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NOTES AND COMMENTS

REGIONAL CONTROL OF INTERNATIONAL FINANCE IN SOUTHERN AND EASTERN AFRICA

*Dr. Kenneth Kaoma Mwenda**

This paper examines the efficacy of the regional integration arrangements in southern and eastern Africa to regulate international finance from multinational corporations to developing countries in that region. At the outset, it is important to point out that in this paper the term international finance excludes other aspects of international finance such as finance from multilateral agencies. Finance from multilateral agencies could include international finance from the World Bank and the International Monetary Fund. In our discussion, we shall confine the term international finance to foreign direct investment in southern and eastern Africa. Indeed, the study of multinational corporations (MNCs) as the primary channel for transmitting foreign direct investment to developing countries has received increasing attention in the last two decades. As Nankani observes:

> "The quest has been for an understanding of both the cause of FDI (foreign direct investment), and the consequences (for home countries, host countries and the international economic and political order) of its rapid growth."[1]

Regulation of foreign investment in developing countries can be viewed from three angles. These viewpoints are regulation at the national level, regulation at the regional level and regulation at the international level. The scope of discussion on the topic is thus wide. However, in this paper, we concentrate on regulation of foreign investment in Southern and Eastern Africa at the regional level. We also refer to the position of states in the Southern and Eastern African region and demonstrate the extent to which regional integration has been successful in regulating foreign investment to these countries. It must be observed, however, that the control of foreign investment at the regional level examines the interface of the international political economy and international law on the one hand, and the efficacy of regional policies on the other hand. To this extent, this paper also examines the regulation

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1 G.T. Nankani, *The Intercountry Distribution of Direct Foreign Investment in Manufacturing* 1 (1979); For a discussion of advantages of foreign direct investment see below; see also, C.P. Kindleberger, *Less Developed Countries and the International Capital Market* in J.W. Markham and G.F. Papanek (Eds.), *Industrial Organisation and Economic Development* 341 (1970).

of foreign investment in Southern and Eastern African states at the international level.

Against this background, it must be submitted that two important regional integration schemes are examined in the paper. These schemes are the Common Market For Eastern And Southern Africa and the Southern Africa Development Community. Zambia, a State party to both the treaties establishing these two regional integration schemes, is one of the countries that is examined in looking at the efficacy of these regional integration schemes. Indeed, these schemes are the main frameworks through which the Zambian government endeavours to regulate foreign investment in the country at the regional level. We now examine the control of foreign investment in the Southern and Eastern African region under the Common Market For Eastern And Southern Africa Treaty. The regional integration scheme established under this treaty is often referred to as COMESA.[2]

1.0 THE COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA:

COMESA was established on 5 November 1993 by a treaty done at Kampala, Uganda.[3] The States that are eligible to membership include Eritrea, Ethiopia, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Sudan, Swaziland, Tanzania, Uganda, Zambia, Djibouti, Angola, Burundi, Comoros, Seychelles, Somali and Zimbabwe.[4] All of these states, except for the latter six, are signatories to the treaty establishing COMESA.[5] It is further provided in the preamble to the treaty that:

> "The following States of Eastern and Southern Africa may become Member States of the Common Market upon fulfilling such conditions as may be determined by the Authority: The Republic of Botswana; and The Republic of South Africa (Post-Apartheid)."[6]

1.1. Background to the Setting of COMESA and the Objectives of COMESA:

It must be observed that COMESA has now replaced the Preferential Trade Area (PTA), a regional integration scheme which had among its objectives, the following agenda: to create trade within the Southern and Eastern Africa region (i.e. between Member States) and to divert trade away from the then apartheid South Africa.

In order to provide an insightful and concise background to the establishment of COMESA, we make reference to the following provision in Art. 2 of the treaty for the establishment of COMESA:

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2 The letters COMESA being the abbreviation of Common Market For Eastern And Southern Africa.

3 See, *International Legal Materials* Vol. XXXIII, No. 5, September 1994, p. 1067.

4 Preamble of the treaty establishing COMESA in *Ibid.*, p.1073.

5 *Ibid.*, p. 1067.

