

# ARTICLES

## Is the SADC trade regime a rules-based system?<sup>1</sup>

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### Introduction

What is the meaning of *rules-based trade*? What are the consequences if an international trade regime is defined as a *rules-based* one? Does it matter whether trade within the Southern African Development Community (SADC) is conducted on the basis of rules or not?

This article discusses these questions in the context of the global debate about rules-based trade and its purported merits, the features of the SADC trade regime, and recent developments around the SADC Tribunal. It will start off by clarifying the meaning of *rules-based trade*. The final part assesses SADC's trade instruments and member states' trade-related practices in the light of criteria generally accepted as indicating rules-based trade. The conclusions will explain why the author considers it important to respect legal principles when it comes to how trade is conducted in southern Africa.

### What is *rules-based trade*?

International agreements, including trade agreements, are "governed by international law".<sup>2</sup> This does not mean that each and every international agreement contains 'hard' obligations and clear enforcement mechanisms, or that a particular trade arrangement will be rules-based simply because the matter is governed by a treaty of some description. International agreements reflect the intention of the parties to it. In a particular instance, this intention may be to establish a form of interaction or cooperation which is not governed by definite rules or enforceable obligations.

The notion of *rules-based trade* as used in the present article refers to trade arrangements between states governed by international agreements which contain specific obligations regarding outcomes and practices. The parties have to comply with these obligations to ensure certainty and predictability,

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1 This article is based on research done for the Trade Law Centre for Southern Africa (tralac).

2 Article 2(1)(a), Vienna Convention on the Law of Treaties.

and transparency is a prerequisite. The substantive content of such trade rules can normally be distilled from the basic principles of the World Trade Organisation (WTO) – such as those relating to the most-favoured nation and national treatment, or those dealing with market access – or other multilateral disciplines applicable to trade-related conduct involving the movement of goods and services across borders. Regional trade arrangements (RTAs) involving WTO member states may of course contain WTO plus obligations, but must respect those multilateral rules that apply to free trade areas (FTAs) and customs unions. Rules-based trade arrangements display, in this author's view, certain substantive as well as formal qualities; for RTAs these are summarised at the end of this section.

Sovereign states are free to conclude international agreements – on trade or whatever subject matter so chosen – and to establish international organisations to promote their interests or to perform certain functions on their behalf. They may endow such organisations with the institutions required to undertake the intended tasks and to exercise the powers granted to them through the founding treaty.

When it comes to international trade and the promotion of regional integration, the governments involved have to decide some additional issues. How will they, for example, ensure non-discriminatory treatment and put a stop to non-tariff barriers in the markets of the other states parties to the agreement? What are the implications of treaty obligations for the parties' citizens? How will their national policies be affected? What happens in case of non-compliance? The answers to these questions should be provided for in the legal instruments in question, which are mostly in the form of treaties establishing international organisations to implement specific trade arrangements. As a general observation, the more comprehensive the trade arrangement and the more advanced the integration process, the stronger the need for appropriate institutions with supranational powers.

As states embark on the road of deeper regional integration, the need for effective harmonisation of policies, reliable outcomes and firmer legal arrangements will increase. Fragmentation would follow if individual member states are free to follow different approaches and apply different rules with regard to substantive issues governed by the treaty in question. Such freedom would undermine the very purpose of the exercise. Member states should not be permitted to invoke their national 'policy space' or enforce domestic jurisdiction in instances where the matter concerned is regulated by the applicable legal instrument, and some entity should speak on behalf of the collective when necessary.

RTAs are not always cast in perfectly lucid terms. Lack of legal clarity is often encountered, making such arrangements less effective. Uncertainty, unpredictability, non-compliance, non-transparency and a lack of remedies

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will undermine the benefits to be gained. Private firms and traders are the most likely to be negatively affected. Investors will also shy away from markets where they do not enjoy the protection of the law and cannot enforce their rights.

One lesson to be learned is that effective trade arrangements require legal instruments which reflect with sufficient degree of precision the intention of the parties with regard to the method of implementation and compliance. The obligations which the members have accepted should be clear in order to ensure that the intended results are achieved. Legal formulations count. Vague formulations and wide discretions undermine legal certainty and are, in fact, anathema to rules-based trade. If interpretation becomes an issue, there should be an independent forum to rule on the correct interpretation or application of the legal instrument at stake. If the particular arrangement is truly rules-based, the rulings of this forum will, as a rule, be binding on the parties involved.

