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Trade Liberalization: Savior or Scourge of SADC Economies? Ben Chigara*

Introduction

The might of global trade forces reined against developing countries individually and collectively are well documented. In its 2001 Report on Trade and Development, the United Nations Conference on Trade and Development (UNCTAD) wrote:

Given the difficulties that developing countries have been facing in finding unilateral solutions to the problem of managing their currencies and preventing financial crises, and given the resistance of the major powers to genuine reform of the international financial architecture, attention has increasingly focused on regional solutions. In this context, there is growing interest in the lessons provided by the European experience with regional monetary cooperation and currency arrangements in the post-Bretton Woods era, which culminated in a monetary union at the end of the 1990s.¹

The difficulties faced by developing countries in the current international economic and trade climate remind one of the story of the colony of mice that shared a crop yard and its adjacent compound of granaries with a cat. Concerned about what appeared to be the cat's eternal control over their welfare, the mice gathered to determine what to do with the cat; much like the Organization of African Unity has been gathering since its foundation in 1963 to determine local and global issues that affect the region. Given that the mice could not eliminate the cat whatsoever, the mice decided that the solution to their problem lay in tying round the cat's neck a belt of jingles. This would significantly reduce the chances that a mouse would find itself stuck between the cat's paws. Excitement at having found a way of taming the cat soon gave way to gloom when the question was asked: whom among them would place the belt of jingles round the cat's neck? That sent home the chilling fact that evolution's trickery had privileged, perhaps permanently, the cat's fortunes over those of the mouse whenever the pair found themselves in a situation of competition—with the cat dominating the mouse and the mouse having to cope with the limits imposed upon it by the cat's domination. It also concluded the meeting of the colony of mice. Among States, similar evolutionary trickery appears to have privileged the

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¹ U.N. CONFERENCE ON TRADE AND DEVELOPMENT, U.N. TRADE AND DEVELOPMENT REPORT AT 118, U.N. Doc. UNCTAD/TDR.2001, U.N. Sales No. E.00.H.D:10 (2001), <http://www.unctad.org/en/docs/tdr01ch5.en.pdf>.

fortunes of developed countries over those of developing and least developed countries, particularly when States compete for allocation of scarce resources and markets in which to trade their goods.

The disparate economic forces and sectors that now dominate international trade date back thousands of years for most developed countries, and only a few hundred years or even less for most developing and least developed countries. Nonetheless, the recently formed World Trade Organization (WTO), which is both a discontinuation and continuation of the General Agreement on Tariffs and Trade (GATT)², is portrayed by its protagonists as the virtuous "Solomon" of old set to even out the case between the cat and the terrified mice so that the cat never has to have nightmares of waking up to find a belt of jingles tied round its neck and the mice never have to worry when they order their welfare in the crop yard and the granaries adjacent to it. This article examines the impact of trade liberalization on Southern African Development Community (SADC)³ economies. This article shows that optimism in the WTO as guarantor of developing countries' fortunes in international trade (inspired by what Gallagher calls the WTO's concept of balance and fairness between the organization's poorest and richest countries⁴) is illusory for most SADC Member States. The reason for this is because developing countries' aspirations to create supranational organizations, that like the European Union are capable of empowering them for meaningful engagement with the rest of the world, are always at the mercy of developed countries' economic interests.⁵ The psychology of dominance and subservience resides at the core of decisions attributable to both extreme affluence and abject poverty in the international community. Even the noble proclamation of the WTO seeking to predicate international trade on the principles of fairness and balance has

2 See CHRISTOPHER ARUP, *THE NEW WORLD TRADE ORGANIZATION AGREEMENTS: GLOBALIZING LAW THROUGH SERVICES AND INTELLECTUAL PROPERTY*, 12 (Cambridge University Press 2000).

3 Treaty Establishing the Southern Africa Development Community, August 17, 1992, Angl.-Bots.-Lesotho-Malawa-Mozam.-Namib.-Swaz.-Tanz.-Zambia-Zimb., 32 I.L.M. 116 (1993).

