REGIONAL INTEGRATION AND THE DUALISM OF ECONOMIC AND SOCIAL POLICY: THE DILEMMA FOR FOREIGN DIRECT INVESTMENT AND TRADE OVER OCCUPATIONAL HEALTH AND SAFETY; A POLICY RE-ALIGNMENT FOR THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY [SADC]

Zolomphi Petros Nkowani

Volume I of II

European Law Research Centre
Faculty of Business and Informatics
University of Salford, The United Kingdom

Submitted in Partial Fulfilment for the award of a Doctor of Philosophy Degree in Law, in the year of our Lord 2005
# Table of Contents

Dedication ................................................................................................... xiv  
Abbreviation ............................................................................................. ix  
Acknowledgement ..................................................................................... xv  
Preliminary Note ...................................................................................... xix  
Abstract ..................................................................................................... 2  
Background ................................................................................................ 5  

## CHAPTER ONE: Introduction ................................................................. 8

1. Background ............................................................................................. 8  
2. Structure of the Thesis ......................................................................... 16  

## CHAPTER TWO: Methodology .............................................................. 28

1. Methods ............................................................................................... 31  
2. Literature Review ................................................................................ 31  
3. Field Work ............................................................................................ 33  
4. Case study ............................................................................................ 34  
5. Survey ................................................................................................... 35  
6. Internet ................................................................................................... 37  
7. Popular Media ....................................................................................... 37  
8. Telephone Interviews .......................................................................... 38  
9. Conclusion ............................................................................................. 38  

## CHAPTER THREE: Conceptual Framework ......................................... 40

1. Introduction ........................................................................................... 40  
2. Synopsis ............................................................................................... 42  
3. Economic Approach ............................................................................ 51  
4. A point of Departure ............................................................................ 52  
5. Methodological questions ..................................................................... 55
### CHAPTER FIVE: Regulation

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Introduction</td>
<td>148</td>
</tr>
<tr>
<td>2. Definition</td>
<td>148</td>
</tr>
<tr>
<td>3. Forms of Regulation</td>
<td>151</td>
</tr>
<tr>
<td>4. Sovereignty</td>
<td>152</td>
</tr>
<tr>
<td>5. Economic Sovereignty</td>
<td>158</td>
</tr>
<tr>
<td>6. Need for regulation</td>
<td>160</td>
</tr>
<tr>
<td>7. State, Sovereignty and Regulation</td>
<td>164</td>
</tr>
<tr>
<td>8. Civil society</td>
<td>172</td>
</tr>
<tr>
<td>9. Choice and Policy Dilemmas</td>
<td>174</td>
</tr>
<tr>
<td>10. Conclusion</td>
<td>184</td>
</tr>
</tbody>
</table>

### CHAPTER SIX: The Southern African Development Community (SADC)

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Introduction</td>
<td>187</td>
</tr>
<tr>
<td>2. Synopsis</td>
<td>188</td>
</tr>
<tr>
<td>3. Frontline origins</td>
<td>190</td>
</tr>
<tr>
<td>4. Organisation</td>
<td>193</td>
</tr>
</tbody>
</table>
### Table of Contents

1. Introduction ........................................................................................................... 374
2. A point of Departure ............................................................................................. 379
3. Institutional Infrastructure .................................................................................. 383

**CHAPTER EIGHT: Occupational Health and Safety Regulation, the Case of Malawi**

1. Introduction ........................................................................................................... 374
2. A point of Departure ............................................................................................. 379
3. Institutional Infrastructure .................................................................................. 383
CHAPTER TEN: Case study ......................................................475
1. Introduction ........................................................................475
2. Preface to the Inquiry .........................................................477
3. Background to the Inquiry ...................................................480
4. Modalities .........................................................................482
5. House keeping matters ......................................................483
6. Findings ...........................................................................487
7. Industrial Relations ............................................................596
8. Concluding Remarks ..........................................................500

CHAPTER ELEVEN: Conclusion ................................................504
1. Enemy at the Gate ...........................................................504
2. Accounts still unsettled .......................................................521
3. Regulatory Parameters ......................................................523
4. Social Policy .................................................................527
5. Governance Issues ...........................................................531
6. Window on OHS Regulation ................................................533

CHAPTER TWELVE: Way forward ..............................................545
1. Introduction .....................................................................545
2. Policy Conception ...........................................................546
3. Non-Tariff Barriers to Trade ................................................551
4. Towards a better social governance ......................................556
5. Trade and Foreign Direct Investment .....................................559
6. Social Capital ...................................................................561
7. The Role of the SADC Tribunal ................................................................. 566
8. The Role of the Media ............................................................................. 567

Bibliography .................................................................................................... 572
Annex. 1 ........................................................................................................... 615
Annex. 2 ........................................................................................................... 617
### ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>AC</td>
<td>Appeal Court</td>
</tr>
<tr>
<td>ADA</td>
<td>Americans with Disability Act</td>
</tr>
<tr>
<td>AGOA</td>
<td>African Growth and Opportunity Act</td>
</tr>
<tr>
<td>AIDS</td>
<td>Acquired Immune Deficiency Syndrome</td>
</tr>
<tr>
<td>All ER</td>
<td>All England Law Reports</td>
</tr>
<tr>
<td>BC</td>
<td>Before Christ</td>
</tr>
<tr>
<td>BITs</td>
<td>Bilateral Investment Treaties</td>
</tr>
<tr>
<td>CA</td>
<td>Court of Appeal</td>
</tr>
<tr>
<td>COMESA</td>
<td>Common Market for East and Southern Africa</td>
</tr>
<tr>
<td>DFID</td>
<td>Department for International Development</td>
</tr>
<tr>
<td>DRC</td>
<td>Democratic Republic of Congo</td>
</tr>
<tr>
<td>EAC</td>
<td>East African Community</td>
</tr>
<tr>
<td>ECCAS</td>
<td>The Economic Community of Central African States</td>
</tr>
<tr>
<td>ECHR</td>
<td>European court of Human Rights</td>
</tr>
<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
</tr>
<tr>
<td>ECOWAS</td>
<td>Economic Community of Western African States</td>
</tr>
<tr>
<td>Edn</td>
<td>Edition</td>
</tr>
<tr>
<td>Eds</td>
<td>Editors</td>
</tr>
<tr>
<td>EEC</td>
<td>European Economic Community</td>
</tr>
<tr>
<td>ELS</td>
<td>Employment and Labour Sector</td>
</tr>
<tr>
<td>Acronym</td>
<td>Full Form</td>
</tr>
<tr>
<td>---------</td>
<td>-----------</td>
</tr>
<tr>
<td>EMA</td>
<td>Environmental Management Act (Malawi)</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>FAO</td>
<td>Food and Agriculture Organisation</td>
</tr>
<tr>
<td>FDI</td>
<td>Foreign Direct Investment</td>
</tr>
<tr>
<td>FLS</td>
<td>Frontline States</td>
</tr>
<tr>
<td>GATS</td>
<td>General Agreement on Trade in Services</td>
</tr>
<tr>
<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
</tr>
<tr>
<td>GDP</td>
<td>Gross Domestic Products</td>
</tr>
<tr>
<td>GSP</td>
<td>Generalised System of Preferences</td>
</tr>
<tr>
<td>HC</td>
<td>High Court</td>
</tr>
<tr>
<td>HIV</td>
<td>Human Immunodeficiency Virus</td>
</tr>
<tr>
<td>HL</td>
<td>House of Lords</td>
</tr>
<tr>
<td>HSC</td>
<td>Health and Safety Commission</td>
</tr>
<tr>
<td>HSE</td>
<td>Health and Safety Executive</td>
</tr>
<tr>
<td>HSW Act</td>
<td>Health and Safety at Work Act 1974</td>
</tr>
<tr>
<td>HSWA</td>
<td>Health and Safety at Work etc Act (1974)</td>
</tr>
<tr>
<td>IBRD</td>
<td>International Bank for Reconstruction and Development</td>
</tr>
<tr>
<td>ICC</td>
<td>International Criminal Court</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>IJCLLIR</td>
<td>International Journal of Comparative Labour Law and Industrial Relations</td>
</tr>
<tr>
<td>ILJ</td>
<td>International Law Journal</td>
</tr>
<tr>
<td>ILO</td>
<td>International Labour Organisation</td>
</tr>
<tr>
<td>IMF</td>
<td>International Monetary Fund</td>
</tr>
</tbody>
</table>
IRC  Industrial Relations Court
LRA  Labour Relations Act
MFN  Most Favoured Nation
MIA  Multilateral Agreement on Investment
MIGA  Multilateral Investment Guarantee Agency
MNEs  Multinational Enterprises
Mw  Malawi
NACOSH  National Advisory Committee on Occupational Safety & Health
NAFTA  North American Free Trade Agreement
NEPAD  New Partnership for Africa's Development
NGOs  Non Governmental Organisations
NOCHSC  National Occupational Health and Safety Commission
OAU  Organisation of African Unity
OECD  Organisation for Economic Co-operation and Development
OSH  Occupational Health and Safety
OSHA  Occupational Safety and Health Administration
OSHA  Occupational Safety and Health Act
PCL  Press Corporation Limited
PIC  Prior Informed Consent
PTA  Preferential Trade Area
RECs  Regional Economic Communities
RIDDOR Reporting of Injuries, Diseases & Dangerous Occurrences Regulations
RISDP Regional Indicative strategic Development Plan
RSA Republic of South Africa
SACU South African Customs Union
SADC Southern African Development Committee
SADCC Southern African Development Coordination Conference
SALC Southern Africa Labour Commission
SALs Structural Adjustment Loans
SAP Structural Adjustment Programme
SCFSR SADC Charter of Fundamental Social Rights
SUCOMA Sugar Corporation of Malawi
TAMA Tobacco Association of Malawi
TNCs Transnational Corporations
TRIMS Trade related investment measures
TRIPS Trade Related Aspects of Intellectual Property Rights
UDHR Universal Declaration of Human Rights
UK The United Kingdom
UN The United Nations
UNAIDS United Nations Programme on HIV/AIDS
UNCTAD United Nations Conference on Trade and Development
UNDP United Nations Development Programme
UNEP United Nations Environment Programme
UNESCO United Nations Educational, Scientific and Cultural Organization
UNICEF United Nations Children’s Education Fund
UNRISD United Nations Research Institute for Social Development
USA United States of America
WCA Workers Compensation Act
WHO World Health Organisation
WIPO World Intellectual Property Organisation
WLR Weekly Law Reports
WRMSD Work Related Musculoskeletal Disorders
WTO World Trade Organisation
DEDICATION

To Kwima Rhoda Nkowani for patience and understanding.
To Tawonga Sarah Nkowani for managing to be born at this most trying moment of my life. You are an angel sent from heaven!
To friends and family for support and encouragement
Acknowledgements

A complete list of those on whose shoulders I stood throughout the course of research and preparation of this thesis would be too long to fit within the space available. However special mention should be made but not necessarily in order of importance.

First and foremost I would like to thank my grand parents, Zolomphi Petros Nkowani (Sr) (who never lived to see the fruits of his sweat) and Egnala Nyalongwe for sending me to school to learn how to read and write and for telling me never to lose the ability to tell 'right from wrong'. My late Grand father's parting words were ‘Charo nchisani usange ukuchita makora’ (Good behaviour gains social acceptance). Such inspiration and wisdom never departed from my face and has been a lamp to my feet. I owe him a huge personal debt of gratitude

My parents and family for support and encouragement over the time of preparation of this thesis. My mum always with a smile never failed to chip in one or two inspirational bible verses and made a heavy load lighter and bearable. My daughters Kwima and Tawonga have been a constant source of strength and the reason for being. Their patience, understanding and accommodation are beyond words
I have had a rare privilege of having a willing, able and supportive team of friends that timely provided much needed advice and help. Top on the list is Clara Gausi of Malawi Savings Bank. From my earlier days as an LL.M Student in my former University (Warwick) she single handed provided professional as well as parental advice and stood by me through out my trials and tribulations and richly informed my intellectual thinking to the present day.

My sister Selah for taking off her coat of a sister and putting on a maternal one and her unfailing provision of love, care and attention which she gave anytime she was called upon. The list would be incomplete without the mention of Mary Mzaza for support and encouragement and Owen Mkandawire for the fraternal help rendered.

In the course of my research I have had unlimited access to literature at the Malawi Embassy in London. Particular mention is made of His Excellency Bright Msaka, Malawi’s High Commissioner to the United Kingdom (at the time) who was always willing to take time off his busy schedule for a chat over some of the ideas that follow. I am grateful to him. Worth of particular mention for kindnesses over and beyond the call of friendship are: Ralph Kasambala, Towera Luhanga and Grace Mangwiza for acting as sounding boards on which the ideas that follow were bounced again and again, Rev. Dr. Augustine Msopole of CCAP
and Apostle S.S Ndovi of Living Waters Church for pastoral encouragements. The Living Waters church International in Manchester for the pastoral care.

The study was made possible by the generous funding provided by the University of Salford through the European Law Research Centre (ELRC). I acknowledge this with gratitude.

Last but by no means least, I thank my supervisor Professor Frank. B. Wright of the European Law Research Centre for his helpful suggestions. I also wish to thank all those that helped one way or the other but cannot be individually mentioned for lack of space, may the good Lord continue to bless you to be of service to others.
Preliminary Note

The present study was carried out at the peak of reforms in the Southern African Development Community and Africa as a whole. Right in the middle of the study (2002) the Organisation of African unity (OAU) was transformed into the African Union (AU). This was not a mere cosmetic change of name. Significantly it is a rebirth of African nationhood in a global village as a powerhouse with its own bargaining powers in international economic relations. Contemplated changes in the Constitutive Act of the AU fundamentally affected issues the study set out to investigate.

AU policy changes streamlined and unified social and economic policy, albeit reactive in nature to global socio-economic and political dynamics. The implication for this inquiry was that there had to be a change of approach from investigating social policy in as far as it relates to occupational health and safety, trade and investment, to assessing how the same forms part of a continental blueprint for a social and economic agenda.

The substance of the study was not affected but its approach had to take such developments if the study was to retain its relevance.
At community level the milestone for occupational health and safety the SADC Charter of Fundamental Social Rights (SCFSR) was passed coinciding with the completion of the restructuring of SADC, six weeks (23rd August 2003) before the final draft was completed. The author tried as much as is humanly possible to take such changes into account.

As will be appreciated a cut off date had to be set and in this case it was 30th April 2004. Changes and/or developments beyond this date may not have been taken into account unless it was felt they fundamentally affected the thesis in which case comments have been offered. It will be appreciated that it is impossible in a dynamic environment like SADC to capture every development. However due diligence was exercised to check and verify data or information.

The reliability of conclusions and/or comments made upon the finding of the research have been subjected to a rigorous process of social enquiry obtaining in social research and the author can safely submit that they are reliable and offer a sound platform and direction for further debate and research on issues raised.

The law in this thesis is stated as it stood at 30th October 2004.
ABSTRACT

The central thesis of the study is that social and economic policy are two sides of the same coin and that at the heart of any functional regional integration is the recognition of this dualism. The study takes a critical look at the debate vis-à-vis, trade, investment and labour and its implication for occupational health and safety standards for developing countries.

Regional integration among developing countries is part of a wider strategy to promote equitable growth and not an end in itself. The thesis contends that effective regional integration for SADC will increase competition, reduce private transaction costs, and enable firms to exploit economies of scale, encourage inward foreign direct investment and facilitate macroeconomic policy coordination.


3 See the way forward in Chapter 12.
Through out the thesis the author maintains that regional groupings must be open towards the world market in the sense of keeping tariffs at a level that does not encourage trade diversion. They should not attempt a form of regional autarky\textsuperscript{4} that has led to past failures\textsuperscript{5}. Open regionalism complements unilateral liberalisation. Without regional coherence, unilateral liberalisation may imply negative spill-over effects\textsuperscript{6}. A regionally coherent liberalisation strategy will cushion the shocks of adjustment to a global economy. The high adjustment cost of unilateral liberalisation has been a cause of policy reversal in the region in the past\textsuperscript{7}.

The discussion is set against a background of possible tensions between social and economic policy and priorities and attempts to indicate that in real terms there is no conflict rather only complimentarity exists. It submits that, it is the understanding of this relationship that is often wanting. The study is set in the Southern African Development Community\textsuperscript{8} (SADC). It traces SADC’s social and economic policy in historical context in an attempt to diagnose the problem. Although the

\textsuperscript{4} A policy of national self-sufficiency and nonreliance on imports or economic aid.

\textsuperscript{5} Winters, A, "Regionalism versus Multilateralism," (WPS 1687, November 1996).

\textsuperscript{6} Vide generally Asante, S.K.B "NEPAD: A Partnership of unequal Partners" New African June 2003 No 419, pp14-16

\textsuperscript{7} Resnick, A, ‘Reversal of Fortunes: Democracy, Property Rights and Foreign Direct Investment Inflows to Developing Countries’, International Organization \textbf{57}(1):175-211.

\textsuperscript{8} SADC has 14 Member States namely: Angola, Botswana, Democratic Republic of Congo (DRC), Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa Swaziland, Tanzania, Zambia and Zimbabwe.
findings and conclusion of the study may not be representative of developing countries generally and geographically specific, they do illuminate some of the regulatory dilemmas developing countries face in their endeavours to dock themselves to the global economy and the task of complying with norms and standards obtaining therein.\footnote{Nyland, C, \textit{Trade and labour rights: a north-south issue?} At \url{www.Articles.monash.edu.au}}

The thesis proposes a policy formula that recognises the dualism of social and economic policy in SADC's integration programme. This is premised on the assertion that economic gains of integration are likely to be wiped out by adverse social effects of economic integration if the social considerations are subordinated to the economic concerns for integration. A holistic approach to regulation, promotion and reconciliation of potentially competing social and economic priorities is proposed involving civil society and social partners (state, employers and employees).

**Background**

Globalisation of the world trading system and economic order is revolutionizing and redefining traditional legal borders and has raised the need for sector specific legislation to respond to specific complexities in particular areas, while on the whole the dynamic nature of modern economic activities give way to a need for an
evolutionary regulatory system that could swiftly respond to changes in
the world of work.

It can not be disputed that general labour law could in a majority of
cases be unsuitable to the day to day occupational health and safety
problems. The same could be said of the health and safety law in
general, vis-à-vis, sector specific health and safety issues. This is not to
suggest that government should legislate for everything, as that would
be an impossible task. However as a starting point, there is need for a
framework legislation\textsuperscript{10} that would give guidance and leadership in as
far as health and safety management is concerned.

The process of globaliation\textsuperscript{11} has brought another dimension to the
problem. There is a global dimension which demands a global or a
multifaceted approach to regulation of occupational health and
safety standards involving government and its social partners\textsuperscript{12}.
Unfortunately in most cases the law has not kept pace with socio-
economic changes. In such a scenario, in pursuit of corporate profit
and foreign direct investment, worker welfare suffers and

\textsuperscript{10} The EU has a framework directive while SADC has a Charter for Fundamental Social
Rights that provides such a framework.

\textsuperscript{11} The complex phenomenon of economic interdependency resulting from trade in goods and
services and capital flows.

\textsuperscript{12} According to Article 1 of SADC social charter, social partners refers to government,
representative organisations of workers and representative organisations of employers.
unscrupulous businessmen exploit state systems while governments do little towards the welfare of the workforce.

Multinational corporations with sophisticated networks working in developing countries and transitional economies have at times managed to escape effective regulation with adverse consequences for the workforce, the environment and the public in general\textsuperscript{13}. As the opposition to linkage rages on, the quest for effective management of health and safety standards remains a contentious issue.

What role can the economics of occupational health and safety standards and practices play in SADC's regional integration and how can economic forces be brought to bear on the social regulation of the market? Can SADC as a regional bloc press on with a social and economic programme that makes it attractive as an investment destination whilst minimizing adverse social effects of the process?

In view of the complex nature of the issues involved, the sheer scale of financial and human capital required and the supranational nature of the problem, a supranational approach to the problem is ideal.

This thesis advocates the dualism of social and economic policy and its interplay in regional integration. The thesis finds that the problem in the past has been a policy misconception. There was a misplaced hope

\textsuperscript{13}Exportation of risk, the case of Bhopal at \url{http://www.american.edu/ted/bhopal}
that economic progress would naturally translate into social progress. In this formula social policy was to evolve as a by-product of economic policy, which has proved to be wrong¹⁴.

The study argues that social and economic policies are two sides of the same coin. It displaces the World Trade Organisation's argument or reluctance to link labour with trade and investment. The central argument is that the international trading community can not only be interested in 'products' and ignore the 'production process'¹⁵. The author uses SADC as a microcosm of the global political economy and places the discussion in that context.

¹⁴ See findings in Chapters 7 & 11, infra.

CHAPTER ONE

Introduction

Background

The present study joins the debate that has been going on in relation to trade, investment and labour and its implication for occupational health and safety among other things for developing countries\textsuperscript{16}. The study is set in the Southern African Development Community (SADC). Though the outcome of the study is not representative of developing countries in general and are specific to the area under study, they throw light on some of the dilemmas developing countries face\textsuperscript{17} in their endeavours to dock themselves to the global economy and in complying with norms and standards obtaining therein.

Various schools of thought, intellectually sound and credible but suffering occasionally from either social or economic remoteness or a combination of both are often resorted to for philosophical thresholds for discussion in this debate\textsuperscript{18}. On the one hand there are those that hold that trade and investment should not be linked to labour for to do so would rob countries such as SADC states of their comparative advantage. Apart from the competitive argument for such a linkage

\textsuperscript{16} Op.cit,n.1
\textsuperscript{17} Op.cit,n.9
\textsuperscript{18} Ibid, p.2.
there is also the fear that the linkage could be used as a form of disguised protection\textsuperscript{19}. This is not to say that protection is not permitted under international trade law, for that would be an incorrect statement of law\textsuperscript{20}. Protection is permitted, albeit to a limited extent i.e. where it is appropriate for the protection of human, animal or plant life or the environment\textsuperscript{21}.

The only rider to the above position is that member states ought to ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. Such regulations should not be more trade-restrictive than would be necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Legitimate objectives are, \textit{inter alia}: national security requirements; the prevention of deceptive practices; protection of human \textit{health or safety} (emphasis supplied), animal or plant life or health, or the environment. In assessing such risks, relevant elements for consideration include available scientific and technical information,

\textsuperscript{19} where country (A) may restrict its domestic market access for products from Country B under the pretext that its production violated internationally recognised labour standards when all that Country A is doing is to protect its domestic industry that could not freely compete with products from country (B).

\textsuperscript{20} Article.2 (2) of the Uruguay Round Agreement on Non Tariff Barriers to Trade coins protection as a sovereign right.

\textsuperscript{21} Article.XX of GATT 47 and Article.16 of SADC Protocol on Trade. These provisions deal with sanitary and Phytosanitary measures and allow what would otherwise be protection for the sake of protecting human, animal and plant life and safety.
related processing technology or intended end-uses of products. What is not permitted is to use standards, testing and certification procedures that create unnecessary obstacles to trade.

Whatever the merits or lack of it, the above is indicative of two important strands to the regulation of the global economy. Primarily human health and safety ought to come before commercial interests. Whether in practice this is the case is another thing and will form part of our decision. However, what has been problematic in the past is the acknowledgement of this link.

Besides the cost and benefit analysis of global economic regulation social and political factors, (of which occupational health and safety is an indispensable component), the linkage of trade and investment with labour will have a significant bearing on global economic regulation and the management of workplace safety and health.

The other school of thought which is rather humanitarian in presentation favours linking the two. According to this school of

22 Article 2 (2) of the Uruguay Round Agreement on Technical Barriers to Trade.
23 Whether a tough and strict regime of health and safety regulation would be a violation of this leeway remains a contentious issue. Op.cit. n.1.
27 Ibid, n.25.
thought, exploitation of labour not only perpetuates global poverty\textsuperscript{28}, which can potentially lead to social unrest on a scale capable of threatening global peace, but also hinders the redistribution of national wealth and proceeds of labour\textsuperscript{29}. The political case has been that labour exploitation allows tyrants to amass wealth at the expense of those that create it\textsuperscript{30}. It is further maintained that labour rights are human rights and that no one should be allowed to have competitive advantage in human rights\textsuperscript{31}. The main concern is that human or civil rights are capable of violation not only by agencies of the state and those that wield public power, but also by corporate actors and others who wield private power such as employers. If one grants this then there arises a need for protection from the later just as there is a need for protection from the former\textsuperscript{32}.

The possibility of liberty being violated by employers will be greatly reduced where there is strong workplace representation by trade

\textsuperscript{28} Poverty is the situation facing those in society whose material needs are least satisfied. Inability to afford an adequate standard of consumption because of low income is referred to as income poverty. If, apart from low income, a country is characterised by malnutrition, poor health, low survival rates, low literacy levels, inadequate housing and living conditions, etc., then there is human poverty. Generally see also World Development Report 2003: Sustainable Development in a Dynamic World, Chapter 4 at http://www.econ.worldbank.org


\textsuperscript{31} See our discussion on the contents of labour rights in Chapter four, post.

union and civil society involvement. The fundamental question then is, on what rational basis can it be argued that while the government must respect individual rights to private and family life, an employer may be free to undermine it with impunity? The difficult question is not whether employers should respect the rights of workers, but to identify what these rights are and the right to health and safety and clean environment in our view is one such set.

This school of thought inspires the conditioning of markets access and development aid on observance of internationally recognized labour standards through the various generalized systems of preferences (GSPs), like the one the USA has with African, Caribbean and Pacific countries (ACP). This sort of argument is advanced more at bilateral level. At a multilateral level the language takes on an economic outlook. Labour exploitation is treated as a subsidy. This is a strategic use of language designed to bring the issue under the World Trade

33 See our discussion on civil society, infra p.115.
34 Article.31 of the constitution of Malawi.
37 The US GSP scheme permits duty-free entry to all products covered by the scheme. The Trade Act of 2002 officially reauthorized the GSP scheme through December 2006. This Act modifies certain regulations on textile and apparel provision under the African Growth and Opportunity Act (AGOA). AGOA provides designated sub-Saharan African countries with duty-free and quota-free access for a wider range of products.
39 Payment or other favourable economic stimulus (such as remission of taxation) given by government to certain individuals or groups of economic entities, usually to encourage their continued existence, growth, development and profitability.
Organization system so as to set in motion its sanction machinery\textsuperscript{40}.

Globalisation has opened a new front to the debate\textsuperscript{41}. With this and changing approaches to economic reconstruction from 'Beg thy neighbour' approach of post-colonial rule in sub-Saharan Africa, to trade and foreign direct investment (FDI)\textsuperscript{42} as engines for development and economic reconstruction. States are re-organising themselves into trading blocs such as SADC to benefit from economies of scale\textsuperscript{43}.

\textsuperscript{40} See our discussion on World Trade Organisation in Chapter one.


\textsuperscript{42} Foreign direct investment (Foreign Direct Investment) occurs when an investor based in one country (the home country) acquires an asset in another country (the host country) with the intent to manage that asset. The management dimension is what distinguishes Foreign Direct Investment from portfolio investment in foreign stocks, bonds and other financial instruments. In most instances, both the investor and the asset it manages abroad are business firms. In such cases, the investor is typically referred to as the "parent firm" and the asset as the affiliate or subsidiary. There are three main categories of Foreign Direct Investment: \textit{Equity capital} is the value of the MNC's investment in shares of an enterprise in a foreign country. An equity capital stake of 10 per cent or more of the ordinary shares or voting power in an incorporated enterprise, or its equivalent in an unincorporated enterprise, is normally considered as a threshold for the control of assets. This category includes both mergers and acquisitions and "greenfield" investments (the creation of new facilities). Mergers and acquisitions are an important source of Foreign Direct Investment for developed countries, although the relative importance varies considerably. \textit{Reinvested earnings} are the MNC's share of affiliate earnings not distributed as dividends or remitted to the MNC. Such retained profits by affiliates are assumed to be reinvested in the affiliate. This can represent up to 60 per cent of outward Foreign Direct Investment in countries such as the United States and the United Kingdom. \textit{Other capital} refers to short or long-term borrowing and lending of funds between the MNC and the affiliate.

\textsuperscript{43} The factors, which make it possible for larger organisations or countries to produce goods or services more cheaply than smaller ones. Economies of scale, which are internal to firms,
the ultimate hope of economic and political integration of their regions\textsuperscript{44}. However in the absence of a coherent competition and labour market policy in such regions, inter-state competition for foreign direct investment sets a race to the bottom of social standards as member states try to outdo each other in offering the most competitive investment climate\textsuperscript{45}. This is done either through tax and regulatory concession or symbolic enforcement of labour standards thus in our case occupational health and safety\textsuperscript{46}.

The thesis suggests that the solution for SADC lies at regional as well as domestic level. A policy solution that seeks to balance potentially conflicting social and economic priorities will not only help the integration process but will also bring social legitimisation to SADC's economic polices and is more likely to be supported at state level than one that doesn't. This way the treaty ideals will be easier to realize as implementation will be less problematic. The thesis further argues that

\textsuperscript{44} Castle, Robert, D.P. Chaudhri, and Nyland, C, (1998), 'Integration of Market Economies and the Rights of Labour: International Regulation. 


\textsuperscript{46} Supra, n.45.
at the heart of any functional regional integration is the recognition of dualism of social and economic policy\textsuperscript{47}.

The thesis concludes that the maintenance of good occupational health and safety standards and practices is an important aspect of the integration equation. This is so because it helps in the creation of a level playing field\textsuperscript{48}. Varying health and safety standards in the region will operate as de facto non-tariff barriers to trade through their effect on the movement of, people, goods and services in the region\textsuperscript{49}.

The thesis suggests that these problems are policy issues and as such require primarily policy solutions. It proposes a policy formula that acknowledges the said dualism in SADC’s integration agenda\textsuperscript{50}. This proposal is premised on the fact that economic gains of integration are likely to be wiped out by adverse social effects of economic liberalisation agenda implied in the economic formula for integration, if the social side of the equation is subordinated to the former. For instance poor health and safety becomes a public health issue and could increases the number of those ending up on public health services or benefit system. This cost-shifting from those that creates it, i.e. economic actors such as TNCs to taxpayers erodes the moral case.

\textsuperscript{47} See chapter seven, supra. p.271
\textsuperscript{49} Infra, p.564.
\textsuperscript{50} See Chapter eleven, infra, pp.559-563.
for free trade as the public pay the bill of poor labour management while firms pocket the profits of labour exploitation and mismanagement.

A holistic approach to promotion and possible reconciliation of potentially conflicting social and economic priorities is proposed in this formula involving civil society and social partners (state, employers and employees). On account of the scale of costs and skills required and supranational nature of the problem, the thesis prefers a supranational approach to regulation and management of occupational health and safety in the region.

**Structure of the thesis**

Chapter two discusses the methodology and methods used for the collection and analysis of data for the thesis. The chapter distinguishes qualitative from quantitative methodologies and explains when and why each or a combination of both could be used and the advantage of doing so. Data and information for the thesis was collected using a number of the methods such as, literature reviews, the internet, case study and a questionnaire among others. A full discussion of the merits and demerits of the research tools and approaches adopted is given in this chapter. The author comes to the conclusion that there is no one correct method of doing research of the embarked on, rather a host of
methods can be employed in one project depending on the issues involved.

The subject of inquiry largely falls within labour law. The author's background is in international economic law. This is reflected in the approaches adopted for the study. A decision was made to adopt a combination of economic and traditional legal approaches to the study of social phenomena in question in the context of SADC. In this regard the central paradigm is that of cost. Chapter three introduces the concept of cost and casts the thesis in economic perspectives.

It was felt that an understanding of the cost element will illuminate why and how economic actors react to regulation. This has policy implications, which comes would be helpful in devising mechanisms for enforcement and implementation of occupational health and safety and other social standards, be it at regional or national level.

Realising that economic rationality does not offer a panacea to all social problems associated with globalisation and power configuration

---

51 The value of the inputs needed to produce any goods or services. This has to be measured in some units or numerical value, usually money.
52 Infra, Chapter three,
54 The assumption that consumers (at least sane and sober ones) are the best judges of their own interests. They are result oriented and always calculate the cost of their action. They consume less of the expensive commodity or services and will substitute it with that which makes economic sound sense. However in real life that is not how choices are essentially made. See Grether, D. & Plott, C. (1979). "Economic theory of choice and the preference; Reversal Phenomenon," American Economic Review, Vol. 69, 623-638.
between the market, state and society, a traditional legal approach that examines law in its social milieu was also undertaken alongside the former. The advantage of the approach has been that it enabled the casting of social issues in economic perspectives. By exposing the toll poor occupational health and safety standards and practices impose on productivity and efficiency, it could provide economic incentives for a safety culture. It also makes the case for society through civil society to get involved in the promotion and safeguarding of occupational health and safety as the financial, social, personal and economic cost of occupational ill-health becomes clear.

Economics provide a behavioural theory to predict how people respond to changes in law. This theory surpasses intuition, just as science surpasses common sense. In addition to a scientific theory of behaviour, economic theory provides a useful normative standard for evaluating law and policy that is crucial in understanding the interface between economic and social regulation of the market.

This approach is inspired by the Chicago school thought, which applies the methodology of economics to the study of law. Indeed any discussion of the economic analysis of law would be incomplete without the mention of Professor Richard Posner who opined that economics has found a vacant niche in the ecology of law and is filling it. Also Oliver Wendell Holmes once said that for the rational study of law, the black-letter man may be the man of the present, but the man for the future is the man of statistics and the master of economics, we learn that for everything, we give up something else, and we are taught to set the advantage we gain against the other advantage we lose and to know what we are doing when we elect. In this he was expounding the theory of opportunity cost which as this study finds plays a crucial in the calculus of health and safety at all levels of

60 The study of human actions in a social context, especially as those actions are directed toward the use of scarce resources to satisfy potentially unlimited wants. Dolan, E, (1983) Basic Economics (3rd Ed) The Dryden Press (New York) p.3.
62 Op.cit, Roscoe Pound
63 Ibid, p. 457,469,474 (1897).
economic engagement\textsuperscript{64}.

Another important concept that preoccupied the author has been that of regulation. The economics of occupational health and safety is about regulating health and safety as a factor of production at an aggregate level. This concept is discussed in chapter five as part of the conceptual framework. The examination focuses on definition, form, need and approaches to regulation. The chapter divides regulation into social and economic regulation. It concludes that the imposition of occupational health and safety standards are a form of the social regulation of the market and cannot be down played in SADC's integration programme. On this premise the chapter advocates a health and safety agenda in SADC's integration. It argues that the social case for occupational health and safety standards has economic as well as political rationales and has significant contributions to make towards the integration process via its effect on living and working conditions in member states.

Chapter four examines the merits and demerits of the linkage question in the context of the World Trade Organisation and International Labour Organisation. The examination looks at World Trade

\textsuperscript{64} Opportunity cost is the cost of pursuing one alternative versus another. For example, if you were going to spend £100 on a new camera, the opportunity cost would be that you would not be able to buy anything else with or invest that £100. For the purposes of financial planning, you should look at the cost versus the benefit of each decision you make.
Organisation's social agenda and protection offered by the two institutions. The jurisprudence of labour rights as human, social, civil as well as political rights is undertaken in this chapter. The advantage of introducing the debate on these issues in this chapter is that it builds on the argument for economic and social regulation of markets.\(^\text{65}\)

It was felt that representatives of the two strands of regulation (WTO and ILO) be examined to see if there is sufficient nexus for linking trade and investment with occupational health and safety standards.\(^\text{66}\) The chapter concludes that the World Trade Organisation's rejection of the linkage of trade and labour is based on a wrong premise, i.e. that it stands for the interests of corporations and not the individuals making up those corporations. It also finds that labour standards would benefit much from linking the two at a multilateral level such as World Trade Organisation.\(^\text{68}\)

Finally the study considers policy and regulatory options available to SADC and concludes that SADC needs to balance economic and

\(^{65}\) Infra, Chapter 5, p.135.

\(^{66}\) See our discussion in Chapter Four.


social considerations in its quest for trade and Foreign Direct Investment. The chapter suggests that a policy solution would be the formulation of a self-standing social policy along side its economic agenda. Conceiving occupational health and safety in civil, social and human rights terms will motivate civil society to be involved in the promotion and enforcement as they will be aware of the social and economic toll of under investment and poor enforcement of occupational health and safety standards.

The deployment of non-control and command approaches will make a valuable contribution towards responding to the dilemma of occupational health and safety over trade and investment in the region. This would be a better way of sharing (as opposed to cost shifting) the economic burden of occupational health and safety regulation and management. This would involve persuasion and pressure from the state and civil society complementing the traditional control and command approach which some firms may resent.


70 Poor occupational health and safety regulation is effectively shifting costs of the consequences to society via, social personal or family cost in terms of care and attention. In a global economy dominate by transnational corporations (Private actors) occupational hazards created are paid by taxpayers via cost shifting.
At the time of writing this thesis, a social charter for SADC\textsuperscript{71} along the line of the EU social charter had just been adopted. Comments are made in a later chapter. As will be appreciated such comments can only be limited to an examination of the Charter. As to what it can realistically achieve, the jury is still out.

Chapter five introduces SADC, the broader context in which the study is set. This is more of a historical presentation. This was necessary to show and tract occupational health and safety policy and development. The evolution and factors (internal as well as external) that have influenced it. The chapter concludes that the region’s colonial legacy has had a lasting impact on social democracy and labour markets in the region.

On the positive note the region has had the opportunity of having a window on socio-economic policy, which prepared ground for theorizing on occupational health and safety in the region. The inheritance of colonial laws such as the UK Factories Act wholesale transplanted into former colonies whose legislative ghost looms on in some countries, is an example.

The negative side the study finds to be that colonial policies on development and occupational health and safety were imposed on the region without taking into account social and cultural factors. It

\textsuperscript{71}Adopted in August 2003 at its summit at Dare-salaam, Tanzania. See text at www.sadc.int
only produced western intellectual style of arrogance on post independence leaders. The chapter finds that participation was more given in form and (less if any at all) in substance, industrial democracy suffered and occupational health and safety took a savage beating\textsuperscript{72}.

Chapter seven carries the debate further by focusing on occupational health and safety in SADC since its formation. The study takes an exploration of occupational health and safety in the context of social policy in the region. It also examines various instruments that embody the region's economic and social policy such as the treaty of SADC and its predecessor\textsuperscript{73}, the social charter\textsuperscript{74}, codes of conduct for the safe use of chemicals, code of conduct on HIV/AIDS and employment and the code of conduct on the employment of women and children rights\textsuperscript{75}.

At domestic level occupational health and safety legislation as an expression of regional occupational health and safety policy has been considered. The chapter concludes that though SADC has had social policy in its constitutive treaty and instruments made thereunder, it has never has had a \textit{de facto} social policy until August 23\textsuperscript{rd} 2003 when the

\textsuperscript{72} On legal transplants see generally Alan Watson, A, 

\textsuperscript{73} Posted on \url{http://www.sadc.int/index.php?action=a1001&page_id=documents_legal_treaties}

\textsuperscript{74} Visit \url{http://www.sadc.int/index.php?action=a1001&page_id=charters_social_rights}

\textsuperscript{75} See our discussion in Chapter 7, infra
social charter, along the lines of the EU social charter was adopted\textsuperscript{76}. It argues that the social charter complements the ideals espoused in article.5 of the treaty that seeks to improve living and working standards in the region.

Examining occupational health and safety for SADC in this context elucidates the significance of social legitimation of its economic programme. For unless people see that the region's economic agenda translates into social progress via, job creation, job security, improved living and working standards, it will be hard to achieve domestic consensus and support that is vital for the implementation of SADC programmes. Various institutions are considered in this chapter such as the SADC court and its role in shaping occupational health and safety policy in the region, domestic courts, civil society, NGO and the media.

Chapter seven examines the question in a domestic context and uses Malawi as a case study. This is done in order to see how SADC policy on occupational health and safety, trade and Investment is impacting on the legislative agenda of member states. The study finds that there are

\textsuperscript{76} In December 2000 in Nice, EU leaders, the European Commission and the European Parliament proclaimed the Charter of Fundamental Rights of the European Union. The charter draws together personal, civil, political, economic and social rights into a single text. The way the charter was drafted was itself an achievement by involving all the EU institutions and a broad spectrum of society. The end result expanded on existent human rights texts to cover modern issues such as data protection, the right to good administration, workers rights and bio-ethics. This is in stark contrast to the SADC social charter. There wasn't that broad an involvement of stakeholders.
trends in occupational health and safety regulation and legislation across the region. However it was found that this development is not entirely due to SADCs efforts, rather there are other global forces such as market access\textsuperscript{77} and development aid conditionality on labour that would take part of the credit.

The down side of this development is that since some conditions are specific to beneficiary states in the region, there is an apparent lack of a coherent enforcement strategy for the region. The same could be safely said of the situation in member states. One possible explanation is that such conditions are more of the imposing state's foreign policy decision than one of labour. The study argues that despite this weakens, it offers the best platform on which to campaign for a viable policy on trade, investment and occupational health and safety within SADC.

Chapter six examines the issue at sectoral as well as enterprise levels. The sector chosen is agriculture while enterprises chosen are tea and Tobacco. This is done using Malawi as a case study. Agriculture was chosen because SADC's economy is predominately based on primary agricultural production and hence common occupational health and safety problems across the region. It was felt that regional consensus

\textsuperscript{77} The conditioning of market access under the American Generalised System of Preferences (GSP) is one such example.
would be easier to achieve on common issues, which could be extended to other areas such as service and manufacturing industries in the region.

The study concludes that despite occupational health and safety policy at regional and state levels, some areas of the economy are not adequately covered. The study concludes that framework policy guidance would make a meaningful difference. It advocates the strengthening of participatory processes in labour as laid down in occupational health and safety legislation. On account of high levels of illiteracy and innumeracy, civil society, trade unions, the judiciary and legal profession would be crucial players. Conclusion is provided in chapter eleven while proposals are offered in 'the way forward'in chapter twelve.
CHAPTER TWO
Methodology

Introduction
Before we commence a discussion of the methodology adopted in this study it is important to introduce two important, but frequently confused terms. These are methodology and methods. The term method refers to tools or techniques of data collection such as questionnaires, interviews, literature reviews, etc.

Methodology on the other hand has a more philosophical meaning and refers to the approach or a paradigm that underpins research\textsuperscript{78}. There are many ways of thinking, categorizing the many methods of designing, carrying out and analyzing the results of a research. However the question of the best method is not merely a technical question, it's about how one understands social reality.

It is not unusual for different research projects to produce different kinds of knowledge about the same phenomena under study\textsuperscript{79}. It is important to bear in mind that Social theory, beliefs and worldviews play a crucial role in social reasoning and the subsequent knowledge emanating from such research.

\textsuperscript{78} Blaxter, L, (2001) \textit{How to Research}, Open University Press, Buckingham, p.59 See also Hammersley, M (ed) \textit{Social research, philosophy, politics and Practice}, London Sage
At the heart of the issue of methods and methodologie employed in any research project is the concept of paradigms. These are conceptual frameworks within which social and scientific theories are constructed\(^{80}\). Put simply, they are ways of breaking down the complexity of the real world that tell their adherents what to do. In essence they are intellectual cultures. Common to social research are those termed quantitative and qualitative paradigms.

Quantitative research is empirical research where data is essentially numerical while qualitative research is empirical research where data is not in the form of numbers\(^{81}\). Quantitative paradigms are concerned with the collection and analysis of data in numerical form. It tends to emphasize relatively large-scale and representative sets of data. It is common in the natural sciences.

Qualitative paradigms on the other hand are concerned with the collection and analysis of information in its many forms, chiefly non-numeric as possible\(^{82}\). It tends to focus on exploring in as much detail as possible, smaller numbers of instances seen as illuminating and aims to achieve depth rather than breadth.

---


\(^{82}\) Op.cit,n.78, p.64
Though there seems to be fundamental differences between the two paradigms, in reality they share similarities and it is not unusual to use in one project a combination of both. While quantitative research may be mostly used for testing theory, it can also be used for exploring an idea and generating hypotheses and theories. Similarly qualitative research can be used for testing hypotheses and theories even though it is mostly used for theory generation\textsuperscript{83}.

In the present study a qualitative approach was preferred over the quantitative one. First, as in social science research, a great deal of the phenomena concerned was available as either raw or processed information in non-numerical form e.g. Legislation, policy documents, legal instruments etc. The advantage of this has been that depth of analysis was achieved as opposed to breadth. It enabled a comparative view of the problem, solutions and potential dilemmas to be taken. Since numerical data has also been used some quantitative techniques have been employed\textsuperscript{84}. The significance of this is that it has been possible to consider the economics of occupational health and safety on the one hand and the cost of poor occupational health and safety on the other with relative ease.

The above approach makes sense if one looks at it from an enterprise

\textsuperscript{83} Op.cit.n.78, p.65
\textsuperscript{84} See Table 4 and the section on Foreign Direct Investment in Chapter 7, post
point of view. For instance the test of reasonable practicability\textsuperscript{85} in occupational health and safety presupposes that the one on whom the duty for health and a safety falls will take into account economic consideration in discharging the duty\textsuperscript{86}. The calculus involved in the cost–benefit analysis borrows from quantitative techniques\textsuperscript{87}. That said, for the most part a qualitative approach was followed in the study.

**Methods**

The study utilized various methods of information and data collection. Their choice and design was done having in mind the methodology adopted. They included the following:

i. Literature review

ii. Fieldwork

iii. Case study

iv. Surveys

v. The Internet

vi. Media and telephone interviews

**Literature Review**

A literature review is a systematic, explicit and reproducible method of identifying, evaluating and interpreting an existing body of work

\textsuperscript{85} See our discussion in Chapter 3, infra


\textsuperscript{87} Op.cit, n.85.
produced by researchers, scholars and practitioners. It not only provides a framework for research but also enables a researcher to place his or her work in the context of what has already been done, allowing comparisons to be made.

The bulk of the material for this study came from reviewing legal and policy documents such as treaties, charters, case reports, professional and academic journals in various forms i.e. print, electronic or audio-visual. This allowed the author to gain an understanding of issues under investigation, how the same had been approached in the past and how to take the discussion further. The method set the road map for the study.

The advantage of this method is that since almost 90% of research material was in recorded form it was easier to consult a wider pool of information. It is also cheap as you can conduct your research from your workstation without having to go out. However, as was the case in the present study the collection of some material involved travels either to libraries, offices etc. The drawback of the method is author’s bias. For this reason time was spent in diligently verifying and comparing materials with established social and empirical reality. Particular care was given to Internet materials.

It became apparent that a large portion of Internet material is not from official sources as is frequently claimed. Crosschecking such data and information became part of the exercise. This included telephone, email and personal visits to contact points. Though it is a cheaper method compared to other it is time consuming. The bias and social remoteness of some of the writers meant at some transplanted ideas were unhelpful to the research.

The geographical area under study is one that is not well served with legal literature around issues under investigation. Much of the literature relied on had a western flavour. Inadequate appreciation of local dynamics rendered some of the well-written material irrelevant. On the whole the method proved useful.

Field Work

This method involves visits to sites to make empirical observations. Malawi was visited made in the second year of the study. In Malawi visits were made to tea, sugar and tobacco plantations. Initially the plan was to look at the sugar industry, however although an agreement had been reached in advance with the owners of the sugar plantations they later on became hostile and uncooperative. This led the author to adopt a field observation approach which involved going to the fields with a checklist.

90 The author felt the reason for this behaviour on the part of corporation concerned was fear of being exposed on its record on occupational health, safety and welfare.
The situation was different for other sectors where cooperation was forthcoming and meetings were held with trade union leaders, management and some employees. Meetings were also held with the Malawi Trade Union (MTU), (the umbrella body for trade unions in Malawi). Visits were also made to the Malawi High court and Industrial relations court (IRC).

Finally meetings were organized with the country's two major insurance companies i.e. Royal & Sun Alliance, and National Insurance Company of Malawi (NICO). The study found that health and safety legislation in Malawi was more observed in the breach than in compliance. The method further afforded an opportunity for original and empirical data collection, bridging the gap of social remoteness of analyzing collected data discussed above. The method further afforded the author an opportunity to gain an inside view of the politics, economics and corporate cultures in that have a significant bearing on the regulation and management of health and safety standards.

Case Study

The other method used is the case study method. Though not very different from the field method described above in that the techniques used were the largely the same, the underlying philosophical motive is different. Where as originality or empirical observation greatly

---

influences the fieldwork method, the case study on the other hand was underpinned by a desire to use Malawi as a microcosm for SADC. The advantage is that by moving away from SADC generally to a case study, depth was achieved. SADC has 14 member states and as such depth could not have realistically been achieved by studying all of them in the space allowed for a doctoral thesis. The other advantage has been that it allowed the author to measure the relevance of SADC to its membership in terms of policy and legislative guidance\textsuperscript{92}. 

The choice of the agricultural sector allowed for detailed examination of how regional policies can trickle down through the social structure to the grassroots level in member states\textsuperscript{93}. Agriculture is one of the sectors undergoing massive privatisation where transnational corporations are effectively ‘running the show’. Government policy on occupational health and safety in the absence of sufficient safeguards can easily be subordinated to the quest for harmonious relations\textsuperscript{94} with corporations involved as the governments want to retain and attract more foreign direct investment. The findings on agriculture form a launch pad for a discussion on the wider side of social and economic policy in SADC’s integration agenda.

\textsuperscript{92} This was compared with the EU where member states such as the United Kingdom are a wash with EU influenced legislation and policy in every department of its internal and external engagement.


\textsuperscript{94} See our discussion on agriculture in chapter 9, infra.
Survey

The study also utilized a survey technique. A questionnaire was prepared and personally administered to a random sample of 100 full time and seasonal employees as follows. 50 questionnaires on one of the tea estates in the south of the country and the remaining 50 questionnaires on a tobacco estate. Initially it was planned to carry out the survey at the two of ILOVO sugar corporation's plantations in the country. Following ILOVO's refusal to cooperate let alone allow the author to conduct interviews with some of its employees, it was decided to carry out the survey on tea and tobacco estates. The tea estate is in the southern part while the tobacco estate is in the north of the country; these are some 400 miles apart.

The advantage of this is that though the industries surveyed were different, their occupational health and safety problems were strikingly similar. This gave the author an insight into the state of occupational health and safety standards and practice in the country, a platform from which to advance the case for an occupational health and safety standards agenda at community level.

On account of the small sample used it would not be fair to draw conclusive generalizations about the regional situation the region. However these findings are indicative of both national and supranational problems and challenges vis-à-vis occupational health and safety standards and practice in the region.
Internet

The wealth of information in form of academic journals, policy papers and other electronic resources on the Internet is amazing. However not all of it is credible and authentic. For this reason one has to keep checking the information with concerned organizations in as much as is practical. This was kept in mind at the outset of this study. The Internet was utilized extensively and became a friend in need. The advantage was that it allowed for the collection of data from as wide a pool as is possible. It was amazing that there is more information about Malawi on the net than you can get in any of the government offices in Malawi. This makes the Internet a researcher's an indispensable tool. However due care should and was taken in this case to verify information.\textsuperscript{95}

Popular Media

The media today has become a major source of current information. It was found to be a valuable source of information for the study. Live broadcasts, interviews, commentary, reviews and correspondent report all provided information that greatly informed debate in this study. The main problem is that of media bias. Some reports are deliberately exaggerated in some aspects.

Telephone Interviews

This is another indispensable tool of communication. This is particularly so in a research conducted a way from the centre of the enquiry. The problem is that is not cheap. It was utilised extensively in cross-checking media and Internet materials with the relevant offices in Malawi, SADC secretariat and locally.

Conclusion

At the end of the research the author came to the conclusion that there is no one perfect method for collecting data and information and that in one exercise a multi-aproach mechanism can be deployed. Room for error was greatly minimized by the use of variously methods.

The author also learnt that there is no single best way of conducting research and that in a single research project a multi-method approach could be employed without losing the philosophical underpinning. Much as the author cannot totally guarantee the reliability of data and their findings, on an objective view they are valid and reliable. Due to the dynamic nature of the issues involved and the rapid socio-economic changes taking place within SADC it is possible
that events have overtaken this discussion. What is important is to place the discussion in its context in terms of time and geographical scope\textsuperscript{96}.

\textsuperscript{96} See preliminary note for a cut-off date (30\textsuperscript{th} April 2004).
CHAPTER THREE

Conceptual Framework

In corporate headquarters' corridors these days, they say that the only way to really insult an entrepreneur is by wishing him luck in creating a lot of jobs ...Modern entrepreneurs think globally. From this standpoint, the nagging unions who say that higher profits should mean more jobs and decent working conditions in your own country sound provincial.

Jos Teunissen and Cees Veltman97

Introduction

Occupational injury and illness are not only matters of health, but also of economics, since they stem from work, and work is an economic activity. The economic perspective on occupational safety and health encompasses both causes and consequences98. The role of economic factors in the etiology of workplace ill-health and the effects this has on the economic prospects for workers, enterprises, nations, and the world as a whole99. It is therefore a very broad perspective, but not complete, because neither the causation nor the human significance

of can be reduced to its economic elements\textsuperscript{100}.

This chapter will indicate the important contributions economic analysis can make to our understanding and the dynamics that affect or influence the management of occupational health and safety standards. Thus it answers primarily two question raised in Chapter one, i.e. the significance of an economic approach to occupational health and safety and the central role of the cost element in the economics of health and safety. It finds that an economic approach usually brushed a side in legal scholarship\textsuperscript{101} is vital to an understanding of how and why firms and organization react to regulation in the manner they do\textsuperscript{102}. It argues that it is only by taking this into account that policies can be formulated that has cross sectoral support and likely to succeed.