Regional integration arrangements may go beyond the reach of RTAs. They may seek to achieve a higher degree of economic integration based on, for example, the harmonisation of their policies or the adoption of similar policies.<sup>3</sup>

Technically, RTAs come in the form of FTAs, customs unions or common markets. Several reasons have been given for why countries negotiate RTAs:<sup>4</sup>

First, they can obtain the traditional gains of trade. Second, countries use legally binding agreements to strengthen domestic policy reform. Third, countries hope to increase their multilateral bargaining power in this way. Fourth, free-trade arrangements can often guarantee access to markets. Fifth, for some countries the possibility of strategic linkages is important. The sixth reason is that countries may be able to benefit from the multilateral and regional interplay by emphasizing their interest in bilateral negotiations at critical points in the multilateral negotiations.

There are multilateral rules on RTAs<sup>5</sup> which must be respected when WTO member states form such arrangements. They constitute a multilateral legal framework and another reason why RTAs are rules-based. RTAs are not open ended configurations where member states are free to pursue whatever trade and commercial policies they deem fit. The WTO rules applicable to RTAs stipulate how the members must conduct their preferential *inter se* arrangement and how they must respect the rights of third parties.

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3 Goode, Walter (Ed.). 2007. *Dictionary of trade policy terms* (Fifth Edition). Cambridge: Cambridge University Press, p 359.

4 Whalley, John, cited in Goode (2007:359–360).

5 In the form of Article XXIV of the General Agreement on Tariffs and Trade (GATT), and the Enabling Clause and Article V of the General Agreement on Trade in Services (GATS).

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When the members of an RTA are also members of the WTO, as is the case with the members of SADC,<sup>6</sup> a general distinction is to be drawn between their external (multilateral) and their internal legal obligations. The former type of obligation relates to the requirements of Article XXIV in the General Agreement on Tariffs and Trade (GATT), and the Enabling Clause<sup>7</sup> – if the particular arrangement comprises only developing countries and has been notified under this Clause – and Article V in the General Agreement on Trade in Services (GATS). RTAs are exceptions to the most-favoured-nation rule and have to comply with the applicable requirements of both GATT and GATS. In addition, the WTO has to be notified when RTAs are launched.<sup>8</sup> In principle, WTO members may also invoke the WTO's dispute settlement procedure in order to ensure compliance with the applicable rules.<sup>9</sup>

The internal rules of RTAs refer to the obligations contained in their own legal instrument and apply between or amongst members themselves. Between the internal and external dimensions there are certain linkages. An FTA, for example, requires rules of origin in order to identify the source of the goods entitled to the preferential treatment granted in terms of the particular free trade agreement. This requirement is linked to GATT Article XXIV, which in turn requires that substantially all trade is to be covered by the FTA in question. The content of these rules of origin is for the FTA parties to determine internally. Their content, i.e. how strict, liberal or simple they are, will obviously impact on the general success of the trade arrangement in question.

By way of a summary, the following can be listed as features of a rules-based RTA:

- It should be established and should function in terms of a properly drafted international legal instrument which should be in force for all the member states.
- Where additional legal instruments such as protocols are added to the overall arrangement, they should be coherent and consistent, and should apply generally.

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6 The exception is Seychelles, which is still negotiating accession to the WTO.

7 The Enabling Clause – “The Decision of the GATT Contracting Parties of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries” – provides in the relevant part for less strict rules that are available to developing nations when forming RTAs. Eventually, however, the spirit behind the exception to the most-favoured-nation clause has to be respected. The member states are also required to inform the WTO about their particular RTA and its internal arrangements.

8 The SADC FTA was notified to the WTO under GATT Article XXIV, on 2 August 2004; notification available at [www.wto.org/english/tratop\\_e/region\\_e/status\\_e.xls](http://www.wto.org/english/tratop_e/region_e/status_e.xls); last accessed 25 March 2011.

9 See e.g. Turkey – Textiles, Appellate Body Report, WT/DS34//AB/R, adopted 19 November 1999.

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- The obligations of the members should be clear and be respected, and implementation should be monitored.
- Disputes regarding the interpretation and application of the legal instruments should be resolved through an independent adjudicative process. Judgments should be binding on the parties concerned. An appeal procedure will improve the legitimacy and integrity of the dispute settlement system.
- The implementation of decisions by the adjudicative body should be ensured through effective procedures. Compliance with such decisions should be monitored.
- The relationship between national and community law should be clear. There should be legal instruments at national level to empower national courts to give effect to community rules and judgements where necessary.
- The rights of private parties should be catered for and should be protected.
- The arrangement should have the necessary institutions. They should be endowed with the powers and independence required to be effective and to act on behalf of the collective.

## The fear of a loss of sovereignty

Political leaders and officials often caution against trade arrangements overstepping their boundaries, especially when regional institutions endeavour to exercise the powers necessary to ensure respect for community law. Such governments are reluctant to enforce the international agreements in question or comply with the rulings of regional courts and tribunals. The reasons are not always clearly articulated, but the loss of governmental 'policy space' and state sovereignty is frequently mentioned.

