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Supranational Courts as Engines for Regional Integration?

A Comparative Study of the Southern African Development Community Tribunal, the European Union Court of Justice, and the Andean Court of Justice

Christina Fanenbruck and Lenya Meißner

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SUPRANATIONAL COURTS AS ENGINES FOR REGIONAL INTEGRATION?

A COMPARATIVE STUDY OF THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY TRIBUNAL, THE EUROPEAN UNION COURT OF JUSTICE, AND THE ANDEAN COURT OF JUSTICE

Christina Fanenbruck and Lenya Meißner

Abstract

This paper investigates the role of regional supranational courts in advancing integration within regional organizations by analyzing three courts. Over the course of the last decades the design of the European Court of Justice has been emulated by several other supranational courts, two of which are studied in this paper. The court of the Southern African Development Community (SADC), the SADC Tribunal (SADCT), as well as the court of the Andean Community (CAN), the Andean Court of Justice (ACJ), both share the design features of the ECJ. Knowing that the ECJ has significantly contributed to integration within the European Coal and Steel Community and later the European Communities, it could be assumed that an emulated design may engender a similar effect on integration in other regional settings. Empirically, this has been the case neither in SADC nor in CAN. This paper considers several explanatory factors extracted from theory and literature in order to establish reasons for this failure of the organizations to integrate. The analysis shows that legitimacy and problem pressure are the two main variables that indicate the effective advancement of integration. The paper argues that while the SADCT failed to foster regional integration due to its suspension on grounds of it lacking legitimacy before having the opportunity to fully unfold its strengths, the ACJ failed to advance integration because it remained passive due to lacking problem pressure.

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Table of Abbreviations

ACHPR	African Court of Human and Peoples' Rights
ACJ	Andean Court of Justice
ANC	African National Congress
ASEAN	Association of South East Asian Nations
AU	African Union
CAN	Andean Community (Spanish: <i>Comunidad Andina</i>)
ECs	European Communities
ECJ	European Court of Justice
ECOWAS	Economic Community of West African States
ECOWASCCJ	Economic Community of West African States Community Court of Justice
ECSC	European Coal and Steel Community
EU	European Union
ICC	International Criminal Court
ICJ	International Court of Justice
RO	Regional Organization
SADC	Southern African Development Community
SADCC	Southern African Development Coordinating Conference
SADCT	Southern African Development Community Tribunal
WTO	World Trade Organization

1. Introduction

Since the 1648 Treaty of Westphalia, the notion of sovereignty has been deeply anchored in the international system, with the sovereign state becoming the cornerstone of the system of states throughout the world. By establishing the precedence of national self-determination through the notion of empire, the Treaty of Westphalia thus set the basis for international cooperation for centuries to come. Interestingly, since the end of World War II in 1945, numerous as well as sophisticated regional organizations (ROs) have come into existence, thereby manifesting a new major trend called regionalism that today has a large influence on cooperation among states.

Admitting that cooperation among states is not a new phenomenon, it should be noted that the scores of ROs that have mushroomed in the past decades are unparalleled. Apparently, states strive to strengthen economic cooperation and to enhance political and social stability in a given region, thereby epitomizing a recent trend: the increasing extent of voluntarily ceded power and jurisdiction over certain policy fields from sovereign states to regional – sometimes partly supranational – organizations. As a consequence, the study of regionalism has gained momentum and comparative regionalism has established itself as a new field of study for international relations scholars (Börzel 2011; Hettne/Söderbaum 2000; Sbragia 2008).

The noted increase in the number of ROs has been accompanied by the creation of dispute settlement mechanisms such as regional courts and tribunals. This is a particularly interesting phenomenon because regional dispute settlement mechanisms touch the core of the individual sovereign state. When setting up such a judicial body, a RO can choose between two types. Intergovernmental organizations that focus on free trade usually opt for a WTO style mechanism which entails an *ad hoc* panel of appointed judges that adjudicates conflicts between states (Alter 2012). Organizations that aim at deeper integration including supranational institutions and a common market often choose to emulate the European Court of Justice (ECJ) model. This kind of court is charged with the uniform interpretation of the founding treaties and its jurisdiction is obligatory in all member states (Alter 2012).

Today, “11 operational copies of the ECJ” exist that share the three inherent features of the ECJ model (Alter 2012: 135). These characteristics are, firstly, a supranational commission that monitors the compliance with community law and can file breaches with the court; secondly, a preliminary ruling mechanism in which national courts can ask questions about the proper application of community law; and thirdly, administrative and constitutional review systems to challenge community acts (Alter 2012: 139). Knowing that the ECJ has advanced integration within the European Communities, it may be assumed that such a court style has the potential to advance integration through jurisprudence in another regional setting as well (Alter 2009). Hence, other regional courts with a comparable institutional structure may have a similar impact on the speed of integration as they are “legal transplants” (Alter et al. 2012: 629). Alter (2012) confirms that both the supranational court of the Andean Community (CAN), the Andean Court of Justice (ACJ), and the court of the Southern African Development Community (SADC), the SADC Tribunal (SADCT), share the institutional design of the ECJ.

However, empirics show that neither the SADCT nor the ACJ has managed to advance integration in their respective region – leaving comparative regionalism researchers puzzled. While the ACJ has never really

tried to push for integration, the SADCT has actively tried to pursue an integrationist agenda but failed completely. This makes the SADCT a particularly interesting case which will be given special attention in the analysis below. Thus, this paper sets out to answer the following question: Under which conditions do ECJ style emulated supranational courts successfully advance integration within their pertinent RO?

This question is tackled by analyzing three cases: the ECJ, the SADCT, and the ACJ, with the SADCT receiving particular attention. The ECJ is selected because it serves as the role model and was the first and therefore oldest supranational court to advance integration. The SADCT is chosen because it is an interesting newer court which despite remarkable efforts to the contrary not only failed to advance integration but arguably withheld it. The ACJ is chosen because it is most similar to the ECJ and has existed for the longest time. As neither the ACJ nor the SADCT has served as engines towards integration, the ECJ can be contrasted with these two courts to distil the most decisive factors explaining this outcome.

We argue that, while the SADCT failed to foster regional integration because it was suspended on grounds of lacking legitimacy before having the opportunity to fully unfold its strengths, the ACJ failed to advance integration because it remained passive due to lacking problem pressure. Given that the SADCT actively tried to pursue an integrationist agenda, it is the more interesting case and will thus receive more attention than the ACJ, which never really practiced expansionist rulings.

This research is highly relevant in the context of integration forces. As the ECJ has shown, it is possible for courts to contribute to integration. Yet, courts in other regional settings have failed to do so. Therefore, the crucial variables that are identified throughout this paper can serve as a guideline to policy-makers and activists concerned with ROs and dispute mechanisms. In particular, the findings can be transferred and applied to other ROs in order to deduce whether and why these courts are likely to advance integration or not. With regards to the existing literature, Alter extensively analyzed the ECJ's political power (Alter 2009, 2012, 2014). Alter and Helfer (and Saldias) conducted in-depth analyses of the ACJ and how it failed to seize power (Alter/Helfer 2010; Alter et al. 2012; Helfer/Alter 2013). Hulse and Van der Vleuten thoroughly analyzed the rise and fall of the SADCT (Hulse 2012; Hulse/Van der Vleuten 2015). However, all failed to analyze success conditions for courts to advance integration. In the following, this research gap shall be filled.

