University of Fort Hare
Together in Excellence

Accountability and transparency deficits and the problem of non-tariff barriers in the Southern African Development Community: A critical assessment of intra-regional trade promotion initiatives

By

CHARLES MULEZA

201104311

A Dissertation submitted in fulfilment of the requirements for the

MASTER OF LAWS DEGREE

At the **Nelson R. Mandela School of Law, University of Fort Hare**

SUPERVISOR: **PROFESSOR PATRICK C. OSODE**

2016

DECLARATION

I, the undersigned, hereby declare that, except for references indicated in the text and any other assistance acknowledged, this dissertation is my own work and has never previously been submitted in part or in its entirety to any institution for purposes of fulfilment of the requirements for a degree or otherwise.

Signed at East London on 24 JUNE 2017----------

C.M
……..

Charles Muleza

ACKNOWLEDGEMENTS

I am thankful to God for the opportunity to conduct research and complete this study, which is close to my heart. I am also thankful to all the people who made this study a reality.

I am profoundly grateful to my supervisor, Professor Patrick C. Osode, for his excellent supervision despite his tight work schedule. His expert guidance, intellectual support, encouragement and patience made this work possible.

To my family, I convey my deep gratitude. Thank you Mom, Phil, Stellah, Roy, Maria and Lesley. I would also like to thank my friends and colleagues: Divaris, Friedrich, Thuli, Nomsa, Thembe, Shelton and Prosper.

Lastly, to those I did not acknowledge by name, I extend my sincere gratitude to you.

DEDICATION

To Charity Muleza

ABBREVIATIONS

AB	Appellate Body of the WTO
AfDB	African Development Bank
ANC	African National Congress
APRM	African Peer Review Mechanism
ASEAN	Association of Southeast Asian Nations
AU	African Union
CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
CILSA	The Comparative and International Law Journal of Southern Africa
COMESA	Common Market for Eastern and Southern Africa
CONSAS	Constellation of Southern African States
CRRs	Country Review Reports
CRTA	Committee on Regional Trade Agreements
DRC	Democratic Republic of the Congo
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EAC	East African Community
EC	European Communities
ECHR	European Convention on Human Rights
ECJ	Court of Justice of the European Communities
ECOWAS	Economic Community of West African States
ECSC	European Coal and Steel Community
EEC	European Economic Community

EESC	European Economic and Social Committee
EU	European Union
EURATOM	European Atomic Energy Community
FIP	Protocol on Finance and Investment
FLS	Frontline States
FRELIMO	The Mozambique Liberation Front
FTA	Free Trade Area
ICJ	International Court of Justice
IIAG	Ibrahim Index of African Governance
IGC	Inter-Governmental Conference
ITAC	International Trade Administration Commission of South Africa
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GSP	Generalised System of Preferences
LDCs	Least Developed Countries
MFN	Most Favoured Nation
MPLA	The Popular Movement for the Liberation of Angola
NAFTA	North American Free Trade Agreement
NEPAD	New Partnership for Africa's Development
NGOs	Non-Governmental Organisations
NTBs	Non-Tariff Barriers
OAU	Organisation of African Unity
OECD	Organisation for Economic Cooperation and Development
OEEC	Organisation for European Economic Cooperation

PER/PELJ	Potchefstroomse Elektroniese Regsblad/Potchefstroom Electronic Law Journal
RECs	Regional Economic Communities
RISDP	Regional Indicative Strategic Development Plan
RTAs	Regional Trade Agreements
SACU	Southern African Customs Union
SADC	Southern African Development Community
SADCC	Southern African Development Coordination Conference
SAIIA	South African Institute of International Affairs
SEA	Single European Act
SPS	Sanitary and phyto-sanitary
SWAPO	South West Africa People's Organisation
TBTs	Technical barriers to trade
TBVC	Transkei, Bophuthatswana, Venda, and Ciskei (the so-called "Bantustans")
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TPRB	Trade Policy Review Board
TPRM	Trade Policy Review Mechanism
TRALAC	Trade Law Centre
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDESA	United Nations Department of Economic and Social Affairs

USA	United States of America
WEF	World Economic Forum
WPSR	World Public Sector Report
WTO	World Trade Organization
ZANU PF	Zimbabwe African National Union Patriotic Front

TABLE OF CONTENTS

ABSTRACT

The Southern African Development Community (SADC) was established with a view to pursuing economic growth and development in the region. However, even after the establishment of the Free Trade Area (FTA), the presence of significant non-tariff barriers (NTBs) has contributed to the lack of progress in achieving these objectives. Therefore, the premise of this study is that the successful realisation of the economic goals of SADC can only be accomplished on the basis of a legal and institutional framework that promotes accountability and transparency at the national and regional level. It is undeniable that this approach is gaining prominence worldwide as more attention is directed towards the removal of NTBs.

For the purposes of advancing trade liberalisation within the context of a more transparent and predictable trade regime, this study analyses the strengths and weaknesses of the SADC legal and institutional framework. To that end, it addresses pertinent issues such as, *inter alia*, the effectiveness of supranational or intergovernmental approaches in regional institutions, the appropriate status of community law within Member States' jurisdictions and the role of state sovereignty in regional integration. To achieve a clearer understanding of these issues, the World Trade Organisation (WTO) is assessed to obtain insights on the multilateral standards that it sets for the accountability and transparency measures of regional trade agreements (RTAs). The comparative analysis of the European Union (EU), which is viewed as the gold standard for regional integration, also assists in enabling this study to draw lessons for SADC, particularly in the determination of recommendations for legal and institutional reform.

CHAPTER 1

Introduction and Background to the Study

1 1 INTRODUCTION

Regional integration enables countries to cooperate to achieve peace, stability and prosperity.[1] Since the World Trade Organization (WTO) came into being, regional trade agreements (RTAs) have grown more rapidly and have become more complex in nature.[2] Thus, having proliferated in large numbers in recent years, and accounting for a substantial amount of global trade, RTAs are increasingly gaining importance in world trade law discourse.[3] Although regional integration has long been recognised as an important vehicle for Africa's development, it still has not translated into effective economic benefits due to failures in ensuring compliance with and enforcement of trade agreements.[4] This study will focus on the institutional challenges of the Southern African Development Community (SADC) that undermine the efficacy of its legal provisions relating to accountability and transparency, especially within the context of regional trade and development.[5]

[1] Shumba "Revisiting legal harmonisation under the Southern African Development Community Treaty: The need to amend the Treaty" 2015 *Law, Democracy and Development* 127, 134.

[2] The Marrakesh Agreement Establishing the World Trade Organization, concluded on 15 April 1994 and in force since January 1995, is the principal source of international trade law. This agreement incorporates the original GATT, 1947. See also, Van den Bossche and Zdouc *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2013) 40; Guzman and Sykes *Research Handbook in International Economic Law* (2007) 153; and Mapuva and Muyengwa-Mapuva "The SADC regional bloc: What challenges and prospects for regional integration" 2014 *Law, Democracy and Development* 23.

[3] Lester *et al. World Trade Law: Text, Materials and Commentary* (2012) 3.

[4] Mapuva and Muyengwa-Mapuva "The SADC regional bloc: What challenges and prospects for regional integration" 2014 *Law, Democracy and Development* 23. See also, Corrigan "Puzzling Over the Pieces: Regional Integration and the African Peer Review Mechanism" 2015 *SAIIA Research Report 18 Governance and APRM Programme* 24. The SADC is recognized by the African Union as one of the eight African Regional Economic Communities (RECs).

[5] The Southern African Development Community (SADC) is a Regional Economic Community established on 17 August 1992, comprising of 15 Member States: Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. It was preceded by the Southern African Development Coordinating Conference (SADCC) established on 1 April 1980. The SADC is hinged on the realisation that in order to achieve any economic growth or peace on the African continent, Member states would have to work together. See http://www.sadc.int/about-sadc/continental-interregional-integration/sadc-african-union/ (accessed 08-04-2015); and www.sadc.int/about-sadc/overview (accessed 17-05-2015).

The configuration of RTAs is diverse and complex, with some RTAs overlap within and across continents at regional and sub-regional levels.[6] As a result, the rise of RTAs with their diverse and discriminatory rules has been dubbed the 'spaghetti bowl' phenomenon.[7] The multiplication of discriminatory rules is precisely what led many to question whether RTAs might undermine the multilateral trading system.[8] The simplest RTA configuration is a bilateral agreement formed between two parties; and these account for more than half of all RTAs in force and for almost sixty per cent of those under negotiation.[9] The plurilateral RTAs are more complex and account for twenty five percent of the RTAs in force.[10]

It is trite that RTAs are legally permissible in terms of the General Agreement on Tariffs and Trade (GATT) under Article XXIV, as an exception to the most favoured nation (MFN) principle.[11] Substantially similar provisions for the establishment of RTAs are found under Article V of the General Agreement on Trade in Services (GATS),[12] the Enabling Clause and the Generalised System of Preferences (GSP).[13] The need to regulate RTAs' consistency with WTO law led to the formation of the WTO Committee on Regional Trade Agreements (CRTA) in 1996 to ensure their compatibility with the multilateral trading system.[14] Therefore, despite

[6] The WTO Secretariat "Regional Trade Integration under Transformation: Preliminary Draft Report prepared for the Seminar on Regional and the WTO" 2002 *The World Trade Organization* 4.
[7] Lester *et al. World Trade Law: Text, Materials and Commentary* (2012) 336.
[8] *Ibid*.
[9] The WTO Secretariat "Regional Trade Integration under Transformation" Preliminary Draft Report prepared for the Seminar on Regional and the WTO (2002) 4.
[10] Bosi *et al.* "Monitoring the process of regional integration in Southern Africa in 2008" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 2. Plurilateral agreements are issue-based and involve three or more WTO Member States agreeing to new rules on a voluntary basis. This contrasts with multilateral WTO agreements, where all WTO members are party to an agreement. See also, https://www.wto.org/english/res_e/reser_e/wts_future2013_e/Nakatomi.pdf (accessed 22-10-2016).
[11] Van den Bossche and Zdouc *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2013) 42, 43; and Lester *et al. World Trade Law: Text, Materials and Commentary* (2012) 337. The General Agreement on Tariffs and Trade, 1994 sets out the basic rules for trade in goods. The GATT, 1947 is no longer in force as its provisions were incorporated by reference in the GATT, 1994. The most pertinent provision here is GATT Article XXIV (4) which at the outset provides that "The Members recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories".
[12] Van den Bossche and Zdouc *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2013) 45, 46; and Lester *et al. World Trade Law: Text, Materials and Commentary* (2012) 329. The General Agreement on Trade in Services (GATS) is the first ever multilateral agreement on trade in services, establishing a regulatory framework within which WTO Members can undertake and implement commitments for the liberalization of trade in services.
[13] There have been 604 notifications of RTAs including goods, services and accessions received by the GATT/WTO as of 8 January 2015, with 398 of them in force. Of these, 422 notifications were made under Article XXIV of the GATT 1947 or GATT 1994, 143 under Article V of the GATS and 39 under the Enabling Clause. See https://www.wto.org/english/tratop_e/region_e/region_e.htm (accessed 06-04-2015). Also visit https://rtais.wto.org/UI/PublicAIIRTAList.aspx (accessed 06-04-2015) for a comprehensive list of RTAs.
[14] Lester *et al. World Trade Law: Text, Materials and Commentary* (2012) 331.

some misgivings, the official position of the WTO membership is that RTAs are compatible with multilateralism.

The establishment of RTAs is driven by a variety of factors, which include economic, political and security considerations. Countries may be driven by the search for access to larger markets which might be easier to engineer at regional or bilateral level, particularly in the absence of willingness among WTO Members to liberalize further on a multilateral basis.[15] Also, RTAs often offer 'laboratories' for various trade liberalisation initiatives in the instance of an impasse at the multilateral level.[16] Therefore, RTAs promote deeper integration as they may cover trade issues which are sensitive or not fully dealt with multilaterally such as investment, competition and labour standards.[17]

In the context of this study, trade refers essentially to the activity of buying and selling or of exchanging goods or services between peoples or countries.[18] Accountability essentially captures the extent to which society is safe and secure, as assessed from the existence of a robust legal system and transparent, effective and accessible institutions.[19] Transparency is the degree to which trade policies and practices, and the process by which they are established, are open and predictable.[20]

This study focuses on intra-regional trade, which means that research will be confined primarily to trade conducted within the SADC region and how such trade may be increased through the elimination of non-tariff barriers (NTBs).[21] NTBs are all obstacles, other than traditional customs duties, which interfere with international trade.[22] They consist of a group of measures, actions or omissions which restrict, to varying degrees and in diverse ways, the market access of goods or services.[23] NTBs certainly include any governmental regulations or

[15] Crawford and Fiorentino "The Changing Landscape of Trade Agreement" *World Trade Organization Discussion Paper No 8* available at http://www.wto.org (accessed 02-08-2015).
[16] *Ibid*.
[17] *Ibid*.
[18] See http://www.oxfordlearnersdictionaries.com/search/english/ (accessed 02-08-2015).
[19] Mo Ibrahim Foundation "Executive Summary" 2015 *Ibrahim Index of African Governance* 6.
[20] See "Transparency" at https://www.wto.org/english/thewto_e/glossary_e/transparency_e.htm (accessed 16-03-2016).
[21] Phooko "No Longer in Suspense: Clarifying the Human Rights Jurisdiction of the SADC Tribunal" 2015 *PER/PELJ* 552. To that end, mainly legal issues will be addressed and subjected to in-depth analysis, although it is acknowledged that economic and political factors have a bearing on the study.
[22] Hillman "Non-tariff barriers: Major Problem in Agricultural Trade" 1978 *American Journal of Agricultural Economics* 491- 492.
[23] Van den Bossche and Zdouc *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2013) 498. It is imperative to note that not only action, but also omission to inform interested parties about the applicable trade laws, regulations and procedures, promptly and accurately gives rise to NTBs.

practices other than tariffs, which directly impede, for instance, the entry of imports into a country.[24]

NTBs may be classified into two main categories. The first category includes quantitative restrictions, which is a relatively well-defined set.[25] The second category is more problematic as it is diverse and wide-ranging, comprising of, among other things, technical barriers to trade (TBTs), sanitary and phyto-sanitary measures (SPS measures), customs formalities and procedures and government procurement laws, procedures and practices.[26] As a result, it is difficult to remove these NTBs if there is any uncertainty or confusion engendered by a lack of accountability and transparency.[27] Therefore, the enhancement of accountability and transparency measures will inevitably facilitate the implementation and compliance with trade agreements and the enforcement of trade-related decisions. This would be critical considering that SADC institutions have been known to indulge in high-sounding rhetoric accompanied by little action.[28]

The provisions for the institutions of SADC are laid out in the SADC Treaty. These institutions include the Summit,[29] Troika,[30] Council of Ministers,[31] Integrated Committee of Ministers,[32] Tribunal,[33] Secretariat,[34] and Standing Committee of Officials.[35] However, the SADC institutions central to this study as far as accountability and transparency in trade are concerned are the Summit of Heads of State and Government and the SADC Tribunal. The role of the

[24] Hoekman and Kostecki *The Political Economy of the World Trading System: The WTO and Beyond* (2001) 42. See also, Van den Bossche and Zdouc *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2013) 37.
[25] Van den Bossche and Zdouc *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2013) 498.
[26] Van den Bossche and Zdouc *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2013) 498. See also, a list of some of these NTBs at the Table of Contents of the Inventory of NT Measures, Note by the WTO Secretariat, TN/MA/S/5/Rev.1, dated 28 Nov 2008. See also, Brenton and Manchin "Making EU Trade Agreements Work: The Role of Rules of Origin" 2002 *Centre for European Policy Studies (CEPS) Working Document 183* 756. It is clear that what matters is not just the level of border barriers but the rules that govern the way they are administered. Unfortunately, there is littles transparency or discussion of the latter, discussion is too often avoided on grounds that these are technical matters, whereas in practice such rules can be just as restrictive as tariff barriers. In a sense, these rules constitute NTBs.
[27] Van den Bossche and Zdouc *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2013) 37, 38, 498.
[28] Osode "The Southern African Development Community in legal historical perspective" 2003 *Journal for Juridical Science* 2.
[29] Article 10 SADC Treaty 1992.
[30] Article 9A SADC Treaty.
[31] Article 11 SADC Treaty.
[32] Article 12 SADC Treaty.
[33] Article 16 SADC Treaty.
[34] Article 14 SADC Treaty.
[35] Article 13 SADC Treaty.

Summit is to deal with, among other things, protocol formulation and the approval of policy before it is adopted into law.[36] On the other hand, the role of the Tribunal is to ensure adherence to and proper interpretation of the provisions of the SADC Treaty (and related instruments) and to hear disputes relating to them.[37] The functions of the SADC institutions indicated above are central in enhancing accountability and transparency.

1 2 PROBLEM STATEMENT

Although SADC has made significant strides in tariff elimination, it is of great concern that NTBs continue to restrict intra-regional trade.[38] The lack of transparency is a major and recurrent non-tariff-related complaint of businesses seeking to trade internationally.[39]

To begin with, transparency is a valuable tool for identifying and addressing unintended obstacles to trade and could also serve as a check against subtle forms of protectionism.[40] For instance, this may be true with respect to SPS measures which may be set up on the basis of conventional rules for the protection of human, animal and plant health and safety.[41] Thus, it is undeniable that due to the lack of transparency the legitimacy of such measures may be questionable.[42] Therefore, it is no surprise that regulatory transparency has been propelled to the forefront of the international trade agenda, both at the bilateral and regional level.[43]

In addition, the transparency of the legal and regulatory process is a significant good governance component from the perspective of SADC Member States' accountability to their

[36] Article 10 SADC Treaty.
[37] Article 16 SADC Treaty.
[38] Article 6 SADC Protocol on Trade. See also, Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration" 2012 *PER/PELJ* 454; and "Non-Tariff Barriers: Reporting, Monitoring and Eliminating Mechanism" at http://www.tradebarriers.org (accessed 16-03-2016), the online NTB reporting mechanism which allows interested parties to report any NTBs they have encountered in the region.
[39] Moise "Transparency Mechanisms and Non-Tariff Measures: Case Studies" 2010 Organisation for Economic Cooperation and Development. Trade and Agriculture Directorate (Trade Committee) Working Party of the Trade Committee OECD Trade Policy Working Paper No. III TAD/TC/WP (2010)4/FINAL 6 Available at http://www.oecd.org/trade.
[40] Moise "Transparency Mechanisms and Non-Tariff Measures: Case Studies" 2010 *Organisation for Economic Cooperation and Development. Trade and Agriculture Directorate (Trade Committee) Working Party of the Trade Committee OECD Trade Policy Working Paper No. III TAD/TC/WP(2010)4/FINAL* 6 Available at http://www.oecd.org/trade.
[41] Article 2 (2) SPS Agreement.
[42] Jackson *The Jurisprudence of GATT & the WTO: Insights on Treaty Law and Economic Relations* (2000) 134. See also, Nkuhlu "Moving Trade Liberalisation Forward" 1999 *SAIIA* 76. See also, Kamau *The regulation of trade barriers under SADC and EAC: Assessing the effectiveness of their legal framework* (LLM Thesis, University of Cape Town, 2014) 34.
[43] Moise "Transparency Mechanisms and Non-Tariff Measures: Case Studies" 2010 OECD *Trade Policy Working Paper* No. III TAD/TC/WP(2010)4/FINAL 6 Available at http://www.oecd.org/trade.

domestic constituencies.[44] In fact, it is necessary in the growth of intra-regional trade that the SADC legal framework ensures the participation of both natural and legal persons in the economic integration process.[45] For instance, in the European Union (EU), good governance entails both accountability and transparency, which are intertwined principles in policy-formulation.[46] The EU Commission believes that the process of administration and policy-making must be visible to the outside world if these are to be credible and understood. The consultation process is pivotal in that respect, acting as the primary interface between the organization and society.[47] Therefore, it follows that, although relatively more complex, European institutions work in a more responsible and open manner, thereby promoting certainty, predictability and legitimacy.

In the EU, regional integration initiatives are comprehensive in nature, going well beyond market access for goods or trade.[48] For instance, a press release from the European Parliament's Committee on Foreign Affairs entitled "*EU must unleash its internal potential to shape international politics, MEPs say*" illustrates this point. Therein, it is stated that in a vote on the Annual Report on Common Foreign and Security Policy (CFSP), the Members of the European Parliament (MEPs) called for a more ambitious, proactive, credible and strategic EU foreign policy based on a shared vision of EU shared interests and values and a common perception of threats to the Union, particularly Russia's geopolitical aggression in Ukraine.[49]

Closer to home, the New Partnership for Africa's Development (NEPAD) stated that inter-country trade and regional co-operation constitute a key part of building a stronger and more

[44] Moise "Transparency Mechanisms and Non-Tariff Measures: Case Studies" 2010 Organisation for Economic Cooperation and Development. Trade and Agriculture Directorate (Trade Committee) Working Party of the Trade Committee OECD Trade Policy Working Paper No. III TAD/TC/WP (2010)4/FINAL 6 available at http://www.oecd.org/trade.

[45] Oppong "Making regional economic community laws enforceable in national legal systems: Constitutional and judicial challenges" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 149.

[46] UNCITRAL "UNCITRAL standards for transparency, accountability and good governance": EU Contribution "Specific mechanisms envisaged in the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration to achieve transparency" 17 July 2004 1.

[47] Commission of the European Communities "Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the commission" 2002 Communication from the Commission (Brussels, 71/12/2002 COM 2002) 704 Final.p17. Specific consultation frameworks are provided for in the Treaties, for example the roles of the institutionalised advisory bodies, the social dialogue according to Articles 137 to 139 TEC or in other Community legislation. This also includes consultation requirements under international agreements and decisions taken in a formal process of consulting Member States 'comitology' procedure according to Council decision 1999/468/EC.

[48] See http://europa.eu/index_en.htm (accessed 12-04-2015).

[49] See http://europa.eu/index_en.htm (accessed 12-04-2015); and http://www.europarl.europa.eu/sides/getDoc (accessed 12-04-2015), for the EU report on the need to support eastern neighbours and to contain Russia, to boost security and stabilization in the south and to procure more defence and security resources urgently.

sustainable African economy.[50] It is asserted that this can be done by enhancing trade within Africa, sharing resources and building mutually beneficial infrastructure, among other things.[51] The NEPAD plays a coordinating, advocacy and facilitation role in this respect.[52]

In SADC, the slow progress in attaining closer regional integration may be discerned from the challenges relating to the implementation of the Regional Indicative Strategic Development Plan (RISDP).[53] It argued that it is imperative for the SADC legal framework and institutions to promote accountability and transparency in order to expedite the elimination of NTBs by facilitating comprehensive monitoring and implementation of protocols and ensuring consequences for Member States' non-compliance with rules.

The flaws of the SADC institutional framework, particularly with regard to the Summit and the Tribunal, were exposed within the context of the crisis in Zimbabwe. The fate of the original Tribunal is an instructive case on supranational institutions in SADC. Originally intended to "build a house of justice" in the region, it offered citizens a forum to challenge their governments.[54] However, after the Tribunal ruled against Zimbabwe in the *Mike Campbell v Republic of Zimbabwe* case, the SADC Summit refused to sanction the judgment.[55] Instead, the Summit appeared to support Zimbabwe's national objectives and proceeded to suspend the Tribunal.[56] All this occurred against the backdrop of land reform in Zimbabwe, where the land occupied by white commercial farmers, who dominated the economy more than twenty years

[50] The New Partnership for Africa's Development (NEPAD) is a planning and coordinating technical body of the African Union. See www.nepad.org (accessed 08-04-2015); and www.au.int/ (accessed 08-04-2015).
[51] Sornarajah and Wang *China, India and the International Economic Order* (2010) 387. It may be noted that the Association of Southeast Asian Nations (ASEAN) shares substantially similar objectives for socio-economic development in the Asia region.
[52] See http://www.nepad.org/regionalintegrationandinfrastructure (accessed 08-04-2015).
[53] Osode "The Southern African Development Community in legal historical perspective" 2003 *Journal for Juridical Science* 1. See also, Phooko "No Longer in Suspense: Clarifying the Human Rights Jurisdiction of the SADC Tribunal" 2015 *PER/PELJ* 535. See also, http://www.sadc.int/about-sadc/integration-milestones/ (accessed 11-04-2016). The RISDP, endorsed by the SADC Heads of State and Government, laid out targets and timeframes for integration as follows: the establishment of a Free Trade Area (FTA) by 2008, a customs union in 2010, a common market in 2015, a monetary union in 2016 and the introduction of a single currency in 2018.
[54] Mapuva and Muyengwa-Mapuva "The SADC regional bloc: What challenges and prospects for regional integration" 2014 *Law, Democracy and Development* 26. See also, Saurombe "The Role of SADC Institutions in implementing SADC Treaty provisions dealing with regional integration" 2012 *PER/PELJ* 462.
[55] *Mike Campbell v Republic of Zimbabwe* SADC (T) 2/2007. Mapuva and Muyengwa-Mapuva "The SADC regional bloc: What challenges and prospects for regional integration" 2014 *Law, Democracy and Development* 32.
[56] Phooko "No Longer in Suspense: Clarifying the Human Rights Jurisdiction of the SADC Tribunal" 2015 *PER/PELJ* 546-547. See also, Saurombe "The Role of SADC Institutions in implementing SADC Treaty provisions dealing with regional integration" 2012 *PER/PELJ* 462; and Dugard *International Law: A South African Perspective* 440-443.

after independence, was expropriated amidst heightened nationalistic rhetoric.[57] Thereafter, sanctions imposed by Western countries, led by the United Kingdom (UK) and the United States of America (USA), led to economic collapse and a sharp rise in inflation and unemployment.[58]

The suspension of the Tribunal was pronounced *ultra vires* by its judges, who were of the view that the Summit did not have the power to suspend the judicial arm of the SADC, thereby causing concerns about the rule of law in the RTA to abound.[59] Presently, the Tribunal has been reconstituted with the mandate to solely adjudicate cases between states. Therefore, SADC has tightened access to the Tribunal.[60] Such instabilities have profound implications for intra-regional trade because the Tribunal is fundamental for dispute resolution and legal guidance to other SADC institutions, and can play an oversight role during the implementation stages of trade agreements.[61]

It is believed that the dominant trend in SADC appears to be the continuation of the solidarity of the Frontline States (FLS) particularly between former liberation movements, including SWAPO, MPLA, FRELIMO, ANC and ZANU PF.[62] In fact, most of African regional integration agreements' preambles affirm the ideal of freedom inspired by liberation struggles from colonization, the quest of which fostered indissoluble bonds of friendship, history, and culture between the sovereign states.[63] Therefore, there are challenges in strengthening SADC as a rules-based RTA possessing significant certainty, predictability and effective dispute settlement, with less machinations of power politics and unilateralism.[64]

To sum up, this study seeks to assess the SADC legal framework and the functions of the institutions discussed above with the aim of enhancing accountability and transparency

[57] Cawthra "The Role of SADC in Managing political crisis and conflict: The Cases of Madagascar and Zimbabwe" 2010 *Friedrich-Ebert-Stiftung* 24.
[58] *Ibid*.
[59] Saurombe "The Role of SADC Institutions in implementing SADC Treaty provisions dealing with regional integration" 2012 *PER/PELJ* 462.
[60] Corrigan "Puzzling Over the Pieces: Regional Integration and the African Peer Review Mechanism" 2015 *SAIIA Research Report* 28.
[61] Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration" 2012 *PER/PELJ* 469.
[62] Shumba "Revisiting legal harmonisation under the Southern African Development Community Treaty: The need to amend the Treaty" 2015 *Law, Democracy and Development* 143. See also, Cawthra "The Role of SADC in Managing political crisis and conflict: The Cases of Madagascar and Zimbabwe" 2010 *Friedrich-Ebert-Stiftung* 30; and Peters-Berries "The Zimbabwe Crisis and SADC: How to deal with a Deviant Member State?" 2002 *Monitoring Regional Integration in Southern Africa Yearbook* 211.
[63] Erasmus "The Consequences of Retaliation in Southern African Trade Relations" 2014 *Stellenbosch: Tralac* 9.
[64] *Ibid*.

mechanisms. This approach is considered to be critical to achieving the objective of boosting intra-regional trade.

1 3 RESEARCH QUESTIONS

The lack of accountability and transparency mechanisms within the SADC legal and institutional framework has led to deep concern about the lack of advancement in the intra-regional trade liberalization agenda. In that context, there is inadequate illumination by research on the questions sought to be addressed in this study which are:

1) What are the provisions for accountability and transparency within the SADC legal framework?

2) What are the SADC institutional challenges and possible solutions for the enhancement of accountability and transparency in intra-regional trade liberalization?

3) Does SADC reflect the WTO's multilateral standards for accountability and transparency?

4) What lessons can be derived from the EU's legal and institutional framework for the enhancement of accountability and transparency in SADC?

1 4 RESEARCH OBJECTIVES

This study will focus on four specific objectives.

Firstly, the study seeks to provide the SADC legal historical background in regional integration. This will necessarily involve a discussion of the SADC institutions in their historic context.

Secondly, a critical assessment of the current SADC legal and institutional framework for accountability and transparency will be undertaken, with the SADC Treaty and applicable Protocols being critical in that respect. On that basis, there will be a significant emphasis on the role of the SADC Summit in the implementation of trade agreements, protocols and decisions, among other things. Thirdly, the study will examine the role of the SADC Tribunal in a similar manner.

Lastly, this study also seeks to critically examine the EU's legal and institutional framework for comparative purposes in order to draw lessons for future SADC legal and institutional reforms relating to accountability and transparency.

1 5 LITERATURE REVIEW

The RTA that is central to this study is the SADC and, as a result, much of the discussion herein seeks to address measures that may be taken to improve intra-regional trade in this regional economic community.[65] The SADC's vision in terms of the Regional Indicative Strategic Development Plan (RISDP) shows the milestones set down for regional integration.[66]

To begin with, Lester provides an account of the legal basis for RTAs at the multilateral level.[67] Although the RTAs are shown to be able to go further, faster, deeper and cheaper in economic integration, the work is most relevant for indicating that there must be caution in implementing free trade policies. Several critiques are cited therein which in essence lay out arguments for trade liberalisation. This translates to the need for accountability and transparency in SADC trade in order to facilitate the integration process.

Trebilcock and Howse explore the impact of regional integration on developing countries.[68] Their work is relevant because SADC Member States include developing and least-developed countries (LDCs). The work identifies problems that emanate from economic, political and cultural differences and the challenges in reconciling those differences without compromising state sovereignty. Their work also indicates that the GATT will always fail to constrain domestic self-interest for the common good and, by inference, signaling that a regional approach is more effective in pursuing common interests.

Osode addresses the legal historical background of SADC on regional integration.[69] The work discusses the transition from SADCC to SADC and the institutional bottlenecks that impede trade liberalization efforts. In that regard, the work sets out the reasons for the failure of closer economic integration. Therefore, the study provides a critical historical insight into the SADC.

[65] SADC Protocol on Trade, 1996.
[66] SADC Regional Indicative Strategic Developmental Plan (RISDP).
[67] See generally, Lester *et al. World Trade Law: Text, Materials and Commentary* (2012). See also, Mapuva and Muyengwa-Mapuva "The SADC regional bloc: What challenges and prospects for regional integration" 2014 *Law, Democracy and Development* 35-36.
[68] See generally, Trebilcock and Howse *The Regulation of International Trade* (2005).
[69] Osode "The Southern African Development Community in legal historical perspective" 2003 *Journal for Juridical Science* 1-9.

Saurombe discusses strengths and weaknesses of the SADC legal and institutional framework.[70] The author observes that the SADC followed the EU's linear model for integration and also identifies other similarities between the two RTAs which will facilitate a comparative assessment later in this study. It is acknowledged that the success of regional integration in the EU where experience has shown that enhanced integration pays greater dividends in trade for Member States is undisputed.

However, Saurombe argues that despite the acceptance of regional integration in SADC, there is a poor record of commitment to the implementation of regional integration goals and objectives. Saurombe warns that better results for regional trade cannot be attained by means of high sounding rhetoric unless robust and comprehensive measures for monitoring and enforcing trade agreements are employed.[71]

In addition, Corrigan addresses transparency through the review reports of governance and regional integration conducted under the auspices of the African Peer Review Mechanism.[72] The reviews have wide-ranging and highly detailed material on trade and regional integration. On the basis of these reports, Corrigan advocates for a simplified approach to regional integration, primarily concerned with trade.

Lastly, Disenyana and Khumalo provide insight into SACU, a relatively advanced regional integration situated within the SADC region.[73] Their work addresses the problem of accountability in the enforcement of SADC Tribunal decisions. It study argues for

[70] Saurombe "Regional Integration Agenda for SADC 'Caught in the winds of change' Problems and Prospects" 2009 *Journal of International Commercial Law and Technology* 100-106. See also, Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy and Development* 458-476; and Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration" 2012 *PER/PELJ* 454-485.

[71] Saurombe "Regional Integration Agenda for SADC 'Caught in the winds of change' Problems and Prospects" 2009 *Journal of International Commercial Law and Technology* 100-106. See also, Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy and Development* 458-476; and Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration" 2012 *PER/PELJ* 454-485. See also, Mapuva and Muyengwa-Mapuva "The SADC regional bloc: What challenges and prospects for regional integration" 2014 *Law, Democracy and Development* 25.

[72] Corrigan "Puzzling Over the Pieces: Regional Integration and the African Peer Review Mechanism" 2015 *SAIIA Research Report 18 Governance and APRM Programme* 6-39. The African Peer Review Mechanism (APRM), which gives insight into governance in African countries, entails review of countries on a voluntary basis.

[73] Disenyana and Khumalo "Transport Services in SACU: Accelerating Harmonisation and Liberalisation" 2009 *SAIIA Research Report 1 Development through Trade Programme* 9-47.

harmonisation of domestic laws, insisting that that would be favourable for trade and the advancement of the integration agenda.

1 6 SIGNIFICANCE OF THE STUDY AND LIMITATION OF THE SCOPE

1 6 1 Significance of the study

Regional integration has long been recognised as an important vehicle for Africa's development.[74] Evidence of its success can be seen in the European Union (EU) which has been hailed as the gold standard of regional integration.[75] This study seeks to examine the legal and institutional challenges hindering SADC trade liberalisation with particular reference to accountability and transparency; and how these challenges may be addressed in order to improve intra-regional trade.[76]

The study will assess the institutions engaged in the implementation of the SADC integration agenda which include, among others, the Summit, Tribunal and Council of Ministers. The debate on how to facilitate intra-regional trade is prominent within SADC and this study seeks to interrogate how enhanced accountability and transparency mechanisms are central in achieving that objective.

1 6 2 Limitation of the scope

This study focuses on intra-SADC trade in the regional integration agenda, particularly on the legal and institutional challenges that must be addressed in order to enhance accountability and transparency. For the purposes of drawing lessons for SADC, pertinent EU legal instruments and institutions will be examined on a comparative basis. The WTO's provisions for accountability and transparency on the multilateral level, which apply to SADC Member States will also be discussed.

[74] Corrigan "Puzzling Over the Pieces: Regional Integration and the African Peer Review Mechanism" 2015 *SAIIA Research Report 18 Governance and APRM Programme* 24.
[75] Guzman and Sykes *Research Handbook in International Economic Law* (2007) 154.
[76] Mistry "Africa's Record of Regional Co-operation and Integration" 2000 *African Affairs* 554. See also, Corrigan "Puzzling Over the Pieces: Regional Integration and the African Peer Review Mechanism" 2015 *SAIIA Research Report 18 Governance and APRM Programme* 24.

1 7 RESEARCH METHODOLOGY

The purpose of this study is to explore the accountability and transparency weaknesses in the legal and institutional framework and the ways by which they could be addressed to advance intra-SADC trade. The research methodology to obtain reliable findings will be fundamental in prescribing ways in which these challenges may be remedied. There are basically two types of research approaches that may be employed in research. These include the quantitative approach and the qualitative approach. This study will rely exclusively on the qualitative approach.

The quantitative research entails the gathering and analysis of statistical or numerical data, leading to conclusive findings. Its outcome is usually used to recommend a final course of action.[77] On the other hand, qualitative research, which is exploratory in nature, is geared towards understanding and analysis of non-numerical data. Its findings are not conclusive.[78] Still, the findings are pivotal in helping develop comprehension and a sound base for further decision making.[79] In view of the nature of the research problem and the objectives of the study, the qualitative approach is the most fitting and suitable methodology.

The qualitative approach may be carried out by means of many research methods which have varying effectiveness and applicability depending on the nature of the research. In this study, the qualitative approach will be implemented by means of a limited number of research methods. These specifically include historical studies, critical content analysis and comparative analysis.[80] These research methods have been identified as the most suitable in answering the research questions because of the following reasons.

The historical studies method will be employed in chapter two of the dissertation. It will serve to provide the historical and factual background of SADC institutional challenges in relation to intra-regional trade. Pertinent literature will be used to critically trace and interpret chronological development of SADC regional integration.

---

[77] See http://www.snapsurveys.com/qualitative-quantitative-research/ (accessed 02-08-2015).
[78] See http://fieldresearch.msf.org/msf/bitstream/10144/84230/1/Qualitative%20research%20methodology.pdf (accessed 30-07-2015). See also, http://isites.harvard.edu/icb/icb.do?keyword=qualitative&pageid=icb.page340273 (accessed 30-07-2015).
[79] Hofstee *Constructing a Good Dissertation: A Practical Guide to Finishing a Masters, MBA or PhD on Schedule* (2006) 33-46.
[80] *Ibid.*

Critical content analysis will be used in the third and fourth chapters in order to critically analyse SADC's legal and institutional framework with regard to finding ways of improving transparency and accountability. In that respect, chapter three will examine the role of the SADC Summit and issues that relate to its functions, such as state sovereignty and supreme community law. In the same vein, chapter four will largely focus on the SADC Tribunal.

The comparative analysis method will be used in chapter five, where the EU's legal and institutional mechanisms that promote accountability and transparency will be analysed. The aim of this chapter is to draw lessons for SADC. The reasons for choosing the EU, among other RTAs, is that it has been relatively successful and SADC shares many similarities with it.

Secondary data analysis will be relied on throughout the study. This data will include literature authored by renowned researchers on the subject such as Saurombe, Ndulo, Erasmus, and Shumba. It will also include pertinent information originating from research institutions and government agencies. Secondary data analysis is of significant importance as it is aimed at providing a more balanced and critical analysis of the research problem.

The sources of the data will include legislation, judicial decisions, textbooks, journals and internet sources. Legal instruments will include WTO agreements such as the General Agreement on Tariffs and Trade (GATT), General Agreement on Trade in Services (GATS) and other multilateral agreements. SADC protocols that have a bearing on regional integration are critical to this study. For comparative purposes, EU legal instruments and case law also will be considered. Judicial decisions of WTO Panels and the Appellate Body may be examined. Pertinent SADC decisions will be discussed. There will be a deliberate attempt to use the most recent textbooks, journals, articles and commentaries.

Internet sources in the form of trade related websites such as those of the WTO, EU, and SADC will be accessed for primary data on recent developments in regional trade integration. Other websites such as *www.jstor.com* will be used to access journals and articles online. Material from research and capacity-building organisations such as the Trade Law Centre (TRALAC) and the South African Institute on International Affairs (SAIIA) will be accessed for SADC trade-related data.

To sum up, the qualitative approach is most appropriate in implementing the research objectives and answering the research questions. This will be facilitated by the availability of sources for primary data as laid out above. It will be crucial for the sound interpretation of

reliable data and, as a result, lead to more effective analysis of the research problem. Secondary literature will be instrumental in the analysis that will be done in the entirety of the study. It will assist in presenting different perspectives on the subject matter, thereby shedding more light on the research problem.

1 8 PROPOSED CHAPTER OUTLINE

The study is organised as follows:

Chapter one provides an introduction to the study as it puts the topic in the appropriate context and, perhaps most importantly, presents the research problem that will be addressed in the ensuing chapters. The research objectives are also set out above as well as the research methodology and literature review.

Chapter two will address the legal historical background of regional integration in the SADC. Similarly, a brief history of the EU will be presented.