In the context of freely concluded agreements, the fear that RTAs will irreversibly jeopardise national sovereignty is not convincing. It is an act of sovereignty to conclude international agreements, to establish trade arrangements with neighbouring countries, and to do this on the basis of reciprocity. There are good reasons why governments consider such arrangements to be mutually beneficial. African regional organisations have been established by the sovereign governments of their member states. The real problem is not the existence of such supranational structures: it is the subsequent unwillingness of member states to respect the applicable legal instruments, to comply with obligations, and to provide for effective domestic measures to implement the relevant rules and rulings.

The benefits of rules-based trade and integration require that the applicable legal instruments are taken seriously and that the mutually agreed rules are respected. As regional integration within a particular configuration moves ahead, it becomes necessary to adjust and augment the legal dimension of

such integration. An obvious example concerns the difference between an FTA and a customs union. A customs union is technically and legally more advanced than an FTA, and has a single customs territory and common external tariff which bind its members. The participating governments are not free to adopt and implement unilateral tariff changes or exclusive trade policies. Thus, a certain degree of a state's 'sovereignty' will be curtailed once it decides to join a customs union.

The loss-of-sovereignty fear rings quite hollow in the light of the many official plans on deepening integration in Africa. Existing regional economic communities want to accept more onerous obligations. This is also the policy of the African Union. Most African regional economic communities have decided to become customs unions and even common markets.<sup>10</sup> The whole continent is divided into regional economic communities and, eventually, all African states should be linked in this manner – at least in terms of the political rhetoric.

SADC adheres to a similar agenda, which extends well beyond the target of achieving an FTA. These ambitions are set out in SADC's Regional Indicative Strategic Development Plan (RISDP) of 2003. Although it is not a legally binding agreement, it enjoys political support. The Plan plots an integration agenda that includes the targets of having an FTA by 2008, a customs union by 2010, a common market by 2015, and an economic union by 2018.

The implications of the rules required to accommodate this level of ambition should be understood before they are adopted. They will have to be taken seriously and have to be implemented, both internally and vis-à-vis third parties.

Some sovereign powers will be affected when regional economic integration is pursued, but that comes with the nature of the enterprise. The effects will be felt by all member states, including the most powerful.

The debate about sovereignty and when to protect it is a universal one. In times of economic hardship, there is a greater temptation for politicians to rediscover the ideals of sovereignty. Nevertheless, it remains a legitimate question to ask – as the WTO's 2004 Sutherland Report indeed does – whether countries and governments in a global economy are not –<sup>11</sup>

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10 The East African Community (EAC) and the Common Market for Eastern and Southern Africa (COMESA) are said to be customs unions already. SADC wanted to become a customs union in 2010, but postponed the decision at the eleventh hour.

11 Sutherland, Peter, J Bhagwati, K Botchwey, N FitzGerald, K Hamada, JH Jackson, C Lafer & T de Montbrial. 2004. *The future of the WTO: Addressing institutional challenges in the new millennium*. Geneva: World Trade Organisation, paragraph 109.

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... obliged to subjugate some level of domestic prerogative to international rules and disciplines? If so, is that a gain or loss to the well-being of societies?

This Report then goes on to observe the following:<sup>12</sup>

Sovereignty is one of the most used and also misused concepts of international affairs and international law. The word is often repeated more or less as a 'mantra' without much thought about its true significance. In fact, the word covers a large range of every complex ideas[,] sometimes relating to the role of states in international organizations, other times relating to internal divisions of power (such as in a federal state), or the degree of government authority towards its citizens. ...

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 realize that the benefits of cooperative action that a treaty enhances are greater than the circumstances that exist otherwise. Indeed, the Appellate Body has commented<sup>13</sup> as follows: "The WTO agreement is a treaty – the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreement."

What, then, is *sovereignty*? The *sovereignty* of the state is an original building block of the Law of Nations. It typically requires respect for territorial integrity and for the rule that treaties cannot bind a state unless it has given its consent to be bound. It is important to emphasise the converse as well: it is an act of sovereignty to become party to an international agreement or a member of an international organisation. This has additional implications: states cannot invoke their national law or constitution as a justification for not respecting their international obligations. If that were possible, there could be no international law. Moreover, a change of government in a particular country will not affect the binding nature of existing agreements to which that state is a party. States are the subjects of public international law – not governments.

