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The Southern African Development Community in legal historical perspective*

Summary

This article explores the institutional history of the Southern African Development Community (SADC) with a view to isolating the factors and/or forces behind the slow progress of real economic integration in Southern Africa. It finds that SADC's poor track record in delivering on its institutional objectives is attributable to four closely-related factors: regional trade imbalances; South African equivocation towards economic integration; lack of political will and/or stability; and an unwillingness on the part of SADC Member States to surrender some elements of their economic sovereignty. Based on lessons extrapolated from the historical analysis, the article concludes with thoughts on what may be required to ensure rapid progress towards real economic integration in Southern Africa.

Die Suid-Afrikaanse Ontwikkelingsgemeenskap in 'n regshistoriese perspektief

Die artikel ondersoek die institusionele geskiedenis van SADC met die doel om die faktore te bepaal wat bydra tot die stadige vordering na ware ekonomiese integrasie in Suidelike Afrika. SADC se stadige vordering ten aansien van voldoening aan sy institusionele doelstellings kan aan vier nabyverwante faktore toegeskryf word: wanbalans in streekshandel; Suid-Afrika se teensinnigheid teenoor ekonomiese integrasie; gebrek aan politieke wilskrag en/of stabiliteit; en 'n onbereidwilligheid van die SADC lidstate om van elemente van hul ekonomiese soewereiniteit afstand te doen. Gebaseer op lesse wat geëkstrapoleer is van die historiese analise/ontleding, sluit hierdie artikel af met gedagtes oor wat verlang mag word om spoedige vooruitgang jeens egte ekonomiese integrasie in Suider Afrika te verseker.

* The financial assistance of the National Research Fund (NRF) towards this research is hereby acknowledged. Comments and findings are those of the authors and should not be attributed to the NRF.

This is the revised version of a paper presented by the author at the Conference on the Development of a Regulatory Framework for Economic Co-operation and Integration within the Southern African Development Community held on 31 May 2002 at the Johannesburg International Airport Holiday Inn.

1. Introduction

The Southern African Development Community¹ was born in August 1992 in what can now be fairly described as a blaze of glory. This was due in part to the fact that its birth was both strategically and fortuitously set against the backdrop of the rapidly unfolding collapse of apartheid in South Africa and the imminent arrival of a majority government in that country. The objectives of SADC as stated in the organisation's Treaty are very broadly stated. Two of these objectives need to be highlighted because of their importance to economic co-operation and development. Article 5(1)(a) of the Treaty states that SADC shall aim to achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa and support the socially disadvantaged through regional integration. According to Article 5(1)(d) of the Treaty, SADC shall also promote self-sustaining development on the basis of collective self-reliance and inter-dependence of Member States.²

Ten years on, the SADC has accomplished little in concrete terms. Rather, what we have witnessed are meetings of SADC organs characterised by high-sounding rhetoric accompanied by little action.³ The institution's track record demonstrates that SADC Member States are continuing to face difficulties with delivering on their ritual professions of commitment to the institutional agenda.⁴ As an essay in legal history, this article seeks to make a credible attempt at explaining the legal framework of SADC, its objectives and, more importantly, its challenges and failures based on a critical interpretation of its historical origins. It will argue that the SADC is, as an inter-governmental institution, struggling largely because of the past from which the institution and its members have come. The article will also attempt to isolate the lessons that can be learnt from the institutional history for the benefit of reform initiatives.

2. The origins of SADC: Exodus from a Development Co-ordination Forum to a Development Community

It is impossible to fully comprehend and appreciate the process of metamorphosis through which SADC has passed without critically exploring the historical context and forces that coalesced in producing the birth of SADC's predecessor, the Southern African Development Co-ordination Conference.⁵ It is a historical fact that from their independence in the 1960s right through

1 Hereafter "SADC".

2 In order to achieve the said objectives, SADC shall develop policies aimed at the progressive elimination of obstacles to free movement of capital and labour, goods and services, and the peoples of the region generally across the territories of Member States. Also, the organisation aims to promote development, transfer and mastery of technology and improve economic management and performance through regional co-operation.