Chapter three will entail a discussion of the concepts of transparency and accountability which, *inter alia*, constitute good governance. Also, inherent in the chapter will be an assessment of SADC's legal framework, including the status, effect and applicability of community law in the Member States. The institutional framework will also be examined, particularly the central role of the SADC Summit in regional integration and the interface between supranational institutions and state sovereignty.

In Chapter four, the WTO's provisions and mechanisms for accountability and transparency will be discussed with due regard to their impact on SADC. The chapter will also examine the role of the SADC Tribunal as an institution that is critical for accountability purposes.

Chapter five critically examines the EU's legal and institutional framework in order to draw some lessons for future SADC legal and institutional reform aimed at enhancing accountability and transparency.

Chapter six will present the conclusions of the study and suggest ways of resolving SADC legal and institutional challenges relating to accountability and transparency. This will entail presentation and discussion of the study's recommendations.

1 9 REFERENCING STYLE

The referencing style used in this study is that of *Speculum Juris*, an accredited open access online law journal published by the Nelson R. Mandela School of Law, University of Fort Hare.[81]

[81] See "Speculum Juris" at http://ufh.za.libguides.com/referencing?p=590550.

CHAPTER 2

The Historical Legal Background of the Southern African Development Community (SADC) and the European Union (EU)

2 1 INTRODUCTION

Regional integration is defined as the adoption of a regional project by a formal regional economic organization designed to enhance the political, economic, social and cultural amalgamation of member states.[82] Regional integration has long been recognised as an important vehicle for Africa's progress from economic marginalization that can be traced back to the many travesties that befell the continent, beginning with the early European invasions, the slave trade and ending with colonial rule.[83]

After gaining independence from colonial rule, most African countries have been engaged in the creation of Regional Economic Communities (RECs) with a view to enhancing economic growth and development, and increasing the continent's international economic status.[84] To date, these objectives have not been fully achieved.[85] Nonetheless, regionalism continues to be vigorously pursued throughout Africa.[86] In fact, Africa boasts a great potential for development with a vast array of natural resources which are vital in globalization and regionalisation of production.[87]

This chapter presents the historical legal background of SADC and the EU in two separate parts. Firstly, the SADC historical legal background is examined from the late 1970s regarding circumstances that led to the formation of the Southern African Development Coordination Conference (SADCC), its establishment and subsequent transition into SADC. This background will be critical in determining effective means of enhancing accountability and transparency for intra-SADC trade.[88] The EU's historical legal background, beginning in the early 1940s, will entail a more focused approach, placing emphasis on the treaties as the

[82] Lee *The Political Economy of Regionalism in Southern Africa* (2003) 2.
[83] Corrigan "Puzzling Over the Pieces: Regional Integration and the African Peer Review Mechanism" 2015 *SAIIA Research Report 18 Governance and APRM Programme* 24. See also, Lee *The Political Economy of Regionalism in Southern Africa* (2003) 1.
[84] Phooko "No Longer in Suspense: Clarifying the Human Rights Jurisdiction of the SADC Tribunal" 2015 *PER-PELJ* 533.
[85] Lee *The Political Economy of Regionalism in Southern Africa* (2003) 2.
[86] *Ibid.*
[87] *Ibid.*
[88] Osode "The Southern African Development Community in legal historical perspective" 2003 *Journal for Juridical Science* 1.

historical milestones in the integration process. The comparative analysis of the EU will ultimately serve the purpose of drawing lessons for SADC regional integration.[89]

2 2 THE HISTORICAL AND LEGAL BACKGROUND OF THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC)

2 2 1 Circumstances leading to the formation of the SADCC

The formation of SADCC resulted from a long process of consultations by leaders in Southern Africa.[90] From 1977, active consultations were undertaken by representatives of the "Frontline States" including Angola, Botswana, Lesotho, Mozambique, Swaziland, United Republic of Tanzania and Zambia.[91] In 1979, the Foreign Ministers of these states met in Gaborone, Botswana, and resolved to convene a meeting of ministers responsible for economic development.[92] That meeting was held in Arusha, Tanzania, in July 1979. It is the Arusha meeting that led to the birth of the Southern African Development Co-ordination Conference (SADCC) in 1980.[93]

To begin with, apartheid South Africa had ambitious designs on the region as it sought to expand its economic and political hegemony beyond the Southern African Customs Union (SACU) by creating a white hinterland to ensure that all economic benefits accrued to South Africa.[94] The South African government was desperate to economically subjugate its neighbouring states as sanctions-busting conduits and became distressed by the Frontline States' support for the international community's sanctions against its apartheid policies.[95] Therefore, in 1978 then Defence Minister P W Botha put forward the "total strategy" aimed at

[89] Lee *The Political Economy of Regionalism in Southern Africa* (2003) 3.
[90] See www.sadc.int/about-sadc/overview/history-and-treaty/ (accessed 17-06-2016).
[91] *Ibid.*
[92] *Ibid.*
[93] Zongwe "An Introduction to the Law of the Southern African Development Community" 2014 *Hauser Global Law School Program: Globalex*, available at www.nyulawglobal.org/globalex/Southern_African_Development_Community1.html (accessed 16-09-2016).
[94] Lee *The Political Economy of Regionalism in Southern Africa* (2003) 45.
[95] Osode "The Southern African Development Community in legal historical perspective" 2003 *Journal for Juridical Science* 4. See also, Lee *The Political Economy of Regionalism in Southern Africa* (2003) 46; and Hanlon *Sanctions Against Apartheid: On the front line, Destabilisation, the SADCC states and sanctions* (1989) 184.

the Frontline States as a policy response to what was seen as the "total onslaught" orchestrated by Moscow to end white rule in South Africa.[96]

As apartheid South Africa's foreign policy, the "total strategy" was multi-dimensional in that it required the mobilization of political, economic, diplomatic and military forces at the government's disposal. For example, South Africa embarked on regional destabilisation and was unofficially at war with Angola, Mozambique and Namibia.[97] This resulted in killings, abductions and the provision of support to dissident groups.[98] In addition to these unofficial wars, regional destabilisation also included military invasions of neighbouring capitals and regular sabotage of regional transport and communications infrastructure, all executed to ensure that the regional trade flowed downwards and southwards into South Africa.[99]

The total strategy also entailed South Africa expelling or deporting thousands of migrant mine workers hailing from SADCC Member States thereby terminating a critical source of foreign exchange earnings for those countries. Trade credits required by SADCC Member States for the import of essential goods were also withheld.[100] For these heavily indebted countries which had limited access to trade credit, such measures threatened to strangle their economies.[101]

In light of the abovementioned political and economic predicaments, the Frontline States established the SADCC in order to advance the cause of national political liberation in Southern Africa and to reduce dependence on apartheid-era South Africa.[102] First, the reduction of dependence on South Africa was particularly in the area of transportation.[103] Due to their nature

---

[96] Osode "The Southern African Development Community in legal historical perspective" 2003 *Journal for Juridical Science* 4. See also, Hanlon *Sanctions Against Apartheid: On the front line, Destabilisation, the SADCC states and sanctions* (1989) 173.

[97] Lee *The Political Economy of Regionalism in Southern Africa* (2003) 46. See also, Motshabi *Sanctions Against Apartheid: South Africa's actions against neighbouring states* (1989) 123.

[98] Lee *The Political Economy of Regionalism in Southern Africa* (2003) 46. It is stated that the damage resulting from regional destabilization cost the Member States US$60.5 billion between 1980 and 1988. Also, at least a million lives were lost and several millions of people displaced.

[99] Lee *The Political Economy of Regionalism in Southern Africa* (2003) 46. See also, Osode "The Southern African Development Community in legal historical perspective" 2003 *Journal for Juridical Science* 4; and Motshabi *Sanctions Against Apartheid: South Africa's actions against neighbouring states* (1989) 123.

[100] Osode "The Southern African Development Community in legal historical perspective" 2003 *Journal for Juridical Science* 4.

[101] *Ibid.*

[102] Bauer and Taylor *Politics in Southern Africa: State and Society in Transition* (2005) 333. See also, Lee *The Political Economy of Regionalism in Southern Africa* (2003) 2; Seidman *Sanctions Against Apartheid: The Frontline states, economic dependence and sanctions* (1989) 167; and Bertelsman-Scott and Mutschler "A Report on an International Conference held on 27-28 October 1998" 1998 *SAIIA Reports* 4. See further, www.sadc.int/about-sadc/overview/history-and-treaty/ (17-06-2016).

[103] Osode "The Southern African Development Community in legal historical perspective" 2003 *Journal for Juridical Science* 3.

as landlocked states with underdeveloped transport and communications infrastructure, the SADCC Member States with the exception of Mozambique, were almost entirely reliant on South African ports and railway routes for the movement of their imports and exports.[104]

Second, SADCC Member States such as Botswana, Lesotho and Swaziland (Boleswa) which were part of SACU, relied heavily on the railway income, import duty and related charges collected jointly and distributed by South Africa to these countries pursuant to the SACU Agreement.[105] Third, some of the states such as Mozambique, Zambia and Botswana could not produce sufficient food for their populace. As a result, they were dependent on South Africa for regular food supplies.[106] Lastly, several of SADCC Member States, especially Lesotho, Mozambique, Botswana, Swaziland and Malawi were significantly dependent in varying degrees on their labour exports to South Africa. Such exports were vital for much needed foreign exchange earnings.[107]

With regard to those issues, SADCC managed to reduce its dependence on South Africa through effective coordination of the strengths and the optimum utilisation of resources for the benefit of all Member States.[108] The circumstances surrounding the formation of SADCC, particularly the increased militarisation of the apartheid regime, caused it to develop a strategy that deviated from the European Union's model of market integration to one that was largely politically oriented.[109] For instance, in 1979 when the total strategy was still in effect, apartheid South Africa placed a carrot before the Frontline States by persuading them to join South Africa and the TBVC states in a Constellation of Southern African States (CONSAS).[110] The proposal was rejected the apartheid regime's regional destabilisation strategy intensified.[111]

---

[104] Osode "The Southern African Development Community in legal historical perspective" 2003 *Journal for Juridical Science* 3. See also, Motshabi *Sanctions Against Apartheid: South Africa's actions against neighbouring states* (1989) 123.
[105] *Ibid*.
[106] Osode "The Southern African Development Community in legal historical perspective" 2003 *Journal for Juridical Science* 3.
[107] Osode "The Southern African Development Community in legal historical perspective" 2003 *Journal for Juridical Science* 3.
[108] See www.sadc.int/about-sadc/overview/history-and-treaty/ (accessed 17-06-2016).
[109] Lee *The Political Economy of Regionalism in Southern Africa* (2003) 45.
[110] Lee *The Political Economy of Regionalism in Southern Africa* (2003) 45 – It must be noted that the TBVC states included the four South African Bantustans, namely Transkei, Bophuthatswana, Venda and Ciskei.
[111] Lee *The Political Economy of Regionalism in Southern Africa* (2003) 45.

2 2 2 The formation of the SADCC

The SADCC was officially launched on 1 April 1980 and it comprised of all the majority-ruled states of Southern Africa.[112] The Heads of States and Government of the Frontline States and the representatives of governments of Lesotho, Malawi and Swaziland signed the Lusaka Declaration "Towards Economic Liberation" in Lusaka, Zambia in the process of establishing the SADCC.[113] The signing of the Lusaka Declaration was in large part possible due to heightened political co-ordination between the Frontline States.[114] Subsequently, SADCC was formalized by means of a Memorandum of Understanding on the Institutions of the Southern African Development Co-ordination Conference dated 20th July 1981.[115]

SADCC was formed with four principal objectives.[116] First, SADCC was aimed at the reducing Member States' dependence on apartheid South Africa.[117] Second, it sought to forge linkages to create genuine and equitable regional integration.[118] The third objective was the mobilization of Member States' resources to promote the implementation of national, interstate and regional policies.[119] Lastly, SADCC was also aimed at securing international cooperation within the framework of the strategy for economic liberalization.[120] The SADCC's Summit of Heads of States and Government decided in a meeting in Harare, Zimbabwe, to formalize SADCC by giving it appropriate legal status, in the form of an Agreement, Charter or Treaty, to replace the Memorandum of Understanding.[121]

In the period between 1984 and 1986, political unrest in South Africa heightened immensely.[122] The SADCC Member States called for more sanctions against the apartheid regime from the

---

[112] Mapuva and Muyengwa-Mapuva "The SADC regional bloc: What challenges and prospects for regional integration" 2014 *Law, Democracy and Development* 24. See also, Ng'ong'ola "SADC Law: Building Towards Regional Integration" 2011 *SADC Law Journal* 124. See further, www.sadc.int/about-sadc/overview/history-and-treaty/ (accessed 17-06-2016). It is stated that the countries which founded the SADCC included Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Zambia and Zimbabwe.
[113] See www.sadc.int/about-sadc/overview/history-and-treaty/ (accessed 17-06-2016).
[114] Bertelsman-Scott and Mutschler "A Report on an International Conference held on 27-28 October 1998" 1998 *SAIIA Reports* 4.
[115] See www.sadc.int/about-sadc/overview/history-and-treaty/ (accessed 17-06-2016).
[116] *Ibid.*
[117] Mapuva and Muyengwa-Mapuva "The SADC regional bloc: What challenges and prospects for regional integration" 2014 *Law, Democracy and Development* 24. See also, www.sadc.int/about-sadc/overview/history-and-treaty/ (accessed 17-06-2016).
[118] See www.sadc.int/about-sadc/overview/history-and-treaty/ (accessed 17-06-2016).
[119] *Ibid.*
[120] *Ibid.*
[121] See www.sadc.int/about-sadc/overview/history-and-treaty/ (accessed 17-06-2016).
[122] Lee *The Political Economy of Regionalism in Southern Africa* (2003) 46.

international community.[123] Even the Zimbabwean government attempted to impose economic sanctions.[124] The sanctions question was viewed within the parameters of an intensified liberation struggle and the opportunity for advancing the political economy of the region.[125] Indeed, the impact of the sanctions was pivotal in President FW De Klerk's decision to end the policy of regional destabilization and begin the long and arduous transition to a post-apartheid South Africa.[126]

In the early 1990's, SADCC reassessed its objectives in light of the transformation of the world economy and changing political and economic dynamics taking place in Africa.[127] This called for a transition from a political to an economic approach to regional integration.[128] The political role of SADCC has been well acknowledged. Its greatest contribution towards SADC is seen as the forging of a regional identity and a sense of common destiny among the countries and peoples of Southern Africa.[129]

Initially the Member States had agreed to focus on regional cooperation and development instead of market integration.[130] However, in 1992 the SADCC Member States determined that the time was apt to move beyond ensuring regional political stability toward promoting market integration.[131] Some of the reasons underlying the change in intent were that the South African apartheid regime had been put to an end and there was a pressing need to end the marginalization of the region in the global economy.[132]

---

[123] Osode "The Southern African Development Community in legal historical perspective" 2003 *Journal for Juridical Science* 4. See also, Danaher *Sanctions Against Apartheid: The US struggle over sanctions against South Africa* (1989) 140.
[124] Lee *The Political Economy of Regionalism in Southern Africa* (2003) 4.
[125] Osode "The Southern African Development Community in legal historical perspective" 2003 *Journal for Juridical Science* 4.
[126] Lee *The Political Economy of Regionalism in Southern Africa* (2003) 46.
[127] Lee *The Political Economy of Regionalism in Southern Africa* (2003) 2.
[128] Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 462. See generally, Gibb "Southern Africa in transition: Prospects and problems facing regional integration" 1998 *The Journal of Modern African Studies* 287-306.
[129] Lee *The Political Economy of Regionalism in Southern Africa* (2003) 44.
[130] Mapuva and Muyengwa-Mapuva "The SADC regional bloc: What challenges and prospects for regional integration" 2014 *Law, Democracy and Development* 24. See also, Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 462; and Ng'ong'ola "SADC Law: Building Towards Regional Integration" 2011 *SADC Law Journal* 124. See further, Lee *The Political Economy of Regionalism in Southern Africa* (2003) 45.
[131] Mapuva and Muyengwa-Mapuva "The SADC regional bloc: What challenges and prospects for regional integration" 2014 *Law, Democracy and Development* 24.
[132] Lee *The Political Economy of Regionalism in Southern Africa* (2003) 47.

2 2 3 The transitional from SADCC to the SADC

At the Summit held in Windhoek, Namibia, on 17 August 1992 the Heads of State and Government signed the SADC Declaration and Treaty that effectively transformed the SADCC into the SADC.[133] The SADC was established under Article 2 of the Treaty to spearhead the economic integration in Southern Africa.[134] Intra-SADC trade is central to regional economic integration.[135] The SADC is currently a regional configuration of fifteen countries, its cooperation and integration drawing upon the historic, economic, political, social and cultural ties.[136]

While SADC is a development community on the basis of the 1992 Windhoek Treaty. The Treaty sets out the main objectives of SADC.[137] These objectives provide that SADC seeks to achieve development and economic growth, to alleviate poverty and to enhance the standard and quality of life of the peoples of Southern Africa and to support the socially disadvantaged through regional integration.[138]

The SADC Treaty's objectives are set to be achieved through increased regional integration, built on democratic principles, and equitable and sustainable development.[139] Two of the objectives stated in the SADC Treaty are broad and indicative of the goal of regional economic integration.[140] In Article 5 (1) (a) it is provided that "SADC shall aim to achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the peoples

[133] Mapuva and Muyengwa-Mapuva "The SADC regional bloc: What challenges and prospects for regional integration" 2014 *Law, Democracy and Development* 24. See also, Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 462. See further, www.sadc.int/about-sadc/overview/history-and-treaty/ (accessed 17-06-2016). The SADC Treaty is sometimes referred to as the Treaty of Windhoek.

[134] Mapuva and Muyengwa-Mapuva "The SADC regional bloc: What challenges and prospects for regional integration" 2014 *Law, Democracy and Development* 24. See also, Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 462; Muthai "Regional trade integration strategies under SADC and the EAC: A comparative analysis" 2011 *SADC Law Journal* 83; and Ng'ong'ola "SADC Law: Building Towards Regional Integration" 2011 *SADC Law Journal* 125.

[135] Buthelezi *Regional Integration in Africa: Prospects and Challenges for the 21st Century* (2006) 174. See also, www.sadc.int/about-sadc/overview/history-and-treaty/ (accessed 17-06-2016).

[136] Muthai "Regional trade integration strategies under SADC and the EAC: A comparative analysis" 2011 *SADC Law Journal* 8. See also, Mudzonga "Liberalising trade in Southern Africa: Implementation challenges for the 2008 SADC FTA and beyond" 2008 *Institute for Global Dialogue* 15.

[137] Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 462. See also, www.sadc.int/about-sadc/overview/history-and-treaty/ (accessed 17-06-2016).

[138] See www.sadc.int/about-sadc/overview/history-and-treaty/ (accessed 17-06-2016).

[139] *Ibid*.

[140] Osode "The Southern African Development Community in legal historical perspective" 2003 *Journal for Juridical Science* 2.

of Southern Africa and support the socially disadvantaged through regional integration.[141] Article 5 (1) (d) further provides that "SADC shall promote self-sustaining development on the basis of collective self-reliance and inter-dependence of Member States.[142]

The SADC Treaty established a series of institutional mechanisms which include the Summit of Heads of State and Government, Council of Ministers, Standing Committee of Officials, a Secretariat and a Tribunal.[143] Despite establishing regional institutions it is argued that SADC retained some of the characteristics of its predecessor.[144] Paramount among these features is the decentralized system of operation which emphasises the sovereignty of Member States while being generally suspicious of supranational regional institutions.[145] The decentralized, bottom-up approach to the integration process is aimed at the participation of stakeholders at the conceptualization, development and implementation level of projects and programmes thereby ensuring that tangible benefits accrue to all participating countries.[146] Still, SADC is deemed fortunate to be able to draw upon the solid political and economic foundations created by the SADCC.[147] Not least among these are the foundations laid down in respect of transport and communication, agriculture and food security and energy.[148]

In the early 1990s, as SADC began to focus more on trade liberalization and market integration, it assumed goals and objectives similar with those of the Common Market for Eastern and Southern Africa (COMESA).[149] Earlier efforts at combining SADCC and COMESA had failed, leading to their co-existence. However, South Africa's joining of SADC in 1994, tremendously bolstered the organisation's status among sub-Saharan RECs.[150] Indeed, goals of SADCC were achieved when South Africa transformed from an apartheid state into a non-racial democracy,

[141] *Ibid.*
[142] *Ibid.*
[143] See www.sadc.int/about-sadc/overview/history-and-treaty/ (accessed 17-06-2016).
[144] Ramsamy "SADC: Evolution and Pespectives" 1999 *SAIIA* 34.
[145] *Ibid.*
[146] *Ibid.*
[147] Mapuva and Muyengwa-Mapuva "The SADC regional bloc: What challenges and prospects for regional integration" 2014 *Law, Democracy and Development* 22. See also, Ramsamy "SADC: Evolution and Pespectives" 1999 *SAIIA* 35.
[148] Ramsamy "SADC: Evolution and Pespectives" 1999 *SAIIA* 35.
[149] Lee *The Political Economy of Regionalism in Southern Africa* (2003) 45. The Common Market for Eastern and Southern Africa will hereafter be simply referred to as the COMESA. In the 1990s, COMESA succeeded the Preferential Trade Agreement for Eastern and Southern Africa, created in 1981, with the objective of increasing intra-regional trade. Therefore, COMESA has always complemented SADCC'S main objective to decrease regional economic dependence on apartheid South Africa and foster development.
[150] Lee *The Political Economy of Regionalism in Southern Africa* (2003) 2.

marking a watershed in the region's history of white-settler domination resulting from the 19th century colonization by various European nations.[151]

In addition to the SADC Treaty, the Protocol on Trade provides the legal framework for regional trade.[152] The Protocol on Trade was signed in 1996 at the Maseru Summit and came into effect on 25 January 2000, upon ratification by two-thirds of the Member States.[153] The Protocol's main provisions include the elimination of intra-SADC trade barriers, the harmonization of customs procedures, trade laws and principles and trade defence instruments.[154] It also consists of provisions addressing trade-related issues, intellectual property rights, competition policy and dispute settlement.[155]

The objectives to phase out tariffs and non-tariff barriers over the course of a stipulated timeframe were set down in the Regional Indicative Strategic Development Plan (RISDP).[156] It was on August 14 2001 in Blantyre, Malawi, that the SADC Heads of State and Government signed an Agreement Amending the 1992 SADC Treaty to establish the RISDP.[157] On the basis of the strategic priorities of SADC and the Common Agenda, the RISDP is designed to provide strategic direction with respect to SADC projects, programmes and activities.[158]

2 2 4 Historical SADC operations

The transformation of SADCC to SADC led to a record of many challenges and remarkable achievements.[159] It is argued that some of the events following the establishment of SADC were influenced by the legacy of SADCC.[160] During the period from 1995 to 1999, the

[151] Lee *The Political Economy of Regionalism in Southern Africa* (2003) 44.
[152] Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 463. See also, Muthai "Regional trade integration strategies under SADC and the EAC: A comparative analysis" 2011 *SADC Law Journal* 84. See further, www.sadc.int/about-sadc/overview/history-and-treaty/ (accessed 17-06-2016).
[153] Ng'ong'ola "SADC Law: Building Towards Regional Integration" 2011 *SADC Law Journal* 125. See also, Mudzonga "Liberalising trade in Southern Africa: Implementation challenges for the 2008 SADC FTA and beyond" 2008 *Institute for Global Dialogue* 15.
[154] The SADC Protocol on Trade. See also, Saurombe *Regionalisation through economic integration in the Southern African Development Community SADC (SADC)* (LLD Thesis, North-West University, 2011). See also, Mudzonga "Liberalising trade in Southern Africa: Implementation challenges for the 2008 SADC FTA and beyond" 2008 *Institute for Global Dialogue* 15.
[155] Mudzonga "Liberalising trade in Southern Africa: Implementation challenges for the 2008 SADC FTA and beyond" 2008 *Institute for Global Dialogue* 15.
[156] Mudzonga "Liberalising trade in Southern Africa: Implementation challenges for the 2008 SADC FTA and beyond" 2008 *Institute for Global Dialogue* 15.
[157] *Ibid.*
[158] *Ibid.*
[159] These will simply be highlighted in the historical context and discussed in-depth in the following chapters.
[160] Bertelsman-Scott and Mutschler "A Report on an International Conference held on 27-28 October 1998" 1998 *SAIIA Reports* 4.

economic performance of SADC improved significantly.[161] Only South Africa, Swaziland and Tanzania recorded growth rates of less than five percent. Botswana, Mauritius, Mozambique, Namibia, Zambia and Zimbabwe recorded growth rates between five and eight percent. Angola, Lesotho and Malawi recorded growth rates of around twelve percent.[162]

Some of the challenges that the region encountered, most of which still persist, include overlapping memberships in the different sub-Saharan RECs.[163] This has led to the abrogation of REC rules, regulations and commitments that may be similar or require simultaneous implementation. Inefficiencies that result are mainly due to duplicated programmes that overstretch the financial and human resources at the disposal of the Member States.[164] Overlapping RECs and bilateral trade agreements also make preferentiality in intra-SADC trade more dispersed in terms of product coverage, tariff structures and free-trade quota, so that they run counter to the multilateral SADC free trade arrangement objective of rationalizing and harmonizing intra-SADC trade concessions.[165] The overlapping membership is symptomatic of a larger problem, which is the lack of commitment or political will by African leaders or governments.[166]

In addition, political instability remains a problem which in turn creates serious tension among states in the region.[167] For example, Swaziland has been under international spotlight for alleged human rights concerns because the monarchy has refused to place national governance on the path to democracy.[168] Angola has seen its civil war drawn down and ended, but political stability remains elusive.[169] In the late 1990s the Democratic Republic of the Congo (DRC) has experienced military conflict which at one point left SADC divided in its intervention.[170] At the turn of the century, Zimbabwe underwent a land reform programme that caused international furore, leading to sanctions being imposed against the national government.[171]

---

[161] Ramsamy "SADC: Evolution and Pespectives" 1999 *SAIIA* 35.
[162] *Ibid.*
[163] Lee *The Political Economy of Regionalism in Southern Africa* (2003) 3. See also, Bertelsman-Scott and Mutschler "A Report on an International Conference held on 27-28 October 1998" 1998 *SAIIA Reports* 5. Sub-Saharan RECs include the East African Community (EAC), Common Market for Eastern and Southern Africa (COMESA) and SADC.
[164] Lee *The Political Economy of Regionalism in Southern Africa* (2003) 3.
[165] Ramsamy "SADC: Evolution and Pespectives" 1999 *SAIIA* 37.
[166] *Ibid.*
[167] Lee *The Political Economy of Regionalism in Southern Africa* (2003) 3.
[168] *Ibid.*
[169] *Ibid.*
[170] *Ibid.*
[171] Lee *The Political Economy of Regionalism in Southern Africa* (2003) 3.

The SADC institutional framework also presented some challenges with regard to the effective implementation of the REC's mandate.[172] Hence, at an Extra-Ordinary Summit held on 9 March 2001, in Windhoek, Namibia, the SADC Heads of State and Government approved a Report on the Review of Operations of SADC institutions and organs.[173] As a result, institutional reform was carried out and eight institutions were established under the guidance of Article 9 of the Treaty Amendment. The new institutional structure consisted of the Summit of Heads of State and Government, the SADC Troika of the Organ, Tribunal, Council of Ministers, Secretariat, National Committees, Sectoral and Cluster Ministerial Committees, Standing Committee of Senior Officials and the SADC Parliamentary Forum.[174]

Lastly, SADC still pursues market integration from the patchwork of its widely divergent economies as evidenced by the growth rates, monetary and fiscal policies, inflation rates, foreign exchange reserves and general macro-economic management.[175] There are so-called star performers such as Botswana and Mauritius, and struggling economies such as Zimbabwe with high inflation and interest rates experienced between 2005 and 2008.[176]

2 3 A BRIEF HISTORY OF THE EUROPEAN UNION (EU)

2 3 1 Circumstances and reasons behind the formation of the EU

The European Union was set up with the aim of ending the frequent and bloody conflicts between its states which culminated in the Second World War.[177] In 1945, after the Second World War and the devastation, loss of life and misery visited upon the European people, an idea was induced that the carnage must never be allowed to happen again.[178] The people were receptive to the path of regional integration as the best option compared to isolated nation

[172] See www.sadc.int/about-sadc/sadc-institutions/ (accessed 17-06-2016).
[173] *Ibid.*
[174] Ramsamy "SADC: Evolution and Pespectives" 1999 *SAIIA* 40 – In light of concerns on the weaknesses of the SADC institutional framework, it is apposite that the Secretariat has the mandate to continue to establish and maintain strengthened institutional, legal and regulatory systems, reformed state institutions that operate with transparency, accountability, competence and professionalism, and the rule of law. See also, www.sadc.int/about-sadc/sadc-institutions/ (accessed 17-06-2016).
[175] Bertelsman-Scott and Mutschler "A Report on an International Conference held on 27-28 October 1998" 1998 *SAIIA Reports* 4.
[176] *Ibid.*
[177] Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 461. See also, Pinder and Usherwood *The European Union: A Very Short Introduction* (2001) 1. See further, http://europa.eu/about-eu/eu-history/index_en.htm (accessed 17-06-2016).
[178] Hanlon *European Community Law* (2003) 1.

states.[179] They were particularly attracted to the idea of building a peaceful, united and prosperous Europe.[180]

Immediately after the war Europe was divided into two power blocs, the East and the West. Such division would last until the late 1980s.[181] Therefore, much of the regional integration plan was to cover the western part, the eastern region was given up to Soviet influence and domination. This East-West divide became known as the Cold War.[182] Western Europe thrived at it benefitted from the financial support provided by the United States (US) under the Marshall Plan which began in 1948.[183] In addition to the Marshall Plan, a body was set up called the Organisation for European Economic Cooperation (OEEC), later to be known as the Organisation for Economic Cooperation and Development (OECD).[184]

Initially, the United Kingdom (UK) did not share the vision of integration with Western Europe, choosing to remain aloof.[185] The major distinguishing feature is that unlike other states looking forward to regional integration, the UK was never invaded during the Second World War and still remained a major world power.[186] The UK also had a historical legacy that involved different social and economic ties compared to other European countries, especially in respect of its involvement with the Empire and the Commonwealth.[187] The UK believed that any international cooperation should be undertaken by fully independent sovereign states.[188] Without the UK, other European states still went ahead with the integration project.

In 1949, the Council of Europe was set up and it brought together governments in a forum for cooperation and negotiation.[189] Its most valuable task was the promulgation of the European Convention on Human Rights (ECHR).[190] The UK was one of the first to ratify it, although

---

[179] *Ibid.*
[180] Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 461. See also, Pinder and Usherwood *The European Union: A Very Short Introduction* (2001) 2.
[181] Hanlon *European Community Law* (2003) 1.
[182] *Ibid.*
[183] *Ibid.*
[184] See http://europa.eu/about-eu/eu-history/1960-1969/1960/index_en.htm (accessed 17-06-2016). The Organisation for European Economic Cooperation (OEEC) became the Organisation for Economic Cooperation and Development (OECD) in December 1960.
[185] *Ibid.*
[186] Pinder and Usherwood *The European Union: A Very Short Introduction* (2001) 4. See also, Hanlon *European Community Law* (2003) 1.
[187] Hanlon *European Community Law* (2003) 2.
[188] Ibid.
[189] Hanlon *European Community Law* (2003) 2.
[190] *Ibid.*

never acted to incorporate it into UK law, thus enabling national courts to ignore it.[191] After the general election on May 1997, the UK government indicated that there was intention to incorporate the ECHR into UK law and the result was the Human Rights Act 1998.[192] The initial features of intergovernmental cooperation fell short of the ambitions of the integrationists, particularly in providing lasting political cohesion and addressing the shattered economics of Europe and the need to place the Federal Republic of Germany in the political structure of western Europe.[193]

The first of the integrative measures was taken by two men, Robert Schuman the French foreign minister and Jean Monnet an administrator in the French civil service.[194] The product was what became known as the Schuman Declaration of May 1950.[195] In short, Schuman stated in the Declaration that "the French government proposes to take action on one limited but decisive point.[196] It proposed to place Franco-German production of coal and steel as a whole under a common higher authority within the framework of an organization open to the participation of the other countries of Europe".[197]

2 3 2 The Treaty of Paris (ECSC Treaty)

In 1951, six founding states signed the Treaty of Paris to establish the European Coal and Steel Community (ECSC) in terms of the ECSC Treaty.[198] These states included Germany, France, Italy, Luxembourg, Belgium and the Netherlands.[199] The UK was invited to participate but declined.[200] The essential feature of the ECSC Treaty was that it created the "Community" of Member States, a new entity with international legal status and separate autonomous institutions.[201] This was a vital step towards regional integration with the transfer of legislative

[191] *Ibid.*
[192] *Ibid.*
[193] *Ibid.*
[194] *Ibid.*
[195] Diebold *The Schuman Plan: A study in economic cooperation 1950-1959* (1962) 45.
[196] Hanlon *European Community Law* (2003) 2.
[197] Pinder and Usherwood *The European Union: A Very Short Introduction* (2001) 1. See also, Hanlon *European Community Law* (2003) 3.
[198] Hanlon *European Community Law* (2003) 3. See generally, Mathijsen *A Guide to European Union law: As amended by the Treaty of Lisbon* (2010). See further, http://europa.eu/about-eu/eu-history/1945-1959/1951/index_en.htm (accessed 17-06-2016).
[199] Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 461.
[200] Hanlon *European Community Law* (2003) 3.
[201] *Ibid.*

and administrative powers to the institutions established by the Treaty.[202] Therefore, significant state sovereignty was pooled for well-defined purposes.[203]

All aspects of the production and distribution of coal and steel were brought under the control of a High Authority which had the power to make legally binding "decisions" and "recommendations". Also created were a European Executive Council, a two-chamber Parliament, a Council of National Ministers, a Court of Justice and an Economic and Social Committee.[204]

It must be noted that the coal and steel industries were pivotal in waging war. Thus, common control of these industries ensured that no single state possessed the capacity to prepare for war, particularly with regard to Germany.[205] The Preamble to the Treaty of Paris states that the creation of the community must be seen as "the basis for a broader and deeper community among peoples long divided by bloody conflicts".[206] However, the setting up of a European Defence Community, with the treaty signed in 1952, did not materialize due to the influence of the suspicious and indifferent French and British.[207]

In the mid-1950s, the focus in regional integration shifted to the sphere of economic relations.[208] In pursuit of economic integration, an intergovernmental conference of the ECSC states met at Messina in 1955 under the leadership of Mr Paul-Henri Spack. The UK declined the invitation.[209]

2 3 3 The Treaties of Rome

In 1957, the attraction to the benefits of economic integration led to the signing of two treaties referred to as the Treaties of Rome, establishing the European Atomic Energy Community (EURATOM) and the European Economic Community (EEC).[210] EURATOM was created in

[202] *Ibid.*
[203] *Ibid.*
[204] Hanlon *European Community Law* (2003) 3. See also, http://europa.eu/about-eu/eu-history/1945-1959/1953/index_en.htm (accessed 17-06-2016).
[205] Sands and Klein *Bowett's Law of International Institutions* (2001) 171. See also, Hanlon *European Community Law* (2003) 3.
[206] *Ibid.*
[207] Hanlon *European Community Law* (2003) 4.
[208] *Ibid.*
[209] *Ibid.*
[210] Sands and Klein *Bowett's Law of International Institutions* (2001) 172. See also http://europa.eu/about-eu/eu-history/1945-1959/1957/index_en.htm (accessed 17-06-2016). The EEC is now called the EC.

order to facilitate conditions necessary for the speedy establishment and growth of nuclear industries whereas the EEC was created for the purposes of establishing a common market.[211]

However, the Treaties of Rome did not have only protective or economic aspirations. Political restructuring of Europe was also high on the agenda.[212] The views of the founding fathers of the Communities were that the aim of the Treaties was to achieve political ends through economic means.[213] After the passing of the Treaties of Rome, there were three Communities, each with a set of autonomous institutions, having the power to develop new structures independently of the participating Member States.[214] Each community had an Assembly, a Council and Court of Justice.[215] Whereas the ECSC had a High Authority, the Treaties of Rome had established a Commission.[216]

The Commission's powers under the EURATOM and the EEC were more limited than the High Authority and the Commission was ranked third after the Council and Assembly in order of precedence.[217] However, the members of these institutions were the same people, albeit wearing different "hats".[218]

2 3 4 The Merger Treaty

In order to rationalize the administration of the institutions created in terms of the Treaties of Rome, a Merger Treaty was completed in 1967.[219] The Merger Treaty fused the executives of the European Communities which included the ECSC, EEC and the Euratom. From then onwards, the European Communities would have a single Commission and a single Council, with both still operating in accordance with the rules governing their respective Communities.[220] Although the three communities thereafter had common institutions they

[211] Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 461.
[212] Hanlon *European Community Law* (2003) 3.
[213] Hanlon *European Community Law* (2003) 4.
[214] Hanlon *European Community Law* (2003) 5.
[215] *Ibid.*
[216] *Ibid*
[217] *Ibid.*
[218] *Ibid.*
[219] Skully "Finland and the EEC: A historical economic outline of their trade relations" 1976 *Journal of Baltic Studies* 220. See also, http://europa.eu/about-eu/eu-history/1960-1969/1967/index_en.htm (accessed 17-06-2016).
[220] Hanlon *European Community Law* (2003) 5. See also, http://europa.eu/about-eu/eu-history/1960-1969/1967/index_en.htm (accessed 17-06-2016). Hanlon *European Community Law* (2003) 5.

remained legally distinct and the powers and functions of the institutions depend on the terms of the Treaty under which they acted.[221]

2 3 5 Circumstances surrounding the UK's joining the EU

The late 1950s and early 1960s in the EU saw unemployment declining and economic growth increasing rapidly due factors associated with competitiveness and economies of scale.[222] This caused UK's attitude towards the EU to change because it was suffering from poor economic performance in comparison to the EEC members.[223] Even the UK-USA Atlantic Alliance became relatively less favorable, with trade patterns shifting towards an integrated Europe.[224]

In 1961, the UK under Prime Minister Harold Macmillan applied to join the community.[225] President Charles de Gaulle of France rejected the application on the basis that UK's membership would likely have a distorting influence on the Community.[226] In 1967, UK's application under Prime Minister Harold Wilson was similarly rejected.[227]

In the 1960s, France, and particularly President de Gaulle, had become dissatisfied with the workings of the Community.[228] In 1965 France absented herself from Council meetings thereby effectively bringing the legislative machinery of the Community to a halt.[229] This became known as the "policy of the empty chair".[230] The crisis was resolved by the so-called "Luxembourg Accord".[231] Although this had no legal status, it was an agreement that allowed any member-state to veto any legislation that it thought might affect its "most important interests".[232] The effect of this agreement was to halt any movement of importance on the political front for almost 20 years.[233]

---

[221] Hanlon *European Community Law* (2003) 5. The ECSC expired in 2002.
[222] Hanlon *European Community Law* (2003) 5.
[223] *Ibid.*
[224] *Ibid.*
[225] *Ibid.*
[226] *Ibid.*
[227] *Ibid.*
[228] *Ibid.*
[229] *Ibid.*
[230] Pinder and Usherwood *The European Union: A Very Short Introduction* (2001) 16. See also, Hanlon *European Community Law* (2003) 6.
[231] *Ibid.*
[232] *Ibid.*
[233] Hanlon *European Community Law* (2003) 6.

