisting South Africa, Ethiopia and Mozambique. The troops were therefore still entirely African, but ‘rehatting’ as explained above, and with first EU, then UN funding.

In a post-Arusha and post-AMIB Burundi, the emphasis shifted to Disarmament, Demobilisation and Reintegration (DDR), the multiparty elections of March 2005, and the realisation of Protocol 4 of Arusha, mainly the socio-economic development of Burundi (Jooma 2005:2), including the resettlement of many refugees in a country known for its land shortages. This is not the only problem, however.

Other issues are whether the power-sharing constitution that entrenches the Hutu majority over the Tutsi will endure, because it is impossible to ever win an election in future. The emergence of new divisions between an ‘Arusha group’ and an ‘anti-Arusha group’ (for and against the details of the pact) does not bode well. What is the prognosis?

Hope also depends on war wariness (Southall 2006:129-131) as well as the success of a whole range for institutions such as a DDR Commission, another Ceasefire Commission, a Demobilisation Programme and an Implementation Monitoring Committee (Boshoff 2006:138-141), and, above all, on the will of both the UN and Africans – especially Burundians – to make it work.

What happened in Burundi confirmed the pattern that was emerging: the UN would only get involved when there was peace to keep. But in this case, it was the South African led regional initiative that made it possible. One special problem in Burundi was that (as in Sudan and the DRC) some rebel groups refused to sign the ceasefire. And the problems continued in 2008.

The situation in Sudan shows many similarities but also greater differences. Here the conflict also goes back to shortly after independence in 1956. But in the nineties, after oil was discovered, conflict flared up again. The process of mediating was initially African before the UN stepped in, especially in the case of Darfur. The major differences are that the conflict in Burundi engulfed the whole territory whereas in Sudan, the oldest manifestation is regional: the South-North fault line. This might have been about identities: Africans in the South and Muslim Arabs in the North clashing, manifesting in either demands for secessionism in the South, or at least, demands for greater autonomy for the southern region. But it is also a resource war, as oil was discovered in the South, and then piped to the North, from where most is exported to the People's Republic of China. This is by far the greatest source of revenue for the central government in Khartoum, the seat of Arab and Muslim power in that country. This North/South conflict in Sudan became a full-scale war between two conventional armies, the Sudan Defence Force and the Sudanese People's Liberation Army (SPLA) representing the non-Muslim, non-Arab South. As in Burundi, the AU took the peace initiatives and tried to make peace. In December 2004, a Comprehensive Peace Agreement (CPA) was agreed, and signed in January 2005 in Nairobi between the government of Sudan and the Sudan People's Liberation Movement (Ajulu et al. 2006:1-2). This brought South/North hostilities to a temporary end – but it flared up again in 2007 because not all parties signed the original agreement, despite the Juba Declaration of 2006 that tried to involve the remaining outside parties as well. Then there was also disagreement about the

reintegration of armies after the conclusion of the ceasefire (Young 2007:9; Schafer 2007:14). Meanwhile conflict spread to Darfur as well.

The UN had established the UN Mission in Sudan (UNMIS) to assist in the implementation of CPA in 2005. Special features of the CPA are that Southern Sudan could draft a constitution for the region; that there would be a Government of National Unity between Khartoum and the South, and that the South could hold a referendum on self-determination in 2011. One unintended consequence of this agreement was that it served as a catalyst for the eruption of conflicts in Darfur as Darfurians suddenly felt that the South had gained more self-governing benefits than they had.

Conflict in Darfur erupted in 2003. This is not about secession or oil or religion since all the inhabitants in Darfur are black and mostly Muslim as well. But there is an Arab minority. The conflict is claimed to be based on old ethnic tensions fuelled by conflicting interests between nomads and farmers, between black Africans and ethnic Arabs, between Darfurians and the government in Khartoum, and, once the tensions escalated into armed conflict, it became a war between the Justice and Equality Movement (JEM) and the Janjaweed (local Arab militia fronting for the Sudanese government). The military wing of the (Southern) Sudan People's Liberation Movement, the SPL Army, then joined forces with the Darfurian rebels, mainly with the JEM, and attacked the government in 2003. The CPA – between the North and South – also fuelled tensions in Darfur as implied above. This was because Darfurians felt marginalised and excluded from political benefits that might accrue to Southerners from that process. In Darfur, as the conflicts escalated, many refugees moved into Chad (Rankhumise 2006:10), creating spillovers into the region just as conflicts in Rwanda and Burundi also caused refugees to spill over into the eastern DRC impacting negatively on stability in that country.

After the conflict erupted in 2003, Chad and other states in the region met in Ndjamen (Chad) to negotiate a ceasefire agreement in April 2004. Unlike the UNMIS, set up to support the Ceasefire Agreement in 2004, the African Union was again first to move into Darfur. The AU wanted to demonstrate that Africans could solve African problems. It decided in July 2004 to set up the African Mission in Sudan (AMIS) to support the Ndjamen Ceasefire of three months earlier. For the new

African Union, and PSC, Darfur was therefore a test case. As the conflict deteriorated and the ceasefire seemed not to work, the South African president remained unwilling to acknowledge these problems, and delayed any requests for UN assistance. For Motsi (2006:1), 'not only did the AU fail dismally in carrying out its mandate, it exacerbated the conflict', and only agreed in January 2006 to endorse the role of the UN. But the Government of Sudan then objected to the UN, and refused to allow non-Africans in the peacekeeping forces. At that time, troop contributions were from seven African states, mainly from Nigeria, Rwanda, Senegal and South Africa. This was new, as none of these countries made any troop contributions to UNMIS in Southern Sudan. However, as three of the five leading nations of the NEPAD initiative (South Africa, Senegal and Nigeria) took the lead in Darfur, the AU/NEPAD imprint was clear to observe. But the African capacities remained weak and the UN agreed to increase its presence in another hybrid force dwarfing the African presence from 2008 onwards.

The problem with Darfur is that it is part of 'sovereign' Sudan with its complex relations with superpowers such as China and Russia as well as with the Arab League, the United Nations, the African Union, and with Chad, where French and American oil interests are invested. Chad is also a major receiver of Darfurian refugees.

As in the case of Burundi, the AU was eager to make a success of an entirely African initiative. But the mandate was not robust enough (Appiah-Mensah 2006:11). If the Arusha Agreement of 2000 was too ambitious for the limited AMIB capacities on the ground in Burundi, the same could be said about Ndjamen and the situation on the ground in Darfur. Here, the need for a Rapid Reaction Force was even greater. But unlike in Burundi where a new government had to be created, the situation in Sudan is that an existing government – the government of Sudan – is party to the conflict. This makes the problems in Darfur more complicated, as the government of Sudan invoked the principle of sovereignty and therefore non-intervention in its affairs. Ironically, this principle was not invoked in the case of the CPA (2004) nor in the case of Ndjamen (also 2004), but only in the case of Darfur – a case that attracted the attention of Britain and the United States in condemning Sudanese genocide in Darfur.

Unlike in Sudan, French and American interests dominate the oil business in Chad, which is also the only state in this region that has diplomatic relations with Taiwan – this of course irritating mainland China, Sudan's main oil client in Africa. Concerned about renewed instability in this new region of conflict, the United States and Nigeria decided to mediate another peace agreement, similar in scope to the Arusha and Nairobi Agreements, but this time in Abuja, Nigeria, in May 2006. This was the first deal between the government of Sudan, the Southern Liberation Movement and Darfur's JEM. It was another African made ceasefire, but was violated once again and by all main actors in Sudanese politics.

The AMIS mandate in Darfur expired on 30 September 2006. By the end of September, it was extended to the end of 2006 with 4000 more troops from the same countries (Nigeria, South Africa, Senegal and Rwanda), with funding from mainly Arab states and with the blessing (Ch. VIII) of the UN. China and Russia abstained in the Security Council in 2006. Earlier, in 2005, the UN Security Council passed Resolution 1593, which referred the situation in Darfur to the International Criminal Court (ICC) as the UN found that the government of Sudan and the Janjaweed violated international human rights and humanitarian law (Williamson 2006:21). However, the United States then abstained during this vote because it objected to the view that the ICC should be able to exercise jurisdiction over states (such as the US) not party to the Rome Statute on the ICC (Williamson 2006:21). The government of Sudan also does not recognise the jurisdiction of the ICC. But this did not prevent the ICC from issuing a summons for the arrest of the Sudanese president in July 2008.

It is therefore clear that the case studies of Burundi and Darfur illustrate that the AU has the capacity to initiate peace processes (peacemaking, ceasefires, etc.), but lacks the funding and capacity to enforce peace. It is also powerless when confronted with international, and especially superpower, interests. Thus, Burundi and Darfur illustrate that AU peace remains an African coalition-of-the-willing and is mainly driven by South Africa and Nigeria. What would happen if they withdrew?

## **Conclusion**

Peacekeeping is not incompatible with regional integration. It is a form of multilateral political and security cooperation globally, continentally and regionally. It also

presupposes common understandings on peacemaking, peacekeeping and peace enforcements. Ch. VIII of the UN Charter of 1945 is particularly appropriate, as it encourages regional arrangements, such as the AU's African Standby Force and regional brigades. The US proposals about an African Command do not fit into this kind of thinking. Africom neither sees itself as a peacemaker in Africa, nor does it propose any links with the African PSC or its African Standby Force.

In contrast, the emergence of continental and regional organisations in Africa, especially in West and Southern Africa, is therefore fully compatible with this kind of regional integration, although not linked to regional bodies. Article 13 of the Protocol on the African Union's Peace and Security Council complements this framework. But it is a case of collective security rather than a military alliance.

Collective security also calls for cooperation on human security issues such as water, refugees and the environment. Unfortunately, this remains the domain of the UN, non-governmental organisations and civil society, and even Western governments as the R2P and ICC initiatives illustrated. The softer issues of human security are just not the terrains of regional integration.

Then there is very little evidence of cooperation on peace enforcements – except in the cases of hybrid forces and under certain protocols of the Arusha Peace Agreement in the case of Burundi. But Burundi is not part of SADC, and it is no longer under AMIB, as the United Nations has already taken over from the African Union. Here it was about provisions made for Ch. VII-type of enforcement functions, never conducted by African missions before. The African Union has therefore yet to complete an African mission that goes beyond the mandate of peacemaking. The AU is also not yet able to conduct more robust missions on its own. The same applies to SADC. The integration agenda on almost all issues – from human security to more military and political matters – thus remains unfinished business.

While the African Union is vastly different in principles and policies from the old Organisation of African Unity, the problems remain basically the same. The same old problems of weak capacity, insufficient funding, lack of political will, the impact of superpower politics, and once more in Africa, the sovereignty principle – that was again to override any form of interference in the domestic affairs of states where

human rights violations took place – have not gone away. However, the debate about R2P is welcome. But big powers such as China, France and the US may still have their own agendas, not always supportive of African goals. The evidence about the role of the ICC and Africom come to mind. SADC structures also remain marginal even where conflicts occur within SADC. It therefore remains to be seen whether the causes of weak integration in the past have been overcome by the desire to unite and cooperate for a better future. The intentions of the peacemakers matter more than ever before.

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## *Chapter 11*

### **How countries of the Southern African Development Community (SADC) can use the World Trade Organisation and the European Community flexibilities for better access to affordable HIV/AIDS medicines**

Stephen S. Kingah, Stefaan Smis and Fredrik Söderbaum

#### **Summary**

This paper discusses the ways in which countries of the Southern African Development Community (SADC) can maximise the patent-related advantages that are available to developing countries and regions by flexibilities offered by the World Trade Organisation (WTO) and the European Community (EC). Article 31 of the Agreement on Trade Related Aspects of Intellectual Property (TRIPs) provided only limited derogation to the exclusive rights that a patent holder may have under Article 28 of TRIPs. The entry into force of the agreement in developing countries entailed that important (cheaper) generic medicine manufacturers such as Brazil, China, India and South Africa would not be able to use TRIPs to supply needed medicines. This problem became known as the 'Doha Paragraph 6 Problem' as it was included in the 2001 Doha Declaration under the section of TRIPs and public health. The Declaration called for a solution to the problem by the end of 2002. Although this deadline was not met, an interim solution to the problem was worked out by the TRIPs Council of the WTO. This interim solution provided generous options for countries in need. The decision was integrated into the TRIPs Agreement as a permanent amendment in December 2005. In the EC, Regulation 816/2006 was adopted to apply the system which had been crafted at the WTO. So far only one country (Rwanda) has used the system to purchase affordable HIV/AIDS medicines from Canada. SADC is a region that has high levels of prevalence rates of HIV/AIDS. The WTO and EC flexibilities have not been used by SADC countries. One of the advantages of the flexibilities is that benefits are specifically guaranteed to regional trade arrangements like SADC's. Why has there been use an under-utilisation of the flexibilities? This paper argues that elements such as lack of awareness on the SADC side, the complicated nature of the procedures in the use of the flexibilities, and the actions of international charities explain the limited use of the system in

SADC. It advocates for a more proactive involvement of SADC and its member states in the negotiations on the various ways in which access to medical products (especially second line HIV/AIDS medicines) can be eased for SADC's citizens.

## **1. Introduction**

How can SADC countries<sup>[1]</sup> take better advantage of the WTO and EC rules that ease access to essential medicines? Many SADC states have high levels of Human Immuno-deficiency Virus/ Acquired Immune Deficiency Syndrome (HIV/AIDS). The disease negatively affects development in the countries of the region. Response to the crisis has many dimensions including prevention, treatment, and the battle against stigmatisation. This paper dwells mainly on the treatment component to the response. Mindful that there is still no cure for the pandemic, prevention remains an important front in the efforts to deal with the disease. However, given that there are over 32 million people who live with HIV, it is vital that action is taken to assuage their plight. In this regard the treatment dimension of response to the pandemic is crucial. Yet treatment through anti-retroviral (ARV) medicines does not only help to mitigate the pain that patients feel but treatment strategies critically complement the other dimensions of the response strategies including preventing and fighting stigmatisation. In terms of prevention, it has been demonstrated that certain ARVs like nevirapine and zedovudine help in limiting transmission of the virus from mothers to their offspring during pregnancy. In terms of addressing the issue of stigma, treatment possibilities have transformed the manner in which individuals feel about HIV/AIDS. The disease is no longer regarded as a death sentence. So with the knowledge that there are treatment options, some patients increasingly feel more comfortable in disclosing their status and also in seeking treatment. The paper will discuss some of the various possibilities at the WTO and EC levels that exist in terms of easing access to affordable essential medicines for poor countries and regions such as SADC's.

Part two discusses the situation of need on the ground. As such it presents a cross-section of the needs that most of the SADC countries are experiencing in terms of

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<sup>[1]</sup> The members of SADC include Angola, Botswana, the Democratic Republic of Congo (the DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. With the exception of island states such as Madagascar and Mauritius the other states have high levels of HIV/AIDS prevalence.

shortages of the essential ARVs. It equally outlines some of the development problems that are posed by the disease for the SADC countries. SADC regional rules and policies that relate to access to affordable health care are also presented. Part three closely examines the nature of ARVs. This is done as a means of providing a substantive context into the nature of the issues under consideration. Having agreed that ARVs (especially the second-line medicines) are relatively more expensive, the fourth part analyses some of the flexibilities that are provided for at WTO level for developing and least developed countries (LDCs) and regions. It is noted that the majority of SADC countries can take advantage of these flexibilities. Part five considers some of the legal provisions that have been put in place by the EC to ensure that poor countries have access to needed medicines. Relevant provisions of the draft Economic Partnership Agreement between the EC and SADC group of countries are equally presented. Part six discusses some of the reasons behind the reluctance that has hitherto characterised the responses of SADC and its member states to the said access-related flexibilities. Part 7 concludes with some thoughts on how the flexibilities could be rendered more amenable for countries that need them.

## **2. The situation of need and the HIV/AIDS-related development challenges**

### **2.1 Situation at the national level**

In SADC countries, there appears to be a *décalage* between the needs and realisation; or between desires and outcomes in terms of the availability of resources to provide affordable ARVs. The countries treated under this heading are selected because they explicitly discuss the nature of their need for affordable HIV/AIDS in their Poverty Reduction Strategy Papers (PRSPs) or National Strategies to combat the pandemic.

In Botswana, for instance, the estimated cost of the national response to HIV/AIDS is about 12.6 billion pulas or about 2.3 billion US dollars (Government of Botswana 2004: 94). A greater part of this sum goes to the provision of ARVs. Although the country (considered a mid-income nation) can afford this option in the short and medium term, it is unclear whether this will continue in the long haul.

The DRC needs about 360 million US dollars per annum to overhaul its decrepit healthcare system. However, the authorities have only been able to come up with the

sum of 82 million US dollars (Government of the DRC 2002: par. 30). It would be difficult for the country to channel needed funds on ARVs mindful that it faces other social and economic problems.

In the PRSP of Malawi, the government makes it clear that the HIV/AIDS pandemic is too severe for the country to handle alone. It notes that Malawi's efforts are inadequate mindful of the spread of the pandemic which dwarfs the scarce resources available to the government (Malawi GDS 2007: xvii).

The issue of need also implicitly underlies the revelation in the Mozambican Poverty Reduction Strategy Paper (PRSP) that the country will scale up its budgetary allocations to deal with HIV/AIDS (Mozambique 2007: par. 201). The Mozambican government itself notes that in March 2004 only about 3000 patients were on ARV therapy against an estimated number of 200000 patients who required therapy in 2004 (Republic of Namibia 2004: 97). The government predicts that at this rate, the demand for ARVs will surge in the foreseeable future (Ibid.:21). Given this reality, it is hard to fathom how the nation will meet such pressures with the limited resources of the country. It is noteworthy that Mozambique is an LDC that is in dire need of funds for alternative and important purposes.

The picture may be slightly different in Namibia given that it is a lower/middle income country. However, the resources set aside for component three (on treatment) in the national response strategy to HIV/AIDS is stupendous. While the total set aside for the implementation of the Mid-Term Plan III (MTP III) is about 453 million US dollars, the amount allocated for treatment and care stands at a little over 245 million US dollars (Namibia 2004: 98). In this regard the issue of sustainability of the strategy of supplying expensive ARVs is an extant challenge.

On its part, the South African National HIV/AIDS Council (unlike any other HIV/AIDS control institution in the region) makes it clear that at current prices the provision of anti-retroviral therapy will account for 40 per cent of the total cost of the Strategic Plan for South Africa (SPSA). It further states that this needed service will soon be unaffordable unless certain legal options are exercised. Amongst these is the amendment of the Patent Act, No 57 of 1978 to allow for the use of compulsory licences when necessary. SANAC also proposes that the government should phase

out obstacles to the lengthy registration process of essential medicines (SANAC 2007: 141).

In Tanzania, the issues of need and cost loom equally large. It is stated in the country's Poverty Reduction Strategy Paper (PRSP) that '[equitable] and sustainable access to care, support and treatment are essential to improve the wellbeing and life expectancy of people living with HIV and AIDS, but issues pertaining to finances, infrastructure, human, and logistical weaknesses need to be resolved first, so as not to further weaken an already constrained health system' (Tanzania 2006: 11). The PRSP of Tanzania, unlike the other countries' documents, highlights the distribution problems related to health care in the country. It states that vital constraints in terms of access to essential health services include, amongst others, long distances to health facilities, insufficient and expensive transport systems, poor quality of care, shortage of skilled health care providers, and poor accountability mechanisms (Tanzania 2006: 12).

Zambia faces a Herculean challenge in terms of needs. These include lack of a hospital policy, outdated and obsolete legislation, distance to health facilities and lack of transport. The government further states that "...long distances and lack of transport in a large but sparsely populated country like Zambia is a key determinant of health seeking behaviour' (Zambia 2007: 84). While recognising its deficiencies in terms of transport infrastructure, the picture of the access situation painted in the PRSP still reveals that the issue of sustainability of the government provision of affordable ARVs will be a salient concern. This is because the government is spending about 5% of its annual budget on the provision of ARVs to its citizens (Zambia 2007: 128).

Eight of the SADC countries are least developed countries (LDCs).<sup>[15]</sup> By UN standards, their Human Development Index (HDI) is low. Two of the states are emerging from conflicts (Angola and the DRC). One of the countries has been under sanctions from Western nations (Zimbabwe). Most Southern African countries have also been facing other challenges including serious droughts and famine that have compounded the problem of food insecurity (Whiteside 2004: 4). These problems

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<sup>[15]</sup> Angola, The Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mozambique, Tanzania and Zambia.

have not been assuaged by the HIV/AIDS pandemic which has compounded the challenges faced by SADC. SADC has been described as the epicentre of HIV/AIDS – that part of the world worst affected by the disease (Murphy et al. 2007: 42). The region accounts for 3.5% of the world's population but has about 35% of the global prevalence of HIV/AIDS (SADC 2005b: 66).

SADC countries can be classified into developing countries and LDCs. The developing countries include Botswana, Mauritius, Namibia, South Africa, Swaziland and Zimbabwe. The other countries are LDCs. The classification is important in understanding the applicability of certain WTO and EC rules in the countries in question. It is also important for understanding the varying responses of SADC states to the pandemic. In average terms, the SADC developing countries are more advanced in development than the LDCs. However, the prevalence of HIV/AIDS is markedly more acute in SADC's developing countries than in its LDCs.

All the SADC developing countries except Zimbabwe have made important strides to provide affordable or even free ARVs through the public health systems. Conversely, all the LDCs with the exception of Zambia and Malawi have fallen below par in terms of providing affordable ARVs to those in need (UNAIDS 2006). Across the board, provision of ARVs in all the countries is below 50% save for Botswana where 85% of those who need ARVs receive the same.

Some of the member states of SADC have gone to great lengths to ensure the provision of the HIV/AIDS medicines. For instance, Zambia has been spending 7.9% of its annual budget to combat the disease. Of this amount the bulk has been used to provide for ARVs. The real issue relates to the sustainability of ARV provision. In all SADC countries except Zimbabwe, prevalence has been increasing. This means that governments will have to grapple with the issue of those already infected as well as those to be infected.

**Table indicating, population, access levels in HIV prevalence in SADC countries (adapted from the Annexes of UNHIV/AIDS 2006 Annual Report)**

	Population (in millions)	No of people with HIV/ HIV/AIDS	% of those receiving ARVs	% of adult prevalence	% \$ <2/day
Angola	15.9	320000	6.0	3.7	-
Botswana	1.8	27000	85	24.1	50.1
The DRC	57.5	1000000	4.0	3.2	-
Lesotho	1.8	270000	14	23.2	56.1
Madagascar	18.6	49000	-	0.5	85.1
Malawi	12.9	940000	20	14.1	76.1
Mauritius	1.2	4100	-	0.6	-
Mozambique	19.8	1800000	9.0	16.1	78.4
Namibia	2.03	230000	35	19.6	55.8
South Africa	47.4	5500000	21	18.8	34.1
Swaziland	1.03	220000	31	33.4	-
Tanzania	38.3	1400000	7.0	6.5	59.7
Zambia	11.7	1100000	27	17	87.4
Zimbabwe	13.01	1700000	8.0	20.1	83
Average	17.4	1078793	22.3	14.4	66.6

### 3. Regional responses

#### 3.1 Legal provisions and Summit outcomes

In presenting the main legal provisions within the SADC legal framework on access to affordable medicines, it is equally worthwhile to discuss the general provisions dealing with HIV/AIDS. Having established the fact that HIV/AIDS compounds and is compounded by poor development prospects, it is important to note that one of the main goals of the SADC Treaty (2001: Article 5(1)(a)) is poverty alleviation through regional integration. Although the treaty falls short of providing an explicit article on health, the SADC Protocol on Health which was adopted on 18 August 1999 makes it clear that cooperation in this area is 'essential for the effective control of communicable diseases and for addressing common health concerns in the Region' (SADC Protocol of Health 1999).<sup>1</sup> In more specific terms, Article 3(b) of the protocol

<sup>[21]</sup> 4<sup>th</sup> recital, SADC Protocol on Health, 18 August 1999.

stipulates that the main goals of the document include the identification, promotion, coordination and support of activities that have the potential to ameliorate the health of the population within the region. It also states that another objective is 'to coordinate regional efforts on epidemic preparedness, mapping prevention, control and where possible the eradication of communicable and non-communicable diseases'.<sup>[</sup>

Pertaining to the general approach in dealing with the pandemic, Article 10(1) of the Protocol seeks to outline a means through which strategies to deal with the disease can be harmonised in the region. It provides as follows:

In order to deal effectively with HIV/AIDS/STDs epidemic in the Region and the interaction of HIV/AIDS/STDs with other diseases, States Parties shall – a) harmonise policies aimed at disease prevention and control, including cooperation and identification of mechanisms to reduce the transmission of STDs and HIV infection; b) develop approaches for the prevention and management of HIV/AIDS/STDs to be implemented in a coherent, comparable, harmonised and standardised manner; c) develop regional policies and plans that recognise the intersectoral impact of HIV/AIDS/STDs and the need for an intersectoral approach to these diseases.