This paper starts with an explanation of the employed research design. We then introduce the dependent variable: the advancement of regional integration. We refute possible counterarguments to systematically establish whether or not a given regional court advanced integration. The following section then turns to the independent variables and tests for each of the courts whether they are positive, negative, or not attainable. Finally, the conclusion summarizes the findings and emphasizes that legitimacy and problem pressure are the two strong variables that indicate effective advancement of integration.

2. Research Design

Since the end of World War II, more and more states have chosen to engage in inter-state cooperation, subsequently leading to the creation of many ROs. Most of these began as intergovernmental projects aimed

at solving collective action problems in the economic sphere (for instance ASEAN). Others have then (possibly unintentionally) developed into organizations with supranational elements and more far-reaching commitments (Lenz 2012: 155). An example of this is SADC which originally started out as intergovernmental cooperation and evolved later into an ambitious integration project (Hulse/Van der Vleuten 2015). The question why some of the RO projects evolved while others have not is one aspect of the study of comparative regionalism. Mainly, it focuses on “new regionalism” that – in contrast to the “old” kind – involves more areas of the world and reflects the “deeper interdependence of today’s global political economy” (Hettne/Söderbaum 2000: 457). Moreover, comparative regionalism aims to spot patterns in internal and external effects, drivers, and outcomes (Börzel 2011). This paper aims to contribute to this research by providing new insights into the role of courts and how they can influence regional integration process.

To this end, we employ a qualitative Y-centered comparative case study design. A Y-centered research design implies that there is variance on the dependent variable (Y). The research aims at explaining this variance by testing all relevant independent variables (Xs) (Ganghof 2005). Unfortunately, in social science research it is virtually impossible to truly test all relevant independent variables. Moreover, given that only three cases will be analyzed in this research, the results have to be regarded with caution. Acknowledging the difficulty of making generalizable conclusions from a three-case study, it is nonetheless attempted. Despite these limitations, the qualitative Y-centered case study design is very useful in identifying the relevant independent variable(s). Moreover, this approach has pronounced advantages in political science research. By conducting small-N Y-centered research, it is possible to concentrate on a few relevant independent variables and to estimate their general causal effect on the dependent variable. We do not attempt to causally explain the impact on the dependent variable. Rather, this research can be described as explorative. By identifying conditions that correlate with a positive or negative effect on integration of ECJ style courts, this research makes it possible to inductively derive hypotheses concerning the role of these courts in RO integration processes. The results of such explorative research in social and political sciences can be used to inductively establish generalizations and offer the opportunity for policy-learning (Hopkin 2010).

In the research at hand, the dependent variable is the advancement of regional integration. This concept is fulfilled when two conditions are satisfied. Firstly, a court must be expansionist in its ruling, meaning it identifies “new legal obligations or constraints not found in treaty texts or supported by the intentions of their drafters, and when these obligations or constraints narrow states’ discretion” (Alter/Helfer 2010: 566). In such cases, the interpretation of the court goes beyond the agreed duties and extends their meaning. Examples are the establishment of new doctrines such as direct effect or supremacy in the case of the ECJ. The inclusion of new policy areas such as environmental policy as a spillover effect of law-making in another realm is also an instance of expansionist ruling. Secondly, these expansionist rulings must be implemented into national law in order to take effect. A supranational court that exercises expansionist law-making but is mostly ignored from national entities is not able to advance integration. Consequently, for a court to trigger an advancement of integration, its rulings must be expansionist as well as respected and complied with. If both circumstances are present, the court has succeeded in strengthening the community vis-à-vis its member states. It has advanced regional integration via law-making.

In the following, three supranational courts with the same institutional structure but different effects on the integration process in their respective RO are analyzed. As displayed in the table below, the role model, the ECJ, successfully spurred integration while the other two courts did not.

Table 1: The Dependent Variable Y (Advancement of Regional Integration)

Variable	Variable Name	1) ECJ	2) SADCT	3) ACJ
Y	Advancement of regional integration	Yes	No	No

Source: Authors.

Hence, there are two differing outcomes (the advancement or non-advancement of regional integration) under consideration. The following analysis aims at explaining this variation. Possible explanatory factors are represented by the independent variables (Xs). Examining the germane literature, five main factors can be expected to play a relevant role: political support, legitimacy, private access, prolonged existence, and problem pressure. These variables will be thoroughly explained and justified in the corresponding section of the paper. According to the principle of parsimony, it is attempted to explain as much of the variance of the dependent variable as possible by considering as few independent variables as possible. Thus, we choose only the most relevant independent variables for our in-depth analysis. The table below summarizes the outlined research design.

Table 2: Comparative Case Study Design

Variable	Variable Name	1) ECJ	2) SADCT	3) ACJ
Y	Advancement of regional integration	Yes	No	No
X1	Political Support			
X2	Legitimacy			
X3	Private Access			
X4	Problem Pressure			
X5	Prolonged Existence			

Source: Authors.

Having explained the research design, we proceed to the next section which contains the main analysis of this paper, starting with a close examination of the dependent variable.

3. The Dependent Variable

The dependent variable is the advancement of regional integration by the respective supranational court. In this chapter, we analyze whether the three courts advanced regional integration. Starting with the ECJ, followed by the SADCT and the ACJ, we briefly introduce each court before assessing its role towards the regional integration process by paying particular attention to the relevant court rulings.

3.1 *The ECJ's Success to Advance Integration*

The European Court of Justice is the judicial body of the European Union and was created by the Treaty of Paris in 1952. Together with the General Court (formerly known as Court of First Instance), it constitutes the Court of Justice of the European Union. For the purpose of this paper, it will be referred to as the European Court of Justice (ECJ). Similarly to the European Coal and Steel Community, the ECJ was created to ensure that Germany could not abuse its dominant power position. The ECJ was meant as a “legal check” with compulsory jurisdiction over member states and a preliminary ruling mechanism that enabled national judges to ask questions about the application of community law (Alter 2012: 137). While the ECJ was capable of declaring that member states had failed to fulfill their obligations under the treaty, remedies in case of treaty violation would not necessarily follow. That is why in the 1950s, the role of the ECJ was rendered “quite limited” (Alter 2012: 137). Because of the limited support from political circles, the court focused on technical and procedural issues. In the early 1960s, then, a decade after its creation, the ECJ established some of the most important precedents. In the following, we explain some of the rulings in order to illustrate that the ECJ had a political impact and – most importantly for the purpose of this paper – significantly spurred regional integration.

The case *Commission v Luxembourg* (ECJ 1962) shows how the court was able to maintain community rules. Luxembourg had imposed a tax on imported gingerbread. The motivation was to increase the competitiveness of Luxembourgish gingerbread that was more expensive because of a high domestic tax on some of the ingredients. This was contrary to the principles of free movement of goods and genuine competition among member states which forbade customs duties. The ECJ ruled that this tax was a disguised customs duty labeled as a compensatory tax and thus was deemed an infringement of community law (Turner 2006).