4 PETER GALLAGHER, *GUIDE TO THE WTO AND DEVELOPING COUNTRIES* (Kluwer Law Int'l 2000).

5 The European Union's strategy of overcoming its previous reliance on the Bretton Woods financial arrangements as a first step to economic independence is often cited as a good example for developing countries. UNCTAD's analysis of the function of viable and appropriate exchange rate regimes in establishing enduring markets in developing economies writes that "... the post-Bretton Woods experience of Europe in establishing mechanisms to achieve a stable pattern of intra-regional exchange rates, and eventually move to a currency union, may hold useful lessons for developing regions, particularly East Asia and South America." U.N. Conference on Trade and Development, *supra* note 2, at 110. But what is often not mentioned in similar reports is the fact that the EU had enormous financial support of the U.S. which had an interest in the success of the EC project. See also D. LASOK, *LAW AND INSTITUTIONS OF THE EUROPEAN UNION*, 6-7 (6th ed. Butterworths 1994).

done little to affect that psychology. This article argues, that in order to uphold that principle, the WTO needs to substitute among Member States the psychology of constructive mutual cooperation for the psychology of dominance and subjugation, by instituting both substantive and procedural measures targeted at ensuring that developing countries' aspirations to create supranational organizations are not compromised by developed countries' efforts to preserve the status quo.

I. Regional Coordination as a Mechanism for Internationalization

Internationalization through regional cooperation has in recent years become the principal model of pursuing States' concerns. Regional cooperation has superseded multilateral cooperation in matters of human rights protection, national defense, and security and economic arrangements. The internationalization of markets through regional economic cooperation and economic integration under the right circumstances is perceived as a very effective way of stimulating sustained growth of national economies.⁶ This model has become the subject of much study in recent years as regional groups across the world embrace it.⁷ Both developing and developed countries are entering into regional agreements seeking to harmonize national development policies for the sake of enhancing their economic growth and competitiveness in a world that increasingly regards globalization as a matter of fact and inevitability. Some of these groups are characterized by diverse heterogeneous economies, while others in comparison, are relatively homogeneous. All this activity points, perhaps to the overwhelming belief by States in the utility of internationalization through rationalization. The SADC, successor to the Southern African Coordination Conference (SADCC)⁸ is one such regional arrangement.

6 See F.A.S.T. MATAMBALYA, *THE IMPACT OF REGIONALISATION SCHEMES ON THE EXPORT AND ECONOMIC PERFORMANCE OF DEVELOPING COUNTRIES* 30 (Brandes and Aspel 1995).

7 See WORLD BANK, *WORLD DEVELOPMENT REPORT*, World Development Report 1996: FROM PLAN TO MARKET (Oxford Univ. Press 1996).

8 Treaty Establishing the Southern African Development Community, *supra* note 3, at 116. Established in 1980 as a forum for economic liberation and reducing economic dependence on apartheid South Africa and to pursue policies aimed at the economic integration of their economies. The original nine member States—Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe—were inspired by four strategic goals, namely, to reduce dependence of the region on the outside world, and in particular on South Africa, to promote collective self-reliance of the member countries, to promote and co-ordinate economic co-operation through a project and sector-led approach, and to provide joint action to secure international understanding of, and practical support for, the SADC strategy.

Established by the treaty of August 17, 1999 signed at Windhoek by the heads of States of Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Tanzania, Zambia and Zimbabwe at the 12th summit of the SADCC the SADC has a membership of 14. Namibia became the tenth Member State after its independence in 1990. Following the holding of democratic elections in South Africa in April 1994, South Africa became the eleventh member State of the SADC in August 1994. Subsequently, Mauritius, Seychelles, and the Democratic Republic of Congo have also become members. The organization seeks to accelerate economic growth of the region, to improve the living conditions of its citizens through regional cooperation in different fields, and to harmonize economic development of the region.⁹ Article 5(1) of the treaty establishing the SADC¹⁰ lists the objectives of the organization to be:

- a) pursuit of development and economic growth, alleviation of poverty, enhancement of the standard and quality of life of its citizens and the support of the socially disadvantaged through regional integration;
- b) evolution of common political values, systems and institutions;
- c) promotion and defense of peace and security;
- d) promotion of self-sustaining development on the basis of collective self-reliance, and the interdependence of member States;
- e) pursuit of complementarity between national and regional strategies and programs;
- f) pursuit and maximization of productive employment and utilization of regional resources;
- g) pursuit of sustainable use of natural resources and the effective protection of the environment; and
- h) strengthening and consolidation of longstanding historical, social and cultural affinities and links among the peoples of the region;

Article 5(2)¹¹ states that in order to achieve the objectives set out in Article 5(1), the SADC shall:

- a) harmonize political and socio-economic policies and plans of Members States;
- b) encourage the peoples 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 programs and projects of the organization;

⁹ See The Lusaka Declaration, 1 April 1980: "Southern Africa: Toward Economic Liberation."