The UK's application was successful in 1970, under Edward Heath with the Treaty of Agreement signed in 1972 and membership effective from January 1973.[234] Also joining were Ireland and Denmark. Norway was also accepted but her people voted "no" in a referendum to join the Community.[235]

Between 1973 and 1986, little political and economic union was realized mainly due to the impasse of the Luxembourg Accord.[236] A series of "summits" of heads of states and government began to take place.[237] These meetings of the European Council did not have legal status within the framework of the Community nor did they have any power to take binding decisions.[238] Still, the European Council assumed overall policy making authority, thereby moving the balance of power away from the supranational Commission to the intergovernmental Council of Ministers.[239]

2 3 6 The Single European Act (SEA)

The European Parliament first consisted of nominees of the Parliaments of Member States.[240] In 1979, the first direct elections to the European Parliament were held.[241] In 1981, Greece became the tenth member of the Community.[242] In 1986, Spain and Portugal joined.[243] However, the stagnation in the decision making process following the Luxembourg Accord brought dissatisfaction at the slow pace at which Community goals were being achieved.[244] Obtaining unanimous agreement of all Member States was almost impossible and those reached were at the "lowest common denominator" level.[245] As a result, it was recognized that some change had to be brought about.[246] Although the original Treaty of Rome or EEC Treaty had withstood major amendment for almost thirty years attempts to amend it prepared the climate for the eventual changes that were brought about by the SEA.[247]

---

[234] Hanlon *European Community Law* (2003) 6.
[235] *Ibid.*
[236] *Ibid.*
[237] *Ibid.*
[238] Ibid.
[239] *Ibid.*
[240] Hanlon *European Community Law* (2003) 7.
[241] *Ibid.*
[242] *Ibid.*
[243] *Ibid.*
[244] *Ibid.*
[245] Hanlon *European Community Law* (2003) 7.
[246] *Ibid.*
[247] Pinder and Usherwood *The European Union: A Very Short Introduction* (2001) 25. See also, Hanlon *European Community Law* (2003) 7.

Major changes on the EEC Treaty brought by the SEA included the different methods in the legislative process, most notably the replacement of the requirement for unanimity in the Council by the qualified majority voting.[248] Henceforth, no single state could block legislation.

The SEA also officially recognized existence of the European Council and this was reaffirmed by the Treaty on European Union in 1992.[249] Furthermore, it officially recognized the Assembly as the European Parliament and introduced new Community competencies such as economic and social cooperation and research, technology and environmental protection.[250] The SEA also incorporated recommendations for the establishment of an internal market by 1992.[251] The signing of the SEA and the accompanying package of the 1992 programme quickened the pace of Community action.[252]

2 3 7 The Treaty on European Union (TEU) (Maastricht Treaty)

It was then realized that institutional change was needed, that is, the adoption of common monetary and fiscal policies.[253] To that end, an intergovernmental conference (IGC) was held in 1991 that eventually led to the signing of the Treaty on European Union in 1992, creating the European Union.[254]

The TEU has three pillars representing the three existing Communities which include the ECSC, Euratom and the EC.[255] The other two are the Common Foreign and Security Policy (CFSP) and the Cooperation in Justice and Home Affairs (JHA).[256] These three pillars support the constitutional order of the EU.[257] Only the EC, the central pillar, is governed by Community law.[258] The CFSP and JHA are governed by intergovernmental cooperation, thus fall outside

[248] Hanlon *European Community Law* (2003) 7.
[249] *Ibid.*
[250] Hanlon *European Community Law* (2003) 8.
[251] *Ibid.*
[252] Hanlon *European Community Law* (2003) 9.
[253] Hanlon *European Community Law* (2003) 9. During negotiations leading to the TEU the UK made the principle of subsidiarity important. Subsidiarity means decisions should be made at the lowest level where possible.[253] If an adequate solution can be obtained by a Member State there is no reason why that decision should be taken by a Community institution. The TEU makes provision for different procedures.
[254] Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 461. See also, Hanlon *European Community Law* (2003) 9. See also, http://europa.eu/about-eu/eu-history/1990-1999/1991/index_en.htm (accessed 17-06-2016); and http://europa.eu/about-eu/eu-history/1990-1999/1992/index_en.htm (accessed 17-06-2016).
[255] Turnbull-Henson "Negotiating the Third Pillar: The Maastricht Treaty and the failure of Justice and Home Affairs cooperation among EU Member States" 1997 *European Community Studies Association Conference* 28.
[256] Hanlon *European Community Law* (2003) 9.
[257] *Ibid.*
[258] *Ibid.*

the jurisdiction of Community institutions, particularly the Court of Justice.[259] It must be noted that the EU is wider than the EC, but is anchored in the EC.

The objective for a single currency was set to be achieved over three stages by 1999.[260] UK, Sweden and Denmark opted out of the third and final stage.[261] The new currency was to be introduced by 1 January 2002.[262] Among other issues, the TEU amended the Treaty of Rome so as to introduce, in terms of Articles 17 to 22, the notion of European Union citizenship. In terms of these provisions, a person who had the nationality of a Member State would be a citizen of the Union.[263]

The review of the TEU at Maastricht at the 6th intergovernmental conference (IGC) included issues such as institutional reform, decision making, flexibility, employment provisions, the abolition of border controls, the common foreign and security policy, subsidiarity and transparency.[264] The outcome of the IGC and subsequent negotiations was the Treaty of Amsterdam.

2 3 8 The Treaty of Amsterdam and the Treaty of Nice

The Treaty of Amsterdam amended the Treaty of Rome in many different ways. It was agreed upon by the Heads of State and Government in 1997 and came into force in 1999. This was a few months behind the third stage of Economic and Monetary Union, which took place on January 1 1999. It was argued that the Treaty of Amsterdam only served as mere tinkering or muddying the waters of Community issues. It was seen as bringing less clarity and more confusion.

The Treaty of Nice sought to bring clarity following a number of left-over issues from the Treaty of Amsterdam concerning the balance of power between the EU and Member States and between Member States themselves.[265] It was also intended to prepare the way for a new wave of countries joining the Union. The Treaty of Nice came into force in February 2003.[266]

[259] *Ibid.*
[260] Hanlon *European Community Law* (2003) 10.
[261] *Ibid.*
[262] *Ibid.*
[263] *Ibid.*
[264] Hanlon *European Community Law* (2003) 13.
[265] Hanlon *European Community Law* (2003) 16.
[266] See http://europa.eu/about-eu/eu-history/2000-2009/2003/index_en.htm (accessed 17-06-2016).

2 4 CONCLUSION

The purpose of this chapter was to provide a historical and legal background of the SADC. The history of the EU was also presented for comparative purposes that will be addressed in this study. The historical legal background in both instances highlights the factors that drive the formation of RECs and the challenges that are encountered.

The success of SADCC enabled the Member States to then turn their focus to economic integration in SADC where increased trade is a fundamental goal. The Protocol on Trade and other related instruments are testament to this reorientation in the direction of regional integration.

Having discussed the history of the SADC and EU, the next chapter is an assessment of SADC's legal and institutional framework with regard to transparency and accountability. In that respect, the chapter will examine the central role of the SADC Summit.

CHAPTER 3

The Legal and Institutional Framework for SADC Regional Integration, Good Governance, Accountability and Transparency

3 1 INTRODUCTION

The concepts of accountability and transparency are gaining prominence in various Regional Trade Agreements (RTAs) worldwide.[267] This has become more critical as greater attention is directed towards the removal of non-tariff barriers (NTBs) to trade.[268] As Baldwin puts it, "the lowering of tariffs is like the draining of a swamp and the lower level has revealed all the snags and stumps of non-tariff barriers that still have to be cleared away".[269] In the Southern African Development Community (SADC), tariffs have been reduced but an analysis of the legal framework and the functions of regional institutions indicates that there is still room for further trade liberalisation in the context of a more transparent and predictable trade regime.[270]

The logic underlying this study is that successful realisation of economic and political aspects of regional integration cannot be accomplished without a legal and institutional framework that promotes good governance in the form of accountability and transparency at the national and supranational levels.[271] Therefore, this chapter undertakes a critical analysis of the strengths

---

[267] Grigorescu "International Organisations and Government Transparency: Linking the International and Domestic Realms" 2003 *International Studies Quarterly* 649. See generally, Keohane and Nye *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy* (2002) 219-244; Dahl *Can International Organizations Be Democratic? A Skeptic's View* (1999) 19-36; Kovach, Neligan and Burall "Power without accountability" 2003 *The Global Accountability Report: One World Trust* 1-50; and Woods "Good Governance in International Organisations" 1999 *Global Governance* 39-61. See also, "WTO gets high marks for accountability, transparency" https://www.wto.org/english/news_e/news03_e/global_account_report_11feb03_e.htm (accessed 26-07-2016); and "Transparency and accountability: a mutual responsibility of governments and citizens" www.afdb.org/en/news-and-events/article/transparency-and-accountability-a-mutual-responsibility-of-governments-and-citizens-133115/ (accessed 14-11-2015).

[268] Hillman "Non-tariff barriers: Major Problem in Agricultural Trade" 1978 *American Journal of Agricultural Economics* 491- 492. Non-Tariff Barriers (NTBs) are all obstacles, other than traditional customs duties, which interfere with international trade. For instance, NTBs may be national laws that are incompatible with regional policies; and that uncertainty and unpredictability in regional policies also constitutes NTBs. See also, Mistry "Africa's Record of Regional Cooperation and Integration" 2000 *African Affairs* 568; Bamodu "Transnational Law, Unification and Harmonisation of International Commercial Law in Africa" 1994 *Journal of African Law* 125; Mancuso "The new African Law: Beyond the Difference between Common Law and Civil Law" 2008 *Annual Survey of International and Comparative Law* 40; and Shumba *Harmonising the Law of Sale in the Southern African Development Community* (LLD Thesis, Stellenbosch University, 2014) 15.

[269] Baldwin *Non-tariff Distortions of International Trade* (1970) 2. See also, Ndulo "The Need for the Harmonisation of Trade Laws in Southern African Development Community (SADC)" 1996 *African Yearbook of International Law* 211.

[270] Shumba *Harmonising the Law of Sale in the Southern African Development Community* (LLD Thesis, Stellenbosch University, 2014) 10.

[271] Fagbayibo "Exploring Legal Imperatives of Regional Integration in Africa" 2012 *CILSA* 76.

and weaknesses of the SADC legal and institutional framework, in terms of accountability and transparency measures, in order to enhance intra-SADC trade by means of trade liberalisation.[272]

3 2 GOOD GOVERNANCE

Good governance is "the exercise of political authority and control over a society and the efficient management of its resources for development".[273] Hence, it can be seen as the proper use of political power, free of self-interest and corruption, for the purposes of development.[274] The Mo Ibrahim Foundation's Ibrahim Index of African Governance (IIAG) defines governance as "the provision of the political, social and economic public goods and services that every citizen has the right to expect from his or her state, and that a state has the responsibility to deliver to its citizens".[275] The major tenets of good governance include accountability and transparency.[276]

In order to measure governance quality, the Mo Ibrahim Foundation Board and IIAG Council constructed a framework with four overarching categories which include safety and the rule of law, participation and human rights, sustainable economic opportunity and human development.[277] The categories are further divided into fourteen sub-categories and accountability is a sub-category under safety and rule of law.[278]

---

[272] Fagbayibo "Exploring Legal Imperatives of Regional Integration in Africa" 2012 *CILSA* 68, 76. For the full text of the SADC Treaty and other key Protocols, including the Protocol on Trade and the Protocol on the Tribunal, see www.sadc.int/documents-publications/ (accessed 10-11-2015).

[273] Handley and Mills *From Isolation to Integration: The South African Economy in the 1990s* (1996) 94. See also, Woods "Good Governance in International Organisations" 1999 *Global Governance* 39.

[274] *Ibid.*

[275] Mo Ibrahim Foundation "Methodology" 2015 *Ibrahim Index of African Governance* 2. See also, Mapuva and Muyengwa-Mapuva "The SADC regional bloc: What challenges and prospects for regional integration" 2014 *Law, Democracy and Development* 34.

[276] Handley and Mills *From Isolation to Integration: The South African Economy in the 1990s* (1996) 94. It is stated that "predictability requires government agents to follow the law rather than to act according to political or personal whim, particularly with regard to economic and investment transactions. Openness requires government to supply the public with reliable economic and social data. The press, for instance, needs full access to social and economic data pertaining to the well-being of society, and the business community needs to know national economic strategies and regulations. The rule of law entails ensuring that rules and regulations are broadly understood and enforcing the law's sovereignty over both government officials and the general public".

[277] Handley and Mills *From Isolation to Integration: The South African Economy in the 1990s* (1996) 94.

[278] Mo Ibrahim Foundation "Methodology" 2015 *Ibrahim Index of African Governance* 3. It is observed that "the safety and rule of law category has four sub-categories which include personal safety, rule of law, accountability and national security. The participation and human rights category has three sub-categories including participation, rights and gender. The sustainable economic opportunity category has four sub-categories which include public management, business environment, infrastructure and rural sector. The fourth category, human development, has three sub-categories which consist of welfare, education and health".

In determining accountability and transparency, the IIAG focuses on outputs and outcomes of policy. As a result, analysis of accountability and transparency transcends declarations of intent and *de jure* statutes, by assessing how far governments go beyond rhetoric and actually apply the principles of good governance.[279]

The link between good governance and regional integration cannot be understated.[280] This is premised on the fact that the successful realisation of both the political and economic aspects of regional integration cannot disregard the basic legal norms that promote national and transnational democratic development, accentuate uniform compliance with transnational directives and promote and sustain continued interaction among relevant stakeholders.[281] Therefore, there is an important nexus between the principles of good governance and effective implementation of integration initiatives.[282] It is believed that failure to adhere to the principles of good governance invites public scepticism and the loss of confidence by stakeholders whose cooperation is often essential for regional integration to succeed.[283]

3 3 ACCOUNTABILITY

Accountability essentially captures the extent to which society is safe and secure as assessed from the existence of a robust legal system and transparent, effective and accessible institutions.[284] It must be noted that accountability and transparency are inexorably linked because accountability depends on transparent procedures and flows of information.[285] According to the African Development Bank (AfDB), accountability refers to the holding of government officials, both political leaders and civil servants, responsible for providing a safe and secure environment and pursuing the economic well-being of the society with equity and

[279] Mo Ibrahim Foundation "Methodology" 2015 *Ibrahim Index of African Governance* 3. See also, Handley and Mills *From Isolation to Integration: The South African Economy in the 1990s* (1996) 94.
[280] Mapuva and Muyengwa-Mapuva "The SADC regional bloc: What challenges and prospects for regional integration" 2014 *Law, Democracy and Development* 25. See also, Fagbayibo "Exploring Legal Imperatives of Regional Integration in Africa" 2012 *CILSA* 68.
[281] *Ibid.*
[282] World Economic Forum on Africa "Capitalize on Opportunity" 2008 *SACU Quarterly, April-June* 1-4 available at www.sacu.int/newsletters/2008/april_june.pdf (accessed 15-11-2015). It is asserted that African leaders have generally agreed to open their governance to scrutiny and criticism as they have conceded that for too long much of Africa's ability to prosper has been impeded by governance-related issues.
[283] *Ibid.*
[284] Mo Ibrahim Foundation "Executive Summary" 2015 *Ibrahim Index of African Governance* 6.
[285] *Ibid.*

disinterest.[286] Accountability requires that institutions inform their members of decisions and grounds on which the decisions are taken.[287]

Accountability is fundamental in guiding, monitoring and evaluating public institutions and programmes.[288] Accountability mechanisms ordinarily lead to enhanced capacities for financial performance and engender an environment which builds up trust.[289] The IIAG uses a number of indicators to assess accountability. These include how the government deals with public officials in instances of corruption.[290] For instance, this may involve the investigation and prosecution for diversion of public funds and abuse of office.[291]

Accountability and transparency are vital in combating widespread corruption that has crippled economic progress in many parts of the world.[292] According to the United Nations Department of Economic and Social Affairs (UNDESA) in its newsletter titled "Survey Assessing Accountability and Transparency in International Development Cooperation", the global debate on a post-2015 development agenda has been focused on the need for enhanced monitoring and accountability at all levels, to ensure delivery on commitments and sustainability of development results.[293] This includes advancing progress on mutual accountability, as an overarching principle for the effectiveness of development cooperation.[294]

Recently, the 2015 World Public Sector Report (WPSR) titled "Responsive and Accountable Public Governance" analysed the most salient features of public governance for enabling

[286] Handley and Mills *From Isolation to Integration: The South African Economy in the 1990s* (1996) 94. See also, AfDB "Bank Group Policy on Good Governance" 1999 *OCOD* 2 available at http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/21-EN Bank_Group_Policy_on_Good_Governance.pdf (accessed 25-07-2016).
[287] Woods "Good Governance in International Organisations" 1999 *Global Governance* 44. The generally accepted view is that accountability entails the assessment of the power or checks and balances that limit or sanction a person or an institution's work.
[288] Woods "Good Governance in International Organisations" 1999 *Global Governance* 44. See also, "2015 World Public Sector Report on Responsive and Accountable Public Governance" https://www.un.org/development/desa/publications/2015-world-public-sector-report.html (accessed 14-11-2015).
[289] *Ibid.*
[290] Mo Ibrahim Foundation "Methodology" 2015 *Ibrahim Index of African Governance* 3.
[291] *Ibid.*
[292] See "Transparency and accountability: a mutual responsibility of governments and citizens" www.afdb.org/en/news-and-events/article/transparency-and-accountability-a-mutual-responsibility-of-governments-and-citizens-133115/ (accessed 14-11-2015).
[293] See "Survey assess accountability and transparency in international development cooperation" https://www.un.org/development/desa/newsletter/trends/2014/01/9355.html (accessed 16-11-2015).
[294] *Ibid.*

inclusive economic growth, social justice and environmental sustainability.[295] Working together with responsive governance, accountable governance was found to be instrumental in the establishment and integration of stronger accountability and anticorruption regulatory frameworks, which are all essential for economic growth.[296]

The WPSR cited examples of robust accountability measures which include supreme audit institutions, and independent oversight bodies which can provide valuable feedback and advice to assist public institutions in becoming more transparent and, consequently, accountable.[297] SADC Member States are also urged to increase the use of resources such as Information and Communications Technology (ICT) and facilitate government data accessibility in order to enhance their interaction with citizens.[298] This would in turn strengthen information sharing and participation, contributing to more accountable and transparent governance.[299]

3 4 TRANSPARENCY

Transparency means making government procedures, processes, investment decisions, contracts, and appointments open to public scrutiny.[300] Therefore, it involves the accessibility of public records and the extent to which the government uses online platforms to deliver public services, among other things.

It must be noted that at the multilateral level, the World Trade Organisation (WTO) has established significant measures that promote transparency and advance trade liberalisation.[301] For instance, WTO Members States agreed on a new Regional Trade Agreement (RTA) transparency mechanism, referred to as the Transparency Mechanism for Regional Trade Agreements, in the Doha Round.[302] Indeed, transparency is a wide-ranging WTO principle,

[295] See "2015 World Public Sector Report on Responsive and Accountable Public Governance" https://www.un.org/development/desa/publications/2015-world-public-sector-report.html (accessed 14-11-2015).
[296] *Ibid.*
[297] *Ibid.*
[298] *Ibid.*
[299] *Ibid.*
[300] Handley and Mills *From Isolation to Integration: The South African Economy in the 1990s* (1996) 94.
[301] Van den Bossche and Zdouc *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2013) 653.
[302] Doha Ministerial Declaration, Ministerial Conference, 14 November 2001, WT/MIN(01)/DEC/1, dated 20 November 2001 para 29. See also, Grigorescu "International Organisations and Government Transparency: Linking the International and Domestic Realms" 2003 *International Studies Quarterly* 644; and Qureshi "The New GATT Trade Policy Review Mechanism: An Exercise in Transparency or 'Enforcement'?" 1990 *Journal of World Trade* 147-160. See further, Van den Bossche and Zdouc *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2013) 653. Noting that the agreement is also called the RTA

encompassing, *inter alia*, anti-dumping investigations, countervailing measures, rules of origin, subsidies and dispute settlement.[303]

Under the auspices of the AfDB, transparency has been touted as one of the main drivers of structural reform across the continent.[304] As the AfDB puts it, "an institution can only be accountable if it is transparent".[305] This has been more apparent as governments seek to work much closer with their constituencies and other stakeholders. Currently, when complaints or disputes arise, ombudsmen and mediators should be easily contactable and available.[306]

Transparency is also the hallmark of the African Peer Review Mechanism (APRM). The APRM functions on a voluntary basis whereby willing states submit their governance and economic development practices to judgment by their peers in order to identify and improve best practices, among other things.[307] The APRM ensures that unlike in the old era of the Organisation of African Unity (OAU), in the African Union (AU), states bolster democracy by respect for human rights, peace and good governance in order to advance economic development.[308]

The AfDB has, along with a number of other institutions, introduced an independent inspection mechanism to address complaints from citizens concerning issues such as private investment. In this respect, the judicial system has been identified as most demanding of true capabilities of independence, transparency and accountability.[309] Two arguments are put forward in this respect.

First, it is contended that the judicial system has a duty and an obligation to be transparent as the authority that applies the law and punishes both small scale and major corruption.[310] According to the World Economic Forum (WEF), in a press release titled "African

Transparency Mechanism, it is stated that it was designed as an exercise in transparency that encourages more liberal trade policies.

[303] Van den Bossche and Zdouc *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2013) 181-182, 251-257. The applicable WTO provisions for transparency will be discussed in the next chapter.

[304] See "Transparency and accountability: a mutual responsibility of governments and citizens" www.afdb.org/en/news-and-events/article/transparency-and-accountability-a-mutual-responsibility-of-governments-and-citizens-133115/ (accessed 14-11-2015).

[305] *Ibid.*

[306] *Ibid.*

[307] Grudz "The African Peer Review Mechanism: Assessing Origins, Institutional Relations and Achievements" 2009 *SAIIA* 3.

[308] *Ibid.*

[309] *Ibid.*

[310] *Ibid.*

Governance: Pressing for Transparency, Reaching for Change", since people are better connected now, there is more transparency.[311]

Second, concerning the relationship between institutions and governments, evaluation is an essential instrument that plays an important role in development, covering methodology, effectiveness and performance.[312] Governments can use this tool to produce reports on public policies. These documents may then be used by citizens to scrutinise public policies, thereby better employing the services of the judicial system.[313] Therefore, the extent to which Member States adhere to indicators such as respect for fundamental rights, good governance, independence of the judiciary and the rule of law determines the extent of implementation of integration goals within the applicable legal framework.[314]

3 5 SADC LEGAL FRAMEWORK FOR REGIONAL INTEGRATION

3 5 1 The SADC Treaty

The SADC Treaty is the founding instrument of the Southern African Development Community (SADC).[315] The transformation of the Southern African Development Coordination Conference (SADCC) into SADC occurred in August 1992, when the SADCC Member States adopted a declaration entitled "Towards a Southern African Development Community" in which they agreed to form an economic community of southern African states.[316] It was at the same meeting that the SADCC Member States adopted the treaty

[311] Woods "Good Governance in International Organisations" 1999 *Global Governance* 45. See also, http://www.weforum.org/news/african-governance-pressing-transparency-realising-change. (accessed 10-11-2015). In order to determine accountability challenges, it is suggested that the decision-making process, *inter alia*, may be examined within the context of the entire institutional framework.

[312] See "Transparency and accountability: a mutual responsibility of governments and citizens" www.afdb.org/en/news-and-events/article/transparency-and-accountability-a-mutual-responsibility-of-governments-and-citizens-133115/ (accessed 14-11-2015).

[313] *Ibid.*

[314] Fagbayibo "Exploring Legal Imperatives of Regional Integration in Africa" 2012 *CILSA* 68.

[315] The Consolidated Text of the Treaty of the Southern African Development Community is available at www.sadc.int/documents-publications/sadc-treaty/ (accessed 14-11-2015). The Treaty was signed by the Heads of State and Government on 17 August 1992 at a summit in Windhoek, Namibia, and it transformed the SADCC to SADC.

[316] Buthelezi *Regional Integration in Africa: Prospects and Challenges for the 21st Century* (2006) 17. It is emphasised that political changes in southern Africa in the late 1980s and early 1990s led SADCC to formalise itself into a legal entity "with effective capacity to lead the region into deeper integration". See Lyakurwa *A Regional Case Study of the SADC* (1999) 250; Mshomba *Africa in the Global Economy* (2000) 187; Afadameh-Adeyemi and Kalula "SADC at 30: Re-examining the Legal and Institutional Anatomy of the Southern African Development Community" 2007 *Monitoring Regional Integration in Southern Africa* 7; and Ndulo "African Integration Schemes: A Case Study of the Southern African Development Community" 1999 *Cornell Law Faculty Publications* 11.

establishing the SADC.[317] Thus, the SADC Treaty changed the name of the SADCC and its mission also changed from that of reducing dependence on South Africa to one of creating an economic community.[318]

The SADC Treaty entered into force on 30 September 1993 and South Africa acceded to it on 29 August 1994, following the first democratic elections held in April of that year.[319] The Treaty constitutes a statement of intent and a resolve to overcome the burden of history.[320] It also acknowledges the benefits of economic integration.[321] Unquestionably, SADC came into being within the context of a freely concluded agreement.[322]

In terms of the Treaty, SADC was established as an international organisation with legal personality bearing the capacity and power to enter into contracts, acquire, own or dispose of movable or immovable property and to sue and be sued.[323] The organisation may also hire staff, run offices, maintain relations with Member States and third States, as well as enter into agreements with such States.[324] Within the territory of each Member State, SADC has such legal capacity as is necessary for the proper exercise of its functions.[325] SADC's legal

[317] Buthelezi *Regional Integration in Africa: Prospects and Challenges for the 21st Century* (2006) 171. See also, Mshomba *Africa in the Global Economy* (2000) 187; Afadameh-Adeyemi and Kalula "SADC at 30: Re-examining the Legal and Institutional Anatomy of the Southern African Development Community" 2007 *Monitoring Regional Integration in Southern Africa* 5; and Ndulo "African Integration Schemes: A Case Study of the Southern African Development Community" 1999 *Cornell Law Faculty Publications* 11.

[318] Article 5 SADC Treaty. See Lyakurwa *A Regional Case Study of the SADC* (1999) 250. See also, Hartzenberg "Economic integration matters for SADC" 2012 *SADC Policy Analysis and Dialogue Programme* 13; Afadameh-Adeyemi and Kalula "SADC at 30: Re-examining the Legal and Institutional Anatomy of the Southern African Development Community" 2007 *Monitoring Regional Integration in Southern Africa* 7; Ndulo "African Integration Schemes: A Case Study of the Southern African Development Community" 1999 *Cornell Law Faculty Publications* 11.

[319] Mshomba *Africa in the Global Economy* (2000) 187. It is noted that within three years following the accession of South Africa, Mauritius, Seychelles and the Democratic Republic of Congo also joined SADC thereby bringing the number of the Member States to fourteen. See also, Hartzenberg "Economic integration matters for SADC" 2012 *SADC Policy Analysis and Dialogue Programme* 13; Lyakurwa *et al Regional Integration in SubSaharan Africa: A Review of Experiences and Issues* (1997) 189; and Lyakurwa *A Regional Case Study of the SADC* (1999) 250.

[320] Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration" 2012 *PER/PELJ* 454.

[321] *Ibid.*

[322] *Ibid.*

[323] Article 3 (1) SADC Treaty. See Ndulo "African Integration Schemes: A Case Study of the Southern African Development Community" 1999 *Cornell Law Faculty Publications* 9. See also, Lyakurwa *A Regional Case Study of the SADC* (1999) 252.

[324] Ndulo "African Integration Schemes: A Case Study of the Southern African Development Community" 1999 *Cornell Law Faculty Publications* 9.

[325] Article 3 (2) SADC Treaty. See Ndulo "African Integration Schemes: A Case Study of the Southern African Development Community" 1999 *Cornell Law Faculty Publications* 9. See also, Afadameh-Adeyemi and Kalula "SADC at 30: Re-examining the Legal and Institutional Anatomy of the Southern African Development Community" 2007 *Monitoring Regional Integration in Southern Africa* 5. It is asserted that with the adoption of a treaty and the centralisation of institutions, it invariably meant that states now had a binding obligation to implement regional agreements and the institutions were to oversee the implementation procedures.

personality, however, is limited by the SADC Treaty in that it must act within the purposes and functions specified or implied in the documents constituting the organisation.[326]

The SADC Treaty provides the legal framework of the organisation by setting out the status, principles, objectives and obligations of Member States,[327] the membership,[328] the institutions,[329] procedural matters relating to areas of cooperation among Member States,[330] cooperation with other international organisations,[331] financial issues,[332] dispute settlement,[333] and sanctions, withdrawal and dissolution.[334]

The objectives of SADC stated in Article 5 (1) of the SADC Treaty, are to:

a. promote sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration;

b. promote common political values, systems and other shared values which are transmitted through institutions which are democratic, legitimate and effective;

c. consolidate, defend and maintain democracy, peace, security and stability;

d. promote self-sustaining development on the basis of collective self-reliance, and the interdependence of Member States;

e. achieve complementarity between national and regional strategies and programmes;

f. promote and maximise productive employment and utilisation of resources of the Region;

[326] Ndulo "African Integration Schemes: A Case Study of the Southern African Development Community" 1999 *Cornell Law Faculty Publications* 9.
[327] Article 6 SADC Treaty.
[328] Articles 7 and 8 SADC Treaty.
[329] Article 9 – 16 SADC Treaty.
[330] Article 20 SADC Treaty.
[331] Article 24 SADC Treaty.
[332] Article 25 – 30 SADC Treaty.
[333] Article 32 SADC Treaty.
[334] Article 33 – 35 SADC Treaty. See Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration" 2012 *PER/PELJ* 457.

g. achieve sustainable utilisation of natural resources and effective protection of the environment;

h. strengthen and consolidate the long standing historical, social and cultural affinities and links among the people of the Region;

i. combat HIV/AIDS or other deadly and communicable diseases;

j. ensure that poverty eradication is addressed in all SADC activities and programmes; and

k. mainstream gender in the process of community building.[335]

The SADC Treaty is far reaching in its application. To give it practical effect, provision is made for SADC Member States to negotiate a series of protocols which spell out the objectives, scope and institutional mechanisms for cooperation and integration in designated areas.[336] Upon approval, the protocols become an integral part of the SADC Treaty.[337] The SADC Protocol on Trade and the Protocol on the Tribunal are examples of such protocols.

[335] Article 5 (1) of the SADC Treaty. In terms of Article 5 (2), the Treaty provides strategies to achieve SADC objectives and these are to:

a. harmonise political and socio-economic policies and plans of Member States;
b. encourage the people of the Region and their institutions to take initiatives to develop economic, social and cultural ties across the Region, and to participate fully in the implementation of the programmes and projects of SADC;
c. create appropriate institutions and mechanisms for the mobilisation of requisite resources for the implementation of programmes and operations of SADC and its institutions;
d. develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the people of the Region generally, among Member States;
e. promote the development of human resources;
f. promote the development, transfer and mastery of technology;
g. improve economic management and performance through regional co-operation;
h. promote the coordination and harmonisation of the international relations of Member States;
i. secure international understanding, co-operation and support, and mobilise the inflow of public and private resources into the Region; and
j. develop such other activities as Member States may decide in furtherance of the objectives of this Treaty.

[336] Afadameh-Adeyemi and Kalula "SADC at 30: Re-examining the Legal and Institutional Anatomy of the Southern African Development Community" 2007 *Monitoring Regional Integration in Southern Africa* 9. See also, Ndulo "African Integration Schemes: A Case Study of the Southern African Development Community" 1999 *Cornell Law Faculty Publications*; and Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 463.

[337] Article 22 SADC Treaty. See Ndulo "African Integration Schemes: A Case Study of the Southern African Development Community" 1999 *Cornell Law Faculty Publications* 13.

The SADC Member States undertook to adopt adequate measures to promote the achievement of the objectives of SADC and agreed to refrain from taking any measures likely to jeopardise the substance of its principles, the achievement of its objectives and the implementation of the provisions of the SADC Treaty.[338] Member States are also required to accord the SADC Treaty the force of national law.[339] However, this provision is not sufficient to make the Treaty applicable in a domestic jurisdiction. Member States would have to pass implementing legislation to achieve this result.[340] In states where national constitutions make treaties, once entered into by the state, applicable in the domestic jurisdiction, the situation might be different.[341] Among SADC states that situation prevails only in South Africa under its post-apartheid constitution.[342]

It can be seen from the areas of cooperation outlined in the Treaty that SADC is not only a regional trade promoting organisation.[343] In addition to the integration of national markets and cooperation in production, states joining the community undertake to cooperate in certain functional areas as well. Examples of these areas include social, political and diplomatic matters, as well as sports and regional security.[344]

Furthermore, the SADC Member States intend to strengthen and consolidate the long standing historical, social and cultural affinities and links among the peoples of the region and to harmonise political and social policies among Member States.[345] SADC states have many traditional links. These include the emergence from colonial oppression and assisting each

[338] Ndulo "African Integration Schemes: A Case Study of the Southern African Development Community" 1999 *Cornell Law Faculty Publications* 14.
[339] Ndulo "African Integration Schemes: A Case Study of the Southern African Development Community" 1999 *Cornell Law Faculty Publications* 14.
[340] *Ibid.*
[341] *Ibid.*
[342] See ss 232 and 231 (4) of The Constitution of the Republic of South Africa, 1996. See also, *Harksen v President of the Republic of South Africa* 2000 2 SA 825 (CC); and *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC). See further, Oppong "Making Regional Economic Community Laws Enforceable in National Legal Systems: Constitutional and Judicial Challenges" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 151; and Ndulo "African Integration Schemes: A Case Study of the Southern African Development Community" 1999 *Cornell Law Faculty Publications* 14.
[343] Ndulo "African Integration Schemes: A Case Study of the Southern African Development Community" 1999 *Cornell Law Faculty Publications* 15.
[344] Article 5 (1) (a), (b), (h) and 5 (2) (b) of the SADC Treaty. See Ndulo "African Integration Schemes: A Case Study of the Southern African Development Community" 1999 *Cornell Law Faculty Publications* 15.
[345] Ndulo "African Integration Schemes: A Case Study of the Southern African Development Community" 1999 *Cornell Law Faculty Publications* 15.

other in the bitter and protracted liberation wars. Also, the indigenous ethnic groups in many of the SADC Member States overlap or have common historical origins.[346]

Accordingly, the SADC strategy of encompassing non-economic matters among its areas of cooperation is a realisation that successful integration invariably has to be anchored on the twin foundations of economic and political integration.[347] As shown, the SADC Treaty makes provision for the formulation of subsidiary legal instruments such as protocols, some of which give specific mandates to various SADC institutions.[348]

3 5 2 The SADC Protocol on Trade

The SADC trade regime is established and governed by the SADC Protocol on Trade whose objective is to liberalise trade in goods and services on the basis of fair, mutually beneficial and equitable agreements.[349] The Protocol is designed to facilitate the implementation of SADC's regional integration agenda.[350] Thus, the Protocol is instrumental in the removal of both tariff and non-tariff barriers to trade.[351]

After the launch of SADC, the shift in focus from a loose coordination to economic integration was clearly shown with the adoption of the Protocol on Trade was signed on 24 August 1996 in Maseru, Lesotho and entered into force on 25 January 2000.[352] It is arguably the most important legal instrument in the community's quest for deepened regional economic integration.[353]

---

[346] Ndulo "African Integration Schemes: A Case Study of the Southern African Development Community" 1999 *Cornell Law Faculty Publications* 15.
[347] *Ibid.*
[348] Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration" 2012 *PER/PELJ* 457.
[349] Article 2, SADC Protocol on Trade. See Shumba *Harmonising the Law of Sale in the Southern African Development Community* (LLD Thesis, Stellenbosch University, 2014) 15; and Kamau *The regulation of trade barriers under SADC and EAC: Assessing the effectiveness of their legal framework* (LLM Thesis, University of Cape Town, 2014) 5, 18, 29.
[350] Secretariat Report "Factual Presentation: Protocol on Trade in the Southern African Development Community (SADC) 12 March 2007" available at rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=45 (accessed 23-01-2016). See also Lee *The Political Economy of Regionalism in Southern Africa* (2003) 109.
[351] See www.sadc.int/documents-publications/show/816 (accessed 13-04-2016). Lee *The Political Economy of Regionalism in Southern Africa* (2003) 110.
[352] Buthelezi *Regional Integration in Africa: Prospects and Challenges for the 21st Century* (2006) 171. See also, Hartzenberg "Economic integration matters for SADC" 2012 *SADC Policy Analysis and Dialogue Programme* 13; and Secretariat Report "Factual Presentation: Protocol on Trade in the Southern African Development Community (SADC) 12 March 2007" available at rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=45 (accessed 23-01-2016). Visit www.sadc.int/themes/economic-development/ (accessed 10-11-2015) and www.sadc.int/documents-publications/show/816 (accessed 13-04-2016).
[353] See www.sadc.int/documents-publications/show/816 (accessed 13-04-2016).

With the inception of SADC, the focal point of the economic integration agenda had effectively changed, the first phase being the establishment of a Free Trade Area (FTA).[354] Article 2 (5) of the Protocol on Trade confirms the objective to "establish a Free Trade Area in the SADC Region".[355] Under the terms of the Protocol on Trade, Member States agreed to phase down tariffs and non-tariff barriers over a 12-year period with the aim of establishing a Free Trade Area (FTA).[356] In addition to that, provision was made for wide-ranging initiatives on customs cooperation and trade facilitation in order for countries to be able to take advantage of the opportunities provided by favourable market access under the FTA.[357]

In terms of its structure and provisions, the SADC Protocol on Trade consists of thirty nine articles and five annexes.[358] The definitions and objectives are contained in Articles 1 and 2 of the Protocol.[359] In Articles 3 to 11, the Protocol provides for the elimination of all barriers to intra-SADC trade in goods. Most notably it provides for the granting of a grace period or derogation of duty for those countries that may be adversely affected by the removal of tariffs or NTBs to trade.[360]

The Protocol also calls for the eventual elimination of all import duties on Member States' goods, a process that should accompany the development of an industrialization strategy that would enhance competition among Member States.[361] It must be noted that the elimination of all existing forms of NTBs is also mandatory.[362] In relation to that, there are provisions which

[354] Lee *The Political Economy of Regionalism in Southern Africa* (2003) 110.
[355] Secretariat Report "Factual Presentation: Protocol on Trade in the Southern African Development Community (SADC) 12 March 2007" available at rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=45 (accessed 23-01-2016). See also, Hartzenberg "Economic integration matters for SADC" 2012 *SADC Policy Analysis and Dialogue Programme* 13.
[356] Hartzenberg "Economic integration matters for SADC" 2012 *SADC Policy Analysis and Dialogue Programme* 15.
[357] *Ibid.*
[358] Secretariat Report "Factual Presentation: Protocol on Trade in the Southern African Development Community (SADC) 12 March 2007" available at rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=45 (accessed 23-01-2016). See also, http://www.sadc.int/documents-publications/protocols/ (accessed 23-01-2016).
[359] Lee *The Political Economy of Regionalism in Southern Africa* (2003) 111.
[360] Article 3 Protocol on Trade. See Erasmus "The Consequences of Retaliation in Southern African Trade Relations" 2014 *Stellenbosch: Tralac* 7. See also, Lee *The Political Economy of Regionalism in Southern Africa* (2003) 111; and Ndulo "African Integration Schemes: A Case Study of the Southern African Development Community" 1999 *Cornell Law Faculty Publications* 19.
[361] Article 4 Protocol on Trade.
[362] Article 6 Protocol on Trade.

require Members States to phase out quantitative restrictions on imports and exports,[363] with a few exceptions.[364] Security interests are protected and national treatment is regulated.[365]

In Articles 12 to 15 the Protocol contains provisions that are applicable in respect of rules of origin, cooperation in customs matters, trade facilitation and transit trade.[366] Furthermore, Articles 16 to 21 are comprised of trade rules dealing with sanitary and phyto-sanitary measures, standards and technical regulations on trade, antidumping and safeguard measures and the protection of infant industries.[367]

The Protocol provides for trade-related investment in Article 22, calling for Member States to create an open cross-border investment regime in order to enhance economic development, diversification and industrialization.[368] Articles 23 to 25 deal with other trade-related issues such as stipulations that SADC Member States should adopt policies that allow them to implement their obligations to the WTO under the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[369]

In terms of Article 26, the Protocol caters for trade development.[370] Furthermore, Articles 27 to 30 deal with trade relations among Member States and with third countries.[371] These provisions focus on preferential trade arrangements, allowing Member States to maintain existing preferential trade arrangements as well as other trading arrangements and enter into new ones as long as such arrangements do not conflict with the Protocol.[372] However, SADC Member States are challenged to review these existing trade-related arrangements to determine if they are compatible with the objectives of the Protocol.[373]

The Protocol calls on Member States to grant Most Favoured Nation (MFN) treatment to all members.[374] It does not prevent a Member State from maintaining preferential trade arrangements with third countries as long as such arrangements are compatible with the

[363] Articles 7 and 8 Protocol on Trade.
[364] Article 9 Protocol on Trade.
[365] Articles 10 and 11 Protocol on Trade.
[366] Lee *The Political Economy of Regionalism in Southern Africa* (2003) 111.
[367] *Ibid.*
[368] *Ibid.*
[369] *Ibid.*
[370] *Ibid.*
[371] *Ibid.*
[372] Article 27 Protocol on Trade.
[373] Lee *The Political Economy of Regionalism in Southern Africa* (2003) 111.
[374] Article 28 (1) Protocol on Trade.

