

**THE REINTEGRATION OF WALVIS BAY AND ITS
PENGUIN/OFF-SHORE ISLAND INTO NAMIBIA**

by

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BAHWADUBA. KGOMO LETEBELE !!!

ABSTRACT

The thesis focuses upon the final reintegration of Walvis Bay and its twelve Penguin/Off-Shore Islands into Namibia. As Namibia's only deep water port, it escaped reintegration in 1989 when the United Nations Security Council Resolution (UNSCR) 435 (1978) was implemented. Hence the study argues that the exclusion of Walvis Bay from the Settlement Plan falls outside the parameters of various UNSC and UN General Assembly Resolutions, viz 385 and 432 of 1976 respectively. Such an arrangement has to be looked at as Pretoria's non-compliance with the above resolutions. South Africa got away with such an arrangement with the blessing of the Western Contact Group of Nations, i.e the United States; Britain; (former West) Germany; France and Canada.

The argument advances further to capture the sudden emergence of Walvis Bay as a dispute between the National Party regime and the African National Congress (ANC) in particular. The dispute came about when the National Party submitted a controversial constitutional proposal during South Africa's transition to democracy at Kempton Park. They were proposing Walvis Bay to constitute part of the new Western Cape province in the post-apartheid South Africa. Namibia's diplomacy paid off when the return of Walvis Bay was agreed upon as it became entangled in the constitutional talks for South Africa's transition to democracy at Kempton Park in 1993-1994.

INTRODUCTION

On March 20 1990, Africa's last colony, Namibia, attained her independence from South Africa. However, her decolonisation process remained incomplete, as it did not simultaneously bring about the reintegration of the disputed territorial enclave of Walvis Bay and the twelve Penguin/Off-Shore Islands: Seal; Halifax; Albatross; Roast Beef; Long Island; Bird; Mercury; Plum Pudding; Hollandsbird; Ichaboe; Possession and Pomona into Namibia.

Throughout the protracted struggle and negotiations which finally led up to Namibia's independence, the South West African People's Organisation (SWAPO), the main liberation movement, and the National Party regime in South Africa, had antithetical viewpoints about the future of the disputed territorial enclave. The former viewed the enclave as part and parcel of Namibia and was determined that independence would be incomplete without the reintegration of the disputed enclave. On the other hand, the latter insisted that its future be decided beyond 1989.

However, at independence, Walvis Bay did not constitute part of the Settlement Plan drawn up under the United Nations Security Council Resolutions (UNSCR) 435 of 1978 which prescribed the independence process for Namibia in 1989. At this time, Walvis Bay and the islands remained under South Africa's illegal and ultimate control. It was thus clear that the dispute over the enclave was to be

resolved in the post-independence era. Surprisingly, the disputed enclave was then to become entangled in the process of constitutional negotiations in South Africa at Kempton Park in 1993.

This study, therefore, attempts to look at the final reintegration of Namibia's only deep water port, i.e Walvis Bay. It then attempts to trace how and why the disputed enclave escaped reintegration in 1989 during the implementation of the Settlement Plan, only to be drawn into the South African negotiation process in 1993-4 at Kempton Park.

The study proposes to argue that during the Cold War, Walvis Bay offered strategic advantages to Western countries as well as South Africa as their ally. Consequently, the Western Contact Group (WCG) of Nations, i.e Britain; the United States; (former West) Germany; France and Canada attempted to diplomatically manoeuvre the United Nations Security Council (UNSC) Resolutions 432; 385 and 435 to their advantage and that of South Africa in particular. However, the collapse of the Cold War reduced the strategic value of the enclave by the West, leaving it only with an economic and political significance to South Africa.

STRUCTURE OF THE THESIS

The thesis is divided into four chapters. Chapter One provides an

overview of the historical, legal, economic as well as the strategic background to Walvis Bay as a disputed territorial enclave. It serves to provide a foundation to different viewpoints/claims over the dispute, ranging from SWAPO, the National Party and the International Court of Justice.

Chapter Two and Three constitute the central focus of the study. Chapter Two seeks to look at how the UNSC Resolutions were manoeuvred by the WCG, one of the major role players in the Namibian (including Walvis Bay) dispute. The role of the UN is to be looked at in the context of the thorough internationalisation of the Namibian Question. In essence, the chapter attempts to look at how and why Walvis Bay escaped reintegration into Namibia in 1989, how and why Namibia's decolonisation process led to her independence without her only deep water port.

In Chapter Three, the focus is on the Joint Administration/ Authority that finally led to a negotiated transfer of the disputed territorial enclave into Namibia in March 1, 1994. It also attempts to capture the sudden emergence of Walvis Bay as a controversial issue at Kempton Park during the transitional constitutional talks, especially between the African National Congress (ANC) and the National Party (NP). The chapter argues that the final return of Walvis Bay became entangled with the negotiation process for South Africa's democracy at Kempton Park in 1993 to 1994.

Chapter Four serves as a conclusion and looks at Walvis Bay as an international port in a changing regional and global political economy.

CHAPTER ONE

BACKGROUND TO THE WALVIS BAY DISPUTE: AN OVERVIEW

1.1. The Historical Background

The illegal occupation of Walvis Bay by South Africa can be traced back to Dutch, Portuguese, American and French explorers in the 1480's, including Bartholomew Diaz. Subsequently, the port came to be known as Bahia de Baleas (Bay of Whales, Walvis Bay) by the Eighteenth-century whalers (Dugard 1991). Their presence on the enclave, including the occupied territory, set in motion the exploitation of Namibia's resources and her people under the banner of colonialism.

In 1793 the Dutch made a claim on Walvis Bay, and in 1795 the British followed suit. However, it was only in 1878 that a British commander, acting under instructions of his imperial government, formally annexed Walvis Bay. Britain had annexed the twelve Penguin islands earlier, in 1874. "The commanding officer duly landed, defined the enclave's boundaries, and in March 12, 1878 proclaimed the area to be British territory" (Moorsom 1984:13).

The British annexation was ratified in 1884/5 when Walvis Bay came to be proclaimed as part of the Cape of Good Hope during the Partition of Africa in Berlin, whilst the rest of the Namibian territory became a German protectorate. Walvis Bay subsequently fell under South Africa with the formation of the Union in 1910.

Germany's defeat during World War I in Europe saw the surrender of SWA (Namibia) and the enclave. These now came under a military governor from 1915 to 1922. This followed the invasion of the then German South West Africa by South African military forces under General Smuts late in 1914. Subsequently, following the transfer of sovereignty over SWA from Germany to the League of Nations in 1920, South Africa assumed responsibility for administering the country under a Class C Mandate of Trusteeship. From that point, Walvis Bay became effectively integrated into SWA under South African rule, leaving the status of the enclave and its islands unaffected. Hence, according to the Union's South West African Affairs Act No.24 of 1922 : "...the port and settlement was for reasons of expediency administered and legislated for as if it were part of the territory of South West Africa, and as if the inhabitants thereof were inhabitants of (the) said territory" (Sparks 1984:491).

Although the mandate system may be said to have reflected primarily imperialistic interests, Landis (1970/1:1) argues that

"In the context of the post-World War I arrangements imposed on the world body by the victorious Allied and Associated powers, the Mandate system was an instrument to give international legitimacy to white supremacy. The war that was fought to save the world for democracy, like the American war of Independence, was not meant to extend to non-white peoples. The principle of self-determination

so eloquently enunciated at Versailles ultimately meant that white Europeans would be the final arbiters of the destinies of colonised non-white peoples. Even to its De Gobineacian color-graded A,B,C categories, the Mandate system was designed to continue white dominance. Thus, the mandating of South West Africa to the Union of South Africa was merely an exercise in transferring the "white man's burden" (or a sacred trust of civilisation) from a defeated white power to one that had helped in the defeat. In no way did it mean even the beginning of self-determination for the indigenous inhabitants of that part of Africa".

Most importantly, it can be argued that the mandate system was reflective of continued white supremacy over the then South West Africa, including the enclave. Its primacy was centered on power and control as the mandate was carried out in violation of the indigenous local populace. Hence it was possible that within a time frame of 55 years, i.e 1922 to 1977, Walvis Bay was administered as part of a broader mandated South West African (Namibian) territory. But in 1977 the Republic of South Africa under Prime Minister John Vorster, passed what came to be known as Proclamation R202 of 1977 with the following provisions: "Walvis Bay shall cease to be administered as if it were part of the territory (of South West Africa) and as if inhabitants thereof were part of the territory and shall again be administered as part of the (Cape) Province".

This proclamation constituted a re-annexation of the enclave back to the Cape, and a repeal of the 1922 Act to justify South Africa's claim over the disputed territorial enclave. It was primarily designed to escape any possible reintegration of the enclave pending any final settlement of the Namibian Question, especially by the United Nations.

1.2. The Legal Dispute Over Walvis Bay

This review does not claim to offer a detailed exposition of the legal dispute around the status of the enclave. It merely offers some general observations. It is necessary, however to highlight what can be referred to as a "Conflict of Laws", i.e between colonial and contemporary international law. Hence whereas the principles of the latter guarantees the right to self-determination, the former gave leverage to foreign powers to pursue their imperialist and colonial policies.

Successive South African authorities put forth their legal claims on the enclave to ratify their colonial domination. As Moorsom (1984:15) argued, "the South African claim to territorial sovereignty over both Walvis Bay and the islands rested on the inheritance of a colonial title". Their international legal theory was informed by colonial instead of contemporary as well as international legal reasoning.

Indeed, South Africa's legal claim was based on carefully selected historical facts and legal theories. In other words, specific colonial historical facts that undermined its claim were ignored, and were in contrast to contemporary international law that requires precolonial history to be considered during decolonisation. As argued by Goeckner and Gunning (1980:903-904), South Africa had relinquished her title over the enclave under three theories of contemporary international law :

1. the norms of international estoppel (i.e when South Africa voluntarily relinquished her sovereignty over the enclave by transferring it to SWA, in 1922 to 1977) bar South Africa from separating Walvis Bay and Namibia;
2. the boundaries of non-self-governing territories granted independence may be determined on the basis of precolonial sovereignty;
3. South Africa had violated the duties imposed on it by the United Nations Charter and thus forfeited its authority over Walvis Bay.