¹⁰ See Treaty Establishing the Southern African Development Community *supra* note 3, at 124.

¹¹ *Id.*

- c) create appropriate institutions and mechanisms for the mobilization of requisite resources for the implementation of programs and operations of the organization and its institutions;
- d) develop policies aimed at progressive elimination of obstacles to the free movement of capital and labor, goods and services, and of the peoples 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 cooperation;
- h) promote the coordination and harmonization of the international relations of Member States;
- i) secure international understanding, cooperation and support, and mobilize the inflow of public and private resources into the region; and
- j) develop such other activities as member States may decide in the furtherance of the objectives of this treaty.

The SADC's shield and nurture approach to economic and trade development prioritizes intra-trade cooperation. This is consistent with the organization's ultimate goal of progressively harmonizing Member States' microeconomic policies towards establishing, incrementally, a free trade zone, a customs union and ultimately full economic union with integrated monetary and fiscal systems and a regional parliament by the year 2034. In its 2001 Trade and Development Report, the United Nations Conference on Trade and Development (UNCTAD) highlights this strategy as a crucial step in any effort by States to break away from dependence on the Bretton Woods system.¹² But the privileging of intra-trade cooperation over inter-trade cooperation may not be consistent with WTO norms of national treatment (NT) and most favored nation status (MFN) to which Member States of the SADC have pledged themselves to by signing the WTO agreements of 1994. This highlights problems created when States simultaneously embrace disjointed trade mechanisms that are evolving contemporaneously when those mechanisms require States Parties to commit themselves to divergent or even conflicting norms. There is nothing novel about the SADC's ultimate goal of wanting to achieve full economic union by 2034. Neither is there anything uncommon about its strategy for getting there. Other regional organizations including the European Union (EU), the North American Free Trade Area (NAFTA), and the Association of East Asian Nations are very much ahead of the SADC in that effort. In fact, those that have made more progress are able to penetrate, with frustrating consequences, the shield in the SADC strategy to achieve an African

¹² See U.N. CONFERENCE ON TRADE AND DEVELOPMENT *supra* note 2, at 118.

Economic Community by 2034.¹³ This raises the question on the reliability of claims, that trade liberalization premised on the concept of balance and fairness is possible for Member States of the WTO who vary from the poorest to the richest countries.¹⁴ The latter do not appear to want to relinquish their Revealed Comparative Advantage¹⁵ (RCA). Rather, they appear keen to secure and to maximize the status quo.

II. The Dynamics of Market Liberalism

Trade liberalization, or opening up of national markets advocated by the WTO, is not a new phenomenon. The economic integration that we call globalization is only the latest stage or example of what has been happening for ages. Calitz writes, that, "If one adopts a long-term perspective, modern economic globalization may be viewed as the latest manifestation of an erratic pattern of economic integration which has occurred in leaps and bounds over the years."¹⁶ In Roman times, when the Dinarius was used as a currency in an area which today covers parts of more than 40 countries in Europe, North Africa, and Asia, monetary integration was far more advanced than in modern Europe. More recently, from 1870 to 1930, the pound sterling was the currency of a part of the world, which today represents more than 50 countries (including India which has a population of one billion—almost one quarter of the world population). The difference between modern day economic globalization and previous versions of it is that:

- 1) it appears not to be driven by an imperial power though the role and function of the United Nations' financial institutions including the International Monetary Fund (IMF) and the World Bank is difficult to exonerate from imperial force machinations;
- 2) it does not require a military offensive aimed at a stable expansion of territory;
- 3) "the major agent of economic integration is a spectacular drop in the cost of communications and information Global communication at falling cost presents competition to

13 See generally O. Akinkugbe, *The European Union-South Africa Free Trade Agreements and the SADC Region*, 68 No.4 THE S. AFR. J. OF ECON., 639 (2000) (discussing the European Union's departure from its practice of entering trade agreements with regional blocks to selecting the strong players in developing countries' regional economic pacts to the detriment of regional groupings).

