SADC LAW: BUILDING TOWARDS REGIONAL INTEGRATION[1]

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I Introduction

The Chairperson and other members of the committee or committees responsible for organising this event, distinguished participants and academic colleagues, from within and beyond the subregion, ladies and gentlemen:

It is my singular honour and privilege to address you at the commencement of this seminar, the first of its kind to be hosted by academic institutions within the subregion. I have not received any instructions, directives, hints or suggestions as to what to talk about; but taking my cue from the title of our workshop, and from the presentations to be made during the six substantive sessions of the seminar, I would like to address you on the continuing relevance of the Southern African Development Community (SADC) as a regional integration arrangement worthy of study by legal scholars and academics. In popular media and other circles, pundits and many social commentators are often quick to pronounce SADC as a "toothless body", and to call for its disbandment. This is the usual reaction to some disagreeable position that SADC leaders would have taken on some matter, such as failure to censure an errant member state, or the decision to suspend the operation of the SADC Tribunal. The overwhelming response to the call for abstracts and paper proposals for this seminar, and the range of issues covered in the proposals, however, suggest that, at least among legal academics, there is merit in studying SADC and in organising an event such as this one.

Our programme has organised the presentations to be made in sessions with the following titles or themes: SADC and trade liberalisation; regionalism in SADC; transnational comparative lessons; regional trade arrangements and the World Trade Organization (WTO); the SADC Tribunal; and SADC and the environment. From some of the abstracts made available to me, I would suggest that the following would have been a more logical thematic grouping: SADC trade relations, subsuming and including the session on regional trade agreements and the WTO; trade plus or trade-related issues such as tax harmonisation; investment protection and harmonisation of commercial laws; SADC and the environment; social protection; and human rights politics and governance issues, including the vexed problem of revising the mandate and jurisdiction of the Tribunal. It would appear from this as well as from the original programme that most of the presentations at this seminar are

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[1] Keynote Address, first annual SADC Law Seminar, University of Cape Town, 17 November 2011.

concerned with SADC trade and trade-related issues. What, then, are some of the burning issues, themes and arguments that ought to be addressed in legal research on SADC trade?

II SADC and trade relations

The first theme or argument I would expect to be addressed in a seminar such as this one is the role, relevance and importance of trade liberalisation to what is called the *SADC common agenda*. A leading scholar and commentator on regionalism in southern Africa contends that, although political considerations motivated the formation of all regional integration initiatives in sub-Saharan Africa, it is economic rationality that must provide the justification for their continuing existence. He suggests that regional integration in Africa –[2]

> … can be seen as a political construct held together by economic cement. If the "cement" fails the construct fails; hence the importance attached to economic integration and cooperation as the defining feature of integration exercises.

If trade liberalisation and market integration are the main ingredients of the economic cement, I would suggest that SADC is an interesting case for this hypothesis.

Almost all of you may be familiar with the history and background of SADC.[3] It was founded in April 1980 as the Southern African Development Coordination Conference (SADCC) by leaders of the so-called Frontline States in southern Africa. It was conceived as an economic dimension to the struggle for liberation of the subregion from colonial and white minority rule and against the political and economic domination of the subregion by the apartheid regime in South Africa. It was conceived as a project coordination regional integration arrangement; a mechanism through which member states would formulate and implement projects of common interest in select areas, with the intention of reducing their 'economic dependence, particularly, but not only on, the Republic of South Africa; …'.[4]

The founders of SADCC were clear that trade and market integration were not its priorities. They had taken note and drawn appropriate lessons from regional trade arrangements in which some of them were involved, under which the distribution of benefits or dividends of regional integration was inequitable and highly skewed in favour of the participating countries with

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2 C McCarthy 'Regional Integration in sub-Saharan Africa: Past present and future' in A Oyejide, B Ndulu & D Greenaway (eds) *Regional Integration and Trade Liberalization in sub-Saharan Africa, Volume 4: Synthesis and Review* (1999) 16. Prof. McCarthy repeats or recalls his argument at page 4 of his paper entitled 'The challenge of reconciling revenue distribution and industrial development in the Southern African Customs Union' (SACU), which he presented at a workshop on developmental integration and the harmonisation of industrial policies in SACU, Institute for Global Dialogue, Pretoria, on 25 October 2006.

3 See AJ Nsekela (ed) *Southern Africa: Toward Economic Liberation* (1981), especially vii – xix; and SADC Secretariat *The Southern African Development Community – SADC History, Evolution and Current Status* (2001).

4 'The Declaration by the Governments of the Independent States of Southern Africa made at Lusaka on 1 April 1980'; cited in Nsekela op cit note 3 at 3.

more advanced economies.[5] Their desire was for "genuine and equitable" regional integration.