6 Section 3 of the preamble of the COMESA Treaty.

"*Conscious* of the overriding need to establish a Common Market for Eastern and Southern Africa:

Bearing in mind the establishment among their respective States of the Preferential Trade Area for Eastern and Southern African States as a first step towards the creation of a Common Market and eventually of an Economic Community for Eastern and Southern Africa;

Recalling the provisions of Art. 29 of the Treaty for the Establishment of the Preferential Trade Area for Eastern and Southern African States to the effect that steps should be taken to develop the Preferential Trade Area established by that Treaty into a Common Market and eventually into an Economic Community ...

Determined to mark a new stage in the process of economic integration with the establishment of a Common Market for Eastern and Southern Africa and the consolidation of their economic co-operation through the implementation of common policies and programmes aimed at achieving sustainable growth and development ...

Having regard to the principles of international law governing relations between sovereign states, and the principles of liberty, fundamental freedoms and the rule of law; and..."

From the above paragraph, it is clear that COMESA is a follow up to PTA. What has happened is that PTA has now been transformed into COMESA. Thus, the process of economic integration under this regional integration scheme has now progressed from a preferential trade area to a common market. Here, the integration scheme is designed to have three phases. The first phase relates to the establishment of a preferential trade area. This is followed by the conversion of this trade area into a common market. Finally, the common market will then be converted into an economic community. Although the COMESA Treaty provides that the regional integration scheme under the treaty is divided in three phases, the treaty does not distinguish a 'preferential trade area' from a 'common market' or from an 'economic community'. Neither does the treaty distinguish a 'common market' from an 'economic community'. Art. 2 of the treaty for the establishment of COMESA (the 'COMESA Treaty') merely provides that 'Preferential Trade Area' means the Preferential Trade Area for Eastern and Southern Africa established by Art. 1 of the Treaty for the establishment of the PTA. This provision in the COMESA Treaty goes on to provide that a Common Market means the Common Market for Eastern and Southern Africa established by Art. 1 of the COMESA Treaty itself. Even so, the provisions referred to in Art. 2 of the COMESA Treaty do not provide definitions of what constitutes a preferential trade area, a common market or an economic community. Thus, the COMESA treaty does not draw any clear distinctions in relation to the three phases of the COMESA regional integration scheme. What is clear, however, is that the scheme is now moving from its first phase into its second

phase.[7] PTA has been abolished and COMESA has been set up in its place. The third phase of the regional integration scheme is thus seen to be the time at which COMESA will be transformed into an economic community.

That said, it must be pointed out that Art. 3 of the treaty for the establishment of COMESA provides that the following are the objectives of COMESA:

> "The aims and objectives of the Common Market shall be: (a) to attain sustainable growth and development of the Member States by promoting a more balanced and harmonious development of its production and marketing structure; (b) to promote joint development in all fields of economic activity and the joint adoption of macro-economic policies and programmes to raise the standard of living of its peoples and to foster closer relations among its Member States; (c) to co-operate in the creation of an enabling environment for foreign, cross border and domestic investment including the joint promotion of research and adaptation of science and technology for development; (d) to co-operate in the promotion of peace, security and stability among Member States in order to enhance economic development in the region; (e) to co-operate in strengthening the relations between the Common Market and the rest of the World and the adoption of common positions in international fora; and (f) to contribute towards the establishment, progress, and the realisation of the objectives of the African Economic Community."[8]

Having provided the background to the establishment of COMESA and having outlined the objectives of COMESA, the study now examines the organs of COMESA.

1.1.2 Organs of COMESA:

Article 7 of the treaty for the establishment of COMESA provides that the following are the organs of COMESA:

"(a) the Authority; (b) the Council; (c) the Court of Justice, (d) the Committee of Governors of Central Banks, (e) the Intergovernmental Committees; (f) the Technical Committees; (g) the Secretariat; (h) the Consultative Committee."

We will now examine the COMESA organs listed above. In the main, the paper examines two of these organs. These are the Authority and the Council. The two organs are concerned respectively with policy formulation and policy recommendation. Having said that, it must be pointed out that the paper will also examine salient features of the remaining organs of COMESA.