14 See Gallagher, *supra* note 4 .

15 For a discussion of recent applications of this economic indicator developed by Balasa in 1965, See generally N. Valentine & G. Krasnik, *SADC Trade With the Rest of the World: Winning Export Sectors and Revealed Comparative Advantage Ratios*, 68 No. 2 THE S. AFR. J. OF ECON., 266 (2000).

16 E. Calitz, *Fiscal Implications of the Economic Globalisation of South Africa*, 68 No.4 THE S. AFR. J. OF ECON., 564, 565 (2000).

governments because it influences the views and behavior of residents and reduces the scope for authoritarianism, paternalism and government without accountability”¹⁷;

- 4) it occurs at an unparalleled scale, attracting participation of State entities, multinational companies, financial institutions, residents and foreigners of States, international mobility of capital, technology and sometimes labor;
- 5) it produces devastating effects, winners and losers, affluence and abject poverty;
- 6) it compounds labor migration, in that an estimated 120 million people find themselves outside their countries of birth, a high proportion even if we discount political refugees; and
- 7) it is perceived by many to be irreversible.¹⁸

Justifications for trade liberalization appears, in one sense, to enjoy themselves to liberal and utilitarian values. Often it is seen as:

- 1) cutting protection and reducing tariff levels leads to maximization of national production and export comparative advantage;
- 2) accelerating integration of economies throughout the world through trade, financial flows, the exchange of technology, information and ideas and the movement of people;
- 3) essential for the generation of export-led growth;¹⁹
- 4) necessary for the improving allocative efficiency and facilitatory of specialist production and increase in exports that enable greater imports and consumption²⁰; and
- 5) facilitatory of dynamic gains such as increased diffusion of knowledge and technology, increased competition, more production in sectors with higher income and price elasticities, and increased investment.²¹

This argument is based in large measure on what Roberts calls the orthodox trade theory and its assumptions of perfect competition, constant or decreasing returns to scale, no externalities...etc.²² Research, however, shows that although positive associations have been found between export and growth in the reforming States, the relationship with liberalization is uncertain. The World Bank in 1989 found from

17 *Id.* at 566.

18 *Id.* at 568.

19 See *Republic of South Africa, Growth, Employment, and Redistribution: A Macroeconomic Strategy* 14 June 1996, (1996), <http://www.polity.org.za/govdocs/policy/growth.html>.

20 S. Roberts, *Understanding the Effects of Trade Policy Reform: The Case of South Africa* 68 No.4 THE S. AFR. J. OF ECON. 607, 609-10 (2000).

21 *Id.*

22 *Id.* at 611.

statistical studies, comparing performance before and after trade policy reform, small or insignificant advantages.²³ To this finding should be added the real danger that attributing all changes in economic performance occurring during the material time, ignores the real possibility that other variables, antecedent or exterior to the reform paradigm, might be at work. Evidence from case studies suggests that reduction in anti-export bias can be achieved more through export incentives building on production capabilities than from import liberalization.²⁴ Roberts concludes that export growth is more likely to be due to investment and infrastructure measures or other forms of export promotion than liberalization.²⁵

However, the haste with which SADC Member States appear to have embraced the WTO trade liberalization agreements of 1994, even in breach of their own regional intra-trade economic arrangements, demonstrates either an immense belief in the economic virtues of market liberalization, or a definite abandonment of all hope against a system that has evolved to subdue them beyond their wildest imagination. In 1994, the Republic of South Africa—the SADC's largest and strongest national economy—adopted a trade liberalization program agreed to under the GATT and implemented under the WTO. In taking this inter-trade highroad, the Republic of South Africa sacrificed some of its fundamental intra-trade covenants with SADC Member States in that it radically simplified, reduced or in some cases abolished tariffs for almost all of South Africa's imports.²⁶ The agreement also abolished stringent requirements of the treaty establishing the SADC.²⁷ For example, it abolished the local content requirements referred to in article 5(1)(f), which in itself undermines article 5(1)(e) of the SADC treaty which requires Member States in their international relations to complement regional strategies and programs. South Africa is not alone on this assault of the object and purpose of the treaty establishing the SADC. Other SADC Member States have or are signing up to multilateral agreements with the WTO that threaten the objectives of the organization. The remark that if nations' successes were measured by the number of agreements that they had merely entered into with one another, regardless of whether or not they actually carried them through, then African nations would be the most successful individually, and collectively. This ceases to be a conference joke, but a sad fact. To safeguard their own commitments under the treaty establishing the SADC, perhaps Member States should now start to negotiate as a single

²³ *Id.* at 612.