Protocol.[375] However, "any advantage, concession, privilege or power granted to a third country must also be granted to other Member States".[376] Notwithstanding that, a Member State shall not be obliged to extend preferences pertaining to another trading bloc of which that Member State was a member at the time of entry into force of the Protocol.[377]

The Protocol also ensures the coordination of trade policies.[378] This is closely related to issues regarding cooperation with third countries or groups of countries.[379] In provisions that are also central to this study, the Protocol on Trade outlines rules relating to institutional arrangements and dispute settlement procedures.[380] In order to deepen integration, the SADC agenda is focused on the substantial phase down of tariffs and elimination of non-tariff barriers.

3 5 3 The Regional Indicative Strategic and Development Plan (RISDP)

In addition to the SADC Treaty and Protocol on Trade, other protocols have been adopted on matters such as corruption, shared watercourse systems, energy, transport, tourism, trade and investment.[381] SADC Member States have also adopted a number of Declarations, Memoranda of Understanding (MOU) and Charters to give effect to their policy objectives.[382]

The RISDP is a blueprint for regional integration which was adopted by the SADC Council of Ministers in August 2003.[383] It fundamentally provides strategic direction for SADC programmes, projects and activities over a fifteen-year period in line with the SADC Common Agenda and strategic priorities enshrined in the SADC Treaty.[384] It specifically laid out the

[375] Article 28 (2) Protocol on Trade.
[376] Lee *The Political Economy of Regionalism in Southern Africa* (2003) 111.
[377] Article 28 (3) Protocol on Trade.
[378] Article 29 Protocol on Trade.
[379] Article 30 Protocol on Trade.
[380] Articles 31 – 39 Protocol on Trade. See Erasmus "The Consequences of Retaliation in Southern African Trade Relations" 2014 *Stellenbosch: Tralac* 7. See also, Secretariat Report "Factual Presentation: Protocol on Trade in the Southern African Development Community (SADC) 12 March 2007" available at rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=45 (accessed 23-01-2016).
[381] Dugard *International Law: A South African Perspective* (2011) 439.
[382] Hartzenberg "Economic integration matters for SADC" 2012 *SADC Policy Analysis and Dialogue Programme* 14.
[383] *Ibid.*
[384] Shumba *Harmonising the Law of Sale in the Southern African Development Community* (LLD Thesis, Stellenbosch University, 2014) 9. Among other things, the RISDP envisages harmonisation of policies, legal and regulatory frameworks that address the business environment and the free movement of all factors of production. It spans from 2005 to 2020. See http://www.sadc.int/about-sadc/overview/strategic-pl/regional-indicative-strategic-development-plan (accessed 29-04-2016).

roadmap for tariff-phasedown and elimination of non-tariff barriers**.** In this connection, the SADC FTA was established albeit after the designated time.[385]

The RISDP identifies trade, economic liberalisation and development as the key catalytic intervention areas for the achievement of deeper integration and poverty eradication in SADC.[386] In 2012 the RISDP marked an important milestone for the region as it represented the final year of the implementation of the SADC Protocol on Trade. The linear trajectory of the integration strategy is aimed at the establishment of a SADC Economic Union by 2018.[387]

The RISDP is a bold and ambitious regional integration plan, but is not legally binding. Neither the SADC Treaty nor the Protocol on Trade gives it legal force. This has an impact on the plans it set out, including the implementation and enforcement of its targets.[388] Regardless, it enjoys immense political legitimacy, often serving as a point of reference with respect to the SADC integration agenda.[389] It is arguable whether its effectiveness would be enhanced if it is accorded some legal force.[390]

Also applicable is the Protocol on Finance and Investment (FIP) which was signed in August 2006 and entered into force on 16 April 2010. The approval and signing of the document has been cited as one of the region's main achievements. The FIP provides the legal basis to allow SADC and its Member States to mobilise financial resources at regional and domestic levels rather than relying solely on foreign aid.[391] The FIP seeks to harmonise financial and investment policies and create a favourable investment climate in SADC countries.[392]

---

[385] Ng'ong'ola "SADC Law: Building Towards Regional Integration" 2011 *SADC Law Journal* 126. See also, http://www.sadc.int/about-sadc/integration-milestones/ (accessed 11-04-2016). The RISDP, endorsed by the SADC Heads of State and Government, laid out targets and timeframes for integration as follows: the establishment of a Free Trade Area (FTA) by 2008, a customs union in 2010, a common market in 2015, a monetary union in 2016 and the introduction of a single currency in 2018. See further, www.sacu.int/docs/pr/2008/pr0812.pdf (accessed 11-04-2016); and "Lack of political will derails SADC integration" http://www.herald.co.zw/lack-of-political-will-derails-sadc-integration/ (accessed 11-09-2016).

[386] Hartzenberg "Economic integration matters for SADC" 2012 *SADC Policy Analysis and Dialogue Programme* 15.

[387] Due to some obstacles, including the lack of political will, most of the RISDP deadlines have not been met thus far. See "Lack of political will derails SADC integration" http://www.herald.co.zw/lack-of-political-will-derails-sadc-integration/ (accessed 11-09-2016).

[388] Saurombe "The SADC Trade Agenda: A Tool to Facilitate Regional Commercial Law: An Analysis" 2009 *South African Mercantile Law Journal* 699.

[389] Hartzenberg "Economic integration matters for SADC" 2012 *SADC Policy Analysis and Dialogue Programme* 14–15.

[390] Shumba *Harmonising the Law of Sale in the Southern African Development Community* (LLD Thesis, Stellenbosch University, 2014) 92.

[391] *Ibid.*

[392] Dugard *International Law: A South African Perspective* (2011) 439.

3 5 3 1 Tariff Phase-Down Commitments

The SADC's first step towards deeper integration involved the launch of the FTA in August 2008, under the theme "SADC Free Trade Area for Growth, Development and Wealth Creation".[393] As a result, eighty-five percent of intra-SADC trade amongst participating Member States attained duty-free status. Since 2008, the remaining tariff barriers relating to sensitive products have been phased down. As a result, by January 2012 the tariff phase down process was essentially complete.[394]

Clearly, significant progress in reducing tariffs to intra-SADC trade has been achieved within twelve years after the adoption of the Protocol on Trade. Although SACU Member States fulfilled their tariff phase down obligations by 2008, the remaining countries were expected to have completed their reductions by 1 January 2012. However, some Member States were lagging behind in the implementation of their tariff phase down commitments.[395]

Many challenges were cited in the implementation of tariff liberalisation commitments. For instance, Mozambique has been the key exception, having negotiated to complete tariff reductions on imports from South Africa by 2015.[396] Malawi delayed its phase down schedule due to budgetary considerations, such that by 2011, only forty-six percent of its tariff offer had been achieved. The tariff levels in Malawi at this point are more or less the same as they were in 2004. Tanzania, although on schedule with respect to its tariff phase down commitments, unilaterally re-introduced a twenty-five percent duty on sugar and paper products in 2010 and has applied for derogation in that respect until 2015.[397]

---

[393] Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration" 2012 *PER/PELJ* 459. It must be noted that the SADC Free Trade Area was launched on the 18th July 2008, substantially eliminating tariffs by at least eighty-five percent on all trade among the Member States with most of the remaining fifteen percent comprising sensitive products. This was in keeping with the WTO's provisions which require FTAs to eliminate tariffs on substantially all trade in terms of Article XXIV 8 (b) GATT. The maximum tariff liberalization was indeed complied with. See also, Kamau *The regulation of trade barriers under SADC and EAC: Assessing the effectiveness of their legal framework* (LLM Thesis, University of Cape Town, 2014) 20. See also, www.sadc.int/ and www.sacu.int/docs/pr/2008/pr0812.pdf (accessed 20-01-2016).

[394] USAID "Audit of the Implementation of the SADC Protocol on Trade" 2011 *USAID* 12, 16. See also, Hartzenberg "Economic integration matters for SADC" 2012 *SADC Policy Analysis and Dialogue Programme* 15.

[395] Hartzenberg "Economic integration matters for SADC" 2012 *SADC Policy Analysis and Dialogue Programme* 15.

[396] *Ibid.*

[397] Ndulo "African Integration Schemes: A Case Study of the Southern African Development Community" 1999 *Cornell Law Faculty Publications* 23. It is stated that international trade in sugar is not free but is regulated by protocols and market access arrangements which means countries are generally more inclined to raise tariffs in that regard for domestic reasons.

Meanwhile, Zimbabwe was granted derogation, in terms of Article 3 (c) of the Protocol on Trade, to suspend its tariff phase downs until 2012 given its difficulties in implementing its tariff commitments on sensitive products. It was then decided that the tariff phase down would be completed in 2014.[398]

It is commendable that in the implementation of the SADC FTA an asymmetrical tariff elimination programme was pursued.[399] Tariffs were lowered at variable scales of speed, commensurate with the level of development of each Member State.[400] Countries were categorised as Developed,[401] Developing[402] and Least Developed.[403] The countries in the Developed category were expected to achieve a level of zero tariffs within five years while those in the Developing category were expected to reach the same benchmark within an eight-year period. Least Developed Countries were allowed to achieve their tariff elimination programme after the eight-year period, but not beyond twelve years.[404]

3 5 3 2 Elimination of Non-Tariff Barriers (NTBs)

Non-tariff measures (NTMs) are "policy measures other than ordinary customs tariffs, which can potentially have an economic effect on international trade in goods, changing quantities traded, or prices, or both".[405] Where such measures act as restrictions on trade, they are considered to be non-tariff barriers (NTBs).[406] Therefore, NTBs are a species of NTMs. NTBs refer to "restrictions that result from prohibitions, conditions or specific market requirements, usually in the form of governmental measures, which make importation or exportation of products difficult and/or costly".[407]

---

[398] *Ibid.*

[399] Article 3 and 4 SADC Protocol on Trade. See Kalenga "Implementation of the SADC Trade Protocol: A Preliminary Review" 2004 *Monitoring Regional Integration in Southern Africa Yearbook* 20. It is asserted that the principle of asymmetry in relation to tariff reductions was meant to address the needs of Least Developed Countries (LDCs) and ensure that a win-win situation prevails in SADC.

[400] Zongwe "An Introduction to the Law of the Southern African Development Community" 2014 *Hauser Global Law School Program: Globalex*, available at www.nyulawglobal.org/globalex/Southern_African_Development_Community1.html (accessed 16-09-2016).

[401] The Developed countries include South Africa and, *de facto*, its Southern African Customs Union (SACU) partners, Botswana, Lesotho, Namibia and Swaziland.

[402] The Developing countries include Mauritius and Zimbabwe.

[403] The Least Developed countries include Madagascar, Malawi, Mozambique, Tanzania and Zambia.

[404] Kalenga "Implementation of the SADC Trade Protocol: A Preliminary Review" 2004 *Monitoring Regional Integration in Southern Africa Yearbook* 20.

[405] Osiemo "The last frontier: Sanitary and Phytosanitary standards and Technical regulations as non-tariff barriers in intra-African trade" 2015 *African Journal of International and Comparative Law* 176.

[406] *Ibid.*

[407] "Non-tariff barriers: Trade Barriers in Africa. Reporting, Monitoring and Eliminating Mechanism" available at www.tradebarriers.org/ (accessed 26/02/17). Examples of NTBs include import bans; general or product-

At the multilateral level, NTBs were first tabled for deliberation in the General Agreement on Tariffs and Trade's (GATT) Kennedy Round of negotiations.[408] In the Tokyo Round of negotiations, standard and technical regulations were recognised as NTBs which needed to be negotiated and disciplined.[409] The Tokyo Round resulted in the plurilateral Agreement on Technical Barriers to Trade.[410]

The Uruguay Round resulted in the Sanitary and Phyto-Sanitary (SPS) Agreement and the Technical Barriers to Trade (TBT) Agreement which were aimed at disciplining national standards so that they do not create unnecessary obstacles to trade.[411] The improper or unjustified use of NTMs such as SPS and TBT measures engenders NTBs.[412]

The WTO has since shifted its focus to NTBs, after it successfully lowered tariffs on industrial products from over forty percent on average to less than four percent on average.[413] However, NTBs remain in high levels, especially in Africa, in the form of price controls; product standards; discriminatory foreign exchange allocation; imposition of quotas; non-automatic licensing; administrative hurdles; multiple checkpoints and border delays; restrictions on the free movement of people, means of production and cross border investments.[414] Due to NTBs, trade links from Africa to the world can be relatively more direct and efficient than trade

specific quotas; complex or discriminatory rules of origin; quality conditions imposed by the importing country on the exporting countries; unjustified Sanitary and Phyto-sanitary conditions; unreasonable or unjustified packaging, labelling, product standards; complex regulatory environment; determination of eligibility of an exporting establishment by the importing country; additional trade documents like Certificate of Origin and Certificate of authenticity; occupational safety and health regulations; employment law; import license; state subsidies, procurement, trading, state ownership; export subsidies; fixation of a minimum import price; product classification; quota shares; multiplicity and controls of foreign exchange market; inadequate infrastructure; "buy national" policy; overvalued currency; restrictive licenses; seasonal import regimes; and corrupt or lengthy customs procedures. See also, Osiemo "The last frontier: Sanitary and Phytosanitary standards and Technical regulations as non-tariff barriers in intra-African trade" 2015 *African Journal of International and Comparative Law* 175 - Non-tariff measures are in the form of governmental measures such as laws, regulations, policies, conditions and restrictions.

[408] Osiemo "The last frontier: Sanitary and Phytosanitary standards and Technical regulations as non-tariff barriers in intra-African trade" 2015 *African Journal of International and Comparative Law* 175 -The Kennedy Round was negotiated between 1964 and 1967.

[409] Osiemo "The last frontier: Sanitary and Phytosanitary standards and Technical regulations as non-tariff barriers in intra-African trade" 2015 *African Journal of International and Comparative Law* 175.

[410] *Ibid*.

[411] *Ibid*.

[412] *Ibid.*

[413] Osiemo "The last frontier: Sanitary and Phytosanitary standards and Technical regulations as non-tariff barriers in intra-African trade" 2015 *African Journal of International and Comparative Law* 174.

[414] Osiemo "The last frontier: Sanitary and Phytosanitary standards and Technical regulations as non-tariff barriers in intra-African trade" 2015 *African Journal of International and Comparative Law* 178.

between neighbouring African regions.[415] NTBs are estimated to affect up to twenty percent of intra-African trade.[416]

In North Africa, NTBs are impeding further integration in regional trade agreements (RTAs). One example is the Arab Maghreb Union (AMU), which includes Algeria, Morocco and Tunisia.[417] The AMU failed to meet its envisioned regional integration milestones on schedule. These included the achievement of a free trading area (FTA) by 1992, a customs union (CU) by 1995 and a common market (CM) by 2000.[418] However, AMU Member States trade more with the European Union (EU) than with each other. Therefore, their trading has remained largely bilateral, with intra-AMU NTBs remaining numerous.[419]

The Southern African Development Community (SADC) provides for the elimination of NTBs in its Protocol on Trade. [420] Tariffs have come down substantially. Yet, NTBs have proliferated and they affect at least one-fifth of intra-SADC trade, amounting to US$ 3.3 billion in 2008.[421]

The most notable types of NTBs in SADC include inefficiencies in transport, customs and logistics, which raise costs; cumbersome fiscal arrangements, which widen borders; restrictive rules of origin, which limit preferential trade; poorly designed technical regulations and standards, which limit consumer choice and hamper trade; and other NTBs, which generally restrict opportunities for regional sourcing.[422] Therefore, NTBs are expensive in terms of direct

[415] "Africa Regional Integration Index Report 2016" 28 available at https://wwwintegrate-africa.org/ (accessed 17-03-2017).
[416] "Africa Regional Integration Index Report 2016" 28 available at https://wwwintegrate-africa.org/ (accessed 17-03-2017) – It is stated that Africa's trade integration indicators include the level of customs duties on imports, share of intra-regional goods exports, share of intra-regional goods imports and the share of total intra-regional goods trade.
[417] Mistry "Africa's Record of Regional Cooperation and Integration" 2000 *African Affairs* 561. The Arab Maghreb Union was formed in 1989.
[418] Mistry "Africa's Record of Regional Cooperation and Integration" 2000 *African Affairs* 561.
[419] Mistry "Africa's Record of Regional Cooperation and Integration" 2000 *African Affairs* 562. The Arab Maghreb Union's NTBs are mainly in the form of a) currency inconvertibility, b) insufficiently harmonised customs procedures and rules-of origin regimes, c) an inadequate intra-AMU trade information network and d) structural weaknesses in the current intra-regional payments system.
[420] Article 6, Protocol on Trade. See Ndulo "African Integration Schemes: A Case Study of the Southern African Development Community" 1999 *Cornell Law Faculty Publications* 20, 23. Noting that the process of tariff elimination is accompanied by an industrial strategy in order to improve the competitiveness of Member States, this is aimed at preventing unequal accrual of benefits from a non-discriminatory market for regional goods and services, particularly for less competitive Member States who would have lost the revenue they received from tariffs without any immediate alternative.
[421] Gillson and Charalambides "Addressing Non-Tariff Barriers on Regional Trade in Southern Africa" https://www.saiia.org.za (accessed 18-03-2017).
[422] Gillson and Charalambides "Addressing Non-Tariff Barriers on Regional Trade in Southern Africa" https://www.saiia.org.za (accessed 18-03-2017).

costs, delays to doing business and discouragement of private sector players from gaining access to markets across the region.[423]

SADC has legal provisions, which essentially reflect WTO standards, aimed at addressing NTBs in the form of unjustified SPS Measures, TBTs and quantitative restrictions on imports and exports.[424] WTO rules require that SPS and TBT measures are not applied in a manner that creates unnecessary obstacles to international trade.[425] For an SPS measure to be deemed necessary for the protection of human, animal and plant health, it should conform to international standards.[426] Alternatively, the SPS measure should be based on scientific principles.[427] For a TBT measure to be deemed necessary to achieve its legitimate objective, it must be based on international standards.[428]

In order to remove NTBs, the COMESA-EAC SADC Tripartite Free Trade Area developed a web-based NTB reporting, monitoring and eliminating mechanism.[429] There are three main dimensions to the mechanism, and these include institutional structures for NTB elimination; reporting and monitoring tools; and a penalty system.[430] The NTB online reporting and monitoring system is critical in improving transparency on NTBs.[431]

In relation to the abovementioned, SADC Member States should refrain from imposing NTBs arbitrarily.[432] The SADC legal framework is flawed in that Member States retained the discretion to adopt measures to eliminate NTBs instead of being guided by clear cut

[423] Hartzenberg "Economic integration matters for SADC" 2012 *SADC Policy Analysis and Dialogue Programme* 15.
[424] Ndulo "African Integration Schemes: A Case Study of the Southern African Development Community" 1999 *Cornell Law Faculty Publications* 21. See also, Kamau *The regulation of trade barriers under SADC and EAC: Assessing the effectiveness of their legal framework* (LLM Thesis, University of Cape Town, 2014) 42. SPS measures are governed by Article 16 of the SADC Trade Protocol. TBTs and quantitative restrictions on imports and exports are governed by Article 17 and 8 of the SADC Trade Protocol respectively. For instance, SADC has a SADC SPS Protocol annexed to the Protocol on Trade, which largely draws from the WTO's SPS Agreement. The SPS Protocol provides for national standards based on international standards, harmonisation, transparency and dispute settlement. The SADC also provides for a TBT Protocol. See also, Osiemo "The last frontier: Sanitary and Phytosanitary standards and Technical regulations as non-tariff barriers in intra-African trade" 2015 *African Journal of International and Comparative Law* 186.
[425] Article 5 (6) SPS Agreement and 2.2 TBT Agreement.
[426] Article 3.2 SPS Agreement.
[427] Article 2.2 SPS Agreement.
[428] Article 2.4 TBT Agreement.
[429] Hartzenberg "Economic integration matters for SADC" 2012 *SADC Policy Analysis and Dialogue Programme* 15. COMESA refers to Common Market for Eastern and Southern Africa and EAC to the East African Community. The online NTB reporting, monitoring and eliminating mechanism became operational in 2009
[430] Osiemo "The last frontier: Sanitary and Phytosanitary standards and Technical regulations as non-tariff barriers in intra-African trade" 2015 *African Journal of International and Comparative Law* 190.
[431] See www.tradebarriers.org. (accessed 28-07-2016).
[432] Article 6 SADC Protocol on Trade.

procedures.[433] Notwithstanding NTB elimination commitments, inspections and certification requirements are still based on national rather than regional standards.[434] For example, Zambia banned importation of milk and milk products from Kenya since 2011 to date, on SPS standards without a risk assessment.[435] Zimbabwe, also, banned the importation of potatoes, on SPS standards grounds, allegedly to protect its tobacco crop from nematodes. However, no risk assessment supported the measure.[436] In South Africa, an environmental levy on plastic bags was introduced to reduce problems associated with litter. However, the technical regulations governing it also affected unrelated issues such as the minimum thickness of the plastic to be used as well as the size of the text that must be printed on the bags. This is contrary to the legal requirements that members should specify technical regulations in terms of performance rather than design or descriptive characteristics.[437]

The economic potential of SADC might remain unrealised if South Africa's attempt at integration is viewed by other Member States as being limited to exploiting their consumer markets for its own mercantile interests.[438] South Africa must also address the perception that it is insufficiently sensitive to, or supportive of, their legitimate development objectives.[439] Therefore, some mechanisms will be necessary to ensure some regional equity, particularly in the distribution of welfare gains derived by all participating Member States, so that benefits from intra-SADC trade are not concentrated in one or two Member States.[440]

Non-tariff barriers are largely indicative of the conflict between national political priorities and regional objectives.[441] The latter are insufficiently addressed by political leaders whose power base tends to be national or ethnic.[442] The SADC Treaty does not expressly encapsulate a "supremacy clause". Although from a principled perspective SADC law and norms within the Community's area of competence should constitute a higher law, it is not guaranteed that upon conflict with a Member State's national law, SADC law shall take precedence. Therefore,

[433] Kamau *The regulation of trade barriers under SADC and EAC: Assessing the effectiveness of their legal framework* (LLM Thesis, University of Cape Town, 2014) 41.
[434]Kamau *The regulation of trade barriers under SADC and EAC: Assessing the effectiveness of their legal framework* (LLM Thesis, University of Cape Town, 2014) 42.
[435] Osiemo "The last frontier: Sanitary and Phytosanitary standards and Technical regulations as non-tariff barriers in intra-African trade" 2015 *African Journal of International and Comparative Law* 190.
[436] *Ibid*.
[437] Gillson and Charalambides "Addressing Non-Tariff Barriers on Regional Trade in Southern Africa" https://www.saiia.org.za (accessed 18-03-2017).
[438] Mistry "Africa's Record of Regional Cooperation and Integration" 2000 *African Affairs* 563.
[439] *Ibid*.
[440] Mistry "Africa's Record of Regional Cooperation and Integration" 2000 *African Affairs* 560.
[441] Mistry "Africa's Record of Regional Cooperation and Integration" 2000 *African Affairs* 571.
[442] Mistry "Africa's Record of Regional Cooperation and Integration" 2000 *African Affairs* 573.

regional integration is somewhat at the mercy of political will.[443] There is clearly a need to develop a more transparent trading environment; legally binding enforcement mechanism for the elimination of NTBs; and more robust penalties in the event of non-compliance by a Member State.[444]

3 6 THE SADC INSTITUTIONAL FRAMEWORK: THE SUMMIT

The SADC Treaty and Protocols constitute the legal framework to which SADC institutions are anchored.[445] These institutions include the Summit,[446] Troika,[447] Council of Ministers,[448] Integrated Committee of Ministers,[449] Tribunal,[450] Secretariat,[451] and Standing Committee of Officials.[452] The SADC institutions are empowered by these legal instruments to play a meaningful role in regional integration.[453] The Treaty's provisions set out the mandate of these institutions.[454]

The Summit is made up of Heads of State and/or Government from the SADC Member States.[455] It is the supreme policy making institution of SADC responsible for the overall policy direction and control of functions in the community.[456] To fulfil this end, subject to Article 22, the Summit adopts legal instruments for the implementation of the provisions of the SADC

[443] Mwanawina "Regional integration versus National Sovereignty" 2011 *Verfassung und Recht in Ubersee* 470.
[444] Kamau *The regulation of trade barriers under SADC and EAC: Assessing the effectiveness of their legal framework* (LLM Thesis, University of Cape Town, 2014) 41.
[445] Article 9 (1) SADC Treaty. See Afadameh-Adeyemi and Kalula "SADC at 30: Re-examining the Legal and Institutional Anatomy of the Southern African Development Community" 2007 *Monitoring Regional Integration in Southern Africa* 11-15; and Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration" 2012 *PER/PELJ* 455.
[446] Article 10 SADC Treaty.
[447] Article 9A SADC Treaty.
[448] Article 11 SADC Treaty.
[449] Article 12 SADC Treaty.
[450] Article 16 SADC Treaty.
[451] Article 14 SADC Treaty.
[452] Article 13 SADC Treaty. Some of these institutions, particularly the Tribunal and Summit, are going to be addressed in detail in the next chapters.
[453] Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration" 2012 *PER/PELJ* 455.
[454] Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration" 2012 *PER/PELJ* 458. It is stated the Tribunal is the only SADC institution provided for under the Windhoek Treaty.
[455] Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration" 2012 *PER/PELJ* 459; and Shumba *Harmonising the Law of Sale in the Southern African Development Community* (LLD Thesis, Stellenbosch University, 2014) 73. Visit www.sadc.intl/ (accessed 06-05-2016).
[456] Article 10 (1) SADC Treaty. See Ooosthuizen *The Southern African Development Community: The Organisation, its Policies and Prospects* (2006) 188; and Shumba *Harmonising the Law of Sale in the Southern African Development Community* (LLD Thesis, Stellenbosch University, 2014) 73.

Treaty, or may delegate this authority to the Council or any other institution of SADC that the Summit deems appropriate.[457] Therefore, the Summit is also a legislative organ.[458]

The Summit meets once or twice a year around August or September and the host is one of the Member States.[459] There may be Special Summit meetings that are called to discuss issues of emergency and whenever there is a need.[460] The Summit is headed by a Chairperson and a Deputy Chairperson elected by the Members States for an annual term. These positions are assumed by Members on a rotating basis.[461]

The Summit has the authority to appoint the Executive Secretary and the Deputy Executive Secretary of the SADC Secretariat.[462] It decides on the admission of new members to SADC.[463] The Summit's decision-making is based on consensus and it is capable of making binding decisions.[464] In terms of Article 22 (1) of the SADC Treaty, a duty is placed on the Member States who are represented at the highest levels in the Summit, to adopt legal instruments for the implementation of the Treaty.[465]

The provisions of the Treaty that are highlighted above show the legal personality of the Summit and the extent of its mandate. [466] That mandate is wide-ranging as expressly stipulated in the constitutive Treaty.[467] The Treaty clearly indicates the functions of the Summit which entail its procedural capacity to make decisions, enforce such decisions or enter into

[457] Article 10 (3) SADC Treaty.
[458] *Ibid*.
[459] Article 10 (5) SADC Treaty.
[460] Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration" 2012 *PER/PELJ* 460. A Special Summit is called an Extra-Ordinary Summit.
[461] Shumba *Harmonising the Law of Sale in the Southern African Development Community* (LLD Thesis, Stellenbosch University, 2014) 74.
[462] Article 10 (7) SADC Treaty. It is stated that the current SADC Executive Secretary is Dr Stergomena Lawrence Tax from the United Republic of Tanzania, appointed by the 33rd Summit of Heads of State and Government in Lilongwe, Malawi, on 17-18th August 2013.
[463] Article 8 (4) SADC Treaty.
[464] Article 10 SADC Treaty.
[465] Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration" 2012 *PER/PELJ* 459. It is argued that the mandate was most notably exercised by the August 1996 Summit in the creation and implementation of the Protocol on Trade that led to the establishment of the FTA in 2008.
[466] Shaw *International Law* (2008) 194. See also, Fagbayibo "Common Problems Affecting Supranational Attempts in Africa: An Analytic Overview" 2013 *PER/ PELJ* 33. Legal personality is defined as a concept which sets out the rights and/or duties of a legal person, including an international organisation within the context of international law".
[467] Shaw *International Law* (2008) 194.

agreements with other entities.[468] Therefore, it must be noted that the extent of the functions of the Summit sheds light on its supremacy in relation to other SADC institutions.[469]

Indeed, the Summit is the supreme and most powerful structure of the SADC and in practice makes decisions on any matter pertaining to SADC.[470] For example, the Summit has the authority to approve policy before it is considered for adoption into law.[471] It also has an oversight role over protocol formulation.[472] A part of its record may show these powers more distinctly.

In 2006, the Extra-ordinary Summit held in South Africa reviewed the state of integration in the region and resolved to accord this process high priority.[473] This signalled a rise in political momentum behind the integration process. Similarly, in 2007 at the Ordinary Summit held in Lusaka, the focus was directed at the imperatives to deepen regional economic integration and to fast-track the implementation of infrastructure development in the region.[474]

Speaking at the Summit held in South Africa in 2008, then South African President Thabo Mbeki stated that the most serious constraints to growing the region was underdeveloped infrastructure and low supply capacities.[475] At the 2010 Windhoek Summit, it was also apparent that the establishment of the customs union depended on the Summit as a decision was made to postpone its formation.[476]

---

[468] *Ibid*.
[469] Fagbayibo "Common Problems Affecting Supranational Attempts in Africa: An Analytic Overview" 2013 *PER/ PELJ* 34. The European Union is, arguably, endowed with a much more extensive legal personality than the United Nations or the African Union.
[470] Shumba *Harmonising the Law of Sale in the Southern African Development Community* (LLD Thesis, Stellenbosch University, 2014) 74.
[471] Article 10 (3) SADC Treaty.
[472] Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration" 2012 *PER/PELJ* 459.
[473] Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration" 2012 *PER/PELJ* 460.
[474] *Ibid*.
[475] Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration" 2012 *PER/PELJ* 459.
[476] Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration" 2012 *PER/PELJ* 459. In 2010, the Summit in Windhoek received a report from the Ministerial Task Force on Regional Economic Integration which outlined concrete actions and timelines aimed at consolidating the SADC FTA. The next phase of establishing the SADC customs union was influenced by the Summit's endorsement of the decision of the Ministerial Task Force to appoint a high level expert group tasked with consolidating and refining the technical work done in order to ensure agreement and common understanding on the parameters and benchmarks of the programme. See http://www.sadc.int/files/3613/5341/5517/SADC_Jubillee_Summit_Communique.pdf.pdf (accessed 11-09-2016). See also, Zongwe "An Introduction to the Law of the Southern African Development Community" 2014 *Hauser Global Law School Program: Globalex*, available at www.nyulawglobal.org/globalex/Southern_African_Development_Community1.html (accessed 16-09-2016).

The SADC Tribunal's judgements have to be referred to the Summit since it is the only institution that has the power to sanction the findings of the Tribunal.[477] The Tribunal may also be requested to play an advisory role at the request of the Summit or the Council of Ministers.[478] These actions, powers and decisions indicate that the Summit has a commanding role in the development of the integration agenda in SADC.[479] Some have suggested that this leaves the success or failure of SADC, including its intra-regional trade agenda, primarily in the hands of the Summit of Heads of State and Government.[480]

As a result, it is believed that political will plays a major role in advancing SADC objectives and strategies considering that any major policy requires the commitment of the Summit. In that respect, many commentators who are critical of the Summit's dominance have increasingly advocated for other SADC institutions to be endowed with supranational powers.[481]

3 7 THE STRENGTHS AND WEAKNESSES OF THE SUMMIT

3 7 1 A brief case study of the Summit's performance: The Lesotho crisis

SADC leaders have shown that they can cooperate in resolving crises on numerous occasions including most recently in Lesotho.[482] The organisation has intervened in Lesotho over the last five years with an acceleration witnessed since May 2014 when the coalition government in

[477] Article 16 (4) SADC Treaty.
[478] Article 16 (4) SADC Treaty. See Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration" 2012 *PER/PELJ* 459.
[479] Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration" 2012 *PER/PELJ* 459.
[480] Shumba *Harmonising the Law of Sale in the Southern African Development Community* (LLD Thesis, Stellenbosch University, 2014) 74.
[481] Phooko "No Longer in Suspense: Clarifying the Human Rights Jurisdiction of the SADC Tribunal" 2015 *PER/PELJ* 551. See also, Ruppel *The Case of Mike Campbell and the Paralysation of the SADC Tribunal* (2012) 152; and Shumba *Harmonising the Law of Sale in the Southern African Development Community* (LLD Thesis, Stellenbosch University, 2014) 74. A new Protocol to reinstate the Tribunal was signed in August 2014.
[482] Mapuva and Muyengwa-Mapuva "The SADC regional bloc: What challenges and prospects for regional integration" 2014 *Law, Democracy and Development* 34. See also, Ndulo "The Need for Harmonisation of Trade Laws in the Southern African Development Community (SADC)" 1996 *Cornell Law Faculty Publications* 224. While pointing out that SADC is primarily aimed at promoting regional economic development, it is accepted that it concerns itself maintaining regional security.[482]

that country collapsed.[483] The result was a testament on how the Summit effectively manages crises and resolves them.[484]

SADC contained the political crisis by brokering a twin-track resolution that involved, on one hand, deploying South African police to guard installations and key political figures and attempting to remove contentious military and police commanders and, on the other hand, postponing elections. The issues that generated the crisis were to be addressed after the elections.[485]

At a meeting in Pretoria, South Africa, between the Troika of the Organ on Politics, Defence and Security Cooperation and the coalition government, SADC agreed to send a facilitator to Lesotho to work with the coalition government to implement the agreed roadmap. In a joint statement with the said SADC Organ's Troika, the Lesotho "Basotho" leaders announced that they would take steps to lift the suspension of parliament that had been earlier ordered by then Prime Minister Thabane to avoid a no-confidence vote.[486]

---

[483] Rupiya *et al.* "Lesotho: A Critique of the Accelerated Politico-Military & Socio-Economic Crises vs. SADC intervention between 2010-2015" http://www.unisa.ac.za/contents/colleges/col_grad_studies/mdea/docs/Book%20Proposal--IARS--2016%20Lesotho-2.pdf (accessed 11-05-2016). See also, Pigou and Prachkovski "Can SADC Facilitate a Sustainable Solution to Lesotho's Crisis?" http://blog.crisisgroup.org/africa/lesotho/2015/08/14/can-sadc-facilitate-a-sustainable-solution-to-lesothos-crisis/ (accessed 11-05-2016). It is reported that mid institutional manipulation, corruption and violence that pitted powerful political and security interests against each other, Prime Minister Tom Thabane discontinued, without dissolving, the parliament to avoid a no-confidence vote. As tensions mounted he fled to South Africa in August 2014, claiming the recently-fired Lesotho Defence Force (LDF) commander, Lt General Tlali Kamoli, had launched a coup.

[484] The Summit was held on the 17th and 18th August 2015. See Pigou and Prachkovski "Can SADC Facilitate a Sustainable Solution to Lesotho's Crisis?" http://blog.crisisgroup.org/africa/lesotho/2015/08/14/can-sadc-facilitate-a-sustainable-solution-to-lesothos-crisis/ (accessed 11-05-2016); also available at http://www.dailymaverick.co.za/article/2015-08-17-lesotho-can-sadc-facilitate-sustainable-solution-to-crisis/#.VzLwZNJ97IU (accessed 11-05-2016).

[485] Pigou and Prachkovski "Can SADC Facilitate a Sustainable Solution to Lesotho's Crisis?" http://blog.crisisgroup.org/africa/lesotho/2015/08/14/can-sadc-facilitate-a-sustainable-solution-to-lesothos-crisis/ (accessed 11-05-2016). The country's complex mixed direct constituency and proportional representation electoral system helped smaller parties and gave individual politicians significant power in the February 2015 elections that were won by former Prime Minister Pakalitha Mosisili, head of a seven-party coalition that his Democratic Congress dominates. His main support comes, ironically, from the Lesotho Congress of Democrats, the party he broke from in 2012. It was led by Mr Mothetjoa Metsing, Prime Minister Thabane's coalition partner until last August, when, as an investigation into his activities progressed to prosecution for corruption, he partly precipitated the crisis by breaking with the Prime Minister.

[486] Ngwawi "A historical perspective of Lesotho's political crisis" http://www.sardc.net/en/southern-african-news-features/a-historical-perspective-of-lesothos-political-crisis/ (accessed 11-05-2016). As Chair of SADC's Organ for Politics, Defence and Security, South African President Jacob Zuma sent his Defence Minister, Nosiviwe Mapisa-Nqakula, and the foreign ministers of Namibia and Zimbabwe to facilitate the resolution of the cisis. Their report caused him to dispatch Deputy President Cyril Ramaphosa, SADC's facilitator on Lesotho, who reported on the deteriorating security situation to an Extra-ordinary SADC Summit in July.

Afterwards, SADC in effect withdrew as Mr Mosisili formed a coalition designed to keep Prime Minister Thabane from power. This is considered by some to have been a mistake as a suspended former Lesotho Defence Forces (LDF) commander, and a respected ex-commander of SADC's own standby force, was subsequently shot dead. Despite such appalling events, SADC made every effort to prevent any descent into widespread conflict in Lesotho.[487]

The Lesotho crisis stood as an important test for SADC's conflict resolution credibility and it was, in large measure, successful. The Summit fundamentally respected Lesotho's sovereignty. Consistent with the principle of state sovereignty, SADC may contain crises but cannot realistically do so without cooperating with local politicians to find a lasting solution in the national interest. All in all, the supremacy of the Summit may be subject to criticism but it ensures stability and security in the region.[488] These factors should be taken into account in the debate on whether to endow other SADC institutions with supranational status.

3 7 2 Addressing accountability deficits under a dominant Summit: A call for supranational institutions

It is generally observed that RTAs tend to have weak institutions which lack independence, making them susceptible to the whims of the Member States. This may lead to lack of progress in the achievement of objectives, for instance when there are personal differences between some of the Heads of State and Government.[489] On the other hand, there appears to be a link between the effective implementation of regional initiatives and the autonomy of regional institutions. This is attributed to the ability of supranational regional institutions to act above the dictates of individual Members States in the furtherance of common interests without being held back by the vagaries of national politics.[490]

In the words of Tallberg, "supranational institutions are largely independent of individual Member States and they are vested with decision making powers which can bind Member

[487] Pigou and Prachkovski "Can SADC Facilitate a Sustainable Solution to Lesotho's Crisis?" http://blog.crisisgroup.org/africa/lesotho/2015/08/14/can-sadc-facilitate-a-sustainable-solution-to-lesothos-crisis/ (accessed 11-05-2016).

[488] Pigou and Prachkovski "Can SADC Facilitate a Sustainable Solution to Lesotho's Crisis?" http://blog.crisisgroup.org/africa/lesotho/2015/08/14/can-sadc-facilitate-a-sustainable-solution-to-lesothos-crisis/ (accessed 11-05-2016). Incidentally, SADC established a commission of inquiry into Brigadier Mohao's death, the contributing factors and relevant antecedents and authorised it to create an "oversight committee" to provide early warning and facilitate a new intervention if needed. The summit also recommended constitutional and security reforms that it said would be reviewed later.