The United Nations General Assembly Resolution 1514 [VX] of 1960 presented a prelude to such legal disputes. The said resolution led progressive forces who fought for liberation in Namibia, i.e. SWAPO and South West African National Union (SWANU), to present their case in international legal arenas. It unequivocally set out three basic criteria to define what came to be known as "non-self-governing status" for an occupied territory, i.e.

- a) that the territory concerned was geographically separate from the administering state,
- b) that its population was ethnically and culturally distinct, and,
- c) that its status was arbitrarily subordinate to that of the administering state.

The above criteria unambiguously nullified South Africa's claim over Walvis Bay for a number of reasons. Firstly, the ethnic composition in the enclave was primarily Topnaar - the indigenous inhabitants, with the exception of its white settler population, which was of German and South African origin. Therefore, the South African legal and administrative claim over the port automatically fell away, with the exception of the period between 1922 and 1977. Thus, with respect to the UN Resolution 1514, Walvis Bay qualified to be a non-self-governing territory (Moorsom 1984:16).

South Africa's legal claims were well projected even beyond independence. Du Pisani (1986:368) has pointed out that "the western intermediaries proposed that Walvis Bay might, as a compromise and gesture of goodwill on the part of Pretoria, be credited with a special international status, such as a free port, under a joint South African-Namibian administering authority. Significantly, the western powers did not dismiss Pretoria's legal claim to Walvis Bay, nor did they demand that Pretoria surrender her control of Walvis Bay unilaterally to an independent Namibian

government on the use of the port, an arrangement which would no doubt prove lucrative in both political and economic terms". Such ideas induced Dugard (1973:92) to caution that "Pretoria would be well advised to learn from the history of the Namibian dispute that sound legal arguments rooted in international law of the colonial era cannot in the long run compete with the United Nations-backed new (contemporary) international law".

1.2.1. International Court Of Justice

The violation of the UN mandate by South Africa was brought to the attention of the ICJ by Liberia and Ethiopia, former members of the League of Nations. They instituted legal proceedings against South Africa in 1960 over the mandated South West Africa. In the event, they lost the case on the grounds that they "had not established any legal right or interest in the matter" (Moleah, 1983:141). Even so, Judge Jessup in 1966 at the ICJ pointed out that "it is commonplace that international law does not recognise military conquest as a source of (colonial) title".

The verdict epitomized a formidable ledger of evidence because South Africa utilized what might be referred to as "colonial legal fiction" by attempting to sidestep contemporary international law. Therefore, the revocation of South Africa's mandate system by the UN General Assembly over Namibia (including the enclave) in 1966, meant that her presence in the territory became illegal. The ruling by the ICJ that declared South Africa's presence as illegal in 1971

followed the revocation of the mandate. In the final analysis, Jessup's reasoning prevailed subsequently as principles of contemporary international law provides.

1.2.2. SWAPO's Recognition By The UN

SWAPO came to be recognised by the UN General Assembly as the sole and authentic representative of the Namibian in 1966. The UN, as well as SWAPO, jointly regarded the disputed enclave as an integral part of Namibian territory following international adjudication. However, Western countries viewed SWAPO as a liberation movement that advocated Marxist-Leninist principles. On the other hand, SWANU was not involved in any armed warfare and failed to obtain an observer status at the UN.

Despite these developments, UN provisions, as they stood on the charter, especially Chapter 7 which provides for sanctions, were not translated into action. That was despite some of its provisions, for instance (i) that "any attempt by the Government of South Africa to annex a part or the whole of the Territory of SWA would be contrary to the advisory opinion of the ICJ of 11 July 1950 (which held that the mandate remained in effect) and would constitute a violation of that Government's obligations under the Mandate and of its other international obligations"; (ii) that "any attempt to annex a part or the whole of the Territory of SWA constitutes an act of aggression"; and (iii) that "South Africa should refrain from any action which might hamper the

implementation of the present resolution and of the previous General Assembly resolutions on SWA;" (Hinz:1990,32).

As a result, South Africa was consistently challenged, by SWAPO in particular, by the invocation of post-colonial international law principles and modern international law precepts which related to rights on self-determination, in order to challenge her colonial title. Nonetheless, and crucially, over the long run, a diplomatic shift of strategy occurred within SWAPO over the disputed territorial enclave.

Initially, SWAPO had argued that the enclave had to be part of the Settlement Plan. For example, SWAPO President, Sam Nujoma was quoted at the UN General Assembly special session on the Namibian Question in 1978 as saying that "SWAPO has maintained and still maintains that Walvis Bay is an integral part of Namibia. Therefore, to us the question of Walvis Bay is not negotiable and cannot be compromised" (Moorsom:1984,10).

To the contrary, however, Namibia was to attain her independence in March 1990 with Walvis Bay and her twelve Penguin/Off-Shore Islands excluded. This settlement was to be struck despite forceful legal manifestations mainly put forth by SWAPO and the broader international community, especially at the United Nations.

1.3. Economic Significance

The economic significance of the enclave can be broadly located within the parameters of the colonised Namibia's economy as subject to capitalist forms of organisation and exploitation, "based on the extensive extraction of the country's varied natural resources, fishing and ranching activities...This economic state of affairs has been consciously designed in accordance with the social interest(s) of the white settler group and international capitalism" (SWAPO: 1981,22-23).

Following the collapse of the Cold War and the associated diminution of the enclave's strategic significance, the economic dimension of South Africa's continued bid to retain control of Walvis Bay rested primarily on its fishing industry, with its massive import and export trade capacity. Most fishing companies in Walvis Bay are owned and controlled by South Africans in the form of subsidiaries, and stood to generate substantial profits by the depletion of Namibian fish and marine resources. Berat (1990:63) correctly argued that "these companies are not concerned with the long term conservation of fishing stocks, and the pilchard stock in particular was rapidly depleted because of the companies' profit motive".

The contribution made by the disputed enclave to the South African Gross National Product (GNP) during the illegal occupation was quite substantial. As a result, substantial profits were

expatriated at the expense of Namibia's overall fragile and colonial political economy. After independence, the new Namibian government therefore declared a 200 nautical mile Exclusive Economic Zone (EEZ). Since then, the fishing contribution to real GDP has increased substantially. This sector now has considerable potential for the development of the Namibian economy. The government regulates the physical volume of fish catches by means of a quota system. During 1992, the total volume rose by 6% to about 624tons, although to date, only a small portion of fish catches are processed in Namibia. This sector is expected to contribute more to the growth of GNP and employment with Namibianisation of the fishing industry and increased processing of catches in the country (Namibia Review:1992/3, 21-22).

South Africa's retention of the port beyond 1990 meant that Namibia could not utilise its port to maximally benefit her entire political economy. The same goes for the regional political economy under the auspices of the Southern African Development Community (SADC). This was so because Namibia was awarded the Marine-Fisheries sector/project to carry out under the auspices of the then SADC(C) in 1991.

Consequently, Walvis Bay's new role and potential within the changing regional political economy still remains to be explored. Its future prospects in relation to its mandated Marine-Fisheries project by SADC focuses on its future directions and scenarios as

a national, regional and international port.

1.4. Maritime/Strategic Significance

The enclave enjoyed its major strategic significance under the NATO alliance during the Cold War. However, the radical shift in the global balance of political and economic forces in 1989-90, consequently impacted strongly upon the collapse of the Eastern Bloc in Europe and on Southern Africa. Amongst others, it had the consequence of forcing the removal of South African forces from Namibia (excluding of course Walvis Bay) and Angola.

Chester Crocker (1992:151), then US Secretary of State for African Affairs, has noted in his memoirs that "Walvis Bay was a training base with the capacity to house perhaps one brigade of ground troops. When and if the South Africans decided to decolonise Namibia (and Walvis Bay) that would alter the strategic equation in Southwestern Africa. It contradicted political logic to believe that they would use a distant and potentially vulnerable enclave in order to launch operations across Namibian land and airspace into Angola".

It may be argued that since South Africa was an ally in the Cold War, the Western Contact Group had to make it impossible for Russian ships and submarines from using the port facilities under any supposedly "Marxist-Leninist" SWAPO government. It could, instead be reserved for use by the Western powers. Both Crocker and

Pik Botha, the former Minister of Foreign Affairs in South Africa, repeatedly stressed the dangers of the Marxist onslaught in the Southern African region. They argued that the emergence of yet another Marxist-Leninist SWAPO government on the region could not be tolerated alongside that of Angola and Mozambique. Hence Walvis Bay had to be kept out of Marxist control.

Of more direct significance is that Walvis Bay was used as a base during the invasion of Angola by South African military forces immediately before the dawn of Angola's independence in 1975. Given the threat posed to South Africa by the collapse of the Portuguese empire, with its potential domino effect on the region, the invasion was calculated to abort the Angolan independence process. However, this precipitated the arrival of Cuban military assistance in Angola to counter Pretoria's aggression and incursion via the disputed strategic port.

The South African military base in Walvis Bay, i.e Rooikop, was also used to train the now defunct territorial force in Namibia, viz the South West Africa Territorial Force (SWATF), as well as hosting a military airport. Barnard (1990:85) quoted the then Minister of Foreign Affairs, Pik Botha, as having said: "over decades (Walvis Bay) belonged indisputably to South Africa and...we have vested interests there. Our investment in Walvis Bay amounts to millions of rands, while the territory offers South Africa a potential airport which is closer to Europe and South America than

Johannesburg".

The abrupt end of the Cold War immediately brought these strategic advantages of the enclave and, indeed, South Africa into question. In the final analysis, it brought about the logistical withdrawal of the South African Defence Force from the enclave, although only after the implementation of the UNCSC Resolution 435 (1978) in 1989. However, the latter's eventual implementation became entangled in the politics of "linkage", as will be shown in the next chapter. This forced the Cubans out of Angola and South Africa from Namibia.

1.5. Conclusion

Although the territorial dispute over Walvis Bay and the twelve Penguin/Off-Shore islands has been finally concluded, this chapter has attempted to map out South Africa's unrelenting colonial claims. These claims were vigorously challenged by the international community in general, and SWAPO in particular. Pretoria was unwilling to accept post colonial precepts of contemporary international law and rather resorted to colonial international law principles. Such colonial legal arguments helped to prolong South Africa's illegal occupation on Namibia's only deep water port.