In the second part the chapter discusses the concept of cost as a component in the calculus of occupational health and safety\textsuperscript{103}. It

\begin{itemize}
\item \textsuperscript{101} See the discussion on the critics of the economic analysis of law, infra.
\item \textsuperscript{103} (Undated) \textit{Economic impact of occupational safety and health in the member states of the European Union}. Bilbao: European Agency for Safety and Health at Work
\end{itemize}
takes the view that understanding the cost element at all levels of economic engagement is vital in the management and regulation of occupational health and safety as it richly informs our understanding which in turn enhances participatory processes and industrial politics for the common good.  

Synopsis

A familiar proposition frequently advanced by developing countries is that in international commerce they have a comparative advantage of cheap labour. This statement speaks volumes and the confusion it engenders is a cause of concern. At this moment we will not go into a discussion of the issues or try to disentangle the said confusion as that is beyond our scope. We will limit ourselves to considering the impact of economic globalization and the liberalization on occupational health and safety regulation within the SADC framework.

Starting the discussion with trade and investment issues may look like a departure from the central issues of the debate, but the opposite is true. Introducing issues of trade and investment first rescues them from


106 See generally the Director-General’s reports entitled Decent work and protection for all in Africa and ILO activities in Africa 1994-99 at http://www.ilo.org/public/english/standards
being clouded with the main issues of occupational health and safety. Though not a great deal of space will be devoted to them it should be acknowledged that they are a ferment of any modern health and safety policy at all levels of state engagement\textsuperscript{107}.

Analytically cases of low labour standards can be thought of as an enlargement of the effective labour supply in the country concerned. The employment of children in violation of host state legislation and International labour standards\textsuperscript{108} in labour intensive industries in the south may increase the labour supply in the south by roughly the number of children added to the labour force. For those countries, that already has a comparative advantage in unskilled labour-intensive industries such as sugar, tobacco and textile this will result in the

\textsuperscript{107} See the ILO's working paper on the Economics of Health and Safety at www.ilo.org
\textsuperscript{108} CEACR: Individual Observation concerning Convention No. 138, Minimum Age, 1973 Malawi (ratification: 1999) Published: 2003. The report proceeds in part under Article 1, paragraph 1, of the Convention. National policy on child labour. The Committee notes that according to the ICFTU child labour is a major problem in Malawi, especially in commercial and subsistence agriculture but also in domestic services where children, mainly girls, are employed in towns. The ICFTU alleged that over 440,000 children between the ages of 10 and 14 are economically active in Malawi, which constitutes over 30 per cent of this age group. More than 20 per cent of the workforces on commercial plantations, especially tobacco plantations are children. The ICFTU added that much child labour on these commercial plantations is hidden because the tenant farming system encourages the whole family to work. Article 23 (4) of the Constitution of Malawi. The Employment Act (Act No.6 of 2000), and section 3 of the Children and young persons Act of Malawi prohibits the employment of persons below the age of fourteen. Convention No. 138 revised Convention 10 concerning the Age for Admission of Children to Employment in Agriculture The Convention in 1973) and C182, Worst Forms of Child Labour Convention, 1999. The report is available at http://www.ilo.org/ilolex/qbe/ceacr2003.htm.
strengthening of that comparative advantage. Southern exports of such products would consequently increase and so correspondingly would northern imports of the same. If collectively southern exports amounts to a large enough share of the total, the increase in import penetration in the north is achieved via a fall in the relative price of labour-intensive manufacturing in world markets. The real wages of unskilled workers in the north are in such a case likely to decline as well, to the extent that southern exports compete head-on with northern production. This is what the World Trade Organization (WTO) hopes to achieve in principle.¹⁰⁹

To an economist what would happen in the scenario described above is the creation of gains from trade for the north. The fall in the relative price of labour-intensive manufacturing represents an improvement in terms of trade of the north since it is the net importer of such products. While unskilled labourers in the north may lose out, the north would be richer as a whole and if governments wish they could compensate for the loss by increased welfare and unemployment benefits.

Trade unions would be uneasy with the above proposition as it could potentially lead to the trade off of labour standards such as occupational safety and health in the South and in the north job loss

¹⁰⁹ This is a classical economic use of law. For an exhaustive discussion on this point, see, Posner, R, (1999) Economic Analysis of Law Little, Brown and Company (Canada).
and or diminution of the bargaining power of laborers whose valuable commodity [labour] could be outsourced more economically elsewhere\textsuperscript{110}. This inevitably affects the process and quality of tripartite consultations as it essentially puts workers and their representatives in a weaker and more vulnerable position. This poses serious obstacles on meaningful social dialogue on issues such as labour and occupational health and safety generally. In this process what would be at issue are not the gains but the legitimacy of the process through which such net gains are created\textsuperscript{111}. Nations have collective preferences as expressed in international conventions over what means of production are admissible\textsuperscript{112} ("fair" or "legitimate") and have restrictions on those that violate such boundaries\textsuperscript{113}. The last two centuries have witnessed a move towards the development of labour legislation and standards that heavily circumscribe the nature of production processes\textsuperscript{114}.

\textsuperscript{110} This is the well-known race -to-the bottom argument according to which workers in the North will have to acquiesce in standards that are low enough to prevent footloose capital and employers from deserting them for the South. Vide, Rodrick, D, in Baldwin, R, et el (Eds) (1999) Market Integration, Regionalism and the Global Economy; Cambridge University Press, p.130.
\textsuperscript{112} See our discussion on the meaning of law, infra.
\textsuperscript{114} See ILO Standards, EU, UN Convention e.g. Slave labour is banned. The World Trade Organisation bans prison labour etc.
The biggest task facing policy makers is how to overcome the ‘us’ versus ‘them’ attitude when it comes to enforcing international labour standards. The EU may say the Malawian children, Chinese prisoners or Indian women who labour under sub-standard conditions are not part of their community and it is not appropriate or practical for them to extend the protection they provide their workers. However as it is granted that this process of production can be legitimately subject to regulation, the case for not interfering because only foreigners are involved becomes one of degree and not of kind\textsuperscript{115}.

Globalization\textsuperscript{116} on the other hand has brought about additional problems in as far as occupational health and safety standards are concerned. It has set off a fierce debate between those that have faith in liberal economics on the one hand and the workforce on the other that feel they are getting a raw deal out of the process\textsuperscript{117}.

\textsuperscript{115} The USA has done this through its Generalised System of Preferences (GSP) and did the EU under the Lomé convention with African Countries. The EU endeavoured to use the Trade and Development provision, Article XXXVI, added to GATT in 1965, under which developed countries do not insist on reciprocity in trade negotiations with developing countries to justify the Lomé conventions. However, it was not regarded as in conformity with Article XXXVI and GATT eventually gave the fourth Lomé convention a waiver (World Trade Organisation 1995a). See generally Articleis, M and Lee, N (eds), (1997) The Economics of the European Union: Policy and Analysis (2nd) Oxford University Press, p.299.

\textsuperscript{117} See, the failed World Trade Organisation talk at Cancun is a classic illustration of the outcry of developing countries. It also shows that no one really wins by trading off decency with trade or investment. See also the ILO ‘s Central American Pilot Project Report at www.ilo.org.
Economists tend to view expanding trade and foreign investment as inherently desirable because they believe that these improve the efficiency with which market economies operate and enhance prospects for growth. Critics of the position do not share this view and accuse the process of globalization for the decline of real wage and labour standards in the south (this is a wide generalization that wrongly portrays the south as the ultimate loser. Some countries in the south are better off than some of their northern counterparts. For instance, the South African economy compares favourably with some northern states. By contrast some eastern european states are no better than most countries in the south).

In the process of globalization expanding networks of trade and investment are bringing societies with very different standards for working conditions into contact with each other and thus creating a need for a global mechanism for the adoption, regulation and management of internationally recognized standards. It cannot be denied that large discrepancies exist in labour standards relating to occupational health, safety and hygiene, child labour, collective bargaining undermine the legitimacy of free trade and make it harder

120 See the United States GSP statute on internationally recognized labour standards. Also our discussion on Malawi, infra.
to sustain domestic consensus over trade and investment\textsuperscript{121}. One could be tempted to think that perhaps those that assert that low labour standards amount to a subsidy\textsuperscript{122} in violation of Article XVI of GATT 1994\textsuperscript{123} or social dumping\textsuperscript{124} have a point.

The problem is compounded with an apparent loss of sovereign power

\textsuperscript{121} The EU has tried to surmount this by putting up a regime of occupational health and safety regulation that fairy command public trust which in turn gives legitimacy to its trade policies. However this is not to say that it has the model or ideal regulatory regime. It has its own lacking or shortcomings as will be apparent latter in our discussion later.

\textsuperscript{122} This was the official USA position under the Clinton Administration. See Bhala, (1999) International trade Law. According to Article 1 of the WTO Agreement on Subsidies and Countervailing Measures, a subsidy is deemed to exist if there is a financial contribution by a government or any public body within the territory of a WTO Member where:(i)a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees); (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits) (iii)a government provides goods or services other than general infrastructure, or purchases goods;(iv)a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments; or there is any form of income or price support in the sense of Article XVI of GATT 1994 and a benefit is thereby conferred.

\textsuperscript{123} In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy\textsuperscript{124}

\textsuperscript{124} According to Article VI of the GATT 47, dumping occurs when a product is introduced into the commerce of another country "at less than the normal value of the product" on the domestic market. If, therefore, a product is sold abroad at a value corresponding to the domestic social cost it cannot be considered to be social dumping. A charge of social dumping might be claimed if real wages in the rest of the economy were higher than those in export-oriented industries. See Went, R, (2000) Globalisation: Neo-liberal Challenge, Radical Responses, (Pluto Press, London).
by nation states to giant multinational corporations\textsuperscript{125}. Nation states in this economic arrangement have less of a grip on economic management. Governments and parliaments are consciously renouncing control over the movement of goods, services and capital across frontiers through free trade conducted under the World Trade Organization\textsuperscript{126}. The said weakening of the state's grip on the economy is not being compensated by a stronger international regulatory regime. The ILO has a weaker enforcement regime for labour standards in comparison to the WTO\textsuperscript{127}. It relies fundamentally on persuasion and voluntary compliance with ratified conventions by member states\textsuperscript{128}. The ILO also exercises a fair amount of monitoring and surveillance over the application of ratified conventions by examining the reports of member states on ratified conventions filed under Art. 22 of the constitution\textsuperscript{129}.

Because of the weak enforcement regime in the ILO this thesis opines

\textsuperscript{125} See the discussion on regulation in chapter 4, p.156.
\textsuperscript{126} See our discussion on regulation on the impact of international arrangements such as World Trade Organisation that can rule that a member state law passed by democratically elected representatives violates its rules and order that that country to change or face trade sanctions. The economic sanctions may force a reconsideration of that law. In a way parliament's legislative activity is subject to scrutiny by undemocratic economic arrangements such as World Trade Organisation, NAFTA.
\textsuperscript{127} The issues of enforcement of labour standards by the ILO is discussed in full in Chapter three under the section dealing with protection offered by the ILO and World Trade Organisation
\textsuperscript{128} See Article. 24-34 Under Chapter 2 of the ILO constitution. An electronic version is available at www.ilo.org
\textsuperscript{129} Generally Baldwin, R, et al, op. cit, n.110, p.132.
that linking labour with trade and investment issues would go along way towards strengthening and improving the global state of labour standards. This would be achieved by bringing on the scene additional teeth in the form of the World Trade Organization sanction machinery. This point that is canvassed in detail in the next chapter.

The foregoing argument takes us to the next point, which is the interplay of globalization and occupational safety and health standards. How has globalization affected such standards for capital importing countries such as SADC states? What role can the imposition of occupational health and safety standards play in SADC’s integration agenda? In answering the above question casting occupational health and safety standards in economic perspectives can be a worthwhile approach and so we proceed in the next section.

130 See the arguments for and against this linkage in the next chapter.
Economic Approach

"In the last quarter of a century, economists and legal scholars, using economics have turned their attention to many areas of the law to supplant the traditional legal analysis. Their basic premises are that legal rules and institutions should be designed to facilitate economic efficiency, that they should make the greatest use of competitive markets and that in the absence of such markets, should 'mimic' what competitive markets would do."

M. Polinsk

While there have been many studies that apply economic analysis to regulation and in particular for present purposes in the area of occupational safety and health, there has been no comprehensive economic study of the entire field. In broad terms, there are three big questions that need to be addressed, i.e., how to give more visibility to the economic role of occupational health and safety within the enterprise, how to respond to the dramatic changes taking place in

---

132 Ibid.
the world of work; and how to extend occupational health and safety research, advocacy and intervention to the developing world. Within the enterprise the two obstacles to be overcome are the identification of the invisible, or indirect, costs of ill-health and the allocation of these costs to the activities that generated them so that they do not appear as overheads. Society's task is to internalise as much of the external cost as is practicable, so that the incentives for the firm correspond more closely to the needs of society. While the general framework is clear, the details of how these goals are to be pursued are not, and would require further research. These are some of the questions that will occupy us in the next few sections.

**A point of Departure**

Economics seems so it is alleged by some commentators and scholars like Richard Posner to have found a vacant niche in the intellectual ecology of law and is rapidly filling it. Consider for a moment one of the classical definitions of law:

---


137 Ibid, Chapter 6 in the context of occupational health and safety in the sub-Saharan Africa, infra.

138 Our discussion on regulation in chapter 5, infra, p.156.


'Law is an obligation backed by a state sanction' 141.

Others (Allot, 1980), pp.6-7) take the view that law is a system of rules and that in the juristic world in which we live these rules are restricted to rules about behavior and that to avoid an over-extension of the term of law, the behavior meant is the behavior of persons in a political society, and that to avoid legitimating the illegitimate, only rules made by a competent and legitimate authority within that society may be called rules of law 142. The debate as to what law means is unceasing and so is the confusion 143. We will not venture into that debate as it is done elsewhere in the discussion. Suffice to say that lawyers and jurists would approach such a question by consulting intuition and available facts 144.

In the definition provided it is apparent that the definition of law

141 Lukes and Scull (eds.) (1983), Durkheim and the Law: Oxford, Martin Robertson. Pp.146-151. There is disagreement among legal philosophers some of which do not share the notion of sanction as a distinct mark of law. For instance Gaston Richard in 'The Origins of Law' (p.4) alludes to guarantee and sociability as the trademark of law. He views law as an instrument society uses to fight egoism [the desire to live for oneself alone, to take cognisance only of one's own goals in the world (p.68)] and insociability which threatens social solidarity and according him sanction is a means of achieving the goal of social harmony and solidarity. Despite his stand, it is clear the idea of sanction is acknowledged. See also Kulischer, M, Annee Sociologique, p.353, V, p.400.

142 cf Hart, The Concept of Law, infra.


144 Generally see, Posner and Landes, The Economic structure of Tort Law, infra.
depends on the context in which it used. However a common
denominator is maintained, i.e. legitimacy derives from a political
society. The distinguishing feature from other social norms according
positivists view is the use of sanctions to back up an
obligation\textsuperscript{145} transmitted by legal rules\textsuperscript{146}.

Reflecting further on the concept of law a word or two might be in
order. The term law has many meanings depending on the context in
which it being used\textsuperscript{147}. In common law traditions it refers to state law
maintained through state institutions\textsuperscript{148}. This law is seen as a normative
and institutional system, which is distinguishable from other social
phenomena\textsuperscript{149}. In other societies such as African legal system law
includes state law, custom and customary law and other social
codes\textsuperscript{150} that have from time immemorial been reputed to been
responsible for enhancing social cohesion\textsuperscript{151}.

This clarification is crucial for any theorizing on how best to adapt
common law to say African legal systems in which SADC legal system

\textsuperscript{145} Austin. \textit{The province of Jurisprudence determined}. Lectures 1,22 and 23, infra
\textsuperscript{146} See Kelsen, \textit{General Theory of Law and State}...p.165ff
\textsuperscript{147} Anthony Allot (1980) \textit{The Limits of Law}. Butterworths & Co, London p.11
\textsuperscript{148} Supra.n.145.
\textsuperscript{149} Woodman, G, 'Customary Law in Common Law Systems'. University of Birmingham, UK
p.1.
\textsuperscript{151} See Chanock, M (1985), \textit{Law, Custom and Social Order: The colonial experience in
exists. It also shades some light on why a wholesale transplant of foreign law into areas such as SADC may be an unhelpful exercise. For the present discussion law is used here to refer to any set of observed social norms, thus the law of the state, international law as well as community law in as far as these incorporates local social norms.

**Methodological Questions**

Lawmakers and Judges often ask, 'how will sanctions affect behavior? If punitive damages are imposed upon a maker for defective product, what will happen to the safety and price of the product in future? Lawyers would answer this in 2003 as they did 201 BC - by consulting intuition and any available facts.

Economics provide a scientific theory to predict the effect of legal sanction on behavior. For economists sanctions look like prices and presumably people respond to these prices by consuming less of the expensive goods and so presumably people respond to sanctions by doing less of the sanctioned activity. This sounds too simple an assumption. Its value to a legal inquiry lies in its provision of a scientific theory for forecasting response to law. This is no less pivotal in economic law as it in business forecasting. For these reason it is possible to resort to methodologies of economics for a rational theorizing on

---


153 For instance some criminal behaviour is motivated by non-economic considerations. Social and psychological factors in the real world may take precedence over the calculation of the price of ones actions.
issues of law and regulation.

For instance, suppose a manufacturer knows that his product will sometimes injure consumers. How safe will he make the product? The answer will depend on two costs. First, the actual cost of safety which depend in turn upon facts about, design and manufacture, and the implicit price of injury to consumers imposed through the manufacturer's legal liability. Liability is a sanction for injuring others. In other words it is the device society uses as a means of reducing the risk of harm, by threatening those who are potential injurers with having to pay for the harm they cause.

In the above scenario the producer will need the help of lawyers to estimate the implicit price of the harm caused. After obtaining, the needed information, the producer will compare the cost of safety with the implicit price of accidents. To maximize profits the manufacturer

---


156 The test of reasonable practicality in occupational health and safety law is founded on such a principle. It takes an economic consideration by requiring the assessment of the cost of preventing the accident and what is economically sound practice. For a distinction between a duty qualified by the term so far as is reasonably practicable and one qualified by the term reasonably practicable, see Edwards vs. National Coal Board (1949) 1 All ER 743. The law was stated by Asquish LJ, this way 'reasonably practicable is a narrower term than
will adjust safety until the actual cost of additional safety equals the implicit price of additional accidents. This helps us understand how companies respond to legislation and regulation. Such an understanding is vital for policy formulation as well as legislative forecast in terms achieving the desired goals.

One can also say that economics provide a behavioral theory to predict how people respond to changes in law. This theory surpasses intuition, just as science surpasses common sense. In addition to a scientific theory of behavior, economics provides a useful normative standard for evaluating law and policy. Laws are not just arcane technical arguments, they are instruments for achieving important social goals. As our discussion is legal we will restrict ourselves to understanding the economic considerations that underlie regulation and public policy vis-à-vis, trade, investment and health and safety standards and practices.

The economic perspective on occupational health and safety standards and practices encompass both causes and consequences.

The role of economic factors in the epidemiology of workplace ill-

'physically possible' and implies that computation must be made in which the quantum of risk is placed one scale and the sacrifice involved in the measure necessary for averting the risk (whether, in money, time or trouble) is placed in the other and that if it be shown that there is a gross disproportion between them the risk being insignificant in relation to the sacrifice, the defendant discharges the onus upon them'. See also to the similar effect Stranks, J, (2001) Health and Safety Law (4th edn), Prentice Hall, London, p.286.
health and the effects this has on the economic prospects for workers, enterprises, nations, and the world as a whole\textsuperscript{157}. It is therefore a very broad perspective, but it is not complete, because neither the causation nor the human significance of Occupational Health and Safety can be reduced to its economic elements.

Our task will be to indicate the most important contributions economic analysis has and still can make to our understanding and management of occupational health and safety in field of agriculture in the face of liberalization and globalization and how that link can complement the further development and implementation of occupational health and safety in the SADC region as it moves towards economic integration\textsuperscript{158} on the Model of the European Union.

\textsuperscript{157} The health status of the workforce in every country has an immediate and direct impact on national and world economies. Total economic losses due to occupational illnesses and injuries are enormous. Such losses are a serious burden on economic development. Thus, apart from health considerations, the improvement of working conditions is a sound economic investment: The International Labour Organization (ILO) has estimated that in 1997, the overall economic losses resulting from work-related diseases and injuries were approximately 4\% of the world's gross national product. In 1992, in European Union countries, the direct cost paid out in compensation for work-related diseases and injuries reached 27 000 million ECUs. In 1994, the overall cost of all work accidents and work-related ill health to the British economy was estimated between £6000 million and £12000 million were estimated to be US$171 000 million, surpassing those of AIDS and on a par with those of cancer and heArticle disease. In the USA, health care expenditures are nearly 50\% greater for workers who report high levels of stress at work. See generally WHO reports on www.who.org.

\textsuperscript{158} Economic integration is the merging to varying degrees of the economies and economic policies of two or more countries in a given region.
Economics means one thing to those instructed in the discipline and another to the uninstructed. When most people hear the word economics\textsuperscript{159}, they think it has to do with the management of money. In particular, "the economics of occupational safety and health" suggests for many little more than "how can better working conditions be made profitable for business?" Economics is a social science i.e. a systematic study of human actions in a social context. It is distinguished from other social sciences, such as political science, psychology and sociology, by the kinds of actions and social institutions with which it is concerned. Briefly, the actions that economics is concerned with are the choices people make when faced with scarcity and the social context are the rules, laws and customs that tell which choices are permitted and which are forbidden\textsuperscript{160}.

Economics has two general features that distinguish it from other social sciences such as law. First it focuses primarily on the economy, the ways in which individuals and communities produce, distribute and consume goods and services. Modern economics is most comfortable studying market economies, since much, more is known about the workings of markets than other types of economic mechanisms. There are many economists who also study the economics of households,

\textsuperscript{159} The studies of human actions in a social context, especially those actions are directed toward the use of scarce resources to satisfy potentially unlimited wants. Dolan,E, (1983) p.3
\textsuperscript{160} Ibid, p.3
enterprise organization, and non-market societies of the past and present.

Economists generally assume that all decisions are made in a "rational" manner, where rationality [usually bounded rationality] has a very specific meaning. To be economically rational, a decision-maker is

(a) Outcome-oriented, basing his or her choices entirely on predicted consequences of each action, and

(b) Systematically calculating, estimating the probability of each possible outcome and assigning each a positive or negative value.\textsuperscript{161} Because of this, the calculus of costs and benefits plays a central role in economic reasoning. Of course, this is not an entirely accurate account of how decisions are made in the real world, and in many situations, calculations of costs and benefits play a minor role. This calls for a holistic approach that encompasses a sociological approach that treats law as social phenomena and studies it in its social milieu. Proponents of this school of thought such as Roscoe Pound\textsuperscript{162} and Marx Webber view law as an instrument of social engineering and asserts that human behavior is to a large extent shaped by social norms of which law is the highest. We will shortly discuss these concepts as they bear on occupational health and safety.


As will become apparent while conventional economics does not provide a complete explanation of human behavior, its explanations will be more effective where market competition is increasingly producing direct consequences for Occupational Health and Safety. The calculus of occupational health and safety will help map out a way of resolving the dilemma over profit, investment and work place health and safety.

**Benefits of Economic Analysis**

Broadly speaking, there are three general purposes that economics can serve for Occupational Health and Safety. First, identifying and measuring the economic costs of occupational injury and disease can motivate the public to take these problems more seriously. This is true at all levels, from the enterprise that may be only dimly aware of the toll that worker ill-health takes on its performance to national governments that may not realize the impact of Occupational Health and Safety problems on economic growth and development and the usual government budgetary constraints that it imposes, let alone the burden that the taxi payer bears through health and other social provisions\(^{163}\).

In effect taxpayers may find themselves subsidizing private economic

---

\(^{163}\) See our discussion on the community burden of occupational injuries and diseases, post.
actors who create occupational health and safety hazards, through public health and asocial security services

Secondly, understanding the connections between the way firms and markets function and types of occupational Health and Safety problems that arise is crucial for the success of policy formulation and implementation at any level of socio-economic engagement. This is crucial in the wake of economic liberalization where non-state actors such as transnational corporations are directly responsible for a significant portion of economic management, once a preserve of the nation-state.

Why conditions are better in some sectors or regions than others, and why are particular groups of workers at greater risk? What is the likely effect of changes in social insurance coverage, government regulation, or, for that matter, new international patterns of trade and investment? As the pace of economic change picks up throughout the world, these questions need to be addressed on a continuing basis and the economics of health and safety plays a crucial part.

Finally, as important as the protection of worker health and well-being is, it is not the only objective of modern society. Economic analysis can help show when safeguarding working conditions is complementary to other social goals, and it can illuminate the tradeoffs when it is not.
The cost element

For all the goals outlined above, a central concept is that of costs. On the one side, we have the costs of improving the conditions of work, in order to reduce the incidence of occupational injury and disease. On the other, we have the costs of not doing these things\textsuperscript{164}.

In a world of scarcity\textsuperscript{165}, it is rare to get something for nothing. The key cost concept in economics is that of opportunity costs – the cost of doing something as measured in terms of the value of lost opportunity to pursue the best alternative activity with the same time or resources\textsuperscript{166}. In some cases the opportunity cost of doing something can be measured in terms of money out the pocket. In other activities


\textsuperscript{165} Something is said to be scarce when if, at zero price, more is wanted than is available. Scarcity makes choice unavoidable.

\textsuperscript{166} Whenever you decide to do something, you are probably giving up an opportunity to do something else (e.g. If you go to school, you may not be able to work. If you grow corn, you may not be able to grow tobacco). Opportunity cost is defined as the value of the best alternative that you forfeit by doing something else. For instance, if you could work and earn £18,000 a year but you decide to go to school, your opportunity cost of attending school is £18,000. When opportunity cost is used in decision making, it is important to consider all costs and benefits. For example, if a college professor could earn £55,000 a year teaching or £65,000 a year working in industry, his opportunity cost of teaching is £65,000. Looking at only opportunity cost, it appears that the college professor should leave teaching for industry, but this decision cannot be made without considering the non-monetary benefits of teaching. Compared to industry, teaching has more job security, more leisure time, more challenges, less stress, and less political structure - all of which increase the utility from teaching. In deciding whether to teach or work in industry, the college professor should determine if his total benefits from teaching, monetary and non-monetary, exceed his opportunity cost of teaching. The professor should leave teaching for industry only if his opportunity costs of teaching exceed his total benefits of teaching. Parent Node (S), \textit{Web Dictionary of Cybernetics and Systems Opportunity Cost} at www.pespmc1.vub.ac.be/asc/opportun
with no money measurements, opportunity cost could be measured in terms of lost times. For instance the time spent of medication for occupational injuries and ill health is the loss of the opportunity to spend the same time on production. For this reason economic analysis is and can play a vital role in understanding and formulating occupational health and safety regulations and legislation. For purposes of the present discussion we will not go into analytical discussion of the cost concept, as that would be outside the scope of our present discussion. Suffice to say that there are many kinds of costs, whose distinctions are important for our present discussion.

**Economic vs. non-economic costs**

Economic costs are those that can be expressed in monetary units. They include the costs paid or expected to be paid by individuals and organizations acting within the economy, as well as the monetary values implicit in activities undertaken or foregone. Non-economic costs are no less real, but for one reason or another cannot be captured in monetary terms. In the case of injury and disease, the non-economic costs are above all the subjective costs of pain, fear, and loss suffered by the victims, their families, and their immediate communities. For shorthand they are referred to as the "human costs" of ill health or premature death. In addition, it should be recognized that the loss of life and health is often opposed for reasons that are not reducible to their cost in either the economic or non-economic sense. This is
particularly the case when standards of social justice are violated: what may make a particular injury unacceptable, for instance, may not be (only) its cost, but also the fact that it could have been prevented but wasn’t, due to the employer’s obsession with making the greatest possible profit.

**Private vs. social cost**

All the costs of worker ill health, to whomever they might accrue, could be added up; this sum would be the full social cost. "Society" has traditionally been thought of as equivalent to the nation, but it makes increasing sense to think of the entire world as our society and indeed, it is not uncommon to talk of a global village in the face of increasing economic integration. Within this overall accounting, however, costs fall on different parties. The particular portion of the cost paid by any one individual or organization is called the private cost, and this is the cost relevant for decision-making on that level insofar as the decision-maker is economically rational. Three points should be borne in mind.

First, private costs do not necessarily enter into the social cost, because they may be offset by benefits to other members of society. Suppose, because of a catastrophic industrial accident, a firm loses half its market share. This constitutes an enormous private cost to the firm, but if the sales are taken up by other firms this is not a component of social cost. If the firm suffering the accident were more efficient than
its competitors, however, the increase in the cost to society of supplying the goods (a much smaller sum) would qualify as social.

Second, not all social costs appear as private costs. For instance, a significant portion of the medical cost of occupational injury and disease in the industrialized countries is indemnified by social insurance systems. Who pays this cost and how? Some of it can ultimately be traced to specific contributors, but the cost may be so spread out as to be invisible at the private level. Imagine that the insurance system borrows money to finance the extra cost, and that the ultimate effect is to reduce the funds available for other projects—how would this be allocated to particular individuals and organizations? Rather than pursue such hopeless investigations, it is safe to simply say that the cost is social.

Third, the possibility for social costs to be borne by one group or another gives rise to the concept of cost shifting. A firm, for instance, may try to reduce its exposure to Occupational Health and Safety costs by shifting some of them to their workforce, to other firms, or to society as a whole.

Financial vs. Implicit cost

Earlier, it was suggested that all economic costs could be expressed in monetary units, but not all take the form of actual money changing hands. When monetary payments are made, we can speak of a
financial (or out-of-pocket) cost, but these are often dwarfed by costs that can be inferred from their effects and given estimated monetary values. Consider, for example, an accident to a worker that results in medical treatment as well as damage to a machine. The firm may pay "real" money to the health care provider; this is a financial cost. But if the useful life of the machine is reduced by two years, and if there is no other factor to attribute this to other than the accident, the increased depreciation is also a cost, just as real despite being an inference.

Ultimately, from an economic point of view, financial costs are potentially deceptive, since, as we have seen, they may be more or less than true social cost. Only the inferred cost of an event in terms of all its impacts on society, based on full information and careful analysis, can be a satisfactory basis for social cost. Economists refer to this as the opportunity cost- the difference between the value of the goods and services available to society with or without the event, decision, etc.

Mostly costs of occupational injury and disease to workers and those who care about them are non-economic. There is no need for economic calculation to replace the deep human emotions that arise when life is unnecessarily shortened or impaired.

**Economic cost to Enterprise**

It is a principle of health and safety management, extending back to that the vast majority of accidents (and this would clearly include
diseases as well) are attributable to the conditions of work, not the performance of work. In a sense, this is a semantic dispute, since even highly dangerous conditions might be regarded as "safe" if work were always performed with exacting attention and precision. But the goal of Occupational Health and Safety management is to make the job appropriate to the capacities of the workforce, not to find ways to exclude most workers from most jobs.

Hence it is customary to view the decisions of the employer concerning what production methods to use, how to implement them, and how to incorporate safety and health concerns as the decisive focus of Occupational Health and Safety policy. From this perspective, the reason that we are interested in the economic costs of poor working conditions is that they provide the material incentives for improving those conditions. Not all costs will do, however. There has been considerable confusion surrounding how to classify the costs to firms, and economic theories distinguish between costs that do or do not enter into these incentives. In a nutshell, to provide effective incentives for the improvement of safety and health conditions, the costs of ill health must be economic, internal, variable, and routinely visible.

For the present discussion we will not go into analytical details of these aspects of costs as this is beyond the scope of this thesis. What we have done is to indicate and set out a conceptual framework for the
discussion of the role or place of occupational health and safety in SADC's economic integration agenda. One concept that is worth understanding is regulation. The whole idea of occupational health and safety is to regulate conditions of work for the benefit of the workforce, the environment and public health. In the next section let's take a look at this concept.

The Burden of Economic Costs

There are two main economic costs that result from disability and premature death at work. The most important is the worker's lost wages during the period of absence from work and possible reduced wages after return to work, either of which may or may not be a social cost, depending on whether otherwise unemployed substitute workers are found to do the same tasks. Research for the United States has found that disability plays an important role in economic outcomes. Approximately one in every ten workers has a disability that limits the amount or kind of work that can be performed. The rate of participation in the labour force for disabled workers is about 2/3 that of the non-disabled, and only half of the likelihood of being in a full-time job.\textsuperscript{167}

While the ratio of disabled workers' earnings to those of the non-disabled has varies from country to country and locality to locality, ominously for developing countries, the earnings ratio falls for workers with less education\textsuperscript{168}, Haveman and Wolfe (1990) found that disabled workers with eleven or fewer years of education made on average only 1/3 the wage of comparable non-disabled workers. Part of this employment and wage gap represents the diminished productivity of the worker following a disabling illness or injury, but a substantial part also represents discrimination\textsuperscript{169}. This bias is now almost religiously accepted as a human right wrong and illegal. This is covered by international law as well as domestic law in member states in the region\textsuperscript{170}. From a social cost standpoint, it is often assumed that lost wages are a reasonable indicator of lost worker productivity.


\textsuperscript{170} Article.20 (1) of the constitution prohibits discrimination on the basis of disability in any form. Article.20 (2) makes such discrimination a crime. At SADC level this is provided for in Article 6 of the Charter of fundamental social rights. See also Americans with Disabilities Act [ADA] of 1990, 42 U.S.C. §§ 12101. The ADA prohibits discrimination on the basis of disability in employment, State and local government, public accommodations, commercial facilities, transportation, and telecommunications. It also applies to the United States Congress. To be protected by the ADA, one must have a disability or have a relationship or association with an individual with a disability. An individual with a disability is defined by the ADA as a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such impairment, or a person who is perceived by others as having such impairment. The ADA does not specifically name all of the impairments that are covered. See Titles I-IV of the Act.
The second major economic element is the cost of medical treatment, care during the period of disability, and rehabilitation. In countries with well-developed social and health insurance systems most of these costs are easy to measure, but there are also household costs that can escape detection. In one US sample, for instance, one in six injured workers needed some other family member to take care of him or her, and almost 2/5 required other family members to perform some or all of their household tasks. (Weil, 1999) Even though these contributions of time and effort by the families of injured workers have no prices in the marketplace, they certainly represent economic costs.

We can expect that the invisible cost of care plays a much more important role in developing countries, and that failure to measure it leads observers to falsely conclude that the economic costs of poor health are low. Assigning prices to care by family members is not difficult in principle: we could either use the going rate for similar work in clinics, rest homes, etc. or we could estimate the opportunity cost of the time spent on care.

This may sound simple in principle but in the case of the SDAC region a major obstacle would be illiteracy and innumeracy rates among the
people concerned\textsuperscript{171}, let alone luck of resources on the part of states to carry out a disciplined quantification of such costs. This is particular true in the case of HIV/Aids that exerting enormous pressures on productivity either through absenteeism due to sickness or funerals. The prevailing view unfortunately does not view HIV/Aids as an occupational issue. As a result it is easily left out of the economic equation for occupational health and safety.

Remarkably, this invisible medical cost has never been quantified nor is it taken into account by courts in work related personal injury cases. This would be an important factor for the courts to take into account. The effect would be to not only to do justice to the victims but it would also push insurance premiums up and in the process would make employers more careful as a cost cutting measure. These are not the only economic costs, however. In a fascinating study employing a unique data set drawn from workers in the U.S., Morse et al. (1998) compared social and economic outcomes between workers who had and hadn’t reported work-related Musculoskeletal disorders (WRMSDs). Some of their results are reproduced in

Table 2

Percentages of WRMSD Cases and Controls Reporting Socio-economic Outcomes

\footnotesize\textsuperscript{171} See our discussion on literacy rates in chapter 3., post
<table>
<thead>
<tr>
<th>WRMS</th>
<th>Contro</th>
<th>Odds</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Promoted</td>
<td>7.9</td>
<td>16.0</td>
<td>0.45</td>
</tr>
<tr>
<td>Divorce</td>
<td>7.1</td>
<td>3.9</td>
<td>1.91</td>
</tr>
<tr>
<td>Moved for financial reasons</td>
<td>6.4</td>
<td>2.8</td>
<td>2.41</td>
</tr>
<tr>
<td>Lost home</td>
<td>3.1</td>
<td>0.9</td>
<td>3.44</td>
</tr>
<tr>
<td>Lost car</td>
<td>4.4</td>
<td>1.9</td>
<td>2.45</td>
</tr>
<tr>
<td>Lost health insurance</td>
<td>6.6</td>
<td>3.5</td>
<td>1.91</td>
</tr>
</tbody>
</table>

The odds ratio in the fourth column indicates the relative likelihood of a worker with WRMSD reporting the outcome relative to a worker in the control group. All of these ratios were significantly different from 1 (equal odds) at the 95% level, except for the last one (health insurance), which was significant at 94%. All of these outcomes are economically important. Failing to be promoted is a source of lost income (as would be divorce, especially for women), while being forced to move, losing one's home or car, or losing health insurance can lead to increased current or future expenses. Not all of these could be given dollar values, but clearly some of them can. Considered as a group, these typically hidden costs of chronic occupational injury may even outweigh the direct costs in foregone wages due to absence
from work\textsuperscript{172}. Even more alarming is the relationship between occupational injury and dependence on public assistance. Quinlan and Mayhew (1999) cite two studies, one for Australia, the other for British Columbia, that show nearly a fourth of all recipients of workers compensation ultimately ending on the welfare roles, making this the third most important route to welfare (after being a single mother and being unemployed)\textsuperscript{173}. This represents a tragedy for the workers involved and also suggests that part of the economic costs is being shifted from the workers compensation system, which is employer-funded, to the general taxpayer. Presumably the role of welfare is even greater for victims who, due to lack of coverage or for some other reason, never received an award from workers compensation in the first place.

Given the substantial economic costs imposed on the victims of occupational injury and disease, as well as their family and those in their immediate community, who is likely to pay them? As we have seen, the worker unavoidably pays many of these costs, but lost wages and medical costs are often reimbursed, in whole or part, by workers

\textsuperscript{172} Post...

compensation\textsuperscript{174} or a similar social security arrangement. It could be said, in fact, that, from an economic point of view, the coverage and adequacy of workers compensation is the single most important determinant of who bears the cost burden of occupational ill health.

To sum up, in addition to bearing the human costs of ill health at work, workers and their families shoulder much of the financial cost as well. This cost takes easily measured but also easily overlooked forms, and it falls with particular force on the most exposed segments of the workforce: migrant workers, women, children, and workers in precarious or non-standard employment. The ILO has promulgated the principle that the employer should pay for the economic costs of occupational injury and disease, but because of the shortcomings of workers compensation, this principle is increasingly violated.

**Conclusion**

It is clear from the foregoing that an understanding of how firms and transnational corporations (TNCs) respond to regulation is crucial to the configuration and formulation of enforcement strategies for occupational health and safety at all levels of economic engagement. Since occupational health and safety is an aspect of the social regulation of the market, it is crucial for policy makers to bear in mind

\textsuperscript{174} See for instance the Employers' Liability (Compulsory Insurance) Act 1969 (UK), Workers compensation Act of Malawi.
those firms and corporations exist primarily for profits\textsuperscript{175} and not as humanitarian private agents. For this reason a sensible balance must be maintained between trade and investment retention and public protection. Form this understanding as our discussion show, the health and safety aspect of international economic law can not be played down either at a bilateral or multilateral level such as World Trade Organization, NAFTA or ILO.

Economic actors such as TNCs are aware that they benefit from the protection of the law of the localities in which they operate and that law is a collective expression, of society's expectations and goals, which it intends to achieve, i.e. social harmony and well-being\textsuperscript{176} health and safety which in this regard ranks high on a priority list. This understanding will facilitate the tripartism in industrial politics. This would be reinforced by the realisation of the knock on effect on efficiency and productivity of occupational injuries and ill health .The study finds that health and safety is an indispensable part of an integration process and an economic perspective on it would make a significant policy input. The question of cost is equally important. When people become aware of the costs forced on them in whatever form, they might take initiative towards promotion of occupational health and


\textsuperscript{176} Article 5 of SADC Treaty.
safety either singularly or collectively as civil society\textsuperscript{177}.

Finally the methodology of economics has a valuable contribution to make to an understanding of occupational health and safety law and its development. Building on this understanding we now proceed to consider an equally important concept in the jurisprudence of occupational health and safety for SADC. This is concept of regulation.

CHAPTER FOUR
Trade, Investment and occupational Health and Safety

'...sustainable development...combines economic development, social development and environmental protection, with full respect for all human rights and fundamental freedoms, including the right to development, and offers a means of achieving a world of greater stability and peace, built on ethical and spiritual vision. Democracy, respect for human rights, transparent, representative and accountable government and administration in all sectors of society, as well as effective participation by civil society, are indispensable foundations for the realization of sustainable development. The lack of development and the existence of widespread absolute poverty can inhibit the full and effective enjoyment of human rights and undermine fragile democracy and popular participation. Neither of them, however, can be invoked to justify violations of human rights and fundamental freedoms.

Habitat Agenda

Introduction

It is now almost universally accepted that trade and foreign direct investment confer large efficiency benefits by fostering the international division of labour and by disseminating the gains from technological progress. This produces economic growth, which in turn leads to

178 Para 4. Preamble to the Habitat agenda adopted by the United Nations Conference on Human settlements (Habitat II), Istanbul, Turkey, 3-4 June 1996
development and eradication of poverty\textsuperscript{181}. Economic studies and empirical data highlight the substantial benefits that developing countries can reap from integrating into the world economy\textsuperscript{182}. However, such studies also show that the translation of trade into growth and of growth into development is far from automatic\textsuperscript{183}. Market access alone, however great its contribution, will not bring growth in itself. Nor does increased growth automatically lead to sustainable human development\textsuperscript{184}.

We also see that trade liberalisation has not benefited all regions of the world or all layers of society in an equal manner. There is in fact an increasing and worrisome split between a group of middle income developing countries which are successful participants in global trade and a large number developing and transition economies comprising over one third of world population which are virtually excluded from it\textsuperscript{185}.


\textsuperscript{182} Hiranya Mukhopadhyay Trade Liberalization in Sub-Saharan Africa: Stagnation or Growth' Queen Elizabeth House, University of Oxford, Working Papers No.qehwps13


\textsuperscript{184} Human development has been defined as enlarging people's choices in a way, which enables them to lead longer, healthier and fuller lives. See Streeten, P., S. J. Burki, M. ul Haq, N. Hicks and F. StewArticle, 1981, First Things First: Meeting Basic Needs in the Developing Countries, (New York): Oxford University Press.

\textsuperscript{185} Supra op.cit. Peter Dorman, (2000).
The reasons for this are manifold, but the key to success lies first and foremost with the domestic policies of the developing countries themselves.

A successful approach to development needs to take account of the whole range of institutional, social and structural needs of a well-functioning society, such as good governance (including policies aimed at transparency, free information flows, fighting corruption\textsuperscript{186}, an efficient civil service, an appropriate institutional and regulatory framework, social inclusion policies (in the field of education, health care, social protection), public services and infrastructures and environmental protection policies. Sound domestic policies are indispensable to creating stability, predictability and security needed to stimulate investment. Of concern is how labour standards such as occupational health and safety can be recognised as forming part of the economic equation so that economic gains of liberalisation are not wiped out by adverse social demands of global trade and investment policy and practice.

The chapter takes us to a consideration of whether in a global economy linking labour with trade and investment would be to casting the net wide enough to involve all key players in the promotion and

\textsuperscript{186} Corruption includes bribery or any other behaviour in relation to persons entrusted with responsibilities in the public or private sectors which violates their duties as public officials, private employees, independent agents or other relationships of that kind and aimed at obtaining undue advantage of any kind for themselves or others
protection of occupational health and safety\textsuperscript{187} i.e. the state, private sector and labour?

\textbf{Trade and Human Rights}

Trade and human rights are usually made out to be strange bedfellows\textsuperscript{188}. Ironically, the international human rights movement began as an initiative against a form of trade - the slave trade\textsuperscript{189}. The recognition through law of the complex relationship between human rights and trade dates back to the beginnings of the anti-slavery movement, with the formation of the first anti-slavery society by a group of English Quakers in 1783\textsuperscript{190}. This movement was phenomenally

\textsuperscript{187} See Pascal Lamy, \textit{The Link between Trade and Development - What Role for the EU Trade Policy?} Speech given at the AIF Conference, Christiansborg September 12, 2000

\textsuperscript{188} See the debate surrounding the Linkage issue within the WTO, discusses later in this chapter

\textsuperscript{189} Op.cit, p.141

\textsuperscript{190} See the British \textit{1807 Abolition of Slavery Act} . In 1805 the House of Commons passed a bill that made it unlawful for any British subject to capture and transport slaves, but the measure was blocked by the House of Lords. In February 1806, Lord Grenville formed a Whig administration. Grenville and his Foreign Secretary, Charles Fox, were strong opponents of the slave trade. Fox and William Wilberforce led the campaign in the House of Commons, whereas Grenville had the task of persuading the House of Lords to accept the measure. Grenville made a passionate speech where he argued that the trade was "contrary to the principles of justice, humanity and sound policy" and criticised fellow members for "not having abolished the trade long ago". When the vote was taken the Abolition of the Slave Trade bill was passed in the House of Lords by 41 votes to 20. In the House of Commons it was carried by 114 to 15 and it become law on 25thMarch, 1807. British captains who were caught continuing the trade were fined £100 for every slave found on board. However, this law did not stop the British slave trade. If slave-ships were in danger of being captured by the British navy, captains often reduced the fines they had to pay by ordering the slaves to be thrown into the sea. Some people involved in the anti-slave trade campaign such as Thomas Clarkson and
successful in securing the global prohibition of slave trade and slavery in both domestic and international law. Its successes presaged contemporary movements for social justice and human rights. But trade and human rights are not inexorably locked into an adversarial relationship.\(^{191}\)

Sometimes, the application of human rights standards produces results favourable to commercial efficiency, competition and human well-being. For instance, free expression law provided the justification for the break up of state telecommunications and broadcasting monopolies.\(^{192}\) In many developing countries, this development in turn spurred the onset of plural democracy.\(^{193}\) In the USA, which pioneered it, this outcome was achieved mostly through Anti-Trust law, showing that trade law and policy can sometimes also advance human rights.\(^{195}\)

Thomas Fowell Buxton, argued that the only way to end the suffering of the slaves was to make slavery illegal. However, it was not until 1833 that Parliament passed the Slavery Abolition Act. For a history of the abolitionist movement see Judi Jennings (1997) _The Business of abolishing the British slave trade, 1783-1807_ London, ISBN: 0714646970 0714642355.

\(^{191}\) Chidi, (2001), p.141, supra

\(^{192}\) Ibid.


\(^{194}\) The Sherman Anti-Trust Act and the body of case law that it has generated over the past 100+ years should be seen in the broader context of the traditional concern that government has always had with monopolies. Prior to the 19\(^{th}\) century, governments typically granted monopoly rights over some portion of the economy in return for a cash payment. In England, this practice was stopped by Parliament with its famous _1624 Statute of Monopolies_ that took
The WTO recognises that global trade and economic endeavour should be conducted with a view to *raising standards of living* (emphasis supplied)\(^{196}\). It declares as its main goal the creation of 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 for the optimal use of the world's resources in accordance with the objective of *sustainable development*, (emphasis supplied) seeking both to protect and preserve the environment and to enhance the means for doing so in a manner away the power of the Crown to grant monopolies. This action was essential for an efficient economy to develop.

\(^{195}\) Opinion is divided as to the efficacy of allowing foreign victims of human rights abuse to bring law suits in the USA. There are those that maintain that this is a good way of enforcing corporate social accountability on the one hand and those that maintain that this harms domestic commerce and industry. The landmark case for litigating on human rights abuse committed outside the United States is *Filartiga vs. Pena-Irala* 630 F.2d 876 (2d Cir.1980), on remand, 577 F.Supp. 860 (E.D.N.Y.1984). *Filartiga* was seen at the time as a newer mode of international lawmakering, emphasizing conventions and declarations as opposed to relying on contrary state practice. The *Filartiga* case also represented a shift from a pure examination of the binding treaty/non- binding treaty dichotomy, relying more on the language of the international proclamations. The *Filartiga* court was hailed as one "educated in modern international law, which recognized its constitutional authority and responsibility to apply that law in appropriate cases." *Filartiga* was a recognition of international law as a part of domestic law, and reflected the proper, activist role of courts. For a discussion of this case and its effect in the United States see Karen E. Holt *Filartiga v. Pena-Irala after Ten Years: Major Breakthrough or Legal Oddity?* 20 Ga.J.Int'l & Comp.L. 543 of Lubbe and others v Cape plc [2000] 1 Weekly Law Reports 1545. See also Katrin Dauenhauer *Human Rights Experts Defend Law from Business Attack* Published on Tuesday, July 29, 2003 by the Inter Press Service. See http://www.commondreams.org/headlines03/0729-09.htm

\(^{196}\) Para.1 to the Preamble to agreement establishing the World Trade Organisation. A full text of the agreement is available at http://www.wto.org/english/docs_e/legal_e/04-wto.doc
consistent with member states’ needs and concerns at different levels of economic development\textsuperscript{197}.

Raising standards of living is an expression of wider ambit that encompasses both social and economic dimensions of human development, such as human rights\textsuperscript{198}. Included in the term human rights are social and economic rights of which labour rights are a species. Granting this for a moment then it would be correct to say that social issues are as much matters within the competence of the WTO as are for other agencies such as the ILO\textsuperscript{197}.

This submission is strengthened by WTO’s choice of sustainable development as a moral benchmark for the conduct of global economic policy. Sustainable development incorporates efficient allocation of the world’s resources, the social and political well-being of all individuals and peoples, and the protection of the environment and poverty alleviation. It aims at realisation of all human rights, which include civil, cultural, and economic, political and social rights, as well as solidarity rights such as the right to development.

\textsuperscript{197} Ibid.

\textsuperscript{198} Following World War II, nations throughout the world, led by the United States and several other developed countries, sought to establish an open and nondiscriminatory trading system with the goal of raising the economic well-being of all countries. Aware of the role of trade barriers in contributing to the economic depression in the 1930s, and the military aggression that rose following the depression, the countries that met to discuss the new trading system saw open trade as essential for economic stability and peace.
Civil and political rights include the well-recognised human rights to life, not to be subjected to torture, not to be held captive in slavery, to freedom of expression, to freedom of thought, conscience and religion, to peaceful assembly and freedom of association, and to vote.

Economic, social and cultural rights include the rights to work, to just and favourable conditions of work, to form and to join trade unions, to strike, to social security, to an adequate standard of living, including adequate food, clothing and housing to the highest attainable standard of physical and mental health, to the education, to take part in cultural life and to benefit from the protection of the moral and material interest resulting form one’s own scientific, literally or artistic production. Another important category of human rights is solidarity rights, including the right to development, which seeks the realization of all human rights i.e. civil, political, economic, social and cultural. The right to development emphasizes the issues of self determination, popular participation in development, resource sovereignty, and international co-operation for development. It can, in fact, be argued that the attainment of the other fundamental human right is linked to and dependent upon realization of the human right to development.

The United Nations Declaration on the Right to Development affirms that 'the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised." Development, which is a principle policy goal of the WTO, should ensure the greatest possible freedom and dignity of every human being. Human rights ought to guarantee the widest possible participation in the processes and gains of development. This is perhaps the most difficult challenge to current economic policy and practice.

A solution to the problem partially lies in linking trade and investment with human rights generally and labour rights in particular. The issue of labour standards remerged almost simultaneously with the establishment of the WTO in 1995. Over the years, whether or not a social clause should be included in trade agreements has become one of the most contentious issues in the North and South conundrum.

---

200 United Nations Declaration on the Right to Development. UNGA Res. 41/128 of 4 December 1986, Article. 1

The proponents of a social clause advocate a link between international labour standards and the liberalisation of international trade. Their case is based essentially on arguments about fair trade, buttressed by moral concerns over child labour and other exploitative labour conditions\textsuperscript{202}. In contrast, the position of developing countries is opposed to a social clause\textsuperscript{203}.

**International Economic Regulation and Human Rights**

The universal recognition of 'inalienable' and 'indivisible' civil, political, economic, and social human rights, and of the general obligation of all governments to protect and promote human rights, requires interpreting international treaties in conformity with relevant human rights obligations\textsuperscript{204}.


\textsuperscript{203} In the Seattle ministerial conference, the USA and other supporters insisted on inclusion of labour standard clauses in the trade laws while the developing countries opposed any such move. Developing country NGOs were vocal in expressing their objections to these linkages at Seattle and subsequent international meetings as well. Developing countries are of the view that they have not been able to secure market access in the developed countries that they expected from the system. They argue that rather than reciprocate market access to developing countries, the economic powers divert the focus of the WTO from implementation of existing agreements and reducing tariff levels and peaks, to calling for a broader agenda encompassing non-trade issues including environmental standards, labour standards and human rights See Pradeep Mehta and Sandeep Singh, 'Current Issues in Human Rights, development and International Trade in the WTO', (2001) 13 Interights Bulletin No.4 pp.143-145

\textsuperscript{204} This follows also from the general international rules on treaty interpretation which require international treaties to be construed 'in good faith in accordance with the ordinary meaning to
Yet most international organisations remain reluctant to integrate human rights into their law and practices and to share their powers with human rights organisations as long as views on economic and social rights differ so fundamentally\textsuperscript{205}.