In August 2001, SADC leaders amended the founding treaty of the organization. In the amended text one of the goals of the grouping, as stipulated in Article 5(1)(i) is to combat HIV/AIDS or other deadly and communicable diseases. This aspiration to deal with the pandemic has been strengthened by the fact that the issue of HIV/AIDS has been made a recurrent and standing element in the agenda of all SADC Summit meetings of Heads of State and Government. At their Summit meeting in Luanda on 3 October 2002 the leaders noted that HIV/AIDS was a major developmental challenge for SADC. They called on all the member states to mobilise more resources to address the pandemic (SADC 2002: par. 27). During the Maseru Summit held in July 2003 the Heads of State and Government regretted the fact that their region had become the epicentre of the disease in the world (SADC 2003: par. 9). They recognised the fact that the 'epidemic has increased levels of poverty,

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<sup>[23]</sup> *Id.*

decimated households, and resulted in high levels of school dropouts and child headed households' (SADC 2003a: par. 18).

In charting a clear response that is commensurate with the challenge, the leaders adopted the Maseru Declaration on the Fight against HIV/AIDS in the SADC region (SADC 2003a: par. 30). The Maseru Declaration on HIV/AIDS (2003) outlines a multisectoral strategy on interventions. As revealed below, the framework set by the Declaration permeates all the anti-HIV/AIDS strategies adopted since 2003 in SADC.

On 26 August 2003, the SADC Summit took an important decision in the regional effort against the pandemic. They approved the establishment of a regional fund to pool money needed in fortifying the fight against HIV/AIDS. The fund will mainly finance the implementation of the SADC HIV/AIDS Strategic Framework and Programme of Action 2003–2007 (SADC 2003a: par. 29). By 2004 the Summit still averred to the fact that the pandemic was showing no signs of abating. As a result it paved the way for discussions on access to traditional approaches to contain the pandemic (SADC 2004: par. 30). By all means, this statement was a landmark – mindful that both within the SADC secretariat and in most of the SADC member states, efforts to strengthen African traditional approaches had hardly even received lip service.<sup>[31]</sup>

During their 2005 Summit meeting SADC leaders called attention to the devastating impact of the disease on the agricultural sector and also on vulnerable children. Their statement equally addressed the link between the spread of HIV and the movement of mobile populations within and across borders. It also called for the establishment of guidelines in terms of all these aspects and endorsed the creation of a regional forum for national anti-HIV/AIDS authorities (SADC 2005a: par. 37).

It is worthy of note that with specific emphasis on access to affordable HIV/AIDS medicines the SADC Health Protocol considered above provides that 'States Parties shall cooperate and assist one another in a) the harmonisation of procedures of pharmaceuticals, quality assurance and registration; b) production, procurement and

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<sup>[31]</sup> For example in a correspondence dated 7 May 2004 addressed to SADC Executive Secretary Praega Ramsamy (as he then was) by Pascal Mulenga of the Botswana Traditional Health Organization pleading for funds to participate in a Johannesburg conference on "Traditional Health Practitioners HIV/AIDS and Natural Remedies Forum," the Executive Secretary declined (in a mail of 18 May 2004) to offer any assistance to the traditional practitioners.

distribution of affordable essential drugs' SADC 1999: Art. 29(a)(b)). In pursuance of the goal of access to affordable HIV/AIDS medicines, the SADC Summit of 2000 held in Namibia recalled the principles that SADC's Council of Ministers had approved regarding the Guidelines on Negotiations with Pharmaceutical Companies on Provision of Drugs for Treatment of HIV/AIDS and related conditions (SADC 2000b: par. 24). The Summit stressed the need for supplies of medicines to be sustainable, equitable, affordable, and accessible (SADC 2000b: par. 24). Accepting the fact that exorbitant prices for ARVs were prohibitive, the Summit agreed that the element of bulk purchasing and manufacturing of generic drugs should be accorded top priority in the implementation of the Strategic Framework (SADC 2003a: par. 22).

It is worth recalling that SADC has also enacted a Code on HIV/AIDS and Employment (SADC 1997). Amongst the main clauses of this document is a stipulation to the effect that '[Employees] with HIV related illness should have access to medical treatment and should be entitled, without discrimination, to agreed existing sick leave provisions' (SADC 1997: Clause 6.2).

### **3.2 SADC's Policy Framework on Access to Affordable Health Care and Medicines**

Amongst the first important SADC Summit meetings that took bold steps to address the issue of HIV/AIDS was the extraordinary meeting that was held in March 2001 in Windhoek, Namibia. The Summit declared that HIV/AIDS presented a major hurdle in the attainment of the goals of the organisation (SADC 2001a: par. 2.3.1.3). Another important summit took place in 2001 in Blantyre, Malawi. In assessing progress made in dealing with the pandemic, SADC leaders welcomed the fact that a common approach had been adopted for dealing with pharmaceutical companies. They further noted that both sides had arrived at a common understanding in dealing with HIV/AIDS. An agreement was ultimately reached with seven of such companies in June 2001 (SADC 2001b: par. 6.5.3). In an ordinary meeting of the Summit that was held in Luanda, Angola in January 2002, SADC leaders abhorred the fact that conflicts and poor treatment of women had helped to accentuate the rates of infections. They noted that the pandemic had evolved into 'a complex social and economic emergency', adding that HIV/AIDS had become the greatest threat to health and development in Southern Africa (SADC 2002: par. 5.4.1).

One of the first overt SADC Council statements regarding HIV/AIDS was made in September 1998 during the Grand Bay Summit in Mauritius. The ministers highlighted the need for cooperation in dealing with infectious diseases such as HIV/AIDS. They referred to the benefits of collective actions in addressing common diseases and they noted that cooperation was needed to ensure economies of scale in terms of bulk purchase of medicines<sup>[42]</sup> and sharing of expensive medical equipment and facilities (SADC 1998: par. 4.5). They also accorded the health sector coordinating unit in South Africa with the powers to develop a framework for the harmonisation of legislation and practice on negotiations with pharmaceutical companies for more affordable medicines (SADC 1998: par. 4.5.1.4). During the SADC Council of Ministers meeting that was held in August 1999 the demands on states in fighting HIV/AIDS was further underscored. The countries that had not implemented the code on employment were implored to do so (SADC 1999: par. 4.2.1.2). The ministers also approved the consolidation of the HIV/AIDS policy Surveillance Task Force on HIV/AIDS. This was to be chaired by Zambia (SADC 1999: par. 4.7.1.4). The Task Force was to include members from other sectors of SADC and this was done to facilitate a multi-sectoral approach to the pandemic (SADC 1999: par. 12.8.2). They equally regretted the fact that the rate of the pandemic was seriously escalating throughout the region (SADC 1999: par. 4.8.1.2).

The main policy initiatives that have incorporated the issue of access in SADC include the Regional Indicative Strategic Development Plan (RISDP), the SADC HIV and AIDS Strategic Framework and Programme of Action 2003-2007, the SADC HIV/AIDS Business Plan and SADC Principles and Guidelines and negotiations with pharmaceutical companies. The RISDP is the main document serving as the platform on which all SADC regional actions are developed (SADC 2003c). An important requirement of the RISDP is that there should be joint procurement and manufacturing of essential education materials and health services, including essential drugs and ARVs, research, as well as mechanisms for referral of patients for tertiary care, and combating of major diseases such as HIV and AIDS (SADC 2003c). The SADC HIV and AIDS Strategic Framework and Programme of Action 2003–2007 ('Strategic Framework') is the main document that elaborates the

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<sup>[42]</sup> SADC now tends to focus more on joint rather than bulk purchase of medicines. Interview, Joseph Mtethwa, SADC Officer in charge of relations of pharmaceutical companies, 11 June 2007.

approach that the organisation is to adopt to deal with the pandemic within a period of five years (2003–2007) (SADC 2004: 12). Amongst the target goals in this regard are the following: the provision of care and treatment including the use of ARVs, assistance in the area of providing nutritional therapies and traditional herbs, bulk procurement of drugs and medical supplies for HIV/AIDS, and, finally, the establishment of policy guidelines on ameliorating access to care and treatment to the most vulnerable social groups (SADC 2004: 12).

The decision to formulate the SADC HIV/AIDS Business Plan (the 'Plan') was adopted in Dar es Salaam in August 2003 (SADC 2004: 4). Amongst the goals of the Plan is the harmonisation of policies for care and support. One of the focal areas in this regard is regional 'joint procurement of drugs, medical supplies and testing reagents... (SADC 2004: 4). The Business Plan is to be financed from three main sources including contributions from SADC member states to the regular budget of the organisation, funds from International Cooperation Partners for specific projects, and, importantly, funds from the SADC HIV/AIDS Trust Fund (SADC 2004: 16). The implementation of the HBP is mainly the attribution of the SADC HIV/AIDS Unit (the 'Unit'). The Plan makes it clear that the '... broad mandate of the HIV/AIDS Unit is to lead, coordinate and manage SADC's response to the epidemic through the operationalisation of the HIV/AIDS Strategic Framework (2003–2007) and the Maseru Declaration' (SADC 2004: 12). In executing this task, the Unit is to direct its attention towards certain focal areas amongst which are procurement and manufacturing of drugs.

SADC has been finalising its principles to guide negotiations with pharmaceutical companies on the provision of drugs for treatment of HIV/AIDS and related conditions. Amongst the important aspects of the proposed principles is the close involvement of ministers in the actions and decisions that are taken by the companies to ease access (SADC 2000a: par. 5.13.2.2).<sup>[</sup> Other vital elements of the principles include 'recognition of the critical role that poverty and malnutrition play in the epidemic [HIV/AIDS], provision of equipment, maintaining the continuum of care, and supplies of appropriate drugs to ensure sustainability, equitability, affordability and accessibility (SADC 2000a: par. 5.13.2.3)'. The Council of Ministers has also

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<sup>[57]</sup> Decisions of the SADC Council of Ministers, 2000(1) SADC/CM/2/2000/1, para. 5.13.2.2.

been keen to assert that other aspects of access such as the provision of laboratory support and infrastructure be regarded as one of the significant constituents of a holistic response to the pandemic (SADC 2000a: par. 5.13.2.4).

#### **4. The nature of anti-retroviral medicines**

ARVs were first developed in the 1990s. Apart from the fact that they are expensive drugs they also share the characteristic of having extremely debilitating side effects. Also, ARVs are to be taken in combination if they are to be effective. That is why it is often said that they are administered in 'cocktails'. Each drug in a combination therapy deals with the virus in a specific way. For instance, fusion inhibitors are used to attain goals that are different from those of protease inhibitors. This necessarily leads one into a discussion of the types of ARVs.

There is a variety of ARVs mainly distinguished by the manner in which they deal with the virus. In the first place, nucleoside transcriptase inhibitors (NTIs) are drugs that 'prevent the viral RNA from changing into the DNA by the use of an enzyme found in the cytoplasm of [a person's] host cells called reverse transcriptase enzymes' (Goosby 2004: 102-103). NTIs are associated with severe liver problems. Examples are abacavir (Trizivir), didanosine (DDI), lamivudine (Epivir), stavudine (Zerit) and zidovudine (AZT or Retrovir).<sup>[61]</sup>

Second, nucleoside reverse transcriptase inhibitors (NRTIs) incorporate themselves into the DNA of the virus leading to the termination of the chain or replication. An example includes tenofovir (Viread). NRTIs are associated with the inflammation of the pancreas as well as with liver problems (Goosby 2004: 104).

Third, the non-nucleoside transcriptase inhibitors (NNTIs) mainly upset the bonding propensity of the reverse transcriptase enzyme. Good examples include efavirenz (Stocrin) and nevirapine (Viramune). While efavirenz is associated with severe depression amongst a minority of the patients, nevirapine has the effects of severe rash as well as hepatitis (Goosby 2004: 105).

Fourth, protease inhibitors are aimed at distorting the coalescence of the virus by curbing the performance of protease. Protease is an enzyme used by HIV for the

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<sup>[61]</sup> The names in brackets represent the marketing names of the drugs.

collage of nascent proteins needed for the assembly of novel virions. Protease inhibitors such as indinavir (Crixivan), lopinavir/retonavir (Kaletra), nelfinavir mesylate (Viracept) and saquinavir (Invirase) are very virulent in destroying HIV. But this only happens when combined with reverse transcriptase inhibitors (Goosby 2004: 105). Protease inhibitors have been associated with increased bleeding in haemophiliacs and also contribute to body fat redistribution.

Finally, fusion inhibitors 'prevent the attachment of the virus to the CD4 receptor on the cell surface. In short, they block HIV's ability to infect healthy CD4 cells (Goosby 2004: 108). An example of a fusion inhibitor is enfuvirtide (Fuzeon). Other categories of ARVs that are still undergoing clinical trials include integrase inhibitors that seek to distort the activities of an enzyme known as integrase. Integrase is the main enzyme that ensures the incorporation of the HIV's DNA into the DNA of the infected cells.

## **5. WTO TRIPs flexibilities which SADC countries can benefit from**

The main flexibilities that poor countries can benefit from in terms of TRIPs can be understood better by considering the TRIPs provisions that refer to technical cooperation, temporal derogations for developing and least developed countries, the Doha Declaration on TRIPs and public health and the 2003 Decision later incorporated, *mutatis mutandis*, as the TRIPs amendment of December 2005.

### **5.1 Technical Cooperation and temporal derogations for poor countries under TRIPs**

The main articles that are in the interest of developing countries and LDCs refer to technical cooperation and transitional provisions. There are a number of provisions in the TRIPs agreement that give term to the fostering of technical cooperation between rich and despondent countries in the field of IPRs.

In the first place, the sixth recital to the preamble of the TRIPs Agreement is recognition by the members of the special needs of the least-developed country members in respect of maximum flexibility in the domestic implementation of law and regulations in order to enable them to create a sound and viable technological base.

In addition, Article 66(1) of the TRIPs Agreement states that LDCs will have ten years to implement the provisions of the document.<sup>[66]</sup> The article also stipulates that the ten-year period may be extended by the Council for TRIPs if the request is made by an LDC member. Such an extension has been accorded to LDCs. They will therefore be expected to start full implementation of TRIPs obligations in 2013 (and 2016 for pharmaceutical products) and not 2005 as originally provided for. Developing countries had to commence full implementation of TRIPs in 2000,<sup>[67]</sup> but this was extended to 2005. While these provisions on extended time lags for developing countries and LDCs are worthwhile, *prima facie*, the real test of their utility is a counter-factual inquiry into the effects of the absence of such temporal exemptions. And to this inquiry one may add that the existence of the broad temporal favours granted LDCs have hardly been used by them for their development. Rather, businesses in some advanced developing countries (for instance, Brazil and India) as well as in the developed countries have been the main beneficiaries of such advantages. In most cases they have simply shifted some of their operations to certain LDCs. For instance, Brazil plans to establish a generic manufacturing company in Mozambique.

Mindful of the fact that the LDCs will eventually have to fully implement TRIPs in any event it is futile to surmise what will eventually come to pass (Robbani 2005: 571). However, such cynicism can hardly be justified when one is talking about the real technical cooperation benefits that poor countries may reap from stipulations such as Article 66(1) which states that developed country members should provide incentives to their enterprises so that they will in turn transfer their know-how and technology to LDCs. The more pointed provision that sanctions technical cooperation under the TRIPs Agreement is Article 67 which states:

In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and

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<sup>[66]</sup> But a proviso is also provided in this regard: application of Articles 3, 4 and 5 are to be immediate.

<sup>[67]</sup> TRIPs Agreement, Article 65(2). Developed countries had to succumb full to the terms of TRIPs within a year of the signing of the Agreement, that is, 1996: TRIPs Agreement, Article 65(1).

enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel.

The WTO and the World Intellectual Property Organisation have also been cooperating in disseminating information in the field of intellectual property to some third world countries. Some developed states have been supporting developing countries and LDCs in putting in place the necessary mechanisms needed to bolster the protection of IPRs. Countries such Canada, Norway and some EC members have provided reports to the WTO secretariat on their activities in this regard.

## **5.2 Doha Declaration and access to affordable medicines**

The Doha Declaration was the outcome of the WTO Ministerial Meeting that was held in the United Arab Emirates (UAE) in November 2001.<sup>[69]</sup> The Declaration contained specific statements on various issues. One of such issues with a separate declaration was the Declaration on the TRIPs Agreement and Public Health ('the Declaration').<sup>[70]</sup> The Declaration was the zenith of discussions that had commenced within the TRIPs Council at the urging the African Group. The spokesperson for the group at the time was the representative of Zimbabwe (Ambassador Boniface Chidyausiku) who was equally the chair of the TRIPs Council.<sup>[71]</sup> The EC<sup>[72]</sup> and Brazil (acting on behalf of many developing countries and LDCs)<sup>[73]</sup> had also submitted important documents on the issue prior to the June 2001 council meeting. Zimbabwe and many third world countries were of the opinion that the Ministerial Conference in Qatar in November 2001 had to be an opportunity to demonstrate members' commitment and contribution to preventing further deaths and saving lives through facilitating easier access to medicines at affordable prices.<sup>[74]</sup> The gist of its proposal was that members issue a special declaration on the TRIPs Agreement and access to medicines at the Ministerial Conference in Qatar, affirming that nothing in

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<sup>[69]</sup> Ministerial Conference, Fourth Session, Doha, 9-14 November 2001, Adopted on 14 November 2001.

<sup>[70]</sup> Declaration on the TRIPs Agreement and Public Health, WT/MIN(01)/DEC/2, adopted on 14 November 2001 (hereafter, the Declaration).

<sup>[71]</sup> Council for TRIPs, Special Discussion on Intellectual Property and Access to Medicines, IP/C/M/31, 18-22 June 2001.

<sup>[72]</sup> IP/C/W/280.

<sup>[73]</sup> IP/C/W/296.

<sup>[74]</sup> IP/C/M/31, par. 2 and 3.

the TRIPs Agreement should prevent members from taking measures to protect public health.<sup>[75]</sup>

Zimbabwe recalled the plight of the young South African AIDS patient and activist (Nkosi Johnson) and the scourge of HIV/AIDS in developing countries. Its precise demands included a) an extension for the transition period for developing countries respecting patent protection; b) the adoption of a moratorium on dispute settlement to allow members to adopt measures that are protective of public health; and c) the placing of a moratorium on dispute settlement specifically on developing countries that take action to promote public health.<sup>[76]</sup> The discussions led to the adoption of the special declaration on public health as had been requested by Zimbabwe. The Declaration contained seven paragraphs. Paragraph 1 restated the awareness of the issue by the members.<sup>[77]</sup> The ministers were quite keen to stress that the TRIPs Agreement should be regarded as part of the solution to the issue. Members were equally cognisant of the importance of maintaining the balance of interests in the intellectual property system.<sup>[78]</sup>

The very core of the Zimbabwean proposal was contained in Paragraph 4 which was a recognition of the fact that the 'TRIPs Agreement does not and should not prevent Members from taking measures to protect public health ... [It] can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all'. A commitment was also made for allowing countries in need to use compulsory licenses as deemed appropriate.<sup>[79]</sup> In a significant way, the members also noted that states will reserve the right to determine what constitutes national emergency or case of extreme urgency with the understanding that diseases such as HIV/AIDS, tuberculosis, malaria and other epidemics may come under such a narrow category.<sup>[80]</sup>

Paragraph 6 contained specific terms aimed at addressing a crucial issue that has come to be known as the 'Paragraph 6 problem'. The problem emanates from the

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<sup>[75]</sup> *Id.*

<sup>[76]</sup> *Id.*, at 6.

<sup>[77]</sup> The Declaration, para. 1.

<sup>[78]</sup> The Declaration, para. 3.

<sup>[79]</sup> *Id.*, para. 5(b).

<sup>[80]</sup> *Id.*, para. 5(c).

wording of Article 31(f) of the TRIPs Agreement that allows for the authorisation of other use of intellectual property products (without the consent of the patent holder) for the predominant supply of the domestic market. This basically means that countries that have the capacity to use compulsory licensing, for instance in the mass provision of vital drugs such as ARVs, can only do so to (mainly) meet the demand of the domestic market. Export of such consignments to foreign countries that are in need ought to be minimal or very limited (Sherer 2004: 367). In addressing this issue contracting parties recognised that WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPs Agreement.<sup>[82]</sup> They also mandated the Council for TRIPs with the task of finding a speedy solution to the problem and report to the General Council before the end of 2002.

### **5.3 The Decision of 30 August 2003**

To address the Paragraph 6 problem, members started negotiations within the TRIPs Council that were geared at reaching a solution that was acceptable to both the rich and poorer countries. The negotiations proved difficult. In the first instance, some of the members like the EC initially expressed preference for a TRIPs Article 30 solution. However, the community later retracted from this approach and declared its intention to go with the majority of the members who expressed a predilection for a TRIPs Article 31 solution. The essence of the Article 31 solution was modification of Article 31(f) in a manner that would reflect the needs of countries that had a public health problem yet lacked sufficient capacity to deal with the issue. The modification would allow those with sufficient capacity to go beyond the TRIPs requirement of manufacture aimed 'predominantly' at the domestic market. It should be noted that Paragraph 6 of the Declaration stated that the TRIPs Council had to report a solution to the General Council by the end of 2002. This deadline later proved unrealistic because of the reservations that the US expressed on the scope of the medicines as well as the number of countries that could benefit from such a waiver of Article 31(f) obligations. The US as well as other Western countries was equally concerned that, if introduced, such a waiver system for Article 31(f) would lead to abuse as some members may actually seek to use the initiative for commercial purposes. After much

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<sup>[82]</sup> The Declaration, para. 6.

debate and clear assurances that were later included in the statement of the chairman of the General Council, the US succumbed. The EC was very instrumental in helping to allay the fears of the US and this helped to secure the eventual agreement on the decision regarding the Paragraph 6 problem.<sup>[83]</sup>

The provisions of the 30 August 2003 decision were important as they waived the obligation of Article 31(f) and also put in place a dispute settlement moratorium on those countries that sought to depart from the strict wording of Article 31(f) to meet public health concerns. Some of the relevant paragraphs of the decision are worth examining.

Paragraphs 2 and 3 are strict measures on notification and labelling that potential users have to respect. While Paragraph 5 sets out a generic safeguard provision for all members to avoid diversion and re-exportation of the products imported under the system, Paragraph 6 is a crucial statement that is very relevant for regional trade agreements (RTAs) such as SADC.<sup>[84]</sup> One of the crucial aspects of paragraph six as mentioned above is that if half of the members of a Regional Trading Agreement (RTA) is made up of LDCs, the requirements of Article 31(f) shall be waived. SADC is composed of eight LDCs and six developing countries. This means that SADC non-LDCs can make use of the waiver of Article 31(f), and such states may also be excused from the obligation of providing justification for the need of the system as elaborated under Paragraph 2(a)(ii). This means, of course, that the SADC Group

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<sup>[83]</sup> Decision of the General Council, Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, WT/L/540, 1 September 2003 (hereafter, the Decision). For an upbeat albeit cautious assessment of the potential positive fallout of the Decision in terms of access to medicines for a broad array of diseases in developing countries see Abbott (2005: 322-323 and 358) (concluding that although the 'adoption of the Decision shows that the WTO can address important issues of social concern ... [the] WTO's effectiveness will be better assessed if, and when, developing countries actually use the Decision to address their public health needs').

<sup>[84]</sup> Paragraph 6 states:

With a view to harnessing economies of scale for the purposes of enhancing purchasing power for, and facilitating the local production of, pharmaceutical products;

(i) where a developing or least-developed country WTO Member is a party to a regional trade agreement within the meaning of Article XXIV of the GATT 1994 and the Decision of 28 November 1979 on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries (L/4903), at least half of the current membership of which is made up of countries presently on the United Nations list of least developed countries, the obligation of the Member under Article 31(f) of the TRIPS Agreement shall be waived to the extent necessary to enable a pharmaceutical product produced or imported under a compulsory license in that Member to be exported to the markets of those developing or least developed country parties to the regional trade agreement that share the health problem in question. It is understood that this will not prejudice the territorial nature of the patent rights in question;

(ii) it is recognized that the development of systems providing for the grant of regional patents to be applicable in the above Members should be promoted. To this end, developed country Members undertake to provide technical cooperation in accordance with Article 67 of the TRIPS Agreement, including in conjunction with other relevant intergovernmental organizations.