Before its final handover, the port came under Joint Administration, i.e JAA (as it is to be shown in the Chapter

Three) only after bilateral negotiations were entered into. Such a settlement was implemented in November 1992 to facilitate for the reintegration of Walvis Bay and the Penguin islands into Namibia which finally took place in March 1, 1994.

CHAPTER TWO

MAJOR ROLE PLAYERS IN THE DISPUTE

Introduction: Players In The Namibian Transition

This chapter explores major role players during the Namibian decolonisation process, i.e the Western Contact Group; the United Nations; the US and South Africa. It is to be argued that the Western Contact Group of Nations managed to diplomatically manoeuvre the UNSC Resolutions 385; 432; 435 and others to their advantage and that of South Africa in particular. It further attempts to trace whether the exclusion of Walvis Bay fell under the parameters of the above UNSC resolutions. It is worth noting that Resolution 432 (1976) came to be solely dedicated to the disputed territorial enclave of Walvis Bay including the twelve Penguin islands.

2.1. Western Contact Group

"Walvis Bay (the only deep-water port on the Namibian coast) was regarded as part of Namibian territory in UNSCR 385/76 but at RSA's insistence, was regarded as part of RSA territory in UNCSR 435/78 and was therefore excluded from all transitional arrangements" (Cliffe,1994:67).

In 1977, the WCG assumed responsibility for dealing with the Namibian Question, and began to mediate negotiations on a transitional arrangement for Namibia acceptable to South Africa. Initially, the United Nations' Council for Namibia was charged with direct responsibility over Namibia by the GA in 1967, including the disputed territorial enclave. However, the WCG's

strategy of alternatively pushing and collaborating with Pretoria led to numerous intransigent deadlocks during a series of bilateral as well as multilateral diplomatic engagements.

The Contact Group, commonly known by its detractors and opponents as the "Gang of Five", sidelined Resolution 385/76 to South Africa's advantage. They were in the forefront of efforts to endorse the UNSC Resolution 435 (1978) which excluded Walvis Bay. This was done despite the unanimous adoption by the United Nations Security Council of Resolution 385 (1976).

Under such terms, the WCG's and Pretoria's main objective in Namibia was to reach a **neo-colonial** settlement that would see the emergence of a non-Marxist settlement, amongst others. Hence the argument that was advanced earlier that South Africa decided to hang onto the enclave largely for **political and economic** reasons after the collapse of the Cold War that nullified its strategic value.

The WCG also remained South Africa's major trading partners despite various forms of international embargoes. Their multilateral foreign policy thinking was indifferent to the resolution of their ally's illegal military and economic occupation of the disputed enclave. The occupation and trade links continued amidst numerous provisions by Resolutions like 432, 385 among many. This also allowed the implementation of Resolution 435, as it was silent upon the issue of reintegrating the disputed enclave into the rest of the Namibian territory.

SWAPO was left with no option but to the effect that the dispute around the enclave was to be resolved later after independence (Interview: A. Aspara, 1994-07-16).

2.2. The United Nations

Namibia started to feature as an international territorial dispute under the League of Nations, before the latter's replacement by the UN in 1945. In 1920, the League granted the C Class Mandate to the then Union of South Africa over Namibia (SWA). At a later stage the Mandate was to be surrendered to the Trusteeship Council whilst on the contrary, South Africa was keen to annex/incorporate Namibia as her fifth province. Such a demand was flatly rejected by the General Assembly and necessitated the involvement of the ICJ with its Advisory Opinions. Successive NP regimes after 1948 failed to honour their obligation as stipulated under the Mandate.

Various UN Resolutions which were passed after numerous protracted and delicate diplomatic efforts to amicably settle the dispute over the territorial enclave were nullified by South Africa's refusal to withdraw from Namibia (including Walvis Bay). "By 1978, the United Nations had tried diplomacy, law, voluntary sanctions, and support for a guerilla movement to set Namibia free from South Africa" (The UN In The 1990s:122).

Hinz (1988:10-11), asserted that "Resolution 385(1976) is the more radical predecessor of Resolution 435(1978) in which the withdrawal of South African troops from Namibia without any

conditions or further reservations was coupled with free elections supervised and controlled by the United Nations. This Resolution was passed unanimously without abstentions (i.e with the votes of the U.S.A; Great Britain; France; Italy and Japan) and would in fact have implied countering South Africa's refusal to accept the decision by using sanctions provided for in Chapter Seven of the United Nations Charter".

General Assembly Resolutions 1514 (XV); 2145; 65(I); 1702/1961 and 1566 addressed the objectives and the international status of the then SWA (Namibia), and clearly included Walvis Bay as part of Namibian territory. The latter further stated that "(4)...the Mandate conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa was therefore terminated, that South Africa had no other right to administer the Territory and that henceforth South West Africa came under the direct responsibility of the UN" (ibid,33).

General Assembly Resolution 2288 (XXII) centered around relations of exploitation of the Namibian resources including her people. It stated quite clearly that South Africa as the administering power had the obligation to ensure, for example, the economic advancement of the territory, where her natural resources were to be protected against abuse in conformity with Chapters XI and XII of the UN Charter.

Yet again, various ICJ advisory opinions dating from 1950 to 1971, as accepted by the GA, were supposed to have guided South

Africa's international obligations over SWA (Namibia including Walvis Bay) and her people. Of major significance was South Africa's annexation of Walvis Bay in 1977 which was declared illegal by the General Assembly. Under the UN Charter as well as the Declaration on Decolonization, Pretoria's illegal presence was a clear cut violation. Hence it was expected of the UN to take practical steps against Pretoria, and by securing a full settlement in Namibia (Dugard 1973).

Faundez (1988:733) rejected Pretoria's simplistic legal determinism by arguing that it was "...the United Nations' responsibility to administer the territory to independence. Yet United Nations resolutions in line with this consensus have lacked the necessary political will for enforcement and implementation. This reluctance to act by Western powers has been justified by technical problems with the procedural aspects of United Nations law, despite the 1971 Advisory Opinion of the International Court of Justice".

Similarly, twentieth century standards and principles of international law could not be applied to preceding centuries. As these standards and principles were developed by the Western world, they stood in a colonial relationship to South Africa which was legally repudiated by the UN (Southall 1987).

2.3. The United States Of America

The involvement of the US in the Namibian Question and the Southern African region merits closer attention in this study.

Of course, its involvement has to be linked to the East-West foreign policy modus operandi that guided regional conflicts. The diplomatic manoeuvring of various UNSC resolutions fell within the broader regional political landscape, i.e. in 1980 the US in collaboration with Pretoria introduced Linkage Policy that was to tie the implementation of 435 to the Cuban withdrawal from Angola. Therefore Western, particularly former American and South African regional policies, need to be examined.

However, this section does not aim to examine various US/SA hostile regional policies in detail, as these are adequately advanced elsewhere (see Davies 1986; O'Meara 1988; Vale 1988 et al). What is relevant, however is that, amongst other factors, such policies were meant for a specific objective, i.e. to reform apartheid through constitutionalism, so that racial and foreign capital could be protected, amongst other factors.

Part of the larger US strategy was to secure negotiated political settlements between surrogates they supported and popular forces like the MPLA. They were successful in Namibia in securing a constitutional transition, and through a series of ceasefires that could not bring peace in Angola.

US foreign policy towards the region experienced its own crisis and contradictions. Perhaps the most typical example was the shift in policy asserted following the ascension of Carter's Administration to power in January 1977, when there was in the U.S a very clear feeling that the policy pursued by Henry

Kissinger both in global and regional issues had failed. The failure seemed to derive from two assumptions which dominated American policies during that period. The first was a particularly optimistic assumption: if the US managed to handle the "stick and carrot" in a certain way, the Soviet Union would eventually accept the American conception of the status quo and of international stability. But as early as 1975, it became clear that in Angola the Russians would never accept the American definition of "stability", i.e the promotion of international capitalism.

The second assumption was based on the premise that better relations with the Soviet Union would enable the US to settle to its advantage conflicts which arose in other parts of the world. Hence the Kissinger Southern African "shuttle" diplomacy. But Kissinger failed to note that some regional conflicts were not necessarily linked to the rivalry between Moscow and Washington. To subordinate these conflicts entirely to US-Soviet tensions was a fundamental error. Thus a fresh start was essential. The Carter Administration came to power equipped with a number of new ideas and perceptions (Chakaodza,1990:17).

Against this wider global context, it must be pointed out that the Carter Administration was supportive of the WCG throughout his term in office. He was followed by the Reagan Administration in 1981 with its new hostile regional foreign policies. These policies, notably "Constructive Engagement" and "Linkage" were engineered by Reagan's Secretary for African Affairs, Chester

Crocker (Seiler, 1995:198).

Chakaodza (1990) has argued that Reagan's policy was far from being constructive. It was rather a destructive gambit designed to secure a Namibian settlement conducive to Western interests in the region and to delay self-determination in South Africa. It was then at this point where the WGC, in collaboration with Pretoria, managed to secure long-term economic and political interests through various regional policies, i.e Reagan's Constructive Engagement.

As successive US administrations remained indifferent to regional liberation movements in particular, the latter were left with no option but to "Look East" especially for their logistical support. Yet, from the perspective of the US, the ideological make-up of the former Communist countries was perceived as an "evil" to be contained and posed a threat to "international order". Such US assertions underlie the American imperialist repertoire in the regional political economy.

2.4. South Africa

The question of why and how of Walvis Bay escaped reintegration in 1990 requires a broader linkage to Western (particularly the United States) and South African objectives as expressed by their regional policies. Some of these policies included the promotion of "Constructive Engagement"; "Total Strategy" and the "Constellation of Southern African States (CONSAS)". The bottom line that merits attention is the ambiguous involvement of the

Contact Group as well as the UN in the internationalised Namibian independence process that finally led to the implementation of the compromised UNSC Resolution 435.

The regional objectives, particularly of the US, through the manipulation of various resolutions at the UN necessitated Walvis Bay as a disputed issue to become a **bargaining chip** after Namibia's independence. South Africa's reluctance to disengage from the enclave was informed by political and economic considerations in the post-Cold War era.