There is an urgent need for clarifying the potential synergies and interrelationships between human rights and international economic law\textsuperscript{206}. For instance What is the relevance of human rights (e.g. of the general guarantees of 'liberty' and property in Articles 3 and 17 of the UDHR) for international economic relations and international organisations (e.g. in the case of World Trade Organisation authorisations to take counter-measures through withdrawal of private intellectual property rights) What are the consequences of social human rights for the interpretation of the law of international organisations (e.g. Article 8 of the TRIPS Agreement on 'measures

be given to the terms of the treaty in their context and in the light of its object and purpose', including 'any relevant rules of international law applicable in the relations between the parties' (cf Article 31 of the 1969 Vienna Convention on the Law of Treaties, which is widely recognised as reflecting customary rules of treaty interpretation

\textsuperscript{205} See the position of SADC and the African Unit, supra, Chapter Six, infra

necessary to protect public health' and 'to prevent the abuse of intellectual property rights')\(^{207}\)?

Have the already more than 20 World Trade Organisation dispute settlement proceedings under the TRIPS Agreement adequately balanced the private intellectual property rights concerned with social human rights and interests\(^{208}\)? Does the extent of social human rights depend on the resources and culture of the society concerned and should therefore be left primarily to national governments\(^{209}\)? Or should World Trade Organisation guarantees of freedom be supplemented by social rights to assistance in dealing with the adjustment problems of competition (such as temporary unemployment)?


\(^{208}\) See Oxfam's paper, 'Patent Injustice: How World Trade Rules Threaten the Health of Poor People' at http://www.southcentre.org

\(^{209}\) The battle between public health and private profit reached the courts in the SADC region when the South African government went into the docks, defending itself against 39 pharmaceutical companies. These companies brought a patent rights challenge to a 1997 South African law seeking to deliver affordable AIDS drugs by using the core safeguard provisions allowed by the World Trade Organisation agreement (compulsory licensing and parallel importing.) Regrettably on 7 March, the World Health Organization (WHO) distanced itself from the case, saying "WHO [reiterates] that it has as a general policy not to take positions on litigation in Member States." Médecins Sans Frontières launched a global signature campaign on 13 March to "drop the case" against the South African government and the case has since been dropped as it proved too great a public relations disaster for the companies involved. This ace illustrates how corporate profit can be paraded before social considerations and unless there is a viable social agenda in the global trading system such problems will continue to plague the global economy and the effects will felt more on developing or least developed countries.
Do democratic human rights imply that individuals and representative non-governmental organisations (NGOs) should become recognised as legal subjects in the law of international organisations? Is it legitimate for international courts (e.g. the World Trade Organisation Appellate Body) to interpret international treaty law in light of human rights even if the contracting parties have deliberately not incorporated human rights into the treaty concerned? Will such 'new human rights interpretations' undermine the predictability and reliability of international dispute settlement mechanisms? Or will they strengthen the legal consistency and democratic legitimacy of international law and the political support of international organisations by civil society?

How does one reconcile general international law rules and treaty rules (e.g. in the World Trade Organisation Agreement) on state responsibility with the special legal and judicial remedies in human rights law and with individual reparation claims as a consequence of human rights violations? Are the general international law rules on state responsibility applicable also in the World Trade Organisation context to the extent they have not been modified or excluded from the

210 A. Randelzhofer and C. Tomuschat (eds), *State Responsibility and the Individual* (The Hague: Martinus Nijhoff 1999), and Article 51 of the draft Articles on state responsibility (provisionally adopted by the International Law Commission in August 2000, document A/CN.4/L.600 of 11 August 2000) according to which 'countermeasures shall not involve any derogation from ... obligations for the protection of fundamental human rights'
Dispute Settlement Understanding (e.g. in Articles 19-21 of the DSU)? Do World Trade Organisation Members and private economic operators have the right to request reparation of injury caused by violations of World Trade Organisation law, notwithstanding the fact that claims for financial compensation have never been raised before a GATT or World Trade Organisation dispute settlement panel and the few GATT and World Trade Organisation dispute settlement findings on reimbursement of illegal subsidies and of illegal antidumping duties have remained controversial?

Is it consistent with World Trade Organisation law that World Trade Organisation dispute settlement bodies disregard general international law rules if they are asked to decide on claims (e.g. recently by Ecuador) that the persistent violation of World Trade Organisation rules (e.g. by the EC import restrictions on bananas) entails obligations under general international law to reparation of injury? Or on claims (e.g. by the European Union) that the US refusal to register and recognise trademarks confiscated under Cuban law amounts to a violation of property rights protected by the TRIPS Agreement and the Paris Convention on Industrial Property?211

211 cf the request by the EC for the establishment of a dispute settlement panel in World Trade Organisation document WT/DS176/2 of 7 July 2000
211 See World Trade Organisation document WT/DS188/2 of 28 March 2000 concerning Colombia's request for the establishment of a World Trade Organisation panel on Nicaragua's
There are already World Trade Organisation dispute settlement proceedings where some of the disputed claims have been submitted to the International Court of Justice\(^\text{212}\) (ICJ) and to the Law of the Sea Tribunal\(^\text{213}\), or in the future possibly also to other dispute settlement procedures\(^\text{214}\).

Are there risks of conflicting dispute settlement rulings if disputes (over issues like private foreign investments and intellectual property rights) are decided by the ICJ or by an ICSID Tribunal, but not by the World restrictions on imports from Honduras and Colombia, which concerned trade sanctions taken in the context of a maritime border dispute submitted to the ICJ

\(^\text{212}\) See World Trade Organisation document WT/DS188/2 of 28 March 2000 concerning Colombia's request for the establishment of a World Trade Organisation panel on Nicaragua's restrictions on imports from Honduras and Colombia, which concerned trade sanctions taken in the context of a maritime border dispute submitted to the ICJ

\(^\text{213}\) In their dispute settlement consultations in summer 2000 over Chile's refusal to admit Spanish fishing vessels to unload catches of swordfish in Chilean ports, the EC threatened to request a World Trade Organisation panel finding on alleged violations of GATT Articles V and XI. Chile, by contrast, invoked its rights under the Law of the Sea Convention and requested arbitration under Annex VII of the LOS Convention, as well as provisional measures by the Law of the Sea Tribunal, because of alleged violations by Spain and the EU of their conservation obligations as flag state and failure to co-operate with the coastal state for that purpose

\(^\text{214}\) In case of investment disputes under the General Agreement on Trade in Services (e.g. the GATS Protocols on financial services and telecommunication services) or under the TRIPS Agreement, claims of violations of national treatment or most-favoured-nation treatment obligations might also be based on the non-discrimination requirements in Bilateral Investment Treaties as well as in the Paris Convention on Industrial Property and may then be submitted to the International Court of Justice, the International Centre for the Settlement of Investment Disputes (ICSID), or to the WIPO arbitration rules if the parties to the dispute invoke the special dispute settlement clauses in the relevant WIPO conventions or Bilateral Investment Treaties
Trade Organisation, with due regard to human rights law (e.g. on protection of private property and full reparation of injury caused by 'regulatory takings')?

Can such risks of conflicting dispute settlement rulings be avoided by recourse to 'arbitration within the World Trade Organisation as an alternative means of dispute settlement ... subject to mutual agreement of the parties' (Article 25 DSU)? What if the parties explicitly request that the arbitral tribunal also apply human rights law and the general international law rules on reparation of injury to their World Trade Organisation dispute?

These question plus many more indicate that perhaps its time to start addressing the social dimension of the international economic order. As we saw in the preceding discussion it is time that the dualism of social and economic policy is acknowledged by an acceptance of the linkage between trade and investment on the one hand and labour on the other. The value of this approach is in its illumination on the interface of such issues on the one hand and trade and development matters such as their complimentarity on the other.
The Paradox of Human Right and Its Relevance to the Global Economic Order

Human rights law proceeds from the premise that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world' (Preamble of the 1948 Universal Declaration of Human Rights). Immanuel Kant defined 'human dignity' as the rational and moral autonomy of human beings, which, according to the ethical categorical imperative, requires rational human beings to act in conformity with self-imposed moral and legal principles that respect equal liberties for the personal development of every person\textsuperscript{215}.

In order to protect maximum equal liberty of individuals to develop their personality, Kant and modern legal theories of justice emphasise the need to establish 'a constitution allowing the greatest possible human freedom in accordance with laws which ensure that the freedom of each can coexist with the freedom of all the others\textsuperscript{216}.'

\begin{footnotesize}
\begin{enumerate}
\item On the various formulations of Kant's moral 'categorical imperative' see H. Reiss (ed.), \textit{Kant-Political Writings} (Cambridge: Cambridge University Press 1991), at 18 (e.g. 'act according to that maxim which we can at the same time will should become a universal law'; 'act always so that you treat humanity whether in your own person or in that of another always as an end, but never as a means only').
\item Kant quoted in H. Reiss (ed), \textit{Kant-Political Writings} (Cambridge: Cambridge University Press 1991), at 23. See likewise J. Rawls, \textit{A Theory of Justice} (Oxford: Oxford University Press 1973), whose 'first principle of justice' is: 'each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others' (60). See also Ernst-Ulrich Petersmann (2001), p.3
\end{enumerate}
\end{footnotesize}
Most constitutional democracies now aim at protecting maximum equal liberties of citizens, including both 'negative' as well as 'positive freedoms'. Some federal constitutions (e.g. in Germany and Switzerland) and European constitutional law also recognise that guarantees of equal freedoms can be invoked vis-à-vis foreign policy powers and must be protected across frontiers (e.g. freedom to import and export subject to lawful governmental trade restrictions).

The 'paradox of freedom', i.e. the inherent tendency of liberty without legal safeguards to destroy itself through abuses of power, was described by Plato. In order to solve the constitutional problem of 'who guards the guardians', Plato recommended a government of laws rather than of men, based on a 'mixed constitution' with

---

217 According to C. B. Macpherson, *The Life and Times of Liberal Democracy* (Oxford: Oxford University Press 1977), in 'most of the English-speaking world and most of Western Europe ... there is general acceptance of a principle of maximum individual freedom consistent with equal freedom for others' (at 7). Constitutional texts adopted in the wake of civil wars or international wars tend to be most explicit in this respect, e.g. the 1789 French Declaration of the Rights of Man and the Citizen (see Article 4: 'Liberty is the power to do anything which does not harm another; hence the only limits to the exercise of each man's natural rights are those which secure to other members of society the enjoyment of the same rights') and the 1949 German Basic Law (see Article 2:1: 'Everyone shall have the right to the free development of his personality, in so far as he does not violate the rights of others or offend against the constitutional order or the moral code').


monarchic, oligarchic, and democratic elements. Kant was the first political philosopher that explained why national constitutional guarantees of freedom and rule of law cannot remain effective without complementary international constitutional guarantees of rule of law among states and cosmopolitan human rights protecting individual freedom vis-à-vis foreign governments across frontiers.

Kant's 'democratic peace thesis' i.e. that constitutional democracies tend to avoid wars among each other, and that 'negative peace' needs to be reinforced by international trade co-operation and cosmopolitan law-has been confirmed by history, notably by the 1951 and 1957 Treaties establishing the European Communities, which are a new kind of peace treaty based on Kantian principles of national and international constitutionalism.

Since every individual and every government risk abusing their freedom and powers, and rules do not enforce themselves, human rights are the most important legal instrument for empowering individuals to defend their equal liberties against abuses of power and for forcing governments, and also international organisations, to regulate national

---


and international relations in a way promoting maximum equal liberty and individual and collective self-government under the rule of law. Just as economic market competition forces producers to increase their productivity and efficiency for the benefit of consumers, and political competition induces governments to improve public policies for the benefit of their citizens, human rights promote the mutual balancing of conflicting rights and an ever more precise specification of the limits of individual freedoms and property rights and of the constitutional limitations of governmental powers.

Historical experience and constitutional theory teaches that market competition, political competition, as well as legal competition among citizens and their human rights cannot function in an undistorted manner unless the antagonistic conflicts among the short-term interests of individuals are reconciled with the common long-term interests of rational human beings on the basis of constitutional safeguards, notably equal human rights and national and international rule of law.

It is beyond dispute that the same reasoning should be extended to international economic relations and the WTO as one of the most powerful global institution for the conduct of global trade policy and practice should give equal premium to social dimension of the global economic intercourse.
Although there is a loose international alliance involving various specialised agencies such as the World Trade Organisation, WHO, ILO and various UN agencies, lack of a coherent policy on linkage question besets their effectiveness\(^{222}\). Depending on the angle from which one is approaching the issue, there has never been a shortage of debate on the issue\(^{223}\) and diversity of opinions\(^{224}\). Proponents argue that a social clause in the World Trade Organization will be necessary for the following reasons:

The ILO is too weak and has failed to prevent the violation of its conventions. Second, the World Trade Organization is considered to have more teeth than the ILO because it can place trade sanctions on those countries where core ILO conventions are violated. Last but not least the linkage will limit the negative social effects of free trade under the World Trade Organization and force the World Trade Organization to be more socially responsible (Greenfield 2002, p.1)


The above sounds simple and attractive from a social point. However it is not without hitches. One is in relation to standing under the World Trade Organization. Standing in the World Trade Organization is given only to governments, thus only a government can file complaints to the World Trade Organization. Unlike under the ILO trade unions, NGOs and other social movement organizations cannot. It is up to governments to decide whether or not to make a complaint about another country’s violation of labour standards. It will make this decision with many political, economic, military and foreign policy considerations such that a decision to use a social clause in the World Trade Organization will be a foreign policy decision and not a decision based on social justice\textsuperscript{225} or worker’s rights.

Though this could in effect be the case, nonetheless it would be a good foreign policy that would strengthen the case for global social justice and peace, as we will see later. The other reason advanced for not linking the two is that enforcing social rights through the World Trade Organization system would result in reclassifying workers rights through the ideology of free trade. It is contended that the real

meaning for workers rights would be lost\textsuperscript{226}. With due respect this view fails to recognize the interplay of social and economic factors in the global economic system\textsuperscript{227}. The two complements each other and it would be wrong to see this complementarily as a loss.

The other relates to the World Trade Organization Dispute resolution system\textsuperscript{228}. Since the World Trade Organization places blame on governments and not on the offending transnational corporations (TNCs)\textsuperscript{229}. It is said that whilst the World Trade Organization is investigating the case, which could take between two to seven years, the accused TNC can easily avoid trade sanction by relocating to another country. While this may be true for small-scale businesses it is doubtful if that would be replicated in the case for larger TNCs involving enormous investment in technology, personnel and intellectual property rights. Such considerations act as economic incentive to invest in improving its occupational health and safety records as the cost of relocating would greatly out weigh the cost of improving its occupational health and safety record.


\textsuperscript{227} See Chidi Anselm Odinkalu Trade and Human Rights , (2001), 13 Interights Bulletin No.4 p.141


\textsuperscript{229} All WTO agreements including the understanding on Rules and Procedures governing the Settlement of Disputes can be down loaded from http://www.wto.org/english/docs
In view of the aforesaid it would be wrong to say that the World Trade Organization only target countries and governments. A wholesale acceptance of this is often rooted in a misunderstanding of internal and external dynamics of economic sovereignty.

There is never a shortage of instances where economic sanctions have been used for non-trade related issues such as the environment and labour issues. Within the World Trade Organization the US has invoked GATT 47 Article XX, which refers protection of Human, animal or plant life and health and to conservation of natural resources. The US embargoes were targeted either directly or indirectly at tuna fishing practices in the Eastern Pacific, particularly those of Mexico, which resulted in the deaths of large numbers of Dolphins.

Development aid is mostly conditioned on among others observance of human rights and fair labour practices. At a bilateral level, market access as at times been conditioned on the beneficiary country taking steps to promote and observe internationally recognized labour

231 GATT 47 Article XX (b)
Efficacy of Sanctions

The welfare effectiveness of sanctions will differ considerably in each case depending on whether the sanctions are able to change policies and practices in targeted countries. While there is not much evidence on the effectiveness of environmental and labour related trade sanctions, significant empirical work has been undertaken with a view to measuring the impact of economic sanctions on state behavior. The most comprehensive work is that by Hufbauer, Schott and Elliott (1990). It examined 115 instances of the use of economic sanctions over a period of 40 years. It concluded that sanctions had an overall success rate of 34% in achieving an alternation of the conduct of the targeting country in the desired direction (Jane Kelsey 2001 p.384).

An important observation made is that economic sanctions are least to

233 The US GSP scheme permits duty-free entry to all products covered by the scheme. The Trade Act of 2002 officially reauthorized the GSP scheme through December 2006. This Act modifies certain regulations on textile and apparel provision under the African Growth and Opportunity Act (AGOA). AGOA provides designated sub-Saharan African countries with duty-free and quota-free access for a wider range of products, including sensitive products. See GSP - Handbook on the Scheme of the United States of America 2003, Including Features of The African Growth And Opportunities Act (AGOA) Programme (UNCTAD/ITCD/TSB/Misc.58/Rev.1)

succeed against intransigent hostile regimes as opposed to countries that are relatively friendly to sanction imposing country (See the case of the United Kingdom and Zimbabwe). This is important if we bear in mind that environmental and labour rights in a sanction regime would be counted as aimed at modest policy changes in comparison to sanctions that seek, say regime change (e.g. Iraq) or removal of a pervasive social ordering like apartheid. This should enable policy makers to think along the line, as this is more likely to be internationally supported.

The opposition at World Trade Organization has led to every country setting its own conditions in relation to trade and labour issues as we have seen. The result is that there is no policy coherence at the international level. It would be wrong to say that international consensus around this issue does not exist235; rather consensus has not been brought under a comprehensive and functional regulatory scheme capable of enforcement under the World Trade Organization.

As indicated currently, labour standards are not subject to World Trade Organization rules and disciplines. But some World Trade Organization

235 The issue of trade and labour standards has been with the World Trade Organisation since its birth. At the Ministerial Conference of the General Agreement on Tariffs and Trade held in Marrakech in April 1994 to sign the treaty that formed the World Trade Organisation, nearly all ministers expressed a point of view on the issue. The Chairman of that conference concluded there was no consensus among member governments at the time, and thus no basis for agreement on the issue.
member governments in Europe and North America believe that the issue must be taken up by the World Trade Organization in some form if public confidence in the World Trade Organization and the global trading system is to be strengthened. Bringing the matter to the World Trade Organization will also provide incentives for World Trade Organization member governments to improve conditions for workers around the world.\(^{236}\)

A global policy response to this problem would take the form of a universal recognition of the link between trade and investment on the one hand and labour on the other. This has always been a bond of contention within the World Trade Organization, which thinks it is not right to link the two and the global civil society that feels the two cannot be separated. The issue was however accepted in the failed OECD's Multilateral Investment Agreement\(^{237}\) (MIA) Unfortunately MIA never lived to bear fruits.

Though the World Trade Organization has refused to link the two, it has given a commitment and recognition of the importance of the issue. In

\(^{236}\) [http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/18lab_e.htm](http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/18lab_e.htm)

\(^{237}\) In May 1995, the OECD Council, at Ministerial level, committed the Organization to the immediate startArticle of negotiations aimed at reaching a Multilateral Agreement on Investment (MAI), which would (a) provide a broad multilateral framework for international investment with high standards for the liberalisation of investment regimes and investment protection and with effective dispute settlement procedures (b) be a free-standing international treaty open to all OECD Members and the European Community, and to accession by non-OECD Member countries.
this section we will explore how the two can compliment each other and how this would inform policy for developing countries such as those of SADC.

The underlying aim of economic liberalization appears to be trade and investment opportunities for states concerned and profit maximization for economic actors involved. However, despite the proliferation of over 1800 binding treaties that contain provisions related to foreign investment at bilateral, regional and sectoral levels, there is no comprehensive multilateral agreement on foreign investment. In the past, several attempts to establish a multilateral investment regime through various forums have failed miserably\textsuperscript{238}.

In the 1990s, the developed countries led by US also launched negotiations for a treaty known as Multilateral Agreement on Investment (MAI) at the OECD which included heavy dose of investment liberalization, protection of investors and a dispute resolution mechanism\textsuperscript{239}. Because of differences among OECD member countries on certain issues under negotiations coupled with

\textsuperscript{238} Kavaljit Singh, \textit{When Elephants Dance: MIA Negotiations in the World Trade Organisation}, Public Interest Research Centre, India \url{www.boell.org/docs/Cancun_Singh.pdf}

\textsuperscript{239} MIA should not be confused with the Multilateral Investment Guarantee Agency (MIGA). MIGA was created in 1988 as a member of the World Bank Group to promote foreign direct investment into emerging economies to improve people's lives and reduce poverty. It offers political risk insurance (guarantees) to investors and lenders, and help developing countries attract and retain private investment.
popular opposition by the NGOs and trade unions, the MAI was finally shelved in 1998. After the collapse of the MAI negotiations, the Working Group on Trade and Investment at the World Trade Organization remains the only multilateral forum where investment issues are under discussion at present.

The Trouble with Sanctions

Despite the theoretical and practical benefits of trade in terms of promoting economic growth, the idea of using trade sanctions to punish countries that do not adhere to or enforce core labour standards remains at the centre of global debate. For instance the main proponent of this approach in the United States the AFL-CIO in its policy manifesto, called on the WTO to "ensure that governments at all levels can continue to protect human and labour rights by withdrawing benefits from governments that fail to guarantee these rights". In other words, the AFL-CIO wants to alter WTO rules so that members can raise barriers against trading partners that do not protect labour rights. The then Vice President Al Gore adopted a similar approach as reflected in his statement that "future trade negotiations ought to

---

include in the fabric of the agreement both labour and environmental components."^{241}

Despite their efficacy sanctions are not trouble free. First, trade sanctions, and in particular barriers to imports from countries with poor labour standards, are not a costless policy^{242}. As noted above, higher trade barriers might exacerbate problems of low economic growth and poverty in the targeted country by restricting its exports. They may hinder the very development that poor countries so desperately need.

Higher trade barriers could also reduce choice and increase prices for consumers in the imposing country. Similarly, import restrictions could raise the price of imported inputs for imposing country companies, reducing their competitiveness, and thereby disrupting long-term investment. Even well-intentioned attempts to use sanctions can be captured by protectionist interests in the imposing state country. That is, domestic industries in the imposing state could champion higher trade barriers against foreign products in order to reduce foreign competition in their market and increase their own monopoly rents and profits. The purported benefits of imposing trade sanctions on a trading partner

---

^{241} Letter to National Association of Manufacturers. February 18, 2000. This policy position implies support for using trade restrictions as the enforcement mechanism for labour and environmental standards.

^{242} Sanctions and trade barriers can also involve bans on exports from the United States, but in the context of labour standards, the debate is usually premised on the assumption that the United States would impose barriers on imports from countries with lax standards.
(i.e. an improvement in that country's labour standards) need to be weighed against these costs.

A second major problem with sanctions is that they only affect industries that are engaged in exporting and not the whole economy. They have no impact on non-traded sectors, such as subsistence agriculture and the irregular employment sector, which often have the worst cases of labour rights abuses. A World Bank survey of the theoretical case for using trade restrictions to improve labour standards overseas concluded "the impacts of trade restrictions taken by foreign countries depend on the circumstances and could backfire if the aim is to improve the situation of workers with limited rights." 243

One recent review of countries petitioned under the USA Generalized System of Preferences (GSP) noted that "the 30 cases ended up being evenly divided between success and failure" and, even in these cases, it is difficult to know if it was the threat of sanctions or the focus of public attention that was the real motivation for change 244. Similarly, a survey of U.S. economic sanctions used for a wide range of objectives over the 1970s and 1980s showed that they resulted in positive

outcomes in less than one case in five. Indeed, trade sanctions are a very blunt instrument to address the complex range of factors contributing to poor labour standards such as poverty, corruption, and political and regulatory weakness.

There are also significant practical problems with reforming WTO rules to allow members to sanction countries with a poor record on labour rights. First, most rule changes at the WTO require either a two-thirds majority or absolute consensus. With the current strong opposition from a coalition of developing countries, it is difficult to envision such a rule change ever being enacted. Indeed, one of the key lessons from the Cancun WTO ministerial is that developing countries are taking an increasingly active role in international trade policy and they are able to block policies that they perceive as against their interests. Yet, even if the rules were modified to enable a member state to bring a case against a country that violated core labour standards, it would be very difficult for the WTO to quantify the effects of lax labour standards. This is important because the WTO needs to measure the economic impact of a violation of its rules in order to determine the size of the sanctions that the complainant may introduce. For example, the WTO could

---


The majority required depends on the rule change being proposed. For example, an amendment to the Final Act (the founding charter of the WTO) requires a two-thirds majority of WTO members to be passed and a consensus in the Ministerial Conference to make the rule changes binding on all members. In contrast, a legally binding "interpretation" of a WTO rule requires only a simple majority.
clearly define the value of U.S. beef exports lost as a result of the European Union's import ban247 on hormone-treated beef248. In a case of poor labour standards overseas, would the WTO allow the United States to ban all imports from that country, or just a fraction? If the United States wanted to increase tariffs, by how much would it be authorized to do so?

Finally, the WTO dispute settlement process either endorses or rejects trade restrictions imposed by individual WTO members on other members. For example, the WTO could rule on whether a Canadian regulation banning imports of goods made using prison labour was legal under WTO rules. Yet, in cases of egregious labour rights abuses, coordinated multilateral action against the offending country is likely to be more effective (rather than action by individual members). Such coordinated action cannot be organized through current WTO procedures.

247 DSU 21.03.c, EC Measures Concerning Meat and Meat Products (Hormones) - Arbitration under Article 21.3 (c) of the Understanding on Rules and Procedures Governing the Settlement of Dispute.

Policymakers concerned with raising labour conditions thus need to look elsewhere for more targeted, subtle, and effective policy tools.

Having gone through the catalogue of problems with sanction it is clear that an alternative policy tool exist, i.e. a coordinated multilateral action against offending states. However this is dependent on there being a consensus around the linkage issue. Unless trade and labour are linked, it is pointless to talk of multilateral efforts to improve labour standards. In the absence of multilateralism, unilateralism prevails and sanctions remain the better evil.

Trade and Labour

Attempts to link trade policy and international labour standards are not new. Indeed, Article 7 of the founding Charter of the International Trade Organization (ITO)\textsuperscript{249} recognized that "unfair labour conditions" create difficulties in international trade and required members to take feasible action to end such labour conditions within their own borders\textsuperscript{250}.

\textsuperscript{249} See United Nations document E/Conf. 2/78. The United Nations Conference on Trade and Employment, held in Havana, Cuba, in 1947, adopted the Havana Charter for the International Trade Organization which was meant to establish a multilateral trade organization. For various reasons, the charter never came into force.

\textsuperscript{250} Generally see Bhagwati, J, (1995) \textit{Free Trade, Fairness and the new Protectionism}, (London: the Institute of Economic Affairs) 26-27. Many developing and some developed
The intent of these negotiators was to establish an International Trade Organization (ITO), which would address not only trade barriers but other issues indirectly related to trade, including employment, investment, restrictive business practices, and commodity agreements. The ITO was to be a United Nations specialized agency, but the ITO treaty was not approved by the United States and a few other signatories and never went into effect. Instead, a provisional agreement on tariffs and trade rules, called the General Agreement on Tariffs and Trade (GATT) was reached and went into effect in 1948. This provisional GATT became the principal set of rules governing international trade for the next 47 years.

The inclusion of labour issues shows clearly that the architects of the post-war Breton woods system recognized the potential linkages between international trade and labour conditions overseas. More the United States has tried in the past to include labour standards in both the GATT and the WTO. In 1986, the United States proposed that the GATT consider "worker rights" during the Uruguay Round but its initiative was not adopted. In 1996, the United States proposed a working group on trade and labour standards at the WTO (this motion was defeated)

nations believe the issue has no place in the WTO framework. These nations argue that efforts to bring labour standards into the arena of multilateral trade negotiations are little more than a smokescreen for protectionism. Many officials in developing countries believe the campaign to bring labour an issue into the WTO is actually a bid by industrial nations to undermine the comparative advantage of lower wage trading partners.
and in Seattle, the United States again proposed such a working group. In all of these instances, a coalition of developing countries blocked the U.S. proposal\textsuperscript{251}.

Many commentators argue that this position reflects entrenched developing country opposition to the concept of international labour standards. Yet, two-thirds of WTO members, mostly developing countries, have ratified six of the seven ILO core conventions\textsuperscript{252}. This suggests that developing countries are not concerned about the setting of core international labour standards per se.

Rather, developing countries worry that the WTO will adopt a wider range of standards than the ILO (i.e. including development standards) and that developed countries will use WTO rules to close their markets to developing country goods and services. Therefore there is, clearly, a broad problem of building international support for any policy proposal in this area. U.S. activity in the sphere of trade and labour standards is not limited to international bodies. The U.S. Generalized System of Preferences (GSP), implemented in 1976, offers preferential access to the U.S. market to developing countries. In determining which countries

\textsuperscript{251} Linkage between trade and core labour standards was debated at the Singapore Ministerial Conference of the WTO, with strongest support from the United States, firm opposition from India and other developing countries, Dec. 13, 1996, para.4, Doc. WT/MIN (96)/DEC, 36 ILM 218 (1996). See also, Diller Janelle M.and. Levy David A (1997) ‘Child Labour, Trade and Investment: Towards the Harmonization of International Law’, 91 American Journal of International Law. 680

\textsuperscript{252}
should receive lower tariff barriers, the President is required to consider, among other things, whether the country is taking steps to offer internationally recognized worker's rights. Between 1985 and 1995, the U.S. reviewed 63 petitions relating to 39 countries for labour rights reasons, though only 12 ended in the withdrawal or suspension of GSP rights. Finally, Section 301 of the 1974 Trade Act (as amended in 1988) also addresses labour rights and trade. This section deals with "unfair" trade practices of foreign countries and establishes mechanisms for the United States to take action against such practices.

The definition of "unreasonable" trade practices that may be subject to legal action includes a persistent pattern of conduct that denies workers rights. This legislation actually goes beyond core ILO labour standards and includes language requiring countries to provide standards for minimum wages, hours of work, and the occupational health and safety of workers. This law has never been invoked and the U.S. Trade Representative has never received a petition to take action under this clause.


254 This is probably because any action will be more likely filed under GSP statutes rather than Section 301. The bill also includes a disclaimer that a country is exempt from action (i.e. sanctions) if it is taking steps to improve labour standards or if its policies and practices are consistent with its level of development. These qualifications may weaken the likelihood of a successful case being brought under this legislation. Similarly, the lack of action under GSP
This history suggests several premises. First, there is no lack of policy ideas in the debate. The difficulty lies in garnering support for any policy and enacting it. There is a particularly strong need to build international consensus around any policy at the multilateral level.

Second, using trade policy tools and institutions alone to improve labour standards is unlikely to achieve the aim of improved labour standards overseas. Thus, it is important to consider other, not strictly "trade policy" tools, such as the work of the ILO and market-based approaches including social labelling and corporate codes of conduct. An empirical study produced by the Organization for Economic Cooperation and Development on "core workers rights and international trade" has enriched the substance of the debate, but so far at least, it has not narrowed noticeably the differences of view of WTO Members on whether the subject properly belongs in the WTO.

---

laws may have convinced parties that a labour rights case brought under Section 301 is unlikely to be successful.


During preparations for the Singapore Ministerial Conference, proposals were made by the United States and Norway for a decision to be taken by Ministers for the WTO to undertake work on promoting core labour standards in the context of global trade liberalization and to report back to Ministers at their 1998 Conference. Both proposals view WTO work in this area as complementing that of the ILO, which they recognize has primary international responsibility in this field. Both countries view the objective as reaching a common understanding among WTO members on how to reinforce the mutually supporting nature of increased trade and improving labour standards.

The international community has considered and debated the importance of labour standards since the idea of international cooperation for the promotion of those standards was first raised in 1815 at the Congress of Vienna. Because both labour standards and trade sanctions are connected to the economy, one of the most commonly maintained suggestions for the improvement of labour standards worldwide is linkage, or the imposition of trade sanctions on countries where labour standards are sub-standard.

258 Following the exile of Napoleon Bonaparte to Elba the victorious Allied powers began a series of committee sessions in Vienna to sort out the problems of Europe. The Big Four were Britain, Austria, Prussia and Russia although the newly royalist France was invited to join later. The key thing in the minds of the Allies was to organise a peace that would bring stability to Europe. visit www.napoleonguide.com

In December 1996, the First Ministerial Conference of the World Trade Organization (World Trade Organization) had an opportunity to decide the linkage issue, and ultimately declined the invitation. Instead, member states acknowledged in a declaration the authority of the International Labour Organization (ILO) to deal with the issue of labour standards\(^{260}\).

However the linkage debate still show no sign of coming to a satisfying conclusion that would ensure safe and sound working conditions for many of the global workforce especially in developing countries where a majority of work labour under sub-standard conditions. Within the limits of the World Trade Organization Declaration alternative means for increasing labour protection exist. Given the extent to which labour standards protect and ameliorate workers' lives, it is important to consider these alternatives at the outset in broader terms.

Though the World Trade Organization could have found sufficient bases for its own authority regarding the linkage question, the present reality is that the ILO has been designated as the exclusive organization to take action. However, the ILO enforcement mechanism cannot offer many incentives for compliance. Enforcement of ratified

conventions in the ILO system is mainly through persuasion and encouragement\textsuperscript{261}. Only in the extreme case can the ILO break off contact with the country in question as a sanction for non-compliance.

Though the shame of international isolation and the stigma of a pariah status are powerful psychological incentives for states to observe internationally recognized labour standards, there is no evidence to show that the formula has and is working let alone been a preferred ILO mode of enforcement. This is not as powerful as trade sanctions under the World Trade Organization regime. At the moment it is possible for such a state of affairs to continue in the community of states and have business as usual in the World Trade Organization system. The only time it can face trade sanctions if you can show that it using low labour standards as a subsidy on production or that its trade products are made using prison labour\textsuperscript{262} or broadly they are a violation of fair trade practice within the context of WTO rules.

The World Trade Organisation has labour concerns embedded within its rules. GATT (1947) Article XX (e) provides that Members may adopt or enforce measures relating to the products of prison labour. This exception, like all exceptions, is conditioned by the requirement that such a measure not be a means of arbitrary or unjustifiable

\textsuperscript{261} See Articles.24-34 of the ILO Constitution

\textsuperscript{262} GATT (1947) Article XX (e)
discrimination between countries where the same conditions prevail, or be a disguised restriction on international trade. While, the question is an open one, it is not clear why prison labour was singled out as prima facie subject to restriction. In the contemporary context, the term prison labour might be viewed, as one form of forced labour. Similarly, the nullification and impairment provisions of Article XXIII offer an interesting perspective on the issue of core labour standards. Essentially, should a Member consider that the attainment of any objective of the GATT is being impeded as a result of any measure applied by another Member, whether or not it conflicts with the provisions of the GATT, the Member may initiate a bilateral process to resolve the matter. In this regard, one of the main objectives of the GATT is to raise living standards (Emphasis supplied) or generally put human development.

If a bilateral process fails to produce satisfactory results, the World Trade Organisation’s Dispute Settlement Body (DSB) is obliged to investigate the matter, and make recommendations. Provision is

---


265 See Article 3 of DSU, infra, p.100
made for consultation with any appropriate inter-governmental organisation, opening the door to the direct involvement of the International Labour Organisation. Significantly, if the circumstances are deemed serious enough, the World Trade Organisation is empowered to authorize suspension of concessions. Both the Article XX (e) and Article XXIII provisions contain the seeds of a potential test case for the World Trade Organisation's dispute settlement process. Though the outcome may be uncertain, such a case would reinforce the existing reality of the World Trade Organisation's mandate in respect to trade-related labour matters.

---

266 Article 4 of the Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The DSU emphasizes the importance of consultations in securing dispute resolution, requiring a Member to enter into consultations within 30 days of a request for consultations from another Member. If after 60 days from the request for consultations there is no settlement, the complaining party may request the establishment of a panel. Where consultations are denied, the complaining party may move directly to request a panel. The parties may voluntarily agree to follow alternative means of dispute settlement, including good offices, conciliation, mediation and arbitration. (Article 5)

Where a dispute is not settled through consultations, the DSU requires the establishment of a panel, at the latest, at the meeting of the DSB following that at which a request is made, unless the DSB decides by consensus against establishment. The DSU also sets out specific rules and deadlines for deciding the terms of reference and composition of panels. Standard terms of reference will apply unless the parties agree to special terms within 20 days of the panel's establishment. And where the parties do not agree on the composition of the panel within the same 20 days, this can be decided by the Director-General. Panels normally consist of three persons of appropriate background and experience from countries not party to the dispute. The Secretariat will maintain a list of experts satisfying the criteria.
The Global Dimension of Trade, Investment and Labour

Why should the EU be concerned about the labour standards that Malawi enforces within its own borders? The answer is provided in the preambular language of the ILO Constitution. It suggests three possible answers. First possibility why the EU should be concerned about Malawi's choice of labour standards because of the implications of this choice for the economic well being of E.U citizens (i.e., the effects that the trade and/or investment implied by Malawi's choice would have on real incomes and working conditions in the other parts on the Continent which is its business partner. Through this partnership the effect may be felt within the EU itself.

Second the EU is concerned about Malawi's choice of labour standards because of the possibility that weak labour standards and poor working conditions in Malawi could lead, to social "unrest so great that the peace and harmony of the world are imperilled," and thereby create political spill-over for the EU. A third possibility is humanitarian: the EU cares directly about the welfare of workers in Malawi. Under each of these possibilities, there arises an international externality associated with Malawi's choice of labour standards.

---

267 See the Preambular language of ILO constitution
The existence of this international externality, in turn, suggests that Malawi’s choice of labour standards may be inefficient from an international perspective if this choice is made unilaterally (i.e., without the input of the EU and other affected countries). The international inefficiency of unilateral choices of labour standards is what gives rise to the possibility of mutually beneficial international action with regard to the determination of labour standards, hence, at a basic level, identifying the problems that can be solved by international action over labour standards amounts to characterizing the international externalities imposed by unilateral choices of labor standards.

In standard economic terms, the distinction between the possibilities described above is simple: The first possibility describes a pecuniary externality of international dimensions, while the remaining two possibilities each describe a non-pecuniary externality of international dimensions. However, to make progress in characterising these externalities more succinctly, it is convenient at this point to introduce a term that lies at the heart of much of what goes on in the World Trade Organization: the term is market access.

Market access is interpreted in the World Trade Organization to reflect the competitive relationship between imported and domestic products\textsuperscript{269}. For example, all else equal, when the EU agrees to lower an import tariff on a particular product, it alters the competitive relationship between imported and domestic units of the product in favour of imported units, and it thereby provides greater market access to foreign producers. By agreeing to reduce its tariff, the EU is effectively agreeing to engineer an outward shift of its import demand curve – that is, a greater volume of imports will be demanded in the EU at any given price charged by foreign exporters – and as a result foreign exporters can expect to enjoy an increase in sales into the EU market and to receive a higher price.

The key observation about the first possibility described above is that the externality associated with Malawi’s unilateral choice of labor standards is in this case transmitted to the EU via its effect on market access. That is, a weakened labour standard in Malawi can effect the economic well-being of EU citizens if – and only if – it has the effect of altering market access in Malawi, in the EU, or in a third-country market where the EU and Malawi both trade or invest.

In short, one country’s choice of labor standards can alter the economic well being of the citizens of another country if and only if it alters market access. As a consequence, if the EU is concerned about Malawi’s choice of labour standards because of the implications of this choice for the economic well-being of EU citizens, then the EU is raising an issue that is, fundamentally, a market-access issue which is a trade issue and under the World Trade Organization.

There is therefore a link between trade, investment and labour. Formally acknowledging this link in multilateral trade and investment fora would give the ILO an additional tooth, and in the process forcing nations to seriously observe labour standards of which occupational health and safety is an aspect. There is a well founded concern that the market-access implications of one government’s choice of weak labor standards could trigger other governments to respond in kind, by either weakening their own labor standards or postponing further strengthening of their labor standards, in the name of international "competitiveness."

There could be other reasons why the EU would be interested in Malawi’s choice of labour standards, which could be political as well as humanitarian. According to the political concern, the EU is concerned about Malawi’s choice of labor standards because of the possibility that weak labor standards and poor working conditions in
Malawi could lead to social unrest, and have political spillover for the EU. The case of the Democratic Republic of Congo where foreign troops mainly form the EU led by France have had to move in to halt the carnage\textsuperscript{270} is an example. According to the humanitarian concern, the EU is concerned about Malawi’s choice of labor standards because it cares directly about the welfare of workers in Malawi. The key distinction between these two possibilities and the first possibility described above is that these possibilities each describe a non-pecuniary externality of international dimensions, in which market interactions play no transmission role. In particular, under each of these remaining possibilities, changes in market access play no direct role in determining how the EU is affected by Malawi’s choice of labor standards. A debate on the linkage of labour and trade and investment would be greatly informed if one understands the definition and content of labour.

**Defining Core Labour Standards**

Groups that advocate improving labour standards do not always define precisely which standards they are referring to. Yet the distinction is very important. The term "labour standards" has been used to refer to a wide range of employment laws, regulations, and practices including the right to form trade unions, the right to practice collective bargaining, prohibitions on child labour, minimum wages,

\textsuperscript{270} The same can be said of Sudan.
overtime rates, limitations on hours worked per week, health and safety regulations, and prohibitions on forced and slave labour. Yet, these standards are not one and the same, particularly when considered from an economic development perspective. There are two key distinctions:

**Core vs. Developmental Standards**

Core labour standards generally refer to specific legal rights (e.g. the right to form unions) and prohibitions on certain abusive practices (e.g. bans on forced labour). These hard-won, universal social achievements represent the minimum conditions for a modern, progressive economy. What is under appreciated is that they create the framework conditions for the economy to operate efficiently. For example, prohibitions on discrimination allow all workers to be used in their most productive capacity and prevent prejudice or other social constraints distorting the labour market. Any society, no matter how poor, should grant its workers such rights.

In contrast, developmental or economic labour standards refer to standards that will vary depending on the level of income in a given

---


272 See our discussion on the right to development, Supra, n.191

273 Trade unions and collective bargaining can introduce distortions in the market, such as the separation of workers into "insiders" and "outsiders." The conclusion of efficiency is thus dependent on the assumption that the underlying institutional framework of the labour market does not encourage distortions.
society. These country-specific standards include minimum wages and overtime rates. Setting uniform levels for such standards across both rich and poor nations (such as a global minimum wage) would render many developing countries uncompetitive (low wages in developing countries largely reflect their lower levels of productivity). Such uniformity would undermine the ability of many developing countries to provide their workers with any jobs let alone safe and stable employment.

While the international community should help developing countries increase their incomes and thus raise their developmental labour standards in the long-run, these standards should vary from country to country and should reflect national income and development levels\textsuperscript{274}.

**Unilateral vs. International**

Another important distinction, also often blurred in the debate, concerns the way in which standards are set. Some commentators wish to see other countries adopting standards equal or equivalent to U.S. standards. For example, the group United Students Against Sweatshops has developed a code of conduct for all companies selling goods to its member universities\textsuperscript{275}.

\textsuperscript{274} Many of the ILO's international conventions are developmental standards, but its seven key conventions (detailed later in the paper) are basically core standards.

\textsuperscript{275} *Workers Rights Consortium Code of Conduct*, United Students Against Sweatshops.
The code requires companies operating overseas to meet U.S. federal regulations for health and safety in the workplace (unless domestic laws and regulations are higher than U.S. standards). It also includes requirements such as a maximum 48 hour week, mandatory vacation leave, overtime pay at a rate above the regular wage, and a "dignified living wage" for all employees. The latter is defined as sufficient to cover "basic needs" such as housing, energy, nutrition, clothing, health care, education, potable water, childcare, transportation, and savings.

Though the actual standards set under such an approach may be lower than U.S. labour market standards, parties in the United States define them in a unilateral way. Imagine if the German government decided to restrict all trade and investment with the United States until the U.S. adopted a German-style labour market with wages equal to German wage levels, six weeks mandatory vacation a year, and significantly higher payroll taxes to fund a state-run, universal pension system.

Such an approach would seek to impose German social norms on U.S. workers and companies and would be flatly rejected by the U.S. Congress. Similarly, unilaterally determined U.S. standards seek to impose U.S. views and norms on weaker nations and are equally unacceptable to developing countries.
In contrast, there are internationally designed and recognized core labour standards and practices. The most well-known are those adopted by the ILO in its numerous conventions. The ILO is a tripartite organization made up of representatives from governments, business, and the labour movement and its 174 members represent nearly all of the world’s governments. Therefore, ILO standards are a more legitimate basis for a discussion of the linkage between international trade and labour standards as they reflect an international consensus and they have been formulated with input from developing countries.

Content of Labour Standards

An inquiry into the core labour standards compels an examination of the text of international human rights documents in which groups of countries have expressed their desire to protect certain rights. In general, core labour standards are limited to the following few principles: the right to organize and bargain collectively; the freedom of association; the prohibition of forced and child labour and the

276 According to the State Department, there are 190 independent states.
principle of non-discrimination, or the right to equality of opportunity and treatment in employment\textsuperscript{278}. It is important to keep in mind, however, that these rights are still not respected in many countries, and controversy continues to exist regarding their validity. Even though many human rights organizations have acknowledged an overlap between labour standards and human rights\textsuperscript{279}, it is unclear whether the World Trade Organization considers labour standards to be part of human rights\textsuperscript{280}.

Nevertheless, several arguments favouring the recognition of labour standards as a subset of human rights exist: first, the freedom of association is a fundamental human right as well as a core labour standard; and second, many victims of political and civil rights

\textsuperscript{278} The origin of "international" labour standards can be traced back to Europe's Industrial Period, which occurred over 150 years ago. According to social reformers, the dreadful working conditions of Europe's workers could not be improved unless all European countries agreed to commit to a certain minimum level of protection. Thus, certain rights in the labour context were accorded more protection across borders in order to prevent unfair competition between European countries. See Virginia A. Leary, International Labour Law (2d ed.), 91 Am. J. Int'l L. 402, 402 (1997) (book review).


\textsuperscript{280} The World Trade Organisation's perceived reluctance to acknowledge labour standards as human rights was observed by one author who noted that an early draft of the Declaration included a statement that all World Trade Organisation members had subscribed to the Universal Declaration of Human Rights. This statement was discarded early on, however, indicating caution on the drafters' part to associate the two types of rights. See Bill Blaikie, World Trade Organization Spurns Workers' Rights, Can. Dimension, Mar. 13, 1997, available in WESTLAW, 1997 WL 9977183, ALLNEWS database.
violations are people involved in labour struggles\textsuperscript{281}. The main sources for the determination of the core labour standards can be categorized as follows:

Multi-lateral human rights instruments; ILO declarations\textsuperscript{282}, Conventions and Recommendations; and bi- and multi-lateral trade agreements. The most important multilateral human rights instruments defining core labor standards are the Universal Declaration of Human Rights (Universal Declaration)\textsuperscript{283}, the ICESR, and the International Covenant on Civil and Political Rights (ICCPR)\textsuperscript{284}. These three general human rights documents are jointly referred to as the "International Bill of Rights." The Universal Declaration proclaims in its Preamble that "[t]he peoples of the United Nations have...determined to promote social

\textsuperscript{281} See Trubek, supra p 400.

\textsuperscript{282} In June 1998 the International Labour Conference reaffirmed its commitment to the founding ideals of the ILO when it adopted the Declaration on Fundamental Principles and Rights at Work and its Follow-up. The Declaration is a pledge by all Members to respect, promote and realize in good faith the principles and rights relating to: freedom of association and the effective recognition of the right to collective bargaining the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation. Declarations are instruments that the ILO has used sparingly. Unlike an international labour Convention, which binds only Members that ratify it, the Declaration applies automatically to all countries that have accepted the ILO Constitution, whether or not they have ratified the fundamental Conventions of the ILO. All countries are encouraged, however, to move towards ratification of these Conventions.


progress and better standards of life in larger freedom. Specifically, its articles emphasize the importance of non-discrimination (art. 7), the right of association (art. 20) and the right to join trade unions (art. 23(4)), the right to social security (art. 22), the right to work in a profession of one's choosing (in just and favorable conditions) with protection against unemployment (art. 23(1)), the right to just and favorable remuneration (art. 23(2)), and the right to an adequate standard of living (art. 25). In addition, the Universal Declaration prohibits slavery (art. 4), provides for the special protection of childhood (art. 25(2)), and proclaims the right to education (art. 26).

The ICESCR repeats those same rights, with a particular emphasis on fair working conditions (art. 7) and on the protection of children from social and economic exploitation (art. 10(3)). Although the ICCPR mentions some of the same rights, it mainly focuses on workers and their rights as civilians in the community. To be precise, in addition to the prohibition of slavery and forced or compulsory labour (art. 8), it refers to the "right to freedom of association with others, including the right to form and join trade unions for the protection of his interests which arguably include occupational health and safety (art. 22(1))."

The ILO has to date published 184 Conventions and as many

285 Universal Declaration, supra. Most states in the world signed the Universal Declaration, but the document is not binding.
Recommendations that together make up the International Labour Code. Because the ILO considers seven of the Conventions to be the most important ones, it continues to encourage its members to adopt at least these key Conventions. These seven Conventions focus on forced labour (1930)\textsuperscript{286} the freedom of association and the protection of the right to organize (1948)\textsuperscript{287}; the right to organize and collective bargaining (1949)\textsuperscript{288}, equal remuneration (1951)\textsuperscript{289}, the abolition of forced labour 1957\textsuperscript{290}, discrimination (employment and occupation) (1958)\textsuperscript{291}, and minimum age (1973)\textsuperscript{292}. Absent from the list unfortunately for us are conventions on occupational health and safety (C.155), and occupational health and safety services (C.161).

Finally, many international trade agreements include clauses to protect workers' rights. For example, workers in the European Union (EU) have recourse to the European Commission and ultimately to the European Commission. Absent from the list unfortunately for us are conventions on occupational health and safety (C.155), and occupational health and safety services (C.161).

\textsuperscript{286} Convention concerning Forced or Compulsory Labour, ILO Doc. 011930029 (June 28, 1930).
\textsuperscript{287} Convention concerning Freedom of Association and Protection of the Right to Organize, ILO Doc. 011948087 (July 9, 1948).
\textsuperscript{288} Convention concerning the Application of the Principles of the Right to Organize and to Bargain Collectively, ILO Doc. 11949098 (July 1, 1949).
\textsuperscript{289} Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, ILO Doc. 011951100 (June 29, 1951).
\textsuperscript{290} Convention concerning the Abolition of Forced Labour, ILO Doc. 011957105 (June 25, 1957).
\textsuperscript{291} Convention concerning Discrimination in Respect of Employment and Occupation, ILO Doc.011958111 (June 25, 1958).
\textsuperscript{292} Convention concerning Minimum Age for Admission to Employment, ILO Doc. 011973138 (June 26, 1973).
Court of Justice for cases involving violations of labour protection. Alternatively, they can appeal to the European Court of Human Rights and petition for the protection of their rights under the European Convention on Human Rights.  

In addition to these three main categories of instruments, another source for the identification of core labour standards are the Organization for Economic Co-operation and Development (OECD). According to a 1996 study by the OECD, the right of collective bargaining and freedom of association, freedom from slavery and indentured servitude, minimum working conditions, health and safety, and minimum age limitations (the prohibition of exploitative forms of child labour), are "essential immediately for assuring fundamental human rights."

The OECD considers these to be the core labour standards, and recommends that they be incorporated in international trade agreements to avoid the imposition of an unfair burden of the costs of globalization on the labour force. As indicated by the above-


mentioned documents, conventions and recommendations, certain standards and rights are more commonly accepted than others, especially among western powers, in light of the United States' efforts to initiate discussions in this area and its insistence on certain rights.\textsuperscript{295} Whereas this list of core labour standards presents a reasonable and essential set of rights from a Western point of view, the existence of some consensus does not mean complete consensus nor the ability and willingness to comply. For many developing countries, these "basic" rights and standards are merely goals to be achieved, and as such several economic concerns need to be taken into account.

**The Debate within the World Trade Organization**

Formed on January 1, 1995 as the successor to the GATT after the Uruguay Round trade negotiations, the World Trade Organization is the legal and institutional foundation of the multilateral trading system. It "provides the principal contractual obligations determining how governments frame and implement domestic trade legislation and regulations addition, it provides a platform for collective debate and

\textsuperscript{295} Interestingly enough, the U.S. has only ratified one of the core labour conventions, see All Free Traders Now?, The Economist, Dec. 7, 1996, at 25, and only 12 of the 176 ILO Conventions. See Jay M. Vogelson, American Bar Association Section of International Law and Practice: Report to the House of Delegates—International Labour Organization, 30 Int'l L. 653, 658 (1996). In addition, states such as California are infamous for their exploitation of labour from Latin American countries in the garment industry. See Devinder Sharma, Labour Standards or Double Standards, The Hindu, Mar. 17, 1997, available in WESTLAW, 1997 WL 9765488, LLNEWS database
negotiation on trade relations

The linkage issue is not a new problem, but in recent years the emphasis on its importance has been sparked by the rapid and increasing globalization and liberalization of trade. One of the consequences of this global economy is increased competition between markets. Another consequence is the increased attention to the manner in which different countries use their labour force to manufacture their products. The resulting transparency of different countries' economic situations and their respective treatment of workers bring us to the linkage question: whether or not the international trade community should enforce labour standards on its trade partners through trade sanctions. Linking the improvement and protection of labour standards to trade measures or aid may sound like the solution, but this in fact raises many voices of opposition. Essentially, the linkage question presents a dilemma between two different and possibly opposite goals: the globalization of trade and investment and the protection of workers and labour standards.

The Preamble of the GATT (he fore runners to the World Trade Organization) suggests that improving workers' rights is at least an indirect objective of the GATT, as evidenced by its explicit goals to

---

ensure full employment and to raise the standard of living\textsuperscript{297}. In addition to other attempts made by the United States to include labour standards under the protection of international trade organizations, the United States proposed to discuss four "minimal international labour standards" (MILS) during the Tokyo Round of the GATT. The focus was on child labour, health and safety practices, slave or forced labour, and discriminatory practices applied to exports. In the end, however, because of the lack of continued support from other countries, the United States decided not to make a formal proposal.

