

**LLM (Human Rights and Democratisation in Africa) 2009**

**Trade Liberalisation and Human Rights Protection under the SADC**

Submitted in partial fulfillment of the requirements of the degree LLM (Human Rights and Democratisation in Africa) Faculty of Law, Centre for Human Rights, University of Pretoria

**By**

**Cláudio Castigo Foquiço**

**Student no 29648239**

**Prepared under the supervision of**

**Prof Fredrick Jjuuko**

**At the Faculty of Law, Makerere University  
Kampala, Uganda**

**29 October 2009**

**DECLARATION**

I, CLÁUDIO CASTIGO FOQUIÇO, do hereby declare that this research is my original work and that to the best of my knowledge and belief; it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

Date: .....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

Prof, Fredrick Jjuuko

Makerere University

Date:.....

### ***Dedication***

My mother, Maria Madalena Sebastião Foquiço you are the one and the only. Your unconditional support has led me thus far. God bless you! Mauro and Helena, I am proud to have you as a brother and girl friend.

All victims of unfair trade policies and practices in Africa...

## **ACKNOWLEDGEMENTS**

Thank God for leading me thus far in my struggles. You strengthened me and made me a believer. You also taught me through your divine knowledge to stand for justice and fairness.

The Centre for Human Rights, I express my gratitude and appreciation for such a wonderful programme. Well done!!! You have changed me for the better and I consider myself a real pan African now. Thanks to Prof Viljoen and Prof Hansungule for sharing their rich knowledge.

Waruguru, my tutor, Bonolo and Tshepo, my clinical group supervisors, many thanks for your valid comments and insights in my work throughout the semester in Pretoria.

Chinedu (the undisputed one), Chongo and Bonolo thank you for your insightful comments on the draft of this dissertation. Without your support, I would not be able to produce this piece of work.

I have never forget 1214, the place to be. Thanks to my housemates, you are the best. Thanks to the founding fathers of the Module 9 Team for entertaining us.

Prof Fredrick Jjuuko, special thanks for your insightful comments and your precious time in guiding me through my dissertation. Last but not least, thanks to Prof Ben Twinomugisha, the Dean of Faculty of Law, Makerere University and all the members of staff for the wonderful reception and hosting.

## List of abbreviations

<b>ACHPR</b>	African Charter on Human and Peoples' Rights
<b>AEC</b>	African Economic Community
<b>ACmHPR</b>	African Commission on Human and Peoples' Rights
<b>AU</b>	African Union
<b>CACM</b>	Central America Common Market
<b>CARICOM</b>	Caribbean Community and Common Market
<b>CMT</b>	Committee of Ministries Responsible for Trade
<b>CM</b>	Common Market
<b>CSOs</b>	Committee of Senior Officials
<b>CU</b>	Costumers Union
<b>DSB</b>	Dispute Settlement Body
<b>DSP</b>	Dispute Settlement Procedure
<b>EAC</b>	East African Community
<b>ECOWAS</b>	Economic Community of West African States
<b>EU</b>	European Union
<b>FTA</b>	Free Trade Area
<b>GATS</b>	General Agreement on Trade and Services
<b>GATT</b>	General Agreement on Tariffs and Trade
<b>G- 77</b>	Group Seventh Seven
<b>GDP</b>	Gross Domestic Product
<b>GSP</b>	General System of Preference
<b>ICE</b>	Intergovernmental Committee of Experts
<b>ICESCR</b>	International Convention on Economic, Social and Cultural Rights
<b>ICPPR</b>	International Convention on Civil and Political Rights
<b>ILO</b>	International Labour Organization
<b>IMF</b>	International Monetary Fund
<b>ITO</b>	International Trade Organization
<b>LDCs</b>	Low Developing Countries
<b>MERCOSUL</b>	Southern Cone Common Market
<b>MNF</b>	Most Favorable Nation
<b>MU</b>	Monetary Union

<b>NTBs</b>	Non- Tariffs Barriers
<b>NAFTA</b>	North America Free Trade Agreement
<b>OHCHR</b>	Office of the High Commissioner for Human Rights
<b>OAU</b>	Organization of African Unity
<b>RIAs</b>	Regional Integration Agreements
<b>RISDP</b>	Regional Indicative Strategic Development Plan
<b>SCC</b>	The Sub-committee on Customs Cooperation
<b>SACU</b>	Southern Africa Customs Union
<b>SADC</b>	Southern Africa Development Community
<b>SADCC</b>	Southern Africa Development Conference Coordination
<b>TCS</b>	Technical Committee on Sugar
<b>TNF</b>	Trade Negotiation Forum
<b>TRIPS</b>	Trade Relates Aspects of Intellectual Property Rights
<b>UDHR</b>	Universal Declaration on Human Rights
<b>UN</b>	United Nations Organization
<b>UNECA</b>	United Nations Economic Commission for Africa
<b>UNCTAD</b>	United Nations Conference for Trade And Development
<b>USA</b>	United States of America
<b>USAID</b>	United States Agency for International Development
<b>UNHCR</b>	United Nations High Commission on Human Rights
<b>WTO</b>	World Trade Organization

## TABLE OF CONTENTS

### Preliminaries

Declaration.....	ii
Dedication.....	iii
Acknowledgements.....	iv
List of Abbreviations.....	v

### CHAPTER I

#### Trade Liberalization and Human Rights Protection under the SADC

1. Introduction.....	1
1.1 Background to the research.....	1
1.2 Problem statement.....	2
1.3 Research question and Objectives.....	3
1.4 Significance and limitations of the research.....	3
1.5 Definition of terms.....	4
1.6 Methodology .....	4
1.7 Literature Review.....	5
1.8 Chapter breakdown.....	7

### CHAPTER II

#### Trade Liberalization and Human Rights: A historical trajectory

2. Introduction.....	9
2.1 Conceptual framework: human rights and trade liberalization.....	9
2.1.1 Human rights: from privilege to rights.....	9
2.1.2 Human rights: Universal dimension?.....	10
2.1.3 A new dynamic: 1990 onwards.....	12
2.2.1 Trade before GATT.....	13
2.2.2 Trade Liberalization under the GATT framework .....	13
2.2.3 Trade liberalization under the WTO framework.....	16
2.2.3.1 Basic principles.....	16
2.2.4 Doha declarations.....	18
2.2.4.1 The linkage between trade liberalization and human rights.....	19
2.2.4.2 Synergetic relation between trade liberalization and human rights.....	22

2.2.4.3	Contradictory relation between trade liberalization and human rights.....	22
2.2.4.4	Balancing trade liberalization and human rights.....	23
2.3	Conclusion.....	26

### **CHAPTER III**

#### **SADC TRADE REGIME**

3.	Introduction.....	27
3.1	Regional Integration Agreements (RIAs).....	28
3.1.1	From SADCC to SADC – Institutional reform.....	29
3.2	Conceptual framework on SADC Protocol on Trade.....	30
3.2.1	SADC trade protocol principles.....	31
3.2.2	Dispute Settlement Procedures.....	32
3.3	Implementation of SADC protocol on trade: achievements and setbacks.....	33
3.4	Conclusion.....	36

### **CHAPTER IV**

#### **ACHIEVING TRADE LIBERALIZATION AND HUMAN RIGHTS**

#### **PROTECTION IN SADC**

4.	Introduction.....	38
4.1	Human Rights framework in SADC Trade Regime.....	39
4.2	The Impact of SADC Protocol on Trade on the enjoyment of socio-economic rights.....	42
4.2.1	Education.....	43
4.2.2	Access to social services.....	44
4.2.3	Poverty and Inequality.....	44
4.2.4	Gender advancement.....	45
4.3	Mainstreaming human rights in SADC Protocol on Trade: feasible or utopian?..	45
4.4	Strengthening of human rights systems for effective protection in SADC.....	47
4.4.1	Why SADC Human Rights Committee?.....	47
4.5	Conclusions and recommendations.....	49
	Bibliography.....	51



## CHAPTER I

### Trade Liberalisation and Human Rights Protection under the SADC

#### 1. Introduction

The massive growth in international trade and the explosion of international technology are leading towards a world trading market and economic interdependence of various nations.<sup>1</sup>

##### 1.1 Background to the research

The economic devastation of 1929 and the end of Second World War in 1945 had significant impact on political change of the world economy. As a result, international trade increased dramatically due to the affirmation of United States of America (USA) as a new leader in world trade.<sup>2</sup> In 1948, the Havana Treaty, signed by 25 governments, established the International Trade Organisation (ITO) to reorganise the world economy.<sup>3</sup> Unfortunately, this organisation did not come into operation for political reasons and the General Agreement on Trade Tariffs was established. In the same year, the Universal Declaration of Human Rights (UDHR) was adopted in part because of the negative impact of the Second World War in every sphere of human life. Since then, we have seen parallel development on trade and human rights. On the one hand, regionalism has become a major component of the trade policy strategies of most countries in the world including African countries.

The end of cold war, in the early 1990s, the neo –liberal theories have contributed significantly to the globalisation of economies through growing economic interdependence, deregulation and the dominance of the market system.<sup>4</sup> Meanwhile, human rights movements increased dramatically during this time. For instance, we have seen the proliferation of many economic communities such as the European Union (EU) in 1957, the Central America Common Market (CACM) in 1960, Organisation of African Unity (OAU) in 1963, Economic Community of West African States (ECOWAS) in 1975

---

<sup>1</sup> M Samson *Essential International Trade Law* (2002) 3

<sup>2</sup> Samson( n 1 above) 9

<sup>3</sup> Samson( n1 above) 9

<sup>4</sup> D Shelton *Protecting Human Rights in Globalized World* (2002) 274

and Southern African Development Community (SADC) in 1980 just to mention a few.<sup>5</sup> On the other hand, the UDHR has been backed by a large number of international conventions and incorporated into the modern constitutions of many countries in the world. The International Covenant on Civil and Political Rights (ICCPR)<sup>6</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR) are the most significant conventions.<sup>7</sup> African countries welcomed regionalism as the trade policy strategy. It was seen as an opportunity to stimulate their economies and increase their market size to become more competitive in the global economy.<sup>8</sup> Despite that, most economies are not performing very well and poverty is still the major concern in Africa, particularly, in most sub-Saharan countries with limited development and economic potential.<sup>9</sup> As Amartya Sen points out elsewhere, liberal economies and economic welfare are fundamentals instrument for enabling and promoting individual freedom as the essential goal of economy and the most efficient mean to realising general welfare. The enjoyment of most human rights depends on access to scarce resources and on the governments' ability and efficiency on resource allocation. Therefore, most of African countries fail to comply with their international obligations under the ICCPR, the ICESCR, the African Charter on Human and Peoples' Rights (ACHPR) and other human rights instruments that they signed.

## 1.2 Problem statement

Southern African countries like other countries in the world adopted regionalism as strategy for trade. SADC member states agreed to adopt the Regional Indicative Strategic Development Plan (RISDP) by the Secretariat to complement restructuring and to provide a clear direction for SADC policies and programmes in order to maximise their benefits and boost their economies.<sup>10</sup> One of the top priorities is to promote trade

---

<sup>5</sup> P Chandra *International Politics* (1994) 184-192

<sup>6</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and *entry into force* 23 March 1976, in accordance with Article 49.

<sup>7</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and *entry into force* 3 January 1976, in accordance with article 27.

<sup>8</sup> OS Saasa, Economic cooperation and integration among developing countries, in OS Saasa (ed)*Economic integration and cooperation in Africa*, African Centre for Technology Studies, Nairobi(1991) 7–8.

<sup>9</sup> T. Kaime 'SADC and Human Security, fitting human rights into the trade matrix' (2004) 1 *African Security Review* 13

<sup>10</sup> UN Assembly resolution 2200A (XXI) ( n 7 above)

liberalisation and increase investment through the establishment of a SADC Common Market. In theory, it is strongly believed that liberalised trade should increase economic welfare but it is misconception that trade itself could bring positive impact on human life. Although liberalisation will bring enormous advantages, it is still not clear how and to what extent it will benefit the vulnerable people. For instance, economic development goes beyond the economic growth that is defined in quantitative macroeconomic terms which is state-centred conception of national income. It does not provide insightful information on the redistribution of resource in the country. From human rights perspective there is a need to reformulate such an approach. Sen's defines development as a freedom and it is empowerment and human capacity for personal self-development. Such an approach is more consistent with human rights dimension.

Indeed, trade liberalisation rules affect a wide range of aspects of the economy. When it is conducted with no regards to 'human rights dimension' and 'social safeguard' could lead to negative impact in many spheres of human life. For instance, generation of tax, increasing of Gross Development Product (GDP), job opportunities, access to technologies, and access to medicines, environmental and labour standards problems, individual freedom and security, freedom of movement and association are conditioned and affected by trade liberalisation rules.

### **1.3 Research question and Objectives**

The key research question in this research is: How can SADC achieve trade liberalisation and, at same time, ensure the human rights protection in the region? The purpose of this research is to examine SADC approach on the trade liberalisation process and its impact on the enjoyment of human rights. In addition, the research examines how the right –based approach on trade can successfully be used as a tool for the advancement of human rights in the SADC context.

### **1.4 Significance and limitations of the research**

This research aiming to provide in-depth analysis of the conceptual linkage between trade liberalisation and human rights and it will focus on the benefits of trade liberalisation for human rights protection. It will further contribute on the understanding of how to use human rights based approach to trade liberalisation to advance human rights in the SADC. This research is limited into two ways: first, there is

not much information available directly related to the topic and secondly, this research is limited to the SADC community but it will draw inspiration from other economic blocs and international instruments, which will inform the arguments.

### **1.5 Definition of terms**

*Trade liberalisation* – is removal of or reduction of trade practices that thwart free flow of goods and services from one nation to another. It includes dismantling of tariffs (such as duties, surcharges, and export subsidies) as well as non-tariff barriers (such as licensing, regulations, quotas, and arbitrary standards).<sup>11</sup>

*Free Trade Area (FTA)* – This is the most common form of integration and involves the elimination of tariffs among member states whilst each country maintains its own tariff and protection policy *vis-à-vis* the outside world, thus requiring strict Rules of Origin.<sup>12</sup>

*Human rights* - are commonly understood as inalienable fundamental rights to which a person is inherently entitled simply because she or he is a human being.<sup>13</sup>

*Rights-based approach to development* – is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. . . . [It] integrates the norms, standards and principles of the international human rights system into the plans, policies and processes of development.<sup>14</sup>

### **1.6 Methodology**

This research is conducted through secondary sources, such as books, work papers, reports, and journals. Interview will be conducted whenever possible. The research will further draw from relevant international instruments related to topic, resolutions and reports from the High Commission for Human Rights.<sup>15</sup> Above all, the

---

<sup>11</sup> <http://www.businessdictionary.com/definition/trade.html> (accessed 20 August 2009).

<sup>12</sup> Unpublished: SP Hess 'The New Economic Geography of a SADC Free Trade Area' unpublished Master Degree, Rhodes University, 2004 19

<sup>13</sup> M Sepulveda *et al*, *Human Rights concept, Ideas and fora* 2004

<sup>14</sup> <http://www.unhchr.ch/development/approaches-04.html> (accessed 22 August 2009)

<sup>15</sup> Office of High Commission for Human Rights *Trade and Human Rights*, 5<sup>th</sup> WTO Ministerial Conference, 10-14 September 2003.

author will adopt a critical approach to issues raised by literature and other sources of information.