The Cuban and the Soviet Union presence posed a major threat to US regional economic and strategic interests, as it sought the entrenchment of Marxist governments in Angola and Mozambique, and threatened to install one in Namibia. Cuban forces, in US thinking, were to be sent home as soon as possible.

Therefore, from 1975 to 1993, successive administrations in the US refused to grant recognition to the MPLA government. It was only under the Democratic Administration, under Clinton in the post-Cold War era, that recognition was extended as well as backdated, i.e starting from 1975 and beyond, to the MPLA government, based on International Law provisions (Starke 1990).

Reagan's hostile US regional 'realist' foreign policies were superseded by the extension of recognition of Angola under Clinton. This was also dictated by economic and political considerations, as informed by the collapse of the Cold War as

well as massive US investments in the Angolan oil and diamond resources. Such a diplomatic gesture mitigated against the supply of military hardware to UNITA contras by Republicans and Nationalists, all in the name of containing 'communist expansionism' in the region.

In South Africa, a negotiated transfer of power/power-sharing equation came to be realised by the NP regime through constitutional means. As they were also pressing for the expulsion of liberation movements from countries like Mozambique; Angola and Lesotho, this resulted in hostile agreements like the Nkomati in 1984 as well as the Lusaka Accords in 1980, amongst others. Under such agreements, South Africa promised to stop its cross border raids whilst it was expected of these countries not to harbour liberation movements like SWAPO and the ANC. These were clear cut submissions to the SA/US regional 'realist' political and economic hegemony, with the former as a self-declared regional 'superpower', whilst the latter perceived itself as the global hegemon (Augelli & Murphy 1988).

Washington and Pretoria were actively involved in providing financial and logistical support to regional insurgency operations that were carried out by the National Union for the Total Independence of Angola (UNITA) and (MNR) 'contras' to further the economic and strategic aims of the US and SA in pursuance of their hostile regional policies. Again, these policies were carried out to demonstrate their self-declared dominant 'hegemonic' power (Vale 1988).

Based on these arguments, there was an element of parallelism between the US and SA and her treatment of their citizenry on foreign policy issues, even though the former was formally, an open democracy, in contrast to the latter's undoubted status as an authoritarian and closed state. Most of the covert operations that the US was heavily involved in were carried out with the US public kept in political ignorance. Equally, "South African troops invaded Angola in 1975 in an action the South African public was kept ignorant of for months; military missions into Angola since then have become almost common-place, with South African troops even attempting economic sabotage. SADF forces have invaded Lesotho, Zambia, Zimbabwe, Mozambique and Angola, destroying property, killing combatants and non-combatants alike. Government had a long involvement with terrorist groups destabilising Southern Africa - especially in Mozambique, where the war against the South African-backed MNR did so much to weaken the FRELIMO government" (Davies,1986:2).

Davies argued that "[A] major objective was to cut the Beira Corridor, preventing it from serving as an alternative to continued dependence by Southern African Development Coordinating Council (SADC[C]) countries on South African ports (including Walvis Bay) and railways - particularly in the event of application of 'counter-sanctions' measures by Pretoria against neighbouring states....One of South Africa's principal levers against the SADCC countries was their dependence on South African ports (including Walvis Bay) and railways - a dependence artificially maintained by repeated sabotage of Mozambican

facilities" (ibid 5).

The widely discredited regional policy as pursued by Pretoria, vis-a-vis CONSAS - failed to counteract SAD[D]C's strategy to delink. Nonetheless, South Africa, especially under P.W Botha - guided by Total Strategy as a doctrine, attempted to sabotage economic relations between SADC(C) countries. These economic relations were particularly meant to reduce dependence by way of delinking these countries from Pretoria. Their delinking from South African transport services in favour of the Beira Corridor came to be targetted by RENAMO contras with direct orders from Pretoria. As of now, any meaningful regional political economy would only be possible through what du Pisani (1990) referred as a movement from destabilization to a post-destabilization regional policy.

The immediate reason why South Africa pursued its various regional policies freely was because of its propaganda machinery as part of diplomacy in achieving its goals. Hence the former Minister of Defence, Magnus Malan, stated in the 80s that Machel was unwilling or unable to prevent his country from serving as base for a "Moscow-inspired revolutionary war against South Africa". He claimed Machel appeared to have lost control of the situation in Mozambique, and said Pretoria was extremely concerned at the course of events there. Such a statement has all the hallmarks of a classic disinformation tactic designed to provide "justification" for overthrow of a government (op cit, 7).

Weimer (1984:35) carefully considered the American traditional realism and argued that "... (t)he United States - especially the Reagan Administration, which tended to see the dynamics of the conflict in Southern Africa in the context of global Superpower confrontation. This globalist perception did not explicitly exclude external intervention as a means to avert or reverse a development which was not in the national interest of the United States".

South Africa, having been a Cold War ally with the NATO countries, had to be accorded maximum protection to maintain the status quo on the region. A somewhat sanguine assessment of regional conflict would recognise that "...The United States, while not discarding a 'European' attitude of trying to minimise the damage, was much more actively involved in the attempts to prevent a revolution in South Africa, the key word being 'constructive engagement' " (ibid).

A parallel must also be drawn between the radical Marxist-Leninist foreign policy orientation of popular forces like the ANC; SWAPO; MPLA and FRELIMO against the conservative and ill-informed white opinion in South Africa and Namibia on the cause-and-effects of regional disputes. Since the popular forces heavily depended on the former Warsaw Pact countries for various forms of support, Nato countries were not well pleased or comfortable with such occurrences.

The situation changed with the end of the Cold War, in Angola and

Namibia: the MPLA discarded its Marxist rhetoric in 1990 whilst SWAPO did so in 1989. This can be clearly linked to the global restructuring that resulted in international and regional shift in the balance of forces. This historical specificity of global as well as regional events leads us in pointing out the overall achievements of various US administrations in Southern Africa.

Therefore, the collapse of the Cold War had substantial regional side-effects on FLS states, especially countries like Angola and Mozambique, with their open pro-Soviet/Cuban foreign policies. It also meant a massive reduction of the Cuban and Soviet presence in the war ravaged southern African region.

2.5. The OAU And The FLS States

It is also worthwhile to briefly look at the diplomatic initiatives of the OAU; FLS states; and the Non-Aligned Movement (NAM) among many in brokering the Namibian settlement. Their role was secondary compared to the primary and controversial one played by the Western Contact Group, yet it has to be acknowledged and appreciated at both bilateral and multilateral level. The Front Line States (Tanzania, Angola, Zimbabwe, Zambia, Botswana and Mozambique) were also strongly committed to the final settlement of the Namibian Question, and to maintaining sanctions against Pretoria (Interview: Prof. du Pisani, 1994-07-15).

The US intransigent and defensive position on the Namibian Question was strongly challenged by Non-aligned activism within

the Security Council. All of the above mentioned organisations, through various diplomatic processes, were continuously bringing the Namibian Question to the attention of the world body.

Nigeria became another country within the OAU that was instrumental in reaching a lasting solution to the Namibian dispute. President Shehu Shagari at the OAU summit in July 1980 called for immediate Namibian independence, and further stated that "her independence without Walvis Bay would be a sham" (Aluko, 1985:41). Under Shagari's leadership, Nigeria as well as the Commonwealth offered to replace the Cuban troops in Angola, so as to pave way for the UNSC Resolution 435 to be implemented.

Actors like the OAU in particular were pursuing African diplomacy to secure peace in the conflict ridden Southern African region. In their quest to promote political dialogue, they consistently argued that the Cuban withdrawal must be tied to the immediate implementation of the Settlement Plan for Namibia's independence, among other factors (Interview: D. Botha, 1994-07-16).

2.5.1. Cuban Withdrawal

The Namibian decolonisation process came to be delayed because of the South African insistence that any lasting political settlement could only be secured on condition that Cubans withdraw from Angola. Such a condition came to be known as "Linkage", and received high priority within the Reagan Administration.

Linkage dates back to 1978 with the adoption of UNSCR 435. By then Pretoria was voicing her concern regarding the Cuban military presence in Angola. Hence Pretoria and Washington extended all sorts of support to consolidate the UNITA contras. They also put a demand on the MPLA to extend recognition to Savimbi and his band of rebels. Therefore linkage was intended to get Cubans out of Angola and the South Africans out of southern Angola and Namibia (excluding Walvis Bay). The Cuban withdrawal featured throughout negotiations with the WCG on the implementation of the UN independence plan on Namibia.

Again, Weimer presents an intriguing interpretation by arguing that "...European governments have continued to interpret the Cuban presence as a result of the repeated South African incursions into Angola since mid - 1975. Washington has continued to see the "Cuban factor" as yet another manifestation of Moscow's "adventurism" in the Third World... This is particularly true of Washington's unwillingness to recognise the fact, now well documented, that in the face of the advance of UNITA and South African troops in Luanda in October/Nov 1975 the MPLA called for a reinforcement of the Cuban presence without any Soviet involvement in the initial phase of the operation" (Weimer, 1984:51-52).

The US's strong objection to the Cuban presence in particular had its own inconsistencies. As Bender (1984:48) noted that "...although the US accords the right to any African nation to request French, Moroccan, Belgian and even American troops when

their sovereignty is threatened by external aggression (eg Chad and Zaire), it does not grant Angola the same right when she was threatened by South Africa". In pursuit of linkage, the US in particular vetoed most of the UNSC Resolutions as well as those put forth by the UN General Assembly. The Security Council permanent members voted negatively on any resolution that was not compatible with their regional interests, especially their Cold War ally - apartheid South Africa.

In light of the preceding considerations there is no doubt that Cubans were considered by Pretoria as a formidable force to be reckoned with in the region. Contrary to the long standing US policy on the region "...there are indications that Washington increasingly views South Africa as the major source of instability in the region and that the question whether a diplomatic clash with Pretoria can be postponed, much less avoided, for much longer is indeed being asked in Washington. Pik Botha's criticism of Washington's 'deviation' from the linkage position in the context of resolution 538 of the UNSC (64) might be an indication of a reassessment of the questionable logic of the linkage approach" (Bender, 1984:85).