Trade liberalisation and market integration became part of the SADC common agenda when SADCC transmogrified into SADC under the Windhoek Declaration and Treaty of 1992. It was not because of the inherent worth of trade liberalisation and market integration that this was done. The Declaration suggested that trade liberalisation was mainly a strategy for attracting 'new types of investment in more productive and competitive industries, producing goods and services for regional and international markets'.[6]

Events outside the region may also have nudged SADC leaders towards market integration. The imminent successful completion of the single European Market project at about the same time had spawned the formation of similar trade liberalisation and market integration projects in almost all regions of the world.[7] For Africa, the Organisation of African Unity (OAU) sponsored the conclusion of the Abuja Treaty for the establishment of an African Economic Community (AEC) in 1991. The Treaty provided for the evolution of the AEC from regional economic communities (RECs) for the various subregions of Africa.[8] SADCC had to be repositioned as the REC for the southern African subregion by courting South Africa's membership and prioritising trade liberalisation and market integration.

The Protocol on Trade, providing for the establishment a free trade area (FTA) for SADC, was signed by eleven of the SADC member states at that time, excluding Angola, at the Maseru Summit on 24 August 1996. It entered into force on 25 January 2000 upon ratification, as required, by two thirds of the member states. At the time, two member states – Angola and the Democratic Republic of the Congo (DRC) – were not party to the Protocol, but today only the DRC is yet to accede to it. The Protocol set an eight-year time frame for establishment of the FTA.

The paper on the state of trade liberalisation in SADC in Session Two should indicate how this was accomplished and what challenges were encountered. The establishment of the SADC FTA must also be assessed in terms of WTO rules and requirements in Article XIV of GATT 1994, under which it was controversially notified in 2004.[9] Session Five, on regional trade agreements (RTAs) and the WTO, ideally should have included a presentation on assessment of the SADC FTA under the Transparency Mechanism established by the WTO in 2006. The SADC FTA is the first African RTA to be notified in the WTO under Article XXIV of the General Agreement on Tariffs and

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5 Sir Seretse Khama 'Introduction' in Nsekela op cit note 3 at xii.

6 SADC *Towards the Southern African Development Community: A Declaration by Heads of State or Government of Southern African States* in SADC Secretariat *SADC Declaration and Treaty* (1993) 7.

7 M Schiff & L Winters *Regional Integration and Development* (2003) 5 – 6.

8 Modalities for the establishment of the AEC are discussed in C Ng'ong'ola 'Regional integration and trade liberalization in Africa – The treaty for the establishment of an African Economic Community revisited in the context of the WTO system' (1999) 33(1) *Journal of World Trade* 152 – 6.

9 This was controversial because some member states apparently preferred to have the FTA notified like most African RTAs under the enabling clause. This instrument provides for special and differential treatment of RTAs entered into amongst developing countries. Such arrangements are not as rigorously examined and assessed as those notified in terms of Article XXIV of GATT 1994.

Trade (GATT) 1994, and to be examined and assessed under the Transparency Mechanism.

Whether assessed from a regional or WTO perspective, it would appear that the implementation of the SADC FTA, although generally satisfactory, has not been without notable legal challenges and difficulties. Some of these are yet to be resolved. At no time, however, has SADC as a construct been in danger of failing because of such difficulties. It may also be noted, for example, that according to its Regional Indicative Strategic Plan, the FTA was supposed to be transformed into a customs union in 2010.[10] This did not take place, and no revised target date has been suggested. This may be yet another indication that SADC is one of those regional integration initiatives held together not by economic rationality but by the political dynamics of the region.

This suggests that, in our research and discussions, we must also give due attention to other elements of the SADC common agenda that might be as relevant as trade or economics in holding the arrangement together.

III The SADC common agenda

Article 5A of the SADC Treaty, as amended in 2001, refers to Article 5 for an indication of what the SADC common agenda is all about. The first part of Article 5 describes the economic, political, social and cultural objectives to be pursued by the organisation. The second part describes what SADC is to do in pursuit of these objectives.

The main economic objective of SADC is to promote sustainable and equitable economic growth and socio-economic development which will ensure poverty alleviation, with the ultimate objective of its eradication. The main political objectives are to promote common political values and systems which are transmitted through institutions that are legitimate, democratic and efficient, and to consolidate, defend and maintain democracy peace, security and stability. The notable social and cultural objectives include combatting HIV and AIDS and other deadly communicable diseases; ensuring that poverty eradication is addressed in all SADC activities; and mainstreaming gender in the process of community-building.