## **1.7 Literature Review**

### **Human Rights**

*International Human Rights Law in Africa*,<sup>16</sup> by Professor Frans Viljoen provides a discussion of human rights protection from global to national perspective in African setting and focus particularly in African Regional System.

*International trade and human rights*<sup>17</sup> by Philippa Said discusses the inter-relation between trade and human rights and the implication of certain international trade regime and policies on human rights regime. In addition, she discusses the possibility of dispute being presented to the WTO Dispute Settlement Mechanism to resolve conflicts between trade rules and trade measures adopted by government to protect human rights.

*International Protection of Human Rights: Achievements and Challenges*<sup>18</sup> edited by Filipe Gomez Isa and Koen de Feyter provides general overview of international protection of human rights in the world from the antecedents of international protection of human rights including vicissitudes of human rights under the current process of globalisation.

### **International trade**

*Essential International Trade Law* by Michelle Samson<sup>19</sup> provides background of the General Agreement on Trade and Tariffs (GATT) and its relationship with WTO.

*Standards and Global trade: a voice for Africa*<sup>20</sup> provides an overview about the challenges and opportunities of African countries, which contributes with less than 2 per

---

<sup>16</sup> F. Viljoen *International Human Rights Law in Africa*(2007)

<sup>17</sup> P. Said 'International Trade and Human Rights' in *International yearbook of regional human rights Master's programmes 2006* (2008) 441

<sup>18</sup> FG Isa & K Feyter *International Protection of Human Rights: Achievements and Challenges* (2006)

<sup>19</sup> Samson (n 1 above) 11

<sup>20</sup> World Bank handbook *Development, Trade and the WTO: Standards and Global trade: a voice for Africa* (eds) B. Hoekman *et al* (2003)

cent of world trade, and proposes some reforms towards improvement of market access through standards compliances.

*World Trade Report 2004*, which explores the linkage between the domestic policy environment and international trade.<sup>21</sup>

### **International trade and human rights**

*Human rights and international trade* edited by Thomas Cotter & Joost Pauwelyn<sup>22</sup> discuss various issues concerning the linkage between human rights and trade.

*Tulane Journal of International and Comparative Law, Rethinking Trade and Human Rights*, by Andrew Lang<sup>23</sup> provides a discussion on the linkage of human rights and trade. Further argues that despite of growing number of literature in this topic, there is still lack of clarity and explicit thinking, for instance, on how human rights actors play an important role on trade policy debates.

*Economic Integration and human rights in Africa: a comment on conceptual linkage*, by Sisule Musungu<sup>24</sup> discusses the conceptual linkage from an African perspective within the legal framework of the economic blocs, including Southern African Development Community (SADC). The article does not provide in-depth details concerning human rights and trade regime and, consequently, does not address the subject matter of the present research.

Another article on *globalisation and human rights: Looking out for the welfare of the worst of*, by Eleanor Fox<sup>25</sup> discusses the impact of free trade on the enjoyment of human rights and suggests more flexibility on the part of WTO to engage in questions of

---

<sup>21</sup> World Trade Organization *World Trade Report: 2004 exploring the linkage between the domestic policy environment and international trade*

<sup>22</sup> T Cotter et al *Human rights and international trade*(2004)

<sup>23</sup> A. Lang *Rethinking Trade and Human Rights* (2007) 15 *Tulane Journal of International and Comparative Law* 1

<sup>24</sup> S Musungu 'Economic Integration and human rights in Africa: a comment on conceptual linkage' (2003) 94 *African Human Rights Law Journal* 3

<sup>25</sup> E Fox 'globalisation and human rights: Looking out for the welfare of the worst' (2003) 35 *NYU Journal of International Law and Politics*

human rights and highlight the Doha declaration as an important achievement concerning trade measures.

*A human rights approach to World Trade Organisation trade policy: another medium for the promotion of human rights in Africa*, by Omphemetse Sibanda<sup>26</sup> discusses the human rights approach to trade policy within the framework of WTO. In addition, it explores the opportunities where such policy can play a fundamental role in the promotion of human rights in Africa.

*Trade and human rights: a perspective for agents of trade policy using a rights based approach to development*, by Richard Oppong<sup>27</sup> discusses the negative impact of trade regimes on developing countries and offers a better scenario based on human rights principles that must inform the trade policy conception toward sustainable development.

## **1.8 Chapter breakdown**

This research comprises four chapters. The chapter one highlights the foundation and basic structure of the research. Chapter two provides a conceptual linkage between trade and human rights and how there are interrelated and affect each other. The chapter three focuses on SADC trade regime and its overall objective and its implementation so far, including elimination of tariffs and non-tariffs barriers. In the Chapter four as case study, it will analyse the importance of human rights approach to trade in SADC. This analysis will be undertaking in line with article 11 of the Convention on Economic and Socio-Cultural Rights (ICESCR), which recognise ‘the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions’. In addition, the analysis of this article will be corroborated with goal 1 of MDG’s- *eradicate extreme poverty and hunger* by 2015 against the trade regime background in SADC. Finally, the conclusion and recommendations will close the chapter.

---

<sup>26</sup> O Sibanda ‘A human rights approach to World Trade Organization trade policy: another medium for the promotion of human rights in Africa’ (2005) 5 *African Human Rights Law Journal* 387

<sup>27</sup> R Oppong ‘Trade and human rights: a perspective for agents of trade policy using a rights based approach to development’ (2006) 6 *African Human Rights Law Journal* 123

## CHAPTER II

### **Trade Liberalisation and Human Rights: A historical trajectory**

Liberalisation in the global regimes of trade, investment and finance does not, *ipso facto*, lead to impacts that are more positive on the well-being of humankind in general or to enhancement of economic development in particular. Nor does such liberalisation *necessarily* lead to greater protection and observation of human rights.<sup>28</sup>

#### **2. Introduction**

The previous chapter laid the foundation of the present research. This chapter analyses the historical trajectory of both regimes human rights and trade in order to understand their origins, complexity, nature and their purposes. Indeed, trade and human rights are complex and controversial issues on their own. Many scholars have argued for and against the linkage between those two regimes. Whatever arguments were put forward, the reality is that trade impacts on human rights either positively or negatively. The Office of the High Commissioner for Human Rights (OHCHR) demonstrated the linkage between trade and human rights at the fifth WTO Ministerial Conference in Cancun, Mexico. For instance, the respect for the human rights principle of non-discrimination should promote a shift of power relations in trade and equality of opportunity, which can influence positively the dynamics of economic growth and poverty reduction.<sup>29</sup> For the purpose of this research, the analysis of those regimes is explored in a pragmatic manner to understand how one affects the other and vice-versa.

#### **2.1 Conceptual framework: human rights and trade liberalisation**

##### **2.1.1 Human rights: from privilege to rights.**

The concept 'human rights' evolved over a long period and may be found both in 'Greek philosophy' and 'various world religions'. It can be traced back from *Magna Carta Libertatum in 1215* to the English *Bill of Rights* of 1689. These documents were

---

<sup>28</sup> UN Sub-Commission for the Promotion & Protection of Human Rights, Human rights as the primary objective of international trade , investment and finance policy practice, Working paper submitted by J. Oloka Onyango and D. Udagama, in accordance with Sub-Commission Resolution 1998/12, UN ESCOR, 51<sup>st</sup> Sess, E/ CN.4/Sub.2/ 1999/11,17 June 1999.

<sup>29</sup> World Bank *World Development Report 2000/2001: Attacking Poverty* 2001 56



the first attempt to claim rights, but it was not extensive to all individuals and it could be exercised only under certain circumstances. Rights incorporated in those charters, at some point in time, were perceived as a privilege. It would be conferred on an individual or certain groups of individuals based on their status. Over the ages, such perception was overtaken by events and the concept of liberty came to be understood as a right of all human beings. For instance, ‘the American Declaration of Independence of 1776 was based on the assumption that all human beings are equal.’ It also referred to certain inalienable rights, such as the right to life, liberty and the pursuit of happiness. The term human rights appeared for the first time in the French *Déclaration des Droits de l’Homme et du Citoyen* (1789).

The term human rights is perceived as a ‘special kind of moral claim’ before governments.<sup>30</sup> However, in order for such rights to have practical effects there is a need to enact laws to guarantee such rights. For instance, most human rights are incorporated in constitutions, in special sections or chapter, often called the Bill of Rights. They are constitutionally guaranteed in many countries and are used as an accountability mechanism.

At the end of the 19<sup>th</sup> century with industrialisation in Europe, the law of human rights emerged to address work concerns. The International Labour Organisation (ILO) was founded in 1919, and Labour rights were introduced.<sup>31</sup> ‘The Bern Convention of 1906 prohibiting night-shift work by women was one of the first multilateral conventions meant to safeguard social rights’. Despite that, human rights protection was not systematic under international law and, consequently, individuals were not subjects of international law. Only certain categories of peoples were granted protection such as slaves, minorities, foreigners, indigenous people etc. International law was an exclusive domain of states and only states were subject to normative frameworks such as laws, rules, and practices under international law.<sup>32</sup>

### **2.1.2 – Human rights: Universal dimension?**

---

<sup>30</sup> Viljoen ( n 16 above) 4

<sup>31</sup> International Federation for Human Rights *Understanding Global Trade & Human Rights*, Report and Resource Guide for National Human Rights NGOs in the view of the 2005 WTO Ministerial Conference, Hong Kong(MC6) 3

<sup>32</sup> Isa & Feyter *International Protection of Human Rights: Achievements and Challenges* (2006) 20-22

The atrocities of the Second World War marked a new era in international relations, international politics and, consequently, international law. It changed interstate relations and brought human rights within the sphere of international law through the Charter of the United Nations signed on 26 June 1945. In 1946, the establishment of UN High Commission on Human Rights (UNHCR) and the adoption by the UN General Assembly of the Universal Declaration on Human Rights (UDHR) on 10 December 1948 marked a beginning of internationalisation of human rights. Thus, human rights issues were no longer a matter of exclusive responsibility of the state and became ‘a legitimate concern of international community’ and the ‘state obligation under the international law.’<sup>33</sup>

In fact, the UDHR was a milestone in the history of human rights although was not legally binding. It was merely a declaration and to move beyond simple moral aspirations towards legal and systematic protection of such rights enshrined in the Declaration, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were adopted in 1966 and supervisory mechanism were created for monitoring compliance with these instruments.

Over the past few decades, many countries have joined the United Nations (UN) and have accepted the obligations spelt out in the UN Charter and the UDHR. In 1968, twenty years after the adoption of the UDHR, the first international human rights conference was convened to assess the progress made on the promotion and protection of human rights.<sup>34</sup>

The evolution of human rights protection also took place at the regional level. For instance, standards and supervisory mechanisms have been established in the European, the Inter-American and the African settings, to ensure human rights compliance in the respective regions. In Africa, the ACHPR<sup>35</sup> is the main human rights instrument that enshrines civil, political, economic and socio-cultural rights altogether. The implementation and the consolidation of human rights was not a smooth process, it had

---

<sup>33</sup> Isa & Feyter (n 32 above) 19

<sup>34</sup> Proclamation of Teheran, proclaimed by the International Conference on human rights at Teheran on 13 may 1968.

<sup>35</sup> C Heyns & M Killander *Compendium of Key Human Rights Documents of the African Union* (2007) 29

its own challenges and achievements. The political rivalry over the hegemony between former Soviet Union and the USA in the context of the cold war had a great impact on shaping the direction and implementation of human rights. For instance, English, American and French revolutions contributed significantly to the birth of civil and political rights, while the revolution of 1917 in Russia gave birth to socio-economic rights.<sup>36</sup> In addition, there is another justification for the separate adoption of the ICCPR and ICESCR, in the sense that, the ICCPR imposes negative obligations on the state while the ICESCR imposes positive obligations that require state intervention. In fact, this argument was widely accepted and most governments converted socio-economic rights into programmatic aspirations in their constitutions. But with increasing acceptance and recognition that all rights are interrelated as envisaged in the Vienna Declaration<sup>37</sup> the justiciability of socio-economic rights is gaining support and has been demonstrated in various jurisdictions like South Africa, India and Canada just to mention a few.

### **2.1.3 – A new dynamic: 1990 onwards**

The end of the Cold War brought some changes in the international arena that shaped the course of human rights progress in the world and in Africa, in particular. For instance, we witnessed political transformation across Africa in the early 1990s, such as the end of authoritarian regimes and democratic transitions across the continent. Although it is still doubtful today whether a transformation really occurred. At regional level, practical steps were taken to institutionalise and consolidate these norms.<sup>38</sup> In 1991, the Africa Economic Community (AEC) treaty under the auspices of the African Union (AU) was adopted in Abuja; it provides for the recognition, promotion and protection of human and peoples' rights in accordance with the ACHPR as a fundamental principle of the economic system.<sup>39</sup> It is clear that before this period economic development was not perceived in the context of human rights. Thus, such paradigm shift contributed significantly to reform of treaties of the sub regional economic institutions, such as SADC, ECOWAS and East African Community (EAC) to bring human rights issues under their mandate.<sup>40</sup> At national level by early 2000, at least

---

<sup>36</sup> Chandra ( n 5 above) 185

<sup>37</sup> World Conference on Human Rights (1993) UN. Doc.A/CONF.157/23,para 5.

<sup>38</sup> J Akokpari & D Zimble *African Human rights architecture* (2008) 233

<sup>39</sup> Akokpari & Zimble ( n 38 above) 233

<sup>40</sup> E L Ngugi 'The Impact of Globalisation on the Promotion and Protection of Human Rights in Africa' (2007) 1 *Malawi Law Journal* 160-161

twenty-four African countries had provisions in their laws for the establishment of human rights bodies.<sup>41</sup>

### **2.2.1 Trade before GATT**

There is evidence that trade dates as far back as ancient society where it involved exchanges of goods based on equivalent time and labor embodied to produce such goods. Nevertheless, the advent of class of traders changed the way trade was conducted. ‘The traders were intermediaries who buy a product below value from the producer and sell it above to the consumer.’<sup>42</sup> The greater the difference the greater was also the margin of profits. Perhaps was there were the principle of comparative advantage was applied even before scientific recognition.

During this time, two major movements influenced Africa: (1) the expansion and consolidation of Islam and (2) the dispersion of Bantu people, which prompted the development of many kingdoms and empires.<sup>43</sup> Since then, many events took place that prompted the change of the nature of trade. The first European contact with African was established by Portugal in fifteen and sixteen centuries and Britain, France and others on seventh and eighteen centuries. The slave trade so called triangle trade was established which consisted on: (1) taking manufactured goods from Europe to Africa, (2) shipping the slaves to the Americas and (3) return to Europe with produce from the slave-labor plantations, such as cotton, sugar, tobacco, rum, etc. This scenario was linked to the events in Europe due to industrialisation and their need for labor. After many years of slave trade and its abolition, the scramble for Africa marked the beginning of another era – the colonisation – that brought dramatic changes in all sphere of life of African people.

### **2.2.2 Trade Liberalisation under the GATT framework**

Before embarking on the concept of trade liberalisation it is important to understand, first, the concept of trade and its purpose and, second, the concept of trade liberalisation. ‘The term *trade* refers to commercial transactions involving the sale and purchase of goods, service or information.’<sup>44</sup> The economic theory suggests that the

---

<sup>41</sup> Unpublished: A J Osogo ‘Oval Slide in triangular spaces? Anchoring Human Rights Institutions in ‘tripartite’ Commonwealth Africa’ unpublished LLM thesis, University of Pretoria, 2006 2

<sup>42</sup> F Manji & P Burnett ‘From the slave trade to free trade, How trade undermines democracy and justice in Africa’ (2005) 1

<sup>43</sup> <http://africanhistory.about.com> (accessed 8 August 2009)

<sup>44</sup> <http://www.businessdictionary.com/definition/trade.html> (accessed 20 August 2009).