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7 *Id.*

8 In Art. 2 of the COMESA treaty it is provided, *inter alia*, that the COMESA Treaty was inspired by the treaty for the establishment of the African Economic Community:

"*Inspired* by the objectives of the Treaty for the Establishment of the African Economic Community and in compliance with the provisions of Art. 28(1) of the said Treaty."

The Authority, consisting of the Heads of state or Government of the Member States, is the supreme policy organ of the Common Market and is responsible for the general policy and direction and control of the performance of the executive functions of the Common Market.[9] Furthermore, the Authority is responsible for the achievement of COMESA's aims and objectives.[10] Indeed, the decisions of the Authority are binding on the Member States and on all other organs of the Common Market other than the Court in exercise of its jurisdiction.[11] These decisions are taken by consensus[12] and the Authority has powers to determine its own rules of procedure.[13]

The Council of Ministers, on the other hand, consists of such Ministers as may be designated by each Member State.[14] The Council is responsible for monitoring and keeping under constant review and ensuring the proper functioning and development of the Common Market.[15] It makes recommendations to the Authority on matters of policy aimed at the efficient and harmonious functioning and development of the Common Market.[16] The Council also gives directions to all other subordinate organs of the Common Market other than the Court in the exercise of its jurisdiction.[17] With regard to powers of the Court, the Council may request the Court to give advisory opinions on matters affecting the Council.[18] Apart from the functions outlined above, other important responsibilities of the Council include making recommendations to the Authority on the designation of Least Developed Countries[19] and designating economically depressed areas of the Common Market.[20] Like decisions of the Authority, decisions of the Council are binding on all Member States, on all subordinate organs of COMESA other than the Court in the exercise of its jurisdiction.[21] It must also be observed that as the case is with the Authority decisions of the Council are taken by consensus.[22] Furthermore, subject to any directions that the Authority may give, the Council has power to determine its own Rules of Procedure.[23]

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9 Treaty for the establishment of COMESA, Art. 8(1).

10 *Ibid.*, Art. 8(1).

11 Art. 8(3).

12 Art. 8(7).

13 Art. 8(6).

14 Art. 9(1).

15 Art. 9(2)(a).

16 Art. 9(2)(b).

17 Art. 9(2)(c).

18 Art. 9(2)(e).

19 Art. 9(2)(i).

20 Art. 9(2)(j).

21 Art. 9(3).

22 Art. 9(6).

23 Art. 9(5).

On the other hand, whereas the Committee of Governors of central banks is responsible for the development of programmes and action plans in the field of finance and monetary co-operation,[24] the Intergovernmental Committee is responsible for the development of programmes and action plans in all sectors of co-operation except in the finance and monetary sector.[25] COMESA also has a Secretariat headed by a secretary-general.[26] The secretary-general is appointed by the Authority and is the chief executive officer of the Common Market.[27]

Chapter Five of the COMESA Treaty establishes the Court of Justice. It plays the traditional role of a judiciary and adjudicates over claims by Common Market employees and third-parties against the Common Market.[28] Decisions of the Court on the interpretation of the provisions of the treaty have precedence over decisions of national courts.[29]

1.1.3. Undertakings and Duties of COMESA Member States:

In order to promote the achievement of the aims and objectives of COMESA the Member States have made specific undertakings to establish a customs union, abolish all non-tariff barriers to trade among themselves, establish a common external tariff and to co-operate in customs procedures and activities.[30] The policy bases of making these undertakings is that there is need to liberalise trade in the region and to promote customs co-operation.[31] Other specific undertakings made by COMESA Member States relate to transport and communications, industry and energy, monetary affairs and finance, agriculture, and economic and social development.[32] Also, Member States recognise that dumping, by which products of a Member State are introduced into the commerce of another Member State at less than the normal value of the products, is to be prohibited if it causes or threatens material injury to an established industry in the territory of the other Member State or materially retards the establishment of a domestic industry.[33] Furthermore, Member States have made general undertakings, first to abstain from any measures that are likely to jeopardise the achievement of the aims and objectives of COMESA,[34]

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24 Art. 13(2).