²⁴ *Id.* at 613.

²⁵ *Id.* at 612.

²⁶ *Id.* at 609.

²⁷ See Treaty Establishing the Southern Africa Development Community *supra* note 3, at 116.

entity those multilateral negotiations whose content is proscribed for by their constituent treaty.

The case of the European Union's (EU) deletion of the Republic of South Africa from its list of typically less developed countries entitled to privileged trading arrangements under the Lomé Convention illustrates, the vulnerability to frustration of developing countries' efforts to set up structures that have the potential to give them a fighting chance against the dominant States in international trade. This is important particularly because the EU is the SADC's largest and single most important trade partner.²⁸ Following that deletion, South Africa, which was keen to resume full trading relations with the EU after the election of the government of national unity in 1994, was compelled to negotiate with the EU separate trade agreements in spite of its membership to the SADC group, which countries were entitled to preferential trade rules under the Lomé Convention. The negotiations, which started in March 1996, were duly concluded on October 11, 1999 in Pretoria, with the signing by the two parties of the Agreement on Trade, Development and Cooperation between the European Community (a supranational organization²⁹) and the Republic of South Africa (a Member State of the SADC). This development has alienated South Africa further away from its SADC treaty pledges and left other Member States of the SADC to develop their own trading arrangements with the European Union. Even more, it raises questions about whether the treaty establishing the SADC has started to fall apart. Article 42 of the Vienna Convention on the Law of Treaties (VCLT) (1969), recognizes that a Party may in certain limited circumstances denounce or withdraw from a treaty, or the operation of a treaty may for a time be suspended, or the treaty may terminate only as a result of the application of the provisions of the treaty in question or of the Vienna Convention.³⁰ While South Africa may not have formally withdrawn from or terminated its SADC membership, its trade liberalization agreement with the EU appears to oppose the object and purpose of the treaty establishing the SADC. This is contrary to Article 58 of the VCLT, which while recognizing under international law the right of States upon giving notice to the other parties, temporarily and *inter se* to suspend the operation of provisions of a treaty, insists that that could happen only where the particular treaty allows for that; or if the suspension in question is not prohibited by the treaty, or if it does not affect the enjoyment by the other parties of their rights under the treaty

28 See generally Akinkugbe O. (2000) *supra* note 13.

29 See Treaty on European Union, February 7, 1992, Belg.-Den.-Fr.-F.R.G.-Greece-Ir.-Italy-Lux.-Neth. -Port.-Spain-U.K., 31 I.L.M. 247 (1992). See also Antti Maunu, *The Implied External Competence of the European Community After the ECJ Opinion 1/94—Towards Coherence or Diversity?* 22 LEGAL ISSUES OF EUROPEAN INTEGRATION 115, 115 (1995).

30 *Vienna Convention on the Law of Treaties, May 22, 1969, art. 42, 8 I.L.M. 679, 695 (1969).*

or the performance of their obligations, and if it is not incompatible with the object and purpose of the treaty.³¹ The object and purpose of the SADC treaty is to harmonize States Parties' economic policies and to pursue complementarity between national and regional strategies and programs leading to the formation of a full economic union,³² which is exactly what the South Africa-EU trade liberalization treaty of 1999 opposes. This raises the question whether the SADC's constituent treaty authorizes unilateral withdrawal or termination. The customary rule *pacta sunt servanda* is instructive. Oppenheim writes that:

With treaties which are apparently intended, or expressly concluded, for a permanent purpose or for a fixed period of time, it would not be permissible to impute to the parties an intention to allow unilateral denunciation or withdrawal. Apart from cases in which such intention must be excluded, the position in customary international law is less clear. ... Article 56 of the Vienna Convention lays down that the general rule is that in the absence of provision in the treaty, a party may not withdraw from it or denounce it: but denunciation or withdrawal are permitted on at least 12 months' notice if it is established that the Parties intended to admit that possibility, or if a right of denunciation or withdrawal may be implied by the nature of the treaty.³³