[489] Fagbayibo "Common Problems Affecting Supranational Attempts in Africa: An Analytic Overview" 2013 *PER/ PELJ* 49.

[490] *Ibid.*

States".[491] In addition, Mutharika also avers that economic integration requires the delegation of power to a supranational body entrusted with the task of safeguarding the interests of both the entity as well as those of the individual Member States.[492] However, the transformation from the Southern African Development Coordination Conference (SADCC) to SADC did not bring about the creation of supranational institutions. The current SADC institutional structures cannot be described as being supranational because they are not independent of individual Member States' influence as underscored by the dominance of the Summit.

Saurombe asserts that the evidence of the lack of supranational institutions is the Summit's dissolution of the SADC Tribunal and the lack of a "harmonious exercise of powers" by the various organs in pursuit of a common agenda.[493] The Summit plays what Saurombe refers to as a "bullying role" in relation to other institutions which report to it.[494] According to Saurombe, deeper integration and trade liberalisation is not going to be realised under a decentralised institutional arrangement. Saurombe advocates for a model of governance that is supranational in nature, transcending individual Member States in the region to a level where decision making is delegated to regional institutions that are, to some extent, independent of Member States' influences.[495]

Similarly, Fagbayibo has advocated for a move towards establishing supranational institutions in SADC in order to avoid the influence that may be brought to bear on regional institutions by Member States. Fagbayibo states that there are common factors that are hindering maximal realisation of supranational institutions in Africa which include weak institutional machinery and non-implementation of key integration initiatives.[496] However, SADC Member States remain distrustful of supranational institutions and are not willing to cede some of their sovereignty.[497]

[491] Tallberg *West European Politics* (2002) 23-46.
[492] Mutharika *Towards Multilateral Economic Cooperation* (1972) 31.
[493] Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration" 2012 *PER/PELJ* 476.
[494] *Ibid*.
[495] Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration" 2012 *PER/PELJ* 458.
[496] Fagbayibo "Common Problems Affecting Supranational Attempts in Africa: An Analytic Overview" 2013 *PER/ PELJ* 48-58. Other problems identified include a skewed distribution of benefits and hegemonic threats, political instability and "democratic deficit".
[497] Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration" 2012 *PER/PELJ* 454.

3 8 STATE SOVEREIGNTY IN SADC: POTENTIAL IMPLICATIONS FOR SUPRANATIONAL INSTITUTIONS AND SUPREME COMMUNITY LAW

3 8 1 Supranational institutions' accountability and transparency

International trade ensures that states have an interest in extending their jurisdiction beyond their territorial limits to cover persons and property in other countries.[498] Inevitably, state sovereignty is a significant and underlying issue in regional integration.[499] The term sovereignty is usually misunderstood because its meaning varies according to the discipline and context in which it is used.[500] The meaning of state sovereignty in international law was described by arbitrator Max Huber in the Island of Palmas case as:

> "a principle that signifies independence in the relations between states. Independence in this regard means a right to exercise, within a portion of the globe, the function of a state, to the exclusion of any other state".[501]

The archaic definition of state sovereignty which refers to the nation-state's supreme, absolute power and authority over its subjects and territory, unfettered by any higher law or rule unless the nation-state consents in an individual and meaningful way, is somewhat misleading in the context of contemporary international law.[502] A number of treaties and customary international law norms impose legal constraints that deter extreme forms of arbitrary sovereignty-based actions by nation-states, including on how citizens are treated.[503]

---

[498] Dugard *International Law: A South African Perspective* (2011) 146. See also, Erasmus "The Consequences of Retaliation in Southern African Trade Relations" 2014 *Stellenbosch: Tralac* 10.

[499] Erasmus "The Consequences of Retaliation in Southern African Trade Relations" 2014 *Stellenbosch: Tralac* 10.

[500] Jackson *Sovereignty, subsidiarity, and separation of powers* (2002) 16. It is generally accepted that the concept of sovereignty does not have particular inherent characteristics, but depends largely on the customs and practices of nation-states and international norms. See also, generally, the works in Biersteker and Weber *State Sovereignty as a Social Construct* (1996).

[501] *Island of Palmas Case (Netherlands v United States*) 2 RIAA 829 (1928). See also, Dugard *International Law: A South African Perspective* (2011) 125; and Jennings "Sovereignty and International Law" in Kreigen (ed) *State, Sovereignty, and International Governance* (2002) 27.

[502] Jackson *Sovereignty, subsidiarity, and separation of powers* (2002) 16, 18-19. This definition can be characterised as that embodied in the Prince who could violate virgins, chop off heads, arbitrarily confiscate property and all sorts of other excessive and inappropriate actions. Of course, this antiquated version of sovereignty no longer prevails in today's world. Now it is argued that there are at least four different meanings of sovereignty, some of which overlap. First, there is domestic sovereignty which refers to the organisation of public authority within a state and to the level of effective control exercised by those holding authority. Second, interdependent sovereignty refers to the ability of public authorities to control trans-border movement. Third, international legal sovereignty refers to the mutual recognition of states or other entities. Fourth, Westphalian sovereignty refers to the exclusion of external actors from domestic authority configurations. See also, generally, Krasner *Sovereignty: Organised Hypocrisy* (1999).

[503] Jackson *Sovereignty, subsidiarity, and separation of powers* (2002) 19.

Sovereignty now fundamentally refers to "questions about the allocation and exercise of power in government decision-making, at nation-state level and at an international level".[504] In international bodies, approaches to decision making in respect of different problems will inevitably differ, but the aim should be efficiency, for instance, in poverty eradication and the creation of wealth.[505]

With particular reference to intra-SADC trade, state sovereignty still allows countries to make their own national laws in line with their own developmental policies and needs. This makes NTBs very difficult to regulate as they are often camouflaged by plausible reasons such as protection of infant industries, human and plant health and standardisation requirements.[506] Some have argued that NTBs will remain a recurring problem because "like ways of avoiding income tax, human invention of NTBs will go on forever".[507] As a result, transparency mechanisms are critical in revealing the nature of NTBs.

Accountability, monitoring and review mechanisms have emerged as a central feature of RTAs.[508] For example, in the North Atlantic Free Trade Agreement (NAFTA), a bi-national review panel displaced national judicial review of most issues concerned with dumping and anti-dumping in disputes among NAFTA members.[509] Decision-making on regional trade issues is ceded to regional panels, particularly in Canada where the role of the domestic courts has been diminished.[510] This is imperative in combating legal diversity caused by a pursuit of national interests.

Measures that are aimed at facilitating free trade can only be successfully implemented if they are supported by an effective legal framework that underpins certainty, clarity and predictability.[511] Fears about the loss of state sovereignty may be well-founded where supranational institutions usurp functions best left to legitimate national structures or act

[504] Jackson *Sovereignty, subsidiarity, and separation of powers* (2002) 19. It is believed that sovereignty may be divided temporarily or nominally to facilitate diplomatic compromise, *inter alia*, which may be useful in the pursuit of regional integration.
[505] *Ibid*.
[506] Van Houtte *The Law of International Trade* (1995) 76.
[507] Jackson *The World Trading System: Law and Policy of International Economic Relations* (1989) 130.
[508] McBride and Fossum *The Rule of Rules: International Agreements and the Semi-Periphery* (2004) 247. In the multilateral trading system of the WTO, the Uruguay Round established the Trade Policy Review Mechanism (TPRM) which reviews adherence to WTO rules and practices and evaluates the impact of individual trade policies.
[509] McBride and Fossum *The Rule of Rules: International Agreements and the Semi-Periphery* (2004) 247.
[510] *Ibid*.
[511] Shumba *Harmonising the Law of Sale in the Southern African Development Community* (LLD Thesis, Stellenbosch University, 2014) 15.

beyond the scope of their mandate.[512] However, inasmuch as state sovereignty is important, accountability and transparency measures in market-making agreements or systems cannot be achieved if part of sovereignty is not pooled together in order to empower regional institutions.[513]

3 8 2 Supreme SADC community law facilitates accountability and transparency measures

The SADC Treaty does not state whether the binding decisions of the Summit have a direct effect in the territory of the Member States.[514] This silence on the part of the SADC Treaty creates a gap in the legal framework for regional integration in SADC because the manner in which decisions of the Summit are implemented is left to the discretion of Member States.[515]

The diverse national laws pertaining to NTBs constitute a barrier to trade in the SADC region. Indeed, uncertain, fragmented, diverse and unpredictable rules and policies are considered to be a significant challenge to regional trade.[516] These diverse rules present an obstacle that is not only felt at the regional level but multilaterally as well.[517]

The non-implementation of key integration initiatives is also believed to be a result of the legal status of community law within the domestic jurisdictions of the Member States.[518] Countries approach the application of international law in the domestic jurisdiction in different ways.[519] Suffice to say, the differential treatment of international law, and by extension community law, leads to it not enjoying equal status with domestic law.[520] It is argued that the lack of pre-eminence of community law causes routine non-implementation of regional policies, which in turn erodes the relevance of the regional institutions.[521]

---

[512] Erasmus "The Consequences of Retaliation in Southern African Trade Relations" 2014 *Stellenbosch: Tralac* 10.
[513] McBride and Fossum *The Rule of Rules: International Agreements and the Semi-Periphery* (2004) 247.
[514] Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration" 2012 *PER/PELJ* 461.
[515] Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration" 2012 *PER/PELJ* 461.
[516] Anderson and Van Wincoop *Gravity with Gravitas: A Solution to the Border Puzzle* (2003) 93.
[517] Shumba *Harmonising the Law of Sale in the Southern African Development Community* (LLD Thesis, Stellenbosch University, 2014) 12.
[518] See *Government of the Republic of Zimbabwe v Fick* 2013 5 SA 325 (CC).
[519] Fagbayibo "Common Problems Affecting Supranational Attempts in Africa: An Analytic Overview" 2013 *PER/ PELJ* 50. Monism, Dualism and Harmonisation are pertinent in this regard.
[520] Fagbayibo "Common Problems Affecting Supranational Attempts in Africa: An Analytic Overview" 2013 *PER/ PELJ* 51.
[521] *Ibid.*

Diverse domestic legal systems rank significantly among the NTBs to trade in SADC. The SADC Member States represent at least three legal families including English common law, Roman-Dutch law and Civil law.[522] Furthermore, each Member State has its own sources of law such as the constitution, indigenous or customary law and religious law. Therefore, every country has its own legal traditions, its own system of legal thought, own method of law-making and its own process of judicial determination of disputes which further complicates issues.[523]

A harmonised legal system could facilitate trade liberalisation.[524] Harmonisation has been defined as "the removal of discord, the reconciliation of contradictory elements, between the rules and effects of two legal systems".[525] According to Cumming, harmonisation is:

> "A flexible concept embodying a range of measures that may vary according to the context in which an issue is treated. In one context, it may mean that the relevant law of the jurisdictions involved is characterised by a high degree of similarity in basic principles but not detailed provisions. The result is that a person familiar with the law in one jurisdiction can easily understand the law of another and adjust to it without difficulty".[526]

Therefore, harmonisation of laws is a process which would involve diverse rules or arguments being combined or adapted to each other to form a coherent whole.[527]

In view of the uncertainty, unpredictability and inaccessibility of domestic laws in the SADC region, free trade is considerably hindered, including the possible gains that could be derived from globalisation and regionalism through trade and economic development.[528] As Mancuso put it, "the issue of diversity of laws has been for a long time, an important and even indirect

[522] Shumba *Harmonising the Law of Sale in the Southern African Development Community* (LLD Thesis, Stellenbosch University, 2014) 13.
[523] Ndulo "The need for harmonisation of Trade Laws in the Southern African Development Community (SADC)" 1996 *African Yearbook of International Law* 196.
[524] Shumba *Harmonising the Law of Sale in the Southern African Development Community* (LLD Thesis, Stellenbosch University, 2014) 16.
[525] Kamba "Comparative Law: A Theoretical Framework" 1974 *International and Comparative Law Quarterly* 501. See also, Shumba *Harmonising the Law of Sale in the Southern African Development Community* (LLD Thesis, Stellenbosch University, 2014) 32.
[526] Cumming *Harmonisation of Law in Canada: An Overview* (1985) 3-4. See also, Shumba *Harmonising the Law of Sale in the Southern African Development Community* (LLD Thesis, Stellenbosch University, 2014) 32.
[527] *Ibid.*
[528] Shumba *Harmonising the Law of Sale in the Southern African Development Community* (LLD Thesis, Stellenbosch University, 2014) 14.

obstacle to economic development".[529] Legal diversity functions as an impediment to intra-regional trade and removes the confidence that comes with legal certainty for those engaged in trade.[530]

3 9 CONCLUSION

This chapter defined good governance and two of its major principles namely, transparency and accountability. It explained how these principles are instrumental in facilitating trade liberalisation in general and the elimination of NTBs in particular. The SADC Treaty's objectives and strategies were discussed, as well as the provisions of the SADC Protocol on Trade. Tariff phase down commitments and the elimination of NTBs were shown to be consistent with the SADC Treaty's objectives, the Protocol on Trade and the RISDP.

With regard to the SADC institutional framework, it is indicated above that most commentators advocate for supranational institutions which will not be "bullied" by the Summit as it executes its mandate. However, it has also been noted that currently the political will to establish supranational institutions is lacking. Nonetheless, any form of closer regional integration will certainly involve the surrender of some aspects of sovereignty by individual Member States, but not much more than that already relinquished by Member States of the EU or NAFTA.[531]

Lastly, it has been shown that the pre-eminence of community law would be crucial for the enhancement of SADC intra-regional trade. This would assist as divergences in national laws and the different status of community law in national jurisdictions all contribute to uncertainty, unpredictability and a lack of transparency. A harmonised and coherent SADC legal system would ensure that the status, interpretation, and application of SADC rules advance intra-regional trade in a consistent manner.

The following chapter will address transparency in the SADC dispute resolution process and accountability in the enforcement of the related judicial decisions. The provisions of the SADC Treaty and Protocol on Trade, as well as the role of the SADC Tribunal will be addressed. In

[529] Mancuso "The new African Law: Beyond the Difference between Common Law and Civil Law" 2008 *Annual Survey of International and Comparative Law* 40.
[530] Ndulo *The Promotion of Intra-Africa Trade and the Harmonisation of Laws in the African Economic Community: Prospects and Problems* (1993) 111-113. See also, Mistelis *Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law* (2001) 20; and Ndulo "The need for harmonisation of Trade Laws in the Southern African Development Community (SADC)" 1996 *African Yearbook of International Law* 211-213.
[531] Ndulo "The Need for Harmonisation of Trade Laws in the Southern African Development Community (SADC)" 1996 *Cornell Law Faculty Publications* 225.

that respect, the provisions and mechanisms of the WTO for ensuring accountability and transparency in its dispute resolution processes will be considered.

CHAPTER 4

Enhancing Accountability and Transparency in SADC: Lessons from the World Trade Organisation

4 1 INTRODUCTION

A lack of accountability and transparency hinders the elimination of Non-Tariff Barriers (NTBs) to trade.[532] The fragmented nature of African markets provides a strong motivation for effective regional integration to facilitate inclusive economic growth.[533] This chapter focuses on the Southern African Development Community's (SADC) intraregional trade liberalisation agenda, particularly the removal of NTBs through enhanced accountability and transparency mechanisms.

The analysis of the transparency mechanisms of the World Trade Organisation (WTO) will shed light on how SADC may ensure that its institutions facilitate accessibility and public scrutiny of intra-regional trade. The WTO's dispute settlement mechanism will also be discussed as it may be useful for SADC to draw lessons from the WTO legal and institutional framework.

The real challenge with regard to accountability is how SADC will ensure that the Tribunal fulfils its mandate within the context of an unclear relationship between community and domestic law.[534] Therefore this chapter will address the South African Constitutional Court decision in the *Government of the Republic of Zimbabwe v Fick* case.[535]

Lastly, the analysis of the Tribunal will also be aimed at gaining a clearer understanding on whether its decisions may be enforceable following a Member State's breach of its obligations. In that respect, the *Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe* case and the circumstances leading to the suspension of the Tribunal will be discussed.[536]

[532] Van den Bossche and Zdouc *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2013) 37, 498.
[533] UNCTAD "Global and Regional Approaches to Trade and Finance" 2007 *United Nations* 2.
[534] Erasmus "The Consequences of Retaliation in Southern African Trade Relations" 2004 *Stellenbosch: Tralac* 10.
[535] *Government of the Republic of Zimbabwe v Fick* 2013 5 SA 325 (CC).
[536] *Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe* SADC (T) 2008.

4 2 TRANSPARENCY IN THE WTO: DRAWING LESSONS FOR SADC

4 2 1 The main features of WTO transparency

The WTO provides rules and procedures that ensure a high level of transparency by setting a benchmark for its Members' trade laws, regulations and procedures.[537] The Transparency Mechanism is a critical component in that regard and was established by the General Council to cater for, *inter alia*, early announcement of Regional Trade Agreements (RTA) and their subsequent notifications to the WTO Secretariat.[538] Through a factual presentation by the WTO Secretariat, it enables WTO Members to engage in the process by deliberating on a notified RTA.[539] The Transparency Mechanism is implemented on a provisional basis. Members may review and, if necessary, modify the decisions and replace it by a permanent mechanism adopted as part of the overall results of the Doha Round.[540]

There are basically five means by which the Transparency Mechanism operates. These include the early announcement of RTAs under formation to the WTO Secretariat, notification of the RTAs thus formed, laying down of procedures to enhance transparency in the RTA, subsequent notification and reporting made by the RTA and, lastly, the preparation of the factual abstract by the WTO Secretariat concerning the RTA.[541]

The early announcement of RTAs that are still under negotiation to the WTO Secretariat enhances transparency for other WTO members.[542] This is facilitated by the submission of all relevant information to the Secretariat, usually in electronic format, which is thereafter posted

---

[537] Van den Bossche and Zdouc *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2013) 498. It is affirmed that some of these rules encompass the requirements for publication, notification, establishment of enquiry points and trade policy review processes. See also, Jackson *The Jurisprudence of GATT & the WTO: Insights on Treaty Law and Economic Relations* (2000) 134. It is argued that the WTO does not always accept its Member's national governments' determinations or policies to prevail when they are not aligned with its norms. However, the WTO remains considerate of some national policies as evidenced by its Panel not always making its decisions *de novo*.

[538] See " Regional Trade Agreements: Transparency Mechanism for RTAs" available at https://www.wto.org/english/tratop_e/region_e/trans_mecha_e.htm (accessed 16-03-2016). It is stated that the Transparency Mechanism was first established on a provisional basis by the General Council, on 14 December 2006.

[539] The Committee on RTAs (CRTA) considers RTAs falling under Article XXIV of the GATT, Article V of the GATS and the Enabling Clause.

[540] Lee *The Political Economy of Regionalism in Southern Africa* (2003) 176-177. See also, " Regional Trade Agreements: Transparency Mechanism for RTAs" available at https://www.wto.org/english/tratop_e/region_e/trans_mecha_e.htm (accessed 16-03-2016).

[541] *Ibid*.

[542] Muthai "Regional trade integration strategies under SADC and the EAC: A comparative analysis" 2011 *SADC Law Journal* 84.

on the WTO website.[543] This information includes critical information regarding the RTA such as its official name, scope, date of signature, timetable for its entry into force, relevant contact points and its website address.[544]

The WTO Secretariat is notified of every RTA that has been formed as soon as possible. Once again, the submission of information in electronic format is encouraged in order to facilitate its dissemination to other members.[545] The pertinent information that is availed includes the specific provision under which the RTA is notified, along with the full text, annexes and protocols relating to the RTA. These documents are supposed to be in one of the WTO's official languages. The RTA is expected to lay out procedures for the purposes of enhancing transparency in its trade regime.[546]

Every RTA that has undergone initial notification to the WTO Secretariat is obliged to make subsequent notifications and reports as soon as possible whenever it becomes necessary.[547] For instance, this may be done when any changes affecting the implementation of the RTA manifest, or when any changes to its operations after implementation occur. According to the WTO, a summary of the changes and the affected texts, schedules, annexes and protocols should be sent in one of the WTO's official languages, preferably in electronic format.[548]

Liberalisation commitments that were made upon the notification of the RTA should be shown to have been met at the end of the RTA's implementation. Therefore, the RTA is required to submit a short written report to the WTO Secretariat relating to the fulfilment of its original commitments.[549] The Secretariat is required to prepare a factual abstract concerning each RTA.[550] This would entail the presentation of features of the RTA which have been established through its examination by the Committee on Regional Trade Agreements (CRTA).

Trade monitoring plays a major role in furthering transparency. WTO members monitor how WTO agreements are being implemented by conducting peer reviews of countries' trade

[543] Lee *The Political Economy of Regionalism in Southern Africa* (2003) 176-177. See also, " Regional Trade Agreements: Transparency Mechanism for RTAs" available at https://www.wto.org/english/tratop_e/region_e/trans_mecha_e.htm (accessed 16-03-2016).
[544] *Ibid.*
[545] Ramsamy "SADC: Evolution and Perspectives" 1999 *SAIIA* 40.
[546] See " Regional Trade Agreements: Transparency Mechanism for RTAs" available at https://www.wto.org/english/tratop_e/region_e/trans_mecha_e.htm (accessed 16-03-2016).
[547] *Ibid.*
[548] *Ibid.*
[549] *Ibid.*
[550] Article 22 (b) Transparency Mechanism.

policies, known as Trade Policy Reviews, and through periodic reports on trade measures around the world.[551] Trade Policy Reviews involve the surveillance of national trade policies and constitute a fundamentally critical practice in the WTO.[552] The Trade Policy Review Mechanism (TPRM) is central to this practice.[553]

For each Trade Policy Review, two documents are prepared: a policy statement by the government under review, and a detailed report written independently by the WTO Secretariat.[554] These two reports, together with the proceedings of the Trade Policy Review Body's meetings are published shortly afterwards, usually six week after the meeting. These Trade Policy Reviews contribute to transparency in the WTO.[555]

There is need to strengthen the capacity of SADC institutions according to their mandate and roles as defined in the SADC Treaty.[556] This is not limited to SADC but also to other RTAs such as the East African Community (EAC), which has made significant strides in this regard. As Jackson puts it, "perhaps almost every human institution has to face the task of how to evolve and change in the face of conditions and circumstances not originally considered when the institution was set up".[557] The failure to evolve by RTAs may cause some nations to be sceptical of regional integration and lead to a regression to unilateral action. SADC should seek to implement the WTO's transparency mechanisms outlined above on the regional level.

4 2 2 The WTO's Trade Policy Review Mechanism (TPRM)

The TPRM is a comprehensive agreement that forms the basis for the realisation of transparency in the multilateral trading system.[558] It has two objectives that it aims to

---

[551] See "Implementation and monitoring" available at https://www.wto.org/english/tratop_e/monitor_e/monitor_e.htm (accessed 17-03-2016).
[552] See "Trade Policy Reviews" available at https://www.wto.org/english/tratop_e/tpr_e/tpr_e.htm (accessed 26-03-2016).
[553] See https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm11_e.htm (accessed 16-03-2016).
[554] Grant Makokera and Gruzd "Promoting Peer Review as a Compliance Mechanism for Regional Integration" 2014 *SAIIA Policy Briefing 106* 2. For example, see "Trade Policy Review: Zimbabwe" https://www.wto.org/english/tratop_e/tpr_e/tp352_e.htm (accessed 28-03-2016) for a trade policy review of Zimbabwe which took place on 19th and 21st of October 2011.
[555] See "Trade Policy Reviews" available at https://www.wto.org/english/tratop_e/tpr_e/tpr_e.htm (accessed 26-03-2016).
[556] Giuffrida and Muller-Glodde "Strengthening SADC institutional structures: Capacity development is the key to the SADC Secretariat's effectiveness" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 145.
[557] Jackson *The Jurisprudence of GATT & the WTO: Insights on Treaty Law and Economic Relations* (2000) 183.
[558] World Trade Organization *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (1999) 380-383. See also, Grant Makokera and Gruzd "Promoting Peer Review as a Compliance Mechanism for Regional Integration" 2014 *SAIIA Policy Briefing 106* 2. It is stated that legal compliance is dealt with separately under the Dispute Settlement Mechanism.

achieve.[559] Firstly, it seeks to "contribute to improved adherence by all Members to rules, disciplines and commitments made under the multilateral trading agreements, and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and the understanding of, the trade policies and practices of Members".[560]

It must be underscored that the TPRM is not intended to "serve as a basis for the enforcement of specific obligations under the Agreements of the WTO or to be employed in the WTO's dispute settlement procedures".[561] The TPRM may not be used to impose new policy commitments on Members.[562] Still, it serves as the means to conduct regular collective appreciation and evaluation of the full range of individual Member's trade policies and practices and their impact on the functioning of the multilateral trading system.[563]

Secondly, the TPRM serves the function of examining the impact of a Member's trade policies and practices on the multilateral trading system.[564] The TPRM's assessment of a Member State is carried out against the background of the wider economic and developmental needs, policies and objectives of the Member concerned, as well as the nature of the external environment.[565]

---

[559] Annex 3 GATT 1994 consists of the Trade Policy Review Mechanism which has Sections A to G, providing the legal foundation for transparency in the WTO.

[560] TPRM Section A (i). See also, "Trade Review Policy Mechanism" at https://www.wto.org/english/res_e/booksp_e/analytic_index_e/tprm_01_e.htm#P1B1 (accessed 28-03-2016).

[561] TPRM Section A (i). See "Trade Policy Review Mechanism" at https://www.wto.org/english/res_e/booksp_e/analytic_index_e/tprm_01_e.htm#P1B1 (accessed 28-03-2016). It is observed that this provision sheds light on the interpretation and application of the TPRM. In the *Canada – Aircraft* case, Brazil furnished material from a Trade Policy Review. Canada objected to the use of this material. In the arguments, Brazil submitted that assistance to the regional aircraft industry conferred a "benefit". This submission relied on the statement in the WTO Secretariat's report in the 1998 Trade Policy Review of Canada. The Panel noted that according to the TPRM in Section A (i), the TPRM "is not intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures". The Panel stated that it would "attach no importance" to this Trade Policy Review in relation to the issue, and it then proceeded to find that Brazil had "failed to adduce evidence" of assistance to the Canadian regional aircraft sector by the programme in question, and therefore that there was "no basis for a prima facie case" that such assistance had been provided as export subsidies prohibited by the SCM Agreement. The Panel noted separately that none of its findings were based on Canada's Trade Policy Review material. A related case, *Chile-Price Band System*, is also addressed.

[562] TPRM Section A (i). See "Trade Policy Review Mechanism" at https://www.wto.org/english/res_e/booksp_e/analytic_index_e/tprm_01_e.htm#P1B1 (accessed 28-03-2016).

[563] *Ibid.*

[564] TPRM Section A (ii). See "Trade Policy Review Mechanism" at https://www.wto.org/english/res_e/booksp_e/analytic_index_e/tprm_01_e.htm#P1B1 (accessed 28-03-2016).

[565] Grant Makokera and Gruzd "Promoting Peer Review as a Compliance Mechanism for Regional Integration" 2014 *SAIIA Policy Briefing 106* 2. It is argued that the TPRM's examination of national policies and practices assists in identifying any incoherence in the policy-making within different sectors of government. This level of transparency, particularly concerning a country's commitment to external obligations, can even assuage foreign investors with regard to the stability of a country's policies.

Noting that trade policy reviews are usually not binding nor may they be used in the dispute settlement process, a SADC-specific TPRM can be employed as a soft law complement to the dispute settlement mechanism as outlined in the SADC Treaty and Protocol on the Tribunal.[566]

It is acknowledged that SADC has already undergone some modest institutional restructuring changes since its creation.[567] Some of these restructuring efforts, such as the Report on the Review of Operations of SADC Institutions, March 2001, were understandably aimed at assessing whether the organisation actually had the ability to promote regional cooperation and integration and what the appropriate institutional framework would be to make SADC a more effective and efficient vehicle for community building.[568] Therefore, the RTA has shown that it is receptive to reforms that would advance its objectives.

4 3 ACCOUNTABILITY IN THE WTO DISPUTE RESOLUTION MECHANISM

The WTO's institutional structure has a dispute settlement mechanism that has evolved from decades of experiment and practice in the General Agreement on Tariffs and Trade (GATT), and is now set forth in the text of the Dispute Settlement Understanding (DSU) as part of the WTO Charter.[569] In any case, the WTO has successfully transitioned from the power-based GATT era that relied heavily on conciliation, negotiation and mediation to the WTO era that is rule-based and reliant on independent judiciaries.[570]

It should be noted that the WTO's DSU provides some measure of security and predictability in the multilateral trading system.[571] This is largely because the decisions emanating from the Dispute Settlement Body (DSB), which is underpinned by the DSU, are binding on the parties

[566] Grant Makokera and Gruzd "Promoting Peer Review as a Compliance Mechanism for Regional Integration" 2014 *SAIIA Policy Briefing 106* 3.
[567] Giuffrida and Muller-Glodde "Strengthening SADC institutional structures: Capacity development is the key to the SADC Secretariat's effectiveness" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 121. It is asserted that one of the most significant restructuring process was initiated in 2001 at the Extraordinary Summit in Windhoek where Heads of State and Government approved a Report on the Restructuring of SADC Institutions also termed the Report on the Review of Operations of SADC Institutions, March 2001.
[568] Giuffrida and Muller-Glodde "Strengthening SADC institutional structures: Capacity development is the key to the SADC Secretariat's effectiveness" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 121.
[569] Jackson *The Jurisprudence of GATT & the WTO: Insights on Treaty Law and Economic Relations* (2000) 133.
[570] Jackson *The World Trading System* (1997) 63. See also, Brewster "Rule-Based Dispute Resolution in international Trade Law" 2006 *Virginia Law Review* 254-256.
[571] Article 3.2 DSU. See also, World Trade Organisation "The future of the WTO" 2004 *Sutherland Report* 15; Lee *The Political Economy of Regionalism in Southern Africa* (2003) 176-177; and Marceau "Consultations and the Panel Process in the WTO Dispute Settlement System" 2006 *World Trade Organisation* 29-30.

to the dispute.[572] In the absence of rule-based trade, predictability becomes minimal. Power-based trade relations do not only compromise predictability and transparency in the trade regime but also render the role of judicial institutions in the dispute resolution process inconsequential.[573]

Dispute resolution is a cornerstone of governance in economic integration and can easily be seen as the barometer for assessing a rule-oriented system. It is critical that it remains legitimate, effective and predictable.[574] Predictability is chiefly elusive in the relatively weak realm of international norms.[575] Therefore, it is necessary to foster pre-eminence of regional law and ensure that it upholds regional interests.[576]

The supremacy of community law empowers regional initiatives and facilitates the institutionalisation of interstate cooperation.[577] In a way, regional economic integration will inevitably entail a state's loss of autonomy over some internal affairs and thus demands relinquishing some sovereignty.[578]

There are suggestions that have been put forward that SADC is still inherently power-based.[579] These observations have been made in light of the circumstances surrounding the suspension of the SADC Tribunal in 2010.[580] It remains to be seen whether the functions of the Summit and the Council of Ministers contribute any efficiency, particularly in combating the challenges arising from the failure to implement Community decisions.[581] It is argued that the SADC

[572] Kiplagat "An institutional and structural Model for successful Economic Integration in Developing Countries" 1994 *Texas International Law Journal* 40.
[573] Article 9 SADC Treaty and Article 6 EAC Treaty provide for the judicial organs in the respective RTAs. See also, Mapuva and Muyengwa-Mapuva "The SADC regional bloc: What challenges and prospects for regional integration" 2014 *Law, Democracy and Development* 32.
[574] Petersmann *International Trade Law and the GATT/WTO Dispute Settlement System* (1997) 208. See also, Jackson *The Jurisprudence of GATT & the WTO: Insights on Treaty Law and Economic Relations* (2000) 134. It is argued that the dispute settlement system plays a crucial role in any treaty system, facilitating cooperation and advancing peace and welfare in-between members involved in relations.
[575] Jackson *The Jurisprudence of GATT & the WTO: Insights on Treaty Law and Economic Relations* (2000) 134.
[576] Tino "The Role of regional judiciaries in Eastern and Southern Africa" 2012 *Monitoring Regional Integration in Southern Africa Yearbook* 140.
[577] *Ibid.*
[578] Petersmann *International Trade Law and the GATT/WTO Dispute Settlement System* (1997) 208. See also, Jackson *The Jurisprudence of GATT & the WTO: Insights on Treaty Law and Economic Relations* (2000) 134.
[579] *Mike Campbell v Republic of Zimbabwe* SADC (T) 2/2007. See also, Scholtz "Review of the role, functions and terms of reference of the SADC Tribunal" 2011 *SADC Law Journal* 5.
[580] Phooko "No Longer in Suspense: Clarifying the Human Rights Jurisdiction of the SADC Tribunal" 2015 *PER/PELJ* 549. See also, Mapuva and Muyengwa-Mapuva "The SADC regional bloc: What challenges and prospects for regional integration" 2014 *Law, Democracy and Development* 32.
[581] Phooko "No Longer in Suspense: Clarifying the Human Rights Jurisdiction of the SADC Tribunal" 2015 *PER/PELJ* 548. See also, Mapuva and Muyengwa-Mapuva "The SADC regional bloc: What challenges and prospects for regional integration" 2014 *Law, Democracy and Development* 34.

Tribunal may benefit from WTO jurisprudence which shows that WTO Panels have successfully confronted and dealt with the "delicate and confusing issue of national sovereignty".[582] This has significant implications for regional trade. The importance of a mandatory and transparent mechanism for monitoring the enforcement of regional standards cannot be overemphasised.[583]

4 4 ACCOUNTABILITY IN THE SADC DISPUTE RESOLUTION MECHANISM

4 4 1 The SADC Tribunal

The Tribunal is the judicial organ of SADC and the only major institution of the Community founded on a Protocol.[584] It was originally set up on the basis of the SADC Protocol on the Tribunal to protect the interests and rights of SADC member states and their citizens, and to develop community jurisprudence with regard to applicable treaties, general principles and rules of public international law.[585] Article 21 of the SADC Protocol on the Tribunal specifically deals with the law applicable by the SADC Tribunal.[586] It provides that the Tribunal shall apply the SADC Treaty, its Protocols and all subsidiary instruments adopted by the Summit, by the Council or by any other institution or organ of the Community pursuant to the Treaty or Protocols.[587]

The primary function of the Tribunal, in terms of article 16 (1) of the SADC Treaty, is to ensure adherence to and proper interpretation of the provisions of the Treaty and subsidiary

[582] Petersmann *International Trade Law and the GATT/WTO Dispute Settlement System* (1997) 208. See also, Jackson *The Jurisprudence of GATT & the WTO: Insights on Treaty Law and Economic Relations* (2000) 134.
[583] Ng'ong'ola "SADC Law: Building Towards Regional Integration" 2011 *SADC Law Journal* 123. See also, Saurombe "Regional Integration Agenda for SADC 'Caught in the winds of change' Problems and Prospects" 2009 *Journal of International Commercial Law and Technology* 104.
[584] Phooko "No Longer in Suspense: Clarifying the Human Rights Jurisdiction of the SADC Tribunal" 2015 *PER/PELJ* 534.
[585] Ruppel and Bangamwabo "The SADC Tribunal: A legal analysis of its mandate and role" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 187.
[586] Ruppel and Bangamwabo "The SADC Tribunal: A legal analysis of its mandate and role" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 195. It may be noted that Article 21 of the SADC Tribunal encompasses about twenty-eight legal instruments and the following are relevant to this study: Declaration and Treaty of SADC, Amended Declaration and Treaty of SADC, Protocol on Immunities and Privileges, Protocol on Legal Affairs, Protocol on Politics, Defence and Security Cooperation, Protocol on Trade, Protocol on Tribunal and the Rules of Procedure Thereof and the Agreement Amending the Protocol on Tribunal. In relation to SADC applicable law, see also the SADC Parliamentary Forum, 2007 Compendium of SADC Protocols and other legal instruments available at www.sadc.int/ (accessed 11-03-2016).
[587] Ruppel and Bangamwabo "The SADC Tribunal: A legal analysis of its mandate and role" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 194.

instruments and to adjudicate upon such disputes as may be referred to it.[588] The seat of the Tribunal is in Windhoek, Namibia.

4 4 1 1 Access and jurisdiction: Locus standi in judicio and ratione materiae

The jurisdiction of the Tribunal is prescribed by the SADC Protocol on the Tribunal and Rules of Procedure Thereof.[589] The reconstituted Tribunal will have jurisdiction to adjudicate matters that arise solely between Member States.[590]

The Tribunal has jurisdiction over all matters provided for in any other agreements that the Member States may conclude among themselves or within the community and that confer jurisdiction on the Tribunal.[591] The Tribunal has exclusive jurisdiction in disputes between personnel in the organs of the community and the community organs.[592]

The Tribunal also has advisory jurisdiction at the request of the Summit or the Council of Ministers.[593] The obligations of the Tribunal go beyond adjudication in contentious proceedings.[594]

The *ratione materiae* or subject matter jurisdiction of the Tribunal is laid down in Article 14 of the Protocol on the Tribunal.[595] The jurisdiction is based on three grounds. First, the Tribunal has jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and the Protocol which relate to the interpretation and application of the Treaty.[596]

[588] Muthai "Regional trade integration strategies under SADC and the EAC: A comparative analysis" 2011 *SADC Law Journal* 84.
[589] Phooko "No Longer in Suspense: Clarifying the Human Rights Jurisdiction of the SADC Tribunal" 2015 *PER/PELJ* 534, 536.
[590] Article 15 (2) Protocol on the Tribunal.
[591] Ruppel and Bangamwabo "The SADC Tribunal: A legal analysis of its mandate and role" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 188.
[592] Article 18 and 19 Protocol on the Tribunal. See also, *Ernest Mtingwi v SADC Secretariat* SADC (T) 2008.
[593] Muthai "Regional trade integration strategies under SADC and the EAC: A comparative analysis" 2011 *SADC Law Journal* 71.
[594] Article 20 Protocol on the Tribunal.
[595] Erasmus "The New Protocol for the SADC Tribunal: Jurisdictional Changes and Implications for SADC Community Law" 2015 *Stellenbosch: Tralac* 6. See also, Palmeter and Mavroidis *Dispute Settlement in the World Trade Organisation: Practice and Procedure* (2004) 21.
[596] Ruppel and Bangamwabo "The SADC Tribunal: A legal analysis of its mandate and role" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 188.