One year later, the ECJ established the principle of direct effect in a preliminary ruling procedure. In the case *Van Gend en Loos* (ECJ 1963), the court was asked about the admissibility of a price increase of an import duty of chemicals. In the complex judgement, the court established the doctrine of direct effect which means that “provisions of binding EU law which are sufficiently clear, precise, and unconditional to be considered justiciable can be invoked and relied on by individuals before national courts” (Craig/De Burca 2011: 180). The doctrine of direct effect was adapted in later judgments, but the key right which the court had conferred to the individual remains until today.

Another year later, the landmark decision of *Costa v E.N.E.L.* (ECJ 1964) changed the face of international law again. Most importantly, it established the supremacy of EU law over national law. The case involved an Italian lawyer who was afraid of losing his shares in an electric company that was privatized. The court ruled that the EC Treaty “has created its own legal system which (...) became an integral part of the legal systems of the member states” and that “the member states have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves” (Turner 2006: 20).

As can be seen from just these three examples, the court used technical issues like taxes on gingerbread, import duties on chemicals, and privatization of the electricity sector to make judgments on totally different topics. By no means was the intent of the Italian share-owner to settle once and for all that EU law outranks Italian law. And yet, this is exactly what the court did. It seized the opportunity, and by making its

decision on the issue – maybe not even as the mainly responsible court if it was a preliminary ruling procedure – it snuck in principles that it found necessary for the community. Once supremacy and direct effect had been established, “member states passed secondary implementing legislation to build a common market, giving litigants legal texts worth invoking, engaging national administrations and judges in enforcing European law, and giving the ECJ a platform upon which to build integration promoting jurisprudence” (Alter 2012: 138).

As has been shown, the ECJ started off slowly with few (important) cases in the 1950s. The first revolutionary decisions were made in the early 1960s. In the 1970s, several more famous judgments followed. In the case *Cassis de Dijon* (ECJ 1979), the ECJ established the principle of mutual recognition by focusing on technical aspects, stating that goods “lawfully marketed in one member state should, in principle, be admitted to the market of other member states” (Craig/De Burca 2011: 685). *Dassonville* (ECJ 1974) led to an expanded interpretation of Article 30 of the Treaty to discriminatory measures, also including “any norm capable of impeding directly or indirectly, actually or potentially, intra-community trade” (Saldias 2007: 11).

The establishment of a “new legal order”, as the ECJ called it, was possible because it benefitted from a tight advocacy network that actively lobbied national level judges, and facilitated communication and subsequent cooperation with the ECJ through, for instance, preliminary ruling procedures (Slaughter 1999: 1105). This epistemic community of pro-integrationist lawyers and judges has been decisive for the success of the ECJ in the early years because they established a “symbiotic relationship” with national courts and agencies (Alter/Helfer 2013: 495).

Palpably, it was a gradual process, but in the long run, the court was able to significantly spur integration by means of its landmark rulings that allegedly had been hard to achieve with political decisions alone. Indeed, Alter confirms that the “ECJ is clearly seen as a successful supranational court that has furthered regional integration through its many rulings” (Alter 2012: 145). Ruppel adds that the “European Union experience has demonstrated that such dispute settlement bodies can indeed play a significant role in regional integration” (Ruppel/Bangamwabo 2008: 180). For the purpose of the paper, later time frames and today’s role of the ECJ shall be disregarded to guarantee a better comparability with the other two courts.

3.2 *The SADCT’s Failure to Advance Integration*

SADC has its origin in the 1974 founded organization of Frontline States. Since then, it has undergone a long process of institutional reform which also includes the creation of a supranational court – the SADC Tribunal. These processes are shortly presented here in order to subsequently explain why the SADCT has failed to advance integration. The fact that the SADCT actively tried to pursue an integrationist agenda gives grounds for delving into this case more extensively.

The Frontline States were created by a few sovereign Southern African states in order to support armed resistance groups fighting colonialism and white minority governments, particularly the South African Apartheid regime (Melber 2012). While the Frontline States can be labeled the origin of regional cooperation

in Southern Africa, in 1980 another organization was established which came to be the immediate predecessor of the SADC: the Southern African Development Coordinating Conference (SADCC). It was founded by nine states of Southern Africa: Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia, and Zimbabwe. One of its main goals was to decrease the dependence of its member states on the economically strong South Africa by, among others, attracting foreign investment (Hulse/Van der Vleuten 2015), and to develop the region as a whole by means of enhanced regional integration. The newly independent Namibia joined SADCC in 1990.

In 1992, SADCC was effectively transformed into the Southern African Development Community (SADC). Next to the ten member states of SADCC, five other states joined the newly formed SADC throughout the next years: the Democratic Republic of Congo, Madagascar, Mauritius, the Seychelles, and South Africa. Institutions such as the Summit of Heads of State or Government (also called ‘the Summit’), the Council of Ministers, and the Secretariat were established to foster the achievement of the stated objectives. In 2001, a major institutional overhaul established an entirely centralized secretariat with limited executive power; however, the discretion of implementation of community law still remained with the member states. Policy areas now also included human rights standards, rule of law, democracy, good governance, and gender equality. At the same time, principles such as sovereignty and non-interference were kept extremely dear (Hulse/Van der Vleuten 2015).

When drafting the 1992 SADC Treaty, it was determined that a court was needed to ensure uniform interpretation of SADC law. Consequently, Article 9 of that Treaty established the SADC Tribunal (Ruppel/Bangamwabo 2008: 179). The mandate of the Tribunal as specified in the Protocol includes two main points:

“ensure adherence to and proper interpretation of the provisions of this [SADC] Treaty and its subsidiary instruments and to adjudicate upon such disputes as may be referred to it [...], and] give advisory opinions on such matters as the [SADC] Summit or the [SADC] Council may refer to it” (SADC 1992, Art. 16).

However, the relevant protocol effectively creating the SADCT was not signed until the ordinary Summit in 2000. Moreover, it was not processed as usual. Due to the fear of not reaching the necessary number of ratifications by member states, the protocol was instead adopted by the heads of states (Hulse/Van der Vleuten 2015).

The court was finally inaugurated as SADC’s highest judicial body in 2005. The Tribunal officially became operational in 2005 and its first case was filed in September 2007 – 15 years after its first reference in the SADC Treaty. In the following years, the SADCT dealt with a total of 18 cases, made expansionist rulings, and demonstrated considerable efforts to inform people about the court and the opportunities it offered them. The Tribunal’s judges informed lawyers and tried to attract cases by conducting workshops on how “to access the new court” (Hulse/Van der Vleuten 2015: 7). They also made several study trips to European and African courts, always trying to learn about “developing jurisprudence under conditions of disparate legal systems” (Hulse/Van der Vleuten 2015: 8).

However, already its second case, *Campbell vs Republic of Zimbabwe* (SADCT 2008), filed in October 2007, caused significant problems. The farmer Mike Campbell advanced a case against the Zimbabwean government with the newly functional SADCT, protesting against the 'Fast Track Land Reform Program' of Zimbabwe. The court ruled in favor of Campbell and ordered Zimbabwe to not only end expropriations, but also to pay compensation to those whose lands had already been seized. This can be considered an activist and expansionist ruling, as the judgment of the Tribunal constrained Zimbabwe's power with regards to the execution of the 'Fast Track Land Reform Program'. Yet, this ruling did not advance integration within SADC because the Zimbabwean government failed to adhere to the court's rulings. In fact, Zimbabwean President Mugabe personally described the judgment as illegitimate "nonsense and of no consequence" (Hulse/Van der Vleuten 2015: 10). In this context, also the lack of ratification of the protocol was brought up by Zimbabwe to delegitimize the Tribunal's authority.