Qualitatively, the SADC treaty appears to be supranational in its aspirations. That Parties intended unilateral withdrawal or denunciation of the treaty is difficult to support, though in theory no treaty is beyond Member States' competence to rescind. President Bush's announcement on May 2, 2001 that his administration intended to leave behind the constraints of the Anti-Ballistic Missile (ABM) Treaty (1972) because it perpetuated distrust and mutual vulnerability, and to deploy defenses against possible missile attacks from States, other than those formerly regarded as major threats to the United States, is a good example. The ABM Treaty is a bilateral treaty entered into in 1972 between the United States and the then-Soviet Union.³⁴ Under the treaty, each Party undertakes not to deploy ABM systems for a defense of the territory of its country, not to provide a base for such defense, and not to deploy ABM systems for defense of an individual region except as provided for in Article III, which allows each party to deploy one ABM system to defend its national capital and one system to defend a region containing

31 *Id.* at art. 58.

32 See articles 5(1)(e) and 5(1)(f) Treaty Establishing the Southern Africa Development Community *supra* note 3, at 124.

33 OPPENHEIM'S INTERNATIONAL LAW 1298-99 (Robert Jennings & Arthur Watts eds., Longman 1996) 1905.

34 Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, art. 1(2), U.S.-U.S.S.R., 23 U.S.T. 3435, available at <http://www.defenselink.mil/acq/acic/treaties/abm/abm.htm>.

ICBM silo launchers.³⁵ The U.S.'s proposed missile defenses would go beyond the limited systems permitted under the ABM Treaty. Analysis of the U.S.'s claims that it unilaterally can free itself from the ABM treaty is instructive on the question whether South Africa's breach of the object and purpose of the SADC treaty is justifiable. Kirgis writes, that:

The parties to a bilateral treaty may agree, if they wish, to abrogate or modify the treaty at any time. Thus, if the United States and Russia agree that the ABM Treaty no longer serves their purposes and decide to terminate it, they may do so by mutual agreement. Non-party States would not have a right to object unless they could make the highly unlikely showing that they were intended beneficiaries of the Treaty, that they relied on the Treaty's continuation in force (in the sense that they did or refrained from doing something significant that they otherwise would or would not have done), and that they would suffer material detriment if the Treaty is terminated. If one of the parties to a treaty unilaterally abandons it, the other party could maintain that the treaty has been breached—unless one of the internationally—recognized grounds for lawful treaty termination is present. One such ground, often invoked when a party wishes to terminate a treaty obligation, is that there has been a fundamental change of circumstances since the treaty was entered into (sometimes called the doctrine of *rebus sic stantibus*). Under the Vienna Convention on the Law of Treaties, which codifies the customary international law of treaties for the most part, a change of circumstances may be invoked as a ground for terminating or withdrawing from a treaty, but only if certain conditions are met. First, the change must be of circumstances existing at the time the treaty was made. Second, the change of circumstances must be “fundamental.” Third, the change must not have been foreseen by the parties. Fourth, the existence of those circumstances must have constituted an essential basis of the consent of the parties to be bound by the treaty in the first place. Fifth, the effect of the change must be radically to transform the “extent” of obligations still to be performed under the treaty. The Vienna Convention does not define “fundamental” nor does it make clear what is meant by the “extent” of obligations still to be performed. Regarding the latter point, in the French language version of the Vienna Convention, the word translated into English as “extent” is “portée.” It could be translated as “impact.”³⁶

The EU's refusal to deal with South Africa as a typical developing State would constitute a fundamental change of South

³⁵ *Id.* at art. 3.

³⁶ Frederic L. Kirgis, *Proposed Missile Defenses and the ABM Treaty*, AM.SOC'Y. OF INT'L L. (2001), available at <http://www.asil.org/insights/insigh70.htm> (last visited Oct. 1, 2001). See also Oppenheim's Int'l. L. *supra* note 33, at 1298.