25 Art. 14(1)(2).

26 Art. 17.

27 Art. 17(2).

28 Art. 27.

29 Art. 29(2).

30 Art. 4(1)(a).

31 Art. 4(1).

32 Art. 4(1)(2)(3)(4) and 4(5).

33 Art. 51.

34 Art. 5(1).

secondly, to take steps to secure the enactment of and the continuation of such legislation which gives effect to the COMESA Treaty.[35]

The guiding principles upon which the aims and objectives of COMESA are based and in pursuit of which the above undertakings have been made, are as follows:[36]

(a) equality and interdependence of the Member States;

(b) solidarity and collective self-reliance among the Member States;

(c) inter-State co-operation, harmonisation of policies and integration of programmes among the Member States;

(d) non-aggression between the Member States;

(e) recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human Rights and Peoples' Rights;

(f) accountability, economic justice and popular participation in development;

(g) the recognition and observance of the rule of law;

(h) the promotion and sustenance of a democratic system of governance in each Member State;

(i) the maintenance of regional peace and stability through the promotion and strengthening of good neighbourliness; and

(j) the peaceful settlement of disputes among the Member States, the active co-operation between neighbouring countries and the promotion of a peaceful environment as a pre-requisite for their economic development.

Based on the above principles, Member States have agreed that any practice which negates the objective of free and liberalised trade shall be prohibited.[37] To this end, the Member States have agreed to prohibit any agreement between undertakings or concerted practice which has as its objective or effect the prevention, restriction or distortion of competition within the Common Market (COMESA).[38] A good example of such practices would be subsidies granted by a Member State or through state resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.[39] To realise the principle of equality

35 Art. 5(2).

36 Art. 6.

37 Art. 55(1).

38 Art. 55(2).

39 See Art. 52.

and inter-dependence of Member States, these states have agreed to accord to one another the 'most favoured nation treatment'.[40] Art. 2 of the COMESA Treaty defines 'most favoured nation treatment' as:

> "any advantage, favour, privilege or immunity granted by any Member State to any product originating in or destined for any third country and shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Member States."

In observance of this 'most favoured nation treatment' postulate, Art. 56 of the COMESA Treaty provides:

> "Nothing in this Treaty shall prevent a Member State from maintaining or entering into new preferential agreements with third countries provided such agreements do not impede or frustrate the objectives of this Treaty and that any advantage, concession, privilege and favour granted to a third country under such agreements are extended to the Member States on a reciprocal basis.

Nothing in this Treaty shall prevent two or more Member States from entering into new preferential agreements among themselves which aim at achieving the objectives of the Common Market (COMESA), provided that any preferential treatment accorded under such agreements is extended to the other Member States on a reciprocal and non-discriminatory basis."

To ensure full observance of the 'most favoured nation clause', Member States have agreed that they shall refrain from 'national treatment'.[41] National treatment could involve either enacting legislation or applying administrative measures which directly or indirectly discriminate against the same or like products of other Member States. Having examined the duties and undertakings of member states of COMESA, we now turn to look at how far it can be argued that international law concepts of state sovereignty and a state's permanent sovereignty over its natural resources are realisable concepts in southern and eastern Africa.

2.0 THE CONCEPTS OF STATE SOVEREIGNTY AND A STATE'S PERMANENT SOVEREIGNTY OVER ITS NATURAL RESOURCES:

Brownlie observes:

> "The sovereignty and equality of states represent the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of states having a uniform legal personality. If international law exists, then the dynamics of state sovereignty can be expressed in terms of law, and, as states are equal and have legal personality, sovereignty is in a major aspect a

40 Art. 56.

41 Art. 57.

relation to other states (and to organisations of states) defined by law. The principle corollaries of the sovereignty and equality of states are:

(1) a jurisdiction, prima facie exclusive, over a territory and the permanent population living there;

(2) a duty of non-intervention in the area of exclusive jurisdiction of the other states; and

(3) the dependence of obligations arising from customary law and treaties on the consent of the obligator."[42]

On the basis of this doctrine of state sovereignty, it is clear that every sovereign state has the right, in international law, to promulgate policy on its internal state matters and on its external state affairs. This right exists both in customary and conventional international law. For example, in Art. 6 of the COMESA Treaty, the customary international law right to state sovereignty is expressed subtly as the principle of 'equality and interdependence of the Member States.'