As defined in the Protocol on the Tribunal in the SADC, the SADCT reported "its finding [the establishment of the failure by a state to comply with a decision of the Tribunal] to the Summit for the latter to take appropriate action" (SADC 2000, Art. 32,5). However, the Summit took action neither on this nor on later referrals. When the Summit finally acted in 2010 after the third contempt of court's ruling, it referred the issue to the SADC Council of Justice Ministers in what Hulse describes as a "delaying tactic" (Hulse 2012: 3). When Zimbabwean Justice Minister Chinamasa claimed that "the tribunal has no jurisdiction over Zimbabwe" (cited in Bell 2009), the SADC justice ministers ordered an independent review of the Tribunal. While an international law expert undertook the assessment, the Tribunal was suspended by the member states. After six months, the Tribunal was found effective, legitimate, and acting in accordance with international law; Zimbabwe was found "precluded from denying the validity of the decisions of the Tribunal" (Bartels 2011: 89).

Notwithstanding the review's outcome, the Summit decided to extend the court's suspension and to launch a modification of its legal instruments (Summit 2011). At the 32nd SADC Heads of States and Government Summit in 2012, the SADC leaders "resolved that a new Protocol on the Tribunal should be negotiated and its mandate confined to interpretation of the SADC Treaty and Protocols relating to *disputes between Member States*" (Summit 2012: 7, emphasis added). It should be noted that this Summit decision was taken unanimously and against "recommendations of both the SADC-instituted review of the Tribunal and SADC's own Ministers of Justice and Attorneys General" (SAFPI 2012). Thus, it can be concluded that while the SADCT tried to advance integration within SADC, the member states scotched all its efforts.

In that regard, it is worth taking an extended look at South Africa's role in this process. It is striking that South Africa as the most powerful country within SADC did not rise up to defend the court when it was virtually suspended in 2010 and later severely limited in its jurisdiction. Being a democratic country which fully supports human rights and the rule of law and usually fights at the forefront to promote good governance on the African continent, it cannot be argued that South Africa did not translate its power into comparable influence because the subject matter was of comparatively little interest. Moreover, given that SADC is institutionally still a rather weak organization, it is even more surprising that South Africa chose this course of action concerning the SADCT. Still in April 2010, South Africa's Deputy Minister of Justice and Constitutional Development Nel openly proclaimed South Africa's adherence to the principles of human rights and the rule of law as well as the country's support for the SADC Tribunal.

The South African Government is indeed proud of, and unequivocal in our principled support for the SADC Tribunal as a legitimate constitutive institution of SADC and believe that it should be accorded all the support and respect needed to fulfill its functions [...]. It is my contention that if we are to succeed in the various regional development matters, we must first and foremost ensure that justice is the bedrock of all our institutional frameworks [...]. We must at all times safeguard jealously those institutions that we collectively have created. (cited in Department of Justice and Constitutional Development 2010)

Evidently, South Africa presents itself as a strong advocate of the rule of law and international justice mechanisms such as the SADC Tribunal. Furthermore, its justice minister openly expressed disagreement with the Tribunal's suspension (Hulse/Van der Vleuten 2015). It also needs to be noted that the Summit must arrive at decisions by consensus. Thus, South Africa – just as any other SADC member state for that matter – had the opportunity to veto the decision to suspend the SADCT. Judge Pillay supports this argument, claiming that “South Africa could have used its power as the SADC’s largest state and its ‘moral authority’ to prevent the Tribunal being emasculated” (Fabricius 2013). And yet, it chose not to do so.

This decision can best be explained by the logic of appropriateness. Nathan finds that SADC “member states are bound by a common commitment to state solidarity and regime protection” rather than by “commitment to human rights and the rule of law” (2012: 136; 2013). In fact, given the large variety of political systems that SADC encompasses, the region has very little normative congruence. Two of the few shared principles uniting the region are “strict respect for sovereignty” and “non-interference in internal affairs of other States” as expressed in the SADC Protocol on Politics, Defense and Security-Cooperation (SADC 2001, preamble). Additionally, it needs to be recalled that SADC can historically be traced back to the Front Line States, giving Mugabe as one of the veterans of the liberation struggle and the longest-serving head of government within SADC the role of an elder who must be respected. This holds particularly true for South Africa, where the feeling of historical debt due to the Apartheid Regime remains present (Nathan 2012).

Hulse even claims that “South Africa’s position as the former pariah state [...] makes it nigh impossible for South Africa to openly criticize Mugabe” (Hulse 2012: 4). Moreover, she argues that “the Zimbabwean leadership was successfully able to portray the Tribunal as an obstacle standing in the way of fulfillment of the promises of the Liberation era” (Hulse 2012: 4) hinting at the fact the SADCT’s decision in the Campbell case declared Zimbabwe’s land reform efforts as unjust. Given that these reforms were aimed at redistributing the country’s land – predominantly owned by white farmers – and, thereby, bringing justice to many blacks that had been formerly discriminated against, it is reasonable for South Africa to not wish “to publicly dissent from this view, for it would be seen as betraying the region’s revered history of Liberation, and risk accusations of being an agent of neocolonialism” (Hulse 2012: 4). Hence, it is proposed that the identity as a liberation fraternity caused South Africa to be silent concerning Zimbabwe’s breach against the SADCT’s rulings.

Moreover, it appears that by reason of the SADCT issue, the unity of SADC as a whole was at stake. In 2011, Nicole Fritz of the Southern Africa Litigation Centre declared that “South Africa knows that Zimbabwe is prepared to throw everything at this issue and if they want to retain a semblance of unity on the regional integration issue they’re going to make some concessions to Zimbabwe” (cited in Christie 2011), displaying

the argument that regional unity has a serious impact on South Africa's decision-making processes. This is supported by Alden and le Pere, who already in 2004 noted that

"[e]ven in those cases – Zimbabwe in particular – where South African interests were most directly affected and leverage was assumed to be considerable, the range of actions available that would not exact costs in terms of SADC unity, domestic politics and relations with all important G-8 countries, turned out to be far fewer than policy makers in Pretoria had anticipated" (Alden/le Pere 2004: 290).

The importance of regional stability and solidity is also emphasized by South Africa's Minister of International Relations and Cooperation, who asserts that "SADC will never achieve regional development and true integration without regional stability" (Nkoana-Mashabane 2012). Thus, recognizing the influence of these factors can to a large extent explain the surprising fact that South Africa did not rise up to defend the Tribunal.

As a result of the Campbell case and the process it set in motion, in 2012 the Tribunal's jurisdiction was confined to member states. Considering that only individuals had approached the SADCT up to that moment, this effectively transformed it into a dormant institution, void of its original purpose. Moreover, as African states have a tradition to not go to court against one another, this will likely ensure that the "Tribunal will remain an empty shell and a waste of taxpayer's money" in the future (Hulse 2012: 3). According to the official website, no more cases have been filed since 2010. Assuming that the rulings of the Tribunal had been implemented, they would have had an integrationist character because they identify new obligations for member states that limit their discretion. Yet, the judgments were never able to cause any impact because they were not implemented. The final say about adherence to the SADCT's judgments lies with the Summit and is therefore dependent on the political will of all member states (Ruppel/Bangamwabo 2008: 213). Being left with a quasi-non-existent mandate, the SADCT is unable to advance integration and while it was active, it tried but failed to do so. Consequently, it has a negative value on the dependent variable; it did not advance integration.