Internationalisation of trade is driven by comparative advantage due to abundant supplies of different commodities in certain countries. The *rationale* of comparative advantage is that the commodity in certain countries possesses is of value in another.<sup>45</sup>

Trade liberalisation – is the removal of or reduction of trade practices that thwart free flow of goods and services from one nation to another. It includes dismantling of tariffs (such as duties, surcharges, and export subsidies) as well as non-tariff barriers (such as licensing, regulations, quotas, and arbitrary standards).<sup>46</sup> It forms part of the process of economic globalisation where there is growing economic interdependence, deregulation, and the dominance of the market system.<sup>47</sup>

Two major factors prompted the paradigm shift of international economics.<sup>48</sup> First, the economic crisis of 1929 in the USA and second, the end of the Second World War, brought USA as a new leader in the international economy. To cope with its new role established Bretton Wood institutions, the World Bank and the International Monetary Fund (IMF) to regulate international investments and to address balance of payment problems respectively, and the ITO to regulate international trade issues. Unfortunately, the latter did not come into operation for political reasons. Thus, the GATT, adopted in 1947, became the main mechanism regulating the conduct of international trade.<sup>49</sup>

GATT requires states to eliminate quota restrictions on imports and preferential trading agreements in order to establish free markets.<sup>50</sup> GATT is a flexible institution with significant opportunities for countries to ‘opt out’ of specific disciplines.<sup>51</sup> Despite this agreement, the USA supported the establishment of the European Community in 1957 in order to facilitate greater economic harmonisation of Western Europe.<sup>52</sup> Conflicting geo-political interests drove such an approach between USA and the former Soviet Union towards the political hegemony through foreign policy. The bipolar division

---

<sup>45</sup> Values is determined by demand in the market unless is undermined by centralization. For details see Samson ( n 1 above) 3

<sup>46</sup> Samson ( n 1 above) 4

<sup>47</sup> Shelton (n 4 above) 274

<sup>48</sup> International Economics deals with economic interdependence among nations. Generally, it analyses the flow of goods, services, and payment between a nation and the rest of the world, the policies directed at regulating this flow, and their effect on the nation welfare. See. Salvatore *International Economics* (1995) 6

<sup>49</sup> A T Guzman ‘Global Governance and WTO’ (2004) 1 *Harvard International Law Journal* 45

<sup>50</sup> Akokpari & Zimble (n 38 above) 4

<sup>51</sup> B. Hoekman ‘The WTO: Functions and Basic Principles’ in Hoekman *et al* (n 20 above) 46

<sup>52</sup> Chandra ( n 5 above) 185

of power had an impact on developing countries (Non-alignment Movement) that wanted to pursue their development agenda without the influence of the East or West bloc.

As Roland has pointed out, the developing countries strategies in GATT must be analysed within the broad context of their activities in the United Nations Conference on Trade and Development (UNCTAD). Within UNCTAD, developing countries created coalition, so called G-77. The G-77 adopted a remarkable declaration that addresses issues of common concern in the first UNCTAD conference in Geneva in 1964. This was perhaps, the first call for greater international trade co-operation to address particular concerns of developing countries. For instance, insufficient transference of technology, increasing protection by developed countries through economic integration process, increased protectionism on agriculture products.<sup>53</sup> The G-77 and UNCTAD activities culminated in the implementation of the Generalised System of Preference (GSP) that laid the foundation for preferential treatment of developing countries, non-reciprocity, and preferential south-south trade.<sup>54</sup>

In the African context, from the very beginning of the decolonisation process in the 1960s, the establishment of sub regional economic communities (RECs) was a significant part of Africa's development strategy. During this period, under the auspices of the OAU, many development agreements were adopted.<sup>55</sup> For instance, the African Declaration on Cooperation, Development, and Economic Independence, the Revised Framework of Principles for the Implementation of the New International Economic Order in Africa were adopted in 1973 and 1976 respectively.<sup>56</sup> This trend culminated in the adoption of the Lagos Plan of Action for the Implementation of the Monrovia Strategy for the Economic Development of Africa. The Lagos Plan envisages the reorganisation of African economies on two fundamental premises: (1) *Self-reliance* entails shifting the production focus on primary commodities to manufacturing goods, and (2) *self-sustaining* development entails greater inter-African trade and

---

<sup>53</sup> S E Roland 'Developing countries coalition at the WTO: in Search of Legal Support' (2007) 48 *Harvard International Law Journal* 487-488

<sup>54</sup> Roland ( n 53 above) 488

<sup>55</sup> UNCTAD *Economic Development in Africa Strengthening Regional Integration for Africa' Development* (2009) 8

<sup>56</sup> C Ake *Democracy and Development in Africa* (2004) 22

cooperation.<sup>57</sup> Unfortunately, this plan was not implement owing to conflicting agendas and divergent interests between donor institutions and African leaders.

In the mid-1980s, the Bretton Wood institutions, World Bank and IMF, came up with Structural Adjustment Programmes (SAPs), which served as a platform for African countries, on individual basis, to begin the trade liberalisation process. This approach contributed significantly to the changing of focus to a developmental agenda.<sup>58</sup> However, regional approach to development is still relevant and a crucial tool for Africa's development. For instance, the AEC treaty adopted in 1991<sup>59</sup> is practical expression. It also provides for the recognition, promotion and protection of human and peoples' rights in accordance with the ACHPR as a fundamental principle of the economic system.<sup>60</sup>

### **2.2.3 – Trade liberalisation under the WTO framework**

The WTO was established in 1995 and its main function is to administer trade agreements negotiated by its members, including the GATT, General Agreement on Trade and Services (GATS), and the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement. The WTO's establishment is one of the outcomes of the Uruguay Round of multilateral talks concluded in 1994 after eight years of negotiations.<sup>61</sup> In this sense, the WTO is a forum for international cooperation on trade-related policies. Unlike its predecessor GATT, WTO rules apply to all members.<sup>62</sup>

#### **2.2.3.1 Basic principles**

The WTO activities are guided by basic principles such as, non-discrimination, reciprocity, binding and enforceable commitments, and transparency. These principles are of paramount importance, in the sense that, trade policies must follow those guiding principles.

#### **Non-discrimination** (articles I and III of the GATT)

---

<sup>57</sup> Ake (n 56 above) 22-23

<sup>58</sup> Samson ( n 1 above) 9

<sup>59</sup> The treaty establishing the AEC was adopted in Abuja, Nigeria, in 1991 and entered into force in 1994, which the AEC form an integral part of the Organization of Africa Union (OAU). For the text of AEC treaty, see [www.africa-union.org](http://www.africa-union.org) ( accessed 7 May 2009)

<sup>60</sup> Musungu ( n 24 above) 91

<sup>61</sup> Hoekman ( n 51 above) 41

<sup>62</sup> Hoekman (n 51 above) 41

The non-discrimination principle ensures that WTO member states give the same treatment to members and non-members of the WTO. Under this principle, there are two major components: first, The Most-Favoured-Nation (MFN) rules require that a member state grant a product manufactured in one member state the same treatment like goods that originate from any other country. Second, the National Treatment principle requires that foreign goods, 'once they complied with applicable border measures, enjoy the same treatment in terms of internal (indirect) taxation like domestically produced goods.'<sup>63</sup>

### **Reciprocity**

Reciprocity is a fundamental principle governing negotiations among the WTO member states. It represents mutual or corresponding concession of advantages or privileges for the commercial relations between two countries. It can reflect the scope of free trade or expansion of trade liberalisation through market access.<sup>64</sup>

### **Binding and Enforceable Commitments**

This principle relies on the non-discrimination principle in the sense that market access commitments are ensured and maintained on a non-discriminatory basis. For instance, the tariffs commitments agreed upon by WTO members in a multilateral trade negotiations and on accession are enumerated in the schedule lists of concessions according to article II of GATT.<sup>65</sup> Once those commitments are binding, there is no room for other measures. In the case of non-compliance of such commitments that is perceived by other countries as a harmful practice, the affected country may bring the situation to the attention of the government concerned in order to redress the situation. The affected country may invoke WTO dispute settlement procedure to adjudicate the matter.<sup>66</sup>

### **Transparency**

Transparency is a fundamental principle of the WTO and it is enshrined in articles X of the GATT and III of the GATS.<sup>67</sup> WTO members are legally obliged to publish their trade regulations in order to allow their scrutiny through review of

---

<sup>63</sup> Chandra ( n 25 above) 43

<sup>64</sup> J M Finger & L A Winters 'Reciprocity in the WTO' in B Hoekman *et al* (n 20 above) 50-51

<sup>65</sup> UNCTAD ( n 55 above) 43

<sup>66</sup> UNCTAD (n 55 above) 43

<sup>67</sup> UNCTAD (n 55 above) 43



administrative decisions affecting trade, to notify changes in trade policies to its peers, etc. Despite some positive progress in the WTO concerning trade discipline, the organisation was criticised for not consider non-trade issues that have been affected by its activities. Many scholars suggested that WTO should expand its mandate to incorporate non-trade issues to cover issues such as environmental policy, human rights, labor and competition policy.<sup>68</sup> The growing dissatisfaction with WTO *modus operandi* resulted in the boycott in the WTO's 1999 Ministerial Conference at Seattle.

#### **2.2.4 – Doha declarations**

The Ministerial Conference often called the Doha Round, which was launched in 2001 with the aim of redressing the imbalances in the Global Trading System by taking care of developing countries' development concerns resulted in the adoption of the Doha Declarations.<sup>69</sup> It comprises declaration on the TRIPS agreements and public health, decisions on implementation-related issues and concerns, Agreement on agriculture, trade related investment measures. Perhaps, the most influential insights came from the OHCHR in the form of several reports submitted for discussion in the WTO ministerial round on Agricultural liberalisation and right to food,<sup>70</sup> the liberalisation of trade in services,<sup>71</sup> investment liberalisation,<sup>72</sup> just to mention a few.

In the African context, some interesting developments took place in 2001, these includes the change of Constitutive Act of the OAU for the establishment of the AU and the adoption of the New Partnership for African Development (NEPAD) as a new African initiative. NEPAD focuses on the provision of essential regional public goods, such as transport, energy, water, information and communication technology, disease eradication, environmental preservation and provision of regional research capacity, as

---

<sup>68</sup> UNCTAD (n 55 above) 304

<sup>69</sup> WTO Doha Declarations, *Doha Development Agenda in Ministerial Conference*, Fourth Session- Doha, 9-14 November (2001)

<sup>70</sup> High Commissioner for Human Rights, *Globalisation and its impact on full enjoyment of Human Rights*, Report of the High Commissioner for Human Rights, submitted in Accordance with Commission Human Rights resolution 2001/32, delivered to the Sub-commission on the Promotion and the Protection of Human Rights UN Doc.e/CN4/Sub2/2001/54 (January 15, 2002).

<sup>71</sup> High Commissioner for Human Rights, *Liberalization of Trade in Services and Human Rights*, Report of the High Commissioner for Human Rights, delivered to the Sub-commission on the Promotion and the Protection of Human Rights UN Doc.e/CN4/Sub2/2002/9 (June 25, 2002).

<sup>72</sup> High Commissioner for Human Rights, *Human Rights, Trade and Investment*, Report of the High Commissioner for Human Rights, delivered to the Sub-commission on the Promotion and the Protection of Human Rights UN Doc.e/CN4/Sub2/2003/9 (July 2, 2003).

well as the promotion of intra-African trade and investments.<sup>73</sup> The *rationale* is to identify common projects and programmes of the member states and harmonise it through economic and investment policies and practices to cement the regional development programmes.

#### **2.2.4. 1 The linkage between trade liberalisation and human rights**

The relationship between trade and human rights has mostly been contradictory even before the adoption of the UDHR. For instance, the slave trade, which was practiced for centuries, is the most unjust form of trade since the advent of humanity. In 1807, attempts to abolish slave trade were made, first by Britain, and then by USA. In 1810, British negotiated an agreement with Portugal calling for gradual abolition of slave trade. Then, the humanity witness two major events, scramble for Africa where colonial masters convened in Berlin in 1884-1885 divided arbitrarily Africa and First World War in 1914-1918. One year latter, the League of Nations was established as an international organisation to bring new international world order entrenched on peace and security. Despite the effort made to bring such an order the organisation failed. Then, from in 1939 – 1945 the Second World War took place. This cycle of events brought uncertainty and fear about the future of humanity because of the devastating impact of war in human lives.

President F D Roosevelt and Winston Churchill launched the premises on which the new international world order should be based in 1941 in their speeches to launch the Atlantic Charter. As Kaufmann has pointed out ‘this new world was to rest on four pillars, trade and finance on the one hand, and peace and human rights on the other.’<sup>74</sup> The Bretton Woods institutions were created to deal with the first two and the last two were left to the establishment of the UN.

The linkage between trade and human rights has always been implicit ever since the inception of the UN. For instance, article 55 of the UN Charter <sup>75</sup> provides that:

---

<sup>73</sup> UNCTAD (n 55 above) 9

<sup>74</sup> C B Kaufmann ‘The Legal Matrix of Human Rights and Trade Law: State Obligations versus Private Rights and Obligations’ in T Cottier et al (eds) *Human Rights and International trade* (2004) 96

<sup>75</sup> The Charter of the United Nations was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945. The Charter was subjected to several amendments.

With a view to the creation of conditions of stability and well-being are necessary for the peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health and related problems, and international cultural and educational co-operation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

The article above established a stepping-stone on which interstate relations should be based and it encourages collaboration in seeking for common solutions for common problems. The *modus operandi* was left to the total discretion of states with regard to its implementation. Since then, interesting developments have taken place in the international arena. For instance, in 1947, GATT came into operation and became the main international trade mechanism for more than four decades until its replacement by the WTO. In 1948, the UDHR was adopted and the Human Rights Committee (HRC) was also established. But, the events in the international arena contributed to those two regimes taking divergent direction.

Both institutions had specific mandates. The reality is that human beings were always the core of their activities and their impacts inevitably affect them. Thus, the activities undertaken by those institutions always influenced, directly or indirectly, positively or negatively, a human life in every sphere with particular relevance to the socio-economic dimension. For instance, the preamble of the Marrakesh agreement defines the objective of the WTO in the following terms:

Raising standard of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment.<sup>76</sup>

From the quote above, it is evident that WTO's objective is in conformity with pillars established under the UN Charter. Indeed, some argue that the linkage between

---

<sup>76</sup> Marrakesh Agreement establishing the World Trade Organization. Available at [www.wto.org](http://www.wto.org) ( accessed 21 April 2009)

trade and human rights is reiterated in article 28 of the UDHR, which states that, 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.'<sup>77</sup> Although human rights are not referred to in this agreement and other WTO agreements, it is clear that their objective is consistent with human rights at least at the framework level. However, the main concern is that the way such activities are undertaken to attain these goals remains problematic and critical. Herein lies the human rights concerns, in the sense that the means applied by WTO to achieve these goals are inconsistent to some extent with human rights values.