It can be argued that the Linkage Theory was also meant to preempt any move by Cubans with their internationalism as their foreign policy orientation, to advance towards Namibia and Mozambique, not to mention South Africa. Ultimately, such a move was halted when the Cuban withdrawal came to be linked to Namibian independence and paved way for the implementation of 435

(1978), despite its silence on the disputed territorial enclave.

The Cubans and Angolans were initially not happy with Linkage Theory. However, their position later proved to be the only obstacle for the final implementation of 435. Finally, they agreed to the Cuban and South African withdrawal from Angola and Namibia. All concerned parties agreed on a scheduled and final military withdrawal from Angola after the signing of the Geneva and New York Accords in 1988. The former primarily addressed SWAPO's undertaking to participate in the cessation of hostilities, whilst the latter focused on the termination of the Cuban presence in Angola (Evans:1990; Du Pisani:1992).

Another dimension that led to these peace accords was the failure by South Africa's militarism to defeat the Angolan/Cuban alliance at Cuito Cuanavale. Pretoria's hostile regional policy of destabilization became sensitive to the loss of young white conscripts at Cuanavale. Her ailing economy, weakened by sanctions, led to changes in the balance of forces within NP, hence they had to concede to the Namibian independence, among other factors.

2.6. SWAPO

SWAPO as the main liberation movement in 1966, opted to launch the armed resistance to achieve self-determination in face of South Africa's intransigence. Hence her illegal presence had to be constantly challenged through various means, i.e military, diplomacy and otherwise, as a liberation movement in addressing

the national question. As a result, the anti-colonial movement in Namibia had to be bolstered through various means of support from the United Nations, after the League of Nations ceased to exist. South Africa continued to disregard the world body by incorporating the mandated territory, until the implementation of the UNSCR 435 (1978) in 1989.

The final outcome of Namibian independence, that is, before the implementation of UNSCR 435 in 1989, had its own controversial predecessor. Expectations were high that Namibia's independence was in sight with the implementation of the UNSC Resolution 435 in 1978. However, Pretoria decided to put in place an internationally unrecognised settlement in Windhoek through the Multiparty Conference (MPC) in June 1985. The installation of a puppet regime in Namibia was in direct conflict with the UN Plan which demanded and guaranteed South Africa's complete withdrawal from Namibia (Du Pisani:1986).

SWAPO, as a liberation movement, waged protracted insurrectionary struggles against the apartheid regime. As a result, SWAPO came to be regarded by the UN as the sole and authentic representative of the Namibian people. In contrast, the WCG in collaboration with Pretoria pushed for the Democratic Turnhalle Alliance (DTA) to be heard on equal terms with SWAPO. That move was flatly rejected by NAM and the OAU. Nonetheless, the DTA emerged as the dominant protege within the MPC and inside Namibia outside the UN Settlement Plan.

Protracted and bitter struggles for independence as waged by SWAPO were largely concentrated and fought in northern Namibia. In addition, war in Namibia was inevitably linked to the civil conflict in southern Angola. Pretoria's illegal occupation of the Namibian territory was challenged by SWAPO through military means, whilst the international community fought through diplomatic means. Namibia's independence, because of Pretoria's intransigence, became a major financial strain on the international community, up until the final implementation of the compromised UNSC Resolution 435 (1978).

2.7. Conclusion

This chapter has attempted to demonstrate that Namibia's incomplete decolonisation process was a result of the exclusion of Walvis Bay from the Settlement Plan when SCR 435/78 was implemented in 1989 (Asante, Asombang :1989). This then has to be clearly interpreted as a departure from the framework and provisions of various SC and GA resolutions, including the reluctance to implement UN resolutions until 1989. Major role players, especially the WCG, were quite instrumental in protecting South Africa's interests, including the unexpected linkage of Namibia's independence to the Cuban withdrawal, as a condition.

South Africa's continued intransigence to withdraw from Namibia could only, at best, be condemned by the international body. Pretoria's continued rejection of the United Nations' authority was in transparent display. An incomplete settlement that was

favourable to Pretoria and the US was finally implemented in 1989. As a result, Namibia's territorial integrity was seriously undermined when her independence was granted without her only deep water port. Hence the enclave was treated as a territorial dispute between South Africa and Namibia, in their post-Cold War bilateral and multilateral diplomacy within regional relations.

With regard to various United Nations General Assembly and Security Council resolutions on the Namibian Question (including Walvis Bay), it became clear that the transfer of the enclave was to be negotiated only after the independence process in 1990. The point that is being emphasised is that Resolution 435, as a compromised SC Resolution, was finally implemented in 1989 despite the exclusion of the enclave from the independence package, at Pretoria's insistence.

In the final analysis - the WCG, particularly the US, became "impartial mediators" in the Namibian Question when conditions suited them best. Hence Walvis Bay as a disputed issue could not be solved until an end to wider regional conflict was in sight. Although SWAPO accepted an incomplete decolonisation process in 1989, the WCG as one of the major actors ceased to exist. Meanwhile, following Namibia's ascension to independence, the South African government came to recognise the inevitability of its conceding its hold over Walvis Bay. What remained to be decided, therefore, was the manner and the timing of the transfer.

CHAPTER THREE

JOINT ADMINISTRATION AGREEMENT/AUTHORITY

Introduction

As Walvis Bay remained an unresolved issue between South Africa and Namibia in the post-independence and Cold War era, bilateral negotiations between these countries became imperative so as to reach a lasting solution on the territorial dispute. A compromise on Joint Administration Authority was agreed upon as an interim arrangement, until the port could be finally reintegrated into the Namibian territory.

Therefore, this chapter attempts to examine the JAA of 1992 that finally led to the negotiated transfer of Walvis Bay to Namibia in March 1, 1994. As a consequence, it is to be argued that the final return of Walvis Bay to Namibia became entangled with the negotiation process for South Africa's transition to democracy at Kempton Park in 1993-1994. A number of options that were open to the post-Namibian government are to be explored.

3.1. Bilateral Negotiations

The two governments, nearing a deadlock during their first round of bilateral negotiations in Cape Town, March 14 1991 agreed to go back for consultation on Joint Administration of the port. During the second round of negotiations in Namibia, on May 17 1992, both parties agreed to explore Joint Administration, including the

future of the twelve Penguin islands. It was hoped that such an agreement would eventually lead to the final settlement of the disputed issue.

The third round of talks in Windhoek, on March 26 1992, led to the final agreement to establish Joint Administration. They also agreed to set up two technical committees, one on the management and administration of the port, whilst the other was to focus on the Orange River dispute. Under such terms, it was hoped that Joint Administration would at most last for a three-year lifespan (Du Pisani 1994).

The Joint Administrative Authority Act 93 of 1993 culminated in a **negotiated transfer** of the enclave to Namibia in March 1, 1994 - ending the long standing **territorial dispute**. This was the outcome of "The agreement between the Government of the Republic of South Africa and the Republic of Namibia dated 1 November 1992 establishing a Joint Administration for Walvis Bay and its off-shore islands as an interim arrangement pending an eventual settlement of the question thus creating a **sui generis** position for Walvis Bay and its Off-shore islands" (Foreign Affairs Document on Joint Administration, Namibia:1992).

Since Walvis Bay and the islands escaped (re)integration at independence in 1990, both governments opted for **bilateral negotiations** in finding an amicable solution on the disputed

issue. Therefore, Walvis Bay was kept on the diplomatic agenda which had to be settled with an emerging, new Namibian government.

3.2. Post-1990: Namibia's Options On Walvis Bay

Reflecting in particular upon avenues to resolve the dispute, a summary of legal opinion was put forth by Berat (1990), on options available to the Namibian Government, and they included the following:-

- a) The free port option: This was visualised as requiring political subservience to Pretoria.
- b) The joint administration option: This was seen as posing practical problems of dual legal/administrative systems which would be extremely complex.
- c) The adjudication option: This was heard upon pleading Namibia's case to the International Court of Justice. The South African Government would be unlikely to heed such judgement, but it would be a good strategy for Namibia to seek an advisory opinion which would probably be in its favour.
- d) The international pressure option: This was to follow up UN Security (Council) Resolution 432 together with leverage from a favourable International Court of Justice advisory opinion. [South Africa, wishing to avoid international pressure on a non-strategic issue, might well yield] (NEPRU Report On Walvis Bay - October 1990).

Berat's first option, also put forward by Dreyer (1991), never materialised. However, the second one came to a concrete realisation after bilateral negotiations were entered into by both governments soon after 1990. Contrary to their prediction, the arrangement never experienced any "practical problems of the dual legal/administrative systems being overly complex", largely because of legal and administrative agreements reached by both governments (The Namibian Foreign Affairs Document on Joint Administration: 1992). If there were any problems during this arrangement, then they were not of large magnitude, if only because of the overlap in law between these two countries, i.e Roman-Dutch Law.

The third option as propagated by Berat was at some stage entertained by Namibia's President, as well as its Foreign Minister, when South Africa kept falling back on her outmoded diplomacy. However, they decided to opt for bilateral diplomacy in 1990, immediately after Namibia's independence in order to settle the disputed territorial enclave.

The last option was deemed not to be feasible since bilaterals were now on track, and South Africa would not succumb to international pressure since they were now held in high-esteem for having reformed apartheid. It can thus be argued that the February 2 1990 speech that was made by F.W. de Klerk accorded the National Party an international acclaim, could not be discredited by a 'minor' regional territorial dispute like Walvis Bay. In his speech, he

announced the unbanning of the ANC and other popular movements.

In the wake of the collapse of the Cold War in the late 80's. Western countries concentrated and encouraged multi-party negotiations in South Africa and on the restructuring of the disintegrating Soviet bloc, all these took shape amongst global events of 'interest' caused by the global economic and political restructuring in the post-Cold War era.

As it happened, the World Trade Centre at Kempton Park provided a favourable arena wherein UNSC Resolution 432 was coincidentally revisited when a controversial constitutional proposal concerning Walvis Bay was tabled by the National Party. Their proposal was suggested that Walvis Bay should be part of the new Cape Province, a mere extension of South Africa's illegal territorial occupation in a post-Cold War era.

3.2. Proposed Constitutional Principles

The collapse of the Cold War constituted a landmark in the history of legal thought in Namibia when all repressive laws were undermined by the adoption of their newly imposed constitution. Inside South Africa, parliament had no other option but to adopt the "Recognition Of The Independence Of Namibia Act 34 of 1990". The Act commenced on the 21st of March 1990, so as to coincide with Namibia's independence day.