Second, the disputes and applications must relate to the interpretation, application or validity of the Protocols and subsidiary instruments adopted within the SADC, and acts of institutions of the community.[597]

Third, it is required that the disputes and applications must relate to matters specifically provided for in any other agreements that States may conclude among themselves or within the community and which confer jurisdiction on the Tribunal.[598]

4 4 1 2 Composition and judicial independence

Judicial independence can be discerned from the appointment of the judges of the Tribunal and their impartiality in the conduct of their duties with reference to the jurisprudence that it produces.[599] Judicial independence can be defined as:

> "The degree to which Judges believe they can decide and do decide consistent with their own personal attitudes, values and conceptions of judicial role [in their interpretation of the law], in opposition to what others, who have or are believed to have political or judicial power, think about or desire in like matters, and particularly when a decision adverse to the beliefs or desires of those with political or judicial power may bring some retribution on the judges personally or on the power of the court".[600]

Thus, it is important for procedures such as those for the appointment of judges to be fair, transparent and reasonable in order to allow for the cultivation of a culture of judicial independence.[601]

With regard to the appointment of judges, Article 16 (3) of the SADC Treaty and Article 4 of the SADC Protocol on the Tribunal are particularly instructive.[602] According to these

[597] *Ibid.*
[598] *Ibid.*
[599] Ruppel and Bangamwabo "The SADC Tribunal: A legal analysis of its mandate and role" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 193. It may be noted that since the SADC Tribunal is relatively still in its infancy and has produced scanty jurisprudence, an extensive analysis on that aspect cannot be made.
[600] Becker *Comparative Judicial Studies* 1970, Rand McNally and Co., Chicago. See also, Besson "The European Union and Human Rights: Towards A Post-National Human Rights Institution?" 2006 *Human Rights Law Review* 323-360.
[601] Ruppel and Bangamwabo "The SADC Tribunal: A legal analysis of its mandate and role" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 193.
[602] Article 16 (3) SADC Treaty and Article 4 Protocol on the Tribunal.

provisions ten judges are appointed for five year renewable terms by the governments of the Member States.[603] Therefore, not all Member States may contribute a judge to the Tribunal.[604]

Member states may choose whoever they deem fit to nominate for the Tribunal. The only condition thereof being that the candidate so chosen must qualify for appointment to the highest office in their respective state or be a jurist of recognised competence.[605] Once elected a member of the Tribunal a judge is neither a delegate of his or her own country nor that of any other state.[606] Judges may serve at most for two consecutive terms after which they cease to qualify for holding office.[607]

If there is a need to increase the number of judges the Council of Ministers has the authority to do so.[608] Only five judges constitute the regular sitting members whereas the others may remain as a pool from which the President may invite a judge to sit when a regular member is absent, or unable to carry out his or her functions.[609] The five regular members form the full bench while three members constitute the ordinary sitting.[610]

Although members of the Tribunal may reach their decisions with impartiality and independence, they may still reflect their national legal system depending on the judge's professional experience and their legal background may be apparent from their decisions. This

[603] Article 3 new Protocol on the Tribunal. See also, Erasmus "The New Protocol for the SADC Tribunal: Jurisdictional Changes and Implications for SADC Community Law" 2015 *Stellenbosch: Tralac* 5, 6; and Zongwe "An Introduction to the Law of the Southern African Development Community" 2014 *Hauser Global Law School Program: Globalex*, available at www.nyulawglobal.org/globalex/Southern_African_Development_Community1.html (accessed 16-09-2016).
[604] Article 3 (6) Protocol on the Tribunal. This provision states that not more than one judge may come from the same member state.
[605] Article 3 (1) Protocol on the Tribunal.
[606] Ruppel and Bangamwabo "The SADC Tribunal: A legal analysis of its mandate and role" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 192.
[607] Article 6 Protocol on the Tribunal. See also, Ruppel and Bangamwabo "The SADC Tribunal: A legal analysis of its mandate and role" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 192. It is stated that two-fifths of the judges are elected every three years and the other three fifths are left until their five years lapse. This ensures continuity and it is the same method that is employed in the ICJ whose judges run for a maximum term of nine years but a third of them are elected every three years.
[608] Article 3 (5) Protocol on the Tribunal. See also, Ruppel and Bangamwabo "The SADC Tribunal: A legal analysis of its mandate and role" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 191.
[609] Article 3 (2) Protocol on the Tribunal. See also, Erasmus "The New Protocol for the SADC Tribunal: Jurisdictional Changes and Implications for SADC Community Law" 2015 *Stellenbosch: Tralac* 5.
[610] Article 3 (3) Protocol on the Tribunal. See also, Ruppel and Bangamwabo "The SADC Tribunal: A legal analysis of its mandate and role" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 191.

is beneficial because diverse legal backgrounds engender a comparative law jurisprudence which merges the experiences of the jurists throughout the region.[611]

4 4 1 3 Effect and review of the Tribunal's decisions

The Tribunal's decisions are final and binding.[612] On the face of it, this implies that there is no further avenue for appeal purposes.[613] However, the lack of an appellate body in its classical sense does not necessarily mean that SADC has no means to revisit the Tribunal's decision. Indeed, in terms of Article 26 of the Tribunal's Rules of Procedure:

> "An application for review of a decision may be made to the Tribunal if it is based on the discovery of some fact which by its nature might have had a decisive influence on the decision if it had been known to the Tribunal at the time the decision was given, but which fact at the time was unknown to both the Tribunal and the party making the application".[614]

An appeal procedure facilitates a thorough interrogation of the law and the facts, thereby increasing confidence in the dispute resolution system.[615]

Unlike in the SADC legal framework, the conflict resolution mechanism in the WTO has an Appellate Body (AB) whereas the EU has the Court of First Instance (CFI) which enables parties to appeal. In fact, it is argued that dispute resolution in the WTO has become more effective since the appellate body was introduced as a mechanism for the review of WTO panel

[611] Ruppel and Bangamwabo "The SADC Tribunal: A legal analysis of its mandate and role" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 192.
[612] Article 24 (3) Protocol on the Tribunal. In terms of Article 16 of the SADC Treaty, the decisions of the Tribunal are final and binding. The SADC Tribunal's decisions are binding *inter partes.* Therefore, the decisions do not have an *erga omnes* effect in its classical sense.
[613] Ndlovu "Campbell v Republic of Zimbabwe: A moment of truth for the SADC Tribunal" 2011 *SADC Law Journal* 74.
[614] Ruppel and Bangamwabo "The SADC Tribunal: A legal analysis of its mandate and role" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 197.
[615] Erasmus "The New Protocol for the SADC Tribunal: Jurisdictional Changes and Implications for SADC Community Law" 2015 *Stellenbosch: Tralac* 16.

decisions.[616] This did not only enhance the enforceability of Members' commitments, but also ensured greater confidence in the quality of the legal findings.[617]

4 4 2 The status of SADC law: Analysis of *Government of the Republic of Zimbabwe v Fick* 2013 5 SA 325 (CC)

SADC law, which consists of treaties, protocols, regulations, decisions and general undertakings, interacts with domestic law in various ways.[618] For instance, it acknowledges the existence of national constitutions and utilises procedures provided by these to implement community law.[619] Furthermore, shared values entrenched in national constitutions, such as respect for human rights, the rule of law and democracy, are reflected in the SADC Treaty.[620] As a result, community law constitutes an added layer of legality by which national governments may be held accountable especially when they violate their own constitutional values.[621] However, SADC law does not contain any specific provisions addressing the relationship between regional and domestic law, particularly regarding supremacy.[622]

The *Government of the Republic of Zimbabwe v Fick* case was ground-breaking with regard to the status of SADC law within the domestic jurisdiction of South Africa, and potentially other Member States as well.[623] It involved the expropriation of the respondent farmers' land by the

[616] Ruppel and Bangamwabo "The SADC Tribunal: A legal analysis of its mandate and role" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 197. The WTO Appellate Body was established in 1995 under Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes. The Appellate Body can uphold, modify or reverse the legal findings and conclusions of a panel; and the Appellate Body Reports, once adopted by the Dispute Settlement Body, must be accepted by the parties to the dispute.

[617] Ruppel and Bangamwabo "The SADC Tribunal: A legal analysis of its mandate and role" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 197.

[618] Oppong "Making regional economic community laws enforceable in national legal systems: Constitutional and judicial challenges" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 149, 164.

[619] *Ibid.*

[620] *Ibid.*

[621] Phooko "No Longer in Suspense: Clarifying the Human Rights Jurisdiction of the SADC Tribunal" 2015 *PER/PELJ* 547. See also, Oppong "Making regional economic community laws enforceable in national legal systems: Constitutional and judicial challenges" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 165; Erasmus "The domestic status of international agreements: has the South African Constitutional Court charted a new approach and could regional integration benefit? 2012 *Monitoring Regional Integration in Southern Africa Yearbook* 10-24; and Erasmus "The New Protocol for the SADC Tribunal: Jurisdictional Changes and Implications for SADC Community Law" 2015 *Stellenbosch: Tralac* 6. For instance, in terms of Article 4 (c) of the SADC Treaty, the SADC Tribunal in *Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe* SADC (T) 2008, found Zimbabwe to be in breach of its commitments to respect human rights, democracy and the rule of law. This case is discussed further in this chapter.

[622] Ruppel and Bangamwabo "The SADC Tribunal: A legal analysis of its mandate and role" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 196. It is believed that this position is in contrast to the one in East African Treaty law, where Articles 8 (4) and 33 (2) EAC Treaty deal with the relationship between community and domestic law.

[623] *Government of the Republic of Zimbabwe v Fick* 2013 5 SA 325 (CC). This case made a dramatic contribution to the way South African courts treat foreign case law, and thus contributed to the development of international

government of Zimbabwe pursuant to the constitutionally authorised land-reform policy. The farmers approached the SADC Tribunal for relief and the decision was in their favour. Zimbabwe did not comply with the decision even after the farmers re-approached the Tribunal and were granted a costs order against Zimbabwe.[624]

The farmers then approached the North Gauteng High Court in Pretoria for the registration and enforcement of the costs order in South Africa. The High Court ordered the registration and execution of the costs order against property of Zimbabwe in South Africa, which Zimbabwe challenged unsuccessfully. Zimbabwe also appealed unsuccessfully to the Supreme Court of Appeal and aggrieved by that outcome sought leave to appeal to the Constitutional Court.[625]

In a majority judgment, per Mogoeng CJ, the Constitutional Court developed the common law on the enforcement of foreign judgments and orders to apply to those of the Tribunal.[626] A key issue before the Court was whether or not the South African statutory rules of civil procedure for the enforcement of foreign judgments also covered judgments of international courts and tribunals.[627] As none of the relevant legislation was applicable in this instance, the common law remained the only possible avenue through which the SADC Tribunal's decision could be enforced in South Africa.[628]

At the time of the decision, the common law on the enforcement of civil judgments had developed only to a point where it provided for the execution of judgments made by domestic

law in the region. In a unanimous decision, it was decided that property in South Africa owned by the Zimbabwean government could be sold to defray legal expenses in a human rights case. See also, Swart "Extending the life of the SADC Tribunal" 2013 *South African Yearbook of International Law* 254-262; and Phooko "No Longer in Suspense: Clarifying the Human Rights Jurisdiction of the SADC Tribunal" 2015 *PER/PELJ* 548.

[624] *Government of the Republic of Zimbabwe v Fick* 2013 5 SA 325 (CC). See also, Ndlovu "Campbell v Republic of Zimbabwe: A moment of truth for the SADC Tribunal" 2011 *SADC Law Journal* 76; and "In the Constitutional Court of South Africa: Government of the Republic of Zimbabwe v Fick and Others" at http://www.constitutionalcourt.org.za/site/FIC.htm (accessed 10-05-2016).

[625] *Government of the Republic of Zimbabwe v Fick* 2013 5 SA 325 (CC). See also, "In the Constitutional Court of South Africa: Government of the Republic of Zimbabwe v Fick and Others" at http://www.constitutionalcourt.org.za/site/FIC.htm (accessed 10-05-2016).

[626] De Wet "The Case of Government of the Republic of Zimbabwe v Louis Karel Fick: A First Step Towards Developing a Doctrine on the Status of International Judgments within the Domestic Legal Order" 2014 *PER/PELJ* 1-31. It is claimed that from the perspective of public international law, the decision was ground-breaking, as it relied on the common law to enforce a binding international judgment within South Africa. In fact, it was the first time since its inception that the Constitutional Court was confronted with the status of a binding international decision within the domestic legal order.

[627] De Wet "The case of Government of the Republic of Zimbabwe v Louis Karel Fick: A First Step Towards Developing a Doctrine on the Status of International Judgments within the Domestic Legal Order" 2014 *PER/PELJ* 1-31.

[628] *Government of the Republic of Zimbabwe v Fick* 2013 5 SA 325 (CC). See also, "In the Constitutional Court of South Africa: Government of the Republic of Zimbabwe v Fick and Others" at http://www.constitutionalcourt.org.za/site/FIC.htm (accessed 10-05-2016).

courts of a foreign state, otherwise known as "foreign judgments". The Court was confronted with whether an "international decision" in the form of a cost order of the SADC Tribunal amounted to a "foreign judgment" as recognized by South African common law.[629] The Court answered this question in the affirmative by relying on the clauses in the Constitution that committed South Africa to the rule of law, as well as its obligations under international law, and to an international-law friendly interpretation of domestic law.[630]

The Constitutional Court held that the High Court correctly ordered that the costs order be enforced in South Africa. It further held that that development was provided for by the SADC legal instruments on the enforcement of the decisions of the Tribunal in the region.[631] The Court took the view that the Constitution enjoins South Africa's domestic courts to develop the common law in order to facilitate the enjoyment of the rights provided for in the Bill of Rights, such as the right of access to courts, compensation for expropriation and the rule of law, which in terms of the amendment to the Constitution of Zimbabwe, would have been denied to the farmers had the costs order of the Tribunal not been enforced.[632] The development of the common law in this case signalled the beginning of a modest but profound elevation of the status of SADC community law within Member States' jurisdictions.

[629] De Wet "The Case of Government of the Republic of Zimbabwe v Louis Karel Fick: A First Step Towards Developing a Doctrine on the Status of International Judgments within the Domestic Legal Order" 2014 *PER/PELJ* 1-31. With regard to the *Government of the Republic of Zimbabwe v Fick* decision it pertinent to draw a distinction between "foreign judgements" as opposed to "international judgements". These two types of judgements are normally treated differently in the domestic legal system. This relates to the fact that it is generally accepted in most jurisdictions that the recognition and enforcement of a "foreign judgment" can be denied where it would result in a violation of domestic public policy. The public policy exception does not, however, fit well in a regime based on public international law, as the SADC legal system is, which does not necessarily permit Member States to use their domestic law as an excuse for not implementing their international obligations.

[630] Sections 231, 232 and 233, Constitution of the Republic of South Africa, 1996. These sections provide for international agreements, customary international law and the application of international law, respectively.

[631] Article 32 (1) of the SADC Protocol on the Tribunal. See De Wet "The Case of Government of the Republic of Zimbabwe v Louis Karel Fick: A First Step Towards Developing a Doctrine on the Status of International Judgments within the Domestic Legal Order" 2014 *PER/PELJ* 1-31. See also, "In the Constitutional Court of South Africa: Government of the Republic of Zimbabwe v Fick and Others" at http://www.constitutionalcourt.org.za/site/FIC.htm (accessed 10-05-2016).

[632] *Government of the Republic of Zimbabwe v Fick* 2013 5 SA 325 (CC). See also, *Glenister v President of the Republic of South Africa and Others* 2011 3 SA 347 (CC). See further, Erasmus "The domestic status of international agreements: has the South African Constitutional Court charted a new approach and could regional integration benefit? 2012 *Monitoring Regional Integration in Southern Africa Yearbook* 10; Erasmus "The Consequences of Retaliation in Southern African Trade Relations" 2014 *Stellenbosch: Tralac* 3; and "In the Constitutional Court of South Africa: Government of the Republic of Zimbabwe v Fick and Others" at http://www.constitutionalcourt.org.za/site/FIC.htm (accessed 10-05-2016).

4 4 3 Suspension of the SADC Tribunal

The Tribunal was suspended following its decision in the *Mike Campbell* case, which concerned the expropriation of land without compensation.[633] The Tribunal ruled against the Zimbabwean government for violation of its obligations as a Member State to act in accordance with democracy, human rights and the rule of law.[634] The decision was vehemently opposed by the Zimbabwean government which argued that although the state had signed both the Treaty and the Protocol on the Tribunal, it was not bound to its rulings because the national parliament had not yet ratified the protocol.[635]

Some are of the view that, perhaps given the human rights concerns in the region, the Summit realised the full implications of a supranational court with individual access, with Tanzanian President Jakaya Kikwete alleged to have remarked to his fellow Heads of State: "we have created a monster that will devour us all".[636] With regard to the *Mike Campbell* ruling, the Tribunal was considered to have encroached into the domestic and politically sensitive issue of land reform, an impingement on Zimbabwe's sovereignty.[637]

Due to the abovementioned issues, the Tribunal's decision in the *Mike Campbell* case was not implemented. Instead, the Summit decided to suspend the Tribunal and develop a new Protocol endowing it with limited jurisdiction, focused on adjudicating matters between states only.[638] The "suspension" was effected by the Summit's decision not to renew the terms of the serving

---

[633] Erasmus "The New Protocol for the SADC Tribunal: Jurisdictional Changes and Implications for SADC Community Law" 2015 *Stellenbosch: Tralac* 1.

[634] Article 4 and 6 SADC Treaty. See Zongwe "An Introduction to the Law of the Southern African Development Community" 2014 *Hauser Global Law School Program: Globalex*, available at www.nyulawglobal.org/globalex/Southern_African_Development_Community1.html (accessed 16-09-2016).

[635] Zvayi "Zim want Sadc Tribunal rulings nullified" 2011 *The Herald* available at http://www.herald.co.zw/zim-wants-sadc-tribunal-rulings-nullified/ (accessed 16-08-2016). See also, Hulse " Silencing a Supranational Court: The Rise and Fall of the SADC Tribunal" 2012 *E-International Relations* available at http://www.e-ir.info/2012/10/25/silencing-a-supranational-court-the-rise-and-fall-of-the-sadc-tribunal/. (accessed 19-08-2016).

[636] Hulse "Silencing a Supranational Court: The Rise and Fall of the SADC Tribunal" 2012 *E-International Relations* available at http://www.e-ir.info/2012/10/25/silencing-a-supranational-court-the-rise-and-fall-of-the-sadc-tribunal/ (accessed 19-08-2016). See also, Christie "The SADC Tribunal's last gasp" 2011 *The Mail and Guardian* South Africa available at http://mg.co.za/article/2011-06-10-the-sadc-tribunals-last-gasp (accessed 19-08-2016).

[637] *Ibid.*

[638] Article 33 new Protocol on the Tribunal. See Erasmus "The New Protocol for the SADC Tribunal: Jurisdictional Changes and Implications for SADC Community Law" 2015 *Stellenbosch: Tralac* 2, 7. See also, Phooko "No Longer in Suspense: Clarifying the Human Rights Jurisdiction of the SADC Tribunal" 2015 *PER/PELJ* 535; Zongwe "An Introduction to the Law of the Southern African Development Community" 2014 *Hauser Global Law School Program: Globalex*, available at www.nyulawglobal.org/globalex/Southern_African_Development_Community1.html (accessed 16-09-2016); and Fritz "Quiet death of an important SADC institution" 2014 *Mail and Guardian* at http://mg.co.za/article/2014-08-29-quiet-death-of-an-important-sadc-institution (accessed 19-08-2016).

judges or to appoint new judges.[639] As a result, since 2010, the Tribunal has not been functioning, and it will formally cease to exist once the new Protocol enters into force. The new Protocol on the Tribunal which was adopted and signed in August 2014 will enter into force upon ratification by two-thirds of the Member States.[640]

It is noted that, in restructuring the Tribunal, the Summit did not invoke the amendment clause in the original Protocol which would have been the correct procedure.[641] The Summit's modus operandi posed the question about the binding nature of SADC legal instruments, as well as the functioning of SADC as a rules-based arrangement.[642] It has generally been criticised for adopting a top-down intervention, which did not advance accountability and transparency.[643]

The enforcement of the Tribunal's decisions by the Summit remains ineffectual. The consensus nature of decision-making in the Summit enables any Member State ruled against to veto proposals aimed at implementing the Tribunal's decision.[644] In order to remedy that problem, SADC should consider adopting the "reverse consensus" rule that is applied at the WTO whereby Panel reports and Appellate Body decisions are adopted unless there is a consensus against adopting them.[645] Reforming decision-making in the Summit into reversed consensus may facilitate the enforcement of the Tribunal's decisions and assist in the implementation of legal instruments in the manner envisaged in the Treaty.[646]

---

[639] Erasmus "The New Protocol for the SADC Tribunal: Jurisdictional Changes and Implications for SADC Community Law" 2015 *Stellenbosch: Tralac* 1-2.

[640] Article 53 new Protocol on the SADC Tribunal. See also, Communique of the 34th Summit of the SADC Heads of State and Government, Victoria Falls, Zimbabwe, August 17-18 2014.

[641] Erasmus "The New Protocol for the SADC Tribunal: Jurisdictional Changes and Implications for SADC Community Law" 2015 *Stellenbosch: Tralac* 2.

[642] *Ibid.*

[643] *Ibid.*

[644] Erasmus "The New Protocol for the SADC Tribunal: Jurisdictional Changes and Implications for SADC Community Law" 2015 *Stellenbosch: Tralac* 11.

[645] Van den Bossche and Zdouc *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2013) 205.

[646] Erasmus "The New Protocol for the SADC Tribunal: Jurisdictional Changes and Implications for SADC Community Law" 2015 *Stellenbosch: Tralac* 10, 11. Notably, Article 44 of the new Protocol on the Tribunal relates to the enforcement and execution of decisions by the future Tribunal, and provides that:

1. Member States and institutions of SADC shall take forthwith all measures necessary to ensure execution of decisions of the Tribunal.
2. A decision of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and must be complied with.
3. Any failure by a Member State to comply with a decision of the Tribunal may be referred to the Tribunal by any Member State affected by the decision.
4. If the Tribunal establishes the existence of such failure, it shall report its findings to the Summit for the latter to take appropriate action.

4 5 CONCLUSION

The WTO legal framework lays down the rules and procedures that are vital in establishing a high level of transparency in the multilateral trading system. As shown above, the WTO provisions may serve as blueprints for SADC-specific transparency measures. Indeed, SADC may make some progress in reducing NTBs by enhancing trade policy review mechanisms that will entail SADC Members making regular and timeous notifications concerning their new or modified trade policies to the SADC Secretariat.

The SADC Secretariat has the potential to intensify information dissemination to interested parties, favourably by an electronic database. Currently, the SADC database puts forth relatively scanty information to assist those involved in intra-regional trade. The EAC has been shown to have made a crucial step with its *Monitoring Mechanism for the elimination of Non-tariff Barriers in EAC*, which was formulated and is being implemented more rigorously.

The WTO dispute resolution mechanism is also instructive as it addresses critical issues of state sovereignty and the status of community law within the Member States' jurisdictions, challenges which SADC contends with. Some of the WTO's strengths identified above include "reversed consensus" decision making in the adoption of Panel reports and the availability of an Appellate Body which facilitates a thorough litigation of the facts and the law.[647] In relation to that, the SADC Tribunal's anatomy and its functions were discussed with a view to improve its contribution to accountability in the region.

Having dealt with transparency and accountability from a WTO standpoint, chiefly by analysing SADC Tribunal, the next chapter will involve a comparative study of the European Union (EU). Taking into account that regional institutions and mechanisms are the main drivers of regional integration, analysis of the EU will be useful in drawing lessons to ameliorate the SADC trade regime.

[647] Jackson *The Jurisprudence of GATT & the WTO: Insights on Treaty Law and Economic Relations* (2000) 136. See also, Petersmann *International Trade Law and the GATT/WTO Dispute Settlement System* (1997) 208-209.

CHAPTER 5

European Union's Legal and Institutional Framework: Lessons for SADC Accountability and Transparency

5 1 INTRODUCTION

The European Union (EU) has always been viewed as the gold standard for regional integration.[648] The purpose of this chapter is to draw lessons from the EU in order to address shortfalls in accountability and transparency measures in the Southern African Development Community's (SADC) legal and institutional framework.[649]

The EU stands as a model for endurance and effectiveness.[650] According to Risse, the EU experience is regarded as unique and its exceptionalism is the compelling reason why other regional arrangements follow its model.[651] As the EU experience shows, regional integration is a long term and complex process.

This chapter will present a brief analysis of the EU legal framework and, thereafter, examine the role of key regional institutions engaged in enhancing accountability and transparency. It will be determined how the EU institutions implement a combination of supranational and intergovernmental approaches to regional integration. Furthermore, pertinent issues including the supremacy of community law and state sovereignty in the EU will be discussed. In drawing lessons for SADC, some caution will be suggested in light of the different historical legacies between the EU and SADC.[652]

5 2 EU LEGAL INSTRUMENTS

European Union community law can be divided into primary and secondary sources. The primary sources consist of treaties, particularly the three original constitutional treaties, as amended by a number of subsequent treaties.[653] The secondary sources include the regulations,

---

[648] Cameron *The European Union as a Model for Regional Integration* (2010) 1.
[649] Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 457.
[650] Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 460. See generally, Volcansek *Courts and regional Integration* (2002) 165-180.
[651] Risse "Approaches to the study of European Politics" 1999 *ECSA Review* 2-9.
[652] Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 459.
[653] Hanlon *European Community Law* (2003) 102. It must be noted that the treaties that constitute primary sources of EU law include the Merger Treaty, the Budgetary Treaty, the Single European Act, the Treaty on European

directives and decisions.[654] The jurisprudence of the European Court of Justice (ECJ) also amount to secondary legislation. Another source of law consists of international agreements entered into by the community on behalf of the Member States, particularly in areas where the community has taken over the competence of the Member States.[655]

As in SADC, each of the EU treaties may form the basis for secondary legislation. However, EU treaty bases that allow for secondary legislation also stipulate the types of measures that they provide for.[656] It is on such grounds that EU institutions are empowered to create legislation, particularly in terms of Article 249 (ex 189) of the European Community (EC) Treaty which provides that:

"in order to carry out their tasks … the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue Directives, take decisions, make recommendations or deliver opinions".

Therefore, Article 249 (ex 189) encompasses five different measures and these include regulations, directives, decisions, recommendations and opinions.[657] The different qualities of these legal instruments present a more pragmatic approach concerning the regulation of different regional interests and may be beneficial for accountability purposes. Firstly, regulations are directly applicable to all Member States and are legally binding. They are also self-executing, which means they take effect on specified dates or after twenty days following their publication in the official journal if no date is specified. Regulations must satisfy two conditions, requiring that they must be based on the authority of the Treaty and must provide reasons in order to be justified.[658]

Secondly, directives are legally binding "as to the results to be achieved".[659] Their main feature is typically setting out the aims to be achieved but leaving the choice of the form and method

Union, the Treaty of Amsterdam and the Treaty of Nice. See also, "*The European Union How the European Union Works: Your guide to the EU institutions*" at http://europa.eu/pol/index_enhtm and http://europa.eu/!bY34KD (accessed 03-07-2016).

[654] Hanlon *European Community Law* (2003) 102, 103.

[655] Hanlon *European Community Law* (2003) 103. Examples of negotiations where the EU acted on behalf of the Member States are the GATT and WTO trade rounds, and the Lome Conventions between Member States and Third World countries.

[656] Hanlon *European Community Law* (2003) 103. For instance, Article 137 (ex 118) of the EC Treaty requires further implementing legislation to be undertaken by means of directives.

[657] See "*The European Union How the European Union Works: Your guide to the EU institutions*" at http://europa.eu/pol/index_enhtm and http://europa.eu/!bY34KD (accessed 03-07-2016).

[658] Hanlon *European Community Law* (2003) 104.

[659] Hanlon *European Community Law* (2003) 105.

of implementation to each Member State, particularly the national parliaments.[660] They are neither directly applicable nor self-executing. Therefore, they do not automatically form part of the national legal system in Member States.[661]

Thirdly, decisions are legally binding and enforceable acts of law usually addressed to particular Member States, or sometimes to specific individuals. They are binding in their entirety upon those to whom they are addressed or directed.[662] Lastly, recommendations and opinions are not legally binding.[663]

This relatively practical legal approach has resulted in a multi-tiered Europe with several levels of commitments towards regional integration.[664] The multi-tiered arrangement has allowed some Euro-sceptic Member States to opt out of certain obligations.[665] The Schengen passport-free zone and the Eurozone are examples of regional initiatives which do not include all EU Member States.[666] This has allowed integration to proceed albeit at varying speed in different areas.

5 3 EU INSTITUTIONS: ENHANCING SADC INSTITUTIONAL ACCOUNTABILITY AND TRANSPARENCY

Most SADC institutions reflect their European Union (EU) counterparts. The institutions in both SADC and the EU are treaty-based and share many characteristics. Hence, a comparative analysis is appropriate to show how the EU institutions are more effective in delivering economic integration as mandated by the treaties.

In the EU, seven institutions are recognised in terms of Article 13 (1) of the Treaty on European Union 2008 (TEU) and these include the European Parliament, the European Council, the Council of the EU, the European Commission, the Court of Justice of the European Union (ECJ), the European Central Bank and the Court of Auditors. In respect of the last two, there are no institutions in SADC with similar functions. Article 13 (1) provides that:

---

[660] *Ibid.*
[661] *Ibid.*
[662] Hanlon *European Community Law* (2003) 106.
[663] *Ibid.*
[664] *Ibid.*
[665] Cameron "The European Union as a Model for Regional Integration" at www.cfr.org/world/european-union-model-regional-integration/p22935 (accessed 22-08-2016).
[666] Schengen Agreement 1985.

the EU shall have an "institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of Member States, and ensure consistency, effectiveness and continuity of its policies and actions".

In addition, Article 13 (2) of the TEU provides that "each institution shall act within the limits of the powers conferred on it by the Treaties". Thus, each institution can only act if it has been expressly authorised to do so by the EU Treaties.[667]

In terms of institutional practice, the EU operates at supranational, national and sub-national level. Hence, some of its institutions exhibit supranational features while others operate on an intergovernmental basis. The EU Commission, EU Parliament and Court of Justice are supranational institutions.[668] On the other hand, the European Council and the Council of the European Union are intergovernmental in nature. An analysis of the key EU institutions may highlight the strengths and weaknesses in the SADC institutional framework.

5 3 1 The European Council and the SADC Summit

A fundamental feature of the European Council is that it involves regular meetings at the highest political level which was agreed to as early as 1974 in Paris.[669] It brings together the EU's top political leaders which include Prime Ministers, Presidents, the European Council President and the President of the Commission.[670] Thus, the EU Council is an intergovernmental body. Although both the SADC Summit and EU Council are made up of Heads of State and Government, their functions differ from time to time.[671]

The European Council meetings occur at least four times a year to give the EU general political direction and priorities.[672] Extraordinary meetings may be called to address urgent issues in need of decisions at the highest level, for example, in economic affairs or foreign policy.

---

[667] Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 458.
[668] McCormick *The European Union: Politics and Policies* (1999) 10. See also, Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 460, 463.
[669] The European Council is different from the Council, which mainly constitutes of national ministers of the respective Member States.
[670] Article 4 Treaty on the European Union. See also, "*The European Union How the European Union Works: Your guide to the EU institutions*" at http://europa.eu/pol/index_enhtm and http://europa.eu/!bY34KD (accessed 03-07-2016). The High Representative of the European Union for Foreign Affairs and Security Policy also takes part in the work of the European Council.
[671] Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 464.
[672] *Ibid.*

The European Council plays an essentially political role, critical for initiatives such as establishing the foundations for economic and monetary union. In fact, Article 4 of the Treaty on the European Union states that the European Council has the task to "provide the Union with the necessary impetus for its development". However, the European Council plays no role in the formal legislative machinery of the community.[673] Therefore, its functions and powers are limited to a certain extent. Decision-making in the EU illustrates the limitations.

The European Union's decision-making competence is generally shared by institutions.[674] Although the SADC Summit relies on consensus decision-making, EU decision-making within the European Council itself is more flexible, being based on consensus or qualified majority voting.[675] For example, qualified majority voting applies in the election of the EU President, and the appointment of the EU Commission and of the High Representative of the Union for Foreign Affairs and Security Policy.[676]

Similar to the SADC Summit, there may be concerns that the European Council has a distorting effect on the institutional balance of the community.[677] However, the cooperation between the European Council and the EU Commission has abated such scepticism as both institutions are now viewed as influential in the achievement of community objectives.[678] On the other hand, the SADC Summit is still being criticised since the whole SADC institutional framework is under its control, including the political and economic direction of the organisation.[679]

Perhaps the origins of the SADC Summit may provide reasons for the control it exercises over the entire institutional framework. To begin with, the Summit has essentially been in place

[673] Hanlon *European Community Law* (2003) 29.
[674] Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 464.
[675] Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 464. It is argued that consensus is deemed to foster reconciliation which is in keeping with African customary law, particularly with regard to dispute settlement.
[676] Mttila and Lane "Why unanimity in the Council? A roll call analysis of Council voting" 2001 *European Union Politics* 31. Since the mid-1990s between 75 and 85 percent of decisions in the Council have been made through a unanimous vote. See also, Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 464, 465; and "*The European Union How the European Union Works: Your guide to the EU institutions*" at http://europa.eu/pol/index_enhtm and http://europa.eu/!bY34KD (accessed 03-07-2016). It is observed that when the European Council decides by vote, only the Heads of State or Government may cast a vote.
[677] The European Council was not considered by the original Treaty.
[678] Hanlon *European Community Law* (2003) 29.
[679] Article 10 SADC Treaty.

since the Frontline States era.[680] It is the Summit which commissioned the transition from the Southern African Development Coordination Conference (SADCC) to SADC. It also commissioned the Protocol on Trade and Regional Indicative Strategic Development Plan (RISDP), with the implementation of the latter markedly developing when it was identified as a strategic priority by the Summit.[681]

5 3 2 The European Court of Justice (ECJ) and the SADC Tribunal

The principal task of the Court of Justice of the European Communities (ECJ) is to ensure the uniform application of the law by all community members and institutions, to serve as a forum for the enforcement of EC law, and to settle disputes between the different actors in the community. Thus, the ECJ has been concerned with ensuring that community law is effective, as a legal system in its own right and in terms of its integration with the legal systems of the Member States.[682]

However, there has been tension between EU institutions and the ECJ as it is assumed that the latter has too much power.[683] For instance, the ECJ developed the doctrine of direct effect which enabled individuals to use community law in their domestic courts, thus preventing Member States from neglecting implementation of community legislation.[684] There were signs even in 1996 that the intergovernmental conference (IGC) was seeking to constrain this supranational power. The United Kingdom (UK) in particular put forward such proposals, but the proposals were not adopted and were eventually dropped as the intergovernmental conference progressed.[685]

---

[680] Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 459. It must be noted that the EU did not experience colonialism whereas SADC's origins are firmly rooted in the struggle for liberation from colonialism. Also, unlike the EU, SADC Member States include developing countries and Least Developed Countries (LDCs).

[681] Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 465. The EU Council's prominence came about mainly in 1961 when informal summits between leaders of the European Community were initiated as a result of the then French President Charles de Gaulle's resentment of the domination of supranational institutions, particularly the EU Commission. The inaugural European Council meeting was held in Dublin in 3 October and, subsequently, in 3 November 1975, when European integration was already underway.

[682] Hanlon *European Community Law* (2003) 58, 63. See generally, the Treaty of Nice reforms. The jurisdiction of the ECJ is limited to the area of the Community. See also, http://curia.europa.eu (accessed 03-07-2016).

[683] *Ibid.*

[684] Hanlon *European Community Law* (2003) 58. The Court has developed a package of fundamental rights which have become an entrenched part of the Community system.

[685] Hanlon *European Community Law* (2003) 58.

Indeed, the power of the ECJ is exceptional compared with the SADC Tribunal, with regard to its supranational status and its wide-ranging jurisdiction. For instance, the International Court of Justice (ICJ) has considered the review of Security Council decisions in several cases but has not yet questioned the discretion of the Security Council.[686] However, the ECJ has done so, for instance in respect of the listing of individuals in terms of United Nations (UN) Security Council Resolution 1267.[687] In that respect, the ECJ annulled a regulation of the intergovernmental Council of the EU, implementing a decision of the Security Council Sanctions Committee, that listed Kadi and Al Barakaat International Foundation as being associated with Al Qaeda and subject, therefore, to the freezing of their funds on the grounds that it violated their fundamental rights under community law, including the right to be heard, the right to effective judicial review and the right to property.[688] Therefore, it is clear that the ECJ's rulings have progressively endowed it with supranational character, thus advancing the direct effect of community law.[689]

5 3 3 The EU Commission and the SADC Secretariat

The SADC Secretariat reflects the features of the EU Commission. Both institutions are responsible for the day-to-day running of their respective organisations. They are executive in nature and implementation of community decisions is monitored by these institutions.[690] Both institutions represent their respective organisations in negotiations, signing partnerships and funding agreements.[691] However, the EU also represents its Member States on bodies such as the WTO while SADC Member States still represent themselves in the WTO.[692]

---

[686] Dugard *International Law: A South African Perspective* (2011) 489.

[687] *Kadi & Al Barakaat International Foundation v Council & Commission* (European Court of Justice Grand Chamber) 8 September 2008, noted in (20090 103 *AJIL* 305). See also, Dugard *International Law: A South African Perspective* (2011) 490.

[688] Dugard *International Law: A South African Perspective* (2011) 489. Article 24 provides that the Security Council is to "act in accordance with the purposes and principles of the United Nations". By necessary implication action that does not accord with the purposes and principles of the UN is ultra vires. The powers of the Security Council under Chapter VII are far-reaching. Article 25 of the Charter obliges states to accept and carry out 'decisions' adopted under Chapter VII and Article 103 provides that "in the event of a conflict between the obligation of the members of the United Nations (UN) under the present Charter and their obligations under any international agreement, their obligations under the present Charter shall prevail".

[689] *Van Gen en Loos* (C-26/62).

[690] See generally, Magnette *What is the European Union? Nature and Prospects* (2005).

[691] Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 470. In respect of SADC, an example is the Agreement with the Community of Portuguese Speaking Countries (CPLP).

[692] Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 470.

The EU Commission has supranational qualities as it is bound to act independently of Member States.[693] In setting out its responsibilities, Article 17 of the Treaty on the European Union provides for the EU Commission to:

> "ensure the application of the Treaties and of measures adopted by the institutions pursuant to the Treaties. It shall oversee the application of Union law under the control of the Court of Justice of the European Union".

The Treaty of Lisbon now provides for the Commission to exercise executive power, which is to be shared with the European Council.[694]

The EU Commission is in charge of implementing community law on behalf of the European Council. It does so through the "Comitology" procedure, which must be distinguished from the Commission's regular decision-making process, and for which specific rules of transparency and public participation apply.[695]

The EU Commission also takes the initiative in the law-making process, whereas the other participating organs, the Council and the Parliament, actually pass the laws.[696] Therefore, the EU Commission is much stronger than the SADC Secretariat due to the executive power conferred on it by the Treaties.

Furthermore, the EU Commission accounts for two thirds of the thirty thousand EU civil servants.[697] On the other hand, it is argued that the SADC Secretariat is small and poorly staffed.[698] It is argued that there may be a lack of expertise as well.[699] The lack of power in turn

[693] Sands and Klein *Bowett's Law of International Institutions* (2001) 181.
[694] Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 469.
[695] Bonzon "Comparative Analysis of Transparency and Public Participation Mechanisms in Regional Trade Agreements and Other International Regimes" 2008 *EDGE Workshop* 10.
[696] Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 469. EU citizens are able to request the EU Commission to legislate in area if a petition supported by one million is presented.
[697] See generally, Stevens and Stevens *Brussel bureaucrats? The administration of the European Union* (2001). See also, Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 467.
[698] Giuffrida and Muller-Glodde "Strengthening SADC institutional structures-capacity development is key to the SADC Secretariat effectiveness" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 1-30.
[699] Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 467.

translates to lack of effectiveness in ensuring progress in regional integration, particularly in the implementation of policies such as the RISDP.[700]

It is argued that in its current structure the SADC Secretariat has been unable to fully execute its mandate of undertaking strategic planning and management. This has led to poor coordination between the Secretariat and National Contact Points.[701] The distribution of responsibilities and obligations is deemed haphazard and this problem is compounded by a wide array of priorities and activities being dependent on limited resources.[702]

Furthermore, the EU Commission has enjoyed more legitimacy owing to its "inseminating effect" on Member States' national political systems.[703] In fact, most mechanisms of public participation in the EU relate to the EU Commission, given its dominant role in the decision-making process.

The EU Commission consults public participants through its Directorates General (DGs), the subdivisions that actually draft the legislation.[704] The Commission also consults private actors to avoid accusations of partiality.[705] Just as ministers in a national cabinet, the EU Commissioners' responsibilities are easily ascertainable.

Incidentally, the EU Commission was also instrumental in promoting the idea of economic, monetary and political union. The same cannot be said of the SADC Secretariat because all the authority to drive regional integration lies solely within the SADC Summit. As indicated above, initiatives such as the RISDP that were commissioned by the Summit also depend on it for final implementation.[706]

5 3 4 The Council of the EU and the SADC Council of Ministers

Although officially known as the Council of the EU, this institution is also commonly referred to as the Council of Ministers. The reason is that the Council of the EU represents the

[700] Giuffrida and Muller-Glodde "Strengthening SADC institutional structures-capacity development is key to the SADC Secretariat effectiveness" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 1-30.
[701] Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 468.
[702] *Ibid.*
[703] Radaelli "Policy Transfer in the EU: International Isomorphism as a Source of Legitimacy" 2001 *John Wiley and Sons Ltd* 25-43.
[704] Bonzon "Comparative Analysis of Transparency and Public Participation Mechanisms in Regional Trade Agreements and Other International Regimes" 2008 *EDGE Workshop* 10.
[705] Armstrong "Rediscovering civil society: The European Union and the White Paper on Governance" 2002 *European Law Journal* 102-132.
[706] Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 468.

governments of the Member States and consists of national ministers.[707] Hence, it is intergovernmental in nature.