States cannot prosper in isolation. Economic development is very directly linked to the ability to trade and being integrated into regional and the global economies. Reciprocal obligations have to be respected, inter alia to prevent beggar-thy-neighbour consequences. Contemporary challenges to governments such as climate change, environmental catastrophes and disease respect neither geographical borders nor sovereignty.

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<sup>12</sup> (ibid.:paragraphs 110 and 111).

<sup>13</sup> Japan – Alcoholic Beverages II, p 16, Dispute Settlement Reports (DSR) 1996: 1, p 97 at 108 (WTO documents: WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R).



These are some of the reasons why some degree of scepticism may be warranted when confronted by claims about how sovereignty is suddenly being undermined by an RTA.

## Examples of rules-based trade

There are many useful insights to be gained from the experience of the WTO, the European Union (EU) and other RTAs with regard to the implementation of their legal regimes. Space and time do not allow a more comprehensive discussion here of these organisations and the abundant literature about them. Examples such as the North American Free Trade Agreement (NAFTA), the Mercado Común del Sur (MERCOSUR, the Southern Common Market) and RTAs in Asia cannot be examined here. The objective with the present article is more modest: to contribute to the debate by discussing the record of SADC's implementation of its legal instruments on trade.

There are also several other African regional economic communities which can be studied, but they often encounter the same problems faced by SADC – particularly with respect to the implementation of legal instruments and the enforcement of trade rules. Comparative analyses of the case law of other regional community courts in Africa<sup>14</sup> are instructive as they explain many generic legal issues and challenges faced by African regional judicial bodies.<sup>15</sup> All regional trade and integration arrangements have to deal with the powers of regional institutions, the effect of their decisions, and dispute resolution. The same basic logic applies to all of them. In Africa these challenges are more acute.

While this author does not argue that African trade arrangements should copy the EU,<sup>16</sup> it has to be recognised that the EU is the most advanced form of regional integration. One of its strengths is that it is clearly a rules-based regime. In the famous *Van Gend & Loos* decision,<sup>17</sup> the European Court of Justice had to interpret the effects of a particular provision in the European Community (EC) Treaty within the territory of the member states, and whether the nationals of those states could lay claim to individual rights which national courts had to protect. The technical issue was whether they could challenge, in domestic courts, a national tariff increase on the ground that it violated

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14 The Court of Justice of the Economic Community of West African States, the East African Court of Justice, and the Court of Justice of the Common Market for Eastern and Southern Africa.

15 For more on these questions and related topics, see Oppong, RF. [Forthcoming]. "Legal aspects of economic integration in Africa".

16 The EU was born out of specific political conditions after World War II, and has adopted a unique formula regarding the path of peaceful integration and the powers of its supranational institutions.

17 Case 26/62, 1963, ECR 1.



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Article 12 of the EC Treaty. The Court said the following as regards what was then the European Economic Community (EEC) Treaty:<sup>18</sup>

The objective of the EEC Treaty, which is to establish a **Common Market**, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states ... This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed by sovereign rights, the exercise of which affects member states and also their citizens. ...

In addition the task assigned to the Court of Justice ... to ensure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community Law has an authority which can be evoked by their nationals before those courts and tribunals. The conclusion to be drawn from this is that the Community constitutes a **new legal order** of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community. [Emphases added]

This judgment signifies the existence of a special legal order brought about by the then EEC Treaty. This legal order is rules-based and enforceable within and between the member states, i.e. on the national and supranational levels. On the interstate level, this function is performed by the European Court of Justice, a Community institution. The Treaty may, in applicable instances, also be invoked by individuals. The rationale for this state of affairs is found in the very nature of the legal arrangement which the members decided to establish and which they have refined and expanded over time. For the EU, the European Court of Justice performs a typical adjudicative function and its jurisprudence has become an integrative force within the Community.<sup>19</sup>

When the member states of RTAs are WTO members as well, as most of them are, they have to deal with one particular aspect of the rules-based trade context: complying with the multilateral requirements for RTAs. For the

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18 (ibid.).

19 As the process of integration deepened over time, the EU's legal framework also changed and evolved to higher levels. On 1 December 2009, the Treaty of Lisbon entered into force. It amended the current EU and EC Treaties, without replacing them. It provides the EU with the legal framework and tools it needs to meet future challenges and to respond to citizens' demands.

purpose of the present discussion, the WTO serves as a useful yardstick since its multilateral trade regime displays unique legal and institutional features. In comparing the old GATT and the new WTO, commentators have drawn attention to the latter's 'rules-based' nature. *Rules-based* became the buzzword for encapsulating the essential difference between the two regimes and for describing the basic features of the WTO system. It is worthwhile reminding ourselves of the gist of multilateral rules-based trade, and how the concept has become a global measurement for conducting trade across borders.