The increasing influence of economic globalisation prompted steady growth of interdependence among states across the globe, which inevitably was accompanied by the erosion of the power of individual states to control and take decisions over their economies.<sup>78</sup> Besides, the international financial institutions designed and recommended policies to the developing countries. These policies had, to some extent, detrimental effects on economies and on peoples live e.g. SAPs.<sup>79</sup> It is certainly a violation of the right to development. The right to development is a human right which demands participation, self-determination, and sovereignty.<sup>80</sup>

In fact, states are better placed to reconcile trade interests and human rights protection under their domestic jurisdictions. Advocates for economic globalisation assert that trade is a driving force for enhanced productivity, innovation, promotion of development, democracy, and global governance with the positive influence on general welfare. Opponents of globalisation assert that it is the rule of corporations over governments and people. For instance, millions of people do not benefit from economic globalisation and some products are manufactured under blatant human rights violations. Indeed, one would agree with Elias Ngugi, who pointed out that globalisation is like a double-edged sword, which cuts both ways.<sup>81</sup> Moreover, Fox who demonstrates the synergistic and conflicting intersection between human rights and trade support this view.<sup>82</sup>

---

<sup>77</sup> See 'Universal Declaration on Human Rights' in Sepulveda *et al* (n 13 above)

<sup>78</sup> C Dommen 'Human Rights and Trade: Two Practical Suggestions for Promoting Coordination and Coherence' in T Cottier *et al* (n 74 above) 200

<sup>79</sup> R H Webber *International Technical Assistance Measures* (2003) 1338-1352

<sup>80</sup> UN Declaration on the Right to Development, UN G.A., 41st Sess., A/RES/41/128 (1986), available at [www.unhchr.ch/html/menu3/b/74.htm](http://www.unhchr.ch/html/menu3/b/74.htm) (accessed 13 May 2009).

<sup>81</sup> Ngugi (As n 40 above) 156

<sup>82</sup> Fox (n 25 above) 203

#### **2.2.4.2 – Synergetic relation between trade liberalisation and human rights**

Trade liberalisation may have positive impacts on the enjoyment of human rights when it functions efficiently through the adoption and implementation of good policies. For instance, the Doha Declarations, allow nations to take advantage of TRIPS flexibilities in order to address public health problems through compulsory licensing (intervening to restrict patent monopolies and provide access to generic drugs) and parallel importation (bringing in cheaper drugs from another country) in certain circumstances.<sup>83</sup> However, the problem is only partially resolved because the state can use such flexibilities only in case of emergency. Another important aspect of the Doha Declarations is the Agreement on Agriculture governed by paragraphs 13 and 14. It recognises the particular concerns and needs of ‘developing countries to effectively take care of their development needs, including food security and rural development.’<sup>84</sup> It is certainly relevant progress for development of developing countries that rely on agriculture as the dominant source of livelihood.

#### **2.2.4.3 – Contradictory relation between trade liberalisation and human rights**

The assumption is that trade liberalisation contributes to economic growth and the general welfare of the people. As Oloka Onyango and Udagama have pointed out, it does not operate automatically since there are other factors to consider.<sup>85</sup> For instance, many developing and Least Developed Countries (LDCs) do not provide product patents on pharmaceutical and food products but Article 27 of the TRIPS Agreement states that patents shall be available to all inventions, whether process or products.<sup>86</sup> Adopting a product patent for pharmaceuticals will definitely have an impact on affordability of medicines due to increase of prices. India did not provide patents for pharmaceuticals in order to make the medicine affordable to the vulnerable groups in India.<sup>87</sup> India is a member of the WTO. The WTO is a ‘single undertaking’ system that is binding to all

---

<sup>83</sup> P Ranjan ‘International Trade and Human Rights: Conflicting Obligations’ in T Cottier *et al* (n 74 above) 314

<sup>84</sup> WTO, *Doha Ministerial Declaration*, Nov. 14, 2001, WT/MIN (01)/DEC/1, para. 13, available at [www.wto.org/english/thewto\\_e/minist\\_e/mino1\\_e/mindecl\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/mino1_e/mindecl_e.htm) (accessed 13 September 2009)

<sup>85</sup> Oloka Onyango & Udagama (n 28 above) para 34

<sup>86</sup> See Art 27.1 of the TRIPS Agreement. Available at [www.wto.org](http://www.wto.org) (accessed 13 September 2009)

<sup>87</sup> ‘Vulnerable or marginalized group’, in a particular setting differs according to various existing socio-economic factors and it should be noted that women, children, indigenous people and people living with HIV and people living with disability have, on different occasions been identified as vulnerable groups. In the context of right to health, Henys & Bekker argue that ‘vulnerable groups enjoy special attention’. See Henys & Bekker in Bekker (ed) (2005) 5

members. For this reason, in 2005, the India patent law was amended to conform to international obligations under the WTO laws and to accommodate product patent protection to all products including food, medicine, and drugs.<sup>88</sup> This will be the case for Uganda and other LDCs in the near future. Uganda was allowed, under WTO rules, to implement, in 2006, the TRIPS Agreement and its enforcement is suspended until 2016.<sup>89</sup>

The right to health is enshrined in Article 12 of the ICESCR, which recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. In addition, Article 2 of the ICESCR states that each party to the Covenant is obliged 'to take steps...to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised. In doing so, the government priority should ensure that vulnerable groups have access to at least a basic level of socio-economic rights, such as primary health care, shelter, food, basic education, etc.<sup>90</sup>

Another example is the case of liberalisation of services. Indeed, it has had, to some extent, detrimental effects for developing countries such as Bolivia where the government privatised the water sector and, consequently, worsened the affordability of such a precious liquid to its population due to the increase of water the price. This encouraged civil society to protest against this measure, which culminated in a near break down of law and order.<sup>91</sup> Scenarios like this are driven by competition for trade investment that results in, some occasion 'race to bottom.'<sup>92</sup> For instance, some countries have either exempted Export Processing Zones that have direct impact on the pattern of tax revenue or 'relaxed existing national labor safeguards' in such zones.<sup>93</sup>

#### **2.2.4.4 – Balancing trade liberalisation and human rights**

---

<sup>88</sup> Ranjan (n 83 above) 314

<sup>89</sup> Doha Declaration on TRIPS and Public Health allows LDCs, including Uganda to postpone patent rights affecting medicine until 2016. See Dommen in T Cottier *et al* (n 74 above) 203

<sup>90</sup> General Comment No.3, paragraphs 10-12

<sup>91</sup> International Federation (n 31 above) 7

<sup>92</sup> The 'race to the bottom' refers to the phenomenon whereby 'states around the world, but particularly in the geopolitical South have felt compelled to ease labor standards, modify tax regulations, and to generally relax standards of scrutiny and oversight in the bid to attract [Foreign Direct Investment] in a mercilessly competitive global economic system' Onyango & Udagama ( n 28 above) para 34

<sup>93</sup> Oloka Onyango & Udagama ( n 28 above) para 34

Freedom is a common feature in trade and human rights. International trade law is primarily aimed towards reducing trade protectionism and improving conditions of international competition and human rights laws are primarily aimed towards elimination of inequalities and social injustice. Trade decisions are most of the time, if not always, based on cost benefit approach and it contrasts fundamentally with the very essence of human rights, which is based on values-based approach. Both regimes leave states with residual margin of discretion to take decision due to parallel international obligations. The main issue is to balance those interests in order to achieve sustainable development.<sup>94</sup> The World Bank recognises in their policies that ‘sustainable development is impossible without human rights consideration’ just as ‘the advancement of an interconnected set of human rights is impossible without development.’<sup>95</sup> The solution for balancing human rights and trade liberalisation commitments is a two-way traffic. On the one hand, using the WTO framework to enforce human rights (as general exceptions clauses on TRIPS agreement article 27.2, GATT article XX, GATS, article XIV). On the other hand, enhance access to information and active participation in the WTO agreements.

The critical question is what is the way forward? In the first place, the answer to this question is not easy considering that states have human rights obligations concurrent with their trade commitments in trade agreements. It leaves government under difficult conditions to make an assertive and balanced decision in circumstance of competing policy options. Thus, their starting point to conciliate trade and human rights concerns is the most synergetic and harmonious manner under the three general exceptions clause.<sup>96</sup> Secondly, from human rights perspective, as argued by Dommen,<sup>97</sup> the yardstick to conciliate human rights and trade commitments in policy making is to prioritise the most vulnerable and marginalise groups. Economist Amartya Sen also supports this approach, ‘the poor face the greatest hurdles to being able to lead the kind

---

<sup>94</sup> The Brundtland Report, World Commission on Environment and Development (WCED), *Our Common Future* UN Doc. A/42/47 (1987) defines sustainable development as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs.’

<sup>95</sup> E U Petersmann ‘Bridging Foundations Human Rights and International Trade Law: Defining and Connecting the Two Fields’ in T Cottier *et al International Trade and Human Rights* (2004) 42

<sup>96</sup> The first is the exception allowing states to take measures for the protection of public morals. The second is the exception allowing measures for the protection of human, animal and plant life or health. The third allows measures for the protection of public order/ordre public. It appears in TRIPS, GPA and GATS. See OHCHR *Human Rights and World Trade Agreements-Using General Exceptions Clauses to Protect Human Rights*(2005) 4

<sup>97</sup> Dommen in T Cottier *et al* (n 74 above) 200-201

of life they value and therefore the most deserving of urgent policy attention.<sup>98</sup> And thirdly, human rights law also requires availability of information and people's participation in the decision-making process that affects them.<sup>99</sup> Lastly, 'better communication and coordination between the relevant ministries at national level is an important step for promoting coherence.'<sup>100</sup> Indeed, National Human Rights Institutions (NHRIs) can be resourceful in providing technical support to relevant ministries in the policy making process to enhance coherence.

At the international level, trade sanctions can be used to punish human rights violators. But, the effectiveness of such measures is questionable. Jackson, for instance, observes that many enterprises and their leaders in the USA argue that the use of trade sanctions is self-defeating and only permit competing nations and firms to come in to fill the gap.<sup>101</sup> Petersmann argues that:<sup>102</sup>

The jurisprudence of WTO dispute settlement bodies, the European Court of Justice, and the European Court of Human Rights suggested that conflicts between human rights and trade to be resolved 'through interpretation, mutual balance, reconciliation of relevant trade rules and human rights without recourse to the contested *ius cogens* core and *erga omnes* character of human rights.

It seems that this view is pragmatic and moderate to settle any disputes that may arise in the context of conflicting situation between human rights and trade. But, this is one side of the picture and may occur when human rights have already been violated. In this case, the matter is already before the court to be addressed in contentious manners since all peaceful means to settle the dispute friendly has been exhausted. Indeed, this approach is applicable as a measure of last resort. The concern is to conciliate and balance human rights obligations and trade commitment in the broad context; in other words the balance and mutual interests of trade commitments and human rights obligations should be consider in the policy making process in order to come up with

---

<sup>98</sup> Quoted in Dommen in T Cottier *et al* (n 74 above) 202

<sup>99</sup> See Art. 19 and 25 of ICCPR provides freedom of access to information, and the right to participate in public affairs, respectively.

<sup>100</sup> Coherence acknowledges that policies are inter-dependent, and that poor policy or neglect in one area can undermine the efficacy of effort. Mutually supportive approaches in related areas of policy are likely to produce greater harmony between intent and outcome. See WTO Report (n 21 above) 90

<sup>101</sup> Unpublished: E Baim 'The Linkage between Human Rights and Trade and Parallel International Obligations: The GATT, The ICESCR and Health Services' unpublished LLD thesis, University of Pretoria, 2005 32

<sup>102</sup> Petersmann in T Cottier *et al* (n 95 above) 34



fair policies. In fact, even though the policy can be well designed, implementation also matters. So far, human rights has played more reactive role than proactive one. Now is the time for those strategies to change and tackle the issues in the policy making level; in other words, human rights lawyers cannot concentrate solely through this legalistic and narrow approach to enforce human rights.

After all, there is a need to expand focus to the area of the trade policy making process in order to capture relevant trade policy aspects that may represent an abstract danger to human rights in the wake of their implementation. There is also a need for co-operation and more coordination in order to enhance coherence in the policy making process and its implementation. At the international level, it can be done through close cooperation and coordination between the OHCHR and the WTO in the policy making process. At the national level, the NHRIs can play an important role in assisting relevant ministries in policy making process particularly with regard to the human rights implications of trade policies. Currently there is a gap in the regional and sub-regional levels to fill in.

### **2.3 Conclusion**

In brief, the relationship has been mostly contradictory with human rights before the adoption of UDHR and the dramatic event is the slave trade. But the things have come a long way since then and many events shaped the nature of trade and human rights which culminated in the internationalisation of those two regimes. For instance, the establishment of GATT, then WTO introduced trade liberalisation and the UN adopted the UDHR, which was backed by ICCPR, ICESCR, and other human rights instruments. In WTO, the Doha Declarations marked another era of WTO policy decision-making. In fact, the human rights dimension became a consideration factor on trade policy making under the WTO. This is evident in WTO agreements, such as TRIPS and its impact on human health, agricultural liberalisation and the right to food just to mention a few. In spite of human rights relevance under the WTO trade policy-making process, there is still need for the establishment of a coherent policy framework.

## CHAPTER III

### SADC TRADE REGIME

From a world order perspective the role of regionalism is to help create a new equilibrium in politics that balances the protection of the vulnerable and the interest of the humanity as a whole (including future generations) against the integrative, technological dynamic associated with globalism.<sup>103</sup>

### 3. Introduction

The success of the EU integration process encouraged many attempts at economic integration among groups of developing countries as a means to stimulate their economic development. In fact, most of these attempts culminated in marginal achievement or collapse. For instance, the CACM established in 1960 by Costa Rica, El Salvador, Guatemala, Honduras, collapsed in 1969 and reestablished in 1990; the Common Markets of the South (MERCOSUL) established in 1991 by Argentina, Brazil, Paraguay, and Uruguay, which is still operational until today. Other examples are the case of the East African Community (EAC), which was established in 1967 by Kenya, Tanzania and Uganda and collapsed in 1977 and reestablished in 1999 by Kenya, Tanzania and Uganda and, subsequently, joined by Rwanda and Burundi.<sup>104</sup> Former Southern African Development Conference Coordination (SADCC) now SADC established in 1980 by nine southern African states is also part of this trend and the list goes on.

The previous chapter focused on trade liberalisation and the human rights trajectory since their inception until now where there is increasing acceptance that human rights and trade are interconnected. This chapter focuses particularly on an analysis of the SADC Protocol on Trade as a case study. Since the SADC Protocol on Trade does not operate in a vacuum there is need to analyse it in context. 'The regional integration approach to development has always been on the agenda of African leaders

---

<sup>103</sup> W Hout 'International Relations and the new regionalism' in DC Bach (1999) (ed) Routledge *Regionalism Across the North-South Divide-state strategy and globalisation* (1999) 25

<sup>104</sup> Akokpari & Zimbler (n 38 above) 234

ever since independence.<sup>105</sup> The analysis of the SADC Protocol on Trade is carried out within framework of Regional Integration Agreements (RIAs).

### **3.1 Regional Integration Agreements (RIAs)**

RIAs involve discrimination against non-member states resulting in preferential liberalisation among member states exclusively. In principle, such arrangements are inconsistent with WTO principles and the most-favorable nation (MNF) rule. The WTO imposes on its members discipline aiming to regulate trade conduct through such agreements.<sup>106</sup>

There are four traditional forms of RIAs, explained as follows:

1. *Free Trade Area (FTA)* – is the most common form of integration and involves the elimination of tariffs among member states whilst each country maintains its own tariff and protection policy towards the rest of the world, thus requiring strict Rules of Origin. A recent example is North American Free Trade Agreement (NAFTA), incorporating the USA, Canada and Mexico.