Apart from bilateral negotiations between Pretoria and Namibia, the OAU was also instrumental in bringing a lasting peace to regional disputes. It came out with an internationally and continentally most acclaimed policy document, i.e The Harare Declaration. The Constitutional provisions of the Harare Declaration were substantial. To start with, this document was a successor to the Lusaka Declaration of April 1, 1980 which was also adopted by the United Nations. The HD was also broadly adopted by inter-governmentals like the NAM; the Commonwealth; the FLS states as well as the United Nations as the OAU's policy document. Its adoption was guided by International Law principles, vis-a-vis Domestic or Municipal Law.

Since the OAU was dealing with this ever intransigent South African regime, it was clearly aware of its delaying tactics. On this score, clause 6.0 of the HD unequivocally noted the apartheid's regime's "record of failure to honour agreements, all of which have already resulted in the loss of so many lives and the destruction of much property in the countries of Southern Africa". Hence Namibia's sovereignty and territorial integrity was seriously undermined, with the deliberate exclusion of her only deep water port, i.e Walvis Bay. The situation was more complicated by South Africa's outmoded diplomatic tendency of not taking a series of bilaterals that were entered into quite seriously.

Clause 4.0 clearly stated that the negotiation process on the region should amongst other things lead "to the complete and genuine independence of Namibia", by which it clearly implied the inclusion of Walvis Bay into Namibia as the country's only deep water port. The (in)complete withdrawal by South Africa from Namibia, vis-a-vis Walvis Bay was a clear act of economic subversion after the strategic significance was diminished by the collapse of the East-West curtain, as the major factor amongst others.

3.2.1. Legal Provisions

The promulgation of the Walvis Bay and Off-Shore Islands Act No. 1 of 1994 in Namibia covered all transitional arrangements that directly related and lead to its final reintegration. It covered a series of laws, for example - the Application Of Laws in Section 2(2) pertaining to the following Ministries, i.e

- a) Trade and Industry,
- b) Justice,
- c) Regional and Local Government and Housing,
- d) Finance and,
- e) Works, Transport and Communication.

In addition, the promulgation of the Namibian Ports Authority Act No. 2 of 1994 covered the repeal and amendment of laws on the disputed enclave. The following statement is worth reproducing as it covers the conerstone of the Act and reads thus : "To provide

for the establishment of the Namibian Ports Authority to undertake the management and control of ports and lighthouses in Namibia and the provision of facilities and services related thereto; and to provide for matters incidental thereto" (1994:2).

3.3. Joint Control

The road to Joint Administration had its own historical setbacks, especially when looking at South Africa's continued "record of failure to honour agreements" coupled with its well known intransigence. A Foreign Affairs Document (1992) outlines developments over the disputed territorial enclave in a logical sequence. It points out that the first bilaterals between the two governments took place in Cape Town during the year 1991 - the year immediately after the attainment of their (in)complete independence process. Their first encounter in Cape Town heard legal; economic; political and historical scenarios or narratives being brought to the fore from both sides without the manipulative participation of the WCG or any other third party.

During the same year, demonstrations by students and workers took place in the capital city, Windhoek, as well as in Walvis Bay itself. They demanded the immediate reintegration of Walvis Bay and the twelve islands. With the resumption of bilateral diplomacy, it therefore became increasingly unlikely that Namibia would opt to refer the matter back to the ICJ.

Dugard (1973:523) had previously reflected on the future disposition of the enclave and commented thus: "although there have been several suggestions of ways in which the dispute over Namibia in its present form might be returned to the International Court of Justice, it seemed unlikely that they would again be consulted unless fresh legal difficulties arose. The Court has given its full approval to the United Nations action, and it seemed probable that the dispute would assume a greater political character, premised of course, upon the legal foundation of the 1971 Advisory Opinion".

Indeed, the matter was never referred back to the ICJ but instead it assumed a political character. Hence the resumption of bilateral negotiations. This would have been in line with the Adjudication Option as propagated by Berat, but did not go to the extreme of seeking any advisory opinion. Opting for negotiations with South Africa seemed to be the only avenue to be explored by Namibians since "world attention" in the post-Cold War era was occupied with other events, i.e South Africa and Eastern Europe amongst other.

Namibian newspapers were also flooded with articles that related to options which registered their popular concerns regarding the long drawn out process in the reintegration of the disputed territorial enclave. Some of those articles were written by Justus Grebe from Walvis Bay and HPB Angula from Windhoek, as concerned Namibian citizens. Grebe established an Ad Hoc Committee that intended to refer the disputed issue back to the ICJ. He was quoted as saying

that "Party politics apart, Walvis Bay would have a better future as a city state along the lines of Hong Kong or similar free ports. This can keep Walvis Bay out of the political arena. Very importantly, people cannot be sold, given or transferred without their agreement or concern" (The Namibian: September 10 1993).

On the contrary, Angula argued that the Ad Hoc Committee in question did not stand any chance of hearing in the ICJ since they were only a committee with no State Personality. Chapter II, Article 34 of the ICJ statute clearly stipulates that "only states may be parties in cases before the Court". A concrete example was the case presented by Liberia and Ethiopia when they took issue with the the then SWA Question against South Africa and were dismissed in a legal jargon that they lacked the necessary locus standi (ibid,8). It then become logical to assume that Grebe did not approve of a scenario where the port after its final reintegration would be under the SWAPO led government. He however, approved of the enclave becoming a free port operating under Joint Administration.

It is not clear whether the very Ad Hoc Committee had any significant backing in their quest to refer the matter to the ICJ and in whose interest. Their thinking was superseded by the overall popular wishes of the majority who desperately wanted the enclave to be reintegrated with immediate effect. The bottom line in their move appeared to have been driven by economic motives at the

expense of attaining complete sovereignty.

3.3.1. Cabinet Committee

The Foreign Affairs Document further stated that a Cabinet Committee had to be established in order to facilitate negotiations with the former South African regime on the disputed territorial enclave and the southern boundary along the Orange River whilst it was also an area of disputation. The Committee was headed by the Minister of Foreign Affairs and it included Ministers of Justice; Fisheries and Marine Resources; Information and Broadcasting; Finance as well as the Attorney General. The Document further stated that "after the second meeting of the Cabinet Committee on Walvis Bay negotiations in Windhoek, it was decided to establish a Joint Technical Committee of senior officials to look into the possibility of a Joint Administrative Authority over Walvis Bay and the off-shore islands".

South Africa's widely known record of failure to honour agreements repeated itself during these bilateral negotiations as some of the scheduled talks had to be unduly postponed. South African negotiators deliberately dragged their heels in reaching a suitable date in establishing Joint Administration, whilst on the other hand, the Cabinet Committee was working around the clock. However, in the final analysis, protracted negotiations resulted in a framework to guide their final report in establishing a Joint Administrative Authority in September 1992.

Joint Administration as an interim arrangement would allow Namibia to have a say in the administrative machinery of the port. This would also mean an achievement of one of Namibia's stated foreign policy goals, although being a temporary measure. Quite predictably, South Africa was ambiguous as ever in presenting papers that conflicted on a number of points with a memorandum that was already agreed upon during the previous rounds of talks and deliberations. Serious areas of disputation included laws in particular that were to govern the enclave during that transitional period, as an interim arrangement.

On the broader question of transition, Namibia's working paper clearly pointed that : "The Joint Administration Agreement was only an interim arrangement in this respect, the Namibian government indeed scored both on the diplomatic field and in its efforts for the ultimate reintegration of the enclave into the Namibian territory. Namibia can be proud of her foreign policy and diplomatic achievements on the Walvis Bay issue. Namibia has also succeeded in bringing about her physical presence in Walvis Bay as a first step in a series aimed at the eventual reintegration of the disputed territorie(s)" (Foreign Affairs Document).

Finally, a report was accepted by both governments in November 1, 1992 for the commencement of the Joint Administrative Authority over Walvis Bay and the twelve islands. The Joint Authority was headed by two Chief Executive Officers, one from each country -

with Nangolo Mbumba from Namibia and Carl von Hirschberg from South Africa (ibid,3).

These Executive Officers were to be assisted by a Management Committee consisting of four officials from each country. They were to be classified as advisors and were to cover areas like general administration; legal affairs; financial affairs; social and community affairs.

3.3.2. Sensitive Areas Of Disputation

The document further states that additionally specialized type of meetings were to be held with officials from both countries on the following fields :-

1. **Harbour Management - Commercial harbour**
 - Fish harbour
 - Boat harbour
2. **Roads and bridge maintenance and construction.**
3. **Nature Conservation (both marine and land life)**
4. **Tourism**
5. **Immigration**
6. **Customs and Excise**
7. **Health and Social Welfare**

However, skepticism continued to characterise this transitional process, especially in the following areas, i.e law; police and prisons; and education and culture as well as pensions. These

became issues that were perceived to be particularly sensitive by the white conservative constituency in Walvis Bay that the National Party went all out to appease, notably in view of the forthcoming South African general elections.

In the interim, the agreement was such that unilateral decision making was not permissible on those sensitive issues. Consultations as well as full exchange of information were to be the basic guidelines. It is worth pointing out that before an agreement on joint administration was reached, the Immigration control posts into Walvis Bay were still the sole prerogative of the then South African Police and Defence Force. The document pointed out, however that Joint Administration fully extended to areas of immigration control, customs and excise.

The said document stated the following on trade : "In line with the Joint Administration Agreement, Namibian customs authorities have also gained physical presence in the enclave. That presence enabled Namibia to have access to information relating to Import and Export figures and other trade statistics channelled through Walvis Bay. That situation also allowed the Namibian customs officials to gain the necessary experience and to prepare for the eventual take-over of all customs related functions". In the same vein, a series of cited documents clearly reflected the level of commitment by the Namibian government to resume control over the disputed enclave with immediate effect. Such retention would give adequate

indications of trade/economic activities carried out on the enclave.