Africa's circumstance relative to the treaty establishing the SADC. The reason for this is that the shift in the perceived status of South Africa by the EU, and the effect of the shift on South Africa satisfies the criteria for determining that a fundamental change of circumstances has occurred, which entitles a State to walk away from a previous treaty dealing with related subject matter. However, a Party is not entitled simply to declare that because the change of circumstances rendered the treaty's obligations unbearable it could no longer consider itself bound by the treaty. Rather, "The proper course was considered to be for it first to approach the other Party (or Parties) with a request to agree to the abrogation of the treaty, perhaps coupling the request with an offer to submit any disputed issue to judicial determination."³⁷ This recognizes that a treaty is concluded against the background of all kinds of circumstances, which a State takes into account in consenting to be bound by the treaty.

The perceived change of South Africa's economic status in the eyes of its major trading partner, the EU, from being a typical developing country that is entitled under the Lomé Convention to a preferential trade regime, to being much more than a typical developing country and therefore not entitled to the preferential trade regime of the Lomé Convention, probably justifies South Africa's breach of its commitments under the SADC treaty on the grounds of foreseeability. Nonetheless, given the fundamental nature of the treaty establishing the SADC, South Africa could have resisted strongly the EU's effort to alienate it from its geographical, political and economic base. In the alternative, it could have initiated termination of its membership of the SADC. Given that neither of the above options prevailed, the result is that firstly, the EU has demonstrated its ability to bite out the heart of an emergent regional trading bloc³⁸ by compelling the most significant Member State of that trading bloc to independently sacrifice its pledges to the emerging regional enterprise by entering into free trade agreements with itself. A second result is that the future of the SADC community hangs in the balance. Subtraction from the SADC's economic weight of South Africa means a certain and significant weakening of the SADC's economic bargaining strength with the EU. Having engaged South Africa through separate trade agreements, the EU has created for itself the possibility of sidelining the SADC States whose economies are predicated on the South African economy. This may compel the remaining SADC States to deal with South Africa as the EU's broker in the region. Common business sense has never favored third parties where there are two principals. The smaller economies of the SADC will probably be the

37 See OPPENHEIM'S INT'L. L. *supra* note 33, at 1304-05.

38 South Africa contributes 60 per cent of the total SADC trade with the rest of the world. See Valentine & Krasnik, *supra* note 15, at 275.

biggest losers of the trade liberalization agreement between South Africa and the EU. The European Solidarity Towards Equal Participation of People (Eurostep), a network of NGOs, in its response to the Communication to the Council and the European Parliament: Guidelines for the Negotiation of New Cooperation Agreements with the African, Caribbean and Pacific (ACP) Countries of November 1997, correctly expressed the concern that:

While liberalization has created significant winners, all studies show that the weakest economies often lose, and the poorest and most vulnerable people are those who usually absorb the majority of the costs of adjustment. While the EU's proposed cooperation with ACP to address supply-side constraints would assist in reducing costs, this section on trade appears to ignore the impact on the poor.³⁹

No preferential treatment of individual SADC Member States by the EU could mitigate the frustration of a fledgling supranational organization intended to serve its own region. While the other Member States of the SADC still enjoy preferential market access over South Africa under the beef and veal, banana, and sugar protocols annexed to the Lomé Convention,⁴⁰ that will probably change when South Africa's agreements with the EU have been fully phased in accordance with the 1999 trade liberalization treaty between the two Parties. The SADC's combined competitive advantage will probably be wiped out. The reason for this forecast is that the access terms of South Africa to the EU market will improve, and in fact become equal in some cases to those hitherto enjoyed by remaining SADC Member States on a number of product lines. One consequence of this development is that most of the SADC Member States will begin to encounter intensified competition from the much more developed markets in South Africa in terms of their exports to the EU market. Increased South African exports may thus replace part of SADC Member States' current exports to the EU.⁴¹ Economists apply comparative advantage to determine the composition and direction of trade.⁴² Comparative advantage theory states that under autarkic conditions a country could potentially export those goods and services

39 See Eurostep, *An Eurostep Response to the Communication to the Council and the European Parliament: Guidelines for the Negotiation of New Cooperation Agreements With the African, Caribbean and Pacific* (1997), available at <http://www.oneworld.org/eurostep/eccom.htm>. (Discussing the impact on exercise of national policy discretion of economic globalisation in South Africa). See CALITZ *supra* note 16, at 564-05.