2. *Customs Union (CU)* – the second step of regional integration requires the region to adopt a common external tariff and eliminate internal trade barriers. This can be seen in the Southern African Customs Union (SACU) involving Botswana, Lesotho, Namibia, South Africa and Swaziland.

3. *Common Market* – a Common Market removes all barriers on trade among members, harmonises trade policies toward the rest of the world, and allows the free movement of labor and capital among member states.<sup>107</sup> An example of a common market is the CARICOM.

4. *Economic Union* – this is the most comprehensive form of regional integration where national economic policies and institutions are unified with supreme institutions having jurisdiction in all member states. If eventually a common currency is adopted the area

---

<sup>105</sup> DC Bach 'Regionalism versus regional integration: the emergence of a new paradigm in Africa' in (ed) Routledge *Regionalism Across the North-South Divide-state strategy and globalisation*(1999) 152

<sup>106</sup> SEATINI ( Southern & Eastern African Trade, Information and Negotiations Institute) 'The WTO in brief' (2002) 2

<sup>107</sup> Salvatore (n 48 above) 741

becomes a *monetary union*. The best example is the EU. For instance, SADC Central Bank will be established by 2016.<sup>108</sup> Two years after, regional currency will be launched.

Actually, a common feature of regional institutional arrangements in the world and Africa in particular, including SADC is intergovernmental coordination as opposed to a supra-national body, which implies surrender of state sovereignty.<sup>109</sup> For instance, the EU is the only example in the world with a supranational structure. The intergovernmental institutional arrangement perhaps poses challenges for successful economic integration. Many developing countries are not willing to relinquish part of their sovereign to a supranational community body. This would avoid the current scenario of double membership in SADC. It poses practical and technical difficulties in integration process. In addition to that, benefits are not equitably distributed among members. Instead, the benefits are most likely to accrue mainly to the most advanced nation in the group.

### **3.1.1 From SADCC to SADC – Institutional reform**

As referred in the chapter I, SADC was established for two reasons: first, the joint co-operation for the sustainable social and economic development of their people and the economies of member states as a whole; and second, the economic liberation of member states from the then apartheid regime in South Africa.<sup>110</sup> But the course of events prompted the institutional reform in SADC.<sup>111</sup> The SADC treaty signed in Namibia in 1992 by 10 member countries introduces the SADC regional integration mechanism; outlines its aims and objectives. The organisation membership has expanded to 14 states, which includes Angola, Botswana, The Democratic Republic of Congo (DRC), Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.<sup>112</sup> One of the SADC fundamental goals is to achieve development and economic growth in order to alleviate poverty and, consequently, enhance the standard of living of the people in southern Africa and support the socially disadvantaged through regional integration.<sup>113</sup>

---

<sup>108</sup> SADC FTA handbook *Growth, Development and Wealth Creation* (2008) 5

<sup>109</sup> Bach in Bach ( n 105 above) 153

<sup>110</sup> Preamble to the Memorandum of Understanding of the Institutions of the Southern Africa Development Coordination Conference reprinted in SADCC: A handbook, SADCC, Gaborone (1988) 3

<sup>111</sup> [www.sadc.int/](http://www.sadc.int/) (accessed on 30 April 2009)

<sup>112</sup> The Preamble of the SADC Treaty adopted in 1992, Windhoek, Namibia on the 17th day of August 1992 amended at Blantyre2001

<sup>113</sup> SADC Treat(n 112 above) Article 5(1) (a)

The general environment in the continent also influenced changes in SADC. The AEC treaty was adopted under the auspices of the OAU now AU to pursue the economic integration of Africa.<sup>114</sup> The EAC treaty in line with 1980 Lagos Plan of Action and Final Act of Lagos, toward gradual process of economic integration.<sup>115</sup> ‘The AEC treaty establishes the recognition, promotion and protection of human and peoples’ rights in accordance with the ACHPR as a fundamental principle of the economic system.’<sup>116</sup> Thus, most RECs amended their treaties, including SADC, ECOWAS and EAC was revived, to bring the human rights dimension under their developmental agenda. Some scholars argue that the increased dominance of neo-liberal economic and political ideology under globalisation has encouraged a paradigm shift in the discourse of human rights as a pre-condition to obtain aid and western investment.<sup>117</sup>

As from 2007, the overall income of the SADC market is US\$ 431 billions and the total population is 247 million. South Africa is certainly the biggest economy in the SADC region with GDP of US\$ 282 billions, representing 65 per cent of total SADC market. The GDP growth rate is 7 per cent in countries like Malawi, Mozambique and Tanzania and Angola, the fastest growth economy with an estimate growth rate of 21 per cent.<sup>118</sup>

### **3.2 Conceptual framework on SADC Protocol on Trade**

The SADC Protocol on Trade<sup>119</sup> is the legal basis for the establishment of FTA. It aimed for the gradual implementation of a FTA with 85 per cent tariff reduction by 2008 and 100 per cent tariff reduction by 2012.<sup>120</sup> SADC’s deeper integration process comprises five stages namely, FTA, Customs Union (CU), Common Market (CM), and Monetary Union (MU).<sup>121</sup>The process will take at least ten years (2008-2018). The SADC Protocol on Trade envisages further liberalisation on intra-regional trade on goods and services, efficient production among its member states, improvement of national and foreign investment conditions, fostering economic development through diversification

---

<sup>114</sup> EC Treaty ( n 59 above)

<sup>115</sup> Musungu ( n 24 above) 91

<sup>116</sup> Musungu n 24 above) 91

<sup>117</sup> Akokpari & Zimble ( n 38 above) 3

<sup>118</sup> SADC FTA handbook( n 108 above) 3

<sup>119</sup> The Protocol on Trade signed in 1996 and entered into force on 2000. See, SADC FTA Handbook (n 107 above) 3-4

<sup>120</sup> Kaime (n 9 above) 109

<sup>121</sup> SADC FTA handbook(n 107 above) 5

and industrialisation of the region on the basis of fair, mutually equitable and beneficial trade agreements.<sup>122</sup>

To enhance its coordination and maximise the benefits of economic integration, the SADC member states adopted the RISDP.<sup>123</sup> RISDP is a 15-year regional integration development framework adopted by the secretariat to complement restructuring of SADC institutions and provide a clear direction for SADC policies and programmes.<sup>124</sup> SADC is expected to eliminate tariffs barriers to intra-trade<sup>125</sup>, import and export duties<sup>126</sup>, and eliminate non-tariffs barriers (NTBs).<sup>127</sup>

The SADC Protocol on Trade comprises trade on goods, trade related investment matters, and other trade related issues, including trade in services, intellectual property, and competition policy. In addition, the SADC Protocol on Trade provides for general exceptions on trade measures. Such exceptions may be invoked to suspend certain trade measures or to safeguard certain interests. Under such circumstances, a member state can rely on grounds like protection of public morals or to maintain public order, human, animal or plant life or health, to secure compliance with provision of the WTO. Also, protect intellectual property, prevent deceptive trade practices and ensure compliance with existing obligations under international agreements etc.<sup>128</sup> In addition, the Protocol also envisages exceptions for security reasons<sup>129</sup> and National Treatment.<sup>130</sup> The other aspects envisaged in the Protocol follow the WTO Trade Laws regime, such as Sanitary and Phytosanitary Measures, Standards and Technical Regulation on Trade, Anti-Dumping Measures, etc.

### **3.2.1 SADC Trade Protocol principles**

The adoption of the SADC Protocol on Trade derives from the article 22 of the SADC treaty, which expressly calls for the conclusion of Protocols as may be necessary in each area of cooperation within the community. The SADC Protocol on Trade is in line

---

<sup>122</sup> SADC Protocol on Trade, Article (2)

<sup>123</sup> SADC RISDP adopted on August 2003 at an Extra-ordinary Summit of Heads of States and Government in Windhoek, Namibia available at [www.sadc.int/](http://www.sadc.int/) (accessed 30 April 2009)

<sup>124</sup> SADC RISDP (n 123 above) 2

<sup>125</sup> SADC Protocol on Trade (n 122 above) Article (3)

<sup>126</sup> SADC Protocol on Trade (n 122 above) Articles (3) (4)

<sup>127</sup> SADC Protocol on Trade (n 122 above) Articles (6) (7) (8)

<sup>128</sup> SADC Protocol on Trade (n 122 above) Article (9)

<sup>129</sup> SADC Protocol on Trade (n 122 above) Article (10)

<sup>130</sup> SADC Protocol on Trade (n 122 above) Article (11)

with principles enshrined in article 4 of the SADC treaty such as, sovereign equality of all member states; solidarity, peace and security; human rights, democracy and the rule of law; equity, balance and mutual benefit and peaceful settlement of disputes. Besides, institutions such as the Committee of Ministries responsible for Trade (CMT), the Committee of Senior Officials (CSO) and Trade Negotiation Forum (TNF) were established and each has its specific mandate. For instance, the CMT, which comprises ministries of member states responsible for trade matters, supervises the implementation of the Protocol on Trade. In the same way, the CMT provides oversight of the CSO and sub-committees established under the Protocol on Trade. The CSO, which is composed of permanent secretaries responsible for trade acts as the technical advisory body and reports to the CMT on matters related to the provisions of the Protocol on Trade, monitors its implementation and supervises the TNF. The TNF mandate has to do with SADC trade negotiations conduct in general. Monitoring the effects of trade liberalisation, and linking the trade liberalisation process to regional cooperation in other sectors is also part of its mandate and report to the CSO.<sup>131</sup>

Further, a number of technical committees and sub-committees were set up to monitor the implementation of specific provisions and related aspects of the Protocol on Trade. The Committees and Sub-committees have their own thematic areas, including the Technical Committee on Sugar (TCS), the Sub-committee on Customs Cooperation (SCC) and the Sub-committee on Trade Facilitation (STF).<sup>132</sup> In case of violation of such principles, the Protocol also envisages the enforcement mechanism, which is discussed next.

### **3.2.2 Dispute Settlement Procedures**

Another relevant aspect is the SADC Dispute Settlement Procedure (DSP). The SADC DSP is similar to the WTO Dispute Settlement System. In WTO, the Dispute Settlement Body (DSB) comprises all WTO members, and they have the authority to establish panels, maintain surveillance of the implementation of decisions and recommendations, and authorise suspension of concessions etc.<sup>133</sup> The same applies to SADC DSP *mutatis mutandi*. The SADC DSP is enshrined in article 32 of the SADC

---

<sup>131</sup> SADC Protocol on Trade (n 122 above) Article (31)

<sup>132</sup> SADC FTA handbook(n 108 above) 5-6

<sup>133</sup> V Delich 'Developing Countries and the WTO Dispute Settlement System' in Hoekman *et al* (n 20 above)

Protocol on Trade, which envisages that member states shall endeavour to agree on the interpretation and application of Protocol on Trade through co-operation and consultation, to arrive at mutually satisfactory agreement. If eventually the disagreement arises in the wake of implementation of any measure, the panel of trade expert is established to settle the dispute. A member state must first request bilateral consultations. If consultations fail to settle the dispute, the complainant state may request the establishment of a panel.

In this case, the CMT in SADC will do the appointment of the trade expert panel to solve the dispute.<sup>134</sup> If eventually, the CMT fails to resolve the dispute in a friendly settlement it will refer the matter to the SADC Tribunal as a measure of last resort as provided in article 32 of the SADC treaty, which states that:

Any dispute arising from the interpretation or application of this Treaty, the interpretation, application or validity of Protocols or other subsidiary instruments made under this Treaty, which cannot be settled amicably, shall be referred to the Tribunal.

Actually, any dispute arising under trade agreements between member states unless otherwise stated shall be in principle settled *amicable* as a materialisation of the principle of peaceful settlement of disputes.<sup>135</sup> If eventually all deployed means to settle the dispute amicably have failed, which means that all friendly settlement options deemed necessary to settle the dispute have been deployed and failed to achieve a suitable solution, the matter is referred to the SADC tribunal as the ultimate organ to resolve the matter.<sup>136</sup> The SADC Tribunal decisions are final and binding.<sup>137</sup> The SADC Tribunal just like other institutions in SADC is bound by the principles enshrined in the SADC treaty, including human rights.<sup>138</sup>

### **3.3 Implementation of SADC Protocol on Trade: achievements and setbacks**

---

<sup>134</sup> SADC Protocol on Trade (n 122 above) 31 (2) (c)

<sup>135</sup> SADC treaty (n 112 above) article 4(e)

<sup>136</sup> The SADC tribunal became fully operational in 2005 five years after the adoption of the Protocol on Tribunal and the Rules of Procedure in 2000. In principle, the tribunal was established in 1992 as one of the SADC institutions. See Southern African Development Community Tribunal (SADC) *About the SADC tribunal* 1

<sup>137</sup> SADC Treaty (n 112 above) Article 16 (5)

<sup>138</sup> SADC Treaty (n 112 above) Article 4(c)



The SADC Protocol on Trade began its implementation in 2000 and is yet to be full implemented.<sup>139</sup> In fact, in January of 2008 12 SADC member states established an FTA, Angola and Madagascar acceded to the Protocol and the DRC is yet to join.<sup>140</sup> The more developed member states, such as South Africa and Southern African Customs Union (SACU), countries – Botswana, Lesotho, Namibia and Swaziland – removed most tariffs. Middle-income countries such as Mauritius reduced tariffs gradually over 8 years as stipulated in the SADC Protocol on Trade. For the Least LDCs such as Mozambique and Zambia tariffs reduction started much later, in 2007 to 2008.<sup>141</sup>

According to the agreed time frame, the CU negotiations are yet to be completed by 2010.<sup>142</sup> There are two antagonist positions concerning the uniform tariffs. Arguments for uniform tariffs are based on political economic considerations and administrative convenience. Arguments against uniformity have to do with the protection of infant industries, revenue or balance of payment considerations. The first supports the position that with uniform tariffs, the level of imports is likely to be higher, it can enhance transparency and administrative simplicity of uniformity in customs clearance procedures and the level of corruption are likely to be lower. The latter supports the view that temporary tariffs may be useful in order to protect infant industries in the respective countries so that they can generate benefits for the economy as a whole.<sup>143</sup> According to economists, the broader access to global market is inevitable since SADC does not have market of large scale to offer variety, quality and low cost of capital and intermediate goods necessary for the local industries to compete.<sup>144</sup> Indeed, the protectionism will help to develop their local market but at the same time will undermine its competitiveness in the global markets.<sup>145</sup>

In 2004, the preliminary assessment conducted to evaluate the implementation of the SADC Protocol on Trade identified a number of challenges, such as Rules of Origin constraints, back-loaded tariffs liberalisation schedules and technical problems in

---

<sup>139</sup> UNECA Economic Commission for Africa: Southern Africa, Fourteenth Meeting of the Inter-governmental Committee of Expert for Southern Africa(ICE) *Progress and Challenges Towards the Attainment of a Free Trade Area and a Customs Union in Southern Africa* (2008) 2

<sup>140</sup> Southern Africa Global Competitive Hub *Audit of the Implementation of the SADC Protocol on Trade* (2007) 4

<sup>141</sup> SADC FTA Handbook (n 108 above) 7

<sup>142</sup> SADC FTA Handbook (n 108 above) 5

<sup>143</sup> Delich (n 131 above) in Hoekman *et al* (n 20 above) 531

<sup>144</sup> SADC Secretariat Report *Evaluation of an Appropriate Model for a SADC Customs Union* (2007) 83