To illustrate further, in pursuance of the doctrine of state sovereignty the Zambian government has enacted legislation[43] and promulgated policy on foreign investment in that country. I have examined these issues elsewhere.[44] The crucial point to note, however, is that the doctrine of state sovereignty may conflict with the need to maintain a fair balance between interests of the COMESA Member States. Various States could have different ideologies and could be pursuing different economic policies. For example, whilst Zambia has recently reverted[45] to the accommodation development strategy, other Member States of COMESA such as Malawi have always retained the accommodation development strategy so as to provide better terms of attracting foreign investment to these countries. Kenya, like Zambia, has shifted its national policy stance from the re-organisation development strategy to the accommodation development strategy. In both these countries there has been a deliberate effort to enact legislation offering generous fiscal incentives. These incentives are targeted at attracting foreign investment to the countries offering the incentives. Here, the pursuit of different national goals inevitably erodes the idea of regional integration. This is one of the major shortcomings of regional integration schemes such as the COMESA scheme. The 'self-interest' agenda of most of the COMESA Member States has increasingly become acute in the light of the IMF and World Bank structural adjustment programme. Privatisation of state owned

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42 I. Brownlie, *Principles of Public International Law* 287 (1990); See also, M. Akerhurst, *A Modern Introduction to International Law* 143-147 at 155-167 (1990).

43 For example, the Securities Act, 1993, the Privatisation Act, 1992 and the Investment Act, 1993.

44 See, K.K. Mwenda, *A Critical Review of Foreign Investment In Zambia: Direct Investment, The Stock Exchange and Privatisation* (1995). Chapter Two.

45 Since the mid 1980's.

business entities has been embarked on in most of the countries in the region. Small stock markets have been set up in almost every country in the region. Pieces of investment legislation providing generous fiscal incentives to foreign investors have been enacted. These laws also provide guarantees against State expropriation of private investors' assets. In several Member States of COMESA, including Zambia and Kenya, the investment codes make provision for such incentives. What this evidence shows is that harmonisation of, say, national fiscal policies in the region will not be easy to achieve. The reason is simple. International law generally has a limited mechanism of State policing.[46] In particular, the lack of a supranational institution to enforce treaty obligations on Member States is a major shortcoming of most regional integration schemes. The COMESA integration scheme is not free from this problem. For example, Zambia's ambitious programme to privatise its state owned enterprises did not arise out of the need to complement with any regional integration scheme. It was (and is) a programme that was primarily targeted at meeting interests of Zambia's international financiers. Thus, although it could be argued that Zambia is asserting its right in international law, the right to state sovereignty, when undertaking the privatisation programme (a programme that is a component of the IMF and World Bank structural adjustment prescriptions), there is some difficulty in seeing how state sovereignty could be asserted when a state is acting under conditions set by its international financier. By the very nature of conditions being attached to Zambia's economic policies, the right to state sovereignty withers away. In the same vein, it is difficult to appreciate the practicality of the doctrine of sovereignty of peoples and nations over their natural wealth and resources.[47] Starke observes:

> "If the (UN) Resolution signified that, in the absence of treaty limitations or international law restrictions, a state was entitled to control the resources within its territory, it would merely enunciate a truism. The real object of the Resolution seems, however, to have been to encourage under-developed countries to make use of their own resources, as a proper foundation for their depletion by the action of other states."[48]

If, as Starke suggests, the real object of the United Nations General Assembly Resolution of 21 December 1952 was to encourage under-developed countries to

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46 See, J.G. Starke, *Introduction to International Law* 3-18 (1989); A. Cassese, *International Law in a Divided World* 11-14, 215-246 (1989); D.J. Harris, *Cases And Materials On International Law* 1-17 (1991).

47 See, United Nations General Assembly Resolution of 21 December 1952, affirming the right of peoples to freely use and exploit their natural wealth and resources. *See also*, Resolution No. 1803(XVII) of the United Nations General Assembly on 14 December 1962 concerning Permanent Sovereignty Over Natural Resources; M.A. Mughraby, *Permanent Sovereignty Over Oil Resources*, 219-221 (1961).