3.3 The ACJ's Failure to Advance Integration

The *Comunidad Andina de Naciones*, the Andean Community founded in 1996, has four members: Bolivia, Columbia, Ecuador, and Peru. All of these are also founding members of CAN's predecessor, the Andean Pact of 1969 (Zilla 2012). They were inspired by the EU to build a common market through supranational institutions. To that end, they emulated the institutional design of the EU (Alter/Helfer 2010). Since 1996 with the signing of the protocol of Trujillo, the CAN focuses its efforts on trade liberalization. In 1979, it had become clear that a supranational court was necessary to guarantee the uniform interpretation of community law. The ECJ was taken as a model and in 1984 the *Tribunal de Justicia de la Comunidad Andina*, the Andean Court of Justice, started working (Alter/Helfer, 2010). It consists of four judges and has its permanent seat in Quito, Ecuador (Zilla 2012: 46). Originally, the ACJ only had the power for acts of annulment. Since 1999, however, it may also initiate failure to act proceedings, accept preliminary rulings by referral from national courts, and adjudicate on labor rights (Zilla 2012: 46).

In the first cases, the ACJ repeated key EU rulings that confirmed direct effect and supremacy of Andean law, even though the cases as such had nothing to do with these concepts. However, the ACJ soon mitigated these statements and declared that Andean law does not constitute a new legal order as in the European case but is solely a “functional necessity” (Alter/Helfer 2010: 571). Indeed, the principle of *complemento indispensable* was introduced to regulate conflicts with national law. It states that even in areas of community competence, member states may enact national laws as long as they do not nullify Andean law (Alter/Helfer 2010: 571). Acknowledging that this principle already hints at a cautious approach towards law-making, two cases shall be explained in which the ACJ failed to become expansionist despite suitable opportunities.

In *Aluminio Reynolds* (ACJ 1990), the court was presented with a preliminary ruling referral from the highest Colombian administrative court. The national court wanted to know if the tax issued by Columbia was covered by Article 55 of the Treaty that prescribes exceptions to trade liberalizations concerning goods considered sensitive for the economy of the member states. If so, the defendant Columbia was correct and the levied tax lawful. Consequently, the applicant, an aluminium producing company, was incorrect and had to pay the tax. At this point, the ACJ was presented with a significant opportunity. Neither the nature nor the scope of these exemptions was defined yet and the court was asked to fill this gap. It could have taken one of two possible routes: either follow the ECJ’s example in the similar *Dassonville* case and give an expansive interpretation; or choose the restrictive interpretation demanded by Columbia, claiming that it is not specifically prohibited to raise tariffs and hence should be allowed. The ACJ sided with the latter position and with Columbia.

The case *Sociedad de Aluminio Nacional* (ACJ 1993) concerned the same issue. In its decision, the ACJ referred to its earlier precedent and explained that the restrictive interpretation should be used. With just these two judgments, the court has shot itself in the foot. Originally, it had been established with the objective to accelerate the process towards creation of a common market. Yet, this kind of law-making slowed down that very process. As a matter of fact, the court had granted member states more freedom to exempt products from the liberalization scheme and had thus thwarted the goals of the common market.

More examples of missed opportunities to become expansionist could be listed at this point. It is clear, though, that the ACJ “draws the principles of Andean community law from the will of the legislator [...] and not actually from the founding goals of the Cartagena Agreement, nor from its declared spirit of philosophy of integration” (Saldias 2007: 20). This shows that the ACJ has “sided with the government, ruling that member states had free reign” (Alter/Helfer 2010: 572) and showed the ACJ’s “unwillingness to expand its authority or the reach of Andean law” (Alter/Helfer 2010: 577). Therefore, the ACJ has not adopted an expansionist style of law-making; the “alleged engine of integration has not seized power” (Saldias 2007: 28).

In recent years, the ACJ has had to deal with new challenges, namely “political and economic schisms” that have emerged between the member states (Alter/Helfer 2010: 578). As a consequence, some countries have recently entered into bilateral free trade agreements with the United States which can be deemed counterproductive to integration within the region (Saldias 2007: 4). Nonetheless, the ACJ is a very active court which has dealt with many cases in its history. In fact, the ACJ is “the third most active international court” (Alter et al. 2012: 629) worldwide. This being said, however, it is noticeable that its rulings are not

expansionist and mostly only deal with one single topic: intellectual property rights. Out of 1338 preliminary ruling proceedings between 1984 and 2007, only 35 dealt with a topic other than intellectual property (Alter/Helfer 2010: 580). With a possible exception regarding its very first court ruling, the ACJ has “refrained from the sort of expansionist law-making that is the hallmark of its European cousin” (Alter/Helfer 2010: 565).

One argument of the intergovernmentalist school of thought in the context of judicial activism deals with the socialization of supranational court judges. Usually, these are judges stemming from the highest national courts, for instance supreme courts. As member states are regarded as unitary actors by intergovernmentalists, these judges are considered part of the member state. It is argued that they have been socialized in a specific culture keeping the member state interest firmly in mind. Moreover, they know that their member state has the power to replace them. Hence, it is claimed that they do not become activist because they do not want to harm their home member state which may favor intergovernmental over supranational cooperation. However, Voeten’s study speaks against this argument by examining the impartiality of international judges in the European Court for Human Rights. He finds that “there is no evidence that judges systematically employ cultural or geopolitical biases in their rulings. [...] Most strongly, the evidence suggests that international judges are policy seekers” (Voeten 2008: 417). Alter and Helfer (2010) add that judges are not power seeking by nature but that active nurturing is necessary. Concerning the research at hand, the socialization argument does not explain the variation on the dependent variable ‘advancement of regional integration’ because all judges – in the ECJ, SADCT, and ACJ – came from the highest national courts and still behaved differently. The ECJ and SADCT judges did not necessarily rule in line with the member states’ interests. The ACJ judges on the other hand did so by not becoming activist. On the other hand, also the claim that judges seek to increase their power and hence push integration to become even more powerful does not hold. Consequently, the argument about socialization of judges is unrelated to this context.

To summarize: During its more than 30 years in operation, the ACJ has proven to be reluctant to expand its authority and the reach of Andean rules in ways that constrain national sovereignty. It has neither “been able to establish a customs union” (Saldias 2007: 4), nor has it seized power in form of expansionist law-making. Therefore, we argue that the ACJ has not contributed to integration within the CAN and the dependent variable advancement of regional integration is negative for the ACJ. This leaves us with a ‘Yes’ for ‘advancement of regional integration’ for the ECJ, and a ‘No’ for the SADCT and the ACJ on the dependent variable. Next, it is essential to look at the independent variables in order to elucidate this variance on the dependent variable.