<sup>145</sup> SADC Secretariat Report (n 144 above) 83

executing tariffs reduction. For instance, the audit found that Mozambique, Malawi, Tanzania and Zimbabwe are delaying on the implementation of their tariff phase down schedules.<sup>146</sup> Malawi, Mozambique and Zambia in achieving their tariffs reduction schedules are expected to drop in custom revenue at least no more than five per cent.<sup>147</sup>

Finally, the Audit Report made a number of recommendations, including consistence and transparency in the implementation of phase down schedules, acceleration of the implementation for countries that had back loaded their tariff cuts. Also, recommended the elimination of any tariff below five per cent and establishment of an effective monitoring mechanism to assist member states in the implementation of the Protocol on Trade both at national and regional levels.<sup>148</sup> Despite that, the intra-trade in SADC is relatively open in Angola, Mauritius, Lesotho and Swaziland and only Namibia and Zambia showed decline in last fifteen years.<sup>149</sup>

In 2007, the final assessment was conducted by United States Agency for International Development (USAID) in order to assess the progress made by SADC on the implementation of the SADC Protocol on Trade and previous recommendations related to its full implementation. According to the Audit Report, trade facilitation instruments were adopted including, revised SADC Rules of Origin, Peer Review Mechanism for SADC custom administrative and other administrative measures.<sup>150</sup>

Despite all that, there are other challenges facing its implementation as identified in the Audit Report. For instance, the inadequate flow of information of other SADC member states makes trade co-operation very difficult (as the case of Malawi where the SADC publication is not displayed to the public); capacity constraint to cope with the implementation of trade facilitation instruments (the case of Namibia). Countries like Tanzania and Zambia are facing challenges in implementing effectively trade facilitation measures due to, in part, double membership. Besides the SADC membership, these countries have membership in EAC and the Common Market of

---

<sup>146</sup> SADC Audit Report (n 140 above) 2

<sup>147</sup> UNECA (n 139 above) 9

<sup>148</sup> UNECA (n 139 above) 4-5

<sup>149</sup> SADC Secretariat Report (n 144 above)13

<sup>150</sup> SADC Transit Regulations, Model SADC MOU, SADC Transit Customs Bond Guarantee Scheme, Rules of Origins Manuals for Officials and Traders, SADC Code of Conduct for Customs Officials, Common Customs Documentation and Guideline for the completion of SADC Customs Documentation which only Botswana reviewed.

Eastern and Southern Africa (COMESA), respectively. Thus far, South Africa is the only country implementing successfully all trade facilitation measures in the region.

Other challenges have also been identified, for instance, small-scale trade is not contemplated in the tariff reduction scheme. From the point of view of business people, there is need to reduce time-consuming custom procedures, bureaucracy, import duties and taxes to be paid in cash through trade facilitation and, export and import licensing and permits, current custom tariffs as trade barrier to be improved through liberalisation. In addition, other identified challenges were high transport costs, poor transport infrastructure and high communication costs.<sup>151</sup>

In 2008, the same challenges were raised in the Fourteenth Meeting of the Intergovernmental Committee of Experts for Southern Africa (ICE), including the lack of a compensatory mechanism in case of losses in revenue for some SADC countries in the integration process and the Rules of Origin as a major obstacle for deeper integration. Double membership is also an obstacle for deeper integration and the lack of an affective institutional framework to facilitate the implementation of agreements.<sup>152</sup> One of the recommendations made by the ICE was that member states will need to find alternative means of raising state revenues, strengthen secretariats in human resources and financially, etc.<sup>153</sup>

### **3.4 Conclusion**

Despite all the measures taken and efforts made thus far on the implementation of SADC Protocol on trade, its achievements remain marginal. There is a wide range of challenges on the full implementation of such Protocol from weak enforcement mechanisms to inadequate resources to sustain the project. This scenario was aggravated by the global economic crisis and eventually its impact will have an adverse effect on the time frame of the implementation of the regional integration process in the SADC. African States, including SADC countries are still premised on colonial structures and it can be evidenced through trade patterns (import and export inflow). In fact, SADC countries are still dependent on customs revenue, and import duties.

---

<sup>151</sup> SADC Secretariat Report (n 143 above) 6

<sup>152</sup> UNECA (n 139 above) 8

<sup>153</sup> UNECA (n 139 above) 12

Besides, there is a need to rethink the SADC structure itself and a supranational structure is most likely to be a better option. A supranational structure would be ideal because it implies surrender of sovereignty and it would affect positively the commitment of member states to the integration process. In fact, a supranational structure would go beyond policies and programmes coordination. It would be helpful in addressing issues of enforcement mechanisms and double membership since the laws, regulations and decisions would have direct application to the national jurisdiction of member states. But, it poses challenges due to political, economic and socio-cultural factors such as political will to surrender sovereignty, land distribution and ethnicity issues that characterise most African countries.

## CHAPTER IV

### ACHIEVING TRADE LIBERALISATION AND HUMAN RIGHTS PROTECTION IN SADC

Without an effective government role in redistribution, markets have failed to guarantee basic human needs or the conditions in which everyone can secure an adequate standard of living consistent with human rights.<sup>154</sup>

#### 4. Introduction

Since the previous chapters focused on a general discussion of the relationship between trade liberalisation and human rights in the SADC trade regime, this chapter focuses specifically on a critical analysis of the SADC trade liberalisation process and human rights protection in the SADC. The question this research attempts to answer is; how can SADC achieve trade liberalisation and, at same time, ensure the human rights protection in the region? This is challenging question considering the current scenario within SADC. In fact, SADC member states have international obligations in human rights law and trade agreements. On the one hand, the majority of SADC member states have ratified the ICESCR<sup>155</sup> and all of them are party to the ACHPR<sup>156</sup>. On the other hand, all SADC member states are members of the WTO, which is the only international organisation regulating trade conduct and binds all member states, including those in SADC.

This research focuses particularly on socio-economic rights; but it first, acknowledges human rights as universal, interdependent, indivisible and inalienable in nature. Second, the current human rights architecture in the world, including in the SADC region is inherently the outcome of a dichotomy between the ICCPR and ICESCR created by the cold war, which is no longer suitable for current challenges. Finally,

---

<sup>154</sup> Center For Economic and Social Rights, *Human Rights and the Global Economic Crisis, consequences, Causes and Responses* (2009) 4 available at [www.icescr.org](http://www.icescr.org) ( accessed 20 August 2009)

<sup>155</sup> Angola acceded on 10 January 1992; The Democratic Republic of Congo acceded on 01 November 1976; Lesotho acceded on 09 September 1992; Madagascar ratified on 22 September 1971; Malawi acceded on 22 December 1993; Mauritius acceded on 12 December 1973; Namibia acceded on 28 November 1994; Swaziland acceded on 26 March 2004 and Zimbabwe acceded on 13 May 1991 available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV3&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV3&chapter=4&lang=en) (access ed 12 October 2009).

<sup>156</sup> Heyns & Killander (n 35 above) 355-357

human rights are more reactive than proactive and perhaps it would be acceptable due to the context within which they emerged in the past. However, the current challenges pose a pressing need to rethink human rights approach. Building on these premises, this chapter has one major objective, namely: to examine critically from a human rights based approach to development, the extent to which trade liberalisation is taking place and how it can ensure human rights protection in general and the realisation of socio-economic rights in particular, including the right to an adequate standard of living. Finally, the chapter provides suggestions on liberalising trade without compromising human rights advancement.

#### **4.1 Human Rights framework in SADC Trade Regime**

A human rights approach to development requires that ‘all developmental processes’ embrace human rights principles and standards. For this reason, it first requires that ‘programmes of development cooperation, policies and technical assistance enable the progressive realisation of human rights.’ Secondly, that human rights standards and principles guide all development processes. And thirdly, that the programmes of development cooperation contribute to enhancement of the states’ capacity as duty bearers to meet their obligations and of right holders to claim their rights.<sup>157</sup> Anyway, this leads to the following questions: 1) what the state is doing? 2) How much effort is the state deploying? And; 3) how is the state going about the process?<sup>158</sup> To answer these questions, first, the people need to have access of information of government activities and other non-state actors. Second, the people need to be empowered to participate actively in developmental processes. Article 11 of the IECSCR, recognises:

the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

In fact, one of the SADC objectives as provided in article 5 (1) (a) of its treaty is to:

---

<sup>157</sup> The State of the World’s Children *The Human Rights Based Approach statement of common understanding* (2004) 91-92

<sup>158</sup> A E Yamin ‘Beyond Compassion: the central role of accountability in applying human rights framework to health’ (2008) 2 *Harvard Human Rights Journal* 10

achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration;

According to article 2 of the ICESCR, each state party to the ICESCR is obliged to ‘take steps’ individually and through international assistance and co-operation towards full realisation of the rights enshrined in the Covenant. Besides, the States as duty bearers have obligations; to respect, to protect, and to fulfill the rights contained in the Covenant.<sup>159</sup> Under international human rights law, the obligation to *respect* these rights imposes negative obligations on the duty bearers. It requires that states refrain from actions that interfere with individuals realising their rights such as depriving or limiting equal access for all persons to the right to ‘an adequate standard of living.’ The obligation to *protect* requires that states prevent interference by third parties with the enjoyment of these rights. For instance, by ensuring that deceptive trade practices do not undermine the right to ‘an adequate standard of living.’ Thus, states establish institutions and other measures deemed necessary to ensure the protection of such rights. Finally, the obligation to *fulfill* requires states to ‘adopt appropriate legislative, administrative, budgetary, judicial, promotional, and other measures toward the full realisation of the rights, including right to an adequate standard of living [...] and to the continuous improvement of living conditions.’<sup>160</sup> According to General Comments 12 and 13, the obligation to fulfill incorporates both an obligation to facilitate and to provide and this includes promotion as provided in paragraph 33 of the General Comment 14.<sup>161</sup>

The purpose of advocating for a human rights framework in the realm of trade agreements is not to jeopardise trade agreement goals but to humanise trade agreements by bringing them in line with human rights principles and standards. For instance, the implementation of the SADC Protocol on Trade is not an end in itself, rather it is a means to an end, a means to achieve development, economic growth and enhance the standard of living. In fact, it falls under the scope of the international cooperation efforts of SADC member states.

---

<sup>159</sup> Petersmann in T Cottier *et al* (n 95 above) 64

<sup>160</sup> Petersmann in T Cottier *et al* (n 95 above) 64

<sup>161</sup> K Lucke ‘State’s and Private Actor’s Obligations under International Human Rights Law and the Draft UN Norms’ in T Cottier *et al* (n 95 above) 152

In 2000, the ICESCR was backed by the Millennium Development Goals (MDGs) launched by the UN. MDGs are benchmark which set eight goals for states to achieve in 15 years and the respective indicators to evaluate its implementation, including poverty eradication and hunger. According to the 1990 World Development Report, poverty is defined as the ‘inability to attain minimum standard of living measured in terms of basic consumption needs or income required to satisfy them.’<sup>162</sup> But, from human rights based approach to development, poverty is understood differently:<sup>163</sup>

Poverty is not simply a lack of material goods and opportunities such as employment, ownership of productive assets and savings. It is also the lack of physical and social goods, such as health, physical integrity, freedom from fear and violence, social belonging, cultural identity, organisational capacity, the ability to exert political influence, and the ability to live in respect and dignity.

It is believed that to realise progressively ‘the right of everyone to an adequate standard of living and the continuous improvement of living conditions’ there is an essential need to eradicate poverty and hunger. This particular goal aims at reducing by half, the proportion of people living on less than a dollar per day as well as achieving full and productive employment and decent work for all, including women and young people. Further, it includes reducing by half the proportion of people who suffer from hunger.<sup>164</sup> But, these indicators do not reflect a human rights approach since they are mainly concerned with statistics as opposed to distribution. There is need for a human rights framework to ensure that distributional policies are established since the traditional approach has failed to do so. There is a need ‘to be transformative’ and for that, the right to information and participation are essential ingredients since:<sup>165</sup>

Human rights are fundamentally concerned with empowerment. This can be understood as an expansion of people’s capabilities and freedoms to participate in, negotiate with, influence, control and hold accountable institutions that affect their lives.

---

<sup>162</sup> World Bank World development Report 1990 quoted in A. Banjo in ‘A Review of Poverty Studies, Drivers and Redressive Strategies in Southern Africa’(2009) 10 *Journal of Sustainable Development in Africa* 3

<sup>163</sup> UN Office of the High Commissioner of Human Rights *Claiming the Millennium Development Goals: A human Rights Approach* (2008) 7

<sup>164</sup> Millennium Development Goals (MDGs) are eight goals to concerning world’s main development challenges to be achieved by 2015. The MDGs are drawn from the actions and targets contained in the Millennium Declaration that was adopted by 189 nations and signed by 147 head of states and governments during the UN Millennium Summit in September 2000.

<sup>165</sup> UN OHCHR (n 163 above) 11



The SADC Executive Secretary, Tomás Salomão in a pre-council media brief said that ‘SADC is determined to play its role in enabling member states to meet the MDGs through the implementation of the RISDP.’<sup>166</sup> So far, the advantages of the SADC trade liberalisation in the enjoyment of human rights are yet to be seen.

#### **4.2 The Impact of SADC Protocol on Trade on the enjoyment of Socio-economic Rights**

A recent study conducted by the Southern Africa Development Research Network (SADRN)<sup>167</sup> found that the implementation of the SADC Protocol on Trade has contributed significantly to the total export in SADC during 2000 to 2006. For instance, in 2000, at the time of the implementation of the SADC Protocol on trade, SADC total exports were over US\$ 50 billion. By the end of 2006, it increased exponentially to over US\$113 billion, which represents more than 100 per cent growth per annum during the abovementioned time. Despite this increase driven by the rise of oil prices and Angola’s economic stability, the pattern of exported products in SADC since the implementation of the SADC Protocol on Trade remains mostly the same.<sup>168</sup> For instance, the mineral fuels and oils, pearls and precious metals were the most exported products and accounted for 20.3 per cent and 19.2 per cent, respectively of overall trade export. Still, mineral fuels and oils experienced steady growth of more than 12 per cent and by the end of the 2006 accounted for 32.9 per cent. In addition, the Study found that:<sup>169</sup>

[...] the European Union (EU) accounted for most of SADC exports by value (about US\$16.74 billion), followed by Eastern Asia with US\$ 8.6 billion, North American Free Trade Area(NAFTA) with US\$ 7.23 billion, lastly SADC itself and Common Markets of the South (MERCOSUL) with US\$ 5.58 and US\$ 2.15 billion, respectively.

---

<sup>166</sup> Pre-Council Media Briefing Note By the Executive Secretary of SADC(2005) available at [www.sadc.int/](http://www.sadc.int/) (accessed 7 April 2009)

<sup>167</sup> M Kabala & M Tsedu ‘Regional Trade Agreements, Effects and Opportunities: Southern Africa Development Network Implementation of the SADC Trade Protocol and the Intra-SADC Trade Performance’ (2008)

<sup>168</sup> Kabala & Tsedu (n 167 above) 8

<sup>169</sup> Kabala & Tsedu (n 167 above) 5

While SADC's trade with the rest of the world experienced growth due to substantial increase in SADC's total export, the SADC-intra trade experienced marginal decline as found in the same study:<sup>170</sup>

Intra-SADC's export share at that point accounted 10.9% of the total, and by the end of the period, it had declined to less than one tenth of total exports. It is also interesting to note that in 2000, the value of export to the EU were double those to Eastern Asia, however that difference was reduced to US\$ 2.6 billion in 2006. This is mainly due to the role and impact of China's activities in the region and on the whole African continent.