The Council of the EU is more advanced in many ways than the SADC Council of Ministers which works in the shadow of the SADC Summit.[708] For instance, the number of ministers in the Council of the EU may vary depending on the matter under consideration.[709] The additional ministers may be those whose portfolio is related to the subject being discussed and they are allowed to contribute but not to vote.[710]

On the other hand, the SADC Council of Ministers is made up of foreign affairs ministers or finance ministers from the Member states. In this case, foreign affairs ministers end up making decisions on all aspects of regional integration. It is argued that this does not create the necessary environment to produce optimal and desired results.[711]

The Council of the EU avoids work overload, often experienced in the SADC Council of Ministers, as it is divided into configurations according to Article 16 (6) of the TEU which provides that:

> "The Council shall meet in different configurations, the list of which shall be adopted in accordance with Article 236 of the Treaty on the Functioning of the European Council. The General Affairs Council shall ensure consistency in the work of the different Council configurations. It shall prepare and ensure the follow-up meetings of the European Council, in liaison with the President of the European Council and the Commission".

Each configuration deals with a specific area such as agriculture and fisheries, making the activities more streamlined.[712]

---

[707] Sands and Klein *Bowett's Law of International Institutions* (2001) 162.
[708] Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 466.
[709] Marks, Hughes and Blank "European Integration from the 1980s: State-Centric v Multi-level Governance" 1996 *Journal of European Public Policy* 341-378.
[710] Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 466.
[711] *Ibid.*
[712] Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 466. The 10 configurations in the EU Council include General affairs, Foreign Affairs, Economic and Financial Affairs, Agriculture and Fisheries, Justice and Home Affairs, Employment, Social Policy, Health and Consumer Affairs, Competitiveness, Transport, Telecommunications and Energy, Environment, Education, Youth and Culture.

On the other hand, SADC has at least twenty-three Protocols almost reflecting this configurations approach. However, institutional arrangements and exclusive functions that underlie these configurations, as provided in the EU Council, are lacking in the SADC approach.[713]

Lastly, the voting system in the EU Council is diverse, some matters require unanimity and others a majority. However, the SADC Council of Ministers is largely accountable to the SADC Summit as far as decision-making is concerned.[714]

5 4 THE SUPRANATIONAL OR COMMUNITY METHOD AND THE INTERGOVERNMENTAL APPROACH IN THE EU

Since the adoption of the Maastricht Treaty, the EU has been dominated by two broad families of decision-making, the community method and the intergovernmental approach.[715]
While the community method advocated for the use of parliamentary decision-making at the EU level to legitimize its activities, the intergovernmental method emphasised reliance on national parliamentary legitimisation and judicial review of decisions.[716]

The community method, being the traditional means of creating EU law, is based on the idea that EU legislation should both respect certain limits on the EU's powers and be the result of a settled consensus between different national and supranational interests.[717] Under this method, the EU was seen as a supranational organisation with limited tasks. It was fashioned in a manner meant to encourage the establishment of a transnational market although not equipped with the resources of governmental nature or to conduct policy in "core" state competencies.[718]

The community method shields a supranational institution such as the EU Commission from direct political pressure. For instance, the EU Commission is able to serve national interests of Member States by delegating power to a number of institutions.[719] Thus, on the basis of both the paradigm of "integration through law" and the supervisory control of national and European

[713] Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 467.
[714] *Ibid.*
[715] Dawson "The Legal and Political Accountability Structure of 'Post-Crisis' EU Economic Governance" 2015 *Journal of Common Market Studies: Hertie School of Governance* 976.
[716] *Ibid.*
[717] Dawson "The Legal and Political Accountability Structure of 'Post-Crisis' EU Economic Governance" 2015 *Journal of Common Market Studies: Hertie School of Governance* 977.
[718] *Ibid.*
[719] Dawson "The Legal and Political Accountability Structure of 'Post-Crisis' EU Economic Governance" 2015 *Journal of Common Market Studies: Hertie School of Governance* 978.

legislatures, new forms of economic governance have emerged, bearing mechanisms to ensure political control and legal scrutiny of institutional decisions.[720]

As the EU has evolved towards new tasks and objectives some limits to the community method have become necessary. Most notable is the shift towards the intergovernmental mode of decision-making, particularly after the Maastricht Treaty came into effect.[721] The Treaty brought new functional imperatives which were critical in respect of new initiatives such as the single currency creation and the common security co-operation. These were policy areas in which national implementation structures differed and which concerned "core" state policy.[722]

Inter-governmental decision making gained ground because Member States were unwilling to pay the diversity premium of handing over significant political control to supranational actors in their "core" functional areas. This resulted in a trade-off between diversity and functionality in decision-making pertaining to legitimate interests of each Member State.[723] To facilitate the trade-off, the Maastricht Treaty laid down the two tier system with two separate frameworks. The first tier is based on the Treaty on the Functioning of the European Union (TFEU) and its structure is predominantly supranational. Policies under the TFEU are formed through the community method. Decisions that are enacted are binding albeit judicially reviewable.[724] The second tier is based on the Treaty on European Union (TEU) and the dominant mode of decision-making is intergovernmental. Member States remain the dominant actors because agreements made in terms of the TEU are primarily implemented at national level.[725]

5 5 SUPREMACY OF COMMUNITY LAW

5 5 1 General Principles on Supremacy of Community law over domestic law

Upon joining the EU, the provisions of the treaties automatically become part of the generally binding law of a Member State and are applicable, not only to the Member State, but also its citizens.[726] Traditionally, the domestic effect of international agreements has been a matter to

[720] Dawson "The Legal and Political Accountability Structure of 'Post-Crisis' EU Economic Governance" 2015 *Journal of Common Market Studies: Hertie School of Governance* 977. See also, Weiler "The Community System: The Dual Character of Supra-Nationalism" 1982 *Yearbook of European Law* 267 – 306.
[721] The Maastricht Treaty brought new functional imperatives which were critical in respect of new initiatives such as the single currency creation and the common security co-operation.
[722] Dawson "The Legal and Political Accountability Structure of 'Post-Crisis' EU Economic Governance" 2015 *Journal of Common Market Studies: Hertie School of Governance* 978.
[723] *Ibid*.
[724] Dawson "The Legal and Political Accountability Structure of 'Post-Crisis' EU Economic Governance" 2015 *Journal of Common Market Studies: Hertie School of Governance* 978.
[725] *Ibid.*
[726] Hanlon *European Community Law* (2003) 103.

be determined in accordance with the constitutional law of each Member State.[727] However, in *Van Gend en Loos* (26/62), the ECJ confirmed that Community law is also the legal concern of individuals, and not only Member States.[728] Therefore, this constituted a limitation on state sovereignty, which is usually taken to mean the supremacy of Parliament, and its unfettered right to make or repeal any domestic law over a defined territory, and a system of laws and procedures which are free from external influence.[729]

By joining the EU, the Member States had clearly abrogated a part of their sovereignty to the community. In addition, the ECJ decision in *Internationale Handelsgesellschaft* (11/70) gave further impetus to the concept of the supremacy of community law. In this case the Court held that "the validity of a community measure or its effect within a Member State cannot be affected by allegations that it runs counter to…the principles of a national constitutional measure".[730] In *Simmenthal* (106/77) the ECJ went further and stated that "any national court must apply community law in its entirety and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the community rule".[731]

5 5 2 The *Factortame* Saga

In an attempt to prevent "quota-hopping" by Spanish fishermen operating behind nominally British companies, the UK government passed the Merchant Shipping Act 1998 and a series of delegated regulations.[732] The legislation set out residence and domicile conditions for fishing companies, the effect of which was to disqualify 95 Spanish fishing boats that were fishing from British ports.[733]

The companies sought interim relief by means of judicial review in the Divisional Court, on the grounds that the Act and regulations were contrary to Articles 7, 52, 58, and 221 of the Treaty, now 14, 43, 48 and 294 respectively, and that interim relief was needed because of the

[727] For example, the UK has a dualist approach to international law. Therefore, international treaties do not give rise to rights or interests which individuals can plead or enforce before their national courts. This applies even to the European Convention on Human Rights, which is directly aimed at individuals. It cannot be domestically invoked by citizens of the UK because it has not yet been implemented in the UK.
[728] Hanlon *European Community Law* (2003) 103.
[729] Hanlon *European Community Law* (2003) 65. See also, Dugard *International Law: A South African Perspective* (2011).
[730] Hanlon *European Community Law* (2003) 66.
[731] *Ibid*.
[732] Hanlon *European Community Law* (2003) 70.
[733] *Ibid*.

irreparable damage that would be caused if the companies had to wait for the full trial to commence before the court.[734]

The Divisional Court, per Neil LJ, granted provisional relief. Relying on *Simmenthal*, the court held that "the High Court now has a duty to take account of and give effect to community law and where there is a conflict, to prefer community law to national law.[735] On appeal by the UK government to the Court of Appeal, interim relief was set aside on the grounds that under the British Constitution courts have neither the power to suspend the application of an Act of Parliament nor to grant an injunction against the Crown.[736]

On appeal to the House of Lords, Lord Bridge held that "there is a presumption that an Act of Parliament was compatible with community law unless and until it was decided otherwise, but that nevertheless, by s 21 of the Crown Proceedings Act 1947 there was no jurisdiction to grant interim relief.[737]

However, the House of Lords made a reference to Article 177 (now 234) to the ECJ asking, *inter alia*, "whether community law empowers or imposes an obligation on a national court to grant interim relief in a situation where a preliminary reference has been made to the ECJ.[738] The ECJ replied to this question in the affirmative, basing its judgment on Article 5 and its previous decision in *Simmenthal*.[739] The ECJ stressed the importance of ensuring that direct effect was a matter of substance, not form; and further held that "the full effectiveness of community law would be impaired if rules of national law could prevent the granting of provisional relief" and called upon national court's to set aside such rules.[740]

The major area of interest in respect of the *Factortame* decisions is their effect on British constitutional law.[741] Before *Factortame,* the UK had not unequivocally accepted the supremacy of community law. However, *Factortame* made it clear that a national court is under a community law obligation to give effective protection to directly effective rights and this will be so even in the face of conflicting domestic legislation.[742] Therefore, *Factortame* and other

[734] Hanlon *European Community Law* (2003) 71.
[735] *Ibid.*
[736] *Ibid.*
[737] Hanlon *European Community Law* (2003) 71.
[738] *Ibid.*
[739] *Ibid.*
[740] *Ibid.*
[741] *Factortame I* (C-213/89).
[742] Article 5 (now Article 10) is the source of this obligation. This shows reliance by the ECJ on the "gap filling" properties of this provision.

cases such as *Emmott* (C-208/90), *Francovich* (C-6 and 9/90) and *Zuckerfabrik* (C-143/88 and C-92/89) are important in the development of a community legal order, particularly with regard to judicial remedies. At the national level, Member States are in a position to implement an array of policies.[743]

5 5 3 Direct effect

The doctrine of direct effect is a judicial development of the ECJ. It is connected to direct applicability although the two should not be confused.[744] In its seminal judgement in the *Van Gend en Loos* case, the ECJ dealt with the meaning of direct effect and direct applicability as well as the conditions for a provision of community law to have direct effect.[745]

The question was whether Article 12 of the EEC Treaty has direct application in national law in the sense that nationals of Member States may on the basis of this Article lay claim to rights which the national court must protect.[746]

The ECJ held that, in terms of Article 177, it is assigned a task the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals. This was seen as showing that Member States have acknowledged that community law has an authority which can be invoked before those courts and tribunals.[747]

The conclusion that was reached by the court was that the community constitutes a new legal order of international law for the benefit of which Member States have limited their sovereign rights, albeit within limited fields, and the subjects of which compromise not only Member States but also their nationals.[748]

[743] Marks *Structural Policy and Multilevel Governance in the EC* (1993) 394. See also, Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 463.
[744] Hanlon *European Community Law* (2003) 108. See also, Emmert *European Union Law: Cases* (2000) 14. It is stated that these are fundamental principles of the European Union law.
[745] *Van Gend en Loos* 1963 (26/62). See also, Emmert *European Union Law: Cases* (2000) 14, 15.
[746] Emmert *European Union Law: Cases* (2000) 16.
[747] *Ibid.*
[748] *Ibid*

The rationale of direct effect is to place the enforcement of community law on two levels, a notion that is referred to as "dual vigilance".[749] Another rationale for direct effect is what is known as the "estoppel argument".[750]

However, not every Treaty Article has been held to be directly effective, and the *Van Gend en Loos* case dealt with this. The Court set out the criteria for direct effect of Treaty provisions, and stated that:

> "The wording of Article 12 (now 25) contains a clear and unconditional prohibition which is not a positive but a negative obligation. Moreover, this obligation is not qualified by any reservation on the part of the states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects…it follows from the forgoing consideration that, according to the spirit, the general scheme and wording of the Treaty, Article 12 (now 25) must be interpreted as producing direct effects and creating individual rights which national courts must protect".[751]

Therefore, the three criteria set out by the ECJ were that the measure in question must be clear and unambiguous, it must be unconditional and, lastly, it must take effect without any further action being required by the community or a Member State.[752] With regard to directives and decisions, the ECJ held that these may be directly effective in some instances.[753]

5 5 4 Direct applicability

In *Simmenthal II* (106/77) the ECJ stated that direct applicability meant that "rules of community law must be fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in force".[754] The ECJ had to ascertain the

[749] Hanlon *European Community Law* (2003) 108. For instance, the Commission acting in its role as the "guardian of the Treaty" may invoke an Article 226 (ex 169) action against a recalcitrant Member State. On the other hand, individuals are also given, at a domestic level, the ability to rely on the principle of direct effect.
[750] That is, by giving rights to individuals, which they can enforce against the state, a Member State is estopped from relying on its own failure to properly implement a directive.
[751] Hanlon *European Community Law* (2003) 109.
[752] *Ibid.*
[753] Hanlon *European Community Law* (2003) 111, 112.
[754] Emmert *European Union Law: Cases* (2000) 25.

consequences that may flow from the direct applicability of a provision of Community law in the event of incompatibility with a subsequent legislative provision of a Member State.[755]

With regard to regulations and direct applicability, in *Van Gend en Loos* it was held that these are clearly directly applicable by reason of Article 249 (ex 189).[756] However, they are not necessarily directly effective.[757]

Direct effect or applicability depends on satisfying the criteria set out in *Van Gend En Loos* for Treaty articles. An example of a regulation that is directly effective was present in the case of *Leonesio v Ministry of Agriculture* (93/71).[758] In that case, the ECJ stated that recognition of national legislative measures which encroach on community law as having legal effect would amount to a denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty. The Court further stated that this would imperil the very foundations of the Community.[759]

The ECJ held that every national court must, in a case within its jurisdiction, apply community law in its entirety and protect the rights which the latter confers on individuals, setting aside any provisions of national law which may conflict with it, whether prior or subsequent to the community rule.[760]

Similarly, in *Factortame I* (C-213/89), the ECJ held that community law must be interpreted as meaning that a national court which, in a case before it concerning community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law, must set aside that rule.[761]

5 5 5 Subsidiarity

EU actions are subject to the principle of subsidiarity which means that, except in the areas where it has exclusive powers, the Union only acts where action will be more efficient at the EU level than at national level.[762]

---

[755] Emmert *European Union Law: Cases* (2000) 224, 25.
[756] Article 249 TEC, substantially reflecting Article 288 of TFEU.
[757] Hanlon *European Community Law* (2003) 110.
[758] Hanlon *European Community Law* (2003) 110.
[759] Emmert *European Union Law: Cases* (2000) 25. The ECJ had already stressed in *Costa v ENEL* that it was impossible for a Member State to accord precedence to a national rule over a conflicting rule of the community, but did not in that case draw any distinction between pre-existing and subsequently adopted national law.
[760] *Simmenthal* case paras 21 and 24. See also, Emmert *European Union Law: Cases* (2000) 14.
[761] Emmert *European Union Law: Cases* (2000) 64, 66.
[762] See "*The European Union How the European Union Works: Your guide to the EU institutions*" at http://europa.eu/pol/index_enhtm and http://europa.eu/!bY34KD (accessed 03-07-2016).

It may be argued that subsidiarity has been established as a general principle of community law. In terms of article 5 (ex 3b) of the EC Treaty, "in areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only sufficiently achieved by the Member States and can, therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community".[763] Therefore, as a principle, subsidiarity has been formally incorporated into EU law.

This means that decisions in the EU must be taken as closely as possible to the citizens affected by them. This approach entails national oversight. National parliaments receive draft legislative acts at the same time as the European Parliament and the Council. They can give their opinion to ensure that their decisions are taken into account.[764]

Concerning subsidiarity, community action may only be justified where Member States are expected to act, if it serves an end which both cannot be achieved satisfactorily at the national level and can be better achieved at Community level.[765]

It is not clearly determined how far this principle will be subject to judgments of the ECJ. If the Court becomes too involved it may be accused of making political decisions. If not, it will be accused of abrogating its responsibilities.[766]

5 6 TRANSPARENCY IN THE EU: MECHANISMS FOR PUBLIC PARTICIPATION

The EU has adopted a legal framework that facilitates access to information by setting out general principles and limits on such access and granting enforceable rights to individuals. The less national parliaments control rule-making in regional or global organisations, the more it is necessary to protect participatory and "deliberative democracy" based on multinational interests, the rule of law beyond state borders and compliance with treaties ratified by national parliaments.[767]

In the EU, an example of an institutionalised form of public participation is the European Economic and Social Committee (EESC). Its members, who represent employers, trade unions,

[763] Hanlon *European Community Law* (2003) 91.
[764] See "*The European Union How the European Union Works: Your guide to the EU institutions*" at http://europa.eu/pol/index_enhtm and http://europa.eu/!bY34KD (accessed 03-07-2016).
[765] Hanlon *European Community Law* (2003) 91.
[766] *Ibid.*
[767] Petersmann *Constitutional Problems of Multi-Level Judicial Governance in Trade and Investment Regulation* (2012) 312.

farmers, consumers and other interest groups, are nominated by the EU Member States' governments and must be consulted before decisions are taken on economic and social policies. This approach is bolstered by the European Commission's willingness to enhance transparency through soft law initiatives.[768]

In 2001, the European Commission adopted the *White Paper on European Governance*,[769] which addressed accountability and transparency measures such as openness and participation. It also contains a code of conduct for the Commission's interaction with civil society.[770] In 2002, the Commission set out the principles and minimum standards for consulting external parties, which aim at giving a common framework to the otherwise decentralised organisation of its consultation with non-state actors.[771]

The principles and standards address the nature of consultation documents to be provided, notion of target groups to be consulted, the issue of timeframe for participation, the need to give feedback on consultation and the requirement to publish results.[772] In respect of timelines, these consultation standards are to be applied at the policy-shaping phase of major proposals and thus do not apply to the formal stages of decision-making as prescribed in the Treaty and in other EU legislation.[773]

In 2005, the EU Commission launched the European Transparency Initiative involving the release of a Green Paper that opened consultation with non-state actors. Therefore, transparency in the EU involves regional institutions such as the EU Commission taking concrete steps to consult EU citizens and other non-state bodies.[774]

The transparency mechanisms have contributed not only to more transparent, inclusive and constitutionally restrained decision-making in supranational and intergovernmental bodies of the EU, but have strengthened accountability as well. Multi-level public participation has

[768] Bonzon "Comparative Analysis of Transparency and Public Participation Mechanisms in Regional Trade Agreements and Other International Regimes" 2008 *EDGE Workshop* 10.
[769] White Paper on European Governance COM (2001) 428.
[770] Bonzon "Comparative Analysis of Transparency and Public Participation Mechanisms in Regional Trade Agreements and Other International Regimes" 2008 *EDGE Workshop* 10.
[771] Bonzon "Comparative Analysis of Transparency and Public Participation Mechanisms in Regional Trade Agreements and Other International Regimes" 2008 *EDGE Workshop* 11.
[772] *Ibid*.
[773] Bonzon "Comparative Analysis of Transparency and Public Participation Mechanisms in Regional Trade Agreements and Other International Regimes" 2008 *EDGE Workshop* 11. The exercise of the Commission's implementation powers with the assistance of "Comitology" committees referred to above is excluded in this respect.
[774] Bonzon "Comparative Analysis of Transparency and Public Participation Mechanisms in Regional Trade Agreements and Other International Regimes" 2008 *EDGE Workshop* 11.

contributed to "constitutional checks and balances" on otherwise discretionary foreign policy powers.[775]

5 7 STATE SOVEREIGNTY IN THE EU

The EU was launched as an economic community and has progressively evolved into a political union.[776] Therefore, the EU institutional structure is marked by a higher degree of integration in a wide range of policy areas and is more elaborate compared to SADC.

The unique feature of the EU is that, although its Member States are sovereign and independent, they pooled some of their "sovereignty" in order to give the institutions strength. Pooling sovereignty meant, in practice, that the Member States delegated some of their decision-making powers to the shared institutions that they created, so that decisions on specific matters of joint interest could be made democratically at the European level.[777] The EU deemed it necessary to strike a balance between the needs of citizens or domestic constituencies and regional interests.[778]

The importance of introducing transparency into the "executive form of multilateralism" that is characterised by member-driven regional or international organisations is that it contributes to legitimacy especially in the decision-making process.[779] Some commentators have argued that traditional patterns in decision-making in international regimes have contributed to a democratic deficit and demonstrate their views by resorting to theories such as the "chain of legitimacy"[780] or the "agency cost theory".[781]

In the EU, the apprehensions about democratic deficit have been addressed. For instance, in *Faccini Dori* C-91/92 it was stated that as far as democratic deficit was concerned, the

[775] Petersmann *Constitutional Problems of Multi-Level Judicial Governance in Trade and Investment Regulation* (2012) 311-312. See also, Peters "The Merits of Global Constitutionalism" 2009 *Indiana Journal of Global Legal Studies* 397, 402.
[776] Bonzon "Comparative Analysis of Transparency and Public Participation Mechanisms in Regional Trade Agreements and Other International Regimes" 2008 *EDGE Workshop* 10.
[777] See "*The European Union How the European Union Works: Your guide to the EU institutions*" at http://europa.eu/pol/index_enhtm and http://europa.eu/!bY34KD (accessed 03-07-2016). The EU, thus, sits between the fully federal system that is found in the United States and the loose, intergovernmental cooperation system seen in the United Nations.
[778] Cameron *The European Union as a Model for Regional Integration* (2010) 2.
[779] Bonzon "Comparative Analysis of Transparency and Public Participation Mechanisms in Regional Trade Agreements and Other International Regimes" 2008 *EDGE Workshop* 3.
[780] Krajewski "Democratic Legitimacy and Constitutional Perspectives of WTO" 2001 *Journal of World Trade* 35.
[781] Sands and Klein *Bowett's Law of International Institutions* (2001) 184. See also, Howse *How to begin to think about the Democratic Deficit at the WTO* (2006).

European Parliament's rights to collaborate in drawing up Community legislation had been increased by the Single European Treaty (SEA) and the Maastricht Treaty.[782]

Some authors have denied the existence of such a legitimacy deficit by viewing conditions of public representation as satisfactory.[783] On the other hand, others have contested the impact of the regulatory shift from the Member States to the regional level, emphasising the so-called "output dimension of legitimacy" or result-oriented legitimacy.[784] According to result-oriented legitimacy, gains of multilateral cooperation compensate for the lack of adequate citizen representation at the international level.[785] Still, the general approach has been geared towards increasing public participation at the national level and improving the representation of national constituencies in delegations at the international level.[786]

Lastly, transparency and accountability mechanisms are critical in the EU not only in decision-making but also for the purposes of democratic legitimisation of regional integration. Their effectiveness is important in reducing what has been dubbed "third generation trade barriers", which are non-tariff barriers to trade (NTBs) arising in particular fields of agriculture, services and intellectual property.[787]

5 9 CONCLUSION

The EU remains the best-developed model of regional integration and may continue to serve as an example for other Regional Trade Agreements, including SADC. To the extent that other regions ever attempt political and monetary union, the EU will provide valuable lessons on what to do and what not to do.[788]

There are lessons that may be drawn from the EU regional integration experience as shown above. The supremacy of EU community law and institutional strength are the main lessons

[782] *Faccini Dori* C-91/92. Emmert *European Union Law: Cases* (2000) 97. See also, Sands and Klein *Bowett's Law of International Institutions* (2001) 184.
[783] See generally, Bacchus *A few thoughts on Legitimacy, Democracy and the WTO* (2005).
[784] Adlung "GATS and Democratic Legitimacy" 2004 *Aussenwirtschaft* 59.
[785] Sutherland Report Chapter III: Sovereignty. See also, Chamovitz "Transparency and Participation in the World Trade Organisation" 2004 *Rutgers Law Review* 942. Chamovitz answers affirmatively the question as to "whether the WTO's requirements for publication, notification and comment and judicial review at the national level are relevant principles to be applied reflexively to the intergovernmental WTO".
[786] Bonzon "Comparative Analysis of Transparency and Public Participation Mechanisms in Regional Trade Agreements and Other International Regimes" 2008 *EDGE Workshop* 4.
[787] Bonzon "Comparative Analysis of Transparency and Public Participation Mechanisms in Regional Trade Agreements and Other International Regimes" 2008 *EDGE Workshop* 5.
[788] Cameron *The European Union as a Model for Regional Integration* (2010) 2.

derived from the analysis above. Noteworthy is the effectiveness of its broad body of law as evidenced by the treaties, regulations, decisions and directives.

In addition, the establishment of stronger institutions, which entailed EU Member States exercising historic political will by pooling together some of their sovereignty, paid dividend in the form of more effective regional integration.[789] The supranational and intergovernmental qualities of the institutions also assist in addressing state sovereignty and balancing national and regional interests.[790]

The following chapter will constitute the conclusion of the study. It will, most importantly, provide recommendations on how transparency and accountability may be enhanced in SADC intra-regional trade. To that end, the lessons from EU integration discussed in this chapter and analyses from preceding chapters will be fundamental to the recommendations that will be made.

[789] Richardson *European Union: Power and Policy Making* (2001) 116. See also, Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy & Development* 467. See also, Shumba *Harmonising the Law of Sale in the Southern African Development Community* (LLD Thesis, Stellenbosch University, 2014) 273.
[790] Cameron "The European Union as a Model for Regional Integration" at www.cfr.org/world/european-union-model-regional-integration/p22935 (accessed 22-08-2016).

CHAPTER 6

Conclusion and Recommendations

6 1 INTRODUCTION AND RECAPITULATION

This study is based on the premise that trade liberalisation leads to greater benefits in the context of Regional Trade Groupings (RTGs), including the Southern African Development Community (SADC). However, the presence of significant non-tariff barriers (NTBs), even after the establishment of Free Trade Areas (FTAs), remains a stumbling block to obtaining those benefits. Therefore, the enhancement of accountability and transparency mechanisms within the legal and institutional framework of RTGs would be useful in the elimination of NTBs by promoting implementation and compliance with the pertinent trade agreements, decisions and policies.

The first chapter of this dissertation introduced the study by presenting the problem statement, the objectives, and the research methodology. The second chapter laid out the legal historical background in order to provide context to the analysis.

The third chapter examined the legal and institutional framework of SADC, focusing on the strengths and weaknesses for accountability and transparency purposes. In relation to that, the main issues that were explored include the possible effectiveness of supreme community law in SADC Member States, the unwillingness to cede state sovereignty to establish supranational institutions and the effectiveness of supranational institutions thereby established. Due to its dominant role in SADC regional integration, the role of the Summit was scrutinised in regard to the foregoing issues.

In Chapter four, the study sought to analyse SADC's functions within the broader framework of the World Trade Organisation (WTO), particularly with regard to its provisions for transparency and accountability measures. To that end, the efficacy of SADC measures was assessed against WTO standards, for example with regard to the role of the SADC Tribunal in dispute settlement.

Chapter five undertook a comparative analysis of the European Union (EU), aimed at drawing lessons that may be useful for the enhancement of accountability and transparency within SADC. The analysis of the EU was confined to issues within the context of this study and it largely mirrored the abovementioned discussion of SADC.

The aim of this sixth and final chapter is to present the conclusions and some recommendations derived from the research and analysis undertaken in this study.

6 2 CONCLUSION

Regional integration is critical for the prosperity of SADC Member States as it provides the means to collectively achieve economic development and poverty alleviation, amongst other objectives.[791] It is through the legal and institutional framework of SADC that effective implementation of trade agreements or decisions can be secured, particularly if accountability and transparency measures are put in place.

The SADC Treaty is by far the most important legal instrument with regard to the legal and institutional framework whereas the Protocol on Trade is critical in terms of provisions for the pursuit of trade liberalisation. As the study has shown, these regional legal instruments constitute community law and underpin the regional institutions in SADC. However, there is a lack of supremacy of community law which could empower regional institutions and facilitate interstate cooperation.[792]

Supreme community law is also instrumental in reducing uncertainty, some of which is bred by diverse national laws.[793] The differential treatment of community law in relation to domestic law by Member States results from its lack of supremacy.[794] Legal diversity that subsists operates as an impediment to the implementation of regional agreements or decisions and removes the confidence that comes with legal certainty.[795] For instance, the SADC Treaty does not state whether the binding decisions of the Summit have a direct effect in the territory of

[791] Article 5 SADC Treaty.
[792] Tino "The role of regional judiciaries in eastern and southern Africa" 2012 *Monitoring Regional Integration in Southern Africa Yearbook* 140.
[793] Gillson and Charalambides "Addressing non-tariff barriers on regional trade in Southern Africa" 2011 *World Bank* 8, available at http://siteresources.worldbank.org/INTAFRREGTOPTRADE/Resources/Addressing_NTBs_Southern_Africa.pdf. See also, TBT Agreement Article 2 (8).
[794] Ndulo "The need for harmonisation of Trade Laws in the Southern African Development Community (SADC)" 1996 *African Yearbook of International Law* 196. See also, Fagbayibo "Common Problems Affecting Supranational Attempts in Africa: An Analytic Overview" 2013 *PER/ PELJ* 51; and Fagbayibo "Exploring Legal Imperatives of Regional Integration in Africa" 2012 *The Comparative and International Law Journal of Southern Africa* 68.
[795] Ndulo *The Promotion of Intra-Africa Trade and the Harmonisation of Laws in the African Economic Community: Prospects and Problems* (1993) 111-113; and Mistelis *Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law* (2001) 20. See also, Ndulo "The need for harmonisation of Trade Laws in the Southern African Development Community (SADC)" 1996 *African Yearbook of International Law* 211-213.

Member States. This gap in the Treaty leaves the implementation of Summit decisions to the discretion of Member States.[796]

In addition, the derogation clause in the SADC Protocol on Trade is flawed because it leaves the Council of Ministers with the discretion to decide matters on a case by case basis.[797] As a result, some scholars have advocated for, at least, the harmonisation of laws, in cases where supreme community law does prevail.[798]

An analysis of the legal historical background also revealed the political and economic orientation of SADC, from the travesties of colonisation and the struggle for liberation to the commitment to regional economic development through trade. The unique SADC Member States' historical experiences shed light on the centrality of state sovereignty in the region, for instance with regard to the general suspicion of supranational regional bodies which are necessary in the establishment of accountability and transparency mechanisms.[799] However, successful regional economic integration will inevitably entail a state's loss of autonomy over some internal affairs, and thus demands relinquishing some sovereignty.[800]

According to Mistry, African Member States' predisposition with sovereignty, which entails remaining politically separate while being convinced that economic integration can be achieved, causes problems in the implementation of regional integration agendas.[801] In fact, state sovereignty, which some consider as an excuse to abandon common regional interests in favour of national autonomy, can actually be divided temporarily or nominally in order to facilitate diplomatic compromise in pursuit of a specific regional interest such as trade liberalisation.[802] A resolution of the sensitive issue of state sovereignty would deter the over-reliance on political consensus in institutional decision making and strengthen SADC with a more effective rules-based trade regime.[803]

---

[796] Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration" 2012 *PER/PELJ* 461.
[797] Article 3 SADC Protocol on Trade.
[798] Kamba "Comparative Law: A Theoretical Framework" 1974 *International and Comparative Law Quarterly* 501. See also, Shumba Harmonising the Law of Sale in the Southern African Development Community (LLD Thesis, Stellenbosch University, 2014) 32.
[799] Lee *The Political Economy of Regionalism in Southern Africa* (2003) 1.
[800] Petersmann *International Trade Law and the GATT/WTO Dispute Settlement System* (1997) 208. See also, Jackson *The Jurisprudence of GATT & the WTO: Insights on Treaty Law and Economic Relations* (2000) 134.
[801] Mistry "Africa's Record of Regional Cooperation and Integration" 2000 *African Affairs* 553.
[802] Jackson *Sovereignty, subsidiarity, and separation of powers* (2002) 19.
[803] Mistry "Africa's Record of Regional Cooperation and Integration" 2000 *African Affairs* 553; and Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration" 2012 *PER/PELJ* 462.

This study found that, with the requisite political will and the surrendering of some state sovereignty, the SADC institutional framework could be more effective in enhancing accountability and transparency. This would require the strengthening of the regional institutional framework by establishing some supranational institutions that are independent of the influence of individual Member States while being vested with decision-making powers that can bind the Member States.[804]

Currently, SADC lacks supranational institutions as an analysis of the powers and functions of the intergovernmental Summit showed that all SADC institutions are answerable to it.[805] The dominance of the Summit was evident in the tension that existed over its relationship with a potentially supranational SADC Tribunal.[806] However, following the disbandment of the Tribunal, and its reconstitution with a limited mandate, the success or failure of SADC initiatives remains mainly dependent on the Summit.[807] Still, many scholars agree that successful economic integration requires the delegation of power to some supranational bodies entrusted with the task of safeguarding the interests of both the region as well as those of the individual Member States.[808]

In seeking ways to enhance accountability and transparency for intra-SADC trade, this study explored how the WTO has promoted transparency, for example at the onset of the Doha Round which produced, amongst others, the establishment of the Transparency Mechanism for RTAs and the Trade Policy Review Mechanism.[809] In addition, the Dispute Resolution Mechanism of the WTO, in terms of the Dispute Settlement Understanding (DSU), also bolsters accountability since it ensures compliance with WTO rules. Therefore, it is advantageous for the WTO that the Dispute Resolution Mechanism is seen to be legitimate, effective and

[804] Tallberg *West European Politics* (2002) 23-46.
[805] Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration" 2012 *PER/PELJ* 476.
[806] See *Mike Campbell v Republic of Zimbabwe* SADC (T) 2/2007. See also, Dugard *International Law: A South African Perspective* 440-443; and Saurombe "The Role of SADC Institutions in implementing SADC Treaty provisions dealing with regional integration" 2012 *PER/PELJ* 462.
[807] Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration" 2012 *PER/PELJ* 462.
[808] Erasmus "Is the SADC trade regime a rules-based system?" 2011 *SADC Law Journal* 17. See also, Fagbayibo "Common Problems Affecting Supranational Attempts in Africa: An Analytic Overview" 2013 *PER/ PELJ* 48-58; Mutharika *Towards Multilateral Economic Cooperation* 31; and Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration" 2012 *PER/PELJ* 458.
[809] Van den Bossche and Zdouc *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2013) 498. See also, Jackson *The Jurisprudence of GATT & the WTO: Insights on Treaty Law and Economic Relations* (2000) 134. Also visit https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm11_e.htm (accessed 16-03-2016).

predictable because such characteristics are notoriously elusive in the weak realm of international law.[810]

The comparative analysis of the European Union (EU) and SADC undertaken in this study affirmed that there is no doubt that trade liberalisation fostered the EU's success. The history of the EU presented above indicated that the benefits of an open market extend beyond trade to regional stability. Even in SADC, the aspirations for regional integration are not limited to trade, but extend to other areas as well. The success of the EU trade regime can be discerned from the arguments currently being made for Britain to remain in the Single Market despite the majority of the people voting to leave the EU in the Brexit referendum.[811]

6 3 RECOMMENDATIONS

6 3 1 Legislative reform

In terms of Article 36 of the SADC Treaty, the Summit is empowered to make and effect amendments of the Treaty.[812] Amendments may be necessary for a number of reasons. To begin with, the current SADC legal framework does not vest any explicit authority in the organisation to adopt binding legal instruments that are directly applicable in the territory of the SADC Member States.[813] This militates against accountability. Without an enabling supreme community law, there can hardly be any meaningful basis for a rules-based system.[814] It has been shown that other important instruments of the organisation are the Regional Indicative Strategic Development Plan (RISDP) which is not accorded legal authority by either the SADC Treaty or the Protocol on Trade.[815] In relation to that, SADC should also consider amending

[810] Jackson *The Jurisprudence of GATT & the WTO: Insights on Treaty Law and Economic Relations* (2000) 134.
[811] See www.investopedia.com/terms/b/brexit.asp. Brexit is an abbreviation for "British exit", which refers to the June 23, 2016, referendum whereby British citizens voted to exit the European Union.
[812] Article 36 (1) of the SADC Treaty provides that "An amendment of this Treaty shall be adopted by a decision of three-quarters of all the Members of the Summit". Therefore, although Summit decisions are made by consensus, the requirement for three-quarters majority to amend the SADC Treaty is a preferable route to address the fundamental legal and institutional reform issues. See also, Shumba "Revisiting legal harmonisation under the Southern African Development Community Treaty: The need to amend the Treaty" 2015 *Law, Democracy and Development* 142.
[813] Shumba "Revisiting legal harmonisation under the Southern African Development Community Treaty: The need to amend the Treaty" 2015 *Law, Democracy and Development* 139.
[814] Erasmus "Is the SADC trade regime a rules-based system?" 2011 *SADC Law Journal* 17.
[815] Hartzenberg "Economic integration matters for SADC" 2012 *SADC Policy Analysis and Dialogue Programme* 14-15. See also, Shumba "Revisiting legal harmonisation under the Southern African Development Community Treaty: The need to amend the Treaty" 2015 *Law, Democracy and Development* 141. It is argued that the binding effect must be accorded to legal instruments such as the SADC Model Law on Electronic Transactions and

the (Amendment) Protocol on the Tribunal to promote supreme community law by enabling direct applicability of the Tribunal's decisions in all Member States, enforceable by SADC itself.[816] The suspension of the SADC Tribunal, while generally clouding scholarly judgement on the positive features of the Summit, has drawn attention to the vital functions of the Tribunal. For example, the South African Constitutional Court ruling in the *Fick* case indicated that future decisions of the Tribunal need to be enforceable by SADC.[817]

6 3 2 Institutional reform

Some degree of transformation is needed in the SADC institutions. In particular, it may be necessary to reconsider the functions of the Summit and to strengthen the role of the SADC Secretariat, Tribunal, Parliamentary Forum (PF) and Council of Ministers.[818]

First, the strengths of the Summit that are less talked about must not be neglected. Regional stability has been engendered by the Summit as its successful interventions in Lesotho, the Democratic Republic of the Congo (DRC) and Zimbabwe show.[819] However, it is recommended that, by virtue of its mandate, the Summit should empower other regional institutions to play a supranational role in regional integration.[820] Political will is critical to cede some measure of state sovereignty in order to strengthen a rules-based system.[821] Undeniably, there is difficulty in monitoring and enforcing treaty-based rules and decisions across national boundaries without supranational institutions to facilitate accountability and transparency mechanisms. Although supranational institutions are generally not favoured in SADC, they are in fact indispensable to regional integration.[822]

Electronic Commerce, recently adopted by the SADC Ministers of Telecommunication, Post and ICT, which seeks to enhance electronic commerce in SADC by improving and modernising national laws.

[816] Shumba "Revisiting legal harmonisation under the Southern African Development Community Treaty: The need to amend the Treaty" 2015 *Law, Democracy and Development* 144.

[817] See *Government of the Republic of Zimbabwe v Fick* 2013 5 SA 325 (CC).