The pursuit of these objectives are obliged to entail, amongst other things, the harmonisation of members states' political and socio-economic plans and policies; encouraging peoples of the region to develop economic, social and cultural ties, and to participate fully in the implementation of SADC projects; developing policies aimed at the progressive elimination of obstacles to the free movement of persons, labour, capital, goods and services; promoting the development of human resources; and promoting the development, transfer and mastery of technology.

In addition to Article 5, Articles 21, 12 and 22 are the other provisions to be noted in the description and elaboration of the SADC common agenda.

Article 21 identifies at least eight 'areas of cooperation' in which SADC member states are expected to develop, coordinate, rationalise and harmonise

[10] SADC *Regional Indicative Strategic Development Plan (RISDP) (Draft*) (2003) para 4.5.5 at 86.

policies, projects and plans. Article 12 establishes an Integrated Committee of Ministers as one of the new SADC institutions to be responsible for overseeing and guiding the Secretariat in the implementation of plans and projects in 'core areas of integration', namely –

(i) trade, industry, finance and investment (TIFI)
(ii) infrastructure and services (I&S)
(iii) food, agriculture and natural resources (FANR), and
(iv) social and human development and special programmes (S&HD&SP).

In the reorganisation that followed the 2001 amendment of the Treaty, four directorates were created in the SADC Secretariat to be responsible for each of the four core areas of integration.

Article 22 provides for the encoding of projects, plans and policies and institutional arrangements for each area of cooperation in a protocol, to be adopted by the summit of heads of state and government acting on the recommendation of the council of ministers. A protocol, needless to say, is a binding legal instrument. After conclusion and approval by summit, a protocol enters into force upon ratification by at least two thirds of the member states. A protocol that has entered into force is, however, binding only on member states that have ratified or acceded to it. Only the Treaty, agreements amending the Treaty, and Protocols on the Tribunal and on Privileges and Immunities of SADC and its Employees are binding on all SADC member states. This means that some member states can opt out of cooperation in some areas, even if they fall within the so-called core areas of integration. SADC adheres to the principle of variable geometry, or multi-speed integration. Member states that are ready and able can proceed with even deeper levels of integration in some areas.

Research conducted some four years ago revealed that, as of March 2008, four protocols had been concluded in the TIFI cluster of areas.[11] Only two of these protocols, on trade and mining, had entered into force. The DRC was, and probably still is, yet to accede to the key Protocol on Trade. The Protocol on Movement of Persons was struggling to attract the number of ratifications required for it to enter into force. There were three protocols for the I&S cluster, which had all entered into force. Again, the DRC was not party to any of them. There were five protocols for the FANR cluster, four of which had entered into force. Angola, the DRC and Madagascar were at the time among those member states not yet ready to subscribe to the Protocol on Wildlife Conservation, the Protocol on Fisheries, and the Revised Protocol on Shared Watercourses. There were four protocols on issues falling within the S&HD&SP cluster, three of which had entered into force. Angola, the DRC and Madagascar were yet to subscribe to the Protocols on Education and Training, on Health, and on Culture, Information and Sports. Botswana, notably, was and continues to be unwilling to commit to the Protocol on Gender.

[11] See C Ngongola 'The legal framework for regional integration in the Southern African Development Community' (2008) 8 *University of Botswana Law Journal* 3 – 46, especially Table 2.

One area not listed as a core area of integration in Article 12 of the Treaty is that of politics, defence and security. At least six protocols have been concluded on issues that could fall within this cluster. Four of these are in force, including the Protocols on Politics, Defence and Security Cooperation, on Illicit Drugs, on Control of Firearms and on Corruption. Angola, the DRC and Madagascar, again, have not subscribed to any of these protocols. The Protocol on Politics, Defence and Security Cooperation, which was put together to legitimise intervention by some SADC member states in the conflict in the DRC, paradoxically, had at the time not been ratified or acceded to by principal or interested actors in the conflict, such as Angola, the DRC and Zambia. Given the history and background of SADC and the role that politics now plays in the region, the Protocol on Politics, Defence and Security Cooperation should probably be like the Treaty, agreements amending the Treaty, or the Protocol on the Tribunal, and deemed applicable to each member state upon joining the organisation. The Protocol on Trade can also be so elevated if there is validity in the argument that trade liberalisation and market integration are part of the economic cement that binds and sustains a regional integration arrangement.

IV Concluding thoughts and observations

It should be apparent from the sketch of the SADC common agenda that there is more to SADC than trade liberalisation and market integration. The scope for research and scholarship on other SADC issues is very wide – almost limitless. If it is in order that the first seminar on SADC law should be preoccupied with trade and trade-related issues, I would expect subsequent seminars to cover and deal with other issues and the law in other core areas of integration, including politics, defence and security cooperation.