Despite such trends, there is no direct evidence of trade liberalisation impact on the enjoyment of human rights so far. Further, it is difficult to get reliable data of SADC activities because some of the member states do not report their activities.<sup>171</sup> Thus, a recent study conducted by the Centre for Policies Studies, which relied mostly on the UN Human Development Index (HDI)<sup>172</sup> provides an assessment of human development in SADC from 1990 to 2008.<sup>173</sup> The study assesses the state of progress in human development and focuses on key development indicators: (1) demographic trends (annual population growth rate, population size and the rate of urbanization);<sup>174</sup> (2) access to social services (sanitation, water, electricity); (3) indicators of inequality (HIV prevalence, Infant Mortality, Gini index<sup>175</sup> and Safety and Security) and (4) gender advancement. It is interesting to note that the United Nations Development Programme (UNDP) classifies countries into three categories namely High, Medium and Low Human Development. In the case of SADC, countries having Low Human Development are Angola, the DRC, Malawi, Mozambique, Tanzania and Zambia (with values ranging from 0.499 – 0.336).<sup>176</sup> The study concluded that over these periods SADC countries performed poorly.

#### **4.2.1 Education**

---

<sup>170</sup> Kabala & Tsedu (n 167 above) 6

<sup>171</sup> Kabala & Tsedu (n 167 above) 3

<sup>172</sup> The concept of Human Development Index (HDI) considers three basic dimensions of human development like longevity, knowledge and standard of living. The HDI is calculated at five-yearly intervals. The HDI scores ranges from 0 to 1. Values closest to 1 indicate the highest HDI status whereas scores closest to 0, the lowest.

<sup>173</sup> R. Richards, 'Assessing human development in SADC: 1990 – 2008'(2008) 52

<sup>174</sup> The DRC has the largest population, followed by South Africa and Tanzania. In 2005, these countries had 58.7 millions, 47.9 millions and 38.5 millions, respectively. See: Richard(n 172 above) 3

<sup>175</sup> Gini Index uses as indicators unemployment, HIV prevalence, infant mortality and the incident of crimes.

<sup>176</sup> Richard(n 172 above) 2

By 2005 the SADC countries with the highest HDI scores was Seychelles, Mauritius and South Africa. Seychelles, South Africa, Mauritius and Botswana experienced increases in educational enrolment *ratio*. South Africa and Seychelles have made the highest expenditure in education (5.4 percent of overall budget), preceded by Lesotho (13.4 per cent), Botswana (10.7 percent), Namibia (6.9 percent) and Swaziland (6.2 percent). Mauritius, Lesotho, Mozambique and Tanzania and South Africa experienced the highest enrolment rate in tertiary education. Mauritius registered the highest rate with 26 per cent, Lesotho, Mozambique and Tanzania with 24 per cent, and South Africa, with 20 percent. In the same period, 2000 -2005 Zimbabwe experienced a steady decline in HDI.

#### **4.2.2 Access to social services**

According to the study, between 1994 and 2004, most SADC countries experienced improvement in access to basic services that improve quality of life and standard of living with emphasis on sanitation by countries like Malawi, the DRC and Zambia. In the same period, countries like Angola, Malawi, Namibia and Tanzania recorded the most substantial improvement to access to water. Despite Mauritius and South Africa significant progress in electrification, the rate is still low compared with other SADC countries while Zimbabwe and Namibia enjoy the highest electricity rate at 34 per cent each in the region.

#### **4.2.3 Poverty and Inequality**

The measure of the inequality is done through Gini Index, which range from 0 to 100. If a certain society scores 0 it has perfect equality, but if scores 100 it has absolute inequality. In SADC, countries like Namibia, Botswana, Lesotho and South Africa still have the highest rates of inequality with 74.3; 63.2; 60.5 and 57.8, respectively. From 1996 and 2005, Lesotho, Namibia and South Africa had the highest rate of unemployment, with 39.3 per cent, 33.8 per cent and 26.6 per cent, respectively. In 2005, the highest HIV infection rate was registered by Swaziland and Botswana with 24.1 per cent, Lesotho with 23.2 percent and Zimbabwe with 20.1 per cent. In the same time countries like Mozambique, the DRC and Malawi registered the highest infant mortality rate with 143 per cent, 132 percent for the last two countries respectively.

#### **4.2.4 Gender advancement**

South Africa and Mauritius were the countries with the highest progress in gender advancement with 107 and 63 respectively.

#### **4.3 Mainstreaming human rights in SADC Protocol on Trade: feasible or utopian?**

The recognition, promotion and protection of human rights were reaffirmed in the AEC treaty and were included in the SADC treaty as a principle. While the AEC treaty acknowledges the ACHPR and provides that RECs shall promote and respect the provisions of the ACHPR, the reality suggests otherwise. It is clear that SADC member states differ in terms of economic development. Thus, the level of human rights protection may naturally differ according to states' capacities to realise those rights, but it does not mean that states are exonerated from their responsibilities. In fact, the ICESCR requires that states 'take steps' toward realisation of such rights progressively 'within their available resources.' In doing so, they can also rely on international aid.

If SADC member states are trying to harmonise policies, programmes etc, to comply with SADC Protocol on Trade framework, they cannot ignore that human rights principles and standards also need to be harmonised to provide strategies and clear guidance to SADC member states on human rights protection. For instance, most human rights institutions devote their activities to the promotion of civil and political rights and ignore socio-economic rights in spite of numerous calls to engage in the promotion of socio-economic rights.<sup>177</sup> Unfortunately, in most state constitutions, the implementation of socio-economic rights falls under the Directive Principles of State Policies (DPSP).<sup>178</sup>

But, Africa is the poorest continent in the world and the major challenge that Africa, including SADC faces is poverty eradication. The current human rights architecture is not adequately settled to addressing this challenge as well as other challenges, including HIV/AIDS, infant mortality etc. Also, human rights are more reactive than proactive; this is evident in SADC where the only institution established to deal with the protection of human rights is the SADC Tribunal.<sup>179</sup>

---

<sup>177</sup> Yamin (n 158 above) 5

<sup>178</sup> Viljoen (n 16 above) 576

<sup>179</sup> The SADC tribunal became full operational in 2005 five years after the adoption of the Protocol on Tribunal and the Rules of Procedure in 2000. In principle, the tribunal was established in 1992 as one of the

At the national level, NHRIs and Non Governmental Organisations (NGOs) focus on the promotion of civil and political rights, and only civil and political rights are justiciable on domestic courts except in South Africa. General Comment No. 10 note that ‘national institutions have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights.’<sup>180</sup> In spite of South Africa signing the ICESCR, it is one of the SADC countries, which did not ratify it alongside Botswana, Mozambique and Tanzania.<sup>181</sup> Ironically, South Africa is the only country where socio-economic rights are justiciable in the SADC region and in Africa.<sup>182</sup> The landmark cases of justiciability of socio-economic rights are *Soobramoney v Minister of Health, Kwazulu-Natal* (Soobramoney case)<sup>183</sup>, *Grootboom v Minister of Housing* (Grootboom case)<sup>184</sup>, *Minister of Health and Others v Treatment Action Campaign and Others* (TAC case)<sup>185</sup> and *Khosa and Others v Minister of Social Development and Other* (Khosa case).<sup>186</sup> In the Zimbabwean constitution, there are no provisions for socio-economic rights while in the Mozambican constitution such provisions are stated as DPSP.

At the regional level, *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*<sup>187</sup> is the landmark case on the justiciability of socio-economic rights. In fact, when African leaders convened in Abuja in 1991 and adopted the AEC treaty they were convinced that it was not possible to integrate Africa without due regard to RECs. They agreed to strengthen the RECs in Africa, including SADC and they recognised the ACHPR provisions as fundamental principles that the developmental process must respect. However, apart from the courts, they failed to establish human rights institutions in these RECs.<sup>188</sup>

---

SADC institutions. For more details please see: Southern African Development Community Tribunal (SADC) ‘About the SADC tribunal’ (???)<sup>1</sup>

<sup>180</sup> UN Committee on Economic, Social and Cultural Rights (Committee on ESCR) adopted at the 51st meeting (nineteenth session), on 1 December 1998.

<sup>181</sup> (n 155 above)

<sup>182</sup> South Africa Constitution Act 108 of 1996 (thereafter “the Constitution”) sec 7(2) says that: ‘the state must respect, protect, promote and fulfill the rights in the Bill of Rights.’

<sup>183</sup> *Soobramoney v Minister of Health*(Kwazulu Natal) 1997(12) BCLR 1696 (CC)

<sup>184</sup> *The Government of the Republic of South Africa & Others v Grootboom & Others* 2000 11 BCLR 1169 (CC)

<sup>185</sup> *Minister of Health and Others v Treatment Action Campaign and Others*(1) 2002(10) BCLR 1033 (CC)

<sup>186</sup> *Luis Khosa and Others v The Minister of Social Development and Other* 2003

<sup>187</sup> *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) in Heyns & Killander (n 35 above) 251

<sup>188</sup> AEC Treaty (n 59 above) Art. 3(g)

#### **4.4 Strengthening of human rights systems for effective protection in SADC**

There is no doubt that sub-regional economic institutions were primarily established to pursue an economic agenda. Various studies have established a correlation between Africa's underdevelopment status with lack of accountability, democracy and respect for human rights, which contributed to failure of capital accumulation since the governments are not accountable to their citizens.<sup>189</sup> However, the increasing influence of human rights discourse prompted a paradigm shift. For instance, at the regional level, the African Commission on Human and Peoples' Rights (ACmHPR) is the regional quasi judicial body in Africa with mandate to promote and protect human rights in the continent. Also is the African Court of Justice and Human Rights. But the ACmHPR was highly criticised due to its weakness in enforce its decisions. In fact, the ACmHPR rights structure was conceived to play a minimum role. For instance, the ACmHPR is composed of eleven members, who works on part-time basis and meet twice annually for 10 to 15 days to monitor state compliance with the ACHPR.<sup>190</sup> For African continent, which is comprised of 53 states obviously, this structure is not adequate to deal with human rights enforcement.

The main concern is holding governments accountable for their actions and that is possible through an effective enforcement system that ensures accountability. As Yamin has pointed out:

human rights framework requires monitoring and oversight by both government officials and those who are affected; such accountability demands transparency, access to information, and active popular participation.<sup>191</sup>

##### **4.4.1 Why SADC Human Rights Committee?**

Concerns like feasibility and possibility of successful protection of human rights in an extensive continent like Africa with 53 states offer remote prospects of success in the short and medium term. Some scholars argue that close trade and other economic co-operation, including human rights protection is more likely to be successful, in sub regional level compared with continental level for many reasons. First, the geographic

---

<sup>189</sup> Akokpari & Zimble (n 38 above) 3

<sup>190</sup> Viljoen (n 16 above) 315

<sup>191</sup> Yamin (n 158 above) 2

proximity, allowing for close co-operation, 'the guarantee of respect of the agreed standards, including human rights,' prospect for greater effectiveness and enforcement of sanctions through trade boycott and other measures.<sup>192</sup> For instance, Madagascar was suspended from SADC in early this year due to a political crisis in the country. Other important advantages are the process of harmonisation of laws and policies is easier at SADC than at AU level, including the common sub regional human rights jurisprudence.<sup>193</sup> Second, in case of conflict in one of the member states, the sub regional institutions are better placed to act immediately when compared with the AU or UN. For instance, ECOWAS intervened successfully in Liberia in 1990 and 1998.<sup>194</sup> It has also Logistic and administrative convenience.

For these reasons, there is a need for a Human Rights Committee (HRC), which will serve as a focal point for human rights enforcement in SADC with a mandate to provide technical assistance, guidance in policies and programmes in SADC and a monitoring mechanism to assess the implementation of policies, programmes and its impact on human rights enjoyment. At the national level in SADC member states, it will provide guidance, technical support and harmonise strategies on how to assist relevant ministries on policy making and its implementation. The SADC HRC will be a forum for discussion of common problems, sharing of experience on the challenges that NHRIs and civil society are facing, their implementation progress and strategies. In addition, it will enhance cohesion and build the bridge for effective enforcement and monitoring mechanism to complement the role of the ACmHPR and perhaps of the United Nations Human Rights Committee (UNHRC). The reality is that the enforcement mechanism of ACmHPR is ineffective.

Despite the development of common human rights jurisprudence The ACmHPR is not providing effective promotion and protection of human rights and is still grappling with strategies to ensure state compliance with ACHPR. States are not submitting report regularly and the remedies are not effective since it depends on the will of the state to comply with decisions or recommendations etc.<sup>195</sup>

---

<sup>192</sup> Viljoen (n 16 above) 482

<sup>193</sup> Viljoen (n 16 above) 482

<sup>194</sup> These interventions were executed without a prior authorization of the United Nation Security Council. See article of Sarkins 'Humanitarian Intervention and the Responsibility to Protect Africa' (2008) 49

<sup>195</sup> Ndulo 'The African Commission and the Court under the African Human Rights System'(2008) 192

In addition, sub regional institutions are ‘means by which the African human rights organisations, such as NHRIs, NGOs can easily make the best use of available resources to secure governments’ compliance with human rights standards. This also facilitates a human rights network where human rights organisations can assess themselves and ‘share burdens while developing specialisation.’<sup>196</sup> In addition, unlike the national level where human rights organisations are condemned to function in the space allowed by their respective governments, sub-regional or regional co-operation offers better opportunities for human rights organisations to promote human rights effectively.<sup>197</sup>

#### **4.5 Conclusions and recommendations**

It is evident that the ambitious FTA project launched on January 2008 in SADC through implementation of the SADC Protocol on Trade has had marginal success despite the efforts made to reduce tariffs barriers and non-tariffs barriers. Further, the impact of trade liberalisation on human rights protection in SADC remains uncertain, however, what is certain is that the current human rights architecture in Africa, particularly in SADC is not adequately structured to promote the enjoyment of socio-economic rights in the region, including the right to everyone to ‘an adequate standard of living.’ Most African countries, particularly sub-Saharan countries, including SADC are facing common problems for which they need to seek common solutions in spite of peculiar nature of some problems.

Besides, due to the limited policy space granted by the WTO trade agreements, which was replicated to some extent in the SADC Protocol on Trade, this research suggests that the feasible and pragmatic approach is to use flexibilities and exceptions to accommodate human rights. At a theoretical level, the general exceptions in the SADC Protocol on Trade and flexibilities granted by the WTO to certain categories of countries, particularly developing countries and LDCs, are the current available options for the advancement of human rights. However, what matters the most is the practical application of this strategy. For that active participation is pertinent and it can be done through access to information and capacity building.

---

<sup>196</sup> M Garling & C Odinkalu *Building Bridges for Rights – Inter-African Initiatives in the Field of Human Rights* (2001) 52

<sup>197</sup> Akokpari & Zimbler (n 38 above) 233



Therefore, SADC should establish the SADC HRC, which can operate at sub regional level with a similar mandate to ACmHPR or operate as a branch of the ACmHPR. The establishment of the SADC HRC can follow one of the two models; the first option is establish it as an independent institution and part of the SADC structure to complement the role of the ACmHPR at sub regional level. Alternatively, is to function as a representative branch of ACmHPR with a specific mandate to monitor the situation in SADC and report periodically to ACmHPR. Regardless of the chosen model, it should be applicable to other sub RECs because the AEC treaty is the platform on which RECs in Africa are based. The AEC and SADC treaties should be amended to incorporate one of the proposed models.