Economic Partnership Agreement (EPA), on the other hand, cannot take advantage of such a provision, mindful that the majority of the members of SADC Group EPA are members of the Southern African Customs Union (SACU) that are developing and not least-developed countries.

The use of compulsory licensing has been limited in regions and countries which one would have thought are in need of the system set out in the 2003 Decision. As at the time of writing, only the Rwandan Government through its Centre for the Treatment and Research on AIDS (TRAC) has made a notification under the system. In the document, announcing the decision by Rwanda to use the system, its permanent representative in Geneva noted that ‘Based on Rwanda’s present evaluation of its public health needs, we expect to import during the next two years 260,000 packs of TriAvir, a fixed-dose combination product of Zidovudine, Lamivudine and Nevirapine ... manufactured in Canada by Apotex, Inc’.<sup>[85]</sup>

The example of Rwanda shows that, contrary to the interventions of Kenya and Pakistan in TRIPs Council meeting of 16 June 2004, the system could be used by developing countries and that the conditions set are not as difficult as they averred.<sup>[86]</sup> However, there is room for improvement in the administrative red tapes that affect access to the system. For instance, in the example of Rwanda, nine Canadian patents were in question: four by Glaxo Group, two by Wellcome Foundation, two by Shire Biochem, and one by Boehringer Ingelheim and Dr Karl Thomas GmbH. Going through the negotiations with all the parties can be difficult for poor countries. Little wonder Hestermeyer (2007) has argued that a poor country like Rwanda could have simply ordered the drugs from India without even using the system at a more cost-effective rate.<sup>[87]</sup>

## **6. EC rules on access to medicines**

### **6.1 Use of compulsory licensing**

Following the adoption of the Decision of 2003 at the level of the WTO, the EC adopted a regulation to apply the terms of the WTO Decision at the level of the

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<sup>[85]</sup> TRIPs Council, Notification under Paragraph 2(a) of the Decision of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health IP/N/9/RWA1, 19 July 2007.

<sup>[86]</sup> IP/C/M/44, par. 91 and 115.

<sup>[87]</sup> Holger P. Hestermeyer, “Canadian-made Drugs for Rwanda: The First Application of the WTO Waiver on Patents and Medicines,” 11 *American Society of International Law Insight* (December 2007).

community. In this regard therefore, Regulation 816/2006 was adopted by the European Council.<sup>[88]</sup> In terms of the operative provisions of the regulation, Article 1 explicitly demarcates the leitmotif for the document. The text establishes a procedure for the grant of compulsory licences in relation to patents and supplementary protection certificates concerning the manufacture and sale of pharmaceutical products, when such products are intended for export to eligible importing countries in need of such products, in order to address public health problems.<sup>[89]</sup>

This provision is quite expansive when collated and juxtaposed with a similar clause in the Commission's proposal CEC 2004). Article 1 of the proposal did not make mention of 'eligible importing members' but rather it alluded to 'eligible WTO members' thereby limiting the scope of potential beneficiaries. While the law itself contains the salient concept of 'need' as being determinative of a decision to use the system, the proposal was silent in this regard. In terms of eligibility proper, Article 4 of the regulation states: The following are eligible importing countries: (a) any least-developed country appearing as such in the United Nations list; (b) any member of the WTO, other than least-developed country members referred to in point (a), that has made a notification to the Council for TRIPs of its intention to use the system as an importer, including whether it will use the system in whole or in a limited way; (c) any country that is not a member of the WTO, but is listed in the OECD Development Assistance Committee's list of low-income countries with a gross national product per capita of less than USD 745, and has made a notification to the Commission of its intention to use the system as an importer, including whether it will use the system in whole or in a limited way.

The wording of this clause is in stark contrast to Article 4 of the Commission's proposal which was limited to WTO members. The proposal's reference to eligibility stated that the following are eligible importing WTO members: (a) a least-developed country member of the WTO (b) any other member of the WTO that has made a notification to the Council for TRIPs of its intention to use the system as an importer,

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<sup>[88]</sup> Regulation (EC) N° 816/2006 of the European Parliament and the Council of 17 May 2006 on Compulsory Licensing of Patents Relating to the Manufacture of Pharmaceutical Products for Export to Countries with Public Health Problems, OJ L 157/1.

<sup>[89]</sup> *Id.*, Article 1.

including whether it will use the system in whole or in a limited way.<sup>[91]</sup> It is worth noting that the Commission's proposal did not include countries such as Botswana, Namibia and South Africa in its list of countries that could be beneficiaries. However the regulation widened the pool of potential beneficiaries to these HIV/AIDS afflicted countries.

Article 6 of the regulation outlines the conditions that are to be met in order to apply for a compulsory licence. Any person may submit an application for a compulsory licence or a supplementary protection certificate.<sup>[92]</sup> The application has to clearly outline the name and contact details of the applicant,<sup>[93]</sup> the name of the product;<sup>[94]</sup> the amount of the product that is to be produced under the compulsory licence<sup>[95]</sup> and the importing country or countries.<sup>[96]</sup> Another important requirement to be met is that the applicant has to show evidence of negotiation with the right holder prior to the request for a compulsory licence.<sup>[97]</sup> One other obligation that the applicant has is that of notifying the right holder of the use of the patented product or process in question.<sup>[98]</sup>

Article 8 of the regulation refers to the verification that national competent authorities have to conduct an inquiry to ensure that the application is in line with the WTO Decision of 2003.<sup>[99]</sup> This provision is similar to Article 6 of the Commission's proposal and indicates the extent to which the compulsory licensing system under EC law is in line or aligned with that of the WTO. This is more so because the regulation itself makes it clear that the products that are imported should not exceed what was notified at the WTO or at the Commission, as the case may be.

Specific requirements are contained in terms of prior negotiation. For instance, the applicant has to show evidence to satisfy the competent authorities that strides have been made to obtain the consent (voluntary licence) from the right holder. S/he has to also show that 'such efforts have not been successful within a period of thirty days

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<sup>[91]</sup> COM(2004) 737, Article 4.

<sup>[92]</sup> Regulation 816/2006, Article 6(1).

<sup>[93]</sup> *Id.*, Article 6(3)(a).

<sup>[94]</sup> *Id.*, Article 6(3)(b).

<sup>[95]</sup> *Id.*, Article 6(3)(c).

<sup>[96]</sup> *Id.*, Article 6(3)(d).

<sup>[97]</sup> *Id.*, Article 6(3)(e).

<sup>[98]</sup> *Id.*, Article 7.

<sup>[99]</sup> *Id.*, Article 8(1)(a).

before submitting the application'.<sup>[100]</sup> A similar provision is contained in Article 7 of the Commission's proposal. However in the proposal the period of thirty days is not referred to. Rather, the proposal evokes the notion of 'reasonable period of time'. So the regulation itself has the strength of being clearer than the wording of the proposal in this regard. Article 9(2) of the regulation provides an exemption to the broad prescription of Article 9(1). It states that the requirement in Paragraph 1 shall not apply in situations of national emergency or other circumstances of extreme urgency or in cases of public non-commercial use under Article 31(b) of the TRIPs Agreement.

The conditions that the compulsory licence has to meet are contained in Article 10. This provision takes up the tenor of Article 8 of the proposal. The broad demands of Article 10 refer mainly to the fact that the licence shall not be used to produce an excess of what is needed;<sup>[101]</sup> the applicant has to indicate the duration of the licence<sup>[102]</sup> and that no re-exportation shall be made 'except where an importing country avails itself of the possibilities under subparagraph 6(i) of the Decision to export to fellow members of a regional trade agreement that share the health problem in question'.<sup>[103]</sup> In addition, the product has to be clearly identified and any distinction should be feasible without significantly affecting the price.<sup>[104]</sup> Moreover, the applicant shall post on a website the quantities being supplied under the licence.

Another important provision relates to remuneration. The licensee is expected to pay the rights holder an amount to be determined by competent authorities. First, in those cases where the application for the compulsory licence is made to respond to an emergency as envisaged in Article 9(2), 'the remuneration shall be a maximum of 4% of the total price to be paid by the importing country or on its behalf'. Second, in all the other cases the remuneration shall be determined taking into account the 'economic value of the use authorised under the licence to the importing country or countries concerned, as well as humanitarian or non-commercial circumstances relating to the issue of the licence'.<sup>[105]</sup>

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<sup>[100]</sup> *Id.*, Article 9(1).

<sup>[101]</sup> *Id.*, Article 10(2).

<sup>[102]</sup> *Id.*, Article 10(3).

<sup>[103]</sup> *Id.*, Article 10(4).

<sup>[104]</sup> *Id.*, Article 10(5).

<sup>[105]</sup> *Id.*, Article 10(9).

## **6.2 Non diversion of products sold on basis of differential pricing**

The basic ideas behind the differential or tiered pricing system is that pharmaceutical companies are encouraged to provide needed and essential medicines at lower prices to LDCs and countries where the need has been expressed. Although the approach is good because it is based on the volition of the pharmaceutical companies (Gamharter 2004:11)<sup>[106]</sup> and because it also eases access to life-saving medicines, it has been criticised because it can easily be abused by free riders who desire to divert the products for purposes of re-exportation back to the rich markets. The problem is succinctly formulated by Scherer and Watal (2004: 370) in these terms:

[Wholesalers] in a low-price country direct supplies through international trade channels to nations in which the manufacturer is attempting to maintain high prices, undermining the high prices (and their contribution to research and development expenditures) in the wealthier nations and, if quantitatively substantial, in inhibiting the manufacturer's willingness to supply at low prices in the low-income nation.

This and other reasons explain why in some countries, pharmaceutical companies are not quite keen on the approach (Subramanian 2001:325). That said, differential pricing makes sense in situations where trade diversion can be controlled. At the level of the EC, Regulation 953/2003 has been enacted in a bid to control the possibility that certain operators could divert medical products that are sold at tiered prices and aimed at poor countries.

## **6.3 The SADC Economic Partnership Agreement with the EC and Access to Medicines**

The Economic Partnership Agreement between the eight members of the SADC EPA Group is meant to replace the trade cooperation parts of the EC-SADC relations that were formerly dealt with under the framework of the Yaoundé, Lomé and Cotonou Agreements. The EPA negotiations are still ongoing and may, at first sight, appear remote to the issues regarding access to affordable HIV/AIDS medicines in Southern Africa. This could not be further from the truth. In the first place, the SADC EPA

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<sup>[106]</sup> See also EC intervention in the TRIPS Council meeting: IP/C/M/40, par. 32.

threatens the cohesive nature of SADC as a regional organisation. As a regional body notified under Article XXIV of the General Agreement on Trade and Tariffs (GATT), SADC has many LDCs and this affords it the possibility of using the regional flexibilities built into the WTO Decision of 30 August 2003 that granted developing countries advantages such as the use of compulsory licensing. SADC EPA, on the other hand, cannot take advantage of these flexibilities given that more than 50% of its members will be non-LDCs.

On a more positive side, however, the inclusion of South Africa into the EPA can be hailed as one positive aspect of the negotiations because its erstwhile participation status as an observer left many institutional questions unresolved. South Africa has one of the highest HIV/AIDS prevalence rates. So do most of the SADC EPA members. Given that the pandemic is better handled when approached from a regional perspective (for instance, pooled ARV procurement) it makes sense to include rather than sequester South Africa from the other EPA members.

Moreover, to the extent that EPAs contain Intellectual Property Rights (IPR) rules that ensure better access to affordable medicines and to the degree that SADC countries are poised to implement the rules at the regional and national levels, international pharmaceutical corporations, brand and generic, could be encouraged to set up companies in SADC countries where they will be able to produce their drugs at cheaper rates because of the relatively cheaper factors of production (for example labour). Such companies would not only produce ARVs but other medicines that can compete well with the generics from India and Brazil. So in this instance, the introduction of balanced IPR rules in the EPA for SADC will have positive fallout for SADC EPA states. However, the introduction of such rules in the EPAs could have a negative aspect in the sense that it could lead poor countries to prematurely introduce strong IPR rules that can, in turn, constrain access to patented or protected technologies.

Furthermore, EPA negotiations are about the exchange of concessions on trade terms. The substratum of the negotiations is market access. When EC markets can be easily accessed without technical barriers and tariff barriers, the SADC producers benefit. SADC producers and poor farmers who benefit are often the breadwinners of families. With better access and productivity they can plan ahead and also set aside

income for health care. Another way of looking at the connection is that when people are ill they simply cannot be viable and productive. Therefore it makes very little sense to attract investments in a country of sick people who cannot be productive and who lack access to medicines.<sup>[109]</sup>

Finally, and of the greatest importance, is that the EC has promised to align the EPA with the provision of development money. This means that SADC countries which are in the EPA will be able to use such funds for the improvement of the health services, infrastructure and equipment. In the absence of such funds, it could be argued that the EPA would lead to a diminution of customs and excise revenues from EC imports. It should be noted that most poor countries rely on such funds to provide for social services, including access to affordable health services.

Considered from these perspectives, the EPA negotiation for SADC becomes crucial. And that is why the SADC EPA negotiations provide a proper trial (the document is still draft) medium through which one can look into the coherent nature of the EC's contributions in a variety of areas and its development pledge as contained in Article 177 of the **Treaty establishing the European Community (TEC)**, on the other. But how are issues of coherence regarding the various aspects of access integrated in the SADC draft EPA?<sup>[110]</sup>

Title V of the draft is on trade-related issues and addresses aspects of competition (Chapter 1), innovation and intellectual property (Chapter 2), public procurement (Chapter 3), the environment (Chapter 4), and social aspects including labour rights (Chapter 5). Chapter 2 on IPR treats all the main forms of IPRs. It also makes provision for patents (Article 10). But the patent-related clause that is relevant for this study is Article 10(2), entitled 'patents and public health'. It states:

(1) The EC Party and the Signatory SADC States recognise the importance of the Doha Declaration on the TRIPs Agreement and Public Health adopted on 14 November 2001 by the Ministerial Conference of the WTO. In interpreting and implementing the rights and obligations under

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<sup>[109]</sup> Interview: Official, Embassy of Mauritius in Brussels (3 May 2007).

<sup>[110]</sup> Economic Partnership Agreement between the SADC Group of States, of the one part, and the European Community and its member states, of the other part (*Draft EC consolidated proposal – each party reserves its right to submit further changes to this text*), as tabled for consideration on 5 June 2007.

this Article, the EC Party and the Signatory SADC States are entitled to rely upon this Declaration. (2) The EC Party and the Signatory SADC States shall contribute to the implementation and respect the Decision of the WTO General Council of 30 August 2003 on paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health, and take the necessary steps to accept the Protocol amending the TRIPs Agreement, done at Geneva on 6 December 2005.

## **7. Why Has SADC countries not used the systems provided for by the WTO and EC flexibilities**

As noted above, Rwanda is the only one of the poor countries that has applied and used the system that was guaranteed by the WTO in 2003. Mindful of the difficult negotiations that led to the realisation of the Decision of 2003, one would have been led to believe that poor countries would hasten in order to notify the WTO of their wish to use the flexibilities regarding access to medicines. This has not been the case. Regional integration organisations (such as SADC) that can also benefit from the system have largely been reticent in terms of using the advantages. What could the reasons be?

First, SADC and national officials dealing with issues of health and issues of trade are simply not sufficiently aware of the system. Even in those instances where there is awareness about the existence of such advantages, there are hardly experts in the various regional and national offices who have sufficient knowledge about the details of the rules in question. Interviews conducted within the framework of this research at the SADC Secretariat confirmed this.

Second, some of the SADC member states that have high levels of HIV/AIDS prevalence, are recipients of assistance from the United States Government under the framework of President's Emergency Plan for AIDS Relief (PEPFAR). PEPFAR lays more emphasis on aspects of prevention in the response to combat the disease. This is not to say that the priority PEPFAR countries do not incorporate the treatment dimension in their responses. However, PEPFAR has contributed in fortifying the view that prevention comes first. In this regard, countries tend to lay more emphasis on prevention strategies.

Third, related to the preceding is the fact that most poor countries in SADC rely on international donors to supplement their response strategies. For instance, the Global Fund has been one of the major contributors in assisting countries in their response strategies. Private collectives (such as the Global Business Coalition), non-governmental organisations (e.g. Médecins sans Frontières) and private foundations (e.g. the Bill and Melinda Gates Foundation and the Clinton Foundation) are some of the bodies that have been at the forefront in assisting countries to ease access to more affordable HIV/AIDS medicines. Mindful that the countries can easily make recourse to the services of such entities (that are often involved in the negotiation of the prices of medicines), the capacity-strapped countries often prefer to rely on the services of such private outfits. Such entities have contributed in lowering the prices of first-line drugs that are now provided for free in some countries. The real challenge remains access to second-line expensive medicines. One can partly attribute the reluctance of SADC and its member states to use the WTO/EC flexibilities on the already reduced prices that have been negotiated by the private entities.

Finally, the very nature of the process to apply for the use of the system is protracted and can be very burdensome for some of the countries that already lack the human resources in the fields of intellectual property and trade rules. As argued in the case of Rwanda, the complexities in which the system is underlain can actually set off any potential gains that could have been made by the poor countries in using the system. In the example of Rwanda, it is revealed that as many as nine patents were involved and that this only contributes in making the use of such as system burdensome. But what can be done to ease the use of the flexibilities?

## **8. Conclusion: using and improving the systems**

As argued earlier, the treatment component of the response strategy impacts on prevention as well as the struggle against stigmatisation. The efforts to ease access to affordable HIV/AIDS medicines in SADC countries and also in other developing countries have been important. Cynics may retort that providing medicines may not be an affordable and sustainable strategy in view of the cost of second-line drugs. They can also argue that providing drugs only widens the pool of those with the malady especially in those cases where patients do not adopt responsible behaviour. These are all important considerations. However, efforts to continuously reduce the

prices of ARVs need to be sustained because a) second-line and even third-line medicines will increasingly be needed and they will be more expensive, and b) in the event of the discovery of a vaccine, it will be vital that the systems maintained by the WTO and the EC for access to medicines be applied as well to vaccines. But for these advantages to be maximised by the states and regions of the south some vital points need to be taken up.

In the first place, both at the WTO and EC levels the conditions that are meant to be met by those poised to use the system are too strict. Applicants are supposed to deal with protracted paper work processes. For instance, both the applicant/importing country and the exporting country have to notify the WTO of the use of the system. This means that in the event of the involvement of multiple patents as in the Rwanda application, many parties have to be involved in the process. In the light of this difficulty, the system could be simplified by requesting a notification only for the country that is importing. Alternatively both applications or notifications could still be maintained on condition that a one-stop shop and accelerated procedure be used in the exporting country when multiple patents are in question. Put alternatively, and as the case may be, in situations where multiple patents are in question, a single focal point or patent holder could be designated by the exporting country to represent the interests of all the owners whose patents are to be used. Second, pooled/regional procurement and notification under the system need to be highlighted in a more effective way. The WTO and EC should widen the pool of regions that can use the systems by removing the derogation that only RTAs, 50% of whose membership is made up of LDCs, be entitled to use the system. Both systems could be simplified by extending such an advantage to all RTAs in the developing world. In this way SACU and SADC EPA states will be able to apply to use the systems without any encumbrances. Third, SADC itself needs to include stronger provisions on access in its protocol on health or in its pending protocol on Sexually Transmissible Diseases. Any provisions that would be included should incorporate the wording of the Doha Declaration and should be made directly applicable in SADC member states.

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## *Chapter 12*

### **Land reform in Zimbabwe: context, process, legal and constitutional issues and implications for the SADC region**

Memory Dube and Rob Midgley

#### **1. Introduction**

Land reform in Zimbabwe has put the country in the international spotlight, mostly in a negative way. There is continuing controversy over the way in which land reform was implemented in Zimbabwe and the effect of this process on the agricultural sector in that country. Although the process has been blamed for the economic meltdown in Zimbabwe, the land seizures and redistribution, now spanning nearly a decade, still continue. The Western powers have unanimously condemned the manner in which the process of land reform has taken place in Zimbabwe but no international body has pronounced on the legality of the Zimbabwean land reform process. Certainly, the Southern African Development Community (SADC) has not been vocal on the issue, choosing to support the process implicitly through inaction or random endorsements by some SADC leaders, although this seems to be changing.

Zimbabwe is a member of SADC, which is an international organisation with an international identity, and is bound by international law (SADC Treaty, Art. 3). SADC has a Tribunal, established by Article 9 of the SADC Treaty, which serves as a dispute resolution mechanism and which is tasked with adjudicating all disputes relating to the interpretation and application of the SADC Treaty. A White Zimbabwean farmer, Michael Campbell, has brought a case to this Tribunal, alleging that Zimbabwe's Constitutional Amendment Act (No. 17) violates SADC law in that it infringes his human rights. He also alleges that the process of land reform in Zimbabwe is not in accordance with SADC principles. By implementing its land reform programme, so he alleges, Zimbabwe has violated its obligations under the SADC Treaty.

The Tribunal granted an interim order for a stay of his eviction from his farm pending a final adjudication on the matter. Campbell had felt compelled to approach the

SADC Tribunal in October 2007 after the Zimbabwean Supreme Court had failed to respond, within a reasonable time, to his challenge of the constitutional validity of Amendment 17. Although Campbell had lodged his challenge in May 2006, the Supreme Court of Zimbabwe only gave judgment on the matter in January 2008, finding that the acquisition in question was legal, thereby authorising the government to proceed with the acquisitions.<sup>1</sup>

This is the first time that an internal matter has simultaneously been brought before the SADC Tribunal and this is its trial of strength. This paper will attempt to explain the issues in the Campbell case by evaluating the land reform process in Zimbabwe and the issues that shaped it. The SADC Tribunal will also be discussed as the region's most critical institution and one that has pronounced on the legality of Zimbabwe's land reform programme.<sup>2</sup> The paper will also discuss the impact of the land reform process in Zimbabwe on the region.

## **2. Mike Campbell (Pty) Ltd and William Michael Campbell v The Republic of Zimbabwe, SADC (T) 2/07**

### **2.1 The case**

William Michael Campbell instituted action on his own behalf and as the Managing Director of Mike Campbell (Pty) Ltd, the owner of the farm 'Mount Carmell', as well as on behalf of the employees of the company and their families who live and work on the farm. Mr Campbell's argument is that Constitutional Amendment 17 of Zimbabwe infringes the principles of human rights, democracy and the law as espoused by the SADC Treaty, and that the actions and conduct of the Zimbabwean government in effecting the farm acquisitions also contravene Zimbabwe's treaty obligations under SADC.

The first efforts at acquiring Mount Carmell by the Zimbabwean government were made on 22 July 2001, but the High Court of Zimbabwe quashed the acquisition order.<sup>3</sup> The first invasion of the property by war veterans took place between September and October 2001. The police did not respond to calls for assistance. In 2006, an attempt was made by the Minister for Land, Land Reform and Resettlement

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<sup>1</sup> *Mike Campbell (Pvt) Ltd & Anor v Min of National Security & Ors* S-49-07.

<sup>2</sup> For a comprehensive analysis of the SADC Tribunal, see Ch. 8 of this publication.

<sup>3</sup> Campbell Case: Heads of Argument Summary. [Online]. Available: [http://www.thezimbabwean.co.uk/index.php?option=com\\_content&view=article&id=13001:campbell-case-heads-of-argument-summary&catid=31:top%20zimbabwe%20stories&Itemid=66](http://www.thezimbabwean.co.uk/index.php?option=com_content&view=article&id=13001:campbell-case-heads-of-argument-summary&catid=31:top%20zimbabwe%20stories&Itemid=66) [27 July 2008].

to allocate the whole of Mount Carmell to former government minister Nathan Shamuyarira, but this was opposed by the Campbells and there was no response from government.<sup>4</sup> On 14 September 2005, the Constitution of Zimbabwe Amendment Act (No. 17) came into effect, effectively extinguishing any judicial recourse or remedy for farmers who wished to object to the acquisition of their farms. On 15 May 2006, the applicants instituted legal proceedings in the Supreme Court of Zimbabwe challenging the constitutional validity of Amendment 17, thus delaying their eviction from Mount Carmell.<sup>5</sup> Because the Supreme Court had failed to give judgment in this matter within a reasonable period of time, the applicants launched proceedings in the SADC Tribunal on 11 October 2007, challenging the government's acquisition of Mount Carmell and also the validity of Amendment 17. A simultaneous application was filed in terms of Article 28 of the Protocol on Tribunal,<sup>6</sup> read in conjunction with Rule 61 Sub-rules (2)–(5) of the Rules of Procedure which requested

...an interim measure restraining the government of Zimbabwe from removing or allowing the removal of, the applicants from the agricultural land...and mandating the respondent (Government of Zimbabwe) to take all necessary and reasonable steps to protect the occupation by the applicants of the said land until the dispute has been finally adjudicated.<sup>7</sup>

An interim order was granted on 13 December 2007 after the Tribunal, headed by the Honourable Justice Dr Luis Anthonio Mondlane, had satisfied itself that the application fulfilled all the criteria for granting interim measures.<sup>8</sup> In the meantime, the Supreme Court of Zimbabwe delivered a judgment on 22 January 2008, dismissing the applicants' challenge to Amendment 17 and authorised the government of Zimbabwe to proceed with the acquisition of Mount Carmell. In March 2008, a total of

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<sup>4</sup>Campbell Application to SADC Tribunal on Land Seizures. [Online]. Available: [www.polity.org.za/attachment.php?aa\\_id=9294](http://www.polity.org.za/attachment.php?aa_id=9294).