4. The Independent Variables

Having established that the ECJ effectively advanced regional integration and the SADCT and ACJ did not, we now examine possible explanations. We consider several independent variables on grounds of their explanatory power: political support, legitimacy, private access, problem pressure, and prolonged existence. Recognizing that some of the variables have blurry boundaries, it is nonetheless possible to generally

distinguish between these five. For all variables we, firstly, derive and explain the pertinent hypothesis. Secondly, we analyze the three cases and determine whether they have a positive value on the variable or not (yes or no). Finally, in the conclusion, we summarize whether or not this variable is decisive for the advancement of regional integration by courts.

4.1 Political Support (X1)

One frequently made argument is that courts only advance integration when the political climate is in favor of it. Thus, this variable predicts that integration by courts is always dependent on the political support of the ruling elite. This is a member state-based argument, assuming that courts only carry out the will of the member states (Garrett 1995). As the following shows, in the specific contexts of the three courts advancing integration, this assumption does not hold.

In the case of the EU, political support for the advancement of integration by the court during the first decades of its existence was not necessary (as mentioned before, recent debates are beyond the scope of this paper). In fact, we argue the opposite, namely that the court steps up to advance integration when political process stagnates. Weiler (1981, 1991) has argued that in the European case legal supranationalism advanced the most when political steps toward integration were poor. More concretely, the ECJ has been attributed with “advancing integration through law when political support for a European common market had faltered” (Alter/Helfer 2013: 491). Consequently, this variable is negative for the ECJ. It advanced integration without the backing of the member states.

The SADCT case is difficult in this regard because there was no support from the political elite for further integration – especially not through the Tribunal – to begin with, but the judges tried anyways. Thus, the court clearly did not act according to the will of the political elite. This also holds true after the first severe problems surfaced. More than once, the SADCT approached the Summit, asking it to ensure that the Tribunal’s rulings are complied with. The result is well known: disintegration and a scraped mandate. It follows that this case does not provide much insight into whether political support is necessary or not to advance integration. It is clear, however, that it would not have hurt.

For the ACJ, in contrast, this hypothesis holds true. The ACJ’s law-making tends to “reflect rather than counterbalance political support for integration” (Alter/Helfer 2010: 579). Especially in the early years, when enthusiasm for regional integration was great among the member states, some key doctrines such as direct effect were established by the court. In recent years, however, integration is in retreat and member states look for alternatives in the greater region; simultaneously, legal supranationalism stagnates. It follows that this variable is positive for the ACJ; the pro-integration climate coincided with more ambitious law-making and vice versa.

It should be noted that Alter and Helfer have offered an alternative view. They have shown that international courts are especially expansionist when “sub-state and societal interlocutors encourage law-making and facilitate compliance with rulings” (2010: 565). This challenges the prominent IR view that states shape

international courts' decision-making. In sum, it can be concluded that a political climate in favor of integration is not a decisive factor in explaining successful integration efforts by ECJ-like courts. That is because the ECJ as the only positive case on the dependent variable has a negative value here. It surely does not hurt if the political direction coincides with the adjudication of the courts, but from the examined cases we cannot conclude that it is necessary.

4.2 Legitimacy (X2)

This variable refers to legitimacy according to certain norms. In our case, it relates to the establishment of the courts in line with the laws of the community and without any flaws in the ratification process. It also refers to the acceptance by the affected population, including the affected politicians. As will be shown, legitimacy is especially important in the SADC case. Here, two theories can be used to derive hypotheses.

Firstly, the principal-agent (P-A) approach proposes that the principals, that is the member states, enjoy a lot of leverage over the agent, that is the court, because they can quite easily rewrite the mandate of the agent (Pollack 2001). A side effect and inherent cost of this delegation is the "agency slack" which can be defined as "unwanted agent behavior" because the agent may attempt to emancipate from the principal (Alter 2012: 237). These are the risks of "agency loss" and "agency cost" (Pollack 2001: 108). Turning the P-A approach around, it hypothesizes that when the speed of the integration process is slow and steady with step-by-step advancements only, the agency slack is not overstretched and the principal will not turn around and punish the agent (the court). Eventually, the agent manages to circumvent the power of the principal and becomes independent of it.

Secondly, neo-functionalism can be used in the legal realm to explain integration. Burley and Mattli have shown that law can function "as a mask for politics" if judges manage to keep the fiction alive that law is not politics (Burley/Mattli 1993: 44). To begin with, judges keep the process "nominally apolitical" by dealing with technocratic issues only (Burley/Mattli 1993: 56). This causes no tension with the politicians and, thus, the court is allowed to continue its work. Then, a certain point can be reached, at which governments must deal with the court as it is and cannot stop it anymore. Thus, according to neo-functionalism, courts can advance integration as long as legitimacy is maintained.

For the ECJ, the variable 'legitimacy' is positive. The ECJ's legitimacy has never been challenged because it was established in the founding treaty at the very beginning of EU integration. It has always been accepted as the central legal body of the community. Empirically, the ECJ only had few problems because it managed not to overstretch the agency slack and to mask political issues as judicial. The ECJ has been careful not to step on the feet of the principals (the EU member states' governments) by focusing on "procedural issues, avoiding entering the political fray where possible" (Alter 2012: 137). Additionally, there have been "a number of examples where the ECJ used technical rulings to avoid controversy" (Alter 2009: 9). The ECJ thus continuously possessed legitimacy.

For the SADCT, on the other hand, there have been tremendous problems with legitimacy. Firstly, the Protocol that established the Tribunal was challenged as illegal by Zimbabwe because it was adopted by the heads of state instead of ratifying it in every member state (Melber 2012: 221). Zimbabwe argued that “it was not in fact bound by the Tribunal’s rulings on the grounds that the national parliament had not yet ratified the Protocol” (Hulse 2012: 2). Although legally speaking Zimbabwe was indeed subject to the court’s jurisdiction because of “commonly accepted principles of international law” (Hulse 2012: 3), there was a deviation from the usual procedure which led to a lack of legitimacy.

Secondly, it has been argued that the establishment of the Tribunal was primarily a donor-pleasing exercise and therefore no genuine undertaking by the Summit (Lenz 2012: 164-167). Thus, as soon as the agency slack became too large through the court ruling on a race/land reform issue, the agent was let go. The Tribunal had dramatically miscalculated the power difference (*Machtgefälle*) vis-à-vis the principals. The “governance transfer rollback” that struck the SADC disabled a “lock-in effect” from taking place and therefore served as a catalyst to the suspension process (Hulse/Van der Vleuten 2015: 1). It remains questionable whether the Tribunal would also have been suspended if it did not have to deal with such a sensitive case at the very beginning of its operational time. Another aspect that is relevant here is the role of a democratic court in a regional organization of largely autocratic member states. In fact, quite a few civil society leaders such as the famous South African Archbishop Emeritus Desmond Tutu raised their voices against a limitation of the court’s jurisdiction, thereby signaling at least partial empirical legitimacy from the public. Yet, most SADC member states qualify as autocratic regimes where the public has almost no power to influence the political process, leading more often than not to a disconnection between politicians and the public. That being said, it remains a fact that no large-scale public outcry accompanied the dismantling of the SADCT. It follows that empirical legitimacy is predominantly not given in this case.

In case of the ACJ, legitimacy is intact. The court was established to solve market-related problems and rests on a sound treaty. Presumably, its authority has never been doubted by any of the involved official actors. Therefore, it can be regarded as highly legitimate. Moreover, as the ACJ lacks expansionist law-making up until today, it has never threatened to overstep its mandate. As a matter of fact, it has taken tiny steps only and has not dealt with political issues at all. Indeed, most decisions “concern narrow issues with relatively low political salience” (Alter/Helfer 2013: 495). Hence, for the ACJ the legitimacy variable is positive.