**WORD COUNT 17998 (including footnotes)**

## BIBLIOGRAPHY

### A. Books

Akokpari, J & Zimbler, D (2008) *African Human rights architecture* South Africa: first published by Fanele, Jacana Media (Pty) Ltd, Sunnyside.

Ake, C (2004) *Democracy and Development in Africa* Washington: 2004

Chandra, P (1994) *International Politics* Jangpura: Vikas Publishing House PTY LTD, New Dehli, reprinted in 1994

Cottier, T; Pauwelyn, J & Burgi, E (2004) (eds) *Human Rights and International trade* Oxford: Oxford University Press.

Garling, M & Odinkalu, C (2001) *Building Bridges for Rights – Inter-African Initiatives in the Field of Human Rights* Inter-African Initiatives in the Field of Human Rights London: INTERIGHTS, Lancaster House London.

Heyns, CH & Killander, M (2007) *Compendium of key human rights documents of the African Union* Pretoria: Pretoria University Press.

Hoekman, B; Mattoo, A & English, P (2003) *Development, Trade and the WTO: Standards and Global trade: a voice for Africa* Washington DC: The World Bank.

Isa, F G & Feyter, K (2006) *International Protection of Human Rights: Achievements and Challenges* Spain: University of Deusto Bilbao.

Manji, F & Burnett, P (2005) *From the slave trade to free trade, How trade undermines democracy and justice in Africa*: Fahamu- Network for Social Justice: Nairobi & Oxford

Salvatore, D (1995) *International Economics* New Jersey: Prentice Hall, 5<sup>th</sup> Edition, Englewood Cliffs.

Samson, M (2002) *Essential International Trade Law* Cavendish: New South Wales

Viljoen, F (2007) *International Human Rights Law in Africa* Oxford: Oxford University Press

### **B. Articles in Books**

Bach, D C (1999) 'Regionalism versus regional integration: the emergence of a new paradigm in Africa' in (ed) Routledge *Regionalism Across the North-South Divide-state strategy and globalisation*

Dommen, C (2004) 'Human Rights and Trade: Two Practical Suggestions for Promoting Coordination and Coherence' in Cottier, T; Pauwelyn, J & Burgi, E (2004) (eds) *Human Rights and International trade* Oxford: Oxford University Press.

Ndulo 'The African Commission and the Court under the African Human Rights System'(2008) in (eds) Akokpari, J & Zimble, D (2008) *African Human rights architecture* South Africa: Fanele, Jacana Media (Pty) Ltd, Sunnyside.

Petersmann, E U (2004) 'Bridging Foundations Human Rights and International Trade Law: Defining and Connecting the Two Fields' in Cottier, T; Pauwelyn, J & Burgi, E (2004) (eds) *Human Rights and International trade* Oxford: Oxford University Press.

Ranjan, P (2004) 'International Trade and Human Rights: Conflicting Obligations' in Cottier, T; Pauwelyn, J & Burgi, E (2004) (eds) *Human Rights and International trade* Oxford: Oxford University Press.

Saasa, O S (1991) 'Economic cooperation and integration among developing countries', in Saasa, O S (1991) (ed) *Economic integration and cooperation in Africa*, African Centre for Technology Studies, Nairobi.

Kaufmann, C B (2004) 'The Legal Matrix of Human Rights and Trade Law: State Obligations versus Private Rights and Obligations' in Cottier, T; Pauwelyn, J & Burgi, E (2004) (eds) *Human Rights and International trade* Oxford: Oxford University Press.

### **C. Articles**

Banjo, A in 'A Review of Poverty Studies, Drivers and Redressive Strategies in Southern Africa' (2009) 10 *Journal of Sustainable Development in Africa* 3

Center for Economic and Social Rights, *Human Rights and the Global Economic Crisis, consequences, Causes and Responses* (2009) 4 available at [www.cescr.org](http://www.cescr.org) (accessed 20 August 2009)

Fox, E 'globalisation and human rights: Looking out for the welfare of the worst' (2003) 35 *NYU Journal of International Law and Politics* 203

Guzman, A T 'Global Governance and WTO' (2004) 45 *Harvard International Law Journal* 1

Lang, A 'Rethinking Trade and Human Rights' (2007) 15 *Tulane Journal of International and Comparative Law* 1

Musungu, S 'Economic Integration and human rights in Africa: a comment on conceptual linkage' (2003) 03 *African Human Rights Law Journal* 94

Ngugi, E L 'The Impact of Globalisation on the Promotion and Protection of Human Rights in Africa' (2007) 1 *Malawi Law Journal* 160-161

Oppong, R 'Trade and human rights: a perspective for agents of trade policy using a rights based approach to development' (2006) 06 *African Human Rights Law Journal* 123

Roland, S E 'Developing countries coalition at the WTO: in Search of Legal Support' (2007) 48 *Harvard International Law Journal* 487-488

Sibanda, O 'A human rights approach to World Trade Organisation trade policy: another medium for the promotion of human rights in Africa' (2005) 05 *African Human Rights Law Journal*, 387

Shelton, D 'Protecting Human Rights in Globalized World', (2002) 25 *Boston College International & Comparative Law Review* 273-322

Kaime, T 'SADC and Human Security, fitting human rights into the trade matrix' (2004) 13 *African Security Review* 1

Yamin, A E 'Beyond Compassion: the central role of accountability in applying human rights framework to health' (2008) 10 *Harvard Human Rights Journal* 2

## **Documents of International, Regional and Sub-regional bodies**

### **D. UN Official Documents**

The Charter of the United Nations, adopted 26 June 1945, entered into force 24 October 1945, as amended by G.A Res. 1991 (XVIII) 17 Dec. 1963, entered into force 31 August 1965 (557 UNTS 143); 2101 of 20 Dec. 1971, entered into force 24 Sept. 1973 (892 UNTS 119)

Universal Declaration of Human Rights, adopted 10 Dec. 1948, G.A Res. 217 A (III), UN Doc. A/810, AT 71 (1948)

UN Declaration on the Right to Development, UN G.A., 41st Sess., A/RES/41/128 (1986), available at [www.unhchr.ch/html/menu3/b/74.htm](http://www.unhchr.ch/html/menu3/b/74.htm) (accessed 13 May 2009)

International Covenant on Civil and Political Rights, adopted 16 Dec. 1966, entered into force 23 March 1976, G.A. Res. 2200A (XXI), UN Doc. A/6316(1966), 999 UNTS 171, reprinted in 6 ILM 368 (1967)

International Covenant on Economic Social and Cultural Rights, adopted 16 Dec. 1966, entered into force 3 Jan. 1976, G.A. Res. 2200A(XXI), UN Doc. A/6316 (1966), 993 UNTS 3, reprinted in 6 ILM 360 (1967)

Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, UN Doc A/CONF.32/41/3 (1968)

The Brundtland Report, World Commission on Environment and Development (WCED), *Our Common Future* UN Doc. A/42/47 (1987)

### **UN Commission for Human Rights Documents**

UN Sub-Commission for the Promotion & Protection of Human Rights, Human rights as the primary objective of international trade , investment and finance policy practice, Working paper submitted by J. Oloka Onyango and D. Udagama, in accordance with Sub-Commission Resolution 1998/12, UN ESCOR, 51<sup>st</sup> Sess, E/ CN.4/Sub.2/ 1999/11,17 June 1999

High Commissioner for Human Rights, *Globalisation and its impact on full enjoyment of Human Rights*, Report of the High Commissioner for Human Rights, submitted in Accordance with Commission Human Rights resolution 2001/32, delivered to the Sub-commission on the Promotion and the Protection of Human Rights UN Doc.e/CN4/Sub2/2001/54 (January 15, 2002)

High Commissioner for Human Rights, *Liberalisation of Trade in Services and Human Rights*, Report of the High Commissioner for Human Rights, delivered to the Sub-commission on the Promotion and the Protection of Human Rights UN Doc.e/CN4/Sub2/2002/9 (June 25, 2002).

High Commissioner for Human Rights, *Human Rights, Trade and Investment*, Report of the High Commissioner for Human Rights, delivered to the Sub-commission on the Promotion and the Protection of Human Rights UN Doc.e/CN4/Sub2/2003/9 (July 2, 2003).

World Conference on Human Rights (1993) UN. Doc.A/CONF.157/23,para 5.

Office of High Commission for Human Rights *Trade and Human Rights*, 5<sup>th</sup> WTO Ministerial Conference, 10-14 September (2003)

OHCHR Human Rights and World Trade Agreements-Using General Exceptions Clauses to Protect Human Rights (2005)

UN Office of the High Commissioner of Human Rights *Claiming the Millennium Development Goals: A human Rights Approach* (2008) 7

### **UN Committee on Economic, Social and Cultural Rights**

UN Committee on Economic, Social and Cultural Rights General Comment No 3, adopted at the (Fifth session), on 14 December 1990.

UN Committee on Economic, Social and Cultural Rights General Comment No 12, adopted at the (Twentieth session), on 12 May 1999.

UN Committee on Economic, Social and Cultural Rights General Comment No 13, adopted at the (Twenty- first session), on 08 December 1999.

UN Committee on Economic, Social and Cultural Rights General Comment No 14, adopted at the (Twenty – second session), on 11 August 2000.

### **E. WTO Official Documents**

Markesh Agreement establishing the World Trade Organisation, 15 April 1994, the results of the Uruguay Round of Multilateral Trade Negotiations: The Legal texts (1995), reprinted in 33 I.L.M 1144(1994)

Agreement on Trade – Related Aspects of Intellectual Property Rights (1994)

WTO, *Doha Ministerial Declaration*, Nov. 14, 2001, WT/MIN (01)/DEC/1, para. 13, available at [www.wto.org/english/thewto\\_e/minist\\_e/mino1\\_e/mindecl\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/mino1_e/mindecl_e.htm) (accessed on 13 September 2009)

General Agreement on Trade in Services (1994)

World Trade Organisation *World Trade Report: 2004 exploring the linkage between the domestic policy environment and international trade*

## **F. AU Official Documents**

Constitutive Act of the African Union adopted in Lomé, Togo, on 11 July 2000 and entered into force on 26 May 2001.

African Charter on Human and Peoples' Rights, adopted by the OAU in Nairobi, Kenya, on 27 June 1981 and entered into force on 21 October 1986

AEC treaty establishing the Africa Economic Community, adopted in Abuja, Nigeria, 1991 and entered into force in 1994 available at <http://www.africa-union.org>

NEPAD Declaration, adopted as the New African Initiative (NAI) by the OAU Assembly in Lusaka, Zambia, in July 2008.

Lagos Plan of Action for the economic development of Africa, adopted by the Organization of African Unity, in its Second Extraordinary Summit of Head of States and Government, in Lagos, Nigeria, 28 – 29 April 1980 reprinted by the OAU Addis, Ethiopia

## **G. SADC Official Documents**

SADC Treaty adopted in 1992, Windhoek, Namibia on the 17th day of August 1992 amended at Blantyre 2001.

The Protocol on Trade signed in 1996 and entered into force on 2000.

Southern Africa Global Competitive Hub *Audit of the Implementation of the SADC Protocol on Trade* (2007) 4.

SADC Secretariat Report *Evaluation of an Appropriate Model for a SADC Customs Union* (2007) 83

SADC FTA handbook Growth, Development and Wealth Creation (2008) available at <http://sadc.int/>



Preamble to the Memorandum of Understanding of the Institutions of the Southern Africa Development Coordination Conference reprinted in SADCC: A handbook, SADCC, Gaberone (1988) <http://sadc.int/> (accessed on 30 April 2009)

## **H. Dissertations**

P. Said 'International Trade and Human Rights' in *International yearbook of regional human rights Master's programmes 2006* (2008) 441

Unpublished: SP Hess 'The New Economic Geography of a SADC Free Trade Area' unpublished Master Degree, Rhodes University, 2004

Unpublished: A J Osogo 'Oval Slide in triangular spaces? Anchoring Human Rights Institutions in 'tripartite' Commonwealth Africa' unpublished LLM thesis, University of Pretoria, 2006 2

Unpublished: E Baim 'The Linkage between Human Rights and Trade and Parallel International Obligations: The GATT, The ICESCR and Health Services' unpublished LLD thesis, University of Pretoria, 2005 32

## **I. Report and other materials**

International Federation for Human Rights *Understanding Global Trade & Human Rights*, Report and Resource Guide for National Human Rights NGOs in the view of the 2005 WTO Ministerial Conference, Hong Kong(MC6) 3

Richards, R 'Assessing human development in SADC: 1990 – 2008' (2008) 52  
SEATINI (Southern & Eastern African Trade, Information and Negotiations Institute)  
'The WTO in brief' (2002) 2

Sepulveda, M; Banning, T; Gudmundsdottir G D & Chamoun, C *Human Rights, Ideas and fora* - Human Rights Education Project, University for Peace (2004)

The State of the World's Children *The Human Rights Based Approach statement of common understanding* (2004)

UNECA Economic Commission for Africa: Southern Africa, Fourteenth Meeting of the Inter-governmental Committee of Expert for Southern Africa(ICE) *Progress and Challenges Towards the Attainment of a Free Trade Area and a Customs Union in Southern Africa* (2008)

Kabala, M & Tsedu, M 'Regional Trade Agreements, Effects and Opportunities: Southern Africa Development Network Implementation of the SADC Trade Protocol and the Intra-SADC Trade Performance' (2008)

World Bank *World Development Report 2000/2001: Attacking Poverty* 2001 56

UNCTAD *Economic Development in Africa Strengthening Regional Integration for Africa' Development* (2009)

## **J. Cases**

*Luis Khosa and Others v The Minister of Social Development and Other* 2003

*Minister of Health and Others v Treatment Action Campaign and Others* (1) 2002(10) BCLR 1033 (CC)

*Soobramoney v Minister of Health* (Kwazulu Natal) 1997(12) BCLR 1696 (CC)

*Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001)

*The Government of the Republic of South Africa & Others v Grootboom & Others* 2000 11 BCLR 1169 (CC)

*Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* in Heyns, CH & Killander, M (2007) *Compendium of key human rights documents of the African Union Pretoria*: Pretoria University Press 251

## **L. National instruments**

South Africa Constitution Act 108 of 1996

Mozambican Constitution Approved by the Assembly of the Republic, on the 16th of November 2004 available at <http://www.govnetgov.co.mz>

Zimbabwean Constitution (as amended the 14 September, 2005 (up to and including Amendment No. 17) available at <http://www.parlzim.gov.zw>

## **M. Websites**

### **Main Internet Sources**

<http://www.unhcr.ch/> – Official Website of the Office of the High Commissioner for Human Rights

<http://www.un.org/> - Official Website of the United Nations

<http://wto.org> – Official Website of the World Trade Organisation

<http://www.africa-union.org> – Official Website of the African Union

<http://sadc.int/> – Official Website of the Southern Africa Development Community

### **Other Internet Sources**

<http://www.hilj.edu> – Harvard International Law Journal Website

<http://africanhistory.about.com> – African History Website

<http://www.businessdictionary.com/definition/trade.html> -Business Dictionary Website

<http://treaties.un.org> – UN treaties Website

<http://www.cescr.org> - Center for Economic and Social Rights Website

<http://www.govnetgov.co.mz> – Official Website of the Government of Mozambique

<http://www.parlzim.gov.zw> - Official Website of the Parliament of Zimbabwe