3 Heiman 1997:658-64.

4 Wallace and Munyantwali 1996:150; Ramsamy 2001.

5 Hereafter "SADCC".

the 1970s and 1980s, all of Southern Africa was largely dependent on South Africa for their economic wellbeing and/or survival. First and perhaps most critical was their dependence on South Africa in the area of transportation. Because of their nature as landlocked States as well as their largely underdeveloped transport and communications infrastructure, the SADCC states, with the singular exception of Mozambique, were almost entirely reliant on South African ports and railway routes for the movement of their imports and exports.⁶ Second, those members of the SADCC who were members of the Southern African Customs Union,⁷ namely, Botswana, Lesotho, and Swaziland,⁸ relied heavily on the railway income, import duty and related charges collected jointly and distributed by South Africa to the Boleswa countries pursuant to the SACU Agreement.⁹ Third, certain SADCC states such as Mozambique, Zambia and Botswana were dependent on South Africa for regular food supplies. Fourth, several of those states, especially, Lesotho, Mozambique, Botswana, Swaziland and Malawi were significantly dependent, in varying degrees, on their labour exports to South Africa for much precious foreign exchange earnings.¹⁰

The SADCC was established in 1980 by the independent states of the Southern African region, namely, Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe. In the years and months immediately preceding their embarking on this initiative, these countries had been unequivocal and unambiguous in their calls and support

6 The logical implication was that the SADCC states could be shut out of their limited export markets and thereby deprived of their desperately needed and meagre foreign exchange earnings by a South African decision to terminate or restrict access to the ports and routes in question. It must also be specifically noted here that even for a SADCC country with an easy natural access to the sea, such as Mozambique, heavy reliance still had to be placed on South Africa for the provision of locomotives, wagons and technical assistance in order to keep their internal rail transportation system functional. The historical record is fairly clear on the point that South Africa tacitly, consistently and creatively encouraged the SADCC states to rely on its transport services and facilities as a means of creating dependency. Martin 1986:252.

7 Hereafter "SACU".

8 Hereafter the "Boleswa countries". See generally, Ajulu and Cammack 1986:139.

9 The customs union came into existence in 1910 pursuant to an agreement concluded between the Union of South Africa and the then British Protectorates of Basutoland, Bechuanaland and Swaziland. The current version of the agreement was executed by the contracting parties on 11 December 1969 but only became operational on 1 March 1970. Those parties were South Africa, Botswana, Lesotho and Swaziland. However, it is fair to say that Namibia was a *de facto* member of the customs union while it remained under the administration of South Africa. As expected, she became a *de jure* member of the customs union shortly after achieving independence. Namibia's accession to the union was made possible by an amendment to the SACU agreement in April 1990. That amendment made provision for the admission of new contracting states into the customs union by unanimous agreement of the existing members. See Grimmett 1999:221.

10 Martin 1986.

for the imposition of comprehensive sanctions on apartheid South Africa by the international community. Logically, the calls and support for those sanctions originated from consensus within the political leadership of those countries that support from the international community in the form of sanctions was indispensable to the success of the liberation struggle against apartheid. According to one commentator, the SADCC members “had chosen to view the sanctions question within the parameters of intensified struggle and the opportunity for advancing the political economy of liberation, not capitulation and subordinated co-operation in sanctions-busting”.¹¹

Exceedingly distressed by the regional support for sanctions and desperate to economically subjugate its neighbours in order to secure their willingness to serve as sanctions-busting conduits, apartheid South Africa in 1978 adopted the now famous “total strategy” policy in dealing with the SADCC members.¹² As a regional foreign policy, “total strategy” was multi-dimensional/faceted in that it required the mobilisation of the political, economic, diplomatic and military forces at the government’s disposal. One example will suffice here. First and perhaps most important, “total strategy” required the regular sabotage of the regional system of transportation and communication designed and executed to guarantee that all of the region’s trade flowed downwards and southwards towards and through South Africa.¹³ Second, the South African government could in pursuit of the “total strategy” policy expel the hundreds of thousands of migrant mine workers from SADCC member-states and thereby terminate a critical source of foreign exchange earnings for those countries. Third, the government could also withhold trade credits required by the said member-states for imports of essential goods. For these heavily-indebted countries who, as such, had limited access to trade credit, such a course of action could strangle their economies.¹⁴

3. SADC: Challenges, problems and prospects

3.1 Regional trade imbalances

Historically, intra-regional trade within Southern Africa has not been significant relative to the individual member-states’ trade with the rest of the world, especially the European Union.¹⁵ The years following the inception of SADC have not witnessed an explosion in SADC intra-regional trade. More importantly, the little regional trade there is overwhelmingly favours South Africa. It is submitted that the slow pace of delivery by members on their commitments relating to trade liberalisation is a tacit expression of widespread doubts as to whether the potential gains resulting from liberalised SADC