<sup>5</sup> Campbell Case: Heads of Argument Summary.

<sup>6</sup> Article 28 reads: 'The Tribunal or the President may, on good cause shown, order the suspension of an act challenged before the Tribunal and may take other interim measures as necessary.'

<sup>7</sup> Mike Campbell (Pty) Ltd and William Michael Campbell v The Republic of Zimbabwe, SADC (T) 2/07 <http://www.saflii.org/sa/cases/SADCT/2007/1.html> (18 July 2008).

<sup>8</sup> These criteria are: a) a *prima facie* right that is sought to be protected; b) an anticipated or threatened interference with that right; c) an absence of any alternative remedy; and d) the balance of convenience is in the favour of the applicant, or if a discretionary decision in favour of the applicant that an interdict is the appropriate relief in the circumstances (*Mike Campbell v Republic of Zimbabwe*.)

78 other White farmers from Zimbabwe were joined in the case and granted the same interim relief as the Campbells ('SADC Tribunal' 30 May 2008).

The matter was to be heard on 29 May 2008, but it had to be postponed to 16 July 2008 because the Zimbabwean government had failed to file its papers by the required date. The Tribunal again convened on 16 July 2008 to hear the main case, but on 17 July 2008 the Zimbabwean government lawyers walked out in protest after the Tribunal had allowed the applicants to bring an urgent application to hold the Zimbabwean government in contempt of court for failure to guarantee the undisturbed possession and enjoyment of the property of the White farmers, as per the Tribunal's interim order. The Zimbabwean government was referred to the SADC Summit for contempt and breach for having failed to ensure the safety of the property and personal security of the White farmers who were protected by the interim order. To date it is not known whether the Summit has decided this matter.

Issues to be considered by the Tribunal were whether Amendment 17 and actions of the Zimbabwean government in connection with the farm acquisitions comply with Zimbabwe's obligations under the SADC Treaty. The applicants submitted that Amendment 17 was subject to SADC law. The applicant's contention was that the Zimbabwean government failed to pay compensation for the seized land; and where the government decided that compensation would be paid it failed to perform the necessary assessment or to follow other procedures laid down by the legislation in question. There are no clearly stated criteria for the selection of farms for acquisition except that the farms are owned by White farmers. The applicant argued that this was a racist criterion.

It is necessary to consider the principle of land reform in general, the substantive content of land reform in Zimbabwe, as well as Amendment 17 and its implications. In a judgement delivered on 28 November 2008, the Tribunal ruled in favour of the farmers, ruling Amendment 17 to be in contravention of SADC Treaty obligations.<sup>9</sup> The Zimbabwean government was ordered to protect the farmers' possession and ownership of their land and property. In its determination of the case, the SADC Tribunal considered the issue of jurisdiction, whether the farmers had been denied access to the courts in Zimbabwe, whether the farmers had been racially

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<sup>9</sup> *Mike Campbell (Pty) Ltd and William Michael Campbell v The Republic of Zimbabwe*, SADC (T) 2/07.

discriminated against and, lastly, whether the government of Zimbabwe had an obligation to pay compensation to the farmers already dispossessed of their farms. As illustrated by the judgement as well, regional and international law has played a role in determining the legality of Amendment 17 and this in turn has a bearing on the land reform process in Zimbabwe and in the region.

### **3. The SADC Tribunal**

The Tribunal is created by Article 9 of the SADC Treaty as the proper platform for the interpretation of the provisions of the SADC Treaty and for ensuring adherence to them.<sup>10</sup> Article 14 of the Protocol on the Tribunal provides that the Tribunal has jurisdiction over all disputes and all applications referred to it in accordance with the SADC Treaty which relate to the interpretation and application of the Treaty. The Campbell case was about the interpretation and application of the SADC Treaty in relation to the basis of human rights.

#### **3.1 Jurisdiction of the Tribunal**

Article 15 extends the Tribunal's jurisdiction to disputes between states and between natural and legal persons and states.

Although natural and legal persons are required to exhaust all domestic remedies before making an application to the Tribunal (Protocol on Tribunal, Art. 15(2)), applications in terms of Article 15 are not subject to the provisions of Article 14 in the same way as all other applications are (i.e. disputes between states and the Community, disputes between natural or legal persons and the community, and disputes between community and staff) (Protocol on Tribunal, Art. 17. 18. 19). While this has been interpreted to mean that disputing member states could agree to authorise the Tribunal to deal with matters not covered by the SADC Treaty (Oosthuizen 2006: 209), the implications of this with regard to disputes between states and individuals are unclear. Usually when natural or legal persons take their case to the Tribunal, they have failed to resolve the matter within their state.

Interestingly, the consent of the other party to the dispute is not required where a dispute is referred to the Tribunal by any party (Protocol on Tribunal Art. 15(3)). This

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<sup>10</sup> Article 16 (1) of the SADC Treaty.

means that only the Tribunal will decide if any dispute falls outside its jurisdiction. If the dispute falls outside the Tribunal's jurisdiction, it means that persons who fail to find legal remedy within the jurisdiction of their states are without remedy within SADC. Such a situation is a very serious anomaly that needs to be addressed. On the other hand, SADC has not yet reached that stage of political integration that would allow the Tribunal to have supranational authority and perhaps act as the final arbiter of all disputes between a state and its citizens, whatever the basis of the dispute. Still, the fact that the consent of the other party is not required when bringing a dispute means that the Tribunal has compulsory jurisdiction over all matters referred to it. By virtue of ratifying the SADC Treaty and the Protocol on Tribunal, a member state binds itself to the Tribunal's jurisdiction over all disputes referred to the Tribunal that involve such a state.

### **3.2 *Locus standi* in the Tribunal**

By giving natural persons *locus standi* before the Tribunal, SADC has adopted the modern practice of recognising individuals as participants and subjects of international law (Shaw 2003: 232). This is particularly relevant in the sphere of human rights protection and human rights law. In that particular regard, even though SADC lacks a comprehensive human rights instrument or Protocol, save for a few provisions that make mention of aspects of human rights, SADC ought to be commended as it has transcended even the International Court of Justice where the jurisdiction of the Court *ratione personae* is not extended to natural persons.

The only condition that individual applications are contingent upon is the exhaustion of all available local remedies. The exhaustion of local remedies rule must conform to generally recognised principles of international law and must not only be viewed in terms of domestic law, especially when the remedies may be non-existent or manifestly inadequate or the process may be unduly prolonged.

In the Campbell case, there was no realistic prospect of exhausting domestic remedies because Amendment 17 precludes one from instituting any legal proceedings with regard to the matter. When the applicants in the Campbell case sought an interim order, the government of Zimbabwe objected on the grounds that all internal remedies had not been exhausted as the matter was still pending before

the Supreme Court of Zimbabwe.<sup>11</sup> However, in this instance the applicants had instituted their legal challenge to Amendment 17 in May 2006, and by the time they applied to the Tribunal, the Supreme Court had done nothing about the matter. Clearly, there was no possibility of proceeding under the domestic jurisdiction.<sup>12</sup> Also, as indicated in the judgement, some circumstances make the exhaustion of local remedies requirement meaningless. In this particular case, Amendment 17 explicitly ousted the jurisdiction of the courts in any case involving the compulsory acquisition of agricultural land and thus leaving the farmers without the option to institute proceedings in any domestic court.

### **3.3. Issues that had to be decided by the Tribunal**

The major issue in the Campbell case was the validity of the land reform process in Zimbabwe. Central to this determination was Constitution of Zimbabwe Amendment (No. 17) Act 2005 which was promulgated in September 2005. This amendment inserts a new s16B into the constitution which effectively confirms and validates all government acquisition orders for agricultural land for resettlement purposes and pre-empts all legal challenges to such acquisitions. In terms of s16B(1), farm owners are precluded from instituting legal proceedings opposing the acquisition of their farmland and can use the court system only to dispute the amount of compensation payable for improvements effected on their farms (Zimbabwe 2004).

Although all agricultural land that is earmarked for acquisition is listed in a new schedule to the Constitution (Zimbabwe 2004: Schedule 7),<sup>13</sup> this does not create enough certainty on the position of farmers as the Act also makes provision for the acquisition of unlisted property should that land be required in the future for any purposes.<sup>14</sup> Such acquisitions would also be immune from legal challenge. The implications of this amendment, in particular its effort to exclude judicial intervention in the acquisition of agricultural land in Zimbabwe, are what was being challenged by the Campbells.

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<sup>11</sup> *William Campbell v The Republic of Zimbabwe*.

<sup>12</sup> See Article 15 (2) of Protocol to Tribunal.

<sup>13</sup> Schedule 7 itemises agricultural land gazetted on or before the 8 July 2005.

<sup>14</sup> See Section 16B (2), (a) (ii) and (iii) of the Constitution of Zimbabwe.

## **4. Land Issues in Zimbabwe**

### **4.1 Land distribution prior to the fast-track land reform.**

Land distribution at Zimbabwe's independence was highly unequal and heavily skewed in favour of white farmers who constitute a tiny minority of the total Zimbabwean population. The difference in land size was also paralleled by the difference in land quality: land in the best agro-ecological zones and best suited for intensive farming was occupied by white commercial farmers (Thomas 2003: 694). Expectations were high among peasants for the immediate redistribution of land upon independence, but very little was achieved in redressing the land situation and this partly explains why, two decades after independence, white farmers found themselves the victims of farm invasions and farm seizures that mirrored the land seizures of the colonial period. Between 1980 and 1990, the Zimbabwean government was constrained by the Lancaster House Constitution which basically sought to protect white property ownership through the 'willing seller – willing buyer' principle and compensation for land had to be paid in foreign currency. Expropriation of land was only allowed in the case of under-utilised land but with compensation at full market value. Upon expiry of the Lancaster House guarantees in 1990, the Zimbabwean government set the wheels in motion for a more effective land reform programme. Little had been achieved during the period when the original Lancaster House restrictions were in place.

Amendments were made to the Constitution (Amendment Act (No. 11) Act No 30 of 1990; Amendment Act (No.12) Act No4 of 1993) to allow for the acquisition of land by government for resettlement purposes. Section 16 of the Constitution, on property rights, and, previously guaranteeing white property ownership, was amended and the Land Acquisition Act (LAA) of 1992 was promulgated. Although the LAA was mostly a compromise to serve the Zimbabwean government's conflicting interests, it was met with tremendous criticism both locally and internationally, particularly from some international donors and financial institutions (Mlambo 2003: 74-75). Interestingly, according to the British based Economist Intelligence Unit, the legislation was '... legally hardly to be distinguishable from provisions for compulsory purchase practised in the UK.' The LAA empowered the President of Zimbabwe to acquire any land where it was reasonably necessary for purposes set out in the Act. Its deviation

from the Lancaster house provisions was that 'any land' could be acquired; 'fair' compensation would be paid within a 'reasonable' time as opposed to 'adequate' compensation and 'prompt' timing. Also, since the market-based land reform had resulted in the haphazard scattered acquisition of land, making it difficult to put in place support systems, the LAA introduced the system of land designation (Coldham 1993: 83). This designation was necessary both for planning purposes and enabling the government to acquire larger blocks of land for 'proper resettlement schemes where the necessary infrastructure could be economically provided (Coldham 1993: 83).' Although this largely meant to pacify the rural electorate that needed land, this land legislation only went to benefit the rich and the ruling elite who engaged in a massive 'scramble' for the best land. The taking and allocation of land was riddled with corruption and political clientelism (De Villiers 2003:17 19). The majority of processed applications and allocations of land went to the newly created 'elite black farmers, aspiring black investors and agriculture graduates.' There was a shift from allocating land to the needy to those who are 'capable' to develop the land and from 1991 onwards the long-standing land resettlement lists were simply shelved (Moyo 1999: 5). The LAA was not such a drastic departure from the Lancaster House Agreement. Had it received the necessary support from White farmers and donors, and had the government implemented the Act effectively, it would have gone a long way towards preventing the land seizures of the early 2000s.

## **4.2 Post-1997 land invasions**

Despite the above-mentioned efforts, the land question remained largely unresolved for most of the 1990s. Although the demand for land was always there, it did not have enough voice to make its demands felt<sup>15</sup> while, on the government's part, land reform remained largely in the realm of rhetoric throughout the 1980s and 1990s.

The late 1990s had seen a surge in political opposition to the ruling party as well as civil society organisations demanding good governance and participation in policy making (Sachikonye 2003: 101-106). Zimbabwe was also going through an economic crisis towards the late 1990s. Improperly implemented, the Economic Structural Adjustment Programme (ESAP) had devastating consequences for the majority of

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<sup>15</sup>Black lobby groups, such as Affirmative Action Group and the Zimbabwean Farmers Union (ZFU), which claimed to represent the rural landless, were fighting for the same constituency as government and, as a result, they were 'controlled politically and co-opted financially' (Moyo 1999: 15).

the population through price increases, decreased earnings and job losses (Ndlela 2003: 137–140). This was exacerbated by the unbudgeted lump sum payments and monthly pensions to members of the Zimbabwe National War Veterans Association as compensation for their role in the war of liberation, as well as the deployment of troops to the DRC to assist the DRC government in fighting rebels (Ndlela 2003: 142). The economic crisis had also extended into a social and political crisis.

Deteriorating conditions and government's insistence on turning a deaf ear to the calls for improved governance through consultation resulted in the emergence of a strong opposition, the Movement for Democratic Change (MDC). In alliance with a variety of constituencies such as academics, youth, professionals, commercial farmers and big business (Sachikonye 2003: 112), the MDC successfully mobilised for a 'NO' vote in the February 2000 Referendum for the new draft Constitution which did not properly reflect the views of the people on the contents of a new constitution (Sachikonye 2003: 115). A credible opposition party had emerged, and one that could potentially dethrone the ZANU-PF government. But how does this changed political landscape relate to the chaotic land reform process that followed?

Government launched the second phase of land resettlement in 1997 where farms were to be acquired on the basis of the guidelines set out in the 1990 Land Policy Statement.<sup>16</sup> Britain had backtracked on its earlier compensation promises through a 1997 letter in which the British Minister for International Development stated: '... we do not accept that Britain has a special responsibility to meet the costs of land purchase in Zimbabwe. We are a new government...without links to the former colonial interests' (Thomas 2003: 708). An International Donors Conference was convened in 1998 to mobilise support for the government's land reform programme but donors indicated that they were more interested in land development than in land reform.

Progress under this land resettlement programme was very slow and the number of families resettled by the end of 2000 still fell short of the 1980 targets.<sup>17</sup> The referendum defeat of 2000 led to the government orchestrating a radical process of

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<sup>16</sup> Farms were to be acquired according to the following criteria: a) the farmer is an absentee, b) the farm is derelict or under-utilised or c) the farm borders on a communal area. (Thomas 2003 *Third World Quarterly* 700)

<sup>17</sup> Only 75000 families had been resettled as opposed to the target of 120000 families by 1985.

land occupation. The government exploited the racial divide in land distribution, the people's need for land and the failure of the British government and other donors to live up to their compensation promises. The 'people' had to be seen to be showing their disgruntlement and the war veterans led the farm invasions. The government supported these farm invasions which were violently carried out and in complete violation of the law. Large numbers of farm labourers were displaced. The state security machinery conveniently turned a blind eye on the violence and the killings (Sachikonye 2003:117). In June 2000, ZANU (PF) ran the elections with the motto, 'Land is the economy, economy is the land' (De Villiers 2003). The government proceeded to adopt and implement a Fast Track Land Resettlement Programme which was initiated by an amendment to the constitution in April 2000 and amendments to the LAA in May 2000,<sup>18</sup> both of which empowered the government to compulsorily acquire land without paying compensation.

#### **4.3 Constitutional and legislative amendments at issue in the Campbell trial**

Despite its referendum defeat in February 2000, the Zimbabwean government proceeded with constitutional reforms in order to fast-track its land reform programme. Section 16A (1) of the Constitution articulates the foundation and the basis for land reform, the nature and history of land dispossession of the Zimbabwean people. It evokes nostalgia for the nationalistic impetus that drove people to fight against the minority rule and for land. The land reform and resettlements have come to be called the 'Third Chimurenga' since they operate on the same nationalist dogma as in the war of liberation. Most importantly, this constitutional amendment shifts full responsibility for the payment of compensation for compulsorily acquired farms from Zimbabwe to Britain as the former colonial power.<sup>19</sup> The amendments provide that where compensation is deemed to be payable, a variety of factors will be taken into account<sup>20</sup>: the resources available to

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<sup>18</sup> Section 16A of the Constitution of Zimbabwe sets the foundation and basis of land reform; the nature and history of land dispossession of the Zimbabwean people; shifts full responsibility for the payment of compensation for compulsorily acquired farms from Zimbabwe to Britain as the former colonial power; and sets out ambiguous factors to be considered in determining compensation. The compensation assessment principles in the LAA were changed, with compensation payable only for improvements on or to the land. The land itself would be taken without compensation and echoed the same sentiments, placing an obligation upon the British government to set up a special fund for the payment of compensation to farmers whose land is compulsorily acquired (Coldham 2001: 228).

<sup>19</sup> See Section 16A (2) of the Constitution of Zimbabwe.

<sup>20</sup> See Section 16A (2) of the Constitution of Zimbabwe.

the acquiring authority in implementing the programme of land reform, any financial constraints that necessitate the payment of compensation in instalments over a period, and any other relevant factor that may be specified in an Act of Parliament.<sup>21</sup> Given the deepening economic crisis in Zimbabwe since 2000 and the level of inflation at present, it is obvious that these factors would be used to justify payment of a pitiful small amount of compensation. It would also be possible for the government simply to create further restrictive criteria through an Act of Parliament, something which the government has not shown an aversion to, particularly when it serves its political interests.

With these constitutional amendments in place, the government speedily proceeded, without much discussion, to amend the LAA (Coldham 2001:228). The compensation assessment principles were changed, compensation being payable only for improvements effected on or to the land. The land itself would be taken without compensation. According to the Constitution, claims for compensation would have to be directed to the British government as the Zimbabwean government disowned responsibility for paying for compensation. As expected, the amendments to the LAA echoed the same sentiments, placing an obligation upon the British government to set up a special fund for the payment of compensation to farmers whose land is compulsorily acquired (Coldham 2001: 228).<sup>22</sup>

Part 1 of the new Schedule to the Act sets out the assessment principles for compensation for specific kinds of improvements but it does not clarify how an improvement is to be valued. What is clear, however, is that the original cost or the approximate cost of the improvement at the time of acquisition is not the basis of the assessment (Coldham 2001:228). Payment of compensation continues to be payable in instalments, but with a reduced initial payment. Only one quarter of the compensation is payable at the time of acquisition or within a reasonable time thereafter, with another quarter payable within two years and the remainder in five years.<sup>23</sup> There is no provision for payment of interest on the compensation and, given

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<sup>21</sup> Other factors specified are: the history of land ownership, use and occupation of the land; the price paid for the land when it was last acquired; the cost or value of improvements on the land; the current use to which the land and any other improvements on it are being put and any investment which the state or the acquiring authority may have made which improved or enhanced the value of the land and any improvements on it.

<sup>22</sup> Section 29C (i) of Land Acquisition Act.

<sup>23</sup> See Section 29C (3) of Land Acquisition Act of 1992.

the astronomical current rate of inflation in Zimbabwe, it is inevitable that by the time compensation is paid out, it will be worthless – in other words, it would neither be prompt nor effective. Recourse to judicial review is still available if a claimant is dissatisfied with the assessment made for compensation but this would only be on the basis that the principles set out in the Act were not adhered to in determining the amount of compensation. If the owner believes that the compensation offered is not 'fair', he or she has no right to appeal to a court of law.<sup>24</sup> While all the amendments apply only to agricultural land, there is no obligation on the part of the government to prove the need for or the suitability of the land for resettlement (Coldham 2001: 228).

These radical amendments to both the Constitution and the LAA rendered the land designation process redundant, for, having divested itself of the obligation to pay compensation for acquired land, there was no need for the government to earmark farms for future acquisition (Coldham 2001: 228).

As from 31 July 2000 an intensive land acquisition process began (Thomas 2003: 701), complemented by farm invasions led by the war veterans. In September 2002, further amendments were made to the Constitution to expedite the land acquisition process. The 90-days' eviction notice that was previously required was reduced to seven days and the fine for failure to comply with an eviction order was increased.<sup>25</sup> The government's radical methods for acquiring farms were so effective that by the end of October 2002 only an estimated 600 to 800 of the 4500 white farmers remained on their land (De Villiers 2003: 21). Despite the above amendments to the LAA, farmers continued with court challenges to the acquisition of their farms and sought eviction orders in respect of the government-sponsored squatters on their properties. According to government reports, '... almost every court action brought by the owners of the land targeted for acquisition challenged the right of the state to acquire the land, not the level of compensation payable for the improvements to the land' (Zimbabwe 2004), as provided for in the LAA. The courts by and large confirmed the government's acquisition orders, but the judicial review process did delay the process of land acquisition. The government needed to prevent these legal challenges to its competence to acquire farms compulsorily. This it did by means of a

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<sup>24</sup> See Section 29D, Land Acquisition Act of 1992. The Supreme Court of Appeal still remains the highest court of appeal on such objections.

<sup>25</sup> See Section 9 of Land Acquisition Act of 1992.

constitutional amendment that confirmed all acquisitions that had previously taken place (Zimbabwe 2004).

ZANU (PF) won the June 2000 election, which was considered neither free nor fair by Western election observers, with the majority of its support deriving from the rural areas where land reform was of more immediate concern than in the urban areas. The failure by the police to evict war veterans from farm properties prompted farmers to approach the courts for relief. An order to evict the land invaders was issued but this was not enforced. Further legislation was passed in 2005 that expedited the process of land expropriation and precluded farmers from contesting the expropriations in court. The government has since continued to acquire farmland belonging to white farmers and it is against the above history and background that Amendment 17 is being challenged in the SADC Tribunal.

Section 3 of the Zimbabwean Constitution proclaims the supremacy of the Constitution and how it supersedes all law and invalidates any law that is inconsistent with the Constitution. In *Smith v Mutasa* (in Naldi 1993: 592),<sup>26</sup> it was declared that such supremacy ‘... is protected by the authority of an independent judiciary, which acts as the interpreter of the constitution and all legislation’ (Naldi 1993: 592).’ The judiciary should have the power to review, when called upon, all decisions of the legislature and the executive, for consistency with the constitution. Section 18 (9) of the Constitution guarantees an individual’s right to judicial redress within a reasonable time in determining his or her civil rights and obligations as well as their parameters. By excluding the jurisdiction of the courts on land acquisition matters, Amendment 17 essentially violates the substantive due process of law by allowing individuals to be arbitrarily deprived of their property without judicial recourse (Naldi 1993: 593).

The very existence of Section 18(9) creates a presumption of a hearing every time individuals’ civil rights have to be determined (Naldi 2003:599). It should be pointed out that s16(2) of the LAA attempted to oust the courts’ jurisdiction to determine what constitutes a ‘fair’ compensation.<sup>27</sup> This was met with outrage from the judiciary, and

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<sup>26</sup> See Supreme Court of Zimbabwe, 1989, in Law Reports of the Commonwealth (Constitutional) (London) 87.

<sup>27</sup> Part of section 16 (2) reads ‘... and no such law shall be called into question by any court on the ground that the compensation provided by that law is not fair.’

the then Chief Justice of the Supreme Court, Mr Anthony Gubbay, declared publicly that the courts would invalidate any legislation that violated the fundamental principles of the Constitution (Naldi 2003: 589). Such court ouster was, however, circumvented by other provisions providing for a Compensation Court as well as an Administrative Court whose decisions could be appealed in the Supreme Court. This worked to keep the executive and legislature in check through judicial intervention where the two branches overextended their competencies.