Compared with the WTO, GATT had a weak institutional and legal basis. GATT was not an international organisation in the true sense.<sup>20</sup> Its system of rights and obligations for trade in goods was set out in a number of legal texts negotiated in 1947. However, diplomacy and power relationships largely determined how disputes got settled. The outcome of the Uruguay Round changed this, and brought about fundamental change. New multilateral agreements were concluded to include trade in services as well as the trade-related aspects of intellectual property rights.

The most dramatic change occurred with the adoption of the Understanding on Rules and Procedures Governing the Settlement of Disputes. This amounted to a completely new and updated dispute settlement system. The old GATT did not provide for a proper adjudicative dispute settlement system. The situation worsened after 1979 when a number of limited-membership agreements on non-tariff measures – the so-called *codes* that emerged after the Tokyo Round negotiations of 1973–1979<sup>21</sup> – were adopted, with their own dispute settlement procedures. All of this changed under the WTO's Dispute Settlement Understanding (DSU). It provides for a single set of rules covering all disputes which may arise under any of the WTO agreements. These agreements constitute a 'single undertaking', and all members are bound by their provisions.<sup>22</sup> An appeals procedure has been added, as has the possibility of compensation for injury in one sector by taking action in another sector. Unilateral action to settle disputes is banned.

In the words of the DSU, the new dispute settlement arrangement "is a central element in providing security and predictability to the multilateral trading system."<sup>23</sup> What we now have is a system that prohibits unilateral acts by member countries to redress what they see as a violation of obligations, or a nullification or impairment of benefits, under any of the WTO agreements. The new arrangement also has a comprehensive set of institutions to oversee

20 The International Trade Organization (Havana) Charter was never adopted.

21 Croome, John. 1999. *Guide to the Uruguay Round Agreements*. The Hague: Kluwer Law International, p 2.

22 The only exception constitutes the WTO's plurilateral agreements.

23 Article 3.2, DSU.

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the implementation of dispute settlement. The Dispute Settlement Body (DSB) is the WTO General Council, functioning for this purpose under a different name. The DSB has full authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of the implementation of rulings and recommendations, and authorise suspension of concessions and obligations.<sup>24</sup>

Another important – and, in the view of many, most significant – difference between the GATT and WTO dispute settlement rules is the change introduced into the decision-making procedures. One commentator put it as follows:<sup>25</sup>

Under the GATT, key decisions depended on consensus agreement to move ahead. This meant that if a party to a dispute was unwilling to have a panel established, or objected to its membership or terms of reference, or did not accept the panel's conclusions, it could refuse its support and thereby block the achievement of consensus and progress. Crucially, the consensus requirement has been turned around by the WTO rules, and progress cannot be blocked unless there is consensus to do so. Thus[,] if a panel has been requested, the DSB must establish it at latest at the meeting following that at which the request was first on the agenda, "unless the DSB decides by consensus not to establish a panel."<sup>26</sup> Such consensus is improbable, since the requesting country is unlikely to change its views unless the dispute has been settled ... A panel report shall be approved by the DSB unless appealed or the DSB decides by consensus not to adopt it. In the case of an appeal, the Appellate Body's report must again be adopted by the DSB unless there is consensus agreement in the DSB not to do so. These provisions effectively removed the opportunities that existed under the GATT procedures for blocking the multilateral dispute settlement process. Combined with the system of deadlines introduced to govern how the dispute is handled under the WTO, the new consensus rule should ensure that the whole dispute settlement procedure moves forward in the future more rapidly and automatically than in the past.

John Jackson, who has studied the WTO and GATT over many years, has observed that the new WTO institutional framework is one with profound implications:<sup>27</sup>

It embraces the so-called single-package idea, which encourages every nation to accept the entire package. This is in contrast to results under prior rounds, such as the Tokyo Round, where nations could pick and choose among the

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24 Article 2.1, DSU.

25 Croome (1999:23).

26 Article 6.1, DSU.

27 Jackson, John H. 1998. "Designing and implementing effective dispute settlement procedures: WTO dispute settlement – Appraisal and prospects". In Krueger, Anne O (Ed.). *The WTO as an international organization*. Chicago: University of Chicago Press, p 162.

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series of protocol agreements (a process called “GATT à la carte”) ... The key attribute of the new procedures ... is ‘automaticity’. No longer will it be feasible for a nation to block the results of a dispute settlement procedure.

Jackson has called the new WTO arrangement a “rule-orientated” system. This is —<sup>28</sup>

... a system that gives guidance in a way of predictable and generally stable rules to millions of entrepreneurs around the world. Such guidance is very necessary for investment decisions, market opening decisions, technological decisions, and so forth. In economists’ terms, this is a system that will reduce the so-called risk premium for some of those decisions.