The following headline on Joint Administration : "Sharing The Walvis Bay Port", appeared on The Namibian : February 22, 1993. The article indicated that Trans-Namib as a parastatal had talks with Portnet which was linked to the then South African Transport Services (SATS), now known as Spoornet. It further indicated that talks centered around economic issues on the port as part of the Joint Administration Agreement between these two countries that could result in a joint share of the port. The crux of the article was the following paragraph: "The highly rated harbour has an annual capacity of four million harbour tonnes per year, with a valuable ship-repair lift and is already the home of the key Namibian fishing industry. Walvis Bay is Namibia's only link to international shipping both for local and regional trade. All its roads and railways, water and other vital supplies come from Namibia".

After having undergone a somewhat complex process in establishing the Joint Administrative Agreement, efforts by both chief officers later proved to have gained currency. For instance, in one of their meetings, they finally discussed how general costs and revenues out of the JAA could be shared, amongst other issues (The Namibian: 1993). It was now expected that Joint Administration as an interim arrangement would lead to the transfer of the port, and in the

event, the dispute around the port was to become a bone of contention during constitutional talks in South Africa.

The South African parliament had previously legislated a provision to pave way for JAA. That piece of legislation was tabled on the 4th May 1993 during a parliamentary session by the then Regional and Land Affairs Minister Andrew Fourie, known as the Joint Administrative Authority For Walvis Bay Bill. He came with a controversial constitutional proposal at Kempton Park. The tabling was only made possible after agreements were finally signed by both countries to pave way for JAA over Walvis Bay (Eastern Province Herald 1993, May 5).

The Bill paralleled with provisions similar to those stipulated in the Foreign Affairs Document. These final commonalities were also made possible by prior consultative meetings by both high powered delegations that included their respective foreign ministers, before the establishment of Working Committees.

It can thus be argued that the National Party regime remained reluctant to let go Walvis Bay, given the economic and political considerations, even after the enclave was robbed its strategic calculus by the demise of the Cold War. Its continued illegal control, be it joint or otherwise was what the NP regime and the WCG always wanted to achieve, as indicated earlier. It was clear that the former was still not prepared to relinquish the JAA

equation even beyond the 27th April 1994. This was to be evidenced at Kempton Park during the constitutional talks when the NP put forth a constitutional deliberation that proposed Walvis Bay to be part of the Cape Province during South Africa's first non-racial elections in April 27, 1994.

3.4. Kempton Park

Walvis Bay turned out to be a bargaining chip (as a disputed and controversial issue at Kempton Park), yet it was not an important element on the agenda of the Negotiating Council. As noted above, the then National Party regime put forth a controversial constitutional proposal that advocated the incorporation of the disputed enclave into the Cape Province for the 1994 April elections. This took place when the delimitation process was taking shape to usher in new provinces.

It can be argued that Walvis Bay would have stayed with South Africa until after the inauguration of a new South African government had not Namibian officials come to Kempton Park. Protracted bilateral and multilateral efforts by these officials from the Ministry of Foreign Affairs in Windhoek, proved fruitful. Their mission was enhanced by diplomatic tactics and strategies as a lobbying initiative. They seized the moment to persuade liberation movements, notably the African National Congress (ANC), to push the National Party into surrendering the enclave.

These officials used the opportunity of Kempton Park to sensitize various liberation movements so as to be responsive and sympathetic to Namibia's cause. Their tactics and strategies that underlied their bargaining strength paid off by resulting in a common position being adopted by liberation forces at Kempton Park. This is contrary to a statement that argued thus: "Namibians probably have to thank South African parties such as the ANC; PAC and others, for putting the Walvis Bay issue back on the (Kempton Park) agenda. Their motion calling for the legislation to transfer Walvis Bay and the Off-Shore islands to Namibia as a matter of urgency, certainly speeded things up" (The Namibian:August 1993:13).

As pointed out earlier, Walvis Bay had not been placed on the agenda at Kempton Park. Hence these parties can only be commended for having acted as pressure groups. Massive pressure exerted on the NP regime culminated in an ultimatum, to the effect that the regime was to inform the Transitional Executive Council's (TEC) sub-council on Foreign Affairs of progress made, within a month from August 16,1993 (Kempton Park Draft Document On Walvis Bay).

Diplomatic efforts taken by Namibian officials in coming down to Kempton Park resulted in their acquiring substantial bargaining power. Thereafter, they had a strong case as an interview with one of these officials served to demonstrate to the author (Pius Dunaiski, Foreign Affairs Official, 11th July 1994 - Windhoek). It can be argued that the sudden emergence of Walvis Bay at Kempton

Park resulted in the enclave becoming a bargaining chip in the negotiation process. Moreover, the SWAPO government saw an ANC government as their best hope for the speedy transfer of the enclave after a political settlement was reached inside South Africa.

On the other hand, although it needed to be prodded, the ANC had a coherent policy stand on the disputed enclave outside the Kempton Park scenario. Hence they took the matter quite seriously. An interview with Namibia's Foreign Affairs Minister conducted by Ibbo Mandaza in SAPEM (March 1991) drives the point home. The position of both the ANC and PAC were stated as being very clear on the disputed territorial enclave. The ANC was also instrumental in shaping a motion at Kempton Park for the final transfer of Walvis Bay to Namibia to be effected as a matter of urgency. It also stated quite clearly in a letter written from the ANC headquarters, addressed to the Namibian Foreign Affairs Minister, dated 17 May 1991. The letter reiterated their long-held position by considering Walvis Bay and the islands as an integral part of Namibia.

Against this, Mr Pius Dunaski, a Namibian official who was actively involved in lobbying for the return of the enclave, made it clear that the Namibian government decided to come to South Africa out of their own initiative. They worked alongside the Walvis Bay Cabinet Committee which operated from the Namibian parliament.

Their diplomatic process was embarked upon immediately after the unbannings of the liberation organisations in 1990. This was even before the inception of the Convention for a Democratic South Africa (CODESA). When CODESA 1 commenced in December 20-21 1991, Namibian officials decided to draft a resolution on the disputed enclave that was guided especially by the UNSC 432 (as a resolution dedicated solely on the Walvis Bay question). This resolution was circulated to individual organisations, as well as to CODESA as a broader umbrella body. It was then followed up by a letter written and addressed to leaders of various delegations as well as the CODESA chairperson. This was during the 1991 Christmas period.

Apparently, the then South African Minister of Foreign Affairs, as well as the Foreign Affairs Director, were angered by the adopted strategy. Namibian officials were accused of 'interfering' with South Africa's domestic affairs. They privately registered their anger and disapproval to Namibian officials. Then came CODESA 2 after the collapse of its predecessor (Collinge 1992). Nonetheless, Namibian officials continued with lobbying, but CODESA 2 came to be clouded by delicate transitional issues. The writing was on the wall that CODESA 2 was also not going to deliver as far as the disputed enclave stood to be resolved.

Namibia then had to wait for the third round of the South Africa negotiation process, i.e the Multi-Party Conference, which convened in November 1993. At that moment, Namibian officials decided to sit

back for a while so as to give South Africans some space to map out their political future. At Kempton Park, the Demarcation Committee that was mandated to divide South Africa into new provinces resumed its clearly set task. It is however imperative to indicate that the ANC in its constitutional proposal was silent on the disputed enclave as far as its future dispensation was concerned. Can it, therefore be assumed that they took it for granted that Walvis Bay constituted part of Namibia?

As pointed out earlier, soon after the National Party presented its controversial constitutional proposal, the officials immediately made their way back and resumed their various bargaining strategies. These included a number of bilaterals and multilaterals with liberation movements. They argued that liberation movements were expected to treat the pending Walvis Bay question as a decolonisation issue in their new constitutional submissions.

They were also advised not to maintain their grip on the disputed enclave but to rather agree to its immediate reintegration rather than being party to its re-colonisation. Pius (1994) indicated that the liberation movements were initially reluctant to take issue on the disputed enclave perhaps because of more pressing transitional issues. But it can also be strongly argued that there was no way where transitional issues could be teased out, however pressing, without the pending Walvis Bay question escaping undetected.

In 1993, these organisations finally realized that sooner than later history would catch up with them, so they did not want to be party to its re-colonisation into the 'new' South Africa. At a later stage, what came to be known as the Planning Committee was constituted at Kempton Park to look at the Talking Points that were agreed upon by the TEC.

3.4.2. Protest Note

After the commencement of the Multi Party Negotiation Process, the three weeks of lobbying for support included both bilateral and multilateral processes, Namibian officials then decided to embark upon the following as strategies:

1. They spoke to the then NP government as ever and always with no success and they decided to send a Protest Note as well;
2. They also spoke to all Negotiating Council members;
3. They held a series of media/conference briefings;
4. Lastly, they wrote to the following:
 - a) Various WCG governments who brokered the Independence Plan that excluded the enclave from the package.
 - b) Wrote to the then OAU chairperson in Egypt (Mubarak).
 - c) The then UN Secretary General (Perez) received a letter as well. (Interview with Mr Pius Dunaiski, 11th July 1994, Windhoek).

These diplomatic processes were largely meant to keep the above well informed about the latest developments on the disputed

enclave. They also helped to demonstrate South Africa's intransigence despite its hailing by the outside world as having moved ahead to reform rather than change the status quo. In the post Cold War era, it was rather expected of Pretoria by way of anticipation to surrender and reintegrate the enclave as a gesture of goodwill.

The dispute was finally well handled by the TEC which became operational on the 7th of December 1993, after a number of arduous and protracted negotiations were entered into with various South Africa's extra-parliamentary groupings. The issue eventually came to the attention of the TEC's sub-council on Foreign Affairs.

The TEC was empowered with some of the following provisions: 'The TEC shall, through its Subcouncil on Foreign Affairs, in regard to foreign policy, liaise, monitor, make recommendations and assist with a view to:-

- a) achieving progressively the broadest possible consensus on matters affecting South Africa's international interests;
- c) securing such international assistance as the Subcouncil considers necessary in order to address the socio-economic needs of the people as a whole;
- d) ensuring that any foreign policy initiative benefits the country as a whole; and
- e) promoting such international relations, including trade, finance, culture and sports relations (TEC Document).