Previously, in December 2000, the Supreme Court of Zimbabwe held that the government had abused the Constitution and had violated the law of the land in implementing its land reform programme. The government was held to have failed to protect farmers and their workers from violence and intimidation. Without a 'workable programme of land reform,' the government was to cease its land acquisitions (Dancaescu 2002–2003: 622). With the appointment of new judges in 2001, the Supreme Court overturned the above decision and held all farm seizures to be legal and that farm invaders should not be evicted (Thomas 2003: 709). In doing so, it is suggested that the Court absolved itself of the duty to interpret and uphold the Constitution in favour of political patronage, rendering the process devoid of meaningful judicial oversight. Amendment 17 was enacted in response to the legal challenges instituted by the farmers. It successfully did away with the rule of law in the acquisition of farms and creates a *lacuna* in the process of land reform.<sup>28</sup>

## 5. Provisions of International Law

There are international instruments that make specific mention of the right to own property. The 1948 Universal Declaration on Human Rights (UDHR) Article 17 provides that 'everyone has the right to own property' and that 'no one shall be arbitrarily deprived of his property.' Having attained the status of international customary law, this provision in the UDHR should secure property rights. However, it fails to address comprehensively the scope of this right by failing to define what constitutes 'arbitrary deprivation' (Shirley 2004: 167). Shirley (2004: 167) provides an interesting analysis. She argues that where land acquisition has been authorised through constitutional amendments and legislative action, due process may be all

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<sup>28</sup> When the regulations themselves are not subject to any form of oversight, there might as well be no regulations.

that is needed to satisfy Article 17 of the UDHR, however skewed such 'due process' may be. However, we disagree with this view.

Racial discrimination is evident in the process of land reform.<sup>29</sup> The International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), describes, in Article 1, racial discrimination as 'any distinction, exclusion, restriction or preference based on race, colour, descent or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'. The state's security machinery's refusal to come to the aid of white farmers under attack from war veterans, and refusal to evict illegal squatters can be considered a violation of the right of persons to protection by the state against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution (ICERD, Art. 5 in Dancaescu 2002–2003: 627). ICERD (Art. 5(d)) goes on to state that everyone is guaranteed equality before the law without distinction as to race and the right to own property alone as well as in association with others. The International Convention on Civil and Political Rights articulates also that 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'. The ruling party's sentiments on the issue of land reform and White people have the potential to incite discrimination, hostility and violence.

International law lacks a coherent, definite stand when it comes to the expropriation of citizens' land and the protection of citizens' property in general. What is agreed upon, however, is that

- expropriation of property by a state in the national interest is a legitimate measure and is not necessarily illegal under international law (Shaw 2003: 738); and
- expropriation by a national authority of property owned by foreigners should be accompanied by compensation at full market value by the expropriating authority (Shearer 1994: 269-275).

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<sup>29</sup> In December 2000, Robert Mugabe told a ZANU (PF), in addition to other racist sentiments, 'We must continue to strike fear into the heart of the white man, our real enemy.' (Kagoro 2002).

International law is explicit when it comes to the taking of foreign-owned property, and over the years, practice, doctrine and case law have come to create a body of principles against the arbitrary acquisition of foreign property.<sup>30</sup> Nonetheless, it is doubtful whether this body of law can be used to determine the Zimbabwean situation, for the farmers cannot rely on their colonial heritage to claim British citizenship and, even if they tried, it would probably be established that their 'dominant and effective nationality' lies with Zimbabwe.<sup>31</sup> In effect, this is a case of Zimbabwe expropriating its own citizens' property. It must be emphasised, however, in relation to Amendment 16 which obliges Britain to pay compensation to the farmers whose land has been acquired, that under international law Zimbabwe cannot create legally binding obligations that are enforceable against another sovereign state without its consent. Much will therefore depend on the interpretation to be given to the Lancaster Agreement, namely, whether the expectations created by the Agreement are legally binding and enforceable on the British government. This writer contends that a political and diplomatic solution may be quicker and more effective, and face saving to the two states.

International law has not offered a state's own nationals the same protection as foreigners when their property is acquired. There is case law and instruments that support, at least by implication, the deprivation of Zimbabwean farmers' property in the public interest. Nationalisation is an act that can be attributed to the exercise of sovereignty by any independent state, and there are numerous United Nations resolutions that reaffirm the permanent sovereignty of states over their natural wealth and resources, starting with Resolution 1803 (XVII) of December 1962.<sup>32</sup> In the *Case Concerning Certain German Interests in Polish Upper Silesia* (1926), the Permanent Court of International Justice found that only 'expropriation for reasons of public utility, judicial liquidation and similar measures' was permissible under customary

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<sup>30</sup> Such principles can be compressed into four distinguishable rules. According to Shearer (1994:270) the acquisitions must'

- 'be for a public purpose in accordance with a declared national policy;
- not discriminate between aliens and citizens, or, as between different foreign nationalities
- not involve the commission of an unjustified irregularity
- be accompanied by the payment of appropriate compensation.

<sup>31</sup>The 'dominant and effective nationality' principle was evolved in the *Iran-United States Case* No.A/18, 5 IRAN-U.S. C.T.R. 251 (Iran-U.S Claims Tribunal 1984) (Shirley 2004: 170 – 171).

<sup>32</sup> See also General Assembly Resolution 3171(XXVIII) of 1973; Resolution 3201 establishing the New International Economic Order of 1974; and Resolution 3281 on the Charter on Economic Rights and Duties of States, 1974. The right to permanent sovereignty over resources features in common Article 1 to the International Covenants of 1966 alongside the right to self determination.

international law. Naldi (1993: 596) contends that these principles have since expanded with the advent of contemporary issues.<sup>33</sup> We suggest that one such contemporary issue in the aftermath of colonialism in Africa is to address the unequal distribution of wealth along racial lines, particularly where land is concerned. The principles should then include the developmental needs of developing countries and the imperative to economically empower the previously disenfranchised majority. The compulsory acquisition of land should then be seen within a larger context.

The question is always whether an individual's fundamental human rights and the state's obligation to protect such rights overrides the urgent and paramount interests of the country as a whole. Article 1 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1954 protects the individual's right to property, 'except in the public interest and subject to the conditions provided for by law and by the general principles of international law'. The right to property is not among the rights included in the main instrument adopted in 1950. Similarly, the above article of the Protocol provides that the state has the right to '...enforce such laws as it deems necessary to control the use of property in accordance with the general interest...' The European Court of Human Rights decided, however, that this reference to international law does not apply to the taking by a state of the property of its own nationals.<sup>34</sup> From judicial interpretations of this Article regarding dispossession of land and compensation two principles have emerged (Naldi 1993: 597):

- (i) 'prompt, adequate and effective compensation in accordance with the general principles of international law ... does not apply to the taking by a state of the property of its nationals but is designed for the protection of aliens'; and
- (ii) Article 1 did not guarantee a right to full compensation in all circumstances since legitimate objectives of 'public interest' such as pursuing measures of economic reform, might call for less than full compensation.

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<sup>33</sup> *Permanent Court of International Justice* (The Hague), Series A, 7, 1926: 22.

<sup>34</sup> *Lithgow, European Court of Human Rights*, Series A No.102;75 ILR p.438 (Shaw *International Law* 739)

These principles indicate that the Zimbabwean concept of 'less than adequate' compensation regarding compulsory acquisition of property was not a novel idea and the LAA fell within acceptable international law norms. On the question of later amendments to the constitution and LAA, which take away the right to compensation, there is no precedent in international law. It can be assumed that some form of compensation is always required and, in balancing the opposing interests, compensation for improvements to the land only might be all that is needed to satisfy the requirements of international law.

United States of America case law similarly confirms the need for land redistribution. In *Hawaiian Housing Authority v Midkiff* 467 US 229 (1984) the US Supreme Court held that land redistribution was constitutional in so far as it 'reduced the perceived social and economic evils of land oligopoly' (Dancaescu 2002–2003: 634). Although circumstances were different in this case as the recipients of the land were already living on the land, the judgment's rationale is important.

The Resolution 41/128 on the Right to Development adopted by the United Nations General Assembly in 1986 recognises in Article 1 that 'development is an inalienable human right by which every human person and all peoples are entitled to participate ... (and that the right) also implies the exercise of their inalienable right to full sovereignty over all their natural wealth and resources...' (Dancaescu 2002–2003: 637). Land is one among the resources referred to above and which is in abundance but concentrated in the hands of a few individuals. Decisions on land reform are complicated where the human rights of those initially dispossessed of land through colonisation, racist regimes and economic injustice; mostly African people, are considered (Dancaescu 2002–2003: 638). It essentially becomes a question of whose rights are more important and whether the sins of the past have been extinguished over time to the extent that land initially seized illegally and through violence and force can now be sold back to its 'owners'. The right to development, not articulated in the Universal Declaration on Human Rights, finds expression in the International Covenant on Economic, Social and Cultural Rights, which guarantees the right to an adequate standard of living and the continuous improvement of one's standard of living (International Covenant on Economic Social and Cultural Rights: Article 11). Implicit in this and the right to development generally, is the right to access resources necessary to achieve such improvement or development.

A secured right to property is an important component of those resources. The Draft Declaration on the Rights of Indigenous People recognises the worth of land to a community and the individual. It notes 'the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to land', to allow them to 'freely pursue their economic, social and cultural development' and have the right to redress for 'any action which has the aim or effect of dispossessing them of their lands, territories and resources' (Dancaescu 2002–2003: 639). Like most instruments of international law elaborating on land issues, this instrument does not clarify what such 'redress' entails. This is a huge oversight, especially considering that such instruments apply mainly to developing countries that were themselves the victims of colonisation and that do not have the financial resources necessary for the payment of compensation upon expropriation.

The African Charter on Human and Peoples' Rights is similarly implicit in its support for land reform. Article 14 of the Charter guarantees the right to property but has a claw-back clause that subjects the right to the interests of the public need in accordance with the provisions of appropriate laws. There is no further elaboration on Article 14 on this matter and this in effect leaves such 'public need' entirely at the discretion of the state (Shirley 2004: 168). Thus the extent of the protection of private property from compulsory and arbitrary expropriation by the state has to be sought and determined through international human rights instruments and international law. This poses a problem when one considers the difference on how the First and the Third Worlds view the concept of human rights. Whereas the First World emphasises that the individual and his or her civil and political rights are paramount, the Third World is more concerned with issues of development, and thus from their perspective, social and economic rights tend to dominate other rights (Shaw 2003: 249-252). At face value, Article 14 would suggest that land reform in Zimbabwe has been supported by 'appropriate' laws as there have been various constitutional and legislative amendments (Shirley 2004: 168).

Article 21 (2) of the African Charter states that 'in case of spoliation the dispossessed people shall have the right to the lawful recovery of its property.... 'According to Shirley, the use of the word 'spoliation' could be interpreted as referring to the forced taking of land during the colonial era. This is to be expected of a continent that is still apprehensive about encroachment on its sovereignty, having fought so hard for it.

The Charter also embodies Africanism with a bias towards establishing states free from the vestiges of colonialism (Shirley 2004: 169)

Land seizures such as those in Zimbabwe will continue to fall within a contested domain of international law that separates North from South until such international development law has matured and provides greater clarity on this issue. As yet there is no 'substantial body of binding rules, conferring specific rights upon developing states and imposing duties on developed countries' (Shearer 1994: 358). This is why Zimbabwe cannot enforce Britain's assurances in respect of helping Zimbabwe meet the costs of land reform, not even by constitutionalising them, without a binding agreement between the two countries. There is no global acceptance of the right to development and its scope and, by extension, of the right to resources, as being specific human rights. However, for developing countries, development does not imply 'simply an increase in productive capacity but major transformations in their social and economic structures (and) ... the ultimate purpose of development is to provide opportunities for a better life to all sections of the population' (Shearer 1994: 359).<sup>35</sup>

The major question with regard to development in the Zimbabwean context is whether any such right outweighs the rights of those who previously controlled the country's wealth and resources, to such an extent that such resources can be compulsorily acquired without compensation. Having said this, given the history and process of land reform in Zimbabwe, it is inconceivable that the land acquisitions were solely motivated by developmental concerns. While those issues played a role, particularly the need to distribute land to the majority and ease their poverty, political concerns have certainly played an equivalent role.

## **6. Campbell case and SADC law**

Article 4 of the SADC Treaty (Article 4(c)) demands that member states act in accordance with the principles of 'human rights, democracy, and the rule of law'. According to the Campbell heads of argument, abiding by these principles entails 'a threefold, integrated commitment of the member states of SADC to attaining economic development, encouraging regional peace and cooperation and ensuring

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<sup>35</sup> 1970 Report of the United Nations Committee for Development.

respect for basic human rights and the rule of law' and this 'includes other international legal instruments which the member states have ratified'. Given the tone of members of the ruling elite at rallies and in speeches, the government technically endorsed the violence, harassment and intimidation that ensued during the farm invasions. At the very least the Zimbabwean government condoned such violations of the human rights of the farmers and the farm workers.

Removing the right to legal redress for land expropriation violates the very foundations of the rule of law as it emasculates the judiciary which is responsible for ensuring adherence to the law. It also ignores the principle of the separation of powers which is imperative for the prevention of despotism and anarchy as it keeps the other branches of government in check. Zimbabwe has thus not acted in conformity with the provisions of Article 4 of the SADC Treaty. One of the principles upon which the rule of law is founded is the ability of individuals to be given a fair and impartial hearing to determine their rights – this is not possible in Zimbabwe. By legalising farm invasions and acquiring farms without due regard for the human rights of the farm owners and their workers and taking away the only source of redress available, the Zimbabwean government is violating the principles of human rights, democracy and the rule of law. In its judgement, the Tribunal confirmed the above by pointing out that,<sup>36</sup>

“the concept (*rule of law*) embraces at least two fundamental rights, namely, the right of access to the courts and the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation. ... Any existing ouster clause in terms such as "the decision of the Minister shall not be subject to appeal or review in any court" prohibits the court from re-examining the decision of the Minister if the decision reached by him was one which he had jurisdiction to make. Any decision affecting the legal rights of individuals arrived at by a procedure which offended against natural justice was outside the jurisdiction of the decision-making authority so that, if the Minister did not comply with the rules of natural justice, his decision was ultra vires or without jurisdiction and the ouster clause did not prevent the Court from enquiring whether his decision was valid or not”.

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<sup>36</sup> *Mike Campbell (Pty) Ltd and William Michael Campbell v The Republic of Zimbabwe*, SADC (T) 2/07.

One of the objectives of SADC Treaty (Article 5(b) and (c)) is to 'promote common political values, democratic and other shared values which are transmitted through institutions which are democratic, legitimate and effective as well as to 'consolidate, defend and maintain democracy, peace, security and stability'. The land reform process in Zimbabwe is also linked to the political and economic meltdown that Zimbabwe has experienced since 2000. A wave of terror is constantly unleashed on the opposition and its supporter; hyper-inflation has reached unprecedented levels; and there has been a huge decline in the people's standards of living. The ZANU-PF government has become increasingly autocratic and is identified with repression and anarchy. Democracy in Zimbabwe is questionable as the ZANU-PF government does not tolerate any opposition. The state's institutions and machinery are under the control and influence of the ruling party and have been used for undemocratic purposes. This goes against the spirit and purpose of the above-mentioned objectives.

The SADC Treaty (Article 6(1)) obliges its member states to desist from acting in a manner that would jeopardise the 'sustenance of its principles, the achievement of its objectives and the implementation of the provisions'. SADC member states are also directed to take all necessary steps to give the Treaty the force of national law in their countries (Article 6(5)). In essence this means that in implementing national policy and legislation, states should give due regard to the provisions of the SADC Treaty and maintain consistency with them. A state can therefore not adduce its own national law as a justification for violating the tenets of SADC law. This is aimed at containing SADC states within the parameters of SADC law and the principles that it embodies. By ratifying the SADC Treaty, Zimbabwe bound itself to see that its national laws and policies conform to the SADC legal framework. The government has failed to observe this and, as the country sinks deeper into a crisis, so does it show disregard for SADC principles and objectives.

## **7. The Tribunal's enforcement mechanisms**

The enforcement and execution of the Tribunal's decisions are regulated by Article 32 of the Protocol on the Tribunal which states:

- 1) The law and rules of civil procedure for the registration and enforcement of foreign judgments in force in the territory of the state in which the judgment is to be enforced will govern enforcement.
- 2) States and institutions of the community must take forthwith all measures necessary to ensure executions of decisions of the Tribunal.
- 3) Decisions of the Tribunal will be binding upon the parties to the dispute in respect of that particular case and enforceable within the territories of the states concerned.
- 4) Any failure by a state to comply with a decision of the Tribunal may be referred to the Tribunal by any party concerned.

If the tribunal finds that these rules have been violated, it must report its finding to the Summit for the latter to take appropriate action. The question remains whether SADC has enough teeth to deal with transgressor states when they fail to execute the decisions of the Tribunal. The effect of this provision is that the Tribunal cannot act unless such failure has been brought to its attention. There are also gaps in Article 32. The Tribunal should have a mechanism to oversee and ensure that its decisions are carried out by member states. For as long as none of the concerned parties bring to the attention of the Tribunal that a decision is not being carried out, the Tribunal cannot report it to the Summit.

To make decisions more effective, the Tribunal should be empowered to follow through and investigate the compliance of member states. However, this is one of the weaknesses of international law in general, especially in circumstances where there is no immediate threat to peace and security. The enforcement and execution of judgments is an issue that many international tribunals and dispute resolution bodies face. For instance, the judgments of the International Court of Justice (ICJ) are final and binding, like those of the SADC Tribunal, but ‘... once the court has found that a state has entered into a commitment concerning its future conduct it is not the court’s function to contemplate that it will not comply with it’ (Shaw 2003: 996).<sup>37</sup> This is the instance where the principle of *pacta sunt servanda*<sup>38</sup> kicks in and states are expected to exercise good faith and carry out their treaty obligations. The record of

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<sup>37</sup> The Nuclear Tests case, ICJ Reports, 1974.

<sup>38</sup> See Article 26 of the Vienna Convention on the Law of Treaties, 1969.

non-compliance with the ICJ's judgments is well documented but the judgments are more valuable on a political level where they make a much greater impact than on the legal level (Shaw 2003: 997).

To expect the Tribunal, a regional institution still in its infancy, to receive full compliance with the decision of its first landmark case is perhaps asking for too much. On the other hand, it is precisely for the reason of being in its infancy that it needs a decision on Zimbabwe to be implemented. A regional organisation such as SADC and its Tribunal are more likely to have a greater effect on Zimbabwe than an international tribunal would. That is because, in a regional setting, countries are more dependent on each other and, due to historical, social, political and cultural affinity, such institutions would command more respect.

In the Campbell case, having such issues deliberated in a regional court takes away the idea of imperialistic notions tainting the judgment. There is also the possibility that Zimbabwe would give precedence to its own domestic court ruling over the findings of the Tribunal. It must be remembered that the Supreme Court of Zimbabwe deliberated on the same matter before the Tribunal. The Supreme Court gave its judgment on 22 January 2008 when the constitutional challenge to Amendment 17 was dismissed, thus ruling the ouster of judicial recourse in land acquisitions legal. The government's response, in the words of Zimbabwe's land reform minister, Didymus Mutasa, was that the acquisition of Mount Carmell would continue ('Land Challenge Acid Test' 22 July 2008). Already, the interim order of the SADC Tribunal was violated with the government failing to protect farmers from being robbed, assaulted and evicted from their farms ('SADC Tribunal Postpones' 30 May 2008). In response to the Tribunal ruling, the government of Zimbabwe, through its Minister of State for National Security, Lands, Land Reform and Resettlement, Mr Didymus Mutasa, has declared that the SADC Tribunal is 'daydreaming' and the government will proceed with land reform in its current form.<sup>39</sup> Mutasa has declared that the laws of Zimbabwe will not be made by SADC, that the SADC Tribunal has no jurisdiction

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<sup>39</sup> "Zimbabwe says it will defy land seizure ruling" *Reuters* 1 Dec 2008 <http://www.namibian.com.na/2008/December/national/0840ED5433.html> (5 December 2008).

over the matter and, as a consequence, those farmers that return to their farms in line with the SADC Tribunal ruling will meet with the wrath of the law.<sup>40</sup>

It is a well established tenet of international law that, despite legislative sovereignty, violation of an international law or norm cannot be justified by advancing the provisions of a state's domestic law (Shaw 2003: 124). To be able to do so would defeat the very objectives of international law and render the dispute resolutions mechanisms redundant. Transgressor states are therefore precluded from pleading deficiency in their domestic law in the international arena. This tenet is embedded in the 1969 Vienna Convention on the Law of Treaties (Article 27) which provides that 'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. This provision adds strength to Article 26 which provides that 'every treaty in force is binding on the parties to it and it must be performed in good faith'.

Because the land issue goes to the fundamentals of sovereignty and is a matter that is also significant to other countries within SADC faced with the same kind of uneven distribution of land, the enforcement of the Tribunal's decision, will have far-reaching consequences. The Tribunal has already asserted itself by reporting Zimbabwe to the Summit for its failure to protect the farmers on their property. Very significant to this, is the Zimbabwe Government's previous refusal to recognise or acknowledge domestic court decisions where they have gone against its land reform programmes and its repeated violation of the rule of law with impunity.<sup>41</sup> As pointed out above, the Zimbabwean government has adopted a very contemptuous attitude towards the decision of the Tribunal.

Beyond enforcement issues, the Campbell case will also work to test the mutual support that should exist between the Tribunal and the Summit. Will the Summit be willing to take punitive action against Zimbabwe for failure to heed the Tribunal's rulings? There is no obligation on the Tribunal to give its recommendations on the course of action to be taken should it find against Zimbabwe but most likely it will

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<sup>40</sup> "Zimbabwe: Govt violated rule of law – SADC Tribunal" *The Standard* 29 November 2008 <http://allafrica.com/stories/200811300007.html> (5 December 2008).

<sup>41</sup> 'The court is saying nonsense, it will never happen that blacks should fight each other. I will die with my claim to land. My right to land is a right which cannot be compromised. It is our right. It is our land. We must be prepared to die for it.' Robert Mugabe, speech at Gwanda, Zimbabwe June 14 2000 (Dancaescu 2002–2003: 616)

make such recommendations. Even then, there is no absolute obligation on the part of the Summit to take action. It has discretion when it comes to taking action and punishing a transgressor state.

Punitive measures against any state are covered by Article 33(1)(a) and (b) of the SADC Treaty which provides that sanctions may be imposed against any member state that persistently fails, without good reason, to fulfil obligations assumed under the SADC Treaty and also against a member state that implements policies which undermine the principles and objectives of SADC. There is no guideline as to the kind of sanctions that may be imposed against a state with appropriate action being decided on a case by case basis. The issue of enforcement and execution of decisions of the Tribunal as well as that of sanctions is not comprehensively dealt with in both the Protocol on the Tribunal as well as in the SADC Treaty. The Summit consists of the Heads of State or Government of all member states and is the supreme policy-making institution of SADC; its decisions are taken by consensus and are binding (Article 10(1) and (8)). The procedures of Protocol on Tribunal and the SADC Treaty do not deal with the issue of whether the transgressor state can be present when deliberations are taking place about what sanctions to impose on that state (Oosthuizen 2006: 177). The presence of Zimbabwe in the deliberations might stand in the way of taking appropriate action.

## **8. Implications for the region**

The Zimbabwean land crisis resonates widely across the region. Progress on land reform has not been impressive in the Southern African region. In Zimbabwe such progress was only accelerated by the fast-track land resettlement programme. The Campbell case goes way beyond Zimbabwean legislation – whatever ruling the Tribunal makes will have an impact on land reform in the region. SADC as a whole is affected by the following land issues:<sup>42</sup>

- land distribution that is inequitable, with limited rights and access for the majority; there is no land use classification in resettlement and the

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<sup>42</sup> S Nanthambwe 'SADC I Land Reform Support Facility: Support to National Programmes' Paper presented at workshop on 'Decentralised Land Reform in Southern Africa' 22-23 April 2008 Gauteng, South Africa [http://www.plaas.org.za/research/land/decentralised-land-reform-in-southern-africa/workshop-papers/dlrna\\_presentation\\_snanthambwe.pdf/](http://www.plaas.org.za/research/land/decentralised-land-reform-in-southern-africa/workshop-papers/dlrna_presentation_snanthambwe.pdf/) (5 December 2008).

resettled population usually does not have the capacity to farm the land, because of lack of planning and infrastructure development;

- weak capacities of government agencies responsible for reform process and administrative processes that are government driven, with little participation of civil society; and
- a judiciary whose capacity is weak and often elite centred and lengthy court processes that delay resettlement and the payment of compensation.