Dispute settlement in the WTO also entails a unified procedure. As the same author notes, —<sup>29</sup>

[t]he previous system was fragmented, with eight or ten different dispute settlement processes. This change has very great implications, particularly for enhancing public understanding, including high government officials’ understanding of the system.

## How does the SADC regime rate as a rules-based system?

The following should be investigated in order to determine how SADC rates as a rules-based arrangement:

- The SADC legal instruments
- Member states’ practice as regards the implementation of SADC legal instruments
- Domestic implementation and enforcement of SADC legal instruments, and
- Developments around the SADC Tribunal.

The SADC Treaty provides for an international organisation with legal personality and the “capacity and power to enter into contract, acquire, own or dispose of immovable property and to sue and be sued”.<sup>30</sup> This provision does not empower SADC to enter into international agreements on behalf of its member states.

The Preamble to the Treaty says the members are aware that “the principles of international law [govern] relations between states”. Under the “General

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28 (ibid.:163).

29 (ibid.:164).

30 Article 3, Consolidated Text of the Treaty of the Southern African Development Community as Amended (hereafter *the Treaty*).

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Undertakings” listed in Article 6, it is stated that member states “shall take all steps necessary to ensure the uniform application of this Treaty”<sup>31</sup> as well as “all necessary steps to accord this Treaty the force of national law”.<sup>32</sup> The latter has far-reaching implications for bolstering a rules-based regime. The literal meaning of Article 6(5) is that the Treaty needs to be given effect within the member states – which will require legislation. This means that legal and natural persons should then be able to invoke the Treaty in domestic courts. This is not happening because members have not respected these provisions. How can this state of affairs be explained?

Part of the operational difficulty with SADC is that compliance with international obligations is not being properly monitored and no penalties exist for non-compliance. The Secretariat should perhaps adopt and implement a strategy to give effect to another obligation in Article 6, i.e. that member states “shall co-operate with and assist institutions of SADC in the performance of their duties”. When doing so, the Secretariat may recall a specific duty of each member, namely that they –<sup>33</sup>

... shall respect the international character and responsibilities of SADC, the Executive Secretary and other staff of SADC, and shall not seek to influence them in the discharge of their functions.

Furthermore, these officials and the members of the Tribunal –<sup>34</sup>

... shall not seek or receive instructions from any Member State, or from any authority external to SADC. They shall refrain from any action incompatible with their positions as international staff responsible only to SADC.

The Treaty does provide for sanctions against members that “persistently fail, without good reason, to fulfil obligations assumed under this Treaty”, or when they “implement policies which undermine the principles and objectives of SADC”.<sup>35</sup> The Zimbabwe saga and that country’s failure to comply with the SADC Tribunal’s rulings on its human rights violations have revealed the weakness in this arrangement. The Summit was not prepared to act against Zimbabwe; instead, it decided to appoint a consultant to investigate the jurisdiction and terms of reference of the Tribunal. In the meantime, until the results are known, the functioning of the Tribunal has been suspended and the terms of the Judges (Members) have not been renewed.<sup>36</sup>

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31 Article 6(4), Treaty.

32 Article 6(5), Treaty.

33 Article 17(1), Treaty. .

34 Article 17(2), Treaty.

35 Article 33(1), Treaty.

36 These decisions were taken at the Summit of 16–17 August 2010, held in Windhoek. The relevant part of the Summit decision reads as follows: “A study shall be undertaken and completed within six months of the Summit meeting of August 2010,

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However, there is no political will to enforce the provisions on sanctions against members who violate their obligations under the Treaty. The Summit consists of the Heads of State or Government, and is SADC's supreme policymaking institution. However, unless provided otherwise in the Treaty, Summit decisions are taken by consensus,<sup>37</sup> giving the member in violation of its obligations a veto over any sanctions. This is a major flaw in the system.

Another important indication of the intention to establish a rules-based system – at least on paper – is found in the provisions of Article 16 of the Treaty, which deals with the SADC Tribunal. This Article provides that –

[t]he 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.

Moreover, the decisions of the Tribunal are final and binding.<sup>38</sup>

These basic provisions in the Treaty have been translated into a detailed Protocol on the Tribunal and Rules of Procedure Thereof. The Protocol binds all SADC member states, as Article 16(2) of the Treaty now clearly confirms.<sup>39</sup> Its jurisdiction is quite wide. Article 14 of the Protocol on the Tribunal deals with the “Basis of Jurisdiction”, and provides that 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: the interpretation and application of the Treaty; the interpretation, application or validity of the Protocols[;] all subsidiary instruments adopted within the framework of the Community[;] and acts of the institutions of the Community.