After more unsuccessful efforts to bring the issue to light, the United States requested the formation of a working group, separate from the Uruguay Round of trade negotiations (1986-1993), to initiate the discussion on labour standards and workers' rights in connection with international trade. This request took place in 1987 at the GATT Council Meeting and suggested five basic labour standards to be addressed, but the request was not granted\textsuperscript{298}.


\textsuperscript{298} The basic labour standards to be addressed were: (1) freedom of association; (2) freedom to organize and bargain collectively; (3) freedom from forced or compulsory labour; (4) a minimum age for the employment of children; and (5) measures setting minimum
Another level of the controversy focuses on the differences in opinions and motives of corporations versus those of workers and unions. International producers and investors in developed countries perceive stringent labour laws and worker guarantees as a burdensome hurdle in the competition for efficiency and profit. Therefore, many companies transfer their business to countries or states with a low-cost, non-unionized labour force such as the SADC region and much of sub-Saharan Africa, and defend these transfers as healthy, competitive, and efficient uses of labour that are ultimately beneficial to the global economy.

Labour unions and workers note that protection and high wages generally indicate advanced economies with stable democracies, competent judiciaries, reliable telecommunication and transportation systems, skilled labour and a working class that enjoys middle class purchasing power. They use this perceived connection as an argument for the enhancement of labour protection as a means to improve states' political and social climate as well.

standards in respect to conditions of work. These rights are similar to the ones used in the United States' General System of Preferences law.
Labour rights proponents also claim that labour rights should not be treated differently than capital or intellectual property protections. The unions and workers finally point out that companies play out the competitive advantages of the different countries to the companies' advantage, by threatening to leave if labour costs increase. The continued existence of this myriad of reasons in favour and dis-favour of linkage makes it a demanding challenge to find a solution that can satisfy all parties involved.

**Protections Provided by the World Trade Organization**

Included in the World Trade Organisation's Declaration was a paragraph on the linkage question that essentially shifted the responsibility in this matter to the ILO. In order to determine whether we could have expected extensive protections from the World Trade Organization, we need to examine if labour protection falls under the functions of the World Trade Organization. The World Trade Organisation's main focus is the free flow of trade between the member countries, and ultimately throughout the world. The World Trade Organization was designed to protect corporations, not the individuals that form them. Whether this can be sustained in the 21st Century is very much doubtful as workers' health and safety let alone labour protection generally is assuming priority state or member state economic agendas.
Regional economic blocs such as SADC and EU are pursuing social reforms in a bid to secure social legitimacy for economic programmes. The trading corporations themselves through their shareholders are heavily investing in public relations and don't want to risk a bad press. This point to a good bossiness case for improved labour standards to be taken aboard the World Trade Organization.

The main functions of the World Trade Organization can be summarized as follows: (1) providing predictable and increased access to markets worldwide; (2) encouraging fair competition; (3) supporting and encouraging reform and development and (4) working towards trade without discrimination. Despite the lack of an explicit reference to labour and its relation to trade in the description of either the functions or the objectives of the World Trade Organization, the World Trade Organisation's preambular language indicates a commitment to sustainable development and to the goal of "raising standards of living," and of "ensuring full employment. In addition, its goals include development and reform, which encompass social progress.

299 For instance in the United Kingdom the Health and Safety Executive is debating a law that would make it mandatory for corporations to have health and safety Directors on the boards as a way of encouraging individual and collective responsibility.

300 See World Trade Organisation OMC, supra.
Current Status of Labour Protection by the World Trade Organization

The first Ministerial Conference took place in Singapore from December 9 through 13, 1996. The primary areas of concern according to the Singapore Ministerial Declaration were: "to assess the implementation of our commitments under the World Trade Organization Agreements and decisions; review the ongoing negotiations and Work Programme; examine developments in world trade; and address the challenges of an evolving world economy. This agenda purposefully did not contain a discussion of labour standards, forcing the United States to threaten to veto the entire Declaration if labour standards were not included.

The World Trade Organization Declaration on "Core Labour Standards" at the meeting was put this way:

We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of

countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the World Trade Organization and ILO Secretariats will continue their existing collaboration.  

The significance of this statement, and its presence in the World Trade Organisation's final Declaration, cannot be overstated. In short we see here the World Trade Organization pushing the issue to the ILO firstly because it believed it was not under its mandate (wrong) and secondly and understandably so, it was felt the ILO had the expertise and know-how to handle it though lack the power to enforce. The collaboration of these two in theory was a good compromise but in practice its efficacy is been greatly tested and the test does not seem is being passed very well.

303 South Korea represents one example of a country's present struggle with new and "improved" labour laws. Overall, the country's workers have seen great improvements in their standard of living since democracy appeared on their doorstep in 1987: people are able to buy cars and live in nicer apartments. However, a recent labour law allows companies to fire workers more easily in order to compete with other industrializing countries that still maintain (comparatively) low wages. Now, instead of fighting for higher wages and better working conditions, South Koreans are trying to achieve job security against the "[g]lobal forces that brought prosperity [and that] now threaten to take it elsewhere." Andrew Pollack, Thriving, South Koreans Strike to Keep It That Way, N.Y. Times, Jan. 17, 1997, at A1; Andrew Pollack, South Korea's Growing Pains, N.Y. Times, Feb. 4, 1997, at D1. Unfortunately, examples like this may discourage developing countries from trying to achieve this type of "labour-protective" industrialization and lead them to believe that the current treatment of their workers is justified.
Protections Provided by the ILO

The ILO was formed in 1919 with the encouragement of Samuel Gompers, President of the American Federation of Labour, to prevent the spread of Bolshevik influence in the European labour movement. After the demise of the League of Nations, the ILO joined the United Nations (UN) in 1946 and became a specialized, independent agency within the UN system.

Its general mandate is to improve working conditions, create employment and promote human rights globally. Its membership consists of more than 174 countries, and although mostly lesser-developed countries and emerging market economies benefit from its practices, the organization's benefit reaches countries all over the globe in its pursuit of human rights, democracy and free enterprise. The unique aspect of the ILO is its tripartite structure, based on the full and active participation of the private sector, represented by labour and business, and the government in its decision making process.

---

304 Mr. Ruggiero sought a firm statement condemning child labour, but the Declaration's statement resulted in the mere reiteration of existing international labour rules. "This chronic inability to take a strong stand on anything could cost the World Trade Organisation its leading role in global commerce. See also Helene Cooper & Bhutan Bare, World Trade Organisation, Top Dog in Trade, Has More Bark than Bite, Wall St. J., Dec. 3, 1996, at A1.


306 cf our earlier discussion on standing in the World Trade Organisation where only governments have legal standing.
The organization consists of two main bodies: the International Labour Conference and the Governing Body. The International Labour Conference adopts new international labour standards, monitors the application of existing standards, and provides a forum for the exchange of information on labour and social issues generally. The Governing Body in turn serves as the executive council and as such makes decisions on policy and programs for recommendation to the Conference, sets the budget for two-year periods, and appoints the Director-General.

The ILO was established for the furtherance of social peace, motivated by the following considerations: first, humanitarian concerns for the large numbers of people negatively affected by poor labour conditions, second, political recognition that poor working conditions could create social unrest and political instability, possibly leading to revolution; and third, economic impetus to prevent unfair trade competition from countries failing to raise labour standards.

The ILO sets and supervises international labour standards, conducts programs of technical assistance and training, and provides information products and services. Its chief concerns are child labour, freedom of association, labour standards and international trade, employment promotion, occupational health and safety management and skills training and women's rights.
The ILO and the Linkage Issue

The linkage problem between labour standards and trade has troubled the ILO since its formation in 1919. This is reflected in the preambular language of its constitution when it states that the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations, which desire to improve the conditions in their own countries\textsuperscript{307}.

In terms of enforcement the ILO does not advance notions of punitive trade measures in the labour context. Specifically, the ILO provides procedures to bring either a representation or a complaint\textsuperscript{308}. While the former is a grievance filed by an organization of workers against a country, the latter is brought by one country against another for the alleged failure to observe a Convention it has ratified. In the resolution of these disputes, however, the ILO can only rely on persuasion and encouragement.

Conclusion

It is clear from the foregoing discussion that health and safety as labour standards falls both under the mandate of the World Trade

\textsuperscript{307}See para. III of the preamble to constitution of the International Labor Organization electronically available at http://www.ilo.org/public/english/about/iloconst.htm#pre

\textsuperscript{308} See Article.24 of the ILO Constitution
Organization (implicitly) as well as the ILO (explicitly). Since there is now a growing increase of trade in agriculture or agricultural related products (our case study) there is a crucial role the link can play within the regional integration programmes such as SADC where interstate competition for trade and Foreign Direct Investment is keen engendering a race to the bottom of occupational health and safety among others.

Granting for a moment that trade and foreign investment is the engine for economic growth\textsuperscript{309}, which is the target to SADC's integration programme then tackling the issue of occupational health, and safety from that wider angle would make real sense for both economic and social progress in the region. The advantage of linking the two for developing countries such as those of SADC is that it will provide checks and balances in the absence of a coherent competition policy at regional level on the adverse effect of unregulated drive for Foreign Direct Investment, which can expose the work force and the environment to effects that would perpetuate instead of reducing poverty. Since poverty has been acknowledged as the main obstacle to the region's human and economic development\textsuperscript{310}, there is need to tackle the problem in the integration package through a combination

\textsuperscript{309} Economic growth is the steady process by which the productive capacity of the economy is increased over time to bring about rising levels of national output and income.

of economic (through World Trade Organization) and social (through say ILO) measures.

The social and economic effects of poverty are wiping out economic gains of integration and this does not enhance the process of integration the region into the global economy. Before we consider the issue in the wider context of SADC in detail it is important to consider regulatory implications for SADC.
CHAPTER FIVE
Regulation

Introduction
This chapter explores the concept of regulation and considers what regulatory options SADC has as it strives to reconcile potentially competing priorities of trade and investment for the region’s economic reconstruction on the one hand and health and safety on the other. Various approaches are considered and the chapter concludes that SADC needs a combination of both control and command and non-control and command approach such as market-based approach, involvement of civil society and a functional networking among the various stakeholders in the region.

Definition
There is no accepted, or at least straightforward, definition of regulation. The term is used to denote, at one extreme, specific legal mechanism to make good deficiencies or curb abuses on the part of particular producers or service providers. On the other it denotes regulatory regimes for an entire economy or particular “type” of capitalism (e.g. free-market or neo-liberal Anglo-Saxon capitalism.

---
312 Capitalism refers to an economic system in which the means of production and distribution are privately or corporately owned and development is proportionate to the accumulation and reinvestment of profits gained in a free market. For a discussion on capitalism generally see
social market capitalism, and organisation-orientated Japanese capitalism). As a result, it is not uncommon to find different interpretations of regulation depending on the level of aggregation (e.g. firm, industry, economy or international) and the country of origin.

In Europe regulation typically refers to the whole realm of legislation, governance (Legislation is an aspect of governance) and social control whereas in the United States regulation has a more specific meaning, namely the sustained and focused control exercised by a public agency over activities that are generally regarded as desirable to society.

Policy-makers in Europe have traditionally been more sceptical than

---


312 A political movement beginning in the 1960s that blends traditional liberal concerns for social justice with an emphasis on economic growth.


their United States counterparts about the efficiency of markets, or at least the ability of markets to function in the absence of recurrent crises, and in many industries the preference was nationalisation rather than regulation\textsuperscript{318}.

Another notable difference is that while in both continents the principal purpose of regulation has been to protect and promote "public interest\textsuperscript{319}" in the United States there is a preference for specialist, independent agencies that are bestowed with regulatory powers\textsuperscript{320}.

In Europe, as is the case of SADC states, regulatory power typically resides with relevant state departments or government ministries\textsuperscript{321}. By its very nature and purpose occupational health and safety standards and practices are a form of social regulation of the market.


\textsuperscript{319} What is meant by this is not clear but is understood to refer to a sum total of public good typified by reduced social cost and waste.

\textsuperscript{320} The UK presents us with an example in the form of the Health and Safety Commission and its enforcement arm, the Health and Safety Executives. See www.hse.co.uk cf. Health and Safety Commission of Malawi, Health and Safety Administration of the USA

\textsuperscript{321} In Malawi this done by the Health and Safety Commission. The Commission falls under the ministry of Labour and Vocational Training. Under the employment Act (Act No.6 of 2000) administration of labour is undertaken by the Labour Commission constituted under s.8 of the Act.
Forms of Regulation

All jurisdictions regulate business structures, though the form and degree of regulation varies. The pattern of regulation may change over time. During certain periods the role of the regulator may be seen to be a containing one. On other occasion it may be introduced to assist business organisation\textsuperscript{322}.

At a broader level regulation can be divided into economic and social regulation. Economic regulations generally cover sectors of the economy such as electricity, agriculture and banking. These regulations usually take the form of overt barriers to entry or exit, licensing and tariffing laws, and price and wage controls.

The regulatory role of the state cannot be grasped adequately without a conceptual and functional understanding of sovereignty, the organising legal and political principle upon which national economic policymaking and regulation as well as international economic co-ordination and regulation are predicated\textsuperscript{323}.

Sovereignty

\textsuperscript{322} David Milman (Ed) (1999) \textit{Regulating Enterprise, Law and Business Organisation in the UK} Hart Publishing (Oxford) p.3

Sovereignty organises the allocation of jurisdictional competence between states based primarily on territoriality\textsuperscript{324} and thus functions as a means of legitimating the distribution of power both within and between states. Conceptually and functionally, sovereignty has an internal and an external dimension.

With regard to the internal dimension, a sovereign nation-state enjoys exclusive authority within the borders of its territory; is entitled to non-interference in its domestic affairs; is the protector of territorial and economic security, is the provider of safety, continuity and stability, and is the supreme lawgiver\textsuperscript{325}.

Internal sovereignty empowers a state to exercise jurisdiction\textsuperscript{326} to prescribe, adjudicate and enforce its laws over persons and acts within its territory. Ultimately, internal sovereignty and the exercise of jurisdictional powers derive from a state’s monopoly of legitimate force.


within its borders. A proper appreciation of the internal dimension of sovereignty requires an understanding of the relationship between the state and the society it governs.

The internal dimension of sovereignty is the relationship between the state and civil society. In today's societies, the exercise of the sovereign power of the state is subject to a range of constitutional rights which define, demarcate and guarantee a public sphere, on the one hand, and a private sphere of the market within which social relations are subject to both non-state and state sanctioned forms of regulation including private law norms.

Constitutional law imposes an obligation on the sovereign power to protect the institutional foundations of the market, the main ones being property rights and contract. Property and contract are the key legal categories for regulating social relations within the market.

The exercise of the sovereign power is constitutionally prescribed in order to ensure that market transactions are not interfered with and thus rendered unpredictable.

The state is therefore one among many institutional and regulatory

---

328 Tshuma, L. (2000), supra p.17
orders regulating social relations. These institutional and regulatory orders include the web of associations that comprise civil society. However, the state’s monopoly of legitimate force gives it the ultimate role in co-coordinating and regulating collective action in situations such as those of market failure.\textsuperscript{329}

The external dimension of sovereignty regulates relations among states in the international system where sovereign nation-states enjoy formal equality vis-à-vis each other. Unlike the situation at the national level where the monopoly over legitimate force provides the state with power to establish institutional and regulatory orders for resolving the dilemmas of collective-action, there is no third party with a similar monopoly of legitimate force and authority at the international level.

However there is seemingly a departure from a traditional international law position in that regional bodies like EU and SADC do have a fair amount of such monopoly of powers. While collective-action problems have always characterized relations among nation-states, these were compounded by the increase in the number of states following decolonisation and the consequent tension between North and South. States need to act collectively at the international level because, private economic and social relations

\textsuperscript{329} A market failure exists when the price established in the market does not equal the marginal social benefit of a good and the marginal social cost of producing the good.
transcend state boundaries, creating a situation where the exercise of powers and functions by different states overlaps and intersects\textsuperscript{330}.

In other words, the constantly mutating economic geography of markets, which know no political borders, is increasingly at variance with the political geography of the nation-state, which is based on fixed territoriality. This calls for co-operation between or among states each of which exercises sovereign powers and functions over some but not all aspects of economic and social relations that transcend territorial boundaries.

However, the on-going increase in economic activities transcending national boundaries exacerbates the dilemmas of collective-action\textsuperscript{331} and some states, such as the United States, have developed a tradition of resorting to extra-territorial measures, thus extending their sovereign reach and jurisdiction beyond their political boundaries\textsuperscript{332}. This however has brought them into conflict with others, which resent


\textsuperscript{332} See Special 301 of the USA Trade Act 1974, Section 102 of the Cuban Liberty and Democratic Solidarity Act (Commonly referred to as the Helmes Burtons Act) 1996, which for bid any nation to trade with Cuba, The USA Act that entitles the USA to take any action against anyone for any act it deems harms American commerce.
this unilateral extension of jurisdiction.\footnote{The war on terror presents us with interesting developments. In the context of pre-emptive defence the USA has as in the case of Afganistan and Iraq resorted to unilateral action under the cloak of enforcing either international Law (Iraq) or domestic self defence (Afganistan). The divergence of views on the Iraq issue points to the unease of other states of the USA's extra territorial enforcement of its laws.}

The above argument should not be taken to suggest that states do not co-operate. They do, and the 'why' and 'how' they do so is at the heart of institutional theory in international relations.\footnote{Institutional theory in international relations is a response to the inadequacies of realist and neorealism theories and seeks to explain why states cooperate and institutionalize their relations. Institutions are defined as 'rules of the game' (North 1990, 4-5) and as 'persistent and connected sets of rules (formal and informal) that prescribe behavioural roles, constrain activity, and shape expectations They can take the form of formal intergovernmental or non-governmental organizations, international regimes, or informal conventions. Institutions help states overcome collective-action problems such as the fear that other states will renege on deals; the inability of a state to monitor other states' behaviour and preferences; and the fear that other states will act opportunistically in a context where punishment mechanisms are inadequate. Institutions help states overcome such problems and reach mutually beneficial agreements and allow reciprocity to operate efficiently. They do this by providing information about the preferences, intentions, behaviour and standard of behaviour of other states. They thus reduce transaction costs, which are the costs of reaching and maintaining agreements (Martin 1997, 3).}

Treaties or agreements between or among states are the traditional legal technique for inter-state co-ordination of policy and regulation and involve derogation from sovereignty.\footnote{Deudney, D. (1996). Binding Sovereigns: Authorities, Structures, and Geo-politics in Philadelphian Systems, in State Sovereignty as Social Construct. T. J. Biersteker and C. Weber. Cambridge, Cambridge University Press: 190-239.} States wishing to be bound by a treaty are expected to ratify or accede to it subject to permitted reservations.
Generally, in the area of international economic policy and regulation, treaties tend to be predicated on the principles of reciprocity, national treatment\textsuperscript{336}, most-favoured\textsuperscript{337} nation treatment, fair treatment\textsuperscript{338}, international standards for the treatment of foreigners, and special treatment for countries, which enjoy special relations with the country in question. Exceptions to the principle of reciprocity have been made for developing countries in some treaties in recognition of their specific historical circumstances\textsuperscript{339}.

A treaty may provide for the establishment of an international organization to which states delegate authority over specific transnational economic issues. International organisations are established to promote common objectives and thus constitute a form of co-operation\textsuperscript{340}.

If the objective of the treaty is the harmonisation of policy or regulation, it may contain a uniform law which signatories are required to adopt. Given the number of states in the post-colonial and post-communist world and the consequent diversity of national and

\textsuperscript{336}GATT 47 Article.3
\textsuperscript{337}GATT 47 Article.4
\textsuperscript{338}GATT 47, Article 42
\textsuperscript{339}See Article.66 of GATT 47
regional interests, it is hard to reach agreement on many policy and regulatory issues. Not surprisingly, treaties take an inordinate amount of time to negotiate and are thus an inflexible technique for co-coordinating policy and regulation.

A more flexible technique than the treaty is the model law, which could be adopted by states with or without modification. ‘Soft law’ codes attempt to bridge the gap between the international and the national spheres\textsuperscript{341}. Standards promulgated by committees of national regulators and professional groups are a recent development and are akin to ‘soft law’ codes of conduct. In fact, Norton argues that capital adequacy banking standards have the attributes of international soft law\textsuperscript{342}.

\textbf{Economic Sovereignty}

In relation to international economic relations critical to the power configuration is the concept of economic sovereignty. This is often confused with sovereignty as international law. The relevance of economic sovereignty is that it forms the basis of a state’s internal and external economic relations\textsuperscript{343}. The resistance of some countries to open up their markets may have more to do with economic

\textsuperscript{341} Picciotto 1996-97, 1030.
\textsuperscript{343} Asif H.Quresh (1999) \textit{International Economic Law} London, Sweet & Maxwell, p34
nationalism than sovereign right as understood in international law. The debate as to whether to link trade and labour is played more in the arena of economic sovereignty than anything else. For this reason let's now reflect on this concept.

As a concept in international economic law (IEL) it is a wash with problems. Though these are being resolved through international agreements it is still clouded with ambiguities of general international law, philosophical differences as to the nature of law and the state and vested economic interests (Quresh, 1999) p.34.

It is descriptive of the totality of the economic powers of a state, as well as its equal status in international economic relations. In this framework state sovereignty connotes juridical independence from the authority of other participants in international economic relations under the framework of international law, and as constrained and augmented by the principle of equality as between states. Thus article 2(1) of the UN

---

344 It is doubtful in today's global economy that one can strictly speak of nationalisms or national economy. The term 'national economy' is one that we hear regularly in day-to-day jargon. In fact it is a misnomer. National economies, as presently constituted, are not national but international. Their stability and strength are constantly affected by the ups and downs of international trade, political climate. Their growth rests on the international market. Their whole direction and planning are subject to international conditions. The story of how September 11 affected air travel industry worldwide and its knock on effect in other areas of economic engagement is still fresh our minds.

345 Oppenheim's International Law (9th ed) Chap.2, See also Mac Donald and D.M (eds), The Structure and Process of international Law (1983)
Charter specifically affirms the sovereign equality as between states\textsuperscript{346}.

Unlike in general public international law in IEL economic sovereignty mainly relates to a states' permanent resources, its economic system and to the rules of engagement in international economic relations.

The question that comes to mind is whether labour as a commodity can be said to be within the domain of economic sovereignty so that to link it with trade and investment would be intrude on the sovereign right of those having a comparative advantage. A negative answer to this would be a fitting one. In the last chapter we came to the conclusion that labour rights are human rights and as such no one should be allowed to have a comparative advantage in human rights\textsuperscript{347}.

\section*{Need for Regulation}

In terms of purpose, two conflicting tensions have to be managed. A system of regulation must seek to facilitate business, because that is

\textsuperscript{346} See also the Declaration on Principles of international law concerning Friendly relations and co-operation Among states in accordance with the United Nations Charter 1970 in Annex to GA Res.2625 (XXV)

deemed to be in the economic interest of a capitalist system\textsuperscript{348}. Equally it must accept that the pursuit of profit requires the protection of interest groups such as passive investors, creditors, employees and the public at a large. It is here that occupational health and safety standards and practices come in, as they not only protects workers and neighbours\textsuperscript{349} but also their economic interests by boosting productivity, efficiency and a voiding accidents that would cause substantial damage to machinery and equipment and increase production costs\textsuperscript{350}.


\textsuperscript{349} Per Lord Atkin in Donoghue v Stevenson [1932] AC 562. The Neighbour Principle is to the effect that one ought to take reasonable care to avoid acts or omissions, which can be reasonably foreseen to be likely to injure a neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question. R v The Board of Trustees of the Science Museum [1993] 3 AER 853, R v Mara (5 November 1986) Court of Appeal [1987] 1 WLR 87

\textsuperscript{350} Frantline in 1992 conducted a survey in the United States on the effect of Occupational injuries and illnesses on economic resources and came to the following conclusions: Roughly 6,371 job-related injury deaths, 13.3 million nonfatal injuries, 60,300 disease deaths, and 1,184,000 illnesses occurred in the U.S. workplace in 1992. The total direct and indirect costs associated with these injuries and illnesses were estimated to be $155.5 billion, or nearly 3 percent of gross domestic product (GDP). Direct costs included medical expenses for hospitals, physicians, and drugs, as well as health insurance administration costs, and were estimated to be $51.8 billion. The indirect costs included loss of wages, costs of fringe benefits, and loss of home production (e.g., child care provided by parent and home repairs), as well as employer retraining and workplace disruption costs, and were estimated to be $103.7 billion. Injuries generated roughly 85 percent whereas diseases generated 15 percent of all costs. These costs were large when compared to those for other diseases. The costs are roughly five times the costs for AIDS, three times the costs for Alzheimer's disease, more than the costs of Arthritis, nearly as great as the costs for cancer, and roughly 82 percent
It is not uncommon to find provisions in occupational health and safety legislation and conventions that extend the liability of employers to persons outside the contract of engagement\textsuperscript{351}. These provisions place upon employers and the self-employed the duty to conduct their undertakings in such a way as to ensure that persons not in their employment who may be affected by the undertaking are not thereby exposed to risks to their safety and health\textsuperscript{352}.

This duty is owed in \textit{rem} and can be enforced through tort and the criminal justice system\textsuperscript{353}. It is also owed in \textit{persona} and can be

\textsuperscript{351} These provisions are found in various occupational health and safety conventions and recommendations, including those adopted by the International Labour Organization (ILO).

\textsuperscript{352} See Section 14-15 of the occupational health and safety law in Malawi, \textit{The (U.K.) HSWA 1974}, and ILO Conventions 155 and 161, which address occupational health and safety in agriculture.

\textsuperscript{353} Corporate Manslaughter is one example. The UK Government in May 2000 undertook consultation about the size and shape of corporate manslaughter or corporate killing charges. Prospectively unlimited fines have been in view. There could be prison sentences for culpable directors. And the field of vision will cover all enterprises, to include public sector organizations, rather than the private sector only. Following the death of seven passengers in the Hatfield Train Disaster in 2002 in July, corporate manslaughter charges were brought against both the corporation and the senior management personally.
enforced mainly through statutory enactments\textsuperscript{354} as well as tort\textsuperscript{355} contract and health and safety law\textsuperscript{356}. The aim of regulation may differ. Economic regulation mostly aims to achieve equity between participants in the market\textsuperscript{357}. Examples include Ant-trust (USA) and competition laws (EU).

Other mechanisms of regulation concentrate on the external conduct of the markets and participants by examining its effect on consumers, competitors and the public in general. Examples of this include a whole

\textsuperscript{354} Section 2 of HSWA 1974 (U K), Bolton Metropolitan Borough Council vs. Malrod Insulations Ltd (13th November 1992) Queen's Bench Division Court (Times Law Reports, 26 November 1992), Canterbury City Council vs. Howlettts and Port Lympne Estates Ltd (27 November 19960 High Court (Times Law Reports, 13th December 1996)

\textsuperscript{355} Schalk Willem Burger Lubbe (Suing as Administrator of the Estate of Rachel Jacoba Lubbe) and 4 Others and Cape Plc. and Related Appeals. The 4-year fight for compensation by South African asbestos miners and residents ended in settlement agreements being signed on 13 March 2003 with both English company Cape Plc and South African company GenCorp Limited. Cape Plc has since agreed to pay £7.5 million compensation to the 7500 members of the Group action brought in England. GenCorp has agreed to pay £3.2 million to those of the Group who were also exposed to asbestos from Gencor/Gefco operations in South Africa. A large number of the Cape victims worked or lived at or near Gencor/Gefco operations. Gefco took over most of Cape's operations when it pulled out of South Africa in 1979. GenCorp owned Gefco for many years

\textsuperscript{356} In 2003 corporate manslaughter charges were brought against senior management of RailTrack following a derailment of one of its trains at Hatfield. This was the litmus test of the proposed corporate manslaughter law. However Charges over the crash against former Railtrack boss Gerald Corbett and two other executives were dropped. Mr Justice Mackay at the Royal Courts of Justice ruled there was no evidence to support allegations against them. Vide http://news.bbc.co.uk/2/hi/uk_news/3618628.stm

\textsuperscript{357} David Milman (Ed) (1999) Regulating Enterprise, Law and Business Organisation in the UK Hart Publishing (Oxford) p.4
corpus of labour legislation of which occupational health and safety is a component.

**The State, Sovereignty and Economic Regulation**

Economic regulatory paradigms need to be understood both theoretically and historically. Historically the emergence of market societies since the 18th century has been inextricably linked to the development of centralised modern states which took the form of welfare or developmentalist states. The administrative and legal practices of modern states were constitutive and therefore enabling of market activity.

On the other hand, the legitimacy of modern states rested on their ability to mediate the different interests within a given society, thus rendering central administrations politically accountable in their enabling of market activity. For many economic regulations is only justified in the event of market failure. In other words, the invisible hand of the market should be permitted to fix prices for commodities.

---

358 This state of affairs, however, presupposed certain power configurations both within and outside of individual territorial state units that pointed to the primacy of central administrations and armies. It has been argued that since the 1980s that primacy has been undermined and new forms of administration are in the making. The new administration has been called governance to differentiate it from previous forms.

359 A brief label for the view that the market does not provide a panacea for all economic problems. There are various ways in which an unregulated market may fail to produce an ideal state of affairs. The main sources of market failures are monopoly, externalities and income distribution.
and allocate goods and services without hindrance except in those instances where the market has failed\textsuperscript{360}. Instances of market failure include: failures of competition\textsuperscript{361} and existence of monopoly power, the existence of public goods\textsuperscript{362}, externalities which are dis-benefits not reflected in producers, costs and benefits which are not reflected in


\textsuperscript{361} Competition is the situation when anybody who wants to buy or sell has a choice of possible suppliers or customers. With perfect competition there are so many suppliers and customers, with good contact between them that all traders ignore the effects of their own supplies or purchases on the market and act as price-takers, able to buy or sell any quantity at a price, which they cannot influence. Such intense competition is rather unusual in real life. The more usual condition is monopolistic or imperfect competition with a limited number of buyers and sellers.

\textsuperscript{362} What is a public good? This question can best be answered by looking at the counterpart private good. Private goods are typically traded in markets. Buyers and sellers meet through the price mechanism. If they agree on a price the ownership or use of the good (or service) can be transferred. Thus private goods tend to be excludable. They have clearly identified owners; and they tend to be rival. For example others cannot enjoy a piece of cake once consumed. Public goods have just the opposite qualities. They are non-excludable and non-rival in consumption. An example is a street sign. It will not wear out even if large numbers of people are looking at it; and it would be extremely difficult costly and highly inefficient to limit its use to only one or a few persons and try to prevent others from looking at it too. A traffic light or clean air is a further example.

This poses immediately the question of who then provides public goods. Once they exist they are there for all to enjoy. So it is often the most rational strategy for private actors to let others go first and seek to enjoy the good without contributing to its production. This is a dilemma that public goods face. Without some sort of collective-action mechanism they risk being under-provided. Conversely without collective action public bads - such as pollution noise street crime risky bank lending and so on - would be over-provided.
their revenues, incomplete markets, information failures, macroeconomic disequilibria, including inflation and cyclical unemployment, poverty and inequality, as well as the production of merit goods. Given that markets for most goods and services are international, the same arguments justifying regulation in the event of market failure can be extended to occupational health and safety at the international level.

Contrary to the general view of neo-classical economists regarding the capacity of markets to self-regulate, the breadth of the above list of market failures suggests that markets have an inherent tendency to fail if left unregulated. Indeed as Polanyi argues in his devastating critique of laissez-faire ideology:

'The free market was opened and kept open by an enormous increase in continuous, centrally

---

363 Situations where markets fail to produce items which people desire even though they would be willing to pay for them.

364 The tendency to under produce information to which access cannot be limited and the creation of false information; cf the Prior Informed Consent procedure in relation to chemical trade, supra.

365 These are goods or services whose consumption is believed to confer benefits on society as a whole greater than those reflected in consumers' own preferences for them. They have presumably external beneficial effects such as making consumers better or more productive people. They are sometimes subsidised by government or provided by charities. See Killick, T. (1989) A Reaction Too Far: Policy and the Role of the State in Developing Countries. London: Overseas Development Institute


367 Thus, an economic doctrine that opposes governmental regulation of or interference in commerce beyond the minimum necessary for a free-enterprise system to operate according to its own economic laws.
organised and controlled interventionism\textsuperscript{368}.

The need for regulation arises from the anarchic character of markets, which are supposed to register numerous individual consumer preferences upon which producers are supposed to allocate resources for the production of commodities to satisfy these preferences. There is a social reason for market regulation which is to minimise the effect of social exploitation market competition may engender such as the lowering or infective policing and enforcement of occupational health and safety standards such as health and safety.

In the process of global competition inter or intra regional varying labour standards normally produce distortions for the economy\textsuperscript{369}. This affects the global movement of goods and services as well as people. Global economic integration would be hard to achieve in such a setting. This argument holds true in relation to regional setups like SADC and the EU\textsuperscript{370}. In this economic setup regulation must encourage a flow of investment into the region while safeguarding or minimising the adverse societal effects of free market practices in line with Article 5 of the treaty of SAC that spells out one of the main


\textsuperscript{369} That is, an economic system in which the allocation of resources is determined solely by supply and demand in free markets and is not directed by government regulation. Alison Jones and Brenda Sufin (2001) EC Competition Law, Texts, Cases and Materials. Oxford University Press, New York p.3

\textsuperscript{370} See SADC report on the on restructuring of SADC.
objectives of SADC as improving the living standards of people of the region\textsuperscript{371}.

The challenge for SADC is on how balance the competing economic and social priorities. This to a larger extent depends on the choice of approaches to regulation has settled for. There are many approaches to regulation but the commonly used are those referred to as market-based and the command and control approach. The market based approach aims to create economic incentives of a safety culture at all level of economic engagement. As indicated in Chapter one\textsuperscript{372}, the calculus of health and safety standards play a vital role in policy formulation for occupational health and safety. It indicates the cost to the enterprise, society and the workforce of under-investment in occupational health and safety standards\textsuperscript{373}. The cost and benefit analysis of occupational health and safety allows for business forecasting and contingency planning and budgeting. In general it can be said that it contributes towards efficiency and productivity at enterprise level and enables a better understanding of the social cost of under-investment in health and safety. It informs public debate on health and safety in ways that approaches cant by showing the cost society bears. This in the end may encourage the public to take interest

\textsuperscript{371} Under Article 12 (2) (a) of the Treaty (1992) social and human development, has been declared one of the core areas of the integration agenda.

\textsuperscript{372} See our discussion on economic analysis of law in Chapter 3.

\textsuperscript{373} See Frontline Survey, op.cit, n.349
and thereby contribute towards policy debate and development for health and safety\textsuperscript{374}.

The market approach presupposes that economic actors are rational beings capable of making rational economic decisions. As seen this may not be the case and could be a source of its weakness. The other presumption made is that accurate and timely economic data is available to participants in the market on which rational economic decisions are based. In the case of occupational health and safety the reporting and recording of occupational accidents, injuries, fatalities, and illnesses and diseases diagnosis would affect the quality of such data.

Lack of systematic reporting coupled with gross under-reporting of health and safety accidents or work related disease diagnosis plus poor record keeping at enterprise level all work against the rationality model and is a source of weakness. The other drawback is that in the absence of a standard reporting procedure at SADC level would mean inter-state is not an accurate reflection of the state of occupational health and safety in the region.

The ILO has tried to give guidance on the harmonization of reporting standards for occupational health and safety in its recommendation of \textsuperscript{374} Article 6(1) of the treaty of SADC.

\textsuperscript{374} Article 6(1) of the treaty of SADC.
June 2002\textsuperscript{375}. At SADC level attempts have been made to harmonise the reporting of occupational health and safety accidents and illnesses\textsuperscript{376}, the only set-back is that national institutions for statistical data collection and the reporting of occupational health and safety are being developed and suffer from the usual problems of resources and staff adequately qualified for the task among other things.

The other danger of this approach is that in the absence of social controls, firms may be tempted to put profit before social considerations such as health and safety and the environment. The command and control approach takes on from where market incentives part ways with what is internationally recognised as socially responsible economic behaviour\textsuperscript{377}. Corporate social responsibility is a by-product of this line of thinking\textsuperscript{378}. The command and control takes the form of legislation, codes of conducts and other instruments of state regulation of the market. It is usually carried out through state institutions such as the health and safety commission and its enforcement.

\textsuperscript{375} See the ILO Proposed Recommendation concerning the list of occupational diseases and the recording and notification of occupational accidents and diseases International Labour Conference 90\textsuperscript{th} Session, Report V (2B) Geneva, June 2002

\textsuperscript{376} See our discussion in Chapter 7.

\textsuperscript{377} Rhodes, M, 'Desperately seeking a solution: Social democracy, thatcherism and the 'third way' in British welfare' West European Politics, 23 (2): 161+ available at http://www.dur.ac.uk/j.m.wadwell/Web%20of%20Science%20searches.doc

\textsuperscript{378} See the ILO Tripartite declaration on Multinational enterprises and Social Dialogue at www.ilo.org
arm in the UK, the Occupational Safety and Health Administration (OSHA) in the United States and the Health and safety commission in the case of Malawi.

The institutional framework would include the social charter for SADC, Health and safety legislation and all supporting legislation and codes of conduct. It lays down what ought to be done where and how it should be done. The advantage is of this approach is its clarity on what need to be done. It clearly spells out duties for all those involved in the protection and promotion of health and safety such as employers, workers, manufacturers and the general public. In economic terms it reduces transactional costs for information collection on what is expected of everyone involved in health and safety.

The disadvantage is that it at times can engender confrontation as constructive engagement may not be very much a part of it. However in post-Roben health and safety legislation participation is feature that has come to distinguish it from other forms of legislation. The bipartism and tripartite requirement in occupational health and safety ensures that confrontation is kept to a minimum. Of course that participation is mainly in relation to policy formulation, though it is also encouraged in relation to enforcement.

The market-based approach to health and safety is an aspect of the
wider non-control and command mechanism. This approach utilises social factors that have a bearing on policy and enforcement of occupational health and safety such as trade unions, civil society, NGOs, the media, professional bodies etc.

These usually use pressure, persuasion, and in extreme circumstances naming and shaming which could have implications for share values of enterprises involved. This entails that shareholders will take an interest in the health and safety record of their corporations which reinforces existing mechanism for health and safety protection. This point is discussed in detail in the next chapter when we consider the situation of SADC in more detail. However a word or two on civil society at this stage would be in order.

**Civil Society**

Civil society comprises 'a web of autonomous associations, independent of the state which bound citizens together in matters of common concern, and by their mere existence or action could have an effect on public policy'. Civil society comprises the public sphere and the private sphere of the market. The public sphere is a common space in which members of society meet, through a variety of media and also in face to face encounters, to discuss matters of common interest.

---

interest; and thus be able to form a common mind about those matters\textsuperscript{380}. As for the market, it is the private sphere of economic production and social reproduction wherein social relations are commoditised and individuals relate to each other as equal owners of commodities.

What should be emphasized is that the relationship between the state and civil society over which it exercises sovereignty is historically specific and the manner in which sovereign power is exercised is shaped by the configuration of social forces. In democratic systems, citizens' awareness and understanding of public policies and of the issues they address are essential elements of good governance. Good governance has eight major characteristics. It is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law\textsuperscript{381}. It assures that corruption is minimized, the views of minorities are taken into account and that the voices of the most vulnerable in society are heard in decision-making. It is also responsive to the present and future needs of society\textsuperscript{382}.


\textsuperscript{381} United Nations Economic and Social Commission for Asia and the Pacific, Human Settlements at http://www.unescap.org/huset/gg/governance.htm

\textsuperscript{382} Recently the terms "governance" and "good governance" are being increasingly used in development literature. Bad governance is being increasingly regarded as one of the root causes of all evil within our societies. Major donors and international financial institutions are
Civil society can be a powerful force in bringing about changes and policy direction through debate and civic awareness. However, this depends among other things on the level of networks and development of civil society in a given society. In the context of SADC, the issue looms large.

Though paragraph four of the preamble to the Treaty of SADC makes an explicit recognition of the need for people of the region to be centrally involved in the decision-making process of SADC through democratic representation, much remains to be seen by way of how much policy input organisations representing civil society have in the region.

Choice and Policy Dilemmas

Views abound that post-Fordism has initiated a "race to the bottom."

In recent years, nations have replaced their Keynesian welfare policies increasingly basing their aid and loans on the condition that reforms that ensure "good governance" are undertaken. Since governance is the process of decision-making and the process by which decisions are implemented, an analysis of governance focuses on the formal and informal actors involved in decision-making and implementing the decisions made and the formal and informal structures that have been set in place to arrive at and implement the decision.

383 The relevant para reads 'Mindful of the need to involve the people of the Region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the rule of law.'

384 Fordism refers to the system of mass production and consumption characteristic of highly developed economies during the 1940s-1960s. Under Fordism, mass consumption combined with mass production to produce sustained economic growth and widespread material advancement.
with "neo-liberal" policies to attract industry and investment and to placate the demands of international capital markets and agencies like the International Monetary Fund (IMF) and the World Bank. Under neo-liberalism, governments are slashing social services and labour, environmental, and consumer safety standards. While the IMF is busy managing international monetary flows, new supranational arrangements like the North American Free Trade Agreement (NAFTA) and the World Trade Organization (World Trade Organisation) are at work liberalising international trade flows. These policies are suggestive of a new global mode of regulation designed to facilitate the post fordist regime of accumulation.

Sustainable development, however, has emerged as a major alternative framework to these neo-liberal policies. Many of those involved with sustainability push for what can be called bottom-up, as opposed to top-down, globalization. Communities want to be economically self-reliant. They want trade, but on terms that level

385 Structural adjustment programmes call *inter alia* the removal of subsidies on farm inputs which has only worked to entrench poverty and an food shortages as a majority of farmers in developing countries like Malawi an the SADC region can not afford the full cost of farm inputs. Governments are moving towards charging for health services, school etc. though the intention is good, the timing is bad. Most of the infant economies are not ready for such weeping economic reforms. The one-size fits all approach is another source of misery. Different societies are going through different phases of economic development and this largely ignored in t6hswes economic adjustment measures.

386 Sustainability and Post-Fordism: Opposites or Complements posted at [http://www.liu.edu/sustain/pf02.html](http://www.liu.edu/sustain/pf02.html)
upwards (not downwards) social and environmental standards. They want democracy that recognises citizens as equals in the voting booth, in the halls of government, and on the farmland and land policies that validate each region’s ecology and communities.

Sustainable development has moved environmental policy discussions away from the club of Rome’s (1972) emphasis upon over consumption and instead emphasizes ecological degradation and biodiversity (IUCN, 1980). The sustainability model also addresses the market’s endemic tendency to externalize ecological costs (Jacobs, 1991) and calls for greater communal constraints upon market excesses.387

The fundamental question facing policy maker is whether sustainability can develop into a coherent mode of regulation?

The current patchwork of international environmental agreements, growing public awareness of environmental issues, the rise of ‘green consumerism’, corporate environmentalism and the incorporation of sustainable development into local and national economic policy represent constituent elements of a new mode of social regulation.

Sustainable development’s status as an alternative to neo-liberalism is already questionable. At the global scale, sustainable development initiatives address issues like global warming and biodiversity but leave

387 Daly and Cobb (1989).
global free trade practices uncontested. As a result, localities lose a considerable amount of control over their own economies; they become globally dependent rather than locally self-reliant. Ironically, policies that are seen as sustainable, such as directing local labour towards jobs in the nonprofit sector, also help to support neo-liberalism. As technologies and globalisation create excess labour pools, that labour can now be deployed as social capital in the nonprofit sector.

The collapse of World Trade Organisation talks in Cancun, (Mexico) at the hands of developing countries is indicative of the undercurrent in international economic order. It also shows that nations are beginning to retreat to nationhood ideals, they are to beginning to listen to people over corporate demands. However this step will be hard to sustain if global networks are weakened. The danger is that regional arrangements may start concluding regional economic pacts that may take away the points scored at Cancun. The question will be how can this be avoided? How equipped is SADC for this challenge? The answer lies in functional integration of the region in which health and safety has a vital role to play.

According to free market ideology, the price mechanism allows markets to co-ordinate consumer preferences and production plans, thus balancing supply and demand and allowing markets to clear. However, the co-ordination of a large number of decentralized
decisions is not smooth as attested by recurring market failures and crises, which cause instability detrimental to capitalist accumulation.

Moreover, the co-ordination of supply and demand through the price mechanism presupposes the existence of competition\textsuperscript{388} between producers. Left to themselves, markets have a tendency to encourage concentration and centralization of capital. Hence the need for collective action in the form of state intervention to compensate for market failures and prevent instability\textsuperscript{389}. The scenario is further complicated with the advent of globalization which is affecting the state-market power configuration. A reflection on this will illuminate the choices that modern states have in the face of the dilemmas confronting them i.e. corporate profit over social justice and industrial and political democracy.

Globalisation is the term often used to describe the increased flexibility and mobility of capital that has come in the wake of the heightened international competition of the early 1970's. What has resulted from

\textsuperscript{388} Competition is the situation when anybody who wants to buy or sell has a choice of possible suppliers or customers. With perfect competition there are so many suppliers and suppliers and customers, with good contact between them that all traders ignore the effects of their own supplies or purchases on the market and act as price-takers, able to buy or sell any quantity at a price, which they cannot influence. Such intense competition is rather unusual in real life. The more usual condition is monopolistic or imperfect competition with a limited number of buyers and sellers.

this increased mobility of capital is a radical restructuring of the global economy. The core capitalist countries (U.S., West Europe, and Japan) have experienced a period of de-industrialisation as most of their manufacturing jobs were shipped to the third world as corporations began taking advantage of the cheaper labour, cheaper regulations, and hence cheaper production costs there. One major consequence of this restructuring of the international division of labour, has been the intensified territorial competition among government units for new investments and for maintaining existing firms in place.\textsuperscript{390}

This increased regional competition to attract and keep capital in the absence of proper regulatory structures for labour standards such as health and safety can potentially has result in the race to the bottom.\textsuperscript{391} This has been the major reason for the deindustrialisation of the core capitalist countries, which couldn't compete with the merger wages and standards of the third world.

This increasing concentration of political and economic power in the hands of transnational corporations\textsuperscript{392} has begun to erode modernist ideals of democracy, of 'power to the people'. It has done so by creating a strange twist on modernist's emphasis on universalism.

\textsuperscript{390} (Sonja, 186).

\textsuperscript{391} The standard lowering drive communities are forced to join if they wish to appear more attractive than the thousands of other communities' Transnational corporations have to choose from.

\textsuperscript{392} Renato Constantino '\textit{WalmArticleization}’ September 15, 1996
Instead of advocating a universalism of human rights, the modern global economic system, is advocating a universalism, in which any standard or regulation protecting the welfare of a nation's people that gets in the way of "free" trade, is done away with or penalised. For example, if Malawi proposed a law saying that it wouldn't buy clothes from countries that used child labour, it would be getting in the way of free trade and SADC\textsuperscript{393} and the World Trade Organisation\textsuperscript{394} would subsequently be able to enforce sanctions on them to get rid of any such laws\textsuperscript{395}.

\textsuperscript{393} Article 6 of the SADC protocol on Trade
\textsuperscript{394} Article 7 of GATT47

\textsuperscript{395} See DS294 United States: \textit{Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") (Brought by EC): 19 June 2003, DS170 Canada: Term of protection for patents (Brought by US): 10 May 1999. On 12 October 2000, the Dispute Settlement Body (the "DSB") adopted the Panel Report 1 as upheld by the Appellate Body Report 2 in Canada - Term of Patent Protection ("Canada - Patent Term"). At the DSB meeting of 23 October 2000, Canada informed the DSB, pursuant to Article 21.3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"), that it would implement the recommendations and rulings of the DSB in this dispute and that it would require a "reasonable period of time" to do so, under the terms of Article 21.3 of the DSU. In view of the impossibility of reaching an agreement with Canada on the period of time required for the implementation of those recommendations and rulings, the United States requested that such period be determined by binding arbitration pursuant to Article 21.3(c) of the DSU. By joint letter of 10 January 2001, Canada and the United States notified the DSB that they had agreed that the duration of the "reasonable period of time" for implementation should be determined through binding arbitration, under the terms of Article 21.3(c) of the DSU, and that I should act as Arbitrator. The parties also indicated in that letter that they had agreed to extend the time-period for the arbitration, fixed at 90 days from the date of adoption of the Panel and Appellate Body Reports by the DSB, until 28 February 2001. Notwithstanding this extension of the time-period, the parties stated that the arbitration award would be deemed to be an award made under Article 21.3(c) of the DSU. Here we see the World Trade
The same logic applies to nearly every standard or regulation (which have usually been created through years of democratic struggle from the people) that attempts to raise the quality of goods it buys, whether for ethical (i.e. tariffs against sweatshop labour), ecological (i.e. tariffs against polluting industries), or health (i.e. bans on certain toxic chemicals like DDT) reasons.

This economic universalism instead of promoting the modernist goals of participatory democracy (there is no public access to World Trade Organisation hearings) promotes the opposite.\textsuperscript{396} It promotes, a standard lowering race to the bottom in which democracy is threatened, as people can't enact laws, which they feel they need to protect themselves. If a nation does enact such a law, then a private tribunal in Geneva (DS will decide on whether the law is agreeable with global trade. If it is not, the law will be challenged. One implication of this is the weakening of the nation state.

The fundamental structural adjustment brought about by the globalisation of the economy has been getting the state out of the economy, thus the words free trade, free market, privatisation, deregulation. This is of course far different than the post-war Fordist

economy where the state was heavily involved in the economy through the use of Keynesian fiscal and monetary policies, which served to redistribute wealth and re-invest in the domestic economy.

Most avenues of economic intervention available to the nation, such as the redistributive policies of social welfare, the raising of the minimum wage, tariffs on trade, standards on labour etc., are being weakened and limited. The nation-state, which has been the most promising host to democracy, is left with the role of reacting to and adapting to the fluctuations of the global marketplace.\(^{397}\)

The nation state is in a crisis of redefinition without a practical ideology that confronts the realities of the emerging global order. "Leaders of nation states are losing much of the control over their territory they once had.\(^{398}\) It should therefore not come as a surprise that in most countries presidential elections are perceived as full of ungrounded

---


398 Max Weber, "Structures of Power," in From Max Weber: Essays in Sociology (New York: Oxford University Press, [1914] 1946), 161. Written at the beginning of the twentieth century, Weber's essay emerged from a context of declining colonial powers and ascending commercial interests. These rising commercial interests employed methods of extracting resources and exploiting labour, which paralleled those of colonial nations. The historical juncture in which Weber's essay appeared is important for two reasons. First, colonialism not only established the economic patterns for what we now term globalisation, it also established the means of political control and the patterns of sudden intercultural overlap which both bind and unravel the world today. Second, the fundamental nature of colonial rule was rentier ownership of capital, material resources and wealth. This feudal model of land use and ownership set the political and sociological pattern for control of overseas colonies by European powers from the sixteenth to nineteenth centuries.
rhetoric and promises. Such widespread recognition of the meaninglessness of elections helps to illuminate the increasing divergence between modern goals of democracy and the realities of modern capitalist development.

The apparent loss of sovereignty and local autonomy to the placeless global economy has intensified the persistent dilemma which has run throughout modernism between localism and globalism, between differentiation and homogenisation, between rooted place and rootless space, and ultimately between being and becoming.

The 'regulation school' provides a political economic explanation, which seeks to locate regulation within specific accumulation strategies. The key concepts of the theory of regulation are 'regime of accumulation' and 'mode of social and political regulation'.

A regime of accumulation describes the stabilisation over a long period of time of the allocation of the net product between consumption and accumulation. It implies some correspondence between the transformation of both conditions of production and the conditions of reproduction of labour.

---

399 Ibid
400 The regime of accumulation is a "form of surplus value production and realization, supported by particular types of production and management technology". Modes of regulation refer to the socio-political institutions and ideologies that regulate the economy and ensure its smooth reproduction.
A particular system of accumulation can exist because its schema of reproduction is coherent. The problem is how to bring the behaviours of political and economic agents into some kind of configuration that will keep the regime of accumulation functioning.

The above requires the existence of a materialised regime of accumulation taking the form of norms, habits, and laws, regulating networks that ensure the unity of the process, i.e. the appropriate consistency of individual behaviours with the schema of reproduction. The body of interiorised rules and social processes is called the mode of regulation.

The value of the regulation school's approach is that it links economic regulation to conditions of production and reproduction and therefore allows a historical analysis of changing conditions of production and reproduction on the one hand and changing regulatory paradigms on the other. Moreover, since accumulation occurs on a global scale, the regulation school's analysis can be applied to global regulation.

Conclusion

In the foregoing chapter we have had an opportunity to look at regulation as a device for achieving health and safety standards within SADC's integration agenda. It has been possible in this discussion to identify some issues that would assist SADC resolve its dilemma for
Foreign Direct Investment and trade over occupational health and safety. One such is to use a combination of control and command and non-control and command mechanism such as a market based approach to occupational health and safety regulation.

The control and command approach would take the form of legislation, directives, codes of practice as well as charters such as its social charter. This should be backed up with a strong monitoring and supervision regime in member states. In the absence of institutional set-ups, the labour and employment sector has had little effect on health and safety management in the region.

The non-control and command mechanism relies mainly on pressure, persuasion and public relations considerations. This involves agents such as trade unions, media and the press, NGOs, professional associations and courts in their contribution towards a health safety policy in the region. The level of networking among stakeholders such as trade unions and NGOs in the region will determine the success of measures aimed at promoting and improving occupational health and safety standards and practices in the region. As discussed elsewhere, low levels of expertise on the part of Trade Unions and NGOs in member states is a source of worry and a reason for pooling together resources and skills and soliciting technical support from other stakeholders such as the ILO, and Donor agencies.
Thirdly economic incentives to occupational health and safety standards and practices can only be effective if it can be shown that improved occupational health and safety standards bolster productivity and efficiency, public relations image, a factor that weighs heavily on the mind of investors. In this regard civil society and professional bodies have a vital role to play.