With regards to the relevance of this variable, it can be concluded that ‘legitimacy’ is an important indicator to explain successful advancement of regional integration by ECJ style courts. Concerning the SADCT, this variable is negative, thus explaining the negative outcome of the dependent variable ‘advancement of regional integration’.

4.3 Private Access (X3)

The next variable ‘Private Access’ is partly linked to legitimacy because it can strongly influence it. As explained earlier, all three of the studied judicial bodies are ECJ style courts which share the same institutional design with only minor deviations. One aspect that does vary is the access rule for private litigants.

Private access means that “private actors have standing in front of ICs [international courts]” (Alter 2012: 265). This standing can take different forms: complete, limited, or no standing in front of the court, which is specified in the respective courts’ statute. The private access rule can also change over time adapting to the community’s needs. In the context of this paper, complete private access for litigants can be influential because individuals can bring controversial topics up to the court that endanger the apolitical nature of the rulings. That is because “private actors are more numerous and motivated by personal incentives” (Alter 2012: 265). This, in turn, can threaten the legitimacy of the court as explained in X2. Hence, the derived hypothesis is that by denying access for private litigants, a higher likeliness for apolitical topics is given that ensures a positive value on X2.

Of the ECJ cases mentioned earlier, not a single one was initiated by private litigants. In *Commission v Luxembourg*, it was a community body (the Commission) that went after a member state (Luxembourg) for violating the treaty. In *Van Gend en Loos*, the case was referred to the ECJ via a preliminary ruling procedure from the national court. In preliminary rulings in general, individual parties have no right to insist that the court refers the case to a higher instance. It is always up to the concerned court whether it wants to ask a question to the ECJ. *Costa* was also a preliminary ruling in the dispute between a private person and a company from the same country that went up to the highest court in Italy which then referred the question to the ECJ. None of these legal disputes included procedures with standing in front of the court for individuals. Additionally, as already mentioned, these crucial cases were also not political in nature but in fact very technocratic issues that the court utilized to broaden its rulings. Thus, for these cases of prime importance for the advancement of regional integration in the early years of the ECJ, the hypothesis holds true.

However, there are also proceedings in which a private person indeed has standing. Without going into too many details about legal procedures at the ECJ, the rule is as follows. In order for a case to qualify for private standing, direct and individual concern have to be established; only then a case is admissible to the court. Both are relatively hard to demonstrate. Especially challenging is individual concern, which means that a person is “differentiated from all other persons” (*Plaumann* test) (Craig/De Burca 2011: 494). Until 2004, about the same number of cases was brought by a direct action of an individual (~7500) as by the Commission and by referral of national courts combined (~2500 plus ~5300 = ~7800) (Alter 2012: 265-270). These numbers, however, do not reveal how many cases of private persons were not dealt with because they did not meet the criteria of direct and individual concern. Presumably, the statistics would look remarkably different if these denied cases were specified. Also, these are the numbers of all cases over a period of time of more than 50 years. Numbers for cases before the 1970s are not available. Therefore, concerning the ECJ it cannot convincingly be argued that the hypothesis either holds true or not. Further data analysis is necessary to obtain more exact values.

The SADCT has no strictly regulated access for private litigants but access per se: SADC allows “private actors to bring disputes with states directly to the international court” (Alter 2012: 140). Article 15 of the Protocol specifies that “individual persons and companies may bring a case against a member state, so long as they have first exhausted all available remedies, or are unable to proceed through national courts” (Hulse 2012). This wide-open access has led the Tribunal to deal with an extremely controversial topic at the very beginning. *Campbell v Republic of Zimbabwe* was filed as the second case and stayed on the agenda for the next years. The Tribunal ruled in Campbell’s favor establishing that Zimbabwe had not only “denied access

to the courts in Zimbabwe” and discriminated against Campbell “on the ground of race,” but also that “fair compensation is payable to the Applicants for their lands compulsorily” (Ruppel/Bangamwabo 2008: 8-9).

However, this ruling did not help Campbell much. As mentioned earlier, the implementation of the judgments rests with the Summit. And yet, the Tribunal failed to apply the neo-functionalist logic of firstly dealing with low profile cases only. Presumably, the Tribunal could have rejected the case by using a technical pretext, declaring itself unable to deal with the matter at hand. Yet, the Tribunal refused to dismiss the case on technical grounds. In this context, the Tribunal president declared: “I am not a politician but a judge” (Hulse/Van der Vleuten 2015: 9). At the same time, the judges were aware of the politically sensitive nature of the case. Nonetheless, they not only decided to take on the case but also made a very strong judgment. Therefore, it was not so much the private access that triggered further developments but the decisions of the judges. The sole fact that the case was brought in by a private party did not guarantee failure to promote regional integration right away. Thus, for the SADCT it is difficult to pinpoint whether private access was the reason for the politicization of the cases and the attributed loss of legitimacy or whether it was the stubbornness of the judges “to come out as strongly” as they did (Hulse/Van der Vleuten 2015: 9). This leaves us with an indistinctive Yes/No for this variable.

The ACJ is also interesting in this regard. Just as the SACDT, it offers unlimited access for private persons. However, private access has never really been practiced; neither right after creation nor in recent times (Alter et al. 2012: 636). Therefore, it can be said that the ACJ provides no functional private access and no de facto access for private litigants, which ensures the apolitical nature of cases. But because it provides de jure access to private litigants, this variable can also only be labelled with a Yes/No.

To sum up, the role of private access in threatening the legitimacy of cases cannot convincingly be established, although there are certain indicators. It might have a negative relationship with legitimacy, but no generalizable pattern could be identified.

4.4 Problem Pressure (X4)

This variable hypothesizes that problem pressure leads to the advancement of regional integration. It supposes that whenever there is an acute need for a dispute settlement mechanism due to high economic interdependence in the region, the installed court is more likely to take on a proactive role than if another settlement system is readily available.

For the ECJ this seems to be true. In the ECSC in the 1950s, there was some economic interdependence between the member states. Moreover, there was no other dispute settlement in place than the ECJ. Thus, a positive relationship between the need for a mediator and the activist ruling that took place in the late 1960s and 1970s is likely. However, it is out of scope of this paper to thoroughly establish this causal mechanism.

In SADC, the situation was different. The Community had already existed for a long time before the Tribunal was created. Therefore, another dispute settlement mechanism had already been in place, at least for inter-state trade disputes. This was, however, not a supranational kind of court but “a WTO style ad hoc panel of trade experts” which had been operating since 2001 (Hulse/Van der Vleuten 2015: 6). The Tribunal was created in addition to this system. Hence, there was a low degree of problem pressure in SADC because one could rely on the other dispute settlement mechanism to solve trade disputes and, in so doing, “facilitate further economic integration” (Hulse/Van der Vleuten 2015: 6). The fact that a suitable alternative was available may also be part of the explanation why no member state stood up against Mugabe in the debate about the suspension of the Tribunal.