Article 15 deals with “Scope of Jurisdiction”. It determines that the Tribunal has jurisdiction over disputes between member states and between natural or legal persons and member states. When natural or legal persons bring an action against a member state, local remedies first need to be exhausted, unless such parties are unable to proceed under the domestic jurisdiction. Where a dispute is referred to the Tribunal by any party, the consent of other parties to the dispute is not required.

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to review the role and responsibilities of the Tribunal. The Committee of Ministers of Justice/Attorneys General shall involve Members of the SADC Tribunal in the study; and the outcome of the study shall be presented by the Committee of Ministers of Justice/Attorneys General at an Extraordinary Summit”. The specific terms of reference for this study were subsequently formulated by the Secretariat and also included indications to make proposals on how to strengthen the Tribunal.

37 Article 10, Treaty.

38 Article 16(5), Treaty.

39 Agreements to amend this Protocol were adopted in 2002, 2007 and 2008. See also Article 15(1) of this Protocol.

## Is the SADC trade regime a rules-based system?

Why has this progressive language not resulted in more impressive outcomes? On paper, these are strong indications of an intention to establish a rules-based system. About 16 matters have been brought before the Tribunal since it started to function in 2005. However, no trade disputes have been heard: all cases dealt with either human rights violations (decided in terms of Articles 4(c) and 6 of the Treaty) or staff issues.<sup>40</sup> Why have there not been any trade disputes?

Part of the explanation is that the texts of certain important legal instruments of SADC are not up-to-date. This applies in particular to Annex VI to the Trade Protocol, which provides for a Panel procedure for the settlement of trade disputes. It is based on the WTO dispute settlement example. The rules with respect to several aspects of this procedure are outstanding. This lacuna applies to both the Protocol on Trade in Goods as well as the proposed Protocol on Trade in Services. It means that trade disputes, should they be brought, cannot be settled through the Panel procedure of Annex VI.

It is striking that practical aspects of regional integration, i.e. matters such as technical barriers to trade, non-tariff barriers, unfair trade practices, standards, transit, tariff classification or rules of origin, have not yet generated any disputes, whether by governments or other parties. Why is this so? It seems that both political and practical factors are part of the answer. There is simply not sufficient awareness or the factual conditions are lacking to support this type of regional integration reality. It is almost as if the legal arrangements are not perceived to constitute binding and enforceable law which can be implemented before national and regional courts. Most SADC members have no domestic legal arrangements on trade remedies, for example.<sup>41</sup> Another important reason must be that the SADC Treaty – and, therefore, SADC law – has not been made part of the law of the land in member states, as Article 6 of the Treaty requires.<sup>42</sup> Another factor could be that trade disputes are perceived as interstate disputes, although there have not yet been any efforts by private parties to test this assumption. Another factor has to do with history and diplomatic tradition: African governments do not litigate against each other on trade issues.

The exact nature of the relationship between the Tribunal and national courts, the effect of SADC law within the member states, and the enforcement of rulings of the Tribunal are not clear. SADC law and practice cannot mature unless these matters are clarified. Against this background, the outcome of

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40 This is provided for by Article 19 of the Protocol on the Tribunal.

41 South Africa is an exception.

42 This writer has not studied the national legal systems of the 15 SADC member states in sufficient detail to be able to assess the extent of formal incorporation of SADC legal instruments. However, discussions with officials and enquires indicate that this is still a neglected area.



## ARTICLES

the Summit study could play a major role. These questions form part of its mandate.

Article 32 of the Protocol on the Tribunal is of particular importance and needs to be quoted in full. It deals with the enforcement and execution of Tribunal judgments and provides as follows:

1. The law and rules of civil procedure for the registration and enforcement of foreign judgements in force in the territory of the Member State in which the judgement is to be enforced shall govern enforcement.
2. Member States and institutions of the Community shall take forthwith all measures necessary to ensure execution of decisions of the Tribunal.
3. Decisions 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 Member States concerned.
4. Any failure by a Member State to comply with a decision of the Tribunal may be referred to the Tribunal by any party concerned.
5. If the Tribunal establishes the existence of such failure, it shall report its finding to the Summit for the latter to take appropriate action.

Here again, little progress can be reported. In order to be able to give domestic effect to rulings of the Tribunal within member states via the procedure of registration, it will be necessary to adopt the necessary national legislation. However, the Tribunal is not a typical foreign domestic court: its judgments concern public international law. There may be serious constitutional obstacles to the domestic application of its judgments as they are about the application of international agreements. International agreements are not, as a rule, directly applicable within the domestic systems of most SADC member states, especially not in those with a common law tradition where a dualist approach to the incorporation of treaties applies.