Finally it is important for SADC to have a strong regulatory mechanism for occupational health and safety standards in order to curb some of the adverse social effects of its liberal economic policies. It is only if people of the region see SADC’s policies as addressing instead of compounding social problems such as poverty, unemployment, low standards of living and working condition that they can support them. 401

401 Supra, op.cit.p.25
Chapter Six

The Southern African Development Community (SADC)

"We shall measure our progress by the improvement of the health of our people; by the number of children in school, and by the quality of water and electricity in our towns and villages, and by the happiness which our people take in being able to manage their own affairs. The welfare of our people is our chief pride, and it is by this that my Government will ask to be judged." Kwame Nkrumah Broadcast to the Nation, 24 Dec, 1957 (Ghana) 402

Introduction

This chapter looks at SADC, and examines the issues of trade and investment and how SADC is balancing it with occupational health and safety standards in the region. The study takes a historical outlook. This has been necessary to develop an understanding of why SADC has such a state of occupational health and as safety regulation.

The chapter also examines SADC institutional set-up and how they are tailored towards resolving or reconciling the dilemmas of trade and

402 Kwame Nkrumah (1963) Africa Must Unite. Moscow Progress Publishers. Nkrumah is considered to be the father figure of Pan-Africanism, liberating Ghana from British rule at the beginning of the 1960's at a time when most other African countries were under the overseas yolk. Nkrumah was a visionary, representing a view of Africa that others dared not dream about, espousing a United States of Africa, a model that other African leaders have since discussed, if not pursued. Nkrumah's vision was one where African countries became not just a source of the world's raw materials, but an economic powerhouse with its own industrial bargaining power.
investment over occupational health and safety standards and practices in the region.

The chapter concludes that a confused priority list and structural and institutional limitations inherent in SADC's predecessor (the SADCC) have been responsible for policy vacuum on occupational health and safety standards in the region. Finally the chapter suggests an approach to integration that takes account of the region's history and the involvement of all social partners in the organization's policy input.

Synopsis

Regional integration initiatives in Africa have a long history, dating back to the establishment of the South African Customs Union (SACU) in 1910 and the East African Community (EAC) in 1919. Since then a number of regional economic communities have been formed across the continent, particularly since the 1970s. Currently there are about 10

---

403 The Southern African Customs Union came into existence on 11 December 1969 with the signature of the Customs Union Agreement between South Africa, Botswana, Lesotho, Namibia and Swaziland. It entered into force on the 1st of March 1970, thereby replacing the Customs Union Agreement of 1910. Its aim is to maintain the free interchange of goods between member countries. It provides for a common external tariff and a common excise tariff to this common customs area. All customs and excise collected in the common customs area are paid into South Africa' national Revenue Fund. The Revenue is shared among members according to a revenue-sharing formula as described in the agreement. South Africa is the custodian of this pool.
or so regional economic groupings in Africa. Today there is no country in Africa that isn’t a member of at least one regional economic group. As reflected in the number of regional agreements both in the continent and world-wide, therefore, the issue continues to occupy a centre-stage in the economic agenda of countries. In addition to agreements at a regional level, attempts have been underway to create economic cooperation (and ultimately meaningful economic integration) among African countries at a continental level.

This effort culminated in the signing of the African Economic Community Treaty (or the Abuja Treaty) in 1991. This treaty came into force in 1994. Among the initial stage objectives of the treaty was to establish continent-wide economic cooperation by strengthening existing (and encouraging the formation of new) regional economic

---

404 Long before the establishment of the OAU, African leaders had recognised that cooperation and integration among African countries in the economic, social and cultural fields are indispensable to the accelerated transformation and sustained development of the African continent. This was concretised in 1963 in the objectives of the OAU Charter, as well as in the OAU Summits of 1973 and 1976, and the Monrovia Declaration of 1979. In 1980 the OAU Extraordinary Summit adopted the Lagos Plan of Action, as a major step towards that goal. During that Summit, the African leaders stated their commitment, individually and collectively, to promote the economic integration of Africa, in order to facilitate and reinforce social and economic intercourse. They also committed themselves to promote the economic and social development and integration of their economies and, to that end, to establish national, regional and sub regional institutions leading to a dynamic and interdependent African economy, thus paving the way for the eventual establishment of the African Economic Community.

405 See Annex 2

communities (RECs) across the continent. Accordingly, six RECs within the continent were perceived as the main building blocks for such a continent-wide integration initiative. These were: the Arab Maghreb Union (AMU), The Common Market for Eastern and Southern Africa (COMESA), the Economic Community of Central African States (ECCAS), the Economic Community of Western African States (ECOWAS), the Southern African Development Community (SADC), and the Intergovernmental Authority on Development (IGAD)

Regional co-operation and integration in the SADC region owes its origin to historical, economic, political, social and cultural factors that have created strong bonds of solidarity and unity among the peoples of the region. These factors have contributed to the formation of a distinct Southern African personality and identity that underpins political and economic co-operation in the region.

Frontline Origins

The formal establishment of structures to promote regional co-operation and integration in the SADC region started as an initiative of

---


408 See the creation of the African Economic Community

409 Pan-Africanism and Liberation movements such as The Front Line States (FLS) across the continent. Post

410 P. Dube, Historic SADC Summit in, Sowetan, 25 august 1995

411 Chapter One of the draft SADC Regional Indicative Strategic Development Plan p.1
the Frontline States (FLS), the original members of which were Angola, Botswana, Mozambique, Tanzania and Zambia. The initiative was directed initially towards the political liberation of the region.

From 1975 when they were formally constituted, the Frontline States met regularly to co-ordinate efforts, resources and strategy, with regard to national liberation movements of Southern Africa that were fighting against colonialism, racism and white minority-rule.

Later, this initiative was extended to address military attacks and destabilization of majority-ruled states by apartheid South Africa. The intensification of the struggle on both fronts strengthened bonds of solidarity and the need for collective action.412

412 The concept of regional economic co-operation was first discussed at a meeting of the frontline states (FLS) foreign ministers in May 1979 in Gaborone. The meeting led to an international conference in Arusha, Tanzania two months later which brought together all independent countries with the exception of Zimbabwe, Namibia and South Africa and international donor agencies. The Arusha conference, led to the Lusaka summit held in the Zambian capital in April 1980. After adopting the declaration, which was to become known, as 'southern Africa: towards economic liberation'. The declaration committed the signatory governments to pursue policies aimed at economic liberation (i.e. to reduce economic dependence on South Africa) and the integrated and equitable development of the economies of the region. The SADCC was subsequently formalized by means of a memorandum of understanding on the institutions of the southern African development co-ordination conference dated 20 July 1981
Most of the countries of Southern Africa ultimately achieved political independence, but against a backdrop of mass poverty[^13], economic underdevelopment and the threat of powerful and hostile white minority-ruled neighbours[^14].

Southern African leaders saw the promotion of economic and social development through co-operation and integration as the next logical step after political independence[^15]. In May 1979, Foreign Ministers of the Frontline States met in Gaborone, Botswana, to discuss economic cooperation.

They agreed to convene an international conference in Arusha, Tanzania, with donor governments and international development institutions. That meeting led to the Arusha Conference in July 1979, which brought together, for the first time, government and international agency representatives from all parts of the world, to discuss regional cooperation in southern Africa[^16].

The Arusha Conference in turn led to the landmark Lusaka Summit, held in the Zambian capital in April 1980. The then nine majority-ruled

[^13]: http://www.SADC.int/english/reports/employment072000-062001.html
[^16]: http://www.trasa.org/about/
countries of southern Africa\textsuperscript{417}, met and declared their commitment "to pursue policies aimed at economic liberation and integrated development of their national economies". The Summit adopted the Lusaka Declaration entitled 'Southern Africa: Towards Economic Liberation'\textsuperscript{418} as well as a Programme of Action covering areas of Food and Agriculture, Industry, Manpower Development and Energy. This led to the birth to the Southern African Development Co-ordination Conference (SADCC) a year later\textsuperscript{419}.

SADCC reflected the spirit of Pan-Africanism and the latter's preoccupation with the need for regional integration as the means towards African continental unity and the recovery of African dignity and status in global affairs. These principles were enshrined in both the OAU Treaty of 1963 and the Lagos Plan of Action of 1980 and the Final Act of Lagos\textsuperscript{420}.

**Organisation**

At the regional level, the main SADCC institutions were the Summit of Heads of State or Government which had responsibility for overall

\textsuperscript{417} Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe.

\textsuperscript{418} For a history of SADC visit www.SADC.int

\textsuperscript{419} The SADCC was subsequently formalized by means of a memorandum of understanding on the institutions of the southern African development co-ordination conference dated 20 July 1981

\textsuperscript{420} An electronic copy of the plan is available in pdf format at http://www.uneca.org/tica/ariportal/docs/lagos_plan.pdf
policy direction and control of the functions of the Conference; the Council of Ministers, which reported to the Summit, oversaw the work and development of SADCC and approved SADCC policies; the Standing Committee of Officials which was a technical advisory committee and advised the Council; and the Secretariat which was responsible for the coordination and management of SADCC programmes.

These institutions were carried wholesale into its successor, SADC. It is clear that institutional failure of SADCC was not adequately addressed at the time of the organisation’s transformation from a coordinating conference to a development community. What changed was the focus and strategy from trade and diversion and reduction of member state’s reliance on apartheid South Africa to the region’s economic integration within the wider continental framework of the final act of Lagos.

This was not a helpful approach to its endeavours, as we shall see later in this discussion. In response to the too obvious institutional limitations SADC has embarked on a medium and long term restructuring process.

---


422 Para. 7 of the preamble to the treaty,
embodied in the regional indicative strategic plan endorsed by the summit at its meeting of in the Tanzanian capital Dare Salaam423.

Aims and Objectives of SADCC

SADCC was formed with four principal objectives, namely, to reduce member States dependence, particularly, but not only, on apartheid South Africa, promote economic development, implement programmes and projects with national and regional impact, to mobilise Member States’ resources, in the quest for collective self-reliance424 and to secure international understanding and support within the framework of the strategy of economic liberation.

In pursuance of these objectives, the organisation focused on functional co-operation in key sectors through a Programme of Action known as the SADCC Programme of Action (SPA). This programme of action was carried over by its successor (SADC). Some of the problems of the SADCC structure included inadequate provision of resources and staffing by member states, which led to inequitable distribution of responsibilities and obligations.

423 25th–26th August 2003
424 The preamble to the SADC Treaty recognises that, in an increasingly interdependent world, mutual understanding, good neighbourliness’ and meaningful co-operation among the countries of the region are indispensable to the realisation of its ideals’.
Different management and administrative procedures and rules, varying standards, qualifications and performance criteria for staff involved in the management of the Regional Programme Rapid increase of Sectors and therefore a plethora of priorities and activities dependent on limited resources which has led to a proliferation of meetings and an increase in associated costs. Under this structure the Secretariat was unable to execute its mandate as provided for in the Treaty, especially that of undertaking strategic planning and management\textsuperscript{425}.

Now there is a centralised system of project implementation under its regional indicative strategic plan endorsed by its summit in August 2003 at its meeting in Dare Salaam Tanzania, with all the sectors clusters at the organisation's secretariat in Gaborone Botswana.

\textbf{Transformation from SADCC to SADC}

By the late 1980's, it had become apparent to SADCC policy makers that the organisation needed strengthening. The challenges presented by the profound socio-economic changes taking place in the region and globally necessitated a review of the Organisation's mandate and priorities\textsuperscript{426}.

\textsuperscript{425} Article 14 (1) (a)
\textsuperscript{426} http://www.zuidafrika.nl/politics/SADC/transform.html
Up to the time, SADCC had existed as a de facto international organisation without a treaty or legally binding instrument. This was consistent with the Founding Fathers' pragmatic approach, which sought to demonstrate practical benefits of regional cooperation without placing heavy demands on member States at the early stage. The emphasis was on coordination of discrete projects within sectors coordinated by member States themselves. From the beginning, member States, acting in their national interests, became active participants in the implementation of regional programmes\textsuperscript{427}.

The establishment of SADCC was largely in response to South African plans for the constellation of Southern African States. The basic aim of SADCC was to reduce its members' economic dependence on South Africa and to promote economic development.

However, in August 1992, SADCC was transformed into SADC. The emphasis of the organisation changed from "development coordination" to developmental, economic\textsuperscript{428} and regional\textsuperscript{429} integration. The coming into being of SADC provided for the desired

\textsuperscript{427} See our discussion on the reasons for the restructuring of SADC, post.
\textsuperscript{428} The preamble of the treaty emphasises the importance of economic interdependence and integration, while SADC is defined as "the organisation for economic integration established by Article 2 of the treaty" (see Article 1).
\textsuperscript{429} One of the objectives of the community is to "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" – Article 5(1) (a).
instrument by means of which member countries could gradually move towards eventual economic integration.

The change was not just in name nor was it the mere dropping off of a ‘C’ from SADCC to SADC. It was a change of the organisations’ strategic vision, from development coordination to economic integration. It was a progression to the next level in the regions’ integration scheme in line with the Lagos plan of action\textsuperscript{430} that envisaged the creation of an integrated African economic community on the model of the European Union.

The Treaty of SADC

The SADC Treaty (The Treaty), and its antecedent Protocols,\textsuperscript{431} is a legally binding document providing an all-encompassing framework, by which countries of the region are to coordinate, harmonise and rationalise\textsuperscript{432} their policies and strategies for sustainable development\textsuperscript{433} in all areas of human endeavour\textsuperscript{434}. The Treaty

\textsuperscript{430} The definition of “protocol” in Article 1 of the treaty refers to a protocol as an instrument of implementation of the treaty, having the same legal force as the treaty.

\textsuperscript{431} Article 21 (2)

\textsuperscript{432} Chengetai C Madziwa Social Charter: Towards People-centred Development SADC Today; Southern African Development Community Vol. 6 No. 4 October 2003 p.10.

\textsuperscript{433} Article 5 (1) of the Treaty. One instrument made hereunder for implementation is the SADC Charter of Fundamental Social Rights (the Charter), which spells out SADC’s social policy. The charter embodies a recognition by stakeholders in the region of the universality and individuality of basic human rights proclaimed in instruments such as the United Nations
commits Member States to fundamental principles of sovereign equality of members, solidarity, peace and security, human rights, democracy and rule of law, equity, balance and mutual benefit as well as peaceful settlement of disputes.

SADC's objectives include the achievement of development and economic growth, alleviation of poverty, enhancement of the quality of life of the peoples of Southern Africa and to support the socially disadvantaged through regional integration. The ultimate objective of SADC, the Community is, therefore, to build a region that will have a high degree of harmonisation and rationalisation to enable the pooling of resources to achieve collective self-reliance in order to improve the living standards (emphasis supplied) of the people.


Article 4 (a)
Article 4 (b)
Article 4 (c)
Article 4 (d).
Article 4 (e)

Generally contained in Article 5 of the treaty
Article 5(a) of the treaty as read with Article 11 of the Charter
Article 5(a) of the treaty as read with Article 10(2) of the Charter. This Article provided for social security for persons that have been unable to re-enter the labour market and have no means of subsistence.

Similar objectives are aspired to by COMESA to which a majority of SADC states are members. See Article 3 of the Treaty of COMESA, infra,

Article 5 (2) (a)
Article 5 (d)
of the region. It can not be denied that health and safety is an important component of the equation.

Despite emphasis on the above-mentioned integration initiatives and on enhancing the free movement of capital and labour, goods and services, and of the people of the Region generally, among Member States, it would probably be difficult to describe SADC as a supranational institution such as the EU, at least at this stage of its evolutionary development.

This flows from the fact that the Community is based on the principle of the sovereign equality of all Member States, and from the description of SADC as an international organisation. SADC structures are still being developed and SADC instruments, in particular Protocols, present one with a more or less embryonic picture of a truly integrated regional system. This point is echoed by the Mozambique Foreign

---


448 Article 5(2) (d).


450 Article 4(a).

451 Article 3(1).
Minister in his contribution on the restructuring of SADC—a point discussed in more detail later in the chapter.

The Treaty provides guidance with regard to the rule of law, democracy, good governance and human rights. The importance of incorporation of human rights in the treaty is that it creates a standing for health and safety. In chapter three we concluded that health and safety and other labour rights are also human rights. This place a heavier obligation on SADC to promote and safeguard health and safety in its integration programme, especially when it comes to trade and investment attraction. The case becomes more placing in the current institutional set-up of the organisation where there is no coherent competition policy that would mitigate the harmful effect of inter-state competition for trade and Foreign Direct Investment in the region.

The situation would have been different if SADC had a competition policy that would ensure hat fair trade practices that enhance living and working condition of people of the region. At present this is not the case. SADC's blueprint for trade and investment is contained in its protocol on trade. However this protocol does not spell out SADC's

452 Article 4 (c)
454 Done at Maseru, the 24th day of August 1996. See www.SADC.int
competition policy instead merely enjoins member states to engage in fair trade practices that promote competition\(^{455}\). What is meant by fair trade is not clear in the protocol, however it cannot be denied that a moral dimension is implied\(^{456}\).

If this is indeed the case then it would be fair to say that trade and investment practices that exploit and expose workers and communities to occupational hazards are a departure from the spirit of the treaty and what the region stands for. It should be possible to challenge such practices in national courts or the community court\(^{457}\). In this regard the court would play a crucial role in shaping community jurisprudence on trade, investment and health and safety. For this to be possible there ought to be dialogue between state courts and the community court. This is what was envisaged in article 16 of the protocol on the tribunal when it provided for national courts to be able to refer to the community court on matters of interpretation in the treaty (including subsidiary instruments made there under)\(^{458}\).

Apart for the court, civil society would be equally valuable. It can take advantage of the legal leeway described above and advocate the

---

\(^{455}\) Article 25

\(^{456}\) Agricultural Commodity Trade, Dependence and Poverty, an analysis of Challenges facing Developing Countries commission of the European communities commission staff working paper, Brussels, 13.8.2003

\(^{457}\) Article 16 (2) of the protocol on tribunal

\(^{458}\) Article 14 (b) of the protocol on tribunal
case for health and safety in the region. The other route would be to use article 5 (1) of the treaty under which SADC has committed itself to promoting sustainable and equitable growth and socio-economic development that enhances the standard and quality of life.

Investments that pollute the environment e.g. agrochemical pollution, perpetuate poverty circle or that leads to a lowering of social standards would be a violation not only of SADC’s own agenda as set out in articles 5 and 5(A) but also an affront to the rule of law and democratic values espoused in article 4 (c) of the treaty. SADC has declared social and human development as one of the core areas of integration459.

Social and Human development requires structures and mechanism that reduces harmful social demands of globalisation and reinforces those that complement the economic agenda such civil society, good industrial relations and NGOs just to name a few460.

The challenge is on how to provide for this in view of the region's limited available resource. The answer is found in Article 21 that contain a pledge by member states to cooperate in those area that foster

459 Article 5 (1) (a) of the Treaty as amended
regional development and integration on the basis of balance, equity and mutual benefit.\textsuperscript{461} On account of resources need for this task a regional approach would be advisable.\textsuperscript{462} This would take the form of networking among stakeholders in the region such as trade unions and NGOs in line with para.7 of the preamble to the treaty which speaks of the need for SADC to involve people of the region centrally in the process of development and integration through the guarantee of democratic rights, human rights observance and the rule of law.

The problem for the region in the past has been lack of a self-standing social policy or at least a policy on health and safety. Though the treaty provides a platform advocating health and safety in the region, its general and vague nature made it hard for local trade unions, NGOs and civil society generally to venture into that kind of legal wilderness.

Article 22 provides for protocol as instruments of implementation of the treaty.\textsuperscript{463} One such protocol is the protocol on health the lead article is 24. This article calls on member states to cater for cross-sectoral occupational health by individually assisting in the development and

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{461} Article 21 (3) (d)
\item \textsuperscript{462} See our discussion on the need for regulating health and safety in SADC in chapter three. Supra, op.cit
\item \textsuperscript{463} See the definition of protocol in Article.1 of the treaty as a amended
\item \textsuperscript{464} Protocol on health done at Maputo, on 18th day of August 1999
\end{itemize}
\end{footnotesize}
delivery of integrated occupational health services\textsuperscript{465} and co-operate in reducing the prevalence of occupational injuries and diseases.

There is an expression of recognition by SADC of the interplay between environmental health and occupational health and safety. This makes sense if one recalls that SADC has a predominantly agro-based economy where for most people the working and living environment are not easy to separate. They live on the farmland and work on the farm as farm workers either as tenants or paid workers.

The said protocol obliges states parties to collaborate, co-operate and assist each other in a cross-sectoral approach in addressing regional environmental health issues and other concerns, including toxic waste, waste management, port health services, pollution of air, land and water, and the degradation of natural resources\textsuperscript{466}.

This is the first time occupational safety has been singularly spelt out at SADC level. Where SADC went wrong is at institutional level. The structure inherited from SADCC was designed to encourage member state participation in development programmes under which every member state was given at least a sector to coordinate. The implication for health safety foremost and foremost is that fragmented

\textsuperscript{465} See ILO's convention 161 (occupational health and safety services

\textsuperscript{466} Article 23 of the Health protocol
structure for health and safety regulation and management. Health and safety requires cross-sectoral approach involving various ministries or departments.

In the case of agriculture for instance, ministries for health, trade and industry, agriculture could be involved. Under SADC’s former institutional framework these sectors were scattered among member states, with varying skill and literacy levels. Coordination was a problem. Secondly this lead to duplication of efforts and overstretching of its thin resources. Lack of a clear lead sector for health and safety made it hard for civil society involvement, as the picture was not clear. Civil society especially in developing countries like SADC need clear guidance, which SADC never provided under its former structure and a lot remains to be seen if it can under the new indicative strategy.

SADC’s response to its institutional limitation has been to adopt a centralised approach under its new structure. The question is whether health and safety is considered to be a priority? Certainly it is not if what an official at SADC secretariat said to the author, off record that SADC’s priority is HIV/AIDS and food security.

Clear in the author’s mind is the fact SADC does not conceive HIV/AIDS as an occupational haphazard as well. Infection and re-infection rates for HIV and AIDS are highest among the poorest in the
region\textsuperscript{467} and these are the ones that are likely to be engaged as agricultural workers\textsuperscript{468} it is necessary to have a trade and investment policy that reflect the region's unique health and safety problems\textsuperscript{469}.

The formula in Art.25 of the trade protocol is a receipt for the region's failure. By leaving it to member states to formulate their own policies that encourage competition, in the face of intense inter-state competition for trade and Foreign Direct Investment is an illusion\textsuperscript{470}. Perhaps the thinking at the time was to encourage voluntarism and minimise friction in the process. Voluntarism requires a framework within which it can to be exercised. In our present case a framework directive\textsuperscript{471} or plan for coordinating and harmonising completion policy in the region would be the best way forward.

On the social front Lo! on 26\textsuperscript{th} August, along came a spider\textsuperscript{472} in the form of a Charter of Fundamental Social Rights (The Charter). This contains the regions' blueprint on health and safety in region. The lead

\textsuperscript{467}See for instance the case of Malawi at http://www.unaids.org

\textsuperscript{468} Thandika Mkandawire, 1999 Agriculture, Employment and Poverty In Malawi, International Labour Organization southern Africa multidisciplinary advisory team (ilo/samat) Harare, Zimbabwe

\textsuperscript{469} Theo Sparreboom (1999) Improving Labour Market Information In Southern Africa International Labour Organization (ilo/samat) Harare, Zimbabwe


\textsuperscript{471} This would be authorised under Article5 (2) (c) as read with Article.22 of the treaty as amended.

\textsuperscript{472} James Patterson (2001) Along Came a Spider made into a movie starring Morgan Freeman as Dr. Alex Cross. Book reviews are available at http://www.amazon.co.uk
article for occupational health and safety is Art. 12. A separate
discussion of this article and the charter would be necessary and is
done in the next chapter. Suffice to say that SADC is evolving a clear
health and safety policy and guidelines that had been scarified in the
past. However challenges on other fronts are still enormous.

SADC, A Fact Sheet

The formation of SADC was the culmination of a long process of
consultations by the leaders of Southern Africa.

Towards the end of the 1970's, it became clear to the leaders of the
region that just having a national flag and a national anthem would
not meet the needs of the people for improved living standards. The
positive experiences gained in working together in the group of
Frontline States, to advance the political struggle, had to be translated
into broader co-operation in pursuit of economic and social
development.

The region covers a total area of 9.277 million square kilometers with a
combined population of 200 million. The Southern African region is
characterized by a multiplicity of regional integration initiatives and
institutions. There is a significant overlap in the membership of regional
organizations as SADC also includes members of COMESA, EAC,
ECCAS, IOC and SACU\textsuperscript{473}.

In addition, a number of SADC countries were active participants in the Cross-Border Initiative (CBI), which was supported by the Africa Development Bank (AfDB), EC, IMF and the World Bank during the 1990s, and which has been succeeded by the Regional Integration Facilitation Forum (RIFF). The RIFF is linked to the same international institutions and regional organizations. These cooperating partners provide a support mechanism for those countries that wish to undertake ‘fast track’ structural reforms aimed at improving market efficiency\textsuperscript{474}.

The SADC and the E&SA RSPs (the latter covering COMESA, EAC, IGAD and IOC) have been harmonised to the greatest extent possible, particularly with respect to the Regional Integration and Trade focal sector. There is also agreement between the Regional Integration Organisation (RIOs) comprising the E&SA and SADC RSPs that programmes will be harmonised. SADC and the other RIOs have established the Inter-Regional Coordination Committee (IRCC) for just this purpose\textsuperscript{475}.

\textsuperscript{473} Annexes 2 and 3.

\textsuperscript{474}Southern African Development Community- European Community Regional Strategy Paper and Regional Indicative Programme For the period 2002-2007,infra

\textsuperscript{475} Annex 4.
Cross-membership has meant that countries that are signatories to a number of international and regional trade agreements face the potential problem of having to conform to different tariff reduction schedules, rules of origin and other requirements. This has created a complex set of incentives facing investors, producers, importers and exporters. It further made harmonisation of regulation and policies difficult.

To address this problem a Task Force has been set up between SADC and COMESA to work towards the harmonisation and coordination of policies and programmes in areas of common interest476. Both organisations have made significant strides towards intensifying and improving working relations and consider closer cooperation a win-win strategy for both, facilitating the integration process in the broader southern African region and allaying donors’ concerns regarding duplication.

SADC has been based on a bottom-up approach whereby decentralised cooperation ensured the necessary support for community building. To arrive at the agreed objectives, the Treaty provides for Member States to conclude a series of

protocols to spell out policies, areas of cooperation and harmonisation as well as the obligations of Member States for effective implementation of agreed decisions. The protocols are negotiated by Member States and all stakeholders and, after approval by the Summit and ratification, become an integral part of the Treaty.

So far 20 protocols have been signed, 9 of which have been ratified and are under implementation. The protocols cover a wide range of areas relating to political, economic and social areas of cooperation.

As the process of developing the protocols is completed and SADC moves to the next phase of regional integration,

---

477 Article.22 (1)
478 Article.21
479 Article.6
480 Article 23(3) lists stakeholders as including private sector, civil society, and Non-governmental organisations and workers and employers organisations. Article of the Social Charter refers to these as social partners.
481 Annex 4
482 Regional integration is the unification of neighbouring states working within a framework to promote free movement of goods, services and factors of production and to co-ordinate and harmonize their policies. This might involve convergence of trade, fiscal and monetary policies as a prelude to integration. It can also be defined as a process and a means by which a group of countries strive to increase their levels of welfare - reduction of poverty, indebtedness and economic malaise. It recognizes that partnership between countries can achieve this goal in a more efficient way than unilateral or independent pursuance of policy in each country. In the case of SADC it can be postulated that regional unification through meaningful co-operation will help arrest poverty and Debt levels in member states.
protocol implementation becomes the most prominent tool for achieving deeper integration. Although some sectors have already made substantial progress with implementation, problems relating to lack of methodology, tools and resources, incomplete strategies on organisational mechanisms and capacity to ensure overall monitoring and coordination have resulted in slow implementation\textsuperscript{483}.

In recognition of the changing environment and the new challenges, SADC, following a substantial review process, established revised priorities in 2001 for the organisation\textsuperscript{484}. Although it was decided to move towards a more centralised institutional set-up, the principle of subsidiarity\textsuperscript{485} was adopted.

The March, 2001 SADC Report on the review of operations of its institutions in section 3.2 provides a comprehensive articulation of SADC's common agenda\textsuperscript{486} and its guiding principles, one of which is the principle of subsidiarity.

\begin{footnotesize}
\begin{enumerate}
\item See comments by the Mozambique foreign minister, infra, n
\item This was done through the adoption of the regional indicative strategic development plan (RISDP) which was endorsed by the summit at its Dare salaam summit from 25-26 August 2003
\item For a general discussion of the principle of subsidiarity see Nicholas Moussis Guide to European Polices (6th edn) European Study Service, Belgium, p.19
\item 'SADC Common Agenda' as defined in Article 1 of the Treaty means the set of fundamental principles and values, referred to in Article 5A of the Treaty (as amended), that ought to guide the integration agenda of SADC.
\end{enumerate}
\end{footnotesize}
The Report defines the SADC Principle of Subsidiarity as meaning that all programmes and activities should be undertaken at levels where they can best be handled based on consultations between governments and relevant stakeholders. In this formula the involvement of institutions, authorities, and agencies outside SADC structures to initiate and implement regional programmes using their own generated resources is promoted and encouraged."\(^{487}\)

Subsidiarity is a device designed to facilitate the participation of stakeholders in the furtherance of its common agenda\(^{488}\). The principle as defined by SADC recognizes the importance of leveraging resources by SADC by facilitating stakeholder participation in the execution of its common agenda. In this regard, SADC has to enter into partnerships and other cooperative arrangements with several stakeholders to facilitate their participation in the implementation of SADC activities, thereby releasing SADC's own resources for other regional integration programmes and projects.

\(^{487}\) See SADC Guidelines Governing Relations Between SADC and Organizations Executing SADC Programmes and Projects Under the Principle of Subsidiarity a summary is posted at http://www.sadc.int/index.php?action=a2001&news_id=170&language_id=1

\(^{488}\) Article 5 of the Treaty spells out the grand vision of SADC's common agenda
It also means that SADC and stakeholders will undertake consultations to enhance their partnership and cooperation. This will enhance participatory governance in the region. So far it looks good on paper but as the saying goes the test of the pudding is in the eating.

The March 2001 Summit decision to restructure SADC and its institutions has a significant impact on the organisation's mandate, structure, responsibilities, funding, and level and frequency of meetings, as well as on budget principles and how they are applied, personnel policy, and settlement of disputes between Member States\textsuperscript{489}.

In essence, the restructuring process has given the Secretariat a more expanded mandate\textsuperscript{490} and increased the number of staff, while the previous Sector Coordinating Units (situated throughout the Member States) are being merged into four Directorates\textsuperscript{491}.

\textsuperscript{489} Article.32
\textsuperscript{490} See Article.14
\textsuperscript{491} Directorates of Infrastructure and Services, Social And Human Development And Special Programmes, Trade, Industry, Finance and Investment and Forestry, Agriculture and Natural Resources
Specialised technical committees and sub-committees continue to meet and provide input on policy, strategy and programme development into the Directorates.

Member States' ownership and participation has been enhanced through the creation of SADC National Committees, which comprise all stakeholders, including the Private Sector and Civil Society.

The structure, operations and functions of SADC are covered by the SADC Treaty, the Agreement amending the Treaty (following the August 2001 Summit).

The SADC Treaty recognises the need for national and regional institutions to stimulate and manage the integration process. One such institution is the SADC Tribunal, which will ensure adherence to, and proper interpretation of, the provisions of the Treaty and its subsidiary instruments and will be responsible for

492 Article.13
493 Article.16 (A)
494 Article.16 (a) (2)
495 Article.9
496 Article.5
497 See Article.5 and Article.5 (a) of the treaty as amended
498 Arrt.9 a s read with Article.16 (1) of the treaty
499 Article.14 (b) of the protocol on tribunal and Rules of procedure thereof 2001 as a mended
the settlement of disputes, mediation, appeal, and conflict resolution.

As more protocols enter into force and implementation intensifies, the need for the Tribunal increases. It is unfortunate that at the time of writing this thesis the court had not yet been constituted. This was due to the fact that funds were not permitting as it appeared (wrongly) that on SADC's priority list the tribunal was visibly absent.

The primary role of SADC is to help define regional priorities, facilitate integration, assist in mobilising resources and to maximise regional impact of projects. The approach initially had been to address national priorities through regional action. Each member state had been allocated a sector to coordinate which involves proposing sector policies, strategies and priorities, and processing projects for inclusion in

500 Articles 17, 18 and Article 19 of the protocol on Tribunal
501 Article 16 of the treaty as read with Article...
503 Preamble to Declaration and treaty of SADC
the sectoral programme, monitoring progress and reporting to the Council of Ministers.

Over time it was realised that this approach had problems and when the organisation undertook the restructuring of the various sectors were clustered under four directorates coordinated from the organisations' secretariat in Gaborone, Botswana. The plan is known as the Regional Indicative Strategic Development plan (RISDP). Effectively this is a blueprint for the organisation's structural and institutional set-up.

It is key in translating SADC objectives and common agenda into a coherent implementation framework in response to the institutional limitations the organisation has had in the past.

**Regional Indicative Strategic Development Plan (RISDP)**

Since its establishment as SADCC in 1980, SADC has evolved as a dynamic organization, capable of adapting its institutional framework, intervention focus and strategic priorities to the continuously changing regional and international political, social and economic environment.

---

504 See our discussion in the section on evolution of SADC, supra, chapter six.
505 SADC TODAY: Southern African Development Community Newsletter Vol. 6 No.1 April 2003 p.14
506 Adopted at the council of Ministers meeting in Luanda, Angola in March 2003 and endorsed by the summit in August 2003 at its meeting in Dare Salaam.
507 Article.5 as read with Article.5 (A) of the treaty as amended.
This dynamic process has seen the organization transforming from a coordination conference (SADCC) into a development community in 1992, the increase of its membership from nine members in 1980 to 14 in 2003 and the expansion, over the years, of its Programme of Action to cover all 20 sectors of cooperation.

These changes made it necessary for SADC to rationalise and streamline its programme of action and to restructure its institutions in order to encompass the evolution of the organisation's development strategy from sector-coordination to an integrated development approach.

It is in this context that, mandated by its member states, the SADC secretariat, in close consultation, at both regional and national levels, with other SADC institutions, regional experts, civil society, private sector representatives and the international cooperating partners, developed the RISDP, as an indicative plan aimed at providing strategic direction for the efficient implementation and delivery of the SADC Programme of Action.

The plan does so by aligning the overarching long term integrated development goals and objectives with adequate discrete policies
and priority intervention areas\textsuperscript{509}, while enhancing and strengthening inter-sectoral linkages and synergies.

By setting logical, reasonable and coherent targets, time frames and major milestones towards the attainment of the agreed goals and objectives, the RISDP contains a built-in results-oriented monitoring and evaluation system that renders it to continuous adjustment to external shocks and to its stakeholders' scrutiny\textsuperscript{510}.

The focal of the RISDP is thus to provide strategic direction with respect to SADC programmes and activities, and to align the strategic objectives and priorities of SADC with the policies and strategies for achieving its long-term goals. The RISDP is indicative in nature, merely outlining the necessary conditions that should be realised towards achieving those goals. In order to facilitate monitoring and measurement of progress, it sets targets and timeframes for goals in the various fields of co-operation.

The purpose of the RISDP is to deepen regional integration in SADC. It provides SADC Member States with a consistent and comprehensive programme of long-term economic and social policies\textsuperscript{511}. It also

\textsuperscript{509} See Chapter Four of the RISDP
\textsuperscript{510} See the executive summary to the RISDP
\textsuperscript{511} Ibid, Chapter Three
provides the Secretariat and other SADC institutions with a clear view of SADC’s approved economic and social policies and priorities\textsuperscript{512}.

This is also in keeping with the reiteration by the RISDP of the commitment of SADC member states to good political, economic and corporate governance, entrenched in a culture of democracy, full participation by civil society, transparency and respect for the rule of law\textsuperscript{513}.

In March 2001, the Heads of State and Government met at an Extraordinary Summit in Windhoek and approved the restructuring of SADC institutions. Key features of this restructuring include the grouping of the 21 sectors into clusters under four directorates\textsuperscript{514} at the secretariat, and the establishment of SADC national committees to coordinate their respective individual Member State interests relating to SADC.

The restructuring exercise aims at facilitating the implementation of a coherent and better co-ordinated strategy, with a view to improving the efficiency and effectiveness of SADC policies and programmes.

\textsuperscript{512} See Chapter 7 of the RISDP

\textsuperscript{513} Vide Article 4 ( C ) of the Treaty of SADC as amended

\textsuperscript{514} Directorates of Infrastructure and Services, Social and Human Development and Special Programmes, Trade, Industry, Finance and Investment and Forestry, Agriculture and Natural Resources. Occupational health and safety will fall under Social and Human Development Directorate. Currently they are under Employment and labour sector coordinated by Zambia
The founders were particularly sensitive to lessons and experiences of past attempts at regional co-operation in Africa, some of which had ended in dismal failure and bitter disappointment. Such failures were largely because sensitive issues of how best to equitably share the costs and benefits of regional co-operation had not been sufficiently addressed and agreed upon at both national and regional levels\(^{515}\).

To avoid similar pitfalls, SADC from the very beginning placed particular emphasis on a decentralized institutional arrangement that would ensure that member states are the principal actors in the formulation and implementation of policy decisions.

The said well-intentioned formula over time has proved to be in a seriously need for a software upgrade which came in the form of the said RISDP. The hardware limitations in the shape of human and economic capital still pose a lingering problem for the region.

Progress in the past was hindered in some cases by differing national priorities among member states. Often times member states put

\(^{515}\) Such as the East African Community comprising Tanzania, Kenya and Uganda. The presidents of Tanzania, Uganda and Kenya on 15th January 2003 launched a new East African Community reviving a regional partnership that collapsed 23 year ago amid disagreements over how modern African States should develop.
national interests first and implementation of SADC projects occupied a subsidiary role\textsuperscript{516}.

The other reason is that member states have varying human and economic development levels. This affects the availability of requisite skills and know-how for the implementation of regional projects.

The region's low technology adoption rate means that keeping pace with socio-economic changes in a dynamic global economy is a problem and out dated technologies have contributed to limited progress recorded and in some cases paused serious risks to occupational health and safety in the region\textsuperscript{517}.

The restructuring exercise was an outcome of the realization that the organization was not moving at the pace desirable for regional integration. One of the factors responsible for this is lack of a definition of a common agenda\textsuperscript{518}, goals, priorities, deadlines as well as a regional development plan. The then integrated development based on sectoral strategy was limited by an inadequate management

\textsuperscript{516} These problems were inherited wholesale from the SADCC institutional limitations that were not addressed under Article.9 of the treaty.

\textsuperscript{517} See our discussion on occupational health and safety in the next chapter.

\textsuperscript{518} The SADC Common Agenda is spelt out in Article 5 of the Treaty as amended, as well as in the Report on The Review of Operations of SADC Institutions and consists of the policies and strategies of the organisation
framework, which did not respond clearly with regard to the articulation of the objectives, policies, priorities and deadlines\footnote{http://www.economist.com.na/2001/230301/story6.htm}.

Other reasons for the restructure include, lack of synergy between the objectives and strategies of the Treaty on one hand and the SADC Programme of Action (SPA) and the institutional framework on the other.

Limited capacity to mobilise significant levels of the regions own resources for the implementation of its Programme and the external financial over-dependence of the SADC among others are all possible reasons.

The clustering of the sectors at the secretariat effectively means pooling together of resources where allocation and need assessment can be swiftly made. This would make coordination of projects easiser, timely and effective. This will improve the efficiency with which sectors function and will aid in the formulation of the region's coherent socio-economic policy.

Lamentably occupational health and safety is not a priority for SADC at the moment as is the SADC court\footnote{A SADC official speaking off the record in conversation with the author on 9th June 2003 put it this way: http://www.economist.com.na/2001/230301/story6.htm}. A SADC official speaking off the record in conversation with the author on 9th June 2003 put it this way:
"Young man, let me tell you. Occupational health and safety and the court are not priorities for SADC. In theory they should but the sad truth is that they are not. The Priority is HIV/AIDS. The court was provided for 1992 in the treaty and constituted by the protocol in 1997 but to date, Judges have not been appointed. We are still looking for accommodation for the court. We have no funds, we will do it when funds become available."

Scary it may sound, this is real. What is disturbing is that SADC seems to be approaching the its priority list from a wrong direction and fighting the battle against HIV/Aids on a wrong footing, no wonder the battle is being lost with a distinction. HIV/Aids has social as well as economic dimensions, which can only be effectively addressed in their proper contexts.

The HIV/AIDS pandemic is reversing economic gains of the integration process made and poses the greatest and real threat to the region's sustainable development.

The loss of the most productive individuals in all sectors of our economies, decline in productivity, and diversion of scarce resources from production to the care and support of the HIV/AIDS infected and affected persons, as well as mitigating the effects on various sectors, and resulting in an increase in the number of orphans and the disruption of family structures all in creases social costs and create

520 Article 9 as read with 16 of the Treaty
pressures on the region's thin resource base. A policy response to the problem has been the SADC Declaration on HIV/AIDS that sets out priority areas requiring attention and action in the fight against HIV/AIDS.

Looking at the distribution of infection by region, country, occupation, gender, age and marital status, the full social and economic impact becomes clear. A policy response to the problem should take social as well as economic factors into account.


522 See [http://www.sadc.int](http://www.sadc.int)

523 See also the SADC HIV/AIDS Strategic Framework (2000-2004) approved by the SADC Council of Ministers in 2000 showing that state parties are committed to combating the HIV/AIDS pandemic through effective regional collaboration, mutual support and the participation of all key stakeholders.

524 UNAIDS dubs HIV/AIDS as a severe development crisis in sub-Saharan Africa, the worst affected region in the world. It is thought that even if exceptionally effective prevention, treatment and care programmes take hold immediately, the scale of the epidemic means that the human and socioeconomic toll will be massive for many generations. See UNAIDS fact sheet 2002 at [www.unaids.org](http://www.unaids.org) The National Institute of Allergy and Infectious Diseases and National Institutes of Health the United States Department of Health and Human services gives break down of the statistics of HIV/ Aids by age, gender, region etc. In its report 'Facts and Figures HIV/Aids', December 2002, among other lays bare the chilling picture of the problem in the SADC region and Sub-Saharan Africa.

525 See The Economics of Health, Safety and Well-being; Barefoot Economics, assessing the economic value of developing a healthy work environment, Dept of occupational Safety, Finland- ILO Safe work- In focus Programme on Safety, Health and The Environment pp.18-19 at [www.ilo.org](http://www.ilo.org)
The RISDP is meant to provide strategic direction for SADC policies and programmes over the medium and long term. It was endorsed by the summit at its meeting (25\textsuperscript{th}-26\textsuperscript{th} August 2003) in Dar es Salaam in Tanzania. This plan is seen as the road map through which the organisation can achieve its long-awaited dream of a common destiny\textsuperscript{526}.

The 15-year plan, to be implemented in three-year phases, spells out strategies for implementing time-bound, prioritised, short and medium term projects with measurable impact in identified intervention areas.

It underpins the restructuring of SADC institutions and provides a clear orientation for SADC's policies and programmes over the medium to long-term. It takes into consideration regional and international parameters, such as the New Partnership for Africa's Development (NEPAD), African Union\textsuperscript{527}, World Trade Organisation, the Millennium Summit Declaration\textsuperscript{528} and the Cotonou Agreement\textsuperscript{529}. It defines SADC

\textsuperscript{526} SADC Today; Southern African Development Community Vol. 6 No. 4 October 2003 p.1
\textsuperscript{527} The African Union was officially launched in Durban, South Africa, on 9 July 2002 to replace the Organisation of African Unity. Its structure is based loosely on that of the European Union. The African Union upholds the sovereign equality and independence of its 53 member states and aims to promote peace, security and solidarity on the African continent.
\textsuperscript{528} On Friday, September 8, over 150 heads of state from around the world took a giant step to eventually create a world government. They unanimously adopted the "United Nations Millennium Declaration" at the conclusion of their United Nations (UN) Millennium Summit. "Only through broad and sustained efforts to create a shared future, based upon our common
vision, mission and strategic objectives, the shared policy framework required to achieve its objectives\textsuperscript{530} the policy reforms and programmes which need to be implemented in order to achieve the set social and economic targets.

It provides a quantification of targets for economic and social development to allow for the effective monitoring of SADC's actual performances against set targets, linkages among the social and economic development targets in order to reveal the coordination and harmonization required between SADC's sectoral policies and where appropriate, macroeconomic policy convergence targets\textsuperscript{531}.

**Socio-Economic Situation**

SADC has a population of some 200 million people and a combined gross domestic product (GDP) of about US$190 billion\textsuperscript{532}. Despite the

\textsuperscript{529} The new ACP EU Partnership Agreement, which, after the Lomé Conventions, is to cover the next 20 years of the relationship between the European Union and the ACP countries -, was signed in Cotonou on 23 June 2000.

\textsuperscript{530} See the Speech by the Organisations' Executive Secretary Prega Rasmsamy of March 2003 in SADC TODAY: Southern African Development Community Newsletter Vol. 6 No.1 April 2003 p.1

\textsuperscript{531} Member states had an opportunity to comment on the first draft of the RISDP at a meeting held in Johannesburg, South Africa on 11-13 February 2003.

\textsuperscript{532} See Munetsi Madakufamba 'NEPAD and SADC Macroeconomic Policies' in SADC TODAY: Southern African Development Community Newsletter Vol. 6 No.1 April 2003 p.6.

The United Kingdom Department for International Development (DFID) - 'Southern Africa Strategy' paper of October 2002 p.2 see also the SADC Trade, Industry and Investment
region's enormous economic potential\textsuperscript{533}, an estimated 40 percent of the total populations still live in abject poverty\textsuperscript{534}. In order for the region to reduce these high levels of poverty, the region's economy has to grow at an estimated rate of about 7 percent per annum\textsuperscript{535}, which is the internationally agreed Millennium development goals\textsuperscript{536} target needed to halve the number of people living below the poverty line of $1 per day\textsuperscript{537}. The current growth rate for SADC is 2\%\textsuperscript{538}.

\begin{center}
\begin{tabular}{l}
\end{tabular}
\end{center}


\textsuperscript{535} The UK Department for international Development (dfid), Developmental Report 2003 p.71 see also SADC TODAY: Southern African Development Community Newsletter Vol. 6 No.1 April 2003 p.1

\textsuperscript{536} The Millennium Development Goals are an ambitious agenda for reducing poverty and improving lives that world leaders agreed on at the Millennium Summit in September 2000. For each goal one or more targets have been set, most for 2015, using 1990 as a benchmark: section 11 of Para (iii) of the declaration reads in relation to poverty eradication ' . We will spare no effort to free our fellow men, women and children from the abject and dehumanising conditions of extreme poverty, to which more than a billion of them are currently subjected. We are committed to making the right to development a reality for everyone, and to freeing the entire human race from want'

\textsuperscript{537} http://www.undp.org/mdg/
The economic situation in SADC improved in the 1990s, but remains unsatisfactory, with several countries experiencing low and decreasing levels of per capita gross national product, low growth rates of gross domestic product, relatively high budget deficits and interest rates, relatively low savings and investment rates and high external debt burdens, all of which have contributed to high levels of poverty. Currently conflicts in the DRC and Zimbabwe have added to the problems the region faces and has to surmount.

The challenge for the region is to create an environment that is conducive to the attainment of high and sustained rates of equitable economic growth and poverty reduction by overcoming the constraints of underdevelopment and dependence on primary sectors of production such as agriculture and mining, improving macroeconomic conditions and maintaining a conducive climate for increasing savings and investment.

538 SADC's average two percent annual growth rate falls short of the seven percent internationally agreed development target needed to halve the number of people living in poverty by 2015. However, this average obscures realities at the national level. Despite the negative impact of poor seasons and HIV/AIDS, there are some countries that have recorded consistent growth rates, well above the target seven percent. The fast growing economies are Botswana and Mozambique, which respectively recorded 9.2 and 14 percent in 2001. Zimbabwe, Seychelles and Democratic Republic of Congo (DRC) recorded negative growth rates in the same year of -8.4 percent, -4 percent and -1.9 percent respectively.

539 Pasca Lamy 'The Challenge of Integrating Africa into the World Economy' p.13 www.kas.org.za
With respect to human and social trends, the level of human development improved in some SADC Member States between the middle and the late 1990s. However, on account of a widespread decline in life expectancy at birth, decreases in real per capita incomes and due to setbacks in school enrolment rates\textsuperscript{540}, the level of human development declined in the majority of Member States over the same time period\textsuperscript{541}.

The region is thus haunted by relatively high levels of income poverty, high and in some cases rising levels of HIV/AIDS infection rates\textsuperscript{542}, raising levels of illiteracy in some countries, and shortages of critical human skills in key areas, among other challenges. SADC achieved positive

\textsuperscript{540} For data on school enrolment for Malawi see Educational Attainment, Enrolment, and School Attendance by Residence and Region, 1998 in the 2001 Year Book by National Statistics Office on \url{http://www.nso.malawi.net}

\textsuperscript{541} SADC Regional Human Development Report 2000 at \url{http://hdr.undp.org/reports/detail_reports.cfm?view=447} General useful information is also found on \url{http://www.unrisd.org/} UNRISD is an autonomous United Nations agency that carries out research on the social dimensions of contemporary problems affecting development. See also ‘Structural Adjustment in a Changing World’ UNRISD Official Publications, Paper No.4 Code BP4 of 1st December 1994

\textsuperscript{542}UNAIDS Fact Sheet 2002 on Sub-Saharan Africa at The Report in part reads ‘In the absence of massively expanded prevention, treatment and care efforts, the AIDS death toll on the continent is expected to continue rising before peaking around the end of this decade. Rampant epidemics are under way in southern Africa where, in four countries, national adult HIV prevalence has risen higher than thought possible, exceeding 30%: Botswana (38.8%), Lesotho (31%), Swaziland (33.4%) and Zimbabwe (33.7%). UNAIDS is a joint United Nations programme on HIV/Aids involving UNICEF, UNDP, UNFPA, UNDCP, ILO, UNESCO, WHO and The World Bank.
economic growth rates averaging 2.1 percent during the period 1997 to 2000. However, these economic growth rates were offset by a population growth of about 2.9 percent per annum during the same period, and are still too low to have a positive impact on unemployment and poverty in the region.543.

There has been a steady increase in employment levels in some member States with a strategic shift from formal to informal sector employment.544. The growth in the informal sector can be attributed to liberalisation of economies.545. In certain instances this resulted in enterprises shutting down or reducing their workforces, which caused a decline in overall formal sector employment.546.

External debt remains a major problem for SADC countries. External debt for SADC increased in 1997/1998, and declined in 1999, mainly due to the qualification of Mozambique and Tanzania for debt relief under the HIPC (Highly Indebted Poor Countries) facility. It is encouraging to note that Zambia and

543 Op.cit, n.520
544 Vide SADC Trade, Industry and Investment Review 2003 at www.SADCreview.com
545 See Patrick Paul Walsh and Ciara Whelan 'Employment Responses to Trade Liberalisation: Irelands Industrial Development' 1972-2000 at http://www.wdi.bus.umich.edu/CEDS%20papers/Walsh_Patrick.doc
Malawi have qualified for inclusion in this programme and have prepared the related Poverty Reduction Strategy Papers.

The incidence of poverty in the region has remained relatively high and has been exacerbated by economic stagnation in some countries. According to the SADC Human Development Report for 2000, the human poverty index for SADC averaged 31.5% and ranged from as low as 11.5% in Mauritius to a high of 54.7% in Angola in 1998. The UNDP Human Development Report 2001 shows that there are large populations living on US$1 a day or less. For instance, in 1999, 11.5% of the population lived on US$1 a day in South Africa, 33.3% in Botswana, 34.9% in Namibia, 36% in Zimbabwe, 37.9% in Mozambique, 43.1% in Lesotho and 63.4% in Zambia.

**Institutional Framework**

The Treaty establishes six institutions\(^{547}\) that in the course of time have been expanded upon, each of which is briefly discussed below. The Summit of Heads of State and Government is considered to be the supreme policy-making body of the Community. The Summit elects a Chairman and a Vice-Chairman of SADC from among its members for an agreed period, on the basis of rotation\(^{548}\). Since decisions of the

---

547 Article 9
548 Article 10(4).
Summit are taken by consensus, any single dissenting head of state has a right to veto.

**The Council of Ministers**

This is the most important structure in terms of the Treaty and responsible for the functioning and development of SADC. The Council is composed of one minister from each member state ". Preferably a Minister responsible for economic planning or finance. In the case of South Africa, Botswana, Tanzania, Zambia, Zimbabwe and Mauritius, the Foreign Ministry co-ordinates SADC involvement. Elsewhere, the responsibility generally lies with the relevant ministers for Economic Development as specified in the Treaty. Council used to meet twice a year before a summit in. Under the new structure it will be meeting four times a year. This makes it more responsive to fast changing and evolving SADC internal structure and issues confronting it.

**The Tribunal**

Constituted to ensure adherence to the proper interpretation of the Treaty. The composition, powers, functions and procedures governing the Tribunal are contained in the Protocol on Tribunal and the Rules of Procedure of 7th August, 2000 that came into force on 14

---

549 Article 11(1).
550 Article 9 as with Article 16 of the treaty
August 2001 Protocol, amended by amendment Protocol of 3rd October, 2002\textsuperscript{551}.