Although applicable to the whole region, such issues are especially relevant to South Africa and Namibia which inherited the same land iniquity when they gained independence and whose land distribution mirrors that of Zimbabwe.

It is clear to see that the fast-track land reform of Zimbabwe is hanging over these countries and there is pressure on government to expropriate land. Such developments, however, have an adverse impact on regional integration in SADC. While Namibia and South Africa might be able to handle their expropriations differently in such a way that their economies and the general standard of living of their people are not affected, unfortunately there exists a catalogued example of the effects of an intensive expropriation and land reform drive. Investors would definitely be worried, wondering if these countries are going down the Zimbabwean way. This does not augur well for the prospects of increased regional integration in the region.

It is amidst the political and economic crisis gripping Zimbabwe that the SADC Free Trade Area has been launched.<sup>43</sup> As previously mentioned, the land crisis goes to the core of Zimbabwe's problems. The Free Trade Area is a product of the SADC Trade Protocol which was signed in 1996. The Trade Protocol contains the legal and structural framework for trade liberalisation in the region. It was signed pursuant to SADC's objectives which include the achievement of economic and economic growth for the region and the enhancement of the standard of life of the people of the region, and the promotion of self-sustaining development on the basis of collective self-reliance and the inter-dependence of SADC member states (SADC Treaty, Article 5).

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<sup>43</sup> The SADC FTA was declared at the 28th SADC Ordinary Summit of Heads of States and Government in Johannesburg, South Africa, 17 August 2008.

While the Free Trade Area is the ultimate objective of the Trade Protocol, the Regional Indicative Strategic Development Plan outlines the progression of the Free Trade Area into other areas of deeper integration such as a Customs Union, Common Market and an Economic Community with a central bank and common currency. This is part of SADC's goals of economic, social and political development where the approach to regional integration is not purely market-based but encompasses development in other sectors integral to SADC's development.

Although the Free Trade Area has since been opened, there are still some challenges that inevitably affect its viability. A bigger market created by the Free Trade Area will not guarantee an increase in intra-regional trade. Countries still need to develop and strengthen their industrial base so as counter the supply side constraints that affect manufacturing output. At the same time, industrialisation will ensure the production of competitive and diversified products. As SADC countries struggle to achieve this, however, the deindustrialisation taking place in Zimbabwe and the destruction of an industrial base that was once second only to South Africa negates this effort and is at variance with the objectives of the region. It will be especially difficult for SADC to build and develop its infrastructure when other, already existing infrastructure is being allowed to decay. It is also highly debatable whether the region will be able to piggy-back Zimbabwe in its integration efforts amid the political and economic uncertainty. Eventually, the quiet diplomacy adopted by the region will become a liability for SADC. Part of the funding for the region's development, infrastructural and otherwise, is anticipated to come from foreign direct investment. However, the Zimbabwean political and economic instability makes the region an unattractive investment destination. Having entered into a Free Trade Area, the region markets itself as a whole, and indeed, happenings in one country will reflect on the other countries. Action in regard of Zimbabwe is necessary if the region wants to be taken seriously and have influence on the global market. The movement towards deeper integration entails the harmonisation of trade and other policies. How this is to be achieved in the case of Zimbabwe is a million dollar question. The country's inflation level and its financial crisis are extraordinarily at variance with the rest of the region. Zimbabwe's inflation was pegged at two million percent in April 2008 and by far incomparable to the regional average of between 3 and 17%. As for the interest rates, they are at over 4000% (Makoshori 2008). It

would take a genius to harmonise these statistics with the rest of the region and, ultimately, it is bad for regional integration.

As the region gears itself for 2010,<sup>44</sup> it is uncertain how the Zimbabwean political and economic climate will be. The unity talks between the ruling party and the opposition, which spelled hope for the future of the country, have reached a deadlock. Once again the crisis seems unending. This will have an impact on tourism in the region, which would otherwise be boosted by the 2010 World Cup to be hosted in South Africa.

The Zimbabwean situation has an adverse impact on regional integration and threatens to further drag a process that, at best, is a very slow one. Peace and security are fundamental to regional economic development and integration. Whatever political and economic instability in one country will always spill-over to the neighbouring countries and affect the whole region. This is unfolding in SADC. The Regional Indicative Strategic Development Plan (RISDP) identifies poverty alleviation as one of the most important priority intervention areas, alongside trade, economic liberalisation and development. There is no food security in Zimbabwe, there is rampant inflation, and literacy levels are being threatened by the massive brain drain that has seen professionals leave the country for greener pastures, unemployment has reached crisis levels and, in general, the standards of living for the people of Zimbabwe have decreased dramatically. In a sense, Zimbabwe is contributing to the exacerbation of the poverty problem in SADC. As people escape Zimbabwe in droves, Zimbabwe has become the source of migrant labour, particularly for Botswana and South Africa which, as the better developed economies, have had to absorb the bulk of Zimbabwe's migration problem (HURISA 2007). As the other countries grapple with their own domestic problems, particularly unemployment, Zimbabweans contribute to the competition for jobs and opportunities leading to conflict and xenophobia as people fight for scarce resources.

Political cohesion in the region is the foundation of all integration – without it no integration effort can ever succeed. As SADC begins to show cracks in its approach towards Zimbabwe, it is threatening the political cement that binds the region together and poses a further challenge to regional integration. In recent months,

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<sup>44</sup> South Africa will be hosting the FIFA World Cup.

Botswana and Zambia, through its late president, Levy Mwanawasa, have come out as big critics of Zimbabwe's ruling party and its policies, in particular the contested March 2008 elections. Botswana's Ian Khama, in an unprecedented move, this year boycotted the SADC summit on 16 and 17 June in Johannesburg on the basis that Zimbabwe had also been invited; and Botswana has chosen not to recognise the current Zimbabwean Government (IRIN 2008; 'Botswana shuns Summit' 15 April 2008).

This illustrates clearly the urgent need for the resolution of the Zimbabwean crisis as its effects go to the deep of every regional integration initiative and negate SADC's core objectives. Once order and stability have been restored, it is unclear how the land situation will be resolved. A reversal of the land allocations will clearly not be welcomed by the poor, especially the rural electorate; at the same time, the agricultural economy, which once saw Zimbabwe as the breadbasket of Africa, has to be restored. How this challenge will be overcome, is unknown. Even if there is a complete reversal of the fast-track land reform in Zimbabwe, there will still be a need for land reform and resettlement. The Zimbabwean challenge also sends warning signals to the rest of the region with regard to land reform. While land grabs may be appealing to the general electorate and while they may score political points, the land question should not be taken lightly, otherwise it will destroy all the inroads that have been made towards regional integration. This also underscores the urgent need for the SADC Regional Land Reform Technical Support Facility, established under the Food, Agriculture and Natural Resources (FANR) Directorate, to be made operational as soon as possible. This Facility seeks to develop a regional land reform strategy, and if implemented properly, will go a long way towards preventing Zimbabwean style land reform in the region.

In principle, the case for land reform is watertight. The need for the urgent redistribution of land cannot be ignored. Had the Tribunal found in favour of the Zimbabwean government, there is ample evidence that the practice of compulsory acquisition of property is viable and well established in international law. But, however valid the concept of land reform, there are certain human rights norms that have to be adhered to in implementing it. The individual rights of a person must, at all times, be respected. There is no doubt that farmers in both South Africa and Namibia are apprehensive of a spill-over effect from the Campbell case. It does not help that

both these countries are in the process of attempting to expropriate land despite the fact that government's right to expropriate land is entrenched in both their constitutions. The compulsory expropriation of land has been met with resistance from some White farmers, and at the same time they have not been prepared to offer their farms for government acquisition and, where the farmers have been willing to sell, governments have been slow in responding or have waived their right to buy. This begs the question: how is the land situation going to be resolved?

Politics plays a very significant role in resolving the land issues. A judgment by the Tribunal in favour of the Zimbabwean government would have been construed as an exoneration of its efforts at fighting neo-imperialism and bestowing justice upon its people. On the other hand, as the Tribunal has delivered judgement in favour of the farmers, this will probably be seen as a vindication of their legal right to own land and not to have it compulsorily acquired, whatever the need, at least not without full compensation.

What makes the Campbell case so critically important for the future relevance of the SADC Tribunal and regional integration, especially as Namibia and South Africa also look to expropriation, is that land reform on its own, including the manner and form in which it has been carried out, cannot be neatly compartmentalised and decided upon without deciding on other core issues, such as the social and political landscape. So Zimbabwe's Land Reform Programme has been found in breach of Zimbabwe's SADC obligations, but how is it going to be modified to conform to such obligations? Three of the 78 farmers in the Campbell case had already been dispossessed of their farms at the time of the judgement and it was ordered that they be compensated by the Zimbabwean government. One can safely assume that these farmers were hoping for the restoration of their farms and that the Zimbabwean government cannot afford to pay them compensation in any case. What happens to all the farmers whose farms were their source of livelihood and who have been left with nothing? These are all the questions that that would have complicated the Tribunal's position but the judges neatly sidestepped such questions. Nonetheless, such issues will continue to dog Zimbabwe regardless of whether or not the Tribunal's decision is abided by.

The record of SADC in dealing with the Zimbabwe situation has not been impressive, to the extent that SADC can be said to have been complicit in the unravelling of Zimbabwe. President Mugabe has cleverly used the language of anti-imperialism to draw the support of SADC leaders, notably Sam Nujoma, former president of Namibia.<sup>45</sup> The whole land crisis has been skilfully turned into a struggle between Third World and First World countries. British protests at the land reform process and the decay of the rule of law in Zimbabwe are seen as veiled attempts to reinstate its imperialism (Phimister & Raftopoulos 2004: 386-389). Notably, the South African government under the leadership of former president Thabo Mbeki has been most supportive of Mugabe and his land policies, and has chosen to ignore the failure of democracy and the rule of law, preferring instead to use quiet diplomacy in dealing with the situation. At times the South African leadership echoed Mugabe's sentiments in lambasting Britain and the West as the root cause of all of Zimbabwe's social, economic and political ills (Phimister & Raftopoulos 2004: 390-396). This is particularly significant in view of the fact that South Africa is probably the only country in SADC that has the 'economic and political muscle to exert pressure on the Mugabe government' and the Zimbabwean government is heavily reliant on South Africa for its trade, oil and electricity supplies (Sachikonye 2003: 126).

SADC has largely been supportive of the Zimbabwean Government and has, to date, failed to condemn outrightly the human rights abuses that have accompanied the chaotic land reform programme. Only Zambia and Botswana have ventured to criticise Robert Mugabe and his government, but only in their country capacities and not on behalf of SADC.

Zimbabwe has violated a number of provisions of the SADC Treaty. Some of the reluctance to act might stem from the importance that is given to the concept of sovereignty by most African states which have resulted in the failure to establish strong regional bodies. By taking action against Zimbabwe, SADC states would be making themselves vulnerable to such actions themselves. This neglects the fact that integration as a principle entails the violation of sovereignty to a certain extent. In attempting to deal with the Zimbabwean situation behind the scenes, while expressing solidarity with Zimbabwe on the international front, SADC has set a

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<sup>45</sup> This alliance is also highly significant when one considers that Namibia is also a former settler colony grappling with iniquities in land redistribution.

dangerous precedent that would make it difficult to take action against Zimbabwe at the Summit. Unfortunately, the region has not yet achieved that level of political maturity where reprimanding the government of Zimbabwe is not construed to be an expression of support for its opposition. This is perhaps one of the reasons why there has been no action on Zimbabwe. In this regard the Campbell case presents a challenge to SADC. If the challenge is taken up and the Summit takes a stand against Zimbabwe this case would then constitute a critical development in the history of SADC and firmly establish the latter as a rules-based institution and should advance the prospects of regional integration. This will encourage and foster, among SADC members, a culture of respect for the many regional agreements that member states sign and never implement. Compliance by one of the region's powerful states will create a precedent of respect for the Tribunal's decisions and credibility. It is highly doubtful, however, if this will actually happen anytime soon, especially considering the immediate reaction of the Zimbabwean government to the ruling. Having said that, if Zimbabwe is again referred to the Summit for non-compliance with the Tribunal hearing, then the above will depend on the Summit and the action it takes pursuant to a referral from the Tribunal.

## **9. Conclusion**

For as long as it is unresolved, the issue of land in Southern Africa will be an emotional issue that is highly susceptible to manipulation from politicians. It will always create irrational inclinations towards harmful radical land reform programmes. The Zimbabwean situation is an example. The level of human rights violations that have come out of the process of land reform in Zimbabwe is unacceptable. This should not detract from the fact that unresolved land iniquities will foster anger and frustration from the landless, directed at those who have the resources. Unfortunately, race will always play a role because, as a legacy of the past political dispensations of minority rule, Whites own most of the resources, especially agricultural land.

While every attempt should be made to redress the wrongs of the past and also to achieve an equitable distribution of resources so as to fight poverty there is no clear direction on how these resources should be reacquired. The affected countries also have to grapple with other socioeconomic issues that affect its financial ability to

acquire land under the free market. Capacity constraints also stand in the way of the pressing need for land redistribution.

International law is conspicuously silent on how to deal with the acquisition of property of citizens in instances of former colonies where the states do not have resources to pay even minimal compensation and yet there is a need to acquire land to meet the urgent and growing public interest over this resource. The Campbell case is, at the end of the day, more than just a decision on the human rights abuses in Zimbabwe. It will be a judgment on land reform as a process and will determine how other SADC countries approach it as they have direction already on how not to do it.

As long as the crisis in Zimbabwe is not resolved, the progress of regional integration will be stalled. Poorly structured, land reform can also stunt economic growth and development. Under its current situation, Zimbabwe cannot effectively implement its obligations with regard to regional economic integration. The outcome of the Campbell case will enhance the credibility of SADC as a regional institution that is committed to democracy, human rights and the rule of law. These are some of the tenets that support economic integration and without which such integration cannot fully succeed.

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## Chapter 13

### Measuring regional trade integration in Southern Africa

Rigmar Osterkamp

#### Abstract

The paper is about to measure the status and direction of commodity trade integration of Botswana, Namibia and South Africa to the Southern African region. It employs a concept of *relative* trade integration to different regions of the world. Two results emerge: first, the degree of integration of Botswana and Namibia to the Southern African region is high, that of South Africa low. Second, with respect to the ongoing trends of trade integration, there seems to be more of a process of disintegration than of integration in Southern Africa.

#### Motivation and research question

Southern African regional integration ranks high on the political agenda of Southern African governments and of the international donor community as well. It has been intensively studied and monitored under a range of aspects. Fewer efforts, however, have been made to develop quantitative measures for the degree and speed of integration. Exceptions relate to the measurement of *convergence* of the Southern African countries with respect to, for example, income per capita, economic growth, inflation, external debt and aspects of the political systems. This paper is about the status and speed of *regional trade integration* of Southern African countries. 'Trade' is understood as trade in commodities. Other external economic relations like trade in services, capital flows, direct investments and migration are not considered here. The central question posed in this study is whether and to what extent a process of trade integration between Southern African countries is occurring.

#### Method

Trade integration is considered here as a situation (or status) and a process. Moreover, trade integration is understood in a relative way: a country's integration with regions of the world is measured by its trade share with these regions and by the change of these shares. An increasing trade share indicates an integration process,

while a decreasing trade share signifies a process of trade disintegration. Thus, an increase of trade flows, even in real terms, between a country and a specific region is not sufficient to constitute an increase in the degree of integration.

'Trade' between a country and a region is measured here as 'exports plus imports'. The data has been retrieved from the online Trade and Industrial Policy Strategies (TIPS) SADC Trade Database. From the commodity classifications provided there, only the two most condensed levels of information have been employed, namely the total over all goods (H0: All commodities) and the next level of 22 categories of commodities (C01 – C22). All data used arise in current US\$, as provided by the database. Three Southern African countries are considered: Botswana, Namibia and South Africa. The analysis concentrates on their trade relations with 21 regions of the world, as provided by the database. One of the regions is Southern Africa which consists of Botswana, Lesotho, Namibia, South Africa and Swaziland, i.e. the Southern African Customs Union (SACU) countries.

The changes of trade shares are based on a comparison of the earliest available information (Botswana: 1999, Namibia: 1998, South Africa: 1992) and the latest (2006 for all three countries). The number of years covered with trade information differs across the three countries. However, our question is not which of the countries made the quickest trade integration progress in the Southern African region. Such a question would have demanded the consideration of an equal number of years. Our question is, instead, whether an integration process – in the example of the three countries – is occurring or not. The higher the number of observations, the higher the validity of the conclusions. Thus, it seemed appropriate to use information for as many years as information is available. In order to reduce the influence of accidental values for the first and the last year, the (linear) trend values and not the factual ones have been used for the calculation of the trade shares.

## **Results**

At first, we consider the H0 level of all commodities and turn later to the disaggregated level of 22 groups of commodities. The three countries are treated one after the other.

*Highly aggregated analysis (H0, 'all commodities')*

Table 1 depicts the trade shares of Botswana with 21 regions of the world. With around 42% of its trade being conducted with the Southern African region, Botswana is highly integrated with this region. The share has practically not changed. However, in 2006 the country was more integrated with Northern Europe which makes up 50% of Botswana's trade. Moreover, Botswana's trade share with this region has increased considerably, by around 10 percentage points. Botswana's trade with Eastern Africa also has increased – however, from a tiny 3.3% to 3.6%. Also increasing but even less important is the trade share with South-Eastern Asia which developed from 0.1% to 0.3%. By contrast, trade shares with Western and Southern Europe have decreased. The decrease is relatively strong for Western Europe where the trade share came down from 8.2% to 0.3%. For Southern Europe the decrease was smaller (from 1.7% to 0.2%).

**Table 1: Botswana, trade shares with 21 regions, 1999 and 2006**

	1999	2006
Southern Africa	42,0%	41,6%
Northern Europe	40,3%	50,0%
Western Europe	8,2%	0,3%
Southern Europe	1,7%	0,2%
Northern America	1,1%	1,7%
Middle Africa	0,0%	0,1%
Eastern Africa	3,3%	3,6%
Eastern Europe	0,3%	0,1%
Eastern Asia	1,1%	0,9%
Australia and New Zealand	0,1%	0,1%
Western Asia	1,1%	0,5%
South America	0,0%	0,0%
South-Eastern Asia	0,1%	0,3%
South-Central Asia	0,1%	0,2%
Western Africa	0,0%	0,0%
Micronesia	0,0%	0,0%
Northern Africa	0,0%	0,0%
Other	0,3%	0,0%
Melanesia	0,0%	0,0%

	1999	2006
Polynesia	0,0%	0,0%
Central America	0,0%	0,2%
Sum	100,0%	100,0%

Sources: Trips SADC Trade Database, author's calculations.

The case of Namibia is depicted in Table 2. Namibia's trade share with Southern Africa was and is high but has considerably decreased, from 60.4% to 51.3%. Eastern Africa, on a much lower level, has likewise lost trade with Namibia which decreased from 1.4% to 0.9%. Other 'losers' are Western Europe and Northern America where the trade shares came down from 7.6% to 5.7% and from 5.1% to 4.1%, respectively. By contrast, trade with Northern Europe, Middle Africa and all four Asian regions increased. The strongest increase happened with Northern Europe where the trade share went from 9.9% to 14.7%. Middle Africa saw an increase from 2.8% to 3.9%. Namibia's trade with the Asian regions, starting from a low level, increased by some percentage points.

**Table 2: Namibia, trade shares with 21 regions, 1998 and 2006**

	1998	2006
Southern Africa	60,4%	51,3%
Northern Europe	9,9%	14,7%
Western Europe	7,6%	5,7%
Southern Europe	7,2%	7,8%
Northern America	5,1%	4,1%
Middle Africa	2,8%	3,9%
Eastern Africa	1,4%	0,9%
Eastern Europe	1,4%	0,2%
Eastern Asia	1,2%	5,9%
Australia and New Zealand	0,7%	0,2%
Western Asia	0,3%	2,1%
South America	0,3%	0,3%
South-Eastern Asia	0,2%	2,0%
South-Central Asia	0,2%	0,4%
Western Africa	0,2%	0,2%

	1998	2006
Micronesia	0,1%	0,0%
Northern Africa	0,0%	0,0%
Other	0,0%	0,1%
Melanesia	0,0%	0,0%
Polynesia	0,0%	0,0%
Central America	0,0%	0,0%
Sum	99,2%	99,9%

Sources: Trips SADC Trade Database, author's calculations.

Table 3, for South Africa, shows a much more 'equilibrated' picture. There seems to be a flaw in the data from Southern Africa: the trade share for 2006 amounts to 0.3% only. South Africa's trade share with Eastern Africa, by contrast, is much higher (19.9% in 2006) and has considerably increased (from 15.3% in 1992). Only trade with Western Europe is more important – but it has decreased. In 1992 it stood at 23.3% and went down to 20.0%. Trade with Western Africa and Middle Africa as well as with the four Asian regions increased by between one and four percentage points. The low figures for trade with Southern Africa and the high figures for 'Other' may lead to the speculation that both categories may have been mixed-up. If this is so, South Africa's trade with other Southern African countries would have shrunk dramatically during 14 years, namely from 20.8% to 4.8%.

**Table 3: South Africa, trade shares with 21 regions, 1992 and 2006**

	1992	2006
Southern Africa	0,0%	0,3%
Northern Europe	9,7%	9,1%
Western Europe	23,3%	20,0%
Southern Europe	5,4%	5,2%
Northern America	10,9%	9,6%
Middle Africa	0,7%	1,4%
Eastern Africa	15,3%	19,9%
Eastern Europe	5,7%	4,9%
Eastern Asia	0,3%	1,4%
Australia and New Zealand	0,9%	2,3%

	1992	2006
Western Asia	2,2%	6,2%
South America	1,7%	2,6%
South-Eastern Asia	2,1%	4,0%
South-Central Asia	0,4%	4,5%
Western Africa	0,2%	2,3%
Micronesia	0,0%	0,0%
Northern Africa	0,1%	0,7%
Other	20,8%	4,8%
Melanesia	0,0%	0,0%
Polynesia	0,0%	0,0%
Central America	0,2%	0,6%
Sum	100,0%	100,0%

Sources: Trips SADC Trade Database, author's calculations.

A résumé on the basis of the 'All commodities' consideration comes to the following conclusion: Botswana and Namibia are strongly integrated into the Southern African region with at present around 40% and 50%, respectively of their total trade. However, Botswana is even more integrated with Northern Europe (50%) and has increased this share (from 40.3%) while Botswana's trade with Southern Africa stagnates. Namibia's trade with Southern Africa even went down by nine percentage points while the country increased its trade shares with Middle Africa and all four Asian regions. South Africa has managed to increase its trade shares with practically all of those regions with which trade was still rather insignificant in 1992. The development of South Africa's trade shares with Southern Africa is – due to possibly flawed data – not clear. But the main increases in trade shares happened in many (high-growth) regions of the world, and probably not just in the Southern African region.

Thus, the 'all commodity' consideration of trade shares comes to the conclusion that the countries analysed seem to disintegrate from Southern Africa rather than to integrate into that region.

*Disaggregated analysis (C01 – C22)*

The Southern African disintegration picture emerging from the view on overall trade (H0) is now to be looked at in more detail by considering 22 commodity groups (C01 – C22). The results are presented in Tables 4 – 6 which show the change of trade shares for each of the commodity groups. An increase of the trade share indicates a case of integration, a decrease a case of disintegration. The Annex Table provides a rough (the official) characterisation of the commodity groups.

Table 4 relates to Botswana. While Botswana's overall trade (H0) with Southern Africa decreased (slightly), there are 16 commodity groups out of 22 which indicate an integration process. However, only five commodity groups experienced a two-digit increase with Southern Africa. These are: live animals (C01), fats and oils (C03), leather products (C08), paper products (C10) and works of art and antiques (C21). By contrast, disintegration processes occurred for metal products (C15), textile products (C11) and chemical products (C06). Strong integration processes into regions other than Southern Africa occurred for textile products (C11, with Northern America), metal products (C15, with Northern Europe), arms and ammunition (C19, with Southeastern Asia).