40 See Paul Sutton, *Seminar on Small Island Developing States: Their Vulnerability, Their Program of Action for Sustainable Development, Their Opportunities for Post-Lomé*, Brussels, (1998), available at <http://www.oneworld.org/ecdpm/en/events/98013/sutton.htm>.

41 Akinkugbe, O. (2000), *supra* note 13, at 654-58.

42 Discussing the SADC's revealed comparative advantage ratios, *see supra* note 15, at 266.

which it produces at lower costs, relative to other countries.⁴³ According to Balassa, if the share of exports of a specific commodity from a country relative to total world trade in that commodity were higher than the share of its total exports in world trade, then the exporter had a comparative advantage in the export of that commodity.⁴⁴ Research up to 2000 shows that the export sectors showing the highest comparative advantage for the SADC include a cross section of agricultural, mining and manufacturing sectors. "However, even the manufacturing sectors that were identified were largely agricultural or mineral based, e.g. pulp and waste paper, iron and steel. "Given the size of the South African economy (reflected by its share of SADC exports of about 60 per cent) one would expect the relative comparative advantage to be heavily influenced by it."⁴⁵

Research on probable country specific implications of full implementation of the Agreement on Trade, Development and Cooperation between the European Community and the Republic of South Africa (1999) suggests that: 1) Namibia will encounter increased competition with South Africa with respect to fish products; 2) Mauritius' textile industry will significantly be altered; 3) Swaziland's competitive position might be altered in respect of pineapples and fruit juice; and 4) Tanzania, Zambia and Zimbabwe might face increased competition with South Africa in tobacco and cut flowers and buds.⁴⁶

It appears that the EU's strategy of entering separate trade liberalisation agreements with the SADC's most powerful Member State potentially rips apart the sub-region's aspirations of achieving economic autonomy by 2034. Established at the behest of sovereign independent States in order to promote their joint common interests, the WTO could do more to ensure that economic strategies adopted by States Parties:

- 1) do not foster economic dependence of developing States on their more developed counterparts. Such an effort would be consistent with the pursuit of international social justice⁴⁷ or what Gallagher calls the WTO's concept of balance and fairness; and
- 2) do more to promote economic, social and cultural rights envisioned in the U.N. International Convention on Social and Cultural Rights (ICESCR) (1966).⁴⁸

43 *Id.*

44 *See supra* note 15, at 267.

45 *See supra* note 15, at 275.

46 *See supra* note 13, at 657.

47 The preamble to the Constitution of the ILO opens: "Whereas universal and lasting peace can be established only if it is based upon social justice ..." International Labour Organisation Const., Preamble, <http://132.236.108.39:8050/publicenglish/about/iloconst.htm>.

48 *See* G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966).

Otherwise developing countries' two-thirds numerical majority⁴⁹ in the WTO on the one hand, and the WTO's claim to instituting balance and fairness in international economic life on the other will count for nothing. Numerical strength on its own is of no significance in international relations unless that majority includes the more powerful States who perceive national interest in a particular position.

Conclusion

It appears that strategies applied by the EU in relation to SADC potentially compel SADC economies to cope but not to compete with the EU. This begs the question whether the WTO's mission of facilitating market liberalization will reduce or add to international problems of poverty, third world debt and corruption. The psychology and dynamics of coping, evidence subservience and not mutual competitiveness. The WTO may do well to consider introducing both substantive and procedural mechanisms to counter further entrenchment of the coping/dominance dynamic in international trade. Prohibition against fragmenting of emergent supranational organizations intended to enhance economic autonomy and competitiveness of developing States through agreements with individual members of those emergent supranational organizations is a possible first substantive step that the WTO could make. To achieve this the WTO could use the ministerial forum to scrutinize compliance with that prohibition by drawing attention to agreements that have the potential to frustrate developing countries aspirations to economic autonomy.

49 Numerical strength in international organisations often counts for nothing. Real power lays with the common interest of the more powerful States. Progressive numerical majority of developing States, that coincided with decolonisation after WW II, prompted a reversal of the fortunes of the UN Security Council, which had seen a strengthening of the decision making capacity of UNGA before decolonisation, perhaps to avoid the sting of Russian and Chinese vetoes where the other five permanent member States of the Council preferred a particular outcome.