The issues on which the court may be called on to adjudicate include matters of constitutional significance such as the proper division of powers between the states and the community, and widely varying matters of substantive law from competition\textsuperscript{552} to social policy. When it becomes operational it will be able to decide cases between states and community institutions\textsuperscript{553}, between individuals (legal or natural) and the community, between the community and its staff\textsuperscript{554} and on a wide range of legal issues between parties that would be referred to it by national courts\textsuperscript{555}.

It will also have power to give opinions on the compatibility with treaty of international agreements and other kinds of jurisdiction, such as in arbitration clauses, could be conferred on by agreements. The importance of the tribunal to SADC vision of integration needs no emphasis\textsuperscript{556}. The tribunal will make a great contribution towards the

\textsuperscript{551} Vide www.SADC.int
\textsuperscript{552} Article.25 of the trade protocol
\textsuperscript{553} Article.17 of protocol on Tribunal
\textsuperscript{554} ibid, Article.19,
\textsuperscript{555} Article. 16(2)
\textsuperscript{556} Paul Craig and Grainne De Burca (1998)EU Law, Texts, Cases and Materials (2nd), Oxford University press, Oxford p.79
creation of a uniform community law and jurisprudence. This will assist harmonisation of regulation and polices in the region, of interest to the present discussion health and safety and other area. It will facilitate and give guidance on interpretation of the treaty, which is vital if predictability for investment purposes is to be achieved.

Uniform application or interpretation of treaty provision would for SADC inspire business confidence and encourage the rights conditions for trade and investments in the region. Unless investors can predict the regulatory consonances of investing in the region, it will be hard for them to make meaningful forecasting and SADC may not be attractive as an investment destination. The contribution of this institution for the overall Health and Safety policy and integration is considered in detail a later section, suffice to say it is one of the pillars of any rule-based organisation or institution.

The Secretariat

Located in Gaborone, is the principle executive institution of SADC and headed by an executive secretary appointed for a four-year term at a

558 T.Koopmans, The Role of Law in the next Stage of European Integration (1986) 35ICLQ 925,930
559 Article.14 (1) (a) of Tribunal protocol
561 See our discussion on the contribution of the court to the integration of the region, post
time. This is the principal executive institution of SADC responsible for strategic planning, co-ordination and management of SADC programmes. It is headed by an Executive Secretary and has its headquarters in Gaborone, Botswana.

The Department of Strategic Planning, Gender and Development and Policy Harmonization has been established in order to strengthen the Secretariat in executing its functions, particularly strategic planning, gender mainstreaming, management and harmonization of policies, and to address problems arising from the current parallel and independent structure of the Sector Coordinating Units.

This department is composed of the four Directorates: Trade, Industry, Finance and Investment Infrastructure and Services; Food, Agriculture and Natural Resources Social and Human Development and Special Programmes.

The Troika

The Extra-Ordinary Summit decided to formalise the practice of a Troika system consisting of the Chair, Incoming Chair and the Outgoing Chair of SADC which has been effective since it was established by Summit at its meeting in Maputo, Mozambique in August 1999. Other

562 Article 14 and 15.
563 Article 9A of the treaty
member States may be co-opted into the Troika as and when necessary.

This system has enabled the Organisation to execute tasks and implement decisions expeditiously as well as provide policy direction to SADC Institutions in period between regular SADC meetings. The Troika system operates at the level of the Summit, the Organ on Politics, Defence and Security, Council and Standing Committee of Senior Officials.

**Organ on Politics, Defence and Security**

The Organ is coordinated at the level of Summit on a Troika basis and reports to the Chairperson of SADC. The Chairperson of the Organ cannot simultaneously hold the Chair of the Summit. The structure, operations and functions of the Organ are regulated by the Protocol on Politics, Defence and Security Cooperation.\(^{564}\)

**Integrated Committee of Ministers**

This institution aims at ensuring proper policy guidance, coordination and harmonization of cross-sectoral activities. The Integrated Committee of Ministers oversees the activities of the four core areas of integration notably, Trade, Industry, Finance and Investment; Infrastructure and Services; Food, Agriculture and Natural Resources.

\(^{564}\) Done at Blantyre, on the 14th day of August 2001
(FANR): Social and Human Development and Special Programmes, including the implementation of the Strategic Plan in their areas of competence. Is constituted by least two Ministers from each Member State and is responsible to Council. Provides policy guidance to the Secretariat and make decisions on matters pertaining to the Directorates as well as monitor and evaluate their work.

**SADC National Committees**

These Committees are composed of key stakeholders notably government, private sector and civil society in member States. Their main functions is to provide inputs at the national level in the formulation of regional policies, strategies, SPA as well as coordinate and oversee the implementation of the these programmes at the national level. The Committees shall also be responsible for the initiation of projects and issue papers as an input to the preparation of the Regional Indicative Development Plan.

**Standing Committee of Senior Officials**

The functions of this Committee shall remain as provided for under Article 13 of the Treaty. The Standing Committee of Officials consists of one Permanent/Principal Secretary or an official of equivalent rank from each Member State, preferably from a ministry responsible for economic planning or finance. This Committee is a technical advisory committee to the Council.
Parallels with COMESA

Like SADC the Common Market for East and Central Africa (COMESA) was established as an organisation of free independent sovereign states that had agreed to co-operate in developing their natural and human resources for the good of all their people. It has a wide-ranging series of objectives including the adoption of macro-economic policies and programmes aimed at raising the standard of living of people in member states.

566 Article 3 (b) of the COMESA Treaty. See also Article.5 (1) (a) of SADC treaty
COMESA offers a parallel to SADC as a regional economic grouping of East and Southern African states. Its membership includes a majority SADC states\(^{567}\). Its history began in December 1994 when it was formed to replace the former Preferential Trade Area (PTA), which had existed from the earlier days of 1981 as a regional integration scheme whose aims among other things were 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\(^{568}\).

What has happened is that the PTA has been transformed into COMESA. Thus the process of economic integration under this regional integration scheme has now progressed from a preferential area to a common market\(^{569}\). The integration scheme was designed to have three phases. The first relates to the creation of a preferential area. This was to be followed by the convention of this trade area into a common market. Finally, the common market will then be converted into an economic community\(^{570}\).

\(^{567}\) Eritrea, Ethiopia, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia Rwanda, Sudan, Swaziland, Tanzania, Uganda, Zambia, Djibouti, Angola, Burundi, Comoros, Seychelles, Somalia and Zimbabwe. On possible overlaps and cross-membership with SADC see annex 2


\(^{569}\) Common market is a form of economic integration in which there is free internal trade, a common tariff, and free movement of labour and capital among partner states

\(^{570}\) Vide Article 2 of the treaty.
Although the COMESA treaty provides that regional integration scheme is divided into three phases, the treaty does not distinguish a 'preferential trade area' from a 'common market' or from an 'economic community'. Neither does it distinguish a 'common market' from an 'economic community'. A midst such luck of clarity and potential confusion what is clear is that the scheme has now progressed to its second phase.

However, due to COMESA's economic history and background its main focus is on the formation of a large economic and trading unit that is capable of overcoming some of the barriers that are faced by individual states in international commerce. COMESA's current strategy can be summed up in the phrase 'economic prosperity through regional integration'.

**Approaches to Integration**

There are generally three recognised approaches to integration: Market Integration, Production or Project-directed Integration, and Development Integration. The Market Integration approach focuses on the integration of markets through, principally, trade liberalisation by way of removal of both tariff and non-tariff barriers to commercial
interaction and investment. This approach aims at achieving full economic co-operation through a gradual process starting with the creation of a free trading zone, followed by the establishment of a common market and ending with an economic community.

The Production or Project-directed approach focuses mainly on the coordinated planning and implementation of productive activities. The Development Integration approach has elements of both production and market integration approaches, but emphasizes equitable development through compensatory and corrective initiatives.

**Strategic Choice**

COMESA strategy so far has been to emphasize the integration of the economic space through removal of trade and investment barriers. Although COMESA has made good progress using this approach, and will continue to pursue it, the focus in the next decade and beyond will

---


573 See our discussion on Comesa, supra.

574 Ibid

575 See Article.5 of the Treaty of SADC as amended

576 Article. 3 as read with Article.45 of Comesa treaty
shift towards development integration⁵⁷⁷. This will mean giving increased prominence to the supply side of integration⁵⁷⁸, namely investment in the productive sectors. This shift in emphasis recognises developments both at the global and regional level.

The attainment of full integration and the implementation of complete COMESA mandate under the Treaty are viewed as long-term objectives. In the short to medium term the emphasis in programme focus is on trade development and investment, specifically, the elimination of impediments to trade and investment⁵⁷⁹.

In terms of approach COMESA and SADC emphasize two different sides of the same coin. The advantage of this is that it offers a chance to avoid a missed opportunity for those states that have dual memberships⁵⁸⁰. However as we have seen this has its own problems such as different incentives for investors which could potentially lead to those countries caught on the regional cross-road lose vision and direction, if not out-right lowering of their labour standards with the aim of making themselves an attractive investment destination.

---

⁵⁷⁷ See ‘The COMESA Vision and Strategy’ at www.comesa.int/
⁵⁷⁸ See Ngwenya. South Africa has refused to join COMESA because its view there is nothing that can be achieved in COMESA that can’t be achieved in SADC. It appears Comesa is to evolve to the level of SADC and shift its emphasis from demand to supply side of integration, thereby embracing development integration strategy
⁵⁷⁹ Article 3 (b)
⁵⁸⁰ See annex 2
SADC emphasizes the supply side interventions in its development approach, although one can detect a different strategy in the process of being introduced, for example with the promotion of a free trade agenda\textsuperscript{581}.

COMESA has traditionally placed emphasis on demand-side measures. The philosophy of Comesa is that the economic development of the sub-Saharan region is largely dependent upon private sector inward investment into the region\textsuperscript{582}. If investment is to be attracted, the small countries of the region must be able to offer a large single market\textsuperscript{583}. There is, therefore, an a priori need to liberalise the trade and investment environment in the region as a whole to attract the investment needed to address the supply side of the region's economy\textsuperscript{584}.

COMESA agenda places emphasis on such issues as tariff reduction and elimination of non-tariff barriers, Streamlining documentation and movement procedures for cargo, harmonising trade documentation

\textsuperscript{581} See Ngwenya \textit{op. cit}
\textsuperscript{582} In COMESA's strategy of trade, investment and development integration, the private sector will play a central role. The Secretariat will work together with governments in COMESA to create the space and environment where the private sector can play its rightful role as the main driver of the economic integration process.
\textsuperscript{583} Op.cit p.1
\textsuperscript{584} Thus a shared goal of both organisations as evidenced by recent developments such as ambitious privatisation programmes taking places in both regions.
and enhancing the capacity of the private sector to take advantage of opportunities arising from regional as well as global integration.\(^{585}\)

Both COMESA and SADC pursue seemingly similar goals, i.e. economic integration. Comesa approaches it through market integration first by creating a common market and eventual integration into an African economic community.\(^{586}\) SADC views development through the integration of national economies of member states as the route.\(^{587}\)

Both COMESA and SADC are building blocks for the African economic community (AEC)\(^{588}\) whose aim is to promote economic, social and

\(^{585}\) Sindiso Ngwenya Supra , op.cit
\(^{586}\) Para 1 as read with para.7 of the preamble to the Treaty. Long before the establishment of the Organization of African Unity (OAU), African leaders had recognised that cooperation and integration among African countries in the economic, social and cultural fields were indispensable to the accelerated transformation and sustained development of the African continent. Since the early 1960s, member states were encouraged to combine their economies into sub-regional markets that would ultimately form one Africa-wide economic union. In 1980, the OAU Extraordinary Summit adopted the Lagos Plan of Action as a major step towards the goal of integration. The commitments in this Plan and the Final Act of Lagos were translated into concrete form in Abuja, Nigeria in June 1991 when the OAU Heads of State and Government signed the Treaty establishing the African Economic Community (AEC) during the 27th Ordinary Session of the Assembly. Since May 1994, the OAU has been operating on the basis of the OAU Charter as well as the AEC Treaty, and the organisation has now been transformed into and is known as the African union.

\(^{587}\) Para 2 of the preamble to the treaty
\(^{588}\) At the regional and sub-regional levels, African countries have embarked on various programmes for the promotion of integration, and have established organisations and institutions to support their effort. So far, the AEC has established direct working relations with the Economic Community of West African States (ECOWAS) in the West African region, the Economic Community of Central African States (ECCAS) in the Central region, and in the East and Southern region, the Common Market for East and Southern Africa (COMESA). In
cultural development\textsuperscript{589} as well as African economic integration in order to increase self-sufficiency\textsuperscript{590} and endogenous development and to create a framework for development, mobilisation of human resources and material. The AEC, the broader context within which comesa and SADC integration efforts are carried out aims to promote co-operation and development in all aspects of human activity with a view to raising the standard of life of Africa's people, maintaining economic stability and establishing a close and peaceful relationship between member states\textsuperscript{591}. If their governing treaties are anything to go by, Comesa is for market integration\textsuperscript{592} while SADC is for development\textsuperscript{593}. Ultimately they are all aiming at economic

\textsuperscript{589} Article.143 of Comesa treaty and Article.5 of SADC treaty
\textsuperscript{590} Article. 3 (5) (c) of Comesa and Article.5 (1) (d) of SADC
\textsuperscript{591} Article.4 of the Treaty establishing the African Economic Community (AEC) Known as the Abuja Treaty
\textsuperscript{592} Market integration is a sub-set of economic integration. It is concerned with the removal of non-tariff barriers to trade across national boards in participating states and the eventual creation of a single market. Unlike economic integration where it's so much the involvement of government through fiscal and monetary policy, in market integration the involvement of government is largely through taxation policy and market forces play a major role.
\textsuperscript{593} Article.2 of the treaty of Comesa

246
integration\textsuperscript{594} of the region so that we can safely speak of them being complimentary of each other\textsuperscript{595}.

In terms of social policy and in our case on health and safety as an aspect of regional economic law for the two organisations, one would find a rather confusing picture emerging. Unlike the SADC treaty, the treaty of Comesa is more elaborate and clear on its social policy\textsuperscript{596}.

Member states are called upon to promote close co-operation between themselves in the social and cultural fields, particularly with respect to the prevention of occupational accidents and diseases\textsuperscript{597} employment and working conditions\textsuperscript{598} and (b) labour laws\textsuperscript{599}. Art.143 (2) mandate the council to adopt a social charter, programmes and regulations as the case might be for the implementation of its social agenda. The difference with SADC is that though SADC does not couch its social policy in such terms

\textsuperscript{594} Thus organising economic activities so that national boundaries do not matter. Complete economic integration would imply free trade in goods and services; perfect capital mobility, complete freedom of migration, complete freedom of establishment for business and an unhindered flow of information and ideas. It would also imply the elimination of national differences in taxation, in the financing of social services, in the rules governing competition and monopoly, and in the environmental regulation and arguably in single currency see \textit{Oxford Dictionary of economics} (2002), Oxford University Press, London, p.241
\textsuperscript{595} Para.8 as read with Para.9 of Comesa and SADC treaties respectively
\textsuperscript{596} Article 143
\textsuperscript{597} Article.143 (e)
\textsuperscript{598} Article. 143 (a)
\textsuperscript{599} Article. 143 (b)
but make it clear in the treaty that the social side of its economic agenda can not be played down⁶⁰⁰.

SADC has gone a step further than comesa to adopt a social charter as a blueprint for its social policy⁶⁰¹. Legally speaking both positions have constitutional force of the respective treaties and open up the possibility for civil society involvement in the regions activities in as far as these issues are concerned.

The problem for Comesa is that lack of clear lead department creates implementation problems. In the case of SADC the situation is different in that its employment and labour sector (ELS) has been designated to coordinate and oversee the issue. However this sector had till august 2003 when the charter was adopted operated without clear policy guidelines in as a far as health and safety in concerned.

Asked as to why SADC seem to be making more progress on the social front than comesa, one could be right to say that in terms of geographical size, it is easier to reach consensus in a smaller organisation than it is for a larger one like Comesa. Secondly social and cultural differences between predominantly Islamic states of Eastern Africa and Christian states of southern Africa plays a role in the jurisprudence of rights and responsibilities making it easier for SADC to

---

⁶⁰⁰ See Article.4 (c) and Article.5 (1) (a) of its treaty
⁶⁰¹ Article.12 is the lead Article for occupational health and safety in the region
reach consensus on social issues that would be hard in Comesa. However on the economic front Comesa has made for institutional progress than SADC. It is easer to agree on the economy that on matters of constitutional law. In this the most important institutional organ then would be the court and both organisations make provision for it. However at the time of writing this thesis the SADC court had been constituted but not yet operational while the COMESA court was up and running.

In the next section we will consider the contribution of the court to the integration programmes for the two regions.

Both SADC and COMESA have developmental goals as their prime concern. However a foundation for development is universal and lasting peace and security predicated on social justice.

The question that comes to mind is in relation to institutional structures COMESA has put in place to further its goals. Both organisations are founded and governed by the rule of law. Their very existence is conditioned on the recognition by member states, institutions and individuals of the binding nature of their rules. One institution for the

---

602 Article.3 of Comesa and Article.5 of SADC treaty
603 See Preamble to the ILO constitution.
604 Article.4 (c) of SADC
605 Article.4 (c) and Article.6 (g) of SADC and COMESA respectively
consolidation of this principle is an independent community court of law or tribunal. Both SADC and COMESA recognise this and have provided for the same\textsuperscript{606}.

Tribunals are meant to further dialogue between national court and themselves\textsuperscript{607} so as to create a regional or community law. This is a powerful tool in the process of harmonisation of legislation in the region\textsuperscript{608} through uniform interpretation and application of community law in the region, as a key to economic integration\textsuperscript{609}. Their role is to ensure that in the interpretation and application of treaties, the law is observed\textsuperscript{610}, i.e. it is responsible for monitoring the legality of acts in member states.\textsuperscript{611} At this point let's take a look at this institution and its contribution to socio-economic policy and overall regional integration.

\textsuperscript{606}Article.9(g)as read with Article.16 (SADC, treaty, as amended), Article.7as read with Article.19 of COMESA Treaty
\textsuperscript{607}Article.16 of SADC and Article.30 of COMESA Treaty.
\textsuperscript{608}Article.3 (6)(b) of COMESA ,Article.5((2) (a) of SADC Treaty,Article.2 (1) (b) of SADC Charter .In the are of occupational health and safety the lead Article is Article.12 of the social charter .
\textsuperscript{610} See Articles.23-30 (COMESA treaty) and Article.9 (SADC), Articles.14-16 (SADC protocol on Tribunal)
\textsuperscript{611} For a distinction between legalism and legality see Anthony Allot (1980) The Limits of Law. Butterworths, London p.149. Legalism- that a law is law is law and it is not competent for anyone to challenge a law or it's authority on any non-legal criterion. Legality --that everyone has the right in every kind of society to have legal rules fairly made and applied to him or her. Differentially punitive, unfair or arbitrary law will be against the principle of legality. Op cit p. 149
Court of Justice for COMESA

The Court of Justice of the Common Market for Eastern and Southern Africa (The court) is established under Article 7 of the COMESA Treaty (The Treaty) as one of its. The main details on the establishment, structure, composition, jurisdiction, staffing, budget and other matters relating to the Court are contained in Chapter Five of COMESA Treaty under Articles 19 to 44. Like the SADC court its primary function is to uphold the rule of law in the operation of the Treaty by ensuring adherence to law in the interpretation and application of the Treaty. Its general jurisdiction is to adjudicate upon all matters, which may be referred to it under the Treaty.

The Court of Justice replaces two judicial bodies that existed under the Treaty Establishing the Preferential Trade Area for Eastern and Southern African States (PTA) and takes up the functions of a third judicial body. These bodies were:

(a) The PTA Tribunal whose function under the PTA Treaty was to ensure the proper interpretation of the provisions of the Treaty and to adjudicate only in disputes between Member States arising from the interpretation and application of the provisions of the PTA Treaty. The

612 Article 16 of SADC treaty, Article 14-16 of SADC protocol on tribunal
613 Article 7 c of the treaty
jurisdiction of the Tribunal was narrow and its ad hoc status and lack of a separate budget stifled its growth.

(b) the PTA Administrative Appeals Board (Board) whose jurisdiction under the PTA Treaty was to adjudicate disputes between staff and the PTA arising from the interpretation and/or application of the Staff Rules and Regulations and terms of contract of employment of staff. The ad hoc status of the Board, its lack of an independent Registry and separate budget severely affected the functioning of this body.

(c) The PTA Centre for Commercial Arbitration was responsible for facilitating international arbitration and/or conciliation of private commercial disputes. The Centre was based in Djibouti and operated under the auspices of the PTA Federation of Chambers of Commerce and Industry.

The Court of Justice shall benefit the process of economic integration since it provides one integrated strong judicial body with one Registry rather than keeping three weak judicial bodies. Further, a strong Court of Justice will address the issue of enforcement of decisions taken collectively and also allow for legal or natural persons affected by regulations, directives or provisions of the Treaty to be able to request
the Court to determine the legality of such provisions, regulations or directives\textsuperscript{614}.

The court has jurisdiction to hear any matter referred to it pursuant to the treaty. In article 6(e) of the treaty member states adopt the recognition, promotion and protection of human and peoples' rights in accordance with provision of the African Charter on Human and people's rights as one of its fundamental principles. This formula is also contained in Article 4(c) of the SADC treaty. Though the SADC treaty does not mention the African charter, they both have human rights as their governing principles. This is important for occupational health and safety. As we saw in chapter three labour rights including health and safety rights are human rights and for this reason it should possible to advocate health and safety programme as part of the democratic and human rights agenda for the regions.

Alternatively the COMESA treaty makes specific provision for health and safety in article 143(e). In article 143 of the treaty is an expression of COMESA's social policy including labour relations policy. SADC elaborately makes provision in its social charter for occupational health and safety, article 12 to be specific.

\textsuperscript{614} Articles 23-30 of the treaty (COMESA) cf. Article 9 SADC treaty and Articles 14-16 of SADC protocol on Tribunal
In terms of standing before the court, member states, secretary general of COMESA and legal and natural persons, can make a representation to the court for a determination of any matter that is within the competence of the court in accordance with Article 23 of the said treaty. For the SADC court article 9 of the treaty gives standing to the summit and the council alone.

However the protocol on the tribunal expands on this formula in article 15 to include member states, natural and legal persons. The only qualifications under both courts are that in relation to legal and natural persons, you must be a resident of the region. Secondly you must exhaust local remedies or show that for some reasons is unable to proceed under the domestic jurisdiction.

The importance of requiring residence over citizenship is that it introduces flexibility and broader coverage that is inclusive of all market participants. This creates certainty in the minds of investors and is good from an investment point. Citizenship would have been too

615 Article.24
616 Article.25
617 Article.26
618 Ibid
619 For a discussion non the concept of exhaustion of local remedies see the Else Case and Spiliada Maritime Corp v Cansuulex Ltd [1986] 3 All RE843, Connelly v TRZ Corpn plc [1998]AC 854 HL
620 Article.15(2) (SADC), Article.26 (COMESA)
621 See our discussion on regulation chapter four
rigid and alienating for foreign investors. These courts act as arbitration courts622 that gives them an added commercial incentive. However a potential problem would be in a case where a similar provision of the comes treaty that is mutatis mutandis that that of SADC receives a different interpretation in the two courts. This would have the effect of delivering two policy decisions and could leave civil society with an option to pick and choose. This does not help the process of harmonisation.

SADC and COMESA were both established within a system of, agreed rules embodied in the Treaty. Their Common agendas will be effectively realised if Member States abide by those rules and expeditiously implement decisions collectively taken. It can, therefore, be said that the system will endure only if an independent authority supervises its rules. This authority is the Court or tribunal as the case may be.

**Contribution of the Court to Regional Integration.**

Not only is SADC a creature of the law, but also pursues its aims exclusively through a new body of law, community law, which is independent, uniform in all the member states of the community, separate from yet superior to national law, and many of whose provisions are directly applicable in all the member States.

622 Article.28 (COMESA)
Like any true legal system, the community legal system needs an effective system of judicial safeguards when the law is challenged or must be applied. The tribunal as the judicial institution of the community is the backbone of that system of safeguards. Its Judges shall ensure that the law is not interpreted and applied differently in each member state, that as a shared legal system, it remains a community system and that it is always identical for all in circumstances. This will go a long way towards establishing common standards and values.

In relation to public policy the tribunal would make a variable contribution to the debate and guidance on matters of health and safety. It would be possible for interested parties to bring matters before the court for adjudication, or national courts would assist in the application of the treaty provision. This dialogue is vital as it aids harmonisation efforts. At the time of writing this thesis the COMESA court was operational while the SADC court wasn’t. There is need for SADC to begin viewing this institution as one of the pillars of its integration agenda.

The court would be expected to give flesh and substance to the treaty with distinctive vision of southern Africa SADC seeks to promote. In this regard the court’s primary concern should be the enhancement of the
effectiveness of community law and its integration into legal systems of
the member states.\textsuperscript{623}

The next chapter looks at health and safety in the SADC region in more
detail from policy to legislative development and investigates possible
avenues for an approach that balances the potentially competing
social and economic priorities for the region.

\textbf{Conclusion}

In the fore-going discussion it appears SADC in its desire for economic
reconstruction of its region has opted for trade and investment as
engines for achieving its agenda as set out in article 5 of its treaty. The
idea has been to achieve economic self-sufficiency of member states.
The mechanisms for political cooperation and articulation of its
common aspirations was first created through the frontline states and
later concretised through the SADCC.

The difference being that SADCC was a post-independence creature, largely in response to demands of the region to turn political
glory into visible social and economic progress. At the time it was a
conceived (wrongly) that economic growth would naturally translate
into social progress and improved standards of living of people of the
region. The social side of the organisation's economic agenda was in

\textsuperscript{623} Paul Craig and Grainne De Burca (1998) \textit{EU Law, Texts, Cases and Materials} (2ndedn);
Oxford University press, Oxford,p.78
this played down. This could possibly be due to the fact that post-independence Southern African was characterized by authoritarian regimes and conflict in which participatory governance was not everyone’s cup of tea.

It was only a matter of time before reality stared into their regions’ eyes resulting in the transformation of SADCC into SADC as a treaty based international organisation. The wholesale carry over of SADDC structures meant that in terms of social policy and economic coordination the old problem had only been dressed-up in new regalia and handed over a new life.

Lack of a self-standing social policy meant that economic gains the region made were wiped out by social demands of policy neglect such as poverty, occupational diseases and injuries, and conflict some of which had economic roots. The need to address these issues required policy turnaround. With an economy that is predominantly agro-based means that a majority of SADC workforce is rural workforce and instances of occupational disease and accidents are more visible among this social group. There has been an absent effort on the part of SADC to see the problem along these lines.

The regions biggest challenge is HIV/AIDS. However there seem to be little conception of HIV and as an occupational hazard. Infection and
re-infection rates are highest among those that occupy lower ranks on the social ladder and it is these that are likely to end up as agricultural workers. The passing of the social charter with Article 12 as a blueprint for occupational health and safety is an encouraging development.

However, success will depend on how SADC coordinates and how it sets out to harmonise health and safety regulation in the region. One way would be through the involvement of civil society. The success of this depends largely on SADC’s relationship with the said civic society. The treaty acknowledges this role in its preamble language but in reality the situation is not an encouraging one for the region.

At domestic level the lack of resources and skilled personnel in health and safety departments speak of the need for networking among social partners if the ideals espoused in the treaty and the social charter are to be realised.

One important institution in this regard is the tribunal. Harmonisation of social and economic policy in the region would make a variable contribution towards functional integration of the region. As the case is at present, the tribunal is not yet functional. It is meaningless for SADC to continue adopting legislative instruments without an institution that would provide independent, coherent policy and legislative guidance.
such as the tribunal. This is a manifestation of misplaced if not outright confused priorities on the part of the organisation.

In relation to trade and investment, it is important that sufficient safeguards to counteract harmful effects of globalisation and intra-SADC competition. One way would be through a competition policy, which would ensure that distortions in labour markets do not lead to lowering of social standards in member states.

The principal instrument for SADC trade is its protocol on trade. Unlike the COMESA treaty it does not spell out a competition policy for SADC. What it does in article 25 is to enjoin member states to adopt policies that promote fair trade and encourage competition. What is implied is voluntarism. Under the current institutional set-up one would wonder how this would work. Voluntarism requires a framework within which it would be pursued. This is a receipt for failure. The author is mindful of the fact that SADC is still evolving and hopes that it might do well to a dress its mind to some of these issues on a continuing basis.
CHAPTER SEVEN

Occupational Health and Safety Policy in SADC

Introduction

In the previous chapter we saw that SADC objectives as set out in its treaty aim at the promotion of economic and social development, the establishment of common ideals and institutions, among others. Development, poverty alleviation and living standards are specifically mentioned as areas on which member states agreed to cooperate with a view to foster regional development and integration.

The treaty as amended states in article.12 that social and human development is one of the core areas for the region's integration. Under the new strategic plan occupational health and safety have been brought under the directorate of Social and Human Development and Special Programmes (SHDSP) that has responsibility for development, promotion and harmonisation of employment policies and labour standards (emphasis supplied) in the

624 Article.5 (1) (a)
625 See Article.9
626 Article. 5 A.
627 Article.5 (1) (a)
628 Article.21 of the Treaty
629 Article.5 (1) (a)
region. The change is a response to structural and institutional limitations inherited from its predecessor and the desire to fine-tune the organisation into social-economic realities obtaining in the region and the global economy\textsuperscript{631}.

On the continental stage the Organisation of African Union (OAU) was on 9\textsuperscript{th} July transformed into an African Union (AU)\textsuperscript{632}. This was not merely a dropping of the letter ‘O’ from the acronym, rather it was a major overhaul of the organisation. Fundamental was the abandoning of the principle of non-interference in internal affairs of member states under the guise of sovereign integrity\textsuperscript{633}. This was principle was responsible for the organisation’s complacency over human rights abuses by tyrants like Uganda’s Idi Amin.

Secondly for the first time, the ideals earlier espoused in the African charter of 1963 establishing the OAU\textsuperscript{634} and the treaty of Abuja establishing the African Economic Community 1993\textsuperscript{635} have been synthesised into a single document, the constitutive Act (The Act) of the AU\textsuperscript{636}. The significance of this development is that continental

\textsuperscript{631} Ibid, pp10-11
\textsuperscript{632} www.african-union.org
\textsuperscript{633} Article 1 of the African Charter, now Article 3 (b) of the Constitutive Act of the African Union
\textsuperscript{634} Ibid, Article 2
\textsuperscript{635} Op.cit, infra n.
\textsuperscript{636} An electronic version of the Act is available at www.african-union.org
social and economic agendas are visibly treated as two sides of the same coin. This is in contrast to the past institutional framework that made them a by-product of the political agenda (colonial emancipation). This has implications for health and safety policy on the continent and on all regional set-ups that are members of the AU. A full discussion of this is done elsewhere in this discussion.

This chapter ventures to look more closely at social policy, vis-à-vis health and safety in the region and how this is being reflected in SADC’s integration programme. What place is occupational health and safety occupying in the region’s drive for trade and investment as an alternative to donor development aid for economic reconstruction of the region.

The chapter tries to answer some of the questions raised in the previous chapters and suggests an approach to health and safety that seeks a third way between, the state, and the market i.e. increased involvement of non-state actors such as civil society, trade unions, the media and professional bodies such as the legal profession to increase civic awareness of issues involved and make corporate social

responsibility part and parcel of its economic relationship with its present and potential investors.

Background

Hundreds of millions of people throughout the world are working today under circumstances that foster ill health and/or are unsafe\(^{638}\). In 2000 the ILO between 1.9-2.3 work related deaths of which 10% were exposed already as working children\(^{639}\) thus yearly over 1.1 million people worldwide die of occupational injuries and work-related diseases, a figure roughly equivalent to the global annual number of deaths from malaria in developing countries, above-mentioned risk reaches a proportion that is estimated to be 10-20 times higher than in established market economies (Table 2 below).

Occupational Accidents, 2002 by region

<table>
<thead>
<tr>
<th>Economically active population</th>
<th>Total employment</th>
<th>Fatalities</th>
<th>Lower limit</th>
<th>Upper limit</th>
<th>Average</th>
<th>Fatal accidents reported to the ILO</th>
<th>3 days’ absence accidents reported to the ILO</th>
<th>All accidents reported to the ILO</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pe</td>
<td>354,356,184</td>
<td>320,159,084</td>
<td>27,515</td>
<td>14,481,479</td>
<td>27,514,810</td>
<td>20,998,144</td>
<td>15,072</td>
<td>4,945,520</td>
</tr>
<tr>
<td>Ua</td>
<td>346,732,102</td>
<td>260,206,962</td>
<td>37,313</td>
<td>19,638,551</td>
<td>37,313,247</td>
<td>28,475,899</td>
<td>13,851</td>
<td>4,686,467</td>
</tr>
</tbody>
</table>

\(^{638}\) The WHO/ILO Joint Effort on occupational health and safety in Africa Report of the Meeting, 7-8 March 9, 2001, see also the distribution of occupational accidents by region at www.ilo.org/safework

\(^{639}\) Dr. Jukka Takala, Lecture presented at the University of Salford MA in Health and Safety Law and Environmental Law Workshop, York, 22-23 November, 2003, p. 1 See also www.ilo.org/safework
## Fig 2 occupational accidents by Region

<table>
<thead>
<tr>
<th>Region</th>
<th>Accidents Reported</th>
</tr>
</thead>
<tbody>
<tr>
<td>Europe</td>
<td>1,721,493,691</td>
</tr>
<tr>
<td>America</td>
<td>1,540,504,540</td>
</tr>
<tr>
<td>Asia</td>
<td>228,351</td>
</tr>
<tr>
<td>Africa</td>
<td>120,184,934</td>
</tr>
<tr>
<td>Oceania</td>
<td>61,237</td>
</tr>
<tr>
<td>Total</td>
<td>10,537,380</td>
</tr>
</tbody>
</table>

Note: The percentages represent regional distribution out of 10,537,380 occupational accidents reported to the ILO in the year 2002.

The picture above may be confusing for those not familiar with the literature. In percentage terms in the 2002 out of a total of 10,537,380 occupational accidents reported to the ILO, Europe had the highest reported accidents at 47% while Africa had the lowest reported accidents at 1.25%. This does not mean that the world of work is more dangerous in Europe and safest in Africa, quite the opposite is true. It possibly means that reporting was best in Europe and worst in Africa. The problem for Africa could be as a result of either under-reporting or non-reporting of work-related injuries or illnesses. This is one of the
problems that policy makers usually face as the true picture and magnitude of the problem in developing countries is not easily ascertainable on account of lack of reliable data.

Table 3 on the hand show how grim the global situation for health and safety in the region and why improvements in health and safety should take centre-stage. Bear in mind the figures above are in relations to the economically active population, but the spill over of poor working conditions such as environmental pollution pose serious public health issues. These affect even those that are not economically active, but dependent of the economically active. The vicious cycle begins and is a serious setback to poverty eradication efforts.

An additional problem to the situation of workers in the SADC Region is the high prevalence and incidence of HIV/AIDS. Table 4 shows the current situation in the region. Worst hit are the vulnerable and it is these that are likely to end up in small scale, informal or agricultural workplaces. Apart from being a public health issue HIV becomes an occupational issue as well and this fact can not be down played or ignored. The need for appropriate occupational health and an safety for SADC need no emphasis.

640 See a Joint United Nations Programme on HIV/AIDS (UNAIDS) and World Health Organization (WHO) AIDS Epidemic Update UNAIDS/03.39E December 2003, p. 7
641 The figures in the table show that Southern Africa is home to about 30% of people living with HIV/AIDS worldwide, yet this region has less than 2% of the world’s population.
<table>
<thead>
<tr>
<th>Region</th>
<th>Children living with HIV/AIDS (millions)</th>
<th>Children newly infected with HIV (millions)</th>
<th>Prevalence (%)</th>
<th>Child deaths due to AIDS (millions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sub-Saharan Africa</td>
<td>26.0 - 28.2</td>
<td>30.0 - 34.4</td>
<td>7.5 - 8.5</td>
<td>2.2 - 2.4</td>
</tr>
<tr>
<td>North Africa &amp; Middle East</td>
<td>470.0 - 730.0</td>
<td>43.0 - 57.0</td>
<td>0.2 - 0.4</td>
<td>35.0 - 60.0</td>
</tr>
<tr>
<td>South &amp; South-East Asia</td>
<td>4.6 - 8.2</td>
<td>610.0 - 8.1</td>
<td>0.4 - 0.8</td>
<td>333.0 - 590.0</td>
</tr>
<tr>
<td>East Asia &amp; Pacific</td>
<td>700.0 - 1.3</td>
<td>50.0 - 270.0</td>
<td>0.1 - 0.4</td>
<td>32.0 - 56.0</td>
</tr>
<tr>
<td>Latin America</td>
<td>1.3 - 1.5</td>
<td>20.0 - 150.0</td>
<td>0.5 - 0.7</td>
<td>40.0 - 70.0</td>
</tr>
<tr>
<td>Caribbean</td>
<td>350.0 - 560.0</td>
<td>45.0 - 55.0</td>
<td>0.9 - 1.1</td>
<td>30.0 - 50.0</td>
</tr>
<tr>
<td>Eastern Europe &amp; Central Asia</td>
<td>1.2 - 1.8</td>
<td>80.0 - 280.0</td>
<td>0.5 - 0.9</td>
<td>22.0 - 37.0</td>
</tr>
<tr>
<td>Western Europe</td>
<td>520.0 - 680.0</td>
<td>30.0 - 43.0</td>
<td>0.3 - 0.8</td>
<td>2.0 - 3.4</td>
</tr>
<tr>
<td>North America</td>
<td>790.0 - 1.2</td>
<td>29.0 - 54.0</td>
<td>0.5 - 0.7</td>
<td>12.0 - 18.0</td>
</tr>
<tr>
<td>Australia &amp; New Zealand</td>
<td>12.0 - 18.0</td>
<td>70.0 - 1.0</td>
<td>0.1 - 0.4</td>
<td>&lt;1.0</td>
</tr>
<tr>
<td>TOTAL</td>
<td>40 million</td>
<td>5 million</td>
<td>1.1%</td>
<td>3 million</td>
</tr>
</tbody>
</table>

*The proportion of adults (15 to 49 years of age) living with HIV/AIDS in 2003, using 2003 population numbers.*

Changes in the world of work are affecting both the health of workers and the environment. Particularly in the Africa region where the introduction of new technologies, new chemical substances and materials can lead to new epidemics of occupational and work-related diseases and injuries, while the traditional hazards, like high dust

642 Sub-Saharan Africa remains by far the region worst affected by the HIV/AIDS epidemic. In 2003, an estimated 26.6 million people in this region were living with HIV, including the 3.2 million who became infected in 2003. AIDS killed approximately 2.3 million people in the same year.
or noise levels at the workplace, have not been dealt with adequately.

This leads to a double burden of occupational disease and injury. Thus, this heavy burden due to the current neglect calls for urgent strengthening of the field of occupational hazard prevention and control in Africa. Safer and healthier work conditions can make an important contribution to poverty alleviation and sustainable development. Efficient application of available knowledge to develop practical solutions to overcome the "knowledge application gap" is more important than generating new theoretical knowledge (See the situation by World Bank regions in table 3 below.

The World, according to World Bank Regions

<table>
<thead>
<tr>
<th></th>
<th>Economically active population</th>
<th>Total employment</th>
<th>Fatalities</th>
<th>Lower limit</th>
<th>Upper limit</th>
<th>Average</th>
<th>Fatal accidents reported to the ILO</th>
<th>3 days' absence accidents reported to the ILO</th>
<th>All accidents reported to the ILO</th>
</tr>
</thead>
<tbody>
<tr>
<td>EME</td>
<td>409,141,496</td>
<td>380,833,643</td>
<td>16,170</td>
<td>8,510,494</td>
<td>16,169,938</td>
<td>12,340,216</td>
<td>14,608</td>
<td>7,631,977</td>
<td>7,646,585</td>
</tr>
<tr>
<td>FSE</td>
<td>184,717,127</td>
<td>162,120,341</td>
<td>21,425</td>
<td>11,276,461</td>
<td>21,425,275</td>
<td>16,350,868</td>
<td>8,665</td>
<td>582,287</td>
<td>590,952</td>
</tr>
<tr>
<td>IND</td>
<td>458,720,000</td>
<td>419,560,000</td>
<td>48,176</td>
<td>25,355,777</td>
<td>48,175,977</td>
<td>36,765,877</td>
<td>211</td>
<td>0</td>
<td>211</td>
</tr>
<tr>
<td>CHN</td>
<td>708,218,102</td>
<td>699,771,000</td>
<td>73,615</td>
<td>38,744,649</td>
<td>73,614,834</td>
<td>56,179,742</td>
<td>17,804</td>
<td>75,773</td>
<td>93,577</td>
</tr>
<tr>
<td>OAI</td>
<td>404,487,050</td>
<td>328,673,800</td>
<td>83,048</td>
<td>43,709,538</td>
<td>83,048,122</td>
<td>63,378,830</td>
<td>5,631</td>
<td>252,499</td>
<td>258,130</td>
</tr>
<tr>
<td>SSA</td>
<td>260,725,947</td>
<td>10,540,604</td>
<td>54,705</td>
<td>28,792,223</td>
<td>54,705,223</td>
<td>41,748,723</td>
<td>1,675</td>
<td>47,105</td>
<td>48,780</td>
</tr>
<tr>
<td>LAC</td>
<td>193,426,602</td>
<td>114,604,962</td>
<td>29,594</td>
<td>15,575,673</td>
<td>29,593,778</td>
<td>22,584,726</td>
<td>6,998</td>
<td>1,699,107</td>
<td>1,706,105</td>
</tr>
<tr>
<td>MEC</td>
<td>112,906,300</td>
<td>48,635,240</td>
<td>28,019</td>
<td>14,746,946</td>
<td>28,019,197</td>
<td>21,383,071</td>
<td>1,876</td>
<td>191,164</td>
<td>193,040</td>
</tr>
<tr>
<td>WORLD</td>
<td>2,732,342,624</td>
<td>2,164,739,590</td>
<td>354,753</td>
<td>186,711,760</td>
<td>354,752,344</td>
<td>270,732,052</td>
<td>57,468</td>
<td>10,479,912</td>
<td>10,537,380</td>
</tr>
</tbody>
</table>
A graphic presentation of the situation is presented in Fig 2 below.

Fig 2: Distribution by World Bank economic region of occupational accidents for the year 2003.

Source: www.ilo.org/safework

It is clear that even taking the view from a smaller angle sub-Saharan Africa reporting patterns remains largely the same. The picture for

occupational accidents and the pressures this exerts on is enormous. In
terms of policy, established economies have an advantage in that
there are systems or reporting of occupational accidents and work
related illness. This enables health and safety audits to be a carried out.

Protocol 155 to ILO convention 155\textsuperscript{644} on occupational health and
safety was adopted\textsuperscript{645} by the ILO to strengthen recording and
notification procedures for occupational accidents and diseases and to
promote the harmonization of recording and notification systems
with the aim of identifying their causes and establishing preventive

\textsuperscript{644} C.155 (Occupational Health and Safety) lays down fundamental objectives and defines
the basic principles of a coherent national policy. It covers all branches of activity and all
workers in those branches and is the most comprehensive of the current standards. It is
designed to be a policy instrument rather than an instrument prescribing precise legal
obligations. The key provisions require member States, in consultation with the most
representative organisations of employers and workers, to formulate, implement and
periodically review a coherent national policy on Occupational Health and Safety and the
working environment
the aim being the prevention of occupational accidents and injuries by eliminating or
minimizing the causes of hazards. In general terms C.155 specifies the spheres of action that
shall be taken into account in the policy. Nevertheless, C.155 also provides detailed rules on
actions to be taken at the national level and at the level of the undertaking. These cover the
whole range of measures regulated in the more specific Occupational Health and Safety
instruments adopted both before and after C.155. The convention is supplemented by R.164
(Occupational Health and Safety), which provides further details and additional practical
guidance on several of the provisions in C.155. Most of the current Codes of Practice provide
additional guidance as to the practical application of C.155. CoP (Occupational Health and
SafetyMS) takes a management systems approach to Occupational Health and Safety and
is designed for use at both the national and enterprise level.

\textsuperscript{645} Protocol of 2002 to the occupational Safety and Health Convention (Note: This Protocol
has not yet come into force. Adopted on: 20:06:2002 at the 90th session of International
Labour Conference, Geneva
measures in accordance with article 4 of convention 155. This gives us grips of the place of healthy and safety in economic agendas. Like SADC most of regional blocs such as the EU started with purely economic concerns, but overtime they have learnt the role of health and safety in their integration and have taken social concerns aboard their programmes.

Though the reasons for the inclusion of social concerns are largely economic such as improved productivity, efficiency and creation of good industrial relations. This sort of assessment draws a lot on economic consideration of occupational health and safety646. Developing countries are slowly taking in the message evidenced by the revolution health and safety legislation in regional set-up as we will see later

646 See our discussion in Chapter Two, Supra, and p.
Occupational health and safety, the Wider Context.

General Trends

The extent to which occupational health and safety has generally been perceived in the last two decades as a form of market regulation, attests to this.\textsuperscript{647} The increased prominence of occupational health and safety in Bilateral Investment treaties (BITs), in regional set up like SADC and EU and multilateral set ups like as the ILO, World Trade Organisation, failed OECD Multilateral Agreement on Investment (MAI)\textsuperscript{648} are footnotes to the realised acceptance if not acceptance of the role of occupational health and safety in the economics of integration, fuelled by globalisation\textsuperscript{649}. However this is not without divergence. There are those that think it is a good thing as it strengthens workers rights and enhances social justice in the process on the one hand and those that say it will scare away investors.


\textsuperscript{649}The complex phenomenon of economic interdependency resulting from trade in goods and services and capital flows. See This liberalization of trade, as a part of globalisation carries the risk, as the Preamble to the Constitution of the ILO warns us, that international competition, by inhibiting the will of certain Members to introduce progress, might be 'an obstacle in the way of other nations which desire to improve the conditions in their own countries'." ILO Director General's 1997 Report on "The ILO, Standards Setting and Globalisation" at http://www.ilo.org/public/english/standards/norm/whynedd/lbrcomp.htm
The problem not unique to developing countries. For instance the Maastricht treaty's social chapter proves to be one of those rare examples of clear blue water between Britain's two main parties. The Conservatives won an opt-out for Britain, Labour has opted back in. Both have an interest in claiming that the social chapter would make a big difference\textsuperscript{650}.

Conservatives argued that it would impose huge costs on British firms. Labour argues that it would strengthen employment rights at a time of widespread job insecurity, and that British firms, like their continental counterparts, can well afford the cost of this\textsuperscript{651}. Such debates indicate that labour issues such as occupational health and safety are not an aside and an economic perspective on it will richly inform policy debate. The labour government abandoned the out-out as soon as it got into office and Britain has now signed up to both the social chapter and its protocol.

Occupational health and safety has re-emerged as a major issue on the social policy reform agenda internationally, attributable in part to a

\textsuperscript{650} See Hugo Gurdon 'The U.S. Should Unsign Kyoto' The Wall Street Journal Europe October 11, 2002

\textsuperscript{651} The Economist: The truth about the social chapter. Maastricht treaty's social policy agreement, 12/09/1995
vocal emerging global civil society. For instance in 1994 the British government completed a major 'Review of Health and safety regulation', twenty years after the introduction of the Health and safety at work act 1974. In the United States of America (USA), the Clinton Administration released the New occupational health and safety: 'Reinventing Worker Health and safety' in 1995 as apart of its broader 'Reinventing Government Initiative'.

In Australia the Industry commission published its compendious reports, Workers Compensation in Australia and Work, Health and Safety, in 1994 and 1995 respectively. In Norway and Sweden, new systems-based approach to regulation, known as internal control (IC) was

654 'Strategic Plan 2001-04' http://www.hse.gov.uk
655 In 1994 and 1995, the then Industry Commission conducted comprehensive inquiries into Australia's workers' compensation and occupational health and safety arrangements - Report No. 36 Workers' Compensation in Australia (4 February 1994) and Report No. 47 Work, Health and Safety (11 September 1995). In doing so, the Commission made a number of recommendations addressing national arrangements for both workers' compensation and occupational health and safety.
introduced in the early and mid 1990s. Within the EU a series of occupational health and safety Directives has triggered increased regulatory action at national level.

Closer home in 1997 Malawi passed the occupational Health, Safety and welfare Act (occupational safety, health and Welfare Act,1997) to regulate conditions of employment with emphasis on occupational safety health and welfare (emphasis supplied). At SADC level in 2003 a Charter of Fundamental Social Rights was adopted. The charter serves as a blueprint for occupational health and safety among other things in the region.

At an international level there has been activity too evidenced by the increasing numbers of countries ratifying or taking steps to ratify ILO conventions on conventions on relating to occupational health and safety. In June 2001 a new convention Safety and Health in

657 In terms of occupational health and safety the leading Directive is the EEC Directive on the Introduction of Measures to Encourage Improvements in the Safety and Health of Workers at Work Directive 89/391
658 Act No.21 of the Laws of Malawi
659 See the title and purpose clause of the Act
660 Articles 11-12 of the Charter
661 As of the time of writing this thesis countries had ratified Convention 155 on occupational health and safety. Three of these are from the SADC region, Lesotho (01:11:2001), South
Agriculture Convention, (C184)\textsuperscript{662}, was adopted by the ILO. Interestingly the preambular language of C184 speaks of the need for a coherent occupational health and safety policy in agriculture as one of the driving force behind the adoption of the convention. This is a vindication of our earlier submission that there has not been a coherent policy on occupational health and safety in agriculture and the failure of general occupational health and safety to adequately address specific challenges obtaining in specific industries.

The problem is exacerbated by increasing industrial specialisation accelerated by technological developments and advances. These developments have had a knock-on effect on employment patterns. A global employment culture that puts profit before jobs and social security is leaving no corner of the globe untouched. The move from a regular workforce to a Japanese type 'just in time\textsuperscript{663}' pattern has increased the preference of seasonal and casual workers over a

\begin{flushright}
Africa (18: 02: 2003) and Zimbabwe (09: 04: 2003). Other countries like Malawi are said to be taking steps to ratify the convention. However Protocol of 2002 (P.155) to the occupational Safety and Health Convention as of 13th September had not received even a single ratification, Convention No.161 (C161) On occupational health services was ratified by 22 countries. Sadly for SADC only Zimbabwe ratified it on 09:04:2003
\end{flushright}

\textsuperscript{662} Convention concerning the Safety and Health in Agriculture: Date of coming into force: 20:09:2003.

So far there has been only three ratifications namely Finland (21:02:2003) Republic of Moldova (20:09:2002) and Slovakia (14:06:2002).

\textsuperscript{663} A system of production using minimal inventories and relying on prompt and efficient deliveries of materials just before they are needed. It relies on reliable reporting of stock holding which is facilitated by the use of computers. It has the advantage of reducing the space needed to store inventories and the interest costs of financing them
Firms are coming under increasing pressure from shareholders to cut costs and increase profits. Boardroom pressures trickle down to management decision making that have a bearing on occupational health and safety. Sadly such effects are not covered by traditional legal mechanisms, necessitating an approach that provides framework legislation for specific industries as has done Convention 184 and other legislative devices at of national and regional ambit.

In the absence of such response fundamentals of free-market economy would be just another Alice in Wonderland. The above attest to the fact that occupational health and safety as a form of regulation of the market in a global market economy is occupying centre-stage. The approach to occupational health and safety in the past had largely taken on a one-size fits all approach characterised by the application general labour or employment law to issues of occupational health and safety. An example of this is Factories act of Malawi and other former British colonies. This produced a jurisprudence that tended to emphasise compensation over

664 See Article.13 (n) of the constitution of Malawi, ante.
665 Carroll &Lewis (1997), Alice in Wonderland Smith mark Publishers
prevention. The attitude of courts reflects this as well\textsuperscript{668}. It is not surprising that the Roben Report recommended a shift of emphasis from compensation to prevention as the primary aim of occupational health and safety regulation. This report has had the impact it was not intended for. It had affected the political and philosophical thinking on occupational health and safety regulation in many jurisdictions worldwide.

**Development of Occupational Health and Safety Regulation**

Present day approaches to health and safety policy and regulation are rooted in the 1960's when trade unions in many countries turned their attention to issues related to the "quality of working life\textsuperscript{669}" such as job security, job satisfaction and occupational health and safety. Later in the decade heightened community awareness of the industrial origins of environmental health\textsuperscript{670} issues caused workers and their unions to "adopt a more questioning approach to potential hazards in the workplace\textsuperscript{671}". Public and worker insistence that "something be done" led to review and revision of occupational health and safety policy.

\begin{itemize}
  \item \textsuperscript{668} Hamilton Mingole (HC) of Malawi, Supra.
  \item \textsuperscript{669} See generally, Alister C. Munthali, *The role of occupational hygiene profession in sustainable development* (1996) Centre for Social Research, University of Malawi
  \item \textsuperscript{670} See the Cape Asbestos case, supra No.
  \item \textsuperscript{671} Creighton and Gunningham\textsuperscript{1985}, p.8
\end{itemize}
and regulation. In the 1970s new laws and policies, which were national in ambit, were adopted in a number of countries. These changes in law and policy established a new framework for occupational health and safety. Institutional mechanisms were created to ensure that conflict over health and safety related issues was managed more effectively and resolved more equitably. Employers were encouraged to engage with workers and introduce strategies to address health and safety issues on an ongoing and systematic basis.