**Table 4: Botswana, change of trade shares by 22 commodity groups, 1999 – 2006**

Commodity group	Change of trade shares with Southern Africa	(Dis)Integration from/with Southern Africa	Most increasing trade shares with:*
C01	<b>20,1%</b>	Integration	Southern Europe (1.7%)
C02	9,2%	Integration	Eastern Asia 1.0%)
C03	<b>17,2%</b>	Integration	South America (4.0%)
C04	5,7%	Integration	South America (0.3%)
C05	-4,9%	Disintegration	Northern Europe (7.9%)
C06	-3,3%	Disintegration	Northern Europe (2.8%)
C07	4,3%	Integration	Eastern Asia (2.2%)
C08	<b>38,1%</b>	Integration	Eastern Asia 1.9%)
C09	0,9%	Integration	Eastern Asia (0.3%)
C10	<b>11,8%</b>	Integration	Western Asia (0.5%)
C11	-10,1%	Disintegration	Northern America (23.7%)

Commodity group	Change of trade shares with Southern Africa	(Dis)Integration from/with Southern Africa	Most increasing trade shares with:*
C12	3,5%	Integration	Northern Europe (0.6%)
C13	-2,3%	DisIntegration	Eastern Asia (2.9%)
C14	0,4%	Integration	Northern Europe (16.0%)
C15	-32,5%	Disintegration	Northern Europe (40.3%)
C16	7,8%	Integration	Western Europe (0.9%)
C17	3,6%	Integration	South-Easternt Asia (1.9%)
C18	0,6%	Integration	Northern America (3.7%)
C19	3,8%	Integration	South-Eastern Asia (60.5%)
C20	1,5%	Integration	Eastern Asia (2.3%)
C21	<b>32,3%</b>	Integration	Australia, NZL (34.2%)
C22	-15,2%	Disintegration	Northern Europe (33.2%)
		* in brackets: increase in percentage points	

Sources: TRIPS SADC Trade Database, author's calculations.

The results for Namibia are contained in Table 5. As we have seen, Namibia's overall trade (H0) with Southern Africa has decreased considerably. On the level of commodity groups, this is reflected in a majority of commodity groups to show decreasing trade shares with Southern Africa (13 out of 22). Considerable increases of trade shares only occurred in a handful of commodity groups: leather products (C08), photographic instruments, clocks and musical instruments (C18), and live animals and animal products (C01). Most articulated disintegration processes developed, for example in metal products (C15), pearls and precious stones (C14), chemical products (C06), and vegetable products (C02). Regions other than Southern Africa, by contrast, saw increasing shares of Namibia's trade. The most pronounced cases are: arms and ammunition (C19, Eastern Asia), pearls and precious stones (C14, Northern Europe), and metal products (C15, Southern Europe).

**Table 5: Namibia, change of trade shares by 22 commodity groups, 1998 – 2006**

Commodity group	Change of trade shares with Southern Africa	(Dis)Integration from/with Southern Africa	Most increasing trade shares with:*
C01	9,8%	Integration	Middle Africa (5.4%)
C02	-17,0%	Disintegration	Western Europe (9.7%)
C03	-2,3%	Disintegration	Middle Africa (2.6%)
C04	2,3%	Integration	Middel Africa (2.5%)
C05	-7,2%	Disintegration	Northern America (17.0%)
C06	-26,8%	Disintegration	Northern America (16.4%)
C07	-7,0%	Disintegration	Middle Africa (5.8%)
C08	22,3%	Integration	Southern Europe (5.9%)
C09	-11,2%	Disintegration	Northern Europe (3.8%)
C10	6,6%	Integration	Northern Europe (0.7%)
C11	-11,9%	Disintegration	Northern America (13.3%)
C12	11,2%	Integration	Middle Africa (0.5%)
C13	-1,9%	Disintegration	Middle Africa (3.9%)
C14	-27,1%	Disintegration	Northern Europe (36.7%)
C15	-42,6%	Disintegration	Southern Europe (22.8%)
C16	1,9%	Integration	Middle Africa (1.4%)
C17	7,8%	Integration	Eastern Asia (11.0%)
C18	17,3%	Integration	Middle Africa (0.9%)
C19	4,7%	Integration	Eastern Asia (74.5%)
C20	-13,6%	Disintegration	Middle Africa (15.7%)
C21	-4,0%	Disintegration	Northern America (10.8%)
C22	-10,9%	Disintegration	Western Europe (9.1%)
		* in brackets: increase in percentage points	

Sources: TRIPS SADC Trade Database, author's calculations.

South Africa's trade with Southern Africa – as recorded in the database – is implausibly low, not only on the H0 level but on the more disaggregated level as well. Thus, Table 6 informs about the regions with which South Africa's trade has increased most for each group of commodities. The highest increase occurred for trade with Western Europe in works of art and antiques (S21), followed by Southern America (fats and oil, S03) and Eastern Asia (wood products, S09; footwear,

headgear and umbrellas, S12; textile products, S11), Western Asia (mineral products, S05), Southern America (live animals and animal products, S01) and, again, Eastern Asia (pearls and precious stones, S14).

**Table 6: South Africa, regions with highest increase of trade shares, by commodity group, 1992 -- 2006**

Commodity group	Most increasing trade shares with:*
S01	Southern America (18.6%)
S02	South-Central Asia (5.1%)
S03	Southern America (23.6%)
S04	South-Central Asia (4.4%)
S05	Western Asia (18.8%)
S06	Australia, NZL (5.8%)
S07	Eastern Asia (2.4%)
S08	Eastern Asia (14.1%)
S09	Eastern Asia (23.0%)
S10	Western Europe (4.9%)
S11	Eastern Asia (15.6%)
S12	Eastern Asia (22.2%)
S13	Eastern Asia (10.3%)
S14	Eastern Asia (18.6%)
S15	South-Central Asia (3.1%)
S16	Eastern Asia (4.0%)
S17	Australia, NZL (6.8%)
S18	South-Eastern Asia (2.0%)
S19	n.a.
S20	Western Europe (10.3%)
S21	Western Europe (56.7%)
S22	Western Asia (17.4%)
* in brackets: increase in percentage points	

Note: For South Africa, the official enumeration of the commodity groups uses an 'S' instead of a 'C'.

Sources: TRIPS SADC Trade Database, author's calculations.

On the basis of the more disaggregated view the following résumé can be drawn. Botswana's overall trade integration process into the Southern African region

stagnates, albeit on a high level. It is therefore plausible to find several of the 22 commodity groups with increasing, partly significantly, increasing trade shares. Namibia's overall pattern is one of disintegration. On the more disaggregated level this is reflected by a low number of commodity groups with significantly increasing trade shares. Here, the disintegration pattern dominates. Due to limitations of the database, the interpretation of the South African trade pattern with respect to Southern Africa is less clear. However, what can be stated is that 12 out of 22 commodity groups experienced a two-digit increase of trade shares with regions other than Southern Africa. This may be taken as a plausible indication that South Africa is at least not strongly integrating into the Southern African region.

### **Two caveats**

Two caveats are in order. The high trade integration of Botswana and Namibia to the Southern African region – that is, primarily to South Africa – may stem from a particular way of trade flow recording: goods supplied by South African (e.g. wholesale) firms to Botswana or Namibia are apparently recorded as imports from South Africa, irrespective of whether these goods originated from South Africa or elsewhere. It may even be possible that goods are recorded as imports from South Africa which have been ordered by Botswana or Namibia directly from overseas suppliers but passed solely through the territory of South Africa to the final destination. Thus, the status of high integration of Botswana and Namibia with the Southern African region may partly be the effect of a particular way of recording trade flows and may not reflect the true origin of goods.

The second caveat relates to the astonishingly low value for South Africa's trade integration with the Southern African region. This may partly be explained by obvious irregularities in the trade figures contained in the database. For example, in six of the 15 years for which information is provided, South Africa's export to the Southern African region is said to be '0' (zero), namely in 1997, 1998, 2003, 2004, 2005 and 2006. In other years export values change from thousands to millions of US dollars. South Africa's import from the region is around US\$750,000 for 2004, while it is US\$ 43 million for 2005.

## **Conclusions**

Two main conclusions may be drawn. First, in terms of the status of commodity trade, the importance of the Southern African region for Botswana and Namibia is rather high, however diminishing. Moreover, the importance may be even exaggerated due to specific trade recording practices. For South Africa, most plausibly, the region only plays a minor role, although this does not follow explicitly from the data provided in the database.

Second, in terms of current trends of commodity trade, Botswana and Namibia are disintegrating from Southern Africa. Their trade relations with Northern Europe and Asia are developing much quicker. South Africa's trade with the region may increase but on a low level. The analysis on a more disaggregated level fits plausibly into this pattern. Some commodity groups indicate an integration process, but most do not.

Thus, in terms of commodity trade and employing the concept of relative integration, the conclusion seems to be unavoidable that there is more of a process of disintegration than of integration occurring in Southern Africa.

## **Questions not raised in this paper and further research**

The paper started by recognising that Southern African economic and political integration is high on the agenda of Southern African governments and even of donor countries. Such a priority is rather plausible on political grounds. However, the economic rationale may be assessed differently. An integration process in relative terms, as understood here, is a zero-sum game. Integration into Southern Africa means necessarily disintegration into other regions. From an economic point of view, the question must be asked: what are the costs – direct costs and foregone chances – of integrating into the Southern African region instead of integrating into other regions of the world?

However, as the analysis shows, at least in the case of external trade in commodities, there is obviously no significant integration process taking place, but rather the contrary. This may partly be the result of a political wish – known to exist at least in Namibia – to loosen the high degree of trade integration with South Africa, rightly understood as trade dependence, and to intensify external trade with countries

of regions other than South Africa. Thus, a next step of this line of thought could be to ask what the integration/disintegration trade pattern looks like when one excludes South Africa and only considers the trade relations between Southern African countries other than South Africa. Moreover, instead of 'Southern Africa' one could analyse the integration/disintegration pattern of SADC countries.

## References

Bösl, A. et al. (eds.). 2000–2007. *Monitoring Regional Integration in Southern Africa*. Stellenbosch: tralac.

**Annex Table: Description of commodity groups: H0 and C01 – C22**

H0: All commodities
C01: Animals (live) and animal products; Section I
C02: Vegetable products; Section II
C03: Fats and Oils (animal or vegetable); Section III
C04: Prepared Foodstuffs; Beverages; and Tobacco; Section IV
C05: Mineral Products; Section V
C06: Chemical products; Section VI
C07: Plastics and Rubber; Section VII
C08: Leather products; Section VIII
C09: Wood products; Section IX
C10: Paper products; Section X
C11: Textile products; Section XI
C12: Footwear; Headgear; and Umbrellas; Section XII
C13: Stone; Cement; and Glass products; Section XIII
C14: Pearls and precious stones; Section XIV
C15: Metal Products; Section XV
C16: Machinery; Section XVI
C17: Vehicles; Aircraft; and Vessels; Section XVII
C18: Photographic instruments; Clocks; and Musical instruments; Section XVIII
C19: Arms and Ammunition; Section XIX
C20: Furniture; Toys; and other products; Section XX
C21: Works of Art and Antiques; Section XXI
C22: Commodities not elsewhere specified XXII

Source: TIPS, SADC Trade Database.

*Chapter 14*

**Fundraising or common foreign policy?  
30 Years of SADC Consultative Conference**

Martin Adelman

**1. Regional integration: the external dimension**

Regional organisations as well as academics studying regional integration have so far overwhelmingly focused on intra-regional issues, such as the relationship between the member states and the regional centre or specific areas of regional cooperation (e.g. trade integration and infrastructure). However, with the move towards deeper integration and the quest for adding new links to the emerging global governance network the dimension of external relations of regional organisations has come into focus (Hänggi et al. 2006). While it can be assumed that the impact of weak regional organisations on the global system is minor, it can also be assumed that inter-regional, trans-regional, and state-to-region links potentially have a significant influence on organisations such as the Southern African Development Community (SADC). In this regard Hänggi (2003) proclaims the thesis of “regionalism through inter-regionalism”, i.e. the fostering of regionalism through the influence of external actors.

Despite its general weak actor quality, SADC has tried, especially since the 1990s, to establish a network of external relations through its Secretariat, member states' ambassadors, and bilateral forums. However, many of these initiatives were discontinued in the new millennium due to the administrative chaos following the 2001 reform or due to political reasons (Adelman 2007). The failure to consolidate bilateral inter-regional links thus draws even more attention to an institution that is unique among regional organisations (which goes back to a time when external relations were not a common topic for regional organisations): the SADC Consultative Conference (CC). As the conference in 2009, can look back to a 30-year history as SADC's main external relations forum, this article aims to shed some light on the historic development, the changing purpose and the future prospects of

the Consultative Conference. Following a chronological approach, the article explores the crucial role the CC plays in SADC's past and future regional integration.

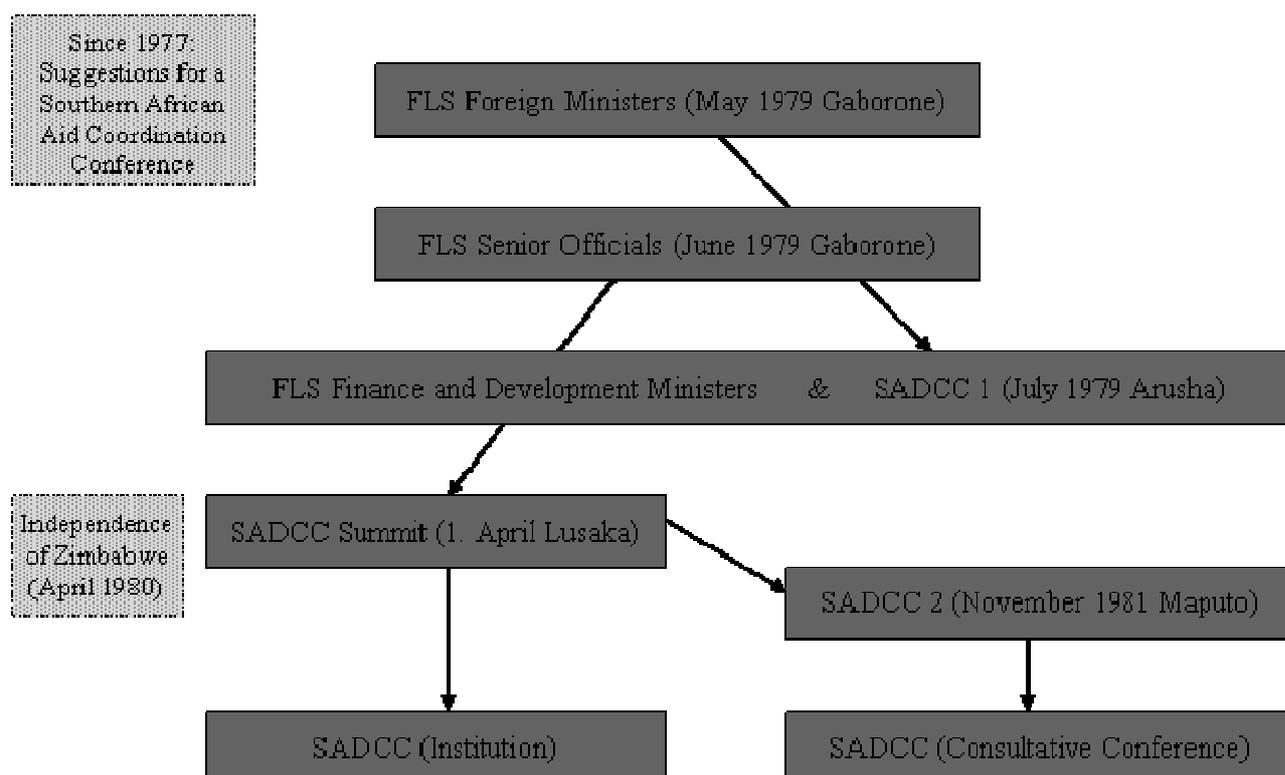
## **2. The rise and decline of the Consultative Conference**

The history of the SADC Consultative Conference can be traced back almost 30 years, thus even preceding SADCC itself. Its founding is closely connected to the political situation at the time. At the end of the 1970s, the region was a political hotspot characterised by the fight against minority governments and civil wars. Economically, falling commodity prices and widespread poverty mirrored the bleak political picture. While the Frontline States (FLS) sought economic stabilisation and a firm stance against apartheid, the western world aimed at regional stability and maintaining its influence without compromising its political and economic ideology. Both interests were served by the idea of a Southern African Aid Coordination Conference (SAACC), which was supported among others by individuals from the European Community (EC), the Commonwealth and the Ford Foundation, and which led to some informal talks (Mandaza and Tostensen 1994: 19ff). The looming independence of Zimbabwe and the question of its future political orientation as well as a possible redistribution of donor money towards this country, prompted the FLS at the Gaborone meeting of 1979 to call for a joint conference of the FLS and the main international donors, as the late Botswana President Sir Seretse Khama (1981: xi) recalled: "in May 1979 Foreign Ministers of the FLS met in Gaborone and decided that a conference of Economic Ministers should be convened at Arusha, to which representatives of bilateral and multilateral external cooperation agencies and institutions should be invited to express their views on our proposed programme of action."

Two months later the first Southern African Development Co-ordination Conference (SADCC 1) took place in Arusha. During the preparation for the Arusha conference and in a separate FLS meeting preceding it, the idea of a permanent regional institution was born and worked out. Hence, on 1 April 1980, regional leaders met in Lusaka for the founding of SADCC as a regional institution. The Lusaka meeting also decided to institutionalise the idea of a joint development coordination conference

with donors and made reference to it in the founding *Lusaka Declaration*.<sup>[2]</sup> Thus, the idea of the joint Southern African Aid Conference (Arusha 1979), later named Consultative Conference, and the founding of the Southern African Development Coordination Conference (SADCC) as a permanent regional institution (Lusaka 1980), are inherently interwoven (Figure 1). The CC as well as the external actors involved in it can therefore be seen as a midwife to the regional organisation.

**Figure 1: The Origins of SADC and SADCC Consultative Conference**



Source: Own compilation.

After the successful start in Arusha 1979 the Maputo Conference 1981 saw a first round of major financial pledges to SADCC (Table 1). Initially, SADCC and the Consultative Conference were dependent mainly on the group of like-minded states and the EC (Table 2).

<sup>[2]</sup> The SADCC Lusaka Declaration states in this regard: “It is envisaged that Southern African Development Coordination meetings of member Southern African States and other invited participants should be held annually.”

**Table 1: Pledges at SADCC 1 (Maputo 1980)**

Donor	Amount (US\$ m)
Australia	1
Germany (Federal Republic)	2
Finland	6
Norway	6
Belgium	8.5
Denmark	10
Italy	15
UNDP	20
Sweden	22
Netherlands	32
US	50
EC	100
African Development Bank	384
<b>Total Amount<sup>[3]</sup></b>	<b>656.5</b>

Source: Braun 1984, based on SADCC: Record of the Ministerial Meeting held in Maputo, Mozambique on 26 November 1980 and reconvened on the afternoon of the 28 November 1980, Annex VI.

**Table 2 Share of Foreign Contribution to SADCC by Partners 1980-87**

Donor country	\$ m	%
Nordic States	405	24
Italy	199	12
EC	192	11
USA	154	9
Canada	134	8
France	127	8
African Development Bank	109	6
World Bank	56	3
Arab States	55	3
UK	48	3
Netherlands	45	3

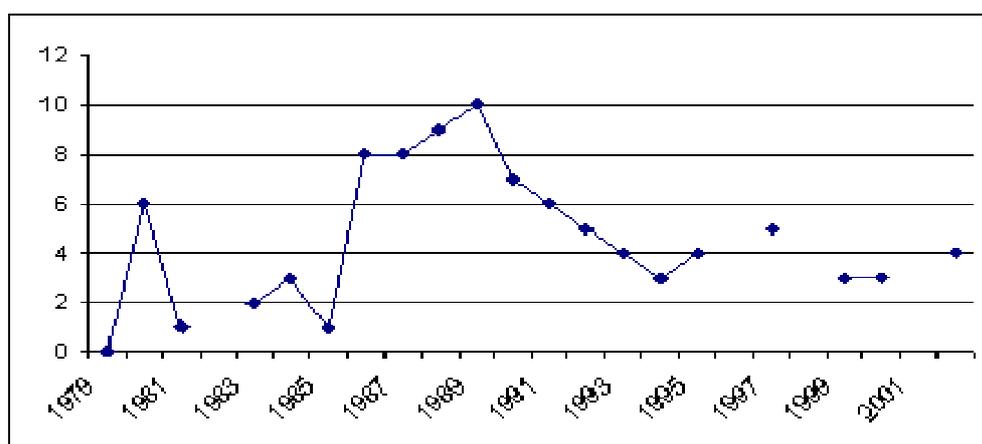
<sup>[3]</sup> Austria, Brazil, Canada, France, the GDR, the UK, Switzerland, Venezuela, Yugoslavia, the BADEA, the Kuwait Fund, the OPEC Fund and the World Bank did not specify their support pledge.

Donor country	\$ m	%
Portugal	43	3
Japan	27	2
West Germany	22	1
China	18	1
Austria	11	1
Others	41	2
<b>Total</b>	<b>1.686</b>	<b>100</b>

Source: Hanlon 1989 : 40.

However, from the mid-1980s on, SADCC was able to raise its profile: the traditional supporters signed formal cooperation agreements, the main Western powers gave up their hostility towards the organisation, and the Eastern Block decided to join the Conference in order to counterbalance Western influence (Figure 2). The rising number of states as well as the number of ministers and vice-ministers participating in the CC are a clear indication of the high level profile of the Conference in the late 1980s (Figure 3).

**Figure 2: Participation of the Communist Block<sup>[4]</sup> in the SADC Consultative Conference**

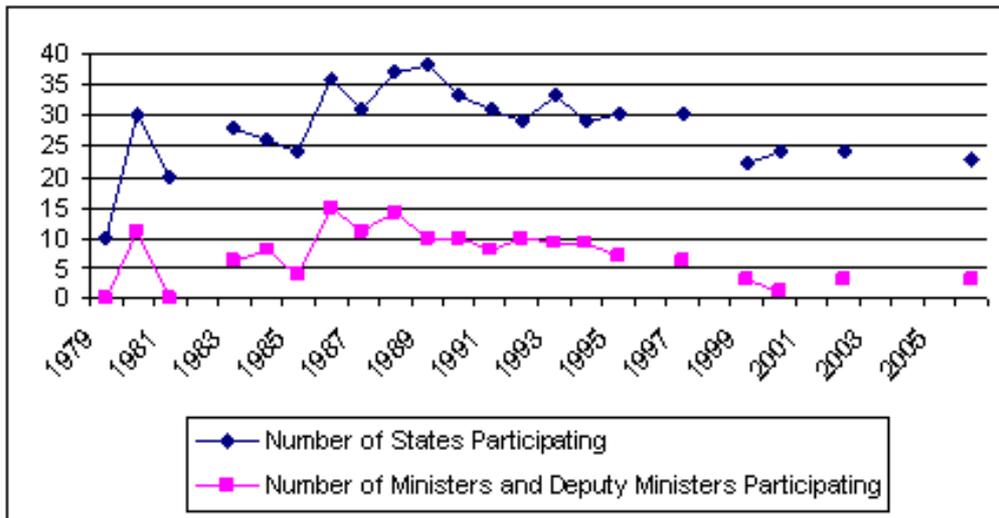


Source: Own compilation based on: SADC: Record of the Consultative Conferences. Several volumes.<sup>[5]</sup>

<sup>[4]</sup> Including, the Eastern European states of the CMEA and also Yugoslavia, Cuba, China, and North Korea.

<sup>[5]</sup> No list of participants is available for the 1996 Conference. In 1982, 1998, 2001, 2003, 2004 and 2005, no conference was held.

**Figure 3 Number of non-SADC states and ministers/deputy ministers participating in the Consultative Conference 1979-2006**



Source: Own compilation, based on: SADC Record of the Consultative Conferences. Several volumes.

In 1989 Hanlon (1989: 42) observed that “the international community increasingly thinks SADCC” and Green (1989: A28) noted that “SADCC annual conferences have their limitations, but they do work. Co-operating partners have put them in their calendar and do come prepared to discuss and to make at least tentative commitments. The sectoral papers provide a target date and a showcase for new projects, and the lead paper and chairman’s speeches play a similar role for main policy priorities and regional political economic perceptions. SADCC’s image is publicized internationally and regionally.”

But after a successful first decade, the status of the CC declined in the 1990s. In 1993, the Secretariat warned the Council in a briefing document (SADC 1993: 459 and 461) about “the noticeable declining trend in the level of representation and in attendance over the past five conferences... Certainly, fewer ICP Ministers and directors have been coming than in the past. In some cases delegations are being headed by Senior Officials and Ambassadors, and comprise embassy staff where this used be largely Ministers and Senior Officials from the capitals of the invited ICPs... The result has been a lowering in the status of the conferences...The absence of ICP Ministers, in significant numbers should be viewed by SADC as a worrying trend that needs to be addressed”.