48 Starke, *supra* n. pp. 125-126. The other question related to the issue of sovereignty of peoples and national over their natural wealth and resources are the recent claims advanced fore the general recognition of the 'right to development' of peoples (before self-determination), and of emancipated territories.

make use of their own resources, as a proper foundation for their independent economic development, then the whole doctrine of sovereignty of peoples and nations over their natural wealth and resources can no longer hold true for most developing countries today. Independent economic development presupposes the existence of 'state sovereignty'. However, as we have shown above, in the light of the IMF and World Bank structural adjustment conditions, it is not realistic to conceive the doctrine of sovereignty of peoples (in developing countries) and nations (developing countries) over their natural wealth and resources.

3.0. FACTORS AFFECTING THE HARMONISATION OF NATIONAL POLICIES OF COMESA MEMBER STATES:

We have already identified and examined 'self-interest' goals, different ideologies in COMESA Member States and the lack of a supra-national institution as some of the important factors affecting the efficacy of the COMESA regional integration scheme. As a result of these factors, it could be argued that COMESA Member States such as Zambia, have not benefited much from this regional integration scheme in as far as regulation of foreign investment in Zambia is concerned. In this section, we will look at four important factors that affect efficacy of COMESA in regulating foreign investment in the Southern and Eastern African region. These factors are politics, economics, socio-cultural issues and technological factors.

Political factors that affect the efficacy of the COMESA integration scheme include some of the issues discussed above. That is, seeking self interests by Member States could involve political agendas such as the retention of dictatorial One-party Systems which do not allow principles of democratic government. Democracy is one of the underlying features imbedded in the principles of the COMESA Treaty. Also, ideological differences between Member States could lead to political problems.

On the other hand, economic factors that affect the efficacy of the COMESA integration scheme include differences in the balance of payment positions, differences in economic policies, the issue of convertibility and exchange rates relating to the Member States' respective currencies and the general level of development of the productive forces in each of the Member States. Socio-cultural factors include problems over the choice and use of language (e.g. the use of Afrikaans in South Africa), differences in national culture, differences in the literacy levels and differences in the social stratification of various Member States. Technological factors include differences in the advancement of each Member State's productive forces (see also economic factors), problems of adaptability of technology to industry in the Member States (e.g the issue of literacy levels and user-comprehension in management information systems), and the differences in choices between capital intensive or labour intensive technology for the Member States.

4.0 THE SADC OPTION AS A THREAT TO THE COMESA REGIONAL INTEGRATION SCHEME:

This section of the paper looks at the Southern African Development Community,[49] as a regional integration scheme posing threats to the realisation of COMESA objectives under the COMESA integration scheme.

On August 17th 1992, Member States of the Southern African Development Co-ordination Conference (SADCC)[50] signed a Treaty[51] establishing the Southern African Development Community (SADC), which replaced SADCC.[52] The background to the SADC regional integration scheme is contained in the following note:

> "As an international economic organisation, it will have legal personality in each of the member State's territory (Art. 3) and its headquarters will be in Gaborone, Botswana - seat of the current SADCC secretariat (Art. 2) ...
>
> SADCC was instituted twelve years ago on April 1 1980 when the Heads of State or Government of nine Southern African countries[53] met in Lusaka, Zambia to adopt a declaration - "Southern Africa: Towards Economic Liberation", which formed the basis for the creation of the institution. Comprised of loose association of states with a quasi-legal personality, its aim amongst others, was to pursue policies to facilitate the economic development and independence of these countries from South Africa, and to achieve the integrated development of the region.
>
> The dramatic changes that have taken place regionally[54] and internationally,[55] together with the developments in South Africa with the dismantling of statutory apartheid, and the unbanning of organisations such as the African National Congress (ANC) and Pan African Congress (PAC), lead SADCC to

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49 Established by the Treaty of the Southern African Development done at Windhoek. Namibia on 17 August 1992, reproduced in 32 ILM 116 (1993).

50 Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, Swanziland, Tanzania, Zambia and Zimbabwe.

51. As well as a Protocol to the Treaty Establishing the Southern Africa Development Community on Immunities and Privileges. This Protocol confers the privileges and immunities on SADC institutions that are necessary for the proper performance of their functions, and are to be comparable to those accorded to similar international organisations. The formalities for entry into force of this Protocol are essentially the same as for the Treaty.