In the United States in 1970, The occupational health and safety Act was passed. In terms of this act, a standard setting and enforcement agency, The Occupational Safety and Health Administration (OSHA) was established. The National Institute for occupational health and safety (NIOHS) was created to provide research and technical assistance, and the National Advisory Committee on occupational Safety and Health (NAC) was appointed.

---

672 See report of the WHO/ILO Joint effort on occupational health and safety in Africa. Harare, March 2001 p.2. The background of this meeting is the urgent need for strengthening occupational health and safety in the African Region, responding to the hazardous work environments and the huge burden of occupational injuries and diseases. Coordination between WHO and ILO is necessary in order to be more effective and because workplace health and safety efforts take place under both Ministry of Health and Ministry of Labour in many countries. In a previous consultation meeting the idea of an African Initiative on occupational health was developed, to serve as an umbrella for actors and activities in the area, to develop a common framework and objectives, and to serve as a fundraising platform.
Representatives of both labour and management\textsuperscript{673} are included in the advisory committee. In 1974, in Britain the Health and Safety At Work Act was promulgated and the Health and Safety Commission (HSC), a tripartite policy-making institution was set up together its inspection and enforcement arm, the Health and Safety Executive (HSE)\textsuperscript{674}. In Sweden in the early 1970s, the ASV (Arbetarskyddverket or Worker Protection Board), an independent agency which was established under the Worker Protection Act of 1949 to oversee the promulgation and enforcement of regulations, was revitalised\textsuperscript{675}. In 1978 a new law, the Working Environment Act was passed\textsuperscript{676}. In other parts of Scandinavia, namely Norway and Denmark similar laws were adopted in the mid-70s\textsuperscript{677}.

In Italy, worker participation and protection from health and safety hazards were boosted by the Worker's Statute of 1969 and the National Health Service Law of 1978\textsuperscript{678}. In Germany legal and policy reform\textsuperscript{679}. Other countries in which similar reforms were undertaken include France, Belgium, the Netherlands and Finland\textsuperscript{680}.

\textsuperscript{673} Ashford\textsuperscript{1976}, p236
\textsuperscript{674} Dawson, Willman et al.\textsuperscript{1988} p184
\textsuperscript{675} Kelman\textsuperscript{1981}, p3
\textsuperscript{676} Oscarsson\textsuperscript{1985}, p159
\textsuperscript{677} Gustavseri\textsuperscript{1985}, p141, Benjamin and Greef\textsuperscript{1997}, p77
\textsuperscript{678} Misiti and Bagnara\textsuperscript{1985}, p41
\textsuperscript{679} Naschold\textsuperscript{1985}, p239
\textsuperscript{680} Ashford\textsuperscript{1976}, p502, Benjamin and Greef\textsuperscript{1997}, p65
Historical Context

Political independence in Southern Africa created possibilities for fundamental changes in labour relations. Having shed off colonial yokes, the new independent governments often nationalised all industry and services and had the opportunity to give shape to labour relations. Inspired in most cases by European experience and theory, a watered-down version of industrial relation was introduced in many countries. The hope was that such systems would create democratic practices and institutions in the overall process of social-economic development.  

The above policy fitted in ideologies aiming at a rapid change to self-reliance and self-determination. Participation and self-management became part of broader strategies for change and development towards a new socio-economic order, often socialist in character. Charismatic leaders like Banda, Nasser, Nyerere and Kaunda played prominent roles in mobilising and initiating these policies.

The ideological loading and the indoctrinating party control that accompanied the first phase of participatory development had a

---

681 Article 3 and Article 4 of the Abuja treaty
682 See Article 4 (k) of the Constitutive Act of the African Union
weak base. Participation was introduced in cases such as Malawi and Zambia by presidential decrees, was not legalised except in a few cases and if legalised, its powers were not strong enough to counter company laws inherited from colonial times. This made participation vulnerable to manipulation by government and employers. It stared to reflect traditional managerial values rather than becoming an instrument for effective redistribution of power and income.

The sad outcome was that democratically won power became corrupted. There was a shift from utopia to slogan, from slogan to dogma, from dogma to repression and from repression to dictatorship. The deterioration of popular participation followed the same path i.e. from economic and social liberalisation to manipulation and from manipulation to exploitation. In such a climate it is hard to imagine meaningful dialogue between employers and employees, let alone among social partners. One obvious casualty has been health and safety and it development.

---

The OAU's obsession with a political agenda disadvantaged a social economic programme such that when the Abuja treaty came into force on 3rd July 1993 the economic map of the continent had a number of shades of regional economic blocs each pursuing its own regional agenda. What the treaty effectively did was to adopt them\textsuperscript{687}. It policy guideline though was good, the reality on the ground was that it scheme did not fit in well with established programmes and became irrelevant.

Participation in industrial governance was labelled 'responsible participation', thereby co-opting trade unions to the execution of party polices (e.g. Malawi and a majority of SADC states), demanding industrial peace and higher productivity\textsuperscript{688}. Trade unions were sidetracked in some countries and in others government introduced works councils by legislation which gave equal or in practice, more power to directly elected works committees or works' councils than to trade union.

The failure of the one-party state to cope with economic development provoked the infamous structural adjustment programmes, introduced by the World Bank and the International Monetary Fund (IMF) and supported by the European Union and the USA. These programmes

\textsuperscript{687} Article 28 (1) of the Treaty

\textsuperscript{688} National security laws were often used to silence industrial action in most one-party states such as Malawi. In such an environment worker participation in matters concerning their health, safety and welfare was severely limited in form, substance and quality.
sought to reduce the public sector, to liberalise the market and to privatise the ownership of the economy. The aim was to improve living conditions (emphasis supplied) of African citizens. The end of the cold war and the dismantling of socialist systems in Eastern Europe gave an additional impulse to neo-liberalism and privatisation.  

Hopes and expectations were once re-created by the transition to a multi-party democracy in the 1990s. Political democracy in Africa has remained weak. One possible explanation for this is that it was introduced using external pressures through development aid blackmaill and often without the populations realising what changes were implemented. It meant to many settling of accounts, intolerance and sterile opposition. The democratic process has been hijacked by urban elites who have used it to realise private ambitions, unleashing what is derogatorily known as ‘help yourself economics’ in which corruption and economic plunder are the order of the day.

---

689 Kester 1996, p.2
690 In Malawi, the former Head of State Dr, Banda and members of his inner-circle were arrested and tried unsuccessfully for murder. In Zambia, Kaunda was stripped of his citizenship and was put in jail. In South Africa, Mandela chose a different path. He set up a truth and Reconciliation Committee that looked at the injustices of the apartheid era. This was aimed at emotional haling as opposed to physical and d economic punishment settled on by some of the second generation of African leaders elsewhere on the continent.
691 In countries like Malawi at present there no effective opposition as the governing party has through financial starvation reduced opposition parties to its satellite parties at it financial mercy.
The challenge for Africa generally is how to give a new lease of life to industrial democracy. Africa and SADC in particular has made a choice of no return in favour of democracy. However the fragile and young democracy risks becoming an illusion if social injustice, exclusion and deprivation continue to grow. Questions such as what is the value of economic progress of a privileged sector, which benefits from structural adjustment if this progress is annihilated by industrial unrest, war or the de facto end of democracy is and has been asked. For this reason it is not surprising to see the emerging prominence of health and safety at regional as well as domestic agenda in regional economic set-ups such as SADC and COMESA.

**Situation Overview**

Although occupational health knowledge and technological innovation have led to solutions to many work-related health problems, these same problems continue to challenge Southern African workers. While there are evident efforts to apply safety policies within some multinational companies, in reality many in Africa operate according to standards differing from those adhered to in the North, which is a

---

693 On the state of poverty in the SADC region see, World Development Report 2003
694 See the executive summary to the 2001/2002 SADC Annual Report p.10
695 See the Human Poverty index for SADC 2003 in the SADC Annual Report .p57
696 The SADC charter is an example
697 The level of health and safety legislation and its expanding and changing scope illustrates this point
departure from internationally recognized standards contained in the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.

Chemicals banned or severely restricted in Europe such as DDT are in common use in Southern Africa. The more advanced Southern African Development Community (SADC) economies, such as South Africa are producing and exporting hazardous processes and substances to other parts of the region. The introduction of export processing zones and the quest for foreign investment make the SADC more vulnerable to such hazardous industrial processes.

However there seems to be a realisation dawning in the region that in seeking to maintain the link between social progress and economic growth, the guarantee of fundamental principles and organisational rights is of particular significance. This enables persons concerned to claim freely and on the basis of equality of opportunity their fair share of the wealth, which they have helped to generate, and to achieve fully their human potential. This as we have seen is linked to the democratisation process weeping through the region. Increased trade union and NGO activity has been responsible for the wave of legal

---

698 See the American position in relation to its GSP programme with developing countries in Bhala, international investment law (2000)
reforms taking place in the area of occupational health and safety in member states\textsuperscript{699}.

The agricultural sector due to its very nature and composition of its workforce\textsuperscript{700} is the hardest hit, in this economic liberalization process. It is often neglected and as a predominantly rural economy, is at the mercy of rural public health that is often substandard compared to urban public health. This has a bearing on occupational health and safety of the workforce as well as the communities around. This is an issue as disease treatment and diagnosis are effectively done at local

\textsuperscript{699} Rene Loewenson (April 1998), 'Situation analysis and Issues in occupational health and safety In The SADC Region' SADC Employment And Labour Sector Meeting Mauritius, Oatuu Hsep

\textsuperscript{700} ILO studies, knowledge and behaviour of pesticide users in Benin African newsletter on occupational health and safety volume 8 number 2 September 1998. The use of pesticides has increased rapidly in African countries. This study on the knowledge and behaviour of the farming population of Benin shows that more than three out of four users are young. They haven't gone to school, and 83.2\% of them ignore both the nature of the products and the instructions on the product labels.

Almost half of the farming population takes precautions that are useless and even dangerous (such as drinking milk, oil or alcohol). Almost all the empty packaging is reused for household purposes.

These findings underline the need for training and for increasing the awareness of the farming population. There is also a need to educate potential instructors (e.g. rural development personnel, health care personnel, etc.)
health centre that neither have enough qualified staff nor resources and equipment for the complex treatment and diagnosis of occupational diseases and injuries.

Despite the evident unsafe nature of workplaces in Southern Africa, workers' occupational illnesses and work-related injuries are poorly detected and rarely diagnosed as being work-related. Workers are poorly informed about the health risks of their work, or they fear bringing their problems of ill health into the open, owing to job insecurity. Systems, services and the legislation governing these are rigidly divided into workplace health (or occupational health) and public health, despite the fact that the worker moves between these two environments and is affected by both.

Neither the worker nor, often, the health worker is able to separate the element of the illness caused by poor working conditions from that caused by poor living conditions. Though reforms are taking place, sector specific legislation is not a common feature of the new reform wave so that the proposed health and safety law applies generally to different sectors. This does not and will not adequately respond to occupational problems attendant

Agriculture due to its complex nature presents problems that are unique to it as well as those present in other sectors of the economy so
that general health and safety law may not adequately address all occupational problems in this sector of economic activity. It is for this reason that we will devote a great deal of our time addressing this sector from a legal and policy standpoint.

Relevance of occupational health and safety to SADC

A number of rationales for a policy on occupational health and safety for SADC could be advanced. The starting point is the impact of globalisation and liberalisation of the global economy, which has brought about increased trade and investment mobility. Globalisation is having both positive and negative effects of relevance to occupational health and safety. On a positive note increased trade has been beneficial to sub-Saharan economies and is the best alternative to donor aid.

701 The ILO convention 155 on occupational health and safety states that the term health, in relation to work, indicates not merely the absence of disease or infirmity; it also includes the physical and mental elements affecting health which are directly related to safety and hygiene at work.

On the negative side the increased trade and foreign investment for instance agricultural inputs such as agro-chemicals has brought new hazards and risks that SADC economies are ill-equipped to handle\textsuperscript{703}.

The technological gap between the producing developed countries and consuming SADC states has been one reason, let alone illiteracy and innumeracy levels in the region that call for regulatory intervention to mitigate the erosion of social standards in the name of free trade in a liberal investment schemes\textsuperscript{704}. Faced with serious institutional limitations in the area of social protection and the impact of health and safety on integration we will see, it is in SADC's interest to improve its record on health and safety if its collective economic gains are not wiped off by social consequences of work related accidents, ill-health and fatalities\textsuperscript{705}.

Granting that everyone has a right to health which include a right to safe working and living conditions\textsuperscript{706} it becomes imperative that in the

\textsuperscript{703} Alberto López-Valcárcel (Dec.2001) New challenges and opportunities for occupational Safety and Health (Occupational Health and Safety) in a globalised world; The African Newsletter of occupational health and safety

\textsuperscript{704} See Memorandum on The Economic Viewpoint in occupational Safety and Health supervision, Ministry of Social Affairs and Health Department for occupational safety and Health ampere, Finland 1999 International Publications

\textsuperscript{705} Ali Taqi, Globalization of Economic Relations: Implications for occupational Safety and Health An International View, XIVth World Congress on occupational Safety and Health Madrid, 23 April 1996

\textsuperscript{706} UDHR, ILO.C.155 and the Constitution of Malawi
context of economic integration programme like that of SADC the jurisprudence of human rights provide some of the reasons why occupational health and safety is economically efficient and an indispensable part of the integration equation.

National and international human rights instruments emphasise the 'indivisibility' of civil, political, economic, social, and cultural human rights\textsuperscript{707}, i.e. that the objective of individual self-determination and self-development requires not only 'negative' freedoms but also 'positive' economic and social rights, enabling citizens to acquire the economic resources and social means necessary for actually using their human rights\textsuperscript{708}.

Modern economic theory emphasise the instrumental role of human rights for economic and personal development, e.g. as incentives for savings and investments, as legal preconditions of professional freedom and transfer of property rights in an exchange economy, and as defensive rights promoting the 'internalisation of external effects' through contractual agreements or court litigation.

\textsuperscript{707} J. Rawls, \textit{The Law of Peoples} (Cambridge, MA: Harvard University Press 1999), e.g. 113-20

\textsuperscript{708} Article 22 of the UDHR: 'Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.
'Freedoms are not only the primary ends of development, they are also among its principal means ... Political freedoms (in the form of free speech and elections) help to promote economic security. Social opportunities (in the form of education and health facilities) facilitate economic participation. Economic facilities (in the form of opportunities for participation in trade and production) can help to generate personal abundance as well as public resources for social facilities.

Freedoms of different kinds can strengthen one another\(^{709}\). Hence, only with political freedoms can people genuinely take advantage of economic freedoms. Rights make human beings better economic actors. You can not legislate good health and jobs. You need an economy strong enough to provide them and for that you need people economically engaged. People will work because they enjoy the fruits of their labour: fair pay, education, and health care for their families and so forth.

Thus economic and social rights are both the incentive for and the reward of a strong economy. When individuals are acknowledged as an important part of the system they tend to take responsibility for it and make efforts to maintain and improve it\(^{710}\). Under investment into


\(^{710}\) Human Development Report 2000 (UNDP 2000), at iii and 57
health and safety is not an acknowledgement of the value of labour and is unlikely to inspire a sense of responsibility that could result in improved efficiency and productivity.

Recognition of human rights, such as freedom of producers and consumers, gives rise to market competition and calls for legal rules enabling mutually agreed market transactions (e.g. liberty rights, contract law, property rights), limiting abuses of market power (e.g. by means of consumer protection law), and promoting monetary stability and undistorted competition (e.g. by means of monetary, securities, and competition laws).

Besides the human rights argument other reasons can be given why occupational health and safety crucial to SADC or any integration programme. They include what is known as the integrationist rationale. This is premised on the fact that harmonisation of laws and social values are the cornerstone of any integration agenda. For the integration process to move forward, member States need to find common ground in their national policies and plans. Emerging social problems with a regional dimension may stimulate further intergovernmental co-operation. These include those associated with

---

711 Article 21 of the treaty
712 See our discussion on the effects of globalisation on occupational health and safety
occupational health\textsuperscript{713} and as safety\textsuperscript{714}, AIDS infection, cross border drug running\textsuperscript{715}.

Secondly Common health and safety standards assist economic integration, since products cannot circulate freely within the region if prices for similar items differ in various member states because of variable health and safety costs imposed on business\textsuperscript{716}. In other ways harmonisation of occupational health and safety standards inn the region would assist the process economic integration. In talking about occupational safety and health standards, we are in fact referring to two distinct types of standards.

First, there are the standards concerning labour. They define the general conditions of occupational safety and health in the workplace. The objective in harmonising this type of standard is to prevent "social dumping"; i.e. prevent the comparative advantages that are derived from lower production costs at the expense of sub-standard working conditions in the enterprise. By harmonising these

\textsuperscript{713} Occupational health also includes occupational hygiene, occupational medicine. See s.1 of the South African occupational health and safety Act. Act No.85 of 1993

\textsuperscript{714} In Article.12 of the treaty as a mended social and human development is one of the core areas for integration. Poor living and working conditions would not be advancing the case for social and human development, the opposite would be true


\textsuperscript{716} Frank B. Wright (1997) Law of Health and Safety at Work; Sweet and Maxwell, London, pp.32-33
standards, we are also seeking social integration within the process of economic integration and liberalisation, in a way that economic growth, achieved through economic integration and liberalisation, is accompanied by social progress717.

Second are the standards concerning product safety. As tariffs are eliminated or reduced, as is currently occurring with the regional economic integration agreements and with the signing of multilateral trade agreements in the framework of the World Trade Organisation (World Trade Organisation), non-tariff technical barriers acquire more significance in international trade718. Technical standards, particularly those related to product safety, could block international trade as effectively as high tariffs did in the past, and for that reason harmonisation of product safety standards has become a prerequisite for economic integration.

Thirdly a reduction of human, social and economic costs of accidents and ill health borne by the workforce will not just bring huge financial

717 Op.cit, Note n. Supra
savings but also increased productivity and quality of life for the whole SADC region.

Fourth, the health status of the workforce in every country has an immediate and direct impact on national and world economies and has political implications. In the case of Malawi the constitutional measure of the success or failure of government policies is rural standards of living. This means there is a political incentive to improve health and a safety both at domestic level as well as regional level. Internal conflict in member states arising out of social disquiet will not be in the best interest of the region’s development as was seen in the case of Zimbabwe which had a knock-on effect on other member states.

The last century brought new and complex technologies into the industrialised world. The risks that these brought have been exported to developing countries such as the SADC region, which often lack the

---
720 See report tripartite meeting on moving to sustainable agricultural development through the modernization of agriculture and employment in a Globalised economy. Geneva, 18-22 September 2000
721 Article.13 (e) of Constitution.
infrastructure to support and maintain these new technologies safely. Economically, these countries offer transnational corporations a competitive advantage. Companies based in countries such as Malawi offer cheap labour and low operating costs, but little incentive to promote environmental ethics, safety procedures and community investment. Firms typically find it more economical to avoid compliance and pay the penalties than to meet statutory requirements. On account of the resources and skill gap between the developed home states and developing host states the only realistic prospect of effectively regulating or enforcing occupational health and safety is through collective action within regional frameworks for occupational health and safety regulation.


723 The Case of Bhopal is a classical example. On December, 3rd, 1984, just after midnight, the Bhopal agricultural pesticide plant released approximately 40 metric tons of methyl isocyanate (MIC) into the atmosphere, resulting in the death of as many as 3000 and injuries to thousands more. The plant was operated by Union Carbide of India, Limited (UCIL), a company controlled (via 50.9 percent stock ownership) by the Union Carbide Corporation (UCC), an American chemical company. UCC provided the basic design of the plant, supervised its engineering and defined operating procedures to run it. Prior to the catastrophe, the Bhopal plant had been losing money for several years due to the weak demand in India for pesticides. This resulted in major personnel reductions, particularly in regard to production and maintenance. At the time of the accident, the plant had been shut down for over a month for a complete maintenance overhaul. Important safety devices were out of commission and staffs with no MIC training were in supervisory roles. Consequently, when a large amount of water entered the MIC tank, the ensuing reaction caused a leak. This was quickly identified, but defects in the MIC unit and staff inadequacies prevented any containment.

The total economic losses due to occupational illnesses and injuries are enormous\textsuperscript{725}. Such losses are a serious burden on economic development\textsuperscript{726}. Thus, apart from health considerations, the improvement of working conditions is a sound economic investment. The International Labour Organization (ILO) estimated that in 1997, the overall economic losses resulting from occupational diseases\textsuperscript{727} and accidents\textsuperscript{728} were approximately 4\% of the world's gross national product. In 1992, in European Union countries, the direct cost paid out in compensation for work-related diseases and injuries reached 27 000 million ECUs. In 1994, the overall cost of all work accidents and work-related ill health to the British economy was estimated between £6 000 million and £12 000 million were estimated to be US$171 000 million, surpassing those of AIDS and on a par with those of cancer and heart disease. In the USA, health care expenditures are nearly 50\% greater for workers who report high levels of stress at work.\textsuperscript{729}

\textsuperscript{725} The Burden of occupational Illness; Press Release WHO/318 June 1999 http://www.who.int


\textsuperscript{727} The term occupational disease covers any disease contracted as a result of an exposure to risk factors arising from work activity. Article.1 of the ILO protocol 155 to convention 155, on occupational health and safety.

\textsuperscript{728} Ibid Article.1 The term occupational accident covers an occurrence arising out of or in the course of work, which results in fatal or non-fatal injury.

\textsuperscript{729} See generally who reports on www.who.org
The introduction of more efficient work practices brings about increased productivity and better industrial relations, that is essential for a smooth functioning of the economy which is vital for economic integration. The case of Zimbabwe illustrates the need for industrial and political tranquillity and harmony. Hence it would be safe to say that there is both a political and economic case for occupational health and safety.

Commentators hold the view that regulation of certain risks such as those arising from massive explosions, should be harmonised at a supranational level on account of the scale for resource costs because any disparity in the substance and application of health and safety laws and regulations produces distortions of competition and affects products prices.

The other explanation for spelling out a social policy within SADC as exemplified by the charter would be that Economic trends clearly indicate that issues of poverty and inequity are paramount concerns in the region. Unemployment, underemployment and poverty are manifestations of employment and developmental problems of the region.

---

730 Alan Neal and Wright. [1997] p.32
These problems require comprehensive strategies, including social protection measures, alongside economic- and regional integration, addressing specific contingencies such as sickness, maternity, employment injury, unemployment, invalidity, old age and death; the provision of medical care; and the provision of subsidies for families with children. Other new or indirect contingencies such as poverty, lack of food and water, transport, energy and education also need to be addressed on the regional level.

Historically economic integration has provided a rationale for the promotion of social rights in order to guarantee a level playing field and to avoid distortions of competition\textsuperscript{731}. In the case of the European union integration has been conceived as a safeguard of the welfare state, thus it is a new forum in which social rights no longer viable at national level are reintroduced\textsuperscript{732}.

Though it is true that regional integration is economic, it is not view exclusively so. It needs to be complimented by some form of political integration, which must include a system of social protection such as health and safety. Political integration is a functional necessity deriving from economic integration or arises from an independent political


\textsuperscript{732} Lo Faro, A (2003) \textit{Regulating social Europe: Reality and myth of collective bargaining in the EC legal order} at \url{http://arc.cs.odu.edu}
claim, which stresses the need for solidarity\textsuperscript{733} and political clarity\textsuperscript{734} on crucial issues within SADC\textsuperscript{735}.

**Trends in the Region**

The colonial laws that were inherited by a majority of Southern African states such as Malawi, Zambia and Zimbabwe from the colonial past were limited in scope and often poorly enforced. Following independence, effort was concentrated on public health reform. Only in the 1980s and 1990s have the occupational health laws that date back to the 1940s been subjected to review. The past decade or so has seen an active process of revision to the occupational health and safety legislation in most of the Southern African states\textsuperscript{736}. Both national and international pressures are responsible for this.

\textsuperscript{733} Article 4 of the SADC treaty

\textsuperscript{734} Emily Mkamanga 'Price of political vagueness' "the problem with political vagueness is that it is costly. People rely on rumours and are bound to make wrong decisions, which end up breaking political structures. Even well established parties with long experience such as the map become victims. Once political structures are broken, the next thing is continuous bickering and no time for development strategies. If African countries are serious about improving their economies, they must normalise their local politics first to avoid conflicts, which so far are hijacking aims and objectives of regional groupings such as SADC". Visit http://www.nationmalawi.com/Articles.asp Article, 668, - 13-03-2002

\textsuperscript{735} Cf charter of fundamental social rights of the European Union (2000/c 364/01 Articles 27-38

\textsuperscript{736} South Africa passed Act No. 85 of 1993: Occupational Health and Safety, subsequently amended by occupational health and safety Amendment Act, No. 181 of 1993, Malawi passed the occupational health, safety and welfare Act, 1997,
Changes in Health and safety legislation in the region have been inspired by an approach to occupational health and safety policy and regulation which first emerged in the 1970s and which broke with traditions established over more than a century ago, at the time of the industrial revolution in Europe. A reflection on the occupational health and safety in the SADC region as is the case on a global scale reveal how decisions about occupational health and safety and the environment are influenced by competing interests, incompleteness of scientific knowledge, differences over what is fair or just, and the compartmentalisation of public policy.

Building on this knowledge it should give policy makers and aid in deciding policy direction and how conflicting priorities can be reconciled. For unless this is appreciated, good occupational health and safety legislation runs the risk of becoming symbolic and unhelpful. The importance of tracking developments abroad, strengthening participatory processes, developing national policy, linking economic policy and occupational health and safety policy, and establishing appropriate trade agreements are stressed need no emphasis.

The new occupational health and safety model envisaged in the SADC charter and reflected in domestic legislation in countries like Malawi.\textsuperscript{737}

\textsuperscript{737} Act 21 of 1997, occupational Safety, Health and Welfare Act (Occupational Health and safety) of Malawi,
and South Africa involve changes in the form and substance of policy and regulation that have significant ramifications for institutional design and practice. Changes in form encompass the emergence of national policy, the adoption of national legislation and the creation of national institutions.

Changes in substance emphasise prevention, participatory processes, performance standards and mechanisms aimed at reconciling competing pressures. Despite sweeping changes to

738 occupational health and safety Act 1993 of South Africa
739 See the purpose clause of Occupational Health and Safety (Malawi) and the Health and Safety Act (South Africa)
740 These deal with the management of occupational health and safety such as the Inspectorate, or the Health and Safety Commission in the case of the UK and its enforcement arm, the Health and Safety Executives (HSE).
741 See preamble to the Occupational Health and Safety Act (Malawi), Article 4 (1) of ILO C.155 on occupational health and safety
742 S.13 (5) of Occupational Health and Safety Act (Malawi), S.13 of occupational health and safety Act (South Africa), Act No. 85 of 1993, Article 4 (2) of ILO C.155
743 The reasonable practicability test introduces in occupational health and safety legislation as a legal device that balances competing economic and social priorities and concerns. The general duty of care provisions in occupational health and safety as contained in ILO Convention C.155 and it accompanying recommendation, proposed Articles 11 and 12 of SADC social charter, Under s.3 of the UK Health and Safety at Work Act 1974, employer organisations have to consider whether they are ensuring, so far as is reasonably practicable, that people not in their employment are not exposed to risk to their health and safety. This is true under ss.15, 17 and 18 of occupational safety, health and Welfare Act, 1997 of Malawi. Practicable means it must be possible or capable of being done safely. To carry out a duty as far as is reasonably practicable means the degree of risk in a particular activity or environment can be balanced against measures taken to control it. Bux v. Slough Metal Ltd (6 July 1973) CA ([1974] 1 All ER 262, General Cleaning Contractors v Christmas [1953] referred to in Pape v Cumbria County Council (23 May 1991), HC [1991] IRLR 463 The 'reasonable practicability' test must take into account, the nature of the employment or, as the
occupational health and safety law in the last decade, Health and a safety system in SADC remain seriously deficient in a number of respects\textsuperscript{744}.

Not only is fragmentation and inconsistency a problem but also the systems are inward looking, and the assumptions implicit in new legal formulae have not been fully appreciated. For example, changes in law have been driven-by a deep and justifiable mistrust of insular-and unilateral decision-making and stress participatory processes.

However, the application of rights, which support participatory processes, such as the right to participate, to representation and to know, is not straightforward. It is necessary to satisfy a number of conditions if these rights are to be made meaningful. Finally new concepts introduced such as risk assessment, are not uncontested. While risk assessment provides a basis for evaluating and prioritising risk, case may be, the particular aspect of the employment concerned, the severity of any potential injury or harm to health or safety that may be involved, and the degree of risk that exists in relation to such potential injury or harm. It must also take into account the state of knowledge about the injury or harm to health or safety that may be involved; the risk of the occurrence of that injury or harm to health or safety; and any methods of preventing, removing or mitigating that injury, harm or risk, the availability and suitability of ways to prevent, remove or mitigate that injury or harm to health or safety or risk. Finally it takes into account, whether the cost of preventing, removing or mitigating that injury or harm to health or safety or that risk is prohibitive in the circumstances. As the risk increases, it is reasonable to increase substantially the time, effort and cost needed to reduce or eliminate that risk.

\textsuperscript{744} Rene Loewenson (April 1998), 'Situation analysis and Issues in occupational health and safety In The SADC Region' SADC Employment and Labour Sector Meeting Mauritius, Oatuu Hsep
it is not value free. New uncertainties and tensions are introduced. Further structural and programmatic change is required if the changes introduced are to yield the desired results.

Nature of Health and Safety Regulation.

In the course of the years there has been a change in the nature of the standards created by such regulatory labour legislation and also in the sanctions through which they are enforced. There is a tendency to pass from the "thou shalt not" to the thou shalt. Legislation on maximum hours, on Sunday and holiday work, on the employment of women, children, and young persons is prohibitive, or, if you like, negative: it is forbidden to employ certain persons for more than a stated number of hours, or on certain processes or at certain places or at all.

Occupational health and safety legislation has always been different in that it is positive in nature. It says to the employer: "thou shalt," for example, ensure that dangerous machinery is securely fenced or that ladders do not slip." Obligations imposed by such "protective" legislation matter whether it refers to hours of work, to safety, health and welfare, or even to certain aspects of wage payments" are

746 E.g. factories act 1961, ss. et seq.; children and young persons Act.
747 Factories Act (UK) 1961, s. 14; cf factories act (Malawi) ss...
generally imposed by Health and safety law, on the employer not as an employer, that is as the party to the contract of employment, but as the occupier of the premises.

the geographical scope of application very much depends on the wording and definition of 'premises' in a particular piece of legislation\textsuperscript{748}. Such obligations are in the social sense managerial obligations, and act as restrictions on the rule, and decision-making powers of management\textsuperscript{749}.

Management involves the control of material as well as of human resources. The law says that it is, as a controller of material and not of human resources that the employer must observe e.g. provisions on safety and on hours of work. A sociologist might say that the command power of management is here concealed behind the screen of the power exercised through the occupation of "premises."

From the lawyer's point of view what matters are the practical consequences of this approach to managerial obligations. If, for example, a worker is injured in an accident due to his employer's failure to have dangerous machinery properly fenced he (or, if the accident is fatal, his widow or next of kin) can claim compensation from the

\textsuperscript{748} See the definition under the Malawi act, factories act etc. S.2

\textsuperscript{749} Tripartite consultations are an example of this.
employer. Normally they will not claim for a breach of the contract of employment\textsuperscript{750}, but for the breach of a general statutory duty imposed by the law upon the occupier of the premises for the benefit of all those who have entered them lawfully\textsuperscript{751}.

In the civil courts protective legislation of this type is enforced through the law of tort and not generally through the law of contract. Whatever the ideological root of these arrangements, in practice they are sensible and beneficial. To rely on such legislation a person injured in an accident does not have to show that there is any contract between him and the occupier at all.

Thus, if owing to a breach of statutory duty incumbent on the occupier a man is injured who is or was employed by a contractor doing some building or repair work in, say, a factory, he can recover damages from the factory owner (occupier)\textsuperscript{752} which in practice means from his insurance company\textsuperscript{753}. An independent contractor such as a window

\textsuperscript{750} Matthews v. Kuwait Bechtel Corporation [1959] 2 GD. 57 (C.A).
\textsuperscript{751} In fact the obligation is owed not only to that are privy to the contract but to the world, as he is to have in contemplation those that could be injured by his actions or omission. See the cape asbestos case's See also Groves v. Lord Wimborne [1898] 2 GD. 402 (C.A.). cf Hunter v Hanley (1955) slt 213 (Court of Session) s 305.
\textsuperscript{753} See compulsory insurance under the employment act of Malawi.
cleaner can rely on these safety provisions\textsuperscript{754}, and so can, in certain circumstances at least, workers employed by a labour only "subcontractor\textsuperscript{755} a matter of great and growing importance especially in the building industry\textsuperscript{756} a very characteristic feature of British labour legislation.

**Basis for occupational Health and a Safety in SADC.**

SADC exists in a web of regional as well as continental organisations all of which have had an influence on policy direction vis-à-vis social and economic spheres\textsuperscript{757}. On a continental level the existence could be traced back to the charter of the African unity\textsuperscript{758}. Article 2 of the charter contained a commitment by member states to coordinate and intensify cooperation in order to achieve a better life for the peoples of Africa. Article 2 (2)(e) sets out their modus operandi. They undertook to coordinate and harmonize their general policies in the area of economic cooperation among others. This was to be done within the

---

\textsuperscript{754} The principle was laid down by the court of appeal in Lavender v Diamints ltd. [1949] 1 K.B. 585, and affirmed by the House of Lords in Wrigley v. British Vinegars Ltd [1964]1A.C. 307.


\textsuperscript{756} Report of the committee of inquiry under professor E H. Phelps Brown into certain matters concerning labour in building and civil engineering, cmnd. 3714 (1968), esp. chaps. VI and vii.

\textsuperscript{757} See Annex 2

\textsuperscript{758} Done at Addis Ababa, Ethiopia 25th day of May 1963. This has now been superseded by the Constitutive act of the African Union, see, www.iss.co.za
framework of charter of the United Nations (UN), and the Universal Declaration of Human Rights\textsuperscript{759}.

Economic cooperation needed institutional framework and the first step in this direction came on 3\textsuperscript{rd} June 1991 when member states adopted the treaty (Abuja Treaty) establishing the African Economic Community in the Nigerian Capital Abuja with the sole purpose of creating an African Economic community (AEC)\textsuperscript{760} that would foster economic, social and cultural integration of the African continent\textsuperscript{761}. The community was to be predicated on the rule of law\textsuperscript{762} human rights\textsuperscript{763}, accountability\textsuperscript{764}, economic justice and popular participation in development\textsuperscript{765}. One of the objectives of the said community is promotion of cooperation in fields of human endeavours such as employment so as to raise continental standards of living\textsuperscript{766}. Thus working and living standards are an important piece of the jigsaw.

\textsuperscript{759} Article 2 (10 (e) of the Charter
\textsuperscript{760} See Annex 2, infra.
\textsuperscript{761} Para7 of the preamble to the treaty
\textsuperscript{762} Article.3 (e)
\textsuperscript{763} Article.3 (g)
\textsuperscript{764} The treaty did not define accountability however the common understanding would be that it meant political accountability which unfortunately was visibly absent in most member states anyway until recently after the end of cold war, when a new wave of democratic dispersion was ushered in many countries, especially of the SADC region. Whether social and corporate accountability could be said to have been envisaged is doubtful. This is on the basis that the treaty preoccupied itself so much with fighting and strengthening African solidarity against colonialism
\textsuperscript{765} Article.3 (h)
\textsuperscript{766} Article.4 (c)
There is a recognition that improved living standards enhance economic stability, foster close and peaceful relations among member states and their contribution towards socio-economic progress, development and continental economic integration\textsuperscript{767}.

At institutional level the treaty provides for an economic and social commission\textsuperscript{768} charged with responsibility among others of preparing programmes, policies and strategies for cooperation in areas of economic and social development among African countries on the one hand and between Africa and the international community on the other. One way to realise such an ambitious goal had been to strengthen the then existing regional economic communities such as SADC and COMESA\textsuperscript{769} and where no existed to encourage such so as to ensure gradual establishment of the community in a accordance with its Article 6. to act as implementation units of the community

The Organisation of African Unity (OAU) was on 9\textsuperscript{th} July 2002 replaced by the African Union (AU)\textsuperscript{770}. The organisation’s ideal espoused in its charter has now been re-enacted into its constitutive Act (The Act)

---

\textsuperscript{767} This is particularly true if considered in view of some of the flash points in Africa. The problems in Zimbabwe have more to do with social exclusion than the tabloid politics on whose diet we are always fed. The tensions between Rwanda and Uganda for instance have been exacerbated by social and economic injustice on both sides of the boarders.

\textsuperscript{768} Article.7 (d)

\textsuperscript{769} Article.28 (1)

\textsuperscript{770} Visit www.africa-union.org
adopted on 11th July, 2000 in Lomé, and Togo. Unlike its predecessor the AU has a more-expanded agenda. The OUA was preoccupied with fighting colonialism and social issues such as human rights were secondary. It makes provision for a defined transitional period, which will ensure a smooth and gradual transition of the OAU and AEC into the Union.

The Constitutive Act replaces the Charter of the OAU. However, at the time of writing the thesis, the Charter remained operative for a transitional for purposes of enabling the OAU/AEC to undertake necessary measures regarding devolution of its assets and liabilities to the African Union and all matters relating thereto. The adoption of the Constitutive Act should be seen as the first step in an ongoing process to streamline and rationalise the existing organisational framework of the Continent, in so doing making the African Union relevant to the demands of the 21st Century and to achieve the ultimate goal of complete African unity.

The text of the constitutive Act indicates that it combines in a single text the charter and the ideals contained in the treaty establishing the AEC. The significance is that a social agenda for the AU is not a by-product of the political and economic agenda as was done under the OAU charter. The elevation of the social side of integration is a great step for

771 Article 2 of the Act
772 Article 3 of the Act. cf Article 2 of the Charter
health and safety and has implication for the continent’s economic policy as it has to take account of this. The challenge is for institutions to carry on this agenda. Realistically such a programme is easily harmonised or executed in smaller units such as economic groupings. In this case it would be groupings such as SADC, Comesa and Ecowas to name a few. In any case these organisations are building blocs of the AEC.

The other reason would be that since Africa has had a unique history of colonisation it means that different parts of Africa were through colonialism subjected to different ideologies for instance Francophone Africa has been so much influenced by French political thought in as much as British political thought influenced its former colonies. Harmonisation presupposes the existence of common social and economic conditions, otherwise ideological crash could stall progress. The situation would be otherwise on a regional level where for instance a majority of members share a common heritage, as is the case with British colonies of the SADC region.

In terms of socio-economic policy, article 5 as read with article 22 of the Act establishes an economic, social and cultural council (ECOSOCC) as an advisory organ of the Union. At the time of writing this thesis a draft statute of the ECOSOCC had been finalised but yet to be adopted by the AU assembly. This development sets the road

773 See our discussion on SADC in the last chapter
map for a continental socio-economic policy that balances trade and investment with social protection.

It is now then for individual regional set-ups to open-up for dialogue with AU institutions in policy formulation. It is interesting that the ECOSOCC is meant to be exclusively a body of civil society organisation (Civil Society Organisations) in AU member states. This is a vindication of our assertion that Civil Society Organisations have a vital policy role to play in relation to market and asocial regulation. The question is, is there such communication at the moment between SADC and continental structures? To answer this question we need to examine SADC instruments of relevance to occupational health and safety and how they fit into the grand continental agenda.

**Treaty Base for Health and Safety Regulation**

The cornerstone for achieving SADC's aims generally has been its 'Framework and Strategy for Building the Community, adopted as a major policy guideline in January 1993. It identifies issues to be addressed, measures to be taken and the process to be followed to implement the Treaty. Crucial to effective implementation of the SADC Framework and Strategy is the establishment of democracy and a culture of popular participation in the region. In the area of social

---

774 Article.2 of the draft ECOSOCC statutes, Exp/Draft/ECOSOCC Statutes/ Rev.2
policy the road map is its social charter\textsuperscript{775} adopted by the summit in Dare Salaam, Tanzania ion 26\textsuperscript{th} August, 2003. In this chapter an examination of the charter is undertaken.

Any discussion of occupational health and safety in SADC has to proceed from a consideration of the source documents such as the treaty and its subsidiary instruments derive. In the context of occupational, health and safety, its tool box comprises a six-pact outfit i.e. the protocol on health\textsuperscript{776}, the social charter\textsuperscript{777}, a code of practice on the safe use of chemicals\textsuperscript{778} and the code of conduct on HIV/AIDS and employment\textsuperscript{779}. This is not the same as saying that these are the only or most important sources of occupational health safety policy and law in the region, rather they represent SADC's own efforts to give meaning and effect to treaty provisions in a accordance with art.22 which makes provision for the adoption of protocols and subsidiary instruments as a means of implementing the treaty.

In article 5(1)(a) the treaty seeks economic and social policies that tend in the ultimate end to bring about improve living standards in the

\textsuperscript{775} Each of the charter's 18 Articles, which set out individuals' rights or freedoms, is taken from a "precursor" text. This can be another charter, a convention, a treaty or jurisprudence

\textsuperscript{776} DONE at Maputo, this 18th day of August 1999

\textsuperscript{777} An electronic copy is available at www.iss.co.za

\textsuperscript{778} Copies of this is available from the SADC Employment and Labour Sector Coordinating Unit, Lusaka, Zambia.

\textsuperscript{779} Ibid
region. Since in the case of SADC there is hardly a fine line separating living and working environment, overall occupational health and safety ought to assume a heightened measure of importance. The case is strengthened by increased trade and investment flows\(^780\) into the region open up the region to new occupational hazards with the potential of becoming public health concerns such as agrochemicals\(^781\).

To appreciate this fact see Fig.4 below on the global flow of investment. Although in global terms the flow to SADC region is small, in terms of regional share there has been a steady increase in the flow towards developing countries generally according to the World Investment report compiled by UNCTAD for the period covering the period 1993-2001. What is essential is not the percentage of Foreign Direct Investment rather the fact that global investment flows to developing countries on the whole as of 2001 had shown a steady increase. This increase has implications for health and safety such as increase in agro-chemicals requiring regional health and safety policies that take this into account has never been more imperative than now.

---

781 See the background to the code on the safe use of chemicals in SADC.
Note: Fig 3 shows a sharp decline in global Foreign Direct Investment flows especially for the period 2000-2001. This shows the response of business to international political climate. Terror attacks in the USA on 9th September sent global economic shocks as shown by corresponding flows to developed countries. Developing countries were not so much affected such that though global trends might have responded negatively, individually developing countries continue to experience a measure of increased trade and investment.\textsuperscript{782}

\textsuperscript{782} At the time of writing this thesis the WIR for 2003 was not out. However a synopsis was available. It showed that it focuses on the Foreign Direct Investment (Foreign Direct Investment) downturn, its reasons and the role of national policies and international investment agreements (IIAs) to attract Foreign Direct Investment and benefit from it. Part One discusses the overall trends in Foreign Direct Investment. Foreign Direct Investment flows have dropped drastically. No rebound is expected in 2003. This question is discussed for the world as a whole, as well as by region. Part Two seeks to advance the understanding of host country policies and measures that are particularly important for attracting Foreign Direct Investment and benefiting from it. It then focuses on key issues that straddle national Foreign Direct Investment policies and international investment agreements, with a view towards bringing out the development dimension.
In terms of sources of occupational health and safety for SADC it would be useful to note that article 4 (C) of the treaty present SADC as a rule based organisation that upholds the rule of law and as an international organisation that conducts its external relations within the confines of international law\(^{783}\). The protocol on the tribunal empowers the tribunal to apply the treaty, protocols made under article 22 of the treaty and subsidiary instruments adopted by the summit or any organ of the community\(^{784}\). Further the tribunal is required to develop its own jurisprudence having regard to applicable treaties, general principles and rules of public international law and principles of the law of states\(^{785}\).

A similar formula is found in the trade protocol that seeks to conduct SADC trade within the framework of World Trade Organisation law\(^{786}\). Art.12 of the social Charter specifically makes ILO convention 155 on occupational health and safety part of the charter. This flows from article 3 of the charter on basic human rights and organisational rights.

The article provides that the charter embodies the recognition by social partners in the region of the indivisibility of basic human rights

\(^{783}\) Para.12 of preamble to the treaty as amended
\(^{784}\) Article.21 (b) of the protocol
\(^{785}\) Ibid Article.21 (a)
\(^{786}\) Articles.16-21 of the Trade Protocol
proclaimed in instruments such as the United Nations Universal Declaration of Human Rights, the African Charter on Human and People's Rights, the constitution of the ILO, the Philadelphia Declaration\textsuperscript{787} and other relevant international instruments. All these are potential sources of SADC occupational health and safety law.

SADC's determination for a better standard of living for its people is clear from its preambular language in paragraph three of its treaty\textsuperscript{788} in which it affirms its determination to ensure, through common action, the progress and well being of the people of the region. Art.4 sets down the organisations governing principles, which include human rights\textsuperscript{789}, democracy and the rule of law [Art.4 (c)]. These are requisites for an inclusive and participatory political and industrial democracy.

The right to health implies to right to a safe and health working and living environment\textsuperscript{790}. It is important that SADC introduces itself as rule-based organisation\textsuperscript{791} as it sets out the parameters within which it will conduct its business in the present context its within the rule of law.

\textsuperscript{787} visit www.ilo.org
\textsuperscript{788} See http://www.SADC.int
\textsuperscript{790} Article.12 (a) of the SASDC charter
\textsuperscript{791} Article.4 (c) of the treaty
Rule of law might mean different things to different people depending on the context and usage\textsuperscript{792}. However in the context of SADC as would be the case with all international organisation includes international law, fundamentally it includes international economic law as applied in its external economic relationship in the process of regional integration. The philosophical rationale for a rule-based organisation is that based on past history for the region human rationality, morality and dignity calls for rule-oriented rather than power-oriented behaviour.

Rule-of-law has been described by Plato as a moral and legal prerequisite for democratic self-government and individual self-development\textsuperscript{793}. Contrary to his earlier recommendation of a government (In the case of SADC, a community) by philosophers, Plato emphasised in his later writings that person-oriented 'political ethics' needs to be supplemented by general legal rules and institutional safeguards so as to protect citizens from arbitrary abuses of power and transform their 'natural freedom' (based upon physical power) into 'legal freedom' (based upon general legal rules and mutual respect)\textsuperscript{794}. These freedoms according to Plato thrive well in a liberal political environment predicated on the rule of law\textsuperscript{795}.

\textsuperscript{792} See Gordon Woodman, op.cit
\textsuperscript{795} SADC is an organisation based on the rule of law. See Article 4 (c) of the treaty
Art. 5 of the treaty sets out the organisation's objectives. Top on the list is the achievement of development\textsuperscript{796} and economic growth, alleviation of poverty, enhancement of the standards and quality of life of the people of the region and to support the socially disadvantaged through regional integration. How it sets out to achieve this in practical terms is crucial. Art.6 spells out the strategy for the realisation of the said goals and objectives. One way has been through harmonisation of political and socio-economic policies and plans of Member States \[\text{Art.5 (2) (a)}\]. The other is through the encouragement of people of the Region and their institutions to take initiatives to develop economic, social and cultural ties across the Region, and to participate fully in the implementation of the programmes and projects of SADC \[\text{Art.5 (2) (b)}\].

Member states also cooperate in areas necessary to foster regional development and integration on the basis of balance, equity and mutual benefit\textsuperscript{797}. Finally member states are supposed through appropriate institutions to coordinate, rationalise and harmonise their overall macro-economic and sectoral policies and strategies, programmes and projects in the areas of co-operation\textsuperscript{798}. Areas of

\textsuperscript{796} See. Article.22 (2) of the African Charter on Human and peoples' Rights (ACHPR)
\textsuperscript{797} Article.21 (1)
\textsuperscript{798} Article.21 (2)
cooperation include industry, trade, investment, finance, agriculture and social welfare.\textsuperscript{799}

The above envisages the involvement of civil society such as Trade union, the media and NGOs in policy formulation and implementation in the region.\textsuperscript{800} The extent to which this has been the case is a matter for debate, what is clear is that on a domestic level there has been a mushrooming of civil society of varying sophistication and degrees of independence. A common explanation has been political reforms that swept through the region in the 1990s. Most countries in the region with the exception of Swaziland, which is a monarch, have embraced some form of democratic governance.

The impetus ironically for change in the region has not been from SADC rather from global trends such as the end of the cold war, which ushered in an era of respect for human rights as an aspect of foreign policy for major donors to the region. The conditioning of aid on Human rights and the impositions of economic sanctions led to a sudden collapse of social and economic structures in countries such as Malawi and Zambia. The result of this was popular disquiet that paved way for political reforms.

\textsuperscript{799} Article 21(3) of the treaty
\textsuperscript{800} See Article 23 of the treaty providing for NGOs
However SADC has sought to carry forward this process, but mounting levels of unemployment, poverty, and HIV/AIDS\textsuperscript{801} scourge has derailed the process. People have become disillusioned with social and economic policies in the region as a result\textsuperscript{802}. Questions are sometimes being asked whether this is a manifestation of a policy failure or merely a failure of policy implementation? The answer to such a question can be found by observing developments within SADC.

The restructuring process indicates that institutional weakness has impeded the realisation of goals it set out to achieve. The debate surrounding a comprehensive social policy in the form of the SADC Charter of Fundamental Social Rights (The Charter)\textsuperscript{803} on the model of the European social Charter\textsuperscript{804} is a vindication of those that have maintained a call for a clear self-standing social policy for the organisation. We will recall from our previous discussion that the political thinking in SADC from its inception has been for an

\textsuperscript{801} See the \textit{Human Development report 2003}

\textsuperscript{802} Minutes of Workshop SADC Preparatory Meeting for WSSD This workshop was the second in a series of regional workshops held in preparation for the World Summit on Sustainable Development in South Africa. It took place from the 29th September – 1st October 2001 at Kopanong Hotel, Benoni, South Africa. Nine out of the 14 SADC countries were represented.

\textsuperscript{803} The Charter sets out in a single text, for the first time in SADC's history, the whole range of civil, political, economic and social rights of SADC citizens and all persons resident in the SADC.

\textsuperscript{804} \textbf{European Social Charter}, Turin, 18.X.1961
economically driven social policy, where economic growth is expected to translate into social progress.

Development was conceived in economic terms with the social aspect as its by-product. The thinking was clearly misconceived. The historical context in which SADC was born is important. Its origin in the Frontline States (FLS) meant that political ideals, such as independence from colonial rule influenced the organisation philosophical outlook. Though the FLS in its vision had social and economic strategy, along the way the two seem to have been sidelined.

After independence, it was time to turn glory into tangible economic and social gain. The choice settled for was that of development and economic growth. The political systems at the time did not encourage popular participation and in most countries authoritarian rule was the order of the day. Social dialogue, let alone industrial democracy suffered.

The above partially explains the slow development of a self-standing social policy in the region. This policy vacuum explains the absence of a coherent policy of occupational health and safety at regional level and each member states has been left to formulate its

own policy on occupational health and safety. However recently there have developments in the area of occupational health and safety. Now let's examine these developments in some detail.

**SADC Charter of Fundamental Social Rights**

SADC states in August 2001 at their Blantyre summit of Heads of States and governments adopted a charter of fundamental social rights (The charter). Since then it has been a consultation document until 26th August 2003 when it endorsed by the summit to be opened for ratification by member states. This is a milestone for occupational health and safety in the region. In as far as policy is concerned SADC seem to be responding to some of the criticisms we raised earlier.

The piecemeal development of social policy let alone occupational health and safety policy is reactionary and faces the usual problem of finding its form and shape to fit into existing dilemmas. Without a functional independent community court or tribunal it remains to be seen how development and harmonisation of a community regulations

---

806 Lord Denning once described, EU social legislation is indeed an un-stoppable tide, which had flowed up English Estuaries and looks set to breach remaining defences. If you can't beat it, you have to join it, and go with the flow. He said the Social Chapter was alive and well and very much directing its attention towards the rights of employees and duties of employers! See www.learnedcounsel.com

807 http://www.uni-africa.org.zm/SADCcHarte

808 Article 12 of the Charter is the lead Article for occupational health and safety

809 Op. cit Chapter V
relating to on occupational health and safety will be achieved\(^\text{810}\). The Charter combines in a single text the civil\(^\text{811}\), political\(^\text{812}\), economic\(^\text{813}\), social\(^\text{814}\) and societal and environmental rights\(^\text{815}\) hitherto laid down in a variety of international\(^\text{816}\), regional or national sources\(^\text{817}\). It is purportedly modelled on the European social charter\(^\text{818}\). It embodies the recognition by governments, employers and workers in the region of the universality and indivisibility of basic human rights\(^\text{819}\) proclaimed in instruments such as the United Nations Universal Declaration of human rights\(^\text{820}\), the African Charter on Human and peoples rights\(^\text{821}\)

\(^{810}\) Article 2(1)(f)

\(^{811}\) See Article 3 of the Charter.

\(^{812}\) Articles 4-6

\(^{813}\) See Article 14

\(^{814}\) Articles 6-11

\(^{815}\) Article 12. See also Article 24 of The African Charter on Human and Peoples Rights

\(^{816}\) Such as those listed in Article 3 of the Charter. ILO conventions expressly referred to in Article 5 of the Charter.

