

CURRICULAR CORE FOR TOMORROW'S TRANSNATIONAL LAWYER IN THE SOUTHERN AFRICA DEVELOPMENT COMMUNITY (SADC)

George Barrie
BA LLB LLD
Dean: Faculty of Law, Rand Afrikaans University
Formerly Chief State Law Adviser (International Law)

INTRODUCTION

The members of the Southern African Development Community (SADC) are Angola, Botswana, Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. One of the avowed purposes of SADC is to establish a development community in the Southern African region *inter alia* by integrating the national economies.

SADC must be seen against the background of NEPAD (New Partnership for Africa's Development) which has as its vision sustainable growth and development and active participation in the world economy.

SADC must also be seen against the background of the upsurge of democratic regimes in the SADC region, a commitment to human rights and the acceptance of market-oriented economies.

The proposed Southern African "economic union" will, as has happened in the European Economic Community, eventually have its distinct economic/trade law. It is thus imperative that law students in the SADC region be prepared to handle this "new" phenomenon which will soon be of great practical relevance in the region.

Provision must thus be made in the curriculum of all law faculties in the SADC region.

In what follows a proposal for a new two semester law subject is made. Some of the topics may have been covered extensively elsewhere in the curriculum e.g. International Law and Private International Law (Conflicts). When these topics are covered in the proposed new subject they will be approached from a more specific SADC Treaty angle.

The new subject with the following curriculum could be named *Transboundary Southern Africa Trade Law*.

SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC)

With the adoption of the SADC Trade Protocol in 1996, the objective of SADC in the field of trade has become the establishment of a free trade area amongst SADC members.

The implications of the SADC Trade Protocol are far reaching. The object of the Protocol is to bring about the establishment of a free trade area amongst SADC members, involving the elimination of tariff barriers and quantitative restrictions. The aim is to establish a free trade area and to liberalize intra-regional trade in goods and services, to ensure efficient production, to contribute towards the improvement of the climate for domestic cross-border and foreign investment and to enhance the economic development, diversification and industrialization of the region. It is in the nature of a framework agreement on trade (Dugard *International Law: A South African Perspective* (2000) 359).

INTERNATIONAL LAW IN GENERAL

The nature and history of international law.

The sources of international law as described in article 38(1) of the Statute of the International Court of Justice (custom; treaties; general principles of law; judicial decisions and teachings of publicists).

The place of international law in municipal (domestic) law.

Special emphasis on immunities and privileges as Article 31 of the SADC Treaty gives SADC institutions and staff such immunities and privileges as are necessary for the proper performance of their functions under the Treaty.

THE LAW RELATING TO INTERNATIONAL ORGANISATIONS

The status and functions of international organizations as subjects of international law.

Their legal nature and constitutional structure.

Interpreting the International Court of Justice's statement that

“Whereas a State possesses the totality of international rights and duties recognized by International law the rights and duties of an entity such as the Organisation must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice”
(Reparation of Injuries Suffered in the Service of the UN 1949 ICJ Reports 174, 180).

Organic structure and composition of international organizations; legislative and regulatory functions of international organizations; treaty relations of international organizations.

TREATIES

Forms and terminology; parties to treaties; multilateral and bilateral treaties.

Ratification – Differences between constitutional systems of states when it comes to ratification.

Reservations and revisions; interpretation of treaties.

Purpose of treaty.

Case Concerning the Applications of the Convention of 1902 Governing the Guardianship of Infants (Netherlands – Sweden) ICJ 1958, 55.

Nicaragua v United States ICJ 1986, 14 at 270.

Beagle Channel Arbitration of 1977 52 ILR 93.

PRIVATE INTERNATIONAL LAW (CONFLICT OF LAWS)

Distinction between Private International Law and Public International Law.

Public International Law is essentially a *supra*-national legal order regulating the legal relations between *states*, whereas private international law is a particular branch of each national legal system regulating the legal relations between *individuals*.

Emphasis on the fact that each national legal system has its own system of private international law.

Conditions which have to be satisfied before a domestic court will enforce the judgment of a foreign court.

General choice of law principles regarding contractual obligations, delictual obligations and cases involving property.

The function of private international law in the SADC region. Within this region is a shared Roman-Dutch heritage (especially in Botswana, Zimbabwe, Swaziland and Lesotho). Is there not scope for an approach based not upon the choice of law rule, but on some form of statutism? (In the other SADC states legal systems are based on English law – Zambia, Malawi and Tanzania; the French Civil Code – Mauritius and the Seychelles; the Portuguese Civil Code – Angola and Mozambique and the Belgian Civil Code – Democratic Republic of the Congo). Ensuring the harmonious operation of these diverse legal systems presents a great challenge. (Forsyth “The Provenance and Future of Private International Law in Southern Africa” 2002 (1) *Tydskrif vir die Suid-Afrikaanse Reg – Journal of South African Law* 60).

Probable influence of the Brussels Convention on Jurisdiction and the Recognition and Enforcement of Foreign Judgments of 1968 and the Rome Convention on the law applicable to Contractual Obligations of 1980 on the SADC region.

ECONOMIC DEVELOPMENT CONTRACTS

An economic development contract can be seen to be an agreement concluded between a less developed state party and a private investor (who is a national of a capital exporting state) in terms of which the parties combine different resources so as to create a suitable legal environment for foreign long-term investment and bring about economic development in a particular sphere of the state party’s economy. (Radesich *Economic Development Contracts: Legal Frameworks for Foreign Private Investment in Third World States* Unpublished LLD thesis 1989, 11).

Such economic development contracts can be placed in five categories:

Transport and public utilities; exploration and exploitation of mineral resources; construction industry; provision of consultative advisory and managerial services; manufacturing activities; general commercial activities and the transfer of technology.

Such contracts are also referred to as State contracts, investment contracts, economic concessions and natural resource contracts. (Onejeme “The Law of Natural Resources Development: Agreements between Developing Countries and Foreign Investors” 1977-78 (5) *Syracuse JILC* 1.

THE WTO (WORLD TRADE ORGANISATION) AND FUNDAMENTAL PRINCIPLES OF INTERNATIONAL TRADE

Object, structure and operation of the WTO.

The fundamental principles of international trade. The principle of non-discrimination (most favoured nation and national treatment principles, market access and the sanctity of tariff bindings) and the general elimination of quantitative restrictions. The requirements of transparency in the publication and administration of trade regulations.

Dispute settlement arrangements in the WTO.

INTERNATIONAL TRADE AND THE ENVIRONMENT

ETM's (Environmental Trade Measures) – policy purposes and feasibility.

Definition of ETM: A restriction on international trade with the announced purpose of promoting an environmental objective.

ETM standards; taxes; import or export restrictions and sanctions.

GATT and the environment. (*The Tuna-Dolphin Report*, “United States – Restrictions on Imports of Tuna” GATT Doc DS21/R, 30 *International Legal Materials* 1594; Charnovitz *Trade Law and Global Governance* (2002) 131).

INTERNATIONAL LABOUR STANDARDS AND TRANS-BORDER TRADE

Role of the ILO (International Labour Organisation), the OECD (Organisation for Economic Cooperation and Development) and Ministerial Conference of the World Trade Organisation.

Core labour standards and the effect on investment, economic development and trade and employment.

The 1998 Declaration on Fundamental Principles and Rights at Work (Kellerson “The ILO Declaration of 1998 on Fundamental Principles and Rights: A Challenge for the Future” 1998 (137) *International Labour Review* 223; Charnovitz *op cit* 273).