As SADC depends heavily on donor funds, the declining status of the Conference presented a threat to the whole organisation. The reasons for the decline are manifold and can be found within but also outside SADC:

First, and most important, are changes in the international environment, notably the end of the Cold War and of the major regional conflicts, which led to a declining interest by the international cooperation partners in the region. Now the partners neither had to outcompete a global rival nor did they have to find ways to balance their policy with regard to the apartheid state. SADC therefore lost its strategic political relevance for the International Cooperation Partners (ICPs).

Secondly, the CC suffered because SADC's relationship with the ICPs had become routine and was no longer confined to the highlight of an annual CC meeting. Development funds were allocated to SADC through ordinary bilateral bureaucratic procedures. In addition, the two most important partners, the Nordic countries and the EU, had established their own bilateral cooperation frameworks: the Nordic-SADC-Initiative (NSI) 1986 and the Berlin Initiative 1994. While these inter-regional initiatives can be seen as an offspring of the CC and occasionally held meetings concurrently with the CC, they nonetheless contributed to a downgrading of the CC, as they presented alternative platforms for high-level political dialogue. The maturity of SADC thus included a loss of functional relevance for the CC.

A third problem was the general frustration of donors with SADC's record of implementation. Only a fraction of the visions and high-flying action plans discussed at the CC translated into concrete projects. The EU's criticism in 1990 that "SADCC has performed very poorly in terms of the disbursement of the Lomé III resources" (SADC 1991:75) is valid and well documented in an independent audit study as well as in SADC documents. The problem of unspent funds continued in the 7th European Development Fund (EDF) so that in 1993 the Council noted with regard to the upcoming 8th EDF that "at this rate it would be difficult for SADC to ask for more resources from the EC" (SADC 1993:38) and that "SADC is losing credibility and risks losing the support of cooperation partners" (Ibid.:39). The SADC Secretariat even spoke of a "poisoned ... atmosphere of cooperation" and warned that "it is now very possible that negative reports on the implementation of the SADC Programme of Action by agency offices in the region back to their capitals could contribute

negatively to the attitudes towards SADC at head offices and could result in more Ministers and directors reviewing their attendance of the consultative conference” (SADC 1993: 462). This lack of performance can mostly be attributed to the decentralised SADC structure, which failed to smoothly administer and implement donor funded projects. The questioning of the developmental function of SADC by the donors was in effect a death threat to the CC.

Finally, the management of SADC-ICP relations and the management of the CC itself also posed problems. SADC failed to establish a satisfactory level of information exchange and consultation with ICPs in-between the meetings and the Conference itself did not do much to facilitate dialogue either. Most of the time at the early conferences was spent on reading out prepared speeches that focused either on past and future pledges or on general topics concerning the north-south relationship. In short, delegates spent a whole day listening to expressions of good will. The half-day working group sessions, which were meant to facilitate dialogue, often suffered from organisational problems, low attendance rate, and unprepared participants as the following note from the Secretariat reveals (SADC 1992:441):

[O]ver the years, concern by both the Secretariat and some of the cooperating partners has been raised over the management of the Sectoral Working Groups, and over the issues that are presented for discussion. The Secretariat has, on a number of times, excluded the proceedings of these consultation meetings from the overall conference Proceedings because most records, like the meetings themselves lacked substance.

Our observations from attending these Working Groups are that most Sectors simply reproduce their sectoral programmes, and then present these verbally. There is no engagement of the cooperating partners on the policy issues that underpin the programmes, no analysis of the operational constraints to efficient project implementation and management, and above all else, there is general lack of touch with issues affecting each project implementation, resulting in rather poor response to questions raised...

There is no doubt too that problems of logistics have also been a contributing factor as there has been unclarity regarding the venues for various meetings. The absence of agendas and distribution of documents late has not helped the

situation. Most participants are, therefore, ill-prepared to engage fully the issues presented for discussion.

The cooperation partners too, are not free of blame. ... some cooperating partners have tended to seek to present set-statements about the role their countries have played in SADC's Programme of Action, instead of responding to issues on the agenda. Others have tended to limit their intervention to subjects that are more sensational or pet subjects, and thus fail to embrace the full context of the dialogue. Most simply sit through the meetings and say nothing.

Frustrating experiences resulting from mismanagement therefore led to a decline in the personal relevance of the CC for high ranking delegates and to lower incentives to attend the following year. In combination, the multiple decline in relevance led to a crisis of the CC in the 1990s that threatened the future existence of the once shining event.

#### **4. Caught between fundraising and political dialogue**

Even more fundamental than the problems discussed above, is the underlying problem of the imprecision inherent in the double function of the CC. According to the 1980 Maputo conference document, the CC aims to fulfil two basic objectives (Kgaraebe 1981:14): "to secure firm pledges from governments and funding agencies for financial and technical support for regional projects ... [and] to explain to the international community SADC's strategy for the region as a whole and to share their thinking on matters of vital and long range importance for the future of SADC".

While the early conferences tended to focus either more on pledging (Maputo 1980, Lusaka 1984) or on policy review (Arusha 1979, Bлатыre 1981, Maseru 1983), it is clear from speeches and SADC documents that by and large the pledging aspect dominated. Success and failure of the CC were often seen in relation to the number of new pledges received. In an internal review in 2000 SADC (2000:418) stated outright: "Given SADC's dependence on donor funding for carrying out its Programme of Actions, the Consultative Conferences were designed, in particular, to highlight funding gaps for priority projects and seek financial support to fill the gaps". However, the idea of a donor conference was only initially successful; after a while pledges decreased and the ICPs lost interest in the pledging circus.

The focus of the second objective, political consultation, was always twofold. Initially the focus was on SADCC itself. The *Lusaka Declaration* envisaged the Conference as “a mechanism for surveying results, evaluation performance identifying strengths and weaknesses and agreeing all future plans”. The debate on SADC’s policies and structures also remained a topic later on, especially with regard to the structural reform and the Regional Indicative Strategic Development Plan (RISDP). Thus, while SADCC was founded to decrease dependency (on RSA and the donors), it is clear that through their financial assistance donors always had an indirect say in SADC affairs.

But the political consultations also had an outward looking dimension, as the CC served as a platform for international diplomacy. Apartheid South Africa was, of course, the most prominent foreign policy issue discussed. With the presence of the ANC, PAC and SWAPO, the conference served as a platform for the liberation movements as well as for a show of solidarity by the independent states. For example, at the Harare Conference (1986), “the chairman issued the first major denunciation of the Reagan Administration hosting of and restoration of military aid to Jonas Savimbi’s Unita as an act of destabilization and aggression in league with SA” (Green 1987: A104). The Gaborone Conference (1987) final communiqué “condemned the continued South African aggression against the SADCC member States and the deepening repression which is taking place inside South Africa itself” and furthermore called upon the international community to redouble its efforts to secure a just and lasting solution to the problems of Southern Africa (SADCC 1987:244). Besides the regional issues, conference speeches from both SADC and ICP also referred to general North-South issues: The fight for a New International Economic Order, debt relief, the 0.7% aid promise or, more recently, aid effectiveness. While it did not play a central role, the CC still served as a mirror of the international North-South trends of the time.

While the CC served as a platform for official foreign policy statements, it also offered the possibility of high-level informal talks. Politically sensitive issues could be informally discussed and networks were built. With regard to SADC’s programme, informal talks contributed to a rationalisation of SADC-ICP relations. The relevance of these informal talks did not go unnoticed by SADC (1993: 459): “A very important aspect of the Conference is the holding of bilateral meetings sometimes in the

corridors of the Conference Centres among the ICPs themselves ... or between ICPs and Ministers and Officials of SADC member States on SADC and on bilateral issues”.

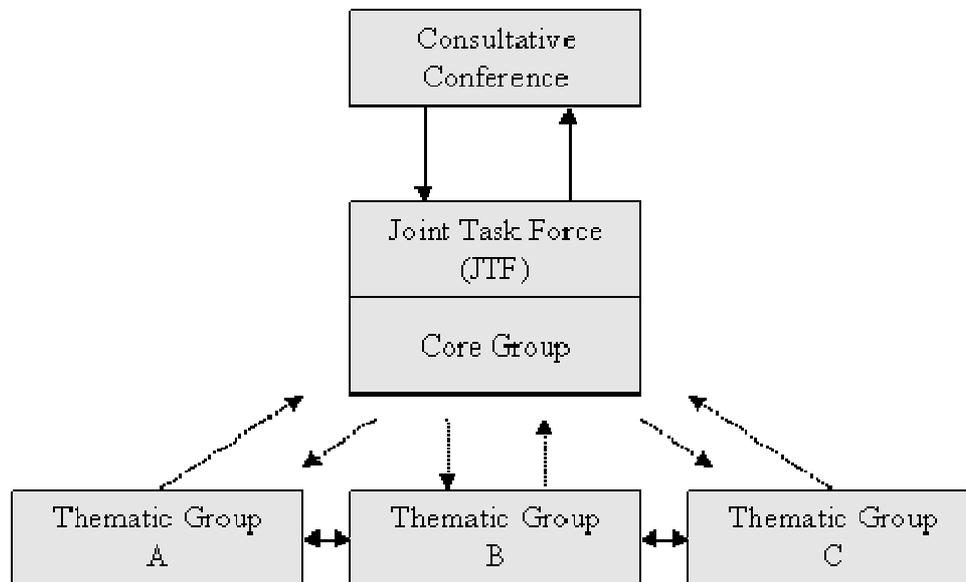
In addition to the problems discussed earlier, it is the wavering between conflicting goals that led to a crisis of the CC which peaked in 1998 when, for the first time, no conference was held. Besides some improvements in conference proceedings, SADC's answer to the crisis was to steer the conference away from unilateral pledges and speeches towards a platform where real dialogue could take place. Symbolically, the event was renamed from 'donor conference' to 'annual conference' and later 'consultative conference'. The time for plenary speeches was cut to give more room for direct interaction in working groups. Thematic background papers prepared by SADC were meant to provide the basis for discussion. To further strengthen the consultative character, the range of participants was broadened to civil society and business members. In 1996 SADC even experimented by holding the CC in the form of an investment forum, but discontinued this approach. Yet, while the reforms pointed in the right direction, many of the old habits persisted and the CC continued to decline. Thus, finally, in 2001, SADC undertook the remarkable step of formally eliminating the objective of receiving new pledges at the conference and to concentrate on bi-annual consultations in the future (SADC 2000:418-425, SADC 2001:57-58). The pledging circus had come to an end. But could the conference be sustained as a mere discussion forum?

## **5. A New SADC-ICP Partnership?**

After SADC-ICP relations had hit rock bottom at the end of the 1990s, the 2001 SADC structural reform and the strategic plans (RISDP and SIPO) as well as the OECD debate on aid effectiveness gave donors incentives to make a fresh start. In October 2003, a Joint Task Force (JTF) was established “to improve coordination between ICPs and SADC” (SADC 2004). The day-to-day work of SADC-ICP cooperation is handled by a Core Group of major Gaborone-based donors led by the EC and the SADC Secretariat. While the JTF serves as a clearing house for information exchange and the general steering of SADC-ICP relations, a number of thematic groups have recently evolved around major cooperation areas such as

water, trade and HIV/AIDS, where donors and SADC staff discuss issues of donor support in the respective sectors.<sup>[6]</sup>

**Figure 4 Structure of SADC-ICP Cooperation**



Source: SADC 2006: Thematic Coordination. Unpublished working paper.

The JTF has successfully worked out a new framework document: the *Windhoek Declaration on a New SADC-ICP Partnership* which spells out objectives and responsibilities of a future SADC-ICP partnership and which was launched at the 2006 Consultative Conference.

On the technical level of aid delivery, the new SADC-ICP structure has the potential to improve aid delivery in terms of the Paris Declaration (Tjonneland 2006 and 2008, EU/Ecodes 2005). The set-up of a donor matrix and thematic working groups will advance donor harmonisation and alignment with SADC strategies. In addition to the chance of increased aid effectiveness, a donor-harmonised approach can also take some bureaucratic weight off the Secretariat, which has hitherto had to deal with about 25 different donors each following different procedures. The ICPs promised in Windhoek to work towards better aid harmonisation (Theodorakis 2006):

<sup>[6]</sup> Thematic Groups (Lead ICP): Trade, Industry, Finance and Investment (EU); Water (Germany); Transport (DFID); Energy (Norway); Agriculture and Food Security (DFID); Natural Resources and Environment (FAO); HIV and AIDS (Sweden); Organ on Politics, Defence and Security Affairs (to be identified); Institutional Capacity Building (Core Group).

We ICPs – as your partners – must ensure that the quality of the aid is improved, that the delivery of aid is more efficient and that its impact is more important and sustainable. This can only be achieved if there is more and better cooperation and coordination among donors. Increased coordination and harmonisation, as well as a better division of labour, will lead to better complementarity of our interventions and reduction of transaction costs. It will also reduce the burden of the SADC Secretariat.

With the new working structure in place, the question remains as to what role the CC plays in the SADC-ICP relationship. Empirically, it is too early to draw conclusions as only two CCs have been held under the new framework. The 2006 Windhoek conference had been postponed twice to allow adequate preparation for the launch of the new partnership.<sup>[7]</sup> The results of the 2006 Conference were mixed (Adelmann 2006: 11). The aim of facilitating discussion – SADC explicitly discouraged the reading of written speeches – worked out in some working groups (e.g. trade), but there was hardly any meaningful dialogue and a lack of preparation on the part of SADC in others (e.g. politics and security). The absence of high level representatives of the major donors may have contributed to the lack of meaningful political discussion. That both the EC and the US could not refrain from publicly announcing new pledges, even though this was explicitly not part of the agenda of the meeting, illustrates how difficult it is to change the character of the Consultative Conference.

The 2008 Mauritius Conference was initially planned as an International Conference on Poverty and Development, an idea that originated at the 2005 Clinton Global Initiative meeting. In 2007, SADC decided to merge the poverty conference with the bi-annual CC under the joint theme of “Regional Economic Integration: A Strategy for Poverty Eradication towards Sustainable Development” (SADC 2007a: 8). Due to the poverty focus, a large number of participants, many from civil society and the private sector, attended the meeting. However, in terms of ministerial participation, the CC again failed to attract a significant number of high ranking ICP participants. The

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<sup>[7]</sup> The Consultative Conference was first postponed from November 2004 to April 2005 because the ICPs felt that more time was needed for adequate preparation. See: SADC: Draft Record of the SADC-ICP Core Group Meeting Held at the SADC Secretariat Boardroom 30 May 2004 (SADC 2004). The official reason for the second postponement to April 2006 was the expected low participation of high ranking ICPs and the wish of member countries to make an input to the conference documents (SADC2005: 3). As the Conference is the main platform for SADC to present itself after the reform, as well as to present the programmes RISDP and SIPO, the practical reason behind the postponement must be seen in the delay of the restructuring, including new personnel in the top positions, and the delay in the implementation of RISDP and SIPO.

confirmation of EU Commissioner Louis Michel hung in the air for so long that eventually his presence surprised even the organisers.

In disregard of its own 2001 strategy for the CC, the 2008 conference explicitly reintroduced the notion of a pledging conference. Among others, SADC stated as conference objectives: “To re-mobilize the international community in particular the developed countries to live up to their commitments in regard to increasing the levels of development aid” and “to mobilise resources both at regional and international levels to regional poverty-oriented programmes/projects” (SADC 2007b: 4). While the fundraising element was directed more to prospective multilateral and private donors than to traditional ICPs, it still left the impression that the CC has not fully overcome its fundraising mentality. As in 2006, the programme foresaw considerable time for thematic exchange in discussion groups. However, in the end, there was only time to rush through presentations by SADC, ICPs, and Civil Society, but not for substantial engagement.

As the CC took place shortly after the disputed Zimbabwe elections, at a time when the election results were still not officially released and violence was running high, the SADC Heads of State were more concerned with internal crisis diplomacy than engaging the ICPs. The ICPs, on the other hand, demanded political answers from SADC. The Zimbabwe issue was raised by leading ICP delegates such as Louis Michel (EC), Jens Stoltenberg (Norway) and Irene Freudenschuss-Reichl (Austria) but not taken up by SADC. Apparently, the failure to agree on a joint communiqué at the end of the conference was also related to the inclusion of Zimbabwe in the document (Southern Times 2008).

While the conference managed to agree to the establishment of a SADC Regional Poverty Observatory to monitor the Millennium Development Goals (MDG) progress, there was also criticism from the ICP with regard to organisation and content of the conference: “For the future, we see a need for a more co-operative process to prepare the Consultative Conference, a more focused action-oriented agenda, an earlier preparation of documents, more discussion on substance rather than procedures and, to encourage political participation, a more political approach...” (Freudenschuss-Reichl 2008). The 2008 impression that the conference lacked political substance thus echoed the 2006 demands of the international community,

which had then declared that “the ICPs would welcome a more active dialogue between SADC and the ICPs on political issues” (Theodorakis 2006).

Thus, it seems that while the new SADC-ICP partnership has improved the working relationship on a technical level in Gaborone, the CC still does not fulfil the function of a political dialogue forum.

## **6. Conclusion: The future of the Consultative Conference**

Looking back and forward, it seems clear that apart from organisational problems the CC suffers from a lack of coherence between expectations and reality. This incoherence is rooted in the multipurpose approach of the conference, which in the end satisfies no purpose at all. In order to avoid future frustration and to restore the international standing of the conference, SADC needs to take a clear stand on three related conceptual issues:

First, the question of the level at which the conference is held must be addressed. The Windhoek Declaration foresees that the technical discussion is left to the Gaborone<sup>[8]</sup> expert forums (JTF, thematic groups) and that the CC concentrates on high-level political discussion in order to provide policy guidance for SADC-ICP cooperation. However, the idea of holding the CC as a policy meeting on summit or ministerial level has largely been unsuccessful because the ICPs failed to participate on ministerial level and SADC was not prepared to engage in a political dialogue (see below). It therefore seems more realistic to regard the CC as a working meeting, where the JTF and the thematic groups take the opportunity to review their work and to discuss it on a broader platform. This would include donors not involved in the Gaborone-based forums as well as participants from civil society. In fact, the preparation of thematic working papers and working groups in recent conferences underlines its de facto working level character. Such a meeting would encourage a focus on current and future donor-funded programmes, something which is important for SADC. However, it is also clear that a working-level meeting will hardly draw high-level participants to the CC and the rhetoric of ministerial or summit meetings would need to be exchanged for a more realistic approach.

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<sup>[8]</sup> Some thematic groups hold meetings not in Gaborone but in Tshwane or elsewhere, depending on the diplomatic representation of the lead donor.

Secondly, SADC needs to clarify whether or not it would like the CC to remain a forum revolving solely around the aid paradigm. So far, it is the ICPs rather than SADC who are demanding political dialogue, which then results in a dialogue on Southern African regional politics. The narrowing of the international development discourse on aid effectiveness (Paris Declaration) has already led to a dominance of technical questions over principal political ones. As SADC's main objective with regard to ICPs is still the unleashing of new funds, it is more than likely that the SADC-ICP dialogue will in future focus even more on technical aid questions. While in principle a focus on aid effectiveness is not wrong, SADC needs to be aware of the opportunity costs: it may let slip an opportunity to engage with leading powers on global issues such as trade, climate change and debt—issues that in the end may have more influence on development than individual aid projects.

A third point that has led to some irritation is the grave discrepancy in the understanding of what is meant by the phrase 'political dialogue'. For SADC, political dialogue seems to be limited to a dialogue on the implementation of its strategic programmes RISDP and SIPO, which are largely donor funded. To some extent, this also includes issues of institutional set-up and the future of regional integration. What it does not seem to include is an open discussion on controversial political issues. The latter, however, is what the ICPs understand by political dialogue. In this regard, the ICPs suggested, with explicit reference to Zimbabwe, that the next CC should be devoted to political issues (Freudenschuss-Reichl 2008). Only if SADC is willing to openly discuss sensitive political issues, it can reach its goal of drawing high level ICP representatives to the meetings. Otherwise, the CC may suffer the same fate as the Berlin Initiative where, also due to political differences, ministerial dialogue was downgraded to troika and working level meetings. The communiqué of a 2002 SADC-EU meeting frankly points to the divergent concepts: "The two sides disagreed on the definition of political dialogue" (SADC 2002: 192).

Regarding the future of the CC, two trends are currently visible: On the one hand, SADC has, at the August 2008 Summit, finally decided to further on drop the high-level meeting aspiration and to opt for a more realistic working-level approach.<sup>[9]</sup> On the other hand, the strong showing of Asian countries at recent conferences, most

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<sup>[9]</sup> At the time of writing, the written Record of Council and Summit 2008 was not yet publically available.

notably the inauguration of a SADC-India Forum at the 2006 conference, supports the idea that SADC is more than an aid recipient. The new political and economic scramble for Africa could well once more turn the CC into an arena where East (this time the Far East) and West struggle for political and economic influence. It remains to be seen, whether or not SADC can make use of this situation and restore the conference to a major political event.

As SADC in 2009 will be able to look back on 30 years of engaging the international community in 23 conferences, it is clear that despite continuous problems and shifting focus, the institution of the CC has indeed contributed to regional integration. The founding of SADC(C) and the running of its programmes would have not been the same without the support of international donors. Furthermore, the quest for continued support has been one of the key drivers behind SADC's reform leading towards deeper integration since SADC needs to present itself to the donors as a functioning construct. Finally, the (bi-)annual meetings with external players forces SADC to make up its mind, to make decisions (not always an easy task for SADC), and to jointly discuss its programme with and defend it against external players. The aforementioned thesis that regionalism is spurred through external players, is thus valid for the SADC Consultative Conference.

**Table 3: SADC(C) Consultative Conferences 1979-2008**

Date	Location	Theme
July 1979	Arusha, Tanzania	SADCC 1
27.11.- 28.11.1980	Maputo, Mozambique	SADCC 2
19.11.- 20.11.1981	Blantyre, Malawi	Southern African Development Co-ordination: From Dependence and Poverty Toward Economic Liberation
1982	-----	-----
27.11.- 28.01.1983	Maseru, Lesotho	Industrial Development, Food, Agriculture
02.11.- 03.02.1984	Lusaka, Zambia	Agriculture
31.01.- 01.02.1985	Mbabane, Swaziland	Food-Agriculture-Energy
30.01.- 31.01.1986	Harare, Zimbabwe	SADCC: The Next Five Years
05.02.- 06.02.1987	Gaborone, Botswana	Investment in Production
28.01.- 29.01.1988	Arusha, Tanzania	Development of Infrastructure and Enterprise
01.02.- 03.02.1989	Luanda, Angola	Productivity Sectors: Engine of Growth and Development
31.01.- 02.02.1990	Lusaka, Zambia	SADCC: The second decade: Enterprise, Skills and Productivity
31.01.- 02.02.1991	Windhoek, Namibia	Human Resources: Primary Factor in Development
29.01.- 31.01.1992	Maputo, Mozambique	Towards Economic Integration
27.01.- 29.01.1993	Harare, Zimbabwe	A framework and strategy for building the community
26.01.- 28.01.1994	Gaborone, Botswana	SADC: Management of Regional Cooperation, Regional Integration in Southern Africa, Regional Relations and Cooperation Post-Apartheid: A Strategy and Policy Framework
01.02.- 04.02.1995	Lilongwe, Malawi	SADC: Resources, Institutions and Capacity for Integration
31.01.- 02.02.1996	Johannesburg, South Africa	SADC: Consultative Conference on Trade and Investment
09.02.-10.02. 1997	Windhoek, Namibia	Productivity: Key to Sustainable Development in SADC
1998	-----	-----

Date	Location	Theme
12.02.1999	Lusaka, Zambia	SADC in the Next Millennium: The Opportunities and Challenges of Information Technology
20.02.- 22.02.2000	Mbabane, Swaziland	Peace, Progress and Prosperity in SADC in the Next Millennium
2001	-----	-----
28.10.- 30.10.2002	Gaborone, Botswana	SADC Institutional Reform for Poverty Reduction through Regional Integration
2003	-----	-----
2004	-----	-----
2005	-----	-----
26.04.- 27.04.2006	Windhoek, Namibia	Partnership for the Implementation of the SADC Regional Indicative Strategic Plan and the Strategic Indicative Plan for the Organ on Politics, Defence and Security
2007	-----	-----
18.04.- 20.04.2008	Port Louis, Mauritius	Regional Economic Integration: A Strategy for Poverty Eradication towards Sustainable Development

Source: Own compilation based on: SADC: The Proceedings of the Annual Consultative Conference. SADC, Gaborone, 21 Volumes since 1979.

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