4.4.3. Draft Resolution

The controversy around the disputed enclave, especially between the ANC and the NP resulted in a Motion/Draft Resolution being tabled and subsequently adopted by the TEC at Kempton Park, on the 16th August 1993. It then provided the clearest articulation of a common position by liberation movements. Its final draft is worth reproducing in its entirety here:-

Noting:

1. The strong views expressed in the Council that Walvis Bay and the off-shore islands should not form part of any demarcation/delimitation of regions for South Africa but that it should be incorporated in Namibia as soon as possible;
2. The report of the Commission on the demarcation/delimitation of regions dated 31 July 1993 does not contain a recommendation that Walvis Bay and the off-shore islands should be included in any proposed SPR;
3. The agreement between the Government of the Republic of South Africa and the Republic of Namibia dated 1 November 1992 establishing a joint administration for Walvis Bay and its off-shore islands as an interim arrangement pending an eventual settlement of the question thus creating a sui generis position for Walvis Bay and its off-shore islands;
4. That the two Governments have been in touch with one another on the issue of the incorporation of Walvis Bay and the off-shore islands into Namibia.
5. The assurance by the Namibian Government that every possible

consideration will be given to the legitimate rights and interests of South African citizens in Walvis Bay in accordance with the Namibian Constitution, the relevant laws of the country as well as the existing bilateral agreements signed between the two Governments.

6. With appreciation the information supplied to the Negotiating Council by the South African Government that there are further important matters including issues such as vested rights, property rights and the transfer of administrative structure without disruption of service to the public that must be resolved between the Governments of South Africa and Namibia;
7. The indication by the South African Government that it is in principle not opposed to the early incorporation/reintegration of Walvis Bay and the off-shore islands into Namibia and to resolving certain important matters identified above;

Endorses:

1. The incorporation/reintegration of Walvis Bay and the off-shore islands into Namibia.

Resolves:

1. To request the South African and Namibian Governments to meet on an urgent basis to finalise the outstanding matters in order for incorporation of Walvis Bay and the off-shore islands into Namibia to take place at the earliest opportunity; and
2. To request the South African Government in the meantime to prepare legislation to this end as a matter of urgency.

3. That the South African Government informs the Negotiating Council and/or the TEC Subcouncil on Foreign Affairs of progress in respect of the above within a month from today, i.e 16th August 1993.

Therefore, the above draft Resolution was put to the Negotiating Council by the Planning Committee at Kempton Park for adoption.

The 16th of August 1993 became a memorable day for the disputed enclave when the ANC led the way side by side with the Namibian officials from the Ministry of Foreign Affairs by strongly objecting to the NP's constitutional proposal. But this was indeed a foreign policy and diplomatic achievement displayed by these officials, coupled with the common coherent policy stand of the Patriotic Front at the WTC that eventually led to a months' ultimatum.

The regime was then required to report back to the Negotiating Council on any progress being made to surrender the enclave. The gist of this paper argues that Walvis Bay and its twelve Penguin Islands were never an item on the agenda at the WTC. As it was earlier shown that South Africa was still prepared to prolong its illegal territorial occupation on the enclave, history dictated otherwise. In the course of events, the final settlement of Walvis Bay as a disputed territorial enclave was put to rest largely because of the bilateral strategies and tactics as the chapter attempted to demonstrate.

3.5. Conclusion

The enclave was finally reintegrated into Namibia on the 1st of March 1994. This chapter has attempted to argue that Joint Administration, South Africa's preferred option, did not in any way reconcile with the terms of reference as stipulated in the various UNSC Resolutions, i.e 432 (1978); and 385 (1976). As a result, the WCG bypassed the UNSCR 432 and preferred to implement the UNSC Resolution 435. The new Namibian government was expected to start negotiating with Pretoria over the disputed enclave after the implementation of the compromised 435. South Africa's post-Namibian independence policy was joint control of Walvis Bay.

Kempton Park gave precedence by way of common positions taken by the broader Mass Democratic Movement (MDM), notably the ANC, leading to the final rest on the disputed territorial enclave. Since the problem started with the annexation of Walvis Bay into the Cape of Good Hope in 1887, its final solution was sought on the South African soil at Kempton Park during the Constitutional talks in 1994.

The dispute as argued earlier, became entangled in the constitutional talks in South Africa during the fragile era of transition to a multi-racial power sharing. South Africa's political transition became national in outlook compared to the Namibian internationalised transitional process. Pretoria, including the West had vested economic interests to promote and

defend imperialism in a post-Cold War era in Walvis Bay. Such acts of intransigence necessitated the holding on the port beyond Namibia's independence, and this went with costs and benefits in maintaining such an illegal occupation.

Walvis Bay's reintegration came about when South Africa's blueprint was being negotiated at Kempton Park. As a result, the dispute culminated in a fundamental change of the NP's policy stand on the enclave, which led to the month ultimatum by the TEC. This then resulted in a date being set, i.e March 1 1994 -followed by celebrations in Namibia after the attainment of their "second independence".

CHAPTER FOUR

4.1. CONCLUSIONS

The resolution of the dispute around Walvis Bay marked a settlement of a territorial dispute through peaceful means, i.e. Diplomacy (negotiations) in a changing regional and global political economy.

As Evans (1994:142) argued that: "whatever the merits of the respective legal arguments, however, in the final analysis the dispute has been a political one resolved only through bilateral diplomacy". A shift in the balance of forces in South Africa's transitional phase was a clear indication that the National Party regime was losing its grip on political power. Hence Evans further asserted that "...In particular, negotiations with Namibia have cast doubt on their comforting and long held realist conviction that in the matter of bilateral asymmetrical bargaining, 'capability' will inevitably condition outcomes" (ibid 152).

The principal thrust of the NP with its delaying tactics was, arguably, to demonstrate its position as a self-proclaimed regional hegemon. As a consequence, the Walvis Bay issue at Kempton Park was resolved by the ultimate and eventual defeat of the NP when they conceded their power monopoly at the negotiating table. The Western Contact Group wanted to maintain the status quo in the Southern African region by harbouring South Africa with its delaying tactics, where the former was in collaboration with its former Cold War ally.

South Africa had vested economic and political interests to defend as well as to promote in a post-Cold War era in Walvis Bay. Her intransigence necessitated the holding on to the port even beyond 1990. Such an act had its own costs and benefits in maintaining an illegal occupation. The enclave was held hostage by Pretoria's racial capitalist economy in a post-independence and Cold War era, as this necessitated the continued plundering of Namibia's fishing resources. At independence in 1990, Pretoria conceded without giving up its illegal economic and military occupation in the disputed territorial enclave.

However, Article 96 of the Namibian Constitution states the following as one of the foreign policy guidelines of the new and small state, viz encourage the settlement of international disputes by peaceful means. Indeed, the Walvis Bay dispute came to be resolved through peaceful (diplomatic) means. Thus, the reintegration falls within the Namibian foreign policy context, as stated above. This has to be linked to Pretoria's conditionality that negotiations over the disputed enclave would resume later. The final reintegration of Walvis Bay and the islands into Namibia did not conform, nor did the implementation of the UN plan in 1989 conform, to various UN resolutions.

The why question fell within the Cold War context. Firstly, the port, in particular offered strategic significance to the West under NATO, of course before the collapse of the East-West era.

Secondly, the broader progressive international community (including SWAPO as the main actor) feared a delay in the final implementation of the compromised UNSCR 435 of 1978. As a matter of fact, the delay was tied to the Linkage Theory. Therefore, Namibia's only deep water port that was to serve the Namibian, regional and international political economies remained under South Africa's illegal control in the post-independence and Cold War era.

Walvis Bay (including the port and harbour) was finally reintegrated into Namibia in March 1 1994. The long dispute over the enclave was amicably resolved as a territorial dispute through political diplomacy. A treaty was also signed by respective Justice Ministers after 84 years of its illegal occupation by successive National Party governments. On the day of its final reintegration, the port was declared international with a fishing capacity within the European Union's political economy as well as the regional one. This includes export quotas that have to be negotiated as part of the Lome Convention, against the regional objects as a trade regime.

4.2. Free Trade Zone

As soon as the treaty took effect, it nullified the Joint Administration Authority which was instituted in November 1, 1992. On the day of reintegration, Walvis Bay was declared a free trade zone by the Namibian President Nujoma. He was quoted as saying "We have decided to turn this place into an important international

business centre...From today Walvis Bay becomes a strategic gate to the emerging markets of southern and west Africa as well as those of Latin America" (Business Day, March 1994:2).

Therefore, South Africa's bitter history in Namibia came to a halt at Kempton Park after a number of diplomatic processes were entered into by both governments immediately after Namibia's independence in 1990. The disputed territorial enclave thrust itself into South Africa's transitional centre stage during the negotiated constitutional talks. It formed the conerstone as a territorial dispute between the new Namibian SWAPO government and the then Nationalist government when the former emerged as Africa's last colony.

Walvis Bay came to be reintegrated through a negotiated settlement of Namibian independence on SA/US terms. The eventual sidestepping of the enclave from the independence plan should be viewed within the broader power relations. South Africa was still all out to exploit the Namibian fishing waters, despite the latters ailing political economy. Hence Colin Leys (1993:34-5) argued that "Walvis Bay - a port of Namibia, was not included in resolution 435 and retained by Pretoria as a means of strangling the Namibian economy".

Keeping Walvis Bay beyond 1990 was what Pretoria, with the blessing of the US had always wanted. All this was done despite the

centrality of the enclave in the regional political economy. It is clear that the forces that mitigated against Walvis Bay were stronger than benefits to be derived from it in carrying out its mandated SADC marine-fisheries project. Declaring Walvis Bay a free port transformed it beyond its present economic status, to an international one.

Overall, the exclusion of Walvis Bay from the Independence Plan fell outside the framework/parameters of various United Nations General Assembly and Security Council Resolutions as pointed out earlier. The implementation of the UNSCR 435 departed quite substantially from subsequent resolutions like 385, 432 etc. The statement constitute part of the central argument of this study.

The other dynamic being the Kempton Park dimension when the disputed enclave forced itself as an item on the agenda of the Negotiating Council during constitutional talks in South Africa. The Mass Democratic Movement, led by the African National Congress (ANC) - through their joint diplomatic initiative played a fundamental and critical role to pressurise the National Party government to concede on the disputed territorial enclave. The dispute suddenly became a diplomatic equation to be resolved through negotiations.

The above arguments constitute the core of this study as the preceding chapters have attempted to show.

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