## Conclusion

The previous part of this article tells a story of high ambition (on paper) and a poor record with regard to implementation. In the light of this picture, is SADC a rules-based system or not?

SADC should be treated as rules-based and a deliberate effort should be made to ensure respect for its rules. This is because its legal instruments provide for a rules-based system – which the Tribunal has confirmed in respect of certain aspects. The region is entitled to and needs the benefits and certainty of rules-based trade, more effective integration, and the application of the rule of law when it comes to cross-border commerce and investment. The fact that SADC was established in terms of certain multilateral rules and was notified under GATT Article XXIV only adds to this argument. The question marks are

## Is the SADC trade regime a rules-based system?

not about the formal legal dimension: it is mostly about poor implementation and insufficient monitoring of compliance.

The discussion above shows that SADC member states neglect their legal obligations, that legal instruments are incomplete, that judgments by the Tribunal are often not respected, and that there is insufficient awareness about the various SADC instruments and how to enforce them. These instruments provide for rights and remedies, but their potential is underutilised. The domestic incorporation of the SADC Treaty and Protocols is an urgent priority. If this requires technical assistance of a particular kind, then it must be planned for. This is not an impossible task.

In order to change the existing state of affairs, politicians and officials should be lobbied (to the extent that this might be useful), the business community should take up this cause, the legal profession should become more actively involved in litigation involving trade rules, and law schools should look at their curricula. More can be done to improve the monitoring of compliance through the Secretariat. And most importantly, the Tribunal should be strengthened and used more extensively. Experience elsewhere has shown that it is through the development of the jurisprudence about implementing community law that the momentum necessary for effective integration and the protection of trade-related rights is generated and maintained. These rights are also the rights of individuals and legal persons: as a rule, governments do not trade: they make the most of the rules, but it is the private sector which trades and risks their investments.

Is rules-based trade a good thing for African RTAs? When trade between states is not conducted on the basis of rules, power considerations and unpredictability will enter the equation. The certainty, legal remedies and transparency typical of rules-based arrangements will be absent. The position of private traders and investors will be negatively affected and other ills such as corruption will become more widespread. These considerations apply to developing countries too: their citizens and consumers will suffer.

Under conditions of poverty, vulnerability and the absence of rights, the negative consequences will most probably be more severe in developing nations. African RTAs need rules-based trade and effective measures to guarantee compliance.

Is the fact that SADC's members are either developing or least developed countries a relevant consideration when it comes to the choice as to how trade should be conducted?<sup>43</sup> Are governments justified in ignoring the rules

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43 South Africa is in a sui generis position. It is, by way of political affiliation and policy choices, part of the developing world. It has recently been invited to join Brazil, Russia, India and China (the BRIC group). In 1995, however, it did join the WTO

of the game because rules-based trade is too onerous and a drain on scarce resources which could otherwise have benefitted the poor and needy? Is lack of technical capacity an issue?

It cannot be denied that the multilateral trade system is about many sophisticated rules which are often difficult to comply with. They may require complex institutions in order to ensure implementation. Many poor nations do not have the domestic structures to enforce all the intellectual property rights enjoyed by companies in developed countries. The implementation of sanitary and phytosanitary (SPS) measures and technical standards, also in terms of being able to export, require laboratories and scientists.

These are the typical challenges associated with poverty and underdevelopment, but the answer does not lie in flouting basic legal norms. When corrupt officials confiscate vehicles and merchandise at a border post because they claim the importer's documentation is not in order,<sup>44</sup> the problem is not lack of capacity. Basic rules on trade facilitation and measures against corruption are a major part of the answer to these dilemmas. This is true of many of the implementation issues to be corrected if we want to ensure that SADC is an effective trade regime that will benefit the people in the member states. Indeed, lack of capacity was never raised as a reason why Zimbabwe refuses to respect the judgments of the SADC Tribunal.

The solution for some of these problems may be easier to implement at the regional level. Regional integration may provide several of the more immediate answers and prevent duplication. A regional standards body can serve a number of countries.<sup>45</sup> Donors can structure their development assistance so to assist more directly the implementation – with active local support – of such efforts.

The way forward will be a more secure one if undertaken along the road of respect for the rule of law, while pursuing the benefits of rules-based trade and regional integration.

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as a developed country. Developing country status in the WTO is based on self-selection. For least-developed countries, international economic criteria have been adopted and are used in the United Nations and other international organisations. It should also be noted that SADC has been notified to the WTO under GATT Article XXIV and not the Enabling Clause, which has less strict requirements for RTAs that comprise only developing countries.

44 This was the complaint in one of the cases before the SADC Tribunal.

45 The SADC Accreditation Service structure is an example.