In that relation, the entering into force of the Court Protocol establishing the African Court on Human and Peoples’ Rights (ACHPR) in 2004 and the appointment of its judges in 2006 is also noteworthy. After all, this court claims continental jurisdiction and attempts to “ensure the protection of human and peoples’ rights in Africa” (ACHPR 2014). Consequently, it can be argued that when the ACHPR ruled on its first case in 2009, the SADCT was more or less rendered unnecessary and hence the SADC member states did not deem it imperative to safeguard the Tribunal. Given the insecurity about when the relevant protocol creating the ACHPR would enter into force, it seems reasonable for the SADC member states to follow a two-track policy until one of the courts was fully functioning. Giving precedence to the larger court also seems reasonable, as it encompasses a broader territory. Problem pressure thus notably decreased.

Additionally, it is interesting to observe that the farmers Tembani and Freeth, replacing their father-in-law Mike Campbell, now launched their case before the ACHPR, citing all 15 SADC heads of states as respondents (MCF 2013). Compellingly, the AU Commission overruled procedural objections and decided to admit the claim for consideration, thereby supporting the argument that the ACHPR might be a viable alternative to the SADCT. Thus, the variable ‘problem pressure’ can be considered negative in the case of SADC. There was no acute need for a dispute settlement mechanism.

In CAN, on the other hand, economic dependence has never been high enough between the member states to begin with and disputes were mainly handled by the WTO system. Additionally, CAN member states have a tradition to deal with problems internally. The one topic that has kept the ACJ busiest, intellectual property, is “mainly addressed through regional rather than national disciplines” (Kingah 2013: 14). Hence, there was no problem pressure at all, leading to a ‘No’ for this variable for the ACJ.

Summing up, problem pressure that is created through the acute need for a dispute settlement mechanism because of high economic interdependence in the region can cause courts to be more proactive than when low problem pressure exists. In the ECSC and later the ECs, problem pressure can be regarded as high, in SADC and CAN it was not. Therefore, we regard this variable as an important factor when explaining the advancement of regional integration by courts. Generally, however, this factor seems to play a larger role in the creation/suspension debate than in the debate on integration promotion.

4.5 Prolonged Existence (X5)

This variable is concerned with path-dependency and supposes that the longer a court exists, the more likely it is to advance integration. This is explained simply by the fact that it has more time to do so. Processes and traditions can form and take root within institutional structures. The ECJ started off in 1952 and has been active for 63 years (in 2015). The SADCT received its first case in 2007 and the last one in 2010. In total, 18 disputes were adjudicated in these four years (Hulse 2012: 1). The ACJ started in 1984 and thus accounts for 31 years of adjudication. Both the ECJ and the ACJ dealt with a multitude of cases.

Thus, while both the ACJ and the ECJ have been active for a very long time, the SADCT only endured four years. Having said this, from a legal point of view, one would also have to measure the SADCT as ‘ongoing’ because the court still exists on paper. Notwithstanding, we can show that the prolonged existence of a court is not an explanatory factor for effective integration by courts because there is variation in the ACJ. It has existed for a long time but has not advanced integration.

5. Conclusion

As this paper’s analysis demonstrates, it is wrong to assume that “supranational courts – no matter how similar to the ECJ – are inherently expansive institutions” (Saldias 2007). This paper is concerned with the question under which conditions supranational courts become expansive in their rulings and thereby contribute to the advancement of regional integration. The findings of this most similar systems case design are summarized as follows in the table below.

Table 3: Findings of the Comparative Case Study Design

Variable	Variable Name	1) ECJ	2) SADCT	3) ACJ	Attributed Influence
Y	Advancement of Regional Integration	Yes	No	No	
X1	Political Support	No	No	Yes	Not important
X2	Legitimacy	Yes	No	Yes	Important
X3	Private Access	Y/N	Y/N	Y/N	Depends
X4	Problem Pressure	Yes	No	No	Important
X5	Prolonged Existence	Yes	No	Yes	Not important

Source: Authors.

We consider a set of independent variables (X1-5) to identify relationships with the dependent variable (Y: advancement of regional integration). The research shows that two variables are relevant when trying to determine whether a supranational court will advance integration within the region: legitimacy (X2) and problem pressure (X4). Firstly, we derive legitimacy (X2) from both the neo-functional logic and the P-A approach. It considers whether a court is challenged in its legal authority and whether it has the support

of civil society and decision makers. If legitimacy is present, the court has a fairly good chance to act as an engine towards integration. In contrast, if legitimacy is challenged, the court is very likely to fail in advancing regional integration. One aspect that can affect legitimacy is whether or not access for private persons (X3) to the court is allowed and intended by the court's statute and practiced in the court's activities. Even though we cannot identify a coherent pattern among the three case studies, this variable has the potential to significantly threaten legitimacy and thus should not be discarded.

Secondly, we identify problem pressure (X4) as a relevant independent variable. This refers to a situation in which the court is needed to solve disputes in the community. When problem pressure is high, no other dispute settlement mechanism is in place that could take over the job of the court. Facing urgent problems can push courts to make expansionist rulings. A high degree of problem pressure would therefore be advantageous for the effective advancement of regional integration. More cases should be considered in order for us to paint a clearer picture of the role of problem pressure in relation to the advancement of regional integration.

It can still be concluded that whenever variables X2 and X4 are positive, the ECJ style court in question is likely to act as an engine towards integration. As the analysis shows, two variables are found to be irrelevant and without influence on the dependent variable. These are political support (X1) and prolonged existence (X5). Neither the support of the political elite nor the number of years of activism made a difference with regards to the dependent variable.

Of course there are also some limitations to these findings. Firstly, the findings are derived from a small-N case study. In addition to the ECJ, we only analyzed two out of eleven cases. Therefore, the generalizability of the findings is limited. Secondly, we exclude the role of the ECJ after the 1970s from the analysis because it has changed over time and would not be comparable anymore with the SADCT and the ACJ. For the ECJ in its early years, the SADCT, and the ACJ, the findings hold true, making it likely that this is also the case for other supranational ECJ like courts. However, the analysis also shows that ROs have developed very differently in different contexts. Therefore, the findings may not hold for all other regional courts out there.

For further research, it would be interesting to apply the presented research model to the remaining nine cases of ECJ style courts and to test the findings. In particular, it would be intriguing to examine another possibly successful example of integration triggered by courts. It is unclear whether the Tribunal of the Economic Community of West African States (ECOWAS), the ECOWAS Community Court of Justice (ECOWASCCJ), presents such a positive case. It is striking, however, that it had a similar genesis with regards to its establishment as the SADCT. Yet, in its first decision, the ECOWASCCJ made clear that it was not allowed to adjudicate the presented case because the member states "must expressly confer such authority" (Alter/Helfer 2013: 497). Thus, it was cautious not to violate its mandate. Later, when private access was given to the ECOWASCCJ, it was able to rule much more expansively (Alter/Helfer 2013). Hence, this seems to be a promising case to test the findings of this analysis.

To conclude, this paper has attempted to explain when a supranational court is able to work as an engine towards integration. Knowing the relevant factors enables us to analyze evolving ROs and to formulate recommendations with regard to the choice between WTO or ECJ style court. Based on the present findings, it

can be estimated whether or not a court will advance integration in the long run. Moreover, the court itself can ascertain what is necessary if it wants to advance integration – and what cannot be recommended.

6. References

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