52 See, Art. 44.

53. Angola, Botswana, Lesotho, Malawi, Mozambique, Swansiland, Tanzania, Zambia and Zimbabwe.

54 Thus the rapprochement reached in Angola between UNITA and the MPLA, the peace talks being brokered between Renamo and Frelimo in Mozambique, and movements in the rest of Southern Africa towards more democratic government, have contributed towards a positive view of the economic gains to be achieved by integration.

55 The end of the Cold War and the collapse of the centrally-planned economies of Eastern Europe and the former Soviet Union.

reconsider its position and its lack of progress in achieving its objectives. This became particularly pressing with the prospect of an economically strong democratic South Africa joining the group. Listing several critical reasons[56] for integrating Southern African economies, the (SADCC) report argued that there was an absolute necessity for these governments (SADCC Member States) to transform and restructure their economies to make them more productive and competitive ... no single country in the region could make the necessary change on their own. 'In these circumstances, closer economic co-operation and integration have become no longer merely desirable, but imperative for growth, development and indeed survival.'

The treaty is seen as an important step towards the attainment of the goals. By formalising what was previously a loose-knit group of states, the treaty gives SADC the teeth it lacked as SADCC, thereby remedying what many considered to be a major flaw in what was otherwise seen as a pragmatic approach to development. In other words, it provides the Community (SADC) with the capacity to enforce decisions taken by its supreme organ, the Summit of Heads of State or Government."[57]

In this section we have outlined the background to the setting up of SADC and we have highlighted the objectives of SADC. We now draw distinctions between SADC and COMESA.

5.0. DRAWING COMPARISONS AND MAKING DISTINCTIONS:

We have already identified above the problem areas of regional control of foreign investment in Zambia under the COMESA integration scheme. In that discussion, we employed a PEST matrix[58] in examining the problem areas. It must be observed that as pointed out above, the SADC regional integration scheme poses a threat to the efficacy of the COMESA regional integration scheme. There are several areas of common interest between SADC and COMESA. It is such areas that we propose to examine.

The treaty for the establishment of SADC emphasises the need to harmonise political and socio-economic policies of SADC Member States.[59] It is clear from our

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56 Including the argument that political change in south Africa is likely to lead to new patterns of investment in the region, with marked preference for South Africa because of its more attractive investment climate, infrastructural development, and its managerial, technical and technological capacities. A further argument looks to developments in the advanced industrialist countries, as well as in the Pacific Rim and Latin America where these countries are entering into protectionist trading blocs constructed to free trade zones. This has made integration even more crucial to enable the countries of the region to strengthen their bargaining power with these trading blocs.

57 R.H. Thomas, "Introductory Note" in 32 ILM 116-117 (1993).

58 Politics, Economics, Socio-cultural and Technological factors.

59 Art. 5(2).

discussion on COMESA objectives, that this SADC objective also obtains under the treaty for the establishment of COMESA. However, the SADC Treaty goes further by providing that the SADC integration scheme should achieve complementarity between national and regional strategies and programmes.[60] There is no emphasis on complementarity in the COMESA Treaty, although this treaty points out that Member States should not take measures which frustrate objectives of the treaty.

It is clear that whilst the SADC Treaty is targeted at achieving development goals in the region, the COMESA Treaty is akin to market growth in the region.[61] This is evidenced by Art. 5(1) of the SADC Treaty which stipulates that one of the objectives of the SADC regional integration scheme is: "to achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of peoples of Southern Africa."

There is no such provision in the COMESA Treaty. Furthermore, it has been established that the three phases of regional integration under the COMESA scheme are not fully explained in the treaty. The COMESA Treaty simply states that from a free trade area, the next stage is a common market before reaching the stage of an economic community. No clear distinctions are drawn between the three stages. Furthermore, the treaty does not stipulate the attributes of these stages.

It is interesting to note also that the COMESA Treaty does not make reference to regulation of technology transfer or transfer pricing. On the other hand, the only provision in the SADC Treaty on these matters relates to technology transfer. There is nothing on transfer pricing in the SADC Treaty. The clause on technology transfer establishes the general need to: "... promote the development, transfer and mastery of technology."[62] Even so, the provision does not promulgate any policy guidelines on the regulation of technology transfer. It simply puts across one of the objectives of the SADC integration scheme.