[818] Shumba *Harmonising the Law of Sale in the Southern African Development Community* (LLD Thesis, Stellenbosch University, 2014) 273.

[819] Ndulo "The Need for Harmonisation of Trade Laws in the Southern African Development Community (SADC)" 1996 *Cornell Law Faculty Publications* 224.

[820] Article 9 SADC Treaty.

[821] Landsberg *The Southern African Development Community's Decision-making Architecture* (2012) 64. See also, Shumba *Harmonising the Law of Sale in the Southern African Development Community* (LLD Thesis, Stellenbosch University, 2014) 275.

[822] Landsberg *The Southern African Development Community's Decision-making Architecture* (2012) 64. See also, Shumba *Harmonising the Law of Sale in the Southern African Development Community* (LLD Thesis, Stellenbosch University, 2014) 275.

Second, it is recommended that the Secretariat must be strengthened and fully capacitated if monitoring, supervising and evaluation initiatives are to succeed.[823] To be strong, the Secretariat's obligations of monitoring, supervising and evaluating the trade liberalisation agenda inherent in the Treaty need to be supported by a new protocol aimed at specifying its supranational powers.[824]

The capacity deficiency of the Secretariat that must be resolved pertains to financial and human resources. The lack of funding inhibits personnel training and research.[825] As a result, it leads to implementation-related challenges.[826] Similarly, the severe lack of expertise in both the legal and economic sections of the institution undermines its efficacy. It is undeniable that from the human resources perspective the few experts that are available are overstretched due to demands at the multilateral, regional and bilateral levels.[827]

Third, the reconstitution of the SADC Tribunal's jurisdiction to solely deal with disputes between states is a commendable step. However, it is recommended that traders in the private sector should also be provided with a SADC dispute resolution forum. A lesson has been drawn in this regard from the EU's Court of First Instance (CFI); accordingly, SADC may be best served by a similar institution to deal with disputes between private traders. In the same vein, the establishment of an appellate forum for trade-related disputes between states at the regional level may also be considered. Both the EU and the WTO benefit from a dispute settlement framework whereby a losing Member State can appeal. It is therefore submitted that the regional institutions should strive to accommodate both the public and private sectors.[828]

[823] Grant Makokera and Gruzd "Promoting Peer Review as a Compliance Mechanism for Regional Integration" 2014 *SAIIA Policy Briefing* 4.
[824] Article 33 of the SADC Treaty is deemed to be less detailed, and thus fall short.
[825] Martor *Business Law in Africa: OHADA and the Harmonisation Process* (2002) 17. It is noted that the positive contribution of *L'Ecole Régionale Supérieure de la Magistrature* (ERSUMA) in *est une institution de l'Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (OHADA) lies in its promotion of legal harmonisation in the Member States, particularly by training judges and other legal practitioners.
[826] Muthai "Regional trade integration strategies under SADC and the EAC: A comparative analysis" 2011 *SADC Law Journal* 95. See also, Shumba "Revisiting legal harmonisation under the Southern African Development Community Treaty: The need to amend the Treaty" 2015 *Law, Democracy and Development* 138.
[827] Muthai "Regional trade integration strategies under SADC and the EAC: A comparative analysis" 2011 *SADC Law Journal* 96.
[828] Oppong "Making regional economic community laws enforceable in national legal systems: Constitutional and judicial challenges" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 149. See also, Shumba *Harmonising the Law of Sale in the Southern African Development Community* (LLD Thesis, Stellenbosch University, 2014) 274.

Fourth, SADC may also consider transforming the SADC Parliamentary Forum (PF), which is currently seen as a mere "talk shop" by according it legislative authority.[829] This would not only strengthen political ties and forge political will for regional initiatives, but would best represent the interests of the citizens in the region who may democratically elect the representatives.[830] SADC should also consider expanding the role of the Council of Ministers on similar terms.

Finally, it is recommended that a new Peer Review Institution should be formed by the Summit in terms of Article 9 of the SADC Treaty, to function under the auspices of the Secretariat. As the supreme decision-making body, the Summit may encourage buy-in into the new institution and commitment to participate by all Member States considering that currently not all of them are involved in the African Peer Review Mechanism (APRM).[831] The function of the Peer Review Institution will be to conduct evaluations on Member States' compliance with trade agreements, cooperation with regional judicial proceedings and decisions and the extent of information dissemination or reporting in respect to trade.[832] However, the scope of the Peer Review Institution should not be over-ambitious, but be focused on trade-specific agreements, decisions and policies. This focused, sectoral and thematic approach is more likely to succeed than a broader approach in view of the funding constraints and the lack of expertise.[833] Therefore, the criteria for review may as well begin with transparency issues and progress to include accountability measures.[834]

[829] Shumba *Harmonising the Law of Sale in the Southern African Development Community* (LLD Thesis, Stellenbosch University, 2014) 273.
[830] Shumba *Harmonising the Law of Sale in the Southern African Development Community* (LLD Thesis, Stellenbosch University, 2014) 273.
[831] Grudz "The African Peer Review Mechanism: Assessing Origins, Institutional Relations and Achievements" 2009 *SAIIA* 3. See also, Grant Makokera and Gruzd "Promoting Peer Review as a Compliance Mechanism for Regional Integration" 2014 *SAIIA Policy Briefing* 3.
[832] Grant Makokera and Gruzd "Promoting Peer Review as a Compliance Mechanism for Regional Integration" 2014 *SAIIA Policy Briefing* 2.
[833] Grant Makokera and Gruzd "Promoting Peer Review as a Compliance Mechanism for Regional Integration" 2014 *SAIIA Policy Briefing* 3.
[834] Corrigan "Puzzling Over the Pieces: Regional Integration and the African Peer Review Mechanism" 2015 *SAIIA Research Report 18 Governance and APRM Programme* 6-39. See also, Grant Makokera and Gruzd "Promoting Peer Review as a Compliance Mechanism for Regional Integration" 2014 *SAIIA Policy Briefing* 3. It is observed that the APRM has nuanced indicators such as flows of formal and informal intra-regional trade, sectoral integration analyses and progress reports on regional integration which facilitates measuring progress.

6 3 3 Participation of SADC citizens

In 2015, one of the resolutions adopted by the annual conference of the SADC Lawyers' Association (LA) was that SADC as an institution belongs to citizens and not to governments, and that SADC leaders must therefore put the interests of the citizens first.[835] Therefore, it is submitted that the SADC LA could be instrumental in facilitating the participation of citizens in regional democratic processes.[836] Increased participation would ensure that public and local authorities are subjected to higher levels of accountability and transparency.[837] In addition, the SADC LA may be engaged in crafting new rules-based and results-oriented measures for monitoring and evaluating regional institutions.[838] This may lead to new innovative ways to improve service delivery and combating the scourge of corruption that usually affects public institutions.[839]

SADC Member States should also leverage the participation of non-governmental organisations (NGOs), if allowed by governments under review, academic institutions and businesses in the private sector by encouraging these entities to promote research and provide data relating to regional trade, thereby raising awareness among the citizens of the region.[840]

6 4 FINAL REMARKS

In conclusion, the focus of this study was the enhancement of accountability and transparency mechanisms to remove NTBs and facilitate intra-SADC trade. It is modestly submitted that SADC should seriously consider the abovementioned recommendations as meaningful integration cannot be accomplished without an enabling legal framework and strong

[835] Thebe "Using the law to strengthen good governance practices in the SADC region" 2015 *De Rebus* 10.
[836] Whittle "SADC lawyers urged to monitor accountability, transparency and implementation, Chissano: Africa not short of ideas; but a serious problem with implementation" 2014 *De Rebus* 3, 6.
[837] Whittle "SADC lawyers urged to monitor accountability, transparency and implementation, Chissano: Africa not short of ideas; but a serious problem with implementation" 2014 *De Rebus* 3.
[838] Whittle "SADC lawyers urged to monitor accountability, transparency and implementation, Chissano: Africa not short of ideas; but a serious problem with implementation" 2014 *De Rebus* 3-4. Speaking at the same event, Former President of Mozambique, Joaquim Chissano underscored the importance of the SADC LA in establishing follow-up, monitoring and implementation mechanisms to ensure transparent and accountable leadership.
[839] Thebe "Using the law to strengthen good governance practices in the SADC region" 2015 *De Rebus* 9.
[840] Ndulo "The Need for Harmonisation of Trade Laws in the Southern African Development Community (SADC)" 1996 *Cornell Law Faculty Publications* 221. See Grant Makokera and Gruzd "Promoting Peer Review as a Compliance Mechanism for Regional Integration" 2014 *SAIIA Policy Briefing* 4; and Shumba "Revisiting legal harmonisation under the Southern African Development Community Treaty: The need to amend the Treaty" 2015 *Law, Democracy and Development* 137. See also, Muthai "Regional trade integration strategies under SADC and the EAC: A comparative analysis" 2011 *SADC Law Journal* 89. It is argued that institutionally, the EAC appears to be more advanced especially with regard to the involvement of the private sector in monitoring NTBs.

institutions, both supranational and intergovernmental, to drive the process.[841] SADC Member States cannot escape the influence of globalisation; rather they should exploit the opportunities availed by closer cooperation to achieve their objectives.[842] Pursuing accountability and transparency is the way forward in ensuring a more efficient and economically integrated SADC.

[841] Shumba "Revisiting legal harmonisation under the Southern African Development Community Treaty: The need to amend the Treaty" 2015 *Law, Democracy and Development* 134.
[842] Article 5 of the SADC Treaty. See also, Shumba "Revisiting legal harmonisation under the Southern African Development Community Treaty: The need to amend the Treaty" 2015 *Law, Democracy and Development* 147.

BIBLIOGRAPHY

Books

Asante SKB *Regionalism and Africa's Development: Expectations, Reality and Challenges* (1997) St Martin's Press Inc., New York.

Baldwin RE *Non-Tariff Distortions of International Trade* (1970) The Brookings Institution, Washington D.C.

Bauer G and Taylor SD *Politics in Southern Africa: State and Society in Transition* (2005) Lynne Rienner Publishers, London.

Becker TL *Comparative Judicial Studies* (1970) Rand McNally and Co., Chicago.

Biersteker TJ and Weber C (eds) *State Sovereignty as a Social Construct* (1996) Cambridge University Press, Cambridge.

Buthelezi S *Regional Integration in Africa: Prospects and Challenges for the 21st Century* (2006) Ikhwezi Afrika Publishing, East London.

Diebold MW *The Schuman Plan: A study in economic cooperation 1950-1959* (1962) Praeger, New York.

Danaher K *Sanctions Against Apartheid: The US struggle over sanctions against South Africa* (1989) Catholic Institute for International Relations, London.

Dugard J *International Law: A South African Perspective* 4th edition (2011) Juta and Company (Pty) Ltd, Cape Town.

Emmert F *European Union Law: Cases* (2000) Kluwer Law International, The Hague.

Guzman AT and Sykes AO *Research Handbook in International Economic Law* (2007) Edward Elgar Publishing Limited, Cheltenham.

Handley A and Mills G *From Isolation to Integration: The South African Economy in the 1990s* (1996) The South African Institute of International Affairs, Johannesburg.

Hanlon J *European Community Law* (2003) Sweet and Maxwell, London.

Hanlon J *Sanctions Against Apartheid: On the front line, Destabilisation, the SADCC states and sanctions* (1989) Catholic Institute for International Relations, London.

Hoekman BM and Kostecki MM *The Political Economy of the World Trading System: The WTO and Beyond* 2nd edition (2001) Oxford University Press, London.

Hofstee E *Constructing a Good Dissertation: A Practical Guide to Finishing a Masters, MBA or PhD on Schedule* (2006) Exactica, Johannesburg.

Jackson JH *The Jurisprudence of the GATT and WTO: Insights on Treaty Law and Economic Relations* (2000) Cambridge University Press, Cambridge.

Jackson JH *The World Trading System* 2nd edition (1997) MIT Press, Cambridge.

Jackson JH *The World Trading System: Law and Policy of International Economic Relations* (1989) MIT Press, Massachusetts.

Kells J and Dyer C *Economic Integration in Southern Africa* (2000) Indiana University Press, Indianapolis.

Krasner SD *Sovereignty: Organised Hypocrisy* (1999) Princeton University Press, Princeton.

Kreijen GPH (ed) *State, Sovereignty, and International Governance* (2002) Oxford University Press, Oxford.

Lee MC *The Political Economy of Regionalism in Southern Africa* (2003) UCT Press and Lynne Rienner Publishers, Cape Town.

Lester S *et al. World Trade Law: Text, Materials and Commentary* (2012) Hart Publishing, Oxford.

Lundahl M and Petersson L *Globalization and the Southern African Economies: Economic Integration Efforts in Southern Africa* (2004) Nordiska Afrikainstitutet, Uppsala.

Lyakurwa W *et al. Regional Integration in Sub-Saharan Africa: Framework, Issues and Methodological Perspectives* (1999) St Martin Press Inc., New York.

Lyakurwa W *Regional Integration in Sub-Saharan Africa: A Regional Case Study of the SADC* (1999) St Martin Press Inc., New York.

Lyakurwa W *et al. Regional Integration in Sub-Saharan Africa: A Review of Experiences and Issues* (1997) St Martin Press Inc., New York.

Magnette P *What is the European Union? Nature and Prospects* (2005) Palgrave Macmillan, Basingstoke.

Martor B *et al. Business Law in Africa: OHADA and the Harmonisation Process* (2002) Kogan Page Limited, London.

Mathijsen PSRF *A Guide to European Union law: As amended by the Treaty of Lisbon* (2010) Sweet & Maxwell, London.

McCormick J *The European Union: Politics and Policies* (1999) Westview Press, Colorado.

Mills G and Mutschler C *Exploring South-South Dialogue: Mercosur in Latin America and SADC in Southern Africa* (1999) South African Institute for International Affairs, Johannesburg.

Motshabi K *Sanctions Against Apartheid: South Africa's actions against neighbouring states* (1989) Catholic Institute for International Relations, London.

Mshomba RE *Africa in the Global Economy* (2000) Lynne Rienner Publishers, London.

Mutharika B *Towards Multilateral Economic Cooperation* (1972) Praeger Publishers, New York.

Ooosthuizen H *The Southern African Development Community: The Organisation, its Policies and Prospects* (2006) Institute for Global Dialogue, Midrand.

Petersmann E-U *International Trade Law and the GATT/WTO Dispute Settlement System* (1997) Kluwer Academic Publishers, Cambridge.

Pinder J and Usherwood S *The European Union: A Very Short Introduction* (2001) Oxford University Press.

Ravenhill J *Global Political Economy* (2005) Oxford University Press, New York.

Richardson J *European Union: Power and Policy Making* (2001) Routledge, London.

Rittberger V and Zangl B *International Organization: Polity, Politics and Policies* (2006) Palgrave Macmillan, Basingstoke.

Sands P and Klein P *Bowett's Law of International Institutions* (2001) Sweet and Maxwell, London.

Seidman A *Sanctions Against Apartheid: The Frontline states, economic dependence and sanctions* (1989) Catholic Institute for International Relations, London.

Shaw M *International Law* (2008) Cambridge University Press, Cambridge.

Sornarajah M and Wang J *China, India and the International Economic Order* (2010) Cambridge University Press, Cambridge.

Tallberg J *West European Politics* (2002) Routledge, Taylor & Francis, London.

Trebilcock MJ and Howse R *The Regulation of International Trade* 3rd edition (2005) Routledge, Taylor & Francis Group, Oxon.

Van den Bossche P *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2008) Cambridge University Press, Cambridge.

Van den Bossche P and Zdouc W *The Law and Policy of the World Trade Organization: Text, Cases and Materials* Third Edition (2013) Cambridge University Press, Cambridge.

Van Houtte H *The Law of International Trade* (1995) Sweet and Maxwell, London.

World Trading Organization *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (1999) Cambridge University Press, Cambridge.

Book chapters

Bacchus J "A few thoughts on Legitimacy, Democracy and the WTO" in Petersmann E-U (ed) *Reforming the World Trading System: Legitimacy, Efficiency and Global Governance* (2005) Oxford University Press, London.

Cameron F The European "Union as a Model for Regional Integration" in Patrick SM (ed) *Crisis in the Eurozone: Transatlantic Perspective* (2010) Council on Foreign Relations: International Institutions and Global Governance Program, New York.

Clough M and Ravenhill J "Regionalism in Southern Africa: The SADCC" in Clough M (ed) *Political Change in Southern Africa* (1982) University of California, Berkeley, California.

Cuming RCC "Harmonisation of Law in Canada: An Overview" in Cuming RCC (ed) *Perspectives on the Harmonisation of Law in Canada* (1985) University of Toronto, Toronto.

Dahl RA "Can International Organizations Be Democratic? A Skeptic's View" in Shapiro I and Hacker-Corden C (eds) *Democracy's Edges* (1999) Cambridge University Press, Cambridge.

Howse RL "How to begin to think about the Democratic Deficit at the WTO" in Griller S *International Governance and Non-Economic Concerns, New Challenges for the International Legal Order* (2006) Springer, New York.

Jackson JH "Sovereignty, subsidiarity, and separation of powers" in Kennedy DLM and Southwick JD (eds) *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (2002) Cambridge University Press, Cambridge.

Keohane RO and Nye J "The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy" in Keohane RO (ed) *Power and Governance in a Politically Globalized World* (2002) Routledge, New York.

Marks G "Structural Policy and Multilevel Governance in the EC" in Cafruny AW and Rosenthal GG (eds) *The State of the European Community: The Maastricht Debates and Beyond Boulder* (1993) Boulder: Lynne Rienner, London.

McBride S and Fossum JE "The Rule of Rules: International Agreements and the Semi-Periphery" in Griffin-Cohen M and Clarkson S (eds) *Governing Under Stress: Middle Powers and the Challenges of Globalization* (2004) Zed Books Ltd, London.

Mistelis L "Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law" in Fletcher I, Mistelis L and Cremona M (eds) *Foundations and Perspectives of International Trade Law* (2001) Sweet & Maxwell, London.

Ndulo M "The Promotion of Intra-Africa Trade and the Harmonisation of Laws in the African Economic Community: Prospects and Problems" in Ajomo A and Adewale O (eds) *African Economic Community Treaty: Issues, Problems and Prospects* (1993) Institute of Advanced Legal Studies, Lagos.

Petersmann E-U "Constitutional Problems of Multi-Level Judicial Governance in Trade and Investment Regulation" in Neergaard V and Nielsen R (eds) *European Legal Method in a Multi-Level EU Legal Order* (2012) DJØF Publishing, Copenhagen.

Ramsamy P "SADC: Evolution and Pespectives" in Mills G and Mutschler C (eds) *Exploring South-South Dialogue. MERCOSUR in Latina America and SADC in Southern Africa* (1999) SAIIA, Johannesburg.

Ruppel OC "The Case of Mike Campbell and the Paralysation of the SADC Tribunal" in Laryea ET, Madolo N and Sucker F (eds) *International Economic Law Voices of Africa* (2012) Siber Ink, Cape Town.

Volcansek ML "Courts and regional Integration" in Snyder (ed) *Regional and Global Regulation of International Trade* (2002) Oxford University Press, London.

Journal Articles

Afadameh-Adeyemi and Kalula "SADC at 30: Re-examining the Legal and Institutional Anatomy of the Southern African Development Community" 2007 *Monitoring Regional Integration in Southern Africa Yearbook* 5-19.

AfDB "Bank Group Policy on Good Governance" 1999 *OCOD* 1-17.

Armstrong "Rediscovering civil society: The European Union and the White Paper on Governance" 2002 *European Law Journal* 102-132.

Bamodu "Transnational Law, Unification and Harmonisation of International Commercial Law in Africa" 1994 *Journal of African Law* 125-143.

Bertelsman-Scott and Mutschler "A Report on an International Conference held on 27-28 October 1998" 1998 *SAIIA* 1-51.

Besson "The European Union and Human Rights: Towards A Post-National Human Rights Institution?" 2006 *Human Rights Law Review*, 323-360.

Bonzon "Comparative Analysis of Transparency and Public Participation Mechanisms in Regional Trade Agreements and Other International Regimes" 2008 *EDGE* 1-22.

Bosi *et al.* "Monitoring the process of regional integration in Southern Africa in 2008" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 1-4.

Brewster "Rule-Based Dispute Resolution in international Trade Law" 2006 *Virginia Law Review* 254-256.

Cawthra "The Role of SADC in Managing political crisis and conflict: The Cases of Madagascar and Zimbabwe" 2010 *Friedrich-Ebert-Stiftung* 24-29.

Chamovitz "Transparency and Participation in the World Trade Organisation" 2004 *Rutgers Law Review* 942.

Corrigan "Puzzling Over the Pieces: Regional Integration and the African Peer Review Mechanism" 2015 *SAIIA* 6-39.

De Wet "The Case of Government of the Republic of Zimbabwe v Louis Karel Fick: A First Step Towards Developing a Doctrine on the Status of International Judgements within the Domestic Legal Order" 2014 *Institute for International and Comparative Law in Africa* 553-568.

Dawson "The Legal and Political Accountability Structure of 'Post-Crisis' EU Economic Governance" 2015 *Journal of Common Market Studies: Hertie School of Governance* 978.

De Wet "The case of Government of the Republic of Zimbabwe v Louis Karel Fick: A First Step Towards Developing a Doctrine on the Status of International Judgments within the Domestic Legal Order" 2014 *PER/ PELJ* 1-31.

Disenyana and Khumalo "Transport Services in SACU: Accelerating Harmonisation and Liberalisation" 2009 *SAIIA* 9-47.

Erasmus "The Consequences of Retaliation in Southern African Trade Relations" 2014 *Stellenbosch: Tralac* 1-12.

Erasmus "The domestic status of international agreements: has the South African Constitutional Court charted a new approach and could regional integration benefit? 2012 *Monitoring Regional Integration in Southern Africa Yearbook* 10-24.

Erasmus "The New Protocol for the SADC Tribunal: Jurisdictional Changes and Implications for SADC Community Law" 2015 *Stellenbosch: Tralac* 1-25.

Erasmus "What has Happened to the Protection of Rights in SADC?" 2012 *Stellenbosch: Tralac* 1-8.

Erasmus "Is the SADC trade regime a rules-based system?" 2011 *SADC Law Journal* 17-34.

Fagbayibo "Common Problems Affecting Supranational Attempts in Africa: An Analytic Overview" 2013 *PER/ PELJ* 32-68.

Fagbayibo "Exploring Legal Imperatives of Regional Integration in Africa" 2012 *The Comparative and International Law Journal of Southern Africa* 64-76.

Faria "Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?" 2009 *Uniform Law Review* 5-34.

Gerhart and Kella "Power and Preferences: Developing Countries and the Role of the WTO Appellate Body" 2005 *North Carolina Journal of International Law & Commercial Regulation* 515-575.

Gibb "Southern Africa in transition: Prospects and problems facing regional integration" 1998 *The Journal of Modern African Studies* 287-306.

Gillson and Charalambides "Addressing non-tariff barriers on regional trade in Southern Africa" 2011 *World Bank.*

Giuffrida and Muller-Glodde "Strengthening SADC institutional structures – capacity development is the key to the SADC Secretariat's effectiveness" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 120-148.

Grant Makokera and Gruzd "Promoting Peer Review as a Compliance Mechanism for Regional Integration" 2014 *SAIIA* 1-4.

Grudz "The African Peer Review Mechanism: Assessing Origins, Institutional Relations and Achievements" 2009 *SAIIA.*

Grigorescu "International Organisations and Government Transparency: Linking the International and Domestic Realms" 2003 *International Studies Quarterly* 643-667.

Hartzenberg "Economic integration matters for SADC" 2012 *SADC Policy Analysis and Dialogue Programme* 13-21.

Hillman "Non-tariff barriers: Major Problem in Agricultural Trade" 1978 *American Journal of Agricultural Economics* 491-501

Kalaba and Tsedu "Implementation of the SADC Trade Protocol and the Intra-SADC Trade Perfomance" 2008 *Southern African Development Research Network* 1-26.

Kalenga "Implementation of the SADC Trade Protocol: A Preliminary Review" 2004 *Monitoring Regional Integration in Southern Africa Yearbook* 17-28.

Kamba "Comparative Law: A Theoretical Framework" 1974 *International and Comparative Law Quarterly* 485-519.

Kiplagat PK "An institutional and structural Model for successful Economic Integration in Developing Countries" 1994 *Texas International Law Journal* 303-325.

Kovach, Neligan and Burall "Power without accountability" 2003 *The Global Accountability Report: One World Trust* 1-50.

Krajewski "Democratic Legitimacy and Constitutional Perspectives of WTO" 2001 *Journal of World Trade* 167-186.

Mancuso "The new African Law: Beyond the Difference between Common Law and Civil Law" 2008 *Annual Survey of International and Comparative Law* 39-60.

Mapuva and Muyengwa-Mapuva "The SADC regional bloc: What challenges and prospects for regional integration" 2014 *Law, Democracy and Development* 22-36.

Marks, Hughes and Blank "European Integration from the 1980s: State-Centric v Multi-level Governance" 1996 *Journal of European Public Policy* 341-378.

Mercurio "Improving Dispute Settlement in the WTO: The DSU Review – Making It Work?" 2004 *Journal of World Trade* 795-854.

Mistry "Africa's Record of Regional Co-operation and Integration" 2000 *African Affairs* 553-573.

Mttila and Lane "Why unanimity in the Council? A roll call analysis of Council voting" 2001 *European Union Politics* 31-52.

Mudzonga "Liberalising trade in Southern Africa: Implementation challenges for the 2008 SADC FTA and beyond" 2008 *Institute for Global Dialogue* 15-23.

Muthai "Regional trade integration strategies under SADC and the EAC: A comparative analysis" 2011 *SADC Law Journal* 81-97.

Mwanawina “Regional integration versus National Sovereignty” 2011 *Verfassung und Recht in Ubersee* 465-481.

Ndulo “African Integration Schemes: A Case Study of the Southern African Development Community” 1999 *Cornell Law Faculty Publications* 4-30.

Ndulo “The Need for Harmonisation of Trade Laws in the Southern African Development Community (SADC)” 1996 *Cornell Law Faculty Publications* 195-225.

Ng’ong’ola “SADC Law: Building Towards Regional Integration” 2011 *SADC Law Journal* 123-128.

Nkuhlu “Moving Trade Liberalisation Forward” 1999 *SAIIA* 76.

Nwauche “Enforcing ECOWAS Law in West African National Courts” 2011 *Journal of African Law* 181-202.

Osiemo “The last frontier: Sanitary and Phytosanitary standards and Technical regulations as non-tariff barriers in intra-African trade” 2015 *African Journal of International and Comparative Law* 174-195.

Oppong “Making Regional Economic Community Laws Enforceable in National Legal Systems – Constitutional and Judicial Challenges” 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 149-169.

Osode “The Southern African Development Community in legal historical perspective” 2003 *Journal for Juridical Science* 1-9.

Peters “The Merits of Global Constitutionalism” 2009 *Indiana Journal of Global Legal Studies* 397-411.

Peters-Berries “The Zimbabwe Crisis and SADC: How to deal with a Deviant Member State?” 2002 *Monitoring Regional Integration in Southern Africa Yearbook* 185-200.

Phooko “No Longer in Suspense: Clarifying the Human Rights Jurisdiction of the SADC Tribunal” 2015 *PER/PELJ* 531-569.

Qureshi “The New GATT Trade Policy Review Mechanism: An Exercise in Transparency or ‘Enforcement’?” 1990 *Journal of World Trade* 147-160.

Radaelli "Policy Transfer in the EU: International Isomorphism as a Source of Legitimacy" 2001 *John Wiley and Sons Ltd* 25-43.

Risse "Approaches to the study of European Politics" 1999 *ECSA Review* 2-9.

Ruppel and Bangamwabo "The SADC Tribunal: a legal analysis of its mandate and role" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 179-221.

Saurombe "Regional Integration Agenda for SADC 'Caught in the winds of change' Problems and Prospects" 2009 *Journal of International Commercial Law and Technology* 100-106.

Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 *Law, Democracy and Development* 458-476.

Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration" 2012 *PER/PELJ* 454-485.

Saurombe "The SADC Trade Agenda, A Tool to Facilitate Regional Commercial Law: An Analysis" 2009 *South African Mercantile Law Journal* 695-709.

Scholtz "Review of the Role, Functions and Terms of Reference of the SADC Tribunal" 2011 *SADC Law Journal* 197-201.

Shumba "Revisiting legal harmonisation under the Southern African Development Community Treaty: The need to amend the Treaty" 2015 *Law, Democracy and Development* 127-147.

Swart "Extending the life of the SADC Tribunal" 2013 *South African Yearbook of International Law* 254-262.

Thebe "Using the law to strengthen good governance practices in the SADC region" 2015 *De Rebus* 1-15.

Tino "The role of regional judiciaries in eastern and southern Africa" 2012 *Monitoring Regional Integration in Southern Africa Yearbook* 140-164.

Weiler "The Community System: The Dual Character of Supra-Nationalism" 1982 *Yearbook of European Law* 267–306.

Whittle "SADC lawyers urged to monitor accountability, transparency and implementation, Chissano: Africa not short of ideas; but a serious problem with implementation" 2014 *De Rebus* 1-9.

Woods "Good Governance in International Organisations" 1999 *Global Governance* 33-61.

World Economic Forum on Africa "Capitalize on Opportunity" 2008 *SACU Quarterly, April-June* 1-4.

International and Regional Instruments

World Trade Organization (WTO)

The General Agreement on Tariffs and Trade (GATT) 1947 and 1994

The General Agreement on Trade in Services (GATS) 1994

The Marrakesh Agreement Establishing the World Trade Organization 1994

The Dispute Settlement Understanding (DSU) 1994

Agreement on Technical Barriers to Trade (TBT) 1994

Transparency Mechanism for Regional Trade Agreements 1996

The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) 1994

Southern African Development Community (SADC)

Protocol on the SADC Tribunal 2000

SADC Treaty 1992

SADC Protocol on Finance and Investment (FIP) 2006

SADC Protocol on Trade 1996

East African Community (EAC)

East African Community Treaty 1999

The Protocol for the Establishment of the East African Community Customs Union 2004

Standardization, Quality Assurance, Metrology and Testing Act 2006

European Union (EU)

The Merger Treaty 1965

The Single European Act (SEA) 1986

The Maastricht Treaty/ Treaty on European Union (TEU) 1992

The Treaty of Amsterdam 1997

The Treaty of Lisbon 2007

The Treaty of Nice 2001

The Treaty of Paris establishing the European Coal and Steel Community (ECSC) 1951

The Treaties of Rome establishing the European Economic Community (EEC) The European Atomic Energy Community (EURATOM) 1957

US and Caribbean

North American Free Trade Agreement (NAFTA)

Caribbean Community (CARICOM)

Asia

Association of Southeast Asian Nations

Constitution

The Constitution of the Republic of South Africa, 1996

Case Law

WTO

Canada – Aircraft

Chile-Price Band System

Turkey – Restrictions on Imports of Textiles and Clothing Products

SADC

*Albert Fungai Mutize et tal v Mike Campbell (Pvt) Ltd et al (*2008:4)

Ernest Mtingwi v SADC Secretariat (2007)

Government of the Republic of Zimbabwe v Fick 2013 5 SA 325 (CC)

Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe (2008)

Mike Campbell v Republic of Zimbabwe SADC (T) 2/2007

South Africa

Glenister v President of the Republic of South Africa and Others 2011 3 SA 347 (CC)

Government of the Republic of Zimbabwe v Fick 2013 5 SA 325 (CC)

Harksen v President of the Republic of South Africa 2000 2 SA 825 (CC)

President of the Republic of South Africa v Hugo 1997 4 SA 1 (CC)

EU

Costa v ENEL (C-6/64)

Emmott (C-208/90)

Faccini Dori (C-91/92)

Factortame I (C-213/89)

Francovich (C-6 and 9/90)

*Humble*t (C-6/60)

Internationale Handelsgesellschaft (C-11/70)

Kadi & Al Barakaat International Foundation v Council & Commission (European Court of Justice Grand Chamber) 8 September 2008 (20090 103 *AJIL* 305)

Marshall No.2 (C-271/91)

Rewe-Zentralfinanz (C-33/76)

Salgoil (C-13/68)

Simmenthal II (C-106/77)

Van Gend en Loos (C-26/62)

Von Colson and *Kamman* (C-14/83)

Zuckerfabrik Suderdithmarschen (C-143/88 and C-92/89)

US

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837 (1984)

Papers

Adlung "GATS and Democratic Legitimacy" 2004 *Aussenwirtschaft* 127-149.

Anderson and Van Wincoop "Gravity with Gravitas: A Solution to the Border Puzzle" 2003 *American Economic Review* 1-32.

Gillson and Charalambides "Addressing Non-Tariff Barriers on Regional Trade in Southern Africa" https://www.saiia.org.za (accessed 18-03-2017).

Marceau "Consultations and the Panel Process in the WTO Dispute Settlement System" *World Trade Organisation* 29-30.

Ruppel "Rule of Law Programme for Sub-Saharan Africa" *Konrad Adenauer Foundation*.

United Nations Conference on Trade and Development (UNCTAD) Economic Development in Africa Report 2013: Intra-African Trade: Unlocking Private Sector Dynamism 2013.

United Nations Conference on Trade and Development (UNCTAD) Economic Development in Africa Report 2013: Making Regional Trade Work for Africa: Turning Words into Deeds 2013.

UNCTAD "Global and Regional Approaches to Trade and Finance" 2007 United Nations.

USAID "Audit of the Implementation of the SADC Protocol on Trade" 2011 *USAID*.

World Trade Organisation "The future of the WTO" 2004 *The Sutherland Report* 15 para 3.7.

Zongwe "An Introduction to the Law of the Southern African Development Community" 2014 *Hauser Global Law School Program: Globalex.*

Theses

Kamau *The regulation of trade barriers under SADC and EAC: Assessing the effectiveness of their legal framework* (LLM Thesis, University of Cape Town, 2014).

Saurombe *Regionalisation through economic integration in the Southern African Development Community SADC (SADC)* (LLD Thesis, North-West University, 2011).

Shumba *Harmonising the Law of Sale in the Southern African Development Community* (LLD Thesis, Stellenbosch University, 2014).

Internet Sources

SADC

"SADC and the African Union" http://www.sadc.int/about-sadc/continental-interregional-integration/sadc-african-union/ (accessed 08-04-2015).

"Protocols" http://www.sadc.int/documents-publications/protocols/ (accessed 16-11-2015).

"Integration milestones" http://www.sadc.int/about-sadc/integration-milestones/ (accessed 11-11-2015).

"Regional Indicative Strategic Development Plan" http://www.sadc.int/about-sadc/overview/strategic-pl/regional-indicative-strategic-development-plan (accessed 29-04-2016).

"Non-Tariff Barrier Monitoring Mechanism" http://www.saiia.org.za/special-publications-series/612-sadc-business-barriers-case-8-non-tariff-barrier-monitoring-mechanism/file (29-03-2016).

"History and Treaty" www.sadc.int/about-sadc/overview/history-and-treaty/ (accessed 22-09-2015).

"SADC Institutions" www.sadc.int/about-sadc/sadc-institutions/ (accessed 23-09-2015).

"Non-Tariff Barriers: Reporting, Monitoring and Eliminating Mechanism" www.tradebarriers.org. (accessed 11-11-2015).

"Active complaints" http://www.tradebarriers.org/active_complaints (accessed 16-03-2016).

WTO sources

"Regional Trade Agreements" https://www.wto.org/english/tratop_e/region_e/region_e.htm (accessed 06-04-2015).

"Factual Presentation: Protocol on Trade in the Southern African Development Community (SADC) 12 March 2007" Secretariat Report rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=45 (accessed 23-01-2016).

"Transparency" https://www.wto.org/english/thewto_e/glossary_e/transparency_e.htm (accessed 16-03-2016).

"Transparency Mechanism for RTAs" https://www.wto.org/english/tratop_e/region_e/trans_mecha_e.htmhttps://www.wto.org/english/tratop_e/monitor_e/monitor_e.htm (17-03-2016).

"Trade Policy Reviews" https://www.wto.org/english/tratop_e/tpr_e/tpr_e.htm (accessed 26-03-2016).

"Trade Policy Reviews: Ensuring Transparency" https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm11_e.htm (accessed 16-03-2016).

"Trade Policy Review Mechanism" https://www.wto.org/english/res_e/booksp_e/analytic_index_e/tprm_01_e.htm#P1B1 (28-03-2016).

"International trade statistics 2012" http://www.wto.org/english/res_e/statis_e/its2012_e/its2012_e.pdf (accessed 03-05-2016).

EU sources

"The history of the European Union: The founding fathers of the EU" http://europa.eu/about-eu/eu-history/index_en.htm (accessed 02-10-2015).

"The history of the European Union: A peaceful Europe – The beginnings of cooperation" http://europa.eu/about-eu/eu-history/1945-1959/1951/index_en.htm (accessed 02-11-2015).

"The history of the European Union: A period of economic growth" http://europa.eu/about-eu/eu-history/1960-1969/1960/index_en.htm (accessed 02-10-2015).

"The history of the European Union: A growing Community – the first enlargement" http://europa.eu/about-eu/eu-history/1970-1979/1970/index_en.htm (accessed 02-10-2015).

The changing face of Europe - the fall of the Berlin Wall https://europa.eu/european-union/about-eu/history_en#1980-1989 (accessed 02-10-2015).

"The history of the European Union: A Europe without frontiers" http://europa.eu/about-eu/eu-history/1990-1999/1991/index_en.htm (accessed 02-10-2015).

"The history of the European Union: Further Expansion" http://europa.eu/about-eu/eu-history/2000-2009/2003/index_en.htm (accessed 02-10-2015).

Reports and newspaper articles

"Africa Regional Integration Index Report 2016" 28 available at https://wwwintegrate-africa.org/ (accessed 17-03-2017).

"Transparency and accountability: a mutual responsibility of governments and citizens" www.afdb.org/en/news-and-events/article/transparency-and-accountability-a-mutual-responsibility-of-governments-and-citizens-133115/ (accessed 14-11-2015).

"Regional integration and infrastructure" http://www.nepad.org/regionalintegrationandinfrastructure (accessed 08-04-2015).

"Regional integration and trade" http://www.uneca.org/our-work/regional-integration-and-trade (accessed 08-04-2015).

"2015 World Public Sector Report on Responsive and Accountable Public Governance" https://www.un.org/development/desa/publications/2015-world-public-sector-report.html (accessed 14-11-2015).

"Survey assess accountability and transparency in international development cooperation" https://www.un.org/development/desa/newsletter/trends/2014/01/9355.html (accessed 16-11-2015).

http://www.weforum.org/news/african-governance-pressing-transparency-realising-change. (accessed 10-11-2015).

"Lesotho: Can SADC facilitate sustainable solution to crisis?"

http://www.dailymaverick.co.za/article/2015-08-17-lesotho-can-sadc-facilitate-sustainable-solution-to-crisis/#.VzLwZNJ97IU (accessed 11-05-2016).

"A historical perspective of Lesotho's political crisis" http://www.sardc.net/en/southern-african-news-features/a-historical-perspective-of-lesothos-political-crisis/ (accessed 10-05-2016).

"Lesotho: A Critique of the Accelerated Politico-Military & Socio-Economic Crises vs. SADC intervention between 2010-2015" http://www.unisa.ac.za/contents/colleges/col_grad_studies/mdea/docs/Book%20Proposal--IARS--2016%20Lesotho-2.pdf (accessed 11-05-2016).

"Zim want Sadc Tribunal rulings nullified" 2011 *The Herald* http://www.herald.co.zw/zim-wants-sadc-tribunal-rulings-nullified/ (accessed 16-08-2016).

"Silencing a Supranational Court: The Rise and Fall of the SADC Tribunal" 2012 *E-International Relations* available at http://www.e-ir.info/2012/10/25/silencing-a-supranational-court-the-rise-and-fall-of-the-sadc-tribunal/ (accessed 19-08-2016).

"The SADC Tribunal's last gasp" 2011 *The Mail and Guardian South Africa* http://mg.co.za/article/2011-06-10-the-sadc-tribunals-last-gasp (accessed 19-08-2016).