11 Martin 1986:275-76.

12 Johnson and Martin 1986:xv.

13 Johnson and Martin 1986:xv

14 Martin 1986:247.

15 See Enterprise March 2001 Issue at 21.

trade will be equitably distributed amongst all.¹⁶ As a source of governmental reluctance in aggressively pursuing the SADC trade liberalisation agenda, these doubts cannot be ignored nor discounted because they collectively produce a fear of South Africa's continued economic and, therefore, political hegemony in the region. As this paper has already shown, the pre-eminent factor in the birth of SADC's predecessor was precisely the elimination of South Africa's regional dominance.¹⁷ That objective was also close to the hearts of SADC's heads of States at the institution's birth.¹⁸ Accordingly, members may be justified in tacitly choosing not to be faithful to a regional trading regime that, when fully implemented, may produce a result that is fundamentally and politically objectionable to the majority of the peoples of the region.

3.2 South African equivocation towards economic integration

It is submitted that, rhetoric apart, South Africa has not, in its concrete actions, been consistent in demonstrating an overwhelming commitment towards deepening economic integration within the Southern African region. This has been most apparent in its less than positive disposition towards liberalising and dropping its trade protectionist stance *vis-à-vis* intra-SADC trade.¹⁹ This is due in part to the South African government's sensitivity to the interests and views of South African manufacturers and trade unions representing workers employed in the manufacturing sector.²⁰

South African equivocation at deepening economic integration through the aggressive, fast-track implementation of a regional trade liberalisation agenda is troubling largely because she stands to benefit the most from

16 It was as far back as 1992 that the South African Chamber of Business pointed out that perhaps the most critical challenge of economic integration initiatives within the Southern African region would consist of the need to distribute the real costs and benefits of integration "among Member countries in a way which, in the face of strong polarisation forces, will make integration a positive sum game for all participants". South African Chamber of Business 1992.

17 Notes 6-10 above and accompanying text.

18 According to one commentator, the SADCC was founded partly to redress the existing inequitable economic domination of the region by South Africa and the organisation expected South Africa to join its ranks on the basis of these same principles and to participate in redressing the current economic imbalance to the benefit of all the countries of the region. Davis 1992:440.

19 It has, for example, been recently reported in the local business press that South Africa has refused a request by Zimbabwe and Mauritius to speed up the dropping of tariffs on clothing and textile products coming into South Africa. An existing agreement, concluded under the auspices of SADC, provides for the tariffs to reach zero by January 2006 but Zimbabwe and Mauritius want the deadline brought forward to January 2004. Moodie 2001.

20 Clearly, while the manufacturers are afraid of the possibility that such trade liberalisation might significantly impact their bottom-line negatively, the trade unions take the view that the need to protect and secure the jobs of their members cannot be served by such liberalisation in South African regional trade policy. See Wallace and Munyantwali 1996:150; Moodie 2001.

such region-wide trade liberalisation.²¹ However, the position in which the South African government finds itself is a particularly complex one laden with what can be fairly described as an insurmountable political dilemma. This is due in part to the fact that the government has a legal/political responsibility to protect and promote the economic and other interests of its citizenry. That responsibility requires that in matters pertaining to economic integration, the government must seek to maximise the national economic interest.²² Similarly, there can be no doubt that the government inherited a huge “social deficit”²³ from its predecessor and the apartheid socio-political order. The fact of the existence of that social deficit can be seen anywhere and everywhere in the new South Africa. For the purposes of this paper, the existence of that historically-generated deficit is the source of a governmental pre-occupation with the overwhelming socio-political objective, namely, the uplifting of the living conditions of the masses of South African peoples as a matter of urgency. That pre-occupation translates into a largely inward-looking political leadership. At the same time though, South Africa, it is submitted, does have and indeed feels a moral responsibility to pursue the reconfiguration and implementation of regional economic integration along lines that will deliver significant and concrete developmental benefits to its SADC partners, especially those belonging to the defunct Frontline States bloc.²⁴ This is due to the obvious enormous contributions made by the members of that bloc to the prosecution and success of the liberation struggle in South Africa. To be sure, the Frontline States suffered serious economic decline as a result of their choice not to do business with the old South Africa in addition to their direct expenditure of significant resources in the fight against apartheid in South Africa.²⁵ Therein lies the insurmountability of the South African government’s dilemma vis-a-vis its SADC partners.