\(^{817}\) Each of the charters 50 Articles, which set out individuals' rights or freedoms, is taken from a "precursor" text. This can be another charter, a convention, a treaty or jurisprudence

\(^{818}\) European Social Charter Turin, 18.x.1961

\(^{819}\) Article 3

\(^{820}\) Adopted and proclaimed by the general assembly resolution 217 A (iii) of 10th Dec 1948

\(^{821}\) African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986: [excerpts] After the 1963 summit where African leaders signed the Charter of the Organisation of African Unity, they were invited to study the possibility of adopting an African Convention on Human Rights to give full effect to both the Charter of the UN and the Universal Declaration of Human Rights. The long process lasted until 1981 with the adoption of the African Charter on Human and Peoples' Rights. The African Charter came into force in 1986, and has been ratified by more than forty African states, thus becoming the most widely accepted regional convention. The uniqueness of the charter lays in the originality of its normative content. It has unusual features, in the sense that it covers economic, social and cultural rights (Article 15, Article 18, Article 20 (1) and Article 29) as well as civil and political rights (Article 8, Article 13 and Article
the constitution of the ILO, the Philadelphia declaration\textsuperscript{822} and other relevant international instruments\textsuperscript{823}.

It makes provision for the harmonisation of regulations relating to health and safety standards at work places across the Region\textsuperscript{824}. It also seeks to promote the formulation and harmonisation of legal, economic and social policies and programmes, which contribute to the creation of productive employment opportunities\textsuperscript{825} and generation of incomes, in Member States\textsuperscript{826}.

Further it advances the case for the promotion of labour policies, practices and measures, which facilitate labour mobility, remove distortions in labour markets and enhance industrial harmony and increase productivity, in Member States\textsuperscript{827} and the establishment of harmonised programmes of social security throughout the region\textsuperscript{828}.

\textsuperscript{20 (1) }, which actually distinguishes it from both the European and the American Conventions which follow a more traditional methodology. Furthermore, the African Charter covers third generation rights, and gives due importance to the assumption that a person has duties as well as rights in the community (Article 27, Article 28 and Article 29)

\textsuperscript{822} See www.ilo.org

\textsuperscript{823} The source of this Article is Article.4 (c) of the treaty in which member states undertake to organise themselves on the principle of human rights, democracy and rule of law inter alia. This is meant to secure international understanding, support and cooperation in line with para.5 of the preamble to the treaty.

\textsuperscript{824} Article 2 (f) of the Charter

\textsuperscript{825} Article.14

\textsuperscript{826} Articles 2(1)(b) and 11(a)

\textsuperscript{827} Article 2 (b) of the Charter. See Kenneth Kaoma Mwenda (1997) \textit{legal aspects of regional integration; comesa and SADC on the regulation of foreign investment in Southern}
As a region SADC has vast economic potential but still remains one of the poorest regions in the world. It is widely appreciated that issues such as the low economic growth rate\textsuperscript{829}, unemployment and underemployment, social exclusion and marginalisation, as well as the inadequacy of current labour and social protection standards and regulations must be addressed in the context of the regional integration agenda of SAD and the charter is a fitting response\textsuperscript{830}.

**Scheme**

The Charter is divided into eighteen articles that address issues ranging from Dignity, Freedom, Solidarity, Equality, and international law\textsuperscript{831}, Justice and workers' social rights. It stops short of incorporating the

\textit{Africa and Eastern Africa; African journal of international and Comparative law, vol.9 pt 2, p.325}

\textsuperscript{828} Article.10

\textsuperscript{829} Over the past five years, since 1995, SADC economies have been significantly transformed. Most SADC countries experienced recovery in their respective economic growth rates, investor confidence improved and capital flows resumed, particularly in Angola, South Africa, Mauritius, Mozambique and Botswana. The downside of this period is marked by the East Asian crisis of 1998-1999 that led to deep declines in economic activity in several emerging economies. The resulting financial market volatility led to a slowdown in growth rates of SADC economies, thereby forcing member countries to address its negative impact though prudent fiscal and monetary policies. However, the SADC region is now beginning to enjoy a strong economic recovery and the average economic growth rate was estimated at 5 percent during 1999/2000.


\textsuperscript{831} Article 5 incorporates ILO conventions.
more recent entrants on the social scene i.e. bioethics and personal data which the EU charter of fundamental Rights has\textsuperscript{832}.

This can be easily explained on account of the different levels of sophistications of the two economies. Where as bioethics is an issue in the EU, it is not in the SADC. However this does not mean that it will not in the near future be an issue, quiet the opposite. It would have been better if these were incorporated instead on wanting for a time when they will be an issue and start thinking of the onerous process of amendment which could be cost and protracted.

Of particular interest to our inquiry are articles 11 (improvement of working and living conditions) article 12 (protection of health, safety and environment), article 13 (information, consultation and participation of workers). These touch directly on occupational health and a safety. Also the issue of Health and safety in covered under the Protocol on health, article 23 (environmental Health) and Art.24 (occupational Health) which call for cross sectoral provision of occupational health Services\textsuperscript{833}. Recall the charter is one of the six pack tool-kit for occupational health and safety in the region\textsuperscript{834}.

\textsuperscript{832} \textit{Official Journal of the European Communities} C 364/1 18.12.2000

\textsuperscript{833} \url{www.SADC.int/protocols}

\textsuperscript{834} The others are the treaty, protocol on health, code of conduct on safe use of chemicals and conduct on HIV/AIDS and Employment in the Region. These are discussed separately later
Unlike the in the European union where harmonisation of standards has been fairly successfully, SADC stands in class of its own. Lack of a coherent policy on occupational health and safety in the past meant that every state formulated its own occupational health and safety independent of the other and according to how it interpreted the treat. The result had been a mushrooming of health and safety legislation in the region that has developed independent of a central policy guidance. In such harmonisation especially in the absence of a judicial organ has proved to be an uphill task. Increased intra-SADC trade has been a source of headache in as far as health and safety in the region is concerned.

This is so because larger economies such as south Africa have been servicing the SADC market in areas such as agricultural chemicals that have been a cause of public health concerns. Though individual state have had health and safety legislation enforcement has been a problem. The problem had been exacerbated by a luck of monitoring which the labour and employment sector should have done, but like the whole organisation it has institutional limitations that are now being attended to.

835 See discussion on the contribution of the court to the integration process
836 Trade Patterns in the SADC Region: Key Issues for the FTADPRU (March 2001) Policy Brief No. 00/P9, University of Cape Town Development Policy Research Unit, p.5 see http://www.commerce.uct.ac.za/dpru
At this stage let's look at provisions of the charter providing for occupational health and safety and what place in the overall economic programme for the region they occupy.

**Occupational Health and Safety Charter Provisions**

Lead articles for occupational health and safety are Art.11 (Working and Living Conditions) Art.12 (Health, safety and the environment). These articles are supported by others such Art.3 that introduces a human and organisational rights perspective and article 5 that calls on member states to establish a priority list of ILO convention and obliges them to take steps to ratify and implement relevant ILO instruments\(^{837}\) as a priority core conventions\(^{838}\). For the ease of reference and

---

837 As of the time of writing this thesis countries had ratified Convention 155 on occupational health and safety. Three of these are from the SADC region, Lesotho (01:11:2001), South Africa (18: 02: 2003) and Zimbabwe (09: 04: 2003). Other countries like Malawi are said to be taking steps to ratify the convention. However Protocol of 2002 (P.155) to the occupational Safety and Health Convention as of 13th September had not received even a single ratification, Convention No.161 (C161) On occupational health services was ratified by 22 countries. Sadly for SADC only Zimbabwe ratified it on 09:04:2003.

838 These include No. 29 Forced Labour Convention (1930); No. 87 Freedom of Association and Protection of the Right to Organize Convention (1948), No. 98 Right to Organize and Collective Bargaining Convention (1949); No. 100 Equal Remuneration Convention (1951); No. 105 Abolition of Forced Labour Convention (1957); No. 111 Discrimination (Employment and Occupation) Convention (1958); No. 138 Minimum Age Convention, (1973); No. 182 Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999) No. 87 Freedom of Association and Protection of the Right to Organize Convention (1948); No. 98 Right to Organize and Collective Bargaining Convention (1949); No. 100 Equal Remuneration Convention (1951); No. 105 Abolition of Forced Labour Convention (1957); No. 111 Discrimination (Employment and Occupation) Convention
discussion the two articles are reproduced as they stood on 30th November, 2003.

Article 11 makes provision for improvements to working and living conditions in the region. This is in recognition of the unique nature of occupational activities in a globalised economy where living and working environments are not easily separable. Also the interplay of the environment and the world of work require a holistic approach. Disasters like the Bhopal and Chernobyl, Cape asbestos case

---

(1958) No. 138 Minimum Age Convention, (1973) and No. 182 Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999) see www.ilo.org

839 See our discussion on the relevance of occupational health and safety for SADC, Chapter Seven

840 On April 25th -26th, 1986 the world's worst nuclear power accident occurred at Chernobyl in the former USSR (now Ukraine). The Chernobyl nuclear power plant located 80 miles north of Kiev had 4 reactors and whilst testing reactor number 4 numerous safety procedures were disregarded. At 1:23am the chain reaction in the reactor became out of control creating explosions and a fireball, which blew off the reactor's heavy steel and concrete lid. For more information visit http://www.un.org/ha/chernobyl

The Chernobyl accident killed more than 30 people immediately, and as a result of the high radiation levels in the surrounding 20-mile radius, 135,00 people had to be evacuated.

841 The case of Lubbe and others v Cape plc [2000] 1 Weekly Law Reports 1545, was decided by the House of Lords in June 2000. It is significant not only in legal terms but in that it has wide implications for the potential liability of multinational companies in relation to claims by employees or ex-employees outside the United Kingdom. The claimants' case was based on the allegation that before 1979, Cape plc had known of the injurious effects of asbestos but had failed to take appropriate steps to ensure the adoption of proper safety precautions and working practices by its subsidiary companies and had therefore acted in breach of its duty of care owed to employees and persons living in the area of the subsidiaries' operations. Exposure to asbestos was said to have taken place in different areas of South Africa and over varying periods of time, ending for the purposes of the claim in 1979. The case has since been settled out of court for £10.71. The main issue raised by the claim was formulated as follows: Whether a parent company which is proved to exercise de facto
illustrate how working and living condition or environments as impact on each other.

Such developments have always been on the mind of policy makers and its not surprising when the ILO on conventions 155 on occupational health and safety obliges ratifying members to in the light of their national conditions and practice, and in consultation with the most representative organisations of employers and workers, to formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment842.

The aim of the policy is to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, by minimising, so far as is reasonably practicable, the causes of hazards inherent in the working environment843. This has become a standard aim for Health and Safety regulation and is evident in art.2 (1) of the charter, which is its objective clause. The preamble to the occupational Safety, Health and Welfare Act (1997) of Malawi is to a similar effect. The relevant part of article 11 reads:

control over the operations of a foreign subsidiary and which knows, through its directors, that those operations involve risks to the health of workers employed by the subsidiary and/or persons in the vicinity of its factory or other business premises, owes a duty of care to those workers and/or other persons in relation to the control which it exercises over and the advice which it gives to the subsidiary company

842 Article.4 (1) of C.155
843 Article.4 (2) of C.155
member States shall create an enabling environment so that harmonisation of minimum requirements laid down in labour legislation and in particular the introduction of equitable basic working and living conditions, the specifications of minimum rest periods, annual paid leave, compassionate leave, paid maternity leave, occupational health and safety protection, and stipulation of acceptable rules and compensation for overtime and shift work, are achieved.

In the United Kingdom such a formula is incorporated into the Employment rights Act 2002\(^\text{844}\) incorporating the EU fixed Time Directive\(^\text{845}\). Art.11 sets out general requirements geared toward the promotion of occupational health, safety and welfare. The articles embodies a recognition of the changing pattern of employment in the region form fixed to flexible or just-in time\(^\text{846}\) patterns which in the past disadvantaged most of the workers as they fell outside scope of legal protection which traditionally covered those in regular employment. For instance it is possible to argue that paid leave is now extended to all classes of workers regardless of status. This is a direct improve their profit margins. One way is by maintaining a small number of workforces and hiring as need a rise (just in time)\(^\text{847}\).

---

844 The Employment Act 2002 received royal assent on 8 July 2002. It is a wide-ranging Act covering, among other things, the rights of working parents, dispute resolution in the workplace, employment tribunal procedures, fixed-term work and flexible working.


846 A system of production using minimal inventories and relying on prompt and efficient deliveries of materials just before they are needed. It relies on reliable reporting of stock holding which is facilitated by the use of computers. It has the advantage of reducing the space needed to store inventories and the interest costs of financing them.

847 See our discussion on regulation in chapter III, ante.
Art. 12 goes further than setting the scene in general terms, as does Article 11. It singles out occupational health and safety and spells out a framework position for SADC on occupational health and safety. On first sight it looks like a purely social provision but on close scrutiny reveals economic and environmental creeping\textsuperscript{848}. In a way this is a response to our anxieties that the social side of SADC’s integration agenda had been down played if not just not been thought had economic value.

The question would be what has been responsible for SADC change of heart. Well, a combination of factors could be responsible if indeed it’s a change of heart and not merely some window dressing designed to secure international understanding, support and cooperation\textsuperscript{849}. One could be a realisation of the economic cost of ill occupational health and safety\textsuperscript{850}, or the changing political climate in the region from authoritarian regimes to participatory democracy has been to the advantage of industrial democracy, which in the past became collateral damage of the political systems\textsuperscript{851}. It is also possible that

\textsuperscript{848} Article. 12 (k)
\textsuperscript{849} See para. 6 of the preamble of the treaty (as amended)
\textsuperscript{850} See our discussion of the economics of occupational health and safety, ante
international pressure and union activity in the region has played a vital role.\textsuperscript{852}

The scope of the provision is unique in that, almost each of its eleven sub-articles has a base of its own. For instance Art. 12 (e) originates from principles obtaining in ergonometry\textsuperscript{853} that seek to use improve workplace safety by appropriate design and construction of workstations, equipment taking into account special needs of end users. Under this principle equipment for pregnant women need to be suited to their needs and equally so for children.

SADC is a net importer of most of occupational hardware and ergonommetics has not yet entered most of member states vocabulary. It remains to be seen how effective this would be. As a policy guideline it will be effective in that it sets a framework for trade and investment policy in the region which member a states are expected to use a baseline in their national policies and legislation. The

\begin{flushright}

\textsuperscript{853} Science concerned with the measurement of human factors, such as body movements and fatigue, which are important in an industrial work process.
\end{flushright

335
value of this is that it is going to ensure that appropriate technologies are imported into the regional resulting in proper use and reduction of occupational accidents emanating from under-use, malfunction and incorrect use among others.

The effect for trade and investment is that states members could be able to demand from their overseas manufacturer's tailor-made equipment instead of using them as damping ground for unwanted equipment designed for the developed world which often results in incorrect use, malfunctions, and accidents and at times become a social exclusion factor. A good example would be facilities designed for those with disabilities. These encourage equal participation in the labour market. Lack of it could exclude some segment of the workforce. Theoretically a balance is being struck between enlargement of a labour market base through liberal economic reforms on the one hand and participation in the market through social inclusion.

Article 12 read:

Member States shall create an enabling environment so that:

a) subject to paragraphs b) to g), every worker in the Region has the right to health and safety at work and to a healthy and safe environment that sustains human development, access to adequate shelter,

b) employers shall provide safe workplaces that do not pose a risk to the health of employees or any other person exposed:
c) basic work environment and occupational health and safety standards as set out in ILO Convention No. 155 are provided;

d) engineering is prioritised to control risk from hazards at source;

e) the organisation of occupational health and safety shall be on the basis of bipartite and tripartite co-operation and the full participation of all parties;

f) workers have a right to information on workplace hazards and the procedures being taken to address them, and to appropriate health and safety training in paid working time;

g) workers have the right to stop work that they reasonably believe poses an immediate and serious risk to their health, safety or physical well being according to ILO Convention No. 155;

h) workers have the right to services, that provide for the prevention, recognition, detection and compensation of work related illness or injury, including emergency care, with rehabilitation and reasonable job security after injury and adequate inflation adjusted compensation;

i) employers control and are liable for work related environmental risks according to the 'polluter pays' principle;

j) workplace bases health service for workers is accessible, affordable and equitable, and is provided on a professional ethical basis; and

k) economic and investment measures take into consideration health, safety and environmental standards.

In chapter three we came to the conclusion that apart from being organisational rights, labour rights are also human rights. In terms of
comparative advantage we opined that much as this has advantaged for infant economies in that it enables them to meaningfully participate in global economy, the exception is that no one should be allowed to have comparative a advantage in human rights. It is important the charter in Art.12 (a) conceives occupational health and safety as a right.

The inclusion of environmental rights is an expression of the link between the environment and working and living conditions. This extends the scope of application to third parties that could be affected through environmental pollution by occupational hazards as was the case in the case of cape asbestos Cape. This fact is clear from sub-article (b) which enjoins employers to provide safe and work places that do not pose a risk to the health of employees or any other person exposed.

Art.12(c) sets a benchmark to the regulation of occupational health and safety in the region by adopting ILO convention 155 on occupational health and safety. The advantage of this is that in view of a poor ratification record of ILO conventions by member states, let a alone those that relate to occupational health and safety, their

854 See Article.12 of the Protocol on Health, Supra
855 Lubbe and others v Cape plc [2000] 1 Weekly Law Reports 1545
856 cf S.13 of Occupational Health and Safety Act (Malawi)
857 See www.ilo.org/ratifications
inclusion in the charter provisions is will make them part of the domestic law of ratifying member states, unless reservation has been entered.

This is an excellent alternative to ratification especially when domestic agendas weigh heavily in favour of non-ratification. It must noted that the formulation of the charter received a lot of input by way of technical assistance from stakeholders such as the ILO and it not surprising that the charter is formulated in such inclusive terms858.

As said Art.12 incorporated broad principles from a variety body of knowledge such as ergonomics859, occupational health and safety and environmental law860. Sub-article (i) introduces the principle of polluter pays into health and safety. This stems from the interplay of occupational health and safety and the environment. The economic rationale behind this linkage is to reduce the externalisation of the cost of industrial activity or as it were cost shifting to tax payers.

858 This is not the only instance where ILO conventions are incorporated. Other examples include Article.5 (a) (ILO conventions), Article.7 (a) (Protection of children and Young People), and Article.14 (Education and Training). Other are implied from the language used in the charter e.g. Article.12 (h) is absence on ILO convention No.161 of occupational health and safety services when it creates a duty on employers to provide services provide for the prevention, recognition, detection of work related illness or injury.
859 Article.12 (d)
860 Article. (l)
The polluter pays principle holds responsible for the environmental and economic effects of his or her polluting activities. For instance, if you pollute a river and someone downstream gets lower-quality water, or must buy more expensive water as a result, you owe compensation to them. This principle is more relevant with regard to waste disposal.

The problem with this principle is that it assumes that the polluter may be found or detected and in cases of historical pollution this has not been the case. Even if they could be identified at the time of identification the company may have ceased trading (Cape Asbestos case).

The other difficulty if considered in the context of integration is that the polluter may see the extra costs simply as an addition to the production costs of the product or process. Consequently the may be added to the overall price of the product and passed on to consumers that could cause distortions in price in the region that would be unhelpful to the movement of people, goods and services.

861 Imperial Oil Ltd. v. Quebec (Minister of the Environment), 2003 SCC 58 (2003.10.30),
863 See R v Secretary of State for Trade and Industry, exparte Duddridge [1996] Env LR325 CA
However its value for SADC is that it brings occupational health and safety, and environmental matters within the framework of regional economic integration with an overall effect of improving occupational health and safety in the region and the burden on the purse of environmental degradation by industrial processes\textsuperscript{865}.

Finally art.12(k) enjoins member stated to create an enabling environment that ensures that economic and investment measures take into consideration health, safety and environmental standards. Perhaps this is most important sub-article in the whole charter in that it advocated the linkage of trade investment with labour and environment. It answers critics of the linkage question\textsuperscript{866}. Industrial disasters in the past decades have shown how these issues are linked and the value of a holistic approach that addresses the problem in a focused medium, instead of partial solutions that approach these issues (World Trade Organisation position) or those that don't realise or if they do trade them off with one another (Competitive advantage).

In as far occupational health and a how policy in the region art.12 sets the right tone. It remains to be seen how SADC implement and achieve


\textsuperscript{866} See discussion on the linkage in Chapter III, Supra.
harmonisation in the region. This can be by means of standard setting or proving framework policy instruments\textsuperscript{867}.

At the time of writing this thesis three policy documents of relevance to occupational health and safety had been issued by the Employment and Labour Sector (ELS) viz, code of practice on the safe use of chemicals in the SADC, code of conduct on HIV/AIDS and employment in SADC and code of conduct on the employment of children and women in SADC\textsuperscript{868}. Let now look at this code.

**Code of Practice on the Safe Use of Chemicals in SADC (1997).**

**Background**

Each year thousands of people die or are seriously poisoned by toxic pesticides and other chemicals\textsuperscript{869}. Many of these substances also cause devastating problems when released into the environment, where they may poison water resources, animal and plant life and people. Unwanted and obsolete stockpiles of such pesticides and toxic

\textsuperscript{867} For instance *The European Commission adopted a White Paper on Environmental Liability* on 9 February 2000 (COM (2000) 66 final). The objective of the White Paper was to explore how the polluter pays principle, one of the key environmental principles in the EC Treaty, can best be applied to serve the aims of Community environmental policy. The White Paper explored how a Community regime on environmental liability might best be shaped. Having explored different options for Community action, the Commission concludes that the most appropriate option was a Community framework directive on environmental liability.

\textsuperscript{868} www.iss.co.za or www.SADC.int

\textsuperscript{869} In Malawi deliberate pesticide poisoning has been reported include suicidal death resulting from pesticide abuse.
chemicals have accumulated in developing countries such as those of the SADC region.

Many of these chemicals are persistent organic pollutants (POPs), highly toxic chemicals that persist in the environment for long periods of time, accumulate in wildlife and people and are mobile in the environment, possibly traveling thousands of kilometers from where they were released. It was hoped that the code would solve these pressing human health and environmental problems by reducing the use of these chemicals to where they are absolutely necessary and can be used safely, thus prevent new chemical safety problems.

In SADC, the manufacturing and use of chemicals is rapidly increasing in all sectors of economic activity. Many chemicals used in the region are imported. Some of these are banned or restricted in their countries of origin due to serious harm they could cause to people and the environment.

Many of the chemical related injuries and illnesses and the harmful effect to the environment in the SADC is neither detected nor managed due to the still underdeveloped systems of regulation, monitoring and detection.

870 See Implementation of The Globally Harmonised System of Chemical Classification And Hazard Communication (Ghs) In South Africa: Progress Report No. 2 Fund For Research Into Industrial Development, Growth And Equity (Fridge) January - March 2003
of chemical hazards and their effects\textsuperscript{871}. Despite this under detection, there is evidence that acute and chronic poisoning of workers is taking place and that short and long term environmental degradation is occurring.

It is internationally recognised, as reflected in the ILO Convention 170\textsuperscript{872}, that there is need for clear standards of practice that identify the duties and rights of all parties in relation to the safe use of chemicals\textsuperscript{873}. These standards should apply in the working environment, within and between SADC member states and the international community.

It is therefore, necessary to establish a systematic approach to safe use of chemicals. An effective control on the safe use of chemicals requires an efficient flow of information from manufacturers or importers to the users of chemicals on the potential hazards and the precautionary measures to be taken.

Following on from this the international community has adopted a mechanism for information sharing in international trade in chemicals.

\textsuperscript{871} Serumola.O and Mbongwe.B \textit{Chemical Substances Management in Botswana} available at \url{http://www.chem.unep.ch}

\textsuperscript{872} \textit{Convention concerning Safety in the use of Chemicals at Work}. Came into force: 04:11:1993.) Unfortunately for SADC only Zimbabwe has ratified this convention \url{www.ilo.org}

\textsuperscript{873} See, \textit{The Convention on the Prior Informed Consent (PIC) Procedure}
known as The Rotterdam Convention on the Prior Informed Consent (PIC)\textsuperscript{874}.

There is a realisation that some countries may not have the level of knowledge or means of getting information about certain chemicals with negative consequences for communities. This flow of information should be followed by regular action by employers to ensure that the necessary measures are taken to protect workers, and consequently the public and the environment. It is in this vein that this code was adopted by SADC in 1997.

It should be noted that though it has implications for occupational health and safety and was adopted before the social charter it did was designed exclusively to give guidance to member states in basic standards for the safe use of chemicals that could apply in all areas of trade, investment and production\textsuperscript{875}. It provides a framework for inspection and enforcement of such standards\textsuperscript{876} and on a framework for tripartite communication, information, networking and training in the safe use of chemicals\textsuperscript{877}.

\textsuperscript{874} The Rotterdam Convention on the Prior Informed Consent (PIC) Procedure for Certain Hazardous Chemicals and Pesticides in International Trade was adopted at a Conference of Plenipotentiaries in Rotterdam on 10 September 1998. During the signing ceremony on 11 September 1998, 61 States and one regional economic integration organization signed the Convention.

\textsuperscript{875} Article 1 (a) of the code

\textsuperscript{876} Ibid, Article 1 (b)

\textsuperscript{877} Ibid, Article 1 (c)
The strategic goal of the code is to ensure the protection of workers from chemical hazards and the prevention or reduction of the incidence of chemically induced illnesses and injuries resulting from the use of chemicals at work which would consequently enhance the protection of the general public and the environment.

The Code represents an important step towards ensuring the protection of citizens and the environment in SADC from the possible dangers resulting from trade in highly dangerous pesticides and chemicals. It establishes a first line of defence against future tragedies by preventing unwanted imports of dangerous chemicals, in the region. By extending to member countries the ability to protect themselves against the risks of toxic substances, it seeks to "level the playing field" and raise regional standards for protection of human health and the environment.

The scope of application covers all economic and social policies, laws and practices and all branches of economic activities. It applies to all workplaces in the private and public sectors including export

878 Ibid Article.1 (1)
879 Ibid Article.1 (1)(i)
880 Under the prior informed consent procedure contained in the Article 1(1) (i) of the code importing countries can refuse the importation of those chemicals that are severely restricted or banned and published under PIC. See the negative import decisions made by some of the SADC countries at http://www.fao.org/pic/Country.htm
881 Ibid, Article.1 (1) (ii)
processing zones and the informal sector. This is quite an ambitious scheme. The informal sector in the SADC region as is the case in all developing countries poses a particular problem in that it falls largely outside the scope of regulatory supervision.

However it has the highest concentration of low levels of innumeracy and literacy. They are twice as much not to understand chemical hazards symbols and warnings. Their inclusion is a welcome formula in that it recognises this problem and brings them under the purview of regulation. The problem would be in relation to monitoring as record keeping is a problem in this sector. Secondly they are likely to access the black-market and engage in cross-border trade in illicit drugs as well as chemicals that are officially banned.

Government’s role under the code is to ensure the existence of tripartite structures on occupational safety and health. This structure should in turn promote the safe use of chemicals. To achieve this, government should make provision for the development of expertise, facilities and resources for the effective implementation of standards spelt out in the code. It calls on governments in member states to take steps to ratify core ILO conventions of chemical safety.

---

882 See Article.3 (7) of the code
883 Ibid Article.3 (1)
884 C.170 (Chemicals Convention, 1990), C.155 (occupational Safety and Health Convention, 1981), C.161 (occupational Health Services Convention, 1985), C.167 (Safety and Health in...
If the guidelines contained in this code were to be implemented it would make a valuable contribution to health and safety in the region. What is clear is how social considerations are determining the course of international trade and investment to the extent that it would be safe to submit that the economic case of social standards contrary to practice is increasingly finding room in economic decision-making. Those measure could be social, they are aimed at achieving a greater economic goal i.e. Economic integration for social progress.

What has been a problem is the piecemeal developments of measures that are designed to achieve this. In the present case this code developed independent of a framework policy for achieving health and safety, which has been adopted this year in the form of the social charter Art.12. The obvious problem is how to tune this into the wider framework and adapt existing inward and narrow looking structures into the rhythm of the charter ideals.

At the international level a plethora of standards without a harmonising authority is a potential source of the problem. On the positive note this developments indicate an international consensus on the interplay of trade and labour. It is time World Trade Organisation reformed itself 

Construction Convention, 1988), C.174(Prevention of Major Industrial Accidents Convention, 1993) and C.176(Safety and Health in Mines Convention, 1995)
and took this on board if it is to gain social acceptance as a people centred organisation that does business with a human face.

The other policy document of relevance to occupational health and safety in the region is the Code of Practice on HIV/AIDS and Employment in SADC

**Code of Practice on HIV/AIDS and Employment in SADC**

**Background**

HIV/AIDS has become one of the most serious problems affecting people in all walks of life in the Southern African Development Community (SADC). About one-fifth of the working people in the region are HIV positive\(^{885}\). The epidemic presents an enormous threat to economic growth and production through illness and death and through the diversion of resources from savings to care for ill people and survivors\(^{886}\).

HIV/AIDS threatens the livelihoods of many workers and those who depend on them - families, communities and enterprises. In doing so, it also weakens national economies.


\(^{886}\) See the ILO *Programme on HIV/AIDS and the world of work* at [www.ilo.org](http://www.ilo.org)
For instance in the case of Malawi the impact of this HIV/AIDS epidemic has been felt by all sectors of society, especially the social services sectors. For example, in the health sector the maternal mortality rate has at least doubled, HIV/AIDS patients occupy more than 50% of medical ward beds and more than 70% of pulmonary tuberculosis patients also have HIV/AIDS infection. In the education and agricultural sectors, teachers and extension workers, respectively, are dying at a faster rate than they can be trained\textsuperscript{887}. The large numbers of orphaned children being cared for by elderly people and young siblings has worsened the poverty status of many homes\textsuperscript{888}.

HIV/AIDS is an anti-thesis of SADC's regional integration agenda. Its impact on the world of work raises serious issues of occupational importance such as occupational health and safety. The costs of HIV/AIDS for enterprises of all sizes and in particular sectors of economic activity are becoming clearer year by year. A fuller understanding of issues common to all enterprises, as well as of challenges that differ in

\textsuperscript{887} Malawi is one of the poorest countries in the world. Its population is characterised by a high proportion of young people under 15 years of age, who account for 45% of the 9.8 million people. This proportion creates a high dependency ratio. Poverty is rampant: 65% of the rural and 55% of the urban population live under conditions of poverty. This situation has been aggravated by recurrent episodes of drought, which has affected food security and the agriculture - dependent economy. Consequently, the inflation rate is very high and economic productivity very low.

\textsuperscript{888} See the Background to the \textit{Malawi National Policy on HIV/AIDS} Final Draft June, 2003, p.4
relationship to size, available resources and sectoral specificities, helps ensure that responses are focused, relevant and effective.

The core problem for employers, as for national economies, is the loss of skilled workers with job-specific competence and organizational experience which goes to shake the very foundation of economic growth and sustainable development of the region which is SADC's raison d'etre. Unless there is economic growth and sustainable development, it is difficult to see how functional integration of the region can be achieved and strategies devised to fight the problem that ignore this fact are likely to be of limited success.

The problem is compounded by lack of protection and support for those living with HIV/AIDS. Social stigmatization, discrimination at work

---

889 SADC's determination is contained in Para.ix of the Preamble to its treaty (as amended). Article.5 (1) (a) spells out economic growth and sustainable development of the region as its main objective.
and lack of effective legal safeguards in the world of work\textsuperscript{891} are some of the problems\textsuperscript{892}

A list of the ILO of national instruments related to HIV/AIDS and the world of work reveal a shocking lack of global interest in incorporating the problem into the global regulatory mechanism\textsuperscript{893}. In the case of SADC only Malawi\textsuperscript{894} Mozambique\textsuperscript{895}, Namibia\textsuperscript{896}, South Africa\textsuperscript{897}, Tanzania\textsuperscript{898} and Zimbabwe\textsuperscript{899} have laws and national policies on

\textsuperscript{891} The expression ‘world of work’ denotes the workplace, encompassing large and small, public and private, rural and urban workplace settings; the formal labour force and those who are informally productive; and government authorities, the legal system and other institutions (such as academic bodies) which shape the labour, employment and human resource environment. See ILO, 2004 HIV/AIDS and Work: Global estimates, Impact and response, The Impact of HIV/AIDS on the World of Work, p.16

\textsuperscript{892} The role of the workplace in providing prevention and care, as well as the protection of rights was recognized by the UN General Assembly in its 26th Special Session of 2001 on HIV/AIDS, which resolved in paragraph 49 of the Declaration of Commitment on HIV/AIDS to:"Strengthen the response to HIV/AIDS in the world of work by establishing and implementing prevention and care programmes in public, private and informal work"


\textsuperscript{894} Malawi HIV/AIDS National Policy, June 2003

\textsuperscript{895} Lei n° 5/2002, de 5 de fevereiro de 2002 (Boletim da República, quArticlee-feira, 13 de Fevereiro de 2002, 1 serie no. 7)


\textsuperscript{897} Code of Practice on Key Aspects of HIV/AIDS and Employment, December 2000 (Government Gazette, 1 December 2000, vol. 426, no. 21815)

\textsuperscript{898} National Policy on HIV/AIDS, September 2001 (This is as of 6th August, 2004)

\textsuperscript{899} Zimbabwe Labour Relations (HIV AND AIDS) Regulations, 1998 (Supplement to the Zimbabwean Government Gazette dated the 14th August, 1998)
HIV/AIDS. However how effective these have been in individual countries remain to be seen.

There is need for to treat HIV/AIDS as a workplace issue liked to occupational health and safety regulation. HIV/AIDS is a workplace issue, not only because it affects the workforce, but also because the workplace can play a vital role in limiting the spread and effects of the epidemic and the medium of occupational health and a safety is the right forum. Such reasons range from the fact that discrimination against people with HIV/AIDS threatens fundamental principles and rights at work, and undermines efforts for prevention and care900.


The main channels through which the HIV epidemic affects social and economic development are through its impact on the labour force and its related effects. The effects flow from the key fact that the epidemic primarily affects the working-age population, where HIV-related illness and deaths are concentrated901.

900 For guidelines on prevention and care of those with HIV/AIDS, see the The ILO Code of Practice on HIV/AIDS
901 Infra, ILO ,2004 ,p.10
Life expectancy is falling in many countries affected by the epidemic, reflecting increasing rates of adult mortality, and accompanying reductions in the workforce. Individuals with important economic and social roles (both men and women) are prevented from providing their full contribution to development. The effects are, not confined to a simple calculus of labour losses but have much deeper implications for the structure of families, the survival of communities and enterprises, and longer-term issues of sustaining productive capacity which is key to the economic integration.

Similarly, the HIV epidemic erodes the savings capacity of households, of formal and informal productive enterprises, and of government, through its effects on income and on levels of expenditure. Over time, reduced rates of savings lead to diminished investment, slower growth of aggregate output, constraints on employment, and the likelihood of impoverishment. Loss of income, impoverishment of households and failures of informal economy enterprises increase poverty, slow the growth of employment, and threaten sustainable development.

The epidemic imposes heavy constraints on families. If the household member who is ill with AIDS is the breadwinner, she/he cannot longer steadily work and contribute to household income. At the same time that the income of persons with symptomatic AIDS is reduced due to
loss of job or livelihood, the AIDS-related medical care costs and other expenses increase.

The resulting hardship in households is countered as much as possible by the remaining working-age adults, older persons and children. Other household members enter the labour force, engage in subsistence farming, or provide daily care for dependants and the home. Sometimes, the family sells its assets to cover urgent expenses, and distress sales are often at a loss. Despite these efforts, there are residual shortcoming sand shortfalls. There is a noticeable aggregate reduction in production and in income, and a discernible aggregate fall in consumption. Efforts to compensate for the loss in income have a number of labour market consequences. Other adults, often unskilled, may enter the labour force for the first time, older persons may return to work, and young household members may enter the labour force prematurely.

One coping strategy that is particularly damaging involves the decision- or the inevitable action - to withdraw children from school so that they may enter the labour market. The switch from school to job compromises their future. It also reduces the potential human capital available to the economy as a whole. The impact of the HIV/AIDS epidemic on a firm is similar to that on household — increasing expenditures, declining productivity and diminishing revenues.
The presence of HIV/AIDS affects expenditures by increasing costs for health care, insurance, death benefits (including burial fees), and for the training and recruitment of replacement labour. Productivity gradually declines because of increasing absenteeism and mortality.

This decline in worker productivity as symptomatic AIDS progresses was documented over a period of three years in a tea estate in Eastern Kenya, and was noted to be especially severe in the last year before death. Increasing absenteeism is also due to an increasing need for time off to meet related obligations, such as care-giving, attending funerals or for newly recruited staff to receive training. A study of firms in Botswana and Kenya by the ILO in 2004 revealed that absenteeism accounted for more than 50% of overall increased labour costs due to HIV/AIDS. Finally, productivity is dampened by the loss of technical and experienced workers when staff turnover demands that less skilled workers be taken on.

HIV/AIDS has detrimental effects on labour force in countries concerned and household's incomes. The long-term effects include

---

903 The term 'labour force' is defined as the sum of all persons who are economically active—a formal definition encompassing all persons of working age who are in paid employment, gainful self-employment, or unemployed, but they provide to their families and are available for and seeking work. Labour force is quantified by summing the products of economic activity
loss of valuable skills and experience, declining productivity (in some case a lot of time is lost through funeral attendances) and rising labour costs due to outsourcing to replace sick or dead employees. Investment is being undermined and government revenue is cut just as countries face pressure on public services mounts904.

Reduced household income means that more families are getting trapped in the poverty cycle and overall living standards of communities' concerned fall. The toll of mortality extends beyond the direct loss to the labour force. The mortality of adults leaves children orphans, but the death of breadwinners leaves orphans destitute. Children whose parents die are orphans whether they are infants or 17 years old.

Few older adolescents can care for themselves adequately when suddenly bereft of parental guidance, even if many 15-, 16-and 17-year-olds already work. In 2003, according to ILO an estimated 15 million children under 18 years of age were orphans as a result of AIDS, rates estimated by for each age and sex group and the population weights of the same age and sex groups. See the ILO, 2004 Report onn HIV/AIDS, Supra

904 In assessing the global impact of HIV/AIDS, however, it is well to recall that it is specifically in countries most heavily affected by HIV/AIDS that labour force participation and economic activity are difficult to measure, and that there are no clear boundaries between persons defined as economically active and those who are not. Many working-age adults are engaged outside the formal economy, and although economically active, the sustenance they provide to their families is not easy to characterize or measure in conventional economic terms.
more than 12 million of them in Africa. The number of orphans is expected to increase substantially as the HIV/AIDS epidemic advances (ILO, 2004). The consequences for children, notably in terms of increases in child labour are worrying.

This is a factor that is likely to limit any progress towards integration and hence the reason why social and economic policy should be fine tuned to complement each other. The burden on women gets heavier as they have to earn a livelihood and provide care to sick family members and neighbours. This catalogue of an off the cuff impact of the epidemic on labour and economy is the *raison d'etre* for a policy on HIV/AIDS at any level of state or interstate engagement.

Member States of the SADC Employment and Labour Sector recognised the impact of the epidemic in the early 1990s. Recognizing the interdependence of SADC countries and their people, and the need for equity and a strong commitment to taking on the challenges of HIV/AIDS, they developed a common guideline on how HIV/AIDS should be treated in employment. The code in 1997\(^{905}\), developed and drawn by Governments, Employers Associations and Labour Movements of the region, taking into account Member States' National Codes and also reflecting principles developed by World Health Organization (WHO) and

\(^{905}\) See The Executive forward to the Code
the International Labour Organization (ILO), was adopted by SADC Summit in September 1997.

Unlike the code on the safe use of chemicals, this code is limited in scope. It applies only to workplaces and cannot be construed to apply to other areas of law such as national immigration laws, policies and related administrative procedures. The idea of focussing ion the workplace alone is ill conceived. HIV/AIDS has had implications for migrant labour and to exclude it from immigration laws is to take a myopic view of a broad problem.

The rights and protection offered in the workplace should be extended beyond workplace, for instance stigmatisation persists beyond the workplace so that any solution has to do more with attitude than employer-employee relations\textsuperscript{906}. An attitude change that is encouraged at workplaces and beyond would be variable. The code is based on fundamental principles of human rights and patient rights, WHO/ILO and regional standards and guidelines, medical and occupational health ethical principles, sound epidemiological data, prudent business practice and a humane and compassionate attitude to individuals\textsuperscript{907}. The approach aims to achieve a balance in protecting

\textsuperscript{906} Statement from the ILO/WHO consultation on AIDS and the workplace, Geneva, June 1988

\textsuperscript{907} See the policy statement clause of the code
the rights of all parties, including those with and without HIV, employers, employees, state and others.

The Code balances individual rights and social needs and provides a platform on which to build strategies for prevention and management of the epidemic. The relevance to occupational health and safety of the code is that links HIV/AIDS and the workplace and emphasises the need for education, awareness and prevention programmes. This would contribute towards preventative measures as people would become aware of the facts about the problem and discard myths surrounding the issue. This can have the effect of reducing the spread of the disease and enhance occupational health and welfare908.

Overview

Workplaces in Southern Africa generally have a high level of occupational hazards. Many of the hazards faced by Southern African workers, such as noise, heat, mechanical hazards and ergonomic hazards, have long been identified and are being controlled in the EU and the USA as we will see later on in our discussion.

Besides traditional occupational hazards, Southern African workers are also exposed to new chemical, psychosocial and physical hazards that

are emerging in consequence of new industrial processes and organisation of work. Many multinational companies, whose parent companies are situated in Europe or the USA, operate in the region, and there are also new entrants from South East Asia and China. Within the region, South African companies (either South African owned or subsidiaries of bigger Northern Hemisphere companies) are expanding operations into other countries, in some cases retaining the 'value added' portion of production in South Africa itself.

Although occupational health knowledge and technological innovation have led to solutions to many work-related health problems, these same problems continue to challenge Southern African workers. While there are evident efforts to apply safety policies within some multinational companies, in reality many in Africa operate according to standards differing from those adhered to in the North, which is a departure from internationally recognized standards contained in the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.

Chemicals banned or severely restricted in Europe such as DDT are in common use in Southern Africa. The more advanced Southern African Development Community (SADC) economies, such as South Africa are producing and exporting hazardous processes and substances to other parts of the region. The introduction of export processing zones and the
quest for foreign investment make the SADC more vulnerable to such hazardous industrial processes.

However there seems to be a realisation dawning in the region that in seeking to maintain the link between social progress and economic growth, the guarantee of fundamental principles and organisational rights is of particular significance. This enables persons concerned to claim freely and on the basis of equality of opportunity their fair share of the wealth, which they have helped to generate, and to achieve fully their human potential.  

This as we have seen is linked to the democratisation process weeping through the region. Increased trade union and NGO activity has been responsible for the wave of legal reforms taking placing in the area of occupational health and safety in member states.

The agricultural sector due to its very nature and composition of its workforce is the hardest hit, in this economic liberalization process. It

909 See the American position in relation to its GSP programme with developing countries in Bhala, international investment law (2000, Supra
911 ILO studies, knowledge and behaviour of pesticide users in Benin African newsletter on occupational health and safety volume 8 number 2 September 1998. The use of pesticides has increased rapidly in African countries. This study on the knowledge and behaviour of the farming population of Benin shows that more than three out of four users are young. They
is often neglected and as a predominantly rural economy and is often at the mercy of rural public health that is often substandard compared to urban public health.

The above has a bearing on occupational health and safety of the workforce as well as the communities around. This is an issue as disease treatment and diagnosis are effectively done at local health centres that neither have enough qualified staff nor resources and equipment for the complex treatment and diagnosis of occupational diseases and injuries. Despite the evident unsafe nature of workplaces in Southern Africa, workers' occupational illnesses and work-related injuries are poorly detected and rarely diagnosed as being work-related. Workers are poorly informed about the health risks of their work, or they fear bringing their problems of ill health into the open, owing to job insecurity. Systems, services and the legislation governing these are rigidly divided into workplace health (or occupational health) and public health, despite the fact that the worker moves between these two environments and is affected by both.

Neither the worker nor, often, the health worker is able to separate the element of the illness caused by poor working conditions from that caused by poor living conditions. Though reforms are taking place,
sector specific legislation is not a common feature of the new reform wave so that the proposed health and safety law applies generally to different sectors. This does not adequately respond to occupational problems attendant to specific sectors such as agriculture.

**Conclusion**

In terms of health and safety policy in the SADC region it is clear now that a semblance of a health and safety policy is being put together under the auspices of the Employment and labour sector. Specific instruments such as the code on the safe use of chemicals, code of practice on HIV/AIDS and Employment, Code of Practice on the employment of youth and a women are aimed at improving occupational safety, health and welfare in the region.

However their piecemeal development meant that there was no policy coherence in the past in relation to such instruments. Each one developed independent of the other. Their development was also reactionary in that they were developed in response to developments in certain sectors of the economy or society e.g. death and poisoning resulting from unsafe use of chemicals in the region, or the critical levels of HIV/AIDS. *De facto* occupational health and safety has been Plan ‘B’ for SADC. This is where it went wrong in the past is addressing it now. Occupational health and safety is and ought to be Plan ‘A’. This is fortified by the fact that the cumulative effects of occupational
disease and accidents are making economic gains of integration illusory.

The problem had been compounded by lack of an organizing philosophy for health and safety and how they relate to the economic agenda the region has embarked on. Increased trade and investment flows in the absence of a coherent social policy that encouraged corporate social responsibility to say the least is a dis-service to the ultimate goals of the organization spelt out in article 5 of the treaty as amended.

The adoption of the social charter on 26th August 2003 by the summit provides the missing link, i.e. a framework for occupational health and safety regulation and development in the region. The task of carrying this forward falls on the Human and Social Development Directorate under the new the Regional Indicative Strategic Development plan (Risdp). What need to be done is for the directorate to give police guidance to member states of civil society organizations on occupational health and safety.

As the situation stands at present civil society’s role in SADC’s activities despite there being avenues in the treaty for their involvement, institutionalizing the same is slow and patchy. These need to improve if the policy goals laid out in article 12 of the charter are to be of any
The above task needs to filter down to member states legislative agenda. Legislation as a species of governance requires policy input and debate which would benefit from civil society involvement in national debates on the issues. One avenue for achieving this would be through dialogue between state courts and the community court\(^\text{912}\).

At the time of writing this thesis this was not possible as the community court was not yet operational. Not only has the non-operationalisation of the court stifled legislative guidance from the court, it has also impeded development of community jurisprudence on economic and social legislation. On the positive side developments in occupational health and safety at SADC level are indicative of a realisation of the central role occupational health and safety has in trade and investment and ultimate social and economic integration of the region. The challenge is how to exploit these in ways that deliver development, decent work and improved working and living standards in the region.

\(^{912}\) Permitted under Article 9 of the Treaty as read with Article 16 (1) of the Protocol on the Tribunal as emended.
Until the signing of the SADC charter on 26th August 2003\textsuperscript{913} there had never been a coherent policy at a community level providing for an effective supranational response to supranational social demands of globalization and its economic agenda. The result had been a mushrooming of domestic regulatory responses of varying degrees of sophistication and effectiveness in the region.

It is interesting that the SDASC executive secretary in his pre-summit press briefing in commenting on the Charter said that key provisions of the draft charter \textsuperscript{914} include freedom of association and collective bargaining\textsuperscript{915}, freedom of movements\textsuperscript{916}, equal treatment of men and women\textsuperscript{917} as well as improvement of working and living conditions \textsuperscript{918}(emphasis added).

\textsuperscript{913} Para.39 of 2003 SADC Summit Final Communiqué. The Summit of Heads of State and Government of the Southern African Development Community (SADC), met in Dar es Salaam, Tanzania on 25 -2 6 August, and among other things Summit signed the SADC Charter on Fundamental Social Rights, which among other things, calls for creation of a conducive environment to facilitate closer and active consultations among social partners and in a spirit conducive to harmonious labour relations. www.sadc.int, see also SADC Leaders to sign Social Rights Charter at www.allafrica.com and Munetsi Madakufamba SADC Leaders approve mutual defence pact, charter on social rights, Southern African News at www.sardc.net/SADCsummit4.htm

\textsuperscript{914} The charter was later adopted without amendments and the order of Articles has not changed

\textsuperscript{915} Article.4

\textsuperscript{916} Article.3. Though this right is not contained in its own Article it s part of the universal civil and human right covered by Article.3 of the charter.

\textsuperscript{917} Article.6

\textsuperscript{918} Article.11
Conspicuous by its absence on the list of key provisions was Art.12, which is the lead article for health and safety. The silence might either have been deliberate rate or unintentional. Whatever the case may be it displays some attitudes towards occupational health and safety among policy makers in SADC. However, the fact art.12 is now a blue print of the issue is encouraging.

Whereas in the EU issues of occupational health and safety are high on government agendas and there is no shortage of public support for such policies as evidenced by the call in some EU countries such as the United Kingdom for the strengthening of corporate killing laws and trial919, SADC as a region has a different set of priories. Their priority according to one official at the secretariat speaking off the record is HIV/Aids and Food insecurity. For this reason the optimism has to be a measured one. However an economic policy that takes cognizance of this fact will compliment the deficit in terms of result and contribution

919 Should senior managers in companies be held personally accountable for actions taken by the company, which lead to the accidental loss of human life? Moves are well advanced in the UK to make this possibility into a reality. The current position covers corporate manslaughter. The existing laws have been criticised in recent years for being an ineffective sanction against criminal negligence, due to the requirement to prove that an individual who "is considered to embody the company" is found guilty. There is no established definition for what this might mean, so in each case the courts are required to identify the presence of the company's directing mind and will. In May 2000, the Government published draft proposals to create a new offence of corporate killing, plus three new offences to cover individuals who cause death by recklessness or gross carelessness. The consultation session for these proposals has passed, and the Government is now considering its final proposals. See BBC News, Wednesday, 20 March, 2002, 14:54 GMT 'Corporate killing' law demanded' at www.news.bbc.co.uk
towards working and living standards in the region.

Politically, liberal economic policies the region has embarked on will lack social legitimacy, unless they can be seen that they are capable of translating into improved living and working standards of the people of the region through poverty reduction, improved living and working conditions.

The statistics on occupational health and safety in the region, let alone agriculture, which employs over 70% of region's population, does not paint a good picture. SADC needs to realize that occupational health and safety are politically deliverable and economically sustainable. The onus is on SADC to offer policy guidance and governments in the region to implement the policy.

The moral case for occupational health and safety in the region needs no emphasis. Occupational health and safety issues are also human rights issues\textsuperscript{920} and as mentioned elsewhere in this discussion human rights are economically efficient. Labour in the region has suffered from political repression in the past such that the need for human rights for the region needs no emphasis. Industrial democracy and human rights

\textsuperscript{920} See our discussion on the content of labour rights, post.
are an economic good. The above are important factors that cannot be left out in the region's integration equation.

SADC has never had a self-standing social policy. What it has had was an economically driven social policy premised on the wrong assumption that economic growth in member states would naturally translate into social progress.

The political origin of the organization partially explain the policy option. Its origin in the Front Line States (FLS) means that its structures were initially designed for the task that it stood for, i.e. Liberation from Colonial rule. The political case at the time out weighted the economic and social case. After independence the policy changed to economic and social development of the region. However structures and institutions were not adapted to take on the new agenda and so was the mindset of the leadership of the day.

In post independence Africa leaders took upon themselves to think for the population they presided over. Some had the arrogance to call that style of their leadership, the African version of democracy, what ever that meant it was a receipt for their own disaster and fall from

---

921 M. Olivier and E. Kalula Beyond Labour Market Regulation: Social Protection and Future of Labour Law in Southern Africa, Rand Afrikaans and Cape Town, University, South Africa
glory, either through the barrel of a gun922 or the ballot box in later years923.

The generation of leaders that ushered in independence presiding over illiteracy and innumeracy rates of unparalled dimensions and consequently adopted paternalistic approaches and attitudes to development. They convinced themselves that the uninstructed minds could never engage with the instructed in a meaningful social and economic debate on issues affecting their lives.

The result of this was that participation and dialogue on issues of public concern such as labour stagnated and social democracy only existed in name. In such an atmosphere social issues were always treated as peripheral to political and economic goal. However the 1990s saw a wave of political change and with it, the advent of participatory democracy. Since then there has been intense trade unionisation and civil society activity, which explains the sudden emergence of labour and social issues on the regional agenda as well as on the domestic front. The problem is one of implementation.

Developments in sectors of international commerce such as chemical

---

922 Ghana's Kwame Nkrumah was overthrown and so was Zaire's Mabuto.
923 Malawi's Dr. Banda lost in multi-party general election of 1994. A year before that Zambia's Kenneth Kaunda lost in similar elections
and pesticides present us with some explanation for the linking occupational health and safety with international trade and investment. The creation of 'the international right to know' in the form of the Prior Informed Consent924 points to an international jurisprudence in favour of social regulation of global economic activities925. This is also an indication of the center-stage occupational health safety and environmental issues ought to be occupying in a global economy warranting the linking of trade investment and labour as an aspect of good practice in international economic relations.

Developments on the continent of importance to occupational and social policy development include the reorganization of the Organization of African Unity (OAU) into the African Union (AU). The fusing of the African charter and the Abuja treaty into the Constitutive Act of the AU has the effect of streamlines continental social and economic policy that would enable the Union to give clear and better policy guideline to member states without potential duplication.

Relevant to our discussion is the creation of the Economic and Social

Council comprising exclusively of civil society organizations (Civil Society Organizations) appointed from each member state. The entrenched role of civil society into policy formulation may create a culture of participatory industrial democracy that would have a multiplier effect among member states. If this happens it would compliment the apparent lack of civil society entrenchment in regional set ups like SADC.

Further under the constitutive Act economic and social policy are to be developed in tandem. This treatment of the two as merely two side of the same coin offers the first line of defense against corporate abuse. It should then be possible to develop economic policies that promote social progress. For this to be replicated into Regional Economic Communities (RECs) that are building blocs of the African Economic Community (AEC) there is need for linkages between the AU and RECs.

In the next chapter we examine the issue in a domestic context and Malawi will be our focus. This is done with a view of seeing how regional and domestic polices are linking. This is important if we are to find make policy suggestions that have both horizontal and vertical application.