Turning back to the COMESA Treaty, the major shortcoming of the COMESA regional integration scheme lies in the fact that trade creation in a region, such as Southern and Eastern Africa, which is mainly constituted by primary goods exporters, would not be an easy task to achieve. For example, how does Zambia export her copper (raw materials) to Tanzania when Tanzania has no secondary industry to process this copper into finished goods? Similarly, Zambia does not have secondary industries to process sisal from Tanzania. Be that as it may, some countries in the region are slightly more technologically advanced than others. Zimbabwe, for

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60 Art. 5(1).

61 Although in the objectives of the COMESA Treaty (that have already been identified above) the term development appears, it is clear from those objectives that the underlying feature behind those objectives is development of the common market and not the multi-dimensional development of people(s) in the region.

62 The SADC Treaty, Art. 5(1).

example, has a steel industry which gives it the potential for growth as an industrialised country. On the other hand, countries such as Zambia have no steel industry.

It must be observed, however, that the primary idea behind these regional integration scheme is that of synergy: 2 + 2 = 5. The European Union model for regional integration seems to have been the basis on which COMESA was designed. From a political point of view, the idea of regional integration may sound romantic. The dynamics and mechanics of successfully implementing a regional integration scheme are not a simple task. As has been demonstrated above under the PEST matrix, there are several shortcomings of the COMESA regional integration scheme. To reiterate, the problem of 'self-interest' of Member States - a problem which arose under the Maastricht Treaty when Britain hesitated on the signing and ratification of that treat - is one such shortcoming. Moreover, it is not easy to talk of synergy in a situation where you have a divergence of power and authority. By this we mean COMESA has its own interests to serve and SADC has its own interest too. At the same time both bodies retain a similar group of countries for membership. Instead of having one strong regional integration body in Southern and Eastern Africa, we have this replication of regional integration schemes which could result in conflict of interests between the two bodies. It could be argued further that the commitment of Member States towards each of these two regional integration schemes is likely to vary. Some states are likely to value SADC as a more development orientated organisation than COMESA. All these differences serve to demonstrate the actual and possible shortcomings of COMESA as a regional integration scheme in Southern and Eastern Africa. To this extent, the paper has demonstrated the shortcomings of regulating foreign investment in Southern and Eastern African States both at the regional and at international levels.

6.0 CONCLUSION:

This paper has examined the COMESA and SADC regional integration schemes in Southern and Eastern Africa as the two important frameworks through which States in Southern and Eastern Africa endeavour to regulate foreign investment in their countries. The paper demonstrated the weaknesses of these regional integration schemes in regulating foreign investment in countries such as Zambia. It must be observed, however, that in examining issues of regional regulation of foreign investment in Southern and Eastern Africa, the paper also examined aspects of international regulation. Regional control of foreign investment is an integral part of international regulation of foreign investment.

We observed that matters such as technology transfer and transfer pricing are not regulated under the COMESA and the SADC Treaties. It is important at this stage to propose that there is need for states in the Southern and Eastern African region to promulgate policies on technology transfer to these countries. If national development is the primary concern of these states, then the development strategies and economic policies in these states must address the issues of viability and adaptability to local conditions of the technology being transferred to Southern and

Eastern Africa. On the other hand, bilateral agreements and treaties on transfer pricing would be helpful in tackling the problem of transfer pricing. As pointed out above, transfer pricing could involve group companies trading across international borders.

In the final analysis, the extent to which regional treaty obligations crystallise into customary international law will, to a large extent, provide new rules for regulating foreign investment in Southern and Eastern Africa. Indeed, it is well established in the field of public international law that the two fundamental requirements to constitute customary international law are State practice and opinio juris (the conviction that the practice is one which is either required or allowed by customary international law).[63] If the two requirements are met then new rules of customary international law on regulation of foreign investment in Southern and Eastern Africa would emerge.

63 See, for example, R.R. Churchill and A.V. Lowe, *The Law of The Sea*, 5-6 (1992). State practice is often published, in the form of the texts of decrees of statutes, law reports, or volumes of diplomatic correspondence.