3.3 Problems of lack of political will and/or instability

Again, contrary to rhetoric, governmental action on the part of SADC member states has not been consistent with an unequivocal commitment to follow through on their SADC treaty-related contractual obligations.²⁶ Some commentators have suggested that this is probably due to the governments’ inability to “marshall political power and direct it toward the introduction of a

21 South Africa is considered to be in this enviable and perhaps inequitable position because of its obvious position as the region’s economic superpower.

22 Wallace and Munyantwana 1996:151.

23 This term is now commonly used in South Africa to refer to the legally-sanctioned (apartheid) omission of past South African governments to provide basic amenities for the majority of the people.

24 See Davis 1992:436-38.

25 Wallace and Munyantwana 1996:152. See also Davis 1992:440.

26 The following examples readily come to mind here: (1) the non-implementation of already-adopted protocols years after being approved by SADC heads of State; (2) the reluctance to sign the protocols on the part of significant numbers of Member states; and (3) the lack of budget allocations (in Member States) for implementation of the protocols.

more efficient system to co-ordinate the objectives of the organisation".²⁷ It is submitted that the inability to muster mass political support for meaningful delivery on SADC treaty commitments may be due in part to governments' inability to persuade their peoples to buy-into the largely economic, free market, capitalist agenda of a supra-national organisation that was originally formed to accomplish the lofty, essentially political objectives of making regional economies independent of South Africa and facilitating the success of ongoing liberation struggles.²⁸

Closely related to the problem of lack of political will and enthusiasm are the twin problems of political instability and uncertainty that continue to plague a number of the SADC countries. For example, while the government and people of Angola still yearn desperately for a permanent peace that continues to be elusive, the people of the Democratic Republic of the Congo have in the last few years witnessed what can be fairly described as an unending socio-political nightmare featuring, *inter alia*, the decimation of the formal economy. The Zimbabwean land crisis and the attendant economic as well as socio-political problems are still unfolding. As though these were not bad enough, there are rumblings of serious political upheaval on the horizon for countries such as Lesotho and Namibia. If, as it is widely believed, some modicum of uniformity in socio-political systems among member states is essential for the success of economic integration,²⁹ it would appear that the prospects for SADC are not presently as bright as the founders would have desired.

3.4 Unwillingness to surrender economic sovereignty

There are a number of unmistakable indicators of a fundamental reluctance on the part of SADC member states to surrender some of their sovereignty in the economic sphere.³⁰ First, the SADCC, in terms of its formal organisational framework, was not founded on a legally binding treaty and, as such, was no more than an informal association of states. Second, according to the relevant provisions of the SADC Treaty, decision-making in all of the organisation's organs must be by consensus, unless otherwise provided. At the operational level, this effectively gives each member state a veto power enabling it to prevent the making of a decision with which it does not agree.³¹ Third, the vague and generalised nature of SADC Treaty obligations assumed by the member states is significant in the context of the ongoing discussion. That nature of the said obligations is exemplified by Article 6 which provides that member states undertake to adopt adequate measures to promote the

27 Wallace and Munyantwana 1996:152.

28 Wallace and Munyantwana 1996:153. The fact that SADC does not have mass appeal within the member states, especially within the most industrialised ones (South Africa, Zimbabwe and Mauritius) might be indicative of problems of legitimacy which the organisation presently takes for granted.

29 Wallace and Munyantwana 1996:152; Davis 1992:441.

30 See Ng'ong'ola 1999:13

31 Tsie 1996:85.

achievement of the objectives of SADC and refrain from taking any measure likely to jeopardise sustenance of its principles. It is submitted that apart from the undertakings being excessively vague, compliance with them is left entirely to the discretion of the member states.³²

4. Concluding remarks

There is one major lesson deducible from the analysis of SADC institutional history presented in this article. On a general level it confirms that there are significant non-legal constraints to effective economic integration in Southern Africa. Accordingly, while a re-configuration of the legal and institutional framework along the lines alluded to in the immediately preceding part will be valuable in facilitating integration, it will not standing alone lead to the attainment of that objective. More specifically, progress towards real integration will require a tightening of the legal framework to include an element of compulsion in relation to compliance with SADC Treaty obligations as well as an effective mechanism for securing such compliance. Agreement to such significant changes in the legal and institutional framework requires greater willingness on the part of Member States to relinquish some of their economic sovereignty for the greater regional good. Such agreement will in turn be impossible without a significant strengthening of the political will on the part of the present political leadership in the region to make the difficult decisions upon which real regional economic integration depends.

32 Tsie 1996:86. The widespread reluctance on the part of the member states may be attributable to the fact that too many of them fought lengthy and difficult liberation wars to secure their political independence. See also Tsie 1994.

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